JUDICIAL INDEPENDENCE AND THE ADMINISTRATION OF THE JUDICIARY IN TRINIDAD AND TOBAGO

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Introduction

Without doubt, the rule of law is the quintessential principle of good governance as that concept is understood in a liberal democratic society. For example, we accept restraints on our liberty only if authorised by law and then only if that law meets the minimum standards of that which is considered to be "reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual." This is a prescription against rule by personal edict and eschews arbitrariness in the conduct of the affairs of state. And because the fundamental rights and freedoms, particularly of the poor and dispossessed, are most vulnerable to infringement by the rich and powerful, it is also a pre-requisite to the maintenance of the rule of law and therefore good governance that the independence of the judiciary be established and maintained. The rule of law and the independence of the judiciary are well established and entrenched in the legal system and exercise great influence over political discourse, if not practice. It is therefore not surprising that all participants in civil society profess themselves to be ardent supporters of an independent judiciary, even though they might disagree on what the independence of the judiciary requires or when it is under threat.

This paper aims firstly to put the recent debate in Trinidad and Tobago over the independence of the judiciary in a theoretical framework. I will then briefly examine the constitutional mechanisms which seek to ensure an independent judiciary. Against that backdrop, I will then discuss the considerations which impact upon the independence of the judiciary in so far as control over the administration of justice is concerned.

Judicial Impartiality

The judicial function may be broken down into four separate though interconnected constituent parts. First of all, the judge must find the facts. Where the evidence is contested, this will involve choosing between two versions of the same incident. And even where the evidence is not contested the judge may be called upon to draw inferences from the uncontraverted facts.

Secondly, the judge must identify the issues in the case. This is usually uncontroversial, although in some cases the very framing of the issue to be determined could pre-determine the result of the next two exercises.
Next, the judge must find and declare the law relevant to the issues already identified. This will involve either an examination of previous judicial decisions or the interpretation of legislation and many times both. Finally, the judge must apply the law to the facts and draw a conclusion. It will be readily appreciated that a judge's findings in any of these areas could fundamentally determine the outcome of a given case. Rejecting the evidence of one party to the proceedings on the ground of an absence of credibility, for example, could be decisive. The statement of the applicable principle of law could be equally determinative. Much will depend upon the individual judge. In cases where a new principle of law is declared, for example, the result will not only depend upon the technical ability of the judge but also on his or her sense of what justice requires in the particular set of circumstances. This in turn will depend upon the particular judge's social or philosophical outlook. The impact of the individual judge's personal circumstances is particularly evident in cases involving the interpretation and application of the fundamental human rights and freedoms which are typically drawn in broad language and are intended to be political and social rather than legal concepts. The result in such a case, therefore, may depend entirely upon what the sitting judge considers to be in the public interest.

While the just result in many cases will depend upon the individual judge's own conception of justice, it is a fundamental constitutional principle that judges must dispense justice fairly and impartially. By this is meant simply that a judge must not be predisposed to a certain result based, say, on his or her likes or dislikes of one of the parties to the proceedings, whether due to personal connections or political affiliation or preferences, our out of fear for repercussions on his or her personal circumstances which a decision might cause, or because of undue deference to one of the parties or based upon any other motive which might cause him or her to depart from a determination of the case in accordance with his or her own honest conviction of what the facts and law are in the given case. Impartiality is the natural enemy of the rule of law. An impartial judge rules in accordance with his or her own personal prejudices and fears and therefore arbitrarily. So fundamental is the principle of impartiality to our legal system that judicial decisions are liable to be set aside wherever there is a real risk of bias, and even in the absence of any proof that the judge was in fact actuated by an improper motive. Justice must not only be done but must also manifestly be seen to be done. An impartial judge, particularly one overly sensitive to potential retaliation or swayed by political considerations is totally unsuited to discharge the awesome responsibility of protecting the fundamental rights and freedoms guaranteed by the Constitution and promoting the rule of law.

