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Does Judicial Independence Matter?

Any discourse on the topic judicial independence possibly invokes the apprehension that everything that needs to be said has already been said and that everyone knows that it matters, and hence, it is unnecessary, even repetitive, to talk about judicial independence any more.

So to begin with a sub-question: Is there a need to talk about judicial independence?

Talking about judicial independence is akin to talking about the rule of law. Everyone knows we have it.

As Sir Gerard Brennan observed, the subject of judicial independence is one that belongs primarily in the public domain. For the purposes of this evening's discourse, I will try to address the topic so that it may be better understood by the community. Necessarily, my observations will not be addressed to the Judiciary or academia.

Lord Bingham, when delivering a lecture at Cambridge University chose as his subject *'The Rule of Law'* because it was an expression used constantly and yet,

so his Lordship said, there was no certainty 'that all those who used the expression knew what they meant.....or meant the same thing'.

Judicial independence is a concept referred to regularly in the context of political announcements, discussions about court decisions, and the relationship between the government of the day and the Judiciary. It is an important concept that lies at the heart of our democratic system of government. Because of that, it tends to be taken for granted. Everyone assumes in Australia that judges are not corrupt, determine cases on their merits, and impartially and fearlessly, in accordance with the law. Yet, I suspect there are different understandings applied by different individuals and sectors to the concept of judicial independence. Hence, akin to Lord Bingham's conundrum as to the meaning of the concept, *'the rule of law'*, we need to understand what is the meaning of the concept of judicial independence. If that meaning can be identified, then a discourse can follow as to whether there is a need to talk about the subject leading, perhaps, to an answer to the primary question postulated: does judicial independence matter?

I will commence by discussing the traditional approach to judicial independence and draw upon its connection with the rule of law. I will then discuss the role of judicial independence in the protection and enforcement of human rights. In that context, I will discuss occasions when judicial independence matters, mostly when the citizen versus the state.

I will then explore the separation of powers and reflect upon the differences in Australia in the recognition of and respect for judicial independence. I will consider some examples in the Commonwealth context, the state sector and, in that context, reflect upon styles of government.

This will lead me to consideration of the modern approaches to government and the phenomenon of judicial independence in practice. I will tease out the topic by reflecting on the facilitation of the Judiciary by the Executive and also, the modern judicial managerial approach to courts' business.

I will then move to a different topic, reactions to sentencing and its relationship with judicial independence. I will touch upon the general philosophical concept of 'justice as fairness'. After reflecting on sentencing, I will turn to the role of the media in the recognition of judicial independence.

I will then move to consider what judicial independence means to whom: the Judiciary, the Executive, the Legislature, the community and the media. I will then turn to my conclusion in answering the primary question, does judicial independence matter?

A TRADITIONAL APPROACH TO JUDICIAL INDEPENDENCE – THE CONNECTION WITH THE RULE OF LAW

As Sir Gerard Brennan observed, a free society exists only so long as it is governed by the rule of law. Sir Gerard also observed that judicial independence exists to serve and protect 'the governed' or, in simpler words, the community. It is a concept described as a bastion, even a fortress. There are evocative descriptions of courts protecting the liberty of the citizen. Judicial independence is a concept that arises in modern times in so many ways – provision of court resources, judicial salaries, the appointment of acting judges and the like.

As long ago as Montesquieu's *The Spirit of Laws* it was said there was no 'liberty' if the Legislature and Executive powers were not separate from the power of judging. Otherwise, Montesquieu said 'the judge might behave with all the violence of an oppressor'.

This is very interesting but we are still not drilling down into what it is that constitutes judicial independence. It seems that the concept comes down to a core principle of the decider of the case being free from influence. This means, free from influence from the government of the day, the parties before the court, the media, other judges' opinions and, even, the predispositions and predilections of the individual judge or judges deciding the case before the court. The aspiration must be for a judge each time he or she hears a case to be like a clean sheet of paper. So, judges when they are sworn into office take an oath or make an affirmation *to do right by all persons, without fear or favour, affection or ill-will*. What these words mean in the judicial oath is that judges will never be frightened or intimidated by what needs to be done; they will not favour one party because for example they know the person or someone connected with the person; they will not like or dislike one party more than the other. Judges will decide cases on the basis of legal principle.

