COURTS, DEMOCRACY AND THE LAW

THE LAW SOCIETY OF THE AUSTRALIAN CAPITAL TERRITORY

BLACKBURN LECTURE

7 AUGUST 1990

The Honourable Sir Gerard Brennan, A.C., K.B.E.,
Justice of the High Court of Australia
This evening we gather again to do honour to the memory of Sir Richard Blackburn. Those who knew Dick Blackburn bear his memory in affection and respect, for his friendship sat lightly and his sense of duty was profound. He was an outstanding judge: a man of undoubted integrity, patient and courteous, industrious, with a capacity for dispassionate analysis of fact and a deep love for and understanding of the law, a helpful colleague who held a high yet humble conceit of the importance of the judicial office. He was one of my first judicial colleagues, and one of the best. I owe him a great personal and professional debt which I acknowledge with gratitude and some pride.

The subject of Courts, Democracy and the Law is not a dry topic of interest merely to constitutional lawyers. It is a subject of critical importance to the political life of this country. It concerns the protection available to women and men who believe themselves to be oppressed by government. It concerns the balance between the governors and the governed, between the powers of the majority and the rights of minorities. It concerns the pivotal role of the Courts in the maintenance of a free but ordered society.

We are the inheritors of a Constitution (partly written) which we accept, without too much reflection, as appropriate
to secure and preserve our freedom. Our faith is born of a long history, marked by a series of compacts designed to limit the powers of government by creating legal checks and balances by one branch of government upon the functions of the others. Three hundred years ago, the Bill of Rights of 1689 declared that the Crown could not lawfully suspend the laws without Parliament’s consent and could not lawfully levy taxes except by grant of Parliament. Parliament, to the exclusion of the Executive Government, was to have the power to make or unmake the law and to keep control of the purse of Government. By law, Parliament acquired ascendancy over the Executive. Shortly afterwards, by the Act of Settlement, the judiciary’s immunity from interference either by the Crown or by Parliament was secured. Judicial independence was achieved by two measures: first, by conferring on the judges tenure of their office during good behaviour, so that they were irremovable by the King save upon an address of both Houses of Parliament. Secondly, by fixing judicial salaries. By ensuring the independence of the Courts, the Act of Settlement ensured that the administration of the law could not thereafter be affected by the influence of either of the political branches of government. The supremacy of the law was established as the basis of government and the arbitrary power of the Executive
Government, which had proved destructive of freedom under the Stuart kings, was dismantled.

In the early 18th century, the personnel of the three branches of government were separated, each branch performing its proper function: law making and the grant of supply were for the Parliament, maintenance of the law and the exercise of the prerogative were for the Crown, administration of the law was for the Courts. The Executive Government was subject to political supervision by Parliament and legal supervision by the Courts. The doctrine of the separation of powers, championed by Montesquieu in 1748 in his *De l'Esprit des Lois*, had great influence on the framers of the American Constitution. In 1788, Hamilton, writing in *The Federalist Papers*, described the judiciary as "the least dangerous" of the three branches of government to the political rights of the people:

"The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the

society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment ..."

Government in the United States maintains a more rigorous separation of powers than government under the Westminster system. In 19th-century England and, after early colonial days, in Australia, the members of the Executive Government were generally members of the elected Parliament who retained executive office only so long as they commanded the confidence of Parliament or of the elected House of the Parliament. This was the system of responsible government. Representative government was said to come with the popular franchise, though it should not be forgotten that women did not have the vote at the time of Federation and more than 60 years passed before Australia's Aboriginal people were enfranchised.

The system of representative and responsible government as we know it was substantially the system whose virtues were extolled by the influential constitutionalist,

A.V. Dicey.⁴ Political sovereignty, he declared, resided in the people, or at least in the electors of the House of Commons. Legal sovereignty, which Dicey defined as the power to make laws unrestricted by legal limit, resided in Parliament. But he asserted that there could be no conflict between political and legal sovereignty, because generally "the permanent wishes of the representative portion of Parliament can hardly in the long run differ from the wishes of the English people, or at any rate of the electors. That which the majority of the House of Commons command, the majority of the English people usually desire."⁵ As Parliament was both representative and supreme, Dicey expected it to reflect the spirit of freedom espoused by the people and to translate that spirit into every aspect of government. The tolerant bridle of democratic sentiment would guide the horse of State, for Parliament was the rider and Parliament was the alter ego of the people. Parliament posed no threat to freedom and the Executive was subject to Parliament's control. One learned commentator has observed that:

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"This beatific vision of legal and political harmony was to prove short-lived, and may never in reality have existed at all."

