The Separation of Powers Doctrine: Figment of the Legal Imagination or Entrenched Reality

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Thesis: The Privy Council's application of the doctrine of separation of powers in a manner that it encompasses the lower judiciary, in *Fraser* and *Inniss* is an improper extension of the 'Hindsian concept' of this doctrine and operates as a figment of the legal imagination rather than an entrenched reality.

Introduction

The doctrine of the separation of powers as outlined in *Hinds v the Queen*[438] has been misapplied in two recent decisions of the Privy Council.[439] *Hinds* establishes that separation of powers is not a pervasive and general doctrine. Rather, it is a specifically defined concept gathered from the text of the Constitution which operates only with respect to the upper judiciary[440]. Lord Diplock made a clear distinction between the

[438] [1977] AC 195 (PC)

[439] *Fraser v Judicial and Legal Services Commission* [2008] UKPC 25; *Inniss v AG of St. Christopher and Nevis* [2008] UKPC 42

[440] This is not exclusive to Commonwealth systems, but is pervasive even in the jurisprudence of the United States of America. In *United States v Johnson* 258 F.3d 361 (5th Cir. 2001), an earlier sentence was appealed on the grounds that Magistrate exercised a power that was ultra vires Article 3 of the United States Constitution. According to Ira P. Robbins, 'Magistrate Judges, Article III, and the Power to Preside Over Federal Prisoner Section 2255 Proceedings' 2002 Fed. Cts. L. Rev. 2, a clear distinction is drawn between the protections and powers of the magistrates of the lower judiciary, and the Supreme Court Judges appointed under Article 3. Classic differences in security of tenure and salary between these two classes are found.

security enjoyed by members of the upper and lower judiciary[441]. To construe the doctrine of the separation of powers in a manner that it encompasses the lower judiciary, as was the case in *Fraser* and *Inniss* is an improper extension of the 'Hindsian' concept of the separation of powers and is a figment of the legal imagination.

The Privy Council has extended the doctrine to magistrates who are employed, not on tenure, as in the case of the higher judiciary, but under fixed contracts. This holding ignores the fact that engagement of members of the Judiciary on fixed term contracts that are subject to renewal is an anathema to the notion of separation of powers. The magistrate operating under contract will be hard pressed to placate the favour of the Executive to safeguard the prospects for re-employment. Therefore the very existence of these contracts negates independence of the judicial officer and, ipso facto, the concept of separation of powers.

The Privy Council considered the two points in issue in the cases of *Fraser*[442] and *Inniss*[443] . The question of the status of the lower magistracy arose for consideration in both cases. On both occasions the Privy Council found that the lower magistracy was afforded constitutional protection against summary removal from office prior to the natural expiration of the fixed term contract of employment. A discussion of the merit of the decision itself is not the aim of this paper. The contention is that the reasoning employed by the Board in arriving at its decision, by its reliance on the principles espoused by Lord Diplock in *Hinds*[444], is suspect.

The Cases / Analysis

In *Fraser,* the appellant was employed as a magistrate on a one year contract. He was dismissed from office pursuant to the

[441] *Hinds v the Queen* (n 1)
[442] *Fraser v Judicial and Legal Services Commission* [2008] UKPC 25
[443] *Inniss v Attorney General of Saint Kitts and Nevis* [2008] UKPC 42
[444] *Hinds v The Queen* (n 1)

notice provisions in his contract before the natural expiration date. Section 91 of the St. Lucia Constitution gives the power to remove a magistrate to the Judicial and Legal Services Commission. The Privy Council held that the notice provisions were circumscribed by the constitutional protection afforded to the office of magistrate under s. 91.[445] The decision of the Court of Appeal, that only a contractual breach had occurred, was reversed. Lord Mance reasoned that, 'the Board accepts that there is nothing in the Constitution inconsistent with the agreement of a fixed term of office...the permissibility of a fixed term is clear from *Hinds.*'[446] He continued: 'The distinction that Lord Diplock drew between the position of the higher judiciary and the lower judiciary in Westminster model constitutions like that of St. Lucia related to the differing degrees of security enjoyed by these differing levels of the judiciary.'[447] He further stated that:

> Lord Diplock was not suggesting that the lower judiciary enjoyed no security at all. On the contrary he mentioned that they had the protection-in Hinds under a similar though not identical provision in the constitution of Jamaica to section 91 in the present Constitution-that they could not be removed or disciplined on the recommendation of the Judicial Service Commission with a right of appeal to the Privy Council.[448]

Interestingly, in the course of its reasoning in *Fraser* the Privy Council said the Court of Appeal's decision in *Inniss* was incorrect.[449] Inniss was engaged as Registrar of the Supreme Court and Additional Magistrate for two years. The contract was determinable at any time on notice or payment in lieu of notice. Inniss was summarily dismissed. The power of removal rests with the Governor-General acting upon the recommendation of the Judicial and Legal Services Commission under section 83 (3) of

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[445] *Fraser v The JLSC* (n 6)
[446] *ibid*
[447] *Fraser v the JLSC* (n 6) 6
[448] *ibid*
[449] *ibid*

the Constitution.[450] The Court of Appeal observed that members of the lower judiciary did not enjoy the same security of tenure as the board had recognized the higher judiciary to possess in *Hinds.* The Court held that there was nothing to preclude either a short or fixed term or the exercise of a contractual right to terminate the engagement of a magistrate.[451] This reading of *Hinds* is to be preferred to that of the Privy Council in *Fraser.*

In *Hinds* Lord Diplock stated expressly that the distinction between the two categories of the judiciary is that the upper judiciary is afforded far greater protection than the lower judiciary.[452] There is nothing in the Constitution which operates to protect the lower judiciary from parliament passing ordinary laws to abolish their office, to reduce their salaries while they still hold office or to provide that the appointments to judicial office shall be only for a fixed term of years.[453] The necessary implication of this assessment is that the lower judiciary's 'independence of the goodwill of the political party which commands a bare majority in parliament is not fully assured.'[454] Effectively, the judgment suggests that a magistrate is subject to an overlap of powers, where the Executive may legitimately have some control in his removal. This is the clearest statement that the doctrine of the separation of powers, from which the independence of the judiciary arises, was not intended to extend to the lower judiciary.

This assertion gains greater traction when Lord Diplock's treatment of the upper judiciary is considered. He reasoned that the upper judiciary 'is granted more firmly rooted tenure.'[455] Accordingly there are constitutional mechanisms which preclude the enactment of ordinary legislation abolishing their offices, adjusting their salaries or providing that their tenure shall expire

[450] *Inniss v AG St. Christopher and Nevis* (n 7)
[451] *ibid*
[452] *Hinds v The Queen* (n 1) 218
[453] *Hinds v The Queen* (n 1) 218
[454] *ibid*
[455] *ibid*

before the attainment of the prescribed age. Importantly they are not subject to any disciplinary control by the Executive while in office.[456] Thereby the officers of the upper judiciary are insulated from 'the temptation to cater to the wishes of the political directorate to preserve or prolong their continuation in office.'[457] This is the essence of the separation of powers. It serves to furnish the upper judiciary with 'complete independence from political pressure by parliament or the executive in the exercise of their judicial functions.'[458] The clear demarcation between the two categories of the judiciary is indicative that the mechanisms attendant with the doctrine of the separation of powers operate exclusively for the benefit of the upper judiciary. A similar level of protection is not countenanced for the lower judiciary.