The Independence of the Judiciary

Although there is a strong relationship between the two, impartiality and independence are analytically two entirely different concepts. Impartiality refers to the attitude of evenhandedness which a judge is expected to bring to bear in resolving any particular dispute. An impartial judge is one who embarks upon a judicial enquiry uninfluenced by the personalities who are the rival parties to the dispute and committed to the resolution of the dispute in accordance with the law as he or she sees it. Independence, on the other hand, refers to the relationship between the judiciary as an
institution and the rest of society as manifested in the objective mechanisms, such as security of tenure and financial security, which are designed to insulate the members of the judiciary from inappropriate influence. The concept of judicial independence describes the objective status of the judiciary as a whole. The concept of impartiality describes the state of mind of the individual judge. A state of independence is not an absolute pre-requisite to impartiality nor does it guarantee impartiality. A robust judge of high moral fibre or one who is already financially secure might be undeterred by the absence of the protections which are indispensable to reassure the faint hearted or weak minded judge. By the same token, the most expansive of protective mechanisms would be wasted on the judge intent upon perverting the course of justice in deference to some political or social affiliation.

The principle of independence of the judiciary serves two fundamental and inter-connected purposes. It creates the conditions in which impartiality is more likely to take root and to flourish. The otherwise courageous judge will draw strength from the climate of insulation in times of great personal stress and hardship. All judges, strong and weak, principled and compromised, would better able to survive unscathed and undaunted the tempest of criticism and abuse to which the more powerful in society may wish to subject them.

The related purpose is to foster and sustain public confidence in the ability of the judiciary to uphold the rule of law, to guard against subversion of the constitution and the fundamental rights and freedoms and generally, to dispense justice with fairness and equanimity. In this regard, the perception of independence on the part of the reasonably well-informed observer is as important as the reality of independence. The judiciary must not only be independent in fact but must also manifestly be seen to be independent. Protective mechanisms must therefore be put into place not only to ensure independence, and therefore impartiality, but also to create the appearance of independence so as to bolster the public confidence in the administration of justice so indispensable to the continued respect for the rule of law. This is why it is no answer to complaints about interference in the independence of the judiciary to quip that judges should be made of sterner stuff, even though we must always strive for the elevation of only the fearless and the principled.

Two further points, also inter-connected, need to be made. The judiciary is by far the weakest branch of the state. It does not raise its own revenue and is entirely dependent upon the executive and legislature for the allocation of funds necessary to carry out its functions. It declares the law and mandates compliance with its orders but is entirely dependent upon the executive for their implementation. Except in the case of the enforcement of the constitution, its rulings on the law are subject to legislative override by a simple majority and even its interpretations of the fundamental rights and freedoms may be altered as long as the appropriate constitutional process is followed. To the extent that it does make law or does intervene in the conduct of public affairs and civil society, it is entirely dependent upon a interested party to initiate the process which might eventually lead to a binding court order. The judiciary therefore plays an entirely passive role in the political and social affairs of society. It does not intervene on its own initiative.
It follows that where the independence of the judiciary is under threat the judiciary is limited in its responses. It can draw the public’s attention to the danger, but it cannot cause legal proceedings to be commenced which might result in judicial orders restraining the offending conduct, except possibly where a contempt of court is thereby committed or an individual judge takes the initiative as a litigant. And even where proceedings are independently commenced to vindicate the independence of the judiciary, the presiding judges will find themselves in the most uncomfortable position of being called upon to adjudicate in a matter in which they are personally interested. They literally will be judges in their own cause and rulings they might make will be susceptible to the inevitable criticism, even from an executive genuinely committed to an independent judiciary, that they are feathering their own beds. They will performe compelled to tread cautiously. For all these reasons, and this is the crux of the second point, the independence of the judiciary is fundamentally dependent for its protection on public opinion, and will be sustained only to the extent that interest groups, the media and the legal profession, in particular, are prepared to rise up in its defence.

