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THE RIGHT TO AN INDEPENDENT JUDICIARY

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Judicial power is "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property."[1] Not only are citizens subject to such power; they have the right to invoke its exercise in their own interests. Like all forms of governmental power, it exists for their benefit. More than 200 years ago, Marshall CJ said, in *Marbury v Madison*[2]:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

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* Chief Justice of Australia

1 *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ.

2 5 US (1 Cranch) 137 (1803) at 163.

Justiciable controversies, amenable to the exercise of judicial power, take various forms. They often involve the government itself. A criminal trial for a serious offence is conducted as a contest between the executive government and a citizen. Civil disputes arise not only between citizens, but also between citizens and the executive government. In a federal system, based upon a written constitution dividing power between a central authority and regional authorities, disputes arise between citizens and governments, and between governments themselves, concerning the limits of power. The Universal Declaration of Human Rights[3], the International Covenant on Civil and Political Rights[4], and the European Convention on Human Rights[5] declare that, in the determination of civil rights and obligations, and criminal responsibility, all people are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Independence is not a perquisite of judicial office, for the personal benefit of judges. The impartial administration of justice according to law is a power and a duty of government. The judges to whom that responsibility is given must be free of any external

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3 Article 10.

4 Article 14(1).

5 Article 6(1).

influence other than the law itself. The independence of judges was said recently by the Privy Council to be "all but universally recognised as a necessary feature of the rule of law"[6]. The Beijing Statement of Principles of the Independence of the Judiciary asserts that independence is essential to the proper performance by the judiciary of its functions in a free society observing the rule of law.[7] It affects both the quality of judicial performance and the acceptability of decisions. Confidence in the administration of justice depends upon a general assumption that judges act according to law, and free from pressure or interference of a kind that might deflect them from their duty.

The values of impartiality and independence are closely related. Judges take an oath to do right by all persons, without fear or favour, affection or ill-will. Their capacity to honour that obligation does not rest only upon their individual consciences. It is supported by institutional arrangements. Citizens are not required to have blind faith in the personal integrity of judges; and judges are not required to struggle individually to maintain their impartiality.

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6 *Independent Jamaica Council for Human Rights (1998) Ltd & Ors v Marshall-Burnett* [2005] UKPC 3, 3 February 2005 [12].

7 Article 4.

The Constitution, written or unwritten, of a society provides for the means of securing the independence and impartiality of judges.

Powerful litigants, private interests, or social interest groups, should be unable to subject judges to improper pressure. The executive government, in one or other of its manifestations, is itself frequently a party to litigation. Furthermore, in a representative democracy, the executive both responds to, and exerts, political pressure. Isolating the exercise of judicial power from executive pressure or interference is, therefore, the primary concern of constitutional arrangements for independence. The strictness with which legislative, executive, and judicial powers are separated varies in different parts of the Commonwealth of Nations. In Australia, the Commonwealth Constitution requires, at the federal level, a degree of separation greater than that which exists at the State level.[8] Even so, it is accepted as a general principle, in all common law jurisdictions, that the judicial power of government should be vested in an authority which is independent of the legislature and the executive. It is in the application of that general principle that issues arise.

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8 That is not to say that State courts are not affected by the requirements of the Constitution - see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

In human affairs, independence is rarely perfect. In the business of government, no one part can exist in isolation from the others. Yet, because it is the right of citizens to have justiciable controversies resolved according to law by an independent tribunal exercising governmental authority, the concept of an independent judiciary must have a reasonably certain minimum content. It is possible to apply a test of independence to arrangements for the exercise of judicial power, while acknowledging that there are areas for legitimate choice. The Commonwealth provides no single model of personal or institutional arrangements for judicial independence. Constitutional and legislative choices are influenced by history, local conditions, and political realities, as much as by legal theory. Yet there are standards by reference to which the right in question can be given content.

Justiciable controversies

When Alexander Hamilton[9] described the judiciary as the branch of government least dangerous to the political rights given by the United States Constitution, he said that, unlike the legislative and executive branches, it has neither force nor will, but merely judgment. The distinction between judgment and will is central to

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9 The Federalist, No 78.

the legitimacy of the exercise of judicial power. It also affects the reach of that power. The judiciary does not set its own agenda. Courts decide controversies, but they have only a limited capacity to decide what controversies are justiciable. In general, and subject to any constitution, it is for Parliament to decide what matters may call for the exercise of judicial power. The qualification is important. In a federal system, the capacity of the courts to resolve disputes about the meaning of the written constitution, including disputes about the distribution and limitation of legislative and executive power, is a necessary aspect of the system itself.[10] In Australia there has never been a sovereign parliament. Before Federation, courts were accustomed to declaring the limits of colonial legislative power. Since Federation, the judicial power to decide the meaning of the Constitution has been treated as self-evident.[11] Furthermore, Charters or Bills of Rights, according to their forms, create potential issues for judicial decision. The scope for judicial review of legislative and administrative action may wax or wane, but the constitutional arrangements of most members of the Commonwealth involve an irreducible minimum. The concept of the rule of law, whether operating as a constitutional assumption, or as part of the

