Annual Conference 2003: Queensland Magistracy Opening Address – by video-link from Sydney

Monday, 7 April 2003, 9:10am

Chief Justice Paul de Jersey AC

The independence of the judiciary is not an ideal: it is necessarily to be guaranteed if the rule of law is to prevail. Central to judicial independence is the absence of external influence. Consistently, it has been described as:

> "… the degree to which judges actually decide cases in accordance with their own determinations of the evidence, the law and justice free from coercion, blandishments, interference, or threats from governmental authorities or private citizens" (Rosenn K., "The Protection of Judicial Independence in Latin America" (1987) 19 University of Miami Inter-American Law Review 1);

and then in the parliamentary context, as:

> "… the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control" (Sir Guy Green, "The Rationale and Some Aspects of Judicial Independence" (1985) 59 ALJ 135).

On the useful Canadian analysis in *Valente* (1985) 2 SCR 673, judicial independence embraces three crucial primary aspects, secure tenure, financial security and institutional security.

As to those aspects, a guaranteed term of appointment is necessary so that judicial officers are not concerned about making decisions to please the body responsible for their possible reappointment. Financial security is necessary, it is said, to ensure that those officers are not tempted to accept bribes – although there fortunately seems no need for that justification in contemporary Australia. Institutional security, or control over administration of the court, prevents, among other things, the other branches of the government from influencing the allocation of Judges to hear particular cases.

As Professor Shetreet has reminded us ("The limits of judicial accountability: a hard look at the *Judicial Officers Act* 1986" (1987) 10 UNSW Law Journal 3, 6-7), however, judicial independence is a concept with a number of limbs: there is, on the one hand, the personal independence assured by security of tenure and conditions, the securities to which I have referred; then there is what he terms "substantive independence…that is, in the discharge of (the) official function"; additionally there is the "collective independence of the judiciary as a whole…corporate or institutional independence of the judiciary"; and finally, there is "the internal independence of the Judge, which refers to his independence viz a viz his judicial superiors and colleagues".

For the Westminster system to operate democratically, the independence of the non-political judiciary must be absolutely secure. In the words of Montesquieu, "there is no liberty, if the power of judgment be not separated from the legislative and executive powers". Of course in a democracy the creating and administering of the law must be subject to

the will of the people. But to ensure the impartial application of the law, the judiciary must be completely immune from political pressure.

Accordingly, while Judges and Magistrates are dedicated to public service, they must not be considered "public servants", the designation of those who administer the Executive – which stands separately. Public servants implement ministerial policy while Judges deliver justice according to law – at no-one's behest.

But political or executive interference is not the only theoretically possible source of external influence to be encountered. The last few decades have witnessed a great elevation in the level of interest shown in the work of the courts by the media. The media, it seems to me, has much more actively pursued a role in drawing attention to perceived unjustified trends in certain areas of judicial decision making, and of course, the area of criminal sentencing is the prime example. The media performs a very important role in informing the public about such matters, but judicial officers must be careful not to allow a media view as such to regulate their independent approach.

While the courts “do not decide cases by reference to every shift in public opinion, the judiciary must keep a weather eye on basic community values in order to retain the relevance of their decisions to that community” (Malcolm CJ: Judicial Independence and Accountability” – Third Worldwide Common Law Judiciary Conference, 5 July 1999). The difficulty lies in accurately discerning enduring community views, for ordinarily courts cannot responsibly react to what may turn out to be temporary shifts in public opinion, or plainly minority views. This is where the responsibility borne by the media is substantial, although the courts

themselves bear a burden. As put by Doyle CJ ("The Well-Tuned Cymbal" in "Fragile Bastion: Judicial Independence in the Nineties and Beyond" (1997), p 43):

> "To focus upon how the media depict the courts is too limited an approach. The judiciary should itself initiate and provide information about the judicial system. It should do what it can to provide the public with a balanced account of its work. To put it bluntly, it is not enough to do what we can to help the media improve the quality of information that it provides to the public. The judiciary should have its own program for informing the public about its work."

And in Queensland we are doing our best in that regard.

