WHAT SEPARATION OF POWERS?

CHIEF JUSTICE MARILYN WARREN*

Speaking in Melbourne almost 70 years ago,[1] Sir Owen Dixon described the 'classical epoch' of jurisprudence and scholarship when the 'three political or juristic conceptions' received full and proper embodiment in constitutional theory.[2] The three conceptions were simply stated:

The supremacy of the law.
The supremacy of the Crown.
The supremacy of Parliament.[3]

Sir Owen Dixon observed that whilst the *Australian Constitution* contained many American features, it also involved ideas that remained 'very strange to English lawyers'.[4] His Honour described these ideas as being, in the main, 'products of Eighteenth Century thought or preconceptions carried through the American instrument into our own'.[5] Sir Owen Dixon considered that '[l]egal [s]ymmetry gave way to common sense'.[6] His Honour was seemingly hesitant, if not unimpressed, by the establishment of the federal jurisdiction. He accepted the expediency of that establishment but on all views rejected it, saying:

> But neither from the point of view of juristic principles nor from that of practical and efficient administration of justice can the division of the Courts into State and federal be regarded as sound.[7]

In his discourse, Sir Owen Dixon adverted, it might be said, with considerable visionary anticipation, to the practical difficulties that would occur in the courts having an independent existence.[8] He specifically adverted to the subjects of the costs of administering justice and the method of judicial appointments, observing nevertheless that '[i]t would not have been beyond the wit of man to devise machinery which would have placed the courts, so to speak, upon neutral territory where they administer the whole of law irrespective of its source'.[9]

Sir Owen's devotion and commitment to principle and his rejection of administrative convenience and pragmatism was made clear in the *Boilermakers* case.[10] His Honour wrote:

* Chief Justice of the Supreme Court of Victoria. This is a full version of the paper delivered as *The Twelfth Lucinda* Lecture at Monash University on 21 September 2004.

1 Sir Owen Dixon, 'The Law and the Constitution', (Lecture delivered in Melbourne, 14 March 1935), as cited in *Jesting Pilate* (1998), 38 ff.

2 Ibid 38-9

3 Ibid 39.

4 Ibid 51.

5 Ibid.

6 Ibid 52.

7 Ibid 53.

8 Ibid.

9 Ibid 54.

10 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 *('Boilermakers')*. The majority judgment (Dixon CJ, McTiernan, Fullager and Kitto JJ) was written by Sir Owen Dixon.

> If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chapters I, II and III and the form and content of ss 1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement. Section 1 positively vests the legislative power of the Commonwealth in the Parliament of the Commonwealth. Then s 61 in exactly the same form, vests the executive power of the Commonwealth in the Crown. They are the counterparts of s 71 which in the same way vests the judicial power of the Commonwealth in this Court, the federal courts the Parliament may create and the State Courts it may invest with federal jurisdiction. This cannot all be treated as meaningless and of no legal consequence.[11]

As Ayres noted in the Dixonian biography, *Boilermakers* 'puts principle ahead of administrative convenience'.[12] Writing to Lord Simonds (who sat on the Privy Council on Boilermakers) in February 1957,[13] some twenty years after the Melbourne discourse,[14] Dixon seemed to admonish himself for not forcing the argument and determination of the separation of powers earlier. He wrote to Lord Simonds:

> I would not like to say how long ago I formed that view, and I have always felt that any other doctrine involved a misunderstanding of the whole instrument of government and one that might conceivably lead to fatal consequences.[15]

Perhaps in 1957 these remarks echoed his views of 1935 but regretted the delay. Of course, Sir Owen Dixon seemed to resist, even look disdainfully, upon things American when compared to British tradition. In 1959, he expressed his concern about the direction of the Melbourne University Law School in writing to Sir John Young, later a Chief Justice of the Supreme Court of Victoria. At the time, a young Zelman Cowen was the Dean. Sir Owen wrote:

> I have nothing to say whatever against a man who has time and money to do so spending years at Harvard. But no one who has seen the influence of Oxford on men could think that it is any substitute to go to Harvard.[16]

I will return to Sir Zelman's contributions a little later.

