The UMPIRE strikes back

John Mountbatten

Judicial independence under attack in South Australia.

On 13 April 1994, the Chief Justice of the Supreme Court of South Australia, Justice Leonard King, wrote on behalf of all of the judges of the Supreme Court to the Attorney-General, Trevor Griffin, to warn him that if the Government proceeded with certain controversial legislation this would provoke a constitutional crisis.

> The judges have resolved that if the Government persists . . . they will have no alternative but to communicate to all members of Parliament . . . I am most unwilling to implement this decision while there is any reasonable prospect that the Government will reconsider its position. I understand that the Bill may proceed through the House of Assembly today. I refer to our telephone conversation this morning in which you indicated that further consideration may be given to the matter. To allow more time for reconsideration I propose to withhold the course of action decided upon by the judges pending such reconsideration. I do this on your assurance that the Bill will not proceed in the Legislative Council without prior notice to me of the Government's decision.
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> A confrontation between the executive government and the judiciary is a matter of great seriousness in any society. The issue involved . . . is . . . one of grave constitutional importance. I request that you make known to the Premier . . . the seriousness with which the judges of the Supreme Court view the issue.[1]

The events which provoked this reaction and the implications they have for democratic government and the rule of law in South Australia are part of a story whose final chapter is yet to be written but whose central plot readers will find fascinating and disturbing.

A good deal has been written in recent years by learned commentators on the subject of judicial independence. Much of this has, no doubt, been prompted by a number of disturbing cases each of which has had the potential to upset the delicate constitutional arrangements which thankfully exist in this country but which still are being fought for in many countries today. A few years ago Justice Michael Kirby reviewed a number of the more 'notorious cases'.[2] As recently as March this year, a former judge of the Victorian Supreme Court writing in a similar vein recommended the establishment of an Australian Judicial Conference, as a forum for discussion and research, to enhance constructive debate within the judiciary and between the judiciary and the executive arm of government as a preventive measure to help ward off the sort of constitutional showdown which occurred in Malaysia in 1988.[3]

Tensions between the judiciary and the executive and legislative branches of government will inevitably arise when judges feel the means by which governments seek to give effect to policy considerations threaten – either directly or indirectly – the institutional independence of the courts. Such a dispute has arisen in South Australia where a constitutional stand-off threatens to develop between the State Government and the judges of the Supreme Court over the new industrial relations legislation.

The new legislation

Following the election of the new Liberal Government in South Australia, new industrial relations legislation – the proposed *Industrial and Employee Relations Act 1994* – was introduced into Parliament. The subject mater of the new Bill was overwhelmingly the same as the subject matter dealt with

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under the old *Industrial Relations Act 1972*. The new Bill sought to create a new court and commission in place of the former court and commission. The transitional provisions of the Bill were as follows:

> 9.(1) On the commencement of this Act, a person who held judicial office in the former Court immediately before the commencement of this Act is transferred, unless the Governor otherwise determines, to the corresponding judicial office in the Court under this Act.
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> (2) On the commencement of this Act, a member of the former Commission is transferred, unless the Governor otherwise determines, to the corresponding office or position in the Commission under this Act.

During the first debate on the new Bill on 13 April 1994 the Opposition spokesman on Industrial Affairs, Ralph Clarke, accused the Government of sponsoring legislation designed to jeopardise the independence of the State's Industrial Court.

The following week the Government confirmed it had received letters from the Law Society and the Chief Justice concerning the proposed legislation. The Government indicated that it intended to address the issues raised in those letters but declined both to table the letters and to release any part of the text of those letters. The following day the Shadow Attorney-General and Leader of the Opposition in the Legislative Council, Mr Sumner, in opposing the Bill suggested that one recent letter of the Chief Justice to the Attorney-General contained trenchant criticism of the Bill to the effect that it conferred on the Executive Government unfettered power to deprive existing judges of their offices and that such a power was 'radically offensive'[4] to the concept of judicial independence.

