MRS LIVINGSTONE

13.

PRIME MINISTER

FOR MEDIA — MONDAY, 19 MAY, 1980

SECOND INTERNATIONAL CONFERENCE OF APPELLATE JUDGES
SYDNEY

The Government is very pleased that this Second International Conference of Appellate Judges should be held in Australia.

At this Conference, the papers which are to be delivered analyse and discuss matters of fundamental concern to the judiciary and to the administration of justice.

Much of what they deal with is focussed on the role which courts have in their community and on the relationship of courts to Government. These are critical aspects of the organisation of society itself. They are issues of the highest importance, in every community, and they are issues which may be discussed openly and without reserve in this country.

We, in Australia, are pleased to know that that is widely recognised abroad, as the venue for this Conference shows.

This Conference will be examining the role of national courts in various countries, over the years and at present, and the role of supra-national courts.

I am not a laywer, and certainly no legal historian or expert in comparative jurisprudence. Lord Chancellor Ellesmere may have said of King James I that "The King is the law speaking". I have waited in vain for the High Court of Australia to say that "The Prime Minister is the law speaking".

But we all have knowledge of the role of the courts in our own country and we all have beliefs about what a legal system should achieve.

In Australia, we have two particular ideas about the judiciary and about the role of the courts and those two ideas are not really separable. We are committed to an independent judiciary and to the rule of law.

It may indeed be said, that those concepts are imprecise and that their content must be defined - that, in the countries in which the same things have been said, very different results have followed.

.../2

Maybe, but a start must be made in words and the words used must try to convey central ideas or principles.

By an independent judiciary I mean, in the first place, that our courts must be established as separate and must be seen by the people to be separate from Government - that is, from the legislature and the executive.

That must be true, regardless of political systems, if you are going to have what we regard as a court of law. Otherwise it is simply a modified arm of Government.

The judiciary must stand apart, and, if it does stand apart and is seen to do so, not only is that a strength in the fabric of society, but also it gives strength to the individual people in that society.

But, secondly, those things will not be realised just by insisting on separation of the courts from Government. You must have, as judges, men and women of ability and integrity.

If those factors are present, the administration of justice will produce lawyers conscious of the role of the courts, and the system will endure.

In Australia, we have been fortunate to possess, both in Commonwealth and in State Courts, judges who are strong and independent; who are impartial and fair; so that the community has faith in the administration of law.

The rule of law means, in the first place, that you must have a body of laws, whether organised as a code or not, published and ascertainable; and in the second place, that the courts will hear and determine every case which comes before them by reference to those laws.

Of course, the content of those laws will vary from country to country, reflecting the way in which the particular community has come to be organised and the moral and religious beliefs of the community.

It may be that the jurisdiction of the courts in any country, and the nature and limits of their power, will, accordingly, differ. What must be constant, however, is that the administration of justice consists in the application of an ascertained system of laws.

That system must be applied without discrimination, as between one person and the next, by reason of race, means, or political or religious beliefs. It is implicit in that, that the system of laws to be applied does not itself discriminate in any of those ways.

.../3

What I have said about those two pillars of the administration of law by the courts would not, I think, be essentially disputed by any of you here.

But it is a foundation for discussion of the role of the courts.

I know that at this Conference such a foundation is implict, and the papers which have been prepared forecast a discussion of more complex matters.

But it is useful to remind ourselves of that foundation, and of the fact that there are many countries where even that has not been achieved.

The people in a community must know, at least in basic outline, what the role of the courts is and what they may expect from them.

The courts must provide a stable framework for resolving, and for giving effect to, people's rights.

But you cannot really define the function of the courts in any wider way unless you examine also the Constitution as a whole.

For an essential ingredient in defining what the role of the courts is, is to ascertain the extent of their powers and the circumstances in which their powers may be exercised.

When at this Conference you consider the relationship between Government and the individual, you are discussing far more than merely the role of the courts.

You are then necessarily discussing the whole constitution of a country - the relationship between the three elements of legislature, the executive and the courts, and, as well, whether there are definable basic rights of individual citizens and what they are.

This Conference is also concerned with questions of what powers the courts should have; in what circumstances they should exercise those powers; and, in particular, how the courts may give effect to basic rights of individuals.

It must be noted that those two questions asked now, are, in a real sense, quite different in their implications from the like questions asked a hundred or two hundred or four hundred years ago.

.../4

The problems which Sir Edward Coke discerned in the time of King James I and the problems which you discern today, may appear similar or analogous; such as the preservation or assertion of individual rights where there is a strong central law-making government. But the similarity or the analogy cannot be pressed too far.

