FIJI LAW SOCIETY CONVENTION –
FACING THE CHALLENGES – 1-3 AUGUST 2003

Judicial Independence and the Rule of Law

INTRODUCTION

It is a great pleasure for me to be in your beautiful country for the first time and an honour to be invited to address the Fiji Law Society Annual Convention for 2003.

Your President has, in his invitation to the Convention, referred to the *'tumultuous political events which rocked Fiji in 2000'* and the link between those events and the convention theme of good governance. Richard Nixon observed some years ago that the Chinese use two brush strokes to write the word *'crisis'*; one brush stroke stands for danger and the other for opportunity. I congratulate the Law Society of Fiji not just for recognising the danger to Fiji society that the events of 2000 represented but, much more importantly, for involving itself strongly, as I know that it has done, in efforts to ensure that the opportunities which the crisis presented to strengthen the legal institutions of Fiji are harnessed.

The topic which I have been asked to address today *'Judicial Independence and the Rule of Law'* is at the very heart of good governance of any State. It is also a very big topic. I cannot pretend to be able to deal with it comprehensively in the time allotted – or perhaps at all! I therefore propose to restrict myself to the following areas:

1. What do we mean by *'judicial independence"*?
2. The significance of judicial independence for the rule of law.
3. The particular burden which the need for judicial independence imposes on judges in developing democracies
4. The role of the legal profession in supporting judicial independence.

In addressing these issues I will look particularly, but not exclusively, to Australian

authority and Australian experience. It is the Australian law and the Australian experience, of course, with which I am most familiar.

'JUDICIAL INDEPENDENCE'

Judicial independence is one of those things that one knows for sure is a good idea. But exactly what is involved in the concept is not always clear. Judicial independence is ordinarily seen as embracing two fundamental principles: the separation of powers and the rule of law.[1] The difficulty is that each of these two principles can mean different things to different people. In some contexts it is also important to distinguish between the personal independence of individual judges and the institutional independence of the courts. I will turn briefly to this distinction below. Before I do so, I would like to say a few things about first, the principle of the separation of powers and secondly, the rule of law.

Separation of Powers

The principle of the separation of powers is particularly problematic for us in the common law world. This is because few of us have constitutions that can be considered to provide for the true separation of the powers of the three arms of government; the executive, the legislature and the judiciary.

Robert Stevens in his essay *'The Act of Settlement and the Questionable History of Judicial Independence'*[2] has reminded us that although the efforts reflected in the *Act of Settlement 1701* (UK) to keep the executive out of the legislature and to offer a measure of protection to the judiciary could have led to a concept of the separation of powers on the later American model, it did not do so. Almost at once the English decided that they preferred a constitutional arrangement which balanced the powers of the three arms of government rather than an arrangement which separated them. Both Fiji and Australia have largely followed the English lead. For this reason our two constitutions provide for a balancing of the powers between the executive, the

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[1] J Debeljak, *'Judicial Independence: A Collection of Material for the Judicial Conference of Australia',* Judicial Conference of Australia, 5th colloquium, Uluru April 2002 – www.jca.asn.au/debeljak.pdf

[2] (2001) *Oxford University Commonwealth Law Journal* 253

legislature and the judiciary rather than a true separation of their respective powers. In each case, however, it is a balance which avoids some of the more obvious idiosyncrasies of the United Kingdom model. On the other hand, the United States of America has adopted a purer separation of powers model. This has been suggested to be because the delegates to the Constitutional Convention held in Philadelphia 75 years after the passing of the *Act of Settlement* misunderstood the nature of the provisions of that Act.[2] Even in the United States, of course, there is not pure separation; the executive appoints judges and the legislature funds the courts.

It is topical to note that it was the decision of the English in the 18th century to pursue a balancing of governmental powers rather than a separation of those powers which provides the background to the constitutional changes recently announced by Prime Minister Tony Blair. It is undeniable that the structure under which the Lord Chancellor is a Cabinet minister, the speaker of the House of Lords, the person responsible for making judicial appointments and himself sits as a judge involves, at least at the theoretical level, serious inroads into the separation of powers. The very existence of the House of Lords as a court, of course, does the same. That in fact the idiosyncratic UK structure has not weakened judicial independence in that country speaks volumes for the importance of culture and tradition in this, as in other, areas. The importance of culture and tradition is a topic to which I will return.