Dicey's portrait of an ideal constitutional arrangement was completed by the Courts which, independent of the other branches of government and possessing no legislative or executive power save what was incidental to the performance of their own functions, would faithfully administer the law in individual cases.

This was the ideal to which the Australian Constitution gave expression. The representative character of the Commonwealth Parliament was provided for by ss.7 and 24. Although responsible government was not expressly prescribed by the Constitution, there is no doubt but that responsible government was the form of government intended by the framers of the Constitution. Thus s.64 precludes a Minister from holding office for more than 3 months unless she or he is or becomes a Senator or a Member of the House of Representatives. In the Boilermakers' Case, it was said that "[p]robably the most striking achievement of the framers of the Australian instrument of government was the

successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism." The Constitution secured the independence of the judiciary by the same measures as those which had first been adopted by the Act of Settlement two hundred years earlier: security of tenure, so that judges are removable only on an address from both Houses of Parliament for proved misbehaviour, and remuneration which cannot be diminished during continuance in office.8 Chapters I, II and III separated the three divisions of power, the repositories being respectively the Parliament, the Governor-General (that is, the Executive Government) and the Courts.

The political and economic events of the 90 years since Federation have exposed the fallacies of Dicey's theory or made much of it obsolete. If it ever were a valid theory that the mind of the people would inform and determine the mind of the legislature and that the mind of the legislature would control the acts of the executive, the theory is valid no longer. In the last 90 years, the balance of power has reverted decisively to the Executive Government. The reasons are various. Government has become more complex,

8. s.72.
the economy has become increasingly the focus of government attention and political decision making has had to rely increasingly upon the advice and support of the public service. The exigencies of national defence in two world wars led the community to accept the need to confer a mass of power on the Executive Government and its bureaucracy. Although powers which had been ceded by Parliaments to Executive Governments during times of war were resumed to some extent by Parliaments in times of peace, societies living under the Westminster system had grown accustomed to a powerful Executive.

Concurrently with the growth of executive power, the tightening discipline of political parties and the predilection of the media for individuals on whom to concentrate attention tied the political fortunes of the members of the Parliament to the political status and reputation of party leaders. Members in the governing party became increasingly dependent on the Ministry for their chances of re-election; backbench members of the opposition became increasingly dependent on shadow cabinets for their chances of governing. The theory of responsible government, which made the fate of an Executive Government dependent upon the confidence of the Parliament was, so to speak, turned on its head by the political dependence of the
majority members of the Parliament on the Executive Government. Policy formulation became primarily an Executive function. As the pressure on legislative time intensified, a virtual monopoly over initiatives for legislation passed to the Executive Government. The influence of Ministers in debate, whether in the party room or in Parliament, was enhanced by the support they could command from the public service. These developments virtually destroyed the Diceyan theory. Writing in the *Law Quarterly Review* in January of this year, P.P. Craig said:

"Parliament's legitimacy [has] continued to be derived from the electorates. In this formal sense, authority could still be perceived as flowing from the bottom upwards. In substance, our constitutional system became one dominated by the top, by the executive and the party hierarchy."

The risk to democratic freedom is obvious. It was stated by Locke, who said it may be "too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make".  

Hailsham, for long Lord Chancellor of England, has said\textsuperscript{11} that the powers of government within Parliament are "now largely in the hands of the government machine, so that the government controls Parliament and not Parliament the government". Seeing that Parliament's unlimited legislative power places a vast pool of power in the hands of the Executive, he concluded: "We live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice."

