

JUDICIAL OVERSIGHT AND ACCOUNTABILITY: THE RISE OF THE WATCHDOG

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I. INTRODUCTION

The doctrine of separation of powers grew out of centuries of political and philosophical development. Its origins can be traced to the fourth century B.C. when Aristotle, in his treatise titled *Politics*, described the functions of the three agencies of government: *the general assembly, the public officials, and the judiciary*¹. The doctrine of separation of powers, including an independent judiciary, was reasonably well developed by 1787 when the framers of the Constitution of England met and made it an important aspect of the document when it was drafted.² The principle of separation of power emanates from the basic premise that ***power corrupts and absolute power corrupts absolutely***. As important as the independence of the judiciary is, it is also a fundamental principle that every institution must be accountable to an authority which is independent of that institution. Lord Atkin said, "*justice is not a cloistered virtue, she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men*". Others have argued that there may be no state interest more compelling than the independence, impartiality, and integrity of the judiciary.³

In his support for the enthronement of the principle of judicial independence and accountability Tembeckjian Robert (2019) observed that:

"There may also be no public office for which individual accountability is so critical, not only because judges often have the last word in our society's disputes, but because public confidence in the courts is fundamental to the rule of law around which our society is organized. Trust in the administration of justice depends not only on the merits of the verdicts rendered in the courtroom but on the probity and the appearance of probity among those who decree them. A litigant may not feel happy about losing a case, but no one should walk out of a proceeding reasonably believing that the process was tainted by an arbiter who was biased, improperly influenced, or otherwise unfair".⁴ Hence, the need for a supervisory body and a judicial watchdog.

¹ Aristotle, *Politics*, book IV, Ch. 14. See generally Robinson, *The Division of Governmental Power in Ancient Greece*, 18 *PoL. ScL Q.* 614 (1903).

² Sam J. Ervin, Jr. *Separation of Powers: Judicial Independence*

³ *Williams-Yulee v. Florida Bar*, 135 S. Ct. 739 (2014); *Raab v. Commission on Judicial Conduct*, 100 N.Y.2d 305 (2003); *Watson v. Commission on Judicial Conduct*, 100 N.Y.2d 290 (2003); see also, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)

⁴ "Toward a Judiciary Both Independent and Accountable" Robert H. Tembeckjian (2019) *Court Review: The Journal of the American Judges Association*

The terms judicial independence and judicial oversight or accountability seem to pull in opposite directions. “If a judge is completely independent, there is a lack of accountability. On the flip side, a judge that is completely accountable may feel pressured to rule in ways that please those to whom the judge is accountable”⁵.

This paper seeks to respond to the following questions: Do judges need to be watched over, held accountable? Are they fallible? If the answer to these questions is yes, then who should the mandate of this oversight be entrusted with and what should be the scope of the oversight? The executive, legislature or the people? Should judges be elected?

II. JUDICIAL INDEPENDENCE

Independence of the judiciary means independence from the Executive and the Legislature, but not independence from accountability. Judicial independence refers to the ability of judges to rule in accordance with the principles of law as they understand them, rather than the social or political standing or interest of the disputants. Judicial independence and the independence of courts is guaranteed in almost all the Commonwealth countries. According to a research carried out by the *Bingham Centre For The Rule of Law*, by 2015, more than 80% of Commonwealth member states had established a framework for having an independent judiciary.

Globally, there are codes of conduct governing judicial independence such as the *UN Basic Principles on the Independence of the Judiciary* that states three conditions for the removal of Judges:

- I. All disciplinary, suspension or removal proceedings shall be determined in accordance with the established standards of judicial conduct⁶.
- II. Incapacity and misconduct are the sole grounds on which removal is justified.⁷

⁵ *Ratio Juris*, "Judicial Independence v. Judicial Accountability: Prolegomenon to Defining Constitutionalism in the Fourth Century of the American Experiment," February 9, 2007

⁶ Art 19 *UN Basic Principles on the Independence of the Judiciary*, 1985 General Assembly Resolution (GA) 40/146 of 13 December 1985.

