SECURING AND MAINTAINING THE INDEPENDENCE OF THE COURT IN JUDICIAL PROCEEDINGS

This article discusses two complementary issues: first, the securing of the independence of the court in judicial proceedings, *ie*, the preconditions necessary to secure such independence; and, second, the maintaining of the independence of the court in judicial proceedings, *ie*, how the Judiciary maintains judicial independence. There are, of course, many facets to the securing and maintaining of judicial independence. This article will discuss some aspects of the two issues.

CHAN Sek Keong*
Chief Justice of the Republic of Singapore.

I. Preface

1 All societies need laws and a legal system for government, the maintenance of law and order, the administration of justice, and for social and economic development. The primary institution charged to resolve societal disputes (and to administer justice) according to law is the Judiciary.

2 In the modern world, the people of every country, if given the choice, aspire to have some sort of democratic State in which they have a say as to who should govern them and to remove those who misgovern them, by some means, preferably through periodic free elections in which they can choose their candidates. Freedom to choose one's Government is the hallmark of a democracy (however defined). However, a democracy cannot exist (much less function) unless there is respect for the law (however the law is created, or established, or administered), and, in particular, the rule of law (whether it is the "soft" model or the "hard" model). The rule of law has meaning only if all are subject to the law and all are equal before the law. Hence, the governors as well as the governed must respect the law and subject themselves to it. But respect for and subjection to the law can only be sustained if a *neutral institution* exists to ensure that the law is respected and enforced

* This is a modified version of a paper that the Chief Justice had submitted at the 13th Conference of Chief Justices of Asia and the Pacific in Ho Chi Minh City, Socialist Republic of Vietnam (from 8–13 November 2009). The Chief Justice is grateful for the assistance provided by Mr Nathaniel Khng, Assistant Registrar, Supreme Court of Singapore.

against all. That institution, in all democracies, is the Judiciary. It is in this sense that the Judiciary is the "lynchpin of a democratic society and the rule of law".[1] But the ability of the Judiciary to fulfil such a role is by no means automatic or assured; this is heavily contingent on it being an *independent* institution.[2]

3 In a democracy with a form of representative government (based on the doctrine of separation of powers), the Judiciary is one of three arms of government, co-equal in status, and vested with the power, among others, to check the Legislature and the Executive in their exercise of powers vested in them by law and the constitution of the State. Its other primary function is to adjudicate disputes between people and disputes between the people and the State or agencies of the State. The Judiciary acts as an impartial referee to decide what conduct is permissible or not permissible under applicable rules of conduct, whether the rules have been infringed or not infringed, and to provide the remedies for such infringements. To fulfil these functions, the Judiciary has to be independent of the other two arms of government. A Judiciary that is not independent would not be able to fulfil such a role, and would provide a weak foundation for democracy and its associated attribute (*ie*, the rule of law) to flourish. Conversely, the Judiciary requires the existence of the rule of law for continuous independence. There cannot be the rule of law without an independent Judiciary, and *vice versa*, but with both, there will be security, law and order, and stability, which are requisites for progress and the protection of political and civil rights.[3]

II. Introduction

4 This article discusses two complementary issues: *first*, the securing of the independence of the court in judicial proceedings, *ie*, the preconditions necessary to secure such independence; and, *second*, the maintaining of the independence of the court in judicial proceedings, *ie*, how the Judiciary maintains judicial independence. There are, of course, many facets to the securing and maintaining of judicial independence. This article will discuss some aspects of the two issues.

---

1 As described by Lydia Brashear Tiede in "Judicial Independence: Often Cited, Rarely Understood" (2006) 15 J Contemp Legal Issues 129 at 129.

2 See Christopher M Larkins, "Judicial Independence and Democratisation: A Theoretical and Conceptual Analysis" (1996) 44 Am J Comp L 605 at 606.

3 See Adel Omar Sherif & Nathan J Brown, United Nations Development Program, *Judicial Independence in the Arab World* (A Study Presented to the Program of Arab Governance); see also Beverley McLachlin, "Judicial Independence: A Functional Perspective" in *Tom Bingham and the Transformation of the Law* (Mads Andenas & Duncan Fairgrieve eds) (Oxford University Press, 2009) at p 276.

5 In *theory*, the independence of the Judiciary (or the courts) can be secured by surrounding judges with a protective wall against external pressures, especially from the Executive and the Legislature, political or social organisations, and pressure groups with general or specific agendas. The components of the protective wall can be categorised according to those that secure (or promise) independence to *each individual member* of the Judiciary and those that secure the independence of the Judiciary as an *institution*. The various components overlap to a certain extent. In theory, the protection afforded by this wall should give the Judiciary the impetus to carry out its constitutional role and the judge a sense of *personal independence*, *ie*, unfettered freedom to adjudicate disputes without fear or favour according to law.

6 In *practice*, however, all the protective walls in the world would not be sufficient for the maintaining of the independence of the court in judicial proceedings if the judges themselves are unable (or do not wish) to exercise (personal) independence in discharging their judicial duties and functions. The reality is that whether a judge wishes to act and decide without fear or favour depends on, in the main, the judge's own personal ethical and moral values, the strength of the judge's beliefs in the rule of law, and the judge's commitment to justice and conviction that he or she has an indispensable role in society as a judge. Put simply, the judge must believe in and maintain the integrity that the judicial office requires of him or her.[4]

III. Securing the independence of the court

7 The protective wall to insulate judges from external influence, interference and pressures is constructed differently from country to country. The components can be categorised, as mentioned earlier, according to those that secure (or promise) independence to *each individual member* of the Judiciary and those that secure (or promise) independence to the Judiciary as an *institution*. Usually, the components are entrenched in written constitutions which cannot be amended except by compliance with special conditions to make it difficult for such amendments to be effected. Accordingly, it is the degree of difficulty in amending the constitution that often determines how strong and solid the protective wall is.

---

4 Francis Bacon, a 16th century English philosopher and writer once said: "Judges ought to be more learned, than witty, more reverend, than plausible, and more advised, than confident. Above all things, integrity is their portion and proper virtue." In a similar vein, Joseph Story, formerly an Associate Justice of the US Supreme Court, stated: "And it is no less true, that personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice."

8 Being protected should, in *theory*, result in the judge being able to exercise *personal independence*, *ie*, to adjudicate disputes without fear or favour according to law. Aharon Barak, who was formerly President of the Supreme Court of Israel, described personal independence as follows:[5]

> Personal independence is independence from relatives and friends, independence from the litigating parties and the public, independence from fellow judges and judges responsible for managing the system (including the president or chief judge of the court), independence from officeholders in the other branches of government. The judge's master is the law. The judge has no other master. From the moment a person is appointed as judge, he must act without any dependence on another.

