

NORTH QUEENSLAND LAW ASSOCIATION
"JUDICIAL INDEPENDENCE"

CONFERENCE
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The Honourable Justice Kiefel
High Court of Australia

The traditional starting point for a discussion of the independence of the judiciary is the political struggles, involving the Stuarts and their overthrow, culminating in the Bill of Rights and the Act of Settlement of 1701. It was by this means that the tenure of a judge's office ceased to be dependent upon the will of the King. Judges were now to retain office during good behaviour and were liable to be removed only upon an address by both Houses of Parliament. Their salaries were to be "ascertained and established". The security which was thereby obtained is regarded as the cornerstone of judicial independence.

We recognise the Act of Settlement as pivotal in the development of the modern judiciary. It reflected some of the thinking of the time - such as Locke's Treatise on Government¹, which referred to three independent arms of government. Montesquieu shortly later wrote of the need for the separation of the judiciary from the legislature and the executive, in order to secure the liberty of the subject². But there was also a political imperative to the Act. What had been asserted was the supremacy of Parliament. What Parliament needed was a judiciary independent of the King, a judiciary which could be relied upon in the event of future disputes between Parliament and the Crown. The enduring legacy of this political act is the mainstay of the Rule of Law.

It should not be thought that with the Act of Settlement there was suddenly created a system which produced secure and independent judges. In some respects it was a rather slower movement than that. For some time the Crown continued to offer other inducements and sinecures to those who might be appointed and those who had already been appointed. And, although the Act of Settlement had required judicial salaries to be rendered certain, it was not until 1760 that legislation confirmed that salaries were to be payable for the duration of a judge's commission³. Even then, they often fell into arrears⁴. It was 1825 before they were freed from uncertainty of payment, when a statute was passed charging them upon the consolidated revenue⁵. Judicial pensions remained at the discretion of the Crown until almost 1800⁶.

1 1690.

2 "The Spirit of Law" 1748 as referred to by Gummow J in *Grollo v Palmer*.

3 McPherson, Supreme Court 53.

4 Thomas, Judicial Ethics, 2nd edn 232.

5 McPherson 53.

6 Thomas 232.

The position of colonial judges in Australia was not as secure as their English counterparts. Bruce McPherson points out, in his History of the Supreme Court of Queensland⁷, that they held office only at pleasure, being removable by the Crown "as occasion may require". Their status changed only with the advent of representative government. It is just as well. There are accounts of early Judges-Advocate, such as Ellis Bent in Sydney, taking their salary from court fees, and supplementing their income by importing and selling brandy and wine. This may not now be considered to be a very good idea.

Many may assume that the position of all judges in Australia - their tenure and remuneration - is secure. The situation is rather more complicated than that. The Commonwealth Constitution secures federal judges against arbitrary interference by the executive or the legislature. Their remuneration may not be diminished⁸. They may only be removed, on an address by both Houses, for proved misbehaviour or incapacity. Their tenure, as constitutionally entrenched, cannot be altered without meeting the requirements of a double majority and a referendum. This is not impossible. You may recall that in 1977 tenure for life was reduced to tenure until the age of 70⁹. One wonders if it would have the same level of support today.

Even if set within a constitutional framework, most of the States and Territories do not secure the independence of judges in the way provided by the Commonwealth Constitution¹⁰. All the states and territories except for Tasmania and the Northern Territory require proven misbehaviour¹¹ to warrant removal. Queensland, New South Wales, Victoria and the ACT also allow for incapacity. In each of Queensland, Victoria, New South Wales and the ACT a finding is required before the Parliament can act - in Queensland, since 2001, by a Tribunal, in Victoria by an investigating committee drawn from a judicial panel, in New South Wales and the ACT by a report of a Judicial Commission. Queensland does not have the additional safeguard of an upper house. None of the State Constitutions or statutes dealing with the judiciary entrenches the provision for removal except for New South Wales. They may be repealed in the ordinary way. In the event that questions arise in the future about the position of the State and Territory judiciary, the search for a solution will necessarily take place outside statute law.

It has never been doubted that the appointment of judges is a matter for the executive. It is, to coin a phrase, at the Crown's pleasure¹². The provisions of the Commonwealth Constitution reflect this. It is interesting now to reflect upon the call for a "politically neutral" body to appoint judges, federal, state and territory, made in 1977. It was made by Sir Garfield Barwick, the then Chief Justice¹³. He was a person who may have understood the appointment process, having himself been

7 p 53.

8 S 72(iii).

9 *The Constitution Alteration (Retirement of Judges) Act 1977*.

