

MAINTAINING THE INDEPENDENCE OF THE JUDICIARY

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We are all familiar with the structures, constitutional and conventional, that supports the independence of the judiciary in our countries, and thus supports the rule of law. They differ somewhat from country to country and in a federation such as Australia they differ even within the one country but they have much in common and they provide the framework within which we go about our daily work of administering justice according to law.

Important though they are to our role, however, the structures that protect our independence are, in the main, not of our making. They are largely the products of the political process and they are not in our hands. To the extent that they are not constitutionally entrenched, the structures mostly find their source in the legislative branch which, subject to the Constitution (if there is one) can change them. Other important elements have their source within the executive branch. Our role as judges in determining or even influencing the form these structures take is strictly limited and is mostly confined to judicial interpretation if and when justifiable questions come for decision before us. There is also a limited role, rarely exercised in practice, to inform public debate about such matters.¹

Today, therefore, in sharing some ideas about judicial independence, I will speak only briefly about what I would call the structures and then only as a preface to a discussion about the foundation upon which the structures rest – the ultimate underpinning of the rule of law, which is the confidence of the people. “Public confidence” is an elusive notion that needs some exploration later but, subject to that, it can be seen that the maintenance of “public confidence” is directly within our areas of responsibility as judges.

First then some brief comments about the structures before turning to the foundation upon which they rest.

As delegates to this important biennial conference of judges of the Pacific, none of us needs reminding of the importance of an independent judiciary in maintaining the rule of law. We need to remind either that the independence of judges is granted and protected not for ourselves but for the people whom we serve.

As judges of Pacific countries we recall too that an independent judiciary provides an underpinning not only for social and political development, but also the economic development that supports and political stability and progress.

¹ See the Guide to Judicial Conduct published by the Australian Institute of Judicial Administration (2002) at section 5.6.1. The Guide is available online at <http://www.ajja.org.au/online/GuidetoJudicialConduct.pdf>.

There is of course a huge literature – academic and otherwise – about the independence of the judiciary. Much has been written about the structures themselves and their origins. This audience will be familiar with much of the literature, including *The Beijing Statement of Principles for the Independence of the Judiciary in the LAWASIA Region*.

The Beijing Statement is founded upon two basic international instruments, namely *The Universal Declaration of Human Rights* and *the International Covenant on Civil and Political Rights*. The preamble to the Beijing Statement recalls that *The Universal Declaration of Human Rights* enshrines the principle of equality before the law, the presumption of innocence and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. The ICCPR in turn aims to guarantee the exercise of those rights. These are principles of universal aspiration.

Whilst we are all familiar with the structures that support an independent judiciary we are also alive to the fact that some of those structures are very fragile, and some of them in fact guarantee very little. The structural basics include, obviously, security of tenure, with removal only as an exceptional matter and only on the ground of proved misbehaviour or incapacity. Security of remuneration is another structural element.

There is also institutional independence. The Beijing Statement is of considerable interest in this respect because it addresses this sometimes forgotten aspect. Little attention is generally paid to institutional independence because it is largely taken for granted that if judges are individually independent they will be collectively independent. The Beijing Statement, however, requires that the principal responsibility for court administration, including the appointment of staff, should vest in the judiciary or in a body on which the judiciary is represented and has an effective role. Very few courts in Australia adopt this recommended model. The High Court of Australia and the three other federal courts have this model, as does the Administrative Appeals Tribunal. The courts of South Australia have a similar model. Yet, in the discharge of their judicial duties, there cannot be the slightest doubt about the independence of the other Australian courts, both collectively as institutions and individually on the part of their judges.

The point to be made here – and I take just one example out of many available – is that some structures may be desirable but not necessary. Some may be desirable, but not necessary and in any event not sufficient. Some elements are invisible in that they rest upon a general consensus held by all those concerned. I very much doubt whether it is the criminal law – powerful though it is in defining improper behaviour and in deterring it – that prevents subtle and clandestine attempts to influence judges. Yet I can say that in 16 years of being the point of contact between my part of the judicial branch and the executive branch of the Commonwealth, there has never been the slightest hint of such a thing.

Nevertheless, as we all know, structures, however well designed, and however well working at one period, can on occasions succumb to other pressures. They can become corrupted and undermined. They can be bypassed by clever stratagems and, in troubled times, there are instances, in which they have been simply ignored. It is not hard to find examples of these failures in some other parts of the world and there are, of course, ample historical examples in many places including, in times past, the home of the common law.

