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### Judicial independence

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*\*S.L.T. 105 In a paper first delivered at the Sheriffs' Conference on 9 March 2002, Lord Hope suggests some guidelines for maintaining judicial independence from the executive and highlights some of the tensions that can exist to threaten such independence even in a mature democracy.*

I have been asked to speak on the subject of judicial independence -- a subject about which, as your Vice-President Sheriff Scott said when he extended the invitation to me, we should all be better informed. One has however only to think for a moment about the phrase to appreciate that there are many facets to the concept which is embodied in these two words. One aspect of judicial independence about which we do, of course, need to remind ourselves constantly is the need to avoid saying or doing anything which might give rise to the appearance of bias. This is a subject on which one might well dwell for quite some time, especially in the light of the rights with which we are all now familiar of art 6 (1) of the European Convention on Human Rights to a fair trial within a reasonable time by an independent and impartial tribunal established by law. But that is not the aspect of judicial independence which I have been asked to speak about. My subject is the independence of the judiciary from the executive.

Now, at first sight, this is a subject which ought not to excite any controversy. In an ideal world it would be devoid of interest, as the principle that the judiciary must be independent of the executive is one to which judges, members of the executive and parliamentarians all subscribe. It is a fundamental principle of our constitutional law. If we had a written constitution it would undoubtedly be written into it, as it is in many if not all the constitutions that are to be found throughout the Commonwealth. Its importance is highlighted in cl 1 of the Justice (Northern Ireland) Bill, which reached the House of Lords this week from the House of Commons. This, the opening clause of the Bill, states in the plainest possible language which is redolent of a constitutional document: "Those with responsibility for the administration of justice must uphold the continued independence of the judiciary."

The independence of the judiciary is also one of the leading principles of the Latimer House Guidelines on good practice governing relations between the executive, Parliament and the judiciary. These are the guidelines which were proposed and adopted for effective implementation by member countries of the Commonwealth at a meeting at Latimer House Conference Centre in Buckinghamshire in June 1998. The importance of this meeting was underlined by the fact that it was addressed by the Lord Chancellor. It was attended by representatives of the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association. Part II of the Guidelines is headed "Preserving Judicial Independence". As the wording of the title indicates, it assumes that the case for the principle of judicial independence does not need to be argued. It assumes that there is general acceptance of the rule that the impartial exercise of judicial authority must not be obstructed or impeded by the executive. What Part II does is look at situations where the principle may be put at risk, and at ways in which it should be preserved and strengthened.

There is no doubt that in some parts of the Commonwealth respect for the guidance which is offered by the Latimer House Guidelines is badly needed. The problems that have been experienced in Zimbabwe provide one glaring example. But one does not have to look very far to see that in other countries too the judiciary are being subjected to undue pressures by the executive. Indeed one of the main aims of the Guidelines was to strengthen the hands of those who seek to develop common standards of conduct, and thereby to ensure the rule of law, in places where the principle itself is at risk. With this in mind they sought to establish common standards there on the part of both the executive and the judiciary. On that view, one might be forgiven for thinking that in the older countries of the Commonwealth, such as our own and countries like Australia and Canada, those common standards are as well established as is the principle and that there is really no need in their case for any such guidelines. But, whether or not that is strictly true today, I believe that it would be highly

dangerous for us to be lulled into a false sense of security by our history. The principle is not one for the past. It is a principle for the here and now. How the situation in which we now find ourselves measures up to it deserves a closer look.

Three questions may serve to identify the points that need to be scrutinised: (1) what purpose does the principle of judicial independence serve -- why is it important; (2) what signs are there, if any, that judicial independence is at risk in Scotland of being compromised; and (3) how can our judicial independence be preserved? Let me examine these points one by one.

### **What purpose does judicial independence serve?**

It seems to me that there is no room for doubt on this point. Judicial independence serves one very specific purpose. Its purpose is to preserve the judge's impartiality, whatever the case is with which he or she has to deal and whatever the circumstances. Impartiality has been described as the supreme judicial virtue. As art 6 (1) of the Convention recognises, it is an essential characteristic of the individual's right to a fair trial. Moreover the principle that the judiciary must be, and must be seen to be, independent of the executive is central to the rule of law in a modern democratic society. The rule of law is, after all, the foundation of our democracy, and a vital part of it is the independence of the judiciary from the executive. It forms the background to everything that we say and do as judges, both on and off the bench.

