CONTEMPORARY PERSPECTIVES OF JUDICIAL POWER[*]

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I propose to offer some comments on judicial power as it is perceived in contemporary Australia from two broad perspectives: that of the Courts and that of the citizen. I want to take the opportunity to try to get up above the trees to get some idea of the shape of the woods. How it looks will depend on your vantage point.

The judiciary

I want to deal first with the perspective of the judiciary.

When one speaks of the perspective of the judiciary, one inevitably speaks of the view from the top.

I suggest that the decisions of the High Court in a number of areas over the last three decades exhibit an underlying dynamic in which judicial power is seen as the principal guarantor of honesty and reasonableness in public life.

The Judicial Process

This dynamic has been manifest in the High Court's increasingly rigorous demands for transparency and rationality in the judicial process itself.

This can be seen in two important developments: first, the insistence that an appeal by way of a rehearing includes a thorough review of findings of fact at trial, even where the trial judge's assessment of the demeanour of witnesses has played a part in the fact finding process; and secondly, the insistence on ever more extensive judicial directions to juries in criminal trials.

I should say that neither of these developments have not been greeted with universal acclaim by trial judges or intermediate courts of appeal.

As to the first of these developments, the High Court's decision in *Fox v Percy*,[1] was the culmination of a series of decisions to the effect that, while appellate courts must respect the "limits under which appellate judges typically operate when compared with trial judges,"[2] courts of appeal proceeding by way of rehearing are not relieved of their statutory obligations by "the fact that the trial judge has, expressly or implicitly, reached a conclusion influenced by an opinion concerning the credibility of witnesses."[3] The appellate court "must 'not shrink from giving effect to' its own conclusion" on issues of credibility.[4]

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[*] North Queensland Law Association Conference 2011, Townsville, 27 May 2011.

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1 (2003) 214 CLR 118.

2 *Fox v Percy* (2003) 214 CLR 118 at [26].

3 *Fox v Percy* (2003) 214 CLR 118 at [29].

4 *Fox v Percy* (2003) 214 CLR 118 at [29].

As to the need for more extensive judicial direction to juries, in *Azzopardi v The Queen*, the High Court re-affirmed the continuing relevance of the distinction between the right to 'comment' and the duty to 'direct' a jury:[5]

> "The distinction between a matter for comment and a matter for judicial direction reflects the fundamental division of functions in a criminal trial between the judge and the jury [with the jury being the tribunal of fact]."

In *RPS v The Queen*, the Court had emphasised the importance of ensuring that the jury is fully instructed as to its task: [6]

> "The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case."

That instruction extends to warnings as to how the jury may not reason to a conviction and as to the dangers of acting upon certain types of evidence. In the last three decades there has been, I think it is fair to say, a substantial expansion in directions required to be given by a trial judge to ensure, not only that the jury's verdict is fairly obtained as a matter of process, but also that it is, and can be seen to be, fair and reasonable as a matter of substance. That requires the giving of directions which show that each arguable weakness in the prosecution case has been squarely brought to the jury's attention. This requirement has been justified, in part at least, by the belief that judges, by their long forensic experience, are aware of weaknesses in some kinds of evidence of which jurors will be unaware, such as identification evidence, or evidence of occurrences long past, or the evidence of certain classes of complainant.

Australian legislatures have largely lost patience with judicial scepticism so far as child complainants and complainants in sex cases are concerned. There is a wonderful critique of outmoded judicial thinking by Spigelman CJ in *R v Markuleski*.[7] In that judgment his Honour made the point that judge-made rules about the unreliability of the evidence of women and children who claimed to have been sexually assaulted were not based on wisdom and experience peculiar to judges, or indeed any wisdom or experience at all: they were just myths which came to have the force of law through the assertion of judges who were at least as ignorant of the psychology of complainants in sex cases as the juries they affected to instruct.

The sober appreciation that judges are likely to be no more worldly-wise than jurors raises the question as to why it is so important that jurors continue to receive judicial direction in relation to the facts of the case.

The answer to this question lies, I think, in the jurisprudential shift of the High Court over the last few decades from an acceptance of the inscrutability of a jury's verdict, and the consequent presumption in favour of the correctness of the jury's verdict, to an insistence that the record explicitly reflect each and every consideration in favour

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5 *Azzopardi v The Queen* (2001) 205 CLR 50 at [49]-[50] per Gaudron, Gummow, Kirby and Hayne JJ.

6 *RPS v The Queen* (2000) 199 CLR 620 at [41]-[42] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

7 (2001) 52 NSWLR 82.

of a verdict of acquittal which the jury might reasonably bear in mind before convicting.

