JUDICIAL INDEPENDENCE AND EFFECTIVENESS

L P THEAN
Retd Judge of Appeal, Supreme Court of Singapore

Introduction

All of us appreciate and acknowledge the importance of judicial independence. We all know generally what the term means. However, the exact nature and extent of judicial independence though often debated are far from being well defined. The question is often asked: independent of what and from whom? Or put it in another way: what does the conception of judicial independence involve? Professor Robert Stevens, the former Master of Pembroke College at Oxford University, in 1993 noted this:

> *While there is widespread consensus on the obvious importance of the independence of the judiciary, the literature on it is meagre, and the concept itself has never been fully unpacked. Unpacking is a process worth engaging in.*[1]

Since then, there have been numerous articles or papers written and published on the subject of independence of the judiciary. However, Professor Steven's statement that the concept of judicial independence itself "has never been fully unpacked" remains substantially true. It is the modest attempt of this paper to "unpack" that concept.

The well known philosopher, Isaiah Berlin, on 31 October 1958, then the Chichele Professor of Social and Political Theory of Oxford University, delivered his Inaugural Lecture entitled *Two Concepts of Liberty*. In that lecture he examined and discussed liberty or freedom in two senses: the negative sense and the positive sense. He said:

> *"I propose to examine no more than two of these senses – but those central ones, with a great deal of human history behind them, and, I dare say, still to come. The first of these political senses of freedom or liberty (I shall use both words to mean the same), which (following much precedent) I shall call the "negative" sense, is involved in the answer to the question "What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other person?" The second, which I shall call the positive sense, is involved in the answer to the question "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?" The two questions are clearly different, even though the answers to them may overlap."*

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[1] *The Independence of the Judiciary. The view from the Lord Chancellor's Office*, Professor Robert Stevens, 1993 at p 3.

Professor Pamela S Karlan of Stanford Law School, in her article entitled *Two Concepts of Judicial Independence*, adopted by analogy Berlin's two concepts of liberty as her framework for her analysis of the two concepts of judicial independence[2]. She said:

> *"Two Concepts of Liberty is quite useful in thinking about judicial independence. It reminds us that, like other forms of liberty, judicial independence has both negative and positive aspects. Judges must be both free from certain kinds of pressures or influences and free to envision and realize certain goals. Berlin's analysis also suggests why it is easier to develop a strong consensus for the negative conception of judicial independence than for the positive one. It explains why a positive conception of judicial independence ultimately cannot escape substantive judgments. Finally, Berlin's work cautions us about having too unconditional a commitment to judicial independence, particularly in its most positive forms, at the expense of other values. Sometimes, factors that look like structural threats to judicial independence from the positive perspective can be equally explicable as structural protections for other values that an unqualified embrace of judicial independence undervalues. Just as "judicial independence" may be too loaded a term to refer to all the ways in which judges may "ward off interference", so too "threats" may be too loaded a term to describe all the constraints on that freedom. Judicial independence is not an end in itself."*

I think I can do no better than to follow these illustrious precedents and respectfully adopt the approach of Professor Karlan in using Berlin's twin concepts as a basic framework "to unpack" the concept of judicial independence. I therefore consider in this paper the concept of judicial independence in the negative sense as consisting of a negative freedom, that is, the freedom of the judiciary from external interference in the administration of justice, and the positive sense as consisting of a positive freedom, that is, the freedom of the judiciary to envision and dispense justice. I shall begin with an examination of the negative freedom, namely, independence of the judiciary from executive interference, independence from legislative interference, independence from the media and independence from lawyers and litigants. I shall then examine the positive freedom, namely the independence of the judiciary to envision its goal of dispensing justice and give effect to its own conception of justice.

Independence from executive

The most common and most discussed feature of judicial independence is independence from governmental or executive interference. In Singapore, this freedom is entrenched in the Constitution of Singapore, where there are express provisions which protect the judiciary from executive interference. For example,

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[2] See Pamela S Karlan, 'Two Concepts of Judicial Independence', Southern California Law Review, v 72 no2/3 (Jan/Mar 1999) at p 535-558.