But what is it that judges do? They exercise judicial power. What is that power? The power of judges lies in their judgment. It is the power which every state must have to decide 'controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property'.

So, unlike totalitarian states, democratic states have a forum where disputes between citizens, or, disputes between the government itself and the citizen can be decided impartially. What is more, the citizens are subject to the burden of the power of the courts, that is, the courts can compel the citizen to do something; but the citizen also has the benefit of the power in that they may trigger the exercise of judicial power in their own interest. But it is not only about a forum to make decisions. It is about the decision being made impartially and fearlessly.

Yet, it does not stop there. In order to demonstrate or show that the decision of the case was reached fearlessly and impartially the judge needs to provide reasons, that is, explain why it is that one party wins and the other loses. In other words, the reasoning behind judicial decision making is inextricably interwoven with judicial independence. It is the reasons for the decision that show what was written and drawn on the blank sheet of paper to reach the result at the end.

But there is more. As former Chief Justice Gleeson observed, judges do not set their own agenda. They are only able to decide the cases that come before them, within the parameters and confines of that case. They cannot make up facts or invoke evidence such as expert evidence, which is not before them. Judges have to decide the cases before them, impartially and fearlessly, applying the rule of law.

Credit for the expression 'the rule of law' is usually given to Professor Dicey. Although there are traces of the concept as far back as Aristotle.

Dicey applied three meanings to this concept, the rule of law. First, no one can be punished or suffer any loss for breaking the law except by order of the courts of the land. Lord Bingham observed that this thinking was clear: if anyone is to be penalized for breaking the law, the breach must be proved before a court of the land, not a tribunal picked by the government. Secondly, Dicey said, in as many words: no one is above the law and everyone is subject to the same law applied in the same courts. Thirdly, Dicey said that the rule of law was a special attribute of English institutions, referring probably to the common law. I will put this third aspect to one side.

Dicey has informed the traditional view of judicial independence, especially that of the Judiciary itself.

JUDICIAL INDEPENDENCE AND THE PROTECTION OF HUMAN RIGHTS

Dicey did not contemplate the need to refer to a Bill of Rights, albeit, the existence of *Magna Carta*. But, doubtless, as commentators have observed Dicey may be taken to have expected human rights laws to form part of the law.

The *Universal Declaration of Human Rights* links the protection of human rights with the rule of law: 'a modern democratic society would find it unacceptable for a totalitarian state to assert that it observed the rule of law'. However, again, as Lord Bingham observed 'there is no universal consensus on the rights and freedoms which are fundamental, even among civilised nations.'

To talk about rights is, inevitably, to talk about law. Rights presuppose a framework of demands which constrain and direct the manner in which force may be exercised. The only way in which demands on the exercise of force can be expressed in civic society is through law. Without the law to give them tangible expression, rights become nothing more than aspirations. Law is, as Spinoza said, the mathematics of freedom.

As judicial independence is integral to the rule of law, which is a necessary presupposition for the protection of individual rights, it follows that judicial independence is integral to the assertion of human rights. Without an independent Judiciary, it is impossible to imagine citizens having tangible human rights capable of being asserted against the state. As former Chief Justice Gleeson observed, 'the independence of judicial officers is a right of the citizens over whom they exercise control'.

Judicial independence in that sense, is itself a human right, insofar as it is the human right which presupposes the unfettered enjoyment of all others. It is for this reason that Article 10 of the *Universal Declaration of Human Rights* and Article 14 of the *International Covenant on Civil and Political Rights* both require an independent and impartial tribunal to determine the rights and obligations of individuals in a civil suit, and in any criminal charge laid against an individual. It is also for this reason that the *Draft Principles on the Independence of the Judiciary*, known as *The Siracusa Principles*, which provided the foundation for the Montreal *Universal Declaration on the Independence of Justice* in 1983 describe judicial independence as an 'essential safeguard' of human rights.

It is sometimes characteristic of states that are bound by the rule of the law to regard the human rights of individuals as inconvenient. They attempt to remove individuals from the jurisdiction of the courts and the independent adjudication of the Judiciary. The United States decision to incarcerate what it termed 'unlawful combatants' in a military base built on land leased from the Cuban government outside the purported jurisdiction of the United States Supreme Court was decried as a breakdown of the rule of law and human rights. This Executive decision was an implicit recognition of the ability of the courts and the law to constrain the behaviour of the Executive towards an individual.