That approach may be contrasted with the long-standing position in the United States. The rules relating to commenting on evidence and directing juries in the United States have long been different from those adopted in Anglo-Australian jurisprudence. The differences in approach and the rationale behind it were summarised by Nancy King:[8]

> "Another change from the traditional common law jury trial [as imported by English settlers] is the rule in most states barring the trial judge from sharing his opinion of the evidence with the jurors. Unlike the rule in many other countries requiring judicial comment on the evidence (known as 'summing up'), this prohibition in the United States is unique. Most states outlawed such comment in the 1800s by constitutional provision, statute, or judicial decision, although it is still an option in federal courts and in the courts in a minority of states. The ban is based on the principle that the jury is the sole judge of the facts, combined with the traditional American distrust of the judiciary. In essence, most state legislatures and courts have decided that the judge's opinion of the evidence is at best irrelevant and meddlesome, and at worst, partisan advocacy. Even in jurisdictions where judges are permitted to comment on the evidence, they must be careful not to give a 'one-sided rendition' of the case. Indeed, at least one recent study showed that American jurors may be deeply suspicious of judicial comment on the evidence. In some ways, this rigid exclusion of judges from factfinding complements the equally uncompromising exclusion of juries from interpreting the law in all but a few states."

The American rule has its origins in the historical experiences of the American colonies. There was at the time of the founding of the United States:

> "…strong public sentiment in favour of weakening the role of the judge, one of the reasons being that the colonial judges were not well regarded by members of the bar and the public. They were often laymen with only minimal training in the law, and were considered - with some justification - to be puppets of the crown."[9]

Administrative Law

The dynamic which has made the judiciary the guarantor of reasonableness in the exercise of the power of the state in judicial decision-making can also be seen at work in the judicial control of administrative decision-making.

In Lord Bingham's recent book, "The Rule of Law",[10] his Lordship identified as the second of the principles said to be ingredients of the rule of law:

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8 Nancy King, 'The American Criminal Jury' (1999) 62(2) *Law and Contemporary Problems* 41, 47-8.

9 Jack Weinsten, 1988, 'The Power and Duty of Federal Judges to Marshall and Comment on the Evidence in Jury Trials and Some Suggestions on Charging Juries', 118 *Federal Review Decisions* 161, 164-5.

10 (Allen Lane, London, 2010), pp 37, 60.

> "Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably."

In the last three decades the Australian judiciary have energetically embraced the role of guarantor of this aspect of the rule of law.

Recent decisions of the High Court make it clear that if administrative decisions are to be rendered immune from judicial review in terms of irreducible minimum levels of fairness and reasonableness, the legislature, whether Commonwealth or State, must make that intention clear beyond peradventure. The private clause, and other devices designed to preclude judicial review, will not prevent the deployment of the concept of jurisdictional error where administrative decision-making has been affected by such unfairness or bad faith or unreasonableness that the decision is not a decision which Parliament could be taken to have authorised.

The key to these developments has been the presumption of statutory interpretation that any decision authorised by the Parliament, even one protected by a privative clause, can only be a decision worthy of that protection if it is made in accordance with minimum requirements of fairness and reasonableness. This presumption has been said to arise as "a matter of judicial obligation to the legislature itself."[11]

In this view of things, the Courts do not apply this presumption to defeat or frustrate the legislative will, but to do justice to the legislature. The High Court in *Ainsworth v Criminal Justice Commission* explained that the Courts do justice to the legislature by proceeding on the footing that, unless the contrary is made clear, "it is improbable that, though it did not say so, the legislature would intend that [its authorised decision maker] should act unfairly."[12] Anything less would result in the Court's upholding a decision which was not worthy of the legislature which authorised it. See also *Geraldton Building Co Pty Ltd v May*[13] and Kirby J in *Chang v Laidley Shire Council*.[14]

It is fair to say that the legislature does not always appreciate the high regard in which it is evidently held by the judiciary.

The recent decision of the High Court in *Kirk v Industrial Relations Commission of New South Wales*,[15] by its approval of the earlier decision in *Craig v South Australia*,[16] confirmed the continuing relevance of the concept of jurisdictional error as the formal device whereby judicial control is exercised over administrative action.

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11 *Cameron v Cole* (1944) 68 CLR 571 at 589 citing *In re Jordison; Raine v Jordison* (1922) 1 Ch 440 at 465 per Younger LJ.

12 (1992) 175 CLR 564 at 574-575.

13 (1977) 136 CLR 379 at 387.

14 (2007) 234 CLR 1 at [39].

15 (2010) 239 CLR 531.

16 (1995) 184 CLR 163.

In *Kirk*, the joint judgment referred, with evident approval to the observation by the eminent Professor Jaffe,[17] that describing an error by an inferior tribunal as "jurisdictional": [18]

> "is almost entirely functional: it is used to validate review when review is felt to be necessary …"

Conceptual uncertainty in the law is usually seen as a bad thing: but in *Kirk*, their Honours made it clear that the looseness of the concept of jurisdictional error is not a pathology which the Courts should seek to eradicate. Rather, they said:[19]

> "…it is important to recognise that the reasoning in *Craig* … is not to be seen as providing a rigid taxonomy of jurisdictional error. The three examples given in further explanation of the ambit of jurisdictional error by an inferior court are just that – examples. They are not to be taken as marking the boundaries of the relevant field."

