

Constitutional Values and the Independence of the Judiciary

Given the current Northern Territory Government's Constitutional Convention, it is probably an appropriate time to pause and consider:

- (a) what values should underlie our constitutional arrangements;
- (b) what practical goals arise from such underlying values;
- (c) what constitutional structure and provisions are required to achieve the goals.

There are two obvious primary values. First, it is for the people of the state to determine by whom they are to be represented and governed. Second, the institutions of government and the officials and agencies of the government exist for the public, to serve the interests of the public. These are the values of open and accountable government. They give rise to the following goals.¹

- (a) government must be conducted openly;
- (b) public officials and agencies must be made accountable for their actions;
- (c) there must be integrity both in the process of government and in the conduct to be expected of public officials.

In order to achieve these goals it is important, among other things, that there be a separation of powers and that the Constitution describe the fundamental relationship between the three parts of the government: the parliament, the executive and the judiciary. More specifically, the Constitution should provide for an independent judiciary because they may otherwise be susceptible to change that is likely to undermine the values and goals referred to above and because, adequately drafted, there is unlikely ever to be a need to remove or amend such constitutional provisions.

An independent judiciary is neces-

sary because the institution promotes the rule of law and precludes the other areas of government from exercising total power. It is a means of ensuring accountability and integrity in the processes and workings of government. It protects the citizens from arbitrary or oppressive executive conduct.

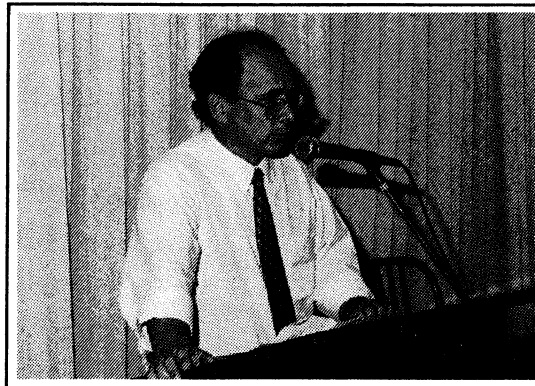
Peace and order can be maintained only by rule of law. Peace and order only exist when there is general conformity with *a priori* rules, breach of which results in penalties, nullification, liability to remedy the breach or other disadvantages².

For the judiciary to adequately administer the rule of law it must be seen to be impartial, independent of government and of any other centre of financial or social power, incorruptible by prospects of reward or personal advancement and fearless in applying the law irrespective of popular acclaim or criticism. Judicial independence requires that:

- a) the judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences;
- b) the judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature;
- c) the other institutions of government respect and observe the proper objects and functions of the judiciary.

The four elements of judicial method are impartiality, procedural fairness, pursuit of justice in accordance with law and exposure to public scrutiny³. Such scrutiny includes the critical analysis of judgments and commentary by the profession and the public on them.

For there to be an independent judiciary the Declaration of Principles on



Steve Southwood, President

Judicial Independence issued by the Chief Justice of the Australian States and Territories and the Beijing Statement of the Independence of the Judiciary in the Lawasia Region suggest at least the following is required:

a) the judiciary should be chosen on the basis of their professional skills and personal qualities; that is, on the basis of proven competence, integrity and independence;

b) there should be impartiality in that appointment process;

c) judges must have security of tenure. Appointment should be until retirement age and tenure should not be altered during the term of office;

d) removal should only be by the Administrator acting on request or advice from parliament and only in exceptional circumstances on grounds of proven misconduct or incapacity. Such misconduct is misconduct which makes the judge unfit to be a judge. The judge who is sought to be removed must have a right to a fair hearing. The importance for protection against removal is obvious. If the government were able to remove a judge with relative ease, there would be none too subtle pressure exerted upon a judge by the fear of removal. There must be security against both direct and indirect attacks on tenure;

e) judges must be adequately remunerated and provided for adequately upon retirement'

f) judges must be free from external interference or circumstances. It should

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be unlawful to pass legislation which seeks to dictate a result in a specific case. Judges need to be immune from being sued in their judicial work. This avoids vindictive actions and enable judges to speak freely when dealing with a case;

g) administrative arrangements affecting the judiciary should be under the control of the judiciary. In particular, the assignment of cases is a matter for judicial administration;

h) it is essential that judges be provided with resources necessary to enable them to perform their functions.

It is also important that justiciable matters be dealt with in the ordinary court system. The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law. The independence and judicial method necessary for perpetrating the rule of law can only exist in a proper court system. Finally the jurisdiction of the Supreme Court should not be limited or restricted.

ENDNOTES

1. *Report of the Royal Commission into Commercial Activities of Government and Other Matters*, Part II pp 1-9; 1-10
2. The Honourable Sir Gerald Brennan, Chief Justice of Australia, "Why Be A Judge?" (1996) 14 *Australian Bar Review* 89 at 90
3. *Ibid* p 91

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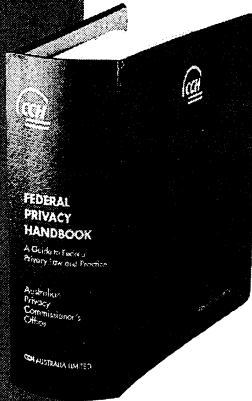
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