10 New South was the exception - refer.

11 NSW - *Constitution Act Pt 9, s 53(1)*; Victoria - Pt s 77(4)(aaa) and s 87 AAB *Constitution Act 1975* - amended 2005; Queensland - *The Constitution Act 2001 (Qld)*, s 60(1), s 61; South Australia - *Constitution Act 1934 (SA)* ss 74, 85; Western Australia - *Constitution Act 1889*, ss 54, 55; but see *Tasmania Constitution Act 1934*, s 1.

12 *Attorney-General v Quin* (1990)170/1.

13 *The State of the Australian Judicature* (1977) 51 ALJ 480, 494.

Commonwealth Attorney-General prior to his appointment to that position. He said that "some restraint" should be placed upon, and accepted by, the Executive Government in its choice of judicial appointees. He proposed a judicial commission for that purpose. Whatever the method of appointment, one thing is clear - the person chosen must have the attributes of an impartial and independent judge.

In a real world the executive government and the judiciary must interact, to an extent. Courts remain dependent upon the executive for adequate funding. The need for certainty of financing is of importance to the courts, as it is to judges personally. The Bangalore Principles of Judicial Conduct¹⁴, settled by the Judicial Integrity Group under the auspices of the United Nations, refer to judicial independence having both institutional as well as individual aspects.

There may be differences of opinion, from time to time, as to what the courts reasonably require, in order to fulfil their role of administering justice. What the executive sees as a reasonable restraint upon spending may be viewed by the court (which is to say, the judges) as preventing or limiting some aspects of its function. Care must be taken not to characterise every denial of funding as a challenge to judicial independence. The denial, or withholding, of funding may not be attended with requirements which themselves impinge upon the integrity of the courts. Nevertheless it has long been assumed that if courts are impeded in the carrying out of their role of adjudication, and feel under pressure for funds to allow them to undertake that role, they cannot be said to have the necessary independence from government.

Courts may also be dependent upon the executive for administrative assistance. In the dealings which are necessary there is the potential for misunderstanding by officers of the executive about the role of the courts and judges. There is a difference between administration and the administration of justice. Judges do not see courts as "service providers" and do not see litigants as "clients". The court's role and a judge's duty are not amenable to descriptions of this kind. The undertaking of the role of the judiciary is difficult to measure, in terms which may be considered useful to government. Those judges, or the heads of jurisdiction, who engage in dialogue with the executive about operational matters, would be alert to organisational issues which may impact upon how the courts undertake their function. Decision-making which goes to the heart of the court's role as adjudicator cannot be compromised.

Pope Cooper, who as most of you would know, was the Northern judge based in Bowen from 1883, had his circuit expenses questioned by the executive. It was followed by a public debate between Samuel Griffiths QC, the then Premier, and the judge which is said to have involved much grandstanding¹⁵ on both sides. Jim Thomas, in his article on the judge¹⁶, says that his detractors in parliament complained that he threw too many picnic parties and was overgenerous with champagne and ice. These allegations were never very well particularised. The northern profession and the press supported the judge. Things came to a head when he was advised that the

14 Of the Judicial Integrity Group, 2002, UN.

15 JB Thomas "The Time of Cooper" p 61.

16 P 65.

government had restricted circuit expenses in such a way that it seemed unlikely the court could fulfil its circuit commitments. Famously, when he received no assurance that funds would be voted to provide for circuit expenses, he sent a telegram threatening to release all the prisoners awaiting trial - on the basis that they were entitled to a trial or to be discharged¹⁷. The judge read this in open court. The prosecutor, Mr Virgil Power, asked his Honour to reconsider. The judge held back the steamer which was awaiting his departure. An assurance was forthcoming¹⁸. Ironically, Griffiths himself later had troubles with the Commonwealth Attorney-General over circuit expenses and matters of allowance to him, when he became a High Court Judge¹⁹.

Matters did not quite end there. Griffiths, in something approaching over-reaction, threatened to have a commission appointed to inquire into the whole matter. The press in Queensland regarded it as an unwarranted interference with the independence of the judiciary. Fortunately Griffiths did not go ahead with it²⁰.

The story of Pope Cooper and the circuit expenses also underlines the part of the media - then of course just the press - can play in controversies concerning the courts. The Brisbane Courier was initially indignant about the judge's stance. It suggested that he had been "brooding over his supposed wrongs in what we believe is to him the uncongenial climate of the north". That, combined with his overwork, may have adversely affected his intellect, it suggested²¹. The background to these statements may have been the northern separation movement, then being mooted as a breakaway from Brisbane administration. So the newspaper's gentle incitement of the public against the judge may have had a political edge. And it is credited with having encouraged Griffiths to consider the course he did, a course of action which may have involved a step preliminary to the judge's removal²². But it was also the newspaper which identified for the public that judicial independence was at stake. This should not be overlooked. The press clearly can be a force for good.