Now in our Queensland system, the separation of powers, which complements and in part assures the independence of the judiciary, is not complete. That is because the judiciary materially depends on the other arms of government: the Executive is the paymaster of the Judges, and provides the resources on which the court system depends. This position in Queensland is to be contrasted with what obtains, as examples, in the High Court, the Federal and Family Courts and the Supreme Court of South Australia. I do not presently raise this matter by way of active criticism of our system, although one cannot in principle overlook the circumstance that the separation of powers in this State is for that reason at present incomplete. My lack of active criticism is explained by its not having any particular, adverse practical consequence.

That judicial independence, which is a precious commodity, is ultimately fragile, may be illustrated by recent instances, drawn not only from developing countries but also sophisticated regimes. Addressing this topic

before the 12th Biennial Conference of the Association of Australian Magistrates in June 2000, I mentioned the treatment meted out in 1988 to the Lord President of the Malaysian judiciary, in retaliation for his earlier successful prosecution of a Prince who went on to become King. Regrettably, instances in which the independence of the judiciary has been flouted have since multiplied. Let me offer more examples.

First, and appropriately mentioned first, there is the situation in Zimbabwe, where the catalogue of dereliction is glaring. Most fundamentally, the government simply refuses to implement orders of the courts. For example, the Supreme Court in November 2000 ruled the land invasions were unconstitutional: the government blithely responded that the decision was "biased" and "racist". Equally disturbing is the intimidation of the judiciary. Justice Benjamin Paradza was arrested in his Chambers on 17 February 2003 and detained overnight. He had previously handed down decisions unpalatable to the government. In September the previous year Justice Blackie had been arrested and detained in humiliating circumstances, to be charged subsequently with obstruction of justice. He had previously sentenced the Minister for Justice to three months imprisonment for contempt of court. Then there was the campaign waged against Chief Justice Gubbay culminating in his forced resignation on 1 July 2001.

In a report dated 18 February 2003, Mr Justice Smalberger, a retired Judge of the Supreme Court of Appeal of South Africa, in his capacity as independent observer, reported to the Forum for Barristers and Advocates of the International Bar Association on the Zimbabwean proceedings against Mr Justice Blackie. In the course of that report, he mentions a judgment given by another Judge, Gillespie J, in *The State v Humbarume*,

a judgment delivered on 26 September 2001. That was a few days before the resignation of Gillespie J. The Judge expressed these sentiments:

> "One cannot have sat on the bench of this court for the last two years and more and not have become increasingly concerned at the manner in which the Executive has attempted to compromise the independence of the judiciary and the sway of the rule of law. Indeed there are those who think that it has succeeded in doing so.
>
> It has gone about this by means of outright defiance of court orders; by attacks upon the integrity of High Court and Supreme Court Judges collectively and individually; by racist attacks on non-black members of those benches; and by defamatory diatribes against any Judge who shows some degree of judicial independence. The vilification of Judges in the press has not stopped short of the uttering of threats against Judges…
>
> Manipulation of court rolls; selective prosecution; and the packing of the bench of the Superior Courts are techniques which provide a government determined to do so with the opportunity to subvert the law while at the same time appearing to respect its institutions. It is a mark of the damage that has been done to the judiciary that there are those who believe that this has been accomplished in Zimbabwe…"

The independent observer refers also to the conclusion of a report of 30 September 2002 by the Legal Resources Foundation, Zimbabwe, which was in these terms:

> "This survey of some of the significant developments that have affected the legal system of Zimbabwe shows a system that is in deep distress. A strong professional system that tried to protect the rights of all and generally upheld the rule of law has been transformed into a system designed to advance the political goals of the ruling elite. The

> professionalism and independence of all the branches of the legal system have been severely compromised.
>
> To repair the substantial damage that has been done, the legal system must be rebuilt on the firm foundation of the rule of law. The police must once again become an a-political, non-partisan law enforcement agency. Political interference in the courts must cease and the independence of the judiciary should be restored."

Also in Africa, we saw on 28 November 2002 the Prime Minister of Swaziland issue a press statement in which he said that his government did "not intend to recognize two judgments of the Court of Appeal". One ruled that the King had no constitutional power superior to parliament's to issue decrees, the impugned decree denying bail to rape suspects. The other committed the Police Commissioner for contempt of court for his disobedience to an order of the High Court. The United Nations special rapporteur took the unsurprising step of viewing these developments "with grave concern for the region".