Article 98 of the Constitution provides for security of tenure of the judges. Once appointed, a Judge of the Supreme Court holds office until he attains the age of 65 years[3], and can only be removed by the President, on the recommendation of a specially appointed tribunal consisting of not less than five persons that are or were Judges of the Supreme Court[4]. Article 98 provides that the remuneration of a Judge of the Supreme Court shall not be altered to his disadvantage after his appointment.[5]

That said, it seems to me that a pure form of judicial independence, as conceived in the classical doctrine of separation of powers, is difficult to achieve. For instance, in Singapore, under Article 95 of the Constitution, judges of the Supreme Court are appointed by the President, acting in his discretion, if he concurs with the advice of the Prime Minister. Under Article 23 of the Constitution, the executive authority of Singapore is vested in the President and exercisable subject to the provisions of the Constitution by him or by the Cabinet or any Minister authorised by the Cabinet. Therefore, effectively the appointments of judges are made by the executive in Singapore. Substantially this is the case in the United Kingdom. Even in the United States of America, whose constitution contains possibly the purest form of the separation of powers doctrine, appointments to the federal judiciary and the Supreme Court are made by the executive together with the legislature.

The lack of doctrinal purity, however, does not mean an introduction of executive interference. It might be asked whether and, if so, to what extent our Constitution provides a firm foundation for judicial independence from the executive. While we have not seen political appointments to the bench, what is there to stop the executive from so packing the Bench if it so wishes? Indeed, what is there to prevent the executive from mustering the necessary two-third majority in Parliament and remove, for example, the article that provides that the remuneration of a judge shall not be altered to his disadvantage? Furthermore, even if the Constitution continues to provide that the remuneration of a judge cannot be altered to his disadvantage, what is there to stop the executive from reducing the administrative infrastructure that supports the judiciary, for example, by removing the vital support staff from the judiciary?

True it is that all these can be done. The fact remains, however, that nothing of that kind has ever been done. This to my mind suggests that the true foundation of judicial independence from the executive, does not lie solely in the provisions of the Constitution, but also in the complex mix of political, economic and other forces acting on the executive. Put it simply in another way, an independent judiciary is a key component in the proper governance of a country. A judiciary that is perceived as weak and partial is a liability to a country. With political legitimacy increasingly tied to economic success, an executive would want a strong and effective judiciary which provides investor and business confidence. Some would find this thought

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[3] Article 98(1) Constitution of the Republic of Singapore.
[4] Article 98(3)-(5), Constitution of the Republic of Singapore.
[5] Article 98(8), Constitution of the Republic of Singapore.

comforting. Those who are more partial to purer forms of judicial independence may find it less so.

Independence from the Legislature

Interference by the legislature is of a very limited nature and takes various forms. The most common form is legislation which either limits the exercise of judicial power or discretion, such as legislation prescribing the minimum or mandatory penalty for offences, and legislation affecting citizens' rights of recourse to the courts. These constraints on the exercise of judicial power are generally acceptable, as they reflect the policy of the state.

All said and done, it is inevitable that the judges in interpreting the law are quite often influenced by the legislature. This is particularly so in the field of interpreting laws passed by Parliament. Clearly, when it comes to cases involving interpretation of statutes passed by Parliament, judges would and indeed should have regard to the intention of Parliament. It is the job of a judge to apply the law as provided for in the statutes. This is not the time and place to embark on a discussion of the jurisprudential merits of the textualist school or the interpretivist school of statutory interpretation. So far as Singapore is concerned, we have section 9A(1) of the Interpretation Act which provides that in the interpretation of a written law, i.e. statutes and subsidiary regulations made under the statute, an interpretation that would promote the purpose or object underlying the written law is preferred to an interpretation that does not. This purposive approach is to be adopted even if there is no ambiguity or inconsistency in the written law. In 1999, the Court of Appeal of Singapore (the final appeal court in Singapore) decided in the case of *Planmarine AG v Maritime and Port Authority of Singapore* [6] that following the clear wording of s 9A of the Interpretation Act, there is no rule that a provision must be ambiguous or inconsistent before such a purposive approach can be taken. In the interpretation of a statutory provision, the court can take into consideration materials such as parliamentary debates to ascertain the meaning of the provision conveyed by the text, taking into account the purpose underlying the written text.[7]

Section 9A of the Interpretation Act thus gives judges some leeway beyond the strict wording of the text, to arrive at an interpretation that would promote the purpose of the law. May I respectfully observe that one should be mindful that purposive interpretation as a doctrine is no more than this — reading the text of the statute, and taking into consideration the accompanying materials, to determine the purpose intended by the legislature. It should not be used as tool or as a basis to exert independence from the legislature and engage in an independent lawmaking enterprise.

