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THE INTEGRITY OF COURTS: POLITICAL CULTURE AND A CULTURE OF POLITICS

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Institutions are under increasing scrutiny — not only in what they do but, in some cases, their very existence. Courts are not, and should not be, immune from this scrutiny. In the case of the High Court of Australia, we must pause and ask: what gives a court institutional integrity, and what gives the High Court its integrity? This piece considers factors which may influence the Court's integrity in light of two broad categories: internal factors, aspects of the way in which the Court operates and is administered; and external factors, aspects of the wider political and legal framework into which the Court was born and continues to live. Overall, the Court's institutional integrity relies on a balanced constitutional structure, maintenance of which depends on both a political culture and a culture of politics.

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I INTRODUCTION

The relation of the judiciary to the people in a self-governing country is a question of profound importance, not only to lawyers interested primarily in the

* Justice of the High Court of Australia. This is an edited version of the 2020 *Melbourne University Law Review* Annual Lecture that was to be given at the University of Melbourne on 1 April 2020. Thanks to Nathan Van Wees for his assistance and to Professor Cheryl Saunders for her comments. Errors and misconceptions remain with the author.

> administration of justice, but to all … citizens who are concerned with the orderly administration of the powers of government and with the secure maintenance of private rights, whether of person or property.[1]

Institutions are under increasing scrutiny — not only in what they do but, in the case of some institutions, their very existence, or the need for them at least in the form in which they currently exist. Other institutions have been, or are being, dismantled. The United Kingdom ('UK') has provided two significant examples only in the last decade or so: Brexit rejected the role of the European Union — one of the largest institutions in the world — and the House of Lords was replaced as the highest judicial body by the Supreme Court of the United Kingdom.[2]

This increased scrutiny and altering, even dismantling, of institutions inevitably raises questions about the integrity of other existing institutions. Courts are not, and should not be, immune from this scrutiny. In the case of the High Court of Australia, it causes us to pause and ask: what gives a court institutional integrity, and what gives the High Court its integrity?

I undertake this examination because, as a Justice of the High Court, I must have one guiding principle — the institution, the High Court of Australia, is bigger than me. It will survive me. Because it is bigger and more enduring than me or any other individual Justice, I am but a custodian of a part of it for a short period. And as a custodian, I need to seek to protect the Court's institutional integrity. How that might be achieved is difficult, if not impossible, unless what it is that gives the High Court its integrity, its strength, is identified, as well as what it is that could damage or threaten that integrity and strength.

Much of the discussion below centres on two closely related ideas: fragility and response to change. The institutional integrity which the High Court enjoys — and which other organs of government in this country must have — is necessarily fragile. And things need not have ended up this way. Our world and our institutions are the product of a particular sequence of historical facts and social attitudes which may have been different. And both the facts and attitudes may change as circumstances change.

We have all been reminded of these ideas of fragility and response to change by the spread of the COVID-19 pandemic. Much of this piece was written before any of us had heard of the coronavirus. But its advent makes the issues raised in this piece even more important. Changed circumstances have forced changes in our institutions. The federal Cabinet met remotely and courts have

[1] Frederick N Judson, *The Judiciary and the People* (Yale University Press, 1918) 3.

[2] See *Constitutional Reform Act 2005* (UK).

been hearing matters remotely.[3] The Family Court of Australia and Federal Circuit Court of Australia have recognised that this may result in lasting changes: for example, remote hearings may provide a safe and less stressful forum for vulnerable parties to attend hearings or give evidence even after the pandemic has passed.[4]

When institutions and circumstances change, we need to keep at the forefront of our minds what gives institutions their integrity, so that our changes preserve and enhance that integrity, rather than damage it. So, for instance, how is the open court principle to be applied when there is no physical courtroom?[5] Change is inevitable, and if we do not strengthen our understanding of institutional integrity, we ultimately risk losing it.

And, as we will see, our understanding of institutional integrity cannot be confined to the integrity of the High Court. Preservation of the Court's integrity requires that all of our institutions of government are working well. For that to be so, each of the three arms of government — legislative, executive and judicial — must fulfil their distinct functions operating, as they must, through different functionaries according to their own different 'skills and professional habits'.[6]

II What Is Institutional Integrity?

The first question is what institutional integrity means in the context of courts. It is impossible to define exhaustively or conclusively. But accepting that proposition cannot and should not obviate the analysis.

When lawyers hear the words 'institutional integrity' in proximity to the word 'court', they may be tempted to think of the requirement for Supreme

[3] See, eg, Tom Burton, 'Why Government Will Never Be the Same Again', *The Australian Financial Review* (Sydney, 14 April 2020) 10; Michael Pelly, 'High Court Aims for Full Return by End of June', *The Australian Financial Review* (Sydney, 28 May 2020) 31; 'Remote Hearings during the COVID-19 Pandemic', *Federal Court of Australia* (Web Page, 15 April 2020) <https://www.fedcourt.gov.au/covid19/remote-hearings>, archived at <https://perma.cc/TJW7-LTWC>.

