

SOUTHEY MEMORIAL LECTURE 1981: JUDICIAL INDEPENDENCE — A FRAGILE BASTION

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[An independent judiciary is a necessary component of free societies but at the same time is one of its most fragile organs. The problems associated with judicial law-making and the casting of the judiciary in the role of interpreting legislation that affects the fundamental rights and civil liberties of ordinary citizens are but two of the instances where that judicial independence comes under great stress. The Right Hon. Sir Ninian Stephen, then of the High Court of Australia, addressed these and other related issues in this speech delivered at the University of Melbourne on 29 September 1981.]

In Western democracies phrases such as 'independence of the judiciary' and 'judicial independence' have a re-assuring ring to them. In this they share those same qualities that are found in the terms 'responsible government' and 'the rule of law'. They re-assure because they suggest the existence of a working democracy and of a government which respects individual liberties.

But just as responsible government and the rule of law are more easily acclaimed than understood, so too with judicial independence. One may ask of whom must the judiciary be independent, and why does it matter to anyone but judges that they should be independent? And are there really any potential threats to that independence? These are the questions which I want to discuss tonight.

As to the first of these questions, I will be concerned only with independence of the other arms of Government, the lack of dependence upon either the legislature or the executive. There are, to be sure, other dependencies of which judges should be free and some of these come from no external source: to be committed to an ideology or to a particular faith or doctrine to such an extent that one forfeits the ability to do justice with that moderate degree of impartiality of which the merely mortal judge is capable is also to have forfeited true independence. But of such dependencies I do not speak tonight: whatever virtue lies in the judicial independence with which I am concerned is to be found in the freedom of judges from the influence of politicians and of the bureaucracy.

I judge this independence to be an important virtue of a free society, but nevertheless it is one of modest proportions; a virtue of a lawyer-like, not on an heroic, scale. The reason for this lies in the nature of the work of judges in the law. Their prime task is to administer the law as they find it. And what parliaments validity enact, whether good or evil, becomes a part of the whole body of law which the judges must accept and administer. So

judicial independence, if it is to conform to notions of representative democracy, can never be at odds with whatever valid laws parliament may make, and it must also accept and enforce bureaucracy's lawful administration of those laws. An independent judiciary is accordingly, in itself, no sufficient guarantee of liberty or of the rights of minorities; only a parliament which by its laws respects liberty and minority rights can give a society worthy of being called free and democratic. Justice Didcott of the South African Supreme Court, dealing with the operation of a law of the Union upon a member of the powerless black majority and being asked to certify whether what had been done had been 'in accordance with justice', said in a recent judgment:

It may have been in accordance with the legislation and, because what appears in legislation is the law, in accordance with that too. But it can hardly be said to have been 'in accordance with justice'. Parliament has the power to pass the statutes it likes, and there is nothing the courts can do about that. The result is law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation.¹

But within its own modest limits judicial independence conduces to the free society and it is within those limits that I confine myself tonight. If judicial independence is in itself far from a complete protection against absolutism in government it is nevertheless a sure touchstone of freedom under the law; where it exists absolutism has not yet established itself; and where it is absent absolutism is likely to have free rein. It was Lord Atkin who, in his memorable war-time dissent in *Liversidge v. Anderson*,² reminded us that it is the judges who 'stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law'.

There are two important and respectable views abroad today which, if put into effect, seem to me to involve, as a necessary although quite unintended consequence, the placing of new stresses upon the independence of the judiciary. The first of these views is that judges should be committed judicial law-makers, consciously and persistently using their judgment-making powers as an instrument with which to reform the law. The second is that judges should feature in a role new to them in Australia, that of interpreters of broadly expressed guarantees of human rights, those guarantees to be entrenched in our federal Constitution or, if they cannot be so entrenched, to at least appear on the statute book.

Each of these views has, of course, much to be said for it; and of late each has attracted distinguished and enthusiastic advocates from amongst the judiciary both in Australia and in the United Kingdom. And, to be sure, they have their critics too. The continuing debate is vigorous, not being

¹ *In re Dube* 1979 (3) S.A.L.R. 820 (N) cited in Neier A., 'The Judiciary's Role in South Africa: Institutional Limitations and Moral Leadership' (1980) 54 *New York University Law Review* 1163, 1169.

