Independence

In the debate in the House of Lords in April 1989 on the Green Paper introduced by the then Lord Chancellor prior to the enactment of the Courts and Legal Services Act, 1990, Lord Hailsham stated that "The independence of the judiciary depends more upon the independence and integrity of the legal profession than upon any other single factor". In his recent Millenium Lecture, given at the Inner Temple on the 25th July, 2000, Master Antonin Scalia, a Justice of the Supreme Court of the United States, said:

> "In the United States, counsel are referred to as officers of the court. Until I became a judge, I did not fully appreciate how apt that description was. An inquisitorial system can function with good judges and poor lawyers; an adversary system cannot. Particularly at the trial stage - though often at the appellate stage as well - justice will not be done unless knowledgeable counsel place before the court the facts and the points of law essential to the outcome."

Though he did not explicitly say so, the use of the phrase "essential to the outcome" suggests that he expected the advocate to be of sufficient independence to be able to render comprehensive assistance to the court. For the members of the Inns of Court the duty of counsel to the court to act with independence and integrity is a basic principle so obvious that it never needed to be written in a statute. The courts in an adversarial system need the assistance of an independent bar to enable them to function properly; that is why professional conduct, education, and rights of audience were until recently, through the agency of the Inns of Court, the exclusive preserve of the judges : see *Re: S (A Barrister) (1981) 1QB 683, 685-6.* The independence of the

bar flowed from the independence of the judges. It would seem obvious as a matter of common sense that, if the judges have the responsibility of presiding over and determining cases in the courts, they should have the power of deciding who should and should not be suitably qualified to appear before them to assist them in the discharge of their public duties.

Parliament has recognised the need for independence in anyone who exercises a right of audience before the courts. Section 42 of the Access to Justice Act 1999, by way of amendment to the 1990 Act, provides:-

> "Every person who exercises before any court a right of audience granted by an authorised body has -
>
> (a) a duty to the court to act with independence in the interests of justice; ..."

Thus in place of the convention which required a barrister to be independent, there is now a *legal obligation* on anyone who exercises a right of audience before any court, to act with independence in the interests of justice. So the necessary dependency of an independent judiciary on independent advocates has been recognised by statute as crucial to securing the ends of justice. This is of direct relevance to Article 6 of the European Convention on Human Rights, now part of our law since the coming into force of the Human Rights Act 1998 on 2nd October 2000. The Article, entitled "Right to a Fair Trial", provides, as we all know, amongst other things:-

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.."

It follows from what I have said that an independent and impartial tribunal established by law will be entitled to have the assistance of advocates who, by virtue of Section 42 of the Access to Justice Act, are under a legal duty to act with independence. For a proper and fair trial and hearing to be had in accordance with Article 6, both the judge and advocates are required by law to be independent, and the judge has to be impartial. Independence and impartiality are interlinked, but the two concepts are not the same. As Lord Bingham has remarked:-

> "Impartiality and independence may not ... be synonyms but there is a very close blood-tie between them".

This brings one face to face with the difficulty I propose to discuss. If a judge is legally obliged by virtue of Article 6 to be independent, and it turns out in a given case that he is not, the consequent violation of a party's right to a fair trial would, I expect, result in the trial being a nullity. As an advocate is legally obliged to act with independence, what would the consequences be, were an advocate in a civil or criminal trial to lack independence in breach of Section 42? Would that nullify the trial, as being in breach of both that Section and Article 6, on the basis that an independent and impartial hearing could not be effective if, for example, either prosecuting counsel or defence counsel were found not to be independent? And would a civil judgment be set aside were it to turn out that one of the advocates lacked independence in breach of Section 42? As is well known, Section 42 was enacted to meet the criticism that employed advocates would be dependent on their employers, and so lack the independence of the bar. But the Section cannot act as a magic spell, on the assumption that every advocate will automatically act with independence merely because the statute says he must. Section 42 should have some

legal content, so it seems appropriate that its meaning and effect should be openly debated sooner rather than later. In my judgment it is in the public interest that the scope of Section 42 should be unambiguous.

