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JUDICIAL INDEPENDENCE: SOME RECENT PROBLEMS

GEOFFREY ROBERTSON QC*

Judicial Independence is fundamental to democracy, and lip-service is paid to it by most states. However, it is a fragile reed, beset by problems of political appointments, government favours to compliant judges, prosecution powers over the court (especially in former Soviet countries) and the potential, in Anglo-American countries, for misuse of the removal process of impeachment by populist politicians. This article considers recent examples, and a further problem of funding justice at a time of austerity. It argues that much closer attention must be paid to protecting judicial independence, and suggests ways of naming and shaming the “lickspittle judge”.

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I INTRODUCTION

If we are to keep our democracy, there must be one commandment: thou shalt not ration justice.

Judge Learned Hand

Professional people have no cares, whatever happens, they get theirs.

Ogden Nash

“Independence and impartiality” are an alliterative conjunction found in every human rights treaty, although they are in fact disparate concepts with different legal histories. Independence means putting judges in a position to act according to their conscience and the justice of the case, free from pressures from governments, funding bodies, armies, or any other source of state power and influence that may possibly bear upon them. Impartiality, on the other hand, is the judicial characteristic of disinterest towards parties and their causes in litigation. There is, of course, some overlap: judges who are not independent of the state will be perceived, and may actually become, partial to the state when it is a party to litigation in their court. There is prolific domestic and international case law concerning “impartiality”; questions relating to real or apparent judicial bias occur all the time, and the appropriate tests are well established.¹ “Independence”, however, is a concept which has not been fully explored, despite the frequency of allegations that judges are overawed by government, or subject to secret political directives.

Judicial independence is fundamental to every democracy, both as a guarantor of the separation of powers in the state, and of the rule of law. It is the only check on an otherwise powerful government, when that government commands an overall majority in Parliament and could, by its otherwise untrammelled law-making power, put citizen liberty at risk. It ensures justice and equity through the predictability of court decisions that cannot be overruled by political or executive power. In practical terms, and as recent studies have shown, it promotes economic development because investors feel more secure if they have access to an independent judiciary to resolve any disputes

¹ *Hauschildt v Denmark* (Series A, No. 154; Application No 10486/83) European Court of Human Rights (1989) 12 EHRR 266.

against the state or against competitors favoured by the government.² For defendants in criminal courts, it functions, so to speak, as David's slingshot, providing the possibility of acquittal against the state Goliath. For all these reasons, and more, it is the most precious of democratic principles but the least appreciated — especially by populist politicians — and in consequence the most vulnerable. This paper surveys some recent problems: the difficulty of detecting and dealing with the judge who becomes a government lickspittle; the confusion associated with the arcane method of "impeachment" and other methods for removing senior judiciary; the pressures on courts from cost-cutting in a time of austerity; and the limited remedies available domestically and internationally against the governments that seek to bend judges to their will.

That an independent judiciary is a prerequisite for any society, based on the rule of law, cannot be doubted, and the conditions for that independence are uncontroversially set out in the International Bar Association's (IBA) *Minimum Standards of Judicial Independence*, agreed in 1982,³ and in the *Basic Principles of the Independence of the Judiciary* adopted by the General Assembly of the United Nations ('UN') in 1985.⁴ These instruments lay down guidelines for appointment and removal for tenure, conduct, and discipline. They are generally designed to ensure that 'judges are not subject to executive control' (personal independence) and that in the discharge of judicial functions 'a judge is subject to nothing but the law and the commands of his conscience' (substantive independence). The latter formulation, in IBA Standard A(i)(c) strikes me as high-sounding but inadequate: a judge is subject, additionally, to certain public expectations arising from the constitutional importance of the office. These should be spelled out in a code of judicial conduct, requiring justice to be done efficiently and decently, without fear or favour, discrimination, or discourtesy. The Code recently drafted by the UN's Internal Justice Tribunal is an example of a judicial code of the kind which supplements the judge's duty of obedience to law and conscience with a set of

² Maria Popova, *Politicized Justice in Emerging Democracies* (Cambridge, 2012) 5 and studies there cited. The World Bank's ICSID Convention offers international arbitration for foreign investor disputes, but only with member governments and at great cost.

³ International Bar Association, *Minimum Standards of Judicial Independence* (International Bar Association, 1982) ('*Minimum Standards*').

⁴ *Human Rights in the Administration of Justice*, GA Res 40/146, UN GAOR, 116th plen mtg. UN Doc A/RES/57/337 (13 December 1985) ('*Basic Principles*').

ethics.⁵ Any complaints about breaches of the code should be decided by a tribunal, which includes senior judges, itself free from executive influence.

The preamble to the UN's *Basic Principles* notes 'there still exists a gap between the vision underlying these principles and the actual situation'. This was in 1985, and remains in 2013, an understatement. To pick some recent examples:

- In Sri Lanka, in 2013, the government, using its large parliamentary majority, impeached its Chief justice in reprisal for declaring unconstitutional part of its legislative agenda. It accused her of this, and other matters that did not amount to 'misconduct', and had her tried and found guilty by a Parliamentary Select Committee, which comprised seven government ministers, sitting in secret, and denying her the opportunity to cross-examine witnesses or to have the benefit of a presumption of innocence. It celebrated her dismissal by a fireworks display.⁶
- In Uganda, President Museveni mounted a direct attack on the Constitutional Court for doing its constitutional duty by striking down an inconsistent Act of Parliament. He made a televised address accusing the judges of 'usurping the power of the people' and claimed that 'the major work for the judges is to settle chicken and goat theft cases but not to determine the country's destiny'. The government orchestrated a large demonstration against the court.⁷
- In Pakistan, corruption amongst low-level judges continues unabated and political bias influences the outcome of politically sensitive cases.⁸
- In Zimbabwe, since 2000, President Mugabe has 'purged the judiciary, packed the courts with ZANU-PF supporters and handed out "gifts" of land and goods to ensure judges' loyalty'.⁹ Independent judges have been removed through 'a combination of physical and psychological intimidation and threats of

⁵ *Code of Conduct for the Judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal*, 64/527, 65th, mtg, 144 144, UN Doc A/65/86, (15 June 2010). The members of the IJC who drafted this code were chaired by Justice Kate O'Reagan. The author is a member.

⁶ Geoffrey Robertson, *Report on the Impeachment of Sri Lanka's Chief Justice* (Bar Human Rights Committee, 2013).

⁷ International Bar Association Human Rights Institute, *Judicial independence undermined: A report on Uganda* (International Bar Association, 2007).

⁸ International Bar Association Human Rights Institute, *A Long March to Justice: A report on judicial independence and integrity in Pakistan* (International Bar Association, 2009).