² (1942) A.C. 206, 244.

short of eager participants on either side, in whose hands it may safely be left. My concern is not to enter that debate but rather to look at possible consequences of these two views in terms of their effect upon the independence of the judiciary. In any final weighing of merits and demerits this seems to be a factor of no little weight, yet one which has, I think, not always attracted the attention which it deserves.

But first an attempt at a definition, followed by two opening propositions. My definition of an independent judiciary is a judiciary which dispenses justice according to law without regard to the policies and inclinations of the government of the day; such a judiciary will, as I have said, unhesitatingly accept and give full effect to whatever valid legislation may be enacted. It is no part of the work of a judge in our system to question the unequivocal terms of a valid statute, whatever may be its moral or ideological overtones; the government of the day is ultimately answerable to the electorate, and to it alone, on those counts. But it is only when a government's wishes have been thus translated into valid law, and not before, that those wishes, now expressed in legal form, become of relevance to an independent judiciary; until then those wishes will be no part of the body of law which alone is the judiciary's task to administer.

I have qualified the judiciary's obedience to the laws of parliament by the adjective 'valid'. Since in Australia we possess both a written constitution and a tradition of judicial review of legislation, our judiciary, in addition to administering the existing law, must also determine, by reference to the Constitution, the validity of challenged legislation. This additional task an independent judiciary must also undertake unaffected either by the policy or the wishes of the government of the day.

My first proposition is that an independent judiciary is a characteristic of free societies. Modern societies which lack an independent judiciary are, I suppose, of two sorts. Those systems of government of the communist model necessarily afford little room for any independence of the judiciary. This is not because of any decay of the system which has led to the invasion by other branches of government of areas in which the judiciary should be left to function independently. It is, rather, because the system itself recognizes no place for judicial independence: the judges 'are not allowed to be indifferent to the policies of the government', they must 'be observant of the directives given by the Communist Party and the government'.³ In such systems of government to speak of judicial independence is not only irrelevant, its absence is in itself no point of criticism; if criticism there is to be, it will concern aspects of the polity more fundamental than the role of the judiciary. Accordingly, of such systems I have nothing to say tonight.

But there are systems of government closer to our own in the sense that they retain some of the trappings of the same democratic model, and in

³ David R. and Brierley J., *Major Legal Systems in the World Today* (1978) 243.

which instances abound of judiciaries deprived of independence; where governments, intended, and often purporting, to rule by democratic processes, ignore settled forms of law-making and law-enforcement. Despite an outward show of democratic legitimacy, arbitrary power is in fact exercised by the executive and the judiciary acts in accordance with its wishes, regardless of the formal state both of the enacted law and of the enshrined constitution. In such societies most of us would regard the individual as having been deprived of important rights and freedoms.

While such societies provide instances of the absence both of an independent judiciary and of a free society, it is less easy to demonstrate a causal and temporal relationship between the loss by a judiciary of its former independence and the loss of individual freedom in that society. Perhaps turning the proposition inside out assists in making it good. Suppose a judiciary, once truly independent but which has come to accept that its decisions should be such as will meet with the approbation of government. The judges, or those of them who are left, will then either actually receive and act upon instructions from government as to how they should decide each class of case which comes before them or may, by anxious watch and constant study of the policies of government, learn for themselves what is expected of them in the disposal of cases. In either event, the outcome will be to destroy the role of the courts as disinterested arbiters, dispensing justice in accordance with law. Instead, both in the eyes of the public and in the judges' own eyes, the courts will have become no more than another mechanism for the promulgation and enforcement of government policy. And once this process is complete the individual will have lost all opportunity to seek protection of his rights according to law. His future will thereafter depend upon the uncertain benevolence of an all-powerful executive, perhaps in the shape of a dominant political party. What I have described was very much the fate of the German judiciary under the Nazi Party over the twelve years from 1933 until the collapse of Germany in 1945.⁴

The loss of an effective independent judiciary may also occur in a less traumatic and hence perhaps more insidious way. The traditional courts and their judiciary may be left outwardly untouched but their jurisdiction steadily diminished by the assignment to special tribunals of all those areas in which an authoritarian government wishes to intervene. The special tribunals, creatures of the regime, will then administer those sensitive areas according to the wishes of government, while the courts, retaining apparent independence, will, in the innocuous areas left to them, have no occasion to exercise it. Yet such a government may display a facade of judicial