The flexibility of the concept of jurisprudential error is seen as a desirable thing, affording the Courts the flexibility to ensure, through judicial review, the observance of minimum standards in the exercise of public power by the decision-makers of the executive government.

There is, of course, respectable legal history behind these developments. The very notion of judicial review was, of course, the creation of the judges. When in the classic judgment of Marshall CJ in *Marbury v Madison*, it was said that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[20] his Honour was making the point that the enforcement of the law against executive governments, and even legislators where a written constitution limits their powers, is inherent in the very notion of judicial power.

It is the characteristic duty of the superior courts to declare and enforce the law, including in relation to administrative agencies. That characteristic was never dependent on statutory authority – in contrast, for example, to the right of appeal which is entirely a creature of statute.

This point was made with specific reference to the Court of King's Bench by Sir John Holt CJ as long ago as 1700 in *Groenvelt v Burwell*[21] that "no Court can be intended exempt from the superintendency of the King in this Court … [so] it is a consequence of every inferior jurisdiction of record, that their proceedings be removable into this Court, to … see whether they keep themselves within the limits of their jurisdiction."

Ruling that an administrative agency has acted unlawfully because it has exceeded or failed to discharge its function is the kind of decision which judges characteristically

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17 Professor Jaffe in "Judicial Review: Constitutional and Jurisdictional Fact" (1957) 70 *Harvard Law Review* 953.

18 (2010) 239 CLR 531 at [64].

19 (2010) 239 CLR 531 at [73].

20 (1803) 1 Cranch 137 at 177.

21 (1700) 1 Salk 144, 91 ER 134.

make, just as judges characteristically interpret contracts or wills. It echoes the views of the great judges of the Court of King's Bench or Queen's Bench in the 16th and 17th Centuries that, in exercising what Sir Edward Coke called "the survey of all other courts," they were exercising the ultimate judicial power inherent in the sovereign as the fountain of justice.

Notwithstanding this history, it is, I think, fair to say that in judicial discussion of the extent to which this characteristic duty of the Courts may be limited by the legislature, it had not been suggested, until *Kirk's Case*, that the principles on which judicial review of administrative action proceeds are themselves integral and inseparable appurtenances of judicial power such that, by reason of Chapter III of the *Commonwealth Constitution*, legislation may not deny or limit their application in the exercise of judicial review.[22] Now the High Court has said that the supervisory jurisdiction is "a defining characteristic" of the superior courts.[23]

In *Kirk*, their Honours said:[24]

> "In *Nat Bell Liquors* [[1922] 2 AC 128 at 162], Lord Sumner said that the jurisdiction to grant certiorari could be contracted or expanded by the legislature: contracted by taking away certiorari 'explicitly and unmistakably' or limiting its availability; expanded by restoring the remedy 'to its pristine rigour by restoring to the record a full statement of the evidence'. The provisions of s 69 of the *Supreme Court Act* are a species of the latter kind of legislative step. But legislation restricting the availability of the remedy is more common.
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> As noted earlier in these reasons, s 179(1) of the IR Act provides that a decision of the Industrial Court, however constituted, 'is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal'. The provisions made by s 179 are expressly extended (by s 179(5)) 'to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise'.
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> Finality or privative provisions have been a prominent feature in the Australian legal landscape for many years. The existence and operation of provisions of that kind are important in considering whether the decisions of particular inferior courts or tribunals are intended to be final. They thus bear directly upon the second of the premises that underpin the decision in *Craig* (that finality of decision is a virtue). The operation of a privative provision is, however, affected by constitutional considerations. More particularly, although a privative provision demonstrates a legislative purpose favouring finality, questions arise about the extent to which the provision can be given an operation that immunises the decisions of an

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22 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 101 [4]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [42].

23 *Kirk v Industrial Relations Commissioner of New South Wales* (2010) 239 CLR 531 at 580-581.

24 (2010) 239 CLR 531 at 578-9.

> inferior court or tribunal from judicial review, yet remain consistent with the constitutional framework for the Australian judicial system."

Their Honours went on to mention the implications of the Commonwealth Constitution:[25]

> "In considering Commonwealth legislation, account must be taken of the two fundamental constitutional considerations pointed out in *Plaintiff S157/2002 v The Commonwealth* [(2003) 211 CLR 476 at 512 [98]]:
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> > 'First, the jurisdiction of this Court to grant relief under s 75(v) of the *Constitution* cannot be removed by or under a law made by the Parliament. Specifically, the jurisdiction to grant s 75(v) relief where there has been jurisdictional error by an officer of the Commonwealth cannot be removed. Secondly, the judicial power of the Commonwealth cannot be exercised otherwise than in accordance with Ch III. The Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.'"

