THE HISTORY, MEANING AND IMPORTANCE OF JUDICIAL INDEPENDENCE:

A COMMONWEALTH CARIBBEAN PERSPECTIVE (With Emphasis on the Cayman Islands)

Lecture given to the Stetson University Law School Winter Programme, Delivered at Cayman Islands Law School December 2012.

The very insightful lectures you have already heard would have already covered some areas of Cayman constitutional law.

My lecture will focus upon the concept of judicial independence as an indispensible element of constitutional governance. Here you will find a remarkable commonality between the constitutional history of the Cayman Islands and that of the United States starting with events that converged at or about the time of the American revolutionary war of independence.

A not very widely known fact is that the Islands' modern status as an international financial centre underpinned as it is by a system of tax neutrality, has a direct link to the American revolutionary war, a link which developed in this way: faced with the prospect of losing its 13 colonies in America, the British Crown became concerned that the battle cry of "no taxation without representation" would spread throughout its remaining colonies in the British West Indies. The concern was that these colonies would declare themselves to be independent rather than submit to being taxed by a ruler who was 5000 miles away and who gave nothing in return. At the time, the Cayman Islands were barely a settlement but other islands, most notably Jamaica, Barbados and Trinidad were producing massive tonnage of sugar and were significant contributors to the GDP of Britain. Indeed, Jamaica was regarded as "the Jewel in the British Crown".

Something had to be done to prevent further rebellion throughout the sugar producing colonies and so the Taxation of the Colonies Act of 1778 was passed in the throes of the Revolutionary War. It was however, too little too late because the 13 American colonies had already declared their independence on 4th July 1776, But the promise of no further taxation (beyond that already imposed on molasses and rum) became and remained of real significance to the remaining colonies throughout the British West Indies.

The Cayman Islands never having had a plantation economy, the Act of 1778 became of long term historical importance to them as there was, at the time, simply nothing here to tax. But, the Act of 1778 carried the promise of the Crown of no taxation, and this promise became a part of the legal legacy of the Islands until the Act was repealed as being obsolete in 1973. The result was that direct taxation never became a factor of life in these Islands and so the tax haven status was born and later nurtured and developed, giving rise to the tax free environment which is of such topical importance today.

Taxation of the Revolutionaries without representation, while the main, was not the only bone of contention with the Crown. As we will see when we come to look a bit further at the history of judicial independence, one of the main concerns in the Petition of Grievances sent by the First Continental Congress[1] to King George 111 in October 1774 was that of the continuing control of the judges by the king.

This control had continued despite the passage of the Act of Settlement 1701 in which parliament had declared that the judges were to be free of interference from the legislature and the king.

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[1] www.ushistory.org/declaration/related/congress.htm.

Foremost among the grievances in the Petition of Grievances were the following:

"The judges of admiralty and vice admiralty courts are empowered to receive their salaries and fees from the effects condemned by themselves". In other words, not only were the judges being used as tax collectors for the crown, expanding rather than reducing the crown's fiscal authority; they were also being made judges in their own causes as tax collectors paying themselves. This must have seemed to loyal colonists, an untenable position of conflict of interests. And they had a further grievance as follows: "The judges of courts of common law have been made entirely dependent on one part of the legislature for their salaries, as well as for the duration of their commissions".

So here we see in 1774, that the colonists understood well the dangers of a judiciary that was not free to administer justice between king and subject as the case might deserve but which was beholden to the Crown and its legislature and so likely to do their bidding.

It was not surprising therefore, that after the Revolutionary War the independence of the judiciary was now of paramount concern and came to be enshrined in article 3 of the United States Constitution where the federal courts were established as a separate arm of government. And there, in words reminiscent of the Act of Settlement itself, it is provided that judges of the Supreme Court (and of other federal courts established by Congress), "shall hold their office during good behaviour and shall… Receive for their services compensation which shall not be diminished during their continuance in office."

Thus, the new Constitution would unmistakably adopt and enshrine the assurance of an independent judiciary, that which was promised in the Act of Settlement 1701but which, from the point of view of the colonists, was never

actualised.

Events over the two hundred and thirty-six years since the American Declaration of Independence have only served to confirm that the separation of powers and the independence of the judiciary are of the essence of true democratic governance.

And, given the common history, one might ask, how have the judiciaries of the Island states of the former and present British West Indies fared over the passage of time?

The constitutional laws of the countries of the English Speaking Caribbean have changed only incrementally in relative terms, since the wave of constitutional reform that swept into being the independence constitutions of many countries in the 1960s. The same holds true in relation to those territories such as the Cayman Islands, that have remained constitutionally and politically British.

This history of constitutional affairs can be seen as a measure of the stability of the democracies of the Commonwealth Caribbean.

With the notable exceptions of Grenada in 1979[2] and the Turks and Caicos Islands at the moment[3], the states of the English-speaking Caribbean have remained, since the brief advent of Federation in 1959 and the movement of many states towards independence in the 1960s, politically stable, free of military interference in civilian affairs, and relatively respectful of their citizens' civil and political rights.

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[2] The leftist New Jewel Movement seized power in a coup in 1979 suspending the Constitution adopted upon independence from Britain in 1974. The Constitution was restored after a U.S. led invasion, supported by troops from Jamaica, in 1983.

[3] Britain suspends Constitution of the Turks and Caicos, 14 August 2009. www.fco.gov.uk/en/news: "A major step to clean up public life in Turks and Caicos Islands". A new Constitution was introduced in July 2012 but elections for a Government

have not yet taken place and all executive authority remains vested in the Governor.

Scholars will point to many reasons for this but there can be no doubt that the reasons include the extended period of political socialization experienced before the advent of independence, during the era in the 1940s and 1950s of internal self-government, under the Westminster model of government.

That era saw the formation and maturation of political parties, the holding of competitive elections for internal self-government and a number of successful cycles of governmental changes as the results of those elections.

