A DEFINITION OF JUDICIAL INDEPENDENCE

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The judiciary is the third branch of government. The rule of law requires that the judiciary be independent from the other branches of government. This article examines judicial independence and the aspects which define it so as to provide a contemporary definition of judicial independence

INTRODUCTION

The political governance of Australia is based on the notion of the rule of law. Professor Martin Krygier argues as a general formulation that:

> The 'rule of law' is a political value or imperative that demands restrictions on the political process – in particular, through a separation of judicial from the other powers of state, and subjection of the executive and military powers of the state to general rules of law substantially the same as those that govern ordinary citizens in their mutual interactions, and fidelity to the law and the Constitution among all office holders.[1]

Specifically in terms of the separation of judicial from the other powers of state Sir Gerard Brennan, a former Chief Justice of the High Court of Australia, reminds us that the rule of law binds the governors and the governed to require that the law be administered impartially, by treating those who seek its remedies equally.[2] Sir Gerard Brennan suggests that such an 'aspiration depends for its fulfilment on the competent and impartial application of the law by judges. In order to discharge that

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1 Martin Krygier, 'Ethical Positivism and the Liberalism of Fear' in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (2000) 59, 59.

2 Sir Gerard Brennan, 'Judicial Independence' (Speech delivered at The Australian Judicial Conference, Canberra, 2 November 1996).

responsibility, it is essential that judges be, and be seen to be, independent.'[3] There is, therefore, a relationship between the independence of the judiciary as the third arm of government and the rule of law. Given that there is a relationship between judicial independence and the rule of law it is crucial to understand what judicial independence is and what is required of judicial independence to fulfil the requirement of the rule of law. This article proposes to both define judicial independence in its contemporary context and elicit its fundamental elements.

TOWARDS OF DEFINITION OF JUDICIAL INDEPENDENCE

Professor Stephen Parker, writing in 2000 considered that:

> Australia is currently ill-equipped to discuss judicial independence in an informed way … [a]s a society, we have not grappled sufficiently in theoretical terms with the nature and purpose of judicial independence, and consequently we lack a conceptual model that will help … to formulate policies, explain them, and know how to response to issues as they arise. This may seem paradoxical. Generally judicial independence commands almost universal approval.[4]

In recognition of Professor Parker's comments the definition of judicial independence which is proposed by this article will pay both theoretical and conceptual attention to what judicial independence is.

Many articles have been written by members of the judiciary, commentators and academics with the aim of providing insight into what judicial independence is and what is required in a liberal democratic society to preserve that independence. However, Professor Parker writes of these articles:

> The last decade has seen a surge in the amount of writing about, and inquiries into, judicial independence in the common law liberal democracies. Serving and retired senior judges have adopted it as a central theme in articles and addresses. … The initial impression is of considerable diversity in approach and formulation of these definitions and rationales, but it is difficult to identify whether the

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3 Ibid.

4 Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds) *The Australian Federal Judicial System* (2000) 62-63.

> differences are merely linguistic, in that different words have been chosen to express the same ideal, or semantics, in the strict sense that a different meaning is intended. The very uncertainty over whether substantive differences are intended illustrates the relative lack of theoretical and conceptual attention to what judicial independence is, and how it relates to other political and social values.[5]

It cannot be suggested that there is an 'agreed' definition of judicial independence. Although major theoretical elements of judicial independence have been identified as enabling the judiciary as the third arm of government to be independent or separate from the other arms of government this article develops a definition of judicial independence that pays conceptual attention to judicial independence's central constructs: 'insularity', 'impartiality' and 'authority'. Each of these constructs represents a collection of discrete, but related elements, consistently identified in the literature.

The construct of 'insularity' was initially identified by Christopher Larkins in his 1996 study of judicial independence.[6] He describes insularity as the notion that:

> judges should not be used to further political aims nor punished for preventing their realisation. .. [I]nsularity is believed to result from certain formal and structural safeguards which give judges life tenure, provide significant checks and balances in their appointment and protect their salary against diminution whilst in office.[7]

This article will expand and add to this list of elements in the formulation of the definition of judicial independence.

The construct of 'impartiality' was also identified by Larkins in his 1996 study of judicial independence. Larkins considers that impartiality is the 'idea that judges will base their decisions on the law and facts: not on any predilections towards one of the litigants.'[8] This article will expand and add to this notion in the formulation of the definition of judicial independence.

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5 Ibid 64–65.

6 Christopher M Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 *American Journal of Comparative Law* 605.

7 Ibid 609.

8 Ibid.

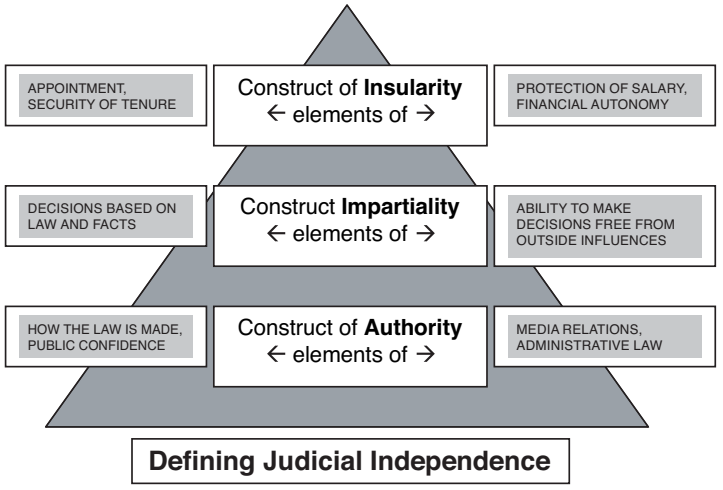
The construct of 'authority' was also identified by Larkins in his study. Larkins suggests that:

> the scope of the judiciary's authority as an institution or, in other words, the relationship of the courts to other parts of the political system and society, and the extent to which they are collectively seen as the legitimate body for the determination of right, wrong, legal and illegal should be incorporated into the definition of judicial independence.[9]

Larkins however did not provide any elements of this construct. This article will suggest, and later discuss, that the elements which illustrate the construct of 'authority' are (i) how the law is made (ii) public confidence (iii) media relations / judicial reticence and (iv) administrative law.