Judges depend on the independence of the advocates before them; so they must be able to discern and determine whether someone has failed to comply with his duty under Section 42. And so must advocates know where they stand, and what they must do, or avoid doing, so as not to compromise their independence. Given the relationship of the duty to act with independence to the right to a fair trial by an independent court in accordance with Article 6, the potential for failed trials may be serious without some reliable understanding of the scope of the legal duty Section 42 has created.

The independence of the judiciary has been widely discussed both nationally and internationally; and so there is much learning and guidance on the factors relevant to determining whether a judge may, or may not, be independent. By contrast there has been hardly any discussion on the nature of the independence required of an advocate. There have been many lofty pronouncements as to the importance of an independent advocate, but no analysis that I have been able to find of what that independence means. As the same word is used for both judge and advocate, one needs to start by looking at the content of judicial independence. There is no other available starting point.

The latest authority on judicial independence is to be found in the Scottish case of *Starrs v. The Procurator Fiscal* : 2000 S.C. Pt II 208, a decision of the High Court of Justiciary, consisting of the Lord Justice Clerk, Lord Prosser and Lord Reed.

The appeal in that case directly called in question the independence and impartiality of a temporary sheriff appointed by the Lord Advocate pursuant to his powers under Section 11 of the Sheriff Courts (Scotland) Act, 1971. The appellants contended that he was not independent, and therefore their right "to a fair and public hearing ... by an independent and impartial tribunal established by law" had been violated in breach of Article 6 of the Convention. The temporary sheriffs formed a pool of persons actually appointed to shrieval office; membership of it had increasingly come to be coveted as a step on the road towards a permanent appointment. From the point of view of the Lord Advocate, it had equally come to be seen to some extent as a probationary period during which potential candidates for permanent appointment could be assessed. A temporary sheriff was appointed for one year only; the appointment was usually reviewed, but it might not be; and by Section 11 (4) of the Act, the Lord Advocate had power to recall the appointment at any time. It was accepted by the Solicitor General that the effect of that provision was that a temporary sheriff held office at the pleasure of the Executive in the person of the Lord Advocate. Moreover, there was no obligation on the Lord Advocate to invite a temporary sheriff to sit. Should he displease someone in a position of influence, he could be tacitly suspended by being "sidelined", that is to say no longer being used at all during the currency of his appointment. The extent to which a temporary sheriff was used, and thus remunerated, appeared to be entirely at the discretion of the

Executive. Temporary sheriffs enjoyed no pension rights, whereas permanent sheriffs did.

The Court examined the relevant authorities and national and international conventions at considerable length. Time does not permit me to review their judgments in any detail; but I would recommend study of their excellent analyses. The Court unanimously concluded that a temporary sheriff was not independent, and so a fair trial, complying with the provisions of Article 6, could not lawfully take place before one.

Lord Prosser opened his opinion by saying:-

> "... the answer to the question of whether a person has had a hearing "by an independent and impartial tribunal established by law" when the tribunal is a temporary sheriff holding office at the pleasure of the Lord Advocate, with no security of tenure, can in my opinion be answered in the negative without any deep or detailed consideration of the words "independent and impartial". Nothing in the statutory provisions regarding temporary sheriffs, and nothing in the account which we were given of how they are selected and appointed, or how they are used, or how they cease to be used or to hold office appears to me to point to any other answer." (231 F)

In the course of his opinion Lord Prosser made other telling comments:

> "The very substantial narrative of procedures and practices which are in fact followed, but are not required by law, seem to me to provide the perfect illustration of a temporary sheriff's total dependence upon the Executive for his continuance in office". (232 H)

> "But the fact that temporary sheriffs will apparently often be hoping for a permanent appointment, and that they hold office during this period with no assurance that they will be used or re-appointed, far less given a permanent position, constitutes, to my mind a quite extreme form of dependence. One must not be Utopian, and a hope of promotion, for example, is no doubt present in the minds of many judges in many systems. I would stop short of saying that this is a general basis for alleging "dependence" on those who can promote. But the possibility of obtaining a better post makes it more, not less, important that there should be security of tenure at any particular level". (233 F)

