WRECKERS at work

Michael Kirby

The erosion of the tenure and independence of statutory office holders in Australia.

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Based on an address to a dinner in honour of Moira Rayner, Commissioner of Equal Opportunity (Vic.), Melbourne, 1 February 1994.

A celebration of equal opportunity

In 19 years of public office in this country, I do not think that I have ever spoken to such a huge dinner of such enthusiastic supporters of human rights and equal opportunity. Seven hundred of us. And three hundred turned away. A thousand Australians who come together to say something to each other and to our fellow citizens. It is a great meeting. It is a celebration of equal opportunity worthy of Moira Rayner, our guest of honour.

I could speak with love and respect for Moira Rayner. For the things which she has done for equal opportunity. For the things which she has done for women in this State and in this country. And for her work for many other groups of disadvantaged fellow citizens including gays, the disabled and people living with HIV/AIDS. I could speak of her work in the Australian section of the International Commission of Jurists where she has been a valiant champion for the cause of equal opportunity, human rights, the rule of law and the independence of those office holders who need independence to do brave and courageous things. But I will not do so.

Indeed, I am not even going to speak about Moira Rayner specifically at all. I want to speak about something which she would agree is even more important than the office she still (but temporarily) holds, than Victoria or even Australia. I want to speak about constitutional institutions and conventions which are under assault, as never before in this country.

This morning I attended a great equal opportunity event in Sydney. I progressed into the Banco Court in Sydney in stately form, in strict order of precedence, naturally. We walked into the Court to welcome Justice Carolyn Simpson, the newest judge of the Supreme Court of New South Wales. She increased by 100 per cent the number of women on the bench of the Supreme Court of New South Wales. They are now two. Yet it is still two more than you have on the Supreme Court of Victoria.

As I sat there and heard the tributes so well and richly deserved by Carolyn Simpson – another fighter for equal opportunity for human rights: a past President of the Council for Civil Liberties of New South Wales, my eyes strayed around the court as they are wont to do during such proceedings. I was listening attentively, I assure you. But the eyes rose up to the portraits of the judges, all dressed in their crimson robes. Images of two hundred years of the history of the administration of justice in our country paraded before me.

Before me, before us, there were about 500 people. They were mostly lawyers. Indeed, mostly barristers, and many solicitors. They rose at the appropriate moment in their groups when the President of the Bar spoke and when the President of the Law Society spoke to welcome the new judge. I thought: how strange are our institutions that preserve our liberties. How important it is to preserve this historical legacy that we have inherited. For example, the way that we choose our judges. Not from a group of people who are trained to be judges in the public service from the beginning of their professional careers. But, for the most part, from the private legal profession. Most come into their offices without the way of

thinking typical of people who have been in government service all their lives. Our judges bring, from outside government, an attitude of mind of vigilant independence. Upon their appointment, they become very important guardians of our liberties.

Independence: an attitude of mind

Then I thought of something which was not quite as ancient as the common law. It came about in 1688 with the Glorious Revolution. Thereafter, the Executive Government could not remove judges at will. It could not remove such people, except by an address of both Houses of Parliament in the one session, praying for their removal on the grounds of proved misconduct or incompetence. This is a feature of our constitutional life which is not found in many countries. It is a most valuable thing that we have in our constitutional life in Australia. And yet in the *law* of this country, it is safely protected only in respect of the federal judges. It is not safely protected for State judges. It is not protected for federal commission holders who are not judges. It is not protected for State commission holders. It is not protected for people who are outside the assurance of s.72 of the Australian Constitution.

