JUDICIAL INDEPENDENCE

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I should like to take as a theme for these remarks the first object of the Australian Judicial Conference. It is stated in these terms: "in the public interest to ensure the maintenance of a strong and independent judiciary as the third arm of government in Australia". To your ears and mine, and perhaps to the ears of many of our fellow Australians, that seems a fairly bland statement of a desirable and non-contentious object. And so it is. But the implications for our society are profound. Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed. But, you may ask, if that is so, why do we see so much ill-informed criticism of the judiciary? There are many answers to this question, but it cannot be doubted that one answer is this: there is a lack of awareness of the extent to which the peace and order of our society depend upon the maintenance of a strong and independent judiciary as the third arm of government. The subject which you have chosen for this symposium belongs primarily in the public domain, not in legal corridors or in academic halls. It is of chief concern to the public rather than to the judiciary or the legal profession. Of course it is right that the techniques of maintaining a strong and independent judiciary should be discussed

by those with primary responsibility for the task, but the discussion should be followed by giving an account of those techniques to the public. And that would be a task worthy of the mettle of the Australian Judicial Conference.

The reason why judicial independence is of such public importance is that a free society exists only so long as it is governed by the rule of law - the rule which binds the governors and the governed, administered impartially and treating equally all those who seek its remedies or against whom its remedies are sought. However vaguely it may be perceived, however unarticulated may be the thought, there is an aspiration in the hearts of all men and women for the rule of law.

That aspiration depends for its fulfilment on the competent and impartial application of the law by judges. In order to discharge that responsibility, it is essential that judges be, and be seen to be, independent. We have become accustomed to the notion that judicial independence includes independence from the dictates of the Executive Government. Lord Coke's denial of the King's right to judge cases and the provisions of the *Act of Settlement* are landmarks in the development of that notion. But modern decisions are so varied and important that independence must be predicated of *any* influence that might tend, or be thought reasonably to tend, to a

want of impartiality in decision-making. Independence of the Executive Government is central to the notion but it is no longer the only independence that is relevant.

Appearance, no less than the reality, of independence is essential. The judiciary, the least dangerous branch of government[1], has public confidence as its necessary but sufficient power base. It has not got, nor does it need, the power of the purse or the power of the sword to make the rule of law effective, provided the people whom we serve have confidence in the exercise of the power of judgment. In earlier times in this century, that confidence was undoubted. Then institutions were not questioned and the work of the judiciary was not well understood. Judges were the revered symbols of justice. You may remember Lord Devlin's observation that "[t]he English judiciary is popularly treated as a national institution, like the navy, and tends to be admired to excess"[2]. That is no longer the position in Australia. As Madam Justice McLachlin said at a recent Commonwealth Law Conference[3]:

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1 *The Federalist Papers* No 78 by Hamilton (1788).
2 *The Judge* (1979) at 25.
3 "The Role of Judges in Modern Commonwealth Society" (1994) 110 *Law Quarterly Review* 260 at 269.

> "Judging is not what it used to be. Judges are more important now; judges are more criticized. And judges face more difficult tasks than they ever have before faced in the history of the Commonwealth."

I respectfully agree. Today the community looks to the courts to adjudicate disputes in areas extending far beyond the areas of jurisdiction invoked 50 years ago. Reposing that function in the judiciary, the community examines judicial performance of the function more critically than hitherto. Of course, this development demonstrates the confidence of the community in the judicial branch of government: a confidence that is not misplaced so long as independence from impermissible influences is jealously maintained. Impermissible influences may be of different kinds.

First, take the changes that have occurred in the distribution of political power. The Diceyan theory which translated the political sovereignty of the people into the legal sovereignty of the Parliament and thus into laws which corresponded with the wishes of the electorate[4] may have been a logical construct rather than a description of political reality. But, however that may be, the political machinery of today led Lord Hailsham to describe the

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4 *Lectures Introductory to the Study of the Law of the Constitution* (1st ed 1885) at 77.

modern democratic system as "an elective dictatorship, absolute in theory if hitherto thought tolerable in practice"[5]. It is beyond question that the contemporary form of Westminster government keeps the Parliament in line with Executive policy, rather than the reverse. And the exigencies of administration coupled with the demands of political success expose the interests of minorities and individuals to risk. That leaves the courts in a singular position. Lord Radcliffe summed up the transition[6]:

> "In the seventeenth century this country turned its back on the idea of a strong central executive, and we have taught ourselves to be proud of the achievement ever since. There was a settlement under which the Commons in parliament and the judges in the courts, working independently, were to be guardians of the rights and liberties of the individual citizen, as then understood, and each was to have power to block any attempt by the executive to trench upon those rights and liberties. Whatever the law courts did or did not do in the next 200 years, they did carry out this part of the bargain, and men valued them accordingly. We have come back, unavoidably, to a strong central executive, and we live by order, decree and regulation and by act of parliament. Parliament and the executive have gone into alliance, and the law courts are pushed more and more into a corner of national life."

