

The Role of the Judiciary in building a more secure and equitable world

Keynote address 21st International Conference of Chief Justices of the World, 3rd Plenary Session, on the theme “Global Governance: a post-COVID imperative”

City Montessori School, Lucknow, India; by videolink from Melbourne

The Hon GT Pagone, President International Association of Judges

It is an honour for me as President of the International Association of Judges to deliver this keynote address at the 3rd Plenary Session of the 21st International Conference of Chief Justices of the World on the theme “Global Governance: a post-COVID imperative”.

The concept note for this conference explained its theme as being to prepare a road map for the world’s leadership for establishing reform and further developing the global government structures needed for guaranteeing a safe and secure future for the people of the world and the generations yet to be born. The conference is being held in the time of a global pandemic where every day we see staggering numbers of people who have become infected with an insidious virus that cannot be seen, spreads rapidly and has caused enormous deaths and tragedy. The entire world is facing real and understandable fear. A consequence of the fear is that unusual measures are taken for our safety. Those measures often include the suspension of rights, freedoms and rules of law that are fundamental to a free, democratic and liberal society.

The role of the judiciary in times of fear is crucial in guaranteeing that emergency measures are taken in accordance with the rule of law and are open to challenge and scrutiny by an independent judiciary. It is crucial for all to know that unusual measures are taken in accordance with legitimate processes for making laws, ordinances and directions. It is crucial for all to know that the enforcement of those measures will be by authorised people who are answerable to the law. It is crucial for all to know that disputes will be determined by independent judges applying objective rules without interference or direction.

It is also important for everyone to know that the general law has not stopped because there is a virus. The spread of the virus has not stopped the need for justice to be administered: disputes still need to be decided, rights still need to be upheld and the law needs to be enforced. It is an important aspect of the welfare, peace, and prosperity of any country that its people are confident that the laws are applied equally to all and that they will be applied fairly even, if not especially, in times of fear. Predictability is an essential feature of any legal system and that is all the more important in times of uncertainty. The safety of the people in their homes depends upon confidence that the law will protect their most basic needs and rights. That is true also of international dealings between countries and between people within countries. Critical to all of that is an independent judiciary. 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 from pressure. It requires that judges make decisions

by reference to known rules and objective standards. This was expressed by the English constitutional lawyers A.V. Dicey in the general document 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 else¹.

This, as Dicey went on to explain, requires that there be “equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts”.

The role of the Judge in the application of law is to do so objectively by impersonal rules and by reference to objective criteria 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 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 discussion².

This process describes unbiased reasoning and decision by reference to principles that are not personal or private to the judge. It is based upon evidence which is objectively verifiable and able to be challenged and contested. All this provides some protection from human frailty and an institutional basis that protects citizens.

The importance of the judiciary as a 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.

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

¹ A.V. Dicey *Introduction to the Study of the Law of Constitution*, 202

² Sir Owen Dixon, *Jesting Pilate* (Law Book Company, 1965) 155-6

independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

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.

All institutions and authorities, whether national or international, must respect, protect and defend that independence.

The guarantee which this seeks to give requires that the Judges are independent from other branches of government and also that they be secure in the exercise of their independent function. The independence of the judiciary is undermined if Judges are vulnerable when they make difficult decisions. Vulnerability can have many causes including inadequate remuneration, security of tenure and lack of personal and economic security after retirement. Personal vulnerability may cause the public to fear that Judges may decide cases to protect themselves rather than to apply fearlessly the rules of law.

The concept document for today's conference reminds us that the "most powerful common denominator for all the nations is their children and it is our duty to bequeath to our children a better inheritance than that bequeathed to us". The importance of that is heightened in these times of pandemic. There are many stresses to the rules of law, the independence of the judiciary and the basis upon which justice is administered. Times of pandemic put understandable pressure on how judges do their work and, therefore, upon how justice is done. We must be vigilant during these times to ensure that what we bequeath to our children is at least as good as we inherited. We find ourselves in a pandemic as the unintended guardians of values which we have inherited from others and which we must preserve for the future. The challenge is to ensure that what we leave for the future is at least as good as what we received from the past.

G T Pagone, QC
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