[4] Family Court of Australia and Federal Circuit Court of Australia, 'Update to the Profession' (9 April 2020) 1 <https://www.qls.com.au/For_the_profession/Courts_commissions_and_tribunals>, archived at <https://perma.cc/4XH4-L3RQ>.

[5] For example, the Family Court, Federal Circuit Court and Federal Court have implemented a procedure whereby members of the public can request a link to view proceedings as they happen online: see ibid 4; Federal Court of Australia, 'National Practitioners/Litigants Guide to Online Hearings and Microsoft Teams' (2 April 2020) 3 <https://www.fedcourt.gov.au/online-services/online-hearings>, archived at <https://perma.cc/TY6M-CFT8>.

[6] *R v Davison* (1954) 90 CLR 353, 382 (Kitto J) ('*Davison*'), quoting CH Wilson, 'Separation of Powers' in *Chambers's Encyclopaedia* (George Newnes, 1950) vol XI, 155.

Courts of the states to maintain the 'defining or essential characteristics' of a court,[7] a requirement ultimately derived from the explanation of ch III of the *Constitution* given in *Kable v Director of Public Prosecutions (NSW)*.[8] But for the purposes of this discussion, institutional integrity means something broader. It is reflected in a court's ability to pursue its task *properly* and *effectively*, with *public confidence* in its ability to do so.

The primary function of a court is to 'decide controversies'[9] by applying legal standards.[10] If a court cannot properly carry out that function, it cannot be said to have integrity. 'Integrity' means, at least, being 'unimpaired' and 'uncorrupted'.[11] There are many ways in which a court might become impaired or corrupted in its task. If a court was prevented from deciding cases according to law, for example, we could say that it was not carrying out its task in an unimpaired or uncorrupted manner. So too would political pressure to decide cases according to the executive's policy preferences undermine the integrity of the court even where, despite the political pressure, the court decides the controversy by applying legal standards. The court must be free to make its decisions on an unimpaired basis and to *feel* itself to be free in that way.

Similarly, if the decisions of a court were not effective, it would not retain its integrity. Courts exercise judicial power, and part of judicial power is the ability to issue decisions which are 'binding and authoritative'.[12] If those decisions were ignored, or not treated as binding, the court would not truly fulfil its function, no matter how hard it tried. It would not have authority. It would not retain its integrity as an institution of government in our society.

Certainly, institutional integrity is related to public confidence in a court, interlinked with both its perception as an apolitical institution and the need for decisions to be made properly and effectively. If the public were to form the view that courts' decisions were made according to the preferences of the government or the whims of a given judge, the public would rightly view the courts as lacking the kind of unimpaired and uncorrupted practice which is central to institutional integrity. This, in turn, would very probably lead to those decisions not being given their proper weight, undermining the effectiveness of the court.

[7] *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J) ('*Wainohu*').

[8] (1996) 189 CLR 51, 96 (Toohey J), 103 (Gaudron J), 116–19 (McHugh J), 127–8 (Gummow J).

[9] *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ) ('*Huddart Parker*').

[10] *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277, 290 (Dixon CJ), 293 (McTiernan J) ('*R v Spicer*').

[11] *Oxford English Dictionary* (online at 17 September 2020) 'integrity' (def 2).

[12] *Huddart Parker* (n 9) 357 (Griffith CJ).

This is why, for example, our legal system contains a rule against bias in decision-making: it is not only important that justice be done, but also that it be *seen* to be done.[13]

The institutional integrity of the High Court, therefore, is *partly* a matter within, but certainly not *entirely* within, the Court's control. The factors which influence whether the Court is able to pursue its task properly and effectively can be broken down into two broad categories. The first may be termed 'internal' factors — aspects of the way in which the Court operates and is administered. The second are 'external' factors — aspects of the wider political and legal framework into which the Court was born and continues to live, but which are largely beyond its control. I will consider briefly the internal factors before moving to the external factors, though the two categories cannot always be easily separated.

III Internal Factors

There are aspects of the way in which the Court operates and is administered that contribute to its integrity. These include not only *how* the Court operates, but also *where* it operates. The Court is a national institution. It is expected to operate as such and it does. There are registries for the Court in each State and Territory and,[14] while the Court ordinarily sits in Canberra, it also sits in other cities on circuit from time to time. When the Court sits in Canberra, it sits in its own building, a building that in 2020 marked the 40th anniversary of its official opening.[15] The symbolic importance of this built form should not be taken for granted. The idea that a court should not sit together with the legislature may seem like a relatively uncontroversial proposition, but that was not a reality for the highest court in the UK until the creation of the Supreme Court there a decade ago.[16] Proponents of the creation of that Court argued that it was symbolically problematic for the separation of powers for the highest court to be located within the country's legislature.[17] A physical separation reinforces the functional separation between the branches of government, both to judges and to the general public.

[13] *Webb v The Queen* (1994) 181 CLR 41, 50 (Mason CJ and McHugh J).

