

# **Justice as Fairness – A Contested Ideal**

**Chief Justice Robert French**

**University of Western Sydney Biennial Dinner**

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**Parliament House, Sydney**

Chancellor, Vice-Chancellor, our Parliamentary host, the Hon David Borger MP, Ladies and Gentleman

There is a comforting sense of familiarity in attending this University of Western Sydney Biennial Dinner. That might be thought odd because I have never been to a University of Western Sydney function before. I have that sense of familiarity because elements of the history of the University, particularly its evolution from a number of precursor institutions, remind me of the Edith Cowan University of which I was Chancellor in Western Australia in the 1990s. It evolved from a number of teachers' colleges and higher education institutions to become the Western Australian College of Advanced Education. In 1991 it became, by operation of State legislation, a university and was named after the first woman to be elected to an Australian Parliament. She was Edith Cowan, who was elected to the Western Australian Parliament in 1921.

The University of Western Sydney began, under its 1988 Act, as a federated network comprising the University of Western Sydney Hawkesbury and the University of Western Sydney Nepean. It evolved, through restructuring and associated statutory changes, into a federation and then into the single multi-campus university which it is today.

An important feature of the University is its legal definition which is contained in its establishment clause, s 5 of the *University of Western Sydney Act 1997*. That section says that the University consists of:

- A Board of Trustees

- The Staff of the University
- The graduates and students of the University.

That definition of the University has its origins in a statute passed in 1571 which defined Oxford University as "the Chancellors, Masters and Scholars of Oxford". It evokes the old ideal of a university as a community of scholars. The ideal is reflected in the way many Australian universities are defined. There are those who think it an anachronism. Hard-headed men and women in thrall to a managerial ethos rooted in micro-economic rationalism tend to be impatient about such notions. It is however an ideal not lightly to be put to one side and especially not at a fundraising dinner. It is not enough to raise funds for an institution because it is for a "university", or for a law school because it is for a "law school". It is the object of the institution and its commitment to furthering that object which should inform decision-making about support for it. The object of the University of Western Sydney is found in its Act:

the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.

Within that general framework your Law School has made an obvious commitment to helping its students to become aware of, to understand and to have an involvement in social justice issues.

The idea of a university, which is reflected in the object of the University of Western Sydney, was expressed in a famous essay by Cardinal John Henry Newman, entitled "The Idea of a University" I quoted it at the inauguration of the Edith Cowan University in Western Australia in 1991. In my opinion, it has just as much relevance on this side of the continent and is relevant for any institution which is designated a "university" whether or not it is a member of the Group of Eight. Newman answered his question "what is a university?" in the following terms:

It is the place to which a thousand schools make contributions; in which the intellect may safely range and speculate, sure to find its equal in some antagonist activity, and its judge in the tribunal of truth. It is a place where inquiry is pushed forward, and discoveries verified

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and perfected, and rashness rendered innocuous, and error exposed, by the collision of mind with mind, and knowledge with knowledge.<sup>1</sup>

And relevantly to alumni:

It is a place which wins the admiration of the young by its celebrity, kindles the affections of the middle-aged by its beauty, and rivets the fidelity of the old by its associations.<sup>2</sup>

This may all seem a little aspirational in today's world of higher education but, absent high aspirations, why would anyone bother giving money to just another business.

Tonight our focus is upon law and in particular the University of Western Sydney Law School. How does a law school fit within the glorious ideals to which I have just referred? The primary task of a law school after all is to produce graduates who will be good lawyers or otherwise bring their legal knowledge and skills to bear upon the variety of law jobs that exist within our society.

Law graduates from any university should be people who have studied and developed competency in those areas of the law, legal reasoning and legal technique, which any person seeking the right to practise, to advise and represent others, should have. Importantly, law graduates should be people who have developed the capacity to further develop their knowledge and competency generally or on a particular topic.

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<sup>1</sup> Newman JH, 'The Idea of a University', in Eliot CW (ed), *Essays English and American*, The Harvard Classics, vol 28, (PF Collier & Son Corporation, 1938) p 38.

<sup>2</sup> Newman JH, '"The Idea of a University', in Eliot CW (ed), *Essays English and American*, The Harvard Classics, vol 28, (PF Collier & Son Corporation, 1938) p 39.

The study of the law however should do far more than expose the student to things he or she must know in order to become a competent practitioner. It should expose the student to fundamental questions about our society the answers to which are contestable and contested. Indeed, in any study of the law worthy of the name that exposure would be inescapable. It is in this aspect of legal studies that, to use the words of Cardinal Newman, the intellect may range and speculate sure to find its equal in some antagonist. It may be too much to expect, as Newman did, that there would be found in the university milieu a tribunal of truth to judge such questions. After all, they have been debated for millennia.

The leading question that confronts the law student as it confronts the law maker and wider society is – what is justice? In the end all of our laws are directed to somebody's idea of justice – laws which as Roscoe Pound wrote in 1914 determine:

... the standards of conduct in the relations of man with man and of man with society which will advance civilisation and will make for the best and noblest society.<sup>3</sup>

We expect our laws to be just according to some conception. We expect of the courts that they will do justice according to law – and not only the courts. We have come to expect justice in official decision-making generally. That is to say, anybody who is given the power by the parliament to make decisions affecting the rights, freedoms, privileges or liabilities of others we expect to act justly.

But what do we mean by the idea of justice and just action? Many have tried to define and explain it. Ambrose Bierce rather cynically called it:

A commodity which is a more or less adulterated condition the State sells to the citizen as a reward for his allegiance, taxes and personal service.<sup>4</sup>

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<sup>3</sup> Pound R, 'Justice According to Law', *The Mid-West Quarterly*, 1:3 (April 1914), pp. 223-235.