This period of post-colonial transitional democratization fortuitously also coincided with the advent of the United Nations and the Universal Declaration of Human Rights, which later came to find expression in the entrenched Bills of Rights of the British Caribbean Independence Constitutions. These advancements took place in the 1950s and 1960s and so, as American Legal scholars, you can take pride in reflecting upon the fact that your Constitutional Bill of Rights, which are embodied in the First Ten Amendments of your Constitution, were already enacted by 1791!

But though it happened some 200 years later in the British Caribbean, the process of constitutional advancement was nonetheless remarkable. In the British Caribbean, it resulted in systems of government under the rule of law which enshrined the Constitution, including the Bills of Rights, as the Supreme Law. These Caribbean written constitutions came to entrench the doctrine of separation of powers in a manner that the Westminster Parliament, even while exporting the concept of the written Constitution to the

newly independent States, had not yet achieved for itself.

Indeed, it was not until the Constitutional Reform Act of 2005, that the link between Parliament and the Judiciary (in the House Lords Judicial Committee), was at last formally separated by the creation of the Supreme Court of the United Kingdom. Another important innovation of the Constitutional Reform Act of 2005, was that which changed the process for the appointments of judges, removing it from the direct control of the Lord Chancellor, who, although the constitutional head of the judiciary was, nonetheless, a senior political and partisan figure.

This independent process for the appointment of the judges was another way in which the United Kingdom's Constitution was catching up with those which had been successfully exported to the rest of the Commonwealth, and for that matter, with the standard declared more than 200 years earlier by the American Revolutionists!

Cayman's constitution is now to be seen as typical in this respect. It provides for appointments by the Governor acting on the advice of an independent services commission; for the security of tenure of judges during good behaviour and that judges' salaries may not be reduced while they are in office without their consent. Again, all reminiscent of the Act of Settlement.

And so, we are able to reflect upon the English-speaking Caribbean constitutions, including Cayman's, as the products of their progressive generation and derived from a shared political and institutional heritage with Britain, and although having found expression in written form (following the paradigm example of the United States), have remained faithful to the Westminster tri-partite system of Government.

But, as scholars of legal history, it is well worth noting that our shared history with Britain was not the beginning of the process, only the outcome. The modern Westminster model – that which depends on the separation of powers – is itself the product of a process of democratization that only gradually emerged over the course of thousands of years.

Throughout the ancient world, the absolutist kings exercised unbridled powers, including ultimate legal authority. Beyond declaring the law and enforcing legal rules, the king in ancient regimes enjoyed full adjudicative powers as well.

The inevitable march from despotism to democracy is said to have first emerged in the form of an early Hebraic conception of an independent Judiciary.

In brief, two formative moments in the Hebraic tradition – one biblical as recorded in Deuteronomy, the other rabbinic, as recorded in the Mishnah – point to the establishment of an independent judiciary operating beyond the role of the king. Deuteronomy describes a centralized judiciary that oversaw an elaborate network of municipal courts and the verses that discuss the administration of justice do not suggest that the king participated in this role[4].

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[4] David C. Flatto, The historical origins of Judicial Independence and their Modern Resonances, 117 Yale L.J. Part 8 (2007) and Deuteronomy 17:8-13.

And as the First Book of Samuel explains at Ch. 10:25; Biblical judges performed judicial duties and the institute of judges was separated from the institute of the king. Moses himself exercised the powers of a superior judicial body and is said to have lain the foundation for the separation of powers indispensible to any democracy, by the creation of an independent judiciary[5].

It is also, of course, widely accepted that Greco-Roman thought was instrumental in the development of western constitutional theory. And the foundation on which the modern constitutional theorists such as Locke, Montesquieu and Blackstone rested their dictum of separation of powers, had long been laid by Plato, Aristotle and Polybius[6].

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[5] Diamont Max: Jews, God and History, New York, 1994, p. 45.

[6] The Oxford Encyclopaedia of Ancient Greece and Rome Vol. 1 by Gagovi and Fantham; Oxford University Press, February 16, 2010.

Despite this early history, the notion of an independent judiciary emerged in a painfully slow manner by way of the English tradition, as the successive despotic kings of England would only reluctantly loosen their grip upon totalitarian rule.

The first traces of an English (and thus a Cayman, as well as a British American) modern judiciary can be seen emerging in the 12th Century A.D. As the business of the Royal household grew more specialized, it became possible to identify a small group of court officials responsible for advising the King on the settlement of disputes. In 1178, Henry II first chose five members of his personal household, two clergy and three lay *"to hear all the complaints of the realm and to do right".* These "*embryonic judges*"[7] were to carry out their work as part of the King's "*Court*" and their activities were supervised by the "*King and the wise men of the realm*". This was the origin of the court of Common Pleas, and the M*agna* C*arta* prescribed that this Court should sit permanently "*in some certain place*", which in practice, became the Palace at Westminster itself.

This close relationship between the King and the Court continued for hundreds of years, although there were many periods of disquiet when the judges tried to distance themselves from the controlling influence of the Kings. However, the prescribed and incongruous nature of the relationship between the King as principal law maker on the one hand, and the judges as interpreters of English law, on the other, remained unresolved.

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[7] Judicial Independence – Its History in England and Wales. Rt. Hon. Brooke LJ, Court of Appeal,England and Wales

Things came to a head in the latter part of the 17th Century with the "*Glorious Revolution*[8] of 1688" when King James II, who had become infamous not only for his counter-reformatory leanings towards Roman Catholicism, but also for his control of the judiciary, was deposed. Parliament had understandably come to see the judges as the subservient tools of the King, and the King, seeking to rule without Parliament, saw the control of the judiciary as an essential element of royal power.

This long constitutional conflict in English history was therefore all about power. Where did sovereign power reside? What power did the sovereign have to dispense with the law? To whom were the judges responsible?