Passing back to Malaysia, we vividly recall the trial of the former Deputy Prime Minister, Anwar Ibrahim on charges of sexual misconduct and corruption. The verdict of guilty was condemned by opposition parties, the Malaysian Bar Council and lawyers who observed the trial. Equally outraged were foreign observers. The International Commission of Jurists deplored "executive manipulation of the judiciary and use of the criminal justice system to launch politically motivated prosecutions and muzzle dissent". Dr Madeleine Albright, then US Secretary of State, considered "Anwar (had) not had the ability to have a free and fair trial". The Prime Minister of Australia expressed "worry that the judiciary (of Malaysia) is not as independent as used to be the case". The London Times asserted "legal chicanery, farcical procedure and naked political bias". The alleged

irregularities in that proceeding included the removal of the case before trial from a Judge acknowledged as independent; the admission into evidence of a prior confession in questionable circumstances; recanting by key witnesses of their alleged confessions; shifting factual allegations, and so on.

May we go then to a regime where, though political instability has been a hallmark, judicial security had been assumed? I speak of Italy, where Prime Minister Silvio Berlusconi is being prosecuted in four matters alleging false accounting, tax fraud and bribery. Specific concerns about the Berlusconi cases fasten upon a law which allows high ranking personalities to appear at the venue of their choice, the fact the Berlusconi's lawyers included the President of the Justice Commission in the House of Deputies, the allegation that the Justice Minister tried to pull a Judge off one of the cases, and the government's announcement that it intended to sue a Judge for his attack upon alleged governmental interference. All of this culminated extraordinarily last year in a nationwide strike by Magistrates protesting the government's alleged efforts to undermine their independence, including the removal of police escorts and the transfer of discretion to pursue prosecutions to the government itself.

In underdeveloped South-East Asian systems, the aggregation of corruption, poverty, and fledgling, inexperienced legal professions has meant there is little prospect the rule of law will readily take root. Endemic corruption apparently bedevils the Indonesian judiciary. In the South Pacific, unconstitutional political activity has jeopardized the rule of law, yet it must be noted on the optimistic side the Fijian courts effectively restored a constitution thrown aside politically. Australian judicial officers

are commendably playing significant roles in the exchange of judicial experience with regional judiciaries.

I have provided this background not to alarm, but respectfully to admonish against complacency. The rule of law, and its component the independence of the judiciary, are indeed inherently fragile stipulations, even regrettably in established and sophisticated regimes. We need to understand them and fearlessly monitor their state of health.

What of the independence of the Magistracy? Judicial independence is essential for the due operation of the Magistracy, just as it is for the due operation of the Judges of the Supreme and District Courts: and it is essential that that independence be protected. A number of features combine amply to warrant that view.

The first is the extensive jurisdiction exercised by the Magistracy. In Queensland, on the criminal side, there is jurisdiction to hear and determine complaints for summary offences (sections 139-178 *Justices Act* 1886) and indictable offences dealt with summarily (sections 552A-J *Criminal Code*) and to hear committal proceedings (sections 99-134 *Justice Act*). On the civil side there is jurisdiction up to $50,000, excluding cases where the title to land, or the validity of a provision of a will or settlement may be in question, but extending to Corporations Law and Trade Practices Act matters, unless they are exclusively committed to another court. It is often and correctly observed that the work of the Magistrates Courts accounts for most of the judicial work carried out in this State daily. The extensiveness of that work is reflected in the comparatively large numbers of Magistrates who sit State-wide, to be contrasted with the comparatively small complement of Judges in the

Supreme and District Courts. It is plainly a busy jurisdiction, where the judicial officer bears responsibility for all decisions – there is no jury. It is a jurisdiction susceptible of review by way of appeal to the District Court, and the lower court is obliged to express comprehensive reasons for its decisions – very often difficult, I accept, because of the pressure of work and limitations on resources.

