

JUDICIAL INDEPENDENCE IN THE PACIFIC

*Hon Justice J Bruce Robertson**

Judicial independence is an imperative feature of the rule of law, as evidenced in the Bangalore Principles of Judicial Conduct. In the context of the Pacific, judges have the benefit of close-knit legal communities which allow for fraternity at all levels; however, this benefit can also pose a danger to judicial independence. This article examines judicial independence in the Pacific. It points out that beside judicial independence sit the important elements of judicial accountability and judicial responsibility, with the two latter giving meaning to the former.

L'indépendance judiciaire est une des composantes de la règle de droit, comme le rappelle les Principes de Conduite Judiciaire de Bangalore (2002). Dans le Pacifique, les juges peuvent utilement tirer profit des étroites relations nouées au sein de la communauté judiciaire de cette région du monde. Toutefois cette proximité géographique et humaine n'est pas sans poser quelques difficultés s'agissant plus particulièrement de l'indépendance des juges. L'auteur s'intéresse à cette situation en mettant l'accent sur l'étroite corrélation qui existe entre la nécessité pour les juges d'avoir à rendre de comptes et les responsabilités qui leur échoient.

I WHAT REALLY MATTERS IN JUDICIAL INDEPENDENCE

Judicial independence is one of the fundamental features of a functional rule of law. The Bangalore Principles of Judicial Conduct (June 1988) command simply that:

Judicial independence is a pre-requisite to the rule of law and the fundamental guarantee to a fair trial. A Judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

It is critical to judicial independence that Judges are not subject or beholden to any person or institution – whether that is the legislative or executive arms of government, the media, litigants, or any other parties. It is equally imperative that

* Magistrate (à la retraite), membre de la New Zealand Court of Appeal.

Judges perform their judicial function fearlessly, impartially, and without ill-will or bias.

It is easy enough, at least in jurisdictions fortunate to exemplify a robust rule of law, to resist overt external pressures from public bodies or zealous litigants. The interests and agendas pushed from those quarters can usually be identified with ease, and rationally addressed and disposed of. What is harder, at a human level, is keeping in check the concern that particular positions on legal issues will be at odds with those of colleagues, inflammatory to academic commentators, or displeasing to litigants' counsel. Jurisdictions in the Pacific have the mixed benefit of small and close-knit legal communities, making fraternity at all levels a real pleasure, but also something of a peril. The task of judicial independence poses the daily challenge of consciously resisting those subtle pressures so as to ensure that judicial integrity is a meaningful element of the rule of law. Unfortunately, where external pressures from other branches of government are threatening or overbearing, Judges may simply not be able to perform an independent adjudicative role. When that is the case, there is an institutional clog on the proper functioning of government and the rule of law will be threatened in a manner that individual Judges may find themselves powerless to overcome.

Judges can never decide a case on the basis of anything other than the relevant law applied to the facts of the case. Judges must keep in mind the limits of their power. Statutes, for example, arrive before Judges as consolidated pieces of law. They may not be changed or amended in the courtroom, and their interpretation must not stray from the meaning of the language as it appears on the page – however much counsel urges otherwise or the Judge has a personal predilection to do differently.

II WHAT DOES THIS MEAN IN THE WIDER CONTEXT?

But what of judicial involvement in law reform, legislative amendment and operational issues? There are those who would argue that Judges have no part in any process outside of court while others promote judicial non-interference in the legislative process, but acknowledge that often Judges do contribute to the development of statute law through emphatic judicial comment – both in and out of the courtroom. I suggest that, in countries the size of most of ours where resources are often relatively scarce, it is constructive for Judges to engage with the legislative and executive arms of government. There is no necessary compromise of judicial independence if Judges in such circumstances offer general views in respect of structure, approach, and the operational reality of various statutory options. There is, of course, an ever-present risk of the appearance of interference – or of Judges being perceived to have pre-judged a matter in light of

communications with the executive. The House of Lords Select Committee on the Constitution considered exactly this issue in its report on the impact of the Human Rights Act 1998 and the Constitutional Reform Act 2005 on the relationship between the three branches of government and the independence of the judiciary. Considering the (im)propriety of discussion (and, impliedly, out-of-court "advising") between the Law Lords and the Home Secretary as to the consistency of the Prevention of Terrorism Act with human rights legislation, the Committee noted:¹

Whilst we have some sympathy with the difficulties outlined by [Home Secretary] Charles Clarke in relation to the Human Rights Act, his call for meetings between the Law Lords and the Home Secretary risks an unacceptable breach of the principle of judicial independence. It is essential that the Law Lords, as the Court of last resort, should not even be perceived to have prejudged an issue as a result of communications with the executive.

