POWERS OF THE STATE AND THE RULE OF LAW

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These lectures are named in remembrance of Frank Loseby, a solicitor who acted for Ho Chi Minh in Hong Kong in the early 1930s. On 29 October 1929 the Imperial Court in Vinh had sentenced Nguyen Ai Quoc (better known as Ho Chi Minh) to death[1]. On 6 June 1931 he had been arrested in Hong Kong whilst travelling on a Chinese passport under the name of Sung Man Cho but his arrest on that day had been made without the authority of a warrant[2] and whilst in detention he was formally re-arrested under a warrant on 12 June 1931. On 6 August 1931, whilst still in custody, an order was made for his deportation from Hong Kong on a ship destined for what was then French Indochina. On 15 August 1931 a second deportation order was made in case the first order was found by the courts not to be effective[3].

The initial arrest of Ho Chi Minh had taken place after the police had entered the house in which he was arrested in search of seditious matter. No seditious matter was found and the arrest was probably unlawful. His re-arrest whilst in custody had been made in an attempt to cure any defect in the initial arrest but

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[1] Lady Borton, *Viet Nam News*, 7 June 2011

[2] *In the matter of the Deportation Ordinance 1917, and the matter of Sung Man Cho v The Superintendent of Prisons* [1931] Hong Kong Law Reports 62, 63

[3] Ibid, 63

may also have been unlawful. The government was, however, determined to deport Ho and to do so by putting him on a ship sailing to a place where he was likely to be executed. Mr Frank Loseby took up the case for Ho and retained Mr Jenkins KC to appear on Ho's behalf in the courts of Hong Kong to challenge the arrest and deportation.

Deportation and extradition are not the same thing. Deportation is a process of ordering someone to leave a country but that does not require the person to be sent to a particular country; extradition, in contrast, is a process of sending a person accused, or sometimes convicted, of a crime to the specific country claiming to have jurisdiction to prosecute or to punish the person and which had requested the person's extradition for that purpose[4]. The process of extradition has many important safeguards that the process of deportation does not, and deportation does not require the person to be sent to a country in which charges are to be laid or convictions are to be punished. One of the arguments which was made on Ho's behalf in the Hong Kong Court was that the purpose of the Hong Kong Government had been to misuse the process of deportation to secure his surrender to the French authorities for the punishment of offences that provided for the death penalty.

The original arrest, and the subsequent re-arrest whilst in custody, were found by the Hong Kong court to be unlawful, but the court decided that the deportation was nonetheless valid under an express provision of the relevant ordinance. Loseby then arranged for an appeal to the Privy Council, which had the effect of delaying the deportation and, during the delay, the lawyers were able to agree on an outcome which enabled Ho to choose the place of his deportation.

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[4] P. Cane and J. Lonaghan (Eds), *The New Oxford Companion to Law* (O.U.P., 2008), 307, 439

The case is a relevant example of the powers of the State and the Rule of Law. The State had the physical power to deport Ho but relied on the law to justify its actions. It was important for the State to comply with the law which governed what it wanted to achieve. Ho's arrest had not been in the process of extradition and none of the safeguards in that process had been available to him by the arrest for the purpose of deportation. In the end Ho's advisors were able to agree with the advisors for the State that he should be allowed to choose his place of deportation and by that pragmatic settlement he avoided being taken to a place where he could otherwise have expected certain death. The settlement of the dispute in that way was made possible by the delay which was created by the appeal to the Privy Council from the Hong Kong Court and, in that way, it was the State's compliance with the rules of procedure, and its respect for the judiciary, that made a compromise possible.

The place of the Rule of Law in government has a long tradition in western political theory but it is not thought to be the best form of government by all political theorists. Plato, in his book *The Republic*, for example, considered that the ideal government was a state governed by wise and superior "philosopher kings" who know what is good for the people and, because they know what is good, cannot themselves be subject to any control over their commands or decisions[5]. Aristotle, on the other hand, maintained that government by law was superior to government by men because the Rule of Law is rule by reason or by some higher principle than the passion or personal inclination of whoever may happen to have the power to compel others to behave in a particular way. The important point about government by law, in other words, is the removal of arbitrary passion from individual people who have the power to govern others.