A. Components of the protective wall for the individual judge

(1) Common components set out in legislation

9 Set out in the Appendix to this article is a comparative table of the common components of the protective walls set out in legislation (*ie*, written constitutions or statutes) for the superior courts of certain common law countries that secure (or promise) independence to the *individual judge*. From the table, the common components of the protective wall for judges of the US Supreme Court would appear to be the strongest, as judges of the US Supreme Court have lifelong security of tenure and remuneration. It should be noted that the US Constitution is not easy to amend, and that any attempt to remove or alter the lifelong security of tenure and remuneration of the Supreme Court judges may be practically impossible, having regard to the respect Americans generally have for their Supreme Court.[6]

---

5 Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) at p 78; see also Sir Ninian M Stephen, "Judicial Independence – A Fragile Bastion" (1981–1982) 13 Melb U L Rev 334 at 336; *Speeches of a Chief Justice: James Spigelman* (Tim D Castle ed) (S2N Publishing, 2008) at p 124; Shirley S Abrahamson, "Remarks of the Hon. Shirley S. Abrahamson before the American Bar Association Commission on Separation of Powers and Judicial Independence, Washington, D.C., December 13, 1996" (1996–1997) 12 St John's J Legal Comment 69 at 70; Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region Art 3(a); United Nations Basic Principles on the Independence of the Judiciary Art 2.

6 See US Constitution Art V; *cf*, Commonwealth of Australia Constitution Act 1901 (Cth) s 128; *cf*, Constitution of the Republic of Singapore (1999 Rev Ed) Art 5. One demonstration of the respect Americans have for their highest court would be the defeat of President Franklin Roosevelt's Judiciary Reorganization Bill of 1937, otherwise known as the "Court Packing Plan". This Bill was designed, amongst others, to allow President Roosevelt to appoint an additional judge to the US Supreme Court for every sitting member over the age of 70, up to a maximum of six. This was an attempt to counter the majority of the court who had ruled that

(*cont'd on the next page*)

10 It can also be seen from the table that whilst security of tenure is guaranteed by written constitution or by statute, the procedures for removing judges who have conducted themselves such that they are unfit to remain as judges are not the same. In regard to the superior courts of the US, the UK and Australia, it can be said that the judges can be removed at the behest of politicians.[7] In contrast, the Singapore Constitution only allows for the removal of a judge of the Supreme Court upon the recommendation of a tribunal of his or her peers (including judges from other Commonwealth countries).[8] Although various arguments can be made for and against each system of removal, it might be pertinent to note, as Aharon Barak did, that a system of removal by politicians may be less appropriate than a system of removal by peers, as the former may give rise to the risk of exploitation by politicians seeking to influence judges.[9]

---

several of his reform measures were unconstitutional. The significance of the defeat of the Bill as an example of the regard Americans have for their highest court is best expressed by this excerpt from William H Rehnquist, *The Supreme Court* (First Vintage Books, 2002) at pp 132–133: "The defeat of the Court-packing plan had long-term political consequences for Roosevelt, the Democratic party, and the nation. But it also constituted a remarkable expression of public feeling about the Supreme Court. Here was a tremendously popular president, re-elected months earlier by a landslide electoral and popular vote, who had personally masterminded an effort to remove the Supreme Court as an obstacle to the carrying out of his popular mandate. A House of Representatives that the President's party controlled by a majority of more than four to one declined to take up the President's bill; a Senate in which there were only 18 Republicans out of a membership of 96 ultimately handed the bill a resounding defeat. There is little reason to think that many members of the American public either understood or sympathized with the particular doctrines espoused by the majority of the Court in holding New Deal legislation unconstitutional, but the defeat of the Court-packing plan made it obvious that the public did not want even a very popular president to tamper with the Supreme Court of the United States. Whatever the shortcomings of its doctrine in the public mind, its judgements were not to be reversed by the simple expedient of crating new judgeships and filling them with administration supporters."

7 In the US, the process of impeachment is used. In the UK, a judge of the Supreme Court may be removed from his or her position on the address of both the House of Commons and the House of Lords. In Australia, a judge of the High Court cannot be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session.

8 See Constitution of the Republic of Singapore (1999 Rev Ed) Art 98.

9 Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) at p 79. In Israel, a judge of the Supreme Court can be removed from office either by a resolution of the Nominations Committee or by a decision of the Disciplinary Tribunal. The Nominations Committee is composed of nine members, *viz*, three judges of the Supreme Court (one of them being the President of the Supreme Court), two Ministers (one of them being the Minister of Justice), two members of the Knesset, and two representatives of the Israel Bar Association. The Disciplinary Tribunal is made up of judges and retired judges.

(2) Immunity from suit

11 There is one other important element in common law jurisdictions for facilitating the independence of judges in their decision-making that is sometimes not protected by legislation. It is that of immunity from suit for acts or omissions in the discharge of judicial duties. This immunity is not the same as immunity from prosecution for criminal acts. In Singapore, there is no legislation that grants such immunity (*ie*, immunity from suit for acts or omissions in the discharge of judicial duties) to the judges of the Supreme Court, although there are statutory provisions granting immunity to the lower judiciary.[10] This omission may be inconsequential, as it is a principle of the common law that judges are immune from suit.[11]

(3) Adequate remuneration and pension rights

12 Not only must a judge's tenure and remuneration be constitutionally protected (to the extent that, in the case of the latter, it may not be reduced during his or her tenure), the quantum of the remuneration received must be adequate to allow for a standard of living commensurate with his or her standing in the community as a judge. Adequate pay for judges fulfils a number of societal functions that will bolster their confidence in maintaining their independence in decision-making and their commitment to justice. In this regard, most importantly, perhaps, it reflects the recognition of the Judiciary as an independent, co-equal arm of government (in political systems that are based on the doctrine of separation of powers).[12] On the other hand, inadequate pay for judges reflects poorly on the views of the other two arms of government on the importance or the societal value of the judicial function. This in turn will result in the public having less respect for judges, the judicial function, and the Judiciary as a whole.[13]

13 More critical would be the fact that judges who are poorly paid are more likely to succumb to the temptation of bribes from litigants, special-interest groups and members of the other arms of government or the public.[14] Judicial corruption destroys judicial independence and undermines the rule of law and the integrity of the entire legal and judicial system. Many suggestions have been made on how to eradicate

10 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 79; Subordinate Courts Act (Cap 321, 2007 Rev Ed) s 68.

