CHAPTER 1

Introduction

[T]he 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.

The Rt Hon Sir Ninian Stephen[1]

The importance of the judiciary

In a democracy, constitutional government is ensured by a system of checks and balances. In his 1908 analysis of the notion of constitutional government, Dr Woodrow Wilson identified among the essential elements and institutions of a constitutional system, '[a] judiciary with substantial and independent powers, secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the government itself'.[2] Dr Wilson went on to describe the courts as the 'balance-wheel' of a constitutional system. He described the importance of a judicial forum in the preservation of the liberty of the individual and the integrity of the government in the following terms:

> There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it judged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance-wheel of our entire system; it is meant to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty.[3]

This description by Dr Wilson is apt to the judicial forum in Australia. The judiciary in Australia, as in all vibrant democracies, stands as a bulwark protecting the citizens from the overweening executive powers. It plays an adjudicative role in disputes between citizens and citizens, and between citizens and state. Given the federal nature of the Australian Constitution, the function of the federal judicial branch, according to Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[4] is 'the quelling of justiciable controversies, whether between citizens (individual or corporate), between citizens and executive government (in civil and criminal matters), or between the various polities in the federation'.[5] The 'core function' undertaken by most judges on a day-to-day basis, according to French CJ of the High Court of Australia, is to hear and decide cases that come before them. He explains that such a decision-making process involves three basic steps. Firstly, the judge has to determine the legal rules or standards applicable to the case. Secondly, the judge has to consider the evidence and decide what the facts are. Thirdly, the judge has to apply the legal rule or standard to the facts 'in order to determine the rights and liabilities of the parties and to award legal remedies or not as the case may be'.[6]

The High Court, as the apex court of Australia, has not only the power but also the duty to pronounce upon the validity of legislation, whether passed by the Commonwealth Parliament or the State legislatures. In a federal system, the judicature occupies a special position, unlike that in a unitary system or under a flexible constitution where the supremacy of Parliament is the governing principle. As a federal government is one whose powers have defined limits, it lacks the competency to exceed those limits. In *R v Kirby; Ex parte Boilermakers' Society of Australia*[7] the High Court said:

> The conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the government were placed in the federal judicature.[8]

The Australian Constitution contains a sprinkling of express rights but does not have an equivalent of the US Bill of Rights.[9] Because of the absence of an entrenched Bill of Rights or a statutory embodiment of rights,[10] the Australian judiciary does not attract the degree of controversy that attends the US Supreme Court when the latter is called upon to interpret the scope of the express guarantees contained in the Bill of Rights. Criticisms of judicial 'activism' in relation to the Australian judiciary are infrequent; however, criticisms of judicial adventurism and activism are levelled at the High Court from time to time. Such an

occasion arose in 1992 when the Court developed a doctrine of an implied right of political communication.[11]

The current prospects for a federal Bill of Rights are dim. If it should come to pass that such an instrument is adopted there will be greater public scrutiny of judicial decisions centred around this instrument. The judiciary, especially the High Court, would likely see itself as the 'guardian' of the guarantees embodied in the Bill of Rights, as can be seen from the experience in the United Kingdom. In the UK context, Lord Steyn, pointing to the *Human Rights Act 1998* as the UK's Bill of Rights, asserted that the guarantor of those rights 'is and can only be an independent, neutral, and impartial judiciary'.[12] With the assumption of such an enhanced role would come demands for greater judicial accountability and possibly for fundamental changes in the process of appointing judges.

Another important function of the courts is the power of judicial review over the acts of the executive. In performing the role of judicial review of the validity of legislation and of the legality of executive action, there will arise occasions when there will be tensions between the judiciary and the executive. Hence, it is vital that the judiciary be fully independent in order for it to carry out its role with fidelity to the oath of judicial office.

A sense of the important role played by an independent judiciary is best obtained by looking at the decision of the High Court in the *Communist Party* case.[13] A Menzies-led government had enacted the *Communist Party Dissolution Act 1950* (Cth), which was designed 'to ban the Communist Party and affiliated bodies, and to restrict the civil liberties of persons declared by the government to be dangerous or *potentially dangerous* communists'.[14] Despite the fact that this law was part of the Liberal–Country Party coalition's election platform for the 1949 election (which the coalition won) and despite the 'anti-communist hysteria fanned by the Korean War',[15] the High Court in a landmark decision invalidated the Act. Professor George Winterton observes:

> The *Communist Party* case demonstrated that our freedom depends on impartial enforcement of the rule of law, of which courts are the ultimate guardians. Although, of course, not infallible, impartial and fearless courts determined to exercise their proper powers are our final defence against tyranny.[16]