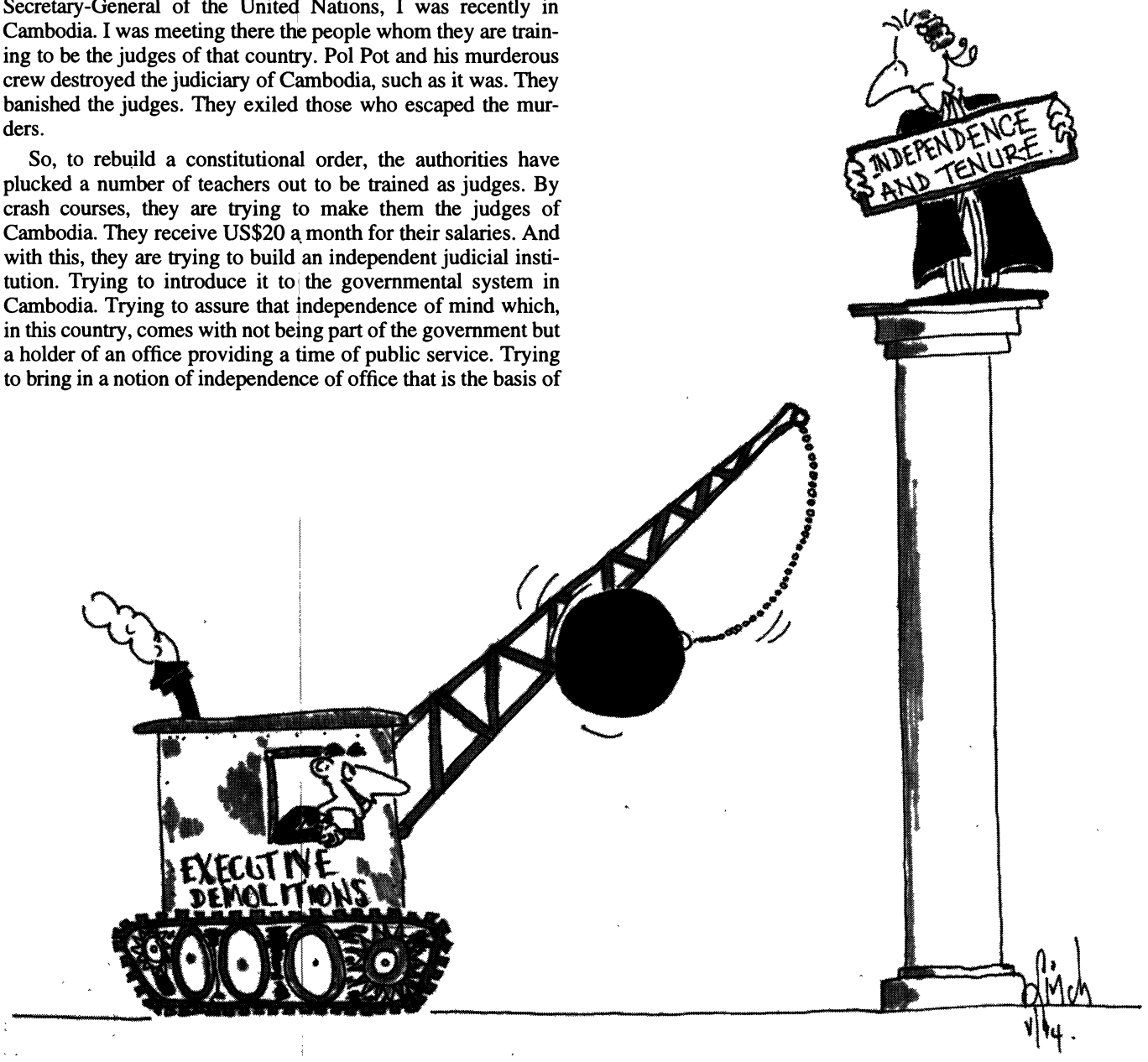
In my new capacity as Special Representative of the Secretary-General of the United Nations, I was recently in Cambodia. I was meeting there the people whom they are training to be the judges of that country. Pol Pot and his murderous crew destroyed the judiciary of Cambodia, such as it was. They banished the judges. They exiled those who escaped the murders.

So, to rebuild a constitutional order, the authorities have plucked a number of teachers out to be trained as judges. By crash courses, they are trying to make them the judges of Cambodia. They receive US$20 a month for their salaries. And with this, they are trying to build an independent judicial institution. Trying to introduce it to the governmental system in Cambodia. Trying to assure that independence of mind which, in this country, comes with not being part of the government but a holder of an office providing a time of public service. Trying to bring in a notion of independence of office that is the basis of the courage which rests on the foundation of a limited capacity of the government of the day – whoever they might be – to remove the office-holder from office. This is a very difficult thing to do in a country that has no such traditions as we have enjoyed. Yet how vital it is.

The Venturini case

Now let me bring you back to Australia. In 1976 a course of events began, the latest example of which has happened to our guest of honour. What has happened to Moira Rayner is, alas, but a sad illustration of several events which have occurred in recent years in Australia. I am here to call them to your attention so that you will not forget.

Dr George Venturini was a member of the Trade Practices Commission of the Commonwealth in 1975. He was appointed to that office by Senator Lionel Murphy. Dr Venturini was something of a maverick. Certainly, he was of an independent cast of mind. But he was a commissioned member of the Trade Practices Commission of our country.



Dr Venturini became concerned in that office about what he thought was the failure of the Commission to pursue what he considered to be a cartel in zinc production. He wrote a very strong dissenting report about it. The report was published.

