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Court Governance and Judicial Independence
The South Australian Approach

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Court governance is concerned with methods of managing courts.

Stated as simply as that, "court governance" is a topic of uncertain scope. What does "court" mean? Does it mean the judicial officers who constitute the court? Does it mean the judicial officers and the administrative functions that are essential to the discharge of judicial duties, such as registry and personal staff? Does it mean the entire administrative structure that supports the court? These are questions to be answered, not matters on which there is a pre-determined conclusion.

Today's topic implies that court governance and judicial independence are linked, as indeed they are.

But while most would acknowledge the link, many would reject the notion that the appropriate form of court governance is determined exclusively by considerations drawn from the concept of judicial independence. The wider the meaning given to the word "court' in this

context, the more likely such persons are to press other considerations as relevant.

There are a number of other considerations that may be promoted as requiring consideration when considering the best form of court governance.

One is administrative efficiency. That is, ensuring that the system of governance will ensure that the courts are administered efficiently. This is a consideration which is sometimes used to support control over court management and administration by the Executive Government. The argument is that it is best placed to ensure efficiency, and that management by the Executive Government can achieve economies of scale and avoid duplication of services.

Another consideration, perhaps the reverse side of the one just mentioned, is that of the skills of the judiciary in relation to administration, and the willingness of the judiciary to assume responsibility for administration.

Another consideration is accountability for public resources. Some will argue that any system of governance that does not provide adequate accountability is not acceptable. This may be used to support control by the Executive Government. In particular it will be used to oppose a system of governance in which the judiciary has responsibility for the

application of public resources, but is in a position to invoke its independence and autonomy to reduce or resist accountability.

Another relevant consideration is judicial collegiality. Collegiality is often deployed to support an approach to governance under which judicial officers collectively control the management and administration of the court. This will be particularly the case when the concept of "court" is given its narrower meaning, focusing mainly on the judicial officers. To some collegiality will be seen as opposed to efficiency.

Another consideration is the impact of output or performance budgeting. Executive Governments have a tendency to treat courts and the administration of justice as services provided to the people, in relation to which performance targets can be set, and desired outputs specified. A method of governance which denies the Executive Government the ability to establish performance measures and set targets may be resisted.

There may be other considerations that are relevant.

The point I make is that the debate about the appropriate method of court governance is not solely concerned with identifying the method of court governance which is consistent with judicial independence and conducive to it. There are other matters that cannot be ignored.

For present purposes I am prepared to assume that judicial independence is a prime consideration or the prime consideration in determining the appropriate approach to court governance.

But that provokes another question. How do we define judicial independence? What is the concept to which we refer as the touchstone to arrive at a suitable system of court governance? This is another area in which debate often proceeds on unstated or unclear premises.

The core aspects of judicial independence include the following:

- **tenure – which involves permanent or long term appointments and protection against removal from office other than for proved misbehaviour;**
- **adequate and secure remuneration – which includes a process for reviewing remuneration that is not subject to inappropriate influence;**
- **immunity from suit for judicial acts;**
- **immunity from retribution or punishment for judicial acts;**
- **protection from undue pressure in relation to the performance of judicial duties;**
- **a commitment to individual independence and impartiality in the performance of judicial duties, and to maintaining the appearance of such independence and impartiality;**

- **a process of appointment that is consistent with judicial independence in the narrow sense, and which the public accepts does not result in appointments for inappropriate reasons.**

Pausing there, what relationship if any is there between these matters and the method of court governance? Perhaps not much.

But most would add as a core aspect of judicial independence, control over the management or allocation of judicial resources, and judicial control over the management of the court's workload. This, if accepted, has a link to court governance, but probably would involve the word "court" in a relatively narrow sense.

More contestable, although an aspect that I would support, is the notion that judicial independence requires that the judiciary be able to provide courts (meaning premises, infrastructure and personnel) where judicial officers can discharge their judicial functions, and to which the public can resort freely. Judicial control is seen as necessary to prevent interference with the public's access to the courts.

Now the term "court" in the wider sense is involved. And now there is a basis for supporting an approach to governance that is consistent with this aspect of judicial independence. But we need to recognise that it is part of the debate to identify when and how "court" in the wider sense becomes involved, and to acknowledge that a number of core aspects of

judicial independence have little or no relationship to the approach to court governance.