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10 *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

11 Attorney-General Alfred Deakin, introducing in 1902 a Bill for the Judiciary Act (Cth) said: "What the legislature may make, and what the executive may do, the judiciary at the last resort declares." Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902, at 10966-10967.

common law through the principle of legality, or as an ideological fetter upon legislative action, itself gives content to a requirement of justiciability. It does not, however, mean that all forms of dispute must be resolved by legal process. Legislation may create, define, and limit many rights and obligations in such a fashion as not to involve curial intervention. The apparatus of civil justice is expensive and cumbersome, and the rule of law does not demand that all questions affecting entitlements or liabilities be decided by courts. In practice, administrative decisions affect the rights of most citizens to a greater extent than judicial decisions.

It is accepted generally that the administration of criminal justice is essentially a field reserved for judicial power.[12] Even in that area, legislatures have the capacity for choice. Diversionary schemes, especially for juvenile offenders, may be employed to direct certain forms of delinquency away from the court system. Administrative penalties are widely used as a substitute for criminal procedure, even in the case of some serious offences, such as tax evasion.

In all jurisdictions, tribunals which form part of the executive rather than the judicial branch of government are employed in functions that might alternatively be given to courts. Australia had a

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[12] *Liyanage v The Queen* [1967] 1 AC 259.

long history of centralized wage-fixing by industrial tribunals. Assigning decisions of those tribunals to executive or judicial power was a problem that led to some major constitutional cases.[13] Specialist tribunals, whose members lack many of the indicia of independence customarily associated with judges, are created by parliaments in all jurisdictions. Only the innocent would suppose that it never occurs to legislators that this could be a means of circumventing judiciary authority. The independence of courts is not always welcomed by those of whom they are independent. It may be seen as a restriction upon a government's capacity to govern. The response may be to deprive courts, not of their independence, but of their jurisdiction. The capacity of the political branches of government to limit the scope of judicial authority, by providing for dispute resolution by tribunals and agencies which form part of the executive, cannot be ignored. At the same time, it increases the importance of judicial review of administrative action.

The availability of judicial review of the decisions of administrative tribunals, and the possibility of immunisation against review by legislative devices such as the privative clause, are

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[13] eg *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

matters that go beyond the scope of this paper.[14] However, they form part of the context in which relations between the three branches of government operate.

How much independence?

In recent years, courts in Australia[15], Canada[16], South Africa[17] and Scotland[18], and the Privy Council in a Caribbean appeal[19], have had to measure arrangements for particular courts against constitutional requirements of judicial independence and impartiality.

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14 For a recent Australian consideration of the issue see *Plaintiff S157 of 2002 v Commonwealth* (2003) 211 CLR 476.

15 eg *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 78 ALJR 977.

16 eg *Valente v The Queen* [1985] 2 SCR 673; *R v Beauregard* [1986] 2 SCR 56; *R v Généraux* [1992] 15 CR 259; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3.

17 *Van Rooyen & Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC).

18 *Starrs v Ruxton* (2000) 2 SLT 42, 2000 JC 208.

19 *Independent Jamaica Council for Human Rights (1998) Ltd & Ors v Marshall-Burnett & Anor* [2005] UKPC 3, 3 February 2005.

Noting the variety of arrangements that exist in practice, and acknowledging the room for legislative choice, the courts have nevertheless identified certain essential requirements for both the personal independence of judges and the institutional independence of courts. They involve freedom from external interference in decision-making in particular cases, and in the administration of courts, although those two subjects overlap. Security of tenure, and financial security, are essential for the personal independence of judges, and are commonly provided for specifically in written constitutions.[20] Article III of the United States Constitution has been a model for provisions of this kind. On the other hand, the requirements for institutional independence are rarely specified.

In the United States, federal judges are appointed for life. Some State judges are elected. Most Commonwealth jurisdictions make provision for compulsory retirement at a certain age. The Act of Settlement provisions concerning removal of judges of superior courts have been followed widely, but procedures for complaints against judges, and for what recent United Kingdom legislation calls "discipline"[21], differ. In some Commonwealth jurisdictions, the appointment of judges for fixed, renewable terms is accepted. In Australia, the Constitution does not permit the appointment of acting

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[20] eg Australian Constitution s 72.