⁹ 'Our Hands are Tied: Erosion of the Rule of Law in Zimbabwe' (Research Report, Human Rights Watch, November 2008).

violence'.¹⁰ Presidential appointment of judges does not require the agreement of the Judicial Services Commission, but in any event, the President appoints four of its six members, and the other two are under the influence of the executive.¹¹

- In Bolivia, the government has introduced the *Ley Corta* (short law), which permits the executive directly to appoint 'interim' judges. In February 2011, President Morales directly appointed fifteen judges to vacancies on the Constitutional Tribunal and the Supreme Court.¹²
- In Singapore, section 98(i) of the Constitution allows judges to hold office after reaching 65 'as the President may approve', and the President will only be directed to approve judges who are approved by the executive — an inducement, if one were needed, to render decisions congenial to the government.¹³ The Asian Wall Street Journal was held in contempt for reporting that the IBA Human Rights Institute had described 'concerns about the subjective and objective independence' of the Singapore judiciary.
- Although the Gambian Constitution guarantees judicial independence (Article 120(3)), judges do not, in practice, have security of tenure. In 2008, three judges were summarily dismissed by order of the President, without any official reason and without consultation with the Judicial Services Commission. It is understood that the dismissals were in reprisal for decisions they had taken in politically sensitive cases.¹⁴
- In Ukraine, in 2012, Judge Rodian Kireyez was condemned by the European Union for sentencing opposition leader Yulia Tymoshenko to seven years in prison (with an order to pay £120 million to the state and a three year ban on

¹⁰ International Council of Advocates and Barristers, *The State of Justice in Zimbabwe: A Report to the International Council of Advocates and Barristers by five Common Law Bars into the State of Justice in Zimbabwe* (International Council of Advocates and Barristers, 2004).

¹¹ International Bar Association Human Rights Institute, *Zimbabwe: Time for a new approach* (International Bar Association, 2011).

¹² United Nations Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the activities of her office in the Plurinational State of Bolivia*, UN Doc A/HRC/16/20/Add.2, 2nd (2 February 2011).

¹³ International Bar Association Human Rights Institute, *Prosperity versus Individual Rights? Human rights, democracy and the rule of law in Singapore* (International Bar Association, 2008); *Attorney-General v Daniel Hertzberg* [2008] SGHC 218 — The Asian Wall Street Journal's publisher (Dow Jones) and two of its journalists were found guilty of 'scandalizing the court' in Singapore for reporting this (and other) criticisms of judicial arrangements in Singapore.

¹⁴ International Bar Association Human Rights Institute, *The Gambia: Freedom of Expression on trial* (International Bar Association, 2010).

political participation). The prosecution, for making a bad deal with Putin over gas prices, would not be classed as a crime in any other democracy, and the sentence was crafted so that she would be unable to participate in the 2014 elections. Kireyez was a “P plate” judge, with his position subject to confirmation by the government, in a state where compliant judges convict 99.8 per cent of defendants.

- In Fiji, the Chief Justice was forcibly removed from office by the military government, which has appointed lawyers with questionable credentials from other countries to the Fijian bench. There is evidence that several judges in Fiji have been physically intimidated, with one judge having his home burned down while on holiday and another having his car sabotaged.¹⁵

And so it goes on — the above examples notable only for being noticed. The problems are not confined to small or poor countries. In Russia, old habits die hard: two constitutional court judges were forced to resign in 2009 after making critical comments about how judicial decisions were really taken by an ‘authoritarian’ government.¹⁶ There has been worldwide criticism of the Mikhail Khodorkovsky decision, with credible allegations that the judge was directed to convict. In the United States, the system of electing state judges has come under increasing criticism, not just for throwing up characters like Oklahoma judge Donald Thompson, who regularly used a sex toy to assist his in-court masturbation,¹⁷ but for placing judges under obligations to those lawyers and lobbyists who have donated to their campaign chests. The US Chamber of Commerce has been spending \$50 million, per year, funding advertisements, with the objective of voting out judges supported by personal injury lawyers, labour unions, and the Democratic Party, and electing new judges sympathetic to insurance companies, multi-national corporations, and the Republican Party.¹⁸ There has also been disquiet at

¹⁵ International Bar Association Human Rights Institute, *Dire Straits: A report on the rule of law in Fiji* (International Bar Association, 2009).

¹⁶ Andrew Osborn, ‘Judges Forced out after Accusing Kremlin of Hijacking Judiciary’, *Daily Telegraph* (online), 2 December 2009
<<http://www.telegraph.co.uk/news/worldnews/europe/russia/6711580/Judges-forced-out-after-accusing-Kremlin-of-hijacking-judiciary.html>>.

¹⁷ ‘Judge convicted of using penis pump in court’, *Sydney Morning Herald* (online), 30 June 2006
<<http://www.smh.com.au/news/unusual-tales/judges-stiff-punishment/2006/06/30/1151174382947.html>>.

¹⁸ Robert Lenzer and Matthew Miller, ‘Buying Justice’, *Forbes Magazine* (online), 21 July 2003
<<http://www.forbes.com/forbes/2003/0721/064.html>>.

the way the much-vaunted Senate Judiciary Committee hearings into the President's Supreme Court nominees have degenerated into what Ronald Dworkin calls 'a waste of everyone's time, a parade of missed opportunities'.¹⁹ Anyone who naively thinks that the US system of Supreme Court appointment weeds out political partisanship has to contend with the otherwise incomprehensible 5:4 decision in *Bush v Gore*,²⁰ which decided the 2000 election.²¹

These are all public examples of cases where the high principles of judicial independence, as described in the IBA and UN instruments, have been breached or, at the very least, put in jeopardy. In some cases the issue is well publicised, by courageous judges or by resignation of the judge under pressure, but in others it depends on the happenstance of a human rights report on the country in question, or whether an alert journalist has identified and publicised a behind-the-scenes government manoeuvre. More surprising, perhaps, is the number of countries where political involvement in the appointment of judges is simply taken for granted. For centuries in Britain, for example, appointment by, or on the advice of, the Lord Chancellor (a member of the executive) was the rule. This worked satisfactorily in the view of the judges, because appointments were made on their *sotto voce* advice.²² The result was judicial cloning, and the UK has now moved to an apolitical, open competition process, unconnected to the executive. Other Commonwealth countries have not followed its lead, and many governments insist on their right to make judicial appointments by decisions that can be influenced by the political views of the candidate. Australia provides a particularly poor example, where appointments to the High Court continue to be made by Prime Ministers who, long before Robert Mugabe did so, have often appointed their own Attorneys General. One current judge was appointed because he was thought to be pro the bureaucracy (he

¹⁹ Ronald Dworkin, 'The Temptation of Elena Kagan', *New York Review of Books* (online), 19 August 2010 <<http://www.nybooks.com/articles/archives/2010/aug/19/temptation-elena-kagan/?pagination=false>>.

²⁰ *Bush v Gore* (2000) 531 U.S. 98.

²¹ For a recent suggestion that Sandra Day O'Connor's deciding judgment might have been influenced by 'a wish to retire under a Republican President' see Rebecca Lowe, *Historic Justice — Rebecca Lowe* (August 2011) International Bar Association <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=D4BEFA92-F04B-44B6-851C-EC50BE382A07>>.

