

Judicial and Prosecutorial Independence: The Role of Interdependence between Institutions and the Need for Self-Disciplining Mechanisms

(Workshop Row 6: WS1.10)

Main Issues Covered

Mr. Charles Caruso, moderator, stated the objective of the workshop was to identify institutional interdependence between prosecutors and the judiciary and how independence is maintained in various systems. Whilst acknowledging that the suggestions of the panel may not be applicable to all the delegates in the room, he expressed the hope that they would be thought-provoking. He created the three hypotheses shown and they bore no relation to the panel members. Each hypothesis represented an idea of how to create independent institutions and how they can serve, with each presenter's topic either directly or indirectly referring to these hypotheses.

The opening presentation by **Judge Andre Davis**, *The Loneliness of the Long Distance Judge: Integrity as an Imperative*, alluded to a movie in which the protagonist has great mental and physical endurance but who has the belief that personal integrity is about being true to oneself and acting accordingly, a notion which distorts his view of world. While buffeted by the arguments of the advocates, judges must never, on the other hand, adopt a self-centered notion of integrity.

What, therefore, is judicial integrity? The “widely-accepted codes of conduct that serve as guideposts,” which are enumerated in the Canon of Judicial Ethics, set forth a two-part concept of judicial integrity. The first canon is that “A judge should uphold the integrity and independence of the judiciary”: this is an imperative for institutional probity and can be regarded as the broad or macro view of judicial integrity. Courts must be cognizant of how their actions will affect the public perception of the judicial system. This is followed by the second canon: “A judge should avoid impropriety and the appearance of impropriety in all activities.” This is a narrower or micro view, which concerns the obligation for judges to comport themselves ethically both on and off the bench.

Judge Davis quoted a section from the federal Constitution enshrining the duties and positions of judges, which is often paraphrased as the “twin protections of life tenure and salary.” In other words, a federal judge is appointed for life on a salary which cannot be reduced during their tenure.

Justice Barry O’Keefe commenced by stating that the rule of law seeks to ensure that all persons are equal before the law. The court system exists to facilitate this. The topic of judicial independence is therefore, he opined, a subset of the rule of law.

What does judicial independence mean? Judges are not extensions of the government. They should be removed from the influence of government, except in the form of acts of parliament or submissions in which the state is a party. Judges must be able to apply the law equally and without fear or favour.

Judicial independence is not about a judge being arbitrary/idiosyncratic or above the law: an honest/independent judiciary is at the very heart of the rule of law and arbitrariness has no place in this.

In Australia, there is a long tradition of judicial independence and integrity, with only three judges ever having been removed from office.

Justice O'Keefe suggested judicial independence should be embodied in the Constitution or in a statute that requires a transparent parliamentary process to be amended. This would fulfill the necessity of the court and judges' position being secure, stable and free of politicization. Judges also need to have high intellect, maturity and be of standing in the community, in order for the court decisions to be more readily accepted by the public.

Justice O'Keefe continued by saying that:

- 1) Judges' salaries and conditions of professional service must be adequate to encourage talented individuals to dedicate their lives to the judiciary.
- 2) There must be no laws which render it difficult for judges/prospective judges to remain/become members of the judiciary – e.g. anti-Semitic laws of Nazi Germany or apartheid laws of Africa.

Justice O'Keefe maintained that prosecutors must have security of tenure, with the tenure defined by statute and must also have security of independence by being responsible to, but not directed by, their head.

Assistant U.S. Attorney (A.U.S.A.) **Ms. Monika Bickert** stated that prosecution systems exist to serve and protect the public. Internal corruption is counter to their mission, thus the need to have a culture of integrity is very strong.

Federal prosecutors come under Department of Justice (DoJ) which is separate from the judiciary. There are DoJ measures and internal policing entities, as well as monitoring by independent state bar associations, to prevent prosecutorial corruption. Having career prosecutors selected with care is one anti-corruption mechanism: US Attorney Offices interview prospective prosecutors to test their ethical/integrity standards, while the FBI conducts independent background checks. Upon their hiring, prosecutors undergo ethics training and annually do so thereafter. Ethics advisors are stationed in each office and at DoJ headquarters. There is intense monitoring, with all major decisions being reviewed by a supervisory chain. Within the first 2 years a prosecutor's career can be terminated without cause, although this happens usually for incompetence rather than ethical issues. Prosecutors are paid a fixed salary and are subject to removal only from within the executive branch.

US Attorneys are selected by the President and confirmed by the Senate and must file public financial disclosure forms.

DoJ's Office of Professional Responsibility (OPR) deals with breaches of professional codes. Staffed by non-political appointees who investigate prosecutorial misconduct, members of

the public, judges and others are encouraged to make referrals. If OPR concludes that there has been misconduct, recommendations will be made for sanctions or other measures. At the end of each year, OPR sends a written report to the AG, which is made public. State bar associations can impose further sanctions.

DoJ's Office of Public Integrity (PIN) investigates criminal law violations at all levels, with the typical crimes including theft of public property and lying. PIN's annual report is also sent to the AG and made public. When a complaint comes in, both a PIN officer and a federal agent are assigned to investigate, and if the case is prosecuted then it goes through the normal process.