There is a clear difficulty with committee-like discussion between members of the executive and members of the judiciary. Discussion such as that sought by Charles Clarke in respect of the mooted British terrorism legislation would have required the Law Lords to comment directly on the merit of the very legislation they may later be required to consider in court. But it is possible for Judges to provide comment in other, acceptable ways. What is crucial is that any comment is kept at a sufficiently "meta" level, so that it is clearly operational constructive criticism, rather than substantive "committee" comment.

Judicial independence is not self-sustaining. True independence is not achieved by isolationism, separatism or distancing from other arms of government, but is made possible by a strong culture of judicial responsibility. That is not only the most meaningful guarantee of judicial independence, it is the obligation that Judges must accept as a natural corollary of sustained independence. As responsible Judges we are all required to keep abreast of legal, political and social developments, and to undertake ongoing training and engagement with cutting-edge ideas and legal theory, and – increasingly important as case loads increase and place judicial resources under strain – to take an active role in case management.

The recent success of Tonga's Chief Justice Anthony Ford in reforming Tonga's judicial system is an instructive example of how an innovative judicial approach to

¹ Report of the House of Lords Select Committee on the Constitution: Relations between the executive, the judiciary and Parliament (26 July 2007). Last accessed for this paper on 31 May 2009 at <www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15102.htm>.

case management can stabilise and invigorate a country's court system.² Chief Justice Ford introduced mandatory mediation in civil cases and enforced strike-out of unprosecuted cases. Tonga now has a computerised case management system, a computer-savvy court staff and an increased capacity to manage growing numbers of civil cases. By his reforms, Chief Justice Ford helped Tonga's courts to be independent of the constraints imposed by limited time and limited resources. Vanuatu achieved a similar success in 2002 with the adoption of its Civil Procedure Rules, which prescribed active case management and increased efficiency in the disposition of cases.³

Judicial independence is a matter of balance. That is highlighted by the increase in case complexity, with advances in forensic evidence presenting novel questions and conceptual puzzles in the criminal sphere, and the explosion of discovery requiring civil court Judges to engage with huge volumes of material prepared by counsel. In those circumstances, it is irresponsible for a Judge to attend a hearing without having first read and considered the case material. But, on the other hand, it is quite contrary to the right to a fair hearing for a Judge to make up his or her mind before hearing counsel's oral argument. The line between responsible preparation and dogmatic pre-determination is a fine one to tread. In an adversarial legal system, counsel are obliged to communicate their argument to the Judge as they wish it to be understood and, in theory, the Judge may adjudicate on the basis of parties' submissions alone. That hard-line position, is not, however, often conducive to the fair disposition of a case and Judges in reality have an obligation to acquaint themselves with the subject matter of a case. Only then can the core of a dispute be grasped, and a reasoned judgment produced. Judicial independence and judicial responsibility are, it seems, mutually antagonistic as well as mutually supportive.

III THE IDEAL OF JUDICIAL INDEPENDENCE

As the Lord Chief Justice of England and Wales said in his address at this year's Commonwealth Law Conference in Hong Kong:⁴

It is... fundamental that there are no circumstances in which the executive may even appear to tell Judges how cases should be decided. Even when the public agrees with

2 Pip Robertson *Reforming the Courts in Tonga* in *Currents* (NZ Aid Magazine) February 2009, Issue 13.

3 See Courts Act (CAP 122) Civil Procedure Rules No 49 2002.

4 The Rt Hon The Lord Judge, Lord Chief Justice of England and Wales *Judicial Independence and Responsibilities* (speech presented at 16th Commonwealth Law Conference, Hong Kong, 9 April 2009, accessed via <www.judiciary.gov.uk/docs/speeches/lcj-jud-independence-resps-hong-kong.pdf> (last viewed 8 June 2009)).

the executive at the particular time in relation to a particular point, future public confidence that justice will be done impartially and independently will be eroded. In the end, I firmly believe that the public, even if dissatisfied with an individual decision in an individual case, wants its judiciary to be independent of the executive.

There will be occasions on which public opinion is in favour of the executive. But political whims come and go and they are the province of elected and accountable politicians. In reality, political questions often come before the courts in the guise of, or bound up in, questions of law, which force Judges to engage with them at least to some degree (a trend which has increased markedly in New Zealand since the enactment of the New Zealand Bill of Rights Act 1990). But the judiciary is not a political organ, and its very integrity is contingent upon its maintaining constancy of principle, whatever the political or social climate. That is the responsibility of the judiciary, and that is what gives meaning to the concept of judicial independence from the executive branch of government.