²² Peer pressure carries its own dangers. Lord Jowitt, Chancellor in the post-war socialist government of Clement Atlee, explained (in a letter to an American lawyer) why he did not appoint left-wingers to the bench: 'How should I have felt, when I noticed the cold looks that I should have received when next I went to lunch at the Inn?' Appointments of judges by judges alone will tend to favour political conservatives and nominees unrepresentative of society.

was — until he was appointed), another because he made an after-dinner speech attacking the kind of judicial activism that was upsetting the Prime Minister.²³

Does political selection matter, if (as has been the case in Australia) all appointees are competent, and have been known occasionally to bite the hand that feeds them the job? It does, because it curbs international criticism of politicians and Presidents who appoint cronies and judicial lickspittles. It has, for example, helped President Zuma weather the storm over his nomination to head South Africa's Constitutional Court of Mogoeng Mogoeng, an inferior jurist with religious beliefs about gays and women that are incompatible with their equal protection under the constitution.²⁴

II DETECTING POLITICAL INFLUENCES

That particular controversy was in the open. I am more concerned about subtle political influences on the judiciary, which are difficult to detect and which can only be inferred from evidence of a pattern or system. Take Georgia, for example, homeland of Stalin and Beria but the favourite European country of George W. Bush (an affection reciprocated by naming a highway after him). The government, after its "Rose revolution", purported to crack down on corruption, and to allow democratic freedom to flourish. Yet the conviction rate remains today a staggering 99.6 per cent. Is it possible to believe that Georgian policemen only arrest those whose guilt can be proved beyond reasonable doubt? That Georgian judges are not independent can be inferred from this statistic, which is provided by the courts themselves, as if proud of their performance. Suspiciously high conviction rates demand an explanation. When Georgia came up before the Human Rights Commission earlier this year, only one country asked about judicial independence, and was of course told that it was improving. The Commission did rather better in 2012 at Ukraine's periodic review, when a number of member states criticized the political pressures to convict and jail Julia Tymoschenko. Ukrainian judges,

²³ A recent example of political appointment in Australia came with cabinet selection of The Chief Justice, a choice between two fine candidates, one from Western Australia and the from New South Wales. The Attorney General favoured the latter, but politicians from other states objected on the basis that a candidate from New South Wales should not have the job again. It is said that after a two-hour debate in cabinet, Prime Minister Rudd banged the table and said: 'Fuck it. We'll take the Western Australian'. This is a strange way to choose a Chief Justice. Geoffrey Robertson, *The Statute of Liberty* (Vintage, 2009) 227.

²⁴ Jonathan Clayton, 'Zuma plays politics with his choice for new Chief Justice', *The Times* (online), 1 September 2011 <<http://www.thetimes.co.uk/tto/law/article3150656.ece>>.

as in Soviet times, are very much under the sway of prosecutors, who may prosecute them if they acquit. Their conviction rate is an even more astounding 99.8 per cent. If the Commission is to function effectively on this issue, it must assume that any country with more than a 90 per cent conviction rate does not have an independent judiciary.

One form of pressure that has gone unnoticed, but which offers a particularly powerful incentive for judges subject to early retirement to favour the government's case, is the prospect of lucrative employment on government inquiries or Commissions. The most intellectually dishonest judgment I have ever witnessed came from a judge close to retirement, who unconscionably protected the corrupt son of the Prime Minister of a small island nation from having evidence of his guilt collected abroad.²⁵ I thought he must have been bribed, but when I later heard that the Prime Minister had appointed him to various Commissions, it struck me that judges may turn lickspittle in the hope of future government favours to supplement their pensions. That is one reason why it is necessary to raise judicial retirement ages, prematurely set in some countries at sixty or sixty-five. But the real problem is that there is no way to detect whether a judge, or a court of judges, has made a perverse decision in order to curry favour with a government, other than by close and expert analysis of the decision itself. This is easier when the intellectual dishonesty involves bending rules of law, but is more difficult to uncover if it has involved twisting the facts that the judge had to "find" by believing or disbelieving witnesses. In other words, the bias of a good bad judge is very difficult to detect.

A similar form of subtle psychological pressure applies to the "contract judge", whose contract is up for renewal every few years. I will never forget the distress with which a judge in Kenya once explained to me why he could not risk upsetting the government by giving bail to a dissident who deserved it, because of his fear that his two-year contract would not be renewed. He had no other employment, his children would have to leave their public school in England, and so forth. His wrongful denial of bail was induced — indeed dictated — by political pressure of a kind that could never be proved, other than from private confession to a visiting colleague. The same kind of pressure can affect judges who are brought back on renewable contracts, after retirement. I am constantly

²⁵ Geoffrey Robertson, *The Justice Game* (Vintage, 1998) 252–5.

surprised the consequent undermining of independence is not recognised for what it is — even the International Labor Organization Administrative Tribunal allows its judges to be indefinitely renewed on three-year contracts. One President was re-appointed no less than five times, his well-remunerated employment contingent upon the regular approval of the body, which was the defending party in all that Tribunal's proceedings. It is essential to abide by the rule that judges must, as a guarantee of independence, possess security of tenure, and that this must be interpreted as permitting no more than one extension, and then only in cases where their services are really needed.²⁶

There are a number of other relationships which place political pressure on judges — not least from tribal or family allegiances, or from their clubs, or social circles. Again, these can only be detected on careful and expert analysis of judgments that deliberately twist facts or misstate law to reach politically acceptable conclusions. One form of pressure in criminal cases can come from the prosecution authority — the office, in some countries, from which most judges are recruited. It is unacceptable that the whole or major part of the judiciary hearing criminal cases should have come up through the prosecutorial apparatus, although it must be said that the European Court of Human Rights ('ECHR') only objects when there is a perception of bias, because the judge has been part of the prosecution office when it was investigating the case before him.²⁷ But a judge who has worked as a lawyer for many years in an office with a police or prosecutorial ethos will naturally be impressed by submissions from that office, and there are countries where the prosecutor, representing the state, is more powerful than the judge — over whose career the prosecutor may have influence. This fact of behind-the-scenes life has led, in Russia for example, to parties attempting to bribe the prosecutor rather than the judge, in the knowledge that the former can give directions to the latter. The authorities in Moscow actually encouraged this kind of corruption when they ousted City Court judge Kudeshkina, after she had refused to follow the prosecutor's 'instructions' on how to decide a case.²⁸

²⁶ This rule is recommended by Dr. Amerasinghe in Chittharanjan F Amerasinghe, *Principles of the Institutional Law of International Organisations* (Cambridge University Press, 1996) 455.

²⁷ *Piersack v Belgium* [1983] 5 ECHR 236.

²⁸ Sabine Leutheusser-Schnarrenberger, 'The Circumstances surrounding the arrest and prosecution of leading Yukos executives' (Report and Addendum, Council of Europe Parliamentary Assembly, 29 November 2004)

<<http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10730&Language=EN>>.

What can be done to detect the judicial lickspittle, when the pro-government pressure under which he or she has buckled is secret, or psychological, or generated by ambition or hope for post-retirement reward? The first step, namely analysing for perversity judgments in favour of the executive, must obviously depend upon their accessibility, and many even at the appeal level are not officially reported. Publicity, as Jeremy Bentham pointed out, is a precondition of justice; 'it keeps the judge, whilst trying, under trial'.²⁹ The IBA, in conjunction with the UN and interested foundations, could help by fostering the electronic availability of judgments. It should be a duty on states to ensure that all final judgments are publicly reported, or at least available to the public if requested — a matter essential to checking judicial independence but overlooked both by the IBA *Minimum Standards* and by the UN *Basic Principles*. Secret or "in chamber" judgments can be a vehicle for criminality; these were used by the corrupt Malaysian judges recently exposed as having conspired with lawyers to favour their clients. A right of public access to unreported judgments is the first step in identifying judges who are actually or intellectually corrupt.

Then, expert analysis of the suspect judgment is essential if perversity is to be exposed. The IBA and other concerned organisations should undertake research into the quality of the jurisprudence in courts suspected of truckling to governments. A great deal of aid money is spent on judicial training, and indeed on judicial networking, but very little on assessing judicial performance and identifying cases where facts have been ignored or twisted, or rules of law misstated or bent, to reach politically convenient conclusions. The task is not easy, although it could be essayed by academics working with distinguished practitioners. It is not dissimilar to the task performed by appeal courts, although it would mean asking not only whether the judge got it wrong, but whether he got it wrong deliberately. There will sometimes be unusual behaviour (undue delay, procedural unfairness, using a judge not qualified to sit, etc.), which may provide evidence of government pressure to reach a desired result, or not to reach a result at all.