⁴ Lowenstein K., 'Law in the Third Reich' (1936) 45 *Yale Law Journal* 779; Lowenstein K., 'Reconstruction of the Administration of Justice in American-Occupied Germany' (1948) 61 *Harvard Law Review* 419, 442-4; Pappé H. O., 'On the Validity of Judicial Decisions in the Nazi Era' (1960) 23 *Modern Law Review* 260, 270.

independence. This was very much the Spanish model under Franco.⁵ The process is, designedly, less dramatic than in the earlier model but the loss of effective judicial independence is no less real.

Of course independence alone is no guarantee of the excellence of a judiciary; the human weaknesses and prejudices of its members, the tardiness of its responses, the excessively high cost of the remedies it offers, any of these may depreciate its worth. But so long as it retains its independence from the other arms of government of the day it will at least afford to the individual that impartiality of adjudication, free of government dictation, which no subservient judiciary can ever provide.

Governments of the present day necessarily pose a greater threat to individual liberties than did those of last century. Modern governments are expected to intervene in areas previously little regulated and the result is a greater intrusion into the private lives of those they govern. The greater that intrusion, the more occasions there will be for the citizen to complain of it. For redress of such complaints, whether because of a denial of benefits to which a citizen is entitled or of unlawful interference with his freedom of action according to law, it will be primarily to an independent judiciary that the citizen must look. And only an independent judiciary, including, of course, those who staff courts set up to review exercises of administrative discretions, can offer the assurance that those intrusions are kept within the limits which the law imposes. So much for the proposition that judicial independence is a characteristic of free societies, and an important one.

My second proposition is that an independent judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion indeed. This combination of seemingly contradictory qualities is to be explained, I think, by the peculiar nature of courts as a constituent part of government. Courts must rely upon other arms of government for their funding and material support, for the enforcement of their judgments and for their defence against attacks of all sorts. And courts possess no initiating power: before they can act at all their jurisdiction must first have been invoked by litigants bringing claims before them; only then do the latent powers which they possess become manifest. As Alexander Hamilton wrote some 200 years ago, the judiciary has neither influence over sword or purse, nor direction of the strength or wealth of society. It has neither force nor will but only judgment and is ultimately dependent upon the executive arm even for the efficacy of its judgments.⁶ Hence the judiciary is the one branch of government which is an unlikely candidate as despot; despite the great powers which it is capable of exercising, especially in the area of judicial review, it remains very much at the mercy of the other arms of government. Those other arms may easily

⁵ Toharia J. J., 'Judicial Independence in an Authoritarian Regime: the Case of Contemporary Spain' (1975) 9 *Law and Society Review* 475.

⁶ Hamilton A., Madison J. and Kay J., *The Federalist* (1961) 489 (Chapter 78).

enough come to view the courts as an impediment to what they regard as the expedient exercise of power, and hence better neutralized by being deprived of their independence. There must be few governments which do not occasionally regard their courts in this light; and these few are not likely to include those governments which are obliged to govern under the restraints of a constitution which confers only limited powers, the bounds of which are determined by the courts.

What ultimately protects the independence of the judiciary is a community consensus that that independence is a quality worth protecting, the citizen being better served if the judiciary is preserved from domination by those more overtly powerful elements of governments, on whose support the judiciary is dependent, yet whose exercise of power the judiciary is charged with keeping within bounds prescribed by law. As Archibald Cox has said, speaking of the U.S. Supreme Court under Chief Justice Warren:

Court decrees draw no authority from the participation of the people. Their power to command consent depends upon more than habit or even the deserved prestige of the justices. It comes, to an important degree, from the continuing force of the rule of law — from the belief that the major influence in judicial decisions is not fiat but principles which bind the judges as well as the litigants and which apply consistently among all men today, and also yesterday and tomorrow.⁷

Without that community consensus operating as a restraint, the temptation for governments to erode the judiciary's independence is likely over time to prove fatal to it.

But this community consensus supporting the independence to the judiciary may be less easy to maintain in the face either of highly activist judicial law-making and or of judges entrusted with the interpretation and application of entrenched guarantees of human rights. It is important to see why this should be so; otherwise that consensus, and with it judicial independence itself, may unwittingly be placed in jeopardy.