Another aspect of the decision in *Kirk*, which is of particular interest to administrative lawyers, is the proposition that the supervisory jurisdiction of the Supreme Courts of the States is an essential part of what is guaranteed by s 73 of the Commonwealth Constitution which, so far as the text is concerned, consists relevantly of the statement that:

> "The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the (Commonwealth) Parliament prescribes, to hear and determine appeals from all judgments … of … the Supreme Court of any State."

As a result of the joint judgment in *Kirk's Case* the debate has moved out of Chapter III, via s 73, to reduce the extent to which State Parliaments can immunise the decisions of their inferior courts and tribunals from judicial supervision by the use of privative clauses.
Their Honours said:[26]

> "In considering State legislation, it is necessary to take account of the requirement of Ch III of the *Constitution* that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary that 'it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.
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> At federation, each of the Supreme Courts referred to in s 73 of the *Constitution* had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England. It followed that each had 'a general power to issue the writ [of certiorari] to any inferior Court' in the State. Victoria and South Australia, intervening, pointed out that statutory

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25 (2010) 239 CLR 531 at 579-80.
26 (2010) 239 CLR 531 at 580-1.

privative provisions had been enacted by colonial legislatures seeking to cut down the availability of certiorari. But in *Colonial Bank of Australasia v Willan,* the Privy Council said of such provisions that:

> 'It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. *There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.'

That is, accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision.

The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts. And because, 'with such exceptions and subject to such regulations as the Parliament prescribes', s 73 of the *Constitution* gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the 'Federal Supreme Court' in which s 71 of the *Constitution* vests the judicial power of the Commonwealth.

There is but one common law of Australia. The supervisory jurisdiction exercised by the State Supreme Courts by the grant of prerogative relief or orders in the nature of that relief is governed in fundamental respects by principles established as part of the common law of Australia. That is, the supervisory jurisdiction exercised by the State Supreme Courts is exercised according to principles that in the end are set by this Court. To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of 'distorted positions'. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics." [Footnotes omitted].

All that having been said, their Honours did not give the privative clause its quietus. They said:[27]

> "This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power."

These statements leave us with some interesting questions. Do they mean that judicial vindication of values of fairness and reasonableness, through the concept of jurisdictional error over agencies of the executive government, is so integral an appurtenance of judicial power that it cannot be excluded by legislation, whether of the Commonwealth or of the constitutionally entrenched Supreme Courts of the States?

To what extent can the legislature determine whether an error on the part of a decision-maker is jurisdictional? Would a legislative declaration that particular kinds of error are not jurisdictional be accepted as conclusive by the Court?

Can the legislature, if it has the political will, avoid the strictures of the interpretative principle of legality by authorising "purported decisions", or would it need to go so far as to specify the vices which would not take the decision outside of the authority to decide conferred by Parliament?

In this regard, there was an interesting suggestion made on behalf of the Commonwealth Government in the course of argument in *Plaintiff S157/2002 v The Commonwealth* that "the Parliament might validly delegate to the Minister 'the power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia.'"[28] In this way, by the use of non-binding guidelines, aliens would have no justiciable rights in relation to residence in Australia.

This suggestion, if accepted, would take the conversation between the Court and the political branches of government to a different level. It raises a question as to whether such arrangements could properly be characterised as laws at all.[29]

In support of the position taken by the Solicitor-General for the Commonwealth in *Plaintiff S157/2002*, two points may be made. First, there are laws, properly so called, which do not, in terms, create enforceable rights.[30] Secondly, the position of those who seek the benefit of the provisions of the hypothetical regime would usually not benefit

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[27] (2010) 239 CLR 531 at 581.

[28] (2003) 211 CLR 476 at [101].

[29] (2003) 211 CLR 476 at [102].

[30] *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454; *Abebe v Commonwealth* (1999) 197 CLR 510 at 527-528 [31].

from its wholesale invalidation. Where benefits are the creature of statute, it does not help a person seeking the benefit of a statutory discretion to be told that the statute does not really exist.

One might also query whether the limits of judicial control must necessarily be reached at the point where the existence of "rights" and, *a fortiori*, the extent of their enforceability, is a matter for the legislature, which, after all, is the source of the decision-making power which is under review. That would seem to be so if the fundamental guiding value is the doing of justice to the legislature. But the fundamental value may be some entrenched constitutional doctrine which is "slouching towards Bethlehem to be born".
The answers to these questions as they emerge may indicate that we have moved outside of the framework of the fundamental premise that the Courts interpret legislation so as to do justice to a presumptively high-minded legislature.

The Citizen

It is always dangerous to engage in sweeping generalisations, but it is, I think, true to say that since the 1980s there has been a sea-change in the way citizens view judges and vice versa.

Community attitudes

At the most obvious level, judicial office no longer confers the social prestige and consequent entitlement to deference of past eras. During Australia's colonial period and for a long time into the 20th Century, the judiciary were widely seen as an instrument of social control which stood at some remove from the vast majority of the population by reason of wealth and social status. The divisions within the community by reason of wealth and social status cut deep. In the British Isles and their dependencies, the class divide was rigid and visible. The hackneyed phrase "access to justice" that we now hear so regularly assumes that the citizens want access to the Courts. The idea is that if one can get access to the Courts, good things will happen and life will be improved. That is certainly not how the Courts have always been perceived by the general population before the current generation.