IV MODELS OF JUDICIAL GOVERNANCE AND THE PACIFIC EXPERIENCE

Coming down from the heights of first principles, it is clear that the day-to-day running of a court-system has certain practical requirements. The scope of governance includes human resourcing matters (appointment and management of staff); services matters (management of IT requirements, library services and judicial education); property management; budget administration (budget-setting and management); overall management and administration; and external communication (who decides what public comment is made on matters relating to the courts).

In practice there are three broad domains in which judicial independence might either be fostered or stymied, depending on the model of governance adopted. First, there is a Judge's tenure and job security. Judging is a public business, and one that is open not only to the scrutiny of government, but to the participation of government actors often with a great deal at stake. There is potential for compromised judicial independence if Judges experience any negative nexus between the outcomes they reach in judgments and the security or quality of their position.

Secondly, there is money. Court administration must be paid for by public money, and if decisions as to how that money is allocated reside with the executive, then there is a risk that Judges may have insufficient autonomy to decide how best to spend the money required to run the courts.

It is also important that Judges have sufficient autonomy to resource their courts adequately, and to avail themselves of ongoing education, conferences and travel to

other jurisdictions. How funding is administered determines the extent to which a judiciary is genuinely independent of the executive.

Finally, there is the simple presence of the government, or existing or prospective political figures, in the courts. Judges are, as we have said, open to pressure from litigants. That pressure is of a unique character when the litigants in question have extensive power over judges' salaries, job security and the very composition of the courts.

Tenure is a curious concept. On the one hand, it ensures a kind of comprehensive independence and autonomy. That is the logic behind academic tenure, and behind judicial tenure. On the other hand, it might diminish accountability. Different jurisdictions strike the balance in different ways.

In the Cook Islands, as in New Zealand, Judges are appointed by the representative of the Crown on the advice of the executive tendered by the prime minister, and a Judge may not be appointed or continue to hold office after the age of 70. It has been the practice for many years now for New Zealand Judges to sit in sessions in the Cook Islands, and these appointments are now made under Art 53(2) of the Constitution, which provides for a judicial term of not more than three years.

However practically unlikely, the executive could demonstrate its displeasure of a Judge by not renewing the term. That has potential – at least in theory – to affect the way a Judge performs his or her role. In Kiribati and Nauru, judicial appointments are also for short contractual terms. In these circumstances, there is the danger that, as the end of the contractual term approaches, Judges might by wary of issuing judgments that might discourage the executive from extending the contract.

The actual political conditions will be the real determinant of whether Judges actually feel any insecurity because of the substance of their judgments. But the very possibility that Judges might tailor their decisions – even if only slightly – to avoid drawing the attention of the government and to preserve their tenure risks undermining judicial independence. Of course, the well-known friend of functioning government, convention, will often render concerns over matters such as executive interference or whim unnecessary. But the mere possibility that those concerns might be realised is itself a stain on judicial independence.

Judicial funding is typically achieved by a complex division of budget decision-making and allocation. Courts in Vanuatu, for example, operate on a self-

administration model.⁵ A judicial council obtains its funding from the Department of Finance, and the funding is then managed by a registrar of the judicial services administration. This model has the advantage of retaining decision-making over instances of spending in the hands of those who are most intimately involved in the processes to be funded, while retaining ultimate responsibility for budget-approval in government. Judicial independence is harmonised with governmental accountability. The public coffers are not bottomless, and Judges, like any public service, naturally have funding constraints. That is not objectionable.

What is objectionable is funding that tangibly restricts the ability of Judges to fulfil their responsibilities of ongoing education, or restricts the ability of courts to dispose of cases in a timely manner, or does not permit Judges and courts to embrace the opportunities offered by technological advancements, such as computerisation. Pacific jurisdictions have progressed significantly in this field. Tonga's overhaul of its court system alone demonstrates the benefit of granting autonomy to Judges to decide how to spend a court's budget.

Other jurisdictions have made changes too. In the Solomon Islands the Ministry of Justice and Legal Affairs used to control all funding of the country's courts and each funding request was through the Ministry. Now, the Solomon Islands' judiciary has its own budget, and its own accounting and administrative staff. That simple change has improved funding efficiency, and illustrates the real benefits that result when decision-making and control is devolved from the executive.

