



# Judicial Independence

## A Destination or A Horizon

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# Overview



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The Role of other Governance Institutions.



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Remuneration.  
Appointments.  
Discipline,  
Security of Tenure.



## Failures/Compromises

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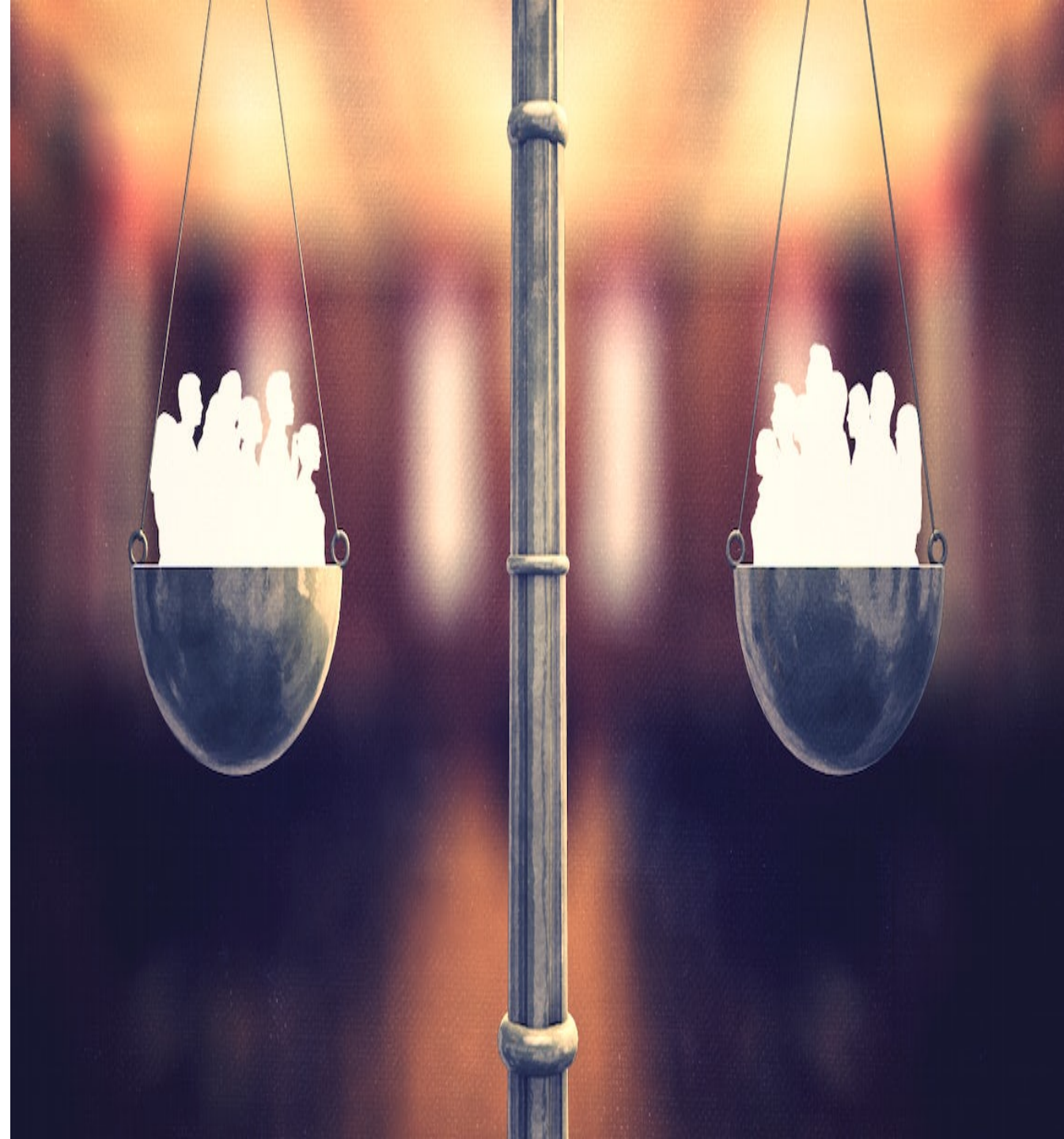
## Recommendations

Appointments,  
Security of Tenure,  
Discipline.  
Insulation from Interference.  
Cultivating Judicial-Media Relations.  
Provision of personal security.  
Institutional Funding and Remuneration.