[21] *Constitution Reform Act* (UK) 2005.

judges to federal courts, but in some Australian States, as in the United Kingdom, such appointments have been common. A constitutional challenge to that practice is awaiting hearing. In Scotland, the practice of appointing temporary sheriffs was found to be incompatible with the European Convention on Human Rights.[22]

The assignment of business within a court, although from one point of view administrative, bears so directly upon decision-making that it is essential that it be within judicial control. The same is true of certain other aspects of the conduct of a court's business, such as fixing times and places for sitting. In practice, however, some of those matters are so closely tied up with the provision of resources by the executive that co-operation with the public or civil service is necessary.

This brings me to the question of the provision and application of funds. Most courts are not self-funding. Nor should they be. The concept of "user-pays" has only limited relevance to access to justice. When a court resolves a dispute between two private litigants, it does so in the interests of the entire community, and in the exercise of governmental power. Courts are not merely publicly funded dispute resolution facilities. It is difficult to know who might

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22 *Starrs v Ruxton* 2000 SLT 42, 2000 JC 208.

be regarded as the users of the services of a criminal court. Most courts cannot be fully independent financially. They must obtain their resources from the other branches of government. Yet the arrangements made concerning those resources may affect the capacity of courts to fulfil their responsibilities; and they may also affect both the reality and the appearance of the freedom of courts from executive interference. Constitutions operate at the level of convention as well as law, and considerations of propriety, as well as enforceable obligation, come into play.

Within Australia, practice varies. The reasons for the differences are historical rather than ideological. The federal courts, including the High Court, have one-line budgets. They receive an amount annually by parliamentary allocation. The judges, assisted by the courts' internal administrators, make decisions about the application of that amount. This gives the courts themselves the ability, within the limits set by the total funding received, and by necessary commitments such as staff salaries and maintenance of buildings, to set their own priorities for expenditure. The application of funds is subject to parliamentary scrutiny. No doubt, unjustifiable expenditure in one year would result in a reduction in funds made available in the next year. Even so, the ability to set priorities is a significant form of independence. With the exception of South Australia, State and Territory superior courts are administered as cost centres in a government department. Although there is consultation with the judiciary, expenditure priorities are decided

ultimately by the executive. Having worked in both systems, my preference is for the federal model.

So far, I have confined attention to superior courts, and the judges of those courts. Yet much, indeed most, judicial power is exercised by judicial officers who are not judges of superior courts. How do the principles that flow from the right to an independent judiciary apply to them? Do those principles allow for the possibility that some courts, and some judicial officers, may be less independent than others? Are the rights of citizens to the exercise of judicial power by impartial and independent tribunals sufficiently protected by a system that gives a full measure of independence to a small class of superior judges, equipped with supervisory powers, and a lesser measure of independence to other judicial officers who attend to most of the business of the justice system?

Independence for whom?

In most Commonwealth jurisdictions, judicial officers at different levels of the court system traditionally have been subject to different regimes of appointment and removal, tenure, remuneration, and performance review. Of course, within many courts there are decision-makers, such as registrars and clerks, who are not judicial officers, but who perform functions ancillary to those of the judges. Commonly, they are members of the public service, employed by the executive branch. Furthermore, even countries whose constitutions

involve a relatively strict separation of powers entrust particular, usually specialised, forms of decision-making and dispute resolution to tribunals that operate outside the mainstream judicial system. In the United States, for example, most federal judges are appointed under, and enjoy the tenure and independence conferred by, Article III of the Constitution, which deals with the judicature. Nevertheless, pursuant to Article I, dealing with the legislative branch, Congress has conferred adjudicative authority upon territorial courts, military tribunals, a court of veterans' appeals, and a court of federal claims. Judges of those courts do not have life tenure, like Article III judges, and they do not all enjoy the same constitutional protection against salary reduction.

In the United Kingdom, the Act of Settlement provisions concerning judicial tenure applied to judges of superior courts. Much judicial power was exercised by judicial officers to whom those provisions did not apply. Others are better qualified to discuss the regime established by the *Constitutional Reform Act* (UK) 2005.

The most familiar example of the problem concerns magistrates. In Australia, as in a number of other parts of the Commonwealth, the position of the magistracy continues to evolve. Until recently, there was no federal magistracy. Summary federal judicial power, civil and criminal, was exercised by State stipendiary

magistrates. They, in turn, until relatively recently, were part of the State public service.[23] They exercised many administrative, as well as judicial, functions. Unlike judges, few of them came from the private legal profession. Until the middle of the 20th century they did not have to be qualified to practise law. Most had spent their working lives in the public service. They were appointed by an official of the Attorney-General's Department. They were subject to Departmental discipline. Their salaries and superannuation arrangements were fixed within the public service, and they were graded in accordance with performance reviews by Departmental officers. Although exercising extensive judicial power, they were firmly within the executive branch of government. That has now changed. The change in the status and independence of the magistracy is one of the most significant and beneficial developments of the last 30 years in the Australian justice system.[24] In New South Wales, the *Judicial Officers Act* 1986 took magistrates out of the executive, and placed them in the judiciary. Magistrates, like Supreme Court and District Court judges, can now be removed only by the Governor, upon an address of both houses of Parliament. They are subject to the same complaints procedures,

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23 For an account of the development of the New South Wales magistracy, see Golder, *High and Responsible Office, A History of the NSW Magistracy* (1991).