Boilermakers has stood the test of time. The High Court has not taken up the opportunity, for example in *Joske*,[17] to review or overturn its principle. In *Wakim*,

11 *Boilermakers* (1956) 94 CLR 254, 275 (Dixon CJ).
12 Philip Ayres, *Owen Dixon* (2003) 256.
13 Ibid 257.
14 Sir Owen Dixon, above n 1, 38.
15 Ayres, above n 12, 257.
16 Ibid 270.
17 *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90, 102. See also Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1; Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 11.

the status of *Boilermakers* was entrenched by the High Court's invalidation of key components of the cross-vesting power, notwithstanding the ramifications for the national corporations structure.[18]

Analysis of the doctrine of separation of powers may, in the twenty-first century, seem to provide arid ground for discussion and debate, the doctrine being well settled. That might be so in the Australian constitutional context almost fifty years after *Boilermakers*. But the presence of the doctrine of separation of powers repeatedly emerges in judicial discourse.

Why is this so?

To respond to the question, it is necessary to identify the dichotomy that has developed in discussion centred upon the separation of powers: there is the federal context and then there is the classic, theoretical context. It is the latter that I will explore.

For about the last twenty years, the judiciary has frequently drunk from the well of the doctrine of separation of powers to reinforce the defensive shield that protects the judiciary against the encroachment of modern twentieth and twenty-first century government. The defensive shield provided by the theoretical trinity embodied in the doctrine of the separation of powers is relied upon to protect one of the 'prizes of the kingdom': judicial independence.

In 1981, Sir Ninian Stephen addressed the issue squarely:

> Governments of the present day necessarily pose a greater threat to individual liberties than did those of last century. Modern governments are expected to intervene in areas previously little regulated and the result is a greater intrusion into the private lives of those they govern. The greater the intrusion, the more occasions there will be for the citizen to complain of it. For redress of such complaints, whether because of a denial of benefits to which a citizen is entitled or of unlawful interference with his freedom of action according to law, it will be primarily to an independent judiciary that the citizen must look. And only an independent judiciary, including, of course, those who staff courts set up to review exercises of administrative discretions, can offer the assurance that those intrusions are kept within the limits which the law imposed ... Those other arms [of government] may easily enough come to view the courts as an impediment to what they regard as the expedient exercise of power and hence better neutralised by being deprived of their independence.[19]

In 1985, Sir Guy Green, then the Chief Justice of the Supreme Court of Tasmania, quoted Sir Ninian Stephen in his own commentary on judicial independence.[20]

18 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

19 Sir Ninian Stephen, 'Judicial Independence – A Fragile Bastion' (1982) 13 *Melbourne University Law Review* 334, 338, 339. See also Sir Ninian Stephen, 'Why Judicial Independence?', (Speech delivered at the Centre for Democratic Institutions Asia-Pacific Judicial Educators' Forum, Sydney, January 2004).

20 Sir Guy Green, 'The Rationale and Some Aspects of Judicial Independence' (1985) 59 *Australian Law Journal* 135, 149-50.

Sir Guy observed that modern judicial independence may be regarded by modern governments as a threat to governmental powers. In this respect, Sir Guy pointed to the prospect of attempts by the executive to achieve greater control of the courts.[21]

Justice McHugh of the High Court of Australia has spoken, extra-judicially, more than once, of the tensions between the executive and the judiciary.[22] His Honour drew upon the doctrine of separation of powers and observed that in the Australian experience, the doctrine has not been easy to implement, especially in the context of administrative review.

The executive does not welcome judicial interference in what it sees as its business: its mandate to govern no matter whether the subject be immigration, superannuation, appointment of acting judges or decisions in town planning. As Chief Justice Gleeson commented:

> It is self-evident that the exercise of [judicial review] will, from time to time, frustrate ambition, curtail power, invalidate legislation, and further administrative action ... This is part of our system of checks and balances. People who exercise political power, and claim to represent the will of the people, do not like being checked or balanced.[23]

Justice McHugh, perhaps in an endeavour to call a truce, said that the tension between the executive and the judiciary is inevitable but that the executive and the judiciary might recognise, in the words of Professor Pearce, 'that each has a role to perform and that each is better equipped to carry it out than the other'.[24] Justice McHugh also said that '[s]ocieties like Australia are better understood as pluralist democracies in which there is not a single source of regulatory power'.[25]

In the case of legal challenge to the validity of legislation, such counsel might effectively mediate the tension. But what of the more mundane aspects of modern government, its control and management of, and its impact upon the courts? Such control is far more subtle and unseen.

