INDEPENDENCE OF THE JUDICIARY IN THE NEXT MILLENNIUM

Justice Bruce Debelle joined the Territory profession at ceremonies to mark the Opening of the Legal Year in Darwin and Alice Springs. This is an edited version of his luncheon address.

We stand at a unique time in history. We have this year truly entered upon the next millennium. We are also celebrating the Centenary of Federation. But I do not wish to use this unique coincidence of two moments in history to reflect on the achievements of our legal past or consider what reforms are required to cope with the exponential advances in science and technology, for example, internet transactions and genetic manipulation — I leave that to Mr Justice Kirby.

Instead, it is the independence of the judiciary about which I wish to speak today. The year 2001 marks not only the beginning of the next millennium and 100 years of Federation but it is also the 300th anniversary of the enactment of the Act of Settlement in 1701. It is the Act of Settlement which secured the independence of the judiciary in England, a constitutional provision which was brought to Australia by the English Colonists.

The English Colonists also brought with them the rule of law, one of the hallmarks of our democratic Westminster system. The rule of law has essentially two main elements. The first is freedom from the exercise of arbitrary power by government. It means the supremacy of law as opposed to the influence of arbitrary power. No person is punishable except for a distinct breach of law established in the ordinary legal manner in ordinary courts of law. In that definition I emphasise the double use of the word "ordinary". Voltaire was particularly alive to absence of the rule of law in France in the 18th Century, contrasting it with England. He had good reason to know the difference. In 1717 he was sent to the Bastille for a poem which he had not written, of which he did not know the author, and with the sentiment of which he did not agree. Eight years later, by then the literary hero of his country, he was lured from the table of the Duke and thrashed by the Duke's lackeys in the presence of their master. He was unable to obtain either legal or honourable redress and, because he had complained of this outrage, paid a second visit to the Bastille.

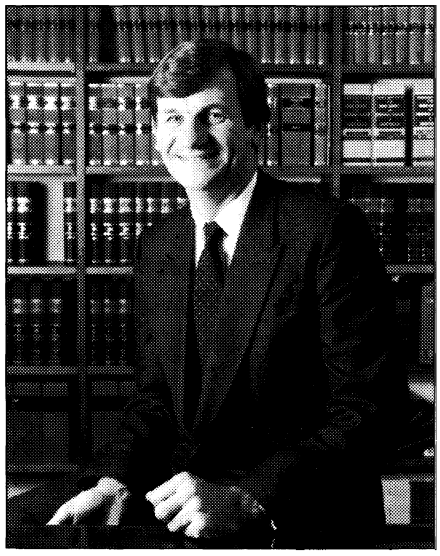
The second element of the rule of law is equality before the law. In other words, no person is above the law. But it means more than that. It means that every person no matter how high or low, whatever his rank or station, is subject to the ordinary law and amenable to the jurisdiction of ordinary courts. Thus, all persons in this country, including even the Prime Minister and the Governor-General, are amenable to the law — this is striking to many observers in Asia and Eastern Europe. As Gleeson CJ pointed out in his Boyer lectures last year, it is the rule of law which restrains and civilises power. It is not the enemy of liberty but its partner.

I suggest that it is the independence of the judiciary which has enabled the rule of law to prevail in our system. A number of other countries have constitutions which soundly proclaim the liberty of the individual and freedom of expression but do not enjoy the rule of law. Article 2 of the Constitution of the Russian Federation states:

> "The individual and his rights and freedoms are the supreme value. Recognition, observance and protection of human and civil rights and freedoms is the obligation of the state."

But do Russians truly enjoy the rule of law and the protection of those high sounding words?

In this country, as in England and in other jurisdictions where the common law prevails, we are accustomed to



Justice Bruce Debelle

judges ruling upon the validity of executive action or even the validity of what Parliament perceives is significant legislation. Consider how observers in other jurisdictions where the judges are not independent would view such matters as the High Court invalidating the proposed nationalisation of banks by the *Banking Act* 1947 and the proscription of the Australian Communist Party by the *Communist Party Dissolution Act* 1950 and upholding the use of the treaties powers in the *Franklin Dam Case*. Some of our constitutional liberties are the result of independent judges interfering with executive action. *Entick v Carrington* is an obvious example.