24 Some of these changes are referred to in *North Australian Legal Aid Service Inc v Bradley* (2004) 78 ALJR 977.

administered by the Judicial Commission of New South Wales. Some aspects of their remuneration, especially in relation to superannuation, continue to reflect the public service background of the magistracy, but, since 1986, an increasing number of magistrates have been recruited from the practising profession. Although there have been pockets of resistance, the trend has been towards assimilating the position of magistrates, in all matters concerning their independence, with that of judges. Similar developments have occurred in other Australian States. The new Federal Magistrates Court was created under Chapter III of the Constitution. Its members have the same protection against removal as other federal judges, and there is a substantial overlapping of jurisdiction between the new court and the Federal and Family Courts. The remuneration of all federal judges and magistrates is fixed by the same tribunal, whose decisions are made openly and independently, subject only to the possibility of parliamentary disallowance.

In *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*[25], decided in 2002, the Constitutional Court of South Africa considered whether the South African Constitution requires that all courts in the judicial hierarchy must have their independence protected in the same way

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[25] 2002 (5) SA 246 (CC).

and to the same degree. That question was answered in the negative. Emphasis was placed on the supervisory role of the higher courts, and the protection which that gives to the courts whose operations are subject to such supervision. The decision turned upon close scrutiny of the relevant South African legislation, in the context of South African society. In 2004, in *North Australian Legal Aid Service Inc v Bradley*[26], a case concerning remuneration arrangements for the Chief Magistrate of the Northern Territory, the High Court of Australia acknowledged the continuing evolution in the position of magistrates in Australia, and held that the legislation there in question, and the arrangements made pursuant to that legislation, did not offend principles of judicial independence.

In the past, there has been general acceptance of different degrees of independence among those exercising judicial power. The theoretical basis of that acceptance is likely to be subjected to closer scrutiny. Realities must be accommodated; change will not proceed evenly; and issues are blurred by the difficulty of drawing a clear dividing line between judicial and other decision-makers. Even so, if the right of citizens to an independent judiciary is to be recognized in full measure, in the longer term it may be difficult to

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[26] (2004) 78 ALJR 977.

justify significantly different levels of independence within the permanent judiciary.

I leave to one side the matter of the widespread use, in many jurisdictions, including the United Kingdom, of acting or temporary judicial officers. In practice, much judicial power is exercised by people whose services are engaged on a part-time basis. In some courts, this is a method of dealing with temporary shortages of judge-power. In others, it is a permanent feature of the system. Because this is the subject of pending litigation in Australia, I will say no more about it.

Appointment, accountability and removal

Although in some civil law countries there is substantial involvement of judges of higher courts in the appointment, supervision and discipline of judges of lower courts, in the common law tradition judges are appointed by the executive government and, at least in the cases of judges of superior courts, the power of removal is with Parliament. In these respects, as in the matter of resources, judges cannot be completely independent of the other branches of government.

As to appointment, customs and procedures vary. Whatever method is adopted, the right to an impartial and independent judiciary requires that neither the reality nor the appearance of

impartiality or independence be compromised. This leaves room for choice. How it relates to a practice of popular election of judges is a matter that does not, I think, arise within the Commonwealth. Nor, at least so far, are we concerned with a procedure of parliamentary interrogation of prospective appointees. In Australia, in 1913, the government in Canberra sounded out a prospective appointee to the High Court,, Mr Piddington, on his views about the federal balance. He said he was a strong centralist. He was appointed. When the exchange became publicly known, he felt obliged to resign.[27] Some recent canvassing by the media of the possibility that an Attorney-General might question prospective appointees, privately, about their legal inclinations appears to overlook three matters. First, there is the unfortunate case of Mr Piddington. Secondly, the most frequent litigant before the High Court is the Commonwealth Attorney-General. Thirdly, most people appointed to the High Court have already had substantial judicial experience, and their judicial record is publicly available.

No one suggests that a record of past decision-making compromises the future impartiality of a judge. Even the fact that a judge has decided the same point of law on an earlier occasion does not mean disqualification from a later case that raises the same

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27 See Blackshield, Coper & Williams (eds), *The Oxford Companion to the High Court of Australia*, Oxford University Press, at 533.

point. The system requires an open, not a blank, mind. It assumes that judges are amenable to persuasion. What, however, of expressions of legal opinion to an appointments authority, or some other body set up to consider prospective appointees? What of formal applications for appointment that canvass such matters? It was the privacy of Mr Piddington's communication of his centralist inclinations that compromised his impartiality. If, in a previous judicial capacity, he had displayed such tendencies for all to see, who could have suggested any impropriety in his appointment?