Similarly, much was made of the interrogation techniques used on suspected terrorists, particularly, techniques such as water-boarding which were characterised as a form of torture. In the debate, the question was never 'Is torture lawful?' It was accepted by all parties that it was not. The debate was always 'Does water-boarding constitute torture?' Again, this is symptomatic of the power of the rule of law.

Whilst, our legal system has always recognised individual rights, it is only recently, in the Australian Capital Territory and Victoria, that these rights have

been given statutory expression. In this, Australia represents an anomaly amongst common law countries.

In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* comprehensively sets out the human rights which individuals residing in Victoria can expect as citizens. A great deal of public commentary has warned of a cabal of judges mad with new-found power using charters of rights to wreak irretrievable damage on civic governance.

The experience of the Judiciary in Victoria in applying the *Charter* has not borne out these predictions. Fortunately, we live in a democracy that does not routinely violate the human rights of its citizens. As such, the *Charter*, as applied by the independent Judiciary of Victoria, has operated as an important adjunct to the human rights of citizens in this state, rather than instigating any program of radical change. The twin bastions of individual rights, parliamentary democracy and the rule of law administered by an independent Judiciary, have ensured the *Charter* has been smoothly integrated into Victorian society, institutions and jurisprudence.

The Victorian and ACT experience with human rights cases demonstrates the critical importance of judicial independence in construing, enforcing and protecting human rights. So far, the cases have been concerned with drug trafficking, access to public housing, the procedural rights of a vexatious litigant, coercive questioning powers, criminal trial procedure, treatment of mental illness, extended imprisonment and professional practice.

The range of facts and circumstances that have come before the courts reveal two things. First, the variety of human rights sought to be protected against the state. Secondly, the significance of the need for impartiality, inscrutable impartiality where the state seeks to deny the citizen his or her rights.

SEPARATION OF POWERS: AUSTRALIAN DIFFERENCES IN THE RECOGNITION OF JUDICIAL INDEPENDENCE

The separation of powers is critical to judicial independence. In Australia there are differences in the recognition and application of the doctrine of separation of powers between the federal sector and the state sector. In the federal sector, there is sharper recognition and demarcation of the separation of powers between the Executive and the Judiciary. There are reasons for this. Principally, they may be found in the *Australian Constitution* and the provisions in Chapter III enshrining the separation of the power, role and function of the federal Judiciary.

Of course, as Professor Lane has observed other than the High Court, federal courts are discretionary statutory creatures. Whilst the Commonwealth Parliament has the power to abolish and create statutory courts, and indeed this has occurred in the industrial jurisdictions, the fact remains it has not happened to the significant federal courts, the Federal Court and the Family Court. The Federal Court is strongly recognised for its connection with the High Court of Australia. Its Chapter III protection is always raised when the Executive and the Legislature contemplate reforms that potentially impact on judicial independence such as judicial remuneration and the determination of judicial complaints.

The recognition and demarcation of the separation of powers between the Executive and the Judiciary in the federal sector is reflected in the administrative structure established to facilitate and deliver judicial independence.

By contrast, as Professor Saunders has highlighted, Victoria does not, constitutionally speaking, recognise separation of powers vis-a-vis the Supreme Court. The judicial independence of federal judges is analogous to the judicial

independence of state judges and vice versa. Professor Lane has observed that the same arrangements apply to both: Executive control of judicial appointments; removal from judicial office; suspension from judicial office; the meaning of 'misbehaviour' or 'incapacity'; the pre eminent role of parliament in removal proceedings; judicial review of these proceedings; an assured judicial remuneration; and the abolition of a court.

However, there are strong constitutional differences between the federal and state sectors. The judicial independence of federal judges is guaranteed by section 72 of the *Constitution* supported by section 128 which requires a double majority in a referendum to alter a position in the *Constitution*. By contrast, the judicial independence of state judges does not have analogous support. So, for example, the *Constitution Act* of Victoria may be amended, albeit with a joint sitting of the Parliament, under the ordinary 'peace, order and good government' law making power. As to removing judges, in the *Constitution* the removal power is limited to specific grounds whereas, with the exception of New South Wales, no removal provision in any state is restricted to prescribed grounds. However, the independence of courts, both federal and state, is an integral part of these courts' function in protecting and implementing the rule of law.

