"Judicial Independence- Lessons from India & Australian Developments"

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JUDICIAL INDEPENDENCE - LESSONS FROM INDIA & AUSTRALIAN DEVELOPMENTS

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LESSONS FROM INDIA

In March 1992 I travelled to New Delhi for two conferences on issues of importance to India, our region and the world. The first concerned the vexed question of self-determination of peoples. The second concerned issues of health and the law. My paper for the latter was on the great challenge which HIV/AIDS presents to India and the world.

I had the privilege during my visit of meeting the Chief Justice of India, the Judges of the Supreme Court and the President of the United Lawyers' Association of India, Mr Soli Sorabjee. He and I had last worked together last year at a remarkable judicial colloquium in Bloemfontein, South Africa: just before the peaceful transition of power to a democratically elected multi-racial government.

Upon my return to Australia, I found on my desk the decision of the Supreme Court of India in *Supreme Court Advocates-on-Record Association and Ors v Union of India.*[1] The decision is one which will reverberate around the countries of the common law. It will command attention especially amongst lawyers and judges in the Commonwealth of Nations. A bench of nine judges of the Supreme Court of India examined two questions. These concerned whether the majority opinions in *S P Gupta v Union of India*[2] were correct or whether that decision should be reconsidered. In *Gupta*, the Supreme Court had held, by majority, that the opinion of the Chief Justice of India enjoyed no primacy over that of the other two constitutional

participants in the appointment of judges. A majority in *Gupta* also took the view that, in the absence of judicially manageable standards for controlling the exercise of discretion by the Government of India for the performance of its duty under Article 216 of the *Constitution*, *mandamus* would not issue to require the determination of judge strength for each High Court in India. The Court in *Gupta* held that the number of the judges in any High Court was not a matter susceptible to being scrutinised by way of judicial review.

It was to reconsider *Gupta* that a nine member bench of the Supreme Court was assembled in the *Supreme Court Advocates* case. The decision which the Court delivered is one of great importance for the independence of the judiciary. By majority, the Court held that, in the event of conflicting opinions by the constitutional functionaries, the opinion of the judiciary "symbolised by the view of the Chief Justice of India" and formed in the manner indicated by the Court, has primacy. No appointment of any judge to the Supreme Court or any High Court of India could be made unless in conformity with the opinion of the Chief Justice of India.

On the issue of judge strength, *Gupta* was overruled. The majority held that, if it were shown that the existing strength of a High Court was inadequate to provide speedy justice to the people as required by Article 21 of the *Constitution* of India, a direction could be issued by the courts to the Government of India to assess the felt need and fix the strength of the judges commensurate with the need to fulfil the State's constitutional obligation.

It is not my province to comment upon the bold decision to which I have referred. As the minority opinions in the Supreme Court indicate, strong views can be expressed on both sides of the arguments. The decision, however, reflects the appreciation which exists in India, as well as in Australia and other countries of our legal tradition concerning the vital importance of maintaining the independence of judicial officers and assuring their capacity effectively to fulfil the duties which they assume upon their appointment.

In India, Australia and other countries of the common law, the attacks upon judicial independence and integrity vary over time. In no two countries are these attacks precisely the same. The purpose of this essay is to call to attention a new illustration of the attempted diminution of judicial independence which has manifested itself in Australia in recent years. Perhaps the same thing could not happen in India. Almost certainly, it could not happen to the Supreme Court and the High Courts or other independent office-holders enjoying guaranteed tenure under the *Constitution*. But these great courts at the apex of a legal system deal, of necessity, with only a small proportion of disputes of the people. Most of the people's cases are dealt with in courts and tribunals of humbler standing or by officials created by the Executive Government to fill offices having a promise of independence. There is now a tendency in Australia to diminish the independence of such office-holders by the expedient of the demolition of their courts, tribunals and other independent offices and the non-reappointment of office-holders to successor bodies. Because the price of freedom is eternal vigilance, this is a development in my own country which I call to notice so that Indian lawyers too can be vigilant about it.

AUSTRALIAN DEVELOPMENTS

The erosion to which I refer began in the Federal sphere in Australia when Justice Jim Staples was not reappointed to the new Australian Industrial Relations Commission when the old Arbitration Commission was abolished.[3] This precedent was soon picked up with enthusiasm by State Governments. It was followed in the State of New South Wales when the Local Court replaced the Court of Petty Sessions. Six magistrates of the old court were not reappointed.[4] In Victoria, numerous State judges and like independent office-holders have lately found their guarantee of tenure to be an empty one when the simple expedient has been followed of abolishing their offices. In this way, nine judges of the Accident Compensation Tribunal were removed without any suggestion of misbehaviour or incapacity. In South Australia, the Industrial Court and Commission were abolished in 1994.[5] Only after strong

protests from the State's judiciary were offensive provisions removed which would have given the State Government the power to exclude some judges from transfer to the new court. In Western Australia, the judicial member of the Compensation Board was effectively removed from office by the abolition of his position.[6] He was, instead, appointed a temporary "Commissioner" of the District Court, but without the same judicial rank and title.