I would go a step further. I argue that a system of governance in which courts, or judicial heads of jurisdiction, must regularly ask the Executive Government for improvements and changes and adjustments to the administration of courts, to ensure that the administration is conducted in a manner consistent with judicial independence, puts the judiciary in a mendicant position that is, in a qualitative way, inconsistent with judicial independence. If accepted, that supports the argument that a system of governance or administration under which the Executive Government, by and large, administers the courts, and the judiciary must regularly ask for changes and adjustments, is not satisfactory.

And there is one claim I would make. It is that the interests of judicial independence, as a central value of our society, will be best promoted if the staff of the courts (in the wider sense) share the judiciary's commitment to judicial independence, by being and seeing themselves as part of a system for the administration of courts which is under the control of the judiciary. In other words, the administration of justice is both the deciding of cases and the management of the system that enables those cases to be heard and decided.

A key issue is whether we accept judicial independence not as an imprecise notion, but as something that can be expressed with reasonable clarity, and which is seen as a core value in our society.

But now there are some qualifications.

A sensible discussion about methods of court governance calls for recognition of the impact of certain features of our system of government, and for recognition of some issues that arise if we promote administrative autonomy for the judiciary in relation to the courts.

The first one is that the concept of the judicial arm or branch of government, as a third arm or branch of government, is not well established in the public mind. Nor is it well established in the mind of legislators or of those responsible for the Executive Government. The concept of the judicial arm or branch of government as a separate arm of government implies a substantial degree of institutional and administrative autonomy. Until we can get it better established and recognised, there will be a tacit resistance to it.

Second, the fact that Parliament is responsible for approving appropriations of money for public purposes (and today control rests with the Executive Government) means that the government's control over the purse strings will always put limits on the autonomy and independence of the judiciary in relation to any system of court

governance. Parliamentary responsibility for appropriations for public purposes is as fundamental a concept as is judicial independence. It means that there will always be scope for the purse strings to be used to influence and affect the administration of courts, whatever model of court governance is adopted.

Third, we need to acknowledge that there is a tradition of judicial disinterest (or at least limited interest) in the management and administration of courts. This tradition may be an obstacle to the grant of administrative autonomy to the judiciary. We need to demonstrate our interest in and capacity in relation to these matters.

Fourth, the judiciary having substantial administrative autonomy in relation to the management of courts in the wider sense has implications for the approach to appointments of heads of jurisdiction, and possibly other judicial offices. The Executive Government might reasonably give substantial weight to management and administrative skills and experience, which might favour candidates for key judicial positions whose primary background is not legal practice.

Fifth, if the judiciary is to be given substantial autonomy in relation to the management of courts, it must accept a collective responsibility (at least through heads of jurisdiction) for the administration of courts in the wider sense. The judiciary as a body cannot say that its only interest and responsibility is the discharge of judicial duties.

Debate about the desirable model for court governance must take account of these matters.

If we argue for institutional autonomy in a wide sense, we need to be able to explain how and why that claim is justified, and we need to realise that if the claim is granted we must accept the accountability that goes with it.

So where do I stand? I will explain my position as briefly as I can, by stating four propositions.

The first is that judicial independence is a core value of, and principle by reference to which, our society and system of government function.

The second proposition is that judicial independence, properly understood, supports a system of court governance which gives to the judiciary control over the provision of premises, infrastructure and staff that are involved in the judiciary discharging judicial duties. This is so because unless the judiciary has control over these matters, it is put in what I have described as a mendicant position, and there is scope for inappropriate interference by the Executive Government in the discharge of judicial duties.

My third proposition is that the concept of the judiciary as a third arm or branch of government leads to the same conclusion, because it supports the conclusion that this arm of government should be autonomous in the management of its own affairs.

My fourth proposition is that judicial independence, in its narrower aspects, does not require the judiciary to have administrative autonomy in relation to the courts in the wider sense. Existing systems in which the Executive Government is responsible for court administration are not inconsistent with the core of judicial independence. But consistently with that we can maintain the first three propositions that I have identified, supporting autonomy in the wider sense.

With that background I turn to the South Australian position.

In South Australia the State Courts Administration Council is, by virtue of the *Courts Administration Act 1993*, responsible for providing "the administrative facilities and services for participating courts that are necessary to enable those courts and their staff properly to carry out the judicial and administrative functions." Each court remains responsible "for its own internal administration."

The Council has responsibility for the control and management of court buildings. It has a Chief Executive Officer ("CEO") called the Administrator. The Administrator appoints the staff of the Council. The

Council employs all the staff necessary to keep the courts functioning. We employ the cleaners, the security staff and sheriff's officers, the court reporters, the registry staff, the registrars and so on. The Council is also responsible for the provision of services through the registries, and for all of the staff who deal with the administrative aspects of the work of the courts. We employ the personal staff of the Judges. We provide the furniture and fittings of the courts and the information technology systems.