His Lordship's view is broadly stated, but it contains no novelty. Nearly 50 years ago, Joseph A. Schumpeter defined, or re-defined, the democratic method in these terms: "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote".\textsuperscript{12} The proposition that "the electorate controls as well as installs" is misleading

"... since electorates normally do not control their political leaders in any way except by refusing to reelect them or the parliamentary majorities that support them ..."\textsuperscript{13}

\textsuperscript{11} In the 1976 Dimbleby Lecture.
\textsuperscript{12} Capitalism, Socialism and Democracy, 3rd ed. (New York, 1950), 269.
\textsuperscript{13} At p.272.
This is a more realistic view of democracy in our time, but it calls for a reappraisal of our constitutional safeguards of freedom. As the wind of political expediency now chills Parliament's willingness to impose checks on the Executive and the Executive now has a large measure of control over legislation, the Courts alone retain their original function of standing between government and the governed. Lord Radcliffe expressed his view of the contemporary relationship between the three branches of government in these terms:  

"In the seventeenth century this country turned its back on the idea of a strong central executive, and we have taught ourselves to be proud of the achievement ever since. There was a settlement under which the Commons in parliament and the judges in the courts, working independently, were to be guardians of the rights and liberties of the individual citizen, as then understood, and each was to have power to block any attempt by the executive to trench upon those rights and liberties. Whatever the law courts did or did not do in the next 200 years, they did carry out this part of the bargain, and men valued them accordingly. We have come back, unavoidably, to a strong central executive, and we live by order, decree and regulation and by act of parliament. Parliament and the executive have gone into alliance, and the law courts are pushed more and more into a corner of national life."

I presume his Lordship meant that the courts were being pushed into a corner of national life by attempts to exclude the courts from some areas of jurisdiction. That is borne out by the record. He could hardly have meant that the courts were becoming irrelevant to society. The courts continue to apply a check on the exercise of power. And, as power is a threat to freedom, a check on power is an important - and sometimes the only - safeguard of freedom.

In so saying, I would not wish to diminish - much less to overlook - such political checks as Parliament imposes on the Executive, nor to pass over the real influence which Parliament brings to bear on the Executive. There are some regrettable and notorious exceptions, but the passage of a Bill in Parliament has not generally become a mere ritual, especially when the Government of the day does not command the support of a majority of the Senate or Upper House. Apart from legislative debates, Parliament's continuing contribution to democracy is its holding of the Executive to public accountability. Moreover, it scrutinizes proposed appropriations and delegations of power and reviews subordinate legislation. The popular spirit of freedom and democracy has been sufficiently lively to encourage Parliament or the party room to seek to restrain, so far as lies within their respective political power, any tendency
on the part of an Executive Government to overreach the rights and the legitimate aspirations of most of our people. But the capacity of Parliament to place a check on executive action is limited by the press of business and the day to day exigencies of politics. Inevitably, there are cases where the rights and aspirations of individuals and minorities are disregarded. In that event, the Courts and some independent quasi-judicial bodies, notably the Administrative Appeals Tribunal, are the only sources of relief. They apply the law and the law determines the ultimate measure of our rights, our privileges and our freedom. It is the universality and equality of legal remedies that distinguish them from the political process.

The check imposed by the Courts on the actions of the political branches of governments have been seen by some as anti-democratic, for the judges are not elected by the people. That view misconceives what is involved in the exercise of judicial power. The Courts do not seek to interfere with lawful policy: that is the proper domain of the political branches. But the Courts are concerned to subject the political branches of government to the rule of law, for that is the constitutional imperative which binds all branches of government. It can hardly be anti-democratic to restrain Parliament to its constitutional
power, nor to constrain the Executive to conform to the Constitution and the laws enacted by Parliament.

The real question to ask is: are the Courts today fitted to provide an effective check against any oppressive exercise of power by the other branches of government? I leave aside problems of access to the Courts by those who seek its remedies and the necessity for funds to maintain the proper functioning of the Courts - not because these problems are marginal, but because I wish to address the structural arrangements which affect the Courts' capacity to discharge their responsibilities.

