

Address by

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on the occasion of Sir Earle Page Memorial Trust Lecture

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"Who do judges think they are"

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

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

CONSTITUTIONAL HISTORY AND PRINCIPLE

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

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

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

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

The Commonwealth Constitution, which deals in separate Chapters with the Parliament, the Executive Government, and the Judicature, provides, in s72, that Federal judges are to be appointed by the Governor General in Council, that they shall not be removed from office except by the Governor General on an address of both Houses of Parliament, on the ground of proved misbehaviour or incapacity, and that their remuneration shall not be diminished during their term of office.

Similarly, the New South Wales Constitution Act provides that State judges are to be appointed by the Governor, and shall not be removed from office except by the Governor on an address of both Houses of Parliament, on the ground of proved misbehaviour or incapacity.

Provisions such as this, which secure the tenure of judges, subject to fixed ages of compulsory retirement (70 in the case of Federal judges and 72 in the case of State judges), are to be found in most jurisdictions with a common law background. They have the same historical origin.

From the time of the Norman Conquest until the end of the seventeenth century, English judges were in the same legal position as civil servants. They were appointed by the King, and held office at the will of the King. They administered justice as the King's delegates. At common law, public servants may be dismissed at the will of the Crown. Similarly, judges could be dismissed if, by their judgments, they incurred the King's displeasure. The King, as the fountainhead of justice, claimed the power to decide the law and, if he chose, to dispense with compliance with the law. This became the subject of major confrontations during the seventeenth century. One such confrontation occurred between James I and Chief Justice Coke. Coke's account of that meeting, perhaps coloured in his own favour, records that he drove the King into a rage by contradicting the King's assertion of the ultimate capacity to decide the common law. That power, according to Coke, belonged to professional judges, trained in the law. This, the King contended, was treason; it amounted to saying that the King was beneath the law. In response, Coke quoted the principle that the King was beneath no man, but was beneath God and the law.

The proposition that the head of State, the embodiment of the executive government, is beneath the law, and that it is for the judiciary to decide what the law is, has vast implications. When combined with the principle that it is for Parliament to legislate, it is the basis of the rule of law.

It took what is often described as a revolution to establish that position in England.

Following the overthrow of the Stuarts, the English Parliament, in the Bill of Rights of 1689, and the Act of Settlement of 1701, enacted various provisions which settled the line of succession to the throne, secured the rights and liberties of the

subject and, in the language used by Parliament at the time, limited the Crown. Here was Parliament asserting a power to determine the royal succession, and enacting legislation for the express purpose of curbing the power and authority of the Crown. Translated into modern language, the expression "limiting the Crown" means restricting the power of the executive government. Recognising that future disputes between Parliament and the Crown would have to be decided by the judiciary, Parliament also set out, in its own interest, to secure the judiciary's independence of the executive. The Act of Settlement provided that thenceforth judges should not hold their commissions at the will of the Crown but should hold office during good behaviour, being liable to be removed only upon an address of both Houses of Parliament. The provision of the Commonwealth Constitution, and of the New South Wales Constitution Act, referred to earlier, which secure the tenure of judges, are taken directly from the English Act of Settlement of 1701.

All judges, it is to be hoped, regard themselves as servants of the public. They are, however, not public servants. They are part of an arm of government which is separate from the executive arm, to which public servants belong. They have a tenure which is specifically designed to secure their independence of the executive. The duty of a public servant is to implement the current policy of the Minister to whose department of state he or she belongs; that is not the duty of a judge. The duty of a judge is to administer justice according to law, not according to the wishes or directions of the executive government of the day. Provided it does not break the law, the executive government (effectively, the Premier and Ministers of the State) can tell public servants what to do. The government cannot direct judges how to decide cases, or exercise judicial discretion. Parliament can enact laws which bind judges, as much as anybody else, but the executive cannot tell judges what to do. If it were otherwise, who could have confidence in the impartiality of decision-making in disputes between citizens and the government? This is the essence of judicial independence, and it is why judges take care not to allow themselves to be treated as, or to be seen as, public servants.

Judicial independence is reinforced, not only by tenure, but also by legal immunity from reprisals for decisions which are unpopular with governments, litigants, or the public. Judges often have to make decisions which will be intensely unpopular with some people, or with governments. To protect their impartiality, the law gives them substantial immunities from actions based on their exercise of judicial power.