Clearly, it is not enough for the principle itself to be recognised. It must also be practised. It is a matter of deeds as well as of words. So, if the system is to be kept in good repair -- and surely it is our responsibility as judges to see that this is so -- we need constantly to revisit this principle, to remind ourselves of it and to assess how it is being applied in practice in what we do. But it is not something that we can create for ourselves, as one of its essential components is the respect which the executive has for the judiciary.

### **Is our judicial independence at risk of being compromised?**

As I indicated earlier, it is easy to be lulled into a false sense of security. As one eminent judge, Chief Justice de la Bastide of Trinidad and Tobago said in an address which he gave on 16 September 1999 on the occasion of the opening of the 1999-2000 law term in his country, there is no more dangerous doctrine than that it is enough for those who wield political power to say that they satisfy their obligation to respect the independence of the judiciary by refraining from telling the judges how to decide cases and not interfering with their decisions once made: (1999) 13 *Commonwealth Judicial Journal* 30. There is, as he put it, more than one way to skin a cat. Judicial independence is rarely the subject of frontal attack. More often it is eroded by those who pay lip service to it and do not appreciate the consequences. There are all sorts of ways in which, short of telling the judges how to decide cases, indirect pressure can be put by the executive on the judiciary which may put at risk the judge's ability to act impartially.

In his contribution to the *Stair Memorial Encyclopaedia*, Vol 5, paras 663-665, Lord Fraser of Tullybelton identified security of tenure and immunity from suit as the two most important ways of ensuring that judges perform their duties impartially and without fear of the consequences. Of these, security of tenure is the more vulnerable to erosion at the hands of the executive. But there are other ways in which the process of erosion may be carried on. I think that John Wadham, the Director of Liberty, was quite right to observe in a recent letter to the press, in which he adopted a phrase which was first used by Lord Steyn, that of the three pillars of our constitution the judiciary is the weakest and the most vulnerable.

### **How can judicial impartiality be preserved?**

It may be helpful then at this stage to look more closely at the Latimer House Guidelines. I am not sure that I would have devised the same list if left to myself. Ever since they were formulated I have felt uneasy about some of them, as they do not entirely reflect our own practice. But at least they are all there on the table. They have been promulgated, and their existence has been noted judicially. They present us with a useful starting point.

The guidelines deal with this subject in three parts: (1) judicial autonomy, (2) funding and (3) training. They also deal with judicial ethics and judicial accountability. How do we measure up to what they recommend?

As regards judicial autonomy, they make the following points: (a) judicial appointments should be made on merit by a judicial appointments commission, established by the constitution or by statute, or by an appropriate officer acting on the advice of such a commission; (b) judicial appointments should normally be permanent; (c) the judicial services commission should be established by the constitution or by statute, with a majority of its members drawn from the senior judiciary; (d) appointments at all levels should have as an objective the achievement of equality between men and women; and (e) judicial vacancies should be advertised.

I should add that the Latimer House working group has proposed that some refinements should be made to these propositions in the *\*S.L.T. 107* light of comments by senior officials of the law ministries of the Commonwealth. The officials have indicated that refinements are needed before they are laid before ministers for their endorsement. These include departing from the provision that a majority of the members of the judicial services commission should be drawn from the judiciary -- the phrase "appropriately constituted and representative" is to be substituted -- and changing the provision about achieving equality between men and women to "the progressive removal of gender imbalance and of other historic factors of discrimination".

When the guidelines were first promulgated our judicial appointments system did not measure up to these standards, although vacancies on the shrieval bench were being advertised. As matters now stand, the practice has been developed of setting up an interim ad hoc judicial appointments commission on whose advice all but the two most senior appointments to the Court of Session bench are made. It is perhaps worth noting that cl 3 of the Justice (Northern Ireland) Bill provides for a judicial appointments commission of which the Lord Chief Justice is to be the chairman together with five judicial members, five lay members and one legal profession member. Our commission, which is to have a lay chairman and a different structure, is not yet statutory. But my impression is that its independence will be sufficiently well ensured for it not to be at risk of being compromised by the executive.