Whilst the judicial independence of federal courts has the vivid constitutional foundation of the *Australian Constitution*, there must be a foundation for state courts in other constitutional sources. Professor Lane expressed the view that the common law forms the 'matrix of State constitutions'. He argued that just as the *Australian Constitution* is framed in accordance with underlying assumptions including the rule of law, the rule of law applies equally to state constitutions because of the role of *Magna Carta* in all Australian constitutions.

Yet, even on a philosophical as distinct from constitutional level, separation of powers in the state sector must exist, otherwise, for practical purposes the role

of the Judiciary would be blurred with the other arms of government, particularly, the Executive.

All that said, an important development occurred with respect to the role of state Supreme Courts recently.

Earlier this year, in *Kirk's* case, the High Court affirmed that state Supreme Courts have a significant role to play in the guardianship and supervision of their own jurisdiction - the very foundation of judicial independence and the rule of law.

In the context of privative clauses, the High Court held that as Chapter III of the *Constitution* requires there to be a Supreme Court of every state; a state cannot alter the constitution or character of its Supreme Court so that it ceases to meet the constitutional description. Thus, the supervisory jurisdiction to determine and enforce the limits on Executive and judicial power by persons and bodies other than the Supreme Court is a defining characteristic of Supreme Courts under Chapter III.

The High Court has made a profound statement about the imperative of judicial independence. Whilst the High Court does not use the words 'judicial independence', its reasoning is entirely concerned by it. The Court took the view that to allow a state to alter the character of its Supreme Court so that it no longer met its constitutional description, would create 'islands of power immune from supervision and restraint,' and undermine the single common law of Australia. To deprive the Supreme Courts of that supervisory jurisdiction would mean that they were no longer independent in the relevant sense. Furthermore, as the High Court exercises ultimate supervisory jurisdiction over all other courts in Australia, to remove the ability of state Supreme Courts to exercise

supervisory jurisdiction is to remove the High Court's jurisdiction, contrary to the entrenched independence of the Judiciary in Chapter III.

Yet, contrary to the constitutional and philosophical recognition of the critical role of state Supreme Courts in *Kirk*, there are some state government structures that do not properly recognise the role of the Supreme Courts and the independence of the Judiciary. Leaving aside South Australia, in most Australian states a strong, powerful and influential Executive provides the facilities, resources and develops the policies that affect the function of judicial power. To demonstrate, it is instructive to understand the framework of the Victorian Executive model and where the Supreme Court fits in.

MODERN GOVERNMENT PRACTICE AND JUDICIAL INDEPENDENCE

It seems that in the early 1990s the Executive resolved in Victoria to restructure the public sector to create what are sometimes described as 'mega departments'. Essentially, the restructure involved a rationalisation and reduction of the numbers of government departments and permanent heads of those departments. Further, the restructure involved the appointment of secretaries to the departments, that is the permanent heads, who are directly employed by, and accountable to, the Premier. The secretaries of the departments develop the public sector policies of the government of the day in accordance with the directions of the Premier and, of course, the relevant minister. These mega departments have large budgets; one of the largest is the budget of the Victorian Department of Justice. The Department provides technology, human resources services, building accommodation, IT services and indeed everything it takes to enable the components of the Executive to deliver the services required of that department. Some states, for example New South Wales, and until the late 1980s, Victoria, have a discrete Attorney's-General Department (preceded in

Victoria by a Law Department). Those departments are concerned with looking after the courts and facilitating their function.

In Victoria, with the implementation of the 'mega department' structure, the courts, particularly the Supreme Court, were relegated to a lower order within the Executive dependent upon service delivery and provision of resources by the mega department of the Department of Justice. Consequently, duplication of administrative work and subtle infiltration of the exercise of judicial power have occurred in a number of ways.

Thus, the Supreme Court, notwithstanding the doctrine of the separation of powers, has engaged with a government provided IT system that is shared with a major litigator in the Supreme Court, the state, and is subject to the allocation of resources by the secretary of a department who is, individually, a frequent litigator in sensitive and difficult matters where the liberty of the citizen is at stake.

These matters were explored by my former colleague, the Hon. Tim Smith in a paper where he spoke about the 'Behemoth' of the modern state government. It is a thorough and accurate assessment.

