REPLY TO THE HONOURABLE RUTH BADER GINSBURG "REMARKS ON JUDICIAL INDEPENDENCE: THE SITUATION OF THE U.S. FEDERAL JUDICIARY"

Melbourne, 1 February 2001

Issues about judicial independence are universal. They will emerge in different ways and at different times in particular societies but this should not divert attention from the essential similarities that exist. Especially is that so when we consider the United States of America.

The diversity of that nation finds reflection in its judicial systems. Three particular differences may be noted. First, it is important to recall that, unlike Australia[1], there is no single, uniform common law of that country. The common law of any jurisdiction in the United States may very well differ greatly from the common law of another, even neighbouring, jurisdiction. There are many reasons why this is so, but not least among them is that the Supreme Court of the United States does not have that unifying general appellate jurisdiction which is given to the High Court of Australia by s 73 of the Constitution.

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1 *Lipohar* (1999) 74 ALJR 281; 168 ALR 8.

Secondly, it is, of course, important to recall, as Justice Ginsburg reminded us, that, outside the United States federal system, the methods of appointment of judges and the terms on which judges serve in the various States may differ greatly from the arrangements which we know: of appointment by the Executive until a specified retirement age unless earlier removed by the extraordinary process of an address of both Houses. Even within the federal system there is that extra step of confirmation by the Senate which is absent from Australian appointment processes.

Finally, it is as well to recall that so much of the work of the United States Supreme Court concerns, or at least is informed by, the application of the Bill of Rights. The "strict and complete legalism", which Sir Owen Dixon said was the only safe guide to resolution of disputes between the integers of this federation[2], does not easily accommodate debates about the application of aspirational statements of rights which are necessarily cast in terms providing no internal guidance to the resolution of the inevitable intersections or conflicts between them. To take only one example, how are both of the fundamental values of freedom of speech *and* the right to a fair trial to be advanced when pre-trial publicity may compromise the trial process[3]? Strict and complete legalism may not always be a

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2 (1952) 35 CLR xi at xiv.

3 O'Callaghan, "The United States Experience of Unfettered Speech and Unfair Trials: A case against an Australian Bill of Rights", (1998) 72 *Australian Law Journal* 957.

sufficient judicial method to resolve such a tension. Moreover, when it is remembered that these are issues about which all will have an opinion, and that they are issues which are not seen as necessarily the province of only the legally trained, it is apparent that controversy will often attend a court's decision of such issues and provoke some questions about judicial independence.

Account must be taken of these, and perhaps other, differences when looking to the experience of the United States in questions touching judicial independence. But when account is taken of them, still the same problems about judicial independence can be seen to be there and it would be wrong to assume that the systems are so different that little can be learned by each from the other. The issues are, as I say, universal.

Judicial independence presupposes the faithful performance of the judicial task. Often enough, the strongest attacks on judicial independence assert that there has not been that faithful performance of the task but, on closer examination, can be seen as asserting no more than that the decision challenged is unpopular or does not accord with the view of the particular speaker.

It must be accepted, however, that independence is given to the judicial branch on the assumption that the judicial branch will perform its work properly. In particular, judicial independence does not entail freedom from restraint. It does not mean that the judge is

free to act as philosopher-king bound by no principle except the dictates of his or her individual (and perhaps idiosyncratic) sense of justice. That is why there is appellate review of decisions. It is why the judicial task must be performed in public. It is why the judge is obliged to give reasons for decision. In these ways the performance of the judicial task is exposed to public scrutiny. And the judge who does not properly perform the task which is assigned is rightly to be subject to critical scrutiny. As Megarry J said in *Erinford Properties Ltd v Cheshire County Council*[4], "No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges."

Nevertheless, the most fundamental challenges to judicial independence will often be provoked (or sought to be justified) by what is said to be a departure from the proper performance of the judicial task. Often such attacks are cast in terms of holding the judges "accountable" but, of course, the sting may lie in what is meant by "accountable". As Justice Ginsburg has illustrated "accountable" will sometimes be used as meaning subordinate to the legislative or executive branch of government.