²⁹ John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1834-1843) vol 5, 316.

III REMOVAL OF SENIOR JUDGES

This has become a real problem, in consequence of recent attempts to remove Chief Justices in Trinidad and Sri Lanka. In the former case, the Constitution first required a finding of incapacity or misconduct by an independent Tribunal of Commonwealth judges. However, in the latter it permitted impeachment by Parliament, merely by vote of a simple majority of MPs, after a finding of “guilty” by a tribunal of seven MPs (in the Chief Justice’s case, the seven held cabinet positions in a government that the Chief Justice’s constitutional decisions had displeased). Although in many respects unsatisfactory, impeachment does at least ensure judicial accountability to an outside body — the democratically elected legislature — and this provides an ultimate safeguard against judicial guardians becoming too incestuous or perceived as too self-interested to guard themselves. It is not, in my experience, the case that judges are necessarily biased in judging their own colleagues — they are usually unforgiving of fellow professionals who have acted unbecomingly, and the bench is a place where hostilities fester as often as friendships form. However, it does not look good, which is some justification for giving Parliament the final say by way of an impeachment process. So the impeachment process may not be objectionable *per se*, at least for a Chief Justice, so long as it is conducted fairly, in a way that fully protects the judge’s rights and in circumstances where it cannot be credibly suggested that it has been instituted or carried on as a reprisal — because, for example, the government does not like the judge’s decision in a particular case. Since almost all cases of serious misbehaviour will involve allegations of crime, senior judges should normally be tried in court first, and only impeached if convicted.

It is generally accepted, and may now be considered an imperative rule of international law, that judges cannot be removed except for proven incapacity or misbehaviour. “Incapacity” is clear enough, but “misbehaviour” is a broad term and should be limited to *serious* misbehaviour. Criminal offences would normally qualify, although even here there are lines to be drawn: in England a circuit judge was sacked after his conviction for smuggling whisky, but senior appellate judges have escaped impeachment for drink-driving offences. Criminal offences can at least be “proven” — namely by the verdict of a judge and/or jury in court proceedings, and subsequent impeachment by Parliament is

scrupulously fair to a judge given the opportunity (however unlikely it is to succeed) to claim that his conviction was wrongful.

Where for some reason a criminal charge has not been proffered, Parliament has the difficult task of replicating court procedures in order to prove — necessarily to the criminal standard, beyond reasonable doubt — that the judge is in fact guilty. Where the “misbehaviour” alleged does not constitute a criminal offence at all, the question of whether it is serious enough to warrant dismissal becomes acute. Why should a judge be dismissed for conduct which is lawful? There are dangers of judges being impeached because governments dislike what they lawfully say or do. Republican politicians in the US attempted to impeach William O. Douglas because he gave an interview to *Playboy*, and in 1988 the calculating Dr. Mahartir, fearing that his honest Chief Justice would rule against him in a forthcoming case, had him dismissed because, at a University book-launch, he spoke up for the independence of the Malaysian judiciary. In every case where it is alleged that non-criminal conduct amounts to “misbehaviour” sufficient to disentitle a judge to sit, especial care must be taken to ensure that the conduct really does reflect so badly on the individual that he or she can no longer be considered fit to judge others — because, in a sense, they cannot even judge themselves.

Some assistance as to the kind and degree of misbehaviour that disqualifies a judge is found in the Latimer House Principles agreed by Law Ministers of the Commonwealth and by the Commonwealth Heads of Government. A specific rule provides:

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.³⁰

This requires clear proof of misconduct that renders them unfit, at least in the eyes of reasonable people, to occupy the justice seat. This finds an echo in the Beijing Statement of Principles of the Independence of the Judiciary in the ASEAN Region, which is subscribed to by thirty-two Chief Justices. Article 22 provides:

Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct that makes the judge unfit to be a judge.

³⁰ ‘Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government’ (Commonwealth Heads of Government, April 2004), Section IV (Independence of Judiciary).

It is essential that the misbehaviour or incapacity be proved. But how; by what procedures and according to what standards? Quite clearly, the standards and procedures for trying allegations of judicial misconduct (particularly if the judge has not been convicted in the courts of any offence), must comply with the minimum standards set out in Article 14 of the International Covenant on Civil and Political Rights ('ICCPR'), namely:

A fair and public hearing by a competent, independent and impartial tribunal with the presumption of innocence; and rights to have adequate time to prepare a defence, to examine and cross-examine witnesses and to call witnesses on his behalf.³¹

These are fundamental safeguards that must apply to quasi-criminal "misconduct" charges, which, if they result in an impeachment address by MPs, will blast the judge's reputation and deprive him of status, job, and pension rights. For this reason the common law insists on scrupulous fairness, as the Privy Council made clear in the leading Commonwealth case of *Evan Rees v Richard Alfred Crane*,³² where the rules of natural justice were held to require a judge to be given, even at a preliminary stage, all the evidence against him and an opportunity to refute the charges. The Beijing Rules insist that 'removal by Parliamentary procedure... should be rarely, if ever, be used' because 'its use other than for the most serious reasons is apt to lead to misuse'.³³ When it is used, 'the judge who is sought to be removed must have the right to a fair hearing'.³⁴ The Latimer House principles are similarly emphatic: Principle VII lays down that 'disciplinary procedures should be fairly and objectively administered...with... appropriate safeguards to ensure fairness'. The Latimer House Guidelines go further:

In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial Tribunal.³⁵

³¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

³² *Evan Rees v Richard Alfred Crane* (1994) 2AC 173.

³³ *Beijing Statement of Principles of the Independence of the Judiciary* (19 August 1995) The Law Association for Asia and the Pacific, rule 23 <<http://lawasia.asn.au/beijing-statement.htm>>.

³⁴ *Ibid* rule 26.

³⁵ 'Commonwealth Principles on the Accountability of and the Relationship between the Three Branches of Government' (Commonwealth Heads of Government, April 2004), Section IV (Independence of Judiciary), Guideline VI (I)(9).

These principles must be stringently applied to any attempt to remove a Chief Justice, who is the representative of the judiciary as a whole and by virtue of the fact that he or she has achieved that exalted status, will normally have a high degree of peer approval and possess a recognised judicial distinction. Indeed many “Westminster model” constitutions give the Chief Justice, through chairmanship of a Legal Services Commission, a leading role in the disciplining and removal of other judges. This does make the removal of a Chief Justice particularly problematic. Some Commonwealth countries provide in their constitution for a tribunal of overseas Commonwealth judges to investigate misconduct charges against the Chief Justice: a recognition, both of the momentous political character of such a move, and the need to eliminate any suggestion of bias in the membership of the tribunal. The cases are, fortunately, very few, but the tribunal in Trinidad and Tobago, called in 2006 to hear charges of misconduct against Chief Justice Sharma, provides a procedural exemplar.

The Tribunal was chaired by Lord Mustill, sitting with distinguished jurists from Jamaica and St. Vincent. The allegation was that Sharma had attempted to pervert the course of justice by pressuring the Chief Magistrate to acquit the leader of the opposition of an imprisonable offence. This is, of course, a serious crime and it should always be “proved” in court before removal proceedings are undertaken. The Chief Justice had been charged, but bizarrely the Chief Magistrate refused to testify when called into court to give evidence against him, so the criminal proceedings were discontinued and an impeachment process commenced instead. Lord Mustill insisted, after lengthy argument, on scrupulously fair procedures: the Chief Magistrate was cross-examined at length; the rules of evidence at a criminal trial were applied; and the burden of proof (following *In Re a Solicitor*) was held to be the criminal standard,³⁶ i.e. proof beyond reasonable doubt.

