

**Lord Carnwath at the Commonwealth Magistrates' and Judges'
Conference, Zambia
Discipline and Removal of Senior Judges
9 September 2014**

The principle that judges of the High Court and above were entitled to security of tenure during good behaviour (“*quamdiu se bene gesserint*”) and removable only on an address to both Houses of Parliament was established in the United Kingdom by the time of the 1701 Act of Settlement. That principle has been translated in to many modern constitutions or statements of principle. For example, article 98(2) of the Zambian Constitution provides:

“(2) A judge of the Supreme Court, High Court, Chairman or Deputy Chairman of the Industrial Relations Court may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind, incompetence or misbehaviour and shall not be so removed except in accordance with the provisions of this Article.”

The Latimer House Guidelines are clear on these issues:

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

ii. Grounds for removal of a judge should be limited to:

a) Inability to perform judicial duties;

b) Serious misconduct.

iii. In all other matters, the process should be conducted by the Chief Judge of the courts.”

The main tensions in practice have been as to the responsibility for deciding whether the tests are met: in particular the respective roles of the Chief Justice (assuming he or she is not the person under challenge) and the Executive. Each has a legitimate interest in the outcome, the former in protecting and promoting judicial independence and effectiveness, the latter the wider interests of the public in the efficient and impartial administration of justice.

In the United Kingdom the Lord Chancellor used to have a claim to act for both interests. He was traditionally a senior legal figure who combined the roles of leader of the judiciary, membership of the Cabinet, and for good measure speaker of the House of Lords. Reform by the Constitutional Reform Act 2005 redistributed the judicial responsibilities of the Lord Chancellor, and transferred most of them to the Lord Chief Justice¹. Discipline was shared between them. Removal requires concurrence between them – still with the added protection, in the case of High Court judges and above, of a vote of both Houses of Parliament.

There is still potential for tension. At present, for the first time in modern history, we have a Lord Chancellor who is a career politician not a lawyer, and who may not perhaps see issues of judicial independence through the same eyes as us. Happily so far there have been no problems. Protection for the judge is provided by elaborate statutory procedures, administered by the Judicial Conduct Investigation Office (JCIO), which reports jointly to the LCJ and the Lord Chancellor.

¹ I take England and Wales as the model. There were equivalent changes in Scotland and N Ireland.

The most recent example involving a senior judge concerned Lord Justice Fulford, a member of the Court of Appeal and a distinguished former judge of the International Criminal Court. This resulted from allegations made in early March of this year (2014) by the Mail on Sunday that as a young lawyer in the late 1970s, working for the National Council of Civil Liberties, he had written in support of an organisation known as the “Paedophile Information Exchange”. This allegation was referred to the JCIO for investigation under the statutory rules, and he was suspended from sitting in the meantime. The investigation was carried out by Lord Kerr, a member of the Supreme Court (and former Lord Chief Justice of Northern Ireland). The process was concluded by an announcement of 18 June 2014, which cleared the judge of any wrongdoing, since when he has returned to sitting.

This case illustrates three important aspects: (i) that even very senior and highly respected judges are not above suspicion, (ii) the importance of well-established independent procedures for investigating such complaints, and above all (iii) the need if at all possible to act speedily. Suspension provides protection for the public, but if prolonged it may deprive them of the services of a valuable judge, and be grossly unfair to him or her if eventually cleared of any wrongdoing.

The Judicial Committee of the Privy Council has a special role in respect of some Commonwealth constitutions, under which removal requires a request of the Governor, followed by an inquiry by a tribunal appointed by the Governor, and then a reference to the Privy Council to advise Her Majesty. This provides the dual protection of a full investigation, followed by confirmation by a wholly independent judicial body. I have not yet been directly involved in such cases, but I can see how difficult they can

be. He has mentioned the case involving the Chief Justice of Gibraltar,² where the tribunal's recommendation for removal was upheld by the Board by a narrow 4:3 majority, the minority opinion being given by Lord Hope. I will come back to some of his comments.

Another very difficult case was from the Cayman Islands, relating to Madam Justice Levers.³ Although the Board upheld the dismissal of the judge, it criticised the strength of some of the Tribunal's comments:

“.....the Board considers that it was not appropriate for the Tribunal to castigate Levers J's conduct in the extreme terms adopted in the Executive Summary. It is one thing for an investigating tribunal to identify conduct that it considers amounts to misbehaviour justifying removal. It is quite another to do so in terms that may irreparably damage the reputation of a judge before her conduct has been appraised by the Judicial Committee.”

