

The Myths of Judicial Independence

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The Six Myths of Judicial Independence

1	Supremacy Myth	Judicial independence represents a primary and supreme judicial virtue, and that it should be protected against all other virtues
2	Purity Myth	Judicial independence can and should be manifest in a single pure and unadulterated form,
3	Safety Myth	Judicial independence is such an accepted and necessary part of our constitutional settlement that its pursuit is 'safe', and that it does not threaten any part of society
4	Methodology Myth	Safety is seen to emanate from a conception of judicial methodology that emphasises formalism/legalism over judicial discretion
5	Neutrality Myth	Judicial independence represents it as a logical, pure, unavoidable and unobjectionable values, and is politically neutral as to competing the visions of the society we
6	Inevitability Myth	Judicial independence becomes an inevitable aspect of contemporary constitutionalism, and that it does not require constant maintenance



The Origin Story...



The Problem of, *and Solutions to*, an Independent Judiciary

Lord Coke Asserts Exclusive Judicial Power of the Courts

“The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some Court of Justice, according to the law and custom of England”

Case of Prohibitions (1607) 12 Co Rep 65

The Kings' 'Royal Power Solution'

Judges exercise independent power;

Judges *can't* be *directly* controlled by the Executive;

But Judges *can* be *indirectly* controlled by the Executive;

So it's OK that ...

Bacon's 'Methodology Solution'

Judges exercise independent power;

Judges *can't* be *directly* controlled by the Executive;

But formalist method to the rescue: *judges only apply law with no discretion*

Judges under 'effective control' through this method, so are 'safe'

So it's OK that ...