All of this leads to this final conclusion. It is that society has little to fear from an independent judiciary and much to lose from one which is inappropriately sensitive to the predilections of the executive and other powerful forces in society. The very rule of law is at stake. It is only a government bent upon dictatorial rule that has anything to fear from an independent judiciary. It follows that there ought logically to be no conceptual obstacle to making the judiciary as independent as we can make it. More is always better. We should err in favour of more independence, except where there is some overriding principle which compels us otherwise.

The Existing Constitutional Protections

Under the Constitution of Trinidad and Tobago, the judiciary enjoys a high degree of protection from outside influence. The Chief Justice is appointed by the President of the Republic, in his or her discretion, albeit after consultation with the Prime Minister and the Leader of the Opposition. All the other judges of the Court of Appeal and the High Court are effectively appointed by an autonomous Judicial and Legal Service Commission. The salary, allowances and other terms of service of judges are a charge on the consolidated fund and may not be altered to their detriment. Judges are removable from office only by the Privy Council and after a hearing before a tribunal composed of judges or ex-judges, a process which is cumbersome but more importantly is insulated from executive influence, except that the members of the tribunal are, in effect, appointed by the Prime Minister and it is the Prime Minister who initiates impeachment proceedings against the Chief Justice. A Salary Review Commission is charged with the responsibility of keeping the terms and conditions of service of judges under review and their recommendations, it is arguable on the authority of Canadian jurisprudence, may only be disregarded for good reason. By current standards, these mechanisms far exceed that which is considered to be the minimum standards needed to guarantee a trial by an independent tribunal.

That the Supreme Court is currently perceived to be independent of the executive
is no better manifested than by the complaints now made with increasing regularity that the Government cannot expect to receive an impartial hearing before the courts. At the very least, it is the clearly held view that the influence which the executive might otherwise wish to wield over the judiciary is nonexistent. Whatever the merits of such views, there is certainly a substantial body of evidence that the courts have in recent time exercised their functions as the guardian of the constitution and the rule of law fairly and fearlessly, even while members of the judiciary have made public what they considered to be threats to the independence of the judiciary. This by no means signifies the absence of the continuing need to be vigilant in ensuring that the independence of the judiciary is not diluted by other indirect means. It means only that, for the time being, the judiciary happens to be comprised, by and large, of men and women of sufficient calibre and metal to remain undeterred by these perceived threats.

**Administrative Autonomy**

When the Chief Justice delivered his ceremonial address on the occasion of the opening of the Law Term in 1999, he raised concerns relating to the control being exercised by the Attorney General over the administration of the judiciary. For example, he complained that the Attorney General had assumed responsibility for the funds allocated by Parliament to the judiciary and was using his power to refuse disbursements in such a way as to determine whether judges should attend legal conferences abroad and who among the judiciary’s staff should go abroad for training and what kind of training they should receive. He had also taken to determining whether staff should be hired to assist the judiciary and had developed the habit of investigating complaints made by members of staff of the judiciary against their superiors. Generally, he was seeking to develop a relationship with the judiciary such as would make the judiciary a department within his Ministry and was even requiring the Chief Justice and his staff to report to him on matters concerning the operation of the Courts in general.

Although, initially, the Attorney General denied that there was any substance to the Chief Justice’s complaints, he confirmed in his detailed report to Parliament that a dispute did exist concerning his role in relation to the administration of justice and he asserted his right of control over administrative matters not pertaining to the judicial function. As guardian of the public interest, and as the Minister with responsibility for the administration of justice, he argued, he was accountable to Parliament for the expenditure of funds allocated by Parliament to the judiciary and it was therefore only fit and proper that he should superintend the administrative affairs of the judiciary.