# Judicial Independence

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- *“...the ability of courts and judges to perform their duties free of influence or control by other actors, whether governmental or private”*



# The Framework

## ART. 10 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS:

- *“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”*

## PRINCIPLE IV OF THE COMMONWEALTH LATIMER HOUSE PRINCIPLES:

- *“An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice”*



# The Building Blocks

- The outworking of judicial independence is three-pronged, as it relates to institutional, as well as the individual independence of judges and the role of other governance institutions.



# **A Strong, Credible Institution**

**The ability to insulate itself and its officers from both internal and external influences.**

**Appointments to the office on merit.**

**Internal accountability mechanisms.**

**Ensure transparency and accountability in the judicial process**

**Continuing judicial education and access to material for legal research.**

**Transparency in assignment of cases and decisive disciplinary action.**



# Hallmarks of Independence

## IMPARTIALITY, INTEGRITY, COMPETENCE

The Bangalore Principles of Judicial Conduct establish the standards for the ethical conduct of judges and reinforce that independence of judges and the judicial institution are bound up with accountability.

# The Role of Other Governance Institutions

**RESOURCING:** A strong judicial institution is a well-resourced one.

**APPOINTMENTS:** The appointments process also affects the credibility of the institution.

**REMUNERATION:** Poorly remunerated judges, are a challenge to independence.

**SECURITY OF TENURE:** Is integral to the independence of judges.

**PROVISION OF SECURITY.**





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# Failures/Compromises

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# **Lack of Internal Accountability- Over-fraternization with the Executive Arm of the Government.**

- An independent judiciary does not mean an isolated, neglected judiciary. However, the pandering of the judicial institution to other governance institutions, especially the executive, robs the institution of independence and its effectiveness as a key player in democratic governance.

# **Lack of Internal Accountability- External and Internal Interference**

- The inability or unwillingness of the judicial institution to insulate judges from outside influences, including politics, and societal affiliations weakens the institution.
- Inappropriate pressure from senior judges or the judicial administration is a subject that is rarely given the attention it deserves, but not a few judicial officers have been pressured by persons in authority to depart from independent decision making.

# Lack of Internal Accountability: Discipline

- The inability of the judicial institution to carry out the disciplining of its officers where allegations of impropriety in office merit such, is a failure of independence.
- Lack of adherence to Codes of Conduct where there have been serious breaches, even commissions of criminal acts, affect the reputation of the judicial institution as an institution of integrity.

# Allocation of Resources-Inadequacy

**MINIMAL FUNDING:** ruling out accommodation of special projects.

**THE LACK OF  
GUARANTEES REGARDING  
THE REMUNERATION OF  
JUDGES.**

**BUDGETARY CUTS:** curtailing the operations of judicial institutions.

**SUBTLY WHITTILING AWAY  
OF THE CONTRACTUALLY  
AGREED REMUNERATION  
OF JUDGES.**

# Lack of Provision of Security

- To say that judging – not the art, but the act, is a dangerous one, may invite challenge or at best, indifference, but it is a matter that requires serious consideration, as tragic incidents come without warning.





## **Lack of Transparency in the Appointment/Promotion Process**

- The process of appointments to the Bench has been beset with accusations of impropriety where the selection is not transparent, and is not seen to be based on merit or experience.

# Judicial Commissions/Councils

- The establishment of independent judicial commissions or councils serves as a measure to ensure impartiality in the selection process towards judicial appointments.
- Commissions/councils are only as effective if the members maintain integrity, are not concerned with considerations other than the transparent criteria of equal opportunity and merit, or cowed by the executive authority.