The procedures adopted by Lord Mustill in Sharma’s Case provide the best precedents for the first stage of any impeachment of a Chief Justice in a Commonwealth country.³⁷ He firmly rejected arguments that a lesser or ‘flexible’ burden of proof would suffice:

³⁶ *Re a Solicitor* (1993) QB 69.

³⁷ The Bar Human Rights Committee of England and Wales has published the Mustill Report on its website, in order that its findings might become better known.

‘the allegations against the Chief Justice are so grave, and the effect of an adverse finding so destructive, that the requirement of proof must be at the extreme end of the scale’.³⁸

So far as judicial review is concerned, the courts are historically reluctant to intervene in the affairs of Parliament. The Bill of Rights of 1689 lays down that proceedings in Parliament, the ultimate court, may not be questioned in any court of law. However that may be in the UK — a country without a written constitution — the precise limits of the separation of powers in other countries will depend on what their Constitution says, and it may be possible for the courts to intervene to ensure that an impeachment process is fair. In *Walter L. Nixon v US* the Supreme Court envisaged this possibility in extreme cases.³⁹ Nixon was a Federal District Court judge who refused to resign after being convicted of perjury and sent to prison. The Senate rules allowed a committee to hear evidence and report it to the full Senate, which on that record decided to impeach him. The judge claimed that he was entitled to be heard by the full senate, but the Supreme Court declined to intervene. The committee hearing took four days, he had been given all defence rights, the facts were uncontested, and a full transcript was available to every Senator. So in terms of fairness, Nixon was treated properly. Chief Justice Rehnquist pointed out that ‘the Framers recognised that most likely there would be two sets of proceedings for individuals who commit impeachable offences — the impeachment trial and a separate criminal trial’ and that a further protection for the judge was the rule that impeachment requires a two-thirds majority, which was not the case in Sri Lanka. It also required a finding of misconduct by the House of Representatives and a trial by the Senate. But, Rehnquist actually conceded that ‘courts possess power to review either legislative or executive action that transgresses identifiable textual limits’ — which was the position taken by the Sri Lanka Supreme Court when it held that the Select Committee was unconstitutional. Justice White made clear that the courts should intervene in the ‘extremely unlikely’ case that ‘the Senate would abuse its discretion and insist on a procedure that would not be deemed a trial by reasonable judges’. Justice Souter concluded:

³⁸ Report of Chief Justice Sharma Impeachment Tribunal; Lord Mustill, Sir Vincent Eloissac, Mr. Morrison QC, 14 Dec 2007, [82]; *Campbell v Hamlet* (2006) 66 WLR 346 (Lord Brown): ‘That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession their Lordships entertain no doubt’.

³⁹ *Walter L. Nixon v US* (1993) 506 US 224.

If the Senate were to act in a manner seriously threatening the integrity of its results, convicting say upon a coin toss or upon a summary determination that an officer of the US was simply “a bad guy”, judicial interference might well be appropriate. In such circumstances, the Senate’s action might be so far beyond the scope of its constitutional authority, and the consequent impact upon the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.⁴⁰

This approach offers a prospect of some minimal protection to a judge if tried by Parliament, but interference by the courts may very well be resented and rejected, as it was in Sri Lanka in 2013 — the government simply ignored court decisions which quashed a Select Committee finding of guilt, and used its Parliamentary majority to vote the Chief Justice out of office, replacing her with their own legal adviser who had no judicial experience. The charges against her did not allege serious misconduct and the seven cabinet ministers who tried her in secret were biased and did not offer her any of the protections deemed essential by Lord Mustill and the Latimer/Beijing declarations. Removing senior judges because their decisions displease the government undermines the rule of law to such an extent that the country which suffers it will suffer the loss of that independent power which is essential to make democracy work. It is a calamity for a nation that purports to uphold the rule of law, but it is an international problem as well, in so far as it may be emulated elsewhere if it passes without consequences and becomes an example for other governments to follow (i.e. to sack inconvenient judges and hold the rest in fear of being impeached if they displease their political masters). Politicians, media people, and diplomats must be made to understand this, and international bodies which uphold, or purport to uphold, the rule of law must realise just what a corrosive precedent is set by a successful attack on judicial independence. There is nothing necessarily wrong with impeachment, which gives a sovereign Parliament representing the people the ultimate power to remove a disgraced judge, but his or her misbehaviour must be proved, and by fair means not foul. Certainly not by a process that has been triggered by dissatisfaction with a judgment that has gone against the government, as transpired in Sri Lanka in 2013.

There are non-legal ways in which a government can imperil judicial independence in the course of making attempts to remove a judge. In many countries it will control and

⁴⁰ *Walter L. Nixon v US* (1993) 506 US 224, 253.

heavily influence the state media, which will endorse its campaigns. Tame journalists may wage a propaganda war against disfavoured judges, placing intolerable psychological pressure on them and their families. A government will, by definition, have a political party with control over large swathes of supporters, and the ability, for example, to organise demonstrations against judicial targets. The large scale public protests in 2012–2013 against Dr Bandaranayke, the Chief Justice of Sri Lanka, are of particular concern in this respect, as the public at large does not know or much care about fine points of constitutional law, and it is difficult to believe that they took to the streets against her without government manipulation. This has been widely alleged in Sri Lanka's free press and there is television footage, which seems to show demonstrators being paid after chanting slogans against her and against the Supreme Court. Orchestrated protest against a particular judge is a particularly objectionable form of retaliation, and any government political party behind such demonstrations deserves the strongest condemnation. The government, of course, will have control of the police and armed forces; the authorities in Sri Lanka effected the physical removal of Mrs Bandaranayke from her Supreme Court chambers and official residence in disrespectful ways that seem designed to humiliate her.

IV FINANCIAL STARVATION: HOW LOW CAN YOU GO?

There is another danger to judicial independence on the horizon, as a possible consequence of the recession, which threatens Europe and the US, and will inevitably produce financial constraints around the globe. The justice system — especially criminal justice and justice for unpopular people like immigrants and asylum-seekers, is a favourite target for politicians in times of financial stringency. Indeed, Greece has cut its immigration tribunals so close to the bone that the European Court of Human Rights has held that it is denying access to justice. In the US, State budget cuts have closed divorce courts in California, stopped courts accepting new civil cases in Ohio, and driven New York State's 1300 judges to sue the executive over frozen pay. Even federal judges receive less than the \$160 000 paid to a first-year associate in a big law firm.⁴¹ Whilst the IBA *Minimum Standards* assert 'the duty of the state to provide adequate financial

⁴¹ 'The Judicial System: The Feeblest Branch', *The Economist* (online) 1 October 2011 <<http://www.economist.com/node/21530985>>.

resources to allow for the due administration of justice', there has not been much discussion of the principles that should govern financial security as an element of judicial independence.

Some guidance about the necessary level of funding for judicial salaries is to be found in a Canadian Supreme Court case, which identifies the yardstick in terms of what a reasonable onlooker, informed of the history and traditions of judicial independence, would view realistically and practically as a minimum salary. This hypothetical observer is reasonable enough to reckon that the reason why judicial salaries must be set at comparatively high public service level is to remove both the temptation to corruption and the public contemplation of the possibility of such temptation.

The guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friendland has put it, speaking as a concerned citizen, it is 'for our sake, not for theirs'.⁴²

Ogden Nash, another concerned citizen, has pointed out that it is for their sake as well as ours, and even these Canadian justices accept that salary reductions may be made in emergencies which threaten the state, such as war or bankruptcy, and that judges may suffer cuts as part of "across the board" pay reductions for senior public servants. Similarly, the IBA's *Minimum Standards* provide that 'judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure'.⁴³ But in such cases, and in all other situations where judicial emoluments are subject to adjustments, the Canadian Supreme Court ruled that government must first have the recommendation of an independent and objective commission. As a consequence of this decision, provincial governments were required to set up such independent bodies and consider their recommendations before reducing judicial entitlements.

There was, however, a vigorous dissent, and the requirement of an independent commission to guard against the possibility of "economic manipulation" was predicated

⁴² *Re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3, 113.

⁴³ International Bar Association, *Minimum Standards of Judicial Independence* (International Bar Association, 1982).

upon what the majority thought was an absolute bar on members of the permanent judiciary negotiating over their pay and conditions:

... Negotiations are deeply problematic because the crown is almost always a party to criminal prosecution in provincial courts. Negotiations by the judges who try those cases put them in a conflict of interest, because they would be negotiating with a litigant...the reasonable person might conclude that judges would alter the manner in which they adjudicate cases in order to curry favour with the executive ... negotiations over remunerations and benefits involves a certain degree of “horse trading” between the parties.⁴⁴

This somewhat purist approach may be justified in a provincial court setting, but the notion that judges who seek better conditions from government would ‘horse trade’ by offering unfair convictions in return would not occur to reasonable and informed observers in many other jurisdictions. The Supreme Court’s solution of an independent salaries commission as a *quid pro quo* for judges foregoing their freedom to negotiate wages and conditions, is unexceptional and actually reflects the long standing position in Britain, but this cannot be an indispensable condition of judicial independence.

The Canadian Supreme Court majority notes that the historical source of constitutional concern for judicial independence in the Anglo-American tradition goes back to political interference by the Stuart monarchs.⁴⁵ That concern had an economic aspect: dismissal at The King’s pleasure — suffered by Edward Coke in 1616 and by other judges disinclined to support the “ship money” exactions in the 1630s — was a financial sword of Damocles. What the puritan MPs and their supporters at the Inns of Court established in their stand against Charles I, which in 1642 led to the civil war, was the principle that lawyers appointed to the bench, whilst still owing their appointment to a decision of the King, would henceforth be free from any pressure to act other than according to the law and their own conscience. The associated abolition of the Star Chamber (in which judges sat with ministers of state) was another step towards judicial independence from the

⁴⁴ *Re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3, 187–8, 342–3 (La Forest J): ‘This result represents a triumph of form over substance’.

⁴⁵ The origins of the principle of judicial independence lie in the Act of Parliament of 15 January 1642 whereby judges were henceforth to hold office on good behavior and not at the pleasure of the Crown. This was much earlier than the Act of Settlement of 1701. See *Re Remuneration of Judges of the Provincial Court (P.E.I.)* [1997] 3 S.C.R. 3, 83.

executive, albeit one which is not honoured in some modern constitutional arrangements (e.g. by the French *Conseil d'Etat*). The use by government of sitting judges for politically charged enquiries and diplomatic missions also sits uneasily with the principles of independence, although it is not expressly inconsistent with IBA *Minimum Standards* or UN *Basic Principles*. Inconsistency with these principles might well arise if the government offered a higher or additional remuneration to a judge for temporarily serving its purposes, and the IBA standards should spell this out.

To make the legitimacy of judicial funding arrangements turn on the perception of the reasonable and informed observer is not entirely satisfactory. There is always the risk that hypothetical “reasonable observers” will be accredited with such extensive knowledge about the law and its traditions that they will be turned into lawyers, or indeed judges — a temptation that judges asked to rule on this sensitive subject must guard against. These are examples of judges who have been oversensitive to their own dignity by insisting that cash-strapped court administrators preserve necessary perks like chauffeur-driven cars and salary-size pensions. What is required of the “reasonable observer” is a fairly hard-nosed appreciation both of how institutional pressures and “old boy networks” can operate, and a feet-on-the-ground ability to exclude far-fetched or theoretical risks.

In the current economic climate, it is not only cut-backs in judicial salaries that may conflict with independence, at least if they are out of line with other cuts in top-level pay. Even more worrying are cuts in court funding, which may reduce the capacity to do justice. At what point should the judges of an underfunded court have a duty to resign? This question was addressed by the Special Court for Sierra Leone in *Prosecutor v Fofang and Rondewa*.⁴⁶ Defendants argued that the independence of their judges had been imperilled by a ‘voluntary donations’ system in which some thirty UN countries paid for the court’s upkeep, by way of voluntary infusions of funds which they had no obligation to give or repeat. Significantly, the court acknowledged that if funding did fall below a certain level, its judges would pack up their tent and depart:

⁴⁶ SCSL-04-14-PT-034: *The Prosecutor v Sam Hinga Norman*. Located on The Special Court for Sierra Leone website at <<http://www.sc-sl.org/CASES/ProsecutorvsFofanaandKondewaCDFCase/AppealsChamberDecisions/tabid/193/Default.aspx>>.

It would be an act of moral irresponsibility for the international community to establish a criminal court system, necessarily involving loss of liberty by arrest and detention as well as by custodial sentence, which lacked the financial guarantees necessary to complete its task. Paying judicial salaries — conventionally set at a high level to remove the temptation to bribery — is but one essential requirement. There must be sufficient funding to keep prisoners in humane conditions and to provide indigent defendants with adequate legal representation. Were a budgetary cut made which removed the right to legal assistance, for example, then the Court could not afford fair trial and should not attempt to do so. Even in this example, however, there is a question of degree. The cut would not remove the right if it merely denied an expensive counsel of choice, or confined representation to one counsel or to a public defender, so long as that lawyer was suitably experienced in criminal defence. Courts are not disabled from doing justice by funding arrangements which limit the money available to the parties, so long as fundamental defence rights are respected ... So far as judicial independence is concerned, what matters in every instance is to ensure that payment is made or fixed in a manner that does not provide an incentive for a judge to decide any case in a particular way, in order to curry favour with the paymaster and so obtain a personal benefit, be it an increase in salary or a reappointment or some other tangible advantage.

Questions have been raised about particular donations to international courts — for example, by the financier George Soros, who funded some initial stages of the ICTY prosecution. The answer lies in the integrity of the selected judges, and the public perception of that integrity. As the Sierra Leone Appeal Chamber concluded in *Fofang*:

The interests of donor states is that the Court they pay for will be successful — but “success” cannot be judged by its conviction rate ... “Success” will be judged by the court’s record in doing justice, expeditiously and fairly: a wrongful or wrongfully influenced conviction would amount to a failure which would have the result of denigrating the Court and the donors who supported its justice mission. Although states all have foreign policy objectives, their purpose in funding an international criminal court cannot be assumed to include the obtaining of convictions against all or even most indictees ... The donors have paid for a court: all they can expect is that it will do justice to every defendant according to law. These funding arrangements give no cause for concern that judges will perceive some financial advantage in finding verdicts of guilt, which are not justified by the evidence.

V REMEDIES AGAINST GOVERNMENTS?

