COLLEGE OF THE BAHAMAS

UNIVERSITY OF THE WEST INDIES LL.B PROGRAMME

CONSTITUTIONAL LAW

THE JUDICIARY (SUPPLEMENT TO WORKSHEET 6) - 2001-2002

INTRODUCTION

Our general objectives in studying this subject area of constitutional law are as follows: (1) primarily to understand that the basic objective here is to seek to determine the extent to which our constitutions establish and protect the independence of the judiciary; (2) to identify the specific constitutional bases upon which the independence of the judiciary is grounded, such as (a) ensuring that the appointment process is insulated from political direction or control, (b) protection of the tenure, remuneration and work conditions of the judiciary, (c) protection of the jurisdiction of the courts, particularly the High Court, and (d) the application of doctrine of separation of powers in helping to protect the independence of the judiciary; (3) to briefly establish the critical relationship between the independence of the judiciary and the enforcement of other important constitutional principles such as the supremacy of the constitution and the rule of law.

WHAT IS MEANT BY THE TERM 'INDEPENDENCE OF THE JUDICIARY'?

A good starting point is the address of Lord Denning in 1950 to the Holdsworth Club, as follows:

> ***"No member of the Government, no Member of Parliament and no official of any government department has any right whatever to direct or influence or to interfere with the decision of any of the judges. It is the sure knowledge of this that gives the people their confidence in judges….The critical test which they must pass if they are to receive the confidence of the people is that they must be independent of the executive."***[1]

The abovementioned definition may be considered to be too narrow in that it stresses that the judiciary should be independent 'of the executive', but the term should be properly understood to mean that the judiciary, or more particularly individual judges, should be free from **ANY** external influence or control, even the control of their judicial superiors, in the exercise of their judicial functions. This latter point was admirably expressed by Lord Donaldson in the April 27, 1994 House of Lords' Debate on the Independence of

[1] **Allen & Thompson, Cases & Materials on Constitutional & Administrative Law (5th ed., 1998) p. 202.**

the Judiciary. In this debate, Lord Donaldson stated that he had given the following response upon being asked whether he was responsible to either the Lord Chancellor or the Lord Chief Justice in the performance of his functions as the President of the National Industrial Relations Court:

> ***"I replied that I was responsible to neither. I was responsible solely to the law and to my own conscience. I have no doubt that I was right. That is what the independence of the judiciary is all about. The judiciary as a whole is independent of the Executive. BUT IT MUST NEVER BE FORGOTTEN THAT EVERY JUDGE IS INDEPENDENT OF EVERY OTHER JUDGE."[2] (Emphasis supplied).***

A similar observation was also made in the article entitled, ***Natural Justice and its Application to Mult-tiered Proceedings,*** in these terms: ***"It is worthy of note that the dynamics of judicial independence are influenced by other variables other than state or governmental interference."[3]***

CONSTITUTIONAL PROTECTION OF JUDICIAL INDEPENDENCE

It has been observed by Dr. Lloyd Barnett, in relation to the Constitution of Jamaica, that ***"…the provisions relating to the appointment and terms of service of judicial officers are designed to insulate them against improper political pressure. There are further provisions and rules aimed at ensuring that judicial officers are free of bias and act impartially in all matters brought before them."[4]*** This vital connection between the appointment and security of tenure of judges and the independence of judiciary has also been made by ***Sueur et al*** in relation to the 'UK Constitution'.[5] They have remarked that: ***"(Judicial) Independence is achieved, in part, by the arrangements for their (judges') appointment and removal from office."***

Further, the Privy Council in ***Hinds v. The Queen[6]*** emphasised the constitutional link between the constitutional provisions guaranteeing security of tenure and the intention of the constitutional framers to protect judicial independence. In this context, their Lordships stated that: ***"…the makers of the Constitution regarded (it) as necessary (that) important questions affecting his (the citizen's) civil or criminal responsibilities (should be) determined by a court, however named, composed of judges WHOSE INDEPENDENCE FROM ALL LOCAL PRESSURE BY PARLIAMENT OR BY THE EXECUTIVE WAS GUARANTEED BY A SECURITY OF TENURE MORE ABSOLUTE THAN THAT PROVIDED BY THE CONSTITUTION FOR JUDGES OF INFERIOR COURTS."[7]***

