

AUSTRALIAN BROADCASTING CORPORATION

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"JUDICIAL INDEPENDENCE - THE IMPORTANCE OF RESPECT FOR  
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Justice Michael Kirby\*

Plans by the Federal Government to pension off Conciliation and Arbitration Commission Deputy President Justice Jim Staples will come under scrutiny this week as members of Federal Parliament receive copies of letters the Judge has written claiming that the Government's action is a threat to judicial independence. One Australian Judge vitally concerned with the principle of judicial independence is the President of the Court of Appeal in New South Wales, Justice Michael Kirby who is also an Australian Representative on the International Commission of Jurists. Justice Kirby spoke to our reporter Matt Peacock today about how recent events in our region particularly the removal of the Lord President of Malaysia Tun Salleh bin Abas has placed the principle in danger.

KIRBY P: Well obviously that's one of the cornerstones of a democratic society. In a democratic community some people have to make the hard decisions in relation to where the balance between individual freedom and responsibility lies. Where constitutional and legal rights begin and end. That responsibility normally rests with the independent branch of Government, the judiciary. Therefore, in order that people

can make those decisions without pressure (or in the words of the oath that judges take "without fear or favour, affection or ill-will") it is necessary that such people should not feel under pressure or under the threat that, if they make a decision which is adverse to the interests of the Government of the day or other powerful parties, they may suffer as a consequence.

PEACOCK: If we take a situation where the Government or the Head of the Government is an interested party before a particular judge and that judge perhaps is not sacked but not appointed to a new body which is created to replace the one that he is a member of, is that a threat do you think?

KIRBY P: I think you are trying to pivot these questions on the position of Mr Justice Staples. I have indicated to you before the interview that I don't propose to speak about his position.

PEACOCK: Why not?

KIRBY P: Because his position is before Parliament at the moment. Also it may come before a court. It may be appropriate at some later time, because of my position as a Commissioner of the ICJ in Geneva, to say something about it. But it is not timely at the moment. I therefore don't propose to say anything about the matter.

PEACOCK: You nonetheless feel that the principles involved in this and the Malaysian case are important?

KIRBY P: I consider the events in Malaysia are a matter of legitimate concern for Australia. That's why, at the

International Commission of Jurists meeting in Caracas last month, I sponsored a resolution which was passed unanimously in the presence of the deposed Lord President of the Malaysian system. This condemned a large number of specific aspects of the removal of the Lord President of Malaysia. The position of Justice Staples did not come up there. But, obviously, the principles which relate to the independence of the judiciary and to the protection of the rule of law are universal principles. They are not just matters for Malaysia, Fiji or Australia. They are matters for the respect of constitutionalism wherever it exists. Therefore, the international principles on the independence of the judiciary apply as much in our country as they do elsewhere.

PEACOCK: Without talking specifically about Judge Staples but talking about the principles that are involved in this country and in others how important then is it for Australia to be seen not to indulge in this kind of activity?

KIRBY P : Look, you came here to talk about Justice Staples. I'm talking about the general principles of the independence of the judiciary and in particular in relation to recent events in our region.

PEACOCK: With respect Judge, if Australia takes action that cuts across this principle that's surely going to encourage it in other parts of the region that we might be objecting to?

KIRBY P: Well it's obviously important that we should not be hypocritical in this matter. We who denounce the abuses

of human rights and the assault on constitutionalism, the assault on democracy and on the independence of the judiciary in other countries should be foremost in protecting these values at home. And generally we do. Differences of opinion can exist in respect of particular cases. They sometimes come before the courts. They are then dealt with according to the law of our country. In our country, recent examples illustrate how courts will uphold and protect the independence of the judiciary. In one recent case in New South Wales where a number of magistrates were not appointed to the new Local Court, they brought proceedings in the courts. The courts upheld their entitlement to be considered without certain disqualifying factors which were said to have been taken into account about them, without any notice to them. So that courts uphold in our country these principles. It's because the courts may be asked to pass upon those principles in relation to Mr Justice Staples that, if you don't mind, I'm not going to refer to that case at the moment. I'm concerned with the general question. Not with the question of how the principles apply in Justice Staples' case. I may be concerned about that at some later time.

PEACOCK: Do you think that we can rest assured that our present politicians, for example, respect this principle sufficiently not to breach it?

KIRBY P: Well I hope they do. Some illustrations, including the one that I've referred to, indicate that sometimes in their anxiety to act with speed in a particular

case (as for example on the reconstitution of a court or a tribunal) the politicians may be motivated by the efficiency of the tribunal, the high reputation of the members of it and so on. Sometimes it's important to upholding the independence of the judiciary which we have boasted of in our tradition for many years, indeed centuries, that respect should be given to people who are judicial officers simply because, otherwise, we diminish the independence of the judicial branch of Government or the public perception of its independence. Now, there are special considerations in Justice Staples' case. I'm not going to go into them, at least at this time. But the general principle is very important. It's important that politicians, anxious no doubt to do the right thing in other respects, should keep their eyes steadfastly on the importance of institutions. It is institutions that matter most. Not people. It's respect for the independence of the judicial institution that is important; not the respect for particular judges as such, whether it's the Lord President in Malaysia, a judge in Fiji or Justice Staples in this country.

PEACOCK: Justice Michael Kirby who is President of the Court of Appeal in New South Wales and he was talking to Matt Peacock.

President of the Court of Appeal of New South Wales;  
Commissioner of the International Commission of  
Jurists. Personal views.