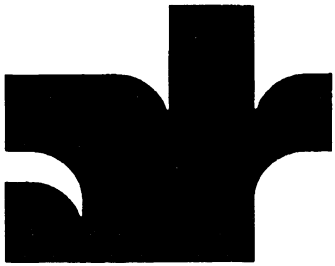

ARTICLES

Andrew P Stockley[*]

JUDICIAL INDEPENDENCE: THE NEW ZEALAND EXPERIENCE

THE desirability of an independent judiciary is, like the rule of law or representative government, largely seen as axiomatic. We expect disputes between individuals to be heard and resolved by an impartial judge. And we expect that judge to be no less impartial should one of the parties before the court be a police prosecutor, a minister of the Crown, or some other agent of the state on whose behalf the judge dispenses justice. Lord Cooke, the former President of the New Zealand Court of Appeal, stated that our system of government is "built upon two complementary and lawfully unalterable principles: the operation of a democratic legislature and the operation of independent courts".[1]

The *New Zealand Bill of Rights Act* 1990 guarantees every person charged with an offence "the right to a fair and public hearing by an independent

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1 Cooke, "Fundamentals" [1988] *NZLJ* 158 at 164.

and impartial court".[2] The Supreme Court of Canada, commenting upon a similar provision in the Canadian Charter of Rights and Freedoms,[3] has held that judicial independence requires not only "the individual independence of a judge", reflected in such matters as tenure and financial security, but also "the institutional independence of the court or tribunal over which he or she presides", such that the judges, rather than the executive or the legislature, control matters of administration bearing directly on the exercise of the judicial role.[4]

Such, according to the Supreme Court of Canada, are the essentials of judicial independence. The process of judicial appointments and the non-political nature of the judicial role will also influence perceptions of impartiality and a judiciary at arm's length from the Government of the day.

The purpose of this article is to provide an overview of the way in which these concepts have been manifested and given effect to in New Zealand during the last 155 years. Ever since colonisation in 1840, judicial independence has been seen as an essential attribute of the country's constitutional arrangements. But the parameters thereof have by no means remained constant. There have been changes to and criticisms of the way in which judges are appointed. In several notable cases judicial conduct has been questioned and subjected to examination. The inviolability of judicial salaries and superannuation arrangements has been challenged. And there have been recent moves, led by the judges themselves, to diminish executive control of judicial resources and court operations. Tensions between the executive and judiciary have arisen in a number of areas, and the concept of judicial independence continues to be refined even today.

JUDICIAL APPOINTMENTS

The first Supreme Court judges in New Zealand bore more resemblance to colonial officials than to the English judiciary. They were appointed by the Crown and held office at its pleasure.[5] William Martin, New Zealand's

2 Section 25(a). See similarly Article 14(1) of the International Covenant on Civil and Political Rights.

3 Section 11(d), Part I, *Constitution Act* 1982 (as enacted by the *Canada Act* 1982 (UK)).

4 *Valente v The Queen* [1985] 2 SCR 673 at 687.

5 Supreme Court Ordinances 1841, 1844. The 1844 ordinance made it clear that the Queen alone (ie, the British not the colonial Government) could appoint permanent judges. The English judges held office during good behaviour rather

first Chief Justice, was 34 years old upon appointment. He had only been admitted to the bar four years previously and is not recorded as having ever appeared as counsel.[6] Henry Chapman, the next judge to be appointed, suffered from a similar lack of legal experience, having spent more time as a bank clerk and businessman than as a lawyer. Having served for eight years on the New Zealand bench, he resigned in 1852 to take up the more lucrative post of Colonial Secretary of Van Diemen's Land.[7] Sidney Stephen, appointed in 1850, was a cousin of the British Colonial Undersecretary and son of the Attorney-General of Van Diemen's Land. Defending his father's honour against a judge in Hobart, he had been struck off the rolls for contempt of court. When the Privy Council reversed this injustice, Stephen appears to have been appointed to the New Zealand bench by way of compensation.[8] Patronage rather than legal experience was determinative of Britain's appointments to colonial judgeships.[9]

The advent of responsible government in New Zealand in 1856 did not lead to an immediate cessation of appointments made in London. The New Zealand Parliament resolved that judges should be appointed by the Queen on the recommendation of an English judge designated for that purpose by the New Zealand Government. Concurrently resolving that "the tenure of Judges of the Supreme Court ought to be assimilated as nearly as may be to that of Judges in England" (that is to say, they should hold office during good behaviour rather than at the Crown's pleasure, no longer liable to dismissal by the Crown except upon an address of Parliament), there appears to have been a desire to insulate the judiciary from the local government. The 1856 resolutions prevented dismissal by the Governor alone and required appointment by an English judge rather

than at the Crown's pleasure. Nevertheless, no New Zealand judge was removed. Cf the removals of Willis, Montagu and Boothby JJ from New South Wales, Van Diemen's Land and South Australia respectively: Castles, *An Australian Legal History* (Law Book Company, Sydney 1982) pp239-43, 276-279, 407-408.

6 Wood, "Construction and Reform: The Establishment of the New Zealand Supreme Court" (1968) 5 *VUW LR* 1 at 2; Cooke (ed), *Portrait of a Profession: The Centennial Book of the New Zealand Law Society* (Reed, Wellington 1969) p37.

7 Modern day Tasmania. Chapman was later a barrister and Attorney-General of Victoria before being reappointed to the New Zealand bench in 1864: Spiller, "The Career of Henry Chapman in Dunedin" (1990) 7 *Otago L Rev* 305 at 307.

8 Cooke (ed), *Portrait of a Profession* p51.

9 At p40; Castles, *An Australian Legal History* p151. Successful English practitioners were unlikely to want a colonial appointment.

than New Zealand politicians.[10] In the event, the British Government rejected the proposal, which it saw as inconsistent with responsible government.[11] The *Supreme Court Judges Act* 1858 (NZ) empowered the Governor to appoint judges on behalf of the Queen and the way was opened for New Zealand ministers to advise the appointment of political colleagues and members of the local bar.

A majority of the Supreme Court judges appointed during the next seventy five years received office as a result of their legal abilities. However, there was undoubted political patronage. Sir Robert Stout, New Zealand's fourth Chief Justice, had been Prime Minister from 1884-87. Later defeated by Seddon for leadership of the Liberal Party, it was during Seddon's premiership that Stout, who continued to be a political rival, was appointed to the bench. Four of the twelve Supreme Court judges appointed during the nineteenth century were better known as politicians than as lawyers. Christopher Richmond had been a minister from 1856-61 and in 1861 led the Opposition in the Lower House before being appointed a judge the following year. Thomas Gillies, appointed in 1875, had been a Member of Parliament and the elected superintendent of the Auckland province. Edward Conolly and Patrick Buckley, appointed in 1889 and 1891 respectively, had both held the position of Attorney-General in addition to other ministerial portfolios.[12]

There were two further political appointments during the first part of the twentieth century. Sir Alexander Herdman was Attorney-General at the time of his appointment in 1918, and came under some criticism both for his lack of legal experience and for having effectively recommended his own elevation. He remained deeply interested in politics, retiring from the bench in July 1935 so as to accept nomination a day later as an independent candidate for Parliament. He renewed his career in politics with a public attack on the Government for having "done more to shatter public confidence ... to upset tried and long established commercial practice and ... to arouse feelings of unrest, bitterness and injustice" than any other in New Zealand's history.[13] Erima Northcroft, appointed to the

10 The resolutions also demonstrated a lack of confidence in the local bar: Wood, "Construction and Reform: The Establishment of the New Zealand Supreme Court" (1968) 5 *VUWLR* 1 at 6.