In reply, the Attorney indicated that the matters raised in the Chief Justice's letter would be addressed by the Government when the Bill came before the Legislative Council. Events took a surprising turn, however, in Parliament on 5 May when the Minister for Industrial Affairs, Mr Ingerson, confirmed that he had asked all Industrial Commission members – including judges and magistrates – whether they might wish to 'take any retirement benefits early'. This was naturally taken by the Opposition as confirmation that the Government wanted to rid itself of *all* existing members of the court/commission and to replace them with – as one member colourfully put it – 'toadies'. Clearly the allegation was that separation packages were being designed by the Government as an indirect means of inducing members of the Industrial Court and Commission to jump before they were pushed.

Letters potent

On 6 May 1994 the Chief Justice released two letters which he had earlier written to the Attorney-General on behalf of the judges of the Supreme Court. The letters were critical of the Government's proposed intention to remove judges from one court by artificially creating another. One letter (dated 13 April 1994) read in part:

> The independence of the judiciary from executive government is one of the cornerstones of our constitutional arrangements. It is designed to secure the impartiality of decisions of courts against the possibility of influence, whether intended or unintended, by government. The judiciary must be kept free, so far as possible, of any perception that it might be influenced by considerations of government favour or disfavour. The security of the citizens and their confidence in being able to have their rights adjudicated upon by impartial courts depends upon the faithful observance of these principles.

After these letters were tabled in Parliament the Government moved to distance itself from mounting criticism by announcing on 7 May 1994 that it would shortly be introducing amendments to those sections of the Bill which were of concern to the judiciary.

Lifting the veil

What then transpired left little doubt as to the Government's real agenda. The Government now produced a new set of proposals which – in effect – sought to move the Deputy Presidents to the District Court and the President to the workers compensation jurisdiction. These provisions were debated in the Legislative Council (or Upper House) on 10 May 1994. The Government's proposals were opposed in the Upper House by the combined forces of the ALP and the Australian Democrats who hold the balance of power in that House. The Leader of the Democrats moved for a clause that the Industrial Court of South Australia continue in existence under the new Act as the Industrial Relations Court of South Australia saying:

> To suggest that a new court is being created is a fallacy. It is a matter of political convenience that a new court is being created. Certainly it is not a new jurisdiction in any significant way . . . largely the way it works is the same. There is an addition to some of the matters it covers but substantially it is the same court.

The Government answered this allegation with an attack on the personnel of the court. It also argued for a curious interpretation of the principle of judicial independence.

> The Hon. the Attorney-General:
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> . . . What does judicial independence really mean? Sure, we intend to preserve the status, position, salary, remuneration, and all the rest of the present judges. But the parliament is entitled to translate judges to different jurisdictions, if it so wishes. That is not an infringement of judicial independence.
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> The Hon. A. J. Redford:
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> The Industrial Court in fact does have a reputation, rightly or wrongly, as being a political court . . . employers and employees have for quite a number of years perceived that court as a political court.
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> . . .
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> . . . whereas the District Court . . . is far less likely to be perceived as a political institution than a specialist court such as the Industrial Court, particularly as it now stands . . . (The opposition says) We are not going to let you shift them into the District Court . . . we are going to look after our mates.
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> The Hon. the Attorney-General:
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> We certainly do not want to politicise it. Rather we want to have in place people who understand that South Australia is entering a new era of industrial relations. If it means breaking up the club, it will open up for South Australians – for employers and employees who are not part of the club – a new horizon. It will give them more opportunities and flexibility.

As both Mr Griffin and Mr Redford are lawyers they might have been expected to have a better understanding of and commitment to the principles of judicial independence. The other lawyer in the Government ranks, the Hon. R. D. Lawson, QC was overseas at the time. Mr Lawson's absence from the debate is significant because it is well-known that in the past he has represented himself as something of a champion of judicial independence.

The siege of the Upper House

In its resolve to press on with the legislation, the Government directed that the House was to sit until the Bill was passed. The House having sat most of the preceding week, then continued to sit through Friday night, all of Saturday and into the small hours of Sunday, until eventually the Democrats agreed to a 'compromise' at 4.00 a.m. on 15 May 1994.