<sup>4</sup> Bierce A, *The Devil's Dictionary*, (Axim Publishing, 2005) p 116

Justice in the perfect republic was explained by Plato as the constant performance, by each member of the State of their own particular function in the State. For many people today however Justice is about fairness. The American legal philosopher John Rawls described fairness as a "fundamental idea in the concept of justice".<sup>5</sup>

We may find it hard to define fairness and unfairness but we know unfairness when we see it. Before the regular provision of legal representation for Aboriginal people in Australia, and particularly in Western Australia, there was little institutional protection against unfair treatment by police or Justice of the Peace beyond their innate sense of fairness. I remember writing letters to government ministers in Western Australia in the very early 1970s asking for consideration to be given to special training for police and Justices of the Peace who had to deal with Aboriginal people. The typical response was that everybody was "equal before the law in Western Australia". Well they weren't. And when lawyers from the Aboriginal Legal Service started to appear on behalf of Aboriginal people there was the odd occasion when fair process proved too much of a challenge for the judicial officers before whom they appeared. In an early case in Western Australia in the 1970s a young lawyer from the newly established Aboriginal Legal Service appeared before two Justices of the Peace in a remote part of the State and said that his client would plead not guilty. The Justices, however, were having none of that. They rejected the plea of not guilty then turned to the Police Prosecutor and asked "What are the facts, Sergeant?" There was no question of hearing the evidence or having witnesses examined and cross-examined. Happily the young lawyer took the case on appeal to the Supreme Court where the conviction was quashed. Today he is a partner in a national law firm and ensures that members of the medical profession receive fair treatment.

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<sup>5</sup> Rawls J, 'Justice as Fairness' (1958) 67 *The Philosophical Review*, pp. 164-194 at 164.

Unlike the Justices of the Peace in that case, we value the presumption of innocence because we do not think it fair that a person should be convicted of crime on a mere accusation. The accuser must prove the truth of the accusation by evidence unless its truth is admitted by the accused. One person should not suffer a penalty or lose liberty on the say-so of another. Some, like the Justices, find this notion inconvenient. I remember a magistrate saying to me many years ago when I challenged the sufficiency of prosecution evidence in the Perth Court of Petty Sessions – "well your client wouldn't be here if he hadn't done something". He was probably right, but we don't regard that as a fair way to proceed to conviction.

Impatience with fair process and the presumption of innocence is manifested in our laws from time to time. Sometimes we find the burden of proof reversed with respect to particular issues so that an accused has to disprove some element of an allegation made against him or her. There are circumstances in which such laws reflect an understandable concern about practical difficulties in proving a matter which it is peculiarly within the power of the accused person to clear up. Is such a law unfair? Is it unjust? Those questions open up for us debate about the rights of the individual and the legitimate concerns of the wider community. Accepting that there are often two sides to these arguments it is necessary to be vigilant when they arise and to scrutinise such laws closely. For each step in the direction of proof by allegation is a step towards a society in which the policeman or official becomes the judge.

This leads me on to the idea of administrative justice. Here again there is an area of contest. Administrative justice is concerned not with what courts do but with the function of public officials in making decisions under law which can affect the rights or freedoms of individuals. It is central to the idea of administrative justice that such decisions should be made lawfully, rationally and fairly. It almost goes without saying that no administrator is above the law and the exercise of any power affecting individuals must be authorised by law. It is important also that such decisions be rational in the sense that they follow a process of reasoning which, even if one disagrees with it, is comprehensible. A third element is that of fair procedure, which is what used to be, and is sometimes still called natural justice. That is not a

difficult idea to grasp. It is something which should resonate with basic community attitudes in a country where the idea of "a fair go" is important.

The core elements of procedural fairness are impartiality or lack of bias on the part of the decision-maker and the provision of an opportunity for the person affected by the decision to put his or her case before the decision is made. That includes the opportunity to comment on any information adverse to the person which may have been placed before the decision-maker. Procedural fairness so understood is not some kind of legalistic ornamentation which acts as a drag on efficient decision-making. It is an aid to good decision-making.

Impartiality requires, among other things, that the decision-maker is not inclined in one way or another by considerations which are irrelevant to the exercise of the legal power in his or her hands. The decision-maker who is biased against men or women, or people of a particular ethnic origin or religion or political belief, is likely to be influenced by things which are irrelevant to the decision to be made. The decision-maker who does not give the person affected by the decision the opportunity to put a case orally or in writing before the decision is made, may make a decision ignorant of important information and therefore a wrong decision. The same is true of the decision-maker who does not give the person an opportunity to comment on adverse information which has been put before the decision-maker. Procedural fairness does not mean that administrative decision-makers have to have oral hearings or act like courts. Procedural fairness is inherently flexible and must be adapted to administrative realities including those of high-volume decision-making where there is little or no discretion.

Courts will read statutes as importing the requirements of procedural fairness unless it is clearly excluded. Sometimes Acts of Parliament expressly exclude procedural fairness. It is not always easy to understand why. It is an important part of the common law. Sometimes it is excluded to limit the scope for judicial challenges. There may be legitimate reasons for such measures in particular circumstances. But legislators and lawyers should be vigilant about such provisions. Whenever the requirements of procedural fairness are removed or abrogated the risk of incorrect and arbitrary decision-making and abuse of power may be increased.

These are matters going to our ideas of justice which are of continuing relevance. They are worthy of close consideration by those who teach the law and those who study it. Law graduates who are informed and engaged with the role of law in our society generally, as this Law School encourages them to be, will make better lawyers. They will also be capable of contributing to community understanding and debate about the contested ideal of justice as fairness according to law.