On the other hand, I would also respectfully say that judges should not be too mindful of the policy of legislature. Judges should not be deciding cases with

[6] *Planmarine AG v Maritime and Port Authority of Singapore* [1999] 2 SLR 1 at para 23.
[7] Section 9A(2) Interpretation Act (Cap 1).

parliamentary approval or the avoidance of parliamentary reprobation in mind. In this respect, the Constitution does provide some degree of judicial independence from the legislature. Article 99 of the Constitution restrains Parliament from discussing the conduct of a judge except on a substantive motion of which notice has been given by not less than one-quarter of the total number of the Members of Parliament. While much of such independence comes from a judge's own courage and discipline, Article 99 lends supports to this, by limiting the occasions where a judge's conduct can be discussed in Parliament.

Judicial independence from the legislature and the executive comes at a price. Judges are protected, but in return they are expected to be impartial and politically neutral. Sir Hartley Shawcross (as Attorney-General of United Kingdom in 1950) said:

> *"[It was] a most important principle of our constitutional practice that judges do not comment on the Policy of Parliament, but administer the law, good or bad, as they find it. It is a traditional doctrine on which the independence of the judiciary rests. If once that doctrine were to be departed from, and judges permitted themselves to ventilate from the Bench the views they might hold on the policy of the legislature, it would be quite impossible to maintain the rule that the conduct of judges is not open to criticism or question."*[8]

In another pointed observation on the British judiciary, another author said thus:

> *"The British judiciary prides itself on its independence ... But this independence has been part of a tacit agreement between judges and politicians. Politicians normally do not meddle with the judiciary even when they could. Ministers do not pressure the Lord Chancellor to award judgeships to the faithful. Party leaders could never removes judges and only alter any statute dealing with the courts after extensive consultation. For their part the judges restrict their scope of authority to private law matters, avoiding the 'political thicket'. Most judges have seemed aware that treading too closely to questions of public policy could propel them into an unwinnable battle with the majority at Westminster. English judges traded range of authority for degree of authority in a narrow field, independence for a reduced role on the public stage ..."*[9]

These observations, made in the context of the British judiciary, are equally pertinent in the Singapore context. The role of a judge is constitutionally defined. Where a judge wanders into criticisms of the executive or the legislature beyond what is necessary for the resolution of the case before him, he should be prepared to receive responses in kind. On the other hand, such judicial restraint from comments on the executive or legislature would necessarily have to give way to duty, in cases

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[8] Supra, Stevens at fn 1 p 79.

[9] J T Waltman, *The Courts of England in the Political Roles of Law Courts in Modern Democracies* (1988) at p 117-118.

such as those involving judicial review, where a judge may have to quash a decision of a minister or government officer, and give reasons for such a decision.

Independence from the media

In modern times independence of the judiciary must necessarily mean also independent from interference from the media. In some advanced countries, the media is treated as the fourth estate, assuming a watchdog role over the various branches of the government of the country. The extent to which this watchdog role extends to the judiciary is subject to varying opinions. In the United Kingdom, Sir Derek Oulton writing in 1994, lamented the increasing freedom felt by newspapers over the last 30 years to attack judges with a vigour that was formerly quite unknown. He also rued that the law of contempt, which used to be employed to prevent this, had steadily declined in its use.[10] This is, however, at least in part, due to a growing view among British judges that "the right of the press to comment on matters of public interest is all but sacrosanct".[11]

To the extent that media attacks affect the standing of the judiciary, the law of contempt can be used to defend the courts. As Lord Diplock said in *Attorney General v Times Newspapers* in 1974:

> *"Contempt of court is punishable because it undermines the confidence not only of the parties to the particular litigation but also of the public as potential suitors, in the due administration of justice by the established courts of law."*[12]

In Singapore, the courts have on occasions used the law of contempt to deal with such attacks by the media: see *Attorney General v Pang Cheng Lian and Ors*[13] and *Attorney General v Zimmerman and Ors*[14].