I take first the matter of law-making by judges.

Let me immediately disclaim any belief that judges either do not or should not make law. The rather sterile controversy which long echoed down the corridors of law schools and was to be heard, in more muffled but, if anything, more querulous tones, in judges' common rooms, as to whether judges *do* make law, may surely now be regarded as long since laid at rest, having been answered with an emphatic 'of course they do'. The lively debate has shifted to questions of occasion and mode. Distinctions of occasion are drawn between, for example, judicial law-making in areas of judge-created common law and in those other areas where the legislature has spoken and statutes have prescribed what shall be the law. Distinctions of mode are concerned with the manner of judicial law-making, whether it should be adventurous, in advance of perceived expectations in the community, or should instead do no more than keep abreast of, or perhaps even lag a cautious distance behind, current community expectations.

⁷ Cox A., *The Warren Court* (1968) 21-2.

It should also be said, if indeed it needs saying, that adventurous judicial law-making is in no sense the domain of the politically progressive. In the past perhaps the best-known examples are of judges blunting the edge of reform and turning back progressive tides. I advisedly choose two overseas illustrations: first, those decisions of the English and American courts of the 19th century which, beginning in the early days of the Industrial Revolution, served to protect the increasing number of large-scale employers of labour against claims by their employees injured by the negligence of fellow servants. This was done by creating the doctrine of common employment, of which it was said in the House of Commons at the close of the century that 'Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase'.⁸ Together with the doctrines of contributory negligence and *volenti not fit injuria*, it long served to shield employers from a substantial part of the cost of industrial accidents. American courts were no less active in taking up and developing the doctrine⁹ and their decisions were in turn relied upon in the United Kingdom.¹⁰ It took until the last decade of the century for Parliament to introduce the first ameliorative legislation, and until 1948 finally to abolish it.¹¹ Secondly, the United States Supreme Court was at various periods not only dominated by powerful conservative forces, but simultaneously adventurous in its constitutional law-making. *Dred Scott v. Sandford*,¹² decided in 1857, which imported into the unorganized territories of the Union the status of slavery, is a prime example. It provoked Lincoln to make a bitter attack upon the Court in his first Inaugural Address. So too were the decisions of the conservative majority of the Court in Roosevelt's New Deal era. Each of these instances provoked extreme public hostility against the Court. It has been said of the *Dred Scott* decision¹³ that but for the distracting intervention of the Civil War the Court and its power would not have survived unchanged, such was the strength of the reaction against it.¹⁴ The striking down of New Deal legislation produced a no less traumatic reaction and, again, it may have been only the partly fortuitous but rapid changes which occurred in the membership and voting pattern of the Court which left its judicial independence untouched.

Although judicial law-making of a highly activist sort has no necessary connexion with political radicalism, the operation of all judicial law-making is radical in a quite different sense. What distinguishes it from law-making by a legislature is, then, much more than the actors involved in the respective

⁸ A remark of the Secretary for Ireland in 1897. Quoted in Friedman L. M. and Ladinsky J., 'Social Change and the Law of Industrial Accidents' (1967) 67 *Columbia Law Review* 50, 53 n. 13.

⁹ *Farwell v. Boston & Worcester Railroad Corp* (1842) 45 Mass. (4 Met.) 59.

¹⁰ *Barton's Hill Coal Co. v. Reid* (1858) 111 Rev. R. 896, 906.

¹¹ Law Reform (Personal Injuries) Act 1948 (U.K.).

¹² (1857) 19 Howard 393.

¹³ *Ibid.*

¹⁴ Carr R. K., *The Supreme Court and Judicial Review* (1942) 258.

processes. The abrupt and radical nature of its operation is most marked when the judicial law-maker is, like the High Court, the appellate court for appeals from a number of jurisdictions, each possessing its own legislature. Assume some doctrine of the common law which is unaffected by statute. If a decision of the High Court makes a change in that doctrine, the law throughout the Commonwealth is, without more ado, immediately altered; nothing more than the announcement of the decision is required to change it. To achieve a like result through legislation would require each of six State legislatures, eleven chambers in all, to pass an identical measure; it would also require appropriate action in the Territories. Such a remarkable feat of co-ordinated legislative law reform would probably need to be preceded by years of intensive preliminary work by Commonwealth and State law reform commissions and to be co-ordinated at meetings of state and federal law officers and draftsmen; and the whole uniform pattern would continually be at risk of some political crisis disrupting a particular State Government's legislative programme.