Reference has been made above to acting or part-time judges. Is this a legitimate means by which governments may assess the suitability of prospective appointees? Suitability has many aspects. It may include temperament, diligence, and such basic skills as the capacity to evaluate evidence and to compose reasons for judgment. Is it reasonable for a government to look for a reliable method of evaluating suitability before making a full-time appointment? Or does it compromise the impartiality of part-time judges if litigants are aware that a judge's prospects of permanent appointment may depend upon making a favourable impression on the executive? Questions such as this were examined by the High Court of Justiciary in the Scottish case of *Starrs v Ruxton*[28]. They deserve

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[28] 2000 SLT 42.

wider debate in other jurisdictions, especially with increasing non-professional interest in the process of appointment.

In a federal system, where the balance of power between federal and State governments is often a sensitive issue, the appointment of the members of the ultimate court that decides constitutional questions usually rests with the federal government. It might explain why, in Australia, at the federal level, neither of the major political parties has shown much interest in proposals to surrender to a Commission or similar authority the power of appointment, or of recommending appointments, to the High Court.

The traditional formula for the removal of judges, or at least superior judges, upon an address of Parliament on the grounds of proved misbehaviour or incapacity serves the interests of independence. Yet, in an age that demands accountability in all aspects of government, it does not satisfy everybody. Appropriate accountability serves two purposes. It promotes good decision-making, and it gives effect to the democratic idea that no power should be uncontrolled. The problem is to strike a balance between those purposes, on the one hand, and the requirements of impartiality and independence on the other.

There now exist, in different Commonwealth countries, and within those countries, various mechanisms designed to strike that balance. For 10 years, when I was Chief Justice of New South

Wales, I was also President of the Judicial Commission of that State. The Judicial Commission was set up in 1986 to receive complaints against judicial officers. This is not the occasion to go into the details of its operation. It is not difficult to devise a suitable method of dealing with serious allegations against judges. If there is an allegation of a crime, criminal justice takes its course. If there is an allegation of incapacity, or non-criminal misbehaviour, so serious that it may warrant removal, then ultimately it is a matter for Parliament. It may be necessary to establish either standing or ad hoc procedures to filter complaints, or investigate facts, but these are to enable Parliament to exercise its proper function. The involvement in those procedures of persons or bodies external to Parliament, including members of the judiciary, is handled differently in different places. The real difficulty is in dealing with complaints that, even if made out, would not justify removal. All complainants believe their complaints are serious. But only a very small percentage of the complaints I have seen could possibly warrant removal. Creating a formal procedure gives rise to an expectation that, if a complaint is found to be justified, some sanction can be applied. Most complainants are not satisfied by being told that a judge will be spoken to. What forms of sanction, short of removal, might there be?

The exposure of judges to public or private censure, or some penalty falling short of removal from office, is, at least in Australia, a controversial topic. The judiciary is not a disciplined force, subject

to command, like the armed services. The independence of judges includes independence of one another. Chief Justices and others may develop formal or informal procedures of appraisal in order to enable them to discharge their responsibilities, but there is an obvious danger if performance review extends beyond matters such as timely delivery of judgments into areas relating to substantive decision-making. The justice system has its own well-established system of performance review: it is the appellate process. Judges enjoy, as a matter of public policy, substantial immunity from civil and penal sanctions for erroneous decisions.[29] In the Supreme Court of the United States, in *Forrester v White*[30], O'Connor J said that "[i]f judges were personally liable for erroneous decisions, the resulting avalanche of suits ... would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits". A system which exposes judges to the possibility of reprisals of any kind for the manner in which they exercise their judicial functions needs to be measured carefully against the imperatives of maintaining their impartiality and independence.

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29 *Sirros v Moore* [1975] QB 118; *In re McC (A Minor)* [1985] AC 528; *Yeldham v Rajski* (1989) 18 NSWLR 48, A Olowofoyeku, *Suing Judges, A Study of Judicial Immunity* (1993) at 74-77.

30 484 US 219 (1988) at 226-227.

A predictable area of future tension between the political branches and the judiciary results from increasing demands for accountability in relation to functions which are described as administrative, but which are closely related to the judicial process. Where it is the function of a head of jurisdiction, or judge administrator, to assign members of a court to hear particular cases, or to allocate the business of a court for disposition according to certain internal arrangements, the capacity to exercise that function free from external interference is an essential aspect of judicial independence.[31] The Supreme Court of Canada has identified "matters of administration bearing directly on the exercise of [the] judicial function", including assignment of judges, sittings of court and court lists, allocation of court-rooms and direction of staff engaged in that function.[32] These processes affect the efficiency of courts, and often involve the application of substantial resources. The public, and the other branches of government, want to be satisfied that the courts are using the funds made available to them wisely. Demands for a suitable level of accountability for the way in which courts apply public money are natural and inevitable. The task of devising appropriate forms of accountability consistent with

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31 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 523-524; *Fingleton v The Queen* [2005] HCA 34.

