JCA COLLOQUIUM

6th OCTOBER 2012

JUDGES AS EMPLOYEES

Thank you for inviting me to join me in your deliberations. It is a great pleasure to be here. When Glenn Martin invited me to speak as this colloquium, I accepted with alacrity. The measure of my enthusiasm can perhaps be assessed by the fact that in August I applied for a visa to come to Australia, only to discover, when I arrived at the visa processing centre, that my previous one had not yet expired.

One of the features of the visa application form – one common to most forms – is that it has a small box, about two inches long and a quarter inch deep, that asks you to identify your employer. As a barrister in private practice from the time I left university I experienced little difficulty with this type of request, simply inserting 'self-employed' and moving on. Since becoming a judge, a little less than four years ago, I found it less easy. My pedantic streak urges me towards accuracy in all written things, and fear of the consequences of inaccuracy causes great anxiety. Perhaps I have an overly vivid imagination, but I can readily visualise the headline 'Judge lies to car-hire-company'. 'Self-employed' no longer seems apt, and 'unemployed' gives the wrong impression. Eventually I resort to filling in the court's name; giving the registrar's phone number, because the President of my court would not be happy to receive an enquiry about my fitness to hold a credit-card, and hope for the best.

Beneath this apparently trivial exercise lurks a rather more fundamental question about the status of judges in democratic states, such yours and now, thankfully, mine. Traditionally, in countries that have drawn from the United Kingdom in the creation of their judicial structures and the adoption of the adversarial system of trial, judges have been regarded as holders of an office

and office-holders, be they members of parliament, members of the clergy,[1] or judges, have never been regarded as employees. But there are signs that this received wisdom is now being called in question. In England, a decision by the House of Lords in relation to a minister of religion,[2] and another of the European Court of Justice, in relation to judges, suggest that the distinction between public office holders and employees has become permeable.[3] There are indications from other jurisdictions, my own included, that the distinction is becoming blurred. Perhaps these are only straws in the wind, but it is worth exploring the consequences of that wind strengthening into a hurricane.

There are a number of problems that arise from treating judges as employees in our type of legal system. Let me expand on that, using examples from my own jurisdiction. In South Africa, the President on the advice of the Judicial Service Commission appoints judges. This is a body established under the Constitution and composed of a mixture of politicians and political appointees – too many – and judges and lawyers – too few. It is required to act rationally and, according to a recent decision by my court, provide reasons for its decisions. But if judges are employees they are entitled in addition to invoke the Employment Equity Act,[4] if they believe that they have been discriminated against in the process of appointment. That would be a serious matter. It would be equally serious if, once appointed, judges were entitled to complain to our labour tribunals about unfair labour practices. A judge, who had fallen foul of the Judge President of the division in which they were sitting, might well perceive an allocation of unattractive duties on circuit in one of the far flung and less pleasant parts of our country as a disciplinary measure. That could be challenged as an unfair labour practice. A judge could not be required to sit

[1] *Davies v Presbyterian Church of Wales* [1986] ICR 280.
[2] *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73; [2006] 4 All ER 1354 (HL)
[3] Advocate General Kokott in the case of O'Brien referred to below said in para 46 that this classification is irrelevant.
[4] Act 55 of 1998.

outside ordinary court hours without being paid overtime in terms of the Basic Conditions of Employment Act.[5]

Even more seriously, if judges are employees then in South Africa they enjoy a constitutional right to join trade unions, engage in collective bargaining and to strike. I understand that this is the position in France, where there are three trade unions, of varying political hues, representing judges. But that occurs in the context of a professional career judiciary falling within the public service, the independence of which is guaranteed separately under the Constitution, which makes the President of France responsible for the judiciary's independence. Legal systems such as ours and yours would I suspect be more inclined to endorse a statement by Chief Justice Lamer of Canada that:

'… under no circumstances is it permissible for the judiciary – not only collectively through its representative organisations, but also as individuals – to engage in negotiations over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. As I explained below, salary negotiations are indelibly political, because remuneration from the public purse is an inherently political issue. Moreover, negotiations would undermine the appearance of judicial independence, because the Crown is almost always a party to criminal prosecutions before provincial courts, and because salary negotiations engender a set of expectations about the behaviour of parties to those negotiations which are inimical to judicial independence. When I referred to negotiations I utilised that term as it is traditionally understood in the labour relations context. Negotiations over remuneration and benefits, in colloquial terms, is a form of "horse-trading."[6]

