Judicial Integrity and the Role of the IAJ Universal Charter in Common Law Countries

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[1] One of the significant innovations in the 2017 update of the IAJ's "Universal Charter of the Judge" ("the Charter") was the inclusion of the new Article 6, *Ethics*. This new section of the Charter articulates a series of autonomous principles of judicial ethics which underpin judicial codes of conduct. Ethical principles are stated not merely for guidance but to inform judges about how they should live their judicial lives. As the Charter says, these ethical principles should be reduced to writing "in order to increase public confidence in judges and the judiciary" and it exhorts judges to play a leading role in the development of such ethical principles.

[2] Article 6 then sets out a series of ethical principles concerning impartiality, the preservation of the dignity of judicial office and of all persons involved in the court process, the necessity to avoid conduct which could adversely affect confidence in a judge's impartiality and independence, and other related matters, including the need for judicial diligence and efficiency.

[3] It is not surprising that the first ethical principle mentioned, and which is invoked throughout Article 6, is that:

> *In the performance of the judicial duties the judge must be impartial and must so be seen.*

[4] The Charter commences in Article 1 by invoking the fundamental principle of the independence of the judiciary:

> *The independence of the judge is indispensable to impartial justice under the law. It is indivisible. It is not a prerogative or a privilege bestowed for the personal interest of judges, but it is provided for the rule of law and the interest of any person asking and waiting for an impartial justice.*

[5] The close relationship between independence and impartiality was described by one of the great common law jurists of the modern era, Lord Bingham, in his last book, "The Rule of Law". He described the implications of the requirement of independence as follows:[1]

> *[The principle of judicial independence] calls for decision makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties and pressure groups, and their own colleagues, particularly those senior to them. In short, they must be independent of anybody or anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be.*

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1 Tom Bingham, "The Rule of Law", Allen Lane, 2010 at p 92.

[6] Lord Bingham then observed that the requirement of independence and the requirement that a decision maker be impartial are closely allied. He referred to the European convention which requires a tribunal to be both independent and impartial, and said[2]:

> *This means that the decision maker, to the greatest extent possible, should approach the issues with an open mind, ready to respond to the legal and factual merits of the case. A decision maker who is truly independent of all influences extraneous to the case to be decided is likely to be impartial, but may nonetheless be subject to personal predilections or prejudices which may pervert his judgment. Of course, since judges and other decision makers are human beings and not robots, they are inevitably, to some extent, the product of their own upbringing, experience and background. The mind which they bring to the decision of issues cannot be a blank canvas. But they should seek to alert themselves to, and so neutralise, any extraneous considerations which might bias their judgment, and if they are conscious of bias, or of matters which might give rise to an appearance of bias, they must decline to make the decision in question.*

[7] It is in that context of understanding the distinction and interplay between the requirements of independence and impartiality that I wish to highlight to you this morning some important findings from the studies undertaken as part of the International Bar Association's Judicial Integrity Initiative.

[8] The Judicial Integrity Initiative ("JII"), which was launched in 2015, was conceived by the IBA as a tool to assist in combatting judicial corruption where it exists by attempting to understand the types of corruption that affect the judicial system and also by focusing on the role of the various professionals who operate within judicial systems. The initiative commenced with meetings of a working group of experts which examined the scope of the problem and current efforts to combat judicial corruption. The JII then undertook various forms of research activities in conjunction with the Basel Institute on Governance, with the goal of identifying the types of corruption affecting judicial systems, in particular, the interactions among professionals within judicial systems.

[9] A research plan was developed and implemented to identify the patterns underlying corrupt behaviour across judicial systems. The main goal of the research was to identify;

1. The most prevalent patterns of corruption in judicial systems;

2. Corruption risks in the interactions between actors in judicial systems; and

3. The risks arising at different stages of a judicial process.

[10] The JII research was not a comparative study, nor did it seek to measure presumptions of the prevalence of corruptions – these sorts of studies are

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[2] Ibid, p 93.

undertaken by bodies such as Transparency International. Rather, the JII was designed to explore specifically how corruption occurs in judicial systems as reported and experienced by legal professionals around the world.

[11] To that end, the JII research program began with a comprehensive literature review, which revealed that there are a range of studies and projects which focus on how corruption affects specific judiciaries and judicial systems. It was seen, however, that these studies are generally limited and lack an approach needed to sustain the development of evidence based anti-corruption strategies. As a consequence, the research program adopted a broad scope which aimed to capture, as far as possible, the variety of ways in which corruption may occur in different judicial systems and contexts. In order to do that, the IBA and the Basel Institute developed and implemented a survey addressed to judicial professionals around the world and also conducted in-country consultations in two countries, Mexico and the Philippines.

[12] The survey was distributed via the IBA's network and partner organisations, including judicial bodies. It attracted more than 1,500 responses from 120 countries.

[13] A discerning and sophisticated approach had to be adopted to the data collected, for a number of reasons. For example, some of the responses provided may be regarded as coming from people who are complicit in corrupt conduct and accordingly those responses should be treated with caution. On the other hand, a significant percentage of survey respondents were in countries where the rule of law is considered to be strong, and this had implications on the nature of the responses and the weight and significance to be attached to them.

[14] The outcome of the analysis of the survey responses showed that bribery and undue political influence were reported as the two most frequent forms of corrupt behaviour observed in judicial systems. In summary, the survey responses indicated that:

- Bribery is considered to be most prevalent in countries where the rule of law is consider to be weak; and

- Undue political influence is believed to occur in countries known to have weak governance structures, as well as in those countries where the rule of law is considered to be strong.

