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INDEPENDENCE OF THE JUDICIARY - BASIC PRINCIPLE,  
NEW CHALLENGES

The Hon Justice Michael Kirby AC CMG

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Australia**

This paper deals with judicial independence. The *International Covenant on Civil and Political Rights*, Article 14.1 requires that criminal and civil cases at law must be determined by a competent, independent and impartial tribunal. This is a fundamental human right.

The author reviews the meaning of this basic requirement against the background of constitutional history and experience.

He addresses a number of particular issues relevant to the ways in which judicial independence may be infringed in developed societies. These include:

- The increasing failure to appoint adequate judicial numbers and the recruitment of acting and part-time judges.
- The introduction of new and ready procedures for the removal and discipline of judges.
- The occasional departure from respect of the independence of judges from each other and from presiding colleagues.
- The effective reduction of judicial salaries during office.
- The abolition of tribunals performing quasi-judicial functions and the non re-appointment of their past members.
- The subjection of the judiciary to pressure from powerful interests in government, the business sector and the media.

Justice Kirby closes his paper with a reflection on the special problems of judicial independence in developing countries where there are many impediments to the attainment of true independence of action and of mind. It is here, he suggests, that the chief challenges for the future will lie.

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A FUNDAMENTAL HUMAN RIGHT

The *International Covenant on Civil and Political Rights* ("ICCPR") states the fundamental that belong to human beings everywhere. Amongst the rights stated are those in the section which contains "Procedural Guarantees in Civil and Criminal Trials"<sup>1</sup>. Article 14.1 says, relevantly:

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\* President of the International Commission of Jurists. Formerly Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. Justice of the High Court of Australia. Personal views.

1 ICCPR, Art 14.

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

This cardinal provision is derived from earlier statements of universal principles<sup>2</sup>. It draws upon the historical experience of many lands. It is impossible to ensure the rule of law, upon which other human rights depend, without providing independent courts and tribunals to resolve, in the language of the ICCPR, competently, independently and impartially, disputes both of a criminal and civil character. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. Without the rule of law and the assurance that comes from independent decision-makers, it is obvious that equality before the law will not exist. Uniformity, consistency and certainly in decisions, will be wholly accidental. The achievement of a manifestly disinterested and impartial application of legal rules will not be a feature of such a society<sup>3</sup>.

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2 For example *Universal Declaration of Human Rights*, Art 10.

3 K Ryan, "Judges, Courts and Tribunals", Paper presented at the Australian Judicial Conference Symposium on Judicial Independence and the Rule of Law at the Turn of the Century, Australian National University, Canberra, 2 November 1996.

The constitutional provision of a judicial branch of government, and the formal assurance that it is separate and independent of the other branches, represents the main way by which most states seek to comply with the principles contained in the foregoing provision of the ICCPR. The judicial branch does not, typically, include all those who, in a given society, make decisions by applying pre-existing law to proved facts. Nowadays, there are many tribunals, statutory decision-makers and others who have that responsibility<sup>4</sup>. Nevertheless, a constitutional statement guaranteeing the independence of the judiciary is a good start. Symbolically, it involves an endorsement of the principles and makes incursions against them more difficult because they will need to be more public.

Total separation of the judicial power is not possible in the real world. In many countries, the Executive Government appoints judges. The legislature provides for their salaries and pensions. It funds the activities of the courts. To give content to the provisions of Art 14.1 ICCPR, it is therefore necessary to go beyond the letter of a written constitution. It is essential to breathe life into the sparse language of the ICCPR. This requires a reflection upon the constitutional struggles, past and present, by which people everywhere have been seeking to attain the kind of human right to

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<sup>4</sup> P Skinner, "Judicial Independence and Residential Tenancy Tribunals" (1998) 7 *J Judicial Admin* (Aust) 130.

which Art 14.1 gives expression. It is not necessary to be a sophisticated investor in Hong Kong or a world-weary lawyer in Australia or the United States, to realise how important it is that a conflict, serious enough to come to formal decision-making in a court, should be resolved by a decision-maker who is "competent, independent and impartial". Even a person living in a most primitive society will aspire to that objective when confronted with the need to approach a decision-maker. A judge without independence is a charade wrapped in a farce inside an oppression.

The conventions which must supplement textual assertions of judicial independence reach deep into the history of each people and each legal system. In the countries of the common law, judicial independence received important constitutional reinforcement when King James II of England was driven from the Kingdom in the "Glorious Revolution" of 1688. His successors, William and Mary, were only accepted by the people on condition, amongst other things, that they promised to respect the tenure of the judges essential to their true independence of mind and of action<sup>5</sup>. The principle, and the way it was achieved by revolution, ensured that for England, brutal intimidation of the judiciary would not again occur.

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<sup>5</sup> *Act of Settlement*, 1701 (GB). F W Maitland, *The Constitutional History of England*, 1950, 283-284; D L Keir, *The Constitutional History of Modern Britain*, 1960, 267.