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[5] Alessandro Passerin d'Entreves, *The Notion of the State* (Oxford University Press, 1967), 70

A State governed by the Rule of Law is, therefore, one in which both those in power who govern and also those who are governed are accountable under the law. The principle of accountability means also that the law applies equally to all. The laws must be clear, publicised, stable and just. There must also be access to impartial dispute resolution when disputes arise. That means that government powers are limited by the legislature and that they may be reviewed by an effective judiciary. It means also that individuals within the State are all bound to comply with the law. Government officials may not exercise their power for personal or private gain, and individuals or corporations, however wealthy or powerful, may not disregard the law but must act in accordance with it.

The Rule of Law does not exist perfectly in any country. That may in part be because there is always some tension within a State between those who govern and those who are governed and there is often some pressure for the Rule of Law to be lessened in favour of speed, expedition, necessity or fear. The Rule of Law may sometimes seem to governments and legislators to be a troublesome inconvenience which stands in the way of what seem like better ideas or more urgent needs, and those who have the job of applying the Rule of Law are often the target of abuse or violence by those who cannot have their way. We see challenges to the Rule of Law in every country for many different justifications such as expedience, efficiency, necessity and external threats. No state is immune to challenges to the Rule of Law and eternal vigilance is necessary to preserve it.

The World Justice Project publishes an annual index measuring the Rule of Law in different countries based upon a series of criteria. The index seeks to capture adherence to the Rule of Law as defined by the universal principles adopted by the World Justice Project. The outcomes are measured by reference to two main principles which seek to measure adherence to the Rule of Law. The first

principle measures whether the law in the country imposes limits on the exercise of power by the State and by its agents as well as upon individuals and private entities. The second principle measures whether the State limits the actions of members of society and fulfills its basic duties towards its population so that the public interest is served, the people are protected from violence, and all members of its society have access to dispute settlement and grievance mechanisms.[6]

A state governed by the Rule of Law requires an independent judiciary to decide when laws are valid or when the acts of government are illegal. That will sometimes put the judiciary in conflict with the government or with the legislature. An example of such a conflict can be seen in the United States decision of *Marbury v Madison*[7] in which the Supreme Court decided that it had the power to declare a law of Congress to be unconstitutional. Congress had passed laws after Thomas Jefferson had been elected President but before he took office and the interval between that period gave enough time to the outgoing president to appoint judges who were likely to carry on the principles of the outgoing administration rather than those of the newly elected President. A banker and large landowner named William Marbury was amongst those selected by the outgoing president as a Justice of Peace for the district of Colombia under the new laws. The Senate confirmed the appointment of William Marbury but the incoming President, upon taking Office, ordered his Secretary of State, James Madison, not to deliver the commissions to enable the new appointee to take office. Marbury then commenced proceedings to compel the Secretary of State to deliver the commission to enable him to take office.

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[6] World Justice Project, *Rule of Law Index 2019*, 8

[7] 5 U.S. *1 Cranch* 137 (1803)

One of the issues before the Court in that case was whether the Court had the legal power to compel the Secretary of State, a government official, to act in a particular way. There was a specific law of Congress that permitted the Court to do that but the Supreme Court decided that the law was unconstitutional because it attempted to increase the Court's original jurisdiction beyond that permitted by Article 3 of the *Constitution*[8]. The case was the first in the United States to establish the Supreme Court's power to determine the constitutional validity of the act of Congress[9]. The Chief Justice said in giving his opinion:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of the judicial duty.[10]

That decision is consistent with principles which had been enunciated before and after *Marbury v Madison*. It is consistent also with the principle that the King is not above the law. Bracton, writing in the 13th century, had maintained that rulers were subject to law:

> The king shall not be subject to men but to God and the Rule of Law: since law makes the king[11]