The right to trial of civil and criminal cases before an independent Tribunal is so fundamental that it should now be part of *jus cogens* — an international law obligation binding on all governments. Article 14(1) of the ICCPR encapsulates this rule, and the Human Rights Committee describes it in General Comment 32 as ‘an absolute right that is not subject to any exception’. That general comment usefully details the obligation on states:

States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.

In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.⁴⁷

This is all very well, but where the final appellate court is not independent, and so cannot be trusted fairly to decide cases to which the executive is party, there can be no hope of legal redress. That leaves only the possibility of obtaining some international enforcement of the rules. Where a State Party to the ICCPR fails to guarantee the rights contained in Article 14(1), an individual may initiate a complaint to the Human Rights

⁴⁷ Human Rights Committee, *General Comment No 32, Article 14, Right to equality before courts and tribunals and to fair trial*, CCPR/C/GC/32 (23 August 2007).

Committee, provided their state has ratified the First Optional Protocol to the ICCPR.⁴⁸ To date, 167 states have signed or ratified the ICCPR, of which 114 states are parties to the First Optional Protocol. Notable states that are still yet to sign or ratify the First Optional Protocol include Afghanistan, China, DPRK, Côte d'Ivoire, Egypt, India, Indonesia, Iran, Iraq, Japan, Kenya, Nigeria, Rwanda, Sudan, Switzerland, United Kingdom, United States, and Zimbabwe. Unfortunately, even those that have signed are prone to ignore an adverse decision by the Committee.

An example is the case of *Oló v Equatorial Guinea*.⁴⁹ The complainant claimed that the judges in Equatorial Guinea could not act independently or impartially, since all judges and magistrates were directly nominated by the President. The Committee found that 'a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the form is incompatible with the notion of an independent tribunal'. However, the Government has yet to issue a formal response to this decision. In its Concluding Observations, published on 13 August 2004, the Human Rights Committee merely 'regrets that the State party has failed to honour its reporting obligations under article 40 of the Covenant and that, despite numerous reminders, not a single report has been submitted to it, not even that initial report which should have been submitted in 1988' and 'expresses its concern at the absence of an independent judiciary in the State party'.

A few successful outcomes do occur. For example, in *Adrien Mundy Busyo v Democratic Republic of the Congo*, the complainant judges were dismissed from office by Presidential Decree after allegations of corruption.⁵⁰ They did not receive a hearing before the Supreme Council of the Judiciary, and the President of the Supreme Court had publicly called for the dismissals. The Committee found that 'the dismissal of the authors was ordered on the grounds that cannot be accepted by the Committee as a justification of the failure to respect the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality'. Following this decision, the judges were admitted to practice and received compensation for their arbitrary suspension from

⁴⁸ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁴⁹ *Oló v Equatorial Guinea* (Communication No. 468/1991).

⁵⁰ *Adrien Mundy Busyo v Democratic Republic of the Congo*, Communication No. 933/2000, U.N. Doc. CCPR/C/78/D/933/2000 (2003).

office. This case was satisfactorily concluded because there was ample and public evidence of the breach and the government was prepared to submit to the adjudication conditions, which are not often satisfied.

Another possible remedy is offered by complaining to the office of Special Rapporteur on the Independence of Judges and Lawyers, established by the Commission on Human Rights, Resolution 1994/41, and extended through subsequent resolutions of the Human Rights Council.⁵¹ The Special Rapporteur responds to individual complaints, sends letters to concerned governments, and summarises these communications in an annual report, in which she comments on various country situations. Her effectiveness, however, is limited by the willingness of states to cooperate, or even to correspond with her. The Special Rapporteur's 2011 report reveals that she sent a total of 97 communications but received only 41 replies (a 42 per cent response rate). The Rapporteur, Ms Gabriela Kaul, usually postpones any comment or recommendation until a reply is received, but the low response rate suggests she should take the initiative if there has been no reply after a reasonable time. It also casts doubt on the clout of the Special Rapporteur, operating a system which relies on responses to confidential communications and is not equipped with resources to monitor courts in countries where the conditions for judicial independence are not fulfilled.

Globalisation has thrown up an increasing number of commercial disputes over the appropriate forum for litigation; most "choice of law" rules allow objections on the basis that a particular forum will not provide an independent adjudication. This may also be raised as an objection to extradition requests. So there is a powerful public interest in promulgating the conditions for judicial independence and in identifying the countries and courts where they are not present. States that do not ring-fence their judges from political pressure must not only be denied extraditees and international litigation, but should also find themselves facing sanctions such as withdrawal of aid and other forms of foreign assistance. Sanctions of this kind would have to depend on authoritative findings — it is all too easy for convicted defendants and unsuccessful litigants to allege political bias in their judges, a claim that can be as difficult to deny as it is to prove. The IBA, and other lawyer-based organisations, have concentrated in the past on supporting

⁵¹ *Commission on Human Rights resolution 2000/42 Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers*, E/CN.4/RES/2000/42 (27 April 2000).

judges under various forms of attack, but they should not hesitate to name and shame those judges who are found to have wilfully complied with political direction. Just as we celebrate the judge who shows courage under political pressure, so we should have no hesitation in declaring the judicial lickspittle as the lowest form of legal life.

VI INTERNATIONAL COURTS

Issues relating to judicial independence have arisen in the relatively new international criminal courts — the ICC, ICTY, ICTR, and the “hybrid” courts in Sierra Leone and Cambodia. Initial objections have been rejected on the basis that the UN Security Council has power under Chapter VII of the Charter to establish criminal courts where they conduce to maintain or restore international peace or security — and of course justice assists in restoring peace. Funding arrangements, as we have seen, may threaten judicial independence, and the decision of the Appeals Chamber of the Sierra Leone court contains in *Fofang’s* case the timely warning that there is a threshold below which that independence may be extinguished if there are insufficient resources to do justice. In that event, judges and lawyers should not accept appointments, or should resign, instead of acting their part in a charade.

The method of appointing judges to international courts and Tribunals raises important independence issues. Until recently, UN judges were nominated by states, with all the familiar UN problems of nepotism and horse-trading. I am aware of cases where friends or relatives of Prime Ministers, possessing no judicial experience, have been nominated; where judges who have attracted domestic scandal have been “kicked upstairs” (out of sight and out of mind in a UN tribunal in Africa); and where diplomats with, and even without, law degrees have been transmogrified into judges by their fellow diplomats. I am not making this up — Fumiko Saiga, a career diplomat from Japan, was elected as an ICC judge and oversaw its DRC proceedings despite the fact that he did not have a law degree.⁵² His death avoided an appeal on the basis that he was unqualified, but Japan then nominated Kuniko Ozaki, who had not yet finished her law degree, although it was

⁵² Afua Hirsch, ‘System for Appointing Judges is Undermining International Court’, *Guardian* (online), 8 September 2010 <<http://www.guardian.co.uk/law/2010/sep/08/law-international-court-justice-legal>>.

said she had relevant experience in Japan's Ministry of Justice.⁵³ Such appointments are calculated to bring international justice into disrepute — and, worryingly, the ICC in September 2011 was forced to extend its deadline for new appointments because good judges had been reluctant to apply.⁵⁴ States take pride in having their nationals elected as UN judges (so long as they are loyal government supporters), and they lobby excessively for them — Nigeria even had T-shirts printed to support a recent candidate. The first academic study of UN judicial appointments concluded that the election of judges was indistinguishable from elections for political offices, and that 'vote-trading, campaigning, and regional politicking invariably play a greater part in candidates' chance of being elected than considerations of individual merit'.⁵⁵ The authors conclude that good judges are overlooked and bad judges are sometimes elevated to important and lucrative places (the ICC pays US\$250 000 tax-free and a half-salary pension).