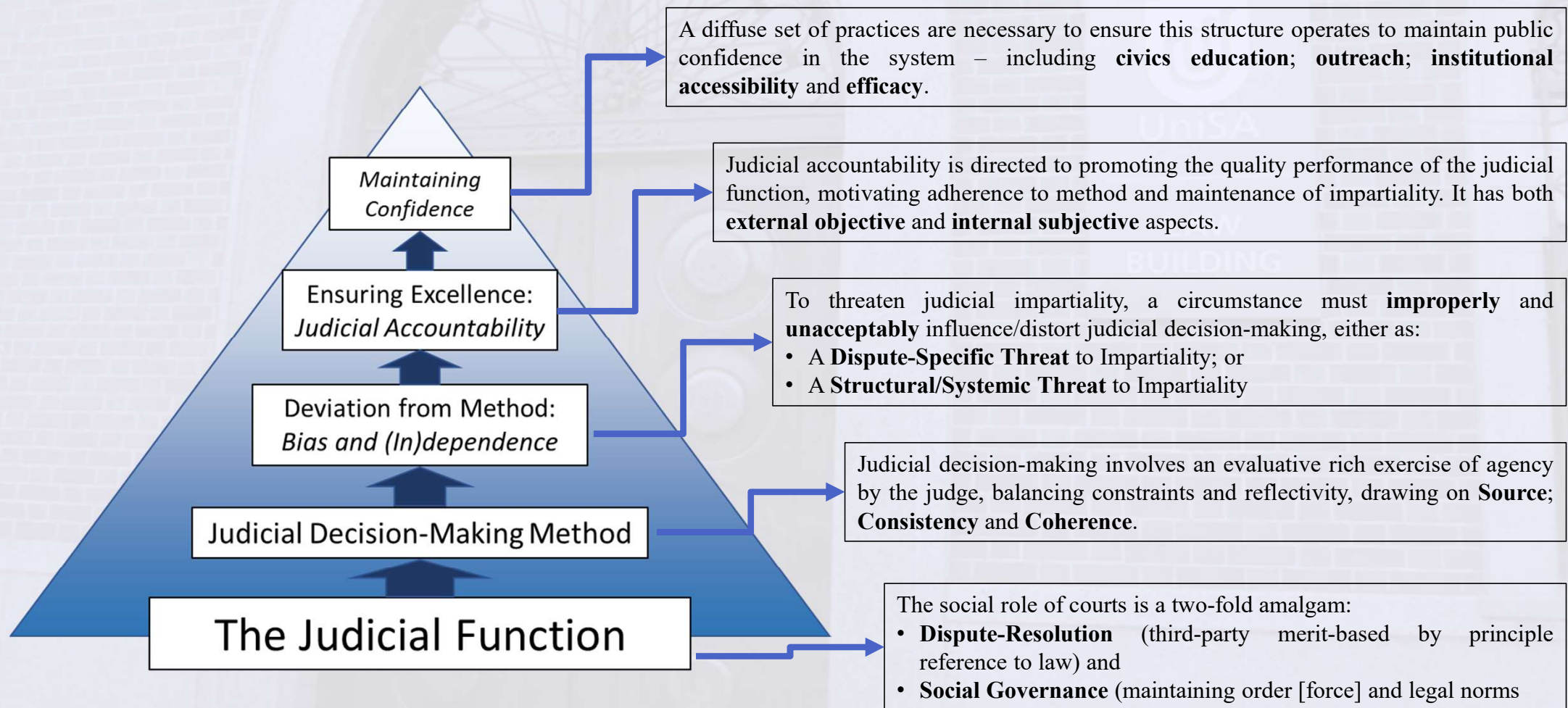


An Alternative Judicial Theory

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Schema of Judicial Theory



The Judicial Function: *Dispute Resolution + Social Governance*

'Species' of Dispute Resolution

	(1) 'Might'	(1) 'Merit'	(1) 'Chance'
	The dispute may be resolved by reference to a property, characteristic or ability of the <i>disputants</i> – the strongest, most popular party	The dispute may be resolved by reference to a property or characteristic of the <i>dispute</i> independent of the disputants	The dispute may be resolved by reference to <i>neither</i> the strength of the parties or their position - such resolution is arbitrary but capable of fairness
(A) Inter-Party The disputants resolve the dispute between themselves ('dyadic').	(1A) Inter-Party Might	(2A) Inter-Party Merit	(3A) Inter-Party Chance
(B) Third-Party The disputants refer the matter to another party and allow the decision of that party to resolve the dispute ('triadic')	(1B) Third-Party Might	(2B) Third-Party Merit	(3B) Third-Party Chance

Judicial Function as Governance: *Power & Rules*

EVERY judicial decision is a PUBLIC act, providing PUBLIC benefits
Courts DO NOT provide a Private Dispute Resolution Service

Governance through ‘Power’

Judicial Decision and Power (Force)

- Judicial resolution is the principal dispute resolution mechanism of the state
- Compliance with judicial decisions is ensured through the enforcement abilities of the state
- Judicial Resolution helps maintain social order and the efficacy of law

Governance through ‘Rules’

Reinforcing Social Rules Through Application	The act of applying a rule to resolve a dispute reinforces that rule, affirming its ongoing validity.
Increasing the Predictability of Rules	Each application of a rule helps make the substantive content of that rule clearer and its operation more predictable.
Maintaining Coherence Between Rules	The application of rules can clarify the relationships <i>between</i> rules , making the operation of the broader normative regime clearer, more coherent and more predictable.
Altering the Substantive Rule	Finally, dispute resolution mechanisms can provide a quick and flexible means of altering the substantive content of the rules.

Judicial Method



Judge Solomon

All fiat, will, intuition and wisdom – may be correct yet is unknowable/unpredictable/arbitrary

V



Judge Machine

All reason, rationality; mechanistic, syllogistic – absolutely predictable, yet inflexible & unresponsive

New Ideal: *Constrained but Genuine Discretion*

This new archetype exists in a virtuous tension, and operates through a methodology that both **constrains the judge** through regulated processes, yet demands the **exercise of genuine evaluative discretion**

- **Source;**
- **Consistency (analogy & precedent)**
- **Principles & Inductive Reasoning;&**
- **The Factual Circumstances**



Synthesised through
genuine acts of
evaluative choice/ act of
will by the judge.

Judicial Independence and Impartiality

I conceptualise concepts of **judicial independence** and **impartiality** as **derivative ideals** that operate **to protect** the judicial decision-making method and **to promote** the performance of the judicial function.

- Judicial Independence must be understood as an *subsidiary aspect* of judicial impartiality,
- Judicial impartiality is itself a **derivative and functional / instrumental** concept

Conceptual Test for Judicial Bias



(1) Mechanism of Influence

That issue must be *capable of impacting/influencing* decision-making of judge (articulate the underlying chain of reasoning)

(2) Impropriety of Influence

That influence must represent a *deviation* from the judicial method (its consideration is methodologically *improper*)

(3) Unacceptability of Influence

That influence must be of such a quality and **intensity** as to represent an **unacceptable** risk to the judicial function

Threats to Judicial Impartiality

(Judicial Bias)
Remedy

Dispute Specific Threats

Threats that arise in the discrete/concrete circumstances of the particular case.