One of my great grandfathers came to Australia after the famine in Ireland. He was, as my aunties used to say: "A fugitive from British justice". Precisely what he had done to rouse the adverse interest of the servants of the Crown has been lost in the mists of time, but what is clear is that he did not want access to justice: justice wanted access to him.
Until this generation, that would have been the attitude of most working class Australians.
Late Victorian judges in England set themselves against even middle class reforms, such as the extension of the franchise to women by the *Reform Acts* by holding that women were not comprehended by the description "persons" on whom the right to vote was conferred. And they did this notwithstanding that the *Acts Interpretation Act* provided that a reference to the male gender included the female, unless the contrary intention was made plain by the legislation being interpreted. Stephen Sedley reminds us:[31]

[31] Simon Sedley, 'Plimsoll's Story', *London Review of Books*, Vol 33 No 9, 28 April 2011.

> "When (the UK) Parliament gave women the right to stand for election, Lady Sandhurst was unseated from the London County Council by an opponent who claimed that, not being a 'person', she could not be 'a fit person of full age'. But when a Miss Cobden was elected and waited till the time for challenge was past before taking her seat, she was promptly prosecuted for being a person sitting as councillor when unqualified. She put up the seemingly impregnable defence that if she was not a person for the purpose of being elected, she could not be a person for the purpose of being prosecuted. Naturally, she was convicted."

In times past, the community saw the judges, and the judges saw themselves, as part of the ruling class who were, by birth and concomitant educational opportunity, best fitted to rule. Those times were not so long ago.

As we learn from Philip Ayres' biography of Sir Owen Dixon, even that great judge was willing to engage in ghost-writing judgments for the aged Sir George Rich. In that latter stages, Dixon was unwilling to continue the practice and sought to dissuade other judges from helping out in this way.[32] The effect of the practice was to enable Rich to remain on the High Court and thereby deny a Federal Labor government the opportunity to replace him. Today that would cause outrage.

In those times, government was still understood as essentially something that was done by government to the governed; and the judiciary were very much part of the government. While a number of people were uncomfortable about that, it was still accepted that the judiciary, the least dangerous branch of government, was also the most respectable, even though it was neither politically or legally responsible, nor socially responsive.

What changed following the Second World War was the vast increase in general prosperity and more particularly, access to secondary and tertiary education. Most of us in this room who are of the same age as the Chief Justice and me, were the first generations of our families to attend university.

The great strides in social equality since the 1960s have meant that over the last three decades it has become clear the governed no longer accept that government is something which simply happens to them, or that other people know best. We have become a rights conscious society: we all have rights and we are not shy about asserting them.

As Murray Gleeson said while he was Chief Justice of Australia, this is not an easy time to be in authority. Things have changed so much in only a few decades. I remember in the mid-1960s my school headmaster, the redoubtable Brother Campbell, telling us that the most important of the Christian virtues was respect for authority. At that time, not much had changed since the Duke of Wellington's time. The Iron Duke apparently disliked his soldiers cheering in the ranks as being "too nearly an expression of opinion" on their part.

Today an educated, meritocratic, sceptical and egalitarian society insists upon high standards of accountability and transparency from all who serve in any of the branches of government.

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[32] Philip Ayres, *Owen Dixon: A Biography* (The Miegunyah Press, 2003), pp 93, 191-102.

But there has been another consequence of these democratic advances.

Now, the use of the phrase "access to justice" signals a view of judicial power which regards it as essentially benevolent. Not coincidentally, the Courts are seen, inaccurately, as service providers rather than as the third arm of government. I say "inaccurately" because by no stretch of language is a convicted person, who is being sentenced to prison, a recipient of legal services. But, the perception is that access to justice is about obtaining the benefit of one or more of the multitude of rights which a generous people have conferred on the citizens of this country through their Parliaments – for which, ironically, our parliamentarians seem historically to have received little credit.

I have already mentioned the description of Alexander Hamilton, writing in the Federalist Papers at the end of the 18th century, of the judicial branch as the least dangerous branch of government. That was said to be because it possessed neither the sword (held by the executive) or the purse (held by the legislature). Many informed members of the public have come to view the judicial branch, not only as the least dangerous but also as the most benign branch of governmental power, precisely because the processes whereby judicial power is exercised are more accessible and transparent than the processes of the other branches of government.

Robert Stevens, in his 2002 book "The English Judges",[33] suggests that the growth of presidential-style government in the liberal democracies of the West has so much focused legitimate authority on themselves as the spokespersons of community opinion, and away from the traditional sources of political power, such as parliamentarians, that the idea of a sovereign parliament as the central fact of political life has lost its hold.