The need to preserve and assert those rights continues, but there is, in constitutional terms, a gulf between the circumstances of kingly autocracy and the circumstances of representative democracy.

The widening reach of government into the lives of its citizens is a common feature of contemporary societies.

There are administrative laws for trade practices, price control, the marketing of rural products, and town-planning; there are welfare laws for health services, pensions, unemployment benefits and homes for the elderly; there is government provision or support for a variety of services in the fields of education, broadcasting and scientific research.

All those laws have some effect on the individual citizen, and where the rights or freedoms of individual citizens are directly affected in the course of administering those laws, it often becomes a live question whether there should be controls and what those controls should be.

But, at least in the Western-style democracies, the increase in Governmental administration has been a reflection of what has been seen as popular desire or demand.

And even where, in truth, governments act on their own initiative, that has been done consistently with the concept of representative government directed to the common good.

In saying this I do not suggest that the political or constitutional theories which underlie the systems of representative democracy justify infringements of accepted individual rights. Indeed those theories include in their origins the assertion of those rights.

But we have arrived at the present system of administration, through departments and agencies of government, by a series of logical extensions of the answerability of administration to the legislature and of the legislature to the electorate.

Maybe those logical extensions need re-appraisal; maybe the welfare state is mutating into an administrative state.

.../5

However that may be, when you are examining the role of the courts in the context of individual rights, you are also involved in an examination of constitutional theory in its wider aspects. That that is so, emphasises the importance of the topics before this international Conference.

So far I have been speaking of courts in a national concept. This Conference will also be discussing supra-national courts.

Australia supports the establishment, by agreement amongst nations, of supra-national courts. I wish to underline the importance of the word "agreement".

If a tribunal of whatever composition is to have jurisdiction extending beyond the boundaries of any one nation, the legitimacy of that jurisdiction must depend on the assent of every country in respect of whose citizens and interests it asserts jurisdiction. If disputes with supra-national elements are to be resolved, it must only be by courts so constituted.

The assertion by a national court of extra-territorial jurisdiction is an assertion by it of supra-national jurisdiction.

It is consistent with national jurisdiction that a national court have power to adjudicate upon matters arising within the nation and to assert its authority over persons who have a recognised connection with the nation.

A person, not a citizen of a nation - or, in the case of a company, not incorporated under its laws - may reside or do business within the boundaries of that nation.

The types of connection sufficient to give a national court jurisdiction have long been accepted. But when a court asserts authority over persons who are not its citizens, and who have not resided or traded or done any relevant act within its borders, that is an assertion of extra-territorial or supra-national jurisdiction. And if that court declares that a national law empowers or obliges it to do that, then that court is declaring that its national legislature has arrogated to itself international power.

There are cases where that has occurred, so that the national court concerned has regarded itself as obliged to claim that jurisdiction despite the general rule that a nation's laws have no extra-territorial operation.

I want to suggest to you that this is a matter closely linked with the subject of the courts and the preservation of the rights of individuals; and that it is a matter affecting the role of the courts, their integrity and independence.

.../6

Suppose a person who has no such connection with a country as is accepted as sufficient to give the courts of that country jurisdiction, does an act outside that country: and suppose that that act is lawful where it is done.

Is it not an infringement of his rights for the courts of the country with which he has no connection to assert jurisdiction over him and to make orders against him? Is that not as much against conceptions of natural justice as to deny a person the right to be heard? The country of which he is a citizen may forbid him to comply with that order.

If it is conceded that so to forbid compliance is legitimate, is not that conclusive of the argument? It cannot be in accordance with the fundamental conceptions of justice affecting the individual, which you are proposing to examine, that an individual be so placed that whether he does something, or refrains from doing it, he is equally to be declared subject to penalties.

You are to be concerned in this Conference with the basic concepts of independence and integrity of the courts as institutions in society.

I suggest that the proposition that a national court is limited in its jurisdiction, that it should not accept or enforce extra-territorial jurisdiction, is an element of that independence and integrity.

If it impairs the standing of a national court that it countenances or cannot prevent infringement of the individual rights of citizens of that nation, it is at least an equal impairment if it acts to penalise the legitimate acts of those beyond its accepted jurisdiction.

Supra-national jurisdiction is properly based on international agreement.

I remarked at the beginning, that the topics of this Conference may be discussed openly and without reservation in Australia.

I suspect that what I have said since may have convinced you of that, but it is the aim of a politician to get everyone to agree with him.

Thank you for inviting me to be with you today. I welcome you all and wish you well in your deliberations.

---000---