My thesis is that the accumulation of so many instances of removal of judicial officers by the abolition of their courts and tribunals has undermined, in Australia, the tenure of office-holders who must act independently and courageously - including against government. I suggest that the lack of understanding in the community, and the media are major problems in explaining the significance of the erosion of constitutional principle. In Australia, the *Constitution* s 72 protects only the tenure of Justices of the High Court of Australia (the highest Court) and other Federal judges. There is no constitutional protection for State judges. Clearly, the recent cases in Australia involve departure from international principles established for the defence of judicial independence. My fear is that we are witnessing an attempt to undo the constitutional settlement which has protected judicial tenure in our tradition since the *Act of Settlement* 1700 (GB) and to return members of the lower judiciary, at least, to a position where they effectively hold office at the will of the Executive Government just as they did in colonial days.[7] Unless this trend is reversed and the convention previously observed is restored, it will be the people of Australia who will suffer, not just the judges. They will lose the precious value of decision-makers who are independent of Government. That independence has been a mainstay of liberty in Australia, as in India.

INTERNATIONAL PRINCIPLES ON JUDICIAL TENURE

The foundation of the international principles of judicial independence is to be found in the requirement of Article 10 of the *Universal Declaration of Human Rights*:

"10. *Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."*

To the same effect is Article 14 of the *International Covenant on Civil and Political Rights*:

"14.1 *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."*

There are similar provisions in every regional charter of human rights. But how is this independence of the tribunal to be secured? That question is answered by the elaboration of international principles for the independence of the judiciary contained in a number of specialised international declarations. The *Basic Principles on the Independence of the Judiciary* were endorsed by the General Assembly of the United Nations.[8] It invited governments "to respect them and to take them into account within the framework of their national legislation and practice". The *Basic Principles* include:

"2. *The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*

11. *The terms of office of judges, their independence, security, adequate remuneration, conditions of services, pensions and age of retirement shall be adequately secured by law.*

12. *Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.*

13. *Promotion of judges, wherever such a system exists, should be based on objective factors, in particular, ability, integrity and experience.*

18. *Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.*

19. *All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."*

The draft *Universal Declaration on the Independence of Justice* was recommended to member countries of the United Nations by the Commission on Human Rights at its 45th Session in 1989. Amongst the principles in the draft *Universal Declaration on the Independence of Justice* were the following dealing with discipline and removal:

"26(b) *The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation upon such a Court or Board.*

27. *.All disciplinary action shall be based upon the established standards of judicial conduct.*

30. *A Judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.*

31. *In the event a Court is abolished, Judges serving on that Court, except those who are elected for a specified term, shall not be affected, but they may be transferred to another Court of the same status."*

The foregoing principles are repeated in numerous international statements about judicial independence. For example, the *Minimum Standards of Judicial Independence*, adopted by the International Bar Association in October 1982, include:

> *"20(a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the term of services.*
>
> *(b) In the case of legislation reorganising courts, judges serving on those courts shall not be affected, except for their transfer to another court of the same status."*

To like effect is the *Universal Declaration of the Independence of Justice*, cl 2.39, adopted at Montreal in June 1983.

The result of these principles is that, at least in the case of judges - and one might say judicial officers performing the duty of judges - their tenure cannot be undone by a reorganisation of their courts or tribunals. Out of deference to the office (whatever view is held of the office-holder) such judicial officers must be afforded the opportunity of appointment to a court of the same or higher rank and status, salary and benefits of office. If the judicial officer declines, he or she must continue to receive the benefits of office of the court which is abolished. If any other practice is implemented, it presents a threat to judicial independence. That threat hangs as a Damoclean sword over the judicial officer. If judicial officers are repeatedly removed from their offices, and not afforded equivalent or higher appointments, the inference must be drawn that their tenure is now, effectively, at the will of the Executive Government, ie the politicians in power from time to time. This is contrary to international principle. It is contrary to the hard-found constitutional settlement to which Australia, like independent India, has hitherto been regarded as heir. Until lately, it has been contrary to Australian practice.

TOWARDS RESTORING A CULTURE OF RESPECT FOR INDEPENDENCE

I have said that the principles stated in terms of judges must be applied to all judicial officers. This is so because the organisation of the Bench is something which varies from one jurisdiction to another. International principles must be stated in terms which apply whatever that organisation may be. Thus, in many countries, judicial work which is done in Australia by magistrates is performed by judges. Even in countries with a legal system so similar to Australia's such as Canada and New Zealand, the work formerly performed by magistrates and performed in Australia by such, is now performed by persons titled "judges". Similarly, the title "*magistrat,*" in civil law countries, is equivalent to that of a judge in our tradition.. Thus, the international principles are addressed to the *functions* of the office-holder, not to their *titles*.