32 *Valente v The Queen* [1985] 2 SCR 673 at 708-709.

the requirements of independence is a challenge for modern government, including the judiciary.

Accountability for the application of resources is one thing; accountability for decision-making is another. Judges work in public; they give reasons for their decisions; and those decisions are routinely subject to the appeal process. That, however, does not satisfy everybody. Much of the work of judges attracts little public attention. Some of it attracts a lot of attention, public comment, and political controversy. The sentencing of offenders is an example. What is called the law and order debate sometimes involves opportunistic demands, not merely for the reduction of judicial discretion, but also for sanctions for unpopular decision-making. If judges could be penalised, or publicly censured, because their decisions displeased the government, or some powerful person or interest group, or, for that matter, most of the community, then the right of citizens to an independent judiciary would be worthless.

There are those who, accepting fully that judges should not be exposed to sanctions because their decisions are unpopular, would see a difference in cases of error. The appeal process reveals judicial mistakes, and some of those mistakes fall outside range of matters upon which different opinions are fairly open. Judicial mistakes may have very damaging consequences. The common law confers on judges an immunity from civil liability. The basis of the immunity is the constitutional imperative of judicial independence. It

is difficult to reconcile that immunity with some alternative system of administrative penalties or sanctions, falling short of removal for incapacity. Sanctions for misconduct falling short of misbehaviour that warrants removal are difficult to devise, in a manner that respects independence. Even more difficult are sanctions for error that falls short of demonstrating incapacity. This is a topic that is certain to produce tensions, especially with the increasing size of the judiciary, and the increasing range of judicial officers who are regarded as being entitled to full independence.

Removal of judges might result from the abolition or restructuring of courts. Subject to the requirements of a Constitution, it is ordinarily for Parliament to decide, from time to time, the configuration of a nation's court system. In Australia, the Constitution mandated the creation of a Federal Supreme Court, to be called the High Court of Australia, but it is for Parliament to decide what other federal courts are to exercise the judicial power of the Commonwealth. The Federal Court and the Family Court were not created until the 1970's, and the Federal Magistrates Court was created very recently. The Federal Court took over the jurisdictions formerly exercised by the Federal Court of Bankruptcy and the Australian Industrial Court. Those courts no longer exist. Obviously, legislatures must be able to respond to changing needs and circumstances by creating and abolishing courts. Is there any legal obligation, or established convention, which requires that judges

who lose office in this way should be appointed to some equivalent office?

In New South Wales, the *Constitution Act* 1902, in s 56 covers the issue. It provides that a person who held an abolished judicial office is entitled, without loss of remuneration, to be appointed to and to hold another judicial office in a court of equivalent status. When the Compensation Court of New South Wales was abolished, its members were appointed to the District Court. Such transfers are not always without difficulty. The District Court exercises extensive criminal jurisdiction, and work of that kind would have been new to some of the former Compensation Court judges. Even so, the transfers were required by the Constitution Act, and worked satisfactorily. It is not hard to think of some specialist courts whose members might have difficulty relating to other work. Of course, they may not want to try, but the problem does not arise in the case of judges who do not wish to be re-located. Abolition of courts or of judicial offices usually takes place for reasons that have nothing to do with an attack on judicial independence. Yet there may be exceptional cases where issues of independence are involved. In the absence of a provision such as s 56, it may not be easy to find a legal, as distinct from a political, basis for a remedy.[33]

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33 Article 29 of the Beijing Statement of Principles of the Independence of the Judiciary is to the same effect as s 56.

Appointment of Judges to Commissions and Inquiries

Reference has already been made to the common practice of conferring judicial power upon persons other than regular judges, by which I mean full-time judges who enjoy the security of tenure and remuneration ordinarily associated with independence. There is an equally common practice of engaging the services of regular judges for the performance of functions which may benefit from the exercise of judicial skills, but which do not involve the exercise of judicial power. Not only is this practice common; it is popular with parliamentarians, and the public. Usually it involves the executive arm of government taking advantage, (not necessarily unfair advantage), of the independence associated in the public mind with the judicial arm. When calls are made for a "judicial inquiry" to be set up, they may be based upon an appreciation of certain judicial skills, but they reflect, above all, a demand for fairness of process and independence of decision-making. Nothing better confirms the judiciary's impartiality than the importance which is so often attached to having a serving or retired judge for an inquiry into some controversial matter which may have nothing to do with the law. Judges are in demand on these occasions, not because they have any special reputation for wisdom, but because they have a special reputation for independence and impartiality. Does this practice carry with it any dangers for the very qualities which are thought to justify its adoption?