In 1983, the then Chief Justice of the Supreme Court of South Australia, Chief Justice King, observed that threats to judicial independence are usually contemplated in a context of direct political interference.[26] As His Honour observed, such interference requires condemnation. However, Chief Justice King thought it was worthwhile to focus attention on a far less direct aspect of attack

21 Ibid.

22 Justice Michael McHugh, 'Tensions Between The Executive And The Judiciary' (2002) 76(9) *Australian Law Journal* 567. See also Justice Michael McHugh, 'The Strengths of the Weakest Arm', (Speech delivered to the Australian Bar Association, Florence, 2 July 2004).

23 Chief Justice Murray Gleeson, 'Legal Oil and Political Vinegar' (1999) 10 *Public Law Review* 108, 111.

24 McHugh, above n 22, 572, quoting Dennis Pearce, 'Executive Versus Judiciary' (1991) 2 *Public Law Review* 179, 193.

25 McHugh, 'Strengths of the Weakest Arm', above n 22.

26 Justice L J King, 'Minimum Standards of Judicial Independence' (1984) 58 *Australian Law Journal* 340.

on judicial independence: the provision of financial and material resources to courts. His Honour said:

> The effective functioning of the judiciary depends in large measure upon the financial and material resources made available to it ... the dependence of the judiciary on outside sources for the wherewithal to perform its function must always pose some threat to the independent and impartial administration of justice. Those who control the purse strings will always have some capacity to influence the actions of those who are dependent upon the contents of the purse.[27]

Chief Justice King observed that under the American system, there is some greater degree of independence in the management and control of the budget and in particular referred to the Canadian approach eventually adopted with respect to the High Court of Australia.[28] His Honour continued:

In the end, however, whether the judiciary deals directly with the legislature or with the legislature through the executive government, or whether the material conditions for the operation of the judiciary are supplied direct by the executive government or are provided by way of lump sum vote, the problem is essentially the same. Legislators and ministers must resist any temptation to use the power of the purse to influence judicial decision-making, either directly or by seeking to influence judicial policy, and judges must be resolute in resisting any temptation to endeavour to please the legislature or executive government in the hope of obtaining more favourable treatment in relation to money or resources.[29]

Through the vehicle of the purse, a government can, in effect, control or constrain the judiciary. This can be done by way of judicial remuneration, court administrative staff, judicial staff and physical court resources, including security.[30]

Take, for example, staffing. Traditionally, court administrative staff (that is, the registry staff, the information technology staff and the like) were employed, under the British, Westminster approach by the executive.[31] In practice, those staff were answerable and loyal to the court, not the employer. Such a situation, in my experience of government spanning back to the seventies, was never

27 Ibid 341-2.

28 Under the *High Court of Australia Act* 1979 (Cth).

29 King, above n 26, 342.

30 Articles 41 and 42 of The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (from the Sixth Conference of Chief Justices of Asia and the Pacific Region) ('the Beijing Principles') deal with the issue of court finance and resources. These Principles represent agreement between the heads of jurisdiction of various countries throughout the Asia-Pacific region on the minimum standards required to protect judicial independence in their respective countries. Relevantly, Article 42 states that even where economic constraints make it difficult to meet minimum judicial requirements, maintenance of the Rule of Law and protection of human rights require the government in question to accord the court system a 'high level of priority' in the allocation of resources.

31 In Victoria, for example, this is achieved by the employment of staff within a government department and 'attached' to a court through the vehicle of the *Public Sector Management Act 1992* (Vic).

questioned. Traditionally, also, judicial staff were employed by, answerable and loyal to the individual judge. Such circumstance has changed in some jurisdictions whereby judicial staff are now subject to the same or similar requirements as public servants.[32]

Then there is information technology. If the courts share their computer system with the relevant government department, there is the theoretical prospect or risk of unauthorised 'looking in', for example, on draft judgments when government is a party or affected by the outcome of a particular case.

As Chief Justice King observed in 1984:

> [Judicial] independence is rightly regarded as the indispensable condition of free constitutional government and the ultimate safeguard of the rights and liberties of the citizen. Proper administrative conditions for securing and safeguarding judicial independence are therefore of the utmost importance ... The courts are dependant upon the legislature, for the material necessities for the administration of justice.[33]

Chief Justice King observed that these factors are capable of manipulation by an unscrupulous executive.[34] But it need not be so drastic, so dreadful. A government that does not fully comprehend the doctrine of separation of powers and relegates a superior court to the classification of a business unit within a large government department is not unscrupulous necessarily but is, at least, ignorant of the critical importance of the doctrinal trinity.

