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Judicial Conduct: Relationship With Government

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JUDICIAL CONDUCT: RELATIONSHIP WITH GOVERNMENT

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In speaking of the relationship between the courts and the media I spoke of a level of inevitable tension. I suggested that the relationship is symbiotic in the sense that each needs the other, but that it could be a tense relationship because each was pursuing different goals. That tension was not, I suggested, unhealthy, so long as each side recognised the legitimate interests of the other and acknowledged that with power comes an obligation for responsible exercise of power.

In dealing with that topic, I suggested that the appropriate response to criticism of a judge, where it was thought that some public reply was desirable, should be undertaken by a court or an organisation of judges, rather than by the individual judge. In considering that concept further, I would like to deal with a different form of criticism, namely criticism by a government minister, official or agency. But in order to address that topic it is necessary to consider the underlying relationship between a judge and the government.

Again, the relationship is one which involves a level of tension. We talk a lot about the importance of judicial independence, but usually without recognising expressly and giving sufficient weight to the many ways in which, as a judge, one is not independent of the government.

There is probably no more central or difficult issue for a judge than dealing with interests of the government. Thus, in nearly every criminal case, the prosecutor is a government officer or agency. Many civil cases, especially in the area that we call administrative law, involve disputes between individuals and the government. And because the government is greatly involved in the day-to-day running of public services, including hospitals, schools, transport and many other activities, there is continuing opportunity for conflict and dispute between citizens and the government. Even private businesses spend much of their time dealing with government regulation and licensing systems.

The relationship between the government and the courts is one which often involves tension or friction. I read in the papers that your government, at a national level, is strenuously engaged in resisting corruption and ensuring that the relationship between its officers and private individuals is subject to the rule of law. I expect it is quite unnecessary to give examples to illustrate the point, but sometimes illustrations from a different system can be useful.

Let me give you an example involving litigation in which I had some personal involvement as an advocate, before becoming a judge. It involved a decision by an Australian government agency about importation of pig-meat into Australia. For many years Australia had limited the countries from which pig-meat could be imported and imposed tight restrictions to ensure that meat which was introduced was free from pig diseases. However, there was pressure from other pork producing countries to allow pig-meat to be imported into Australia. They argued that Australia had obligations as a member of the World Trade Organisation which it was not fulfilling. If it were to refuse permission to import pig-meat from, for example, Denmark or the United States of America, it needed to do more than show that pigs in those countries suffered from diseases which were not found in Australia. It needed to prove, scientifically, that diseases could be introduced through the importation of pig-meat and that there was a real risk that such diseases could find their way into Australian pig farms. And, I should say, this argument did not arise only in relation to pig-meat: there have been complaints about importation restrictions on apples, pears and many other food materials. Because Australia is a large island, we are free of some diseases which are common in many other parts of the world. Our farmers are keen to avoid the risk of contamination, wherever possible. On the other hand, overseas producers tell the Government that Australian farmers are just trying to protect their own products from competition and that the risk of importation of disease is too low to be significant.

Faced with these conflicting pressures, the Australian government spent some years, and considerable amounts of money, undertaking scientific assessments of the risk of importation of diseases in relation to a number of products. At the end of this lengthy exercise, the government agency responsible for controlling imports decided to relax the restrictions on importation of pig-meat. The Australian pork farmers challenged this decision in the Federal Court.

The first point to note is that in accordance with basic principles of administrative law, unless a special tribunal is established or particular power given to a court to review the correctness of the decision, the role of the court is limited to determining that the decision was made according to law. The factual determination made by the Government, through its responsible officers, was not able to be challenged, so the challenge in the pig-meat case concerned the proper application of the legal principles set out in statutes which specified the process which was to be followed and the standard which was to be adopted. The questions for the Court were therefore narrow ones. In that sense, the Government's decision-making process was largely immune from challenge, because the only legitimate challenge was for legal error. Nevertheless, the Government officers whose decision was under challenge did not enjoy having to go through the court process. First, they were scientists and public servants and would be answerable to their Minister if the Court found they had made mistakes. Secondly, although they obtained some comfort from the fact that their factual conclusions were largely immune from challenge, they thought that the legal argument, strictly limited to the application of the legal requirements imposed by Australian law, ignored important underlying issues, such as Australia's compliance with WTO obligations, Government policy allowing a competitive market place so that the cost to consumers of food products was no higher than it should be and, importantly to some members of the Government, the challenge was brought by Australian pork farmers who had economic interests to protect by way of limiting competition, as well as legitimate concerns about the health of their pigs.

In appearing for the Commonwealth, resisting the challenge to the validity of the decision, it was necessary to explain to the senior departmental officers the way in which the hearing would proceed and the kinds of issues which would be addressed. That explanation did not entirely allay their concerns, because they quickly realised that none of the broader policy issues, having international ramifications from the point of view of the Government, would be considered by the Court. Similarly, they were not encouraged by the thought that the judge would have no interest in, or concern for, their personal careers, should the decision go against the Government.