The collection of all these elements under the grouping of a construct enables a more concise and inclusive definition of judicial independence to be formulated. The importance of defining judicial independence in this way is evidenced by its flexibility. The definition proposed in this article not only provides a mechanism by which to join *all* elements identified as relating to judicial independence together but also enables the interrelationship between elements to be examined.

The definition of judicial independence which will be proposed is represented by the diagram below:



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9 Ibid 610.

At the top of the judicial independence pyramid lays the construct of 'insularity'. The elements of the construct of 'insularity' are (i) appointment, (ii) security of tenure (including maintenance of appointment during tenure), (iii) protection of salary during tenure, and (iv) the financial and administrative autonomy of the courts. Whilst the elements comprising the construct of 'insularity' are important to defining judicial independence, and must form part of any definition of judicial independence, the elements, by themselves, do not adequately (and are the least able to) define judicial independence due to conceptual difficulties which will be discussed later in this article.

'Impartiality' is similarly important to judicial independence. The construct of 'impartiality' suggests that judges will base their decisions on the law and the facts, and not any predilection towards one of the litigants and that the judiciary must be able to make their decisions free from the influences of the executive and legislative braches of government. "Impartiality" is an important characteristic of judicial independence. However, the construct of 'impartiality' neither by itself nor in conjunction with the construct of 'insularity' adequately defines, nor gives a strong basis upon which to define judicial independence due to conceptual difficulties which will be discussed later in this article.

In contrast, the construct of 'authority' with its own indicative elements brings together and strengthens the constructs of 'insularity' and 'impartiality' to form a comprehensive and conceptually relevant definition of judicial independence. The elements of the construct of 'authority' are (i) how the law is made (ii) public confidence (iii) media relations / judicial reticence and (iii) administrative law.

DEFINING JUDICIAL INDEPENDENCE: THE CONSTRUCTS

The Construct of 'Authority'

The construct of 'authority' is the defining characteristic, and forms the basis of the definition of judicial independence. The elements of the construct of 'authority' are:

1. how the law is 'made'. This is the notion that judicial officers no longer 'apply' the law but make it[10] and in doing so are displaying the legitimacy and 'authority' of the institution;
2. public confidence. In this context, public confidence does not carry with it connotations of "popularity" but rather a focus upon the function of the courts and the position of the institution within society.[11] Public confidence is required in the institution of the courts as the upholder of the aspiration of the rule of law;
3. media relations / judicial reticence. This is the notion that the media has the ability to both promote the workings of the courts but also to influence through criticism the workings of the courts and judges. The relationship between media relations and judicial reticence is such that the relaxation of traditional notions of judicial reticence may been seen as a way of diminishing the hegemony that the media holds with respect to the dissemination of information about the courts so as to promote the legitimacy and 'authority' of the courts as institutions;[12] and

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[10] See Sir Gerard Brennan, 'Limits on the Use of Judges' (1978) 9 *Federal Law Review* 1; Justice Ronald Sackville, 'Continuity and Judicial Creativity – Some Observations' (1997) 20 *University of New South Wales Law Journal* 145; Justice Michael Kirby, 'Judicial Activism' (1997) 27 *Western Australian Law Review* 1 and AR Blackshield, 'The Legitimacy and Authority of Judges' (1987) 10 *University of New South Wales Law Journal* 155.

[11] See Sir Anthony Mason, 'The State of the Judicature' (1994) 24 *Melbourne University Law Review* 9; Justice Bruce Debelle, 'Judicial Independence and the Rule of Law' (2001) 75 *Australian Law Journal* 556; Chief Justice Murray Gleeson, 'Public Confidence in the Judiciary' (2002) 76 *Australian Law Journal* 558; Justice Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 *Monash University Law Review* 209, and Justice CSC Sheller, 'Judicial Independence' (2002) 6 *The Judicial Review* 1.

[12] See Justice RD Nicholson, 'Judicial Independence and the Conduct of Media Relations by the Courts' (1993) 2 *Journal of Judicial Administration* 207; Chris Merritt, 'The Court and the Media: What Reforms are Needed and Why?' (1999) 1 *University of Technology Sydney Law Review* 42; Justice CSC Sheller, 'Judicial Independence' (2002) 6 *The Judicial Review* 1; George Williams, 'The High Court and the Media' (1999) 1 *University of Technology Sydney Law Review* 136;

4. administrative review. This is in recognition of the need for the courts to ensure that the powers of the executive are kept in balance as against the rights of citizens.[13] This process ensures the legitimacy and 'authority' of the courts as separate from the decisions and actions of the other branches of government.