It was progressive recognition of the importance of the work daily accomplished by the Magistracy which no doubt led to the changes in the Magisterial system which have occurred over the decades, changes interestingly described by Mr John Lowndes SM in his paper, "The Australian Magistracy, from Justices of the Peace to Judges and beyond" published in the Australian Law Journal (2000) volume 74, page 509ff. Mr Lowndes refers (page 510) to the transition of Magistrates from honorary Justices of the Peace to paid Magistrates; then the transformation of that paid Magistracy from "Police Magistrates" to "Stipendiary Magistrates"; to be followed by the transition of a "lay, untrained and unqualified Magistracy into a professional, legally trained and competent body of judicial officers"; and then the following separation of the Magistracy from the public service. It was then of course that the Magistracy effectively took on the cloak of judicial independence. Also important to securing that position, I should add, was the introduction of the requirement that persons qualified for appointment as Magistrates be legally qualified.

There is now a general expectation that Magistrates, like Judges, will, in discharging their responsibilities, exhibit judicial independence. Certainly the litigating public expects that. So do Magistrates themselves, witness the lively interest in the topic at conferences like these. And so does the legislature. The *Magistrates Act* 1991 is styled "an Act relating to the

office of Magistrates, the judicial independence of the Magistracy, and for related purposes". In his second reading speech introducing the Bill, the then Attorney-General said the legislation would ensure the judicial independence of Magistrates was "statutorily recognized".

That Act deals with the judicial independence of Magistrates to the extent of prescribing a Magistrate's tenure of office, and the only circumstances in which a Magistrate might be suspended or removed. Additionally, while according the Chief Magistrate a power to "discipline by way of reprimand" (section 10(8)), the Act prescribes the only circumstances in which that may occur. The Act also obliges (section 13) a Magistrate to comply with any "reasonable direction" of the Chief Magistrate, but the assumption clearly is that a direction would not be reasonable if it compromised the Magistrate's independence.

I do not wish to make any particular comment on current proceedings, of course, or to be seen to imply any view in relation to them. It would however be vacuous not to remind that Justice Mackenzie, in his judgment in Ms Cornack's case (number 8261 of 2002, judgment delivered 27 November 2002) extracted these observations of Chief Justice Gleeson, from his paper "Public confidence in the judiciary" delivered at the 6th Colloquium of the Judicial Conference of Australia on 26 April 2002:

> "It is a source of frustration to some people that judges are difficult to remove, … . Of course, judges, like anyone else, are punishable for breaches of the law. But the sanction of removal is better seen as aimed at protecting the public than at punishing an individual. There may be, within a court, internal administrative measures that can properly be used to address some problems of judicial conduct. But, unless a judge does something so serious as to warrant removal following parliamentary resolution, there is generally no capacity

in any person or authority to suspend, or fine, or otherwise penalise for misconduct. It is often wrongly assumed that, beyond their capacity to advise, warn, and take appropriate administrative steps, Chief Justices, and other heads of jurisdiction, have authority to penalise other judges. Judicial independence means, amongst other things, that judges are independent of each other.

…

As to procedures for dealing with complaints, I would make one comment based on my experience of almost 10 years as President of the Judicial Commission of New South Wales. As a rule, the more serious the complaint, the easier it is to devise means to deal with it. And the converse is true. If a judge is alleged to have committed a crime, then the matter is investigated and tried in the same manner as any other allegation of crime against a citizen. If a judge is alleged to be suffering such incapacity as warrants removal, the procedures to be followed are clear. The difficult cases tend to be those in which the complaint, even if made out, would not justify removal. The complainant is likely to assume that there must be some other sanction available. It can be difficult to satisfy an aggrieved person whose complaint is justified, but who sees no form of sanction visited upon the judicial officer involved. False expectations can be created. I do not put this as an argument against having any form of complaints procedure; but it is a problem that needs to be kept in mind.

There is a fundamental problem about any course that would leave a judge in office, with both the capacity and the duty to exercise the judicial power of the Commonwealth, or of another unit of the Federation and yet publicly discredited by censure or some other form of disciplinary action.

…

To some people, both inside and outside government, this is difficult to reconcile with current ideas of accountability. … It is all the more important, then, that we should be in a position to explain the constitutional principles that are at work.