If we go one step further in considering judges as employees the question that needs to be asked and answered is this one: 'If judges are employees, who is their employer?' The only possible answer appears to be that the judge is in

[5] Act 75 of 1997.
[6] *Reference re: Public Sector Pay Reduction Act (P.E.I.), s10; Attorney-General of Canada et al Intervenors: Reference re: Independence of Judges of Provincial Court, Prince Edward Island, Provincial Court Act and Public Sector Pay Reduction Act; Attorney-General of Canada et al, Intervenors* (1997) 150 DLR (4th) 577 (SCC) para 134.

some measure a State employee, in other words a member of the Civil Service. In South Africa that would apply at a national level. In your federal system I understand that the reference to a State employee, could apply in relation to the judiciary at both national and state level. But that raises deeply troubling implications for the concept of judicial independence and the doctrine of the separation of powers. Employees are accountable to their employer. But judges are supposed to hold the balance between the State and the citizen. They are the guardians of people's rights. If they are to be accountable to the government, wherein does their independence lie? Under the doctrine of the separation of powers the judiciary is one of the three arms of government. Members of parliament are not the employees of the legislature. Ministers of State are not the employees of the executive. How can one treat the judiciary as an arm of government, when its members are employed by the State and therefore, indirectly at least, by the executive responsible for the administration of government? In that scenario judges become simply civil servants, perhaps with a role of special importance to play within the body politic, but civil servants none the less.

The notion that judges are simply a special class of civil servants, subject to oversight by the executive, may well have a hold on the public imagination and, certainly the imagination of politicians. Recently, and controversially, the government in South Africa announced that it intended to establish a commission to review the judgments of the Constitutional Court. It has since added the judgments of the Supreme Court of Appeal to those that require such review. High-ranking representatives of government, including the President, have been broadly critical of courts being involved in policy matters that they claim are the purview of the executive. They have said that the reasoning in minority judgments – curiously enough those that accept the government's arguments – is more persuasive than that in majority judgments. Even more

recently shortly before I left South Africa to come to this conference, COSATU, our largest trade union federation, which is party to a tri-partite alliance with the ANC and the South African Communist Party, an historic alliance having its roots in the struggle against apartheid, has said at its national conference that it too proposes to review the activities of the courts. Running through these statements is the implicit notion that the courts exist to reflect the political will of the government and its associates.

It is not only in South Africa that there are concerns about the status of judges. At the end of 2011 a referendum was held in Ireland to alter the clause in the Irish Constitution that provided that the remuneration of judges should not be reduced. The change read as follows:

'The remuneration of judges shall not be reduced during their continuance in office *save in accordance with this section.'*

A new subsection was then added to the relevant Article of the Constitution to provide that where remuneration of any person is paid out of public money and a law is passed stating that there shall be a reduction in that remuneration, proportionate reductions may be made to the remuneration of judges. In other words judges are to be treated in the same way as civil servants. The referendum passed with an overwhelming majority.[7] The only surprise was that some 354 000 people voted against the amendment. The evident popularity of the measure amongst the public at large caused one Irish judge to comment wryly to me, that the judiciary had not been aware that they had such large families.

While these events have been playing themselves out in South Africa and Ireland, a senior barrister in England, Mr Dermot O'Brien QC, has been fighting though the courts to establish his right to a pension for his 27 years of

[7] In an electorate of 3.191 million, 97.7% (1 393 877 votes) approved the amendment with only 20.3% (354 134 votes) against.

part-time, fee-paid service as a recorder from 1978 to 2005. The terms upon which he served as a recorder did not include a pension, so he invoked the European Council's directive on part-time work[8] to found his claim. In order to do so, under the regulations giving effect to the Directive in the United Kingdom, he had to establish that his judicial work as a recorder, principally presiding over criminal trials in the Crown and county courts, was undertaken whilst working under a contract of employment or:

'any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.'

Alternatively he argued that in terms of the Directive itself he had 'an employment contract or employment relationship as defined by the law of the Member State', ie the United Kingdom. Whilst these arguments were presented in the alternative on the face of it there is no difference between them.