With the change of federal government in 1975, there was an inquiry into the Trade Practices Commission. The new Fraser Government introduced a measure to change the Act which had established the Commission. The new Act came into force at midnight on 30 June 1976. By the new Act, the old Commission was abolished. Every Commissioner thereby lost office, although he or she had been promised tenure of office not to be removed except by the will of Parliament for proved misconduct or incapacity.

The result of the repeal and re-enactment was that every Commissioner, save for Dr Venturini, was re-appointed to the new Commission. Dr Venturini was not re-appointed. Rather than submit to this ignominious removal by the abolition of his institution, Dr Venturini tendered his resignation to the Governor-General, Sir John Kerr. The resignation was to take effect at one minute to midnight on 30 June 1976.

This tale is told in a book which Dr Venturini has written. It is a pity more Australians did not read the book at the time. Perhaps some in office did so. Certainly Australia there followed a course of action which has sadly been repeated many times since 1976.

Other removals of independent office holders

In 1981 a number of judges of the Federal Court were judges in the Northern Territory. The Northern Territory removed them from office by the abolition and reconstitution of the courts in the Northern Territory. Of course, the judges dealt with in this way remained judges of the Federal Court. One might say no harm was done. But it was an example of the removal of those judges from the offices to which they had been appointed, not by the procedure that Parliament had promised. They were not protected by the Constitution, because in this respect, they were judges in the Northern Territory.

In 1988, the Federal Labor Government acted. This is not a partisan thing. The Labor Government effectively removed from office Justice James Staples. He was another maverick. It was done in the same way – by what I would call the *Venturini* procedure. The old Arbitration Commission, of which Justice Staples and I had been members together, was abolished. In its place, the new Industrial Relations Commission was created. Every member of the old body was appointed to the new. Even a judge who had reached retiring age was given a special dispensation. He was appointed to the new Commission; but not Justice Staples. I protested at the time. But it was said: 'He is not a *real* judge'. He is a member of a commission not a court. Justice Staples had been promised he would not be removed, except for cause demonstrated to Parliament in the same way as a judge. Yet he was effectively removed from office.

In 1988, the same thing happened in New South Wales. The Government reconstituted the Local Court of New South Wales from the Court of Petty Sessions. Of the 105 magistrates of the old court, 100 were appointed to the new court. But five were not. They were not appointed because of a work assessment, which they did not see. It is said that one was always late. One was said to be always rude. One was said sometimes to be intoxicated. Secret, private comments about these judicial officers which were never put to them. They were never given an opportunity to respond or to defend themselves. They lost their judicial office by the new procedure, not removed on merit – but by the abolition of their court and office.

As chance would have it, this time the issue came before me sitting in my judicial capacity. The Court of Appeal in New South Wales, by a majority, said that this is not good enough. The magistrates did not have a right to be appointed to the new court. But they did have a legitimate expectation, an equal opportunity right, if you will, to have their application for appointment to the new Local Court considered on its merits. And not determined on secret reports. Their applications were sent back to be reconsidered free from procedural unfairness to them.

Then it was done again in the case of the former magistrate, Mr Quin. Mr Quin lost his case in the High Court of Australia. The High Court, reversing my court, said that courts must not interfere in Crown appointments to judicial office. The appointment to office is in the gift of the Crown. Courts should not question the Crown's prerogatives in this respect. A disappointing failure of our higher court to defend the fulcrum of judicial independence – tenure.

Recent cases in Victoria

If this tale, this cautionary tale, were not serious enough, it gathers pace in 1992. In this State and elsewhere in our Commonwealth, the instances accumulate. The new Government in this State saw Commissioners of the Law Reform Commission of Victoria removed from office when the Commission was abolished.

In 1992, nine undoubted judges of the Accident Compensation Tribunal of this State, undoubted judges of an undoubted court were effectively removed from office by the *Venturini* expedient. Their tribunal, their court, was abolished. They are now suing in the courts of this State. Lest I fall into the error of contempt of court, I shall say nothing more of their case.

Then this year, the office-holder of the Liquor Licensing Commission was removed from office in a similar way.

In October 1993, Moira Rayner received similar treatment. She was removed from office by the simple expedient of the abolition of the office which she held. She was not removed for cause, as had been promised by Parliament. Simply, the expedient of destroying the office which she held was the procedure used to end her appointment.