The IBA has set up a panel to "vet" ICC candidates, although its report will not deter states from proceeding to elect judges according to political alignments, irrespective of their merit. A better approach would be to take the nomination process out of the hands of states and entrust it to an expert and independent panel. This was achieved in 2008 in relation to internal judicial appointments by pressure from UN staff unions, which insisted upon having the employment, disciplinary, sexual harassment, etc. cases brought by their members and decided by judges who were independent of the organisation. So the International Justice Council — a five person body, two elected by staff, two appointed by management, chaired by a distinguished jurist selected by them (the first chair was South African Justice Kate O'Regan) selects two or three of the best applicants and recommends them to the General Assembly for each judicial position. The appeal for candidates of ten or fifteen years judicial experience is made through papers like *The Economist* and *Le Monde*, and elicited this year over four hundred applications. The Council then meets to identify the top 30–40 candidates, who are brought to The Hague to be invigilated by way of a two-hour competitive examination paper and a one-hour interview. Having taken part in this process as an IJC member, I

⁵³ Caroline Binham, 'Election Shines Light on War Crimes Court', *Financial Times* (online), 14 September 2011 <<http://www.ft.com/cms/s/0/21de35c6-def7-11e0-9af3-00144feabdc0.html#axzz2Ml6SbqM4>>.

⁵⁴ *Ibid.*

⁵⁵ Ruth Mackenzie et al, *Selecting International Judges: Principle, Process and Politics* (Oxford University Press, 2010) 12.

can attest to its proficiency in assessing merit in the judicial qualities of reasoning and judicial writing; although all candidates will have long judicial careers, an exam paper can detect those who have lazily allowed their judgments to be written by their associates or law clerks (although Richard Posner does not see this as a problem, because ‘a lot of law clerks are smarter than their judges, because intellectual ability is a bigger factor in choosing a law clerk than in choosing a judge’).⁵⁶

The appointment process for international judges must be made transparent, meritocratic, and non-political. Otherwise, good candidates will be reluctant to put their names forward and the courts themselves will be open to the rebuke that they are stacked in favour of government favourites, or else by jurists lacking in distinction. Lord Hoffman’s critique of the opacity and lack of merit criteria for judicial appointments to the ECHR also spotlights the danger of giving states the right to insist on their candidates:

The court now has 47 judges, one for each member state of the Council of Europe. One country, one judge; so that Liechtenstein, San Marion, Monaco and Andorra, which have a combined population slightly less than that of the London Borough of Islington, have four judges and Russia, with a population of 140 million, has one judge. The judges are elected by a sub-committee of the Council of Europe’s Parliamentary Assembly, which consists of 18 members chaired by a Latvian politician, on which the UK representatives are a Labour politician with a trade union background and no legal qualifications and a Conservative politician who was called to the Bar in 1972 but so far as I know has never practiced. They choose from lists of 3 drawn by the governments of the 47 members in a manner, which is totally opaque.⁵⁷

⁵⁶ Eric Segall, ‘The Court: A Talk with Judge Richard Posner’ *New York Review of Books* (online), 29 September 2011 <<http://www.nybooks.com/articles/archives/2011/sep/29/court-talk-judge-richard-posner/?pagination=false>>.

⁵⁷ Lord Leonard Hoffman, ‘The Universality of Human Rights’ (Speech delivered at the Judicial Studies Board Annual Lecture, 19 March 2009) <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf>.

VII CONCLUSION

The independence of the judiciary should be precious in every democracy as the mainstay of the rule of law. But its importance is not publicly appreciated, and there are many countries in the world where it is simply a sham. This may be observed from the 99 per cent conviction rates in former Soviet states, and is blatant from the ease with which the government in Sri Lanka used their parliamentary majority to impeach a Chief Justice in reprisal for a conscientious decision which displeased it. The real problem, in countries where judges are nominally independent, is to remove practices and procedures that conduce to knee-jerk support of the state, ranging from political appointments and recruitment from government service to renewable contracts and lucrative state roles on offer in retirement.

A different kind of pressure comes from cost-cutting and austerity measures in various countries that can reduce funds so far that a court cannot operate fairly, at which point it should not operate at all. And then there is the problem of judicial removal — the vulnerability of judges to being punished by governments using their power, sometimes through the Parliament they control, to effect the removal of an uncongenial jurist. And when judicial independence is challenged by the state, there are few international avenues for redress. The Human Rights Council “thrashes with a feather”, the UN Rapporteur may write protest letters (which as often as not go unanswered), but protecting judicial independence is now often seen as a “lawyer’s problem” — lacking the urgency or importance of other human rights issues.

There is also the difficulty of finding out about threats to judicial independence and identifying the judges who bow to them. Naming and shaming judges is dangerous in many countries, thanks to Napoleonic insult laws bequeathed by the French and the arcane British contempt law against “scandalizing the court” (in Scotland, it is called “murmuring judges”). In America this crime has been abolished,⁵⁸ and in Canada it is a dead letter,⁵⁹ but in many country’s journalists find themselves threatened, arrested, and even jailed for making imputations against the judiciary. These strict liability offences — of “insulting” and “scandalising” — cast a chill over investigative reporting,

⁵⁸ *Bridges v California* (1941) 314 US 252.

⁵⁹ *R v Kopyto* (1987) 47 D.L.R. (4th) 213.

especially investigations into judges who are controlled by, or in awe of, the government. In Singapore, the proprietor and two journalists from the Asian Wall Street Journal were held in contempt and fined for, inter alia, reporting the publication of an IBA report questioning the independence of the Singapore judiciary.⁶⁰ These offences have no place in a democratic society, where judges should be confident enough to ignore criticism, and should welcome — and even assist — journalists who seek information about hidden political pressures. The UK is only now getting round to abolishing the “scandalisation” offence; the main authority, from 1899, is based on colonial racist assumptions (the crime was said to be obsolete in England, but necessary to keep the natives quiet in the Empire),⁶¹ and more recent Privy Council authorities from Mauritius say it is still desirable to have it in “small islands”.⁶² Small islands, of course, are precisely where investigation of government pressure on judges is most necessary (and I do not exclude the small island of Britain).

There is, however, another side to the coin, and it should be emphasized. Just as there should be freedom to criticize judges, so judges themselves must have the right to speak out freely and without being punished or sacked for doing so. They have an understandable reticence about entering the public arena to pronounce on political matters, but on this one subject — their own independence — they must be heard. Let us not forget that one of the worst examples of political interference — Dr Mahatir’s sacking of Sallah Abbas and two other distinguished appellate judges, because he feared they might decide the United Malays National Organisation case against his governing party was justified by the claim that the judge was “guilty” of misbehaviour by defending judicial independence in a university lecture. It is actually the duty of every judge to speak out — in a judgment, a lecture, a book launch, or even a broadcast to the nation — whenever he or she has reason to believe that judicial independence is under threat.

⁶⁰ *Attorney-General v Daniel Hertzberg* [2008] SGHC 218.

⁶¹ *McLeod v St Aubyn* (1899) AC 549.

⁶² *Ahnee v DPP of Mauritius* (1999) 2AC 294; Geoffrey Robertson and Andrew Nicol, *On Media Law* (Penguin, 5th ed, 2007) 448–52.

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