It is important to note what the dispute was not about. It was not about who should decide how much money should be allocated to the judiciary and under what heading. That is clearly Parliament’s domain. In developing the budget for the judiciary, the Minister of Finance will no doubt be influenced by the Government’s policy towards the delivery of justice to the community and the specific allocation of funds will reflect this. Of course, it is expected that in developing its policy, the Government will take heed of the priorities which the judiciary has set for itself. It is also a generally recognised constitutional principle that the judiciary must be provided with adequate funding to discharge its responsibilities. But other than these broad constraints, the executive through Parliament
is free to decide how much money should be allocated and in what areas. Who decides if and when those funds should be released is another question and was at the heart of the dispute. The Chief Justice feared that control by the executive over the funds allocated to the judiciary and over the other administrative aspects of the judiciary would erode judiciary independence. In such a system, he argued;

The Executive can in effect operate a system of reward and punishment that will make the judges think twice before they make decisions which they know will antagonise the Executive. Once a regime is introduced which enables such a system to be operated, judicial independence has been severely compromised. It is immaterial whether you introduce or operate the regime for that purpose. It is also immaterial that the judges do not in fact allow their judgments to be affected by the prospect of reward or punishment. The fact is the risk has been created that the judge may not be strong enough to resist the pressure and as a result public confidence in his impartiality has been diminished.\(^{\text{13}}\)

Former Chief Justice, Sir Isaac Hyatali also saw executive control over the administration of justice as a threat to the independence of the judiciary. In an article published in the *Civil Justice Quarterly*, he said.\(^{\text{14}}\)

The stark reality .... is that by reason of the total dependence on the executive for its material and human resources the constitutional independence on the judicial arm is susceptible of erosion by indirect but nevertheless effective means. An individual judge, one insulated in his own high-mindedness and personal integrity, may nevertheless be successfully hampered and impeded in all his judicial efforts whilst another of frailer metal may be driven either by indifference or conformity.

Given the security of tenure and financial security to which judges are entitled under the Constitution, it might be argued that the Chief Justice and his predecessor were somewhat sensitive of the risk to judicial independence which executive control over the administration of justice might pose. It is only the truly weak-minded judge, one might think, who would be susceptible to influence by the way in which the executive might use, say, its power over the disbursement of funds. It would be a sad day if a judge would tailor his or her judgment in a case as an inducement to or a reward for the executive favouring his or her attendance at a conference abroad, when there is no possibility that the executive could affect his or her paycheck at the end of the month. As remote a possibility as this might be, however, as long as judges continue to be susceptible to the normal human frailties to which we are all subject, it might be thought better, out of an abundance of caution, to eliminate the possibility of influence from this source than to chance the subversion of the rule of law, as long as, that is, there is no overriding reason to do otherwise.

But the threat to the independence of the judiciary posed by executive control over the administration of the judiciary is likely to operate in more subtle ways. A judge’s conditions of service consist of more than his or her salary and other emoluments. To function effectively, a judge needs to be provided with facilities and amenities as basic
as a properly functioning and comfortable
building in which to work, paper to write on,
computers on which to process words and
staff to assist in the performance of his or her
duties. A judge will be more or less harassed
and discomforted depending upon the quality
of plant and other support which are provided.
Where decisions concerning the disburse­
ments of funds which would make his or her
work environment more welcoming are made
by the executive, there may be a tendency to
develop an attitude of deference to, if not
dependence, upon the very branch of the state
in respect of which he or she may be called
upon to judge allegations of infringements of
the law. A neutral attitude is important to
the maintenance of impartiality. Even a benign
disposition to the executive is potentially
destructive of impartiality. The judge’s
position of vulnerability is exacerbated where
the staff which serve him or her are subject to
conflicting loyalties between the judiciary with
whom they work and the executive whom
they must obey. R.E. McGarvie put it this
way.

A judge ... needs to be placed in a
position which builds and encour­
gages the habit of independence of
mind and strength of will necessary
for impartial decisions. A court in
which those responsible to the
executive decide the way in which
the operation of the courts will be
managed, the way cases will
progress towards hearing and which
cases will be heard by which judge
at which time, is not likely to produce
the impartial strength and independ­
ence of mind which the community
requires of its judges. The relation­
ship between administrators and
judges will tend to develop to one
where the judges are well cared for
and even prized, but are treated as
senior staff who do specialised public
work in the courts which the
administration runs on behalf of the
executive.15