In December 1993, the Director of Public Prosecutions of Victoria, perhaps too high to be removed from office, became the subject of legislation which is still under consideration, proposing to put him effectively under the control of a 'Deputy Director' of Public Prosecutions. As it seemed to some observers of the State, this was a quintessential development in Orwellian 'Double Speak'. To talk of a 'Deputy Director', without whose authority nothing effective and important can be done by the Director, was a classic case of a misleading title misstating the truth. Yet the Director of Public Prosecutions is a person whose decisions determine whether the great process of Crown prosecution is not misused to harass the enemies or favour the friends of the temporary holders of political power.

In Western Australia now, the *Compensation Act* has been amended. At the end of February 1994, a new Act will come into force. It abolishes the Compensation Board of Western Australia. The office of a judge of that Board is thereby abolished. An undoubted judge, promised tenure, loses his office in this way. It may be that judge can make special arrangements with the Government of Western Australia. I do hope so. Because otherwise we will see, repeated through this country, the course I have been trying to illustrate to you. It is a course of removing people, whether they be judges or other people,

who have to do brave and strong things akin to those which judges have to do. Removing them from office by the simple expedient of abolishing the office which they have held.

That is where these melancholy developments stand. But not quite. Because people watch these events. People in political office have friends and they have enemies. The problem of which I speak is not a partisan matter. Politicians of every complexion have acted without respect for the constitutional conventions. Their conduct, I am sad to say, has been disgraceful.

There is an ancient battle known to our history between the Executive and Parliament. In the old days, it was the battle between the Crown and Parliament. But now it is the opinionated Executive in all jurisdictions of this country which, unheedful of the principles of independence of mind and of the need for courage, is embarked upon a course to deprive Parliament of the review of the tenure of independent office-holders.

Moira Rayner never faced Parliament with an accusation that she had, for cause, given reason to be removed. Indeed, none of the people I have spoken of were put before Parliament – as they had been promised – to be judged by the people's representatives, before being deprived of their independent positions. The steps were taken by the government of the day – governments of both political persuasions, simply to abolish the office. It is a course to be watched. In my view, it is a course to be lamented.

Constitutional departures and civic protest

When I was in Cambodia last week, I read a book about President Nixon's decision to bomb Cambodia secretly. Do you remember how it was done? The B52s took off from Guam, en route to Vietnam. They were given bombing coordinates, apparently taking them to bombing targets in Vietnam. The coordinates actually took them 30 kilometres into Cambodia. That quiet, neutral country of seven million people, between powerful Thailand and strong Vietnam, was bombed most cruelly.

One of the pilots, who was a man of some religion, heard that his bombs had fallen on a wedding feast, killing all present. His own marriage ceremony had been so important to him, that he became deeply concerned. He wrote to his member of Congress. He protested about what had happened. He said it was unacceptable. He offered to give evidence. He believed the President's action was a breach of the United States Constitution – in word or spirit.

This serviceman commenced a test case in the court of the United States to assert the bombing of Cambodia by the President, without the authority of the Congress – required under the Constitution of the United States – was an unconstitutional and illegal act. He fought his case, through the courts. He fought it in the media. He fought it in the Congress. He was joined by other concerned soldiers and airmen who objected to what they had been required to do. Not because they were pacifists. But because their orders had been unconstitutional and wrong; done without the authority of the people. Eventually their voices were heard by the people.

Things have happened in our country which breach fundamental constitutional conventions. They are conventions which have been respected for centuries. We should not accept such breaches. We should protest resolutely. We should continue to do so until the people listen to the protesters.

A call to international principle

In Madrid two weeks ago, I went through the list of the Australian departures from the proper principle I have presented to you tonight, in a meeting of the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers. I mentioned the cases, including the case of Moira Rayner. I told the participants of a development in far-away Australia involving the removal of independent people from office simply by the new expedient of abolishing their office. It is a development which, like the American pilots, we should not accept. As citizens we should protest it. As a judge who knows the institutions of our country, I protest it. As women you should protest it. As men you should protest it. It is a matter of the constitutional conventions of Australia. It is a matter of abiding concern to all of us. I believe it is not too much to say that it lies at the heart of the rule of law in this country.

Just as Moira Rayner dedicated herself, we should renew our dedication to the independence of office holders, who need to do brave and strong things, when we think of her service to the people of Victoria, the people of Australia. We must hold Parliaments to their promises given to judges and other independent office-holders: that they will not be removed without parliamentary sanction. If Parliaments abolish the office of such people, they must conform to international principles. Such office-holders must then be offered appointment to another office of the same or equivalent rank and independence. This is not merely a protection for the personal position of the incumbents. It is a protection of the independence of their office, which is vital to the interests of the public whom they serve.

The wreckers of important constitutional conventions are at work in Australia. We should expose them and reveal the danger which their actions pose to our good government.