The fundamental factor is, of course, the state of the law. The supremacy of the law underpins our constitutional arrangements, and the Courts are bound by the limitations which the law itself imposes on the protection which the Courts may afford. The Australian Constitution confers no jurisdiction to declare an Act of Parliament invalid, except under some few provisions, notably those designed to divide legislative powers between the Commonwealth and the States, to secure freedom of trade, commerce and intercourse among the States and to secure freedom of religion and equality of treatment of out-of-State residents. Nor do the Constitutions of the several States confer jurisdiction to
review Acts of Parliament. Therefore the Courts apply the laws enacted by Parliaments within their respective constitutional authority. If Parliament enacts oppressive legislation, the Courts are bound to apply it. If the Executive secures statutory authority for its actions, the Courts must acknowledge the legal validity of those actions, even if they be oppressive or the statutory authority for them be obtained retrospectively. The Courts are helpless to remedy injustice in the face of unjust legislation enacted within power.15

Nevertheless, the rule of law ensures that the text of a statute is interpreted, so far as possible, with respect for the values of the common law.16 Parliament's sovereignty is expressed solely in the words of the statute,17 and it is for the Courts to interpret and apply the law thus expressed. In Marbury v. Madison18 Marshall C.J. declared:

"It is, emphatically, the province and duty of the judicial department to say what the law is."

18. (1803) 1 Cranch 137, 177; 5 U.S.87, 111.
And, as Lord Wilberforce has said, the judicial function of statutory interpretation is "an essential part of the constitutional process by which subjects are brought under the rule of law".

The values of the common law inform the rules of statutory interpretation. There is an inclination, where the language permits – a presumption, if you like – against construing an Act to have a retrospective operation, especially if the Act creates a criminal offence; against the creation of a criminal offence or the conferring of a right to seize or search by language which is ambiguous; against the expropriation of property; indeed, against the disturbance of common law rights and privileges.

Interpreting statutes in this way, the courts are "a mediating influence between the executive and the legislature on the one hand and the citizen on the other." Sometimes the rules of statutory interpretation may throw up a construction of an Act opposed to the intention of its promoters, but it is no function of the courts to

give effect to intentions that have not been translated into the language of the Act. This was reaffirmed by the High Court in *Clunies-Ross v. The Commonwealth*: 22

"It would be an abdication of the duty of this Court under the Constitution if we were to determine [this] important and general question of law ... according to whether we personally agreed or disagreed with the political and social objectives which the Minister sought to achieve. ... As a matter of constitutional duty, [the] question must be considered objectively and answered in this Court as a question of law and not as a matter to be determined by reference to the political or social merits of the particular case."

The absence of any power in the courts to invalidate Acts of Parliament that are oppressive of human rights is seen by some to be the Achilles heel of a society which aspires to constitutionally protected freedom. Two solutions have been proposed to arm the courts with legitimate weapons for the task. The first is the entrenching of a Bill or Charter of Rights in our Constitution; the second is the exhumation of a proposition advanced by Chief Justice Coke in *Dr Bonham's Case* nearly 400 years ago, namely, that "the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right

and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void". 23

This is not the occasion to rehearse the many arguments for and against a Constitutional Bill of Rights, but I would refer to one important consideration. Judicial interpretation of a Bill of Rights expressed, as it necessarily would be, in terms of broad generality, would require the translation of political and social values into the Constitution. The judiciary would be equipped with a political power - albeit a power to be exercised in a structured and reasoned way - to override the power of the political branches of government. The judiciary would be politicized. Whether our society is better served by an apolitical judiciary possessing limited though often effective powers to protect individuals and minorities from overreaching by a majoritarian government, or by a politicized judiciary possessing more direct and extensive powers to confer that protection is a question which I leave to others to answer.

23. (1612) 8 Co.Rep.113b, 118a; 77 E.R.646, 652.
The second suggestion for investing the Courts with a jurisdiction to review Acts of Parliament has led to a re-examination of the proposition that the common law will control Acts of Parliament. In New Zealand, the more modest form of the proposition would deny that Parliament has power substantially to alter the tri-partite distribution of functions. After all, the doctrine of the sovereignty of Parliament must itself be found in the common law which first distributed among the three branches of government their respective functions. Sir Robin Cooke would go further. In *Taylor v. New Zealand Poultry Board* he said:\(^{24}\)

"I do not think that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them."