There may be some grounds for doubting the ability of the current system to react as quickly to events when vacancies occur on the Court of Session bench as was certainly possible under the old system. As I S Dickinson, "Post-Devolution Developments", 2002 SLT (News) 74 at p 76, has observed, the fact that no permanent successor to the most senior judge in Scotland was appointed until six weeks after Lord Rodger's translation to the House of Lords might suggest that the procedure was working less than smoothly and this should be a matter of concern to everyone at Holyrood. But on the whole, however much one may regret the opportunity which the current system provides for delay in the making of the appointments, I do not think that we have anything to be seriously concerned about as regards the issue which I am considering, which is the independence of the judiciary. There are obvious benefits in a more open system from the point of view of public confidence.

As regards funding, the current guidelines are as follows: (a) sufficient funding to enable the judiciary to perform its functions to the highest standards should be provided; (b) appropriate salaries, supporting staff, resources and equipment are essential to the proper functioning of the judiciary; (c) as a matter of principle, judicial salaries and benefits should be set by an independent commission and should be maintained; and (d) the administration of monies allocated to the judiciary should be under the control of the judiciary.

Refinements are proposed here also. The phrase "sufficient funding" is to be enlarged to "sufficient and sustainable funding". The provision that the administration of moneys allocated to the judiciary should be under the control of the judiciary is to be dropped. In its place the proposal is for a recommendation that such funds, "once voted for the judiciary by the legislature, should be protected from alienation and abuse".

Here we are entering upon more contentious territory. There is no real problem about salaries and benefits. In our case they are set by the Senior Salaries Review Commission which consults widely and whose advice on judicial salaries is given directly to the Prime Minister. From time to time the increases that have been recommended have been deferred for up to nine months or, as we have recently seen, in part for a whole year. But the recommendations as to salary levels have always, in my experience, been accepted. I should add, in parenthesis, that this has not always been so in the United States. For the years 1995-97 and 1999 Congress blocked proposals for cost of living adjustments to be made to the federal judges -- a decision which some of those affected are seeking to bring under judicial review in the Supreme Court. It is also an accepted principle in our country that judicial salaries and benefits, once set, are to be maintained -- in other words, that they are not to be

reduced. There is only one exception that I am aware of. It is now possible for judicial officers at the most senior levels, such as the Lord Chief Justice and the Lord President, to move down to a position at lower levels on the salary scale, on appointment as a Lord of Appeal in Ordinary. I have no direct experience of this myself, as the luxury of being on a higher pay scale than the Law Lords was not available in my day as Lord President. But I do not imagine that those affected object to this adjustment, which reflects an undoubted reduction in their administrative responsibilities.

The recommendations about supporting staff, resources and equipment -- that they should be sufficient to enable the judiciary to function "to **\*S.L.T. 108** the highest standards", and especially the current recommendation that the administration of moneys allocated to the judiciary should be "under the control of the judiciary", are much more contentious. We are not in the position that is to be found in some countries in Commonwealth Africa where there simply are not enough funds to build courts, let alone provide them with libraries or even copies of the laws which they must administer -- leaving it to the judges to procure these facilities themselves at their own expense even though they have no security of remuneration. But there is no denying the fact that, dependent as we are on public funds for the staff, resources and equipment which we need to do our job properly, there are shortcomings. I suspect that all of us would be able to identify aspects of our work for which there is underfunding without too much difficulty. On the other hand, would we want to go so far as to say that the moneys allocated to the judiciary should be under the *control* of the judiciary?

Plainly this is not what happens anywhere in the United Kingdom. It is not the practice for our Parliaments to allocate funds specifically to the judiciary. Decisions on this matter are left, under our practice, to ministers. What our systems do, both north and south of the border, is to place both the responsibility for administering these funds and the liability to account to Parliament for what is done with them on the executive. These two aspects of financial control are, of course, inseparable as it is a system of public funding that we are talking about. I suspect that we would all rather leave it to the civil servants in the Justice Department to carry on these day-to-day activities. We would rather that it was they, and not the judges, who had the task of appearing before the Justice Committees to explain how the funds are being spent and to answer the inevitable criticisms.

