

Judicial independence: The right of every citizen

Karen Brewer

An independent and impartial judiciary is one of the cornerstones of democracy. The rule of law requires independent courts and tribunals to resolve disputes competently, independently and impartially. Judges and magistrates' must decide matters before the minimum accordance with their assessment of the facts and their understanding of the law, free from any improper influences, inducements or pressures, direct or indirect, from any quarter, for whatever reason. Not only must individual judges be independent in their decision-making but the institution itself needs to be able to operate without its activities being influenced or curtailed by other organs of state.

Judicial independence is not the right of individual judges but a constitutional right of every citizen.

The UN Universal Declaration of Human Rights states in Article 10 that: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.'

Institutional independence

The UN Basic Principles on the Independence of Judges² states in Article 1 that: 'The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country.' Judicial independence is guaranteed in the constitutions of all Commonwealth countries and in the Commonwealth fundamental values, including the Commonwealth Charter. However, many governments still continue to treat the judiciary not as the third organ of state but as a ministerial department, subject to the government's direction and will.

In 2013 the United Nations Human Rights Council passed a resolution calling on: 'All States to guarantee the independence of judges and lawyers and the objectivity and impartiality of prosecutors, as well as their ability to perform their functions accordingly, including by taking effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional functions without interference, harassment, threats or intimidation of any kind.'

Governments have tried to influence the appointment of judges (especially at the highest level). For the most part, the executive or parliament have been reluctant to delegate the power to remove judges to an independent judicial disciplinary commission. They continue to influence and control the judiciary through the control of budgets and the operations of the courts.

While the judiciary should be accountable for the funding it spends, budgetary control has also been used in the power play between the three organs of state. The Commonwealth (Latimer House) Principles state that: 'Adequate resources should be provided for the judicial system to operate effectively without any

undue constraints which may hamper the independence sought.' Suitable and sustainable funding should be provided to enable the judiciary to perform its functions to the highest of standards. In some Commonwealth jurisdictions, the judiciary has been made responsible for its own budget and finances. However, in most, control over the budget and finances remains in the hands of the executive, which has ultimate control over remuneration of judicial officers and court staff, and over the running of the courts, thus impacting on the good administration of justice.³

Appointment and removal

Constitutional provisions cover the structure of the judiciary and set out the terms and conditions under which the judiciary operates. This includes provisions for the appointment and removal of the higher judiciary, although the constitution (or legislation) does not always clearly delineate the role of each organ of state in these processes. Many countries have moved towards a more transparent system for appointments and removals in line with the Latimer House Principles⁴, setting up independent commissions, though their composition may not be as non-partisan as they could be. In addition the legislature in some Commonwealth jurisdictions has recently sought vetting rights over judicial appointments and this adversely impacts on the independence of the judiciary and the separation of powers.

These uncertainties of interpretation of constitutional provisions led the Commonwealth Lawyers Association (CLA), Commonwealth Legal Education Association (CLEA) and Commonwealth Magistrates' and Judges' Association (CMJA) to undertake a Commonwealth-wide analysis. Their report, *Judicial Appointment Commissions: A Clause for Constitutions*, was published in December 2013 and recommends an independent commission with little or no involvement of parliament or the executive.⁵

Constitutions provide for the removal of judges for misbehaviour, incapacity or inability to function. However, such documents do not always specify the criteria against which misbehaviour, inability or incapacity can be assessed, and thus these concepts remain prone to misinterpretation. Mechanisms are in place (e.g. the appointment of a tribunal, commission or committee) to investigate any allegations. However, governments have, in some cases, ignored the provisions of the constitution and proceeded to remove judges without following due process, or by interpreting their powers as having the authority to suspend, sack or impeach judges without providing the judge in question with an opportunity to 'be fully informed of the charges, be represented at a hearing, to make full defence and to be judged by an impartial tribunal'⁶.

Events in the Commonwealth have recently led the Commonwealth Secretariat's Rule of Law Division to work on



Tom Perry

Magistrate Petelo Pa'anga Soakimi in the Magistrates Court, Nuku'alofa, Tongatapu, Tonga

developing a model law on Judicial Services Commissions to deal with the appointment and removal of judicial officers.

Better communication

An independent judiciary cannot operate in a vacuum and must interact with other stakeholders to ensure the good administration of justice. The Latimer House Principles, and subsequent plans of action⁷ developed by Commonwealth associations⁸, provide best practice in the relationship between the three organs of state. At its conference in Nairobi in October 2014, and in line with the Latimer House Principles, the East African Magistrates and Judges Association recommended that while judicial independence should not be compromised, there was room for collaboration and co-operation with the other organs of state in furthering the good administration of justice, and in ensuring that each organ of state understands and respects the others. At the CMJA Conference held in Livingstone, Zambia, in September 2014, the CMJA's president, the Hon. John Vertes, outlined the important role that the heads of the judiciary have to play in ensuring the judiciary remains independent and respected as a separate institution.⁹

Individual independence

The personal independence of each judge is as important as institutional independence. Terms and conditions of service (including salaries and pensions) must be guaranteed, security of tenure has to be respected and judicial officers must receive the required training to ensure that they are able to fulfil their functions. The UN Basic Principles also state that judges should be

immune from prosecution for fulfilling their judicial functions.¹⁰ This does not mean, however, that individual judges or the judiciary as a whole are not accountable for their actions.