On the day after the House of Commons resolved that King James II had abdicated in favour of the co-regency of William the 3rd and Mary the 2nd, a parliamentary committee drew up Heads of Grievances to be presented to the new Sovereigns. These included provisions, which in the light of the history of despotic control of the judges by earlier Kings, were seen as essential for ensuring the independence of the judges. They provided ,"*for making judges" commissions permanent during good behaviour; for ascertaining and establishing their salaries, to be paid only out of the public revenue (as distinct from by way of grants from the King or his courtiers); and for preventing the judges being removed and suspended from the execution of their offices, unless by due cause of law*[9]."

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[8] W. Holdworth, History of English Law (7th Ed. 1956),195

[9] See *Judicial Independence:* Brooke LJ (above).

These reforms, which are regarded as having laid the permanent foundation for the independence of the modern judiciary, were enacted in much the same form in the Act of Settlement 1701 and have remained in place ever since. As already mentioned, they purported to ensure the two things that are vital to judicial independence: security of tenure and financial security of the judges, both being put beyond the control of the King.

Apart from the crucial achievement of the separation of the judicial branch from the King, the Act of Settlement was also aimed at eradicating the wide spread corruption within the English judiciary of which Francis Bacon's fall from office as Lord Chancellor in 1621, for accepting gifts from litigants appearing before his court, was perhaps the most notorious example.

Notwithstanding those constitutional advances during the reign of William and Mary , more than 70 years later, at the time of the American Revolution, as we have seen, the colonists upon declaring their independence from England included, among their List of Grievances against King George III; their characterization of the King's control of the British judiciary as an obstruction of justice declaring that "[the King] has made Judges dependent on his will alone for the tenure of their office and the amount and payment "of their salaries".

Thus, from the point of view of the Founding Fathers at the time of the American Revolution, the reality of British colonial judicial dependence did not match the perception of independence sought to be created by the Act of Settlement 1701.

The Founding Fathers nonetheless understood the importance of the principles sought to be captured by the Act of Settlement and so proposed for enshrinement in the first modern written Constitution of the Western World, the principle of permanent tenure for federal judges during good behaviour; and for financial security by forbidding any reduction in federal judicial salaries. It was also then recognized and as we have seen- came to be enshrined in Article 3- that security of tenure would not count for very much if the executive branch were at liberty to reduce a judge's pay if it did not like his or her judgments, or do away with the Federal Courts altogether if they became an impediment to political objectives.

And so, as we have seen, the separation of powers became central to the United States Constitution – as it was later to become for the written constitutions of all nations within the Commonwealth of Nations. The intermingled tripartite system of government with the checks and balances of its great organizing principle – the doctrine of separation of powers – became irreversibly entrenched, including its essential commitment to a separate and independent judiciary.

What then, in today's world one may ask is the importance of an independent judiciary to the doctrine of separation of powers? Long gone are the days when despotic kings would seek to subjugate the judges, in the way lamented by Chief Justice Sir Edward Coke in his assertion that the judges of James I's reign were not to be seen, as "*lions under the throne*" (as his rival Francis Bacon had proposed and declared) but as *"umpires between King and subject"*[10].

One may be inclined to think that the fact that Chief Justice Coke was imprisoned by James I for this outward show of rebellion, is so far removed from present day Commonwealth democratic reality, as to require of nothing more than relegation to the annals of history. Regrettably however, any such sense of complacency would be badly misplaced.
We need not look far for proof in this regard: examples of present day abuses abound in our midst within the Commonwealth. Just since the beginning of 2012 we have seen[11] -

- a stand-off between the Government and the judiciary in Pakistan over the refusal of President Gillani to obey a court order directing him to institute an investigation of corruption against his predecessor President Musharraf[12].

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[10] Catherine Drinker Bowen: *The Lion and the Throne, the Life and Times of Sir Edward Coke 1552-1634.*

[11] See Dr. Karen Brewer, Secretary General of CJMA: "*100 days of the EPG Reform Agenda – Progress and Priorities. The Strengthening of Democracy, Rule of Law and Human Rights in the Commonwealth".*

- an attempted coup in Papua New Guinea (including many attempts to suspend the Chief Justice since November last year)[13];
- The invasion of court, kidnapping and arrest by paramilitary forces of the Chief Justice in the Maldives[14];
- The closure of all the Courts in Malawi due to a strike by court officers who have not received increments although agreed by Parliament since 2006[15];
- the farce of the non-democratic government of Fiji lifting the Emergency Rules only to replace them with orders along the same lines and thus preventing ordinary access to the Courts[16].
- Attempts by the Sri Lankan government to impeach the Chief Justice apparently in reprisal for a constitutional ruling unfavourable to the Government but favourable to the Tamil ethnic minority.

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[12] BBC News Asia; 19th January 201

[13] For having declared the opponent of the incumbent Prime Minister to have been the winner of the last elections: The Australian News, Feb. 12 2012.

[14] For having ordered the release from unlawful detention of the Opposition Leader citing "corruption" as the grounds of arrest: *The Jurist, 17 January 2012.*

[15] Irish Rule of Law International, January 2012.

[16] The Guardian, AP Foreign, Friday January 6 2012.
And see: Sri Lankan lawyers reject new chief justice: en-maktoob.news.yahoo.com.

Closer to home in the Cayman Islands, there have been transgressions, which although not as blatant as those examples, are cause for concern nonetheless. For instance, the arrest of a judge here in 2008 by the police in the so-called "Operation Tempura", on the spurious basis of alleged misconduct in public office with the knowledge and support of the Governor, and which allegations were never and could never have been substantiated, was an egregious example of an attack upon the judiciary by the executive.(See Henderson v The Governor 2008 CILR 28)

The obvious lesson that these recent and current examples of intrusion upon judicial independence hold for us who enjoy the relative stability of our Caribbean and United States democracies is, of course, that we may never take the great organizing principle – the separation of powers - for granted.

The separation of powers is properly regarded as the "backbone of democracy"[17]. The modern understanding of the principle is based upon the concept of a "trinity of branches" whose status stems from the constitution. Each of the three branches is limited in its authority and its powers. None of them is omnipotent. The legislative branch, the executive branch and the judicial branch are of equal status and have no authority beyond that granted them in and by the Constitution whose power stems, in turn, from the people.