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[8] Ibid, 173-80; see also Charles F Hobson "Defining the Office": John Marshall as Chief Justice*"* (2006) 154 *University of Pennsylvania Law Review* 1421, 1429

[9] Bernard Schwartz, *The History of the Supreme Court* (Oxford University Press, 1995), 41

[10] Ibid, 177-178

[11] E.C.S Wade and G. Godfrey Phillips, *Constitutional Administrative Law* (9th edition, Longman), 85-6

In *Entick v Carrington*[12] two messengers of the king were found to have acted illegally by breaking into and entering a house and seizing papers. Their conduct had been authorised by a warrant issued by the Secretary of State but the Court declared that their actions were illegal because the warrant had lacked legislative authority: it was not enough to have the authority of office.

Limitations upon government by judges applying the Rule of Law is not always liked by the government which is prevented from doing what it would like, but government by the Rule of Law enforced by an independent judiciary promotes the welfare, peace, order and prosperity of the State. Government by force is not effective as a long-term mechanism for any group of people to be governed and does not encourage voluntary or willing compliance with common rules. Government in which there is corruption also undermines compliance with the rules. Individuals cannot be expected voluntarily or willingly to comply with laws if they know that the laws can be ignored by bribing an official or if the law matters less than the enforcement of personal will by force or brute power.

An important aspect of the welfare, peace, order and prosperity in a State is the extent to which its individuals are confident that the law applies equally to all and that it will be applied equally and fairly to all. Individuals engaging in personal acts of retribution undermine order in a State and is best discouraged by providing an accessible system of justice for individuals to seek the enforcement of objective rules which are applicable to all. Predictability is an important feature for any legal system. People need predictability about the content and the application of the law if they are to deal confidently with each other in any aspect of their domestic and business activities, from the most simple to the most complex. The safety of people in their homes depends upon confidence that the law will protect their most basic needs and rights. Domestic

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[12] (1765) 19 *State Trials* 1030

relations within families depend upon basic rules to protect children from parental abuse and spouses from domestic violence. Both simple and complex dealings alike in trade and commerce within a State depend upon known rules which are also known to be applied consistently to all without preferential treatment for some: contracts cannot be made if contracts cannot be relied upon or enforced; roads cannot be used safely if crimes are not punished, and rules of traffic are not enforced.

This is true also of international dealings by any state and by the members of any State. States can rarely survive without some degree of international interaction. The prosperity of States often depends upon attracting international trade and investment which, for its part, will need the certainty that the rights and interests of those who trade and invest will be protected and that agreements will be predictably enforced. Any country wishing to attract international investment, or to encourage its citizens to participate in international transactions, must have a stable and predictable set of rules. The exercise of arbitrary and unpredictable power increases the risk of dealings within the State and thereby undermines its ability to attract business and investment.

An independent judiciary is essential to the Rule of Law. That requires that those who apply the law are different from those who make the law and from those who administer the law in government. It requires also that judges make decisions independently from external interference or pressure and by reference to known rules and objective standards. The English constitutional lawyer A. V. Dicey expressed the general doctrine of the Rule of Law as having three meanings:

> It means, in the first place, the absolute supremacy or preponderance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of

> prerogative, or even of wide discretionary authority on the part of the government…; a man may with us be punished for a breach of law, but he can be punished for nothing else[13].

This requires, as Dicey went on to explain, "equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts"[14].

It is for the courts both to apply the law and also, when necessary, to declare what the law is or means. The ability of the judiciary to declare the law raises an important question about the method by which judges may exercise that power. The Rule of Law would mean little if the power of arbitrary decision making were simply shifted to the judiciary. Bishop Hadley had drawn attention to the significance of the power to interpret the law in a sermon to King George I in 1717 when the Bishop said:

> Whoever hath an absolute power to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes and not the person who first wrote or spoke them.

