CAN THE JUDICIARY MAINTAIN ITS INDEPENDENCE?

A COMMENT ON THE ADDRESS OF SIR STEPHEN SEDLEY

Justice David Baragwanath*

Sir Stephen's remarks are the mature reflection by a master of his craft on the very essence of what it is to be a judge, bringing home both the weight of responsibility of refugee work, and the comfort of companionship with others who share that task. They echo those of another Englishman to a colleague when each faced a reality even starker than that of refugee adjudication:

> Be of good comfort Master Ridley, and play the man. We shall this day light such a candle by God's grace in England, as (I trust) shall never be put out.

The pressures of which he speaks are very real. It is worth considering what has caused them and what can be done about it.

Challenge to judicial independence is a reality of every generation and every society. There is always resentment of authority; as memory of the reasons for judicial independence recedes and the lessons of the past are forgotten there is fresh need to justify it in each generation. Justice Kirby's plea to restore the teaching of civics is worth repeating.

Our generation of judges has experienced in addition the general questioning of authority. In the present context it has become acute as the English tradition of welcoming refugees, to which so many jurisdictions of the Common Law fell heir, was challenged by the emergence of xenophobia that is such a paradox in immigrant societies like ours. All too frequently the fear of the unknown that is

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immanent in all of us is relied on by the unscrupulous for personal advancement. Sir Stephen describes the result - of refugee bashing becoming an election issue and of refugee judges coming under personal attack, sometimes by those who should know better.

The generation before ours, including its judges, needed no education about its responsibility to refugees. They had faced personally in many cases the fact and certainly the prospect of invasion and death. Their experience, of which Sir Stephen has spoken so movingly in his Pilgrim Fathers lecture delivered at Plymouth last month, *The Long Arm and the Mailed Fist*, led to the Universal Declaration of Human Rights, the 1951 Convention and subsequent Protocol as well as international accession to each.

The vision of international responsibility for refugees tended to dim as our generation found ourselves with the time and means to shift focus from the brute necessities of defence and nutrition. Few nowadays have heard of the Battle of the Coral Sea that kept New Zealand from invasion; or the regular food parcels from here that helped keep England from starvation. So-called "economic theorists", in the name of Adam Smith who would have been outraged by their misuse of a small part of his writing, have elevated selfishness to a political philosophy. And so the scene was set for the problems Sir Stephen describes.

What is to be done? Candour requires acknowledgement that we are engaged in a competing battle of ideologies. Judicial independence ultimately stands upon its acceptance by the community. The first requirement is performance. To achieve that requires two things. One is obvious enough - judges with the intelligence, sensitivity, competence and good sense to deal with cases efficiently and well.

There are already in place the sharp spurs to optimum performance provided by appellate review and by peer pressure. As to the former, judges of first instance find that appellate courts are rightly uncompromising in keeping them up to scratch; something appreciated, if sometimes ruefully, as the role of the "three fullbacks" in the late Paul Temm's description of them. And as to the latter, the developing international jurisprudence, to which a number in this room have contributed notably, provides an invaluable source not only of legitimacy for refugee jurisprudence but of guidance to what is right. A truly transnational jurisprudence is well developed. And modern communications mean not only that fellow judges from other jurisdictions will be looking at what we have written, but even worse, we are likely to have to look them in the eye.

Earlier this year Sir Stephen commented to me on the outstanding quality of the New Zealand Refugee Status Appeals Authority. We are proud to possess a tribunal that has twice been preferred by the House of Lords to the distinguished court of which Sir Stephen is a member, and on a notable occasion has declined to follow the Lords in a decision that has been acknowledged as correct. The jurisprudence of the New Zealand RSAA, with its meticulous analysis of the precedents and academic writings as well as the painstaking care with which facts are established and evaluated, provides an exemplary response to the human tendency to xenophobia.

The second element of judicial independence is security of tenure. In his classic *The Nature of the Judicial Process* (1921) Cardozo observed:

> Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.