Not surprisingly Mr O'Brien's claim was resisted by the Ministry of Justice on the traditional footing that his appointment as a recorder was an appointment to a judicial office and as such he was not employed under a contract of employment nor working in terms of a contract under which he had undertaken to perform personally work for another party to the contract. Up to the stage of the Court of Appeal this argument worked very well.[9] The court held that there was no contract of employment and the alternative suggestion that there was a contract to perform work for another party was bluntly rejected in six words, with the rhetorical questions: 'Which other party? What contract?'

Thus far the case trod a path well travelled in many courts. The emphatic response of the Court of Appeal is supported by many judicial pronouncements

[8] Council Directive (EC) 97/81 (concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the EUTC)(OJ 1998 L14 p 9).
[9] *O'Brien v Department of Constitutional Affairs* [2008] EWCA Civ 1448.

from other jurisdictions drawing on a similar heritage. The fullest is perhaps the following statement by Sawant J on behalf of the Supreme Court of India:

'The judicial service is not service in the sense of "employment". The judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the state. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the state, what is intended to be conveyed is that the three essential functions of the state are entrusted to the three organs of the state, and each one of them in turn represents the authority of the state. However, those who exercise the state power are the ministers, the legislators and the judges, and not the members of their staff who implement or assist in implementing their decisions.'[10]

In your own country, the High Court said, simply '… judges are not employees of a State'.[11] Equally blunt were the majority judges in a New Zealand case: '… the judiciary are not employees or agents of the Crown'.[12] The Supreme Court of Canada was just as clear. In the judgment of Lamer CJC that I mentioned earlier, it said:

'… the fact remains, that judges, although they must ultimately be paid from public monies, are not civil servants. Civil servants are part of the executive; judges by definition are independent of the executive.

When O'Brien's case reached the Supreme Court,[13] however, it took a different turn, although not necessarily as dramatic as the one where a member of the House of Lords in a dissenting speech noted that the respondent had come to the House armed with the law, but in his colleagues had encountered the prophets. Speaking for the court, Lord Walker cited a passage from the

[10] *All India Judges' Association & others v Union of India and others; State of Himachlal Pradesh v High Court of Himacha Pradesh; Shamsher Bahadur Singh v State of Bihar& others* [1994] LRC 115 (SC) at 121c-h. See also *Veeraswami v Union of India & others* [1993] 1 LRC 59 (SC).
[11] *Re Australian Education Union & others: Ex parte the State of Victoria* 184 CLR 188 (HCA) at 233. The principle is affirmed in various passages in the judgments in *Austin v Commonwealth* 215 CLR 185.
[12] *Attorney-General v Chapman* [2011] NZSC 110 para 175.
[13] *O' Brien v Ministry of Justice* [2010] UKSC 34; [2010] 4 All ER 62 (SC).

judgment of the Court of Appeal of Northern Ireland, dealing with equality claims by the chairs of certain tribunals that were dependent upon the claimants being in employment, in which Carswell LCJ said:

'All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the President of the Industrial Tribunals or the Court Service, or more loosely arranged in collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment . . .'[14]

This was not in itself a novel observation. In 1996, Lord Bingham, in a lecture on judicial independence,[15] had said:

'After appointment, judges sit in courts provided by the state, they have offices provided, heated and lighted by the state, they have clerks employed by the state, they use books and computers mostly provided by the state, they are themselves paid by the state. In all these respects the position of judges is not very different from that of any other employee of the state.'

However, Lord Bingham went on to recognise that the position of judges must of necessity be categorically different from ordinary government employees.

Lord Walker went on to discuss certain decisions of the European Court of Justice and a decision by the House of Lords that a minister in the Church of Scotland could be a worker under an employment contract,[16] and decided to refer to the European Court of Justice the question whether it was for domestic law to determine whether 'judges as a whole are "workers who have an

[14] *Perceval-Price v Department of Economic Development* [2000] IRLR 380 para 26. The court held that the definition of worker in that case, which was largely similar to that in *O'Brien,* applied to the chairs of the various tribunals. See also *Stevenson v Lord Advocate* 1999 SLT 382.
[15] Judicial Studies Board Annual Lecture given on 5 November 1966 and reprinted in *The Business of Judging: Selected Essays and Speeches* 55 at 57-58.
[16] *Percy v Board of National Mission of the Church of Scotland* 2005 UKHL 73; [2006] 2 AC 28.

employment contract or employment relationship" within the EU directive or whether there is a Community norm by which that fell to be determined.' The question was referred under the Directive because the European Court of Justice had no jurisdiction to construe the UK regulations.