11 At 7. Although Arney CJ and Johnston J were both appointed by the British Government before the enactment of the *Supreme Court Judges Act* 1858.

12 At 9; Cooke (ed), *Portrait of a Profession* pp51-55.

13 He failed to be elected to Parliament: Cooke (ed), *Portrait of a Profession* pp92, 105. See also Leicester, "Variations on a Judicial Theme" (1935) 11 *NZLJ* 216.

bench in 1935, had had a more outstanding legal career than Herdman but was also well known for his political involvements.[14]

If some, although by no means a majority, of Supreme Court appointments between 1858 and 1935 were political in nature, the same cannot be said of the period from 1935 onwards. Successive governments have avoided making political appointments during the last sixty years and it would now be regarded as highly unusual, if not constitutionally inappropriate, for an active politician to be made a judge.[15]

Judicial appointments do, however, remain within the gift of the government of the day. The Governor-General appoints the Chief Justice at the nomination of the Prime Minister, the Court of Appeal and High Court judges at the Attorney-General's recommendation, and District Court judges upon the advice of the Minister of Justice.[16] The extent to which the appropriate minister consults with others tends to vary with the incumbent. Sir Geoffrey Palmer, Attorney-General from 1984 to 1989, notes that he tended to consult with the Solicitor-General, the Chief Justice, President of the Court of Appeal and President of the Law Society before recommending appointments to the bench.[17] The Secretary of Justice, Chief District Court Judge, and the presidents of the Law Commission, Bar Association and appropriate District Law Society have also been consulted on occasion.[18] But, as noted by Sir Thomas

14 Cooke (ed), *Portrait of a Profession* p125.

15 The same has been generally true of Britain since 1914 but is not yet characteristic of Canada or Australia. There has been considerable political patronage among the lower levels of the Canadian judiciary. Barwick CJ and Murphy J were both Government ministers when appointed to the Australian High Court in 1964 and 1975 respectively: De Smith & Brazier, *Constitutional and Administrative Law* (Penguin Books, London, 7th ed 1994) p398; McCormick and Greene, *Judges and Judging: Inside the Canadian Judicial System* (James Lorimer & Co, Toronto 1990) pp37-48; Lane, *An Introduction to the Australian Constitutions* (Law Book Company, Sydney, 6th ed 1994) p167.

16 The Supreme Court was renamed the High Court in 1979 (Magistrates' Courts being renamed District Courts). A separate Court of Appeal was established in 1957.

17 Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* (Brooker's Ltd, Wellington 1995) p43. Palmer is also a former Minister of Justice and was Prime Minister from 1989 to 1990.

18 See for example the comments of Paul East (Attorney-General), "Call to Change Judicial Selection", *The Press*, Christchurch, 20 March 1995, and of Robson (Secretary of Justice in the 1960s), *Sacred Cows and Rogue Elephants: Policy Development in the New Zealand Justice Department* (Government Printing Office, Wellington 1987) p272.

Eichelbaum, who as Chief Justice from 1989 has worked with six different Attorneys-General,[19] the nature of the consultative process can vary widely.

During the last twenty years there have been increasing calls to impose some sort of limitations upon the Attorney's power to recommend judicial appointments. There appear to have been two primary concerns. Firstly, and despite recent practice, an Attorney might feel tempted to make a political appointment and some safeguard was thus needed to ensure a non-political and thereby independent judiciary. Secondly, there was a need to enlarge the range of candidates considered for appointment to the bench to try to achieve a more representative judiciary.[20]

In 1974 Jack Hodder, a Wellington lawyer and legal commentator, suggested establishing a Judicial Appointments Committee, to comprise the Chief Justice, four lawyers nominated by the Law Society, and five other members appointed by the Minister of Justice. The Committee's task would be to consider names put forward and to draw up a shortlist from which the Government could make an appointment.[21] In 1978 the Royal Commission on the Courts made a similar proposal, recommending a Judicial Commission whose Appointments Committee would advise the Government on all appointments to the bench.[22]

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19 Both as President of the Law Society and Chief Justice: Eichelbaum, "Judicial Independence - Fact or Fiction?" [1993] *NZLJ* 90 at 92.

20 For instance Jane Kelsey has criticised the judiciary as "almost exclusively comprised of ageing Pakeha men, drawn from the legal and social elite [who] ... cannot be expected to identify with, or even understand, the demands of Maori as *tangata whenua*, minority cultures, women, or the poor": "Judges and the Bill of Rights" (1986) 3 *Cantabury L Rev* 155 at 163.

21 Hodder, "Judicial Appointments in New Zealand" [1974] *NZLJ* 80 at 87. A similar proposal was made recently in England: British Section of the International Commission of Jurists (Justice), *The Judiciary in England and Wales* (Justice, London 1992) p27. Note also Barwick CJ's advocacy in 1977 of a similar judicial appointments committee in Australia: Kirby, *The Judges* (Australian Broadcasting Corporation, Sydney 1983) p22.

22 NZ, Royal Commission on the Courts, *Report* (1978) paras 659-562, pp200-202. The Appointments Committee would normally comprise the Chief Justice, two members nominated by the Law Society and two members nominated by the Government on a non-political basis (for example, the Solicitor-General and Secretary of Justice).

This part of the Royal Commission's report was, in the event, not acted upon. Many judges argued that the present system was quite adequate;[23] some commentators suggested that it would lead to relatively safe appointments, inhibiting an Attorney's "occasional flash of innovation".[24] The concept has, however, been recently revived and this time the lead has been taken by judges themselves. In 1992 Sir Robin Cooke (as he then was) said that he was "increasingly coming to see the force of the argument for a judicial appointments commission". Speaking in Oxford, he suggested that:

> Among candidates of roughly equal standing a Government must naturally be disposed to select one whose sympathies are thought to be congenial to its policies. Probably the more senior the judicial office, the more significant the political or philosophical factors. ... Perhaps the best chance of approaching the impossible goal of complete impartiality is either to limit political input in key judicial appointments or to devise a system under which political input itself is balanced.[25]

Chief Justice Sir Thomas Eichelbaum argued in early 1993 that a more visible, systematic and accountable appointment process was needed: "The difficulty is to suggest something better. I see no attraction in elected Judges or public hearings of the American kind. On the other hand I foresee pressure for lifting the present shroud of secrecy." The minimum reform, he suggested, "and it may be sufficient", would be "a set procedure of consultation with named persons and institutions."[26] Later that year, speaking at the swearing in of Dame Silvia Cartwright, New Zealand's first female High Court judge, Sir Thomas went further, endorsing the creation of a Judicial Appointments Board to recommend names to the Attorney-General.[27]

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23 Mahon, "Judicial Appointment and Promotion" [1974] *NZLJ* 257 at 258; Ellis, "Do We Need a Judicial Commission?" [1983] *NZLJ* 206 at 209.