That seems to be an overstatement. The community looks to the courts for the protection of minorities and individuals against the

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5 1976 *Dimbleby Lecture* at 2.
6 *Not in Feather Beds*, The Quality Book Club (1968) at 34.

overreaching of their legal interests by the political branches of government.

In other parts of the common law world, courts have been expected to protect minority and individual rights in situations that were once not thought to be justiciable. In Canada, the Charter of Rights and Freedoms has conferred on the Courts a wide jurisdiction touching issues that were once reserved to the political branches of government. In New Zealand, a nation with a unitary Constitution, an appellate judge has suggested[7] that "[s]ome common law rights presumably lie so deep that even Parliament could not override them". In India, the long record of activism on the part of the Supreme Court has entrenched it firmly in the affectionate confidence of the people. In Australia, the High Court's approach has been more cautious, although its declaration of an implied freedom of political discussion has stimulated judicial and public discussion of the validity of a variety of laws.

Judicial review of executive action has blown the wind of legal orthodoxy through the silent corridors of the bureaucracy, ensuring

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7 Sir Robin Cooke P (as he then was) in *Taylor v New Zealand Poultry Board* [1984] NZLR 394 at 398.

that powers whose exercise is apt to affect individual interests are constrained by requirements of procedural fairness. In the construction of statutes, the courts have sought to find in the text propositions that accord with the values of the common law and thus to be what Lord Simon has called[8] "a mediating influence between the executive and the legislature on the one hand and the citizen on the other".

In these and in other areas of jurisdiction involving the citizen and government, the impartial application of the rule of law demands independence of the judicial branch of government from the political branches of government. And, of course, that independence continues to be essential to the due administration of the criminal law. If that independence were, or were thought by the litigants or the public to be, put at risk, the rule of law would be imperilled and the peace and order of society would be problematic.

Independence is necessary not only from the political branches of government nor only to safeguard the impartial administration of public law. The courts have been invested with jurisdiction to

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8 *Stock v Frank Jones (Tipson) Ltd* [1978] 1 All ER 948 at 953E.

determine private law issues under open-textured or non-exhaustive laws that leave much to be filled in by judicial reasoning. Trade practices and unfair contract legislation often call for the making of judgments by reference to values rather than by reference to detailed rules. Oftentimes one party to the litigation will be a comparatively powerful corporation; the other, an individual either in his or her own interest or as a representative of a consumer, industrial or other interest group. The entrusting of jurisdictions of these kinds to the courts proceeds on the footing that judges are independent of the interests represented by either side of the controversy. Although in earlier times similar interests were arrayed against each other in litigious battles, there was less room for judicial opinion to determine the outcome. Nowadays, open-textured criteria of reasonableness, fairness, justifiability or proportionality are statutorily employed to cast on the courts the responsibility of forming value judgments that have, or might have, significant economic or social effects.

Perhaps the independence that is most difficult for a judge to achieve is independence from those influences which unconsciously affect our attitudes to particular classes of people. Attitudes based on race, religion, ideology, gender or lifestyle that are irrelevant to the case in hand may unconsciously influence a judge who does not consciously address the possibility of prejudice and extirpate the gremlins of impermissible discrimination. Such gremlins are not

extirpated by mere declaration. Indeed, too vocal a judicial protest of impartiality may bespeak an overreaction to prejudice in one direction by forming a prejudice in the other. Or it may indicate a failure to employ that worldly wisdom which permissibly takes account of differences that are relevant for some purposes but irrelevant for others.

Independence of the modern judiciary has many facets. The external factors that tend to undermine independence are well recognized by the judiciary but perhaps not so well recognized by the political branches of government or by the public. Some of the structures that preserve independence are well established. I need not canvass the twin constitutional pillars of judicial independence - security of tenure and conditions of service that the Executive cannot touch - except to say this: if either of these pillars is eroded, in time society will pay an awful price.

Judicial independence is the priceless possession of any country under the rule of law. The public are entitled to insist on its observance by the judges and on its protection by the Parliament and the Executive. But in the ultimate, judicial independence rests on the calibre and the character of the judges themselves. Judicial independence is not a quality that is picked up with the judicial gown or conferred by the judicial commission. It is a cast of mind

that is a feature of personal character honed, however, by exposure to those judicial officers and professional colleagues who possess that quality and, on fortunately rare occasions, by reaction against some instance where independence has been compromised.

The importance of symposia of the kind which is now to take place is twofold: it confirms the ethos and the commitment to independence of the Australian judiciary and it reflects upon the means by which that independence can be protected and enhanced in the interest of the public whom we serve. Justice is administered by human institutions; they can be fallible, but they should never be perverse. Being human institutions, continual vigilance is needed to ensure that they are isolated from impermissible influences and strengthened by the pressure of a peer group devoted to impeccable standards of independence.

I offer my respectful congratulations to the Australian Judicial Conference, the Faculty of Law of Griffith University and the Research School of Social Sciences at the Australian National University on the organization and conduct of a symposium on a topic of such public importance.