The case, Professor Winterton elaborates, was one of the High Court's most important decisions because of 'its symbolic importance as a reaffirmation of judicial independence'.[17]

The development of an independent judiciary

The notion of an independent judiciary took a very long time to evolve. The roots of the development of an independent judiciary can be traced

back to the English *Act of Settlement 1701*.[18] Prior to this Act, particularly in the seventeenth century, the appeal by the Crown and Parliament to the law for support in their struggle for power enhanced the importance of the judiciary.[19] Professor Shimon Shetreet observes that the judges thus became so important to the political struggle that 'both Crown and Parliament began to exercise every available form of control over the judiciary'.[20]

The Crown sought to exercise control over the judiciary in various ways. As judges then held office at the Crown's pleasure they could simply be removed from office without cause, or they could be suspended. There were other forms of control available to the Crown, also. Judges were dependent on the discretion of the Crown in relation to their salaries, pensions and promotion. To counter the Crown's influence over the judges, the Parliament sought to exert its own control over the judiciary by resorting to claimed breaches of parliamentary privilege, impeaching judges or calling them before Parliament to defend their decisions or actions.[21]

Judicial independence was significantly advanced by the passage of the *Act of Settlement 1701*. The rule that judges served at the good pleasure (*durante bene placito*) of the Crown was transformed by this Act as it provided that:

> [t]he judges' commission be made *quamdiu se bene gesserint* [during good behaviour] and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them.[22]

However, judges could still be removed without cause upon the demise of the monarch. This was overcome in 1760 by an Act which provided that their commissions should continue notwithstanding the demise of the monarch.[23] Judicial independence was further secured in England by various developments after the *Act of Settlement 1701*. Professor Shetreet explains these developments as follows:

> An Act of 1760 first established judicial salaries, and provided that they should be made a permanent charge upon the Civil List. In 1799 legislation established judicial pensions. Only in the last century did judges' remuneration take the form of comprehensive salaries coupled with a prohibition against supplementing it. Until then judicial salaries were supplemented by additional sources of income such as judicial fees, presents, profits arising out of sale of offices, allowances for robes and loaves of sugar. The additional sources of income were eliminated in a very long, gradual evolution extending over three centuries.[24]

The rule of law

The operation of the rule of law depends on a truly independent judiciary.[25] One of Australia's most highly regarded High Court Chief Justices, Sir Owen Dixon, described the Commonwealth Constitution as an instrument framed in accordance with many traditional conceptions, and added:

'Among these I think that it may fairly be said that the rule of law forms an assumption'.[26] This was reinforced by Sir Anthony Mason, Chief Justice of the High Court (1987–95), when he pointed out that 'the principal objects of the Constitution were to provide for a system of representative and responsible government and the maintenance of the rule of law by an independent judiciary'.[27]

The rule of law is a notion that is difficult to define as it has different meanings.[28] One sense of the notion is as the antithesis of the exercise of arbitrary power. A more prevailing meaning is 'the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts'.[29] If the governed and the governors are to stand equally before the law it is imperative that the judiciary should be impartial and have the appearance of impartiality;[30] hence, the effective operation of the rule of law requires a truly independent judiciary.[31]

The importance of judicial independence is highlighted by the oath (or affirmation) which a judge has to take upon appointment to the Bench. For instance, the judges of the High Court of Australia must take an oath (or affirmation) upon assuming office to 'do right to all manner of people according to law without fear or favour, affection or ill will'.[32] In his swearing-in speech as Chief Justice of the High Court of Australia, Sir Gerard Brennan elucidated the meaning and significance of this oath:[33]

> The . . . promise is to 'do right to all manner of people according to law without fear or favour, affection or ill-will'. . . In substantially that form the oath or affirmation is taken by every judge. It is rich in meaning. It precludes partisanship for a cause, however worthy to the eyes of a protagonist that cause may be. It forbids any judge to regard himself or herself as a representative of a section of society. It forbids partiality and, most importantly, it commands independence from any influence that might improperly tilt the scale of justice. When the case is heard, the judge must decide it in the lonely room of his or her own conscience but in accordance with law. That is the way in which right is done without fear or favour, affection or ill-will. Judges sometimes appear to be remote, belonging to what have been described as 'the chill and distant heights'. In the doing of justice that must be so. Justice is not done in public rallies. Nor can it be done by opinion polls or in the comment or correspondence columns of the journals.