Incidentally, it is of interest to speculate on what has precipitated the proposed constitutional changes in the UK. Although there has been criticism of Lord Irvine's conduct as Lord Chancellor, particularly his fund-raising activities, he has been seen as a champion of judicial independence. I love the story that after the Home Secretary almost burst a blood vessel in response to a High Court decision on asylum law, Lord Irvine told a House of Commons Committee *'maturity requires that when you get a decision that favours you, you do not clap. And when you get one that goes against you, you do not boo'.*[3] However, despite Lord Irvine's defence of the independence of the judiciary, the *Human Rights Act 1998*, which he piloted through the Parliament, effectively brings into UK law the European *Convention for the Protection of Human*

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[3] David Pannick QC, *Times Online,* 24 June 2003

Rights and Fundamental Freedoms - as interpreted by the European Court of Human Rights. It was, I suspect, this opening up by the UK to Europe in the area of human rights that provided the main impetus for a fundamental rethink of the UK constitutional position so far as the separation of powers and judicial independence are concerned. It may be, I suppose, that in every jurisdiction it would be wise to reconsider from time to time fundamental aspects of the constitutional structure to see that they remain appropriate.

A further complexity touching on the separation of powers, particularly when seen in the context of judicial independence, is that while it is widely regarded as a cornerstone of liberal democracy, it can be seen as a derogation from pure democracy. Attacks on judges, and on particular judicial decisions, are often accompanied by references to the fact that the judges, unlike the members of Parliament, are not elected.

Of course, many aspects of well-functioning constitutions involve departures from true democracy. Indeed, a State founded on pure democracy is probably nowhere to be found. Some departure from pure democracy is essential for a well (in the sense of a fair and just) functioning liberal democracy. The difficult question is how much departure? We accept, for example, the legitimacy in many countries of legislative upper houses that are not elected on a whole of population basis. In the United States of America it is accepted that the President can be elected by an Electoral College and not by popular vote at all. More importantly, the need to balance within a liberal democracy the power of the majority and the civil and human rights of the minority is almost universally accepted.

It is in the same spirit that most citizens accept the power of the judiciary to strike down on constitution grounds legislation enacted by governments popularly elected. Similarly, we accept that courts should have some capacity to review administrative actions undertaken by governments with obvious public approval. We accept, indeed most would demand, that unpopular judges cannot be removed from office without proper cause and after proper procedures. These apparent departures from pure democracy operate as part of the essential underpinning of the structure of our constitutional democracies. The analysis in terms of political theory of these apparent

derogations from pure democracy is underdeveloped. As Robert Stevens, in the paper to which I have already referred, observed, in most parts of the old British Commonwealth muddling through in matters of this kind has been the order of the day. For myself, I think that muddling through is not necessarily a bad thing; it allows guidance to be obtained from past experience. But again it places a high value on culture and tradition.

'Rule of Law'

The meaning to be attributed to the phrase the *'rule of law'* is also problematic. Like *'judicial independence'* we know that it is a good thing but it is not easily defined.

In his book *'The Rule of Law'*[4] Geoffrey Walker has pointed out that the phrase *'rule of law'* is used in a number of different senses. In one sense it applies to any state of law and order as opposed to anarchy. In this sense it is possible to argue that the rule of law may be just as well preserved by a dictatorship or military occupation as by a liberal democracy. A second meaning is that of *'government under law'*. This means that the organs of government must themselves operate not only through the law, but also under the law in the sense that the legality of their actions may be tested before independent courts of law so that the law operates as a constraint upon the actions of the government. Some people use the phrase *'rule of law'* in a third sense, which is a philosophical sense. Used in this sense the rule of law says something about the substantive content of the enactments that issue from the legislative arm of government. It is in this sense that the rule of law invokes a body of inherited values, mainly, in societies like ours, distilled from the experience of the common law over the centuries, and to some extent, as Walker suggests, to the political and legal philosophies of ancient Greece and republican Rome. The presumption of innocence, the entitlement to legal representation, the presumption against retroactive legislation and the openness of court proceedings are all examples of these values.