In addition to legal immunities, there are political conventions and parliamentary procedures which are designed for the same purpose. In most parliaments established on the Westminster model the standing orders prohibit personal imputations against judges except on a substantive motion for removal. The author of Odger's Australian Senate Practice states:

The protection of judicial office-holders under the standing order is based on the need for comity and mutual respect between the legislature and the judiciary, and the requirement that judicial officers be protected from remarks which might needlessly undermine public respect for the judiciary.

The importance of these conventions and procedures to the preservation of the health of our institutions, political and judicial, is frequently overlooked.

There are, no doubt, many people who, on occasion, regret that it is not possible for a democratically elected government to direct judges how to decide cases, or to dismiss, suspend, fine, or otherwise penalise, judges who make what they regard as bad decisions. This, however, is the price our system is prepared to pay for justice which bears both the reality and appearance of impartiality. The fact that the system is willing to pay that price indicates the importance it attaches to judicial impartiality.

Although the institutional and individual impartiality of judges is often taken for granted, it would be a mistake to overlook the store placed in it by the public. This is demonstrated by the frequent demands for judicial inquiries into matters of public importance and controversy whilst judges may be regarded as having special skill and experience in analysing and evaluating evidence, it is undoubtedly their reputation for impartiality which is seen as their principal attribute and which prompts governments to propose them for work of this kind.

The extent to which Chief Justices should be willing to make judges available for Commissions and inquiries is a matter of debate within the judiciary and the legal profession. It seems to come as a surprise to some people that a Premier or an Attorney-General cannot summon up a judge on demand. There are serious questions as to the extent to which the judiciary should allow its reputation for impartiality to be used by governments in circumstances where that reputation may be compromised. Sometimes it is, or becomes, apparent that any judge who conducts a particular inquiry is likely to be subjected to imputations of bias. In such a case the damage that may be done to the judiciary will involve harm to the whole community. Our system goes to great lengths, and pays a high price, to secure judicial impartiality. It is an important public asset, and we cannot allow its value to be debased.

MODERN REALITIES

The principles of judicial independence, important as they are, need to be considered alongside other important aspects of the reality of current circumstances. Those principles were developed before the emergence of democracy as we now know it. The governments and the parliaments of which judges in former times asserted their independence did not claim to represent the will of the community. The practical problems involved in maintaining that an autocratic monarch cannot tell judges what to do are somewhat different from those involved in conveying a similar message to a democratically elected government which claims to represent the general public. Moreover, the modern public is, by comparison with former times, educated and questioning. All forms of authority are under scrutiny and challenge, judicial authority amongst them. Institutions often need to change in some respects if they are to remain essentially the same. In particular, they need to have the self-awareness to enable them to distinguish between what is essential and what is inessential, and the self-confidence to discard the latter, if necessary, in the interests of preserving the former.

1. Accountability

We live in an age which demands, from all governmental institutions, satisfactory forms of accountability. Accountability and independence are not always easy to reconcile.

The traditional forms of judicial accountability are well established. Judges function in public. They are obliged to hear argument on both sides of the question and give reasons for their decisions. Their decisions are routinely subject to appeal. These are important forms of accountability. It is, however, legitimate to ask whether they are sufficient.

The principles earlier considered mark out the boundaries which any proposals for further accountability cannot cross. Even so, there is room for recognition of reasonable public demands.

Consider, first, the subject of efficiency. The public are entitled to expect that courts, as institutions, and judges, as individuals, will conduct their business with reasonable efficiency. Courts, within the limits of budgetary and other constraints, should be effectively administered. Judges should handle cases before them, so far as it is within their power to do so, in such a manner as to promote economy and efficiency. They should produce their judgements reasonably promptly, having regard to their other judicial commitments.

The principles of independence do not require that courts and judges be left entirely unaccountable in relation to matters such as this. The traditional judicial techniques of accountability, which are openness and publicity, can readily be adapted to this end. The process has already begun. Since 1989, all courts in the New South Wales court system have published Annual Reviews of their operations. I do not pretend that they are models of reporting. How could they be? Such things were, in this State, previously unknown. Much of the statistical and other information included in them was never previously kept, let alone made available to the public. A good deal of effort is being put into improving the quality of such information, but it should be recognised that, until quite recently, it would never have occurred to those involved in the court system that information of this kind should be compiled and made available to the public.

Since judges do their work in public, their individual performance is publicly observed. Heads of jurisdiction are seeking to develop methods of dealing with the problem of heavy delays in delivery of reserved judgements in a manner which is not too heavy handed and respects the independence of individual judges, but which at the same time accepts the community's proper concern with judicial efficiency.