The answer to the question - what should the judiciary be maintained as independent from? - is more often answered by reference to the executive branch of government. However, some legislative acts have the capacity to limit the jurisdiction of the courts, or to interfere with the way in which they adjudicate upon matters. By this means judicial independence could be seriously eroded.

The doctrine of separation of powers is entrenched in the Commonwealth Constitution and the courts guard against trespass. Even so, at a federal level questions may arise about the ability of the Parliament to abolish a lower federal court. There may be questions about it being a genuine reorganisation of the Court²³. It is not so long ago that the federal Industrial Court judges were merged into the Federal Court of Australia, leaving the Industrial Court on the statute books. The

17 Thomas 66.

18 Thomas 66.

19 Thomas 67-68.

20 Thomas 67.

21 Thomas, 67.

22 Thomas 67.

23 *Attorney-General v Quin ...* 170/1.

judges also held commissions to the Federal Court. The process may raise questions about the use of double commissions.

Where issues involving the integrity of State court systems arise, solutions are sometimes found in the Commonwealth Constitution, because they exercise some federal jurisdiction. It is also possible for the States to provide safeguards against the erosion of the jurisdiction of the courts. In Victoria this is achieved by a provision which renders any repeal or variation of the section conferring the powers and jurisdiction of the Supreme Court void, unless the Parliamentary member introducing the bill, for variation or repeal, makes a statement to the Parliament about the reasons for doing so. And amendment of the section requires an absolute majority of the whole members of both Houses²⁴.

On occasions members of the legislative branch of government may make statements critical of the courts, statements which may suggest that the judiciary should be independent, which is to say independent of Parliament and so as not to assume a legislative function. It should not be surprising that the separation of powers is taken seriously by all three branches of government in Australia. Constitutional arrangements here have led to a more pronounced separation of powers than those which have existed in England. It cannot be a bad thing for each branch to protect its area of decision-making from intrusion, if that is what is happening. The views of the judiciary and the legislature are likely to differ on these questions. The judiciary sometimes sees such criticism as lacking in understanding of its role. As a result judges may view sustained attacks as the application of pressure to do other than their duty and as attempts to undermine the good opinion the public has of the courts.

There is of course nothing remarkable or novel in the complaint that judges should not be too creative. In the early Middle Ages the rendering of decisions contrary to the known law was considered a form of judicial misconduct²⁵. In some cases that may beg the question of what is the known law. Even the liberal Montesquieu, earlier mentioned, required judges to be held to a mechanical application of "la loi". This was pushed so far that, in 1790, judges were forbidden to interpret the law. In case of doubt or omission they were required to refer the matter to the legislature²⁶. The historical account of this situation does not say whether this was very helpful! For whatever reason, this early effort to exclude judicial creativity failed quite quickly. It must be accepted that judges do not decide cases in a vacuum. They do so in a framework and by reference to accepted legal principle. Sometimes however there is no such principle and the courts are required to state one, for application in that case and for the future. Logically this can hardly be surprising. This is how the law develops.

The courts may more often find themselves in uncharted waters where the meaning and operation of a statute is involved. Principles of statutory interpretation, as developed by the courts, are methods. They do not provide the answer, in each

24 S 85(5) *Constitution (Jurisdiction of Supreme Court) Act 1991* (Vic) and s 18(2A).

25 Thomas, 227.

26 Julius Stone - Recent Trends in English Precedent, 1945, p 2.

case, as to what should be taken as intended by the legislature. The ability of a statute to reflect what the responsible Minister meant, and what Parliament understood, should not be over-estimated. Not the least of the difficulties, for the person drafting the legislation, is that statutes are intended to cover situations which cannot be foreseen. Clarity of expression is often lost in generality. It is statutes which offer only a bare framework which present the courts with difficulty, for it is part of their duty to render them operable. To an extent, they must make them speak. The experience of each case fills the gaps.

Judges in Europe have dealt with codes which state personal rights at a high level of abstraction. There is presently discussion about the introduction of legislation which may enshrine some values or rights which are regarded as fundamental. Rights described as "fundamental" are usually, of their nature, of wide application. They are, of necessity, stated in terms of concepts. Where the courts are given the task of reading and applying statutes such as this they may, consistent with their duty, have little ability to constrain the breadth of their operation and their effect upon other parts of the law. It needs to be understood that in doing so they are not assuming a law-making function. They are giving effect to a particular kind of legislation.

Earlier remarks should not be taken to suggest that the other branches of government do not, generally speaking, have confidence in the courts. It is a matter of no small importance that the past few decades have seen the executive and the legislature accepting the need for a larger role, on the part of the courts, in relation to decisions which affect citizens. Legislation has facilitated the review of action taken by the executive and by administrative decision-makers at most levels. This strongly implies a confidence in the courts. It suggests that the independence of the judiciary is still seen as desirable, some three hundred years after the Act of Settlement.