11 See S H Bailey *et al*, *Smith, Bailey & Gunn on the Modern English Legal System* (Sweet & Maxwell, 5th Ed, 2007) at para 4-039; see also Enid Campbell & H P Lee, *The Australian Judiciary* (Cambridge University Press, 2001) at pp 189–190.

12 See also paras 18–19 of this article on adequate funding and control.

13 See also paras 20–21 of this article on respect and support for the Judiciary.

14 See *Speeches of a Chief Justice: James Spigelman* (Tim D Castle ed) (S2N Publishing, 2008) at p 126.

corruption in the Judiciary, such as, for example, requiring a judge to declare his or her assets, and those of his or her family, before he or she can be appointed as a judge, and thereafter to require an annual declaration. This may or may not work, as corruption takes many forms. Ultimately, it comes down to the moral character of the judge, and, to a large extent, the corporate culture of the Judiciary as an institution as regards integrity and respect for the rule of law under the moral leadership of the Chief Justice.[15]

B. Components of the protective wall for the institution

14 It is essential for the Judiciary to be formally recognised as an independent *institution* by law and acknowledged as such by the Legislature and the Executive. Thus, the constitutions of the US, Australia and Singapore each expressly declare that the judicial power of the State is vested in the Judiciary.[16] By vesting the judicial power of the nation in the Judiciary, and without placing any restriction on how it may be exercised in matters within the court's jurisdiction, the Judiciary is recognised and accepted as an independent institution. But although the constitutional or legal recognition of the judicial power of a country being vested in the Judiciary is a significant component of the protective wall towards the securing of the Judiciary's independence as an institution, there are other reinforcing factors.

(1) A fair process for judicial appointment

15 One factor would be a *fair* and *objective* process for the appointment of judges. Judges should be selected, based on their capacity to carry out the judicial role, and not their political affiliations or beliefs. The importance of selecting a candidate based on ability to carry out the judicial role is underscored by this comment by William H Rehnquist, the 16th Chief Justice of the US: "The right to one's day in court is meaningless if the judge who hears the case lacks the talent, experience and temperament that will enable him to protect imperiled rights and to render a fair decision." Thus, in Art 11 of the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, it is stated that judges should be chosen "on the basis of proven competence, integrity and independence".[17] It could be added that equally important qualities would be judicial temperament and a commitment to law and justice. How is a fair and objective process of

15 See also paras 23–26 of this article.

16 US Constitution Art III §1; Commonwealth of Australia Constitution Act 1901 (Cth) s 71; Constitution of the Republic of Singapore (1999 Rev Ed) Art 93.

17 Competence, of course, means more than simply knowing the law (in fact, some judges think that it is not necessary to know the law, but only how to apply the law when it is made known to them).

appointment ensured? In the major common law jurisdictions, typically, the other arms of government have a hand in appointments to the superior courts.[18] That said, each country should have its own model of appointment suitable to its own circumstances to ensure that the best candidates are appointed.[19]

16 Parenthetically, in common law countries, it is probably the case that where judges adjudicate cases on an adversarial basis and the Bar (*ie*, lawyers in private practice) is independent, the independence and commitment to the rule of law of the Judiciary as a whole would be facilitated by the appointment of competent members of the Bar to the superior court. Apart from the general ethos of an independent Bar, a competent member of the Bar would normally have sufficient financial means to maintain himself or herself and his or her family comfortably by the time he or she is selected for appointment to a judicial position in the superior court. A judge in such a financial position, it can be said, would have an extra sense of financial security (on top of that provided by security of tenure and remuneration), and would also not be likely to succumb to corruption. In this connection, it may also be added that the law in Singapore does not forbid a judge of the Supreme Court who has resigned or retired to return to private practice. This absence of any constraint on a judge resuming his or her previous professional life may make it counterproductive for the Executive to interfere with judicial independence, and may imbue a judge with additional confidence to adjudicate on disputes without fear or favour.

17 In some countries, superior court judges are also appointed from the ranks of government lawyers and also the academia. Singapore follows this practice in order to provide the Supreme Court with a diversity of judicial outlooks and values. Judges from the ranks of government lawyers and the academia can provide a different

18 See Beverley McLachlin, "Judicial Independence: A Functional Perspective" in *Tom Bingham and the Transformation of the Law* (Mads Andenas & Duncan Fairgrieve eds) (Oxford University Press, 2009) at p 274. In the US, the President nominates a candidate for appointment to the Supreme Court but the candidate has to be confirmed by the Senate. In the UK, a commission nominates candidates for appointment to the Supreme Court by the Queen. In Australia, appointments to the High Court are made by the Governor-General on the advice of the Attorney-General. In Singapore, appointments to the Supreme Court are made by the President acting in his discretion, on the advice of the Prime Minister who must consult the Chief Justice.

19 As Shirley S Abrahamson, Chief Justice of the Supreme Court of Wisconsin, in "Remarks of the Hon. Shirley S. Abrahamson before the American Bar Association Commission on Separation of Powers and Judicial Independence, Washington, D.C., December 13, 1996" (1996–1997) 12 St John's J Legal Comment 69 at 76, stated, the "best system [for appointing judges] is the one that suits the particular legal culture of the jurisdiction".

perspective on political, social and cultural issues which may be relevant to any dispute that comes before the courts. A superior court that exclusively consists of judges from the Bar, whose previous professional work would have primarily concerned litigating for private parties, may not always have a proper appreciation of certain societal interests and the necessary balance between public and private rights.

(2) Adequate funding and control

18 Independence can only exist if the Judiciary is able to *function* like an independent institution. Put in another way, the Judiciary must be allowed to have full control of the running of the courts, as well as be provided with adequate funding for necessary resources and facilities. Any shortcomings in this regard may raise concerns as to the recognition of the Judiciary as a co-equal arm of government (in political systems that are based on the doctrine of separation of powers), and the *reality* and *appearance* of judicial independence.[20] The fact that the prerogative for the provision of adequate funding lies with the other arms of government can lead to problems. Hence, a lack of funding has been an issue faced by some courts in the US.[21] In approaching a funding problem, the onus, perhaps, lies on the Judiciary itself to make the Executive and the Legislature aware of its needs. As Shirley S Abrahamson, Chief Justice of the Supreme Court of Wisconsin, stated:[22]

> Underfunding of the courts may stem in large part from a lack of communication among the branches. Like the general public, the legislature and executive branches may not be sufficiently familiar with the workings of the courts and thus may not fully appreciate our funding needs.