The extraordinary power invested in the judicial office demands a high standard of behaviour.

However, judicial officers are human beings, subject to the same pressures and vulnerabilities that other human beings are subject to, all the while being asked to resolve difficult legal disputes with the wisdom of Solomon.

Ethical behaviour and anti-corruption

In her report to the Human Rights Council of April 2014, special rapporteur on the independence of judges and lawyers Mrs Gabriella Knaul states that the judge's duty is 'the fair and impartial application of the law. Judges must therefore be accountable for their actions and conduct, so that the public can have full confidence in the ability of the judiciary to carry out its functions independently and impartially.'¹¹ Over the last 30 years Commonwealth judiciaries have developed ethical guidelines for their conduct within and outside of court. Since 1998 the CMJA has been the repository of these guidelines, which are refined and amended on a regular basis.

Judicial independence and impartiality are essential to ensure that the public has confidence in the judiciary. This 'implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties'.¹² Judicial officers across the

The status of the lower judiciary

For the CMJA and the UN, judicial officers working at all levels of the judiciary are part of the judiciary and their independence is paramount to ensure that human rights are respected. Magistrates are the first, and often the only, point of contact the public have with the judicial system, and form the backbone of all justice systems. However, Commonwealth constitutions rarely mention the independence of the lower judiciary (and in particular the magistracy), which the executive usually deems to be under its control, to be part of the civil service subject to the same terms and conditions, including removal, as civil servants. The CMJA General Assembly in Turks and Caicos ‘deplored the fact that in parts of the Commonwealth the independence of the magistracy is inadequately safeguarded and requests Council in collaboration with the Commonwealth Secretariat to take positive steps to eliminate these breaches of the Latimer House Principles wherever they occur’.

Following an in-depth study, the CMJA issued a report on The Status of Magistrates’ in February 2013, which included a set of guidelines to ensure the independence and integrity of magistrates. A summarised version of the report was presented to the Commonwealth Law Ministers’ Meeting held in Sydney, Australia, in July 2011 for consideration. Law ministers agreed, as stated in paragraph eight of the Communiqué: ‘to consider taking appropriate steps to strengthen their domestic legal frameworks and other measures for assuring the independence and integrity of their magistracy in compliance with the Commonwealth fundamental values, having due regard to the suggested Guidelines.’ Progress with this commitment has been slow, with many jurisdictions continuing to treat the lower judiciary as employees of state the with few, if any, constitutional protections.

Commonwealth are guided by these principles, which can be found in the oaths of office they swear on appointment.

Corruption continues to be endemic in parts of the Commonwealth despite efforts to eliminate it. The Commonwealth Limassol Conclusions¹³ set out a number of recommendations to identify strategies, best practices and actions that would achieve the objective of securing independence, integrity and accountability of judicial officers, and a judicial system free from corruption, including better and more consistent training, the development of ethical standards, security of tenure, and adequate terms and conditions of service, so that judicial officers and staff are not tempted by corruption. The Bangalore Principles of Judicial Conduct, developed under the auspices of the UN and adopted in 2002¹⁴, set out the ethical standards required of judges in the fight against corruption.

Conclusion

Without judicial independence, judicial officers will not be able to fulfil their constitutional function to protect human rights and to ensure compliance with the law, which is required in every democracy. In the paper presented to the Commonwealth law ministers in Botswana in May 2014, the late Chief Justice of

Botswana, Justice Nganunu, outlined the importance of an independent judiciary to economic development, stating that confidence in the organs of state and the rule of law ‘brings about the necessary peace and harmony to enable citizens of a country or region to take up long-term developments without fear of loss of their investments’.

The Latimer House Principles state that ‘an independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice’. It is our right as citizens to ensure that the judiciary is not only *de jure* but also *de facto* the respected third pillar of democracy.

Endnotes

- 1 Also described as ‘Judicial Officers’ in this article
- 2 UN Basic Principles on the Independence of Judges Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
- 3 UN Basic Principles, Article 7: ‘It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.’
- 4 Latimer House Principles on the Accountability of and Relationship between the Three Branches of Government, 2003.
- 5 Available on the CMJA website: www.cmja.org [Accessed 12 November 2014].
- 6 Parliamentary Supremacy and Judicial Independence: The Latimer House Guidelines for the Commonwealth, 1998.
- 7 For example: Nairobi Plan of Action for Africa, 2005, and the Edinburgh Plan of Action on the Development and Implementation of the Commonwealth (Latimer House) Principle, 2008.
- 8 CLA, CLEA, CMJA and Commonwealth Parliamentary Association.
- 9 See www.cmja.org for text of the Hon. John Vertes presentation.
- 10 Article 16: ‘Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.’
- 11 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Report of the special rapporteur on the independence of judges and lawyers. A/HRC/26/32.
- 12 Communication No. 387/1989, Arvo O. Karttunen vs Finland (views adopted on 23 October 1992), in UN doc: General Assembly Official Records, A/48/40, 2, p. 120, para. 7.2.
- 13 Formulated from the Commonwealth Colloquium on Combating Corruption in the Judiciary, Limassol, Cyprus 2002.
- 14 Available at: www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf [Accessed 12 November 2014].

DR KAREN BREWER is secretary general of the Commonwealth Magistrates’ and Judges’ Association (CMJA), and secretary to the Latimer House Working Group.