It is therefore important to understand the role of reason and reasoning in the process of the application of the Rule of Law through an independent judiciary as the means by which judges are also confined in what they can do. The role of the judge in the application of law must necessarily be to apply objective and impersonal rules by reference to objective criteria and upon probative and contestable evidence. Sir Owen Dixon, an Australian Chief Justice, explained this judicial process to an American audience in a lecture in 1955 as follows:

> The Court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness. With us in Australia appeals are argued at length in

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[13] A.V. Dicey *Introduction to the Study of the Law of Constitution*, 202

[14] Ibid, 202-3

> open court and written briefs are not filed. The argument is dialectical and the judges engage in the discussion. At every point in the argument the existence is assumed of a body of ascertained principles or doctrines which both counsel and judges know or ought to know and there is a constant appeal to this body of knowledge. In the course of argument there is usually a resort to case law, for one purpose or another. It may be for an illustration. It may be because there is a decided case to which the Court will ascribe an imperative authority, if the Court has established by its practice a distinction between persuasive and imperative authority. But for the most part it is for the purpose of persuasion; persuasion as to the true principle or doctrine or the true application of principle or doctrine to the whole or part of the legal complex which is under discussion[15]

The judicial process described by Sir Owen Dixon is fundamental for any State that wants to have its laws respected and obeyed. The judicial process described is of unbiased reasoning and decision by reference to principles that are not personal or private to the judge and upon evidence which is objectively verifiable and without interference from others. Basing decisions upon objective principles and evidence external to the judge provides protection against arbitrary and capricious justice. It provides also some protection from naturally occurring faulty decision making which in many instances we cannot escape. It is essential in that process for the judge to explain the reasons for decision and to do so by reference to objective rules and principles that are known and accessible to all.

There are many examples within a constitutional framework when the judiciary has been called upon to declare that laws made by parliament were unconstitutional and, therefore, invalid. This power is assumed from the existence of a Constitution and from the investing of jurisdiction and judicial

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[15] Sir Owen Dixon, *Jesting Pilate* (Law Book Company, 1965) 155-6

power in the courts[16]. The existence of that power enabled the High Court of Australia to declare as unconstitutional legislation made by the parliament in 1950 to prohibit membership of the Australian Communist Party. The law had permitted the government to declare a body of persons to be an unlawful association if its continued existence was thought by the government to prejudice the security and defence of the Commonwealth or the execution or maintenance of the Constitution or of the laws of the Commonwealth. The court held the law to be invalid and that the court had the power to do that because it had the power under the Constitution to decide any matter arising under it or involving its interpretation. Dixon J explained that the laws which the parliament could make depended upon traditional conceptions of government including the separation of judicial power and the Rule of Law. He explained the limitation of the power of parliament to make laws as follows:

> The power is ancillary or incidental to sustaining and carrying on government. Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the Rule of Law forms an assumption. In such a system I think that it would be impossible to say of a law of the character described, which depends for its supposed connection with the power upon the conclusion of the legislature concerning the doings and the designs of the bodies or persons to be affected and affords no objective test of the applicability of the power, that it is a law upon a matter incidental to the execution and the maintenance of the Constitution and the laws of the Commonwealth.[17]

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[16] B Galligan "*Judicial Review in the Australian Federal System: its original and function*" (1979) 10 FLRev 367

[17] *Australian Communist Party v The Commonwealth* (*Communist Party Case*) (1951) 83 CLR 1, 193; see also per Fullagar J at 262-3 and Kitto J at 272-3

Constitutional judicial review of this kind will not only arise where there are controversial political issues at stake. Sometimes it will arise in less controversial areas where the question will simply be whether the legislature has acted within the constitutional powers it has been given. In Australia, for example, the courts have been called upon to decide whether laws made by parliament come within the specified heads of power given to the federal parliament by the *Constitution*. One of those heads of power is the power to make laws with respect to taxation, and the courts have sometimes had to decide whether a law made by parliament as a tax came within the power. The courts in that context have decided that a compulsory obligation is not a tax if it is a penalty[18] or an arbitrary exaction[19]. A law imposing taxation will also fail to be within the power to make laws with respect to taxation if the tax is incontestable, in other words, that for a tax law to be valid "it must be possible to differentiate it from an arbitrary exaction" by "reference to the criteria by which liability to impose the tax is imposed"[20].