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[2] **Ibid at p. 205.**
[3] **Eversley, Natural Justice and its Application to Multi-tiered Proceedings, Vol. 9, No.1 (1999) UWI Caribbean Law Review, p. 75; also contained in Vol. 22, Nos 1 & 2 (1997) West Indian Law Journal, p. 78.**
[4] **Barnett, The Constitutional Law of Jamaica (Oxford University Press, 1977) p. 323.**
[5] **Sueur et al, Principles of Public Law (2nd ed., 1999) p. 45.**
[6] **[1977] AC 195.**
[7] **Ibid at p. 221.**

This link between the security of tenure of judges and judicial independence indicates that the greater the security of tenure, all other things being equal, the greater the independence of the judiciary, at least in theory. On the other hand, the lesser the security of tenure enjoyed by the judiciary, the lesser the judicial independence, again, at least in theory. This reasoning led the Privy Council to imply in ***Hinds*** that since the lower judiciary, such as magistrates, enjoyed a less secure tenure than members of the higher judiciary, then their independence ***"is thus not fully assured."***[8] Their Lordships illustrated the distinction between the security of tenure of the higher judiciary and lower judiciary thus:

> ***"The distinction between the higher judiciary and the lower judiciary is that the former are given a greater security of tenure than the latter. There is nothing in the Constitution to protect the lower judiciary against Parliament passing ordinary laws (a) abolishing their office (b) reducing their salaries while they are in office or © providing that their appointments to judicial office shall be only for a short fixed term of years. Their independence of the goodwill of the political party which commands a bare majority in the Parliament is thus not fully assured. The only protection that is assured to them by section 112 is that they cannot be removed or disciplined except on the recommendation of the Judicial Service Commission with a right of appeal to the Privy Council."***[9]

RE: JUDICIAL INDEPENDENCE AND THE POWER OF APPOINTMENT

The concept of judicial independence is significantly connected to the factor of who is responsible for the appointment of members of the judiciary and the nature of the appointment, that is whether the appointment is permanent or temporary and how secure it is. The underlying rationale of this theory is that judicial independence would be less influenced by the executive or the legislature the lesser or more remote the involvement of either bodies with the judicial appointment process. It is certainly more reflective of an appearance of judicial independence if both the executive and the legislature had nothing to do with judicial appointments. This is, perhaps, an ideal, but it is certainly not an inaccessible ideal.

Our constitutional provisions on the issue of appointment of the judiciary appear to incorporate an approach of seeking to achieve a position which approximates to about midway of the abovementioned ideal. Thus, the format adopted by our various constitutions stipulate that, generally, the heads of the various judicial systems are appointed by the political directorate; whereas, the remainder of the judiciary are appointable by constitutionally established Judicial and Legal Services Commissions. See article 94 (1) and (2) of The Bahamas Constitution. In Guyana, articles 127 and 128 of the Guyana Constitution have recently been amended by ***THE CONSTITUTION***

[8] **Ibid at p. 218.**
[9] **Ibid.**

(AMENDMENT) (No.4) ACT 2001. These amendments, which received the Presidential assent on the 7th August, 2001, state as follows:

> ***"Article 127 of the Constitution is hereby altered as follows-***
> ***(a) by substitution for paragraph (1) thereof of the following paragraph-***
>
> ***'(1) The Chancellor and the Chief Justice shall each be appointed by the President, acting after obtaining the agreement of the Leader of the Opposition.'"……***
>
> ***……***
> ***"Article 128 of the Constitution is hereby altered as follows-***
> ***(a) by substitution for paragraph (1) thereof of the following paragraph-***
>
> ***'(1) The Judges, other than the Chancellor and the Chief Justice, shall be appointed by the President who shall act in accordance with the advice of the Judicial Service Commission.'"***

It is to be noted in respect of the new requirement in Guyana that the President must now obtain the ***"agreement of the Leader of the Opposition",*** though a radical departure from the previous constitutional requirement that the President should merely consult with the Leader of the Opposition (formerly Minority Leader), essentially only operates to dilute the power of the President in this regard, but it does not deal with the issue of ensuring that judicial appointments are insulated from political influence altogether.