What we can, and do, insist upon is that the judges who are in charge of the administration of our courts -- the Lord President and the sheriffs principal -- are consulted regularly by the civil servants in the Justice Department and the Scottish Court Service with a view to meeting their requirements and before any further so called "savings" are made in order to trim annual expenditure. We can also insist upon an appropriate system of delegation of decision making to the officials in charge of each court and that those officials are answerable to the judiciary. On the whole this system works as well as can be expected. I doubt very much whether it would be improved by transferring control of these funds, and the responsibility of accounting for them, to the Lord President and the sheriffs principal.

As for training, the relevant guidelines state the following: (a) a culture of judicial education should be developed; (b) training should be organised, systematic and ongoing and under the control of an adequately funded judicial body; (c) judicial training should include the teaching of law, judicial skills and the social context including ethnic and gender issues; (d) the curriculum should be controlled by judicial officers who should have the assistance of lay specialists.

There is perhaps not much to be said in our case about this chapter either. The Sheriffs' Association has always paid careful attention to the need for judicial education, and it has been careful to ensure that it has been conducted by and controlled by judicial officers. The executive has co-operated well with this endeavour by providing funding when necessary. And now we have the Judicial Studies Committee, whose principal officers are members of the judiciary. I believe that it is adequately funded and resourced by the executive. It has been suggested to me that there is some concern about subject matter -- in other words, that pressure is being brought to bear on the committee by the executive to incorporate "fashionable" subjects into its programme such as how to deal with sex offences, domestic violence and issues of gender and racial equality. For my part, I do not think that you need to be too much concerned about this, so long as you are not being deprived of training on matters that you regard as more pressing or more directly relevant. As I shall mention later, an important part of our handling of the principle of judicial independence is our relationship with the public whom we exist to serve. Respect for the principle is likely to be diminished if the public are allowed to believe that issues which are of concern to them are being ignored by the judiciary. The Judicial Studies Board in England is very much alive to this. It has taken the lead in the development of educational programmes on issues of gender and racial equality.

On the subject of judicial ethics, the Guidelines state that a code of ethics and conduct should be

developed and adopted by the judiciary as a means of ensuring the accountability of judges. There is no provision for a code of ethics in the Justice (Northern Ireland) Bill, although cl 16 provides for a code of practice relating to the handling of complaints against *\*S.L.T. 109* judicial officers. It has been suggested by the Scottish Executive that the Lord President should be given statutory authority, in consultation with the relevant interests, to draw up a code for the judiciary in Scotland with appropriate investigatory, disciplinary and enforcement powers. Systems of this kind exist in the United States, in Canada and in some other jurisdictions in the Commonwealth. Those who advocate such a code should be under no illusions about the magnitude of the task which this would involve, and its implications. A great deal of judicial time would have to be devoted both to its drawing up and, as codes tend to be the focus for complaints, to its enforcement. That certainly has been the experience in Canada. One must then ask the question -- and it is a question which must be squarely faced up to by the executive -- whether it would not be better to allow the senior judges who would be drawn into this process to get on with the task which they were appointed to do on the bench, in view of all the other demands that are already being made on judicial time. On the other hand there is no getting away from the fact that, where they have been introduced, codes are seen as an important way of preserving judicial integrity and maintaining public confidence in the judiciary.

As to accountability, they state that a judge should be at risk of removal only in the case of inability to perform judicial duties or serious misconduct, that cases of removal should be judged by an independent and impartial tribunal and that all matters of discipline should be left to the chief judge of the court. I need not mention in present company the provisions of s 12 of the Sheriff Courts Act 1971. Clauses 6 to 8 of the Justice (Northern Ireland) Bill, which provide for the removal from the various judicial offices including the most senior in the Province, follow these principles.