Other, more subtle means might be tried by successive Executives and legislatures to attempt to influence judges and affect the outcome of their deliberations. But at least for the superior judiciary of England, the threat of dismissal because the Crown did not like a particular outcome, was lifted. This revolutionary achievement was to become a model which eventually was extended to the constitutions of all other countries of the common law. It provides the formal assurance in those countries of the type of judicial independence for which Article 14.1 ICCPR stands<sup>6</sup>.

At first, the English were somewhat reluctant to share the prize of judicial independence with their colonies. The Declaration of Independence of the United States of America, for example, listed as one of the grievances of the American colonists against King George III that<sup>7</sup>:

"He has made judges dependent on his Will alone, for the Tenure of the Offices, and the Amount and Payment of their Salaries".

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<sup>6</sup> In Australia, the guarantee is contained in Chapter III of the Australian Constitution ("the judicature"). Section 71 vests the judicial power in nominated courts. Section 72 provides for judicial appointment, tenure and remuneration. It controls removal and forbids diminution in remuneration during continuance in office.

<sup>7</sup> Declaration of Independence of the United States of America, 4 July 1776.

It was this experience that led James Madison, in drafting the amendments to the United States Constitution, which became the Bill of Rights of that country, to assert<sup>8</sup>:

"[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights; they will be an impenetrable bulwark against every assumption of power in the legislature or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the Declaration of Rights".

Bad experiences led to an emerging conviction in many countries that guarantees had to be provided against the kind of governmental action that would diminish the independence of the courts: the dismissal or suspension of judges who delivered unpalatable decisions; putting out to pasture judges who had a record of reversing government action; leaving unfilled judicial vacancies so that courts could not perform their functions; selecting weak, incompetent, corrupt and partial appointees to sit in the judicial seat; lopping the pensions, salaries and other benefits so as to intimidate judges and to divert them from the lawful, honest and principled actions required by the proper discharge of their functions.

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<sup>8</sup> J Madison cited R Bader-Ginsburg, "Remarks on Judicial Independence", Hawaii State Bar, 3 February 1998, to be published *Australian Law Journal*, forthcoming, manuscript pp 20-21.

Although there have certainly been cases of judicial weakness, partiality, cowardice and corruption, symbolised most vividly by Judge Roland Freissler who did Hitler's bidding, there have been many more cases of judicial integrity, courage and principled conduct. The real test comes when judges are led by their understanding of the law, the findings on the facts and the pull of conscience to a decision which is contrary to what the other branches of government or other powerful interests in society want. Something different from what "the home crowd" wants<sup>9</sup>. That is when judicial independence is put to the test.

In the United States, in recent times, the Supreme Court has twice, and unanimously, rejected an argument by the President of great political importance to the most powerful office-holder of the nation. In *United States v Nixon*<sup>10</sup>, the Court in July 1974 upheld a subpoena issued by a District Court judge, the Hon John Sirica, directing President Nixon to produce, for use in a criminal proceeding, tape recordings and documents recording conversations in the White House between Nixon and his advisers. The Supreme Court included four Nixon appointees, including Chief Justice Burger who wrote the Court's decision. The Court unanimously declared the

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<sup>9</sup> Ginsburg above n 8 p 1.

<sup>10</sup> 418 US 683 (1974).

law. It affirmed the subpoena. The President obeyed. He then promptly resigned from office.

More recently, in *Clinton v Jones*<sup>11</sup>, President Clinton claimed immunity until the expiry of his term as President from proceedings in court brought against him by Ms Paula Jones. Unanimously, the Supreme Court dismissed his petition. It was held that it would be an abuse of discretion for the District Court to defer the trial because in doing so, it would fail to take into account the interests of the individual citizen to bring her case to trial which could be held without impinging on the President's conduct of his office. In many countries of the world, such strong and independent judicial decisions could not be made in the face of powerful opposition from government or other formidable interests.

Yet many countries do record similar examples where the great and powerful, the opinionated and the wealthy have been subjected by judicial decision to the rule of law expounded in independent courts. In my own country, the High Court of Australia has repeatedly, over the past century, held the balance fixed by law, upheld the Constitution and defended fundamental principles against the wishes of elected governments and Parliaments. In 1948 it

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<sup>11</sup> 137 LEd 2d 945 (1998).

struck down the nationalisation of the private banks<sup>12</sup>. In 1951, it declared unconstitutional an attempt to dissolve the communist party and to deprive communists of basic rights<sup>13</sup>. In 1992 it overturned much earlier law to uphold the rights of Australia's indigenous people in their land<sup>14</sup>. In 1996 it held that such rights were not necessarily extinguished by the grant of pastoral leases which cover about half of the land of the Australian continent<sup>15</sup>. Decisions of this kind would be unlikely in a society where judicial independence was not guaranteed by the letter of the Constitution and not upheld by political convention, respected and obeyed by powerful interests and supported by the people. These are the objectives to which Art 14.1 ICCPR point the entire international community. They are the proper subject of reflection in this conference.

#### COMMENTARY ON ARTICLE 14.1

Article 14.1 of the ICCPR provides institutional guarantees to secure the human rights contained within it. Professor Manfred

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12 *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.