⁷ Art 18. *Ibid.*

- III. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa affirmed the need for the protection of the independent of the judiciary and guarantees the certainty of tenure for judicial officers who shall only be removed based on the provisions of the law⁸.
- IV. Article 29 (a) of the IBA Minimum Standards of Judicial Independence notes that “the grounds for removal of judges shall be fixed by law and shall be clearly defined”. They also clarified the degree or level of misconduct that is considered sufficient to warrant the removal of a judge.⁹

Rosenn Keith in his review of the Latin America’s code of judicial independence noted that “Court decisions should not be influenced or altered by external forces, whether political or economic, institutional or individual”¹⁰.

An independent and impartial judiciary is not only an indispensable anchor of any tripartite system of government, it is also an immeasurable protector of basic rights and liberties, such as ensuring the right to counsel, the right against self-incrimination, the right to a fair trial, the right to free expression, and the right to worship. This may subject judges to unfair and certainly unwanted criticism. A prosecutor may denounce the release of a defendant on recognizance. A public defender may decry the imposition of the maximum sentence against a convicted felon. A newspaper may take issue with an appellate court’s legal reasoning. A public official may claim bias because of a judge’s political pedigree or ethnic ancestry. Whatever pressure or public clamor may be brought to bear, the judge’s job is to act at all times, on and off the bench, in a manner that upholds and promotes public confidence in the independence, integrity, and impartiality of the judiciary. Why are judicial probity and fairness so significant? Because public confidence in the administration of justice is what keeps people coming back to the courts and what empowers the writ of law. The judicial branch may be the most subtle and least understood of the three, but its independence, integrity, and impartiality are at the heart of what George Washington identified as the “due administration of justice” that is the “firmest pillar of good government.”¹¹.

⁸ Articles 1 (g) and 4 African Union Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, 2003

⁹ Art 30 the *IBA Minimum Standards of Judicial Independence*, 1982

¹⁰ Keith S. Rosenn, "The Protection of Judicial Independence in Latin America," *Inter-America Law Review*, No. 19 (1987)

¹¹ George Washington, Letter of Attorney General Edmund Randolph, Sept. 28, 1789, available at <https://founders.archives.gov/documents/Washington/05-04-02-0073>.

The Bangalore Principles of Judicial Conduct that was endorsed in 2003 to complement the *UN's Basic Principles on the Independence of the Judiciary* placed independence as the number one core value of any judicial system and a prerequisite to the Rule of Law¹².

In 1995, the group of Asian-Pacific Chief Justices adopted a common set of standards for the promotion and protection of their judicial institutions, which included judicial independence. These are known as the 'Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region'.

In 1998, a similar statement of principle ("the Latimer House Principles") was also agreed by representatives from over 20 Commonwealth countries at a conference held at Latimer House, Buckinghamshire, UK. The Latimer House Principles was eventually adopted in 2003 and covers what is expected from the Executive, the Judiciary, and the Parliament in order to sustain a democratic government. The emphasis on judicial independence shows the importance attached to the role of the judiciary in acting as a check on the other arms of government.

III. ROLE OF JUDICIAL COMMISSIONS

According to the Commonwealth's *Model Law on Judicial Service Commissions*, Judicial Commissions have the following functions/roles:

- (a) to select applicants for appointment to judicial office and advise the [Head of State] accordingly;
- (b) to discipline judicial officers and where relevant to advise the [Head of State] as to their suspension or removal from office;
- (c) to advise the [Executive] on matters relating to the improvement and efficiency of the administration of justice; and
- (d) Any other function given to the Commission by the Constitution or another Act¹³.

In 81% of Commonwealth jurisdictions there are judicial commissions that play essential roles in the selection or shortlisting of candidates for judicial appointment¹⁴. These commissions have

¹² The Bangalore Principles of Judicial Conduct 2003

¹³ Section 8(1) paras a-d Model Law on Judicial Service Commissions 2018.

¹⁴ J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law)

recorded varying levels of successes. This goes to show that emerging judicial commissions are becoming a norm.

But what should be the scope of their oversight?

Judicial accountability entails basically that judges are held accountable to the Constitution and to the law. The principal way in which judges are expected to account for the performance of their legal and constitutional duties is by giving reasoned judgments and rulings in open court. Appeal mechanisms serve as a further check in many cases to the performance of judges' judicial duties. A judge acting in good faith should incur no personal sanction if his or her decision is overturned on appeal. Indeed, the rule of law would suffer if judges were deterred from applying the law as they saw it, and such a situation would be particularly detrimental to the independence of the judiciary, of which the decision-making autonomy of individual judges is a vital part.