To illustrate the point I want to make about structures being necessary, but not sufficient, I take an example from this region – in fact from the Pacific Rim.

The place from which the example is taken has a strong respect for the rule of law. It has a high level of educational and well established and generally well resources public institutions. The place is the State o Victoria.

The example I am about to give did not represent an attempt to influence a particular decision – in fact I believe that such an attempt would have been unthinkable. Rather, it was the abolition of an entire “court”.

In 1985, the Parliament of Victoria established an Accident Compensation Tribunal² as a specialist tribunal to hear workers compensation cases. It was a measure of reform. The Act that established the Tribunal accorded its presidential members the same status and tenure as judges of the County Court – a large and well-respected trial court in Victoria. Although only one of the members held a commission as a judge of the Country Court, the Act was quite explicit about the rights and status of all the presidential members. They were given, by the Parliament, the designation of “*judge*” and the “rank, status and precedence of a judge of the County Court”. They were to hold office until the age of 72 years – the same as a judge – were to be entitled to pensions on the same rates and terms and conditions as those of a judge of the County Court, and likewise their spouses and children. They had a high degree of security of tenure in that they could be removed only for incapacity or neglect (the establishment of which was presumably a jurisdictional fact) or upon an address of both Houses of the Parliament.

Nevertheless, in November 1992 the Parliament of Victoria enacted the Accident Compensation (*Work Cover*) Act 1992,s 10 of which abolished the Tribunal. It was as simple as that. There was no provision for the continued existence of the offices of the members or for their tenure. The Act that gave them their rights had simply been repealed. The affected members were offered compensation – said to be “generous” – but they were not all offered equivalent positions. Their right to a pension was abolished when the Act was repealed. There was much protest from the judiciary but the public seemed largely unmoved. Litigation brought by some members of the abolished Tribunal in the Supreme Court, later transferred to the Federal Court, was subsequently settled on terms that were never disclosed. The incident is now largely forgotten except, no doubt, by the individuals concerned.

The incident does, I think, make the point that structures can be fragile and public support for a position that seems obvious to judges may not be forthcoming at all. It is perhaps worth remembering that whilst the constitutional structures protecting the federal judiciary in Australia – and possibly the Supreme Courts of the States as well – is exceedingly robust, there are other areas in which the protection is in fact fragile.

² Accident Compensation Act 1985.

The other point that can be made about this example leads me to the main area of discussion – public confidence. I recall very well the debates about the abolition of the Accident Compensation Tribunal. Although members of my Court could take no part in them, the case had a special significance since I had been at the Bar with some of those whose offices were abolished. It was said at the time that it would have been different if the Tribunal had been a court – whilst the members of this Tribunal had been called judges and had the status and precedence of judges, they were nevertheless not judges and it was not a court. Could the same thing have happened to a court? In point of theory, within the States and territories of Australia, there are some courts to which it could have happened and as Justice Kirby has pointed out there have been other examples³ - even in Victoria and, even there, in relation to a court.⁴

The answer to the question "*Would this have happened if the Tribunal had been a Court?*" is, I think, very probably "No". (Justice Kirby has argued that the Tribunal was indeed a "court" but the point here is that this was not the generally perception.)

On then asks why would it probably have been different if the Tribunal had been perceived to be a court?

My suggested answer is that in Victoria, and one would hope in any of the places represented here, courts of general jurisdiction – so-called "real courts" – are seen as so fundamental to the workings of a democratic society that they cannot simply be abolished.

If I am right about this – and that was the general view at the time – it turns attention to what is generally described as "public confidence". This is a very broad expression capable of describing several concepts, few if any of them precisely defined. Since today, I want to speak about the practical rather than the theoretical, it seems to me that when we say that the independence of the judiciary and the independent role of the courts, rests upon "public confidence" we say no more than that it rests upon a deep-rooted, broad consensus – a general, almost instinctive and pervasive view – that an independent judiciary does indeed underpin basic rights and freedoms. We are speaking of a pervasive view that recognizes, and values, albeit in a very broad way, underlying and basal democratic concepts.

The large body of writing about the independence of the judiciary is now being complemented by much writing about the maintenance of public confidence. My thesis is that the two go hand in hand. I therefore take this opportunity to draw attention to an especially valuable collection of material compiled by the Judicial Conference of Australia for its members. It was published in two volumes in February 2003 under the title "Judicial Independence". The whole of it

³ Abolition of Courts and Non-reappointment of Judicial Officers (1995) 12 Australia Bar Review 181.