It is said that while media attacks on the judiciary occasionally may amount to harassment, and in some cases are downright attempts to destroy judicial reputations, what is involved is not so much an attack on judicial independence but on judicial standing. I am not certain that attacks by the media involve only an issue of judicial reputation and not judicial independence. For one thing, the two are very much tied up together. For another, just as we seek to restrict parliamentary criticism of judicial conduct so that judges will not feel pressured to make decisions with parliamentary approval or criticism in mind, so too should we restrain media criticism of judicial conduct for the same reasons. The dangers of influence from the media and public opinion were well highlighted by Chief Justice Murray Gleeson of Australia in his article, *A Changing Judiciary*, in the following terms:

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[10] *Journal of Law and Society*, vol 21, no. 4, Dec. 1994 at 569.
[11] See for example, Lord Bingham, *Judicial Independence,* Judicial Studies Board Annual Lecture given on 5 November 1996, reproduced in Tom Bingham, *The Business of Judging* 2000 at p 61.
[12] *Attorney-General v Times Newspapers* [1974] AC 273 at 309.
[13] [1972-1974] SLR 658.
[14] [1984-1985] SLR 814.

> *"By comparison with our predecessors, modern judges might appear anxious to please. Sometimes we seem a little unclear as to exactly who we want to please, or what it is that might please them; and there are still some among us who have difficulty in regarding the justice system as a service industry. The judiciary has responded to the demands of consumerism. That we should value public confidence is beyond doubt. But our thinking about what public confidence means, and how it is to be maintained, requires some clarification. The civil justice system is not simply a government funded dispute resolution service which has as its object the satisfaction of parties to disputes. Its object is to administer justice according to law, and if that means forcing someone to pay his debts or honour his contractual obligation ... then that is what must be done, even though it will cause dissatisfaction. The criminal justice system is an even more unlikely subject of universal approval ... We have a service charter. It is to do right by all manner of people, without fear or favour, affection or ill will. The confidence we seek from the public is confidence that we will pursue that objective with fidelity and integrity, even if to do so makes us unpopular, or causes dissatisfaction in some quarters. That confidence is not secured by seeking popular acclaim for our decisions, or by appearing to be responsive to threats."*[15]

Independence from the lawyers and litigants

Lastly, with regard to judicial independence, we should not forget the influence of the litigants and their lawyers. In this respect, one of the most important considerations is that judges should be free from having their financial well-being dependent on the outcome of the cases they are deciding. There are sometimes arguments about the precise level of financial provision needed to ensure that judges are not tempted to seek to benefit from their decisions. Much of this debate is, in my view, unnecessary. Once judges are adequately remunerated, such that they need not endure economic hardship, pecuniary gain is hardly a justification for any judge to sway his decision.

It may be too materialistic an approach to say this. But to my mind there is a link between judicial remuneration and judicial independence from lawyers and litigants, albeit a more subtle one. This was well expressed by Lord Bingham when he said:

> *"In most societies, and subject to most obvious exceptions, there is some perceived relationship between what someone earns and the status or prestige which he enjoys. Financial rewards are not, of course, everything, but nor are they nothing. Unless, therefore, the rewards of judicial office (with or without other benefits) are sufficient to attract the ablest candidate to accept appointment, albeit with some financial sacrifice, the ranks of the judiciary must be filled by the second best, those who (under our system) have failed to make it in private practice, and there would be an inevitable lowering in the*

[15] Murray Gleeson, *A Changing Judiciary* (2001) ALJ 547 at p 554.