These elements are properly contained within the construct of 'authority' in that there is a relationship between, and interaction with, the elements identified and the power of the other branches of government and social values.[14] The result of these relationships and interactions is such that the construct of 'authority' is of determinative importance to the defining of judicial independence. A further implication of the construct of 'authority' is that the judiciary itself has the ability to encourage and advance judicial independence directly via the elements identified as representative of the construct of 'authority'. In other words, the judiciary can promote its 'authority' and consequently its independence through (i) the making of law, (ii) promoting and maintaining public confidence, (iii) providing accurate information about the workings of the courts and responding to criticism and (iv) participating in administrative law. This ability is in contrast to the non-existent or limited power that the judiciary can exert upon the elements contained within the constructs of 'insularity' and 'impartiality'. So approaching the development of a definition of judicial

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[13] See Justice Michael Kirby, 'Judicial Independence in Australia Reaches a Moment of Truth' (1990) 13 *University of New South Wales Law Journal* 187; John Baston, 'Judicial Review: Recent Trends' (2001) 29 *Federal Law Review* 371; Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (2000); RMA Chongwe, 'Judicial Review of Executive Action: Government under the Law' in John Hatchard and Peter Slinn (eds), *Parliamentary Sovereignty and Judicial Independence: A Commonwealth Approach* (1999) 81; Jeremy Kirk, 'Rights, Review and Reasons for Restraint' (2001) 23 *Sydney Law Review* 19; Justice Michael McHugh, 'Tensions Between the Executive and the Judiciary' (2002) 76 *Australian Law Journal* 567.

[14] Justice RE McGarvie has written that '[t]he judiciary draws moral authority from the confidence in it which is produced in the community by respect for the importance of its function and the way it performs it. When a court makes a decision against the powerful executive, the executive complies through a respect for the law and also from knowledge that it would otherwise incur serious community disapproval.': Justice RE McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) 1 *Journal of Judicial Administration* 3, 4.

independence with the straightforward and unifying concept of 'authority' affords a way by which to define judicial independence against the criterion of the rule of law.

The Construct of 'Insularity'

The construct of 'insularity' is a collection of elements representative of the structural and formal safeguards in place to protect members of the judiciary from potential or actual political and other outside pressures.[15] The construct of 'insularity' includes the following elements:

1. the appointment process;
2. security of tenure and maintenance of appointment during tenure;
3. the protection of salary against diminution whilst in office; and
4. the court's financial and administrative autonomy.

Whilst these elements are of importance to judicial independence they do not, and cannot, define the independence of the judiciary against the criterion of the rule of law. This is due to the fact that the very independence that these elements seek to protect can be undermined by the other branches of government. The risk is very real, for in Australia the executive and legislature has:

1. total control over the appointment of judges;[16]
2. some control over the security of tenure of the judiciary;[17]

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[15] Christopher Larkins contention that '[j]udicial officers must have an assurance of insularity to ensure that judges are not used by other branches of government, or other powerful groups in society, to further political aims.': Larkins, above n 6, 609.

[16] See Commonwealth, *Australian Judicial System*, Parliamentary Paper No 307/1987 (1987) 69-76; Sam Strutt, Judicial Appointments Questioned', *The Australian Financial Review* (Sydney), 6 June 2003, 55; Kate Marshall, 'Support for High Court Selection', *The Australian Financial Review* (Sydney), 13 December 2002; Sir Anthony Mason, 'The Appointment and Removal of Judges' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the 90s and Beyond* (1997) 1, and Sir Harry Gibbs, *Oration Delivered at the Opening of the Supreme Court Library's Rare Books Room* (2000) Queensland Courts Publications <http://www.courts.qld.gov.au/publications/articles/speeches/gibbs110200.htm> at 27 January 2005.

3. total control over the salaries and superannuation of judges;[18]
4. control over the funding and, to varying degrees, the management of the courts;[19] and
5. control over the creation of tribunals which take away from and precede the jurisdiction of the courts.[20]

With the purpose of developing a definition which unifies the theoretical and conceptual characteristics of judicial independence it is not suggested that the government should not have control over the elements identified under the construct of 'insularity'. Nor is it suggested that the judiciary, as the third branch of the governmental trinity, must, for independence sake, be totally and incontrovertibly separated from the other branches of government. What this article is seeking is to demonstrate is

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[17] See Justice Michael Kirby, 'The Abolition of Courts and Non-Reappointment of Judicial Officers in Australia' (Speech delivered at the Ronald Wilson Lecture 1994, Perth, 28 November, 1994); Susan Zeitz, 'Security of Tenure and Judicial Independence' (1998) 7 *Journal of Judicial Administration* 15; Anthony Blackshield, The Appointment and Removal of Federal Judges' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000), and Peter H Lane, 'Constitutional Aspects of Judicial Independence' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the 90s and Beyond* (1997) 64.

[18] See Sir Anthony Mason, 'The Independence of the Bench, The Independence of the Bar and the Bar's role in the Judicial System' (Speech delivered at the Conference of English Scottish and Australian Bar Associations, London, 4 July 1992); *Austin v Commonwealth of Australia* (2003) 215 CLR 185 and Chris Merritt, 'Surcharge Threatens Judges Autonomy', *The Australian Financial Review* (Sydney) 27 June 2003, 57.

[19] See RG Hammond, 'The Judiciary and the Executive' (1991) 1 *Journal of Judicial Administration* 88 and Thomas W Church and Peter A Sallman, *Governing Australia's Courts* (1991); Justice Alastair Nicholson, 'In Response to a More Compliant Judiciary?' (2002) 76 *Australian Law Journal* 231, and John Alford, Royston Gustavson and Phillip Williams, *The Governance of Australia's Courts: A Managerial Perspective* (2004).