I propose today to use the phrase *'rule of law'* principally in the second of the senses identified by Walker but with some content gained from the third sense. As the Chief

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[4] *Melbourne University Press* 1988 at 3.7

Justice of Australia, the Hon AM Gleeson AC has observed:[5]

> *'In Australian legal and political discourse, a governing authority could not satisfy the requirements of the rule of law merely by being able to point to a fundamental law which empowered it to act in an arbitrary manner'*

The position is, I am sure, the same in Fijian legal and political discourse. However, I will try to avoid the pitfall of using *'rule of law'* as though it meant *'rule of good law'*. This would be to use the phrase as a shorthand for a broad social philosophy and thus to deprive it of useful meaning.

Chief Justice Gleeson[5] has outlined the various practical requirements which the High Court of Australia has identified as being required by the rule of law. They are:

- a minimum capacity for judicial review of administrative action;
- the courts may not grant the executive dispensation from the criminal law;
- a separation between executive and judicial function;
- judicial decisions must be made in accordance with legal standards, not general considerations of fairness;
- the right of citizens to a fair trial;
- the right of citizens to privileged communications with a legal advisor;
- that the content of the law should be accessible to the public;
- access to the courts for citizens seeking to prevent violations of the law (subject to reasonable standing requirements);
- that the courts will exercise their jurisdiction when it is properly invoked;
- all citizens are equal before the law; and
- criminal laws should operate uniformly where circumstances are not materially different.

I expect, although I do not pretend to know, that this list, which it may be observed is

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[5] *'Courts and the Rule of Law',* speech given at Melbourne University, 7 November 2001 www.hcourt.gov.au/publications

mainly concerned with legal process, could fairly readily be accepted in Fiji.

After that rather lengthy introduction to the principles that underpin the concept of judicial independence I turn to examine the concept itself in more detail.

JUDICIAL INDEPENDENCE AND THE RULE OF LAW

Sir Gerard Brennan, then Chief Justice of Australia, in the course of opening the 12th South Pacific Judicial Conference,[6] said:

> *'The competent and impartial administration of justice according to law demands judicial independence: that is, independence of influences, legalities or powers which might deflect the judge from unqualified observance of the rule of law.'*

The above sentiment seems to underlie nearly every international and national instrument or statement concerning human rights.[7]

Under any definition of the rule of law, the independence of the judiciary will be a critical feature. No nation can claim to be governed by the rule of law unless the laws are applied equally to all. That is, to use the words of Michael Walzer[8], unless:

> *'citizens come into the forum with nothing but their arguments.'*

The first and perhaps the most important thing to be said about judicial independence

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[6] held in Sydney on 14 April 1997

[7] See, for example *Universal Declaration of Human Rights* (1948) – Article 10; *International Covenant on Civil and Political Rights* (1966) – selected articles; *Draft Principles on the Independence of the Judiciary* (1981) (the "Syracuse Principles"), drafted by the International Commission of Jurists and the International Association of Penal Law; *Independence of the Judiciary in the LAWASIA Region: Principles and Conclusions* (1982), in LAWASIA, *A Report of a Seminar held in Tokyo,* 17-18 July 1982 (the "Tokyo Principles"); *International Bar Association Code of Minimum Standards of Judicial Independence* (1982) (the "New Delhi Standards"), adopted at the 19th Biennial Conference of the International Bar Association, New Delhi, 1982; *Universal Declaration on the Independence of Justice* (1983) (the "Montreal Declaration"), adopted at the First World Conference on the Independence of Justice, Montreal, 1983; *United Nations Basic Principles on the Independence of the Judiciary* (1985), in the report of the "Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders", Report Prepared by the Secretariat 58 (UN Doc A/CONF.121/22/Rev.1 (1986)). Copies of the text can be found in *CIJL Bulletin* No 25-26 at 14 or at http//www.unhchr.ch/html.menu3/b/h_comp50.htm.
a) General Assembly Resolution 40/32 of 29 November 1985
b) General Assembly Resolution 40/146 of 13 December 1985

in the context of the rule of law is that it is not for the benefit of the judges but for the benefit of those who may come to be judged. As Sir Gerard Brennan put it at a symposium of the Judicial Conference of Australia on 2 November 1996:

> *'Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and to protect not the governors but the governed.'*

A second important thing to be said about judicial independence, and it flows from the first, is that it is concerned with independence in the exercise of the judicial function – ie in hearing and determining cases. Some interference with the capacity of judges to live their lives as they might wish is entirely compatible with judicial independence properly understood. For example, neither the reality nor the perception of my independence as a judge is affected by the Australian Government determining the terms and conditions in which my staff are employed or, within reason, the airline upon which I should fly.