The imposition of tax, and the role of the courts in how taxes are imposed, is an important aspect of the powers of the state and its relationships with the Rule of Law. Taxes were described by Oliver Wendell Holmes Jr as "what we pay for civilized society"[21] and are necessary to enable government to pay for roads, hospitals, sanitation, education and welfare. The price is, however, something imposed upon others and is often seen by others as a form of legalized theft[22]. It

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[18] *R v Barger* (1908) 6 CLR 41,99; re *Dymond* (1959) 101 CLR 11, 22; *Air Caledonie International v Commonwealth* (1988) 165 CLR, 467; *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, 684

[19] *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 640-1, 658; *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 467

[20] *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97 [39]; see also *Deputy Commissioner of Taxation v Brown* (1958) 100 CLR 32, 40; and *Chevron Australia Holdings Pty Ltd v Federal Commissioner of Taxation* (2017) 251 FCR 40, 84 [143]

[21] *Compania General de Tabacos de Filipinas v Collector of Internal Revenue* 275 U.S. 87, 100 (1927)

[22] See D.M.Walker, *The Oxford Companion to Law* (O.U.P, 1980) "Taxation", 1208

is an area, therefore, in which the authority to impose taxation must be clear and the rules by which tax is imposed must be certain and predictable.

The role of the courts in taxation disputes is to ensure compliance with the law by both the government imposing tax and the taxpayer who must pay it. Taxpayers must obey the law and must pay the taxes which the law requires to be paid, but taxpayers are entitled to have those laws applied correctly. The government should not demand more than is due by law and the public should be confident in knowing that the government is applying the rules uniformly to all who must pay. The government, in other words, must apply the rule of law in the administration of taxation and the public generally should be able to feel confident that the system is being applied correctly. Any disputes about the correct amount of taxation need to be resolved by judges who are independent from those demanding payment or refusing to pay. The role of the judges in that context is to ensure that tax authorities are applying the law correctly and are demanding the right amount of tax to be paid, and also that the government is acting fairly in doing so. It is important for any taxpayer who loses a tax case to feel that the procedure has been fair and that the judge who has decided the case against the taxpayer had not been directed to do so by others, but had applied objective rules which apply equally to all. The judge in that context must be seen by the parties, and by the public, as a neutral and fair arbiter applying the rules fairly and without fear or favour from either party.

The duty of courts to declare the law can sometimes have profound social and political consequences. In the last few weeks we have seen conflict in the United Kingdom over the roles of parliament, the government and the Courts concerning Brexit. In that context the Supreme Court was called upon to rule upon whether the parliament of the United Kingdom had been lawfully prorogued and decided that it has not been lawfully prorogued and that it should be recalled. The Supreme Court of the United States was required in the case of

Bush v Gore[23] to decide, in effect, which of two presidential contenders had succeeded in the 2000 United States presidential elections in the State of Florida. Each state in the United States conducted its own popular vote in the election for United States president and vice-president and on 8 November 2000 the Florida Division of Elections had reported that George W Bush had won 48.8% of the vote in Florida. The Supreme Court of Florida subsequently directed a manual recount of ballots on which the machines had failed to detect votes for the president. The United States Supreme Court in an appeal reversed that decision by majority of 5 to 4 and effectively awarded Florida's 25 votes in the national electoral college, and therefore the United States presidential election in that year, to the republican candidate George W Bush.

In the United States there are many examples of the Supreme Court being called upon to make decisions with profound social consequences. In 1857 the United States Supreme Court decided by a majority of 7 to 2 in *Dred Scott v Sandford*[24] that Dred Scott, an enslaved African American, and his wife, could not sue for freedom in federal courts because they could not claim citizenship in the United States. In contrast, in *Brown v Board of Education of Topeka*[25], the United States Supreme Court ruled that American State laws establishing racial segregation in public schools were unconstitutional even if the segregated schools were otherwise equal in quality. In *Roe v Wade*[26] the United States Supreme Court ruled that the United States *Constitution* protected a pregnant woman's liberty to choose to have an abortion without excessive government restriction thereby striking down many United States state and federal abortion laws.