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

14 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

15 *Wik Peoples v Queensland* (1996) 187 CLR 1.

Nowak<sup>16</sup> comments that the apparent intention of the Article is to extend the protection granted beyond the "formally" (and nationally) defined term "court":

"On the one hand it is not enough for the national legislature to designate an authority as a court if this does not correspond to Art 14(1)'s requirements of independence and impartiality. On the other hand administrative authorities that are largely independent and free of directives may, under certain circumstances, satisfy the requirements of a tribunal pursuant to Art 14".

Explaining the tripartite requirements of the Article, Professor Nowak emphasises that the conditions expressed are "to ensure that the jurisdictional power of a tribunal is determined generally and independent of the given case". The requirement of independence:

"relates primarily to the executive but also to a lesser extent to the legislative branch of the State. Judges or other members of a tribunal need not necessarily be appointed for life or be unimpeachable, but they must be appointed or elected for a longer period of time (at least several years) and may not be subject to directives or in some other manner dependent on other State organs in the exercise of their office. In particular, this independence is not always assured with military courts, revolutionary tribunals and similar special courts. However, the criterion of independence goes beyond mere separation of State powers and is to ensure that tribunals are not overly influenced by powerful social groups. In certain cases, this may also lead to a duty on State Parties to undertake positive

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<sup>16</sup> M Nowak, *UN Covenant on Civil and Political Rights - ICCPR Commentary*, Engel, 1993, 233 at 244-246.

measures to ensure this guarantee against excessive influence by the media, industry, political parties, etc".

Many countries will be able to point to municipal decisions of their courts in which the principle of the manifest independence and impartiality of the courts and tribunals have been explored: perhaps against a background of alleged bias by a judicial officer; perhaps against evidence of apparent attempts by the media or other powerful interests to sway particular decisions in favour of one party or another<sup>17</sup>. Different countries exhibit different conceptions of the law of contempt and in particular in relation to the media which necessarily play a part in the attainment of other human rights mentioned in the ICCPR<sup>18</sup>. Most of the cases coming before the United Nations Human Rights Committee and the European Court of Human Rights or national courts in relation to the guarantee of judicial independence and impartiality have concerned problems of perceived bias on the part of a member of a court or tribunal. Thus in *Karttunen v Finland*<sup>19</sup>, the author of the communication to the Human Rights Committee claimed violation of Art 14 in that the Court

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17 See eg *Gallagher v Durack* (1983) 152 CLR 238; *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

18 For example freedom of expression. See Article 19 ICCPR. See Nowak above n 16 at 335ff.

19 UN Doc CCPR/C/46/D/387/1989 (1992) digested in F F Mubtin(?) et al, *International Human Rights Law and Practice, Cases Treaties and Materials*, Kluwer, 1997, 527.

included a lay participant connected with the complainant who had brought proceedings against the applicant. Finland conceded that the proceedings did not meet the requirements of Art 14.1. However, it suggested that the actual decision of the Tribunal was not influenced. The Committee upheld the need for manifest independence of the parties and unquestionable impartiality. It directed Finland to provide the applicant with an effective remedy for the violation of the ICCPR.

Several cases concerning the need to ensure judicial independence from the parties have been decided by the European Court of Human Rights<sup>20</sup>. In doing so, that Court has sometimes disturbed long settled practices in civil law countries by which district prosecutors can occasionally act as magistrates and also order the detention of criminal defendants. The Court has held that in this judicial capacity such prosecutors have to be, and to appear to be, completely independent of those involved in the initiation of criminal proceedings.

The cases coming before international tribunals illustrate the variety of municipal arrangements which exist to which the universal statements of human rights principle must be applied. That variety is

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20 See eg *Huber v Switzerland* 188 UER Ct HR (series A) (1990).

seen everywhere in the world. It is evident throughout Asia because of different legal traditions, colonial experience and legislative adaptation of the competing European models on offer. Because there is a growing body of jurisprudence collecting around the provisions of the ICCPR (and equivalent texts) and because in the case of many states adverse determinations of breaches of the ICCPR oblige corrective measures to bring municipal law into conformity, it is inevitable that the influence of the ICCPR will expand and increase. I believe that it is likely, in the years ahead, to affect the construction of ambiguous provisions of national constitutions<sup>21</sup>, municipal statutory provisions<sup>22</sup> and areas of the common law in need of development and re-exposition<sup>23</sup>.

I turn now to some special issues affecting judicial independence which require the vigilant attention of judges, lawyers and indeed all citizens. The generalities of Art 14.1 of the ICCPR must ultimately be considered in the context of real challenges to judicial independence. These vary in time and place. But they exist

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<sup>21</sup> *Newcrest Mining v The Commonwealth* (1991) 71 ALJR 1346 at 1423; 147 ALR 42 at 147; *Kartinyeri v The Commonwealth* [1998] HCA 22 at 163.

<sup>22</sup> *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 (CA).

<sup>23</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

and they need to be exposed by those who know the history of earlier threats to judicial independence and why its preservation is important for the practical defence of all other human rights.