Neither on a national level, nor in the States, can Australians regard the worst as over. In the Federal sphere, the Minister for Industrial Relations, following a 48 hour strike by coalmining workers, announced in 1994 the intention of the Government to abolish the independent Coal Industry Tribunal[9] established in 1949 by the Federal and New South Wales Parliaments jointly. The fate of the office-holder has not been mentioned. It is expected that the President of the Tribunal will be appointed a Commissioner of the Australian Industrial Relations Commission (AIRC), a position of equivalent rank. As to the Coalfield Conciliators, the note which I have seen promises no more than that "attempts will be made" to re-allocate them somewhere else within the AIRC. Meanwhile, the Opposition has announced its intention to abolish the Industrial Relations Court.[10] The Opposition spokesman (Mr John Howard) stated:

> *"I have a strong objection in principle to establishing special courts because special courts over time end up doing special deals. It won't be responsible to the Attorney General. It will be responsible to the Minister for Industrial Relations and it will*

absorb the ambience of the industrial relations scene rather than the legal scene."

If the Opposition in Australia is faithful to the principles uniformly observed by Federal governments at least, were Parliament at its behest to abolish the Industrial Relations Court, it would simply shift its work back to the Federal Court of Australia and allow the Industrial Relations Court to wither on the vine until its last member had died or retired. At least in the case of Federal judges in Australia, their tenure is protected by the *Constitution*. They, at least, cannot be removed and treated as so many others have lately been. But not so, in the case of judge-like (and even judge-titled) members of other independent decision-making bodies, Federal and State.

The point of this paper has been to call to notice of Indian colleagues in the law the growing proliferation of instances where old conventions protecting judicial independence in Australia have been rejected and expediency or political will has reigned. There may have been too many tribunals. There may indeed have been too many whose members have been given the title of "judge". But Parliament having acted in this way, it should not undo its promise lightly. If it does, it should obey international principles which have been devised by the United Nations and the international community to safeguard the independence of judges and judge-like office holders. That independence is crucial to a civilised society, pretending to live by the rule of law.

Of necessity, observance of the international principles and past Australian conventions will occasionally mean that people who would not be appointed *ab initio* to another court or body must be offered appointment out of respect for the basic principles of judicial independence. When it is said that this contemplates sanctioning in office and appointing people who would not otherwise get there, the answer which must be given is that those people *were* in office. If there is material to justify their removal there are statutory procedures to that end. The judiciary, like any other institution, is made up of people of varying capacity. We accept that fact, and even

the occasional mistaken appointment, as the price which is paid for the overall public good of the assurance of the independence of judicial and like office-holders. That independence is respected, not for the entitlements of the judge and his or her dependants. It is there for the protection of the community itself. Without assured tenure, there is always a risk that a decision-maker will bend to the will of the powerful or twist to the interests that seem to promise personal advantage. "Without fear or favour" is the boast. It must be upheld by the assurance of true independence. It is undermined by the repeated illustrations in Australia of the abolition of courts and court-like tribunals and the non-reappointment to the successor bodies of the former incumbents.

The way ahead on this issue, in Australia at least, is the enactment of entrenched constitutional guarantees, at least for judicial officers, which mirror those in the Australian *Constitution* and now enacted (but not entrenched) in the New South Wales *Constitution Act*. It is vigilant decision-making by the courts of Australia, expressing the common law in a way defensive of the protection of judicial independence. In this respect the international principles may now be invoked in Australia to help elaborate the common law or to construe ambiguous statutes in a way defensive of the tenure of independent decision-makers.[11] The legal profession should be mobilised to a realisation of the importance of the issue and to its duty to explain that importance to the community and to the media which sadly sees the protests as yet another example of lawyers protecting their personal privileges.

Where Parliaments and governments restructure courts, tribunals and independent offices (as is their right) they should conform to the principles respectful of the independence of the office-holders of the superseded body. Parliaments should keep their promise to such office-holders. Narrow distinctions should be rejected in favour of a realistic appreciation of the high constitutional issue which is at stake. And the judges themselves must be willing to defend the independence of their offices. Not merely for themselves. But for the community which is thereby protected.

FOOTNOTES

* President of the Court of Appeal of New South Wales, Australia. Chairman of the Executive Committee of the International Commission of Jurists, Geneva.

1. (1993) 4 SCC 441 (S Ct India).
2. (1981) Supp SCC 87 (S Ct India). See also *Subhash Sharma v Union of India* (1991) Supp (1) SCC 574 (S Ct India).
3. See M D Kirby, *The Removal of Justice Staples and the Silent Forces of Industrial Relations*, (1989) 31 J Ind Rels 334; (1990) 6 Aust Bar Rev 1.
4. These cases were litigated. See *Macrae v Attorney-General* (1987) 9 NSWLR 268 (CA); *Quin v Attorney General (New South Wales)* (1988) 28 IR 244; *Attorney General for New South Wales v Quin* (1990) 170 CLR 1 (H Ct Aust).
5. *Industrial and Employees Relations Act* 1994 (SA) amending the *Industrial Relations Act* 1972 (SA).
6. *Workers' Compensation Rehabilitation Act* 1991 (WA), s 112(1).
7. M D Kirby, "A Disgraceful Blow to Judicial Independence" (1993) 5 Judl Officers Bull 41.
8. A Res/40/32 (29 November 1985).
9. See *Sydney Morning Herald* 20 April 1994, 2.
10. See the Melbourne *Age*, 1 November 1993, 3.
11. See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 44.