> *standing and reputation of the judiciary, and a sea change in the relationship between advocate and judge. There would also, I suggest, be a loss of those qualities of confidence and courage on which the assertion of true independence not infrequently depends, because these qualities tend to be the product of professional success, not the hallmark of professional mediocrity."*[16]

I respectfully agree with Lord Bingham. The maintenance of a strong and independent judiciary depends in part on the payment of sufficient remuneration. However, having received such remuneration, as is with many aspects of judicial independence, much then lies with the judges, to retain the confidence of lawyers and litigants.

At common law (in Singapore) a judge acting in his judicial capacity is immune from any suit for any error, whether of law or fact or for negligence.[17] Further what the judge says in court is absolutely privileged and cannot found the subject of an action for damages for defamation. This position is not provided in the Constitution; nor is it provided by any statute. In *Sirros v Moore* [1975] QB 118 at 132, Lord Denning MR said:

> *"[I]t has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear."*

This passage of the judgment of Lord Denning MR is applicable to Singapore. Hence, where a judge has made a mistake, the remedy lies in an appeal to a higher court where the error can be corrected. In cases of judicial misbehaviour the remedy is by proceedings against him for removal as provided in the Constitution.

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[16] Supra, Lord Bingham, fn 11 at p 65-66.

[17] The immunities of a judge are not expressed in the Constitution, but by common law. See *Ebge v Adefarasin* [1986] LRC (Const) 596, SC (Nigeria) where it was held that a judge was immune from civil action in respect of any act done or order made by him in the discharge of his judicial duty where he acted within his jurisdiction or believed in good faith that he acted within his jurisdiction. See also *Sirros v Moore* [1975] QB 118; *Moll v Butler* (1985) 4 NSWLR 231; *Rajski v Powell* (1987) 11 NSWLR 522.

Judicial activism

I now turn to the positive aspect of judicial independence, that is, the ability of judges to envision and achieve certain goals in the dispensation of justice. As a start, I would say that the positive independence to adjudicate and decide on issues or matters coming before judges cannot be based on their own convictions without regard to the law. Such a basis would only bring about uncertainty in the law. It would mean, at least to a substantial extent, that judges possessed of such independence are entitled to follow and apply their own notion of the law. Clearly such a position is untenable. Judges are appointed to uphold and apply the law. They are not anointed to be prophets of the law.

Concerns over judges venturing beyond the law have traditionally centred on judges expanding the ambit of individual rights beyond that found in the strict text of the country's equivalent of a bill of rights, or on judges being overly interventionist in limiting the powers of the executive. John Gava, Senior Lecturer at the Law School in the University of Adelaide, notes a new phenomenon in Australia, what he calls 'hero-judges', who see their roles as enhancing the capacity of the government to manage the economy, in order to stoke up the pace of economic growth. He cautions as follows:

> *"The structure of our political system, with countervailing sources of political power in the Senate, the various States, and indirect political controls provided by a free press and the seemingly ever-present prospect of an election, makes complete victories rare. 'Rough and ready' these compromises may be, but they do allow for the perception and the reality that all sides have had an input. Judicial treatment of such issues is essentially 'black and white' and clearly demarcates the winners from the losers and sharply circumscribes involvement by outsiders.*
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> *Neither are judges in an institution that allows them to garner the information and views necessary for political decision-making. Judges don't have research facilities and the opportunities to hold hearings; neither do they benefit from the advice of expert lobbyists and the scrutiny of the press. They are also severely constrained in their ability to take part in and learn from the robust debate that characterises normal politics."*[18]

Independence of personal bias

Judges in deciding on matters before them should be independent of their personal biases. By this, I do not mean that a judge must have total absence of pre-conceptions and notions of the law and justice. If this is so, no one would have a fair trial, and no one ever will. Mr Jerome Frank, a federal judge in the United States, provided a useful contrast between permissible background influences, which we

[18] John Gava, *The Rise of the Hero Judge* UNSWLJ (2001) Vol 24(3) 747 at p 754.

were born with and acquired in the process of growing up, with a different set of biased pre-conceptions. He said:

> *"In addition to those acquired social value judgments, every judge, however, unavoidably has many idiosyncratic "learning of the mind", uniquely personal prejudices, which may interfere with his fairness at trial ... The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self knowledge, nullify their effect. Much harm is done by the myth that, merely putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine ... Freely avowing that he is a human being, the judge can and should, through self-scrutiny, prevent the operation of this class of biases."*[19]

Mr Jerome Frank's observations on the need for a judge to maintain independence of mind, serves as a pointed reminder of a common thread found in the above discussion on the various aspects of judicial independence – judicial independence is as much a matter of a judge's character, courage and discipline, as it is a matter of constitutional and structural safeguards.