It is not my purpose today to discuss whether Mr O'Brien's claim was good. That will be determined later this year by the Supreme Court and there are special features of the applicable regulations that may affect the issue.[17] It is also not my purpose to consider whether he should, in all good faith, receive a pension. My concern is with the approach adopted by the European Court of Justice to the position of judges, which is I think instructive so far as their status is concerned. That does, I am afraid require some exposition of its terms. I start with the opinion of the Advocate General, which is frequently decisive in European Community law. She started her opinion by saying:

'… the question [is] whether the directive obliges a Member State to grant rights under the Framework Agreement also to a civil servant.'[18]

Reading that for the first time it struck me as putting the cart before the horse and I confess that reading it again merely reinforces the impression. The question under consideration was whether Mr O'Brien was working under a contract under which he undertook to perform services for another, or in terms of the Directive itself, whether he was in an employment relationship recognised by the law of the United Kingdom. To take as one's starting point that he was a civil servant is, to the eyes of this South African lawyer, to answer the question without considering the central issue of whether a recorder or other judge in England, is a civil servant. Of course judges are civil servants in many

[17] Regulation 17 expressly excludes part-time fee paid judges from its scope. However, in para 39 of the opinion of the Advocate General it is recorded that the approach of the British government is that this is for purposes of clarification only – people like Mr O'Brien being the only judges to whom the regulations could potentially apply.

[18] Opinion of Advocate General Kokott, para 28 available at: http://csdle.lex.unict.it/Archive/LW/EU%20social%20law/EU%20case-law/Opinions/20120214-105335_Conc_C_393_10enpdf.pdf.

European jurisdictions, including the one from which Advocate General Kockott comes. However, the interpretational approach, which seems to pay little if any heed to the language of either the Directive, certainly seems strange to a lawyer schooled in the common law tradition of statutory interpretation. What is not surprising, in the light of the manner in which the question was framed, is that the Advocate General said that the position of a judge must be contrasted with that of an independent contractor and that the need for judicial independence was not an 'appropriate' reason to exclude judges from the category of workers to whom the Directive applied.

The response of the United Kingdom government was to spell out once more the traditional view of the position of judges. Its submission is recorded in the judgment in the following terms:

'… domestic law has long-recognised that judges are not employed under a contract, and that that law does not recognise any category of 'employment relationship' as distinct from the relationship created by a contract. For those reasons, according to the Ministry of Justice and the United Kingdom Government, judges in general do not fall within the scope of Directive 97/81.'

This contention was give short shrift by the Court. In para 41 of its judgment the court said:

'it must be observed that the sole fact that judges are treated as judicial office holders is insufficient in itself to exclude the latter from enjoying the rights provided for by that framework agreement.'

As the expression 'judicial office holder' is merely the nomenclature used in English law to distinguish certain classes of person from employees, one is left not knowing whether the court appreciated the distinction that is drawn in English law in this regard. It went on to say that the position of judges must be contrasted with that of independent contractors. Lastly it returned the case to the Supreme Court with the following injunction:

'An exclusion from that protection may be permitted only if the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, within the category of workers.'

It is perhaps less than surprising in the light of this that when the case returned to the Supreme Court in July, a preliminary ruling was made that Mr O'Brien was a part-time worker within the terms of the Directive.

Where then does this leave judges in England and Wales? They are workers for the purpose of the Directive on part-time work. It would appear that this will also make them workers for the purpose of other Directives, such as those on working time, health and safety at work and equal treatment for men and women. Implementing these in relation to the judiciary may prove difficult. Working time directives are not readily capable of being transposed to the judicial system. Claims for stress may proliferate under health and safety at work directives and heads of courts may be faced with demands for less taxing court duties. After all even on the bench there are those who are less enthusiastic about hard work than is desirable, and South Africa is not the only country in the world where complaints of judicial delays and outstanding judgments are made. The appointment process is clearly affected by any provision directed at preventing discrimination. I read recently that the UK has the worst track record in Europe for the advancement of women in the judiciary. If that is so can a challenge to an appointment or a failure to make an appointment be excluded? Perhaps the most curious aspect of all this is that judges may turn out to be workers in terms of a range of European Directives, whilst the Supreme Court has even more recently held that a similarly worded directive does not apply to arbitrators.[19] That may mean that they arrive at the curious position that an arbitrator, who undoubtedly performs work for others

[19] *Jivraj vHashwani* [2011] UKSC 40.

under a contract, does not come within the Directives, whilst a judge who is not subject to any contract at all, does. As the King remarked in the King and I: 'But … 'tis a puzzlement.'

