ROTARY CLUB OF HAMILTON
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7.00 PM

Chief Justice Paul de Jersey

Introduction:

I wish to speak this evening on aspects of a concept central to the judicial system, and that is the independence of the judiciary. These are buzz words uttered with almost tedious frequency. But their scope may not be sufficiently understood, and in that respect they resemble the related concept of the separation of powers.

Since becoming Chief Justice, I have been struck by an administrative focus on productivity: reduction of delay and expense, throughput of cases, management of litigation. The efficient conduct of our litigation is of prime importance. In fact, in the Supreme Court of Queensland our lists are running well: the twenty-four Judges are disposing of their caseloads quickly and efficiently and most importantly, giving timely judgments.

But the focus on efficiency cannot be allowed to blur the more fundamental significance of the judicial system. A couple of weeks ago, addressing the new intake of law students at the University of Queensland, I described law as "the community s best attempt to assure what is sometimes called a `civil  society; a framework of known or predictable regulation necessary for our civilised interaction as sophisticated human beings". I mentioned "the pivotal significance to society of the legal system", and affirmed that "the judiciary is indeed the third `arm of Government , along with the legislature and the Executive". I asserted that "the justice system is a critically important component of our social fabric. It protects all members of the community from harm. It ensures peace, order and good government. It secures personal freedom. It guarantees to the individual citizen the impartial, apolitical adjudication and securing of his or her rights". We need to remind ourselves of these aspects of the legal and judicial system in times of heady economic rationalism.

I confess that when I describe the judiciary as an "arm of government", I am not being original. This characterisation is time-hallowed. But the public generally, I feel, tends to think of government as confined to the legislature, or perhaps including the bureaucracy, as implied in the complaint: "We are over-governed." And so I am endeavouring to emphasise the real significance of the judicial system as a part of government, an arm pivotal to the peace, order and good government of the people.

A particular feature of the Australian judiciary is that the Judges are not elected, by contrast with the Judges of some American States. You will have heard of those Judges: they regularly impose outlandishly long terms of imprisonment - up to hundreds of years in length - and especially when they are seeking re-election. In this country, the Judges of most courts are appointed for life, meaning usually until the age of 70, subject to removal for misbehaviour. This manner of appointment is an important factor in guaranteeing judicial independence. What does that independence involve?

Essentially, impartiality, and that entails freedom from any external influence which may corrupt.

The independence of the judiciary is intimately connected with the separation of powers. That concept is not readily understood. Our system of government is, the so-called "Westminster system", inherited from England in 1788. The Commonwealth Constitution reflects it. There are three branches of government, the Executive, the Legislature and the Judiciary. Each has distinct powers. The Executive comprises the Queen, represented by the Governor-General at the Federal level and the State Governors, together with Cabinet Ministers at both levels. The Executive administers the law. The Legislature is the nation s parliaments. It makes the law. The Judiciary, the Judges of all the courts of the land, interprets and applies that law. In theory, the branches are distinct and separate. In practice, however, the Executive and the Legislature have been brought together in Parliament with systems of checks and balances to ensure they carefully monitor each other. Both the Executive and the Legislature comprise elected representatives of the people, save of course the Monarch and the Governors. and so both those arms are subject to political forces.

For the Westminster system to operate democratically, the independence of the non-political judiciary must be absolutely secured. In the words of Montesquieu, "There is no liberty, if the power of judgment be not separated from the legislative and executive powers." Of course in a democracy the creating and administering of the law must be subject to the will of the people. But to ensure the impartial application of the law, the judiciary must be completely immune from political pressure.

In practical terms there is some difficulty maintaining a completely independent judiciary, and that is because there is some necessary material dependence on the other arms of government. The Executive is the "paymaster". In a Canadian case called *Valente*, Justice Le Dain specified three "crucial aspects of independence: security of tenure, financial security and institutional security". Security of tenure, meaning a guaranteed term of appointment, is necessary so that Judges are not concerned about making decisions to please the body responsible for their possible re-appointment. Financial security is necessary, it is said, to ensure that Judges are not tempted to accept bribes. Institutional security, or control over administration of the court, prevents, among other things, the other branches of

government from influencing the allocation of Judges to hear particular cases. In Australia, and in many other countries, the judiciary depends upon the other arms of government to respect this independence. Of course as I have said, the Executive pays Judges salaries and pensions, and as well provides buildings and staff to run the courts, and maintains the legislation which ensures security of tenure. Obviously enough this places the judiciary in a potentially difficult situation. And so I say that the maintenance of an independent judiciary depends to an extent upon the co-operation of the Executive.

We can become complacent about these fundamental notions. In Queensland there have been some notable challenges to judicial independence over the years. Some of you may recall the Ithaca election petition case in 1938.

The relationship between the courts and the Executive in this State has been characterised by some tension, as the history books show. The Executive, not surprisingly, has sometimes been distrustful of a body which can pass independently upon the validity and operation of legislation and cut down the operation of governmental decisions. Some years ago I declared the proposed "world s tallest building" project unlawful. In doing so I found that a Minister of the Crown had breached a statutory obligation. I hasten to say that there was no adverse ramification. Other Judges in past decades have not fared quite so well. I am pleased to say that in recent Queensland history, there has been great respect for these concepts. But as I say, we can become unduly complacent, as a Malaysian experience only ten years ago shows.