# Judge-led Processes

- There have sometimes been accusations of cronyism, and other factors that challenge the independence of the system of appointment, and of the persons so selected.
- The society expects its judges to exhibit integrity, competence and impartiality; but when appointments to judgeship are made for reasons other than merit, it results in a lack of competence in decision-making.

# Non-Compliance with Court Judgments and Intimidation by Government

- One area in which judiciaries are rendered ineffectual to uphold the rule of law, is the failure of other arms of government to comply with the judgments of the courts.
- Some judges have been put in fear of their lives, for upholding their own, or the institution's independence.

# Parliamentary Immunity and Judicial Independence

- There has been some debate that parliamentary immunity trumps equality before the law, so that a member of parliament may not be called before the court to answer for actions which are not concerned with the member's discharge of parliamentary duties.

# Security of Tenure (Contract Judges)

- There has been much discourse regarding the compromise of the security of tenure which further compromises the independence of such judges who have to perform their duties ever mindful of the spectre of unemployment if their contract is not renewed, should they fail to find favour with the appointing authority.



## Security of Tenure (Acting Judges)

- The phenomenon of acting judges has also sometimes come under unfavourable scrutiny, as undermining the independence of persons so appointed, especially in the countries where there is no constitutional provision or legislative act permitting it.

# The Role of the Media

- The saying that “the pen is mightier than the sword” is not an exaggeration for the written word can make or break a society, and that includes the judiciary.
- The media epitomises the truth of that statement, but it is not limited to the written word, other forms of media can be just as injurious if not handled with care.

# The Role of the Media

- Irresponsible media reporting without knowledge of the facts which are ascertainable by ordinary diligence, or misreporting for any reason, including misinformation or a misapprehension of legal terminologies, and commentary on judgments, including headlines which are derogatory of the court, can negatively impact the decision-making process, placing pressure of the judicial process.
- The fear of an unfriendly media environment that questions the competence of judges and opens them to ridicule or hate, can affect the independence of a judge in no small measure. The converse is also true, for a judge who curries favour with the media, may pander to the views of the public in decision-making.

# The Role of the Media

- The politicising of legal issues is a source of potential harm to the judicial institution and the security of judges, and has become the subject of recent concern as it also erodes the independence of judges in politically charged environments where the expression of a view in opposition to political agenda may be perceived to be enmity towards a political party.
- The line between criticism and contemptuous reporting is thin.

# The Other side of the Pendulum

- The judge who would rather skew a case against the government in order to not be seen to be compromised, than to be the true arbiter their judicial oath dictates, is no more independent than the one who succumbs to governmental interference.

# Successes

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# Institutional Resourcing

- The funding of the judiciary appears to have improved in varying degrees in a number of commonwealth jurisdictions. It is achieved in diverse ways, but commonly through constitutional provisions and legislation.

# Remuneration

- Remuneration of judges has been tackled in diverse, but no less effective ways.
- Some countries have provided mechanisms for determining remunerations in their Constitutions while others provide for such by legislation.

# Appointments

- It is the hope that the increasing use of truly independent commissions and councils will make the system transparent, and increase confidence in judicial appointments.

# Discipline and Security of Tenure

- Countries have made efforts which are clearly aimed at insulating the institution from an erosion of its independence through the control of external actors, by ensuring that judges are only removed after a disciplinary process that determines cause, scrupulously.



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## 8 Recommendations

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# 1. Appointments, Security of Tenure

- Commissions/councils must be enabled to establish internal mechanisms that ensure that their nominations adhere to clear criteria for appointments, based solely on the needs of the judicial institution and the merit of applicants for judicial positions.
- Commissions/councils should be given teeth in the appointment process through appropriate wording in national constitutions or legislation.



## 2. Discipline

- Judiciaries must not lend themselves to accusations of the “old school tie” that shields wrongdoers from consequences.
- Decisive action against judges whose conduct falls beneath the expected standard must be provided for in disciplinary legislation, and must be rigorously applied.