The Administrator, as CEO, is responsible to the Council and subject to its control and direction. Although the Administrator is appointed by the Governor, a person cannot be appointed as Administrator unless nominated by the Council, and the Administrator cannot "be dismissed from office or reduced in status" without the concurrence of the Council. So the independence of the administrator from the Executive Government is assured.

All of our staff, some 600 or more of them, are employed by the Council. However, the provisions of the *Public Sector Management Act* govern their employment.

The Council is funded by monies appropriated by Parliament on an annual basis. An appropriation is made on the basis of a budget prepared by the Council, but we are required to obtain the Attorney-General's approval. That means that the Executive Government

maintains control over the financial resources available to the Council. We tend to be treated like government departments. We are subject to "efficiency dividends". We cannot get funding for new proposals unless we can persuade the Attorney-General to support the proposal, and unless he can persuade Cabinet to do so.

We receive our annual appropriation as a single lump sum but it is based on a detailed budget. Our recurrent funding is about $65 million a year. We have considerable autonomy in dealing with that money, but our expenditure must accord generally with the approved budget. Nevertheless, if savings are made we can decide how they are to be used. We have scope for some discretion in the application of our funds. On the other hand, when money is short, we have to decide where the cuts will be made. In times of stringency, it is the Council that has to make the difficult decisions.

The Council comprises the Chief Justice, the Chief Judge of the District Court and the Chief Magistrate. A decision supported by the Chief Justice and one other Council member is a decision of the Council. That means that the Chief Justice has the power of veto, but must get one other Council member to support a proposed decision.

The Council meets at least monthly with the Administrator and our senior staff. Formal votes of the Council are virtually unheard of. We decide almost everything by consensus. We act like the Board of

Directors of a medium sized company. The Authority has an Executive Committee of senior staff. The Executive is responsible for the detailed administration of the Authority, and advises the Council on many issues.

Our accounts are audited annually by the Auditor-General. We present a written report each year to Parliament. The practice is for me to attend with the Attorney-General before the relevant Parliamentary Estimates Committee when the appropriation to the Council is under consideration. Although it is the Attorney-General's portfolio that is under consideration, I regularly answer questions from the Members of Parliament.

The Administrator and staff of the Authority are members of numerous committees established by the Executive Government, the purpose of most of which is to ensure co-operation and co-ordination in matters involving the administration of justice. Our staff participate on the basis that they represent the Council as an independent statutory authority, and on the basis that they are not providing advice to the Executive Government or bound by decisions of the Executive Government.

We have, I believe, as much autonomy as is consistent with the control of the Executive Government over our funding, and with our responsibility and accountability for the efficient delivery of the

administrative services that the Council provides to the Courts. Funding remains a real issue for us.

We consider that we should be provided with more funding, and we regularly make this point to the Executive Government. From time to time we do have to remind the Executive Government of our statutory independence. But I have never encountered the slightest hint that the power of the purse might be used to exercise inappropriate influence over the Council.

The Council accepts responsibility for efficient administration, and for the efficient and effective provision of administrative support to the courts. We accept our accountability. We acknowledge that if something goes wrong, and it is the Council's responsibility, we cannot invoke judicial independence to escape responsibility. This is an inevitable and significant aspect of our arrangements.

Our system eliminates, more or less entirely, the need for the judiciary to ask the Executive Government to modify the manner in which it deals with the courts, in recognition of the principle of judicial independence. That is because the relevant decisions are made by the Council. Nor is there any occasion for us, during the course of a year, to ask the Executive Government to fund particular activities. Once our appropriation is settled, we must live within that, but decisions about how the money is used are our decisions.

There is no significant competition for resources as between the courts. We manage the system as a whole, with a view to the best use of our resources as a whole.

Our system of governance is one that makes real the concept of the judicial arm of government. Our staff, by and large, understand themselves as part of an administrative system for the administration of justice, that is managed by the judiciary.

I believe that our system meets the requirements of judicial independence in the broadest sense. It enhances that principle, because it ensures substantial autonomy to the judiciary in relation to the governance of the courts.

No doubt improvements could be made. However, the so-called Executive Government model, such as exists in Victoria, does not appear to me to accord with judicial independence in the broader sense. In outlining the considerations relevant to establishing an appropriate form of court governance, I have, I believe, identified the reasons why the Victorian model is not a satisfactory model.