24 Eichelbaum CJ notes but disagrees with this analysis: "Judicial Independence - Fact or Fiction?" [1993] *NZLJ* 90 at 92.

25 Cooke, "Empowerment and Accountability: The Quest for Administrative Justice" (1992) 18 *Commonwealth L Bull* 1326 at 1331. Quoted in Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* p79.

26 Eichelbaum, "Judicial Independence - Fact or Fiction?" [1993] *NZLJ* 90 at 92.

27 [1993] *NZLJ* 335. Eichelbaum CJ suggested that such a body would include not only judges but also members from various sectors connected with the court system.

Interestingly, it is now the politicians who are dragging their feet in this area. Sir Geoffrey Palmer notes that, having been Attorney-General, he would not favour a judicial appointments commission:

> A commission would be overly cautious. There would be a tendency towards safe appointments and blandness in my judgment. ... Furthermore in my experience Judges are anxious to exert influence on appointments. It is clearly right that they should be properly consulted. It is not appropriate that they should drive the process and I believe they would under most variations of the Judicial Commission proposal, even if it appeared they did not. If Judges are in the Commission they will exert great weight on the opinion of lay members. The tendency to turn the judiciary into a self-perpetuating oligarchy ought to be resisted.[28]

Palmer also notes that if the government appoints Commission members this could lead to political patronage positions. He is joined in his distrust by Paul East, Attorney-General from 1990 to 1997, who argues that "a judicial commission is more likely to continue to pick from the traditional pool rather than to strive to ensure the judiciary is representative of the whole cross section of society".[29]

Palmer suggests that judicial calls for changes to the appointment process may well be motivated by self-interest:

> I do not recall in my time as an MP and Minister ever having any representations about the method of appointing Judges. If there was public dissatisfaction one would have thought there would have been public debate, media attention, and discussions in Parliament. I know of none. It seems, therefore, just a little odd that the only people raising these issues are our highest Judges.

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28 Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* pp81-82; see also p78.

29 Quoted at p81. See also East's comments, as above, fn18. At least one judge also opposes a judicial appointments commission: see Tompkins, "The Independence of the Judiciary" [1994] *NZLJ* 285 at 287. Justice Michael Kirby, now a member of the High Court of Australia, has made similar comments: Kirby, *The Judges* p23.

> None of the discussions in New Zealand has articulated what is wrong with the Attorney making the decision. It is said that the appearance may be wrong. But it is not said that bad decisions have been made. It is stated how well the procedures in New Zealand have worked and it is agreed that appointments are not motivated by party politics here. If that is true, and I believe it is, then why change?[30]

Palmer returns to Eichelbaum's initial suggestion, that of a consultative process rather than a formal commission to advise the government on judicial appointments. He proposes a statutory obligation upon the Attorney-General to consult the Chief Justice, President of the Court of Appeal and Chief District Court Judge, the presidents of the Law Society and the appropriate District Law Society, and the Justice and Law Reform Select Committee.[31]

In 1995 Paul East indicated his intention to broaden the consultation traditionally employed by the Attorney-General. He suggested that, in addition to the Chief Justice, President of the Court of Appeal, presidents of the Law Society, Bar Association and Law Commission, he would also consult with several political figures, namely the Minister of Justice, the Opposition Justice spokesperson, and the Chairman of the Justice and Law Reform Select Committee.[32] There is some evidence of his talking with Maori and women's groups during recent judicial appointments rounds.[33] But the Government has to date resisted the proposal that consultation be mandated by statute. Political appointments to the bench are a thing of

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30 Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* p83.

31 At p89. See also p74. Thompkins similarly proposes an obligation upon the Attorney to consult, listing the Chief Justice, President of the Court of Appeal, presidents of the Law Society and Bar Association, and Leader of the Opposition as potential consultees: Tompkins, "The Independence of the Judiciary" [1994] *NZLJ* 285 at 287. Interestingly the Supreme Court of India has held that the word "consultation" in the Indian Constitution effectively means "concurrence". Cooke has however noted his disagreement with this decision: "Making the Angels Weep" [1994] *NZLJ* 361at 362, 364.

32 East, "A Judicial Commission" [1995] *NZLJ* 189 at 191.

33 Conversation of Joanne Morris, member of the Law Commission and Waitangi Tribunal, with the author, 23 June 1995. See also Dugdale, "Choosing Judges" [1995] *NZLJ* 126. The Judicial Working Group on Gender Equity, set up in 1995 by Eichelbaum CJ in collaboration with the Law Commission's Women's Access to Justice Project, is also giving some attention to judicial appointments.

New Zealand's past; the right to appoint to the judiciary nevertheless remains with the executive and, despite various suggestions for change, the level of consultation employed with leaders of the judiciary, the bar and other political parties is likely to continue to vary according to the minister in office.

SECURITY OF TENURE

Judges' security of tenure - their immunity from dismissal by the Crown - has long been seen as an essential component of judicial independence. The *Act of Settlement* 1700 (UK) provided that judges' commissions were henceforth to be held during good behaviour rather than at the Crown's pleasure. As already mentioned, the first Supreme Court judges in New Zealand held office at the Crown's pleasure,[34] but with the advent of responsible government in 1856 were given the same tenure as their counterparts in Britain.[35] The *Constitution Act* 1986 provides the most recent enactment of the basic principle:

> A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office.[36]

To date no address has been moved against a New Zealand judge.[37] There was, however, a parliamentary inquiry into the conduct of Mr Justice

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34 Supreme Court Ordinances 1841, 1844, although the *Colonial Leave of Absence Act* 1782 (Burke's Act) arguably limited the Governor's power of removal.

35 *Supreme Court Judges Act* 1858, re-enacted in the *Supreme Court Act* 1882 then the *Judicature Act* 1908. The British provisions are now to be found in the *Appellate Jurisdiction Act* 1876 and *Supreme Court Act* 1981.

36 Section 23. The *Constitution Act* 1986 resolved an ambiguity in the *Act of Settlement* 1700 (UK) and New Zealand statutes based upon it: namely, whether the Crown could only remove a judge on a Parliamentary address for misbehaviour, or whether the Crown had two powers of removal - on its own initiative for misbehaviour, or on an address of Parliament. The first interpretation was preferred: Department of Justice, Officials Committee on Constitutional Reform, *Second Report* (1986) para 3.98; Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* p28.

