



SHORT WORKSHOP REPORT FORM

Number and title of workshop: WS 1.10 Judicial and Prosecutorial Independence – The Role of Interdependence between Institutions and the Need for Self-Disciplining Mechanisms

Date and time of workshop: 9:00 AM – 11:00 AM, Saturday, 13 November 2010

Moderator: Charles Caruso, American Bar Association (ABA)

Rapporteurs:

Judge Frank Montalvo (United States District Court for the Western District of Texas)
Ms. Lesley D. Junlakan, Freelance Consultant/Writer

Panellists

Justice Vichai Vivitasevi (Former Justice, Supreme Court of Thailand)
Justice Barry O'Keefe (Former Justice, Supreme Court of Australia)
Judge Andre Davis (United States Court of Appeals for the 4th Circuit)
Ms. Monica Bickert (Rule of Law Advisor), U.S. Embassy, Bangkok

Main Issues Covered

The judicial and prosecutorial branch independence as a prerequisite to a competent and efficiently functioning judiciary and prosecution as well as what and how this independence contributes to the goal of creating a corruption-free judiciary and prosecution. As concerns the judiciary, the panel discussed the state of judicial independence and the organic law that contributes to creating and maintaining that independence in Thailand, Australia and the United States. The point of this comparative law exercise was to assess the state of judicial independence under each system and provide an explanation of what justice system factors contribute to that independence.

Judge Andre M. Davis explained that judicial integrity is not an empty vessel. While the definition of judicial integrity is necessarily broad and malleable because unique situations constantly arise, there must be some order to the manner in which integrity is defined. Judge Davis' references to The Loneliness of the Long Distance Runner to demonstrate that integrity is something more than one's choice to act in conformity with one's own world view. Judge Davis warned that judges must look past their own personal notion of integrity when navigating judicial integrity.

Judge Davis identified the "widely-accepted codes of conduct that serve as guideposts," which are enumerated in the Canon of Judicial Ethics. He explained that the Canons set forth a two-part concept of judicial integrity. The first, and broader part, is the imperative for institutional probity. Courts must be cognizant of how their actions will affect the public perception of the judicial system. The second, and narrower part, is the day-to-day behaviour of the individual judges and their obligation to comport themselves ethically both on and off the bench.



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Judge Davis warned that the phenomenon of electing judges rather than appointing them may raise concerns about judicial integrity for a handful of reasons. An instance in which, according to Judge Davis, a judge comported himself perhaps in compliance with his own personal sense of integrity, but violated the more objective and societal standards of judicial integrity, was when the Chief Justice of Alabama installed a 5,280-pound monument with the Ten Commandments at the state court courthouse. A federal judge ordered the Chief Justice of Alabama to remove the monument because it violated the constitutional right of separation of church and state. Here, even if installing the Ten Commandments monument was in compliance with the Chief Justice of Alabama's personal sense of integrity, it flew in the face of the more objective, societal standard for judicial integrity, not to mention the law.

Judge Davis next explored the tensions between judicial integrity and First Amendment rights to freedom of speech and the balance that must be struck, especially for elected judges. The tension exists because First Amendment rights go to the heart of personal rights, but judges must still comport themselves within the constructs of a less self-centred definition of judicial integrity. He discussed a United States Supreme Court decision which struck down a state regulation on the political speech of judicial candidates. Judge Davis also raised concerns about the willingness of elected judges to protect the rights of minorities and to issue unpopular decisions when that is what is required by law, which again raises issues of complying with a non-self-centred notion of integrity.

Finally, Judge Davis explored the tension between judicial integrity and judicial independence. He pointed out the balance between the constitutional independence of the judiciary – that judges are appointed for life and cannot have their salaries reduced – and the manner in which the legislative branch checks the judiciary's power – Congress has the power to establish and abolish all federal courts aside from the Supreme Court. Judge Davis argued that "popular and widespread respect for the judiciary" depends on its integrity and independence. Therefore, judges must push past their own sense of integrity and embrace a multi-dimensional notion of judicial integrity for which they can be held accountable.

In his presentation, "The Powers of the Judiciary: the New Composition Toward Social Justice," Justice Vichai spoke about the recent restructuring of Thailand's court system. Justice Vichai briefly recounted the historical events that led to the current make-up of the Thai judiciary, commenting on some of the problems of independence that have arisen. In recent years, the judiciary has played a larger role in the political arena, straying from its traditionally insular and independent function, causing some concern.

The 1997 Constitution gave much consideration to the principle of separating government functions, and created the three main judicial bodies: the Courts of Justice, the Constitutional Court, and the Administrative Courts, each with different judicial functions. Previously the Courts of Justice were the only courts with real adjudicative authority. Justice Vichai identified this as a change from a "unitary" to a "binary" judiciary.

The Constitutional Court is tasked with, as the name implies, ruling on the constitutionality of laws. It also plays a role in determining the appropriate powers and duties of constitutional organizations. The Administrative Courts essentially handle all cases involving the government, both disputes between government entities, and disputes between the government and private citizens. The Courts of Justice handle all other cases not within the jurisdiction of the Constitutional Court or the Administrative Courts.

According to Ms. Bickert, the U.S. Attorney's Offices play a central role in preventing corruption:



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1. Prosecutors are non-political hires.
 - a. Interviewed about ethical issues before hiring. Background investigations focus on a candidate's ethics, truthfulness, and possible motivations for corrupt conduct (allegiance to certain organizations; financial needs or extreme spending habits).
 - b. Fixed salary, no financial incentive for number of convictions
2. Prosecutors undergo training in ethics and the consequences of corrupt behaviour before starting the job, and every year as part of continuing legal education.
 - a. Prosecutors are governed often by the code of ethics of the federal system as well as the state that licenses them.
 - b. Before becoming a lawyer, must take ethics in law school, must pass ethics exam showing that they understand the rules, so there is already an awareness of the rules and how to analyze ethical dilemmas.
 - c. Each prosecutors office has a designated ethics advisor who is available for advice when ethical issues arise
 - i. For instance: exculpatory questions, conflict of interest
 - ii. DOJ also has central Ethics Office within Justice Management Division: www.justice.gov/jmd/, with explanation of rules that govern prosecutors re: financial and political conflicts of interests, financial disclosure, gifts, etc. It is publicly accessible.
 - d. All of this creates a culture of honesty and integrity
3. Prosecutors are monitored to ensure they are behaving ethically
 - a. For the first 2 years, prosecutors are on probation. Their work and decisions are reviewed by supervisors.
 - b. Even after the first 2 years, prosecutors are closely monitored by a pyramidal hierarchy of supervisors. Decisions about whether to decline or charge cases, which charges to file, and how to dispose of cases are all reviewed.
4. There is no political turnover of line prosecutors
 - a. Attorney General can fire the AUSAs but only with cause.

Justice Barry O'Keefe stated that judicial independence means that judges are not extensions of the government. The only way that the government can "influence" the judiciary is through laws, or other vehicles/means resorted to by litigants in the course of the ordinary judicial process.

Judges are appointed and that process has served the country well as only 3 judges have been removed from office in Australia's history. The two ways which best ensure judicial independence are: by placing it in the Constitution; or, in the absence of a constitutional provision, through strong laws. In the same way as independence gives judges security in their opinions, it gives prosecutors protection from political influence.