The instant law-making which is the product of the judiciary is no calculated outcome, deliberately conceived and attained. It is, rather, the unintended but inevitable product of the judicial method and reflects the judiciary's relative lack of resources and powers designed for law-making; courts are well enough equipped for their task of adjudication according to law, but not as well equipped for other tasks. A court cannot select for itself a chosen field in which to make law, it is dependent for its law-making opportunities upon the cases that come before it. At best, if it happens to possess a discretionary appellate jurisdiction, it may exclude cases from its lists, but it cannot conjure up cases to provide it ready-made with an area in which to legislate. And because it must deal with cases as they come before it, it has little opportunity to make any broad preliminary enquiry in an area it is about to enter as legislator; it must rely, instead, upon the submissions of counsel, narrowly directed to the case in point and to the interests of the respective clients, who will usually have little interest in anything but the outcome of their case. A court will have only such time for its own research as the crowded court lists allow; it will lack any extensive research staff and will labour under the familiar restraints which the adversary system imposes upon judges in undertaking any independent ascertainment of fact or opinion. It will not hear the views of third parties who, having no interest in the particular litigation, may nevertheless be vitally affected by any resultant change in the law. Even if it could hear them, it would not be entitled to take account of what they said if to do so would be to deviate from its primary task of doing justice as between the parties before it.

It is difficult to conceive of two more different modes of law-making than that of the legislature, supported by law reform agencies, and that of the judiciary; on the grounds of efficiency, if measured in terms of speed in

creation, judicial law-making is unquestionably superior. But such efficiency can be bought at too high a price; the law-making processes of the despot are, after all, also highly efficient, changing the law by a stroke of the pen. And this abrupt and radical quality, this efficiency if you like, of judicial law-making is one of its features which bears on judicial independence. Compare it with the more orthodox process of law-making: it is no accident that the latter's approach to law reform is a deliberate one. The painstaking work of law reform commissions, their research, their enquiries, their consideration of submissions from interested parties and the detailed reasoning supporting their conclusions, these all go to make up one entire process of reasoned persuasion. If that persuasion be successful, the reshaping of the law will be the less likely to appear arbitrary, even to those whose interests that reshaping adversely affects. And the legislative process which then follows plays its part. The passage of a measure through the legislature confers a unique stamp of democratic legitimacy, valuable in a country possessing democratic traditions. Moreover the legislative process is exposed to, and provides a safety valve for, those community pressures which, if not released in this way, may otherwise build up to levels dangerous to the system itself. An elected legislature as the identified and visible maker of laws can be seen to be responsive to legitimate pressures and to the strongly held views of the community. Courts, on the other hand, confer no democratic legitimacy upon the law they make and their judgments are neither responsive to, nor afford any relief for, the pressures of community concern which bear so strongly upon an elected legislature which must periodically go to the people.

It is, of course, a constant complaint of the full-time law reformer that all too seldom and all too tardily does the appropriate legislative process in fact follow and give effect to the work of law reform commissions. Apologists refer to the excessive pressures upon the time of present day legislatures; less amiable critics suggest that some legislatures have so declined that their proceedings have degenerated into a continuous and elementary election campaign.¹⁵ Those impatient for change accordingly find irresistible the apparent ease and efficiency of a court's judgment as a law-making tool and urge its more adventurous use, not always appreciative of the inherent disadvantages which such use entails and the possible long-term consequences it may involve. It was Lord Devlin who asked plaintively:

Why is it, . . . that the denunciators of judicial inactivity so rarely pause to throw even a passing curse at the legislators who ought really to be doing the job? They seem so often to swallow without noticing it the quite preposterous excuse that parliament has no time and to take only a perfunctory interest in an institution such as the law commission.¹⁶

¹⁵ Reid G. S., 'The Changing Political Framework' (January 1980) 24 *Quadrant* 5, 7.

¹⁶ *The Judge* (1979) 17.