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[17] So described by Aharon Barak: The Judge in a Democracy; Princeton University Press 2006 adopting the dicta from Cooper v Canada [1996] 3 S.C.R. 854, 867.

The importance of the principle of the separation of powers is in the very connection between the three branches that requires them to function together within the limitations– or checks and balances – that they place on each other.

It is against this historical backdrop of the emergence of the doctrine of separation of powers that we can properly understand the concept of judicial independence, the focus of my talk to you today. What is Judicial Independence? Why is it important? And, given the very premise of its justification – which is to serve and protect the rights of the people – how then are the judges themselves to be held accountable?

What then is "judicial independence?

Like the proverbial elephant in the room, it is remarkable as much by its presence as by its absence, even though it may not be easily described. The following example of its very noticeable absence, taken again from the Pakistani experience is illustrative.

Tensions between President Musharraf and the judiciary came to a head in 2007 when he suspended Itjikhar Chaudhry, the Chief Justice of the Supreme Court, sparking mass protests by lawyers and wide political unrest. When the court attempted to rule on the validity of Musharraf's victory in the October presidential elections, he again took pre-emptive action and imposed martial law on November 3rd, suspending the Constitution, replacing much of the higher judiciary, and arresting more than 6000 civil society activists, political leaders, and lawyers. When the state of emergency was lifted under an amended Constitution fashioned by Musharraf, a judiciary, also of his own choosing, was installed. Musharraf, who first came to power by way of a coup in October 1999, remained in power for 9 years until August 2008.

From that chilling and oppressive example of the Pakistani' experience, we can at once identify the importance of judicial independence and lament its absence. Chief Justice Chaudhry and his colleagues, left to the exercise of their independent judgment free from political interference, would have upheld the constitutional right of the people of Pakistan to a democratically elected government. The usurpation of the democratic process by Musharaf and his military prevented the judiciary from doing so and denied the people that most fundamental of rights.

The Pakistani experience under Musharraf also provides a poignant reminder that judicial independence has two distinct elements: first the institutional independence of the judges and, secondly, the individual independence of judges as dispensers of justice in the cases as they happen to come before the courts.

Both elements of judicial independence are indispensible to the assurance of constitutional governance and the proper administration of justice.

Again from the Pakistani example, it can plainly be seen that judicial independence requires that judges not be subject to control by the political regime and that they be shielded from any threats, interference or manipulation which may either force them to unjustly favour the state or subject them to punishment for not doing so.

The rule of law – that central tenet of the democratic social contract by which those who are governed agree to be governed, and which requires that no person is above the law – is not secure when the institution for its enforcement

is composed of judges who either fear challenging the government or are already predisposed towards declaring its deeds to be lawful.

And so we see being distilled from this dialectic, two clear requirements of judicial independence: first impartiality or the absence of bias and second, "political insularity"[18] – the assurance of being insulated from political interference.

These are the important elements of independence that have found expression in the constitutional requirements that judges may not be removed from office for reaching decisions which are generally or politically "unpopular", and that the makeup of the courts should not be altered for political reasons.

It is to be expected then that in any attempt at formulating a complete definition of judicial independence – there will be the inevitable reference to impartiality and insularity.

One definition offered by a leading American Academic[19] I find to be especially compelling: Judicial Independence is "*the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice, free from coercion, blandishments, interference or threats from governmental authorities, private citizens [or powerful interest groups]"*

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[18] See: Fiss, "The Limits of Judicial Independence, 25 U. Miami Inter-Am. L. Rev. 58 (1993) for the coining of this expression.

[19] Rosenn: "The Protection of Judicial Independence in Latin America 19. U. Miami Inter-am. L. Rev. 1-25 (1987).

This definition also neatly captures the two essential elements of institutional and individual judicial independence mentioned earlier.It must not be forgotten that not only is the independence of the individual judges to dispense justice important, but no less so is the independence of the judicial institution as a whole.

Judicial independence is not meaningful if the judiciary is not afforded the means by which to dispense justice. To be sure, judges need to be impartial and insulated from political pressure, but just as important, allowed to operate a broadly defined scope of institutional authority for the judicial branch[20].

This concept of administrative autonomy as an aspect of judicial independence should by now be regarded as beyond debate having been settled by Commonwealth Heads of Government as a defining principle of the Commonwealth (Latimer House) Principles on the Accountability of the Relationship between the Three Branches of Government [(as agreed by Law

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[20] Thus, a more accurate definition of judicial independence might be posited:

> "Judicial independence refers to the existence of judges who are not manipulated for political gain, who are impartial towards the parties of a dispute, and who form a judicial branch which has the power and means of an institution to regulate the legality of government behaviour, deliver "neutral" justice, and determine significant constitutional and legal values." (See Rosenn (supra).)

Ministers and endorsed by Commonwealth Heads of government Meeting, Abuja, Nigeria 2003)]. Article 1v) (c) of the Principles declares:

> *"Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought."*

But what, we may well ask, is the reality within the Commonwealth Caribbean, of which Cayman is a part? There is no doubt, as the scholars and other commentators have been willing to acknowledge[21] that the Commonwealth Caribbean has been blessed with capable, strong and independent judges and that judicial independence at the individual level is well established and recognised.

It is, however, at the institutional level of independence, in practice if not in theory, that we lag behind the modern constitutional standards and indeed, behind the modern democratic expectations of our citizens.

Despite the endorsement of all of our governments of the Commonwealth (Latimer House) Principles; throughout the Commonwealth Caribbean the judiciaries in the main have no autonomous control over their budgetary affairs. Instead, the judicial budgets, even after they are approved and allocated by Parliament, remain under the direct control of the Ministers of Justice such that

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[21] See, for instance: Constitutional *Reform in the English-speaking Caribbean*: Challenges and Prospects (The Judiciary at page 10). A report prepared for the Conflict Prevention and Peace Forum January 2011: www.webarchive.ssrc.org.

expenditure is approved on the piece-meal, virtually item by item basis, and must be submitted by the Heads of Judiciary and first approved at the political ministerial level, before the expenditure is allowed.