Chief Justice Gleeson observed, at the 2003 Commonwealth Law Conference, that there is 'a tension between the demands of managerial efficiency and the core purpose of the institution: in our case, the administration of justice.'[35] None of this tension is new. In 1905, a disagreement broke out between the then Chief Justice of the High Court, Chief Justice Griffith and the Commonwealth Attorney-General, Josiah Symon. The disagreement concerned the travelling expenses, accommodation and the provision of staff to the High Court. Fierce letters were exchanged. In a letter dated 22 February 1905, the Attorney-General pointed out to the justices of the High Court the 'excessive sum' of 2,285 pounds that the sittings of the court had cost the Commonwealth since October 1903 (a little over 12 months). The Attorney-General indicated in the letter that as a 'trustee for the public in relation to High Court expenditure,' he had every intention of continuing with his economic measures in order to 'prevent its recurrence' and draw in the purse strings accordingly.[36]

32 In Victoria, for example, judicial staff are now subject to employment in the same way as a public servant through the *Public Sector Management Act 1992* (Vic).

33 Justice King, above n 26, 342.

34 Ibid.

35 Chief Justice Murray Gleeson, 'The State of the Judicature' (2003) 77(8) *Australian Law Journal* 505, 511

36 Tony Blackshield, Michael Coper and George Williams, *The Oxford Companion to the High Court of Australia* (2001) 650-1.

The dispute escalated to the point where the Attorney-General informed the Chief Justice that travelling costs would be limited to the provision of one associate and one tipstaff when the Court travelled to Brisbane, rather than the customary three associates and three tipstaves. Furthermore, the number of telephones in the rooms of the judges and their associates in Sydney was to be reduced from five to one and the payment for telephones in the private residences of judges would be discontinued.[37]

It did not stop there. The Attorney-General refused reimbursement for the cost of direct steamship fares from Sydney to Hobart and back to Melbourne. He also requested additional information about the cost of the visit of the High Court to Melbourne at the time. The dispute culminated in the judges of the High Court determining to suspend a sitting by a single justice in Melbourne. The decision made headlines.[38] The High Court was said to be on strike.[39] Eventually, the affair ended after Sir Alfred Deakin was sworn in as Prime Minister and Sir Isaac Isaacs as Attorney-General on 5 July 1905. Isaacs wrote to Chief Justice Griffith less than a week after his appointment and the matter was resolved. Peace between the judiciary and the executive reigned once again.

In 1931, during the Depression, the Commonwealth Parliament enacted legislation to reduce the salary of Commonwealth office-holders and public servants.[40] For constitutional reasons, the legislation could not apply to federal judges. However, the Prime Minister of the time, James Scullin, wrote to federal judges requesting that they accept a reduced salary. The High Court judges declined on the ground that, '[n]o encroachments should be allowed upon the independence of the judicial office and the immunity of its emoluments from reduction'.[41] Nonetheless, in correspondence of 10 August 1931, all judges accepted certain reductions. The voluntary reductions, and I emphasise voluntary, ended in 1935.[42] In 1931, the British Government, similar to the Australian Government, proposed a reduction of judicial salaries. The English judges wrote that they were not civil servants, they held offices of dignity and importance, were constitutionally vital, and discharged the gravest and most responsible duties.[43]

The topic of judicial remuneration never seems to go away. As Sir Zelman Cowen and Sir David Derham observed almost 50 years ago, the judges of the Supreme Court of Victoria sought an increase in judicial remuneration in the context of a period of sharp inflation and substantial increases in parliamentary and governmental salaries in the State.[44] At the time, in 1954, the Attorney-General informed the Chief Justice, Sir Edmund Herring, that the government

37 Ibid 651.
38 Ibid.
39 Ibid 650-1.
40 *The Financial Emergency Act 1931* (Cth).
41 Blackshield, Coper and Williams, above n 36, 597.
42 Ibid.
43 Sir Zelman Cowen, *Sir John Latham and Other Papers* (1965) 155 ff.
44 Sir Zelman Cowan and Sir David Derham 'The Constitutional Position of the Judges' (1956) 29 *Australian Law Journal* 705.

intended to raise judicial salaries but at a level considerably lower than those proposed. The judges wrote through the Chief Justice to the Premier, John Cain, on 23 November 1954 in extremely strong terms venting their concern and dissatisfaction, and included the following statement:

> We feel that the proposals represent not only a serious injustice to present holders of judicial office but a great impairment of the prestige of the Supreme Court, and a disregard of the conditions necessary to maintain the independence of the judiciary.[45]

Eventually, with the government not shifting its position, the Chief Justice spoke from the Bench on 8 December 1954, making a public statement on behalf of the judges of the Supreme Court with regard to their constitutional position. However, the government did not shift its position.[46]

As the French would say:

> *Plus ça change, plus c'est la même chose.*
> (The more things change, the more things stay the same).

