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Evolution of the judicial function: undesirable blurring?

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I am honoured to have the opportunity to deliver this address. Sir Harry asked me to speak on an aspect of the Commonwealth Constitution, and I will do so. That being my direction, I must at once say that I am relieved, on a relaxed Friday evening on the Gold Coast, to be addressing at Coolangatta the members of the Samuel Griffith Society, and not any other gathering!

I applaud your interest in the development and application of our constitutional law. That you will listen critically to my views is a challenge I accept. I hope however you may accept that, as Griffith's successor in office 14 down the line, notwithstanding my enduring respect for that great man of truly epic achievement, I will not this evening pretend to be, in the words of Alfred Deakin, "lean, ascetic, cold, clear, collected and acidulated". Well at least I won't be ascetic, cold or acidulated: it is after all a balmy Gold Coast evening and we are enjoying a pleasant dinner.

I wish to speak of some evolution in the role of the courts of law in our democracy. My thesis is that there has over recent decades been departure from the assumption that courts exist for the sole purpose of the judicial determination of cases within the courtroom: a departure which has arisen through actions of the executive, in requiring from courts what are essentially administrative rulings; and more subtly through various approaches of courts themselves and individual Judges, to which I will come. I will ultimately mention the issue whether the proliferation of tribunals, at the State level especially, may possibly be a consequence of some perceived blurring of the judicial function.

My theme has relevance to this conference because of the constraints imposed on State legislatures, by Chapter III of the Commonwealth Constitution, in relation to the structure and jurisdiction of State courts. A number of cases have emphasized the primacy of the strictly judicial function, in the context of legislative and executive attempts to embellish it, for example by requiring a Judge to perform an administrative role. *Grollo v Palmer* (1995) 184 CLR 348, 364-5 affirmed that no non-judicial function can be conferred which is incompatible with the performance of the judicial

function. The High Court spoke there of maintaining the "integrity" and "legitimacy" of the judicial arm. Two of the justices adopted the United States Supreme Court's reference to courts' "reputation for impartiality and non-partisanship", warning that that reputation "may not be borrowed by the political branches to cloak their work in the neutral colours of judicial action" (*Mistretta v US* (1989) 488 US 361, 407).

On two comparatively recent occasions, the High Court has stopped governments from infringing in that way upon the institutional integrity of the courts. The first case was *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1. The Minister had under legislation nominated a Federal Court Judge to enquire into whether certain land was a significant Aboriginal area deserving of protection, and to report to the Minister. The court held that the function of reporting to the Minister was incompatible with the judicial function under Chapter III: discharging that function would place the Judge into the echelons of administration, with the Judge effectively a ministerial adviser.

The second instance was the celebrated case of *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51, where the High Court struck down New South Wales legislation empowering the Supreme Court of that State to order the detention of a specific, named person, beyond the expiration of a previously imposed finite term of imprisonment, in order to protect the community protection. McHugh J described it as "ad hominem" legislation. The majority view was that the exercise of that jurisdiction would be incompatible with the integrity, independence and impartiality of the Supreme Court, as a court in which federal jurisdiction also had been invested under Part III. The vice of the legislation was that it was directed to Mr Kable alone, and contemplated the court's proceeding very differently from the way in which it would ordinarily proceed. It was the extreme nature of that legislation which led to its being invalidated. McHugh J said that it made the Supreme Court "the instrument of a legislative plan, initiated by the executive government, to imprison the appellant by a process far removed from the judicial process that is ordinarily involved when a court is asked to imprison a person" (p 122).

Chapter III leaves State legislatures with considerable scope in relation to the non-federal jurisdiction of their courts, although in other extreme cases, jurisdiction would be wanting. McHugh J went to the limit, and interestingly instanced legislation purporting to appoint the Chief Justice as a member of the Cabinet, or a law requiring the Supreme Court to determine how much of the State budget should be spent on child welfare. Let this be clear: I have no such pretension; and my court has no such inclination.

While at the Bar I appeared for the State of Queensland in the High Court, with I should concede but patchy success, over a phase in which Queensland saw itself as the victim of Commonwealth expansionism. It was deliciously ironic for me to witness the High Court in *Kable* interpreting the Constitution so as, in effect, to buttress the Supreme Courts of the States against legislative intrusion into their traditional jurisdictions.

Notwithstanding *Kable*, State legislatures plainly remain alive to the utility of invoking the reputations of their Supreme Courts to lend authority to what could be described broadly as administrative decisions in controversial areas. In recent decades, legislation has broadened the jurisdiction of State Judges to authorize covert police operations. *Grollo* confirms the legitimacy of such authority. Politically, it is obviously attractive to have those potentially controversial decisions made by Supreme Court Judges, and in fairness, I note that governments have been ready to ensure that Judges, acting administratively, have the necessary immunity (cf. *Supreme Court of Queensland Act* 1991, s 27AA). But as anti-terrorism legislation, especially, will increase the frequency of such interventions, one may fairly ask whether there is risk of eroding the "public confidence" in the judicial process rightly and so often proclaimed as central to the legitimacy of the courts of law. One sees in W*ilson* and *Kable* frequent reference to the need for the courts to be seen to be "acting openly, impartially and in accordance with fair and proper procedures" (eg *Wilson*, p22). In issuing those warrants, Judges invariably act behind closed doors and ex parte, a process most Judges would not relish.