Partly because of the novelty of the subject, some of the suggestions made about court performance standards are curious. A measure of court productivity which treats all cases as the same, so that a charge of murder is one case, and a charge of catching undersized fish is one case, and productivity is determined by the number of cases decided, is not likely to command much respect. However, this is an infant science, and it is encouraging that people at least are trying to develop it.

one of the problems involved in relating concepts of productivity to court performance is that what is being measured, when one looks at case disposition, is the output of a complex system in which there are various participants with interests that are often conflicting. The length of time it takes to deal with a given number of cases depends upon the resources, human and financial, which the government is willing to allocate to the court system, any legislation enacted by parliament which affects the conduct of such cases, the diligence and efficiency of the judges who decide the cases, the competence of the lawyers who argue them, and the attitudes of the litigants themselves. (Not all litigants, especially in the criminal area, are in a hurry to have their cases heard). Measuring the output of such a system is one thing. Identifying means of increasing the output is a far more challenging task.

The public and their representatives are entitled to question the techniques by which judges go about their business, for these, along with a number of other factors, affect the efficiency of operations in which the public has a significant stake. They are entitled to expect judges to participate in open discussion of the rules and procedures by which courts function, many of which are judgemade. Modern judges participate actively in law reform commissions and institutes of judicial administration.

The judiciary needs to develop, and is gradually developing, better techniques of explaining its ways to the community. That the process of development takes time is not of itself a cause for concern. It is better for these changes to evolve. To work, they need the general support of the judiciary, whose conservatism about such matters, whilst occasionally frustrating, can also be a strength. It means that, when change comes, it is based on experience and a consensus of opinion, and is not merely the brainwave of a clever individual. Such change is more likely to be lasting and effective.

2. Judicial Education

Modern judges accept that continuing professional education has become part of the job.

The Judicial Commission of New South Wales is a leader in this field, and its educational work for judges has received international recognition. The nature of that work can be seen from the Commission's Annual reports.

In recent years there has been a substantial development in formal arrangements for continuing legal education for all New South Wales judges and magistrates, and also for training and orientation programmes for new appointees. The Judicial Commission, in conjunction with the Australian Institute of Judicial Administration has commenced to conduct residential orientation courses for new judges, which have been attended by judges from all parts of Australia and neighbouring Pacific countries. For several years, the Judicial Commission has conducted orientation courses for new magistrates.

Once again, this is a relatively new area of activity for judges and administrators and its implications are still being worked out. In England, where there is a Judicial Studies Board, there has been debate about the possibility of both formal training and performance review, and the implications that may have for judicial independence which entails, amongst other things, the independence of judges from one another. Both in England and in New South Wales the issue of independence has been handled by an insistence that the senior judiciary should control judicial training and education. However, questions of funding are of practical importance, and that comes principally from the executive. There is a natural tendency for those who pay the piper to seek to call the tune, and this, in turn, produces a degree of reluctance on the part of judicial leaders to press for more funding for this important work. My personal view is that this reluctance should be abandoned. The judiciary should insist upon maintaining control of judicial training and education, but it should be prepared to state its case, publicly, for financial support. We should be less risk-averse. Our independence is not as

fragile as we sometimes appear to think.

What is more controversial, and sensitive, is the form of instruction sometimes proposed for judges and magistrates by various interest groups. Some areas of information are no longer controversial. The Judicial Commission, for example, has conducted formal programmes of aboriginal cultural awareness, and gender awareness. There are, however, groups who would like to see judges and magistrates collectively exhorted to impose more severe penalties for certain offences, or counselled to exercise their discretion for or against certain types of people. Some people seem to want to encourage judicial officers to be aggressively partial in the administration of justice. In fact, some people seem to think that the only good judges are those who would see it as both a right and a duty to tilt the scales of justice in favour of deserving causes.

The dividing line between appropriate information and awareness programmes, and inappropriate indoctrination, needs to be respected. Subject to that, however, judicial education is an important and developing area of activity.

3. The Politics of Law and Order

One of the features of modern life with which judges have to come to terms is that justice, and especially criminal justice, is now administered in a context of saturation media coverage, and highly politicised concern about certain law and order issues.

It always has been the case that some courts have attracted public attention, and some individual cases have received a lot of publicity. However, what constituted widespread publicity even 30 years ago was very different from what constitutes widespread publicity today.