[20] See Justice PW Young, 'ALRC Report on Federal Courts' (2000) 74 *Australian Law Journal* 205; Sir Ninian Stephen, 'Southey Memorial Lecture 1981: Judicial Independence – A Fragile Bastion' (1982) 13 *Melbourne University Law Review* 334, 341; Justice Michael Kirby, 'The Independence of the Judiciary – Basic Principle, New Challenges' (Speech delivered at the International Bar Association and Human Rights Institution Conference, Hong Kong, 12-14 June 1998) and Justice Murray Kellam, 'The Evolving Structure of Tribunals in Australia' (Speech delivered at the Third Annual AIJA Tribunals Conference, Melbourne, 9 June 2000).

that there are conceptual difficulties in asserting that judicial independence is defined solely by these elements. Relying on these elements to define judicial independence is too restrictive. In order to support this contention each of the elements of the constructs of "insularity" and "impartiality" will be discussed as against the criterion of the rule of law:

The Appointment Process

Any appointment to judicial office is an executive act over which the executive has exclusive control. This executive control exists at both state and federal levels.[21] As the deliberations of the executive are not public and do not normally involve participation or input from the public the concern is that *all* appointments are political and made for political gain.[22]

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[21] *Australian Constitution* s 72(i) and section 6 of the *High Court of Australia Act 1979* (Cth) which requires the Commonwealth Attorney-General to consult with the Attorneys General of the states about the appointment of a justice of the High Court. What 'consultation' means is not really known: Sir Anthony Mason, 'The Appointment and Removal of Judges' in Helen Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 12; *Supreme Court Act 1970* (NSW) ss 26, 31; *Supreme Court of Queensland Act 1991* (Qld) s 12; *Constitution Act 1975* (Vic) s 75; *Supreme Court Act 1935* (WA) s 7(1); *Supreme Court Act 1887* (Tas) s 5; *Supreme Court Act 1979* (NT) s 32(1) and *Supreme Court Act* 1933 (ACT) s 4(1). Although it should be noted that the Queensland Government in 2003 placed advertisements in the Courier Mail and The Australian newspapers seeking expressions of interest for the position of Queensland's Chief Magistrate: The Hon Rod Welford MP, 'Queensland Chief Magistrate Position Advertised' (Press Release, 3 July 2003).

[22] Professor Tony Blackshield contends that all appointments are 'political' and that there are three categories of political appointment: '[f]irst, an appointing government may try to influence the court's future direction by finding candidates who are sympathetic (or at least not unsympathetic) to its own broad political outlook. … Second, an appointment may be 'political' in the sense that the appointee is 'political': a practising Member of Parliament, or some other public figure well-known for current and active political involvement. … Third, a government's choice of candidates, may be influenced (or even dictated) by political considerations, not merely with an eye to the long-term development and direction of judicial doctrine, but in the more immediate sense that the appointment is made (retrospectively) as a personal reward for political services rendered, or (prospectively) with a calculated eye to its impact on a pending election campaign, or particular pending legislation.': Anthony Blackshield, 'The Appointment and Removal of Federal Judges' in Brian Opeskin and Fiona Wheeler, *The Australian Federal Judicial System* (1990) 427-428.

The link between the executive and the judicial branch need not detract from the independence of the judiciary. The construct of 'authority' highlights that judicial independence is more effectively defined by how decisions are made by the courts, public confidence, media relations and the judiciary's position as the arbiter in administrative law. It is the 'authority' of the courts as the legitimate forums for the resolution of disputes which defines the independence of the judiciary despite any executive influence there may be in the appointment process.[23] Chief Justice Murray Gleeson argues that any doubts as to the independence of appointees from the appointment process misrepresents the practicalities of being a judge and administering the law in Australia. Chief Justice Gleeson has written that:

> Judges have never regarded themselves as public servants. People who have made a career as independent advocates, functioning without employers or even partners, find it easy, and natural, following judicial appointment, to maintain their independence of the executive government. It should not be assumed that governments are also unequivocally pleased by that independence; but it is a fundamental constitutional background from which judges are chosen. The status and independence of the judiciary in common law owes a good deal to the fact that historically judges have been appointed from within the legal profession, and that many successful lawyers have regarded it as a privilege to be offered judicial office, even if that involves a large drop in income.[24]

The proximity between the executive, legislative and judicial branches of government is not severed once an appointee takes office. To the contrary, the executive and legislative branches, both at state and federal levels have the ability to exercise power in terms of tenure and the setting of conditions of service.

Security of Tenure

The formal securing of judicial tenure has its origins in English history. Prior to 1689, English judges were appointed by the sovereign and served in office during the sovereign's pleasure. This tenure induced both real and apprehended pressure upon

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[23] Chief Justice Murray Gleeson, 'Judicial Selection and Training: Two Sides of the One Coin' (2003) 77 *Australian Law Journal* 591.

[24] Ibid 592.

members of the judiciary to make the "right" decision.[25] William of Orange and Mary ascended to the British throne after the Glorious Revolution of 1688. With their ascension to the throne parliament required a compromise of some monarchical power to parliament.[26] Included in this shifting of the balance of political power was the removal of the judiciary from the direct manipulation of the sovereign. In 1701, the *Act of Settlement*[27] was enacted promising that:

> Judges commissions be made during good behaviour and their salaries be ascertained and established: but upon the address of both Houses of Parliament it may be lawful to remove them.