As every fair-minded observer would immediately acknowledge, the judiciary is absolutely the most accountable of any of the arms of government: almost invariably conducting its business in

open court; regularly subjected to the glare of intense publicity, not always kind; and predictably moderate and most courteously restrained in any response.

I move from *Kable* to *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519, where the High Court last year upheld Queensland legislation which endows the Supreme Court with jurisdiction to order the indefinite detention of a prisoner, beyond the expiration of the finite term to which he has been sentenced, on the ground he is a serious danger to the community. That legislation was drafted carefully – in characteristically Queensland style, not in relation to any named person, and by contrast with the *Kable* legislation so as to avoid incompatibility with Chapter III. It was held not substantially to impair the Supreme Court's "institutional integrity", or to jeopardize the court's role as a repository of federal jurisdiction. As put by McHugh J (p 1528), "nothing in the Act might lead a reasonable person to conclude that the Supreme Court of Queensland, when exercising federal jurisdiction, might not be an impartial tribunal free of governmental or legislative influence or might not be capable of administering invested federal jurisdiction according to law". The jurisdiction conferred by this legislation remains controversial, however. Undoubtedly it is exercised judicially. Equally, the executive will be relieved of an area of necessary decision-making, which it may otherwise find immensely troublesome.

My point this evening is not to criticize governments for casting these potentially controversial jurisdictions on to courts. Governments have power to do so, and courts have an undoubted reputation for the independent discharge of all of their jurisdictions. It is unsurprising governments see courts as attractive decision makers in those areas. My point is simply to urge the need for circumspection. Governments must be astute to the inherent fragility of public confidence, and also, to the pivotal importance to society of a judiciary considered "legitimate". Governments must be careful not to embellish the core judicial function in such a way as to blur it, and thereby erode the confidence on which its authority depends. I suggest Sir Samuel Griffith would have agreed. As Sir Harry Gibbs has observed, "Griffith was resolute in resisting any encroachment on the jurisdiction or power of the Court, whether from above or below" (White and Rahemtula (eds) "Queensland Judges on the High Court" (2003) note 23).

I make it clear that my reservation does not extend to the jurisdiction judicially to review administrative decision-making. If carried out within the strictures delineated by the legislation, which focuses on lawfulness not merit, the discharge of that jurisdiction should enhance, not diminish, perceptions of the authority of courts, in their role as custodians of legal rights as between citizen and State – and that remains so, I believe, notwithstanding the wounding suffered by the Federal Court through its own exercise of that jurisdiction. Fortunately we have not in this country experienced the antipathy between parliament and courts such as in post-revolution France provoked the decree forbidding courts from exercising jurisdiction in administrative matters. The Conseil d'Etat is a highly effective and respected institution, but here we have no need for such a body.

I have spoken of the need for care as governments invest courts of law with administrative functions, albeit legitimately notwithstanding Chapter III. But contemporary courts and Judges must themselves be careful to avoid any blurring of that essentially judicial function, and some things have occurred in recent years which may warrant reflection.

This issue arose dramatically for me in 2000, when the then Chief Magistrate of this State, sitting with other Magistrates in a courtroom, formally apologized to indigenous people for what were said to be past injustices. I do not raise this to reopen old wounds, but as an effective illustration of my point. The "apology" involved the presentation of a "deed of apology and commitment" from the Magistrates Court. Having earlier informed the Chief Magistrate of my opposition to what she then proposed doing and in the face of her determination nevertheless to proceed, I was constrained eventually to issue a media release, which was published, in which I made these observations:

> "The core judicial function is to determine cases in court. Expressing an apology for past treatment of Aborigines and Torres Strait Islander people, or any particular section of the community falls outside that judicial function. The obligation of the courts and judicial officers is to render justice according to law to all people, in the inclusive sense. It is critical, to preserve the necessary perception of independence and impartiality, that judicial officers not be seen as acknowledging one section of the community more than others.

> There is also the risk that such an initiative may be interpreted as an attempt to put pressure on the executive government, on a matter for which the executive, not the judiciary, carries the relevant public responsibility…It is not part of the role of the courts to venture publicly into contentious policy areas. Doing so could imperil the precious heritage of absolute judicial neutrality in political controversy."

Though substantially criticized in some quarters, I remain of those views, expressed I should say with the substantial support of the then Judges of the Supreme Court. That was in my view an instance of a court, or a body of judicial officers, moving inappropriately and unhelpfully beyond the judicial charter. However one might personally share those sentiments, it was completely inappropriate they be presented as an expression of judicial view.