## SPECIAL ISSUES

### Judicial appointments:

In many states, the threat to judicial independence will not lie in direct confrontation between other branches of government and other powerful interests (on the one hand) and the judiciary (on the other). There are countries of the world where judges and lawyers are intimidated, oppressed and prevented from performing the duties necessary to their offices and even killed for doing their duty. Those in doubt should read the Annual Reports of the Centre for the Independence of Judges and Lawyers established by the International Commission of Jurists titled *Attacks on Justice*. Those reports collect, and annually review, the case studies which are assembled in Geneva relating to attacks on judges and lawyers. Those attacks can range from brutal intimidation and murder to much more subtle and insidious interventions by the state and other powerful interests designed to reduce the independence of mind and action of the members of courts and other tribunals.

In many jurisdictions, the problems will be less those of brutal intimidation and more those involving departure from proper principle. Take for example the question of the term of appointment

of judges and those performing quasi-judicial office. As Professor Nowak has acknowledged, life tenure is not a prerequisite to the kind of judicial independence of which the ICCPR is speaking. In Australia, federal judges were originally held<sup>24</sup>, like those of the United States, to be entitled under the Constitution to appointment for life. This created certain inconvenience. It was repaired by one of the few formal constitutional amendments carried by referendum in Australia<sup>25</sup>. This provides that judges of the highest court must retire at the age of 70. Parliament may provide a retirement age for other federal judges. Judges of the State courts in Australia generally have no precisely equivalent constitutional protection. Their protections lie in statutory provisions (which may ordinarily be amended) and longstanding convention and practice.

In recent years, to clear backlogs in state courts, governments of different political persuasions in the Australian States, have resorted to the appointment of many acting judges. Busy legal practitioners and sometimes academics or retired judges agree to offer their services, in effect, part-time. Such appointments have practical advantages. Nobody doubts the integrity of the legal

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<sup>24</sup> In *Waterside Workers' Federation of Australia v A W Alexander Ltd* (1918) 25 CLR 434.

<sup>25</sup> Constitution Alteration (Retirement of Judges) 1977 (No 83 of 1977).

practitioners who have accepted appointment. But they run into serious problems of principle. The past Chief Justice of Australia (Sir Gerard Brennan) noted that "judicial independence is at risk when future appointment or security of tenure is within the gift of the Executive"<sup>26</sup>.

The practice of appointing acting judges, instead of supplementing the permanent establishment of the judiciary, has been condemned by professional bodies in Australia<sup>27</sup>. One recent report stated<sup>28</sup>:

"Acting judges whose reappointment or permanent appointment is at the discretion of the ... Attorney-General and Cabinet clearly lack judicial independence in the accepted sense".

This is a further illustration of the dichotomy between actual diminution of independence in the *subjective* sense and the appearance of loss of independence by application of an *objective* criterion. Most of the lawyers who accept part-time or temporary judicial appointment in the Australian States would not be influenced

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<sup>26</sup> F G Brennan, "The State of the Judicature" (1998) 72 *Australian Law Journal* at 34-35.

<sup>27</sup> For example the International Commission of Jurists, Australian Section (NSW Branch), *Report on Acting NSW District Court Judges*, unpublished, April 1998

<sup>28</sup> *Ibid.*

in their decisions by the lack of guaranteed tenure. They have busy practices, universities or judicial pensions to return to. But what of the lawyer who would like a permanent appointment? What of the problem of such a lawyer faced with a decision which might be very upsetting to government, unpopular with the media or disturbing to some powerful body with influence? Anecdotal stories soon spread about the "form" of acting judges which may harm their chances of permanent appointment in a way that is unjust. Such psychological pressures, however subtle, should not be imposed on decision-makers. They should be free from inducements and protected by tenure which is the fundamental guarantee of real independence. Whilst the objective of governments to clear backlogs in court lists is admirable, the growing tendency, at least in Australia, to attack the problem by the use of part-time and acting judicial appointees is undesirable. It diverts attention from ensuring that the judicial establishment is kept at a level which can discharge the work of the judicial branch of government.

In the United States the basic problem is the same but its immediate manifestation is different. Serious delays in the appointment of federal judges have been criticised by Chief Justice Renhquist in the *Annual Report on the Judiciary*<sup>29</sup>. In jurisdictions

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<sup>29</sup> Report on the State of the Judiciary (US), 1997 noted *New York Times*, 1 January 1998 at A13.

where legislative approval of judicial appointments is required, there seems to be an increasing tendency to introduce political bargaining, horse trading and consequent delays<sup>30</sup>. One feature of independence of courts and tribunals in today's world is an assurance that their essential personnel will enjoy appointment for a period sufficient to remove the distracting concern about reappointment and future livelihood. Furthermore, the courts or tribunals concerned need to be kept in sufficient resources, human and financial, to ensure that they can perform their essential functions at an appropriate level of competence and with an independence of government that is missing where the judiciary is constantly beholden to inadequate handouts and short-term appointments for its very survival and effectiveness.

Judicial accountability:

A constant problem is that of reconciling the sometimes conflicting demands of judicial independence and tenure with the demands of accountability and essential levels of judicial competence.