To speak of the independence of the judiciary raises the question: from whom or what should the judiciary be independent? Since first and foremost the phrase embodies the idea of the separation of powers, the judiciary must be independent of the other branches of government. Judicial independence seen from this perspective requires effective constitutional protection for judicial tenure, judicial remuneration (including pension rights) and immunity from suit in respect of the exercise of judicial functions.

Judicial independence also requires that the judges are neither in fact, nor seen to be, instruments of the executive government. Chapter III of the Australian Constitution has been construed as guaranteeing the independence of federal judges by preventing the conferral on them of functions that would breach the separation of the judicial arm from the executive arm of the Government. In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*[9] the High Court of Australia held that a judge of the Federal Court of Australia could not be appointed by a Minister of the Crown to prepare a report where the report was a condition precedent to the power of the

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[8] *'Spheres of Justice: a Defence of Pluralism and Equality'*, Basic Books 1990
[9] (1996) 189 CLR 1

Minister to make a declaration under a statute. The majority of the High Court[10] stated:

> *'Bearing in mind that public confidence in the independence of the judiciary is achieved by a separation of the judges from the persons exercising the political functions of government, no functions can be conferred on a Ch III judge that would breach that separation. The separation that is relevant here is separation in the performing of the particular non-judicial function; the principal does not touch personal relationships or relationships outside the area of governmental activity between judges and those who perform legislative or executive functions. Those relationships are matters for judicial sensitivity but not of constitutional significance.'*

Their Honours were careful to distinguish the particular function which they found to be incompatible with the holding of federal judicial office from functions such as conducting royal commissions or presiding over administrative tribunals.[11] In those circumstances the High Court said, the judge is required to act judicially in finding facts and applying the law and could not have regard to the wishes of the Executive Government except where conveyed by way of submission for the judge's independent evaluation. The High Court concluded that:

> *'Independence from the Legislature and the Executive Government in the sense thus explained* [ie in the sense of being required to act judicially] *is essential to the constitutional compatibility of performing a non-judicial function with the holding of office as a Ch III judge.'*

The reference by the High Court to *'personal relationships and relationships outside the area of governmental activity between judges and those who perform legislative or executive functions'* draws attention to a difficult issue for all judges. It is an issue that can be particularly problematic in small communities. Different judges will take different views about the extent to which they should fraternise with, for example, members of the Executive Government. Little help is gained here from constitutional principles. Ultimately all judges must make an evaluation of whether his or her personal relationships and conduct might give rise to a perception of lack of independence.

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[10] Brennan, Dawson, Toohey, McHugh and Gummow JJ at 16

[11] at 17-18

The factors of which I have referred above, relate principally, but not entirely to the personal independence of individual judges. However, the courts need also to maintain their institutional independence if citizens are to maintain confidence that they and the government equally come before the courts *'with nothing but their arguments'*. The institutional independence of the courts involves adequate funding for the operation of the courts, the provision of suitable and adequate court buildings and other facilities, a system of court administration that respects the independence of the judicial arm of government and the exclusion of the executive arm of government from any involvement in, or influence over, listing. Beyond these essential matters, views may differ as to what constitutional independence for courts requires.

Some Australian courts are self administering and thus have complete control over the management of their own budgets. Others are still administered by State Government departments. Those of us who enjoy self administration see it as a more important aspect of jurisdictional independence than do those who are not in complete control of their own administration. As Chief Justice Gleeson has pointed out: [12]

> *'Sometimes things seem essential and fundamental just because they are familiar.'*

The reverse, I suspect, is also true. When I was a young practitioner working in the office of the Crown Prosecutor, it seemed quite acceptable that criminal listings were undertaken within the Crown Prosecutor's Office. Departure from random listing of cases was common. Trials where it was expected to be easy to prove the guilt of the accused were listed early in a month (jury duty was a one month term) and more difficult cases later in the month by which time juries were expected to have become more cynical. Demanding cases were listed before those judges whose trial skills were regarded as of higher than average quality. Such practices now seem an almost shocking inroad into institutional judicial independence.