A most difficult aspect of the state government structure for courts is the way in which policy priorities are developed. Let me refer again to the Victorian experience. Under the Secretary of the Department of Justice lie a number of Executive Directors with specific portfolios. A group made up of the Secretary and the Executive Directors will meet periodically to discuss the priorities of the Department of Justice for the coming year. Quite properly, the courts are not involved in this process. However, the group ultimately determines the policy and budget priorities and thereby the application of Department of Justice resources for the coming year. If the courts are to succeed in obtaining funding

it is politically sensible to craft the court case for resources to fit within the policy priorities of the Department of Justice. Given the functions embraced in the Justice Department – police, emergency services and corrections for instance – the awkwardness involved in such a structure for courts is immediately understood with regard to the Supreme Court.

Under these arrangements there is a thin façade constituting the separation of powers.

By contrast, in the federal sector the federal courts receive separate funding and are responsible for their own budgets. Of course, they are accountable to the Commonwealth Parliament. Further, the administrative head of the federal courts, the chief executive officer, is also the chief or senior registrar of the court, appointed by the Executive Council and accountable to the Commonwealth Parliament. In addition, the remuneration of the chief executive officers is determined by the Commonwealth Remuneration Tribunal. Hence, we see a much stronger and sharper demarcation of the separation of powers between the Executive and the Judiciary at the federal level.

Additionally, the time taken up by state courts in dealing with a government department, involves double dealing and participation of the Judiciary in administrative responsibility. This has to be done to ensure that the court is appropriately separated and protected from the exigencies of the public sector when it comes to the application of the rule of law and the independence of the Judiciary. It is also a very awkward structure which, given its complexities and the tight control of resources in accordance with government policy, both sides, the Executive and the Judiciary, manage as well as they can. Nevertheless, it is a questionable arrangement. Perceptions are important. It is undesirable to assert formal separation of the Judiciary from the Executive yet, in practice,

apply a pragmatic or expedient approach. Real Judicial independence is significant for the citizen within the structure of government.

We may ask, why should the citizen in the federal sector have a higher level of confidence in the true independence of the Judiciary than would be the case in the state sector?

On one view, the state sector approach is more cost efficient in the delivery of a greater volume of judicial work than the federal sector there being a higher number of filings in the state sector. If we take a fair comparator, a civil proceeding such as a corporations matter in the Victorian Supreme Court, the Federal Court and the New South Wales Supreme Court the whole of cost to government in the state sector is a little under \$3,000 per case, whereas in the federal sector, the whole of government cost is a little over \$11,000 per case. Doubtless, this difference is focussed upon by state treasuries.

Of course, the comparison takes no account of the true cost of the delivery of justice in a state sector system where there is necessarily duplication of process and active involvement of the Judiciary in the administrative aspects of the Supreme Court, thereby taking judges away from their direct decision making work as judges.

The second phenomenon of modern government practice and judicial independence is the modern pressure placed on courts and, therefore, judges to hear and dispose of more cases more quickly. Around Australia in both state and federal courts, there is growing specialization of the Judiciary, increased judge management of cases and, to some extent, judicial involvement in alternative dispute resolution. We know that in the higher courts about ninety-six per cent of all cases settle before trial. It is the remaining three to four per cent, hard rump of cases that are the challenge for the modern court. They are

hard fought cases where the parties usually want to take a trial through to its very conclusion and, in due course, pursue most avenues of appeal. There is not a superior court in the country that does not engage in judicial management of cases. This will only increase with the High Court decision in *Aon*. Law reform agencies and governments, state and federal are anxious to implement civil procedure reforms. Arrangements including over-arching obligations, pre-action protocols, liberal powers of case management invested in courts, narrowed discovery and expanded ADR are intended by governments to reduce the cost to the state of dispute resolution.

This has two consequences. First of all, the resolution of disputes between citizens is more frequently played out in a private rather than the public forum. Secondly, increased pressure is placed upon the Judiciary to play a managerial, as distinct from a judicial, role. One of the dangers of this approach is that judges will be tempted to conduct proceedings, such as case management conferences or early neutral evaluation hearings, in private. They may be pressured, or at least tempted, to conduct judge led mediations where private caucusing with the parties may occur.

Immediately two phenomena arise: closed justice and the risk of tainting the impartiality of the judicial function. Judicial independence is at risk.