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<sup>30</sup> In for example the case of the withdrawal of State Judge Federico Massiah-Jackson from consideration for appointment to the United States District Court. See *Washington Post* 17 March 1998 at A19.

The old belief that the judiciary was beyond criticism, both as to its work and personnel, has given way in many countries to a serious desire, not least from the judiciary itself, to ensure that appropriate levels of performance are reached, that continuing education outside the courtroom is accepted, that minimum standards of diligence, competence and ethical conduct are upheld and that all of this is demonstrated to the community whom the judges serve. The Chief Justice of New Zealand (Sir Thomas Eichelbaum) has written about the delicate balance between accountability and independence in judicial office<sup>31</sup>:

"The imperative of judicial independence means that, although publicly funded, the judiciary cannot be directed by or held to account by a Minister in the same way as other public officials. Judicial independence does not mean, however, that the judiciary is free from the requirement to be accountable. Judges are held to account by the appellate system, whereby judicial decisions can be reviewed and corrected, and by the openness of the judicial system, which exposes Judges to public scrutiny, of which there is plenty. ... In the current climate a much greater emphasis is placed on the accountability of public institutions for managing scarce resources in a prudent and careful manner. The New Zealand judiciary, like its counterparts in other countries, recognises the importance of efficiency and value for money in the operation of the Courts and of providing assurance of this to the community".

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<sup>31</sup> T Eichelbaum, *Report on the New Zealand Judiciary*, 1995, Wellington, December 1995 at 2 noted Skinner above n 4 at 132.

As indications of appropriate accountability consistent with independence, it is possible to point in many countries to the detailed reports that are now given by the judiciary to the Executive and the legislature which must raise taxes from the people to fund the courts. It may also be seen in the much greater involvement of the judiciary today, than was formerly the case, in continuing formal education and in bodies concerned with judicial administration. In many jurisdictions, institutions have been established, in which complaints about the judiciary can be investigated and, where proved, dealt within ways short of constitutional removal<sup>32</sup>. Constitutional machinery for the removal of a judge who is proved guilty of serious misconduct or incapacity will often be inappropriate, and for that reason, ineffective, in the case of the judge who is simply rude, repeatedly guilty of unjustifiable discrimination, keeping inappropriate company, sleeping on the bench, given to indulgence in alcohol, lateness and chronic delay in the provision of reasons.

The problem which the judiciary, and the community, face in such cases of judicial default is a difficult one. How can the independence of the institution be safeguarded without tolerating a performance of a highly skilled and important public function which falls short of the appropriate standard? The danger of a too easy

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<sup>32</sup> In one Australian jurisdiction, namely New South Wales, a Judicial Commission has been established.

and intrusive system of discipline for judges is that judges will be made constant targets by disgruntled litigants, professional rivals, media editorialists who thirst for simple (and generally more punitive) solutions to every problem, and politicians or others on the make? Recently in New York a State district judge, Judge Duckman, was removed from office by a 7 to 4 ruling of the Commission on Judicial Conduct of the State's highest court, the Court of Appeals. The majority concluded that the judge had shown a "bullying" bias against prosecutors and made disparaging or inappropriate remarks against African-Americans and women coming before his court. The judge, at last report, was appealing<sup>33</sup>. The mother of a young woman who was killed after the judge allowed to go free the person who killed her daughter, loudly applauded the Commission's decision. But the judge's representative claimed that the complaints against him were merely the result of a political campaign by the State Governor, embarked upon for local political reasons. A dissident on the Commission, Judge William Thompson, was reported as saying "a jurist who has sat on over 50,000 cases should not be removed for misconduct in only 19 cases"<sup>34</sup>. No self-interest on the part of Judge Duckman was contended nor any corruption in the accepted sense.

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33 Reported *New York Times*. 25 October 1997 at B1.

34 *Ibid*, at B3. For a recent illustration of the departure of an English judge (Harman J) see F Gibb and K Knight, "Fast Exit for the Slowest Judge" (London), *The Times*, 14 February 1998, 2 and Editorial, 14 February 1998 at 23.

Somehow, judicial conduct commissions have to operate in a context which respects the variability of appointees and the need to defend judges from litigant, political, media and other pressure which would diminish the capacity of the institution as a whole to perform its function with courage, resolution and true independence.

*Independence from each other:*

One aspect of judicial independence which is often overlooked is that judges must also be independent from each other. A proper system of judicial administration will provide for presiding judges and court officials to organise the business of the members of courts and tribunals efficiently, economically and justly as between different members. But in the performance of the central role of decision-making, a member of a court or tribunal will not be independent if he or she can be directed by a superior colleague on how to decide a matter. Nor will the judge enjoy independence of mind if he or she can be effectively removed from the performance of the judicial function by the simple expedient of rostering the judge off work. If that were to become common, the court or tribunal in question would not be constituted in accordance with law. The formal procedures for discipline and removal from office would then be set at naught.

An interesting case illustrating this lastmentioned principle came before the Privy Council on appeal from the Court of Appeal of Trinidad and Tobago. Justice Richard Crane, a judge of the High Court of that country, was directed by the Chief Justice not to sit.