In 1952, the then Chairman of General Sessions in Victoria (the equivalent of the modern position of Chief Judge of the County Court) was admonished by the Premier of the State in a letter over remarks made from the Bench involving criticism of government housing policy.[47] Eminent jurists, Sir Zelman Cowen and Sir David Derham, submitted that such interference was improper.[48] Obviously so. Governments do not wish to be told, to be reminded, that their political will does not always prevail. They do not like to be told that the courts stand as the last line of defence between the government and the citizen. As Sir Gerard Brennan observed:

> 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 protect, not the governors but the governed.[49]

Sir Guy Green noted that judicial independence is often expressed as an 'axiomatic constitutional principle.'[50] Whilst jurisdictions apply a British model of partnership between the government department allocated the responsibility for courts and the judiciary, there is, in a sense, a trust on the part of the courts; a leap of faith.[51] However, sometimes as a result of difficult experiences, the partnership can lead to judicial cynicism, even distrust. Officials and politicians

45 Ibid 705-6.
46 Ibid.
47 Sir Zelman Cowan and Sir David Derham, 'The Independence of Judges' (1953) 26 *Australian Law Journal* 462.
48 Ibid.
49 Justice Gerald Brennan, 'Judicial Independence' (Paper presented at the Australian Judicial Conference, Australian National University, Canberra, 2 November 1996).
50 Sir Guy Green, above n 20, 135.
51 See, eg, Lord Harry Woolf, 'Judicial Review – The Tensions Between the Executive and the Judiciary' (1998) 114 *Law Quarterly Review* 579, 584.

may view judicial reticence or resistance to government plans and projects that are management driven, or the speaking out by the courts against such proposals, as demonstrating that judges live in ivory towers; that the judiciary resists inclusion in a holistic, structural entity.

It is constitutionally undesirable that courts be placed in the position of having to compete with the political priorities of the executive on matters of funding. As Chief Justice Gleeson informed the Supreme Court of Japan:

> Judges cannot engage in the political process, and they do not (or at least should not) aspire to political legitimacy or seek popular acclaim.[52]

Rather, adequate resources should be provided as needed regardless of whether courts and their function are politically attractive. Just as the legislature could not function properly without adequate resources, so too do the courts need adequate resources so as to have the capacity to fulfil their constitutional roles. Similarly, it is difficult to comprehend that a ministerial office would not be provided with adequate resources to achieve its executive functions. Likewise, the courts.

The Commonwealth Parliamentary Association stated the principle in relation to courts succinctly:

> Adequate resources should be provided for the judicial system to operate effectively without any undue restraints which may hamper the independence sought.[53]

Post-war Australia has seen a considerable change in the administration of government, but particularly so in the last thirty years. Management reform has been implemented so as to improve the effectiveness of government by making public administration more responsive and accountable, and more efficient and effective.[54] Governments have implemented methods of devolution of services but, naturally, want to ensure adherence to an overall policy framework.[55] Political scientists and public administration commentators have observed the altered governmental landscape and noted that there has been a shift from a hierarchical approach based on precedence and the application of long standing rules to a new approach.[56]

52 Chief Justice Murray Gleeson, 'Current Issues for the Australian Judiciary' (Speech delivered to the Supreme Court of Japan, Tokyo, 17 January 2000).

53 *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government*, endorsed by the Commonwealth Heads of Government Meeting, Abuja Nigeria, 2003. See also Chief Justice David K Malcolm, 'The Judiciary Under the Constitution: The Future of Reform' (2003) 31 *The University of Western Australia Law Review* 129, 130, 134-9 where the Chief Justice makes reference to the Beijing Principles in the context of Western Australian constitutional reform.

54 Michael Keating and Patrick Weller, 'Rethinking government's roles and operations', in Glyn Davis and Patrick Weller (eds), *Are You Being Served – State Citizens and Governance* (2001) 73, 80.

55 Ibid 82.

56 Michael Keating, 'Reshaping service delivery', in Glyn Davis and Patrick Weller (eds), *Are You Being Served – State Citizens and Governance* (2001) 98, 98-100.

