

Separation of powers – importance of judicial independence

[Politics](#)



The Jamaican Constitution (hereinafter “ the Constitution”) came into effect with the Jamaica Independence Act of 1962. The Act was tabled to ‘ make provision for and in connection with, the attainment by Jamaica of fully responsible status within the Commonwealth. ’ This document formed the framework for Jamaica’s political independence and created the premise on which this fledgling nation could carve out its own legal system based on its own moral, cultural and political experience.

The Constitution though largely reflective of the previous colonial relationship, has within it an innate balance of power between the arms of government that is theoretically and fundamentally positioned to support the country’s self-governance. This balance is so designed, to facilitate the critical functions of government while ensuring that no single body so fully controls the reins of power that it’s will can be imposed without the acquiescence of the other parties, and the greater society.

This balance is grounded in the principle of the Separation of Powers, implied by the Constitution. With the complex interplay of relationships, and the significance of power within the Executive, the Legislature and the Judiciary, the latter emerges as the keepers of the gate in maintaining this equilibrium through its function as the arbiters of justice. The Doctrine of the Separation of Powers was first proposed by the Greek philosopher Aristotle (384-322BC), and made popular in the 17th century by French writer Charles Louis de Montesquieu.

Montesquieu argued that for an independent judiciary to exist, the three arms of government must have separate and independent powers within their areas of responsibility, otherwise we run the risk of there being no

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liberty, arbitrary control, violence and oppression. This principle may be applied to varying degrees in any legal system and may or may not be a legal restriction; however it is a very effective tool used to protect the rights and liberties of citizens from tyranny.

The Constitution by virtue of Section 34, establishes Parliament (the Legislature) as the first arm of government and comprises the Queen (represented by the Governor General) and two Houses: the Senate and the House of Representatives. Under Sections 48 –50, it is given power to make laws for the peace, order and good governance of Jamaica, decide special rights, immunities and powers of the Senate, the House of Representatives and its members; and the conditional power to alter the Constitution.

By virtue of Section 68, the Governor General is given Executive power to be used on the Queen's behalf either directly or through officers under him. Section 69 establishes the Cabinet as the main body to direct policy. The Cabinet, consisting of the Prime Minister and other Ministers chosen by him, manages the general administrative functions of the Government and is accountable to Parliament. The Governor General together with the Cabinet comprises the Executive arm of Government, the second arm of government.

The Judiciary is the third arm of Government. It comprises judges and magistrates from the network of courts that form the legal system. Sections 97 and 103 of the Constitution establish the Supreme Court and the Court of Appeal, respectively. The Chief Justice and the President of the Court of Appeal are appointed by the Governor General on the advice of the Prime Minister in consultation with the Leader of the Opposition.

The other Puisne Judges are appointed by the Governor General on the advice of the Judicial Services Commission. It is important to note that there is some degree of inter-connectivity between the Executive and the Legislature, as members of the Cabinet are also members of Parliament. The sharing of personnel between these two bodies compromises the strict application of the doctrine of the separation of powers. It is therefore imperative that the Judiciary executes its functions in an independent manner.

The Constitution supports the assertion that the Judiciary has not only the right, but the responsibility to review the affairs and policies of the Executive and Legislature to ensure that their powers are being exercised within the limits of the Constitution. In exercising this duty, a court can declare a law unconstitutional and therefore null and void as in the case of *Adrian Nation, Kereen Wright v DPP and the Attorney General of Jamaica*. In *Moses Hinds v. The Queen* it was underscored that the fair and effective administration of justice constitutionally rests only within the powers of the Judiciary and in *Independent Jamaica Council for Human Rights Ltd. and Others v. Marshall-Burnett and the Attorney General of Jamaica*, the Privy Council overruled the judgment of the Jamaican Appellate Court in finding that the three Bills attempting to remove the Privy Council as the final appellate court were unconstitutional. This decision was based on their previous ruling in *Hinds*.

As demonstrated in other Commonwealth jurisdictions, the Judiciary may indirectly place pressure on the Legislature to ensure that laws are drafted *intra vires*, in the first instance. In attempting to avoid *ultra vires* rulings, the Legislature often times "...tests its own legislation in the courts. This

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occurred in *Suratt et al v Attorney General of Trinidad and Tobago* wherein the Trinidad and Tobago Government defended an action on the grounds that a Bill seeking to promote equality was unconstitutional by virtue of its being discriminatory. This challenge to legislation is another example of the check and balance of the Separation of Powers. The Judiciary is thus required to rule on complex issues that have direct implications for the members and institutions within society, including the other arms of government; with impartiality and in accordance with the Rule of Law. The rule of law as proposed by A. V. Dicey asserts that no man should be punished except for conduct in clear breach of the law. This assertion supports the fact that the legal system rests on the objectivity of the Judiciary.

Where we are governed under a system which rests upon the impartial application of laws, and under which citizens' rights and obligations are regulated by those laws, there must be an established and accepted system for making law. The law must be publicly known. Interference with rights and obligations must be justified within the law as the perception of rights, freedoms and equality in society is influenced by the quality of judicial rulings. In the spirit of Judicial Independence, the Judiciary must be impartial and may not be influenced by any source except the law.

