



## AUSTRALASIAN STUDY OF PARLIAMENT GROUP

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### Northern Territory Chapter

**PAPER TITLE:** *Parliamentary Government  
Under Threat From the Courts?*

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*Parliamentary Government Under Threat?*  
Contemporary Challenges to Liberal Democracies

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PARLIAMENTARY GOVERNMENT UNDER THREAT?  
CONTEMPORARY CHALLENGES TO LIBERAL DEMOCRACY  
ADDRESS BY CHIEF JUSTICE BRIAN MARTIN AO MBE -

PARLIAMENTARY GOVERNMENT UNDER THREAT FROM THE  
COURTS?

The theme of the conference is “Is parliamentary government under threat? Contemporary challenges to liberal democracies”. I note that the promotional material cites some of the challenges to parliamentary government within the Australasian and South Pacific region as including, “the independence of the judiciary and the rule of law”. The topic upon which I have been asked to speak is “Legal and Justice System”. Am I to take it that the conference, which is said to be an excellent opportunity to address and debate some of the critical issues facing parliamentary institutions today, has amongst its foundational concerns that the legal and justice system, administered by an independent judiciary under the rule of law is a threat to parliamentary government and a challenge to liberal democracy?

Given the absurdity of such a proposition, I am sure that that was not what was intended and adopt the more charitable view that your organisers consider that resistance to perceived contemporary challenges to liberal democracies can be aided by the application of the rule of law administered by an independent judiciary. I will endeavour to reinforce that view. Finally, I will suggest that

one of the challenges to liberal democracy can come from within parliament itself.

First, a brief review of the legal and justice system as it operates throughout Australia. There are variations between the States and Territories, but you will no doubt be familiar with that which prevails in your jurisdiction. What is common is the existence of courts of general jurisdiction regarded as superior courts going by the name of Supreme Courts. They commonly entertain appeals from courts lower in the judicial hierarchy, deal with cases at first instance, both civil and criminal, and hear appeals from decisions of their own judges. In general terms, they are courts of unlimited jurisdiction, but, there are other courts and tribunals throughout the States and Territories which exercise powers which are not vested in that court.

It is the Supreme Courts which exercise a supervisory jurisdiction, either by way of appeal or through prerogative remedies or the like in respect of a wide range of decisions made in lower courts and tribunals. Of more direct interest to you, I suspect, is the jurisdiction of superior courts to review the making of law, the enactments of the parliament, subordinate legislation, usually formulated by the executive, and administrative actions taken by those responsible for carrying the legislation into effect. I will return to that later.

The Federal Court of Australia and Federal Magistrates Service (as it is called) are established by the Commonwealth and administer justice under Commonwealth legislation.

Appeals now lie from decisions of courts of appeal in all of the States and Territories and from the Full Court of the Federal Court to the High Court of Australia established under the Constitution of the Commonwealth. Leave is required. That Constitution provides expressly for the separation of powers between the legislative, executive and judicial arms of government of the Federation. As with all other provisions of that Constitution, the judicial arm of government and judiciary are entrenched in the sense that the Constitution may not be amended except by the constitutional alteration procedures prescribed by s 128.

Since 1978 the Northern Territory has been constituted as a self-governing body politic under the Crown by a statute of the Commonwealth. A Supreme Court for the Territory had been established long before that. The Commonwealth legislation constituting the court was repealed and Territory legislation creating the court in its present guise, but with the then same judges, was enacted and came into operation on 1 October 1979. Theoretically, the Legislative Assembly could repeal the Act and certainly amend it and perhaps even do away with the court, but I suspect that the High Court would have

something to say about that as well may the Commonwealth parliament. It has intervened before.

The parliament, the executive and judiciary all depend for their existence upon law, law to be found in statutes and from which their respective powers are derived. Those powers are often supplemented by the common law. By whatever means, they all owe their existence and the scope of their several powers to the law and are subject to any constraints which it imposes.

Parliament is a creature of statute as is the repository of executive power. It is also law which establishes the means whereby members of parliament are elected and remunerated. It is, for the most part, a statute which provides for the powers and privileges of members.