So invasive has this practice become in some of our Caribbean jurisdictions, that as Chief Justice, I have had to commiserate first-hand with colleagues who must first secure ministerial approval before they can travel to attend important conferences overseas – conferences which are essential for continuing judicial education and for the cross-fertilization of ideas which foster the enhancement of the democracies that we serve. And this sort of budgetary control should not be underestimated for its demoralizing effect: a recent example was the rejection of the request of one of my colleagues for the modest funds to host the annual conference of Caribbean Heads of Judiciary, with a peremptory ministerial rebuff to the effect that "The Government doesn't have money for that sort of thing".

That was a response that suggested that the Minister had an image in mind of the Chief Justices merely getting together to have a good time!! Such an attitude is a parody on our Caribbean sense of business and is far removed from the system in the United States where Judicial Conference of the United States, made up of senior Federal judges, controls the budgets for the Federal Courts.

An even more poignant example of lack of institutional independence and closer to home here in the Cayman Islands, was the recent diversion of the entire legal aid budget away from the Courts by way of ministerial edict for other so-called "nation building purposes".

Although the judiciary in Cayman has autonomy over its own budget once agreed by legislature and the Cabinet, this arrogation of legal aid budget was said to be justified in part out of a sense of political umbrage that the Courts should not be spending money on expensive lawyers "*to get criminals off the hook*".

This happened notwithstanding that in the Cayman Islands, the Courts are charged by law and the Constitution with the administration of justice, an essential part of which is the delivery of legal aid for most criminal defendants who cannot afford to pay their own lawyers[22].

While the position with legal aid has since been restored to the status quo ante, the episode certainly gave the impression that the political directorate did not regard the administration of justice as an important priority and did not understand the need for the institutional independence of the judiciary as a vital aspect of its ability to administer justice. The episode was an example of how bureaucratic control of the administrative functions of the judiciary, can undermine the need of the judicial institution to be insulated from political control.

Given all that I have said so far, you may well consider to be rhetorical the next question – "*Why is judicial independence important?*" But, in reality, it still is a question that exercises the minds and emotions of many in our societies.

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[22] The diversion of the legal aid budget happened also despite the clear provisions of Section 107 of the Cayman Islands Constitution Order 2009 which states: "*The Legislature and the Cabinet shall uphold the rule of law and judicial independence, and shall ensure that adequate funds are provided to support the Judicial Administration in the Cayman Islands."* Part V of the Constitution establishes the Judicature of the Cayman Islands, Section 96 providing for the appointment and tenure of Judges of the Grand Court as well as with Section 106, for the discipline of judges.

And why is this? I think it is because, as Justice Stephen Breyer of the United States Supreme Court explains[23]:

> *"It is not because judicial independence is not (seen by people as) important – (most see it) as very important. Rather, it is because as soon as I start talking about the need for tenure, security of salaries, and adequate resources, the average person will say, "Of course you think that, you have a personal interest, you are a judge. Those are your problems. Every person has problems, and many have worse problems than you."*

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[23] Comment: Liberty, Prosperity, and a strong Judicial Institution. http://www.law.duke.edu/journals/61LCPBreyer

So then, despite such typical sentiments, why is judicial independence so important?

Throughout the Commonwealth Caribbean, as in the United Kingdom, and in your own country the United States, judges take the oath to do right by all manner of people coming before the courts the same whether "they are poor or rich", "without fear or favour, affection or ill-will." The oath is the judge's personal acceptance of the requirement of impartiality and at the same time demands freedom from external pressures, whether from the executive, powerful interest groups or even from other judges. No citizen challenging an action or decision of government that affects him or her would want the case decided by a judge whose tenure or promotion may depend on the goodwill of government. And in this regard, the appearance of the possibility of interference is as important as the reality.

But, whatever the perception of the individual litigant may be, it is now widely and ever more increasingly understood that people's liberty and prosperity depend greatly upon there being strong judicial institutions within the democratic framework of governments.

There is now a significant body of legal and political research and studies done by international organizations and human rights activists who have all identified the important role that an independent judiciary must play in securing the fundamental human rights that are promised by modern constitutions. Indeed, many assert that it is the indispensible link in the machinery for securing individual protection against human rights abuses by the instrumentalities of the State[24].

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[24] See, for a useful survey: *Judicial Independence and human rights protection around the world; Linda Camp Keith "Judicature" Vol. 85 November 4, January-February 2002.*

The nexus between the independence of the judiciary and human rights has been most strongly emphasised by the international organizations. Both the Universal Declarations of Human Rights and the International Covenant on Civil and Political Rights, identify an independent judiciary as one of the essential elements for safeguarding human rights. And the United Nations, which also regularly assists emergent states in establishing systems of justice, has set forth standards for achieving an independent judiciary in its Basic Principles on the Independence of the Judiciary[25].

But of course, none of this is really new. As Alexander Hamilton, one of the framers of the United States Constitution declared: "(limitations on government) *can be preserved in practice no other way than through the medium of courts of justice….Without this, all the reservations of particular rights or privileges would amount to nothing."*[26]

Thus, judicial independence is essential, not for the personal sake of the judges themselves, but for the ability of the judges to ensure the rights of citizens.

An independent judiciary is able to ensure that powerful individuals must conform to the law; that no one is above the law and no one is below the law. Without it, there is little hope for the rule of law and the preservation of the social contract between the governed and those who govern.

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[25] Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26th August – 6th September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 Nov. 1985 and 40/146 of 13th December 1985.

[26] Alexander Hamilton, The Federalist Newspaper No. 78, at 465, 466 (Clinton Rossiter ed., 19610.