Within the Constitution, security of tenure and security of salary are entrenched provisions designed to insulate the Judiciary from pressure intended to influence their rulings. Judicial Impartiality is defined as ' the freedom of each individual judge to reach a decision within the law without undue interference or pressure from government, other judges, the media or any other source. ' While attempts to directly interfere with the fair and

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effective administration of justice may be limited, it can be argued that several factors undoubtedly affect the court's ability to properly execute its role.

Particularly within the Jamaican context, financial constraints arising out of cost-cutting measures of Parliament and limitations in Ministerial budgets have severely affected the resources and physical infrastructure required for the efficient operations of the machinery of the Judiciary. In recent times, influential voices in the Jamaican legal fraternity have highlighted the need to address the issue of limited resources. The Director of Public Prosecutions, Paula Llewellyn have stated that “ the country is struggling with a low capacity court situation and that is affecting how the wheels of justice turn..... ou should have been building more courtrooms and making sure you have more personnel, court reporters, prosecutors, resident magistrates.... and that was not being done. ” The Judiciary also provides guidance to the citizens and other branches of government on matters relating to the Constitution, through statutory interpretation and application of general principles of law while settling disputes brought before them. Their ability to be fair and impartial is particularly challenged when called upon to interpret and rule on legal documents that are poorly drafted or ambiguous.

Although the law lends itself to flexibility and expediency, the question arises in some instances whether the ruling accurately represents the will of the Legislative as some appeals have been advanced on the grounds of statutory misinterpretation as in the case of *R v East Berkshire Health Authority ex parte Walsh*. Judges may find themselves inadvertently assuming the role of

creating legal rights when required to make plain issues not explicitly addressed by legislation.

It has been debated that these so-called 'created laws' are not in fact created but are legal principles which lay dormant until judges' interpretations unearth them. This was the position taken by Brett, M. R, in *Munster v Lamb*. However, the perception is that this 'power' does indeed exist as, in plural societies right and wrong are just as plural and judges must ensure that conclusions sufficiently represent a fair carriage of justice. If the Judiciary were acting solely as the mouth piece of the Legislature and the Executive with no independent thought or justice-driven compass, this arm of government would hardly be relevant.

In *Earl Pratt and Ivan Morgan v The Attorney General and The Superintendent of Prisons, Saint Catherine*, the Privy Council interpreted inhumane treatment under section 17(1) of the Constitution of Jamaica to include delay between conviction and the carrying out of the death penalty though the constitution was silent on this matter. This interpretation created a legal right which had the effect of automatically commuting death penalty convictions for convicts on death row in excess of five years to life imprisonment.

The Judiciary also exercises its constitutional mandate through a process of Judicial Review which is the means by which " Government departments, local authorities or others with law-making and administrative powers are confined by the courts within powers granted by the [Constitution]. .

Although Jamaica does not have a specific Judicial Review Act, provisions for judicial and constitutional claims fall under Administrative Law Claims in <https://assignbuster.com/separation-of-powers-importance-of-judicial-independence/>

section 56 of the Supreme Court of Civil Procedure Rules, 2002. Judicial Review is an important tool of the Judicial Branch.

It is considered a grave and ominous “ responsibility which the courts must not shirk from or attempt to shift to Parliament” “ as this responsibility in and of itself is a system of checks and balances thus seen as the: last bulwark of citizenry. ” The grounds for Judicial Review includes error of law, failure to observe the principles of equity, abdication of functions, improper delegation of authority, and unreasonableness of a decision. All are supporting grounds for the argument that the maintenance of fair justice is really what is at the heart of the function of the Judiciary. “ Remedies for judicial review include: Certiorari, for quashing unlawful acts, Prohibition, for prohibiting unlawful acts and Mandamus, (now mandatory order), for requiring performance of a public duty, including a duty to make a decision or determination, or to hear and determine any case” 6. The fair administration of justice by Jamaica’s courts is influenced by the fact that its final court of appeal rests outside its jurisdiction.

According to the principle of stare decisis or Judicial Precedence, courts are bound follow the ruling of higher or equal courts. With the Privy Counsel being retained by the Constitution as Jamaica’s final appellate court, the discussion arises whether the rulings of that external body are sympathetic to the Caribbean experience and thus a fair and effective administration of Justice. According to Sharma JA of the Trinidadian Court of Appeal in *Boodram v.*

AG and Another, “ even after our independence, our courts have continued to develop our law very much in accordance with English jurisprudence. The <https://assignbuster.com/separation-of-powers-importance-of-judicial-independence/>

inherent danger and pitfall in this approach is that, since Independence our society has developed differently from the English and now requires a robust examination in order to render our Constitution and common law meaningful. " The Jamaican Constitution was so designed to support and to be supported by the Doctrine of Separation of Powers between the Legislative, the Executive and the Judiciary.

Though not free of limitations, the Doctrine effectively balances power among the three bodies, ensuring that encroachments that are not in the interest of justice are held somewhat in check. The sharing of personnel between the Executive and the Legislative bodies in the Jamaican Parliament, however, can lead to cynicism and has the potential for corruption. It is therefore imperative that the Judiciary be allowed to function independently and be protected from interference from those who would seek to influence its decisions.

Despite the intent of the Constitution's authors, the justice system can only be determined to be fair or faulty based on human factors, the judges. The Constitution is a function as well as a reflection of the society it serves and as such our moral, cultural and economic experience will determine how our justice system evolves and whether the tenets on which it is founded are sufficiently strong and rooted to support Jamaica's political and legal independence.