It has been said that the public attitude to war in the USA underwent a great change when American families sat down each night to watch television news programmes depicting casualties with unprecedented visual and emotional impact. To an extent, a similar phenomenon may account for the fact that modern citizens have become convinced that they are living in the middle of a crime wave. Night after night they see, on their TV screens, victims, or relatives of victims, of violent crime, telling their stories, and being asked whether they are satisfied with the sentences imposed on convicted offenders. Talk-back radio programmes are filled with people expressing feelings of insecurity and demanding every-increasing severity of penalties. To all of this, politicians respond by competing with one another to be seen to be tough on crime.

This phenomenon is not peculiar to New South Wales, or to Australia. The same thing is happening in America, England and New Zealand.

Justice James Wood, who conducted the Royal Commission into the Police Service, in a recent address to the Police Academy said:

A ... myth, which has been imposed on the police from the outside, is the notion that police can and should, either through an increase in numbers, or in the aggressiveness of their policing, prevent crime. Relentless law and order campaigns, and attribution of blame to police for outbreaks of criminality, are misplaced. The causes of crime lie elsewhere - in the social and economic conditions of the time, and in contemporary moral values, over none of which do police have any control.

It may be added that judges do not control those matters anymore than do police.

Criminal justice is not the only area of judicial decision-making which attracts popular interest and political controversy. How should a traditionally conservative and reticent institution respond to these circumstances?

Once again, the principles earlier discussed mark out the limits of any appropriate response. Whatever judges do, they cannot compromise their independence and impartiality.

All courts, at all levels in the judicial hierarchy, decide individual cases on the basis of the evidence before them, after hearing argument from the legal representatives of the parties. Any appearance of pre-judgement is to be avoided. This restricts the extent to which judges can speak out about cases or issues, and prevents public comment upon matters which may come up for future argument and decision. How, consistently with the need to maintain both the reality and the appearance of impartiality, can judges engage in public debate about issues of law and justice? Yet, if they remain silent, they are seen as aloof or arrogant, and indifferent to the concerns of the community. They are accused of being "out of touch", and their failure to answer the accusation is taken as further evidence of its truth.

Here again, change is occurring. Judicial leaders, and judicial organisations, are exploring ways and means of making appropriate responses to the demand for better communication. Most court systems now employ public information officers, who liaise with the media and who seek to explain and communicate, in a proper way, the workings of the justice system. It will never be possible, or desirable, for judges to join fully in public discussion of matters of law and order, but there is plenty of scope for improvement in the way in which the system explains itself to the community.

4. The Adversarial Society

From time to time the adversarial method of our system of litigation is called into question. What attracts less attention, however, is the adversarial nature of our whole society.

The political system is necessarily combative. However, there is no reason why the principal institutions of government should be not only separate but also antagonistic. Tension is sometimes constructive, but so is mutual respect and appropriate co-operation.

What the community receives as justice is the outcome of a process to which all of the three branches of government, the

legislature, the executive, and the judiciary, contribute, as do litigants, legal practitioners and others. It is fair to say that all of the participants in that process sometimes appear to be better at maintaining their own power and independence than they are at working constructively with the others in the interests of the public.

There is a lot of room for a better understanding between the three branches of government, and between the government, the legal profession, and the litigating public, of each other's problems and aspirations. In New South Wales a small step in the right direction has been taken by the regular convening of Civil and Criminal Justice Forums, at which Ministers, senior judges, and certain interested public authorities, and the legal profession meet to exchange information. It is not within the capacity of either parliament, or the executive, or the judiciary, acting alone, to make the changes necessary to overcome the problems, especially of cost and delay, which are necessary to satisfy the public's expectations of access to justice. Co-operation does not necessarily involve surrender of power or loss of independence. Unless there is a co-ordinated attack on the existing problems they will never be solved.

In a passage quoted earlier there is a reference to "the need for comity and mutual respect between the legislature and the judiciary". To some, that language may sound antiquated. Why should that be so? Why should not the great institutions of state behave towards one another with comity and mutual respect? If comity is a word of forgotten meaning, then people in public life should once again be made aware of it. Why should conflict and distrust be regarded as the natural order of things? It does not assist the people of New South Wales for the parliament, the executive and the judiciary to regard each other as adversaries. We all aim, in different ways, to serve the public interest. We should behave as if we valued and respected one another. That would be an important contribution to the health and decency of public life in this State.

Justice Murray Gleeson.