Provisions such as those to be found in Division 3 of the Criminal Code of the Northern Territory concerning offences against executive and legislative power are designed to deter people from interfering with the exercise by a Minister of any duty or authority conferred upon them, or interfering in the free exercise by the parliament of its authority, or intimidating members or bribing members in order to influence them. There was recently in the Northern Territory a case in which people who intentionally disturbed the Assembly whilst it was in session were tried and convicted under the provisions of that law. The procedures

within the parliament and its committees are regulated by law formulated by members through standing orders.

What sort of challenge or threat does the judiciary pose to harm the parliament by virtue of any of those laws? The simple answer must be none, since the judiciary administers justice according to law. Courts only act to secure the maintenance of the law and to ensure that that which is unlawful is dealt with in the appropriate fashion. For example, the Supreme Court may review the manner of the making of a particular law by the Parliament to determine whether it was as required by law, that is, by adhering to the procedures prescribed for the passage of a Bill and obtaining necessary assent. That reinforces the process prescribed by Parliament itself.

It is complained that courts sometimes declare legislation enacted in the manner prescribed to be invalid. That is because the legislation is found to be beyond the legislative competence of the parliament in the particular case. The bounds of that competence are fixed by law and the Court is the guardian of constitutional limitations. The Commonwealth parliament has specifically enumerated heads of legislative power and all else is left to the States. If Commonwealth legislation steps outside its mandated boundary then the court has a duty to say so and in so doing may be seen to be challenging the Commonwealth parliament. It is not. What it is doing may be to preserve the powers of State parliaments. Where the laws of the Commonwealth and a State

are inconsistent, then the law contained in the Constitution says that the law of the Commonwealth prevails. The courts have a clear duty under the law to say so. Neither of those judicial functions pose a challenge to liberal democracy. On the contrary, they uphold it. They ensure that those who are democratically elected to their parliaments exercise their legislative powers within the bounds of the purpose for which they were elected. Electors do not authorise the members of Parliament to abuse their legislative power, but to work within it.

Parliament is entrusted to make laws for the peace, order and good government of society (or like terminology to the same effect). The courts dispense justice according to those laws, and the common law, for the same purpose, that is, to maintain peace, order and good government of the same society. The judgments of the courts maintain peace by resolving disputes, order is achieved by defining parties' rights and responsibilities. They provide the judicial means of attaining good government by upholding the rule of law.

The courts are often called upon to determine the meaning of legislation in the course of dispute between parties. In those circumstances it is the duty of the court to decide the facts giving rise to the dispute and then apply the law to resolve it. If the law contained in the statute is unclear, then it is the responsibility and duty of the court to give it the meaning that the legislature is taken to have intended it to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not

always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of constructions may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning (*Project Blue Sky v ABA* (1998) 194 CLR 355 at p 384). Parliament is taken to be aware of those rules of construction and thus to expect they will be applied to its legislation.

In performing that task the courts are not off on a frolic of their own. They do not initiate the action which gives rise to the need for the interpretation of a statute. It is the parties who govern the shape and form of the litigation and the issues to be determined in the course of it. The duty of the courts is to hear and determine the case.

Some might suggest that courts are a challenge to the parliament because of their role in the interpretation of statutes. In so doing the courts endeavour to act in aid of parliament by interpreting the legislation so as to reflect its intent and purpose so far as it is clear. If, notwithstanding that effort, the parliament is of the view that the court has not correctly identified the intent and purpose of the legislation then, of course, parliament can fix it.

The courts also exercise jurisdiction in respect of the actions or inactions of executive government, comprising Ministers, public servants and others administering legislation, including subordinate legislation, such as regulations

and by-laws. In that regard the primary role of a court is to determine whether the action called in question was undertaken in accordance with the law enabling it. If it was not, then the action is without lawful authority and the court must say so. Surely it is in the best interests of parliament that nobody purports to act under its authority unless that person truly has that authority. Often the question is not so much as to whether the action taken was pursuant to power, but whether correct procedures have been followed. That is most often found in judgments about natural justice or procedural fairness, as it is now usually called. Again, the democratically elected parliament would surely not countenance action being carried out under its authority so as to deprive a person of rights of property or freedom to act without that being done in the manner required by law.