While judicial law-making of an adventurous sort by an appointed judiciary is likely in any democracy to give rise to doubts as to its legitimacy, there are in our Australian federal and judicial system features likely to give added force to such doubts. The careful distribution of legislative powers between Commonwealth and States which is a consequence of our Constitution was regarded as critical at the time of federation and has ever since been a central element of our federation. Yet the judicial law-maker is largely free to ignore it. No matter whether the subject matter be within the grant of federal legislative power or in an area which the Constitution has left to State legislatures, it will be equally open to the judicial law-maker, who is subject to none of those restraints which limited grants of legislative power or the neutralizing threat of inconsistency imposes upon Australian legislatures. The judicial law-maker is in this sense as legislatively omni-competent as is the British Parliament. And one judicial law-maker, the High Court, has unique opportunities for the exercise of these powers; unlike the Supreme Court of the United States, it serves as a general court of appeal from all Australian courts, whether state or federal, and thus enjoys an almost boundless field in which to engage in judicial law-making. The more adventurous becomes an appointed judiciary's exercise of its law-making powers, the greater will the temptation be for governments to ensure, at least by highly selective appointments if not by other means, that these quasi-legislators will make laws which reflect the views of government.

The inherent characteristics of law-making by judges, combined with those features unique to Australia, ensure that the assumption by our courts of any very extensive role as activist law-makers and reformers will expose their independence to forces which it may be ill-equipped to withstand; and should the courts' *ad hoc* law-making on occasion prove ill-advised the better armed will those forces be. As a recent Solicitor General of the United States has said:

When courts begin to make law wholesale, or if you will, act like legislatures, they quickly come under attack from many sources for their alleged usurpation of power as they appear to exceed the proper role perceived for them in our scheme of government.¹⁷

And Senator Moynihan has observed that:

If the federal courts are going to make law (a legislative function) and enforce law (an executive function) . . . they are inevitably going to find themselves in conflict with the legislative and executive branches.¹⁸

There are two quarters from which activist judicial law-making may inadvertently arouse powerful opposition, anxious to do battle with judges whom they have come to perceive as their opponents, and perhaps prepared for that purpose to extend their attack to include the concept of judicial

¹⁷ McCree W., Address to the Annual Dinner Meeting of the Judicial Administration Division of the American Bar Association 1978, quoted in Kaufman I. R., *Chilling Judicial Independence* (1979) 14.

¹⁸ Lehman Memorial Lecture (1978), quoted *ibid.* n. 43.

independence itself. First, there are all those interested groups injured by particular instances of judicial law-making; then there are the other arms of government. I do not, of course, suggest that either will engage in anything so sinister as a premeditated undermining of the judicial arm of government. Nor need I; my thesis is indeed made out if what happens is no more than sustained attacks upon the courts, magnified in their effect upon the public consensus by the distorting mirrors of the media.

Initiation of such attacks can be expected from those interest groups adversely affected by whatever change in their position has been brought about by judge-made law. Their hostility will be the greater because they have been affected by the decision in a case to which they were not a party. Unheard and unheeded, they will feel that their legal position has been altered for the worse by the legislation of an unelected and unrepresentative body that will not even purport to have considered their particular circumstances or to have heard any submissions concerned with their interests or those of the public generally.

It will naturally enough be to the legislative and executive arms that they will complain and if they represent important interests in the community both may be inclined to listen favourably to them. That what is complained of will be described as unjustifiable judicial intervention in the legislative field is not likely to make the orthodox occupant of that field, the legislature, or what has come to be the initiator of the legislative process, the executive, any the less sympathetic to the complaints it receives.

Isolated attacks the judiciary can no doubt survive unscathed, but it may be different if any thorough-going policy of judicial law-making is undertaken. It is not difficult to see how such attacks, having ready media exposure, may over time erode an existing community consensus of support for an independent judiciary, converting it to a conviction that the activities of the judiciary must be shackled. In that direction lies the path towards substantial loss of judicial independence. Although that independence is supported by provisions as to the tenure and remuneration of judges which may make it seem relatively unassailable, in times of inflation the latter is an illusory safeguard and the former may not of itself, in the long term, prove effective.