37 Cf the removal of Vasta J from the Supreme Court of Queensland in 1988 and the proceedings instigated against Murphy J in the Australian Federal Parliament during 1984-86. Security of tenure provisions were circumvented when the New

Chapman in 1874. Charles Ward, a District Judge, had accused Chapman of showing bias when the latter granted an ex parte order to a local barrister, Macassey, for pre-trial inspection of telegrams between a newspaper proprietor's lawyer and Ward. (Macassey was suing the newspaper proprietor for libel and suspected Ward of involvement.) One of Chapman's sons was in practice with Macassey, and Ward telegraphed the Premier that in the circumstances there was "no chance of a fair trial before Judge Chapman", that another judge should be sent to hear the case on account of Chapman's "gross partiality", and that Chapman be suspended "until the Assembly meets to take action".[38] Although criticised for making an order to inspect telegrams without having heard both sides, Chapman was cleared of partiality by the Government and presided at the subsequent libel trial in an even-handed fashion.[39] The Committee of Enquiry appointed by Parliament later concluded: "That the charges made by Mr Ward against Mr Justice Chapman have not been substantiated, and were made without due consideration of their importance as affecting the character of a high judicial officer."[40]

If Chapman deserved to be vindicated, Mr Justice Edwards, although never investigated by Parliament, perhaps ought to have been. Appointed to the Supreme Court in 1896,[41] he became known in Auckland for his ill-temper, vindictiveness and a habit of visiting his dislike of particular counsel upon their clients.[42] His disdain for T Cotter KC was manifested

South Wales and Victorian Governments abolished the Magistrates Court and Accident Compensation Tribunal respectively and failed to reappoint some of the judicial officers concerned to other courts or tribunals: Marks, "Judicial Independence" (1994) 68 *ALJ* 173; Kirby, "Judges Under Attack" [1994] *NZLJ* 365.

38 For further detail see Spiller, "The Career of Henry Chapman in Dunedin" (1990) 7 *Otago L Rev* 305 at 315-317. Ward's telegrams to the Premier were later published, the Parliamentary Committee of Enquiry finding that these had been obtained and disclosed by Macassey.

39 At 317. The newspaper proprietor was in fact acquitted.

40 *Otago Daily Times*, 12 August 1874, cited in Spiller, "The Career of Henry Chapman in Dunedin" (1990) 7 *Otago L Rev* 305 at 317.

41 He had obtained a Supreme Court judgeship in 1890 for agreeing to act as a native lands commissioner. Shortly thereafter a new government came to power and challenged the validity of his appointment on the basis that there had been no vacancy on the Supreme Court and there was therefore no statutory appropriation for his salary, meaning that he was improperly dependent upon the government of the day. The Privy Council upheld the government's case in *Buckley v Edwards* [1892] AC 387.

42 For further detail see Cooke (ed), *Portrait of a Profession* p78; Robson, *Sacred Cows and Rogue Elephants* pp254-255; Dugdale, *Lawful Occasions* (Auckland District Law Society, Auckland 1979) pp26-36.

on a number of occasions in 1912. When Cotter repeated a question in the case of *Attwood v Sutcliffe*, thinking that Edwards had not caught the witness's reply, Edwards' response was typically caustic: "I must be allowed to discharge this abominably tiresome and monotonous duty of writing down answers to questions, mostly irrelevant, in decent quietude, which I cannot do if counsel persists in repeating them. I will not have it."[43] In *Paterson v Paterson and Kronfield*, a 1913 case involving a husband's divorce petition against his wife for alleged adultery, the evidence might have appeared incontrovertible, Kronfield having been found naked at the alleged scene and time. Edwards' dislike of the husband's counsel, MG McGregor, was however such that he interrupted him constantly and summed up against the husband.[44] Shortly afterwards a resolution was signed by 87 of 106 practitioners present at a meeting of the Auckland bar, expressing their regret "that the administration of justice has been imperilled ... by [Edwards'] failure in recent years to maintain that judicial and impartial attitude during the hearing of cases which should distinguish the holder of so important an office."[45] A copy was sent to the Attorney-General and subsequently to Edwards himself. There was some talk of an address in Parliament[46] but further action was ultimately discontinued when Edwards agreed to a transfer from Auckland to Wellington. Within several years the Wellington bar was similarly moved to agitate for his removal. According to one lawyer and later judge, Sir Hubert Ostler, Edwards "offered to retire if the Government would pay him £1000 compensation, as well as his pension, and they were glad to get rid of him on those terms".[47] The £1000 was in fact compensation for leave not taken but, on any analysis of his judicial career, Edwards' courtroom manner was such that he may be considered

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43 Quoted in Dugdale, *Lawful Occasions* p28.

44 At p29. The jury found against the husband. Contempt of court proceedings were later brought against the proprietors of a newspaper for satirising Edwards' conduct of the trial. Unrepentant, they were farewelled for a full court sitting in Wellington (which ultimately dismissed the proceedings) following a city parade complete with band.

45 Quoted in Robson, *Sacred Cows and Rogue Elephants* p254. Twelve practitioners not present at the meeting also signed the resolution: Dugdale, *Lawful Occasions* p31.

46 Allegedly suppressed by Oliver Samuel, a member of the Legislative Council and a good friend of Edwards: Ostler, "Bench and Bar 1903-1928" in Cooke (ed), *Portrait of a Profession* p78.

47 As above.

fortunate to have been allowed to retire rather than being forcibly removed.[48]

District Court judges in New Zealand have less protection than their High Court superiors. There is no requirement for an address of Parliament, the *District Courts Act* 1947 providing that "The Governor-General may, if he thinks fit, remove a Judge for inability or misbehaviour."[49]

The Government appointed a Royal Commission in 1889 at the request of Charles Rawson, the District Judge of Taranaki, who had been accused by a public meeting of being partial in the administration of justice. Complaints that Rawson had been unduly influenced by the local MP and was liable to drunkenness were quickly disproved. One newspaper described the charges brought as "frivolous and outrageous", "a pitiable travesty of grave and serious proceedings", and, as if this were not enough, "a farrago of unsupported idiotic nonsense".[50]

More recent complaints against District Court judges have, on the whole, been levelled and resolved out of public view. Ralph Hanan, the then Minister of Justice, forced the retirements of two magistrates in 1965.[51] The first, whose health was declining, had become impatient and difficult to deal with in court. A complaint was brought by the District Law Society and, after indicating that he was considering appointing a commissioner to investigate, Hanan secured the magistrate's retirement. In the second case, where a District Law Society forwarded complaints that a magistrate was overbearing and harsh in court, took over examination of

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48 Although it should be noted that Edwards' legal analysis was of a high standard and that some of the charges against him (not repeated here) are apocryphal. Dugdale, *Lawful Occasions* p35, proves the inaccuracy of some of Ostler's comments, which are, surprisingly, reprinted in Chen & Palmer, *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland 1993) pp195-196. Edwards continued to prove obdurate in retirement, setting himself up in practice again (although not appearing in court) and suing the Government (unsuccessfully) over the rate at which his pension was taxed. It is nevertheless possible to feel some empathy for a man who, if tough and overbearing, also demonstrated courage and a sense of adventure, learning to ride a motorcycle at the age of 65, and going on circuits on it, covering up to 240 miles in a day: Ostler, "Bench and Bar 1903-1928" in Cooke (ed), *Portrait of a Profession* pp71-72.