This is not to deny the limited protection accorded to the magistracy by sections 83 (3) [459] and 91[460] of the respective Constitutions. Nevertheless the removal of a magistrate can only be impugned on two grounds: where the decision to remove the magistrate from office is irrational, and where the removal involves procedural impropriety[461]. In this context irrationality exists where there is an absence of reasonable cause to justify the

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[456] *ibid* 219

[457] *Attorney General v Grenada Bar Association* GD 2000 CA 2 3

[458] *ibid*

[459] S 83 (3) of the St. Christopher and Nevis Constitution provides that 'the power to exercise disciplinary control over persons holding or acting in offices to which the section applies and the power to remove such persons from office shall vest in the Governor-General acting in accordance with the recommendation of the Judicial and Legal Services Commission:'

[460] S 91(2) of the St. Lucia Constitution provides that 'the power to exercise disciplinary control over persons acting or holding in offices to which the section applies and the power to remove such persons from office is vested in the Judicial and Legal Service Commission.'

[461] In the Council of Civil Service Unions v Minister for Civil Service [1985] AC 374, Lord Diplock clearly stated the grounds for judicial review which are: illegality, irrationality, and procedural impropriety.

removal of the officer.[462] Both grounds fall squarely within the province of administrative law and do not implicate the constitutional law doctrine of the separation of powers. Thus, the irresistible conclusion is that the principles established in *Hinds* were inapplicable to both *Fraser*[463] and *Inniss*[464]. It is evident that the Privy Council recognized that there existed a lacuna in the protection offered to magistrates under the present constitutional arrangements. The attempt at remedying the defect is noble. However the attempt cannot entail the extension of a doctrine beyond the limits outlined in *Hinds*. A more appropriate Administrative Law finding was available to the Board in both cases: irrationality[465] in *Fraser* and procedural impropriety[466] in *Inniss*.

Irrationality applies to a decision of an administrative body which is 'so unreasonable that no reasonable authority could have come to it.'[467] This requirement of reasonableness must be satisfied if an administrative decision is to be legitimate. Therefore there is an implied requirement of reasonable cause for any removal of an officer of the lower judiciary under the respective contractual provisions. This requirement was established in

[462] *Thomas v The Attorney General* (1981) 32 WIR 375 the plaintiff was a police officer in the Trinidad and Tobago Police Force. In 1972 he was charged with three offences against discipline in accordance with the Police Service Commission Regulations 1966. The Police Service Commission, purporting to act under regulation 99 of the Regulations of 1966, dismissed the plaintiff from the police force. He brought an action against the Attorney General in the High Court claiming a declaration that he was still a member of the police force or that he had been wrongfully dismissed and was entitled to damages. On appeal, the Privy Council held, inter alia, that on a proper construction of s.99 (1) of the Constitution, the Police Service Commission's power "to remove" a police officer was a power to remove him for reasonable cause of which the Commission was the sole judge.

[463] *Fraser v the JLSC* (n 6)

[464] *Inniss v AG of St. Christopher and Nevis* (n 7)

[465] *CCSU v Minister for Civil Service* (n 23) 411

[466] *Ibid:*412

[467] *Associated Provincial Picture Houses Ltd. V Wednesbury Corporation* [1948] 1 KB 223

Thomas v the Attorney General[468], where Lord Diplock, delivering the Board's opinion, reasoned that:

> ...There are overwhelming reasons why "remove" in the context of "to remove and exercise disciplinary control over" police officers in section 99 (I) (and in the corresponding sections related to the other public services) must be understood as meaning remove for reasonable cause"...and not embracing any power to remove at the commission's whim...Dismissal of individual members of a public service at whim is the negation of equality of treatment.

Thomas was based, not on constitutional law principles, but administrative law principles. In accordance with such principles administrative bodies that exercise an absolute discretion must exercise it rationally. That is, the decisions of administrative bodies that exercise absolute discretion must conform to reason. Reason necessarily connotes notions of natural justice which includes inter alia the right to a hearing. The Privy Council in *Fraser* accepted that there was no such hearing and the procedure followed was unfair. The failure to observe basic rules of natural justice or the failure to act with procedural fairness toward the person to be affected by the decision of an administrative tribunal are grounds upon which the decisions may have been impugned.[469]

Additionally the removals may have been impugned on the basis of procedural impropriety. Procedural impropriety arises where a 'tribunal fails to observe procedural rules that are expressly laid down in the legislative instrument by which the jurisdiction is conferred, even where such failure does not involve a denial of natural justice.'[470] Once it is established that procedural rules have not been adhered to the decision of the tribunal is defective. As such the Commission's admission in *Fraser* that it had failed to observe the rules governing the exercise of its discretion, without more, was determinative of the issue. The reliance on *Hinds* was unnecessary.