There were a number of contentious issues: firstly, those provisions (set out above) which required that at the commencement of the Act a person who held judicial office in the former court immediately before the Act came into force would be transferred to the corresponding judicial office in the 'new' court *'unless the Governor otherwise determines';* secondly, there were the radi-

cally altered terms of tenure for commissioners. Under the 'old' Act, commissioners had the same security of tenure as members of the judiciary: that is, retirement at 70 in the case of judges; and 65 in the case of magistrates. Under the 'new' Act, security of tenure was to be limited to one six-year term.

To deal with the first objection, the Government proposed that before the Governor made any 'assignment' (s.18(2)) – or judicial appointment – the Attorney-General would have to *consult with* the Chief Judge of the District Court. (All judges of the new court would become judges of the District Court). To meet the second objection, the Government proposed that all members of the commission be appointed for a term of six years with the *possibility* of renewal for *one* further term of six years. That proposal was opposed by the Opposition with the support of the Democrats, and the Government was finally persuaded to create what was described in the press as a referral panel to examine all appointments. In fact, the relevant legislation now provides that before a person is appointed (or re-appointed) as a Commissioner, (ss.29-34) the Minister must consult confidentially about the proposed appointment with a panel consisting of:

- a nominee of the United Trades and Labour Council; and
- a nominee of the South Australian Employers' Chamber of Commerce and Industry; and
- a nominee of the House of Assembly appointed by resolution of that House; and
- a nominee of the Legislative Council appointed by resolution of the Council; and
- the Commissioner of Public Employment.

For the purpose of consultation the Minister must inform the members of the panel of all persons short-listed for appointment. Needless to say, serious questions arise concerning the relevance, expertise and purpose of such a panel.

Further correspondence

On 18 May 1994, as the Bill entered the House of Assembly, the media published extracts of a new letter from the Chief Justice to the Attorney-General wherein the court renewed its attack on the legislation.

> I am bound to say . . . from a quick perusal of the proposals, that the essential vice of the proposal appears to remain. The Government will still be empowered to remove judges out of the jurisdiction to which they have been regularly appointed by not designating them as judges of the Industrial Relations Court and to replace them by its own nominees. This can only be damaging to the public's perception of the independence of the Court.[5]

In a published interview which the Chief Justice gave a few days later Justice King was asked whether he still had concerns about the legislation. His Honour said:

> Some of the features which were most objectionable from the point of view of judicial independence [have been] removed . . . Those features were the power of the Government to move out of the industrial jurisdiction the judges who've been properly appointed. Under the amendments, the present judges of the Industrial Court will remain there during their term of office and that feature has therefore been removed as regards the Industrial Relations Court, although there is something of a problem regarding the Commission. Unfortunately, the amendments have introduced a further feature which is most disturbing. The present provision is that new judges will be assigned in the future to the Industrial Relations Court for a fixed term of six years. That means of course, that a decision as to whether a judge's term of assignment will be renewed after that six years could depend upon whether his [sic] judgements were pleasing [to] the Government during the period of his office, and that's a most disquieting precedent. It's a particular concern in a court to which the Government is a constant and regular party to litigation. It is a provision which is open to abuse and one which I think ought not be a feature of legislation regarding the Courts. [Sunday Mail (Adelaide) 22.5.94, p.17]

In response to this interview the Attorney-General wrote a letter to the Editor in which he said:

> The comments which appeared in the article are quite wrong. During the committee stages of the debate in the Legislative Council amendments were made to the clauses dealing with judicial office. In particular, the provision relating to the Court's principal judiciary being appointed for a term of six years was removed . . . judges will continue to retire at 70 years of age and magistrates at 65. The Government will not have the power to move them to another jurisdiction against their will . . . At no time has the Government sought to undermine the independence of the judiciary and the final provision for the legislation put that beyond doubt. [Sunday Mail 29.5.94. p.50]

Then, rather curiously, in what the Attorney described as a 'footnote to the debate' comes this somewhat sinister allusion:

> I observe that at some time in the future the community will have to address the issue of not only judicial independence and what it really means, but also the important issue of how accountability of the judiciary can be addressed. [Sunday Mail 29.5.94. p.50]

What does this mean? *How* will 'the community' address the issue of judicial independence and what it *really* means? Does the Attorney mean that the Executive is thinking of redefining judicial independence as it is currently understood – or misunderstood. And what about those gratuitous remarks concerning accountability? Accountability to whom? No one would advocate a judiciary which is unaccountable – least of all the judiciary. But if the Attorney is suggesting that the judiciary ought to be accountable to the legislature or – still worse – the executive, then the constitutional implications really are extraordinary.

This sort of sabre rattling is neither edifying nor productive. How has it come about? Some say out of a simple but nefarious plan by the Government to rid itself of some politically unpalatable judicial and quasi-judicial figures, whose judgments (or some of them) do not appeal to the Government or its advisers, by closing down one court and opening another. Precedents exist. Others suggest that there is a somewhat naive concept of responsible government currently abroad. A new Government is elected with a considerable mandate. In its eagerness to address inefficiencies and promote economic revival it over-reaches itself both constitutionally and politically. Whatever the reason, the results – constitutional and otherwise – are unacceptable. Whatever the intention, the impression has been created of a government determined to muzzle certain members of the Industrial Court and Commission.

A muted media

There has been some comment in the national press. Under the heading 'Brown "garrottes" commission with industrial law changes', John Kerin – writing in the *Australian* (19.5.94) – sounded concerned:

> The Brown Government yesterday pushed through industrial law changes that empower it to axe South Australia's Industrial Commissioners and effectively downgrade the standing of the Industrial Court.
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> In a range of changes that have astounded the judiciary and senior legal sources in the State, the executive arm of government is empowered to determine whether the serving members of the Industrial Commission stay in office.

Curiously perhaps, the following day, the same paper's editorial headed 'Moderate labour reform for SA' suggested that: 'South Australia's new industrial relations law hardly warrants agitation' and described the 'familiar, non-debate about institutional reform and "judicial independence"' as 'a diversionary non-issue'.

Regrettably, the media in South Australia have greeted these issues with an almost Olympian silence. The President of the Law Society of SA, Stephen Walsh, QC recently observed that the *Advertiser* – the only daily newspaper in the State – had declined to publish two media releases issued by the Law Society strongly opposing those parts of the Bill which, in the Society's view, threatened the independence of the judiciary.

> Our Chief Justice has not been fighting a lone battle on the topic of the assault upon the fundamental constitutional principle of separation of powers and the independence of the judiciary.[6]

Three years ago, the Australian Bar Association published a nine page statement entitled 'The Independence of the Judiciary'.[7] That statement also concerned the independence of members of tribunals and other judicial and quasi-judicial bodies. It is worth quoting:

> The institutions of a democratic society require careful guardianship. Even Australia, with its rich democratic tradition, cannot assume that the foundations of its liberty are impregnable.
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> . . .
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> An independent judiciary is a keystone in the democratic arch. That keystone shows signs of stress. If it crumbles, democracy falls with it.
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> . . .
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> It is the task of the judiciary to ensure that power is only exercised according to law. Without judicial independence, that task is impossible.
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> Power in contemporary Australian society resides increasingly with the executive arm of government. Parliament, for all its strengths in other areas, does not consistently control, but rather is often controlled by, the executive.
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> In these circumstances, it is inevitable that the executive will from time to time exceed its lawful authority unless checked by an independent body the decisions of which are binding. The judiciary is the only instrument equipped to act as guardian of the public interest in this field . . . only a judiciary independent of the executive will be able effectively to ensure that executive power is exercised lawfully.
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> . . .
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> The legal profession has not in the past done enough to secure the independence of the judiciary, or to guard against the at times grossly improper interference with that independence. The Australian Bar Association will in the future do everything in its power to ensure that these mistakes are not repeated.[8]

It has to be said that the sad irony is that at the time of writing (24 June 1994) the ABA has not yet issued any statement concerning the extraordinary events which have been developing in South Australia over the past three months.