Here in Zambia the provisions for removal of senior judges have come under close scrutiny recently following the decision of the President to initiate removal procedures for three senior judges in May 2012 for alleged irregularities in the relation to cases before them. Article 98 of the Zambian constitution, to which I have already referred, gives the President the power to initiate and conclude the process:

“98(3) If the President considers that the question of removing a judge of the Supreme Court or of the High Court under this Article ought to be investigated, then –

² *Hearing on the Report of the Chief Justice of Gibraltar (Gibraltar)* [2009] UKPC 43 (12 November 2009)

³ *Madam Justice Levers, Hearing on the Report of (The Cayman Islands)* [2010] UKPC 24 (29 July 2010)

(a) he shall appoint a tribunal which shall consist of a Chairman and not less than two other members, who hold or have held high judicial office;

(b) the tribunal shall inquire into the matter and report on the facts thereof to the President and advise the President whether the judge ought to be removed from office under this Article for inability as aforesaid or for misbehaviour.

(4) Where a tribunal appointed under clause (3) advises the President that a judge of the Supreme Court or of the High Court ought to be removed from office for inability, or incompetence or for misbehaviour, the President shall remove such judge from office.”

By 98(5), having initiated the process the President has power to suspend the judge from performing the functions of his office.

Here again the potential for tension between the judiciary and executive is clear, but ultimately the President seems to have the whip hand. It is true that he can only act on the recommendation of a judicial tribunal, but its members are appointed by him, and his power to suspend in the meantime is apparently uncontrolled.

In May last year (2013) in *Mutuna v Attorney General*, this case came before the Supreme Court which gave an important judgment on the availability of judicial review to control the President's action. Leave had been granted in the High Court, but the Attorney General applied to discharge the leave on the basis that the case was not reasonably arguable. He was successful, and the claim was dismissed at the leave stage, but only by a narrow majority (4:3). There were three strong dissenting judgments, on

the basis that the case was sufficiently arguable to be allowed to go to full hearing.⁴

The difficulty which even the majority found is perhaps apparent from the final words of the leading judgment (given by Chibesakunda Ag. CJ). Although the court discharged the leave to apply for judicial review, it concluded with these words:

“Before we end, we want to state that although we agree that the President in exercising the powers vested in him under Article 98 has unfettered discretion under the said Article, we nonetheless believe that it would be advisable, considering circumstances of this matter, for the tribunal not to proceed.”

Notwithstanding that plea, I understand that a tribunal was subsequently established by the President, but is itself now subject to an application for judicial review which may come before the Supreme Court. So it would be wrong to enter into a discussion of the merits at this stage.

I would make only one comment, which relates not to the substance of the judgments, but simply to one aspect – that is, the use of the English authorities on *Wednesbury* reasonableness. As far as I can judge from my limited reading of the case, the arguments turned on a relatively narrow application of that principle, based particularly on Lord Diplock’s famously restrictive definition of irrationality in the CCSU case in 1985⁵ (was the decision “so outrageous in its defiance of logic or of accepted moral standards that no reasonable person in his position could have acted in the way he did?”). I confess, with respect to that great judge, that I have never

⁴ I was kindly supplied with complete transcripts during the course of the conference. For a critical academic comment on the judgments see: <http://zambiareports.com/2013/07/12/prof-ndulo-disputes-supreme-court-judgement-on-mutuna/>

⁵ [1985] AC 374

found that part of his speech easy to follow. Judicial outrage seems a curiously inappropriate criterion for the reasoned and objective decision-making normally required of a judge. In any event, that narrow approach has been substantially modified in later case-law, particularly where constitutional principles or basic human rights are at stake:

“The common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the so-called *Wednesbury* principle. The nature of judicial review in every case depends upon the context.”

I quote the leading judgment of Lord Mance in a Supreme Court case earlier this year.⁶ It may be, I say no more, that the flexibility allowed by such developments in the law provides a route to a greater degree of judicial supervision of decisions relating to the discipline of judges, even in cases where constitution appears to give unfettered power to the President.

Looking more internationally, basic principles on the Independence of the Judiciary were adopted by the UN General Assembly in 1985, but as the preamble acknowledged “there still exists a gap between the vision underlying these principles and the actual situation”. In a recent article “Judicial Independence: some recent problems” (IBA Human Rights Institute Thematic Papers No 4 June 2014) Geoffrey Robertson QC comments “this was in 1985 and remains in 2014 an understatement”. He cites examples of serious threats to judicial independence from around the world, happily mostly outside the Commonwealth.