In a system like Australia, where at the federal level, the exercise of the judicial power of the Commonwealth is set apart

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4 [1974] Ch 261 at 268.

from the legislative and executive branches of government, it is as well to recall why that should be so. The discussion of separation of powers does not begin, as observation of recent debates might suggest, with the Court's decision in *Re Wakim; Ex parte McNally*[5]. The 1921 decision in *In re Judiciary and Navigation Acts*[6] that it was beyond power to require the High Court to give advisory opinions and the 1956 decision in *The Queen v Kirby; Ex parte Boilermakers' Society of Australia*[7] which led to the separation of the judicial and other functions of the arbitration system are two of the most important decisions in the area. As was pointed out in the joint judgment in *Boilermakers*[8], "[t]he fundamental principle upon which federation proceeds is the allocation of powers of government" and[9] "the ultimate responsibility for deciding upon the limits of the respective powers of the government [is necessarily] placed in the federal judicature".

It is, therefore, inevitable that the courts, especially the federal judicature in a federal system, will be required to decide cases in which governments, state or national, have a stake. Judicial

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5 (1999) 198 CLR 511.

6 (1921) 29 CLR 257.

7 (1956) 94 CLR 254.

8 (1956) 94 CLR 254 at 276.

9 (1956) 94 CLR 254 at 268.

independence is essential if disputes of that kind are to be resolved according to law. Indeed, in any legal system, federal or unitary, the power of the state will be invoked whenever a citizen is charged with crime. What is right and just in such a case may not always be popular; it may not be convenient or expedient; it may provoke heated political debate.

In this country, the most dramatic example of the assertion of judicial independence may be thought to come from this last area of the criminal law, not the more overtly political area of federal relations. Yet that would be to ignore what happened in the *Banking Case*[10] and the *Communist Party Dissolution Case*[11]. It should be remembered that each was a case in which issues were litigated which were central to political debates of the time. The decision in the *Banking Case* directly affected the way in which the post-World War II economy of this country was shaped. The decision in the *Communist Party Dissolution Case* was, in effect, put to the people in the referendum for constitutional amendment which followed[12], a process differing fundamentally from the legislative override to which Justice Ginsburg referred. Each case concerned an issue that

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10 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1; (1949) 79 CLR 497.

11 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

12 Constitution Alteration (Powers to Deal with Communists and Communism) 1951 (Cth).

provoked the greatest political controversy, but, unlike more recent times, it was controversy which was not aimed directly at the Court.

These two cases are very important. Nevertheless, it is also as well to recall what happened in 1962. Perhaps it is because nearly 40 years have passed that there seems to be a risk of the events of that time fading from the collective memory of lawyers and others interested in the subject of judicial independence. They were events which demonstrated most clearly the need for that quality.

I refer, of course, to *Tait v The Queen*[13] where the High Court granted an injunction restraining the executive of the State of Victoria from proceeding with the execution of a prisoner whose application for special leave to appeal to the Court had been filed but not heard. At the time, the execution of Tait would, I suspect, not have been an unpopular move. Certainly it was a course upon which the State government was determined. The drama of the *Tait* case is well documented[14]. It is as well, however, to consider carefully what Dixon CJ said[15]:

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13 (1962) 108 CLR 620.

14 See Hulme, "*Tait's Case*, and Sir Owen Dixon", *Victorian Bar News*, Winter (1997) 34; Burns, *The Tait Case*, (1962).

15 (1962) 108 CLR 620 at 624.

> "We are prepared to grant an adjournment of these applications without giving any consideration to or expressing any opinion as to the grounds upon which they are to be based, but entirely so that the authority of this Court may be maintained and we may have another opportunity of considering it.
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> We shall accordingly order that the execution of the prisoner fixed for tomorrow morning be not carried out but be stayed pending the disposal of the applications to this Court for special leave and of any appeal to this Court in consequence of such applications."

"*Entirely*" so that the authority of this Court may be maintained "are very strong words. They would be seen by some as asserting a place for the courts in the scheme of government which would surprise them. Yet it is fundamental to the rule of law.

We are indebted to Justice Ginsburg for what she has said. Whatever may be the differences between our two nations' legal systems, the principle of judicial independence lies at the heart of each. Her Honour's paper demonstrates how and why that is so.