The Supreme Court of Israel embraced a jurisprudence of judicially protected individual rights though Israel has no Bill of Rights.\(^{25}\) These views have found no Australian resonance, but there are many instances of judicial rejection of attempts to overreach individual rights by

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exercise of dictatorial power. A prime example is the courts' resistance to attempts on the part of the political branches of government to acquire uncontrolled power by legislative exclusion of the courts' ordinary jurisdiction. Sir William Wade has commented:26

"... to exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power. It is no exaggeration, therefore, to describe this as an abuse of the power of Parliament, speaking constitutionally. This is the justification, as I see it, for the strong, it might even be said rebellious, stand which the courts have made against allowing Acts of Parliament to create pockets of uncontrollable power in violation of the rule of law. Parliament is unduly addicted to this practice, giving too much weight to temporary convenience and too little to constitutional principle. The law's delay, together with its uncertainty and expense, tempts governments to take short cuts by elimination of the courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease."

So much for judicial checks on Acts of Parliament. By contrast, no doctrine of sovereignty precludes judicial review of executive action. To the contrary, the doctrine of legislative supremacy requires the courts to determine whether any exercise of executive power - including the

power to enact rules and regulations - falls within Parliament's grant. In performing this duty, the Courts apply the notions of the common law in protection of individual rights and legitimate expectations.\textsuperscript{27} The Courts insist that executive and administrative power be exercised in good faith according to law and for the purpose for which it was conferred, having regard to all relevant considerations and to none which are irrelevant, that natural justice be done in exercise of power, and that an exercise of power must not be so unreasonable that no reasonable repository of the power could have so exercised it. These are important constraints on the arbitrary exercise of power and, on occasions, they no doubt frustrate what is seen as its efficient exercise. That is the price which must be paid by a society which lives under the rule of law.

It would be tedious to describe the myriad ways in which the law protects freedom and the ways in which Courts, as the administrators of the law, extend its protection over the community. It suffices to say that there are two basic

functions which the Courts must perform: settlement of disputes between individuals or between individuals and the Government, and declaration of the law as it applies to the settlement of disputes. By the Courts' performance of these functions, the rule of law is made to govern, alienation of individuals or powerless groups from mainstream society is avoided, self-help and revolt are made unnecessary, the infrastructure of trade and commerce is secured, an ordered society founded on law applying equally to all is established and governments are constrained by law in the exercise of political power. The list could go on, but it can be summed up by saying what is obvious: that the functioning of the Courts is essential to the peace, order and good government of society. To the extent that the Courts cannot, or do not efficiently, perform their basic functions, to that extent injustice is done and the cohesion of society is at risk. The risk to society may not be apparent immediately, but injustice compounds on itself and saps confidence in the rule of law on which the stability of society depends.

In the long history of the common law, some values have been recognized as the enduring values of a free and democratic society and they are the values which inform the development of the common law and help to mould the meaning
of statutes. These values include the dignity and integrity of every person, substantive equality before the law, the absence of unjustified discrimination, the peaceful possession of one's property, the benefit of natural justice, and immunity from retrospective and unreasonable operation of laws. To ensure that effect is given to these values when they stand in the way of an exercise of power, especially the power of governments, a judiciary of unquestioned independence is essential. The judge stands in the lonely no-man's-land between the government and the governed, between the wealthy and the poor, the strong and the weak. She or he can identify with neither, for partisanship robs the judge of the authority essential to discharge the judicial office.

The spirit of independence is deeply ingrained in the judiciary but it would be folly to believe that it is not susceptible to attrition at the hands of government. Governments, preoccupied with the pressing problems of the day and having little knowledge of and less sympathy with the judicial method, often fail to see that the courts are, and must be seen to be, separate from the other branches of government. Their independence must be respected - not for the sake of some foolish notion of status but in order that they may perform their necessarily lonely function. A free
and democratic society could not be long maintained if governments were to seek to impose on the Courts controls of the kind properly imposed upon the Departments of State. It would be a cautionary reflection for any government that was minded to do so that, should they come into opposition, the precedent that they had set might rob them of the law's protection.