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[23] 531 US 98 (2000)

[24] 60 U.S. 393 (1857)

[25] 347 US 483 (1954)

[26] 410 U.S. 113 (1973)

The significance of decisions to the parties in litigation, and for the public generally, requires that the Rule of Law be applied by an independent judiciary if the Rule of Law is to be effective. Public confidence in controversial judicial outcomes requires a judiciary which is free from political interference and is not vulnerable in its decision making. The importance of the judiciary as the guarantor of the Rule of Law is stated in Article 1 of the *Universal Charter of the Judge*, which was adopted by the International Association of Judges at its meeting in 2017 (updating the Universal Charter which had been adopted at its meeting in Taiwan on 17 November 1999). Article 1 states:

> The judiciary, as guarantor of the Rule of Law, is one of the three powers of any democratic state
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> Judges shall in all their work ensure the rights of everyone to a fair trial. They shall provide the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.
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> The independence of the judge is indispensable to impartial justice under the law. It is indivisible. It is not a prerogative or a privilege bestowed for the personal interest of judges, but it is provided for the Rule of Law and the interest of any person asking and waiting for an impartial justice.
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> All institutions and authorities, whether national or international, must respect, protect and defend that independence.

It is essential to that independence that judges be both separate from the other branches of government and also that they are secure in the exercise of their independent function.

The conditions under which judges operate must be such that the public can feel confident in the outcome. They must be secure in their person, position, future and economic conditions. They will often be called upon to make decisions in which governments, legislatures and powerful corporations and individuals will

have an interest in a particular outcome and those who come to judges for justice must be confident of a fair and impartial decision, whether it is favourable or unfavourable. Confidence in impartial decision making requires the judges to be secure in their position. It must not be possible for them to be removed from office except on the grounds of proven misbehavior, incompetence or incapacity. They must have security of tenure so that their livelihood and position is not vulnerable to unpopular decisions. They must also have the conditions necessary for them to undertake their work competently and appropriately. In today's world that means that they must have access to those means of modern technology which will enable them to work efficiently and openly.

Confidence in an independent judiciary is undermined if judges are vulnerable when they make difficult decisions. Vulnerability can have many causes but amongst them are inadequate remuneration, lack of security of tenure and lack of security after retirement. Personal vulnerability may encourage judges to decide cases to protect themselves rather than to apply the law without fear or favour. The existence of such vulnerability may thus cause the public to lack confidence in the independence of judicial decisions but consider that decisions were made in part to protect the judge rather than in the impartial application of the law without fear or favour. To remove the vulnerabilities which undermine confidence in the administration of justice, it is important that judges are adequately paid, that they cannot be removed from office except in the case of proven misbehavior or established incapacity, and that they have an adequate pension upon retirement. It is the removal of those vulnerabilities which will enhance public confidence in the impartiality and fairness of difficult decisions. A litigant who has lost a case is entitled to feel that the loss has been fairly reached notwithstanding the disappointment. That requires the judicial process to be undertaken by reference to known laws in a predictable environment and in which the litigants can participate by reference to known principles, objective

criteria and probative and contestable evidence. It requires also that their work is open, transparent and visible to all. That requirement is sometimes expressed by the maxim that justice must not only be done, but that it must manifestly and undoubtfully be seen to be done[27]. The maxim expresses many important aspects of accountable justice including that the public is entitled to see the inner workings of its judicial system in its application of laws to individual cases. In that application judges must supply reasons for their decisions by reference to known rules, objective criteria and probative and contestable evidence.

The strength of any State can in part be measured by its acceptance of challenges to its actions. The public can feel confident in a government which accepts adverse decisions made by judges who are independent from government and from the legislature. Governments may not be happy with losing cases but they are strengthened by the community's support which comes from the State's acceptance that its decisions are subject to review by an independent judiciary without interference.

G.T. Pagone

[27] *R v Sussex Justices; ex parte McCarthy* [1924] 1KB 256, 259