---

20 See Beverley McLachlin, "Judicial Independence: A Functional Perspective" in *Tom Bingham and the Transformation of the Law* (Mads Andenas & Duncan Fairgrieve eds) (Oxford University Press, 2009) at p 280; see also *Speeches of a Chief Justice: James Spigelman* (Tim D Castle ed) (S2N Publishing, 2008) at p 126; see also Justice King, "Minimum Standards of Judicial Independence" (1983) 8 Int'l Legal Prac 65 at 66–67.

21 See Jeffrey Jackson, "Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers" (1993) 52 Md L Rev 217. However, it may not be appropriate for the Judiciary to set its own budget. As Aharon Barak states in *The Judge in a Democracy* (Princeton University Press, 2006) at p 80: "The independence of the judicial branch must, of course, be part of the checks and balances mandated by the separation of powers. Therefore, the judicial branch should not determine its own budget: the judicial branch's budget should be set by the legislative branch, and the judicial branch should give the legislative branch an accounting of the way it is run."

22 Shirley S Abrahamson, "Remarks of the Hon. Shirley S. Abrahamson before the American Bar Association Commission on Separation of Powers and Judicial Independence, Washington, D.C., December 13, 1996" (1996–1997) 12 St John's J Legal Comment 69 at 75.

> We must communicate effectively with our co-equal branches if we are to successfully plead our cause with them and avoid damaging confrontations about funding.

19 In Singapore, fortunately, both the higher and the lower judiciaries have the necessary freedom in the running of the courts, and have no problem in securing adequate funding from the other arms of government to staff and resource the courts (*ie*, *inter alia*, to pay the judges, judicial officers and other court staff, and to improve and modernise the court infrastructure generally). The Executive's approach to judicial resource funding is generous, and is consistent with its recognition of the indispensable role of the Judiciary in the proper governance of a modern State – this being the fair and efficient administration of justice.[23] The funding and other resources provided by the Executive to the courts reflect its views on the importance of the judicial function in the affairs of the nation and the economic and social development of the nation.[24] It also reflects the desire that the judicial function be discharged properly, efficiently, effectively and independently in accordance with law.

(3) Respect and support for the Judiciary

20 The respect and support of the public is crucial for the independence of the Judiciary as an institution. In a democratic society, the respect and support of the public is, in fact, one of the best safeguards for the independence of the Judiciary as an institution. Conversely, a lack of respect and support from the public for the Judiciary and its functions can be detrimental to its independence.[25] In this regard, any *perception* of a lack of respect from the Judiciary's

---

23 Details of the funding provided to the Judiciary can be found on the Ministry of Finance's website <http://www.mof.gov.sg/> (accessed 1 February 2010).

24 It might be added that judges of the Supreme Court of Singapore are entitled to a "GDP bonus" should the country's GDP show a growth of more than 2%. The quantum of the bonus depends on the extent of the growth. Singapore is probably the only country in the world that provides such a bonus to the Judiciary, and this bonus acts as an acknowledgment that the Judiciary plays an important role in the country's economic development. It could be argued that this bonus might result in judges favouring the Government in any court dispute involving the Government. However, as the bonus is paid on the basis of GDP growth, without any discretion on the part of the Executive, it is difficult to see how this privilege would affect the judges' independence.

25 Stephen Breyer, an Associate Justice of the US Supreme Court, stated in "Judicial Independence" (2006–2007) 95 Geo LJ 903 at 903: "[T]he Judiciary is, in at least some measure, dependent on the public's fundamental acceptance of its legitimacy. And when a large segment of the population believes that judges are not deciding cases according to the rule of law, much is at stake. … [T]he society around us can undermine the judicial independence that is the rock upon which the judicial institution rests."

co-equal institutions,[26] *viz*, the Executive and the Legislature, could be expected to trickle down to all state bodies and the public, leading to a loss of public confidence in the Judiciary,[27] and, ultimately, a call for the limiting of the independence of the Judiciary.[28] Thus, Art 99 of the Singapore Constitution provides that the conduct of a Supreme Court judge cannot be discussed in Parliament "except on a substantive motion of which notice has been given by not less than one-quarter of the total number of the Members of Parliament".[29] For acts or words amounting to contempt of the court, the law provides that every person can be punished, from the President, the Prime Minister, down to the man in the street.

21 However, mechanisms such as the doctrine of contempt should not be used to stifle fair and reasonable criticism of the work of the Judiciary and also judicial decisions. The right to criticise is only part of the freedom of speech and expression the citizen enjoys in a democracy and its exercise will encourage or ensure that judges are independent in their decision-making. It is a form of public review similar to judicial review of executive acts, where judges look over the shoulders of the Executive to correct its mistakes. Hence, the doctrine of judicial independence calls for the judicious use of the contempt power, and the final appellate court has a responsibility to ensure a judicial restraint in the use of this power. Fair and objective criticism of judicial decisions

26 Other than refraining from insulting the Judiciary, showing respect could, of course, mean other things, such as refraining from reducing the jurisdiction of the courts, reducing the funding given to the Judiciary, and appointing incompetent judges.

27 As Professor Enid Campbell and Professor H P Lee state in *The Australian Judiciary* (Cambridge University Press, 2001) at p 58: "Scurrilous abuse of particular members of the Judiciary, or attacks which question the integrity of judicial institutions, undermine public confidence in the courts and acceptance of their decisions."

28 See also Sir Ninian M Stephen, "Judicial Independence – A Fragile Bastion" (1981–1982) 13 Melb U L Rev 334 at 344; Daryl Williams, "Judicial Independence and the High Court" (1997–1998) 27 U W Aust L Rev 140 at 151. Indeed, criticism from the other arms of government can directly affect the independence of a Judiciary's decision-making as well; in this regard, the comments of Otto Kaus, a former Associate Justice of the Supreme Court of California, which can be found in W F Rylaarsdam, "Judicial Independence – A Value Worth Protecting" (1992–1993) 66 S Cal L Rev 1653 at 1655–1656, are worth setting out. When asked about whether political attacks on the court would affect the court's decisions, Kaus remarked: "It is difficult to ignore a crocodile in your bathtub when you are shaving in the morning."