Why should we be concerned with these developments? Perhaps I am unduly sensitive, but that may flow from my background as a South African lawyer. I was born shortly after the Nationalist Party came to power and lived through three states of emergency, an incipient armed revolution, a traumatic and frequently violent process of negotiation towards democracy, before we emerged with a democratic government in 1994. As part of that settlement – indeed a crucial part – we adopted one of the most generous Bills of Rights ever enacted, including both second and third generation rights and vested the courts with the power to interpret and secure the enforcement of those rights. This was seen as necessary to ensure that the Constitution fulfilled a transformative purpose in extending basic services, such as health, housing and education, to the entire population and providing essential protection against a repetition of the systematic oppression of people in society that had been the hallmarks of apartheid. In the result our judges were vested with great powers. That was done even though the previous judiciary was viewed with suspicion as essentially subservient to the government of the day, by which they had all been appointed, even though many of its members were technically competent and it numbered some fine lawyers in its ranks.

We did two things. First, we embarked upon a process of transformation of the judiciary itself including the establishment of our Constitutional Court. Second, we vested great powers in the judges. They can strike down legislation as contrary to the Bill of Rights or, under the principle of legality, as irrational. Their powers of judicial review require that all administrative action can be tested not only for procedural fairness, but also for reasonableness. Executive action that is not administrative action, such as the appointment of a new chief

justice[20] and the head of the prosecution service,[21] and the dismissal of the head of national security,[22] have been reviewed on grounds of rationality. So has the government's refusal to roll out anti-retroviral treatment to mothers and newborn babies who were HIV positive.[23] The legislative process has been reviewed for the adequacy of its public participation in legislative processes, [24] as well as for the compliance of the legislation it passes with international instruments to which South Africa is a party.[25]

Whilst South Africa may be an outlier in the extensive powers that it vests in its judges, there is a tendency in many jurisdictions in the English-speaking world, for judges to play a far more significant role in areas of the day to day functioning of society than was the case in the past. One need only read the decisions of the highest courts in your country, the UK, New Zealand, India and Canada to see the truth of this. This development seems to have its primary source in the extension of the scope of judicial review and the adoption by most countries, in some or other form, of human rights instruments. Where that is so it makes further demands on the legal system. In particular it requires a careful development of a doctrine of the separation of powers and an independent judiciary. The traditional and limited function of the courts, of making law by the processes of statutory interpretation and incremental developments of the common law, is substantially expanded. We are now making decisions that materially affect not only the administration of government entities but also the allocation of public funds. I found myself doing precisely that in the term that ended last week in a case involving the eviction of desperately poor individuals

[20] *Justice Alliance of South Africa v President of the Republic of South Africa & others* 2011 (5) SA 388 CC).
[21] *Democratic Alliance v The Acting National Director of Public Prosecutions* 2012 (1) SA 471 (SCA). Upheld the day before this address was delivered in *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24.
[22] *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC).
[23] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC).
[24] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC); *Matatiele Municipality and Others v President of the RSA and Others (No 2)* 2007 (6) SA 477 (CC).
[25] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

from a derelict and dangerous building, where the court had to formulate the terms upon which the local authority would provide temporary emergency accommodation.[26] Such decisions are rarely popular with the authorities upon whom new and frequently unwelcome burdens are imposed. If judges are civil servants, like the officials concerned in taking such decisions, will the authorities as readily accept their judgments? The acid test is always whether the courts' decisions are implemented. If the judges are perceived to be civil servants the temptation from the side of the executive to ignore their decisions in favour of the decisions of other civil servants, who are regarded as better qualified and better informed in that particular area, will be considerable. That is the one side of the picture.