Perhaps even more importantly, over the last three decades the accelerating processes of globalisation and technological change have eroded national economic sovereignty and imposed an ideology of economic rationalism and managerialism on all Western governments. The party system struggles to hold the line when the real powers in the land, the managers, the heads of government bureaucracies and the heads of corporations with multi-national connections, advise governments that commitments to longheld values enshrined in party manifestos are no longer affordable.

And there is no longer, on the Left side of politics, so much of the traditional distrust of judges as partisan lackeys of the ruling class: since World War II, judges have become just like the rest of us.

The Courts have come to be viewed as a forum for social change.

There are a number of reasons why the judicial process has become so attractive as a forum for those who agitate for social change. The judicial process necessarily involves the open discussion in public of an issue conducted before a disinterested arbiter who gives a fair hearing to all sides of the debate. The debate is conducted with a level of economy, skill and learning which the public knows is absent from Parliamentary debates. There is an understandable perception that the conversation which occurs in courts is more polite, more rational and more reasonable than that

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[33] (Hart Publishing, Oxford, 2002), pp 147-150.

conducted in political fora. And the issues in dispute are resolved by a public statement of a reasoned preference for one side over the other. And, of course, the judges are no longer seen as the agents of a ruling elite, but the sons and daughters of families they know. We are the judges now.

Most importantly, in terms of public confidence, is the perception, and reality, of judicial independence. Our judges cannot expect reward or punishment for doing their duty. While they may have views of their own, they are beholden to no political party or interest group. However imperfect the judges are, no one imagines that they serve the agenda of business or government, that we can be bought or intimidated.

I hasten to say that this state of affairs is not in any way due to the fact that we are good persons, that we are better or stronger than anyone else. In truth, it is because of the institutional arrangements which we have in place have served to guarantee judicial independence within the common law tradition since the conclusion of the English Revolution in the 17th Century: appointment until we reach the age of seventy without fear of removal, save for proven misbehaviour or diminution in terms and conditions, is the great bulwark of our independence.

Manifestations of a changed attitude

The burgeoning of public confidence in the judiciary, relative to the other arms of government, is manifest in a number of ways. So benign does the judicial process appear to our citizens that more and more litigants choose to represent themselves in the superior courts. I say "choose" advisedly because I am not persuaded that any litigant with a reasonably arguable case is not able to obtain legal representation in a superior court because of financial constraints. In saying this I am not speaking of the Family Court. But so far as the other superior courts are concerned, there is an army of lawyers, which swells yearly, who are available to represent the indigent.

Those litigants who choose not to be represented often become so enamoured of the processes of litigation that they become, what the psychiatrists describe as querulent litigants, who litigate and litigate until they have laid waste to their own and their family's lives, and those of the unfortunates against whom they litigate. The reasons why this happens are complicated. It has been suggested that it is a pathology of a prosperous democratic society. And there is reason to think that there is something in that suggestion: the phenomenon is unknown in Northern Ireland, for example. And it may also be that a benign judiciary is also a factor: the phenomenon is not known, for example, in the jurisprudence of the former Soviet Union.

Another manifestation has been the growth of public interest litigation. In this respect, Professor Abram Chayes of Harvard University in an article, "The Role of the Judge in Public Law Litigation", identified several characteristics of the judicial process which he considered make the judiciary an appropriate organ to determine disputes involving public interests broader than the specific interests of parties to traditional litigations:[34]

> "*First*…[a judge's] professional tradition insulates him from narrow political pressures, but, given the operation of the federal appointive

[34] (1976) 89(7) *Harvard Law Review* 1281 at 1308-1309.

> power and the demands of contemporary law practice, he is likely to have some experience of the political process and acquaintance with a fairly broad range of public policy problems…he is governed by a professional ideal of reflective and dispassionate analysis of the problem before him and is likely to have had some experience in putting this ideal into practice.
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> *Second*, the public law model permits ad hoc applications of broad national policy in situations of limited scope. The solutions can be tailored to the needs of the particular situation and flexibly administered or modified as experience develops with the regime established in the particular case.
> *Third*, the procedure permits a relatively high degree of participation by representatives of those who will be directly affected by the decision, without establishing a *liberum veto.*
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> *Fourth*, … public law litigation furnishes strong incentives for the parties to produce information. … Information produced will not only be subject to adversary review, but as we have seen, the judge can engage his own experts to assist in evaluating the evidence …
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> *Fifth*, the judicial process is an effective mechanism for registering and responding to grievances generated by the operation of public programs in a regulatory state. Unlike an administrative bureaucracy or a legislature, the judiciary *must* respond to the complaints of the aggrieved. It is also rather well situated to perform the task of balancing the importance of competing policy interests in a specific situation. … The bureaucracy deals with specific situations but only from a position of commitment to particular policy interests.
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> *Sixth*, the judiciary has the advantage of being non-bureaucratic. It is effective in tapping energies and resources outside itself and outside the government in the exploration of the situation and the assessment of remedies. … It [works] through a smallish, representative task force, assembled ad hoc, and easily dismantled when the problem is finally resolved."