The use of the male gender does not detract from the force of the argument; rather, ironically, it makes Cardozo's point. Basic among the "other forces" is one's personal need for security; and lack of security of tenure can, consciously or unconsciously, bear upon performance of any judge, not least those carrying the heavy responsibility of refugee determination. In New Zealand the 1999 amendment to the Immigration Act filled an unhappy systemic gap in our arrangements, by providing statutory protection from dismissal of members of the RSAA. The measure is imperfect; while permitting appointment for a term not exceeding 4 years, there is no lower limit on the term. Selection of an insufficient term could put at risk the decisions of a Tribunal on the principles stated by the Privy Council in *Millar v Dickson*.[1]

Performance apart, what can the Judges do? Certainly they must not infringe the vital convention that members of each of the three limbs of government - Judges, Parliament and the Executive - will treat the others with respect. If in their judgments they do make findings adverse to other parts of the fabric of government they must do so responsibly and proportionately; they may not engage in public discussion of their decisions or upon issues on which they adjudicate. And indeed the judges can claim no monopoly of virtue in relation to refugee issues. In this country it was the politicians who put right the unfortunate

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1 *Millar v Dickson* [2002] 3 All ER 1041.

breach by our judiciary of the non-refoulement obligation,[2] responding to the problem by legislating against it; and then legislating the Convention into domestic law. In England also the Executive are entitled to due credit. Sir Stephen's appointment to the High Court on 1 October 1992 occurred less than a year after his win in the Court of Appeal in *M v Home Office*[3] and while the Crown was preparing for its subsequent unsuccessful appeal. Only a cynic would suggest that the appointment was made to take him out.

But this international group does not need examples of simply outrageous behaviour, in many States, by the rougher elements of the media and by aspirants to, and sometimes holders of, public office. Even in better behaved societies xenophobia is a tempting political ploy that can be very successful in fanning the insecurities that can motivate rash unthinking responses.

In my view the judges have a vital role to play, not only to adjudicate justly in a given case, but to inform the wider community, including the responsible media and their readers, viewers and hearers, as to what is going on and why.

Dr Warren Young's research into the jury system[4] was greatly comforting, evidencing the respect of the ordinary juror for the law and for common fairness. The current generation of Common Law judges has belatedly recognised that respect for the rule of law in society is sustained rather than damaged by total candour in adjudication. Each judgment in a significant case is written for the benefit not only of the losing party but of the wider community including voters and politicians. With the exceptions already mentioned most of us have the privilege of tenure that secures against dismissal for an unpopular decision. Sometimes such decisions are unavoidable; Sir Stephen has written about the mail that tends to follow them.

The judges of each generation must in my view work to preserve and strengthen public confidence in them and their work by taking the trouble to explain the total picture which includes the sacrifices made by others in time of war of which we have the advantage. As former advocates for the most part, judges are able to communicate to leader writers the 22 million statistic which New Zealand politicians have taken firmly on board. Perhaps as an island people,

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2 See *D v Minister of Immigration* [1991] 2 NZLR 673.

3 *M v Home Office* [1992] QB 270.

4 See New Zealand Law Commission Preliminary Papers 32 and 37 and Report 69 *Juries in Criminal Trials* (1998-2001).

all of us immigrants, it is easier for us than most to imagine what drives people to gamble on the hard decision and difficult route that may lead to a refugee status application. The fact that refugee judges must distinguish between honest claimants and the even greater number of fraudsters requires careful exposition in addition to sound judgement to ensure that they are treated decently. Those like Sir Stephen, who can communicate to a wider audience than readers of the law reports, contribute notably to the essential process of public education and public confidence that is ultimately essential to judicial independence.

There is some evidence that things are improving. Leaders of public opinion are, in more and more places, calming down. The German weekly, *Die Zeit*, has remarked on change of attitudes in that great State, where appreciation is dawning that the very Gastarbeiter and other foreigners whose presence has been a cause of concern are the key to the problems of an ageing society. In Oxford I met a young Australian who has published a very effective critique of the *Tampa* affair. In New Zealand leader writers are, on the whole, avoiding the nonsense of the London tabloids.

In his Pilgrim Lecture Sir Stephen applauds the development of the International Criminal Court and deplores the current constraints upon it. His plea is for a seamless application of the principle aut cedere aut judicari. His present address contributes mightily to the development of a seamless refugee jurisprudence throughout the free world. In considering whether one's performance is up to the mark, refugee judges now have the Sedley standard to measure themselves against.

The place of Latimer's agony was where the Sedleys picked me up to join them for a memorable weekend in the country. Underlying the solemnity of his address is the camaraderie of the international legal community. This has been a memorable event in which it is a privilege and also a delight to take part. It will be a source of courage and inspiration to many judges and through them to the people whose future they determine.