In 1988 the security of tenure of the Malaysian judiciary was seriously challenged. The King removed from office the Lord President, the Malaysian equivalent of Chief Justice. Malaysia has a Westminster system. Its Constitution provides that a Judge may not be removed from office unless following a recommendation made by a tribunal appointed by the King. How did all this arise? In 1973 a young Prince was convicted of a criminal offence. He was a prospective candidate for the position of King. The King is elected every five years by the Sultans of the various Malaysian States. Sultans are the only eligible candidates. The young Prince s chances of being elected King once he became Sultan would possibly have been hampered by the existence of a criminal record. The Solicitor-General at the time, the person responsible for prosecuting the Prince, was later to become Lord President. The young Prince was in due course granted a full pardon by his father, the Sultan, and his record expunged. He became Sultan after his father s death and in the late 1980s was elected King. In 1988 as King he appointed a tribunal to consider recommending removal of the Lord President who had prosecuted him fifteen years earlier. It is said there was a "paucity of evidence of any misconduct by the Lord President". The Lord President attempted to prevent his removal by applying to the Supreme Court for orders prohibiting the tribunal from making a recommendation. The Supreme Court made the order, but the King suspended the Judges. The recommendation was made and the King removed the Lord President from office. To top off the whole show, the chairman of the tribunal which made the

recommendation was appointed as the new Lord President.

This is a well publicised, clearly established example of how an improperly motivated Executive can easily frustrate the determinations of an independent judiciary found to be "inconvenient".

Let me now mention the state of the German judiciary under Hitler s regime. Here we saw one of the most horrifying examples of how easily a community can be deprived of an independent judiciary. The laws of that regime permitted the Government to dismiss from office any Judge who was politically undesirable, or not "Aryan", or who would not undertake "to support the national state at all times and without reservation". Judges could even be removed from office without reasons being given (Muller: Hitler s Justice (Harvard) 1991 page 72). Hitler dismissed Judges if their sentences were considered "too lenient, or whose conduct seemed insufficiently loyal to national socialism" (ibid). Judges were told by the equivalent of the Reich Chief Justice, "There is no independence of law against national socialism. Say to yourselves of every decision which you make: `How would the Fuhrer decide in my place? " (Shirer: The Rise and Fall of the Third Reich (New York, Simon and Schuster, 1960) page 334). The Judges had been "liberated" from their obligation to the law only to be constrained by an incomparably more restricted "obligation to the main principles of the Fuhrer s Government", a step which in the last analysis had the effect of making "the Judge a direct servant of the State", or as Freisler (a German legal commentator at the time) put it, "The law is the bated breath of life ... but the guardian of the law must be the soldier at the front of life of the nation" (supra, page 73). An extreme example, but instructive.

Let me lighten the gravity now with a slightly diverting excursus into Queensland history. I mentioned before that one of the safeguards of judicial independence is a guaranteed salary of appropriate order. Judges have to travel on circuit to country towns from time to time. Needless to say, the Government must provide adequately for the expenses of circuit work. If a Judge has to run the risk of bearing these expenses personally, then the Executive is subjecting the Judge to a pressure which may obviously be inimical to the proper discharge of judicial duties. Hence this experience of the Supreme Court Mr Justice Cooper in the late 1880s.

This Judge worked in the north. Labouring in the stifling courthouses of that time, he was careful about his comforts. They should include, he considered, a plentiful supply of ice to cool his champagne. The Premier, the great Sir Samuel Griffith, took a stand against what he considered to be the Judge s extravagance. The Premier raised the matter in Parliament. Unfortunately, however, the Premier over-stated the Judge s expenses. The Premier failed to acknowledge his error, so the Judge published the relevant correspondence in the *Courier-Mail*. The Judge observed that "men of ordinary integrity would hesitate before they sacrificed truth to the gratification of making a startling statement in debate". The passion did not

let up. Four years later, the Government specifically limited the Judge s expenses to a fixed sum by means of statute. By the time the Judge learned of this limitation, he had already spent a substantial portion of the allocation. The Judge immediately warned the Government that when he had spent all of it, he would close down the circuit and return to his base at Bowen. That time arrived when he was in Townsville. True to his word, the Judge announced that he would end the sittings at noon one day, and then discharge all the prisoners not by then dealt with. This is called "delivering the gaol". In consternation, the Northern Crown Prosecutor issued an instruction to the police that they should re-arrest all prisoners upon release. Then the Prosecutor secured an immediate undertaking from the Government that it would meet all further expenses relating to the circuit. The sittings were resumed. Cooper had won. But needless to say, he suffered. The *Courier* said that he must have been suffering from what it called a "mental ailment". (This account is taken from McPherson: Supreme Court of Queensland, Butterworths, 1989, page 196).

I repeat that story because it is entertaining. But it is not really a very instructive example of the importance of judicial independence. My own view is that it suggests a rather self-indulgent judiciary. I can assure you that things are very different 120 years later.

The dedication of the Judges I lead is immense. I greatly regret any suggestion that their work is under-valued or its significance not properly understood. I am disappointed by baseless criticism of the judiciary, whether it be suggested inefficiency or the traditional, and I add unjustifiable, charge of aloofness. Part of my endeavour to repel, or better still forestall such criticism, is by communicating more readily with the public about what we do, explaining our initiatives and dispelling any false charge that we are impervious to change. That includes my visiting court centres outside Brisbane on a regular basis, being open with the media, and using the many opportunities available to me to explain aspects of our operation. In this I have the willing support of my wife, most importantly, and also the Court which I lead very much on a collaborative basis.

Thank you for giving me this particular opportunity this evening to express these views.