The new approach has focused on the measure of performance and results based on gauges of efficiency, effectiveness and quality of service.[57] Of substantial impact on the restructure of public administration has been the implementation of programme-based budgeting systems.[58] Inevitably, a politically important purpose of programme-budgeting is the imposition of political directions. Again, as political scientists and public administration commentators would have it:

> [Programme-based budgeting systems] impose greater political direction over policy options with major financial implications. The greater emphasis on corporate goals and strategic planning at the agency level has primarily been intended to facilitate the managerial control of secretaries [of government departments] and senior management and so to increase the 'internal' accountability within their agencies. As such, improved internal accountability does not necessarily increase accountability to the public. However, improved control from the top may also assist ministers in making agencies responsive to political direction.[59]

Courts understand the desire of governments to achieve their political imperatives, but courts are inevitably apprehensive if they are swept up with them. Courts have no difficulty with appropriate accountability but they fear the imposition of budget-driven exercises that do, or might, impact on something so fundamental to our society as judicial independence and the administration of justice. Courts also fear their being used, or seen to be used, as a tool for the achievement of a political goal of the government of the day. The courts do so not for reasons of preciousness, arrogance or innate conservatism. They do so because of their constitutional charge; their duty under the separation of powers doctrine.

Fundamental to the discussion on separation of powers is the matter of function of each of the components of the trinity. With respect to the judiciary, there are two critical elements: first, the judiciary does not function of itself;[60] secondly, the judiciary is based upon the fundamental principles of impartiality and independence. The legislature and the executive function quite differently. They do not function impartially and independently. Rather, those two arms operate politically. The executive arm of government asserts a mandate to govern and so asserts itself on the basis of the mandate given by the electorate. The judiciary has a constitutional charge, a duty to administer justice and apply the rule of law. Each arm must respect the other's function. Such respect necessarily involves a

57 Ibid 100. See also Chief Justice Spigelman, 'Seen to be Done: The Principle of Open Justice – Part II' (2000) 74 *Australian Law Journal* 378, 380-1. Though recognising the valuable insights and reforms which may come about as a result of the development of performance measurements, Spigelman CJ bemoans their use in relation to the courts where they may operate to devalue aspects of those judicial activities which he considers incapable of measurement. Indeed, his Honour argues that, paradoxically, 'one characteristic of open justice is its inefficiency'.

58 Richard Mulgan and John Uhr, 'Accountability and Governance' in Glyn Davis and Patrick Weller (eds), *Are You Being Served – State Citizens and Governance* (2001) 152, 166.

59 Ibid.

60 See William Anstey Wynes, Legislative, *Executive and Judicial Powers in Australia* (5th ed, 1976) 410.

regime of government that facilitates and maximises the independence of the judiciary. The Canadians have such a model.[61] So too, do the federal jurisdictions in this country.[62]

Returning to the words of Sir Owen Dixon in 1935, it is not beyond 'the wit of men', and, I interpolate, women, in modern government to devise governmental machinery so as to place the courts on 'neutral territory'.[63] Until such neutrality is achieved universally, the ongoing discourse of judges upon judicial independence and, necessarily, the separation of powers will continue.

Indeed, around the world, where a British based legal system operates, the importance of judicial independence resonates. Chief Justice McLachlin in Canada raises suspicion about judicial 'report cards'.[64] Lord Steyn in England cautions courts against acquiescence to the exercise of executive power.[65] The Supreme Court of the United States of America enforces the jurisdiction of the courts of that country against the policies of its own head of state.[66]

History informs us that in any British-based constitutional system, there will be a touchstone – the doctrine of separation of powers. The executive of the day of any modern government under such a system must acknowledge the role of the courts in their system both in principle and in practice. Similarly, history informs us that as long as the system exists, the judiciary will not go away and, when necessary, it will not be silent.[67]

61 See the *Courts Administration Services Act 2002* (Canada).
62 See the *High Court of Australia Act 1979* (Cth) and the *Courts and Tribunals Administration (Amendment) Act 1989* (Cth).
63 Sir Owen Dixon, above n 1, 54.
64 Chief Justice Beverley McLachlin, 'Judicial Independence' (Speech delivered at the Fourth Worldwide Common Law Judiciary Conference, Vancouver, 5 May 2001).
65 Lord Johan Steyn, 'Guantanamo Bay: The Legal Black Hole' (Speech delivered at the 27th F A Mann Lecture, London, 25 November 2003).
66 *Rasul v Bush,* 124 S Ct 2686 (2004).
67 Indeed, a clear demonstration of this imperative is the fact that so many Chief Justices have chosen to speak and write about this topic, as highlighted throughout this lecture.