A decision by a court overriding an executive act may be seen as a challenge by the actor, but there is no good reason why it should be seen as being a challenge to the parliament. The court's intervention is in aid of the law as expressed by the parliament, or with its authority, and the courts uphold its will.

Subject to one important matter, which I will mention shortly, parliament has monopoly power to control the administration of justice, how it shall be achieved, by whom and in respect of the enforcement of the judgments of the courts. Legislation establishing courts, tribunals and the process of arbitration

are obvious examples of parliamentary control of the means by which justice is administered through the conferral of jurisdiction to hear and determine controversies.

We have advanced a long way from the perception of Judges in the colonial era who felt themselves threatened by the growth of colonial self-government and were considered to have leaned towards those ideas which tended to disparage the local legislature ("A Colonial Parliament and Colonial Judges", an article by Master Coghill of the Supreme Court of Victoria published in 1956 30 ALJ 253). The tensions between the Judiciary and Executive are well described in the story regarding, "A battle between those two doughty Irish giants, Barry J (Sir Redmond the Magnificent) and George Higginbothom, the then Attorney-General". To keep it short, it revolved around whether the Judge should communicate with the Executive by writing directly to the Governor or to the Attorney-General. The Judge considered that as the Governor was the representative of the Queen, he had the power to deal with matters to do with the independence of the Judges and thus a Judge should communicate directly with him. The situation became quite nasty and I quote from a letter from the Judge to the Governor. The Judge was seeking permission to lay the correspondence before the other Judges stating that he did not wish:

"passivity to cause the creation of a precedent which would obliterate the provisions of the Constitution Act, make the Executive paramount to

the legislature, allow that body to assume a power not possessed by Parliament and reduce the condition of her Majesty's Judges to that of absolute dependence upon the mere will of Your Excellency and the Executive Council".

The Act of Settlement 1701 came about as a result of significant constitutional battles in England in the 17<sup>th</sup> Century. It provided that judges hold office, not at the pleasure of the King, but during good behaviour and arose in the context of a struggle for power between parliament and the King. It was the capacity of the judiciary to make binding decisions determining the limits of power as between parliament and the executive that originally made it so important for parliament to secure the judiciary's independence of the executive by enacting that law.

A purpose of judicial independence is to secure impartiality in decision making by courts. In any well ordered democracy it is also well recognised that the independence of the judiciary from the executive arm of state, in particular, is essential since the state in its various emanations is more often than not one of the litigants before the court. The criminal side of the register in any jurisdiction is a plain example of that, as are cases in which a member of the public calls in question an administrative act or process. There are the none too rare circumstances where the state and a member of the public are joined in civil litigation, such as claims for compensation for wrongs done by the state causing compensable loss. In most jurisdictions the state is amongst the major employer, a relationship giving rise to claims for compensation for work

related injury. These are the most obvious examples of the undoubted proposition justifying the claims to judicial independence.

Without that cornerstone of its integrity, the judiciary could not command the respect and confidence of the community upon which it depends for its support and respect for its judgments. That is one of the reasons why it is so important that those in positions of political power and influence should not publicly admonish a judge or a court, particularly where there lies behind the attack a political motive or where vituperative language is employed. Fair comment on a judgment is not unacceptable.

In these days the dominance of the executive arm of government, supported by the bureaucracy, over the parliament is obvious. To a significant extent it has undermined the theory that the Westminster model of responsible government effectively guarantees democratic control of executive power. It is from that dominance which the judiciary must be free and thus independent. The appearance of that independence is extremely important. Many judicial officers, including me, take the view that being seen to be too close to those wielding political and administrative power is undesirable. There was a close relationship between Justice Bevan of the former Territory Supreme Court with the then Administrator, Dr Gilruth, which led to the ruination of his career. Dr Gilruth's actions as Administrator made him unpopular and because of a close association between him and the judge, the judge was seen as lacking

judicial independence. As Justice Mildren of this court relates in his foreword to the volume containing Northern Territory Judgments 1918-1950:

“On 18 September 1918 the Town Council passed a series of resolutions accusing him of being partisan and “the all round legal hand to the government.””