The *Act of Settlement* 1701[28] was significant, and remains significant, in that it granted a guarantee of tenure. Susan Zeitz in her article on security of tenure and judicial independence suggests that:

> The reality of tenure on these terms provided a basis upon which genuine independence of the judiciary could be established, thus supporting both the reality and perception of an objective mind determining the issues brought before the courts.[29]

The principle of security of tenure has been incorporated into the Australian legal system. In the Australian legal system a distinction must be made between the tenure of (i) justices of the High Court[30] which is protected by the *Constitution*, (ii) judges

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[25] See Justice Alan Demack, 'Judicial Accountability: An Historical Perspective' (1987) *Queensland Law Society Journal* 13; Lord Justice Brooke, 'Judicial Independence – Its History in England and Wales' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the 90s and Beyond* (1997) 89, and Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999).

[26] See John Cannon (ed) *The Oxford Companion to British History* (1997).

[27] 12 & 13 Will III c2.

[28] 12 & 13 Will III c2.

[29] Susan Zeitz, 'Security of Tenure and Judicial Independence' (1998) 7 *Journal of Judicial Administration* 159, 161.

[30] Section 72 of the *Constitution* provides that the tenure of a justice of the High Court expires on the attainment of 70 years of age. It should be noted that this compulsory retirement age was inserted into the *Constitution* after the 1977 Referendum as up until that time tenure was guaranteed for life: *New South Wales v Commonwealth* (1915) 20 CLR 54; House of Representatives Standing Committee on Legal and Constitutional Affairs,

of other Federal Courts[31] whose tenure is protected by the *Constitution* but whose courts are not and (iii) judges of state and territory courts[32] whose tenure is provided for in legislation capable of repeal by state parliaments. These forms of judicial tenure, particularly those of the state and territory judiciaries, have been described as 'fragile'[33] by Professor Peter Lane due to the fact that control over tenure is vested solely in the other branches of government.[34]

This is not to suggest that tenure, and the security of that tenure, is not an important characteristic of judicial independence. Rather this is to suggest that defining judicial independence solely by reference to security of tenure may not be conclusive. To repeat Susan Zeitz's comments, security of tenure provides 'a basis upon which genuine independence' can be established. Genuine independence as against the criterion of the rule of law is established when the courts and judges enjoy legitimacy and

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Commonwealth Parliament, '*Constitutional Change'* (1997) 106, and Cheryl Saunders, 'Changing the Constitution: The Three Referendum Amendments of 1997' (1977) 51 *Australian Law Journal* 508.

31 The Family Court of Australia, the Federal Court of Australia and the Federal Magistrates Service are protected by virtue of section 72 of the *Constitution* as they are federal courts created by the Commonwealth Parliament. The distinction is that the courts themselves are statutory creations which are within the power of the federal parliament to abolish: Peter H Lane, 'Constitutional Aspects of Judicial Independence' in Helen Cunningham (ed) *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997) 64.

32 See *Constitution Act 1902* (NSW) s 53; *Judicial Officers Act 1986* (NSW) s 41; *Constitution Act 1975* (Vic) s 77; *Supreme Court Act 1935* (WA) s 9; *Constitution Act 1889* (WA) ss 54, 55; *Constitution Act 1934* (SA) ss 74, 75; *Supreme Court Act 1995* (Qld) s 195, *Constitution Act 1867* (Qld) ss 15, 16.

33 Peter H Lane, above n 31, 71.

34 There are issues concerning the security of tenure with governments 'restructuring' courts and appointing acting judges, see Justice Michael Kirby, 'Abolition of Courts and Non-Reappointment of Judicial Officers' (1995) 12 *Australian Bar Review* 183; Blackshield, above n 22; Sir Anthony Mason, above n 18; Justice Michael Kirby, 'Judicial Independence and Justice Staples: An Alarming "Removal"' (1989) *Law Society Journal* 68; Justice Michael Kirby, 'Independence of the Judiciary – Basic Principle, New Challenges; (Speech delivered at the International Bar Association Human Rights Institute Conference, Hong Kong, 12 – 14 June 1998) and Justice LJ King, 'The Attorney-General, Politics and the Judiciary' (Speech delivered at the Fourth Annual Colloquium on the Judicial Conference of Australia, Sydney, November 1999).

'authority' as an institution. On this basis judicial independence is defined more effectively by the 'authority' that the judiciary and the courts enjoy as the legitimate forums for the resolution of disputes than by the legislative provisions detailing terms of tenure. Support for such a contention can be found in the following comments of Justice Michael Kirby:

> It would be a mistake to think that the protection of the independence of the judiciary rests only in legal provisions. As has already been demonstrated, those provisions are in some respects inadequate, incomplete or susceptible to ready repeal or circumvention. A much more substantial source of support is community understanding and appreciation on the part which the judiciary plays in ensuring observance of the rule of law and the other values treasured in our form of society.[35]

Protection of Salary during Tenure

Closely linked to the provisions detailing the tenure of judges are the provisions relating to judicial remuneration. The protection of remuneration during tenure is an element of 'insularity' as it represents a safeguard against financial pressure being placed upon judges by the executive or litigants.

That judicial salaries should not be diminished during a judge's term in office has its origins in the same historical circumstances from which the principle of security of tenure emerged. The provision in the *Act of Settlement 1701*[36] promising security of tenure also promised that judicial 'salaries be ascertained and established'. Or in other words, that judicial salaries be known and fixed at the time of appointment.[37] This has the effect of ensuring that wages are not open to manipulation, thereby

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35 Justice Michael Kirby, 'Judicial Independence in Australia reaches a Moment of Truth' (1990) 13 *University of New South Wales Law Journal* 187, 191.