According to **Justice Vichai Vivitasevi**, corruption of state officials has been widespread in Thai political history. Criminal proceedings against them were not effective because they have influence over officials in the criminal justice system and have money to hire skilled lawyers to ensure their acquittal if charged.

Vote-buying occurs flagrantly and, after winning the election, politicians need to recoup their money – this leads to their corruption. Their dishonesty is infamous and they lack public trust. “The judiciary is the last hope of the people,” he asserted.

Thai society recognizes that judicial independence is an essential factor but distrusts the political system/public officials. Therefore, to have an elected judiciary is impossible.

In an attempt to revive the political system, apart from courts of justice, two other court systems were introduced in 1997: the Constitutional Court and the Administrative Courts. Justice Vichai focused on the Courts of Justice, and in particular the Division for Holders of Political Office within the Supreme Court, established to respond to the massive problem of corruption amongst politicians and state officials. A special panel consisting of nine judges, selected from the Supreme Court's general assembly by secret ballot, is responsible for the trial in such cases. According to Justice Vichai, the selection process assures judicial independence.

The Constitution empowers the National Anti-Corruption Commission (NACC) to act inquisitorially and to refer cases to the Attorney General. However, as a check and balance, in the event that the AG decides not to prosecute and the joint working group which is then formed cannot reach a decision, the NACC can file a prosecution independently.

Main Outcomes

Judge Davis remarked that “both at the institutional and personal levels independence and integrity are inseparable. Only this will win widespread respect for the judiciary and for the rule of law.”

Justice O’Keefe emphasized that judicial independence should be embodied in the Constitution or a statute; and that people of standing and integrity should be selected so that their words and actions can be respected and trusted.

A.U.S.A. Bickert's parting thought was that policing mechanisms empower the public.

Justice Vichai concluded that the judiciary should continue with their own culture and traditions clearly separated from politics to maintain the public trust. It would be far from easy to heed calls for the judiciary to intervene and resolve the political crisis and it could even exacerbate it.

Main Outputs

Due to time limitations, only one debate topic was used: *Judicial Self-Disciplining Mechanisms*.

It was the panel's consensus that it is critically important that judiciaries have in place effective self-disciplining mechanisms to provide assurance that when there are violations, appropriate responses will be taken. In the US the process is transparent and clear, with the judges as subject to the law as any citizen would be.

In Australia the removal of a judge has to be approved by both houses and is a rare occurrence.

Asked to comment on the sub-topic of *Self-Disciplining Scheme versus Independent, Non-Judicial Disciplining Bodies*, Judge Montalvo commented that the complainant should be secure in their ability to complain, and complaints attacking the legal reasoning of a judge's decision should not be entertained.

In Thailand, there have been many cases in which judges, primarily of the Courts of First Instance, have been removed or sanctioned. Both members of the general public and public prosecutors are entitled to be complainants. The most important disciplinary mechanism is the Judicial Commission, but judges are also subject to two other legal methods: the equivalent of impeachment (a petition signed by 20,000 people); and vetting by the NACC.

Judge Davis and Montalvo opined that hard and fast rules about situations requiring recusal by a judge contribute significantly to the avoidance of conflict and appearance of impropriety.

Justice O'Keefe stated that judges, as members of the community, should be aware of social expectations and trends, whilst Judge Davis was of the opinion that best practices should dictate procedures. Justice Vichai added that providing ethical training for judges is insufficient: they must also have public trust.

In response to a question on methods of safeguarding judicial integrity, Judge Montalvo commented that inflexible procedures and poorly designed practices often work to undermine public trust in the judiciary.

Judge Davis added that in systems where the judiciary is under the control of the executive branch, judges need to come together as a collective to both work for whatever change is possible and obtain greater independence, while at the same time establishing support systems for each other to nurture a strong sense of independence and courage. According to

one of the delegates, this is the case also when the judicial appointment process is controlled by royalty.

From the floor the head of Uganda's ACA commented that in his country the level of immunity given to the judiciary is a cause of concern. Mr. Caruso indicated that such a concern is due to an overly expansive view of immunity that extends to personal acts of the judge, which is not the way it is usually interpreted.

A local delegate commented that Thailand's trust in the judicial branch has been recently undermined by series of scandals: Justice Vichai agreed and Justice O'Keefe's recommendation was that the response from the judiciary should be both public and swift.

Asked by a TI delegate to comment on a recent case in which two judges had been sentencing alleged delinquents to a reformatory in return for kick-backs, Judge Davis stated that the adjudication of all those involved as delinquents had been rescinded and the judges had been prosecuted for such conduct.

Recommendations/Follow-up Actions

Workshop Highlights (including interesting quotes)

Judge Montalvo:

"Sunlight is the best antidote to corruption"

"Poor procedures are the best allies of corruption".

Justice O'Keefe:

"It is no part of a judge's mandate to take bribes."

Judge Davis:

"Both at the institutional and personal levels independence and integrity are inseparable. Only this will win widespread respect for the judiciary and for the rule of law."

Justice Vichai:

"The judiciary is the last hope of the people."

AUSA Bickert:

"Policing mechanisms empower the public."