As Lord Acton memorably stated: "*Power tends to corrupt and absolute power corrupts absolutely.*"[27]

A further import of an independent judiciary, not to be overlooked, is the stability that it provides to the economy by the assurance of the rule of law. The harmful consequences of a controlled judiciary is often illustrated by reference to intrusion upon personal liberties. But the effect of a non-independent judiciary upon commercial interests and upon the stability of economies, and so the welfare of citizens, could be equally devastating. Consistent and predictable enforcement of contractual and commercial rights are crucial to business development. The co-existence in the developed and fast emerging economies of stable, independent court systems and thriving national economies is hardly co-incidental. Investors and developers cannot risk doing business in an unstable legal environment where their legal rights depend merely on who is in power. They depend on the uniform application of the law by a judiciary that is not swayed by either popular opinion or political power, but is instead guided by precedent and the rule of law.[28] I would suggest that no more needs be said to explain the importance of an independent judiciary; but a little must be said about judicial accountability if the true meaning of the separation of powers and the rule of law is to be recognised.

BREAK FOR 5 MINUTES

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[27] En.wikiquote.org/wiki/John.Dulberg-Acton

[28] Judging Judges: Securing Judicial Independence by use of judicial performance evaluations. Penny J White, 29 Fordham Urban Law Journal 153,

SEE ALSO: The World Bank Group- Legal Dissolutions of the Market Economy. Judicial Indiependence: What it is, How can it be measured, Why it Occurrs. http://www.worldbank.org/publicsector/legal/judicial independence.htm2001.

Judicial Accountability

What then, do we make of the notion of judicial accountability? How do we ensure that the judges themselves do not exceed or abuse the authority vested in them by the law and the constitution? And how are they to be held to account when they fail to carry out their duties in a timely manner?

These are all important questions to be addressed in any discussion about the doctrine of separation of powers, the rule of law and judicial independence.

Nothing can be more detrimental to the rule of law and the independence of a judiciary than the absence of the trust and confidence of the people they serve – the situation that would readily occur if judges were seen as unaccountable for their misdeeds or their incompetence.

And the notion of accountability itself gives rise to the spectrum of issues just mentioned. These range from accountability to the rule of law by restraint of judicial activism that would stray into the realm of the legislative and executive functions; to misbehaviour or inability justifying removal; to disciplinary control for failings which fall short of justifying removal.

The time available allows only for a brief discussion of this spectrum of issues. A particularly notorious example of the first – judicial activism going beyond the proper bounds of the law and constitution – is often cited as the U.S. Supreme Court decision in Bush v Gore.[29] There the outcome of a presidential election was determined by judicial edict declaring the results of the Florida election in favour of President Bush by the narrow margin of 537 votes of nearly sixty (60) million cast, rather than by reference back to the Florida electoral and constitutional machinery for recount.

Many commentators[30] believe that in that case the U.S. Supreme Court assumed an activist role, failing to restrain itself within the proper bounds of its Constitutional remit, and in so doing allowed itself to be carried by the political philosophies and preferences of its majority. The commentators point to the ultimate harm that such a judicial attitude can do to the public confidence and trust in the constitutional safeguards and the rule of law.

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[29] Bush v Gore: www.law.cornell.edu/supct/html/00-949.ZPC.html

[30] A comprehensive summary of the commentaries can be seen at *"When Freedom Isn't Free: The cost of Judicial Independence in Bush v Gore: Karlan 64 OHIO St. L.J. 265, 2003.*

SEE ALSO: Jeffrey Toobin's article in the New Yorker: Freedom and Prologue. Dec 6. 2010: www.newyorker.com/talk/comment2010.

Whatever one makes of that debate (and there certainly have been other examples of excessive judicial activism over the years) there should be no argument – difficult in practice though it may be – that judges are required to restrain themselves from seeking to "legislate from the bench." There can be no argument that judges should follow and apply the law and its policies, in keeping with the mandate of the law and the constitution. Thus the term "judicial restraint" in its substantive sense, involves a normative approach to exercising judicial power that is genuinely compelled by legal and constitutional principle, not by the whim or philosophical beliefs of the particular judge.

As Justice Breyer is reported as having observed:

"*The good that proper adjudication can do…is only attainable…if judges actually decide according to law, and are perceived…to be deciding according to law, rather than according to their own whim….*[31]

Thus, it may be said, a judge's primary accountability is to the law.

The meaning of the term "During Good Behaviour" as it has filtered down over the centuries into modern constitutions from the Act of Settlement 1701, is now well understood, even if not categorically defined.

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[31] Remarks to the Conference of the Supreme Court of the Americas, October 1995 http://usinfo.state.gov/journals/itdhr/1296/ijde/bfeyer.htm.

It is now well understood that judges can and will be accountable by way of removal from office for serious misbehaviour or inability to fulfill the responsibilities of office.

While there have mercifully not been a very large number of instances over the years since the Act of Settlement, two recent examples, one from the Cayman Islands[32] (the *Levers* case) and one from Gibraltar[33] (involving former Chief Justice Schofield), represent – at opposite ends of the spectrum – the kinds of obvious and far less obvious circumstances which could be regarded as justiying in removal.

Certainly in the Levers case, examples of the manner in which the Constitutions ensure the accountability of the judges by way of the ultimate sanction of removal. It represents an example of the well established safeguard of the constitutional checks and balances designed for the protection of the people.

It is, however, in the newly emergent tendency to legislate for the ongoing discipline and control of the judges, even while they are not to be removed but are to remain in office, that there is fertile ground for the seeds of uncertainty being sown amidst the constitutional checks and balances.

This is a trend emerging in the form of legislation or regulation even in some of the more advanced and sophisticated democracies such as the United States[34], the United Kingdom[35] and Canada[36].

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[32] *Levers v The Governor of the Cayman Islands [2009] UKPC 0092*

[33] *The Hearing on the Report of the Chief Justice of Gibraltar [2009] UKPC 43*

These new regimes respond to the modern expectations of accountability and transparency of the age in which we live and which assume that the more information about and control the citizen has over those holding public office, the more they can be called to account for their action or inactions, and so the better democracy works.