Once it was thought vital to judicial independence that judges, or at least the senior judiciary, be appointed for life. Today many common law countries, including Fiji

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[12] *'A Changing Judiciary'* speech delivered to Judicial Conference of Australia, 7 April 2001

and Australia, have compulsory retirement ages for judges. Although we all now accept that life appointments are not necessary to ensure judicial independence, an interesting question may one day arise as to whether the increasing physical and mental health of the senior judiciary might call for the compulsory retirement age for judges to be lifted. An issue touching on judicial independence could be seen to arise from the potential for serving judges to be perceived to be courting appointments post-retirement - perhaps as commissioners of enquiry or even as partners in, or consultants to, large legal firms.

I raise the issue of possible perceptions so far as judges approaching the compulsory retiring age is concerned because in the area of judicial independence, as in so many other areas, perceptions are important. The judiciary has been described as the *'least dangerous branch of government'*.[13] It is the least dangerous because it has neither the power of the purse nor the force of arms; its power base is ultimately public confidence. If the people whom the judiciary serve in any country lose confidence in it, the judiciary's power in that country will be lost.

The potential fragility of the power of the judicial arm of government has, as it seems to me, given judicial propriety a heightened importance in recent times. It has been observed on a number of occasions that *'judging is not what it used to be'*.[14] Today communities look to courts to adjudicate disputes in areas which extend far beyond the areas of jurisdiction invoked, say, fifty years ago. Those who come before the courts now are a more diverse group than was once the case. The confidence that is thus shown in the judicial arm of government is accompanied by more critical examination of judicial performance and judicial conduct than was previously experienced. This critical examination includes debate in the popular media. For these reasons, today, perhaps more than at any other time, it is necessary for judicial conduct, and particularly judicial independence from all impermissible influences, to be jealously guarded.

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[13] *The Federalist Papers* No. 78 by Hamilton (1788), cited by the Hon Sir Gerard Brennan, AC, KBE, Chief Justice of Australia in 'Judicial Independence' (an address to the Australian Judicial Conference, 2 November 1996)

[14] see, for example, Madame Justice McLachlin (as she then was) *'The Rule of Judges in Modern Commonwealth Society'* (1994) 110 *Law Quarterly Review* 260 at 269

I refer to *'all impermissible influences'* because, of course, it is not only the other two arms of government that could pose threats to judicial independence. Public opinion, as harnessed by the popular media, can be a source of impermissible influence. It is one of the roles of the judiciary to protect the legal rights of the unpopular and to respect and apply legal principles even where the community, or perhaps just the media, might prefer that this not be done.

In Australia, as many of you will be aware, the members of the High Court have in recent years been the subject of quite intemperate criticism by members of the Executive Government, as well as by others, concerning a decision in the area of native title.[15] The judges of my Court have had to withstand strident criticism concerning the Court's interpretation and application of Australia's laws concerning refugees.[16] Some criticism of judicial decisions is to be expected. Indeed, some criticism of this kind may be a good thing. But criticism, particularly intemperate criticism, of individual judges is different. In 1991 the Australian Bar Association published a statement on *The Independence of the Judiciary*. That statement recognised that:

> *'Politicians and bureaucrats do not necessarily appreciate the impact which their actions and decisions may have upon the delicate structures on which judicial independence depends. It is a matter of extreme regret that some do not even appreciate the crucial role of the judiciary in the maintenance of the democratic system which it is their duty to uphold and without which their own liberties as politicians, public servants and citizens would disappear.'*

When criticism of the judiciary exceeds acceptable bounds, it is generally considered acceptable for the head of the relevant jurisdiction to respond. Chief Justice Brennan considered it appropriate in 1997 to write privately to the Acting Prime Minister expressing his concern at the failure of members of the Executive to respect the

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[15] *Wik Peoples v State of Queensland* (1996) 187 CLR 1