[Emphasis added].

There is a perception abroad, allied to disillusionment with party politics as a means of pursuing social change, that ordinary citizens have no real influence over the course of decision-making in the political branches of government. Access to the Courts, on the other hand, affords the aggrieved the opportunity to be part of a conversation about matters of public interest. I should emphasise that I am not criticising our home-grown politicians. All the Western democracies are struggling to maintain citizens' confidence that the political process can respond to their wishes.

All of these points provide support for the view that:

> "the scope for the ventilation of matters of legitimate public concern and a public declaration in support of accountability is a vital task of courts

> and other public entities charged with finding legal resolution for infringement of social rights."[35]

So strong indeed has the perception become that it forms the basis for the demand that those who use the processes of litigation to ventilate public interest arguments should not have to pay the other side's costs, even if the claims ventilated are rejected by the Courts.

It is not immediately obvious that disincentives to litigation are a bad thing. One of the time-honoured maxims of the law has been: "*Interest rei publicae ut sit finis litium*": It is in the public interest that there be an end to suits.

More colourfully, Judge Learned Hand, the greatest American judge not to sit on the Supreme Court of the United States, said: "After some dozen years of experience, I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death."[36]

Litigation has traditionally been regarded as a necessary evil, to be preferred to trial by ordeal or by combat, but nevertheless stressful, uncertain, beset by delays and wasteful of the community's resources. On that traditional view, the provision of an indemnity to the successful party is part of the minimum of justice owed to a party wrongly put through such an ordeal to enforce his or her legal rights.

The classic formulation of the doctrine of indemnity is that of Bramwell B in *Barons of the Exchequer in Harold v Smith*:[37]

> "Costs are an indemnity. They are given to the person who receives them to indemnify him in respect of the costs of some proceedings which the other party has compelled him to take. They are not a punishment on the party who has to pay them, nor a bonus to the person who is to receive them; therefore on the question of costs, if you can find out the extent of that damnification, you can find out the extent to which costs ought to be allowed. Of course, I do not mean to say there are not exceptions, cases in which certain arbitrary rules for taxation have been laid down; but as a rule costs are an indemnity. Find out the damnification and then you can find out the amount of the costs you ought to allow."

Their traditional view is under challenge. There is a particular concern about the chilling effect upon the willingness of individuals to pursue litigation brought by them in the public interest, for example, to protect the environment against development thought to be harmful, or to ensure the humane treatment of persons in detention, or to enforce laws designed to maintain minimum standards of probity in business.

It is necessary to understand, of course, that where such a claim succeeds, the successful claimant can be expected to be as enthusiastic as anyone else about the idea that the costs of the proceeding should follow the event. There is undeniable force in

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35 Andrea Durbach, 'Test Case Mediation – Privatising the Public Interest' (1995) 6. *Australasian Dispute Resolution Journal* 233 at 238.

36 David Capper, "Maintenance and Champerty in Australia – Litigation in Support of Funding!" (2007) 26 *Civil Justice Quarterly* 288 at 290-291.

37 (1860) 35 LT (OS), 1 MS 556 at 557.

the argument that a plaintiff who is put to expense to enforce his or her rights can only have complete justice if the party who wrongly resisted the claim is required to reimburse that expense.

So we are talking about a chilling effect which cannot be understood otherwise than in the context of the prospect of losing the case. It is hard to accept that it is harmful to the public interest that people should be discouraged from bringing losing cases: no-one would urge that hopeless cases clog up the courts.

And defendants are members of the public too. Is it really fair to expect them to be consoled that they have been sued, wrongly as it turns out, in the public interest?

While there may be disagreement over the precise definition of 'public interest litigation', there can be little doubt that an increase in the level of litigation answering to that general description[38] has been spurred by the legislative trend towards open standing provisions, that is, legislative provisions which allow any member of the public to bring proceedings even in the absence of any direct material interest in the subject matter of the litigation: an example is s 80 of the *Trade Practices Act 1974* (Cth).
Open standing provisions are thought to have the salutary effect that interested persons within the community can be engaged to police certain laws so that their enforcement is not entirely dependent on the willingness of agencies of the executive government to take up the cause.

It may be argued that the broad standing entitlement provided by the legislature to bring proceedings of the kind in issue means that courts should adopt a more lenient approach in awarding costs against public interest litigants.

In argument before the High Court in *Oshlack v Richmond River Council*,[39] Mr Basten QC, as his Honour then was, put this contention:

> "There is a link [between standing and costs] and the link is that in giving effect to the statutory policy, it is in effect, inconsistent and undermining of that statutory policy if one fails to take into account … the way in which costs may operate as a disincentive to persons pursuing their mandate under the open standing provisions. To say that it is an irrelevant consideration … is simply not in accordance with the unfettered discretion in relation to costs which is vested in the court."[40]

The majority of the High Court in *Oshlack* did not accept that statutory provisions enlarging standing implied an otherwise tacit legislative intention to alter the law as to the disposition of costs.