29 One way in which the Legislature publicly demonstrates its recognition of and respect for the Judiciary as a co-equal institution is that it accords a prominent role to the Judiciary in state functions, such as the opening of Parliament. On its part, the Executive accords the Judiciary protocol standing in the Table of Precedence (*ie*, the protocol list) together with the President, Ministers and the Speaker of Parliament, and other senior state officials.

will instil accountability and greater discipline in decision-making.[30] If no one is allowed to judge judges, there could be lawless courts and irresponsible judging.[31] But criticism of judgments should not lead to the denigration of judges.[32]

IV. Maintaining independence in judicial proceedings

22 Judicial independence in court proceedings (this being, essentially, the judge's hearing of a dispute and coming to a decision on the dispute) has to exist in *substance* and not only in theory. The exercise of (personal) independence during hearings and in reaching the correct decision on the law and the facts has to be the *norm*. All the safeguards in the world would not be sufficient for the maintaining of the independence of the court in judicial proceedings if judges themselves do not have the courage or desire to exercise independence in the course of court proceedings. The reality of the maintenance of independence in judicial proceedings is that it is dependent greatly on the level of integrity of the individual judges, and, in particular, that of the Chief Justice.

A. The special position of the Chief Justice

23 The functions of the Chief Justice, as the head of the Judiciary, generally can be said to be threefold. First, the Chief Justice is the symbol of the third arm of government (in political systems that are based on the doctrine of separation of powers), and, as its head, acts for the Judiciary in its relations with the other two arms of government (*ie*, the Legislature and the Executive). Second, the Chief Justice is the administrative head (*ie*, the chief executive officer) of the Judiciary and is responsible for the efficient and proper administration of the courts, including obtaining sufficient judges and court staff to run the courts smoothly. Third, the Chief Justice is the senior judge in the Judiciary, and, depending on his or her personal qualities as a judge, can, by his or

30 See Frank B Cross, "Thoughts on Goldilocks and Judicial Independence" (2003) 64 Ohio St LJ 195; see also Dame Sian Elias, "Judicial Independence Seven Years On" (2004) 10 Canterbury L Rev 217 at 228.

31 John A Ferejohn & Larry D Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint" (2002) 77 NYU LR 962 at 973; see also Gerald E Rosen, "Judicial Independence in an Age of Political and Media Scrutiny" (1997) 14 T M Cooley L Rev 685 at 691–692. Some jurisdictions have organisations to deal with complaints against judges.

32 Enid Campbell & H P Lee, *The Australian Judiciary* (Cambridge University Press, 2001) at p 58; see also Stephen B Burbank, "The Past and Present of Judicial Independence" (1996–1997) 80 Judicature 117 at 121; Daryl Williams, "Judicial Independence and the High Court" (1997–1998) 27 U W Aust L Rev 140; Stephen Bindman, "Judicial Independence and Accountability" (1996) 4 UNBLJ 59.

her leadership, influence the development of the law and the legal system of the country, and the direction in which it should go.

24 Therefore, because of his or her public standing, the Chief Justice has a *special role* in ensuring that the independence of the Judiciary does, indeed, exist. He or she establishes the judicial values for the Judiciary and sets the direction and "tone" of the judicial system (*ie*, whether it will be a hard, soft or a balanced judicial system, and what the values of the justice system should be). The judges look to the Chief Justice for leadership. The public looks to the Chief Justice for justice. To the people, the Chief Justice is the face of justice in the State and the protector of the people against the wrongs of others and abuses of power or wrongdoings or unlawful acts of state agencies. A weak Chief Justice who is perceived to lack the ability to preserve and protect the independence of the Judiciary against all will undoubtedly have a debilitating effect on the other judges and affect the public trust and confidence in the entire judicial system. On the other hand, a strong and independent Chief Justice can *personify* the independence of the Judiciary and *exemplify* the exercise of independence in judicial proceedings. Hence, a person who does not have the commitment or mental strength to be independent and to act as such in discharging judicial functions should not for the sake of the people and the judicial institution, and for his or her own self-respect, accept appointment as Chief Justice.

25 In common law jurisdictions, the Chief Justice's standing among his or her fellow judges is often said to be one of *primus inter pares* (*ie*, first among equals). This means that while the Chief Justice is the head of the Judiciary and ranks above the other judges in protocol, and is paid a higher salary to reflect his or her standing, in the discharge of judicial duties, the other judges are *equal* to the Chief Justice *in law* in stating and applying the law in a dispute before the court. The Chief Justice is not like a chief executive officer of a corporation who can order subordinates to carry out orders. He or she cannot tell the other judges how to decide their cases.[33] But the Chief Justice has certain powers which he or she can exercise over the other judges, such as recommending them for promotion.[34] Administratively, the Chief Justice can decide, *inter alia*, the cases each judge should hear, or the division of the courts each judge should be assigned to. Judicially, the Chief Justice can, in the exercise of co-ordinate jurisdiction, formally disagree with the law as stated by another judge, and the Chief Justice's decisions will

33 Incidentally, that may amount to contempt of court.

34 In Malaysia, the Judges Ethics' Committee Bill 2008 has proposed that the Chief Justice of the Federal Court be made the chairman of the Judges' Ethics Committee, a committee that would deal with judges who have breached the Judges' Code of Ethics.

be given some degree of respect by the other judges even if they are not legally bound by them. But if the Chief Justice is exercising appellate jurisdiction, which is normally the case, he or she can create binding precedent on the courts below,[35] but only if the other appellate judges on the coram for the case in question agree. Thus, other judges are expected to accord proper respect to the Chief Justice, but do not necessarily have to defer to the Chief Justice when adjudicating cases. The Chief Justice is in that sense a first among equals, but he or she must earn the respect of the other judges for his or her learning and wisdom to be functionally regarded by them in the upholding of the rule of law as a first among equals.

26 It may be fair to say that a Chief Justice in an Asian society, by virtue of his or her office and position, is likely to receive more respect from his or her judges than his or her counterparts in Western common law jurisdictions. Asian culture can be said to contain a "social gene" that triggers a high degree of deference for the head of any institution, especially one of such high standing as the Judiciary. Deference, of course, is not the same as subservience. But this makes it all the more necessary for the Chief Justice to be (and be seen to be) a defender of judicial independence and a role model to his or her judges in the discharge of judicial functions.

B. Four elements to be independent from

27 A judge with integrity who wishes to maintain the independence of the court in judicial proceedings must, of course, be cognisant of whom or what he or she must be independent from.[36] The standard or common elements are: (a) the other two arms of government (*ie*, the Legislature and the Executive), (b) fellow judges, (c) personal beliefs and prejudices, and (d) third parties.

(1) Independence from the Legislature and the Executive

28 This means, with respect to the Legislature, that judges should not be adjudicating "with parliamentary approval or the avoidance of parliamentary reprobation in mind".[37] It also means that judges should not be concerned about any adverse criticisms by Members of

35 Pursuant to the doctrine of *stare decisis*; see para 39 of this article.

36 See Lydia Brashear Tiede, "Judicial Independence: Often Cited, Rarely Understood" (2006) 15 J Contemp Legal Issues 129 at 130; see also Lord Tom Bingham, *The Business of Judging* (Oxford University Press, 2000) at p 61.