This direction followed the receipt of complaints about him. The Chief Justice declined to include him in a roster of judges to sit in the following Term. Later, a Judicial and Legal Service Commission, of which the Chief Justice was an *ex officio* member, agreed with that decision. Without notice to the judge, the Commission met to consider steps for his formal removal. Action was taken by Justice Crane for judicial review in the courts. The Privy Council, upholding a decision of the majority of the Court of Appeal of Trinidad and Tobago, concluded that the Chief Justice had no power to suspend or remove the judge from office except by the procedure provided by the Constitution. The Chief Justice's power to organise the procedure and sittings of the courts did not run so far. Excluding Justice Crane from participation in the roster was not the kind of administrative arrangement which was within the Chief Justice's competence. It was an unconstitutional suspension of a judge from judicial office which was unlawful<sup>35</sup>. The Privy Council acknowledged that sometimes it would be necessary to move with speed in cases of allegations of misconduct. But an individual judge was in "a particularly vulnerable position both for the present and for the future if suspicion of the kind referred to is raised without foundation"<sup>36</sup>. The judge whose duty was to accord fairness was

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35 *Rees v Crane* [1994] 2 AC 173.

36 *Ibid.*, at 194 per Lord Slynn of Hadley.

also entitled to have fairness accorded to him in such a circumstance.

The case involving Justice Crane is a strong decision and one which reminds readers of the lonely individuality of each judicial decision-maker. In collegiate courts, it is necessary and efficient to share the workload and to exchange ideas and opinions. But even there, respect must always be paid to the right of each judge to decide matters according to that judge's conscience and understanding of the facts and law. Court officials and presiding justices cannot invade that space which is essential to true judicial independence. This is often misunderstood by the media, by government officials used to directions from superiors and by the public. When I was President of a Court of Appeal, I was often amused by the assumption of my power to direct my colleagues and to "pull them into line". Lawyers know that it does not happen like that. Judges know that it never should.

#### Judicial remuneration:

Another issue of judicial independence which needs constant vigilance relates to salary, pensions and other benefits of office. Many municipal constitutions expressly stated that there may be no

diminution in the remuneration of judges during their judicial service<sup>37</sup>. But sometimes, as in Australia and Canada, such provisions relate only to federal, or federally appointed, judges. Thus in Canada, a number of cases have lately come before the Supreme Court dealing with complaints by Provincial court judges about erosion of their benefits, working conditions and status<sup>38</sup>. In a recent case, the Supreme Court of Canada accepted that a Province was free to raise, freeze or reduce judicial salaries of Provincial judges, as well as other forms of their compensation, so long as they did not fall below a minimum acceptable level. But the Supreme Court held that a Province could not do this unless the proposed changes were first considered by an "independent, effective and objective Commission" whose report, and any governmental departure from it, was publicly disclosed and able to be justified by government in a court of law. Drawing upon section 11(d) of the *Canadian Charter of Rights and Freedoms* which guarantees an accused person the right to be tried by an independent and impartial judge (in much the same terms as Art 14.1 ICCPR) the Supreme Court of Canada held that it was impermissible for Provincial judges to negotiate with Provincial authorities about the terms of their compensation, although Chief

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37 Australian Constitution, s 72(iii) ["shall receive shall remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office"].

38 *R v Valente* [1985] 2 SCR 673; (1985) 24 DLR (4th) 161.

Judges could address such issues in public *fora* and in communication with governmental officials. With true independence, one judge of the Supreme Court of Canada (Justice La Forest) dissented strongly from the notion that there was a constitutionally entrenched role for Judicial Compensation Commissions<sup>39</sup>.

In Australia, a recent introduction of a surcharge tax on superannuation has had differential consequences upon federal judges appointed before a given date, and those appointed thereafter; upon State judges and Supreme Court masters; and some territorial judges and magistrates<sup>40</sup>. According to news reports, the Association of Australian Magistrates has claimed that the failure to exempt those magistrates already appointed from the superannuation surcharge has effectively reduced their remuneration contrary to principles of income security for judicial officers during their tenure. I must make no comment lest the matter should proceed to litigation. The recent decisions in Canada illustrate the

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39 Reference re *Public Sector Pay Reduction Act* (PEI), s 10; Reference re *Provincial Court Act* (PEI); *R v Campbell*; *R v Ekmecic*; *R v Wickman*; *Manitoba Provincial Judges' Assn v Manitoba (Minister of Justice)* [1997] 3 SCR 3; (1997) 150 DRL (4th) 577 (SCC) ("Provincial Court Judges' Case"). See also J S Ziegel, "The Supreme Court Radicalises Judicial Compensation", [1998] 9:2 Constitutional FORUM, 31.

40 R Campbell, "ACT Magistrates' Super Surcharge to Stay", *Canberra Times*, 16 April 1998 1; Editorial "Magistrates' Super Ruling is Wrong", *Canberra Times*, 16 April 1998 at 8.

way in which questions of this kind can come before constitutional courts. In the Judges Case<sup>41</sup> in 1937, the Privy Council rejected a contention that judges could not sit in such matters because they necessarily had a personal interest. The Privy Council upheld the view that judges, in that case of a Canadian court, although "in an embarrassing position" were "bound to act *ex necessitate*"<sup>42</sup>.