But such an objective, in the case of the judiciary, can be readily overstated. An immediately apparent danger of this new kind of judicial control is of course, its potential intrusiveness upon the need for judicial insularity from external influence and pressure. I will comment a bit further on this below. This trend, mercifully, has not yet found its way to Caribbean shores, perhaps with the singular exception of our own jurisdiction of the Cayman Islands; where as Chief Justice on behalf of the Judiciary, along with the Governor and the JLSC, I am in the midst of trying to unravel the Gordian knot of the new Constitutional innovation of ongoing disciplinary control of the judges[37].

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[34] 28 U.S.C. chp. 332 (1976).

[35] The Judicial Discipline (Prescribed Procedures) (Amendment) Regulations 2008.

[36] Through the Canadian Judicial Council (for Superior Court Judges) or the provincial Judicial Council (for Provincial Court judges)

[37] Chief Justice of the Cayman Islands v. The Governor [2012] UKPC39- referrals under Section 4 of the Judicial Committee Act 1833. As a result of the decision, the two constitutional issues must now be resolved by way of Judicial Review before the Grand Court

A particular difficulty with the Cayman situation is the potential view of the Constitution that – despite the established principles of separation of powers – would vest in the Governor, the Head of the Executive branch, a general power to exercise ongoing disciplinary control over the judges. But by contrast and of great importance, even in those other western constitutional democracies where this new trend for ongoing disciplinary control of the judges has emerged, it is recognised and accepted that any such process must remain within the judiciary.

Then it is accepted that the judiciary should be allowed to discipline themselves unless the issue is serious enough to justify removal.

By way of example: in the United States the process involves complaints being sent to the Judicial Councils, one established for each of the Eleven Circuits of the Federal Court System. Each Council is composed of circuit court judges in active service and is empowered to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuits". This is taken to include such orders or directives as may be necessary to regulate the conduct of the judges, short of removal from office.

In the United Kingdom, the process involves an Office of Judicial Complaints which is headed by a senior judge and which investigates and advises the Lord Chief Justice on matters of disciplinary complaints. Again, the process remains entirely within the judiciary; as all matters falling short of justifying the removal of a judge are dealt with as between the judge concerned and the Lord Chief Justice.

In the United Kingdom, the immediate sanctions for the kind of less serious misconduct under discussion, could include a warning or reprimand and guidance given to the judge to remedy the shortcoming. In the United States, sanctions available to the Judicial Councils under the Judicial Conduct and Disability Act 1980 could include public and private censure, orders prohibiting further assignment of cases to the judge in question for a specified period of time (presumably to allow him or her to address any backlog in work) and formal pressure "requesting" that the judge retires "voluntarily"[38].

Even when such a regulatory scheme remains internal to the judiciary (as in the examples cited) – let alone when it involves a regulatory body that is external to the judiciary (as in Cayman) – any discerning observer will appreciate that the separation-of-powers doctrine requires careful constitutional scrutiny of the potential threat to independence and impartiality[39].

Such concerns loom very large indeed when the disciplinary regime is to be imposed from outside the judiciary. This is primarily because the public are immediately likely to question the ability of the judges to remain impartial where a case might involve their external regulator. This could often be the case in the Cayman Islands, where the Governor is often a party to cases coming before the Courts.

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[38] 28 USC Ch 16 S. 354 subs. 2(d)(2).

[39] As Irving Kaufman suggests in "*The Essence of Judicial Independence"* Columbia Law Review Vol. 80 No. 4 May 1880.

What in any event, one might well ask, is the justification for seeking to impose this kind of ongoing external disciplinary control over the judges?

As already observed, it is widely acknowledged that, in general, judges tend to be conscientious and competent in their approach to their duties. Certainly that has been the Caribbean and Caymanian experience over the last 50 years. This, no doubt, as they are only human, is due in no small measure to the fact that judges sit in the open glare of public scrutiny – scrutiny both by the immediate parties involved in cases and by the media on behalf of the public. It is no doubt also due to the fact that judges are amenable to having their decisions reviewed immediately by way of appeal.

In other words, by the very nature of what they do, judges are accountable and in so many ways, more accountable, than the public officials of any other branch of government.

And so the question certainly bears asking: Is this newly emergent trend for the ongoing disciplinary control of judges likely to inure to the public good when weighed against the obvious pitfalls and dangers to judicial independence?

Already, there are many dissentient voices over this issue – a number of them having witnessed the result of the disciplinary process in the United States – who say "NO". These include voices of criticism raised no less than from within Congressional Committees[40] charged with the responsibility of reviewing the system.

If the threat of discipline, like the Sword of Damocles hanging over his head, gives a judge an irrelevant personal stake in the outcome of a particularly troublesome case before him, the intrusiveness of possible intermediate sanctions relating to his functions, can never be justified.

Nothing in our long history of constitutional development explains a power in the judges to exercise ongoing discipline over each other, let alone a power in an extra-judicial body as in Cayman, to exercise ongoing discipline over the judges.

The separation-of-powers framework contemplates that the judiciary will hold its members accountable to the law and to litigants through the powers of appellate review, not through a process of inquisitorial oversight and sanction.

Weighing against the apparently thin justification for this type of ongoing disciplinary oversight is the extraordinary danger, especially in small jurisdictions like Cayman, of the actual erosion of impartiality that is of the essence of the judicial role. This type of disciplinary regime is likely to invite dissatisfied litigants to harass judges who rule against them. Although under most disciplinary procedures the authorities must dismiss complaints which are based merely on the merits of a judge's decision, they are nonetheless obliged to review the complaints before they can be dismissed. The disgruntled litigant may then also seek a review of the dismissal, and may even be able to force the disciplinary authority to review the record of the case which he complains about.

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[40] See Kaufman, ibid p.698 and S.1428, 95th Cong. 2nd Session. S. Rep. No. 1035, 95th Cong. 2nd Sess. 47-71 (1978); and Penny White, supra. Judging Judges: p.1057.