36 12 & 13 Will III c2.

37 See *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 78 ALJR 977 with respect to the validity of the appointment of the Chief Magistrate of the Northern Territory on a contract term of two years and also *Buckley v Edwards* [1992] AC 387 where the question arose as to the power of the Governor of New Zealand to appoint additional judges of the Supreme Court of New Zealand without Parliament having made any provision for the salary of a judge so appointed. The relevant legislation provided that the judge's salary was to be that which was provided by law. The appointment was declared invalid.

removing the potential to influence independence through monetary means. This principle has been embodied at state, territory and federal levels in Australia.[38]

Whilst the theoretical need for such a principle is not in dispute, there are two practical aspects of the principle which detract from its intention. The first is that whilst there are constitutional and legislative prohibitions upon the reduction of salary during tenure, there are no reciprocal legislative or constitutional obligations upon governments to increase salaries during tenure. The issue is further complicated by what exactly constitutes "remuneration". Both of these aspects are within the sphere of control of the government.

Justice McGarvie has written with respect to the increasing of judicial wages during tenure that:

> The original constitutional intent of such provisions, to prevent governments from putting pressure on judges by the threat to cut their salaries, has been frustrated by inflation. In real terms the salaries are continually cut by inflation, unless their nominal amounts are increased to give the same purchasing power as before … It is not enough that increases be left to the whim of the government.[39]

The whim of the government to which Justice McGarvie refers, is the involvement of the government in the approval process for any increases to judicial salaries. The base salaries of federal judges are determined by the Remuneration Tribunal.[40] The Remuneration Tribunal is charged with the setting of wages not only for federal judges and administrative tribunal members but also for parliamentarians, ministers and senior public servants.[41] Sir Anthony Mason has previously argued that this combined role is in itself contrary to considerations of judicial independence as judicial salaries are considered together with those of the other branches of government to which the judiciary

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38 *Constitution* s 72(iii); *Supreme Court Act 1970* (NSW) s 29; *Supreme Court Act 1935* (SA) s 12, *Supreme Court Act 1887* (Tas) s 7; *Constitution Act 1975* (Vic) s 82 and *Constitution of Queensland 2001* (Qld) s 62.

39 Justice RE McGarvie, above n 14, 20.

40 Established under and governed by the *Remuneration Tribunal Act 1973* (Cth). <http://www.remtribunal.gov.au>.

41 *Remuneration Tribunal Act 1973* (Cth) ss 5, 6, 7. See also Australia Bar Association Statement, *The Independence of the Judiciary* (1990), paragraph 3.11.

should be kept separate: '[i]t is impossible to take politics entirely out of salary determinations.'[42]

The Remuneration Tribunal is not charged with determining the entire range of employment provisions of federal judicial and related officers. For example, some judges' entitlements are provided under legislation administered by the Commonwealth Attorney-General.[43] The end result is that the government retains to some degree the ability to control and to create new conditions of remuneration for judicial officers.

Whilst judicial salaries and the preservation of salaries during tenure may be inextricably linked with the government, the effects of the link need not detract from the independence of the judiciary or the defining of judicial independence as against the criterion of the rule of law. When considered from the perspective of the courts 'authority' as the legitimate forum for the resolution of disputes the protection of wages during tenure does not need to be relied upon to define independence.

Financial and Administrative Autonomy

As with individual members of the judiciary the financial control of the courts is referred to as an element of judicial independence. All federal, state and territorial courts are dependent upon governments for their funding. Judicial independence when considered against the criterion of the rule of law therefore cannot be defined by the extent to which any of the courts are financially or separate from government. Setting aside, the issue of financial autonomy as an aspect of judicial independence, Thomas Church and Peter Sallman, who conducted a study of the governance of Australia's court in 1991[44] contend that 'the crucial issue is the level and amount of administrative independence required to support a satisfactory level of adjudicative independence.'[45]

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42 Sir Anthony Mason, 'Judicial Independence and the Separation of Powers' (1990) 13 *University of New South Wales Law Journal* 173, 179.

43 For example, judge's pensions in the *Judge's Pensions Act 1968* (Cth) and long-leave in the *Judge's (Long Leave Payments) Act 1979* (Cth).

44 Thomas W Church and Peter A Sallman, *Governing Australia's Courts* (1991).

45 Ibid 7.

In examining this issue Church and Sallman found it difficult to reconcile the idea that adjudicative independence could be affected by the level of administrative independence. Church and Sallman contend that '[i]t is not immediately clear to us why executive administration of the courts adds much more of a thread to adjudicatory independence than the already unavoidable dependence of courts and the judiciary on the political branches of government for their financial and organizational support. … Those who argue that administrative independence is a prerequisite for adjudicatory independence of the courts often fail to explain how the judiciary in Westminster systems around the world (including) Australia have managed to maintain independence over a long period of time, despite executive administration of the courts.[46] Therefore in terms of providing a definition of judicial independence the financial and administrative arrangement for the management of Australia's courts merely becomes an element of independence not evidence of it.[47]

Summary of the Construct of 'Insularity'

That the elements collected under the construction of 'insularity' are important to the notion of judicial independence is not in dispute. What is disputed is that the elements of the construct of 'insularity' either singularly or collectively define judicial independence. A similar position is revealed when judicial

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[46] Ibid 8.