37 L P Thean, "Judicial Independence and Effectiveness" in *The Eighth General Assembly and Conference Workshop Papers* (ASEAN Law Association, 2003) at pp 33–34; see also Lord Tom Bingham, *The Business of Judging* (Oxford University Press, 2000) at p 61.

Parliament on the decisions of the courts affecting them or their party. Nor should judges be afraid to strike down Acts of Parliament which are inconsistent with the constitution. On the other hand, judges should respect Parliament and the legislative process and interpret Acts of Parliament according to the purposes of the law as intended by Parliament.[38]

29 With respect to the Executive, this means, for one, that a judge should not tailor judicial decisions to ingratiate himself or herself with the Executive for whatever reason, be it for promotion or otherwise.[39] The courts must also not shy away from exercising their power of judicial review to correct, and if necessary nullify, any executive act or decision which is contrary to its statutory powers for fear of executive reaction. Judicial review is a very powerful weapon which an independent Judiciary can effectively use, if it is used properly, to correct any executive infraction, whether deliberate or inadvertent, of the law. Where the Executive has the welfare of the people at heart in the execution of its policies, the proper use of judicial review by the courts is also for the benefit of the Executive as it enables the Executive to comply with the law and act in the interest of the public. Where the Executive respects the independence of the Judiciary, the Executive will accept the decisions of the court and correct or modify its decisions to conform to

38 See L P Thean, "Judicial Independence and Effectiveness" in *The Eighth General Assembly and Conference Workshop Papers* (ASEAN Law Association, 2003) at p 32. Singapore has adopted the purposive method of interpretation of statutes; see Interpretation Act (Cap 1, 2002 Rev Ed) s 9A.

39 See Lord Tom Bingham, *The Business of Judging* (Oxford University Press, 2000) at p 60. Lord Bingham of Cornhill correctly indicates that a judge who determines a case in a certain manner in order to earn the favour of the Executive for the purposes of future promotion would have betrayed his judicial calling. Such a judge would clearly be unfit for the judicial role. The Judiciary should strive to avoid the situation hypothesised by Sir Ninian Stephen in "Judicial Independence – A Fragile Bastion" (1981–1982) 13 Melb U L Rev 334 at 337: "Suppose a Judiciary, once truly independent but which has come to accept that its decisions should be such as will meet with the approbation of government [*sic*]. The judges, or those of them who are left, will then either actually receive and act upon instructions from government [*sic*] as to how they should decide each class of case which comes before them or may, by anxious watch and constant study of the policies of government [*sic*], learn for themselves what is expected of them in the disposal of cases. In either event, the outcome will be to destroy the role of the courts as disinterested arbiters, dispensing justice in accordance with law. Instead, both in the eyes of the public and in the judges' own eyes, the courts will have become no more than another mechanism for the promulgation and enforcement of government policy. And once this process is complete the individual will have lost all opportunity to seek protection of his rights according to law. His future will thereafter depend upon the uncertain benevolence of an all-powerful executive, perhaps in the shape of a dominant political party. What I have described was very much the fate of the German Judiciary under the Nazi Party over twelve years from 1933 until the collapse of Germany in 1945."

the law, or if necessary, the Executive can seek the support of the Legislature to amend the law. This is the practice in Singapore.

(2) Independence from other judges

30 There are learned judges and less learned judges. There are strong judges and weak judges. There are industrious judges and lazy judges. Judicial independence requires that each judge act independently, irrespective of what his or her fellow judges think. A judge deciding a case alone will normally decide the case on his or her own, unless he or she consults another, perhaps stronger or more experienced, judge. In theory, consultation is not acceptance. In practice, the judge should make sure it is not so, unless he or she happens to agree with the judge who is consulted. Where the judge is a member of a panel of judges in deciding a case, he or she should remember that he or she must decide the case according to his or her own conscience and his or her own view of the law. However, the judge must bear in mind that there is such a thing as "group-think". Thinking as (or in) a group does not necessarily mean that a decision is not independently arrived at. On the contrary, it may *hone* independent thoughts.

(3) Independence from personal beliefs and prejudices

31 Yielding to one's personal beliefs and prejudices is something which every judge should avoid. As Benjamin Cardozo, a former Associate Justice of the US Supreme Court, famously opined:[40]

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'.

32 In a similar vein, Penny J White, a former Associate Justice of the Supreme Court of Tennessee, stated:[41]

> Judicial independence is not the freedom of a judge to decide cases based on personal whim or caprice, nor is it the freedom of a judge to decide cases based on personal viewpoints of what the law ought to require. A judge remains accountable to the fair application of the law regardless of the judge's endorsement of or belief in the law.

---

40 Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1949) at p 141.

41 Penny J White, "Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations" (2002) 29 Fordham Urb LJ 1053 at 1060.

33 Of course, it is impossible for a judge, being human, to be completely free from personal prejudices. Also, being a lawyer or someone with legal training, it is impossible that he or she would have no preconceptions of ethics, morality or justice, or the social or cultural values of the society he or she lives in. The judge cannot be free from these matters. But the concept of independence requires the judge to try and put these things aside when he or she is adjudicating a case. His or her decision should be based on the facts and the law. Many judges have the capacity to put aside personal views and apply the law. But, realistically, absolute independence is *not possible* as a judge will be inevitably affected, subconsciously at the very least, by his or her personal beliefs and prejudices. This is one reason why the law must always allow for an appeal against a first instance decision.

34 Not only must a judge avoid adjudicating according to his or her personal beliefs and prejudices, a judge must ensure that he or she is not *perceived* to be affected by his or her personal beliefs and prejudices. In the judicial process, the *perception* of independence is as important as actual independence. Hence, a judge should disqualify himself or herself from any case where a party has (or may have) such a perception.[42] In a case where one of the parties has (or may have) reservations about a judge's independence, the judge should be brave or humble enough to disqualify himself or herself from the case, whether or not he or she has reservations about his or her own independence, unless such reservations are clearly unjustified. In the administration of justice, *amour propre* (or self-esteem) has no place.

35 Furthermore, in the common law adversarial system of trials, the judge should refrain from over-interfering with the trial process, lest one of the parties perceives that the judge has made up his or her mind and therefore is not able to exercise independent judgment any more. In particular, the judge should refrain from cross-examining witnesses, and making adverse comments on the evidence adduced.[43] Any intervention should be minimal and only made expressly for the purpose of clarifying the issues in the case in question.[44]

---

42 The public may not know, and usually does not know, and may not even care, about the judge's personal commitment to justice and the rule of law. Hence, it is important that judges do not give any grounds to those who are cynical or suspicious of the independence of the Judiciary to feed their cynicism or suspicions, such as by being seen to be frequently socialising with members of the Executive or of political parties. The same observations apply to socialising in public with lawyers and also top executives in the commercial sector.