During the time required for these procedures to run their course, the judge under investigation being only human, would no doubt feel a chill.

Indeed, since authorities may choose to conduct investigations, the judge may be inclined to avoid rendering any further potentially controversial decisions while the complaint is pending. Under such regimes, there would inevitably arise cases in which even the most dispassionate judge, knowing that litigants could "punish" him by harassment by abusing the process, would be unable to preserve an unwavering focus only upon the relevant issues of the cases coming before him.

Any disciplinary system that so potentially allows or encourages interested parties to strike out at judges, is too great an interference with judicial impartiality to be tolerable under the doctrine of separation of powers.

Just as legislators must be free to consider and enact legislation and the members of the executive free to execute the laws and their executive policies, so must each judge be free to adjudicate fairly and without fear of reprisal.

It is for reasons such as these that commentators[41] believe that disciplinary regimes even such as prescribed in the United States by the Judicial Conduct and Disability Act that disturb a judge's impartiality must, absent a demonstrated democratic necessity, be deemed an unconstitutional infringement upon judicial independence.

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[41] See *Kaufman (above) for a survey of the commentaries.*

So, while judges must certainly be accountable for their misdeeds or incompetences and inefficiencies like everyone else, no disciplinary system should be imposed that would interfere with their ability to be independent.

Conclusions

The entire history of the inter-relationships between the three branches of government has, time and again, shown the delicate nature of the balance between the separation of powers.

Without a deep and abiding sense of mutual respect and appreciation for the fundamental importance of the respective functions, one branch or the other could readily seek to trespass in such a way as to upset, if not destroy, the delicate balance .

"Restraint" and "mutual respect and trust" must therefore be the watch words for the future.

I have already mentioned the experience of ***Bush v Gore*** as an example – at least as perceived in the minds of many – of what can go wrong when there is the absence of appropriate judicial restraint.

In the United States there have been other concerns over what commentators have discounted as an activist right wing Republican Court. See for example the comments in the decision on the ***Citizens United*** case where the Supreme Court swept aside legislation intended to control partisan campaign financing.

Recent experiences in the United Kingdom are illustrative of the threat to democracy that can arise from the other extreme of too little restraint on the part of the legislature and the executive, in their responses to judicial decisions.

Here I refer to the unusual degree of tension that developed after the enactment of the Human Rights Act 1998, between the government and the judiciary in reaction to judicial decisions, particularly in the field of criminal sentencing, asylum and immigration matters[42]. Even more challenging in the United Kingdom, have been the statutes, aimed at the threat of terrorist activity, but which seek, in the name of public safety, to detain and control individuals who have yet committed no offence.[43]

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[42] Lord Justice David Keen of the Court of Appeal of England and Wales presents an insightful examination of the subject in his article: "*The Independence of the Judge*" published in "Tom Bingham and the Transformation of the Law, A Liber Amicorum, Oxford University Press, 2011 (Rep.).

[43] They include the Anti-terrorism, Crime and Security Act 2001 and the Prevention of Terrorism Act 2005.

Inevitably, these statutes have given rise to issues which the Courts had to resolve. They involved the fundamental problem of balancing the vital traditional rights to liberty and a fair trial, with the essential concerns of society for the preservation of its own safety.

Judicial pronouncements which came down in favour of the fundamental human rights were criticised for not paying due regard to public safety. Often, the most strident and misinformed criticisms came from members of Parliament who vented their misgivings from behind the safety of Parliamentary privilege.

The fact that the British judiciary has emerged from this tense debate perhaps even stronger than before, is due in great part to the measured and clearly articulated responses from the authoritative judicial decisions of the day, most notably perhaps, those flowing from the pen of Lord Bingham[44].

While the firm resolve of the court for the fulfilment of its functions and its concern for human dignity and for the rights of the individual were unmistakable in those judgements, so too was the courts' willingness, in an appropriate case, to recognise, acknowledge and defer to the legislative and executive roles in the design and implementation of legislative policy, especially those aimed at preserving public safety.

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[44] See, for examples: A and Others v Secretary of State for the Home Department *[2004] UKHL 56;* *Secretary of State for the Home Department v JJ [2007] UKHL 45; and* *Secretary of State for the Home Department v MB [2007] UKHL 46*

This measured judicial approach provided the British public with the necessary assurance that the Courts would not unduly overreach into the Legislative or Executive realms, recognising as Lord Devlin had once stated that:

"…the British have no more wish to be governed by judges than they have to be judged by administrators."

As we look to the future, it is only reasonable to expect that similarly difficult and potentially tense constitutional issues – pitting the rights of the individual against the mandate of the State – will continue to arise for determination by our Courts whether in the United Kingdom, the Caribbean or in the United States.

As citizens, judges and students of the law, we must insist upon the same kind of measured, restrained and mutually respectful responses amongst the participants within the separate branches of our constitutional governments, as have emerged to solidify and ensure the future of our democracies.

If by their actions and criticisms aimed against each other, the separate branches of government erode the public trust and respect which are so vital to the fulfilment of the responsibilities vested by our constitutions, they will end up undermining the democracy and the Rule of Law on which our societies depend.

We should be especially sensitive to the reality that with neither the power of the sword nor the power of the purse[45] the judicial branch has an enduring vulnerability to attack. The trust and faith vested in the judiciary could only have developed and will only continue in the future, if judges, while remaining appropriately accountable, are also in a position to enhance their legitimacy and thereby help to safeguard judicial independence.

As you fulfil your individual quests to become lawyers, you must always remember that lawyers are first and foremost officers of the Court. As lawyers this will mean that one of your paramount responsibilities will be to respect, preserve and protect the independence of the judiciary, in your quest with the judges to ensure the rule of law.

Hon. Anthony Smellie
Chief Justice of the Cayman Islands

December 29, 2012

[45] Alexander Hamilton: the Federalist, No. 78 at 465 (Clinton Rossiter Ed. 1961).