[16] *Migration Act* 1958 (Cth) one decision to have attracted criticism is *Minister for Immigration and Multicultural Affairs v Khawar* (2000) 101 FCR 501; on appeal *Khawar v Minister for Immigration and Multicultural Affairs* (1999) 168 ALR 190. An appeal to the High Court was dismissed – see *Minister for Immigration & Multicultural Affairs v Khawar* (2002) 187 ALR 574

convention that they should not act in a way likely to undermine the standing of the judiciary.[17] On 3 June 2002 the Chief Justice of the Federal Court of Australia felt compelled to make a statement in open court the day before the hearing of a contentious appeal as to the extent of the Court's power to review decisions of the Refugee Review Tribunal. He felt provoked to do so because of comments made on national television by the Minister for Immigration, a party to the appeals, which members of the public might have seen as calculated to put pressure on the Court. The Chief Justice spoke of the concern of the judges before whom the appeal was listed with *'the protection of the appearance, and the reality, of the integrity of the judicial process'*. Wide publicity was given to the Minister's statement, made the next day by his counsel, that he had no intention of seeking to interfere with the independence of the judges of the Court.

The reverse of the widely accepted convention that members of the Executive Government should not undermine the standing of the judiciary by publicly criticising individual judges is the convention that judges ought not to speak out on controversial or political issues. There are, of course, limits to the desirability of judicial reticence. The view of Lord Kilmuir that *'*[s]*o long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except on the performance of his judicial duties, must necessarily bring him within the focus of criticism'*[18] is not now generally held. Indeed, the judicial silence in Nazi Germany, in South Africa during the apartheid era and in Chile and Argentina during the regimes of the juntas has been severely criticised. Nonetheless, judicial comment on, or other involvement in, the transient political issues of the day will detract from perceptions of judicial independence. Each judge must make an assessment for himself or herself as to when the line between political issues of the day and fundamental issues concerning which a judge should take a stand has been crossed.

Another *'impermissible influence'* which a judge must seek to avoid is the influence

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[17] Michael Kirby, *'Attacks on Judges – A Universal Phenomenon'* Speech delivered at the American Bar Association Section of Litigation Winter Leadership Meeting, Maui, Hawaii, 5 January 1998

[18] Letter from Lord Kilmuir, the Lord Chancellor to the BBC in 1955 – countermanded by Lord Chancellor Mackay in 1987

of personal prejudice. Prejudice is, of course, a difficult influence for anyone to avoid. We are all prejudiced in many different ways. Few, if any, of us recognise all of our own prejudices. Even when recognised, prejudices are not easily put aside. Sir Gerard Brennan recognised this when he observed[7] that:

> *'Perhaps the independence that is most difficult for a judge to achieve is independence from those influences which unconsciously affect our attitudes to particular classes of people. Attitudes based on race, religion, ideology, gender or lifestyle that are irrelevant to the case in hand may unconsciously influence a judge who does not consciously address the possibility of prejudice and extirpate the gremlins of impermissible discrimination.'*

JUDICIAL INDEPENDENCE IN A DEVELOPING DEMOCRACY

Within any country the reputation of the judiciary for independence and impartiality is a collective reputation. Chief Justice Gleeson has said in the Australian context of the judiciaries' reputation for independence and impartiality:

> *'That reputation is our principle asset. It represents capital that has been built up by generations of judicial officers. We hold it on trust. It is not ours to fritter away as we please.'*[19]

At its heart judicial independence is, as Sir Gerard Brennan has described it,[13] a *'cast of mind'*. It is a characteristic most readily assumed, as his Honour pointed out,[13] by those who have had the opportunity to spend time with judges and professional colleagues who possess that quality. It is also, as it seems to me, most readily assumed by those who have spent their formative years in a community the culture and traditions of which understand, respect and value judicial independence.

The Chief Justice's observation tends to suggest that judges in countries where democracy is not well developed may carry a burden largely spared their colleagues in countries where the history of judicial independence is longer. That burden is the burden of building a collective reputation for independence and impartiality. Building

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[19] *'Valuing Justice'* speech to Family Law Conference, Sydney, 27 July 2001

a collective reputation is likely to be a more onerous task than caring for a reputation well established. An established reputation is likely to survive the odd blow relatively undiminished but a reputation in the process of being established, or with only a short history behind it, will be more fragile.