The Constitution of Barbados represents a departure from this model and seems to reflect the United Kingdom position where all of the judges are appointed by the political directorate. Thus, section 81 of the Barbados Constitution provides as follows:
"***(1) The Chief Justice and other Judges of the Supreme Court shall be appointed by the Governor-General…on the recommendation of the Prime Minister after consultation with the Leader of the Opposition."***

One senior counsel in Guyana defends the position of political involvement in the appointment process on the ground that this practice obtains in the United Kingdom where the Lord Chancellor, who is a member of both the executive and the legislature, is responsible for the appointment of the members of the judiciary. It is generally contended that this historical anomaly has worked well in the United Kingdom without impairing judicial independence there. What, however, does not seem to be fully appreciated by those who make this point in Guyana and elsewhere is that there has developed a strong convention in the United Kingdom which ensures that the appointment of judges is insulated from political influence and control. Can the same be said for Guyana, for instance? As stated earlier in my Lectures on Conventions, "It is questionable whether there may not be an opposite convention in relation to the appointment of the various heads of the judiciary since these officials are appointed by

the political directorate directly. Recently, in Guyana the most senior judge was passed over for the position of Chief Justice after she had given a decision against the government. This may have been just coincidental, but there were no apparent reasons, in my respectful view, based on rational criteria upon which this supercession could have been justified. Only the fullest transparency can clear up such matters, but this has been sadly lacking."[10]

Further, in Barbados, the recent controversy , where a former Attorney-General was appointed Chief Justice by the very government under which he served, raises issues of transparency in terms of whether the critical factor of the appearance of independence has been satisfied and whether the idea of any operation of a convention, similar to one in the United Kingdom, either generally in the Commonwealth Caribbean or particularly in Barbados, has not finally exploded? Regarding the issue of the appearance of bias, or lack of judicial independence, this writer has observed in a recent article entitled, ***Contemporary Issues of Bias in Adjudication,*** as follows:

> ***"It is important to note that, in addressing this issue, the question of appearance is as great as actual reality. It has been said that perception is as much a part of reality as are concrete facts. This pivotal factor has long been recognized in this area of law. Indeed, Lord Hewart quintessentially underscored this point when he asserted that the appearance that justice is done is of equal, if not greater, importance than the actuality of justice being done.[11] As a matter of fact, in a great number of cases the principle against the appearance of bias has vitiated decisions where it was clearly shown that there was no actual bias involved. For example, in the leading case of Dimes v Grand Junction Canal,[12] it was found that Lord Chancellor Cottenham was not infected with actual bias. Indeed, his orders were subsequently found to be correct on the merits."[13]***

Furthermore, in the landmark case of ***Re Pinochet Ugarte (No. 2),[14]*** Lord Nolan, in referring to the great importance of the appearance of impartiality,[15] stated that: ***"I would only add that in any case where the impartiality of a judge is in question, the appearance of the mattter is just as important as the reality."*** The great significance of the perception of judicial independence was also adverted to by Professor Robert Black in a recent paper dealing with judicial appointments in Scotland.[16]

There are some, like JAG Griffith, who think that judicial independence in terms of political neutrality is nothing but a myth. In his book, ***The Politics of the Judiciary,*** Griffith argues as follows:

> ***"Judges in the UK cannot be politically neutral because they are placed***

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[10] **Eversley, Lecture Notes on Conventions (Unpublished, 2002).**
[11] **R v. Sussex Justices ex p. Mc Carthy [1924] 1 KB 256.**
[12] **(1852) 3 H.L. Cas. 759.**
[13] **UWI Caribbean Law Review, Vol. 10, No. 2., (December 2000), p.276, at pp. 286-287.**
[14] **[2000] 1 AC 119.**
[15] **See Eversley, supra, in Contemporary issues of bias, at p. 287.**
[16] **Conference on the Scottish Parliament and the Scottish Judiciary, 1998 SLT (News) 321.**

> ***in positions where they are required to make political choices which are sometimes presented to them, and often presented by them, as determinations of where the public interest lies; that in their interpretation of what is in the public interest and therefore politically desirable is determined by the kind of people they are and the position they hold in our society; that this position is part of established authority and so is necessarily conservative, not liberal*** ."[17]

Sueur et al has also stated that: ***"Some commentators have argued that, in carrying out their tasks, the judges choose to be other than independent of the government."***[18] The point was also made by ***Sueur et al*** that the latter arguments have been challenged in recent times.[19]

TEMPORARY APPOINTMENTS AND JUDICIAL INDEPENDENCE

Where such temporary appointments are made directly by the polictical directorate, there are two factors affecting judicial independence which are implicated. The first relates to the political involvement in the appointment, and the second deals with the issue of security of tenure. It is respectfully submitted, therefore that a sustained and widespread practice of temporary judicial appointments would be seriously inimical to judicial independence and, ultimately, the rule of law.

In the recent Scottish case of ***Starrs and Chalmers v. Ruxton,*** the Appeal Court of the High Court of Justiciary of Scotland had to determine whether the appointment of a temporary sheriff, a judicial officer, for one year was compatible with Article 6 (1) of the European Convention of Human Rights. The Court held that it was not compatible with Article 6 (1) and further stated as follows:

> ***"The appointment for one year at the discretion of the Lord Advocate did not square with the appearance of independence, nor did the removal from office through ministerial policy rather than statute. A well informed observer would think that a temporary sheriff might be influenced by his hopes and fears as to his prospective advancement. The combination of one year appointment with liability either to recall or suspension or limited use is inconsistent with the requirement of independence. Security of tenure is one of the cornerstones of judicial independence, as the adequacy of judicial independence cannot be adequately tested on the assumption that the executive will always behave with appropriate restraint. It is fundamental that human rights are no longer dependent solely on conventions which are not legally enforceable. It would be inconsistent with the whole approach of the Convention if the***

[17] **(London:Fontana; 5th ed., 1977) p. 336.**
[18] **Sueur et al, Principles of Public Law (2nd., ed., 1999) p. 46.**
[19] **Ibid.**

independence of the courts rested upon convention rather than law."[20]

But note that in the case of ***Clancy v. Baird "a decision of the Inner House… a similar application in respect of temporary judges in the Court of Session was refused, the manner of their appointment being different."***[21]

On the issue of the appointment of temporary judges in Scotland, Professor Robert Black of the University of Edinburgh stated as follows:

> ***"A crucial element in the independence of judges is that their tenure of office accords them freedom both in actuality and in public perception from political pressure and external political influence in any decision which they are called upon to take. Temporary sheriffs have no security of tenure. They hold office technically at the pleasure of the Secretary of State for Scotland (though in reality at the pleasure of the Lord Advocate). The judicial oath requires them to act 'without fear or favour, affection or ill will'. A reasonable bystander might well ask how acting without fear or or favour can be accomplished, and, more importantly, can be seen to be accomplished when the temporay sheriff is dependent for his continuance in office upon the will of the legal-politician, namely the Lord Advocate, who (or whose local representative) is a party to the vast majority of cases that every temporary sheriff is ever required to adjudicate upon. A fortiori is this so when when a very high proportion of temporary sheriffs are seeking (or at least envisaging the distinct possibility) of a permanent appointment and the fulfilment of this ambition is a matter which rests entirely in the hands of the same Lord Advocate."***[22]