It is the confidence which is maintained in the judiciary that, on occasions, has led the Parliament to attempt to give *too* great a role to the judiciary - one which may not be compatible with the judicial function. When this occurs the principle of the separation of powers must be invoked and the independence of the judiciary thereby maintained. Cases such as *Wilson v Minister*²⁷ have held invalid the appointment of a judge to the role of a reporter to a Minister with respect to the requirements of a Commonwealth Heritage Act. In the majority judgment it was said that Blackstone rightly perceived that liberty is not secured merely by the creation of separate institutions, some judicial and some political, but also by separating the judges who constitute the judicial institutions from those who perform executive and legislative functions²⁸. Sir Owen Dixon himself accepted administrative positions during World War II, whilst a serving judge, including as envoy to the United States. He later said that, in retrospect, he did not altogether approve of what he had done²⁹. The separation of functions is a constitutional imperative. Its end is achieved, not only by avoiding the occasions when political influence might affect judicial

27 (1996) 189 CLR 1.

28 Thomas, 67.

29 "Royal Commissions" (1955) 29 ALR 253, 272.

independence, but by proscribing occasions that might sap public confidence in the independence of the Judiciary³⁰.

It is said that the court's authority ultimately rests upon sustained public confidence for its moral sanction³¹. Clearly the independence of the judiciary depends upon the public valuing what it protects - that their equal treatment under the Rule of Law. Without an understanding of these things the potential for acceptance of changes inimical to independence, if not its loss, increases. This is especially so where constitutional safeguards are not in place. Our society has become accustomed to the protection afforded by an independent judiciary. Education about governance is our society has not however always had a high priority.

The Guide to Judicial Conduct, published for the Council of Chief Justices of Australia, refers to the constitutional independence of a judge and their independence in discharge of judicial duties. Having been freed from potential pressures from the other branches of government and undertaking only those duties which will ensure the maintenance of public confidence, one may ask: what else does a judge need to be independent from? Of course there are other external pressures, not the least of which is the media.

The Code of Judicial Conduct speaks of the "insidious pressure" of publicity, insidious because it is difficult for anyone, including judges, to be immune from it. This does not suggest that reporting of court-related matters is a threat to judicial independence. To the contrary, well-informed debate and criticism is essential to the maintenance of our system. And it does not mean that judges are not, and should not be, aware of public opinion, or at least what is said to reflect public opinion. Judicial independence does not mean that judges are meant to be detached from society. Nor are they. Many judges, in the course of their work, see far more of the capacity of humans for anti-social conduct than most should have to. And their work requires them to consider what particular standards may be held by the community at large. This may not always be easy to answer, but it is unlikely to be what passes for public opinion on a current topic, inflamed by misinformation. The standards to be applied by the courts are necessarily those which will endure.

It goes without saying that, whatever method of appointment of judges is employed, it is necessary that a person have the qualities of which the Australian Guide to Judicial Conduct and the Bangalore Principles speak. Principal amongst them are a personal sense of independence, combined with impartiality and integrity. The guides to, or codes of, conduct, which have issued in the last decade, acknowledge a need for statements of ethical standards. These standards are largely self-administered by judges. There are real impediments to dealing with complaints against judges, in the sense of providing a remedy. This should underscore the importance of appointing only persons of the requisite ability and character to office. Judicial independence may imply protection from discipline. This was the view

30 "Royal Commissions" (1955) ALR 253, 272.

31 *Baker v Carr* (1962) 369 US 186 per Frankfurter J.

expressed by Sandra Day O'Connor, speaking extra-judicially. Independence may readily be threatened by action taken against judges, under the guise of discipline³².

There is another potential external pressure which may influence a judge - it comes from other judges. An internal pressure can come from the judge themselves, if they veer from the path of proper and impartial reasoning. This is not to say that the assistance of other judges should not be sought or that collegiate decision-making, at appellate level, is not preferable. The point is simply that each judge must be true to themselves in their decision-making. It is that personal independence which is critical to the wider notion of judicial independence.

Conclusion

We speak of judicial independence as if it is something we have had for a long time and as if it may never be taken away. It is more fragile than that. We should perhaps reflect on how, and to what extent, it is supported and maintained. Where it is not constitutionally entrenched support for it will be sought in other sources, such as the common law. Sir Owen Dixon said that the Commonwealth Constitution is framed according to many traditional conceptions and some of them are simply assumed³³. The Rule of Law is one such assumption and independent courts are integral to it.

32 "The Importance of Judicial Independence", Arab Judicial Forum, Bahrain, 15 September 2003.

33 *Australian Communist Party v Commonwealth* (1951) ... 83/1.