REACTIONS TO SENTENCING AND ITS RELATIONSHIP WITH JUDICIAL INDEPENDENCE: THE ROLE OF THE MEDIA IN THE RECOGNITION OF JUDICIAL INDEPENDENCE

In 2007, at a National Judicial College of Australia conference on the topic *Confidence in the Courts*, Professor David Brown delivered a paper exploring the concepts 'popular punitiveness' and the 'public voice'. After observing that there

is a running commentary in modern society on judges and their work in sentencing, he said that:

... [these] forces include the 'rise of the public voice' as part of a more general 'anti elites' political movement; the declining influence of social and legal expertise; the tendency to construct 'community' through fear and the risk of victimisation; and the development of new forms of communication which in their emphasis on images and a shared cultural experience are somewhat at odds with the rationalistic and truth oriented discourses of the law.

Criticism of judicial decisions is not novel nor is it confined to sentencing cases.

Four days after the Communist Party decision of the High Court, Prime Minister Menzies did not make 'legal criticisms' of the decision, but said it caused 'grave concern to some millions' of Australians.

Following intervention by the High Court in the *Tait* case, the Victorian government resolved to commute the sentence of death imposed on Mr Tait. Premier Bolte issued a two page statement saying that the cabinet had been 'forced' to commute the death sentence and that several recent developments (referring to the High Court) had 'virtually deprived the Government of power to discharge its responsibilities to the public'. The Premier continued by referring to the exploitation of the legal system and the use of the 'legal machine' making it 'quite impossible' for the government to discharge its functions.

After the High Court decision in *Mabo*, and then the decision in *Wik*, the Deputy Prime Minister of the day stated his intention to ensure judges appointed to the High Court were 'Capital C conservatives'. On *Wik* it was said that the High Court had 'gone beyond tolerable limits'.

These cases demonstrate the level of tension that arises when the Executive has a sense of frustration at the setting aside of a decision which is politically important to the government of the day. However, as then Justice McHugh

pointed out, 'the courts cannot be moved by the political consequences of their decisions. They must maintain an a-political stance. In contrast to the exercise of Executive power, judges cannot base their decisions on or be affected by, potential political implications and media pressures. The judges must base their decisions on the law'.

This leads me to the very point about the role of the media. These days there is a deliberate approach by some media to campaign for increased sentences. Recently, the Sentencing Advisory Council of Victoria published work that disclosed an increase in the length of sentences imposed in the higher courts in Victoria in relation to certain serious offences. Further research is yet to be done, but there is a real prospect of a correlation between the increase in the sentences imposed and pressure brought to bear by sectors of the media to achieve a populist outcome of increased sentences.

Some media complain about sentencing starting from an expectation that justice is fair. Their criticism often confronts judicial independence and attempts to pressure the Judiciary to sentence more harshly. This media starts with a different premise from the Judiciary. The Judiciary sees justice as just, sometimes fair, sometimes harsh. More than ever, judges are under pressure to be 'fearless'.

When we ask the question: does judicial independence matter? – we need to immediately identify for which purpose or goal are we making the enquiry.

This immediately focuses our attention on identifying what it is about the job of judges that means they must be free to act independently.

The fundamental job of the judge is to apply the law, and to do so justly and from an independent and objective position, without being influenced by self-

interest or the vested interests of others. If this is correct, then we need to note that the key task of the judge is to apply the law in a particular way, not to produce a particular result.

While the result of a particular legal case, for example, a conviction and sentence will in the end be viewed differently by different individuals or groups, as either just or unjust, the judge will have done his or her job if the case has been run and managed in accordance with the law. So returning to the question posed: where does judicial independence fit into the overall objective of the justice system to ensure just legal outcomes for the citizens?

Returning to the issue that is constantly raised by the media – the inappropriateness and ‘softness’ of sentences handed down by the courts. Often there is a complaint that a particular sentence is simply not just. Why is it not just? Because say, a certain number of years imprisonment is simply not fair given the nature of the crime in question. So the appeal is to our sense of fairness.

So how do these notions of justice, fairness and judicial independence operate in relation to the act of a judge determining a sentence?

The connection between fairness and justice has a long history in modern political and moral philosophy. One of its champions, John Rawls, has detailed this connection in his most influential theory, *Justice as Fairness*.