In the April 2005 edition of the *Law Quarterly Review* there is a paper by a senior English judge examining this topic in the light of practice in the United Kingdom and Israel.[34] Recent legislation in the United Kingdom[35] specifically deals with certain matters relating to the conduct of public inquiries by serving judges. In a book published last year, the Chief Justice of the United States considered the practice of Justices of the Supreme Court of the United States serving in extra-judicial capacities.[36] Chief Justice Rehnquist referred to such famous examples as Justice Roberts' inquiry into the circumstances of the Japanese attack on Pearl Harbour, Justice Jackson's service on the Nuremberg War Crimes Tribunal, and Chief Justice Warren's inquiry into the assassination of President Kennedy. His opinion was that in extraordinary circumstances of grave national consequence such service may be justified. Plainly, in all but extraordinary circumstances, it would not be contemplated. War seems to create special cases. During World War II, Sir Owen Dixon, while on the High Court, served as Chairman of the Central Wool Committee, the Australian Shipping Control Board, the Marine War Risks Insurance Board, the Salvage Board, and the Allied

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34 J Beatson, Should Judges conduct public inquiries? (2005) 121 LQR 221.

35 *Inquiries Act* 2005 (UK).

36 William H Rehnquist, *Centennial Crisis: The Disputed Election of 1876*, (2004) at 220-248.

Consultative Shipping Council of Australia, and also as Australian Minister to Washington. In 1950, he attempted to mediate a dispute between India and Pakistan over Kashmir. Sir William Webb, while a member of the High Court, was President of the International Military Tribunal for the Far East, in Tokyo.

In 1955, Sir Owen Dixon said that, in retrospect, he did not altogether approve of his own extra-judicial service.[37] He also said that, with only one very trifling exception during the Great War, the High Court of Australia has always maintained the position that its judges would not accept appointment as Royal Commissioners. That position was first asserted by Chief Justice Knox, it was reasserted in the 1920's, it was maintained by Chief Justice Dixon, and it has been maintained to the present day. In brief, in the Supreme Court of the United States, and the High Court of Australia, extra-judicial service has been rare and extraordinary, and has been confined substantially to times of war or grave national emergency. In Australia, members of the High Court are not available to serve as Royal Commissioners.

As to other federal judges in Australia, their position is affected by the separation of powers required by the Constitution. Non-judicial power may not be conferred on federal courts, but

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[37] (1955) 29 Australian Law Journal at 272.

federal judges, appointed as persona designata, may take on functions that do not involve the exercise of judicial power provided such functions are not incompatible with their status and independence, or with the exercise of the judicial power of the Commonwealth, or with the maintenance of public confidence in the exercise of the judicial power of the Commonwealth.[38] The High Court has cited the opinion of the Supreme Court of the United States in *Mistretta v United States*[39]:

> "The legitimacy of the Judicial Branch ultimately depends upon its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action."

That is a salutary warning even in jurisdictions where there is no constitutionally required separation of powers, such as the Australian States. There are well understood practical dangers of judges being drawn into political controversy by an injudicious decision to take on an inquiry in which partisan interests are involved. It may be that the reason why the executive seeks a judge for an inquiry is that it is obvious that it may arouse political passions, and it is hoped they may be cooled by a neutral inquirer. That might be a good reason for the judiciary to decline to be drawn

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38 *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

39 488 US 361 at 407 (1989).

in. What is worse, however, is a case where an inquiry is given a task which is of such a nature that its performance cannot be completely independent of executive or legislative influence. It is one thing to seek to turn the judiciary's reputation for impartiality to public advantage; it is another thing to use that reputation to give to partisan executive or legislative action a spurious appearance of impartiality.

In most Australian States, including New South Wales, the practice in relation to judges acting as Royal Commissioners or conducting inquiries is much the same as it is in the United Kingdom. It is accepted, although opinions differ about its wisdom in particular cases. There is an important practical issue: the method of selection of the judge to be invited to do the job. Plainly this can be relevant to the appearance of impartiality. The Australian Guidelines to Judicial Conduct[40] tell judges that if the executive government is seeking the services of a judge for a non-judicial appointment, the first approach should be to the Chief Justice or other head of jurisdiction, seeking the approval of that person for the appointment of a judge from that jurisdiction, and seeking approval to approach the judge in question. Judges should not deal directly with the Attorney-General or other representative of the executive government without the prior approval of the head of jurisdiction

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[40] Guidelines to Judicial Conduct, Ch 5.

who has the responsibility of considering the propriety of the judge accepting the proposed appointment. The exceptional State is Victoria.[41] In 1923, Chief Justice Irvine wrote to the Victorian Attorney-General declining a request that he invite one of the judges of the Supreme Court of Victoria to undertake a Royal Commission, and expressing the view that it was generally inappropriate for judges to do other than hear and determine issues of fact and law in the context of the resolution of a justiciable controversy.[42] In 1954, the judges of the Supreme Court of Victoria, with the support of the Victorian Bar, adopted a resolution that, except in a matter of national importance arising in times of national emergency, it is undesirable that any judge should accept nomination as a Royal Commissioner. The Chief Justice of Victoria has told me that this remains the view of her Court.