⁶ *Kennedy v Charity Commission* [2014] UKSC 20 paras 51-55 (a decision concerning the right of access to documents relating to a statutory inquiry into a matter of general public concern). I reviewed these developments in a speech in HK earlier this year: *From Rationality to Proportionality in the Modern Law*, to be published later this year in the Hong Kong Law Journal, but now available on the UK Supreme Court website: <http://www.supremecourt.uk/docs/speech-140414.pdf>

A controversial case cited by him from within the Commonwealth was from Sri Lanka, where in 2013 the Chief Justice, Shirani Bandaranayake, was removed from office by a process of impeachment initiated by the President. Robertson gives a characteristically hard-hitting and critical account, asserting (*inter alia*) that she was –

“... found guilty by a Parliamentary Select Committee, which comprised seven government ministers, sitting in secret and denying her the opportunity to cross-examine witnesses or to have the benefit of a presumption of innocence...”⁷

It would be difficult for me to comment on the facts without more direct knowledge, even if it were appropriate to do so. I note that the process was governed by Article 107 of the Constitution (“Independence of the Judiciary”) which on its face gives the power of removal to the President subject only to Parliamentary control:

“Every judge shall hold office during good behaviour and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity”.

The same article provides that “the investigation and proof of the alleged misbehaviour or incapacity and the right of such judge to appear and be heard in person or by a representative” are left to Parliament to determine “by law or by Standing Orders”.

⁷The impeachment was also criticised by the International Commission of Jurists: <http://www.icj.org/icj-condemns-impeachment-of-sri-lankas-chief-justice/>

Interestingly, Robertson does not condemn the impeachment process outright:

“Although in many respects unsatisfactory, impeachment does at least ensure judicial accountability to an outside body – the democratically elected legislature – and this provides an ultimate safeguard against judicial guardians becoming too incestuous or being perceived as too self-interested to regulate themselves.... The impeachment process may not be objectionable per se – at least for a chief justice – so long as it is conducted fairly in a way that fully protects the judge’s rights and in circumstances where it cannot be credibly suggested that it has been instituted or carried on as a reprisal, for reasons such as the government is unhappy with a judge’s decision in a particular case..”

This recognizes first that not all judges, even chief justices, are beyond criticism, but secondly that the government is and should be concerned about the proper and efficient functioning of the judicial system. The law can be a crucial instrument of government policy for good, and an effective judicial system is a critical part of that.

In deference to the Sri Lankan judges who are here, and with whom I have discussed the case, I make clear that it does not throw any doubt on the independence of the Sri Lankan judiciary as a whole. On a more positive note, I would also add that last month I attended a very impressive international conference on environmental law in Sri Lanka (sponsored by UNEP and the Asian Development Bank), which was attended by senior judges from the South Asian region, and impressively chaired by the present Chief Justice. As far as I could judge, in spite of the circumstances of his appointment, he appeared to have gained the respect and support of his colleagues both national and regional.

In conclusion I come back to Lord Hope's dissenting opinion in the Gibraltar case, which shows how difficult the balance can be. The opinion deserves close attention, not least (in this audience) for the attention it gives to the valuable work in this field of the CMJA. I also commend his account of his own experience as Lord President, when faced with disagreements with the then government over criminal sentencing policy. As he said, "The ability of the press too to stir up trouble must not be underestimated". He referred to a particular headline in The Scotsman's report following one such disagreement: "Warning over threat to justice". He continued:

"From then on the press sought to exploit what they saw as a rift between me and the Secretary of State over issues of policy. As reported upon report the number of occasions on which I had intervened were said to have been much greater than they actually were. So much so that when it was announced that I was to resign as Lord President on my appointment as a Lord of Appeal in Ordinary the headlines were "Was he pushed or did he jump?" and "(Minister) tightens grip on crime as Lord Hope quits". I was able to correct this impression in an interview after my resignation. But it was obvious to me that any attempt to do so earlier would only have provided the press with further copy and made matters worse."

Of the majority opinion to uphold the dismissal of the Chief Justice, he said:

"It fails to give proper weight to the crucial importance of protecting senior judges against attacks by the executive upon their efforts to uphold judicial independence in their jurisdiction. Errors of judgment there may well have been. But to say that this amounts to an inability to discharge the functions of the office... seems to me to go too far. It risks setting a dangerous precedent."

He concluded, however, by recognizing sadly that the harm could not be undone:

“The Chief Justice has now been suspended from office for more than two years. He has been exposed to a long and bruising inquiry, the effect of which has been to harden attitudes on either side.”

In the minority’s view, the proper course would have been for him to be given the opportunity simply to resign, with no adverse inferences of any kind being drawn against him.

Those passages show how difficult it can be in practice to draw the line between acceptable and unacceptable conduct, even at the highest level, and emphasise that in all these cases we are dealing not just with a fundamental public interest, but also with individuals who, unless and until shown to be guilty by a fair process, are entitled to be treated with respect and compassion.