I do not intend to engage in the continuing philosophical debate his 1958 essay has inspired, other than to take note of a key element of his theory which remains a vital component in any analysis of fairness or justice; this is the crucial notion of impartiality.

The philosopher, Professor Amartya Sen, describes fairness, the notion of impartiality and Rawls' theory, in the following way:

So what *is* fairness? This fundamental idea can be given shape in various ways, but central to it must be a demand to avoid bias in our evaluations, taking note of the interests and concerns of others as well, and in particular the need to avoid being influenced by our respective vested interests, or by our personal priorities or eccentricities or prejudices. It can broadly be seen as a demand for impartiality.

While the principles of justice which Rawls specifies may be but one of many sets of principles which could be argued to be at the centre of the notion of justice, the notion of impartiality is at the core of the role of judges in their task of administering justice.

WHAT JUDICIAL INDEPENDENCE MEANS TO WHOM

For the Judiciary, judicial independence involves a strict constitutional interpretation. Judges decide cases fairly, fearlessly and impartially. Judges also believe, very strongly, that they should be supported by the Executive in the implementation of their role and the delivery of judicial independence. Indeed, judges believe that there is an obligation upon the strongest arm of government, the Executive, to properly resource the weakest arm of government, the Judiciary.

The Executive arm of government sees the Judiciary as the enforcement agency of the state. So, for example, when the citizen is to be prosecuted for breaching the laws of the state, it is the courts that supervise the process and determine the breach and the punishment. The Executive also sees the courts as the vehicle for creating certainty in the state by quelling disputes between citizens through dispute resolution. That said, the Executive may see the courts as an obstruction to government business and a frustrating agency for political goals

and power. But that is not how the Judiciary views it nor would it be proper of the Judiciary to think that way.

The Legislature, on the other hand, in strict constitutional terms views the Judiciary as the interpreter of the laws as made by the parliament.

For the community, or those described by Sir Gerard Brennan as 'the governed', the Judiciary is seen as the enforcement agency of the public will and also the protector of the citizen.

The media see the Judiciary as the provider of the news that is presented and marketed to the community in a way that is enticing, interesting, topical and consistent with the modern way of accessing instantaneous information. There are significant sectors of the media that appreciate and understand the role of the courts in protecting the citizen against the state and facilitating the resolution of disputes between citizens.

For the media there will always be a tension with the courts, but simultaneously a symbiotic or cooperative relationship. The courts need the media to explain to the community the work they do. The media needs the courts to provide significant parts of the news.

Similar to the Executive, the media will be frustrated by the courts which exercise their independent judicial function to protect the human right of an individual over and above protecting another right, freedom of speech. The tension between freedom of speech and the human right of a fair trial of an accused citizen is all part of the pressure and difficulty faced by the modern Judiciary.

CONCLUSION

I turn then to the primary question: Does judicial independence matter?

The conclusion is obvious. As a matter of constitutional and legal principle it matters because judicial independence lies at the heart of our democracy. When the Judiciary frustrates the Executive it is a healthy phenomenon of our democracy. For the Legislature, if the laws made are interpreted or constrained in a way not anticipated by it, again, it is a healthy phenomenon of our democracy. For the community, or the governed, the Judiciary is not about populism. That is for the Executive, with the ministers of the government of the day, and the Legislature, through the electoral processes. Thus, whilst the community may on occasion be dissatisfied with a sentence imposed on an individual or with the outcome of a civil case they are able to take comfort and certainty from the fact that, if a time ever comes when they need to be protected from the state, or when they have a dispute with another citizen, they will be heard equally before the law by an impartial and fearless decision maker.

Ultimately, it is what the community thinks about judicial independence that matters.

To draw again from Lord Bingham, to the community I would say this: when the knock comes on the door late at night, when you are arrested and placed in custody, when your insurer unfairly refuses to pay for your damaged home or vehicle, when a sales person tells lies and misleads you on the quality of the product being bought, when a state or local government fails to do what it is bound to do by law at your loss and cost, it is the independent Judiciary to whom you may turn.

Whilst our Judiciary is not threatened by guns, sacking and imprisonment, the community should be alert to the subtle ways judicial independence may be eroded. It is the Judiciary that is always vigilant and protective of the citizen and the state within which the citizen lives. Judicial Independence matters.