Conclusion

It would be wrong to assume that the political branches of government are natural enemies of judicial independence. The Act of Settlement was the work of a Parliament which saw that its own interests lay in supporting the judiciary's independence of the

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41 The history is discussed in (1955) 29 Australian Law Journal, at 252-272.

42 The Irvine Memorandum is set out at (1955) 29 Australian Law Journal 256-259.

executive, that is, the King. Similarly, in modern democracies, executive dominance of the political process, potentially weakening the power and influence of parliaments, gives legislators a continuing interest in preventing executive dominance of the judges. In a representative democracy, parliaments are composed of shifting power groups, and those who today are in the ascendancy will one day be in opposition. Politicians, even when in power, are not so short-sighted as to overlook the possibility that the interests they represent may in future need the protection of a non-compliant judiciary. Judge Clifford Wallace of the United States, referring to an earlier work by William Landes and Richard Posner, observed that "[t]he predictability that comes with judicial independence also benefits the political branches of government" because "interest groups have increased faith in the endurance across administrations of legislation they support".[43]

The economic significance of the predictability that comes with the rule of law and judicial independence is widely acknowledged. Speaking in Australia in March 2005, the Chief Justice of the People's Republic of China, Xiao Yang, said:[44]:

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43 J Clifford Wallace, "An Essay on Independence of the Judiciary: Independence from What and Why", 58 NYU Annual Survey of American Law 241 (2001).

44 The Hon Xiao Yang, *Current State and Future Development of China's Judicial Reform,* 11th Conference of Chief Justices of Asia and the Pacific, 20 March 2005.

> "Thirty years ago [in] China ... the law and the judiciary only focused on punishment, while the judiciary's function of impartial judgment was totally obliterated. Judicial organs and officials were [equated] with other government departments and common civil servants while judicial independence was totally neglected ...
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> Since reform and opening up in 1978, fundamental changes have taken place in China's politics, economy and society and they have put forward new requirements for [the] judicial system. The understanding of the judiciary by the government, society and people has also changed. A new set of judicial concepts as part of political civilization is taking shape."

In Asia and the Pacific region, "judicial reform" is high on the agenda of developing economies. The reasons are pragmatic as well as ideological. As well as protecting the rights of citizens, an independent judiciary is good for government, and good for business. Impartial, predictable, rule-based adjudication in open justice administered by independent courts is a necessary condition of economic progress.

To ask whether judges deserve their independence is like asking whether parliamentarians deserve their freedom of speech. It should not be difficult to explain to the public, and to those in the political branches of government, why they need, benefit from, and have a right to, an independent judiciary. Providing and reinforcing that explanation is a responsibility of the modern judiciary. It is not enough to justify our independence to one another. There is an educational role for us to take up. Legal practitioners, and law teachers, are our allies in that task, but we should not assume that we are facing a hostile audience. In Australia, and in many other

parts of the Commonwealth, it is unlikely that there would be a direct challenge to the concept of judicial independence. What is more likely is that some people, not understanding why it exists, or what it involves, will make well-intentioned demands, in the name of accountability, which are inconsistent with independence.

How well equipped are we to explain to citizens their right to an independent judiciary, and to encourage them to value that right? Most superior courts in Australia and, I assume, in other parts of the Commonwealth, have Public Information Officers. Those people are not there merely for the purpose of reacting to emergencies, and dealing with the demands of the media. Perhaps we should be making better use of their potential. We can hope, and sometimes reasonably expect, that political leaders and civil servants will understand why our independence exists, and what it requires, but it is unrealistic to expect those of whom we are supposed to be independent to assume the burden of justifying that independence to the public. Modern judicial organization and leadership has, in the broadest sense of the term, a political dimension. Representing the judiciary to the political branches of government, and to the public, and explaining independence in an age of accountability, is a challenge. The ways in which different judiciaries address that challenge will be influenced by local circumstances. There is always the likelihood that claims of independence will be seen as self-interested. The message that needs to be communicated and constantly reinforced, in the manner appropriate to the time and

place, is that an independent judiciary is indispensable in a free society living under the rule of law.