The words 'without fear or favour, affection or ill-will', commonly recited in judicial oaths in most liberal democratic countries, signify the values of independence and impartiality which constitute 'the pillars on which justice according to the law stands'.[34]

Meaning of judicial independence

Judicial independence, according to Sir Anthony Mason, is 'a privilege of, and a protection for, the people'.[35] It is necessary to consider what

the principle of judicial independence means and why that principle is regarded as being of fundamental importance.[36] In any society there will always be conflicts between the people and governmental authorities and between individual and individual. The essence of a civilised society is the supplanting of violent retaliation or retribution by a system of courts. Inevitably, when a court is called upon to adjudicate a dispute there will be a winner and a loser.[37] Quite obviously, if the loser believes the judge to be acting according to the dictates of the government or to be partial towards the other party, they are unlikely to accept the verdict of the judge. The resentment generated can lead to 'social discord, division, conflict and violence'.[38] Hence it is important for the community to have absolute confidence in the impartiality of the judiciary. That confidence exists only if the judiciary is seen to be truly independent. Judicial independence has a number of aspects to it. Shimon Shetreet explains these aspects as follows:

> The independence of the individual judge refers to his personal independence (that is, his personal security of tenure and terms of service), as well as his substantive independence (that is, in the discharge of his official function). In addition to the independence of the individual judge there is also the collective independence of the judiciary as a whole. This aspect is sometimes referred to as the corporate or institutional independence of the judiciary.[39]

Shetreet also points to another aspect of judicial independence, namely the independence of the individual judge vis-à-vis the judge's judicial superiors and colleagues. He labels this the 'internal independence' of the judge.[40]

The key essence of the substantive independence of the individual judge is that a judge must be 'free from pressures which could tend to influence a judge to reach a decision in a case other than that which is indicated by intellect and conscience based on a genuine assessment of the evidence and an honest application of that law'.[41] French CJ in *South Australia v Totani*[42] said:

> At the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in the court, including, but not limited to, the influence of the executive government and its authorities. Decisional independence is a necessary condition of impartiality. Procedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process.[43]

Impartiality has been described as 'the supreme judicial virtue'.[44] There is some debate as to whether the principle of judicial independence connotes more than just the notion of impartiality. In the Canadian case of *MacKeigan v Hickman*[45] McLachlin J said that impartiality relates to 'the mental state possessed by a judge' whereas judicial independence denotes

'the underlying relationship between the judiciary and other branches of government which serves to ensure that the court will function and be perceived to function impartially'.[46] However, Justice R D Nicholson (Federal Court of Australia) found the distinction 'between impartiality (as a state of mind) and independence (as a state of institutional independence)' to be 'too semantic'. In his view they reflected different aspects of the principle of judicial independence.[47] The principle of judicial independence seeks to secure for the judiciary an environment in which the judges can perform their functions without being subject to any form of duress, pressure or influence.[48] For a judiciary to be properly independent, it is also argued, it must be substantially in charge of its own administrative affairs.[49]

International standards and judicial independence

The principle of judicial independence is accorded almost universal recognition.[50] The requirement that judges should be independent in their decision-making is acknowledged by all liberal democratic legal systems.[51] The importance of an 'independent and impartial' tribunal is accorded recognition in a number of international instruments.[52] The *Universal Declaration of Human Rights* (Art 10) provides that '[e]veryone 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'. Similarly, the *International Covenant on Civil and Political Rights* (Art 14(1)) enshrines the right of everyone who is charged with a criminal offence to 'a fair and public hearing by a competent, independent and impartial tribunal established by law'.[53]

It is worthwhile to note the following provisions of the *Basic Principles on the Independence of the Judiciary*, which were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Milan, September 1985) and subsequently endorsed by the United Nations General Assembly (in December 1985):

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them 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.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

The *Draft Universal Declaration on the Independence of Justice* (1989) (Singhvi Declaration) also deals with the independence of the judiciary. Paragraphs 3 and 8 of the draft declaration provide:

3. In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of the judge to pronounce his judgment freely. Judges, on their part, individually and collectively, shall exercise their functions with full responsibility of the discipline of law in their legal system.
. . .
8. Judges shall always conduct themselves in such a manner as to preserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of thought, belief, speech, expression, professional association, assembly and movement.

The universal status of the principle of judicial independence was reaffirmed by a resolution adopted on 19 August 1995 by the Chief Justices at the 6th Conference of Chief Justices of Asia and the Pacific.[54] The resolution embodying the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* provides, in Art 3, the following:

(3) Independence of the Judiciary requires that:
   (a) the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences direct or indirect, from any source; and
   (b) the Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.