We should not forget that it was a long evolution over some 600 years before judges became independent. The constitutional struggles of the 17th Century were particularly significant. They enabled judges to be free from executive interference and ensured that judges would be paid an adequate salary out of public revenue, a provision necessary to avoid bribery which had been inherent in earlier times. It was not until the judges became independent that the rule of law truly developed. When Parliament enacted that judges held office while of good behaviour, judges became free from

executive and parliamentary interference and that freedom enabled the rule of law to prevail.

While the rule of law depends upon an independent judiciary, both in turn require the support and confidence of the community. The rule of law will not prevail in a time of revolution. Revolution is likely to occur when the community loses confidence in the laws which have been made or the manner in which they are being forced. The public must have confidence in both judges and in the legal system.

How will judges preserve and maintain that confidence? They will do so first by giving decisions according to law. It is essential, therefore, that persons appointed to the courts at all levels should have the experience and technical expertise to discharge their task. Views are sometimes expressed that courts should be more representative of the community. It is a view that I find difficult to accept. Judges do not represent a particular constituency, a fact which appears to have been overlooked by the writer of a recent letter to the *Northern Territory News*. They have no agenda. Their task is limited simply to deciding the cases brought to them. Their independence means that they have no need to seek popularity or be influenced by public opinion or by any pressure group.

Judges also maintain confidence by recognising the constraints upon the exercise of judicial power. This is not a prescription for a supine judiciary. Instead, it is to recognise the proper constraints of the separation of powers. To adapt the words of Gleeson CJ, again in his Boyer lectures, the legal reasoning which demands respect is that which adheres to legal principle.

Confidence is also maintained by the fact that judges are clearly accountable in a most public way for their decision-making. Litigation is conducted in public. Judges have an obligation to give reasons for their decisions. Those reasons are public and are liable to appeal. The work of judges takes place in an open and public way. It is a manifestly transparent process. Secrecy is anathema to the process. Judges are accountable in other ways. Everything they do, even their level and source of remuneration, should be open to public scrutiny. Confidence will be engendered by the judiciary being seen to be independent from Parliament and the Executive.

Judges will also foster confidence by educating the court about their role and function. I do not question the well-established principles that judges do not engage in public debate about the merits of their decision and that they do not become involved in political process. Instead, I suggest that judges should be taking a more active role in educating the community about the legal system in general and the role of judges in particular. The community should be informed of the constitutional struggles which led to the independence of the judiciary and the establishment of the rule of law. In that way, the community would be assisted in understanding the need for an independent judiciary and how it guarantees that courts are the last bastion between the citizen and government and between the citizen and the other powerful litigant.

In short, judicial reticence is a desirable quality. But it should not be a muzzle. Judges have the capacity to identify the topics on which they might properly speak. Equally important is an independent legal profession.

In addition to the traditional ways of informing the community by addressing community groups, schools and the like, I suggest that judges should write educational articles for publication in the press as well as in other journals. The Internet provides an extraordinarily useful tool. Most courts in Australia have websites with standard information such as court lists, contact numbers and the like. These websites can be used to provide complete reasons for a sentence, thus providing additional and more accurate information than might be contained in a media report. It might be possible also to provide useful summaries of decisions in which there is considerable public interest. In this respect, I applaud the launch of the new website of the Supreme Court of the Northern Territory by the Chief Justice this morning.

In short, judicial reticence is a desirable quality. But it should not be a muzzle. Judges have the capacity to identify the topics on which they might properly speak. Equally important is an independent legal profession. In this context, independence means a profession which are able to advise or represent any client, no matter how unpopular the cause and to represent that client without fearing any kind of recrimination or retribution. The profession is under constant attack. At this time the Bar in some of the jurisdictions has been called upon to defend two long standing rules of conduct. The first is the rule that requires a solicitor to brief a barrister. The second is the rule that barristers should not practise in partnership. Both are said to be anti-competitive.

The profession must be ready to examine its conduct rules and defend what must be maintained in the public interest. The public interest demands a strong and independent profession. This is not the proper occasion to embark upon an examination of the need for the two rules I have mentioned. I only note that it takes but a moment's reflection to realise the rule against practising in partnership promotes rather than diminishes competition. More importantly, it and the cab-rank rule assist the presentation of unpopular clients or causes.

The real safeguard for the protection of civil liberty is not to be found in high sounding declarations of civil liberty but in an independent judiciary which is capable of upholding and enforcing the law. Without an independent judiciary and an independent legal profession, declarations of rights are but empty shibboleths. Both judges and the profession have a duty to inform and educate the community. Unless we provide that information and that education, we run the risk of apathy undermining these essential bulwarks of our democratic system.