> "But in the case of temporary Sheriffs, where the appointment is frequently a "career move", the combination of a one-year appointment with liability to either recall or suspension or limited use is in my opinion wholly inconsistent with the requirement of independence." (233 F)

Lord Reed began the relevant section of his opinion with these words:-

> "In order to establish whether a body can be considered to be "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence ..". And Lord Reed referred to the case of *Bryan v United Kingdom.* (241 C)

Thereafter he cited passages from the European Charter on the statute for judges adopted in July 1998, and from the Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983. The European Charter contained this statement:-

> "Clearly, the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of independence and impartiality of the judge in question, who was hoping to be established in post or to have his or her contract renewed". (242 F)

Shortly afterwards Lord Reed continued:-

> "It also appears to me to be important that temporary sheriffs may well be potential candidates for a permanent appointment in the event of a vacancy occurring, as is recognised in the notes issued to candidates for appointment as temporary sheriffs. The danger to judicial independence in such circumstances is subtle, but has been well described by Kirby J. of the High Court of Australia, speaking extra-judicially, in a paper which was drawn to our attention:
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> > "But what of the lawyer who would welcome a permanent appointment? What of the problem of such a lawyer faced with a decision which might be very upsetting to government, unpopular with the media or disturbing to some powerful body with influence? Anecdotal stories soon spread about the "form" of acting judges which may harm their chances of permanent appointment in a way that is unjust. Such psychological pressures, however subtle, should not be imposed on decision makers" "
> > (243 C)

A few lines later Lord Reed referred to some observations of the Chief Justice of Australia who had also drawn attention to the threat to judicial independence posed by the appointment of acting judges, observing that

"judicial independence is at risk when future appointment or security of tenure is within the gift of the Executive". (243 F)

And he further observed:

"Judicial independence can be threatened not only by interference by the executive, but also by a judge's being influenced, consciously or unconsciously, by his hopes and fears as to his possible treatment by the executive. It is for that reason the judge must not be dependent on the executive, however well the executive may behave: "independence" connotes the absence of dependence." (248 C)

Later in his opinion he referred to a telling passage from the judgment of Le Dain J. in *R v Valente* (1985) 34 DLR (4th) 161. That case was concerned with the question whether a court was an "independent and impartial tribunal" within the meaning of Section 11 (d) of the Canadian Charter of Rights and Freedoms. In that case Le Dain J. said this (at 248 I):

"Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial", as Howland C.J.0. noted (in the lower court), connotes absence of bias, actual or perceived. The word "independent" in Section 11 (d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the exercise of judicial functions, but a status or relationship to others, particularly in the Executive Branch of Government, that rests on objective conditions or guarantees." (248 I)

Lastly I would remind you of what Lord Bingham said in his Annual Lecture given in November 1996 to the Judicial Studies Board. It is reproduced in his book, "The business of Judging", at page 55. At page 61 one finds Lord Bingham saying this:-

> "Any mention of judicial independence must eventually prompt the question independent of what? The most obvious answer is, of course, independent of Government. I find it impossible to think of any way which judges, in their decision-making role, should not be independent of Government. But they should also be independent of the legislature, save in its law-making capacity. Judges should not defer to expressions of Parliamentary opinion, or decide cases with a view either to earning Parliamentary approbation or avoiding Parliamentary censure. They must also, plainly, ensure that their impartiality is not undermined by any other association, whether professional, commercial, personal or whatever."

From these citations I think one can draw these conclusions:-

First, independence of a judge depends on the occupational framework in which he works and lives. It is a matter of status; it does not depend on a state of mind, save to the extent that one may suitably speak of someone as independent minded.

Second, independent mindedness is probably better described as impartiality, which is a subjective state of mind, that is to say believing that one is holding the scales fairly between the parties and without partiality towards either.

Third, whether a judge is, or is seen to be, impartial can only be evaluated by what he says and does, or by reference to his connections or associations, looked at objectively. Hence the well known authorities on bias, or appearance of bias.