Other instruments providing international standards pertaining to judicial independence include: The International Bar Association's *Minimum Standards of Judicial Independence* (1982) (New Delhi Standards); the International Commission of Jurists' *Draft Principles on the Independence of the Judiciary* (1981) (Siracusa Principles); and the

Bangalore Principles of Judicial Conduct (2002). The importance accorded to the principle of judicial independence is underlined by a number of international conferences and meetings on the subject, including: the World Conference of Independence of Judiciary (Montreal, 1983); the Lusaka Seminar on the Independence of Judges and Lawyers (1986); and the Latimer House Conference which formulated the *Latimer House Principles and Guidelines for the Commonwealth* (1998). The most recent statement of international standards is the *Mt Scopus Approved Revised International Standards of Judicial Independence* (2008) which emanated from a number of conferences involving many legal academics and jurists.[55]

A declaration of judicial independence

On 10 April 1997, the Chief Justices of the Supreme Courts of all six Australian States, the Australian Capital Territory and the Northern Territory issued a *Declaration of Principles on Judicial Independence*.[56] The Declaration was timed to coincide with the holding of the South Pacific Judicial Conference. In a radio interview, Chief Justice John Doyle of the South Australian Supreme Court (1995–2012) explained that the Chief Justices concerned thought that it was a 'good idea' to record in writing principles pertaining to some aspects of judicial independence.[57]

At the outset the Declaration referred to various international instruments, in particular the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*. The following principles were enunciated in the Declaration, relating to the appointment of judges of the State and Territory Courts:

(1) Persons appointed as Judges of those Courts should be duly appointed to judicial office with security of tenure until the statutory age of retirement. However, there is no objection in principle to:
   (a) the allocation of judicial duties to a retired judge if made by the judicial head of the relevant court in exercise of a statutory power; or
   (b) the appointment of an acting judge, whether a retired judge or not, provided that the appointment of an acting judge is made with the approval of the judicial head of the Court to which the judge is appointed and provided that the appointment is made only in special circumstances which render it necessary.
(2) The appointment of an acting judge to avoid meeting a need for a permanent appointment is objectionable in principle.
(3) The holder of a judicial office should not, during the term of that office, be dependent upon the Executive Government for the continuance of the right to exercise that judicial office or any particular jurisdiction or power associated with that office.

(4) There is no objection in principle to the Executive Government appointing a judge, who holds a judicial office on terms consistent with principle (1), to exercise a particular jurisdiction associated with the judge's office, to an additional judicial office, in either case for a limited term provided that:
   (a) the judge consents;
   (b) the appointment is made with the consent of the judicial head of the Court from which the judge is chosen;
   (c) the appointment is for a substantial term, and is not renewable;
   (d) the appointment is not terminable or revocable during its term by the Executive Government unless:
      (i) the judge is removed from the first mentioned judicial office; or
      (ii) the particular jurisdiction or additional judicial office is abolished.

(5) It should not be within the power of Executive Government to appoint a holder of judicial office to any position of seniority or administrative responsibility or of increased status or emoluments within the judiciary for a limited renewable term or on the basis that the appointment is revocable by Executive Government, subject only to the need, if provided for by statute, to appoint acting judicial heads of Courts during the absence of a judicial head or during the inability of a judicial head for the time being to perform the duties of the office.

(6) There is no objection in principle to the appointment of judges to positions of administrative responsibility within Courts for limited terms provided that such appointments are made by the Court concerned or by the judicial head of the Court concerned.

The Declaration was described by Sir Gerard Brennan as 'timely', and he explained that the High Court and federal courts were not signatories to the Declaration because their independence was protected by the Commonwealth Constitution.[58] Sir Gerard added:

> Political issues must be debated, political fortunes must wax and wane, political figures must come and go according to the popular will. That is the nature of a democracy. But the apolitical organ of government, the courts, are there continually to extend the protection of the law equally to all who are subject to their jurisdiction: to the minority as well as the majority, the disadvantaged as well as the powerful, to the sinners as well as the saints, to the politically incorrect as well as those who embrace a contemporary orthodoxy.[59]

Guarantees of judicial independence

Prior to federation, removal of Australian colonial judges could be effected under the *Colonial Leave of Absence Act 1782*, an Imperial Act commonly referred to as '*Burke's Act*'.[60] The power of removal was expressed in the following terms in s 2:

> If any person or persons holding such office shall be wilfully absent from the colony or plantation wherein the same is or ought to be exercised, without