43 *Mohammed Ali bin Johari v PP* [2008] 4 SLR(R) 1058 at [75].

44 *Mohammed Ali bin Johari v PP* [2008] 4 SLR(R) 1058 at [75].

(4) Independence from third parties

36 Finally, the judge must be independent from the pressures exerted by third parties.[45] This would be a reference to pressure exerted by the general public, and, in particular, the media and Non-Governmental Organisations ("NGOs"). Third party pressure is often understated. But it is commonplace and should not be underestimated in its ability to affect the independence of judges.[46] As James Spigelman, Chief Justice of the Supreme Court of New South Wales, astutely noted, "[o[ften the most significant point of pressure on members of the Judiciary comes from public pressure, particularly as reflected in the media which, in turn, influences politicians".[47] Judges are, as already mentioned, human, and therefore pressure can adversely affect "the objectivity and neutrality of the administration of justice, even if unconsciously".[48]

V. Perception issues regarding non-tenured judges

A. Appointment of judges without security of tenure

37 Singapore, like Malaysia, appoints superior court judges for short periods either for the purpose of testing their suitability for appointment as judges or for clearing an existing backlog of cases (after which they return to their previous careers).[49] Here, purists on the concept of judicial independence take the view that there is the risk that such judges may not act independently. This risk, however, may not be significant in reality, unless temporary judges are appointed for the wrong reasons, such as to test a candidate's willingness to adjudicate in favour of the other arms of government. In a country like Singapore, where judicial decisions are open to the scrutiny of the public, it is unlikely that temporary appointments will be made for illegitimate reasons such as to secretly test a candidate's willingness to adjudicate in favour of the other arms of government rather than in accordance with law. In reality, there is no reason to suspect that judges appointed on a

45 *Speeches of a Chief Justice: James Spigelman* (Tim D Castle ed) (S2N Publishing, 2008) at pp 126–127.

46 See also para 20 of this article; Shimon Shetreet, "Judicial Independence and Accountability in Israel" (1984) Int'l & Comp LQ 979 at 1003 and 1006. Concepts such as the *sub judice* rule, a facet of the doctrine of contempt, can be helpful to preclude third party influence.

47 *Speeches of a Chief Justice: James Spigelman* (Tim D Castle ed) (S2N Publishing, 208) at p 126.

48 See *Speeches of a Chief Justice: James Spigelman* (Tim D Castle ed) (S2N Publishing, 2008) at p 127; see also John M Walker, "Current Threats to Judicial Independence and Appropriate Responses: A Presentation to the American Bar Association" (1996–1997) 12 St John's J Legal Comment 34 at 51.

49 See Constitution of the Republic of Singapore (1999 Rev Ed) Art 94(4).

temporary basis to test suitability and fitness for appointment to a tenured position or to clear a backlog of cases will fail to act independently in the discharge of their duties. Indeed, for the former, it is to the judge's advantage if he or she were to act independently in accordance with the law. In fact, issues of independence may not even arise in the course of a temporary judge's engagement, as most, if not all, of the disputes temporary judges are asked to adjudicate will not involve the other arms of government.[50]

B. The lower judiciary of Singapore

38 The same assertion of a lack of judicial independence has been made against the lower judiciary in Singapore, which would, in the main, consist of the District Judges and Magistrates of the Subordinate Courts. The District Judges and Magistrates, who are appointed to their positions by the Legal Service Commission,[51] deal with over 95% of all judicial matters in Singapore. The main criticism here is, surprisingly, not that they lack judicial independence due to a lack of security of tenure, but that their career advancement depends on the Legal Service Commission, of which the Attorney-General is a member, and also that they can be transferred out of the courts to the Attorney-General's Chambers or to some other government department as a legal officer. An issue that arises would be whether such criticisms should be avoided by changing the system to one where the judicial service is separate from the legal service. Such criticisms, however, disregard the fact that the Chief Justice is the head of the Legal Service Commission and has the final say on judicial postings. Also, how the lower judiciary and legal service of a State should be structured depends on the circumstances of that State.[52] In a small

50 It should be emphasised that a judge should not act on the presumption that the other arms of government have exceeded their mandate to demonstrate independence. The presence or lack of judicial independence should not be judged based on outcomes (in cases involving the other arms of government) *per se*; rather, as Christopher M Larkins opined, in "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis" (1996) 44 Am J Comp L 605 at 618–619, conclusions should, amongst others, be drawn from a *careful examination* of the *exact rationale* and *methodology* of the court in coming to its decisions.

51 The Legal Service Commission is in charge of maintaining a corps of officers to staff the courts, the Attorney-General's Chambers, and the legal service departments of various Ministries and other arms of the Government.

52 See also Beverley McLachlin, "Judicial Independence: A Functional Perspective" in *Tom Bingham and the Transformation of the Law* (Mads Andenas & Duncan Fairgrieve eds) (Oxford University Press, 2009) at p 280; see also *Speeches of a Chief Justice: James Spigelman* (Tim D Castle ed) (S2N Publishing, 2008) at p 126; see also Justice King, "Minimum Standards of Judicial Independence" (1983) 8 Int'l Legal Prac 65 at 66–67.

State, it may not be practical to have a separate judicial and legal service.[53]

VI. Fidelity to the law and judicial independence

A. Stare decisis *and judicial independence*

39 Independence in judicial decision-making does not mean that the judge must decide every case afresh. Common law regimes adopt and apply the doctrine of *stare decisis* – in which lower courts must follow the decisions of the superior courts on the same issues,[54] and superior courts must respect and follow their previous decisions on the same issues except when the decisions are clearly wrong and would cause injustice. In this regard, Aharon Barak opined:[55]

> The independence of the individual judge means that the judge is subject to no authority other than the law. This authority includes, of course, the authority of case law determined by the courts whose opinions bind the judge. Judicial independence does not mean release from the chains of binding precedent or other judicial instructions that bind the judge. These are part of the law to whose authority the judge is subject.

40 The doctrine of *stare decisis* restricts judges, who may have their own personal views about the fair and just outcome for disputes coming before them, from deferring to their whims and fancies. The doctrine therefore prevents chaos in the judicial system where no litigant is sure of what the law is. Certainty and stability in the law are vital to the existence of the rule of law. Paradoxically, a doctrine that curtails the independence of the judge to decide as he or she likes actually promotes the rule of law and, thereby, judicial independence.