Vulnerable tribunals:

In some jurisdictions, where the independence of the official judiciary, at least in the higher courts, has been strictly observed, it is tribunals and lower courts that occasionally find themselves vulnerable to governmental and legislative action inimical to independence of the kind that Art 14.1 of the ICCPR is speaking. The problem has come about because of the appointment of large numbers of court-like bodies, tribunals and office-holders to perform functions having similarities to those of the courts. A question is presented as to whether such bodies are within the assurance of Article 14.1 ICCPR which refers not only to "courts" but also, by juxtaposition, to "tribunals" concerned in deciding a "suit at law". Thus, in New Zealand, Residential Tenancy Tribunals have been

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41 [1937] 2 DLR 209 at 210 affirming [1936] 4 DLR 134 (Sask CA).

42 Ziegel above n 39 at 41.

established to take over from the traditional courts the resolution of disputes between landlords and tenants. The object of this innovation was to provide a readily accessible, speedy and inexpensive way of solving such cases. In 1996 the Tribunals heard more than 22,000 applications. They have 38 members, two-thirds of them legally qualified. They sit part-time, as required, in 40 courthouses throughout New Zealand. Are they entitled to the same protections as Art 14.1 promises?

In Australia, there have been some rather unfortunate cases where bodies, federal and state, some of which were not strictly "courts" have been abolished. Some of the members have not then been reappointed to the successor bodies<sup>43</sup>. The former Chief Justice of Australia, Sir Anthony Mason, in a paper "The Appointment and Removal of Judges"<sup>44</sup> deals with the special problem of tribunals by acknowledging the way in which international statements, including that in the ICCPR, address the "essentiality of judicial

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43 M D Kirby, "Abolition of Courts and Non-Reappointment of Judicial Officers" (1995) 12 *Aust Bar Rev* 181. See also S Zeitz, "Security of Tenure and Judicial Independence" (1998) 7 *J of Judicial Admin* (Aust) 159. The author refers to the Report of the Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals (1989) of the Australian Parliament. *Ibid* at 174-5.

44 A F Mason, "The Appointment and Removal of Judges" in Cunningham (ed) *Fragile Bastion - Judicial Independence in the Nineties and Beyond*. Judicial Commission of NSW, Sydney, 1997, 32.

independence" for decision-makers and not their formal titles or the names of the bodies on which they serve<sup>45</sup>:

"The vast range of administrative tribunals, the wide variations in the functions which they discharge and the issues which they are called upon to decide make it impossible to apply to all tribunals standing outside the orthodox court system the regime which ought to govern the appointment and removal of judges. It is simply not possible to equate the appointment of members of all tribunals to the appointment of judges of courts, though an equation might be found to exist in those respects between members of some tribunals and judges of some courts. ... Unless we put in place provisions which preserve the independence of magistrates and members of tribunals we run the risk that interference with the independence of magistrates and tribunal members will eventually contribute to the erosion of the concept of judicial independence as it applies to judges. The central element of judicial independence is the freedom of the judge to hear and decide cases without interference and uninfluenced by an outsider - be it government, pressure group or anyone else. The purpose of that independence, it should be emphasised, is to serve as a protection of and privilege of the people, not of the judges".

This too presents a tricky problem. Legislatures should have the power, at least at the lower level of courts and tribunals, to reconstitute and reorganise the work of such bodies in accordance with the changing theories and practices of judicial administration. But where government may be, potentially, a party to litigation (as is always the case in tribunals dealing with social security claimants, refugees and migration disputes) it is inimical to the idea of

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45 Mason, above n 44, cited in Skinner above n 4 at 134.

independence enshrined in Art 14.1 ICCPR that such decision-makers should have constantly to look over their shoulders at the likelihood of reappointment or the risks of termination. It is easy to say that appointment and reappointment to such bodies should be "rational, merit-based and transparent"<sup>46</sup>. However, the closer the involvement of the decision-maker in the review of government and official decisions, the more intolerable is the thought that, after a short time, such decision-maker will be subject to reappointment or termination influenced by the opinions of the very persons that had been under that decision-maker's scrutiny.

In Australia, at this time, proposals are being made in a number of jurisdictions to reorganise administrative tribunals: abolishing those that already exist and replacing them with new and different bodies. The reasons commonly given are that such reorganisation is needed to secure greater efficiency. Experience from the past teaches the need for vigilance in cases of this kind. Governments and legislatures, which are directly accountable to taxpayers, have a right to change courts and tribunals that are not constitutionally entrenched. But taking advantage of such changes to diminish the independence of formal decision-making, to remove

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<sup>46</sup> Australia, Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39, AGPS, Canberra, 1995 at 70-72.

those deemed troublesome and to send a signal of their vulnerability to those newly appointed or reappointed, is a matter that deserves close attention. The response of the judiciary and of the legal profession should be measured against the touchstone of Art 14.1.