49 Section 7(1).

50 The newspaper was *The Press*, Christchurch. For further detail see Quilliam, "A Taranaki Episode: The Rawson Commission" in Cooke (ed), *Portrait of a Profession* pp357-361.

51 Robson, *Sacred Cows and Rogue Elephants* pp256-259.

witnesses, prejudged cases and took inadequate notes, the magistrate similarly retired after being notified that a formal investigation would be held.[52]

Sir Geoffrey Palmer notes that he forced the resignations of two District Court judges when he was Minister of Justice from 1984 to 1989,[53] but nevertheless concludes that their tenure should be put on an equal footing with members of the High Court.[54] Since the reorganisation of the court system in 1979, the importance and jurisdiction of District Court judges has increased significantly and it is therefore argued that their independence from the executive should be strengthened by requiring an address of Parliament, not just a ministerial recommendation to the Crown, to effect a removal.

In 1978 the Royal Commission on the Courts suggested that judicial independence would be enhanced by elaborating upon the criteria and mechanisms for removing a judge. The Commission recommended the *Judges Act* 1971 (Canada) as a model, a statute which sets up a committee of judges to investigate whether (and if necessary recommend that) a judge should be removed from office.[55] Subsequent experience has shown some difficulties with the Canadian model[56] and Sir Geoffrey Palmer has argued

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52 The most recent example of a formal investigation occurred in July 1996 when the Minister of Justice ordered an inquiry into allegations of irregularities involving travel claims submitted by two District Court judges. Unusually, the fact of the investigation and the names of the judges (who then stood down for the duration of the inquiry) were publicly released: "Judges stand down during expenses inquiry", *The Press*, Christchurch, 24 July 1996. The judges were subsequently prosecuted for fraud: one pleaded guilty, resigned from the bench, and was sentenced; the other pleaded not guilty, was acquitted, and (amid considerable public controversy) remains a District Court judge (no longer sitting in open court but transferred to hear accident compensation appeals).

53 Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* p85. See also p84.

54 At p85. See also Tompkins, "The Independence of the Judiciary" [1994] *NZLJ* 285 at 287. A similar point has been made with respect to the office of Master of the High Court, established under the *Judicature Amendment Act* 1986. Masters possess important powers (particularly with respect to summary judgment applications, assessments of damages and costs, and certain company and land transfer matters) but lack security of tenure, being appointed to five year (renewable) terms.

55 NZ, Royal Commission on the Courts, *Report* (1978) para 704, p217.

56 Notably the Canadian Judicial Council's 1981 inquiry into comments made by Justice Thomas Berger (of the Supreme Court of British Columbia): Sturgess & Chubb, *Judging the World: Law and Politics in the World's Leading Courts*

against delegating Parliament's responsibility in this area.[57] He cites the United States Senate's 1989 impeachment of Federal Judge Alcee Hastings, accused of racketeering and perjury, as an example of a legislature's ability to give thorough and objective consideration to such a matter.[58]

The Royal Commission further recommended that less important complaints against judges (not justifying removal) be funnelled through the Judicial Commission it advocated; those which appeared to have some merit would then be referred to the head of the appropriate bench.[59] Other jurisdictions have gone considerably further: a variety of judicial commissions (sometimes only comprising judges, sometimes also including lawyers and laymen) hear complaints against judges at all levels in Canada and the United States.[60] New Zealand's judges argued against any such formal disciplinary body, claiming it would "threaten the independence of the judiciary. ... It would make judges subject to complaints by all manner of malcontents."[61] The Royal Commission's proposal, diluted as it was (limited to a Commission with "a receiving and postbox function for complaints against judges"[62]), has, like the Royal Commission's other proposals relating to judicial discipline, failed to be adopted. New Zealand's security of tenure provisions have, unlike developments in Canada and parts of Australia, remained largely unaltered since 1858.

(Butterworths, Sydney 1988) p225. In *Valente v The Queen* [1985] 2 SCR 673 the Supreme Court of Canada, while conceding that removal by address of Parliament for statutorily specified cause was sufficient for the needs of judicial independence, demonstrated a preference for a prior judicial inquiry and required that in either event the judge affected be given a full opportunity to be heard.

57 Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* p87.

58 At p73. Despite his removal from the bench, Hastings was subsequently elected to Congress in 1992.

59 NZ, Royal Commission on the Courts, *Report* (1978) para 715, p222.

60 See also *Judicial Officers Act* 1986 (NSW).

61 NZ, Royal Commission on the Courts, *Report* (1978) p218. This conclusion is supported by Palmer where he notes the observations of MH McLelland that a disciplinary body invites complaints and automatically gives them a status and significance they would not otherwise assume: Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* p88.

62 Ellis, "Do We Need a Judicial Commission?" [1983] *NZLJ* 206 at 209.

FINANCIAL SECURITY

Statutory protection for judges' salaries is of equally long-standing origin. The *Constitution Act* 1986 prohibits reducing the salary of a High Court judge while he or she continues in office.[63] Similar provisions can be found in the *Judicature Act* 1908, *Supreme Court Act* 1882 and *Supreme Court Judges Act* 1858. The *New Zealand Constitution Act* 1852 (UK) bound the New Zealand Parliament, in addition to the Government, to the same effect until the adoption of the *Statute of Westminster* in 1947.[64]

During a recession in 1921-22 the Government introduced legislation to reduce the salaries of all public servants. The judges approached the Attorney-General, Sir Francis Bell, asking whether it would be proper for them to offer to accept a reduction in their salaries. He replied in the negative, arguing that this would infringe judicial independence. In 1931, with the onset of the depression, the then Government reduced the salaries of civil servants by ten per cent and the Attorney-General asked the Chief Justice if the judges would agree to an equivalent reduction. Sir Michael Myers replied that this would be constitutionally improper and the *Finance Act No 1* 1931 exempted the judges from its provisions. In early 1932 a further salary cut was imposed on civil servants and the judges were asked to consider a voluntary refund of an equivalent part of their salaries. The Leader of the Opposition called for the judges to be included in the National Expenditure Adjustment Bill and for the *New Zealand Constitution Act* to be amended if necessary to achieve this. According to Sir David Smith, a Supreme Court judge at the time, he and four of his colleagues were prepared to offer a voluntary refund to the Treasury; the other five Supreme Court judges were opposed, however. Before the judges could reply, a letter from Sir Francis Bell, the former Attorney-General, was published in a Wellington newspaper. Referring for the first time to the precedent of 1921-22, he argued that judges, while in the service of the Crown, were not Crown servants in the sense of being subject to Government control: "If the judges, moved by any personal sentiments or influenced by public clamour demanding equality of sacrifice, voluntarily make any surrender of their salaries, they make it difficult if not impossible, for their successors in office in similar circumstances to refrain from following the precedent so initiated." Sir David Smith claims that the letter had a dramatic effect, stilling protest in

63 Section 24. Court of Appeal judges are ex officio members of the High Court.

64 Section 65 of the *New Zealand Constitution Act* 1852 (UK) (safeguarding judicial salaries) remained unalterable except by Britain until the passing of the *New Zealand Constitution (Amendment) Act* 1947 (UK).

