

## Chapter 10

### Who Do Judges Think They Are?\*

It seems fitting, on an occasion which is intended to honour the memory of Sir Earle Page, a distinguished Australian statesman, parliamentarian and Minister of the Crown, a founding member of a major political party, and a practical man of affairs, to examine a subject which has constitutional, political and practical dimensions.

The self-image of judges is fashioned primarily in terms of constitutional and legal principle. This is hardly surprising. Others see judges from different points of view. My present purpose, however, is to seek to explain what judges see as their place in the scheme of things, and then to consider ways in which that perception may need to be modified or expanded to make it appropriate to modern circumstances.

#### Constitutional history and principle

Judges regard the judiciary as the third arm of government, separate from, and independent of, the two political arms, the legislature and the executive. Their duty is to maintain the rule of law, to uphold the Constitution, and to administer civil and criminal justice, impartially, according to law.

Modern communities in the western tradition of government distinguish between the exercise of legislative, executive and judicial power, and accept, at least to some degree, the theory that separation between the institutions which exercise those three kinds of power is an important protection of individual liberty. This is not the occasion to go into the history, or the validity, of that political theory, which has involved some interesting misunderstandings. It provides a convenient starting point for a description of the role of the judiciary.

The independence of the judicial arm of government is not a benefit won by judges on some ancient industrial battlefield, and now jealously guarded as a perquisite of office. It is a constitutional principle with a sound practical rationale. Justice must be, and be seen to be, administered with impartiality. Executive governments are themselves major litigants. Almost all criminal cases are fought as contests between the government and a citizen. Governments are frequently involved in civil litigation, either directly or through corporations in which they have a stake. Courts are sometimes called upon to determine disputes between different governments, or between the legislative and the executive branches of government.

Judicial independence is an element of the constitutional system of checks and balances, and is the primary source of assurance of judicial impartiality.

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\* Sir Earle Page Memorial Trust Lecture, Parliament House, Sydney, 21 October 1998.

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