As one would expect, the Federal Court judge who heard the proceedings focused his mind on the evidence of the case and the legal errors which were said by the challengers to render the decision unlawful. His judgment, setting aside the decision on the grounds that one at least of the alleged errors had been committed, was correctly and properly reasoned, purely on the basis of legal error. [2] However, the judge was a very senior member of our Federal Court and I do not doubt for one moment that he was fully aware of the kinds of issues which would have agitated the Government, up to Ministerial level, as well as the individual departmental officers. It was clear from his decision that he resolutely put those factors to one side in addressing the legal issue of validity.

By way of a postscript, I should add that quite recently the Full Court of the Federal Court overturned the decision of the primary judge and upheld the validity of the Commonwealth actions. [3]

Despite the serious level of frustration which was caused by the commencement of the proceedings, which was increased by the decision of the primary judge to uphold the challenge, and only subsided when the appeal was successful, there was never the slightest hint of any communication between the Government and the judges involved, nor any hint of pressure being placed by the Government on the judges or the Federal Court. Each institution, whatever its internal attitudes and concerns, did its job, and kept to its own sphere of action.

However, without any impropriety, government officers have commented critically on adverse decisions. There have been occasions in recent years, especially in relation to the handling of challenges to decisions refusing visas to people seeking to stay in Australia as refugees, that the Minister for Immigration has been publicly critical of particular judgments of the Federal Court and of that Court's approach to such cases generally. However, the Government's response at a more formal level was not to put pressure on the Court, but to change the law so as to limit the availability of appeals to the Court. That, within constitutional limits, is of course an approach always open to a government which is dissatisfied with the course of judicial proceedings.

It is, of course, precisely to protect judges against influence by the government of the day that federal judges are required under our Constitution to be appointed for a term which expires upon the judge attaining 70 years of age, subject to earlier removal only on the ground of "proved misbehaviour or incapacity", something which must be proved to the satisfaction of both Houses of our Commonwealth Parliament and approved by the Government. It is a power which is practically never used. Certainly, there would be a national outrage if the power were used as a means of disciplining judges for bringing down decisions which were unpopular with the Government.

That being said, it is wrong to suggest that there is some absolute level of independence which places judges entirely beyond governmental pressure. In Australia, most judges are appointed from the ranks of practicing lawyers. Judges appointed to the superior courts will almost always have been advocates with many years of experience appearing in those courts. Sometimes outsiders think that once appointed, such a person will be inclined to favour the government, because he or she is grateful for attaining an appointment. That, however, is not a view widely shared within the legal profession. For many successful lawyers, work in the profession is highly rewarding, both intellectually and financially, and appointment to a court is not always seen as an unmitigated benefit. Often it is accepted as part of one's public duty.

More plausibly, judges may be thought to find in favour of the government in order to improve their prospects of promotion. While that is a more plausible concern than mere gratitude arising from appointment, at least in Australia, I think it has limited relevance. That is for three broad reasons. First, there is in fact very little opportunity for promotion either from a lower court to a superior court, or from being a judge of a court to being the chief judge or chief justice or president of the court. Secondly, most judges do not look for promotion. If they have accepted appointment to a particular court, it will generally be with the expectation that they will remain on that court. There are a number of reasons for that, but one is that, because they are generally senior members of the profession at the time of their appointment, they are likely to have few real expectations of promotion before they are due for retirement. Being a specialist in one jurisdiction or another also tends to limit the expectation of promotion to a different court.

Thirdly, judges often do not want promotion, especially if it involves a change from sitting in court to undertaking the administrative and other functions of the head of a court. There are of course those who positively welcome that opportunity. One who may be known to some of you is Judge Blanch, the Chief Judge of the District Court of New South Wales, who took that position after a short period as a judge of the Supreme Court, which is a higher court than the District Court.

There are other ways in which the courts as institutions are dependent on the goodwill of the government. Thus, the government is responsible for the court's budgets and thus for the quality of court buildings, the level of support services, including libraries and research assistants. As we all know, these things are important to the quality of one's life and work experience as a judge. Similarly, as case-loads increase in particular courts, governments must be prepared to appoint sufficient numbers of judicial officers to ensure that the work of the courts is done, and can be done properly and expeditiously. Thus the institutional health of the courts is dependent upon the government fulfilling its responsibilities.

There are also more subtle ways in which judicial attitudes can be seen as favouring the Government. Judges form part of the public administration of a country, as do the legislative and executive arms of government. Some judges may seem to enjoy the exercise of power and reach decisions which demonstrate their ability to give effect to their own independent views, but most see power as an imposition of heavy responsibility. They will not wish to promote social instability and may as a result appear to share values and attitudes with the executive arms of government.