The abovementioned considerations would seem to apply to two situations of temporary judicial appointments in the context of the Guyana Constitution. One situation, which occurred recently, refers to the practice of granting repeated extensions of a temporary nature to certain appellate judges who have reached the retirement age stipulated by the constitution. Recently, there was a pre-emptive challenge, in a matter involving the government, against two of the appellate judges hearing an appeal, on the ground of bias or lack of independence, because the appellate judges in question had passed the retirement age and had been granted extensions of a temporary nature by the government. In so far as this writer is presently aware, this matter is still in abeyance, as there has been no final disposition of this case as yet. The other situation has come about because of a recent amendment in August, 2001 of the Guyana Constitution where for the first time constitutional provision has been made for the appointment of "part-time judges". The amendment reads as follows:

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[20] **(a) See report at [2000] UKHRR 78;(b) also Internet report at www.ecclawsoc.org.uk/case-sta.html, at p.1.**
[21] **(a) April 4, 2000, Unreported; (b) Also, see footnote 13(b), above, at pp. 1-2.**
[22] **Conference on "The Scottish Parliament and the Scottish Judiciary", 1998 SLT (News) 321.**

"The Constitution is hereby altered by the insertion immediately after article 128 of the following article –

128A (1) Part-time judges may be appointed by the President, who shall act in accordance with the advice of the Judicial Service Commission.

(2) Parliament may by law determine the terms and conditions of part-time judges."

The fact that this power has been put in the Constitution of Guyana may have made it impervious to judicial review on the ground of unconstitutionality since what the constitution allows cannot be said to be inconsistent with the constitution. However, it would seem that the very nature of such appointments would run counter to the fundamental constitutional principles of judicial independence and the rule of law. Part-time appointments are by their very nature insecure which seriously undercuts a basic tenet of judicial independence, i.e. security of tenure. The fact that these part-time judicial appointments are to be made effectively by the Judicial Service Commission not only does not offset the disadvantage of the insecurity of tenure occasioned by these appointments, but the fact of appointments by the JSC offers little comfort since the majority of the members of the JSC, itself, is effectively appointed by the executive. For instance, according to ***article 198 of the Guyana Constitution,*** three out of six members (namely, the Chancellor, the Chief Justice and the Chairman of the Public Service Commission) are appointed directly by the President; one is appointed by the President ***"after meaningful consultation with the Leader of the Opposition"[23];*** and up to two persons ***"after the National Assembly has meaningfully consulted such bodies as appear to it to represent attorneys-at-law in Guyana and signified its choice of members to the President."[24]***

REFERENCES

- SEE SOURCES REFERRED TO HEREIN.

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[23] **The word 'meaningful' has been introduced by the recent amendment to the Guyana Constitution in August, 2001 by the CONSTITUTION (AMENDMENT) (NO. 4) ACT 2001.**
[24] **This insertion has been made by the recent amendment in August, 2001 referred to above.**
[25] **IN RENDERING UNTO CAESAR THE THINGS THAT ARE CAESAR'S AND UNTO GOD THE THINGS THAT ARE GOD'S, I HEREBY ACKNOWLEDGE AND GIVE CREDIT TO ALL**

THOSE PERSONS WHOSE SOURCES I HAVE SPECIFICALLY REFERRED TO IN PREPARATION OF THIS WORKSHEET. HOWEVER, WITH RESPECT TO MY OWN INPUT, INCLUDING MY UNDERSTANDING AND MY EXPRESSION OF THAT UNDERSTANDING WHICH I HAVE GRATEFULLY RECEIVED FROM THE LORD, I HEREBY FREELY AND JOYFULLY GIVE ALL HONOUR, ALL PRAISE AND ALL GLORY TO MY MOST GLORIOUS HEAVENLY FATHER IN AND THROUGH MY MOST BLESSED LORD AND SAVIOUR JESUS CHRIST.