McHugh J was trenchant:[41]

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38 Cf. Stein J in *Oshlack v Richmond River Council* (1994) 82 LGERA 236.
39 (1998) 193 CLR 72.
40 *Oshlack v Richmond River Council* (Transcript, High Court, 1997).
41 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 105-6 per McHugh J.

> "it does not logically follow that the introduction of wider standing provisions means that courts should construe the traditional costs discretion so as to undermine the principle of the usual order as to costs…
> First, the legislature has expressly acted to widen standing requirements but has stopped short of taking the separate and further step of expressly altering the traditional costs discretion. It could readily have done so, and its omission may properly be viewed as deliberate…
>
> Second, and perhaps more important, open standing provisions cause no relevant prejudice to respondents, whether they be public authorities or private persons, but undermining the traditional costs discretion may cause significant prejudice to parties who are successful in litigation."

With respect, there is, as usual, much to admire in these observations of McHugh J.

The third major manifestation of the burgeoning public confidence in the judiciary as an agent of social change that I want to mention has been the enthusiasm for a bill or charter of rights. Essential to that enthusiasm is the confidence that the judicial process can be relied upon to satisfactorily balance right against right. And if the balancing exercise occurs in a constitutional context, that confidence needs to extend to accepting that the balance cannot be changed by popular vote.

The processes of judicial reasoning are well-suited to determining narrow questions based on the application to the evidence adduced by the parties of predetermined legal principles. Some sceptics are not so confident that those whose skills have been developed for these purposes can be relied upon to replace the elected legislature in determining the priority of broad and often conflicting political values. The sceptics tend to recoil from the consequence of the broad assumption of responsibility by the judiciary that Alexis de Tocqueville commented on in his great work "Democracy in America". De Tocqueville presciently observed:

> "There is almost no political question in the United States that is not resolved sooner or later into a judicial question." [42]

In the view of the sceptics, that trend, now evident in this country, is apt to diminish our democracy by leading us to rely upon judges to decide broadly political questions.

Most of the criticism of the activism of the liberal decisions of U.S. Supreme Court in the period between the Chief Justiceship of Earl Warren and the current conservative domination came from conservative commentators. But the performance of the Supreme Court in the 19th Century and first half of the 20th Century drew trenchant criticism from the Left.

Lord McCluskey, who had been the Solicitor-General for Scotland in the Callaghan Labour Government of the 1970s, in his 1986 Reith Lectures, summarised from the

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[42] Tocqueville, *Democracy in America*, Harvey Mansfield & Delba Whinthrop, trans., ed. (University of Chicago Press, Chicago, 2000), p 257.

perspective of the Left, the low points in the performance of the US Supreme Court as the interpreter of the US Bill of Rights. Lord McCluskey said:

> "[T]he broad, unqualified statements of rights which the Supreme Court Justices have had to apply did not prevent them, until recently, from taking a narrow legalistic, laissez-faire perspective on freedom so as to strike down as unconstitutional legislation designed to stop the exploitation of workers, women, children or immigrants. They legalized slavery; and when it was abolished, they legalized racial segregation. They repeatedly held that women were not entitled to equality with men. They approved the unconstitutional removal by the Executive of the constitutional rights of Americans of Japanese origin after the bombing of Pearl Harbour."

The confidence of the public in the judiciary and the self-confidence of the judiciary are not to be taken for granted. The risk of the politicisation of a judiciary involved in mediating the broad political pronouncements of a Bill of Rights is illustrated by the strong perceptions that the US Supreme Court is now in the grip of right wing ideologues in pursuit of their own political agenda. That perception has been expressed by eminent legal scholars such as Ronald Dworkin, who has recently published two articles on the New York Review of Books website, about the US Supreme Court's decisions over the last year. These articles are entitled, "The Court's Embarrassingly Bad Decisions"[43] and "More Bad Arguments: The Roberts Court & Money in Politics".[44]

Whether Professor Dworkin's criticisms of the US Supreme Court's decisions are warranted, it is clear that no-one seriously thinks that the justices of the US Supreme Court make decisions without giving full effect to their own political preferences. Happily, no-one thinks that of any Australian court.

The citizenry must, of course, make up their own minds about these issues. I would venture only one comment in this regard. On great political questions, legal training and judicial experience are unlikely to provide the kind of wisdom required to give an answer which will be more satisfactory in ethical, or moral or political terms than an informed electorate and a responsive legislature. As Bob Dylan said, "Ain't no point in talking to me; it's just the same as talking to you."

And to my fellow judges, I would repeat the observation of my favourite French judge, Michel de Montaigne:

> "No matter how high the bench upon which we are sitting, we are always sitting on our own backside."

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43 *<http://www.nybooks.com/articles/archives/2011/May/26/courts-embarrasingly-bad-decisions/>*

44 *<http://www.nybooks.com/blogs/nyrblog/2011/apr 27/more-bad-arguments-roberts-court-money-politics/>*