The other side is that it is difficult to see how one can formulate a sensible and acceptable doctrine of the separation of powers, unless the judges are truly separate from the legislature and the executive. But such a doctrine is necessary if there is to be a rational demarcation of those matters that are the province of the government and those that are subject to interference by the courts. Only last week we had an example of the need for this in a case involving the controversial introduction of an electronic system of road tolls around Johannesburg, our largest and commercially most important city, and on the main road to Pretoria, the centre of government administration, some 45 kms away. The plans for this were well advanced and roads had been upgraded and the gantries for the electronic tolls were increasingly in evidence. Four years after the decision to undertake electronic tolling had been taken, and after the roads agency had incurred a debt of R21 billion, guaranteed by the government, an alliance of bodies opposed to the tolling sought and obtained an

[26] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and 97 others (The Socio-Economic Rights Institute of South Africa intervening as amicus curiae)*(735/2011)[2012] ZASCA 116.

interdict against the commencement of the tolls. An urgent appeal to the Constitutional Court was upheld.[27] The court said:

'a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. … A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.'

The court went on to point out that the appropriation of funds is a matter for parliament and the executive is responsible for the proper expenditure of those funds. Accordingly courts should be reluctant to step in to prevent them from implementing the decisions they make in that regard.

This is a classic separation of powers decision. Whilst expressing disappointment, the parties that had sought the order accepted it and it has been widely accepted in the media, even though the implementation of tolling is massively unpopular across all communities. Would it be the same if the government employed the judges? I doubt it. The difficulty in that situation is that the judges are perceived to be on the side of their paymasters. It is only where judges are perceived to be fully independent of the government that their controversial, dare I say unpopular, decisions are likely to receive general acceptance. And that I believe is never likely to be the case where the public perception is that the judges are simply civil servants.

[27] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18.

Traditionally the notion of judicial independence has been directed at preventing executive interference in the judicial decision-making process. It has been thought necessary to ensure that judges properly fulfil their role as the protectors of the rights of the people against an overweening bureaucracy. But it is more than that. When courts are charged with determining issues that may go to the heart of the state's functions, it is vital that there is seen to be an appropriate distance and a clear distinction between them and the public administration. That is crucial, if government is to accept without complaint the decisions by the courts, and if losing litigants are to accept their losses. It is essential that the public perceive there to be a distinct separation between judges and the executive and public administration. Without that there can be no trust that the judges will fully and impartially administer justice in the cases that come before them.

In this area, as with the difficult issue of recusal that you will be discussing tomorrow, perception is all.[28] If judges are mere employees of the State, falling in our case within the Department of Justice and Constitutional Development, that distance cannot exist in fact and cannot be seen by the public to exist. Our Constitutional Court has said: 'What matters is that the judiciary must be seen to be free from external interference.'[29] For my part I am unable to see how that can be the case when the judges are employed in a government department.

Of course saying that the judges are not employees of the government is only part of the answer. An appointments process that enables the government of the day to place its handpicked choices on the judicial bench will undercut ostensible independence. We had the graphic example of Chief Justice Steyn, who was a civil servant before his elevation to the bench and was widely seen to

[28] *Van Rooyen & Others v The State & Others (General Council of the Bar of South Africa Intervening)* supra para 32.
[29] *Justice Alliance of South Africa v President of the Republic of South Africa & others* supra para 68.

be the government's man, particularly because he was elevated to that position above one of South Africa's most respected and independent-minded jurists, Justice Schreiner.[30] Nor should it be forgotten how swiftly the National Party transformed the bench in South Africa with the appointment of people seen to be allies of the governing party and aligned to its way of thinking, albeit that they were not seen to be well qualified for judicial appointment. The memory of the packing of the court of which I am now a member, in order to force through that government's policy of depriving Coloured voters of their votes, may be less immediate than formerly, but every South African lawyer should be constantly reminded of it.

A similar warning has been sounded in your jurisdiction. The then Chief Justice of New South Wales, Justice Spigelman pointed out that:

'Judges who are selected or promoted on the basis of how they are likely to decide, rather than on the basis of their professional expertise may not disappoint the authorities who select and promote them.'[31]

That is why so many jurisdictions, our own included, have in recent years engaged in a good deal of debate over the process by which judges are appointed. Ways are sought to find a via media between the overtly political process that characterises federal judicial appointments in the United States and the secretive 'tap on the shoulder' approach that formerly characterised appointments in many other jurisdictions. I doubt whether anyone has struck, or possibly ever will strike, a perfect balance in this regard but the fact that we are trying to do so is an important part of ensuring both judicial independence and the proper separation of powers.

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[30] Edwin Cameron 'Legal Chauvinism, Executive-mindedness and Justice L C Steyn' (1982) 99 *SALJ* 380. There is a selection of articles on Steyn CJ referred to in the contribution by Stephen D Girvin in Reinhold Zimmerman and DP Visser 'Southern Cross: civil law and common law in South Africa' 134, fn 205. Chief Justice Rabie was similarly viewed.