Parliament and causing the judges unanimously to reject any reduction in salary.[65]

The New Zealand judges fared better than their English counterparts. The *National Economy Act* 1931 (UK) reduced the salaries of "persons in His Majesty's service" and the Government applied the statute to judges as well as civil servants. The judges protested that this was contrary to constitutional convention[66] and were eventually rewarded by the restoration of their full salaries.[67] Nevertheless the point had been made that, lacking entrenched legal protection, Parliament could always impliedly repeal any statutory provision safeguarding judicial remuneration.[68] In 1932 the New Zealand Parliament lacked the legal authority to overturn s65 of the *New Zealand Constitution Act* 1852 (UK). Having become fully sovereign in the meantime, it faces no such barrier with respect to s24 of the *Constitution Act* 1986.

The New Zealand judges' stand of 1931-32 has been further undermined by recent events. In February 1991 the Higher Salaries Commission increased judicial salaries as from October of the previous year.[69] The Minister of Justice asked the judges to consider making a voluntary refund in view of the recession affecting the country. Several days later the heads of the different benches made a joint announcement renouncing their salary increases and noting that they believed many other judges would do the same.[70] Thus, a voluntary salary reduction, claimed to be

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65 For further detail, see Smith, "Bench and Bar 1928-50" in Cooke (ed), *Portrait of a Profession* pp99-103. Bell's letter was published in *The Dominion* of 27 April 1932. The Government exacted some revenge, breaking precedent by declining to recommend knighthoods for any judges or retiring judges during the next three and a half years.

66 The English judges' memorandum is set out in Cowen & Derham, "The Constitutional Position of the Judges" (1956) 29 *ALJ* 705.

67 Phillips & Jackson, *O Hood Phillips' Constitutional and Administrative Law* (Sweet & Maxwell, London, 7th ed 1987) p391.

68 Judges of Western Australia suffered a ten per cent salary cut in 1983 on this basis. Federal judges, on the other hand, avoided a salary reduction in 1931, given that s72(iii) of the Australian Constitution protects them against diminution of remuneration while in office: Kirby, *The Judges* p54.

69 Determinations of the Higher Salaries Commission become subordinate legislation without requiring Cabinet approval; the salaries so determined are then paid under automatic appropriation: Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* p30.

70 At p33. Some judges appear to have followed suit while others accepted the increase but made charitable donations.

constitutionally unacceptable in 1931-32, was effectively agreed to sixty years later.

The New Zealand judges were less amenable to various Government proposals between 1987 and 1992 to alter their (relatively generous) superannuation entitlements. In 1987 the Labour Government announced changes to the method of taxing superannuation schemes, which, while taking in more money, would be used to offset projected income tax reductions. The judges objected through the Chief Justice that this would have the effect of reducing their superannuation payments and was therefore in breach of constitutional convention. The Solicitor-General, JJ McGrath, concurred that superannuation was deferred remuneration and therefore protected by s24 of the *Constitution Act.* However, he argued that economic measures, applicable to all citizens, such as taxation (and the Government proposals were to apply to all superannuation schemes) did not constitute a "reduction" in salary.[71] The judges would, in addition, like all other taxpayers, simultaneously gain from the income tax reductions projected.[72] Fortified by a contrary opinion from Professor FM Brookfield, former Dean of the Auckland Law School, the judges (somewhat surprisingly) continued to insist that while the Government could impliedly repeal their salary protection in this instance, the proposed superannuation changes were nevertheless in breach of convention.[73] The Government proceeded and in 1991 its successor went further by proposing to close off all government superannuation schemes including that for judges. The Solicitor-General distinguished the situation from the

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71 Recent overseas authority makes the same point. See for example, *R v Campbell* (1995) 25 Alberta LR (3d) 158. MacDonald CJTD goes further in *Lowther v Prince Edward Island* (1995) 118 DLR (4d) 665 at 675 (and contradicts the arguments made in 1931-32), suggesting that an equal reduction in salary for all persons paid by the Government (judges and civil servants alike) might be legitimate in terms of judicial independence, the important point being that the judiciary is not singled out. See also *Manitoba Provincial Judges Association v Manitoba (Minister of Justice)* (1995) 125 DLR (4d) 149 at 164-166.

72 Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* p35; McGrath, "Changes to Judicial Superannuation" (Solicitor-General's Opinion of 24 September 1991) in Chen & Palmer, *Public Law in New Zealand* p196.

73 Palmer, "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* p36. Palmer invited the judges to sue if desired; the Chief Justice replied that no disinterested judge could be found. Palmer has subsequently suggested that a retired judge (already drawing superannuation) or the Privy Council could have dealt with the issue.

sort of general tax measures which had been the subject of his earlier opinion, and concluded that this would constitute a reduction in judicial remuneration. The Government, while legally entitled to override the *Constitution Act*, determined to abide by convention and accordingly preserved the existing rights of serving judges while requiring new appointees to join a less beneficial superannuation scheme.[74]

The principle of judicial financial security has, by and large, been respected by New Zealand governments. Sacrifices have been requested but not insisted upon in times of economic difficulty - the judges' refusal to accede in 1931-32 and their claim to immunity from a general measure of taxation in 1987-90, while seemingly motivated by considerations of constitutional propriety, must in both instances appear somewhat self-serving.[75]

INSTITUTIONAL INDEPENDENCE

In recent years there have been moves in a number of overseas jurisdictions for judges to take greater control of court administration. This represents an expansion of the traditional view of judicial independence, namely the independence of individual judges and in particular their ability to be free from Government influence when deciding cases. Administering the court system, funding and building new courtrooms, and employing and controlling court staff, has traditionally been left to the executive, the judge's role being seen as one of adjudication not administration. It has, however, more recently been argued that judicial independence goes beyond adjudicative independence - that there is also a requirement for institutional independence. There is otherwise a danger that the executive can exert improper influence through its control of court resources and allocation of support services to the judiciary. The Supreme Court of Canada has held that judicial independence necessitates some degree of administrative autonomy from the executive,[76] and various Australian judges have lobbied for

74 At p37; McGrath, "Changes to Judicial Superannuation" in Chen & Palmer, *Public Law in New Zealand*.

75 Although not to the same extent as the 140 federal judges who brought proceedings in *Atkins v United States* 556 F 2d 1028 (1977) claiming (unsuccessfully) that their constitutional protection against reduction of salary had been infringed by the effects of inflation.