These are as much matters of perception as reality, but the impartial administration of justice must take account of perceptions. Given the major role played by Government in much litigation, judges need to be conscious of the fact that not only is their independence essential to the exercise of judicial functions, but that any appearance of improper influence will find a ready audience in some parts of the community, with the potential for serious and detrimental effects on the overall standing of the judiciary in the community.

All of this requires that the courts maintain a delicate balance, which not only requires discipline in reaching the right decision, but also means being able to deliver persuasive reasons in support of that decision and being able to maintain every appearance of responsible detachment and impartiality in

the conduct of cases on a daily basis. Such an ideal may be easily stated, but is difficult to perform in practice. That may be illustrated by common experience, which has nothing necessarily to do with relationships with government agencies. Thus, in every case, as evidence is heard and argument presented, we tend to identify weaknesses in the case of a particular party and form tentative views as to which way the case must be decided. If we reach those views too hastily, or express them too strongly, one party will fear that he or she is not getting a fair hearing. On the other hand, it would certainly be wrong to suggest to one party that he or she is in a strong position, when that is not the case, only to disappointment them when judgment is delivered. In that situation, the losing party may have been lulled into a false sense of security and not presented arguments as forcefully as might otherwise have been done. Fairness and the appearance of impartiality will always be difficult to achieve in an absolute sense. One rule is always to seek to express views with polite restraint and to invite comment where appropriate. How that is to be done in particular cases will always depend upon cultural norms, the nature of the evidence and the way the case is being presented.

What is possible will also depend upon social circumstances. Sometimes the most difficult examples come from smaller towns in rural areas. Small communities may be tightly knit social networks. If a judge lives in such a community, he or she may inevitably have a greater likelihood of mixing socially with government officials and others in positions of administration, than would be the case in a large metropolitan city. Similarly, if a superior court judge visits such a town, protocol may require that he or she be entertained by senior government officials. In Australia, I think we are generally more conscious of the need to avoid appearances of contact with government officials, than was true in the past. Generally, speaking, relationships between a court and the Government now tend to be channelled through the presiding judge for the court and through executive officers who are not judges. Furthermore, at least where there is a well-established body of lawyers, our judges tend to associate more with advocates than with government officers and, by common understanding, avoid private social meetings with individual advocates who are involved in cases pending before that judge.

However, just because such principles tend to be vague and difficult to apply unwaveringly, it is important to have available mechanisms whereby individual litigants or members of the public, can complain about inappropriate conduct on the part of a judge. The mere existence of such machinery helps to maintain public confidence in the administration of justice.

In our State, there is a Judicial Commission, [4] established by statute which has a Conduct Division. The Conduct Division is empowered to handle complaints about any judicial officer. A complaint about a judge from a particular court may be considered by a panel of senior judges which will include the Chief Judges of two or three other courts. Frequently the complaints do not involve serious matters and often enough demonstrate a misunderstanding on the part of the complainant, rather than any level of improper conduct on the part of the judicial officer. Whatever the circumstances, the Commission keeps the complainant informed of the way in which his or her complaint is being investigated and, if it is dismissed, will explain why that course has been taken. No doubt some complainants will be dissatisfied with the process or the result, or both. Nevertheless, others will be satisfied that their complaints have been properly considered. The existence of the system helps to ensure an on-going level of education of the community in relation to standards of judicial behaviour.

The Commission itself has reasonable resources and is funded by the Government. Otherwise, it is independent of the Government and is so constituted as not to be seen to be part of any particular court's administration. Each of these elements is important in the interests of public confidence in its operation.

On the other hand, to the extent that it does uphold complaints and take action, usually by way of counselling, in relation to the conduct of a particular judge, its adverse conclusion and criticism of the judge will nevertheless maintain principles of judicial independence, because it is not part of the Government interfering, by way of disciplinary process, with the independence of the judiciary.

As I suggested was the case with the relationship between the courts and the media, the greatest guarantee of judicial independence is usually the existence of an appropriate institution to ensure that independence and accountability are properly balanced. From our experience, achieving the necessary balance is a matter of some delicacy and is critically dependent upon specific social and cultural circumstances. What may be seen as a bare necessity in one jurisdiction may be seen as heavy-handed interference in another.

As is often the case with the law, close attention to detail and procedure will often be critical to the

successful functioning of an institution. The judiciary itself is no exception. Nor can any particular institution readily be transplanted from one culture to another, without careful attention to the social and legal conditions of each, to ensure that the transplanted organ is not rejected. Ideas, however, can be exchanged, I hope with mutual benefit.

END NOTES

1. A Justice of Appeal of the Supreme Court of New South Wales, Sydney, Australia.
2. *Australian Pork Ltd v Director of Animal and Plant Quarantine* [2005] FCA 671.
3. *Director of Animal and Plant Quarantine v Australian Pork Ltd* [2005] FCAFC 306 (16 September 2005).
4. Established under the *Judicial Officers Act* 1986 (NSW); website <http://www.judcom.nsw.gov.au>.