So much for the possible danger to judicial independence which any judicial law-maker must bear in mind. However that risk may be evaluated, it can never be allowed to preclude further judicial development of the law. Were it to do so, that would invite dangers of a different kind: atrophy of great areas of the law which, without constant yet gradual or on occasion perhaps not so gradual remoulding, would lose its relevance for modern society. Development has always been the life-blood of the common law and the more swiftly our society changes, the greater the need for developments in the law to keep pace with those changing mores. Great areas of our law are still relatively untouched by statute and likely to remain so. As

things presently stand, it is for the courts to ensure that in those areas the law develops consistently with the changing needs of modern society. Courts in Australia today are well aware of this. The proof lies in the pages of any of our Australian law reports, for those who care to read them. That not every opportunity for law-making which presents itself is eagerly exploited is due to a realization that constant activism is not an end in itself, and that there exist in Australia active law reform commissions and legislatures which possess democratic legitimacy.

What judges must do is determine, each for himself, where lies that uncertain line separating the proper from the excessive in terms of judicial law-making. The position of that line has been much debated of late. There is, of course, room for wide differences of opinion and also for clear differentiation between those areas of the law which are in origin judge-made, those which are the creature of statute or have been the subject of supervening detailed legislative regulation and those again in which law reform commissions are actively working. But what has frequently played little or no part in the debate is a consideration of the risk that over-enthusiastic judicial law-making may unintentionally tend towards the undermining of judicial independence, upon which depends both creative judicial law-making as we know it and the law's guardianship of individual liberties.

That other possible source of threat to judicial independence, the casting of the judiciary in the role of interpreters of a bill of rights, is closely allied to what has gone before. Once any guarantee of rights, expressed, as it generally must be, in broad terms, is either entrenched in a constitution, as in the United States, or is enacted as a part of the statute law, as in Canada, and its precise meaning and application to particular situations is left to the judiciary, the judges perforce become social legislators. They can then scarcely be criticized for law-making but will almost certainly be criticized by some for the way in which they make the law. The meanings which they give to the necessarily broad concepts which confront them in constitution or statute will not please all; some meanings may please very few. And because the court will be dealing with abstract values it is particularly likely to arouse the strongest of feelings. It has been the American experience that the issues then arising for decision are different not only in magnitude but in essential quality from the issues which have traditionally come before courts.

These new issues, the product of the entrenchment of guarantees of individual rights, tend to transform the courtroom. No longer is it a place where parties come to have their private disputes determined, private in the sense that, although a government or its instrumentality may be party to the dispute, the dispute will concern the right or obligation, usually material and self-interested, of some individual or corporation. Instead, the dispute will be in the area of human values, broad social issues seen by the parties

as of deep moral significance, going to the root character of the society. Racial discrimination, unequal treatment of particular classes, religious observance — these are the sort of issues that may arise, bred by a bill of rights and having to be decided one way or another by the judges who have to interpret and apply the broad text of the constitutional guarantees.

These new issues are not only of their nature highly emotive; the rival contentions will often be non-negotiable. The parties espousing such issues may be doing so quite disinterestedly, a deep-seated sense of moral right being involved rather than any question of material gain or loss. Matters of high principle, passionately adhered to, will be at stake, often on both sides. Because such issues 'are usually seen in absolute terms, as matters of right and wrong, those who dispute over them are seldom inclined to compromise their differences'.¹⁹ It has been said that the United States Supreme Court 'has assumed an enormous political burden by agreeing to decide such matters'.²⁰ It is that same burden which an Australian court charged with the interpretation and application of a bill of rights will have to bear. The true burden lies not in the work-load involved, a relatively minor matter, but in the responsibilities to be assumed when a court enters the field of social policy making.

Both the legislature and the executive may find it very convenient to shift to the judiciary the task of initiative-taking in areas such as these. Elected bodies may have much to fear if they have to decide such issues for themselves; wise politicians may well prefer to avoid the issue for fear of electoral backlash. It is not unknown for governments in Australia to avoid, and if possible indefinitely to defer, definitive action upon what they regard as divisive issues, whether they concern abortion, prostitution, conservation or any one of a score of electorally sensitive topics. And constitutional provisions which prohibit laws abridging freedom of speech or depriving persons of life, liberty or property without due process of law and the equal protection of the laws not only give rise to issues just as emotive, they are also, as Professor Kadish has pointed out,²¹ not readily answerable to strictly legal resolution. It would be wrong to suppose that courts which have to decide these issues and which are not answerable for their decisions at the polls, have, unlike the other arms of government, nothing to fear; what they have to fear is the erosion of the concept of judicial independence.