B. Judicial independence as fidelity to the law

41 In general, the Western liberal establishment, and, especially, the Western liberal press, often do not accept that many Asian judiciaries are independent simply, it would appear, because they often do not

---

53 The need for a separate lower judiciary and legal service has to be balanced by the need to have the best legal talent to exercise judicial power at all levels of adjudication. In this connection, a combined service may prove more attractive to talented individuals, as it would allow for greater opportunities for development and career advancement.

54 There is still leeway for a judge to express some disagreement – via his or her judgments in which he or she can suggest that the precedent in question should be reconsidered by the higher court.

55 Aharon Barak, *The Judge in a Democracy* (Princeton University Press, 2006) at pp 78–79.

overturn laws which curtail individual liberties, especially those that are regarded as human rights, and they often do not decide against the State or a public authority in any court proceedings involving such issues. However, a more rational approach would be to not look at outcomes *per se* as determinative of the presence or lack of judicial independence. Conclusions should, rather, be drawn from a *careful examination* of the *exact rationale* and *methodology* of the court in coming to its decisions.[56]

42 Some Asian countries do not have democratic political systems based on the doctrine of separation of powers in which the Legislature, the Executive and the Judiciary each has its own sphere of operations, that is independent from one another.[57] Political, social and cultural values differ in Western and Asian societies, and within Asia itself, there is a huge variety of political systems. Some do not believe that the Western liberal democratic form of government, with its focus on individual rights, is appropriate for their societies which for hundreds, if not thousands, of years, have preferred communitarian values over individual rights. They do not agree with Margaret Thatcher's famous opinion – that there are no societies, only individuals. Some believe in economic development and progress first before liberal democracy. There are others that believe that the two can co-exist. And there are also others that believe that democracy will strengthen economic development, and therefore should come first.

43 Thus, in the Asian context, the Judiciary of a State may not have a role in the checking of the powers of the Legislature and the Executive. If the political system of a State does not allow the Judiciary to check the powers of the Legislature or the powers of the Executive, it would not be meaningful to discuss judicial independence like as if that State had adopted a political system that recognises the separation of powers of the organs of the State. In such States, the absence of any judicial power to overturn legislative or executive acts is not a function of the Judiciary, and, accordingly, the concept of judicial independence can only be meaningful in one context, *viz*, fidelity of the Judiciary to the law as expressed in whatever acts or instruments that are recognised as law. Fidelity to the law is then a true reflection of judicial independence in that context. But, of course, whether fidelity to the law can be achieved in practice, where there is no separation of powers, depends greatly on

56 Christopher M Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis" (1996) 44 Am J Comp L 605 at 618–619.

57 It should be remembered that constitutional democracy (based on the separation of powers doctrine) is a Western political concept developed in Western political entities during the 18th and 19th centuries when many Asian territories were under Western domination. However, it has been imposed on many colonial territories as a condition for independence. It has survived in a number of former colonial territories, and failed in many others.

the courage of the individual judge to exercise personal independence and not on the independence of the Judiciary as an institution.

VII. Conclusion

44 This article has attempted to cover the main aspects of securing and maintaining the independence of the court in judicial proceedings. It can be said, however, that the issues were considered in the context of a democratic system of government with the doctrine of separation of powers. This doctrine may be entrenched in a written constitution (which is usually the case) or recognised by the unwritten norms of the system (*eg*, in the UK and Israel). Where the doctrine of separation of powers is part of the constitutional structure of the State, the rule of law and its associated principle of the independence of the Judiciary are vital to the maintenance and preservation of that form of constitutional government.

45 In respect of such systems, Beverly McLachlin, Chief Justice of Canada, provides an apt summary of the role of judicial independence, which is as follows:[58]

> [T]he requirement of judicial independence flows from the specific character of the function of the Judiciary: to adjudicate disputes between the government and the citizen, or between one citizen and another, in accordance with the law. Constitutional democracy and the rule of law requires a separation between, on the one hand, the legislative and executive branches that make and implement the law, and on the other hand, the judicial branch that interprets and applies the law when disputes arise in particular cases. … Each branch must be functionally independent if it is to properly perform its constitutional role. More particularly, an independent Judiciary is necessary for the enforcement of constitutional limits imposed on the power of the executive and the legislative branches. If the executive branch is seen as being able to exercise improper influence on the Judiciary's exercise of its judicial function, the rule of law is undermined. If the legislative or executive branch is seen as being able to improperly influence the adjudication of constitutional limits on the powers of these branches, the basic structure of constitutional democracy is also undermined.

58 Beverley McLachlin, "Judicial Independence: A Functional Perspective" in *Tom Bingham and the Transformation of the Law* (Mads Andenas & Duncan Fairgrieve eds) (Oxford University Press, 2009) at p 281.

APPENDIX

	United States Supreme Court	United Kingdom Supreme Court	High Court of Australia	Supreme Court of Singapore
Main legislation	• US Constitution	• Constitutional Reform Act 2005 (c 4) (UK) • Judicial Pensions and Retirement Act 1993 (c 8) (UK)	• Commonwealth of Australia Constitution Act 1901 (Cth)	• Constitution of the Republic of Singapore (1999 Rev Ed)
Tenure	• Tenure for life	• Security of tenure up to the age of 70	• Security of tenure up to the age of 70	• Security of tenure up to the age of 65 • President may also appoint temporary judges (known as "Judicial Commissioners") for such periods as he thinks fit or for specific cases or classes of cases
Remuneration	• Salary cannot be diminished during time in office	• Amount of remuneration is determined by the Lord Chancellor with the agreement of the Treasury, and the amount may increase but cannot decrease	• Amount of remuneration received is to be fixed by Parliament, but the amount received cannot be diminished during the judge's time in office	• Remuneration and other terms of office cannot be altered to a judge's disadvantage after appointment
Removal	• Security from removal during good behaviour • Removal is by impeachment, a process where the House of Representatives present a charge to the Senate, which then tries the matter, and may only convict if there is a two-third majority	• Security from removal during good behaviour • Removal is by way of an address of both Houses of Parliament	• Removal can only be on the ground of misbehaviour or incapacity • Removal is by the Governor-General in Council, on an address from both Houses of Parliament in the same session	• Removal can only be for misbehaviour or incapacity • Removal is by the President on the recommendation of a tribunal of five persons, which would consist of present or former judges of the Supreme Court, or persons who hold or have held equivalent office in any part of the Commonwealth