[47] Sir Harry Gibbs commented in 1983 that '[u]nder the *High Court of Australia Act 1979* the High Court now administers its own affairs … However, what must be recognised is that the independence of the Court is not must strengthened by the new system. The Court must still depend on Parliament for its annual budget, and that means that in practice the Executive can still effectively influence the decisions of important matters of administration affecting the Court, such as staff ceilings. I do not mention this by way of complaint. Under the Westminster system of government the Executive, through its control of Parliament, normally has the last say in matters involving the expenditure of public money, including that spent in providing the system of justice. … The independence of the judiciary is maintained by the character of the judges themselves, the support of the legal profession and the sentiments of the community generally. It is an illusion to think that legislation such as the *High Court of Australia Act* has more than a symbolic significance so far as the independence of the Court is concerned.': Sir Harry Gibbs, 'Comment: The High Court Today" (1983) 10 *Sydney Law Review* 1, 3–4.

independence is considered against the construct of 'impartiality'.

The Construct of 'Impartiality'

The function of the judiciary, as the branch of government responsible for the application and interpretation of the law, is to ensure that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[48] Alan Rose, a past president of the Australian Law Reform Commission argues that:

> Justice, and the appearance of that justice being delivered, are fundamental to the maintenance of the rule of law. Justice implies – consistency, in process and result – that is, treating like cases alike; a process which is from coercion or corruption; ensuring that inequality between the parties does not influence the outcome of the process; adherence to the values of procedural fairness, by allowing parties the opportunity to prevent their case and to answer contrary allegations, and unbiased neutral decision making; dignified, careful and serious decision-making and an open and reviewable process.[49]

On this basis some commentators argue that this notion of impartiality defines the independence of the judiciary.[50] I suggest that the converse is true: there cannot be impartiality without independence. I suggest that this is particularly so when the notion of impartiality is viewed against the criterion of the rule of law.

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48 *R v Sussex Justices; Ex partes McCarthy* [1924] 1 KB 256, 259 (Lord Hewitt).

49 Alan Rose, 'The Model Judiciary – Fitting in with Modern Government' (1999) 4 *The Judicial Review* 323, 326.

50 See Parker, above n 4; Sir Ninian Stephen, 'Southey Memorial Lecture 1981: Judicial Independence – A Fragile Bastion' (1982) 13 *Melbourne University Law Review* 334; Justice David Malcolm, 'Judicial Reform in the 21st Century in the Asia Pacific Region' (Speech delivered at the World Bank Conference, Washington DC, 6 June 2000); Sir Guy Green, 'The Rationale and Some Aspects of Judicial Independence' (1985) 59 *Australian Law Journal* 135 and Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (2003). But compare the study of judicial independence undertaken by Christopher Larkins: Larkins, above n 6.

Whilst it is conceded that the distinction at first may appear to be a fine one,[51] there is a significant distinction between impartiality and the defining of independence. The distinction arises as there are three difficulties associated with the identification and definition of impartiality. These difficulties make the notional distinction between impartiality and independence much more than just semantics. The first difficulty is identifying impartiality and the standards and ideals against which judicial impartiality should be assessed.[52] The second difficulty is identifying the partiality or biases of judges.[53] And the third difficulty is presented by the way in which the courts deal with allegations of partiality or bias.[54] This analysis is not to suggest that impartiality, as a notion, is not, nor should not be, a central pillar

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51 See the comments of Justice Nicholson: Justice RD Nicholson, 'Judicial Independence and Accountability: Can They Co-Exist?' 67 (1993) *Australian Law Journal* 404, 405.

52 For example see Kate Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 *Feminist Legal Studies* 1, 10–11 for a feminist legal perspective. Members of the Realist movement would argue that judicial decision-making is determined more by what the judge had for breakfast rather than a consideration of 'legal' factors.': Chief Justice William Rehnquist, 'Remarks on the Process of Judging' (1992) 49 *Washington and Lee Law Review* 263, 263-264 and members of the Critical Legal Studies movement argue that the law is just politics: there is no apolitical (or impartial) judicial decision-making process.: Allan Hutchinson and Patrick Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 *Stanford Law Review* 199, 206.

53 Jerome Frank would not be surprised at this outcome as he suggests that 'if we wish[ed] to emphasise the influence of individual characteristics of the judges, we are confined to a blind guess as to what really affected his decision.:' Jerome Frank, *Courts on Trial* (1949) 157. See also Malleson, above n 52; Larkins, above n 6 and JAG Griffith, *The Politics of the Judiciary* (2nd ed, 1981).

54 In an action brought by a party for an allegation of bias against a judge the test is not whether the judge was or was not biased or what the factors were or were not that influenced the decision-making process. Rather, the test is that of an objective standard based upon a fair minded observer. The test is whether a fair-minded observer (not a judge) would be led to reasonable suspicion of pre-judgment, prejudice or partiality through the conduct of the judge: *Webb & Hay v The Queen* (1994) CLR 41. Chief Justice Murray Gleeson argues that such a test is 'postulated in order to emphasise the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues.': Chief Justice Murray Gleeson, 'Judging the Judges' (1979) 53 *Australian Law Journal* 338, 343.