Judicial administration

One area of judicial independence that is crucial in ensuring that judges are able to carry out effectively their duties, but which is often neglected, is the independence of judges to carry out judicial administration. There are two schools of thought here. One school is represented by critics who have expressed fears that allowing judges management control over the judicial administration and proceedings would diminish the quality of justice[20]. The other is typified by the views such as that of the Supreme Court of the United States in *Geders v United States*, where it said:

> *"... if truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings ..."*[21]

This latter view finds support from Lord Mackay of Clashfern who as the Lord Chancellor of the United Kingdom, said in 1991:

> *"[The judges'] function is to decide cases and in so doing they must be given full independence of action, free from any influence. But in order to preserve their independence the judges must have some control or influence over the administrative penumbra immediately surrounding the judicial process. If judges were not, for example, in control of the listing of cases to be heard in the courts it might be open to an unscrupulous executive to seek to influence the outcome of cases (including those to which public authorities were a*

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[19] *In re J.P Linehan, Inc.*, 138 F.2d 650 at p 653 (2d Cir 1943).
[20] See e.g. Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982).
[21] *Geders v United States*, 425 U.S. 80, 87 (1976).

> *party) by ensuring that they were listed before judges thought to be sympathetic to a point of view, or simply by delaying the hearing of the case if that seemed to advantage the public authority concerned."*[22]

This issue is a matter of particular concern in the United Kingdom, as the British judges do not exert control over court administration. The problems of this lack of influence over the judicial administrative penumbra were well expressed by Lord Bingham in his lecture on judicial independence in 1996 in the following terms:

> *"For better or worse, the British judges do not control the financing and administration of the court system. If there were ever a chance of their doing so, which I doubt, it was lost when the Courts Act 1971 converted the Lord Chancellor's Department from a small secretariat into a department of state employing some 10,000 civil servants. It cannot be suggested that the relationship between the administration and the judges over the last quarter century has been in all respects an easy one. Many judges have resented what they perceived as an administration breathing down their necks, treating them as pawns on a bureaucratic chessboard. Decisions directly bearing on the performance of judicial functions and the efficiency of court administration have on occasions been made without consultation and for ill-conceived reasons. While high standards of public administration are as necessary for this field as in any other, management concepts quite inappropriate to the unique function of administering justice have been wrongly allowed to intrude. There has been difficulty and dispute on the frontier, not alleviated by doubt about where the frontier is or should be."*[23]

. In dealing with our court administration, however, one should be alive to the appropriateness of management and administrative concepts on the unique function of administering justice. There are for example, numerous management concepts developed to promote efficiency of production. Many of these are produced for the manufacturing industry, where the focus is on increasing output while ensuring that errors are minimised. Taking a straightforward application to judicial administration might translate into increasing case disposal, which would or might have effect on the quality of the administration of justice. This is not to say that efficiency in resolving cases is not important; of course it is important. What I mean is that commercial and industrial practices and processes of evaluation of productivity are not always applicable and should not apply indiscriminately across the board without evaluating its appropriateness in assessing judicial productivity.

Judicial effectiveness

This leads me to the topic of judicial effectiveness. In the administration of the judicial system, judges should ensure that justice is not delayed. Justice Reavley of the Texas Supreme Court underlined the consequences of delay when he said:

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[22] Purchas, 'What is Happening to Judicial Independence', *New Law Journal* 30 Sept, 1994 at p 1308.
[23] Supra, Lord Bingham fn 11 at p 67-68.