76 Deschênes CJ (of the Quebec Superior Court) published a report in 1981 (*Maîtres Chez Eux - Masters in Their Own House: Independent Judicial Administration of the Courts*) calling for an end to executive control of judicial administration. The Supreme Court in *Valente* did not go as far, speaking only

implementation of the same principle. According to a Chief Justice of Western Australia:

> the preparation of judicial estimates by anyone not acting under the direction of the judiciary and the exercise of control by the Government over the way in which courts expend the funds granted to them necessarily poses a potential threat to judicial independence.[77]

In some Australian states the traditional model of court administration remains intact, namely executive control through a generalist department which also deals with a wide variety of other justice and penal system matters. In New South Wales a second model has been employed, "the separate executive department", whereby the courts are managed by a separate department devoted exclusively to judicial administration. A third, so-called "autonomous", model has been implemented in South Australia and at the federal level: substantial administrative autonomy has been vested in the federal and family courts and the Administrative Appeals Tribunal.[78]

Overseas trends have not gone unnoticed in New Zealand. In 1978 the Royal Commission on the Courts noted a variety of problems with court administration: delays in hearings, staff shortages, a lack of adequate resources and facilities, and out-dated equipment. It recommended that the courts be managed by a Judicial Commission to comprise the Chief Justice, the Chief District Court Judge, a High Court judge, the Solicitor-General, the Secretary of Justice and two members nominated by the Law Society. A Chief Court Administrator would be appointed and, together with the Chief Justice and Chief District Court Judge, would form "the key triumvirate in the administration of justice." The Government would

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of the minimum constitutional requirements: that judges should control the assignment of cases, court sittings, allocation of courtrooms and the direction of staff engaged in carrying out such functions: Colvin, "The Executive and the Independence of the Judiciary" (1986-87) 51 *Sask LR* 229 at 230 and 244.

77 Malcolm, "The State Judicial Power" (1991) 21 *UWA LR* 7 at 29. The Fitzgerald Report contended that "independence of the Judiciary bespeaks as much autonomy as is possible in the internal management of the administration of the Courts": Qld, Commission of Enquiry into Corruption in Queensland, *Report* (1989) p134.

78 For the above classification see Nicholson, "Judicial Independence and Accountability: Can they Co-Exist?" (1993) 67 *ALJ* 404 at 423. Phillips, "The Courts and the Parliament" (1995) 9 *Legis Stud* 72 at 76-77 discusses recent reforms in South Australia, New South Wales and the Northern Territory.

however retain significant control: the Chief Court Administrator would be responsible to the Secretary of Justice and the executive would continue to make the most important decisions relating to court finances and employing staff.[79]

In the end nothing came of the proposal, the judges of the time opposing a judicial commission in the same way that they resisted a judicial appointments committee.[80] More recently, however, as overseas jurisdictions have made some progress in this area, the New Zealand judges have reconsidered their position. In 1993 Sir Thomas Eichelbaum reflected upon the courts' place within the Department of Justice, noting that the Courts Division was but one of six divisions within the department, its General Manager being responsible to both the Secretary and Minister of Justice:

> In this area New Zealand lags far behind. The Lord Chancellor's Department is at least focused on serving the Courts. In Australia there are precedents for a separate 'Courts Division'. In New Zealand the judiciary has to compete for attention with the prison service, community corrections, the commercial affairs division and sundry others. The Group Manager answers not to the judiciary but to the Secretary of Justice who in turn rates Courts as but one of a number of onerous responsibilities. The structure is inimical to judicial independence in two distinct respects. Conceptually, the notion that the Courts are beholden for their servicing on a department of the Executive branch is wrong. Practically, the Judges have insufficient influence over the nature and quality of the services.[81]

Justice Tompkins endorsed the Chief Justice's views later that year, commenting: "It is my personal view that the Courts in this country should be administered by a Courts department, controlled by the Judges,

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79 NZ, Royal Commission on the Courts, *Report* (1978) paras 646-654, pp196-198. See also p244.

80 Ellis, "Do We Need a Judicial Commission?" [1983] *NZLJ* 206 at 208. A Courts Consultative Committee was established comprising the Chief Justice, the heads of the different benches, and Law Society and Justice department representatives.

81 Eichelbaum, "Judicial Independence- Fact or Fiction?" [1993] *NZLJ* 90 at 91.

independent of any other government department and minister of the Crown, reporting directly to Parliament."[82]

The Government responded with surprising alacrity, commissioning two reviews of the operations of the Justice Department in 1994 and consequently resolving to break the department up, retaining a Ministry of Justice while also establishing a Department for Courts and Department of Corrections.[83] The Department for Courts, which officially commenced operations in July 1995, is based upon the "separate executive department" rather than the "autonomous department" model. That is to say, its sole function is administering the courts, but - contrary to Tompkins' recommendation - its chief executive is ultimately responsible to a minister of the Crown, not the judiciary.[84] The new department's functions include providing courtrooms, clerical and administrative services, professional and ancillary support (for example, legal services for children, Family Court counselling), enforcing monetary penalties, and providing policy advice to the minister and support services to the judiciary.[85] Research and administrative assistance for judges, library services and the like are to be set at "the level negotiated between the Judicial leaders and the Chief Executive of the Department."[86] A Courts Executive Council, to comprise the Chief Executive and the heads of the principal benches, will provide a forum for consultation on matters of mutual concern, but it has been made clear that the Chief Executive, accountable to the minister, will bear final responsibility for administration of the courts.[87] The judges have won a stand-alone

82 Tompkins, "The Independence of the Judiciary" [1994] *NZLJ* 285 at 290.

83 NZ, Department of Justice, *Review of the Department of Justice - Stage One Report* and *Report of the Courts Services Review Committee* (1994).

84 The Chief Executive is responsible to the Minister of Justice. Palmer opposed Tompkins' proposal, arguing it would not be easy "to hold Judges accountable for the manner in which they controlled expenditure and administration, were they responsible for it. A Chief Executive of a stand-alone department reporting to a Chief Justice does not appeal to me in the least. Administration is not a judicial function in my book.": "Judicial Selection and Accountability: Can the New Zealand System Survive?" in Gray & McClintock (eds), *Courts and Policy: Checking the Balance* p32

85 Department for Courts, *Forecast Financial Statements of the Department for Courts for the Year Ending 30 June 1996* (Department for Courts, Wellington 1995).