### **The heart of the problem**

But I sense that a review of what these Guidelines recommend, while important so that we can get our bearings on this subject, has not really got to the heart of the problem which is of concern to you. There is no doubt that devolution has changed the situation radically. We now have a Scottish Parliament, and we now have an executive which is directly answerable to that Parliament, on our doorstep. The structure of the devolution settlement has, quite understandably, brought into much sharper focus the matters that have been devolved from Westminster. This is certainly so in the case of our systems of civil and criminal justice. The spotlight which, under the regime which I was familiar with when I was Lord President, depended almost entirely on the interest shown in these matters by ministers -- the Secretary of State and the Law Officers -- is now in the hands of the members who sit on Justice Committees to whom the ministers in the Scottish Executive are now directly accountable.

Under the old regime it was possible for the Lord President and the sheriffs principal to discuss these matters face to face in private with the relevant ministers. These discussions took place in the expectation, which was almost always realised, that once the ministers were persuaded that a particular course of action was or was not desirable that would be the end of the matter. I say "almost always", because there was always the possibility that the Treasury, or even more significantly the Prime Minister, might have other views. It is no secret that the increasingly widespread use of temporary sheriffs instead of appointing more permanent sheriffs was Treasury driven, against the advice of the senior judiciary. So too was the use of temporary judges in the Court of Session and the High Court of Justiciary. Later on, when the judiciary in England and Wales were being exposed to Michael Howard's views on criminal justice in general and on sentencing in particular, the Scottish ministers for a time held out against those views under the guidance of the Lord Advocate. As you will recall, the appointment of Michael Forsyth as Secretary of State changed all that. But even then the senior judiciary had a direct line to all the people that mattered in the executive. It was not very democratic. But it was efficient, and on the whole it worked.

Now we have to recognise that democracy has been brought home to Scotland, and that the ministerial team with whom the senior judiciary may still be able to deal on matters which are of concern to the judges are able to exercise much less autonomy than they were able to exercise formerly. It is hardly surprising that all the old problems about non-legislative interference with sentencing policy and about the setting of unreasonable and unrealistic targets to measure performance, which caused so much trouble in the last period of the Conservative Government, have revived. Nor is it surprising that in the context of the active scrutiny by the Parliament and its committees they look now to be even more formidable. It has been suggested to me that this is leading to unwelcome and occasionally improper pressure by the Scottish Court *\*S.L.T. 110* Service to accommodate their own priorities in preference to those which are set by the judiciary.

Of course, there are pressures of the old familiar kind south of the border too. "Is David Blunkett the biggest threat to our legal system?" was the heading to an article by Joshua Rozenberg in the *Daily Telegraph* last November. The article itself began with the questions "What has David Blunkett got against the judges?", and "Do his natural instincts to control the world around him mean that he considers the judiciary an enemy to be cowed?" But the press in London, despite all their faults, seem to be much more aware of the dangers that lurk not far below the surface than their counterparts in Scotland whose awareness of these issues and willingness to get to grips with them has, to date, been so disappointing. Joshua Rozenberg went on to observe that remarks such as those by Mr Blunkett betray a fundamental misunderstanding of how the legal system works and the part played in it by the judges. I do hope that there are still some journalists left in Scotland who are astute enough and carry sufficient weight with their editors to be able to voice the same criticism, should it be needed, in our newspapers.

These thoughts give rise to these further questions: (1) where is the line to be drawn between the responsibilities of the executive and those of the judiciary, and (2) how is that line to be held if there is a risk that it will be crossed by the executive?

There is an obvious tension between the demands of the executive -- driven inexorably by politics -- and respect for the independence of the judiciary. Both sides seek to serve the public interest. But every judge knows that it is impossible to satisfy everybody when justice is being administered. That is not the judges' task. Their task is to administer justice, without fear or favour, affection or ill will. Impartiality requires a measure of detachment from the consequences. But wherever there is dissatisfaction complaints will be made, and it will not be long before the politician -- whose aim, at heart, is indeed so far as possible to satisfy everybody -- will be attracted by them. So it is important to make it clear, and to do so repeatedly, that there are some areas of the administration of justice that must be left exclusively to the judiciary.