### THE BIG CHALLENGE: DEVELOPING COUNTRIES

Much of what has been said in these remarks has addressed the problems of developed societies with long traditions of judicial independence and strong laws and a strong culture supporting the principles in Art 14.1. Other countries, as we know, have much more rudimentary problems. In my service for the United Nations in Cambodia, I saw the difficulty of securing independence of the judiciary in a society that had been shattered by revolution, invasion, genocide, further invasion and civil war. The problems are endemic. Lack of trained personnel. Inadequate payment. A tradition from colonial times of dialogue about cases with the Ministry of Justice. Apparently pre-determined outcomes to trials<sup>47</sup>. A lack of

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47 B Fernando and T Wickremasingh, "An Absence of Genuine Courts - A Fundamental Obstacle to Democracy in Cambodia" in Asia Human Rights Commission, *Human Rights Solidarity*, December 1997, vol 7 no 7 at 11. Cf R Reynolds, "Dicey in Cambodia or Droit Administratif Meets the Common Law" (1998) 72 *Australian Law Journal* 204. At 209 the author states that constitutional separation of powers for the judiciary fits uncomfortably with the Cambodian tradition of petitions to the King for the remedy of perceived wrongs and injustices. Power rather than reason, influence rather than law, are seen as the

constitutional structures to appoint a new higher judiciary, independent of government. Where judges have, exceptionally, reached decisions inimical to government, they have reportedly been suspended by order of the Minister of Justice<sup>48</sup>.

My successor as Special Representative for Human Rights (Ambassador Thomas Hammarberg) has, as I did, emphasised the central importance of an independent judiciary to the restoration of human rights in Cambodia<sup>49</sup>. But it will not happen overnight. It will not happen without support of the government and people of Cambodia. And it will not happen without a lot of assistance from lawyers in more fortunate lands. I imagine that some of these observations might be extended to other countries in the region. They might extend to the courts of China outside the Hong Kong SAR. The recent announcement of the new President of the Supreme People's Court, Mr Xiao Yang, that in future courts in China will be open to the public and to the media is to be welcomed<sup>50</sup>.

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sources of official remedies. Doubtless this is true in many societies like that of Cambodia.

48 "Three Appeal Court Judges Suspended" in *Human Rights Solidarity*, January 1998, Vol 8 No 1, 13.

49 Report of the Special Representative on Human Rights in Cambodia to the United Nations Commission on Human Rights, March 1998, Geneva. See "Military, judiciary at top of UN envoy's concerns", *Phnom Penh Post*, 4 April 1998, at 9.

50 "China opens its courts to public scrutiny", reported *Sydney Morning Herald*, 18 April 1998 at 1, 23.

Scrutiny and true accountability to the public and to informed critics will enhance the demands for judicial independence. Departures from independence will become more obvious. Notorious cases will raise public demand that will ultimately have to be satisfied by increasingly educated citizens aware of fundamental rights, including that in Art 14.1. I pay tribute to the sharp-eyed monitors of judicial independence - the UN Special Rapporteur on the Independence of the Judiciary (Dato' Param Cumaraswamy); the CIJL of the International Commission of Jurists; The Human Rights Institute of the IBA; Amnesty International; Lawasia and the Asian Human Rights Commission based in Hong Kong.

## CONCLUSIONS

Article 14.1 ICCPR speaks to all states and individuals everywhere. It propounds not merely an aspiration but a principle of international human rights law. It is a principle which can never be taken for granted. Powerful enemies who would derogate from the independence of courts and tribunals are never far away. It is the nature of the work of courts and tribunals to leave many who come before them unhappy with their results. I have mentioned some of the admirable decisions by which the rule of law has been upheld by courts in countries blessed by independent decision-makers acting according to law. I have listed some of the modern ways in which judicial independence can be endangered and diminished. But the chief challenge lies in developing countries where derogation from this fundamental principle is often serious, endemic and apparently

intractable. Article 14.1 ICCPR states the standard. In our countries we must seek to uphold that standard and be alert wherever it is endangered.

A special obligation to defend judicial independence falls on judges and lawyers not because of self-interest but because they are aware of the history and purpose of judicial independence and the myriad of ways by which it can be attacked by powerful interests, public and private. In recent times attacks by governments and politicians who should know better, spurred on by a media avid for entertainment did conflict and by powerful sectors in society unused to being thwarted, have become much more vocal than they were in earlier times<sup>51</sup> The chief challenge is to spread the influence of Art 14.1 to those countries which have never really enjoyed a culture of competent, independent and impartial tribunals established by law. That is a challenge to which the International Bar Association and the International Commission of Jurists should jointly commit themselves.

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51 See for example the *Judicial Reform Bill* 1998 (US) which provides that United States federal judges may not - except under limited circumstances - (1) require state or local government to impose a tax to meet the terms of a judicial order; (2) enjoin enforcement of a state law passed by ballot initiative; and (3) sit in civil rights cases if objected to on a first peremptory strike by a litigant. See *Washington Post* 22 August 1998 at A22. The Justice Department and the Judicial Conference have objected to the Bill.