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[468] *Thomas v AG* (n 24)

[469] *CCSU v Minister for Civil Service* (n 23) per Lord Diplock

[470] *Ibid:* 411 A-B

Moreover, the Privy Council's concession that the engagement of a magistrate can be undertaken by a contract for a fixed term[471] is inconsistent with the separation of powers doctrine. The fixed term is one of the major features that distinguish the two categories of the judiciary.[472] By holding that the agreement of fixed terms is an appropriate mode of engagement of magistrates, the Privy Council concedes that the doctrine of the separation of powers does not extend to the lower judiciary. The reasoning of the Privy Council is to be contrasted with that of Chief Justice Byron in *Grenada Bar Association*.[473] The learned Chief Justice contended that:

> The institutional safeguards of the independence of the judiciary do not belong to the judicial officer for him to surrender as he pleases, they are rights which are...to protect...constitutionally guaranteed rights to the rule of law, equality before the law and fair trial. I do not think that the courts could allow the consent of an office holder to any erosion of the constitutional safeguards to his independence...to have greater effect...than the interest of the public in preservation of...a free and independent judicial system

The inevitable conclusion is that any agreement which could lawfully avoid the institutional safeguards for the independence of an officer of the judiciary is contrary to the principle of judicial independence. *Grenada Bar Association* was concerned with the office of the Director of Public Prosecutions. The Director of Public Prosecution is responsible for the institution and conduct of criminal proceedings. As such it is imperative that the holder of the office be shielded from political or other improper influences. The office forms part of the upper judiciary. Accordingly, it is unsurprising that the Court ruled that the Director of Public Prosecutions cannot be removed from office save for inability or misbehaviour before he attains the prescribed age. Hence the Director cannot be removed on the basis of effluxion of time.

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[471] *Fraser v the JLSC* (n 6) 6

[472] *Hinds v the Queen* (n 1) 218

[473] *AG v Grenada Bar Association* (n 20)

Contrarily there is no bar to the removal from office of an officer of lower judiciary on the basis of effluxion of time. In both Fraser[474] and *Inniss*[475] the Privy Council contended that the constitutional protection overrides the contractual provisions. However, the Board failed to adequately consider the question whether the Executive could circumvent the constitutional protection by the engagement of magistrates under fixed term contracts of very short duration. The Privy Council contented itself by stating that it would be politically inexpedient for the Executive to engage magistrates under short term contracts.[476] It is of note that the Privy Council did not say that such arrangements would be unlawful. This ambivalence demonstrates that the officers of the lower judiciary are not required to be endowed with the same qualities of independence as is afforded to the office of the Director of Public Prosecutions and, by extension, the upper judiciary. Otherwise the Privy Council would have unhesitatingly stated that the magistrate is incompetent to enter into any agreement that avoided the constitutional safeguards of their independence. The separation of powers as outlined in *Hinds* does not extend to the lower judiciary.

Conclusion

A clear distinction is drawn between the security of tenure appropriate to the officers of the upper judiciary and to those of the lower judiciary. The manifest intention is to insulate the former from improper influences in the exercise of their judicial functions. Such independence is only assured by according to the upper judiciary a degree of security of tenure that is commensurate with the importance of the jurisdiction that they exercise. The doctrine

[474] *Fraser v the JLSC* (n 6)
[475] *Inniss v the AG of St Christopher and Nevis* (n 7)
[476] *Fraser v the JLSC (n 6)*

of separation of powers provides the protection necessary to ensure the full independence of the upper judiciary. Therefore any suggestion that the mechanisms associated with the doctrine extend to the lower judiciary is fallacious.