Arguments against greater judicial
control over the administration of justice
derived from the principle of judicial
accountability do not bear reasoned scrutiny.
Judges are accountable for the discharge of
their judicial functions. They deliver justice
in public and are required always to give
written reasons for their judgments. They are
also subject to appeal. Procedures are also
available to complain about their conduct on
and off the bench. Arguments can be made
for a reorganisation of the powers of the
Judicial and Legal Service Commission to
more effectively deal with complaints against
judges and indeed this issue has been dealt
with by the MacKay Commission of Enquiry.16
But accountability by judges for their conduct
is not related to the question whether they
should exercise more autonomy in the
administration of their judicial affairs. In so
far as accountability for the expenditure of
monies is concerned, on the other hand, there
are already in place across the public service
elaborate mechanisms relating to access to
public funds and scrutiny by the independent
Auditor General of the way in which these
funds are disbursed. It is the Auditor
General’s job to ensure that monies are spent
in accordance with the will of Parliament.

In sum, there do not appear to be any
overriding considerations which would
compel the continued micro-management of
the administration of the judiciary by the
executive.

Both the enquiries conducted by Justice
Telford Georges17 and the Mackay Com-
missioners concluded that there ought to be greater judicial control over the administration of the judiciary. MacKay considered that funds already allocated to the judiciary ought only to be withheld where the financial exigencies, as determined by the Minister of Finance, dictated differently. Otherwise, funds allocated by Parliament to the judiciary ought to be released upon request. MacKay also conceived of the administrative affairs of the judiciary being put under the control of the Chief Court Executive Administrator who in turn was to be answerable to the Chief Justice. In this, the MacKay Commissioners and Justice Georges are backed by a formidable body of opinion worldwide in support of greater judicial control over the administration of justice. Judges, lawyers and administrators from every continent have spoken out in support of the principle. This is no better exemplified than by the Latimer House Guidelines developed by representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates and Judges’ Association, the Commonwealth Lawyers Association and the Commonwealth Legal Education Association. The Guidelines recommend that “the administration of monies allocated to the judiciary should be under the control of the judiciary.”

How the relationship between the executive and the judiciary will develop in the light of the MacKay recommendations remains to be seen. But the signs are not encouraging. Without awaiting the result of the enquiry commissioned by the Government itself, the Attorney General moved in Parliament the passage of the Sentencing Commission Act which established a commission charged with the responsibility of developing guidelines for sentencing in criminal matters. The Act specifically provides that judges are not qualified to be appointed as members of the commission. Yet still, the Act empowers the commission to “conduct research or inquiries into the administration of justice and report the results of its research, inquiries and investigations and make recommendations for change, reorganisation and general improvement of the administration of justice.” In the House of Representatives, the Attorney General resisted an amendment proposed by the opposition which would have limited the power of inquiry into the administration of justice only in so far as it related to sentencing. The member concerned clearly had the debate over control of the administration of justice in mind. The Attorney General argued, rather dubiously, that “the entire administration of justice could have (an) impact on sentencing” and declined the invitation to amend. Undoubtedly, we have not heard the last on this issue.
End Notes

1Under the Constitution of Trinidad and Tobago, (Laws of Trinidad and Tobago, Chap. 1L01, Section 13), the courts are authorised to strike down legislation which do not meet this standard. However, this power of judicial review does not apply to laws in existence on the date the Constitution came into force – Section 6.


3The Constitution, s. 102.

4Ibid., ss. 104 & 110.

5Ibid., s. 136(5).

6Ibid., s. 136(6).

7Ibid., s. 137.

8Ibid., ss. 140, 141.


11R v

12“The address of the Chief Justice, the Honourable Mr. Michael de la Bastide, T.C., Q.C. on Thursday 16th September 1999,” (“The Chief Justice’s address”), Government Printery.


14The Chief Justice’s speech, p.2.


17Report of the Commission Appointed to enquire into and Report and Make Recommendations on the Mechanisms for the Administration of Justice in Trinidad and Tobago.


20 No. 80 of 2000.

21 Ibid., s. 5(1)(e).

22 Un-revised Hansard, October 4th 2000, 11.05-11.15 p.m.