There is no doubt that Judges are humans and that misbehavior is part of human nature. But judicial misbehavior or misconduct is exacerbated by the fact that judges have so much power and so little oversight. While judges' doctrinal mistakes are corrected by the well-established appellate court system, there are fewer protections against judges' misconduct on and off the bench. That's where judicial conduct commissions come in.

The duty of policing judicial misconduct falls on these commissions, which are little-known state administrative agencies. How judicial officers are appointed, disciplined and removed from office is at the heart of judicial independence. Commonwealth jurisdictions vary in their traditions and procedures for appointing, disciplining and removing judges, and the composition and objects of judicial commissions share a commitment to the separation of powers and an understanding of the importance of an independent judiciary. It is particularly important that the selection criteria and processes that are in place should be a reliable means of identifying candidates who have the right characteristics, because it is difficult for a judge to be removed once in office. This commitment is encapsulated in the *Commonwealth (Latimer House)*

*Principles on the Three Branches of Government*¹⁵. These principles have established that judges do need to be held accountable and to have judicial oversight.

The debate of whether a judge should be elected or appointed has been a topic for discussion since the creation of the judicial system. Depending on what side of the decision one may be on, there are some challenges that arise from each side. If a judge is elected, will he be judicious in his decision based on the law or based on his constituents? If the judge is appointed, will he be subject to the authority that appointed him, thereby slanting his decision to keep their favour?

It was not necessarily uncommon for judges to engage in activities that compromised or appeared to compromise their judicial independence. While the concept of an independent judiciary came well before public insistence on the principle of accountable judiciary, it would be wrong to conclude that the latter is a departure the former. Contrary to what may be a common complaint among judges, Judicial Commissions, far from inhibiting judicial independence, actually protect it.

There is a need however to provide model rules of judicial disciplinary enforcement, *inter alia* to help ethics professionals avoid crossing the line between independence and accountability. Judicial activism creates a certain demand for accountability from the Executive and the Legislators, which we cannot shrug off by reliance on judicial independence, particularly where the judiciary is entrusted with a creative as opposed to a purely protective role. It is a fundamental principle that every institution must be accountable to an authority which is independent of that institution. It is true that no public institution can survive in a democratic set up unless it retains public confidence. Judiciary is no exception to it. The garden of Judiciary is a delicate structure, it needs care, and constant vigilance. Any amount of negligence can cause irreparable damage to the whole institution.¹⁶

Judges' judicial personal behaviour (misconduct) also needs to be subjected to judicial oversight by an independent body such as Judicial Commissions, as they are expected to act as watchdogs. This oversight responsibility should not be left to the executive. Oversight might necessitate disciplinary action which range from removal to formal reprimands to achieve accountability.

¹⁵ Commonwealth (Latimer House) Principles on the Three Branches of Government.

¹⁶ Ysrao Judge "Judicial accountability"

Removal from office is the most severe disciplinary sanction, and some commonwealth jurisdictions also make provision for lesser sanction measures such as a formal reprimand.

The challenge then is to distinguish judicial ‘misbehaviour’ or ‘misconduct’, in the sense of conduct, which in some way undermines the independence or propriety of the judiciary, from good faith errors and differences of judicial opinion for which judges should not face personal sanction. Even if the allegations of misconduct relate to a judge’s actions and behaviour outside the courtroom, there is still a danger that the real aim of proceedings may be to remove a judge whose rulings are considered troublesome by those in authority.

The Latimer Principles observed that identifying ‘misbehaviour’ that warrants a judge’s removal is therefore likely to be a delicate task in practice, and one which calls for ‘appropriate safeguards to ensure fairness’. In addition, it notes that “to providing proper procedures for the removal of judges on grounds of incapacity or misbehaviour that are required to support the principle of independence of the judiciary, any disciplinary procedures should be fairly and objectively administered”¹⁷.

Some would argue that although there are no Commonwealth jurisdictions in which the executive has the power to dismiss a judge, the executive does however remove judges in practice¹⁸.