Fourth, by contrast whether a judge is independent can be determined by objective assessment of the factual circumstances of his engagement. Relevant factors may be security of tenure; freedom from external pressures or influences; remuneration and career prospects not at the discretion of someone in a position of influence.

Fifth, a judge may be independent, but not impartial; or not independent, but yet impartial. Independence, rather than dependence, is likely to enhance impartiality, or the appearance of it.

It seems to me that the guidance one can derive from the learning on judicial independence, may very substantially be utilised by analogy to determine the scope of the duty of independence placed upon an advocate by Section 42. Like a judge, the independence of an advocate surely must be a matter of status assessed by reference to the occupational framework in which the advocate lives and works. The nearest authoritative extra-judicial support for this view is to be found in the Kalisher Memorial lecture given by Lord Steyn on the 13th October 1998. Referring to the proposal by the Lord Chancellor to confer rights of audience on lawyers working in the Crown Prosecution Service he said this:-

> "But in my view the proposed granting of full rights of audience to lawyers working for the Crown Prosecution Service (CPS) would be a mistake. I make no criticism of the CPS or of the dedicated lawyers who work for the CPS. The point is an institutional one. On grounds of constitutionalism it would be a mistake to grant such rights to State employees: prosecutions in the Crown Court by members of an independent Bar places a brake on the Executive. It is no answer to say that CPS lawyers already prosecute in the magistrates courts. The important cases where tensions between the liberty of the citizen and the interests of the executive arise are heard in the Crown Court.

> It is an illusion to believe that CPS lawyers work in the same culture of independence as barristers in private practice. Inevitably, CPS lawyers have to display a loyalty to the organisation which employs them and that imposes direct and indirect pressures on them. Failure to fit into the corporate culture of the CPS may result in dismissal or denial of promotion."

It is noteworthy that Lord Steyn referred to the point as being an institutional one; that would seem to be synonymous with treating it as a matter of status depending on the occupational framework in which an advocate finds himself. An advocate cannot, of course, be impartial, for *ex hypothesi* his function is to promote his client's cause. But, in the words of Justice Scalia, the Court expects knowledgeable counsel to place before the Court the facts and points of law essential to the outcome. That calls for, if not impartiality, detachment and integrity. And those qualities may not be secured unless the occupational framework in which the advocate works and lives, objectively assessed, ensures independence. That seems to be the reason why the duty under Section 42 is expressed as being "to act with independence in the interests of justice". To borrow and adapt the words of Lord Bingham: acting with independence and acting in the interests of justice may not be synonymous, but there is a very close blood tie between them.

So what are the essential features of an occupational framework capable of ensuring the independence of an advocate? I would tentatively characterise them like this:

First, the advocate must have security in his occupation, that is to say he must not be on risk of losing his profession, or his ability to practise it, at the pleasure or will of others.

Second, he must not be subject to any external restraints or constraints, however subtle, which may inhibit his freedom of thought and action.

Third, his career prospects, or his remuneration, must not be at the discretion of others in a position of influence.

Fourth, he must not be dependent on any person or persons, who may thereby be able to exercise any dominion or control over his ability to make judgments or take decisions.

Assuming that these are the kinds of criteria that may be relevant, the next step is to test them by reference to the position of independent barristers, and employed advocates, whether barristers or solicitors.

I take first independent barristers, as they are conventionally called. On another occasion I described the occupational position of the independent barrister like this:-

> "First, he is not employed by anyone, so he is free of the constraint of any conflicting contractual or fiduciary duty. Second, if he displeases and loses a lay or professional client by saying or doing things not to the client's liking, he or his chambers will have sufficient other clients available to instruct him. Third, the rules of professional conduct

designed to maintain professional standards are as much a weapon as a protection for a barrister. Fourth, chambers framework presided over by an effective head, ensures that proper standards are maintained, usually by providing the necessary advice when difficult problems arise".