[31] 'Judicial Appointments and Judicial Independence' The Rule of Law Conference, Brisbane, 31 August 2007, published in 'Speeches of a Chief Justice: James Spigelman 1998 –2008' 121 at 126.

I believe that it is vitally important that any attempt to impose the status of employees on judges, or to induce judges to view themselves in that light, be vigorously refuted. So must any suggestion that judges are subordinate or beholden to the government of the day. Judges are not civil servants and an appointment as a judge should not be seen as part of a career path in the civil service. In my country the civil service owes a constitutional obligation to implement the policies of the government of the day. The judiciary's obligation is to ensure that persons injured by failures in that administration can obtain appropriate redress.

I suggest that, if judges see themselves as fundamentally civil servants, there is a real risk that they will act as civil servants and perceive their loyalties to be those that civil servants owe to the government of the day. Whilst on this topic I would like to endorse a warning that Chief Justice Warren sounded, in an address published in the Australian Law Journal last year,[32] about the insidious dangers of incorporating the courts in large government departments, that have responsibility for other functions connected with the courts, such as the prosecution services, prisons and the like. Her Honour wrote that as a result of new structures in the government of Victoria:

‘ the courts, particularly the Supreme Court, were relegated to a lower order within the Executive, dependent upon service delivery and provision of resources by the mega Department of Justice. Consequently duplication of administrative work and subtle infiltration of the exercise of judicial power have occurred in a number of ways.’

In the result she said:

‘it is politically sensible to craft the court case for resources to fit within the policy priorities of the Department of Justice … including police, emergency services and corrections’.

You may be interested to know that we have experienced the same difficulties in South Africa and are currently engaged in an experiment to overcome them,

[32] Hon Marilyn Warren AC, the Chief Justice of Victoria, entitled ‘Does judicial independence matter?’ (2011) 85 *ALJ* 481 and particularly the portion at 485 to 487 under the heading ‘Modern government practice and judicial independence.’

by the creation of a separate Office of the Chief Justice, which will oversee the courts independently of the Department of Justice and Constitutional Development. Initially this will be the Constitutional Court and the Supreme Court of Appeal, but in due course it will include the other superior courts, and perhaps a long way down the line the lower courts as well.

Both our jurisdictions – ours to a lesser extent than yours I suspect, in view of the history of apartheid, – are fortunate to have a long tradition of judicial independence, supported by a vigorous and independent legal profession. We need however to be aware that this situation is vulnerable at many levels and there will always be those who seek to curb judicial independence. In both our countries we need to be vigilant in identifying judicial candidates who are independent in disposition and approach and who will view with fortitude the pressures of public criticism, especially from those in the political arena. We should welcome candidates of proven skills[33] who are forthright in their views, and fearlessly independent in undertaking the judicial role. Australians and South Africans are fortunate that we have and have had fine lawyers with these qualities to emulate. But it is all too easy to fall away from the standards they have set. A recent article by a respected barrister in Pakistan should sound a warning to all of us of the risks of doing so. She wrote of her own country's travails:

'Lawyers, especially in the lower tiers of the profession, often found themselves at the mercy of judges inducted through the civil service rather than the legal profession or appointed for their political leanings rather than their acumen. These judges neither understood nor were sympathetic to the demands of the profession. They did not think much of arriving in court without having read the files, keeping lawyers waiting and deciding cases arbitrarily. It seemed as though, with some notable exceptions, their aim was not the administration of justice but the appeasement of those to whom they felt they owed their positions and in some cases even unjust enrichment.'[34]

[33] The bench is not the place to acquire the skills needed to perform the judicial task.
[34] Amber Darr 'The Fractured Nexus' in Dawn newspaper of 27 March 2012, available at http://www.dawn.com/2012/03/27/the-fractured-nexus.html

For me the starting point is a clear understanding that judges are not civil servants. They are not employees. They have a constitutional responsibility to exercise the judicial authority in our democracies, without fear or favour. Like T S Eliot, after a long journey I return to whence I came. A failure of judicial rectitude in completing a form to secure a cell phone contract or a visa is forgivable. For the judiciary to accept that they are part of the public service or employees of the government in any shape or form is constitutionally, as well as institutionally, subversive.

Thank you very much.