The UN Human Rights Committee has characterised an executive power to dismiss judges as a threat to judicial independence that undermines the right to a fair trial before an independent court¹⁹. The Commonwealth Latimer House Principles succinctly noted that the mechanism for determining whether a judge is to be removed from office ‘should include appropriate safeguards to ensure fairness’. This raises two important questions that need to be addressed in practice:

- Which body, or combination of bodies, should be responsible for the removal process; and
- What safeguards such bodies should adopt to ensure fairness.

¹⁷ Principle VII (b) of the *Commonwealth Latimer House Principles*

¹⁸ J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law) p 91

¹⁹ UN Human Rights Committee, General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (23 August 2007), para 20

Should Judicial Commissions be investigator, prosecutor, and tribunal for erring judicial officers? No, it would contravene the Latin maxim *nemo judex in causa sua*. The entire removal and oversight process need not be in the hands of a single body. While the judicial commission may investigate, they should not be the body that prosecutes and tries erring judicial officers. An *ad hoc* tribunal system or a permanent tribunal should be set up for trying of erring judicial officers. The principles of natural justice demand that there should be:

- an independent and impartial decision-maker;
- a presumption of innocence in questions of wrongdoing;
- proceedings that are conducted fairly (a right to know the opposing case, sufficient time to prepare a defence, the opportunity to present evidence and where relevant to cross-examine witnesses);
- a right to legal or other representation;
- a right to reasons, particularly in matters such as these in which there is great public interest; and
- The possibility of judicial review to ensure that all the legal requirements of the removal process are adhered to in practice, and where appropriate also an appeal which may consider both questions of law and fact.

There is a school of thought that argues that judicial oversight and accountability cannot be left solely at the feet of Judicial Commissions alone and that it should be a collaborative effort of the legal profession. This means that Professional Legal Associations have a role to play because corruption occurs even between lawyers and judges. As the President of the International Bar Association (IBA) David W. Rivkin said,

‘Corruption in judiciary is a problem on every continent. Where it occurs, this corruption undermines the rule of law and civil society, because it causes citizens to lose faith in the ability of government to assist them. And where judicial corruption exists, it is impossible to eliminate corruption in other aspects of government. This issue requires the attention and resolve of the

legal profession as a whole to overcome it, and the IBA, as the global association of lawyers and bar associations, can uniquely contribute to the fight against judicial corruption²⁰.’

The IBA argued that lawyers are always in the frontline of protecting the rule of law: without it, those human rights that are enshrined in the law cannot be guaranteed. A partnership between professional lawyers’ associations and that of judges will constitute a decisive factor in enhancing the promotion of the rule of law and the judicial sector²¹.

CONCLUSION

In concluding, I submit therefore, that *Judicial Independence and Judicial accountability* are vital in upholding the rule of law in the society and as such, one should not be sacrificed on the altar of the other. Corruption is a threat to the basic concept of rule of law because corruption in the judiciary erodes the principles of independence, impartiality and integrity of the judiciary; infringes on the right to a fair trial; creates obstacles to the effective and efficient administration of justice; and undermines the credibility of the entire justice system. As such, judicial accountability must not be achieved at the expense of judicial independence. The UN Special Rapporteur on the independence of judges and lawyers (UNSRIJL) also noted that:

‘accountability mechanisms should follow clear procedures and objective criteria provided for by law and established standards of professional conduct’²².

Finally, I submit that, as argued by other academics and international organizations, in order to hold an independent judiciary accountable; the following modalities will need to be put in place in any judicial system:

- defining ‘misconduct’;
- distinguishing between judicial corruption and judicial misconduct;
- allowing the judicial Commissions to report judicial corruption to appropriate authorities and giving them the mandate to tackle judicial misconduct decisively;
- Setting out clear guidelines for procedures for the discipline of judges;

²⁰ Rivkin David (2015) “Judicial Integrity Initiative” International Bar Association available at www.ibanet.org/judicial-integrity-IBA-publishes new-report accessed on 6 September 2021

²¹ Matos I. Jose (2021) “Foreword” to the Report on “Judicial Integrity Initiative” International Bar Association available at www.ibanet.org/judicial-integrity-IBA-publishes new-report accessed on 6 September 2021

²² UNODC, UNGA, ‘Report of the Special Rapporteur on the Independence of Judges and Lawyers’, Human Rights Council, 26th session (28 April 2014) A/HRC/26/31 (2014), para 77.

- Maintaining transparency in the entire process.