Both the Administrator and the judge were obliged to leave town.

The quality of independence extends to absence of any influence which could conceivably cause a judicial officer to determine a case on other than by the impartial application of the law to facts as found. Hence on occasion a judicial officer will be asked to stand aside from a case because of a perception of bias arising from his or her relationship with one of the parties or some other reason. Occasionally a judge will volunteer to stand aside, or seek not to be listed on a particular case, because of a factor known to the judge but not necessarily known to the parties. This does not mean the judge would not be true to his or her oath, but rather that he or she may be perceived as not being so. But, in such a case the judge’s reputation and that of the court must be protected.

A former Chief Justice of the High Court, Sir Gerard Brennan, rightly observed that judicial independence exists not to preserve and protect the governors, but the governed. It is not for the benefit of the judiciary, but the community.

It is parliament which has created one of the most important planks of judicial independence, but yet, there are examples of parliament having acted contrary to that principle. Courts have been abolished and judicial officers simply left without a job. They have not been dismissed in the manner provided for in the common constitutional arrangements between parliament and the judiciary. It is important to recognise that a parliament could bring itself into disrepute by such an action if it were seen as being no more than an attempt to intimidate the judiciary or to remove from office judges who for whatever reason the government of the day does not like. Such an attack upon independence would not arise where a parliament abolished a court for good reason and those holding status as judicial officers in that court are transferred to another with no less standing.

In a paper published in the Australian Bar Review in 1995 Justice Kirby, then President of the Court of Appeal Division of the Supreme Court of New South Wales, and now a justice of the High Court made a detailed and revealing historical review of the Australian experience concerning executive subversions to the fundamental constitutional principle of judicial independence. In a review of that paper the Honourable Justice Brian Sully in an article published in 1997 1 Macarthur Law Review, p 1 observed that Justice Kirby was concerned primarily with the device which had become increasingly popular with executives both of the Commonwealth and States of simply abolishing particular courts or tribunals, the members of which had, pursuant to

their establishing statutes, security of tenure in accordance with the conventional Act of Settlement terms, and thereupon reconstituting the particular court or tribunal, but without reappointing some particular member or members and without preserving the traditional alternative of redeploying to an equivalent Crown appointment carrying the same terms of tenure and of remuneration. My suggestion is that by such means a parliament poses its own challenge to liberal democratic values.

Judges of Supreme Courts may be secure in their position, beyond the customary appointment to a fixed retirement age, as a consequence of comments made by some of the Justices of the High Court in *Kable v The Director of Public Prosecutions* (1996) 189 CLR 51. Those courts have, in the words of Justice Gaudron, “a role and existence which transcends their status as State Courts”. Justice McHugh is of the view that it was beyond the power of State and Territory parliaments to abolish the Supreme Courts because the Commonwealth Constitution provides for appeals from those courts to the High Court which means that the Supreme Courts must be at the apex of the State judicial systems. Those comforting opinions, however, do not necessarily extend to other courts.

In the view of Len King, a distinguished Australian who held high executive office as Attorney-General and high judicial office as Chief Justice of the State

of South Australia (I hasten to add not at the same time) “The administration of justice is a core function of state”.

He was then speaking in the context of the duty of the state to provide the resources necessary to support the judiciary in its role, a notion which has my full support. However, I want to take that proposition in the broader context of this conference. The administration of justice does not stand aside from the existence or functions of a well ordered liberal democracy. It is an essential part of it. The Court acts in aid of the parliamentary and executive functions and neither should be threatened by them. Parliament should see the administration of justice by an independent judiciary as a bastion against rule by man rather than the rule of law. They should be very careful not to challenge the independence of the judiciary or the rule of law which stand as key elements of a liberal democracy. Therein lies the seeds of Parliament's threat to itself.