> The Judicial Officers Act of New South Wales contains a limited power to suspend judicial officers while there is a pending complaint that is sufficiently serious to raise the possibility of removal, and following a charge or conviction of an offence punishable by imprisonment for 12 months or more. The power is vested in the head of jurisdiction. Subject to those qualifications, the Act provides no form of sanction short of removal. That is consistent with established principle."

[See also what Mackenzie J recorded in his judgment on the application of Mr Gribbin and Ms Thacker (8710 of 2002, 27 November 2002, para 11]

That aspect aside, it falls for consideration whether the independent Magistracy should be more broadly recognized. Chapter 4 of the *Constitution of Queensland*, as consolidated in 2001, acknowledges that there must be a Supreme Court and a District Court, and includes provisions as to the tenure and remuneration of the Judges. There is a question whether we have not reached the point where similar constitutional provision should not be accorded the Magistrates Court.

Now it is important, when speaking of judicial independence, not to overlook its significant corollary, judicial accountability. This is achieved in a number of ways. Formal accountability is secured through discharging the obligation to give comprehensive reasons for judgment, and through the appeal process. Judicial officers could not these days follow the advice given by Lord Mansfield to a general appointed Governor of an island in the West Indies, finding himself obliged therefore to sit also as a Judge. It is said (Jackson, Natural Justice 2nd edition 1979, p 97) that Lord Mansfield said to him: "Be of good cheer – take my advice and you will be reckoned a great Judge as well as a great commander in chief.

Nothing is more easy; only hear both sides patiently, then consider what you think justice requires and decide accordingly. But never give your reasons – for your judgment will probably be right, but your reasons will certainly be wrong." On the contrary, of the obligation to give reasons, Chief Justice Gleeson ("Judicial accountability" (1995) to the Judicial Review 117, 122-4) has said:

> "This form of accountability is not to be taken lightly. The requirement of giving a fully reasoned explanation for all decisions has profound importance in the performance of the judicial function. Apart from Judges, how many other decision-makers are obliged, as a matter of routine, to state, in public, the reasons for all their decisions? Most decisions, other than those made by Judges, are made by people who may choose whether or not to give their reasons."

Less formal accountability is facilitated fundamentally by the obligation to conduct judicial proceedings in public. That exposes judicial officers who do not display the requisite qualities to the prospect of public assessment by the people, their peers and the press and media. Public comment and criticism can be powerful forces for enhancement of the quality of judicial performance. It is worth recalling the reference by Lord Shaw of Dunfermline in *Scott v Scott* (1913) AC 417, 447 to the words of Bentham:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice…publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the Judge himself, while trying, under trial…the security of securities is publicity".

But whether in this State court proceedings are to be televised remains an open question. For my part, I am rather influenced by the view of Mr Michael Beloff QC when in the United Kingdom delivering the 1999 Atkin Lecture: "Comprehensive coverage of cases would stupefy. Edited coverage would distort. All television corrupts, selective television corrupts absolutely."

A more recent form of public accountability is achieved through the statutory obligation on courts to publish annual reports, or their voluntarily undertaking that responsibility. Such reports draw public attention, importantly, to rates of disposition of caseloads, and that may lead to pressure for more expedition. Such reports also tend to highlight judicial initiatives in the area of continuing education. The people expect their Judges and Magistrates to keep up-to-date in their areas of expertise. In terms of current reasonable expectations, judicial officers will be properly accountable only if they do so, and are seen to do so.

For the lone Magistrate resident in a detached regional community, notions of judicial independence and accountability take on special practical significance. Judicial independence essentially means impartiality, freedom from any external influence which may corrupt, and that must be the reality, and seen as such. In the smaller, detached community, the resident judicial officer suffers particular burdens in this regard: he or she must resist developing too close an association with the community such as may fuel perceptions of partiality, and that can be difficult both professionally and personally. It is in large part their successfully surviving the litmus test which guarantees the more general public acceptance of the Magistracy on which its legitimacy ultimately depends.

It has been a privilege to address you. I congratulate you on your determination to confront these most fundamental notions.