To those features I would add virtual security of tenure. Once a barrister is a member of chambers, it is most unlikely that he would be required to leave. Most stay for their professional lives, until appointment or retirement. It is true that chambers do break up, or merge, and that members do leave for one reason or another. But moving or leaving chambers would be most unlikely to be caused or influenced, directly or indirectly, by any advice given to a client or by any decision made in Court, save to the extent that it involved a breach of professional conduct.

It has been said, I think correctly, that the independence of a barrister can be compromised if his practice depends on one client, or very few clients. Someone who does exclusively prosecution work for one authority may not want to offend it; a young barrister acting all the time for one or two powerful City firms may feel inhibited in saying or doing things which may displease. Without doubt that measure of dependency may carry risk of a breach of Section 42. The countervailing protections offered by the chambers system, in practice, I believe, sufficiently diminish it, but they may in certain circumstances fail to do so.

The occupational framework within which employed advocates may have to function seems to me to be substantially different. First, every employed advocate is bound by terms of employment. His primary loyalty must be to his sole client, his employer, to whom he owes contractual and fiduciary obligations. Second, he is

dependent on the employer for his salary, for increases in salary, for promotion and advancement within the organisation of which he becomes a member. Third, the organisation itself may have a structure, for example line managers, and a hierarchy similar to that which exists in the Civil Service. Fourth, an employed advocate has no security of tenure. He may have a term contract. But that would not prevent the contract from being terminated early, on payment of compensation; or the employed advocate being "sidelined" by not being fully used, or used repeatedly on uncongenial work, should he not commend himself to someone of influence. The conclusion seems inescapable; any employed advocate would in reality be employed at the pleasure of the employer. And to the extent that the employed advocate may enjoy some measure of employment protection, his working life may well become unbearable if he is at odds with those around him.

It seems to me that by analogy the position of an employed advocate is similar to that of a temporary sheriff. That, of course, does not mean that the overwhelming majority of employed advocates will fail in their duty to the Court to act honestly, competently and with unquestioned integrity. There can be no doubt that both barristers and solicitors employed in the Crown Prosecution Service or in industry, do their best to act honourably as professional men. But what the law now requires is independence, which is different from integrity. Parliament has recognised that independence, or the appearance of it, is necessary for the maintenance of public confidence in the legal system. For in the public perception, absent independence, there is a risk, or even a likelihood, of bias and lack of probity. It seems difficult to escape from the conclusion that employed advocates may be faced with formidable difficulty in complying with the duty of independence required by Section 42.

I would add that similar problems may confront solicitors in private practice, whether partners in, or employed by, a firm. Partners in a firm have never been considered to be independent of one another; they owe fiduciary duties to each other; the objective of the firm is the generation of profit to their joint and several benefit. That is why it has never been accepted that different solicitors in the same firm could act for clients with opposed interests, in contrast to barristers in the same chambers who can, because each is a sole practitioner, and genuinely so. Whether , or to what extent, the occupational framework in which they function would, or could, enable a firm's solicitor advocates to comply with the legal duty of independence, is not something on which it would be appropriate for the Treasurer of an Inn of Court to express an opinion. That is a question for the Law Society.

The enactment of Section 42 was, to my mind, a mistake. It would have been preferable to have left the position as it was; barristers fulfilling the duty of independence as a matter of convention; and employed advocates advising and appearing for their employers in court on the understanding that they were not independent. That would not in any way compromise their integrity, competence or duty to the court; on the contrary frank recognition of their position as employed advocates would enhance their professional standing.

However, there would remain the problem of compliance with Article 6. Can there be a fair and public hearing by an independent tribunal, if any advocate appearing before it in fact lacks independence? That question, together with the questions I have posed in relation to Section 42, have yet to be answered by a court. We may not have long to wait. It seems to me to be very probable that one day soon

a defendant in a criminal case will assert that he has not had a fair trial in accordance with Article 6, because either prosecuting counsel, or defence counsel, or both, were employed by the State, and therefore not independent in breach of s.42.

By way of postscript I would say this. What I have said is, of course, controversial. It was not intended in any way to give offence. If I have unwittingly done so, I apologise. My motive has been to sound warnings of some risks which I perceive may lie ahead for members of this Inn of Court.

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13th November 2000