[15] The IBA recognises that these findings are not new, but the research highlighted the fact that undue political influence and bribery do not occur uniformly across systems. Moreover, the research highlighted the fact that different types of courts may "attract" different forms of corruption. For example, the role of electoral courts may increase the risk of undue political influence, whereas civil courts may be more exposed to the risk of bribery through the actions of influential business people.

[16] Without in any way underplaying the significance of bribery as a form of corrupt behaviour, for today's purposes I want to amplify a little more the IBA's findings in relation to undue influence and other forms of interferences. Involvement by a judge in blatantly dishonest conduct such as bribery is clearly unethical. But the issues associated with undue political inference are often much more subtle and

pervasive than the straight out dishonesty associated with bribery, and some ethical discernment is required. In that regard, for example, the JII noted that a commonly observed risk is that the overall independence of the judicial system can be undermined at the political level. This might involve appointment procedures, budget allocations and oversight mechanisms. Importantly, however, the JII report drew the same distinction adverted to by Lord Bingham in the passage I quoted earlier, namely that political interference which undermines the independence and impartiality of the judiciary must be distinguished from instances where political influences may be legitimate and even actually called for. The JII noted, for example, that in many constitutional courts, and probably in all high appellant courts, the appointment of judges is a definite political act. The values of appointees affect their decisions and it is perfectly legitimate for governments in democratic countries to seek to choose judges who, in their view, are likely to reflect in their decisions the values of those who appoint them to the office. That is not to be considered corrupt to the extent that the judge in question articulates his or her rulings in a way that reflects his or her own values. However, when specific interest groups or political groups are given systematically preferential treatment by a judge, then one can speak of undue political influence or political interference. And, I would add, judges need to be alert to even the prospect that the values which they profess may nevertheless represent an extraneous consideration which might bias their judgment in a particular matter.

[17] The JII study also noted the importance of distinguishing between undue influence, on the one hand, and more direct interference, political and otherwise, exerted on the judiciary, on the other.

[18] Undue personal influence was noted to be able to arise through subtle, even secretive, mechanisms such as closed informal networks representing particular economic or political interests.

[19] In some countries, these may be based on kinship, ethnicity or other particular connections, such as education. The informal networks could span the public and private sectors, and operate across government, business, politics and judicial systems.

[20] Undue political influence can arise in a number of ways:

- Undue political influence through appointment on an openly partisan basis;
- Undue political influence through manipulation of budget allocations to courts and tribunals;
- Undue political influence exercised through closed informal networks.

[21] The research undertaken by the JII has also disclosed the propensity for direct political or economic interference. It was noted, for example, that the influence of informal networks can extend beyond undue personal influence and undue political influence to actual direct interference. Where such informal networks are particularly strong, members of those networks may seek to intervene directly in the judicial selection process or in judicial decision making to ensure particular interests,

whether political, commercial or social, remain protected. This form of direct interference can extend to appointments which embed individuals in the judiciary to perform a function of "gatekeepers" to those in power, or by appointing "insiders" to high positions in the judiciary with an expectation that the insider can be and will be directed to make decisions that will guarantee protection and impunity of those in power.

[22] Another form of direct interference arises through the control of appointments by powerful actors which openly reflect practices of nepotism or other forms of favouritism.

[23] Of course, direct influence is not limited to those wielding political power. Undue interference in the judiciary may also be of a violent nature, as in cases where organised crime is involved. The goal in such cases is to ensure specific outcomes, such as the dropping of particular cases or the acquittal of individuals, and is often accompanied by threats and/or extortion.

[24] It is against that background that the JII report specifically stated:

> *The literature notes that independence and accountability of judges are fundamental to an impartial judicial process. As a consequence, judges' protection from undue influence or interference is a key concern and various principles and standards for judicial independence have been introduced by different bodies.*

[25] In light of the findings of the IBA's research and survey, the updated Charter promulgated by the IAJ is an important contemporary reaffirmation by judges themselves of the centrality of independence and impartiality to the judicial mission.

[26] In the traditional form of oath or affirmation taken by a newly appointed judge in a common law country, the judge promised solemnly to act "without fear or favour, affection or ill will". This form of promise, or a close variation, is still in use today. This form of oath has been said to provide an accurate summation of the philosophical basis of judicial ethics, at least for judges in common law countries.[3] The oath is, by its clear words, an unequivocal promise of impartiality and, as Lord Bingham said in another context, covers a very wide range of ethical duties.[4] He gave a modern paraphrase of the duties and responsibilities imposed under the traditional oath of office by saying[5]:

> *[A] judge must free himself of prejudice and partiality and so conduct himself, in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent and impartial judgment.*

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3 JB Thomas, "Judicial Ethics in Australia" (3rd Ed), LexisNexis, 2009 at para 2.5

4 Tom Bingham, "The Business of Judging", OUP, 2000 at p 74

5 Ibid at 74

[27] The IAJ's emphasis in the new Charter on independence and the ethics of impartiality is, if I may respectfully say, to be applauded. The focus on these fundamental values is completely appropriate, particularly in light of the research conducted as part of the IBA's JII. Whilst I have focussed in these remarks on the application of these matters in common law jurisdictions, I am sure I would not be contradicted if I say that these values of independence and impartiality define the essence of all judges and that it is a very good thing that the IAJ has given them appropriate prominence in the updated Charter.

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