Individual Judges are sometimes criticized for their public statements on matters of essentially executive concern, even sometimes in areas which have nothing at all to do with the workings of courts. It is not my intention to develop that this evening, or to enter generally into the debate about so-called "judicial activism". But obviously the public could find bewildering the concept of a Judge more widely published as social commentator than as courtroom adjudicator; or a Judge lapsing from applying the statute and common law into realms of social engineering. By experience and disposition, Judges are astute to those dangers.

There are two other particular avenues of departure from the strictly judicial core function which should I suggest be approached with care.

The first is involvement of Judges in Commissions of Inquiry. Generally speaking this will not create conflict with Chapter III, and so much was confirmed in *Wilson's* case (p 17). Nevertheless the issue can be of concern, in the general context I have been advancing. For many years – indeed since 1987 – the Judges of the Supreme Court of Queensland have proceeded on the basis it would be inappropriate for a serving Judge to accept a position to head a Commission of Inquiry conducted under the auspices of executive government. The rationale for that view has been the recognition that the core function of the judiciary is the determination of matters in court, by the delivery of judgments enforceable by process of law; and the fundamental importance of preserving the confidence of the public in the judiciary's discharge of that function, which could be impaired

were Judges to be unnecessarily involved in the political controversy which often surrounds such inquiries. A similar approach has for a long time been taken by the Supreme Court of Victoria.

The Fitzgerald Inquiry in this State illustrates this concern. As it turned out, the subject matter of the inquiry was highly contentious and controversial, and the findings undoubtedly contributed to a change of State government. I am relieved responsibility for that non-judicial exercise was not cast upon a serving Judge, for two reasons: the strictly judicial role was thereby not blurred or compromised, in the context of public perception; and the prospect of reasonable continuing relations between the executive and judicial arms of government was not unnecessarily jeopardised.

By way of contrast, in the exercise of its strictly judicial function, the Supreme Court of Queensland in recent decades made rulings on the validity of electoral results – with substantial public ramification. Yet that did not erode public confidence in the courts, which the people accepted was simply doing what it was constitutionally charged to do.

When I speak of executive/judicial relations, of course the separation of powers and the independence of the non-elected judiciary spawn tensions. But if relations can be comfortable, the public is the beneficiary, and I have found a substantial part of my role as Chief Justice is seeking responsibly to manage that interface.

Secondly, I mention the feature of Judges or courts assisting executive government with commentary on draft legislation which may affect the operation and jurisdiction of the court. In 1991, the *Supreme Court of Queensland Act* established a body called the Litigation Reform Commission, comprising the President and Judges of Appeal, and other appointees. That Commission was charged with making reports and recommendations with respect to the operation of the courts, which were directed to the executive, and which inevitably involved consultation with the executive as to various proposals. The body no longer exists, but it has been the practice of the government to provide the court with drafts of legislation which may have an impact on the workings and jurisdiction of the courts.

My practice has been to seek the assistance of other Judges prior to formulating any comment, and we are careful not to intrude into areas of executive policy. The procedure has worked well, and the court has not been discomforted by having to pass on the validity or interpretation of legislation on which I have previously offered views. This is an area where some compromise has I believe been justified, in the public interest, though one must of course approach the matter with care.

In summary, executive governments, and courts and Judges themselves, must, in these times, be careful to ensure that the clear delineation of the judicial function not become blurred or distorted. I raised at the outset whether the proliferation of tribunals, especially in the States, might not reflect some change in executive regard for the courts of law, perhaps fed by the evolution of the judicial role of which I have spoken this evening. I turn to the issue raised at the start.

Is it really the case that sophisticated modern society, and the intricacy of the problems it spawns, have warranted the establishment of so many specialist tribunals? I am unconvinced that the capacity of courts and Judges, demonstrated over many decades, to embrace effectively a wide-range of decision-making, has waned; or that the public would be more confident in having contentious issues on sensitive subjects determined by tribunals rather than by courts. And it is moot whether other features presented as being the advantages of tribunals, are really being achieved: relative informality, greater expedition and comparative lack of expense.

I am, I suppose not surprisingly, an advocate of the enormous benefit to be drawn by the public from their courts of law. But as I have suggested, and a number of times this evening, the courts themselves, and the governments of their jurisdictions, must be careful to preserve the integrity of that fundamental judicial process, and thereby maintain the public confidence on which the ultimate authority of the judicial determination depends.

I will stop there, lest I come to emulate one of Sir Samuel Griffith's very few, <u>less</u> than effective public performances – his loss of the motion to censure Queensland Premier Sir Thomas McIlwraith, following a parliamentary session in which he, Griffith, is said to have spoken

continuously for … 7 hours (R.B. Joyce: "Australian Dictionary of Biography – for Windows", Melbourne University Press, p 2).