⁴ By way of contrast, the judges of the Industrial Relations Court of Australia, a federal court of specialized industrial jurisdiction, had the protection of the tenure guaranteed by Chapter III of the Constitution. Thus, whilst some of the jurisdiction of that Court was abolished and the rest transferred to the Federal Court, the Industrial Relations Court of Australia continued in existence and will do so until the last of its judges resigns or reaches the age of retirement. The judges in fact all had, in any case, commissions as judges of the Federal Court of Australia and of course these could not be affected either.

repays serious study as a reminder of both the importance and the fragility of the concept and of the actions that can be taken to protect it. The JCA publication is complemented by another very valuable collection of papers entitled "Confidence in the Courts" which is the product of a conference held in February 2007 by the National Judicial College of Australia in association with the Australian National University College of Law and the ANU Institute of Social Sciences and Law. Each of the papers repays close attention and are readily available on the internet.⁵

It emerges in these and other writings that if there is to be public confidence in the courts such as to provide a foundation in public support for the independence of the judges (and indeed other democratic foundations) "the public" must at least have a basic understanding of their system of justice (for it is indeed "theirs") and, moreover, that the system that is thus revealed to them must manifestly merit that confidence.

The system needs to be understood and, when understood, must not be found wanting. But we need to go further than that. The system needs to be such that, when understood, it is seen as something to be really valued – indeed cherished.

What role do judges have, then, in assisting the public to understand the system in which they should have confidence of such strengths as to provide its underpinning?

Here again, much has been written about the need for judges to explain the system to the public and the legitimacy of them doing so. Strangely, much less has been accomplished in this area than one might have hoped. I say "strangely" because the need is obvious and individual ways of meeting these needs are not hard to find.

This is a task in which judges should be keen to be involved, either directly or in support of programs undertaken by others. Today is not the occasion to go into matters of detail but opportunities exist in the provision of curriculum materials, the provision of facilities, the development of online learning (of which there are some excellent examples in Canada and the United Kingdom) and writing and speaking for broader audiences about the law and about the functions and responsibilities of the courts.

There are also now huge opportunities for the dissemination of information about courts and their work on the internet. Court websites have become more and more important and offer great opportunities for the dissemination of information, for interactive online learning and, of course, for the publication of information about the Court such as to enhance its transparency and accountability.

There are also large opportunities for removing misconceptions about the decisions of courts by publishing those decisions to anyone in the world who may be interested on a court website. When I became Chief Justice of the Federal Court I inherited, with enthusiasm, a system devised by Justice Trevor Morling for distributing judgments throughout the Pacific. Important judgments were sent by mail to our library in Sydney where they would be photocopied, gather

⁵ <http://law.anu.edu.au/nissl/courts07.htm>

together over the space of a few months and then sent by mail to other courts in the Pacific. The system was slow and far from comprehensive. Many important cases were missed. But it was a start.

Now, with the arrival of PacLII, a process that used to take months takes place comprehensively and almost instantly. PacLII, which is attached to the School of Law at the University of the South Pacific, is a very important development. PacLII has grown in size and importance since its establishment in 2002 and now has material from some 20 Pacific jurisdictions. It has been described as making a major contribution to the improvement of the quality of justice and access to law in the Pacific region. It serves the communities in the Pacific including but not limited to the legal communities, and it is accessed by interested lawyers and other worldwide.

I suppose this process does, however, raise once more the question: For whom do we write judgments? How is public confidence to be maintained, if judgments are unintelligible to the public? A solution that may avoid the question to some extent is to publish judgment summaries in cases of significant public interest and place these, simultaneously with the Court's full reasons for decision, upon the internet. If this is done most, if not all, of the potential criticisms of the practice of giving judgment summaries can be answered. The summary and the reasons stand side by side, worldwide – for all to see.

In the Federal Court we have gone a little further and we provide, on our website, judgments, judgment summaries and, in some important cases, video-clips of important judgments being delivered and summaries being read. Certainly, however, whatever practice is adopted, the enormous benefits available from publishing the work of the courts to the community at large, in an accessible and intelligible way, should not be overlooked.

If, as we all believe, what we do in our judicial work is founded upon reason, we should surely feel confident that if the reasons are revealed and if they are universally available and widely accessible, some of the foundations for public confidence have been laid.

Technology presents many challenges but also many opportunities in the task of explaining to the public the work of the courts and the importance of that work. As in the broader sphere of education, so too with public education about the courts: Some courts in our region have made cautious use of television. Should we explore this a little more? Should we consider online streaming?

The purpose of this address is not to suggest all, or even many, of the possible answers. It is, however, one of my purposes to raise the topic as one of great importance.