In Guam, in 1998, the country's legislature refined its laws governing the composition and powers of the judicial council. The judicial council was expressly stated to fall under the control of the judiciary, and the Attorney-General was removed as a member.

The presence of government or political figures in the courts is a natural consequence of the rule of law, but it can create tensions between the judicial and executive arms of government. Since each decision of a court must favour either one side or the other, what happens when a court is required to adjudicate a dispute that strikes at the heart of government?

In small Pacific states the courts have often been called upon to adjudicate between competing political parties. In Papua New Guinea, when Prime Minister Pais Wingti attempted to extend his position, opposition parties appealed to the country's Supreme Court. The Court found the action was illegal, which forced a new election. Indirectly, the judiciary determined the fate of executive government.

5 Judicial Services and Courts Act 2000 (No 54).

In Vanuatu, the Supreme Court has been drawn into political events, most acutely in 1996 when there was a dispute over the sitting of Parliament and the Chief Justice was sacked for gross misconduct after he issued arrest warrants for leaders of a revolt.⁶

In the Philippines, the courts were required to mediate disputes between supporters and detractors of President Ramos as he attempted to circumvent the end of his presidential term.⁷

What these illustrate is that in small political environments the independence of the judiciary can be rocked to its very core when the courts are the melting pot for political disputes. In such circumstances, the might of one arm of government, and its ability to amass military or police power, may decide the matter – at least temporarily. In such circumstances, the rule of law is under great threat, and such is the commitment of most countries to the rule of law that significant political sanctions are the usual response.⁸

Judicial independence is a topic which often engenders motherhood and apple pie sentiments among governance theorists and proponents. That is not to belittle, or to diminish its significance. But, judicial life is not a series of one-way streets. Alongside judicial independence sit two associated elements of the judicial role, which are equally important if judicial independence is to have real meaning.

I call them judicial responsibility and judicial accountability. I have already touched on judicial responsibility as a complement to true judicial independence, and acknowledged to the potential for judicial independence and responsibility to conflict with each other. But I emphasise the extent to which judicial responsibility is critical to robust court processes and to Judges who enjoy the confidence of the public they serve.

As Judges we are of course answerable only to the Constitution and the law, and to our oath in reaching individual decisions. But we cannot expect, advocate or demand judicial independence from executive government if we do not accept judicial responsibility. To do so would undermine the faith placed by the public in the judiciary, and weaken the courts' mandate to influence the development of the law.

6 Graham Hassall and Cheryl Saunders *Asia-Pacific Constitutional Systems* (Cambridge University Press, New York, 2002) 189-191.

7 *Ibid.*

8 Consider, for example, the suspension of Fiji from the Pacific Islands Forum in May of this year after the country's failure to hold democratic elections.

As I have said, in a day-to-day sense judicial responsibility engages our obligation to keep abreast of developments, to undertake ongoing training and exposure to new ideas, and to engage positively and proactively in case management.

That is not to say that we must all be expert in all areas of the law. Whatever the merit of a "generalist" judiciary, there is rarely a bench of Judges who are all equally competent in the same areas of law. That does not, however, excuse non-participation in cases outside our immediate scope of familiarity. We have a responsibility, in preparation for any matter we are going to hear, to acquaint ourselves with the relevant law. Only then will we be able properly to engage with submissions, participate in the hearing, and to discharge our responsibility to do justice between the parties.

In addition to judicial responsibility, there must also be self-imposed judicial accountability? Are we answerable for when and how we perform our judicial functions, and if so, to whom?

For me the answer is that we are absolutely accountable: to counsel who bring cases, to those who will be affected by the outcome we reach in our decisions and to the law itself. The elements of judging on which we can properly be called to account are timeliness of decision-making, intelligibility of decisions, and sensible sensitivity both to the reach of decisions into other parts of the law, and to the impact of particular outcomes on the parties.

We should never forget that people end up in court either because they have been compelled by the state to be there (in the case of criminal matters), or because they have no option (as a respondent to a civil claim), or because they have exhausted other legal avenues (such as negotiation or mediation). Some Judges characterise the courts as a forum for the law's advancement and development. I suggest, in modern society, that is a myth, and a myth that, if perpetuated, hampers the efficient administration of the courts. In my country at least, the operation of the District Court in its criminal jurisdiction deals to an overwhelming majority of the work. Its speedy despatch is essential. The consequences for individuals of criminal convictions and particular sentences simply do not permit Judges to prolong their decision-making unnecessarily. Judicial pragmatism is essential. Sentence indications are an example of an attempt to speed-up criminal court procedure. Such an operation can be seen as countering some pure jurisprudential concepts, but strict adherence to such notions will bring the system to its knees. There can be no deviation from fundamental precepts of the onus and standard of proof, the right to participate, confront and challenge, and the provision of clear

and comprehensive reasons. They are givens, but how they are provided must be sensibly appraised.