Material Threats

Relationship
Threats

Subject-Matter/
Issue Threats

(Judicial Independence)
Prophylactic

Structural Threats

Threats of an institutional/systemic nature that exist independently of any particular dispute.

Judge as
Person

Judge as
Professional

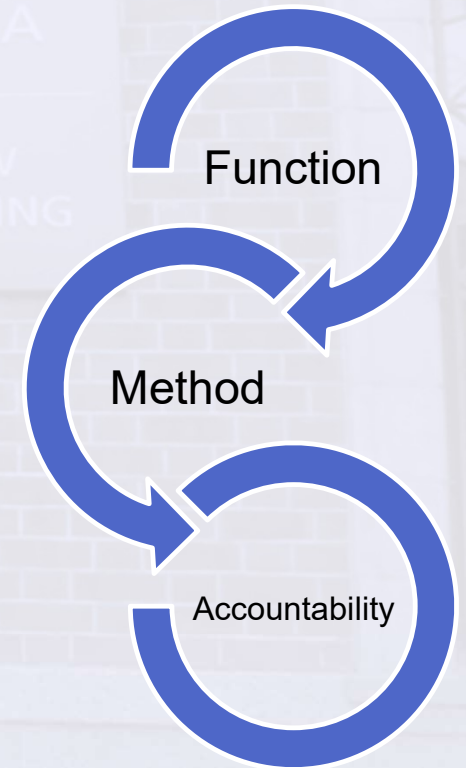
Judge as
Member of
Court

Judge as
Individual
within Court

Judicial Integrity & Accountability

I define judicial accountability as a *derivative functional concept* that operates:

- to promote **conformity with the judicial decision-making method**; and
- to promote the **excellent performance of the judicial function**.



Internal & External Aspects

This approach highlights both the internal and external aspects of accountability:



‘Internal’ Aspects of Accountability – the development of actual judicial **integrity** and a professional **habitus**, and

‘External’ Aspects of Accountability – involving the **reputation** for such **integrity**.

Mechanisms of Accountability

Personal Conduct and Behaviour of the Individual Judge



- 1) Professional Disciplining of Judges
- 2) Civil and Criminal Liability
- 3) Informal Mechanisms and Social Pressures

Substantive Performance of the Judicial Role



- 1) 'Open Justice' – *Accountability through Process*
- 2) Judicial Reasons – *Accountability through Justification*
- 3) Judicial Review and Appeal – *Consistency, Correctness and Accountability*
- 4) Internal Processes – *Accountability through Internal Mechanisms*
- 5) Criticism and Critique – *Testing the Merit of Judicial Determinations*

Accountability for the Administration and Operation of the Judicial Institution



- 1) Financial & Economic Accountability;
- 2) Judicial Management and Performance Standards;
and
- 3) Institutional Reporting Mechanisms

Threats To Judicial Independence



Threats to Judicial Independence in Australia



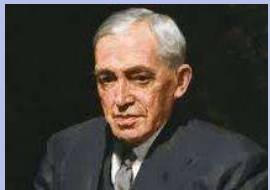
Populism and Increased Political Attacks

The increasing tendency by those in positions of power to directly and publicly attack the judiciary - exacerbated by the rise of populist politics in the US and UK



Absence of Champion

This issue of politicised attacks is exacerbated by the absence of clear authoritative champions for the Courts and the judicial role.



Dixon's Shadow – The Persistence of Formalism/Legalism in Australia

The strangely enduring impact of formalism/legalism in Australia: the long shadow Dixon's 'strict and complete legalism'



Alienation and Apathy of the Public

The unspoken, unexamined controversy facing our justice system is that the alienation of the population is so complete that for most people they have no idea of how incapable that system currently is at serving their needs

Possible Judicial Responses

Intellectual Honesty

Greater intellectually honesty in identifying and justifying the evaluative choices judges make all the time – *judgments; conferencing; extra-curially*

Personal Integrity, Character & Culture

As this conception of judicial independence depend deeply upon the individual judge, and their character and integrity, it is necessary to select for, support and foster these characteristic.

Awareness & New Alliances

Work to build new alliances to champion for the courts, and to address the fragmentation of the Federation (and join twitter!)

Openness & Engagement

Embrace opportunities to engage and educate the public on the nature of our courts and the role they perform: *TV docos; MOOCs; Streaming;*

