THE IMPORTANCE OF JUDICIAL INDEPENDENCE

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The concept

Judicial independence is a fundamental component of the rule of law, that is, the very important rule whereby the law is applied equally to all persons (and entities) by an impartial judiciary.

Judicial independence shields judges from inappropriate influences, be they from the government or other external actors, enabling them to make decisions based solely on the law and the evidence.

Additionally, it protects judges by shielding the courts from executive or legislative influence when deciding on human rights breaches by branches of the state itself.

The protections afforded through genuine independence are critical to a properly functioning judicial system.

To understand judicial independence you first need to understand what is known as the doctrine of the separation of powers and you need to know what the legislature and the executive and the judiciary are.

Well, the doctrine of the separation of powers holds that the legislature and the executive and the judiciary are three wholly separate and wholly independent arms of government, each confined to its own role.

Let's stick here to Tasmanian Government and to the Supreme Court of Tasmania.

The legislature is the two houses of parliament – the House of Assembly and the Legislative Council, the Executive is the Premier and Cabinet Ministers and those people employed in the State Service and other officials appointed by the State. The Judiciary, for present purposes, is the seven judges of the Supreme Court.

So, under the doctrine of the separation of powers the judges must be independent of Parliament and the Executive.

Why should this be? Well Parliament makes the laws under which we live and the Executive manage them and enforce them, for example via the police force for criminal laws. But it is the Judiciary which must say what the laws mean, how and when they may be applied and when they have been broken.

This can only be done by judges who are wholly independent of the law makers and the law enforcers. Like a football umpire. Someone who can decide a case between two opposing sides, fairly and impartially, without being influenced by anyone in government or elsewhere.

Judges must make a personal decision based on the law. The buck stops with them. So if they could be pressured to favour one side or the other, the result would be unfair and unjust. Corrupt in fact.

So judges must be incorruptible. But how do you achieve that. Well in this country, unlike some, where judges are popularly elected, it is achieved by ensuring security of tenure and conditions.

That is achieved partly by legislation – a statute – and partly by a long standing convention inherited from our British past via the Westminster system.

James II of England who ruled from 1685 – 1688 sacked 10 judges in three years, so when he was overthrown by Parliament and replaced by William III, the Act of Settlement was passed in 1701. That statute held that the Kings and Queens of England could not be Roman Catholic and that judges could only be removed from office by the vote of both houses of Parliament.

In Tasmania security of tenure is guaranteed by a statute called the Supreme Court Act which says that judges can sit until they are 75 years old and that they cannot be removed from office other than by the vote of both houses of Parliament for proven misconduct or incapacity for office.

A further layer of protection is provided by a convention, backed up in case law, that a judge's salary and entitlements cannot be reduced during the judge's period of office.

That doesn't stop Parliament from doing things to reduce the entitlements of future judges as it did when the government of the day abolished judicial pensions 20 odd years ago, leaving Tasmanian judges as the only judges in Australia without pensions in retirement.

The way it works

In practice the judges encounter many cases where the government is one of the parties before the Court. Environmental cases are good examples. The Bob Brown Foundation is often opposed in Court by the environment minister or Timber Tasmania, over disputes about mining or logging in the Tarkine. These are hotly contested cases where the judge's decision is going to be unpopular with one side or the other whatever it is.

You can see how a judge must be totally independent and unable to be threatened by anyone, however subtle the pressure may be. So that a judge is never tempted to even think – oh I must look after the government or my salary might be cut or not increased.

Judicial independence also operates amongst the judges. The Chief Justice is not my boss. He is what is known as the first among equals. It is his job to organise the business of the Court but he cannot give orders. Everything that happens as to work-sharing between judges and serving the people of Launceston and Burnie and so on, happens as a result purely of co-operation between the judges and the Chief Justice.

The system of appeals also has a part to play in reinforcing judicial independence. No irrational or biased decision of a judge could ever go unchecked, because the unsuccessful party has a right of appeal to a Full Court of three judges in civil cases, involving say money or property, or to a Court of Criminal Appeal of three judges in criminal cases. And above those Courts sits the ultimate appeal court, the High Court in Canberra, which can sit a court of up to seven judges.

Judge's decisions can be reversed by those appeal courts and in criminal cases a retrial can be ordered or a verdict of not guilty entered.

Now, all of this judicial independence does not mean that judges cannot be complained about. Systems or protocols exist within the Court and between the Court and the Bar Association and the Law Society where complaints can be made to the Chief Justice about a judge being rude or being too slow or about sexual harassment or bullying. If the complaint is actually about the Chief Justice it is made to the next most senior judge.

Some other States have what are known as judicial commissions comprising retired judges and other appointed members who deal with complaints against judges and may report to the Attorney General up to and including recommending that Parliament should consider removing the judge.

We will no doubt have a judicial commission in the not too distant future. I am looking at the various models in other jurisdictions at the moment.

I should add that only one Tasmanian judge has ever been removed by Parliament. He was Justice Montagu who was only the second judge was appointed to the Court after the first Chief Justice John Pedder was appointed 199 years ago in 1824. Two further attempts at removal were unsuccessfully made in the Tasmanian Parliament in the case of Justice Thomas Horne in 1860 and Justice John McIntyre in 1907.

Montagu spared the legal profession little more than the press. The *Colonial Times* of 12 July 1836 reported that when the Solicitor-General, Alfred Stephen, arrived late to court and began to eat a sandwich and drink lemonade rather than opening his case, Montagu railed:

… in your official capacity, I shall always treat you with the courtesy and the respect due to you. Were you elsewhere, I should treat you, after your conduct, with even less courtesy than a dog or a cur, as your conduct richly deserves.

His ire extended in April 1840 to the then Lieutenant-Governor, Sir John Franklin, who had advised Montagu that the cottage in Launceston ordinarily reserved for judges on circuit would be unavailable because the Franklins required it because an official ball was to be held in the town. Montagu wrote to Franklin complaining that it was an affront to him and the Court that Franklin and his suite should occupy the cottage at the time of a Court circuit.

On 27 October 1847, Thomas Young, a solicitor acting on behalf of his client, Anthony MacMeckan, wrote a letter of demand to Justice Montagu seeking payment of a debt of £283 within seven days. Montagu begged for time to allow him to sell securities he had offered for

the debt, but Young, who apparently held a grudge against Montagu, pressed on and issued a summons against him in the Supreme Court. Montagu offered a cheque in full settlement of the debt, but less the legal costs of the summons, which Montagu claimed was illegal. This offer was also refused.

On 17 November, Montagu obtained a summons from Chief Justice Pedder calling upon MacMeckan to show cause why his summons should not be set aside for illegality. Pedder heard the application and a few days later he found in Montagu's favour on the basis that each judge formed an integral part of the Supreme Court and that neither of them could sue or be sued in it

Ultimately Lieutenant – Governor Denison obtained advice from his law officers that it was lawful for him to suspend a judge under a statue known as *Burke's Act* in circumstances where the judge had used his office to avoid paying a legally due debt. Montagu was removed from office on 31 December 1847 by an order of the Lieutenant-Governor and the Executive Council.

As the American Bar Association has recently noted, the complex and ever evolving nature of judicial independence means it is constantly under threat. The twentieth century has seen an increased political significance of the courts with cases of judicial review—where judges determine the legality of laws passed by the legislative branch—on the rise, along with a growing trend of courts being politicized by politicians and the media.

Additionally, rapid technological development changes the way courts work and what people's expectations are as to the meaning of access to justice and timely delivery of justice.

For these reasons, the independence of the judiciary needs to be kept under constant review.

Justice Stephen Estcourt AM

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