I believe that the line has to be drawn between instructions as to *what* we are to do and instructions as to *how* we are to do it. The public is entitled to expect to be well served by a well educated, socially aware and self disciplined judiciary. So it is a proper concern of the executive that there should be systems in place for judicial training and for the regulation of judicial conduct. So also with sentencing and the treatment in court of vulnerable witnesses. The public is entitled to expect that the judges have sufficient means available to them, and that they are sufficiently aware of the consequences of what they do, to enable them to impose appropriate sentences and to protect witnesses who are particularly vulnerable when they are giving evidence, such as children and complainers in sexual misconduct cases. So it is a proper concern of the executive that measures should be in place to provide the judiciary with those means and to equip them with that awareness. That all lies in the "what to do" category.

But the "how to do it" must be left by the executive exclusively to the judiciary. It is not just that the executive must refrain from telling the judges how to decide cases and from interfering with their decisions once made. There is, as Chief Justice de la Bastide put it, more than one way to skin a cat. Indirect pressure by the executive, by measures such as the setting of performance targets or league tables, is just as objectionable as overt instruction in regard to judicial decision-taking. So too is control, whether direct or indirect, by the executive over what the judge does in his or her own courtroom.

As for the question "how is the line to be held?", I would offer two answers to it. The first is a practical one, the other more philosophical. On a practical level, there is a need to maintain a constant process of dialogue. The responsibility for this lies primarily with the senior judiciary. I spent a good deal of my time on this when I was Lord President. I thought that it was important to establish a sound working relationship with all the branches of our justice system-- ministers, the Law Officers, the Law Society, the Faculty of Advocates, various organisations such as the Sheriffs' Association and child mediation services and especially with key people in the media. My aim was to keep myself as widely informed as I could, to anticipate the problems that were bound to arise as far as possible and to know who to turn to in confidence if things went wrong. So far as the media were concerned, one of my aims in making and maintaining personal contact with the editors was to eliminate as far as I could by means of face to face contact the natural temptation for them to see the judiciary in terms of stereotypes. Obviously these are tasks for the headmaster, not for everybody. But all members of the judiciary have a part to play in this process. If the senior judiciary are to *\*S.L.T. 111* represent your interests effectively, they have to know what it is that is of concern to you. There is a channel through which communications can be made. My advice is that you should respect that fact, and that you should make use of it.

The philosophical point is simply this. Respect for the principle of the independence of the judiciary is no longer guaranteed. In a modern democratic society respect for it must be earned. It is a two way process, and a crucial element in the equation is public confidence in the judiciary. This requires judicial self discipline. It also requires the maintenance of standards at all levels. Long delays in issuing judgments, oppressive conduct in court and inappropriate conduct out of court are some of the examples one might give of things that tend to undermine public confidence in us and that tend, in turn, to strengthen the hands of the executive. We must not allow the independence of the judiciary to be compromised by surrendering control of issues that most concern us to the executive. But the executive may well seek to respond to public pressure to maintain standards in a way we would not welcome if we cannot deal with these matters ourselves effectively.

When I spoke on judicial independence at the Commonwealth Magistrates' and Judges' Association's Conference 18 months ago in Edinburgh, for which the support of the Sheriffs' Association was invaluable and very much appreciated, I suggested to my audience, which came from all parts of the Commonwealth, that there were some searching questions that they needed to ask themselves. Were their own systems for setting and policing standards of judicial conduct good enough to maintain public confidence? If not, what more should they be doing about this? Did they need to establish codes of conduct, and a list of sanctions to go with it? What were they to do about whistleblowing -- reporting instances of misconduct to those in authority, an activity that normally attracts vigorous disapproval among colleagues? I am not to be taken as advocating codes of conduct, sanctions or whistleblowing in our country. But others may well do so. As I have already mentioned, support for codes of conduct is to be found in the Latimer House Guidelines in the context of their recommendations for preserving the independence of the judiciary. It might be wise for you to work out what views, if any, you have about all these issues.

I cannot pretend to have answered all the points that may be of concern to you or to have worked out a clear and simple path for you to follow. But I hope that these thoughts may serve as an introduction to discussion of this topic, which is of such crucial importance to the rule of law in our democracy.

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