of the judicial function or to the attainment of justice. Rather, this analysis suggests that when considering independence, impartiality cannot be considered in isolation or as the defining aspect of judicial independence. The focus upon impartiality must be shifted from the individual behaviours and attitudes of particular members of the judiciary to the courts as an institution in society and the acceptance of impartiality as a consequence of (i) how the law is made (ii) public confidence, (iii) media relations/judicial reticence and (iv) administrative review. To this end the legitimacy of the courts and judges rests on the 'authority' that the courts enjoy as the appropriate forums for the resolution of disputes by the community and other branches of government. This legitimacy and 'authority' rests on how the law is made by judges.,[55] public confidence,[56] media relations[57] and the involvement of the judiciary in administrative review.[58] Each of these elements contribute to the realisation of legitimacy and 'authority' and subsequent independence in the following way:

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[55] See Justice Michael Kirby, '"Judicial Activism" Authority, Principle and Policy in the Judicial Method 4. Concordat (Shortened Version)' (Speech delivered at the Hamlyn Lectures Fifty-Fifth Series, University of Cardiff United Kingdom, 25 November 2003); Justice Michael McHugh, 'The Strengths of the Weakest Arm; (Speech delivered at the Australian Bar Conference, Florence 2 July 2004); Justice Michael Kirby, 'Judicial Activism' (1997) 27 *Western Australian Law Review*, 1, 19; Justice Ronald Sackville, 'Continuity and Judicial Creativity – Some Observations' (1997) 29 *University of New South Wales Law Journal* 145; Justice Michael McHugh, 'The Law-Making Function of the Judicial Process – Part 1' (1998) 62 *Australian Law Journal* 15 and Sir Ninian Stephen, 'Southey Memorial Lecture 1981: Judicial Independence – A Fragile Bastion' (1982) 13 *Melbourne University Law Review* 334.

[56] Sir Anthony Mason, 'The Appointment and Removal of Judges' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the 90s beyond* (1997) 1, 7.

[57] See Justice RD Nicholson, 'Judicial Independence and the Conduct of Media Relations by the Courts' (1993) 2 *Journal of Judicial Administration* 207; Chris Merritt, 'The Court and the Media: What Reforms are Needed and Why?' (1999) 1 *University of Technology Sydney Law Review* 42; Justice CSC Sheller, 'Judicial Independence' (2002) 6 *The Judicial Review* 1; and George Williams, 'The High Court and the Media' (1999) 1 *University of Technology Sydney Law Review* 136.

[58] See John McMillan, 'Recent Themes in Judicial Review of Federal Executive Action' (1996) 24 *Federal Law Review* 347 and Justice Michael McHugh, above n 13, 570.

(i) how the law is made: The importance of how the law is made by judges to the legitimacy and 'authority' of the courts is demonstrated by the following comments of Justice Michael McHugh:

> the legitimacy of each institution within [the] pluralist conception [of democracy] must be determined by reference to "its instrumental value" in contributing to a democracy. In turn, the "instrumental value" may be measured by the extent to which courts are practically compelled to regulate society where legislatures are not able or do not do so.[59]

(ii) public confidence: The importance of public confidence to the 'authority' of the courts has been recognised by Chief Justice Murray Gleeson who has written that '[i]n the case of almost every judicial decision there is at least one loser. Judicial decisions may provide rigorous disagreement, but the peace and security of the community depends upon there being a general willingness to abide by them.[60]

(iii) media relations/judicial reticence: Chief Justice Beverley McLachlin suggests that '[p]ublic confidence and the adherence to the aspiration of impartiality by judges ensures that judges are open and accountable, not only on appeal, but through other public avenues such as the media.[61] That judges are open and accountable through public avenues such as the media ensures that the 'authority' and the legitimacy of the courts are maintained.

(iv) Administrative review: The comments of John McMillan make the relationship between administrative review and

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[59] Justice Michael McHugh, 'The Strengths of the Weakest Arm' (Speech delivered at the Australian Bar Association Conference, Florence, Italy, 2 July 2004).

[60] Chief Justice Murray Gleeson, 'Judicial Accountability' in Courts in a Representative Democracy: Papers from the National Conference of the Australian Institute of Judicial Administration, the Law Council of Australia and the Constitutional Centenary Foundation (1994) 165, 167.

[61] Chief Justice Beverley McLachlin, 'Courts, Transparency and Public Confidence – To the Better Administration of Justice' [2003] *Deakin Law Review* 1.

the 'authority' of the courts to define judicial independence as against the criterion of the rule of law in the following way:

> The distinction between merit review and judicial review is the most commonly-cited principle to explain the relationship of the judiciary to the executive. In a sense, the principle serves a dual purpose, defining the role of the judiciary whilst safeguarding the separate role of the executive from unwarranted judicial intrusion. The point of … interest is that the distinction largely depends upon judicial exposition …'[62]

The independence garnered from the 'authority' that the courts enjoy and hold as the legitimate forums for the resolution of disputes enables judges to feel confident in their role of being able to apply the law to the facts without 'fear, favour or affection'. This is the defining measure of judicial independence and serves to fulfil the aspiration and the requirements of the rule of law.

CONCLUSION

The importance that an independent judiciary plays in ensuring that the aspiration of the rule of law is achieved cannot be underestimated. Given this importance it is necessary to understand what independence is from the perspective of the judiciary. It is only when each element has been identified and is considered as part of a flexible and holistic definition that a theoretically and conceptually relevant definition of judicial independence can be developed. This is the benefit of incorporating into the processing of defining judicial the construct of 'authority'. Defining judicial independence through the use of the construct of 'authority' ensures that all identified characteristics of judicial independence are included and can be evaluated against the criterion of the rule of law.

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[62] John McMillan, 'Recent Themes in Judicial Review and Federal Executive Action' (1996) 24 *Federal Law* Review 347, 377.