Nevertheless, the lesson of history is clear. As the great debate between Coke and the (other) King demonstrates, the verdict of successive generations will be against those who seek to abuse power for short-term political advantage whatever their claim of right. The Writ of Principle has been taken out. It is returnable on a date to be fixed by the High Court of Conscience. The jury is still out in South Australia – but not for long.

References

1. The contents of this and other letters from the Chief Justice to the Attorney-General were subsequently released by the Chief Justice.
2. Kirby, M., 'Judicial Independence in Australia Reaches a Moment of Truth', (1990) 13 *UNSWLJ* 187 at 191 ff.
3. Marks, K., 'Judicial Independence', (1994) 68 *ALJ* 174 at 177-179, 187.
4. This phrase was first employed by the Chief Justice in his Honour's letter to the Attorney dated 8 April 1994.
5. Letter dated 10 May 1994.
6. Walsh, Stephen, QC, 'President's Message', (1994) 16(5) *Law Society Bulletin* 7-8.
7. Ironically, one of the signatories to that document was R.D. Lawson, QC (then President of the South Australian Bar Association): the same R.D. Lawson, QC who was overseas when the Bill was being debated in the Upper House.
8. Document dated March 1991

DEATHS IN CUSTODY

A seminar entitled 'A Study of Deaths in Correctional Custody in South Australia 1980 to 31 March 1993' sponsored by the Australian and New Zealand Society of Criminology was held at Flinders University, Adelaide on 15 June 1994. The speaker was John Dawes, South Australia's first Public Advocate, but previously, for 11 years, the Chief Executive Officer of the Department of Correctional Services. John Dawes is undertaking the research for a Master of Arts at Flinders University.

Mr Dawes discussed two major approaches to understanding prison experience and deaths in custody. Much of the literature takes a 'deprivation theory' perspective and has its origins in the work of Sykes and of Goffman.[1] Deprivation theories suggest that the experiences of imprisonment are so traumatic and damaging, because of poor conditions, overcrowding, lack of support and abuse of human rights that death may provide a way out. The deprivation perspective has been reinforced in this country by the findings of Royal Commissions (NSW, Nagle 1978; South Australia, Johnston, 1976; Clarkson, 1981; and nationally Royal Commission into Aboriginal Deaths in Custody (RCIADIC), 1988, 89, 90, 91) which have outlined a series of human rights abuses and poor practices in our prisons.

The second approach is called 'importation theory' and suggests that people's prior experiences and history are influential in determining how they behave and whether they might resort to self-destructive behaviour, including suicide. Supporters of this approach highlight the increasing suicide rate in the Australian community by young people, especially males.[2] Dawes believes it may prove a worthwhile strategy to look at how factors from these two perspectives may interact.

The remainder of the seminar was structured around a discussion of descriptive statistics which demonstrate that the pattern of deaths in SA prisons during the last 13.25 years closely resembles the national picture developed for the RCIADIC.

While some differences have emerged, these are relatively minor and will be fully described in the thesis and planned publications. The seminar material is also providing a context for a case control study where 37 male prisoners who died in custody in the research period will be compared with a group of 195 prisoners matched for gender and date of admission. This methodology is designed to identify any pattern of individual or situational factors which might help identify those prisoners who might be at risk. This research is underway.

Further information can be obtained from John Dawes (tel (08) 269 7575).

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References

1. Sykes, G.M., *The Society of Captives: A Study of Maximum Security Prison*, Princeton University Press, 1958; Goffman, E., *Encounters: Two Studies in the Sociology of Interaction*, Bobbs-Merrill, Indianapolis, 1961.
2. Kosky, R. 'Is Suicide Behaviour Increasing Among Australian Youth?', (1987) 147 *The Medical Journal of Australia*, 17 August; Dudley, M., Waters, B., Kelk, N. and Howard, J., 'Youth Suicide in New South Wales: Urban-Rural Trends', (1992) 156 *The Medical Journal Of Australia*, 20 January.