The judges who constitute the Courts must have the knowledge to apply the principles of the law in a great variety of cases. They need experience and a wisdom that does not come in books to make judgments in harmony with the values of the common law as those values are applied in the daily workings of the courts. These are demanding qualifications, but nothing less will do. The judiciary must be appointed as an elite, not to create delusions of social hauteur, but in order that each judge, in the necessary isolation of her or his office, may be supported and, if need be, constrained by collegiate standards of competence and integrity. Yet Governments seem not to be alive to the fragility of the attraction of judicial office, which is damaged by any appointment that does not command the respect - I do not say the assent - of judicial colleagues. Let one improvident appointment be made and a well qualified appointee will be harder to attract to the
next vacancy; let two or three such appointments be made and
the bench will not recover its attraction or its status for
a generation. Nor do Governments always understand judicial
insistence on, indeed judicial pre-occupation with, the
preservation of the twin pillars of independence: tenure and
conditions of service that the Executive cannot touch. A
government, used to the competitive atmosphere of the
market, may see these issues merely as the concerns of a
pressure group. That is profoundly wrong. The concerns are
both constitutionally fundamental and practical. The
reality is that, if tenure be not protected against
unjustified complaints of unfitness, the fearless and
impartial discharge of judicial office will be impaired by
fear of personal consequences. The tenure of federal judges
is secured by the Constitution; the tenure of State judges
is not. I do not venture to predict how the tenure of
judges of proposed Courts of the Australian Capital
Territory may be secured. Tenure is one thing; conditions
of service is the other. It should be clearly understood
that the structural problem of judicial conditions of
service is not the level of remuneration. I do not —
indeed, I would not — express the least opinion on the level
of remuneration. The problem relates to the isolation of
judges from influence by government, whether the influence
be by generosity or parsimony. The problem, which could
have arisen at any time under an unwritten constitution, now exists under the Constitution of the Commonwealth because inflation and the nominalistic theory of money have placed judicial remuneration back in the hands of the Executive. The problem is not merely that Executive control is contrary to constitutional history and intent. The power to fix from time to time the conditions of judicial service is an inappropriate power to entrust to an Executive Government with the capacity to translate its decision into law. It gives rise to a misgiving of some relationship between the Executive Government’s periodic decisions on conditions of service and judicial conformity to governmental aspirations of judicial conduct or even judicial decision-making. What is essential, in both Commonwealth and State, is machinery for fixing judicial conditions of service that is as independent of political influence as the Courts themselves.

While the capacity of the Courts to perform their function of applying the law in preservation of a free and democratic society depends in large measure upon the quality of judicial appointments, security of tenure and the removal of conditions of service from executive control, it is clear that the Courts’ traditional functions must be expanded if they are to discharge efficiently their duty of settling disputes. In a society ruled by law - indeed, in a society
whose values and moral standards are increasingly derived from the law - the Courts must be fitted to provide efficient and available mechanisms to settle legal disputes. Yet that is not the case. Even when a litigant has the capacity to prize open the doors of the court, the dispute may be solved preferentially by private mediation or arbitration at the litigant's expense. The Courts, the State instruments of dispute resolution, are not yet equipped to provide the same services - cheap, speedy, flexible and, if desired, informal - which many potential litigants now find it advantageous to provide for themselves. It is to be hoped that public mechanisms for efficient dispute resolution at reasonable cost will be developed to supplement the traditional formal procedures. Dispute resolution is not a discretionary service offered by the government; it is an essential part of government. Without it, the rule of law becomes a platitude to which lip service may be given in the period before it is rejected outright.

If we ask again the question "are the courts fitted to provide an effective check against any oppressive exercise of power by the other branches of government?" the answer is not an unqualified yes or no. To some extent the capacity of the courts to perform their function depends on the
standards adopted by governments in the appointment of judges, but there are also structural weaknesses affecting the maintenance of judicial independence and the facilities available for dispute resolution. If judicial review of Acts of Parliament is thought desirable, some change in our constitutional law is required. The judicial branch of government is still the least dangerous branch to the political rights of the community and the most constant protector of those rights, but its strengthening is critical to the democratic freedom that we boast and to the peace, order and good government that is the birthright of future generations.