Additionally, of course, in a country where there is a long history of judicial independence the risks attending the exercise of judicial independence are likely to be less than in countries which lack a similar history. The admiration which one feels, for example, for a High Court judge in Zimbabwe who openly demonstrates independence from the Mugabe regime is understandably great. By contrast it seems fair to assume that neither the judges of the High Court of Australia who recently disappointed the Australian Government in the interpretation which they placed on a privative clause in the *Migration Act 1958*,[20] or the judges of the Supreme Court of the United States who determined the outcome of the last presidential election,[21] felt that they thereby placed themselves in personal danger. In each case the judges were able to feel secure that public confidence in the judicial process, rooted in a long history of respect and acceptance of judicial decisions, gave them the protection that they needed to render justice impartially.

An additional burden carried by judiciaries in developing democracies is that the political development of democracy is itself dependent on an independent judiciary. Without an independent judiciary, confidence in a multi-party democratic process in which citizens may participate fearlessly is unlikely to be generated.

Moreover, as James D Wolfensohn, President of the World Bank, has stated on a number of occasions, an effective legal and judicial system is essential for long-term economic development. In his keynote address at the Global Conference *'Empowerment, Security and Opportunity Through Law and Justice'*[22] President Wolfensohn said:

'There can be no good and clean government without respect for the

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[20] *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1
[21] *Bush v Gore* 121 S. Ct.525 (2000)
[22] St Petersburg, 9 July 2001

> *rule of law, nor transparent and well-functioning financial markets, nor equitable and sustainable development ... What do legal and justice systems have to do with powerlessness, vulnerability and lack of opportunity? Almost everything: the quality of the legal norms in a society and the manner in which they are administered have clear and direct impacts on the extent to which citizens have a voice in the government decisions that affect their lives, the extent to which there are official safety nets and mechanisms that help them cope with economic and natural shocks, and the ways open to them to overcome disadvantages and to grasp opportunities'*

Even where a community's immediate concerns are more basic than *'well-functioning financial markets'*, just and effective government is dependent on the rule of law. Without the rule of law a community is likely to find itself at the mercy of the self-interested powerful. Title to land may not be respected, freedom to conduct business without interference may not be achievable, products may not be able to be transported safely from farm to village or from village to city.

JUDICIAL INDEPENDENCE AND THE LEGAL PROFESSION

I have so far said little about the practicing legal profession in the context of judicial independence and the rule of law. I do not mean thereby to diminish the importance of the role that the legal profession plays in any common law country in protecting the independence of the judiciary and the rule of law.

It has been suggested that *'*[t]*he status and independence of the judiciary in common law countries owes a good deal to the fact that judges have historically been appointed from within the legal profession'.*[23] The culture of providing independent and fearless legal advice is, it seems, threatened throughout the common law world by the growing commercialisation of legal practice. Nonetheless, while it survives, that professional culture does assist in the development of the disposition towards fearless independence so vital in a judicial officer. Law Societies in common law countries everywhere will contribute to the maintenance of judicial independence in their own country by seeking to preserve the traditional independence of the legal profession.

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[23] Gleeson CJ *'Judicial Selection and Training: Two Sides of the One Coin'*, paper delivered to the Judicial Conference of Australia, Darwin, 31 May 2003

Perhaps more importantly, as your keynote speaker has noted on an earlier occasion,[24] the reticence in public debate and controversy that citizens expect of their judges means that it rests increasingly on the organised legal profession to defend the judiciary. This will particularly be the case where, as in Australia at the moment, the Attorney-General is unwilling to assume the role of speaking in defence of the judiciary.

Additionally, it seems to me, the legal profession is well placed to assist in building and maintaining public awareness of the importance of the independence of the judiciary to the maintenance of the rule of law. This Convention is an example of the Fiji Law Society doing exactly this. I congratulate all of those involved in its organisation and conduct.

Catherine Branson
A Judge of the Federal Court of Australia
17 July 2003

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[24] Justice Michael Kirby *'Attacks on Judges – a Universal Phenomenon'*, speech delivered at the American Bar Association Litigation Section Winter Leadership Meeting, Hawaii, 5 January 1998