"Delay haunts the administration of justice. It postpones the rectification of wrong and the vindication of the unjustly accused. It crowds the dockets of the courts, increasing the costs for all litigants, pressurising judges to take short cuts, interfering with the prompt and deliberate disposition of those causes in which all parties are diligent and prepared for trial, and overhanging the entire process with the pall of disorganisation and insolubility. But even these are not the worst of what delay does. The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination. If the facts are not fully and accurately determined, then the wisest judge cannot distinguish between merit and demerit. If we do not get the facts right, there is little chance for the judgment to be right."[24]

In Singapore, we are happy to say that the backlog of cases has been eliminated, and most cases filed in courts are now disposed of in less than a year. A recent comparative study found that Singapore has the highest clearance rate of all the countries surveyed, even though it is among the countries with the fewest judges per capita.[25] As a result of such success, it has been suggested that a "problem" has surfaced, namely that of a 'front-log'. An article in the local newspaper *The Straits Times* in December 2001 highlighted that some courtrooms in the High Court remained unused because judges were so efficient that they have cleared all the cases quickly and some lawyers could not get their cases ready in time for a hearing.[26] The report also noted that 10% of overall court time was not used for trials. First of all, I do not consider this a problem. I would say that it is a good thing, rather than a bad one, that needs to be addressed. It gives time for the judges prepare for cases; to reflect on the issues before them; to do better research; and more time to think through the impact of their decision on the litigants and the law. Secondly, with all respect to the author of that learned article, he or she has no idea of what the judges do and how the judges work. The work of a judge is not confined to merely hearing cases in open court; a lot of the hard work is done in his quiet chambers. One should bear in mind the following observations of Chief Justice Gleeson of Australia which are particularly pertinent:

"In many modern courts, especially in civil cases, the pressure of business, and the increased reliance on written material, means that judges are required to assimilate substantial amounts of such material, assisted by some compressed oral argument, and then to reserve their decisions, and move directly on to the next case on the list, writing judgments in such spare time as

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[24] *Southern Pac. Transport Co v Stoot*, 530 S. W. 2D 930, 931 (Tex. 1975).
[25] Maria Dakolias, *Court Performance Around the World,* 2 Yale Human Rts & Dev. L. J. 87, 133 (1999).
[26] *Judges waiting to hear High Court cases*, Straits Times, 25 Dec 2001.

> *becomes available to them. To add insult to injury, there is the maddening tendency to assume that judges are only at work when they are sitting in court. People who make that assumption have probably never read a judgment, and have no idea of the work that goes into a reserved decision."*[27]

Balance between judicial effectiveness and justice

A balanced mind is a hallmark of a good judge, and it is just as necessary in judicial administration. In the midst of achieving efficiency, there is a need for caution to be exercised. Speed in disposal of cases is only one element of judicial effectiveness. An over-emphasis on efficiency can work against effectiveness. Counsel who lack time to prepare their cases are unable to present their cases properly and adequately to judges. Judges who do not have sufficient time to hear cases and to deliberate on matters and issues before them would more likely than not hand down decisions of poor quality, which in turn reflect on the quality of the judiciary and the system. While speedy resolution of disputes is essential, an increase in efficiency is not an improvement, if it results in inaccuracy or unfairness. Isaiah Berlin noted that the positive conception of liberty for one man can intrude on the liberty of another. So too is it for a positive conception of judicial independence. Ultimately, a judiciary is only as effective as the quality of its judges, and a balanced system should be set in place to allow them to get on with the task of judging. Judicial independence of judicial administration can help judges achieve justice, but if a right balance is not achieved and maintained, it can intrude on the liberty of others, and take the litigants further away from the goal of justice.

Conclusion

I hope I have unpacked in some small measure, the concept of judicial independence. In particular, through the framework of negative and positive freedoms, I hope I have clarified two things. First, judicial independence is not an absolute concept. It provides certain freedoms to the judiciary, but also exacts certain trade-offs. It is a question of balance. That brings me to the second point. How does one strike that balance? Ultimately, judicial independence is not an end in itself. It is a means to an end, and that end must be the achievement of justice for all peoples. If judicial independence helps to achieve this, then it would have struck the right balance.

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[27] Murray Gleeson, supra at f p 553.