The necessity of pragmatism in the criminal courts means that only a very small number of criminal cases come up for lengthy consideration. Those are the cases that set the precedents by which the vast majority of cases are disposed. They are the exceptions to the general rule that cases are decided by the application of the relevant law to the facts. Most cases do not have scope beyond the defendant in respect of which they are made, and the need to expound general principle or theory on abstract points of law is curtailed.

Judicial review and public law are two areas in which the courts hold public decision-making bodies to account. Judicial review engages courts in a critical oversight role, and it is one of the spheres in which the demand for judicial independence can be most tested. Judicial review and public law cases less often lend themselves to accommodations between the parties, but even there it can occur. It is fundamental that the Court's role is not sullied.

In civil law generally, courts are becoming less relevant. There are few litigants who actually care whether the High Court of Australia is to be preferred over the Supreme Court of Canada. Most litigants want no more than the quickest, cheapest and simplest way out of a problem. Of course, large companies, particularly those concerned with competition law, often pursue litigation as a means of obtaining a precedent by which they can conduct their business. But, it is not the role of courts to provide litigants with multi-purpose precedents.

Mediation, as an alternative means of dispute resolution, has become increasingly utilised in the last couple of decades. Where litigation is public and sometimes ugly, mediation and arbitration have the benefits of confidentiality, adjudicators chosen by the parties themselves,, and much more timely dispute resolution

There remain, however, a distinct set of cases where the people involved, for whatever reason, have no option but to use the courts. To those people, be they involved in criminal or civil matters, we owe an absolute duty to provide a system in which they can obtain relief in a timely way. In civil matters, waiting for years to get a fixture is an anathema. Waiting years, let alone months, to get a decision is inexcusable. The higher the court responsible for issuing the decision, the greater the judicial obligation. On appeal, a case has been heard at least once, and sometimes twice or even three times. Higher courts have the real benefit of having had the hard slog of fact-finding done for them. This is what I mean by judicial accountability, and it is no more than is required by the rule of law.

In the common law tradition, it is assumed that the parties to a dispute are equally resourced, equally represented and equally capable of putting to the court comprehensive submissions and competent oral argument. We all know that in the bulk of cases that is not the reality. The question, then, is what is the Judge's duty to ensure that germane aspects of a case that counsel do not present are taken into account and allowed to inform the disposition of the case? It is elementary that cases must remain within the control of the parties and not become hobby-horses of individual Judges who choose to pursue their own whimsies or agendas. Perhaps the most realistic solution is for Judges to attempt to engage fully with counsel during hearings, with the practical aim of filling in gaps left by imperfect submissions, but not of constructing a substantially different case to that advanced by the parties, however much an alternative set of arguments might be preferable.

A judiciary cannot be independent without the support of an independent profession. Indications in some parts of the Pacific in recent weeks reminds us of the attacks which can be levelled by executive government not only at the judiciary itself, but equally at the lawyers who appear in those courts.

At a micro-level, taking cognisance of different models of judicial administration and management may be of less moment. What is universally required is an environment in which a state's Judges are free to make decisions as they see fit on the facts as they determine them to be. That is the pith of judicial independence, which is made possible only by strong habits of judicial responsibility and accountability.

V CONCLUSION

I have focussed in this paper on the common law tradition of judicial independence which holds that the three arms of government ought to be separated and autonomous. The position in civil law countries is, however, different, with the judicial and executive branches of government tending in practice to be more integrated. In this context, judicial "independence" might mean something more like "impartiality".⁹ I suggest, however, that what really matters are not the formal mechanisms by which judicial independence is achieved – although robust formal mechanisms are a good start! – but the actual experience of Judges in the operation of courts.

What is telling in any given jurisdiction is the extent to which its judges are able to perform their role with integrity and without regard to external pressures, and the extent to which they are able to fulfil their complex responsibilities. In the Pacific

⁹ For a discussion of the civil tradition in the Asia-Pacific region see Hassall and Saunders at 188-189.

that challenge is complicated by small nation size and, in some cases, still maturing and settling political systems. But as long as the rule of law is expounded as the first principle of functioning government, then judicial independence will have a strong foundation, and a promising future.