What then of the challenge to bring the system into such good order that, once understood, it will indeed be seen to be of fundamental importance – a system whose values, including the independence of its judges, society will see as indeed one of its own foundations? The answer I would give to this question is simple, nearly everything.

This is not to say that every defect in the system is of the same importance or has the same priority but everything is important. But I believe that it is important, for example, that when a member of the public attends a courthouse that person is treated with courtesy. That is important whoever the person is and whatever their business with the court.

When I joined the Federal Court, one of the first things I did was to order the removal of a crude sign which announced to anyone visiting our courthouse in Melbourne: "No change for phone". It revealed an attitude of mind that was quite unacceptable. Since then, we have had the advantage of selecting our own staff, all of whom understand the notion that the reputation of a court amongst the public rest as much upon matters that the public can readily understand, such as courtesy (and even cleanliness of the premises) as upon matters that are far more important constitutionally. I suspect, although I may be wrong, that in the smaller more intimate island communities of the Pacific, interactions on a personal and local level may be even more important than they are in the larger and more diffuse communities that we have in Australia and New Zealand.

From the counter clerk, the responsibility extends upwards and outwards to every aspect of the judicial system. In all courts the areas in which there is individual and collegiate responsibility on the part of the judges are very wide indeed. In self-administered courts, the areas of responsibility are even wider but the core areas are the same for everyone. Some of the areas for special attention are suggested by the topics for discussion over the next few days. They include backlogs, a subset of which is of course the timely hearing of cases and the timely delivery of judgment. They include case management, mediation, the use of computers, judicial accountability, computer management and some exciting PaCLII projects. Finally, and if I may say so, highly appropriately, there is a panel discussion on Friday about "the vision of future Pacific judiciaries".

Judges tend to be cynical about "visions" and other expressions associated with "management" but whilst a degree of scepticism is healthy, the experience that I have been fortunate enough to have in the management of our discrete part of the federal judicial system in Australia, suggests to me that visions are essential. In a collegiate way, and in collaboration with the professional administrators with whom we work in the Federal Court, we have articulated many visions over the years.

The problem lies not with visions, but with the absence of visions. In this regard I was particularly taken by a paper, delivered by Professor John Kleining of the Australian National University and City University of New York at the Confidence in the Courts Conference to which I made earlier reference. Professor Kleining offers what he described as "something of a theoretically-based warning against institutional complacency". In particular, he warned against the idea that a generally well-functioning judiciary can rest on its laurels. His theory, he said, tapped into wider work in organisational behaviour relating to what is sometimes called institutional entropy. This was the idea that even successful institutions will have a "natural"

tendency to decline and that, unless certain proactive measures are adopted, they will regress.⁶

Professor Kleining's paper, which is available on the internet,⁷ serves as a useful reminder to us all of what can happen. I have no doubt at all that he is right. It is an observable phenomenon in the law that reforms tend to slip away. To use a term of the age, the "default mode", slips lower. The reforms to case management systems that reduce the number of court appearances from ten to three slip away and they go back to ten again. The costs go up proportionately.

This is not to despair, it is to face reality and to recognize the system of justice that we must encourage and assist the community to understand and therefore to support, is one in need of constant attention. We should fear that it will slip backwards if we do not maintain it. Our task is to have visions, to formulate them and to pursue them and to be relentless in that pursuit. We should recognize the natural tendency to decay and we should strive relentlessly to avoid it in the constant progress towards a system of which we can all be proud and which the public, understand it, will unquestionably support. That, of course, is visionary but it is a vision that will provide the soundest foundation for independence which stands at the heart of our work in administering justice, according to law, without fear or favour, affection or ill will.

It gives me very particular pleasure to deliver a keynote address at this Pacific Judicial Conference in the presence of many friends and colleagues whose work, under often difficult circumstances, I have so much admired over many years. I know that, in the end, we all share the same visions.

⁶ "Entropy" is appropriate from the field of thermodynamics where it is used to refer to the degree to which energy is uniformly distributed within a closed system. All closed systems display a tendency, over time, to distribute their energy evenly as per the second law of thermodynamics. A system at equilibrium, by definition, has maximum entropy. The trend towards equilibrium is irreversible in the absence of intervention from outside the system. The use of entropy as a metaphor for organisational decay seeks to emphasise the need for constant intervention to prevent an organization from sliding irreversibly into its "natural state" whatever, in the instance of courts, that may be.

⁷ <http://law.anu.edu.au/nissl/Kleining.pdf>