The great model in this field has long been the United States' Constitution and its Supreme Court. Each was in origin very much a product of a special time and place. Each began life in an emotional and political climate very different from that of present-day Australia. The birth of a new nation in a

¹⁹ Downing R. G., 'Judicial Ethics and the Political Role of the Courts' (1970) 35 *Law and Contemporary Problems* 94, 99.

²⁰ *Ibid.* 101.

²¹ Kadish S. J., 'Judicial Review in the High Court and the United States Supreme Court' (1959) 2 *M.U.L.R.* 4, 151.

new continent, the winning of a war of independence in the intellectual ferment of the late 18th century, provided for each a unique context. And each has had some two centuries in which to become established as an integral part of the American ethos. De Tocqueville identified the power of the Supreme Court as residing in 'the power of public opinion'²² and Justice Frankfurter said that 'the confidence of the people is the ultimate reliance of the Court as an institution'.²³ Any new Australian bill of rights, interpreted and applied by an Australian court, will encounter at its inception an environment very different not only from that of the America of Washington, Madison and Jefferson but from that which, in the course of almost two hundred years, has come to surround and support the American Constitution and Supreme Court. If, on occasions, even that Supreme Court has seemed in jeopardy because of the burden cast upon it by its role as interpreter of the guaranteed rights of the individual, an Australian court will necessarily occupy a far more vulnerable position.

This is not to say that the benefits which a bill of rights can confer should not be sought for Australia; but it does suggest that in transplanting it to these shores account should be taken of the new stresses which this will impose upon a judiciary charged with its interpretation and application, doing so not in the interests of the judges but of the transplant itself, which can only thrive with the aid of an independent judiciary.

The protection of minority interests from oppression by the majority for the time being is a principal virtue of constitutionally guaranteed rights but, like its other virtues, is entirely dependent upon those guarantees being interpreted and applied by a judiciary which is independent of influence by that majority. Without an independent judiciary to interpret and apply them, such guarantees are of little worth and if as a result of their introduction independence is lost or curtailed we end up worse off than when we began. A bill of rights will only be as effective as the judiciary is independent, and will be self-defeating if it comes to be the very cause of judges losing their independence. The problems raised by a bill of rights are very much akin to, but more acute than, those of judicial law-making generally, and this because the work of interpreting and applying a bill of rights involves once again judicial law-making, but now in an area of very special sensitivity.

To warn of dangers and foretell difficulties in this way, and then to stop short of suggesting any remedies, has all the charm of irresponsibility. However there is, I am sure, a convention permitting a speaker to rely on the late hour and the impatient audience as justifying his coming to an end without detailing splendid solutions to the problems he raises. I am about to take advantage of that convention, concluding by saying only this: a bill of rights for Australia should be in a form which does not leave to its

²² De Tocqueville A., *Democracy in America* (1862) 9.

²³ 'The Supreme Court in the Mirror of Justices' [1957] 105 *University of Pennsylvania Law Review* 781, 796.

interpreters great areas in which they are expected to supply missing content. Our own home-grown experience with s. 92 of the Constitution suggests that there are better ways of conferring guaranteed freedoms than by the enunciation of quite generalized concepts which are prone to convey quite different meanings to different minds. Again, any bill of rights should be fashioned to Australia's own particular needs, now and in the foreseeable future. It should reflect the uniqueness of our country's geography and population distribution, the variety of cultures among our population, the long-enduring imprint of colonial boundaries and regional loyalties, still apparent after eighty years of federation, and the identity and needs of those minorities whose rights it is to protect. Any imported bill of rights framed for other peoples and for problems other than our own may prove both difficult to interpret to our special needs and unlikely to be accepted, over time, as every Australian's valued birthright. And any bill of rights must not be alterable at the will of the parliamentary majority of the moment, but neither should its form be so immutable that in time its unyielding text becomes a straight jacket on the body politic rather than a strong yet supple protection for the developing community which it is to serve. There may, of course, be great constitutional difficulties in framing a charter of rights in anything approaching such ideal form but the closer it gets to that ideal the higher will be the regard in which it is held, the greater will be its acceptance in the community and the less will be the stresses which its interpretation and application imposes upon judicial independence.