### 3. Internal Mechanisms-Assignment of Cases

- It is recommended that a system of transparency in the assignment of cases, and in the empanelling of judges must be established. Such may be mechanical, and thus removed from human manipulation.

## 4. Insulation from Internal and External Influences

- Judges must be removed from politics, and be discouraged from “hobnobbing” with politicians.
- The institution must encourage circumspection in the lifestyles and social interactions of judges, including their involvement in certain clubs and societies.
- A few judicial officers have been pressured by persons in authority to depart from independent decision making. It is important to create internal control mechanisms that will expose such attempts.

## 5. Cultivating Judicial-Media Relations

- Channels by which a reporter can receive answers from the judicial administration before it reports cases, including the proper use of judicial words and their meanings, and court terminology may be created.
- Judiciary-media workshops and seminars may provide insight into the decision-making process, to minimise trials in the media.

## 6. Security of Tenure

- If the promised tenure must be curtailed, it must be for reasons of incapacity or bad behaviour. Nothing else will suffice.
- Contract judges must receive the assurance of an automatic renewal of their contracts, except for incapacity or misbehaviour or where qualified local persons must be given the chance to also develop judicial careers, and there is no room for expansion of the Bench.

## 7. Provision of personal security

- Securing the person of the judge can only provide the comfort necessary for the independence of the judge who is enabled to perform his duty free from the fear of harm or worse.

## 8. Addressing Institutional Funding and Remuneration

- Judicial institutions should be granted a degree of financial autonomy that will enable the judiciary to not only meet its current needs, but to enable expansion, modernisation, and programmes to increase access to justice and efficiency in the dispensation of justice.
- The success stories in countries that use legislation to provide mechanisms for the determination of remuneration should encourage other countries to do the same for their judges.

# Conclusion

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## *Destination or Horizon?*

*It does not matter either way, for a destination presents the motivation to reach a goal, while a horizon only opens up territories yet to be conquered, and vistas of possibilities and improvements even beyond imagination.*

*There is hope yet for the society that recognises that its very life depends on the quality of justice it permits.*





# Recap

Failures/ Compromises	Successes	Recommendations
<ul style="list-style-type: none"><li>• The failure to realise the financial independence of the Judiciary. Minimal funding for the judiciary.</li><li>• Lack of guarantees regarding remuneration of judges. No Security of Tenure.</li><li>• Lack of Transparency in Appointments/Promotions. Ineffective Commissions/Councils.</li><li>• The inability of Judicial Institutions to discipline officers.</li></ul>	<ul style="list-style-type: none"><li>• Improved Institutional Resourcing, through constitutional provisions and legislation.</li><li>• Improved mechanisms for remuneration of judges.</li><li>• Increasing use of commissions and councils. Increased transparency, and increase confidence in judicial appointments.</li><li>• Improved Disciplinary processes, insulating the erosion of independence from the control of external actors.</li></ul>	<ul style="list-style-type: none"><li>• Grant judicial institutions some degree of financial autonomy.</li><li>• If the promised tenure must be curtailed, it must be for reasons of incapacity or bad behaviour.</li><li>• Ensure that the composition of, and the appointment process of members of judicial commission or councils is the subject of legislation. The work of commissions must be subject to some form of scrutiny.</li><li>• Decisive action against judges whose conduct falls beneath the expected standard must be provided for in disciplinary legislation.</li></ul>

# Recap

Failures/ Compromises	Recommendations
<ul style="list-style-type: none"><li>• Non-compliance with judgments and Parliamentary Immunity.</li><li>• Poor Relationships with the Media.</li><li>• Lack of Provision of Security.</li></ul>	<ul style="list-style-type: none"><li>• The leadership of the judicial institution must endeavour to insulate judges from external influence in their decision-making.</li><li>• The relationship of the judiciary and the media must be cultivated.</li><li>• Judges must be provided with security.</li></ul>

**Thank you**