86 At pp21-22.

87 Department for Courts, "Courts Transition News", 16 June 1995, p2. The Chief Justice has recently repeated his preference for an autonomous judicial department with a budget provided by the state but controlled by the judiciary: Eichelbaum, "Key issues in Australian and New Zealand Judicial

department focused solely on the courts; its management, while likely to include greater consultation with the judiciary, has however been left in the hands of professional administrators responsible to the Crown not the judges.

IMMUNITY FROM POLITICAL ATTACK

The importance of judicial independence is further manifested in the convention that the executive, both ministers and public servants, should refrain from criticising the judiciary. The Cabinet Official Manual enjoins ministers from expressing any views which "could be regarded as reflecting adversely on the impartiality, personal views or ability of any Judge". Ministers are advised to "avoid commenting on any sentences within the appeal period". "If a Minister feels he or she has grounds for concern over a sentencing decision, the Attorney-General should be informed."[88] The Standing Orders of the House of Representatives impose lesser, but nevertheless significant, restrictions on members of Parliament, prohibiting "unbecoming words" against members of the judiciary or referring to matters currently before the courts if this might prejudice judicial proceedings.[89]

One Cabinet minister, John Banks, was twice reprimanded during 1995.[90] In May he claimed on radio talkback that most District Court judges "are second-rate lawyers that couldn't make, can't make, and haven't made a living in private practice and have very little to offer the judicial system in this country". Chief District Court Judge Ronald Young wrote to the Attorney-General and Minister of Justice complaining about what he termed "gutter" comments and asking, "if the conventions about comment between the Judiciary and the Government are to be ignored in this way, then what hope have our democratic institutions".[91] Banks wrote a letter of apology several days later[92] but in less than a month had returned to the attack. District Court judge Richard Bollard having given what was seen as a relatively lenient sentence to a Maori activist who had attacked a

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Administration" (Paper presented at the Australian Institute of Judicial Administration Annual Conference, Wellington, 21 September 1996) p6.

88 Cabinet Office Manual (1991), H1 and H2.

89 SO 170 and 172. The Speaker ruled in 1951 that suggesting a sentence was inappropriate would be in breach of Standing Orders: NZ, Parl, *Debates* (1951) Vol 294 at 329

90 Minister of Police from 1990 to 1993 and Minister of Tourism from 1993 to 1996.

91 "Radio talk lands Banks in hot seat", *The Press*, Christchurch, 19 May 1995.

92 "Banks regrets talkback jibe", *The Press*, Christchurch, 25 May 1995.

landmark tree in Auckland, Banks sarcastically said of the judge on radio: "So this outstanding individual that sits on the District Court in Auckland, Judge Bollard, a truly special New Zealander, gave a severe telling-off to the One Tree vandal and sentenced him to a dreadful punishment of six months periodic detention. I'm not critical of that truly great man ... that has to make these very difficult decisions."[93] The Chief Justice personally protested to the Prime Minister[94] and the Attorney-General characterised Banks' remarks as "unacceptable".[95]

This was by no means Banks' first attack on the judiciary. In 1983, when a backbench MP, he had criticised the "weak kneed judicial officers who let the police down time and time again ... spending too much time mollycoddling the thugs."[96] Nor was he the first Cabinet minister to attack a sentence with which he disagreed. The then Prime Minister, Sir Robert Muldoon, denounced a 1983 decision favouring Waitangi Day protesters as "thoroughly bad" and others of his ministers attacked decisions going against the Government on matters such as the Clyde High Dam and Western Samoan citizenship.[97] During the 1993 election, the Leader of the Opposition, Mike Moore, claimed that "our Judges are seen as living in ivory towers totally removed from the concerns and aspirations of ordinary people".[98] In 1994 two Opposition spokesmen, both former ministers, criticised individual judges, Phil Goff suggesting that Justice Smellie was favouring an "old-boy network" by ordering the name suppression of a prominent Auckland paedophile, and Michael Cullen calling Sir Ronald Davison, appointed to head a Commission of Inquiry, "the least distinguished Chief Justice this century."[99]

Attacks on judges have been made by ministers and members of Parliament from both sides of the House. The Law Society, and sometimes judges themselves, have protested on each occasion. The judiciary cannot expect an immunity from criticism; their judgments are subject to appeal and to adverse comment from both academic and media

93 "Talkback lands Banks back in strife", *The Press*, Christchurch, 19 June 1995.
94 "Rules may have to change - PM", *The Press*, Christchurch, 21 June 1995.
95 "Cabinet colleague roasts Banks", *The Press*, Christchurch, 20 June 1995.
96 Quoted in Palmer, *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, Auckland, 2nd ed 1987) pp184-185.
97 As above.
98 Quoted by Tompkins, "The Independence of the Judiciary" [1994] *NZLJ* 285 at 290.
99 "Lawyers quick to defend judiciary", *The Press*, Christchurch, 2 September 1994.

opinion. Unrestrained abuse by public figures is, however, another matter, executive intimidation and a loss of public confidence being but two of the dangers posed. There is nevertheless a distinction between abuse and criticism. Former Prime Minister, Jim Bolger, has questioned whether the Cabinet Office Manual should be revised so as to allow ministers to comment on judgments which raise matters of legitimate public concern.[100] There appears to be at least some ground for believing that the convention as presently enforced may be too widely drawn and that politicians should be able to comment, like other members of society, on judicial decisions provided that they do not malign the judge or his or her motivations.

Sir Geoffrey Palmer notes that the judges themselves are contributing to a greater politicisation of their roles and actions. He criticises an increasing trend towards extra-judicial comment, particularly speeches which impact upon Government policy. Palmer notes Sir Robin Cooke's attack on a Crimes Bill introduced in the House and argues that

> generally speaking, New Zealand Judges are prone to say too much out of the Court. I do not believe that they should be muzzled altogether, but there must be severe limits about the extent to which they can join the public debate on policy matters where these issues also fall within their capacity of adjudication.[101]

Increasing judicial activism, particularly in the areas of administrative law, Treaty of Waitangi jurisprudence, and in relation to the *New Zealand Bill of Rights Act* 1990, suggest that tensions between the executive and judiciary - and some continuing uncertainty over the exact parameters of judicial independence - are likely to persist for some time to come.

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100 See fn94. In July 1996 there was considerable public criticism of Justice Morris for allegedly sexist comments made in the course of summing up for the jury in a rape case. Eichelbaum CJ publicly reprimanded Morris, saying that his remarks had been "inappropriate". In the light of media and judicial criticism, ministerial comment would not have been out of place. "Chief Justice rebukes sex-trial judge", *The Press*, Christchurch, 5 July 1996. For public and Court of Appeal criticism of Morris' conduct in two previous murder trials, see Hubbard, "Sitting in judgment", *Listener*, 21 October 1995, p48.

101 Eichelbaum, "Judicial Independence- Fact or Fiction?" [1993] *NZLJ* 90 at 91.