[14] 'About the Registry', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/registry/about>, archived at <https://perma.cc/97XA-U8XK>.

[15] 'The Building', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/about/the-building>, archived at <https://perma.cc/D79Z-WSHY>.

[16] See *Constitutional Reform Act 2005* (UK).

[17] United Kingdom, *Parliamentary Debates*, House of Commons, 9 February 2004, vol 417, col 1131 (Christopher Leslie, Parliamentary Under-Secretary of State for Constitutional Affairs).

Other contributors to the integrity of the institution are less self-evident but are derived, at least in part, from the Court's internal structure and arrangements. For example, the Court's practices are directed towards transparency and independent decision-making according to law. These practices include oral hearings and video recordings of those hearings,[18] as well as the publication of reasons for any decision the Court makes. Stating reasons for decisions has long been seen as essential to the performance of the judicial task.[19] The reasons that the High Court publishes show, for all to see, that the Justices take their roles seriously and form independent opinions.[20] All of the Justices dissented at least once in 2019, and there was at least one dissenting opinion in around one third of cases.[21]

Preparing and publishing detailed reasons for decision has another consequence: there is a publicly available record for members of the public, and the Court itself, to see the ways in which doctrine is developed and applied over time. The Court accumulates and builds upon the insights and knowledge that are revealed by that record (informed and assisted by the work of both the legal profession and the academy).

Other organs of government operate very differently from this model. The reasons for political decisions are of a different nature to the reasons for legal decisions. Political decision-making can proceed on a view of what is best for the community overall. This might be informed by any number of social or economic considerations. But judges are not free to make decisions in this way: they are not 'independent architects of the best future'.[22] They are constrained by what legislatures and courts have done before them. This prevents them from relying on the broad criteria which can inform political decisions. That is why the outcome of legal cases cannot be determined, and must not be understood, by looking to which political party was in government when a judge was

[18] High Court of Australia, 'Access to Hearings' (Press Release, 2013) <https://www.hcourt.gov.au/cases/recent-av-recordings>, archived at <https://perma.cc/36Y9-KWGD>; 'Recent AV Recordings', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/cases/recent-av-recordings>, archived at <https://perma.cc/EYE6-QWXC>.

[19] See, eg, *Wainohu* (n 7) 213–14 [54]–[59] (French CJ and Kiefel J).

[20] See generally Sir Frank Kitto, 'Why Write Judgments?' (1992) 66(12) *Australian Law Journal* 787.

[21] Andrew Lynch, 'A Model of Diversity: Definitely No Groupthink on This Bench', *The Australian* (Canberra, 21 February 2020) 23. See also Michael Pelly, 'High Court Divisions Emerge', *The Australian Financial Review* (Sydney, 21 February 2020) 33.

[22] See Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 410. See also *R v Spicer* (n 10) 293 (McTiernan J).

appointed. As Gleeson CJ remarked,[23] the only occasion he could identify in his time on the Court where the Court had divided in opinion according to the political colour of the government that had appointed the individual justices was a negligence case about the liability of road authorities (hardly a hot button political issue).[24] By contrast, in the United States ('US'), a *New York Times* report tracked rates of agreement and dissent among judges and found that these were indeed related to the political party which appointed the judges.[25] Such a result has, thankfully, been avoided in Australia and that is largely due to the legal reasoning employed by all members of the judiciary in this country. This separation of legal and political reasoning is something that we all must try to preserve — legal and political reasoning are different in approach, object, purpose and effect.

History tells us that we should not only recognise these contributors to the Court's integrity but also ensure that they are both protected and enhanced. The Court has taken active steps, for example, to make itself more accessible to the public, and this helps to foster confidence in the Court. The Court has always published its reasons and these are available online, free of charge.[26] For nearly 20 years, the High Court has also published summaries of its judgments at the same time as reasons are delivered in Court, in order to make those decisions more accessible to the public.[27] Audio-visual recordings of every full court hearing are available to be viewed online, free of charge.[28] A written transcript of every hearing before the Court is available online, also free of charge.[29] In 2020, the Court became more accessible with the introduction of a Digital Lodgment System.[30] This enables the public to search the cases filed in the

[23] 'Retiring Chief Justice Murray Gleeson', *Law Report* (ABC Radio National, 19 August 2008) <https://www.abc.net.au/radionational/programs/lawreport/retiring-chief-justice-murray-gleeson/3200662>, archived at <https://perma.cc/CQ7G-WZEQ>.

[24] *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

[25] Rebecca R Ruiz et al, 'These Judges Are Shifting the Appeals Courts to the Right', *The New York Times* (online, 14 March 2020) <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-takeaways.html>, archived at <https://perma.cc/W4NM-YK63>.

[26] 'Operation of the Court', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/about/operation>, archived at <https://perma.cc/T5ZE-CA2M>.

[27] 'Access to Hearings' (n 18).

[28] 'Recent AV Recordings' (n 18).

[29] 'Transcripts', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/publications/judgments/transcripts>, archived at <https://perma.cc/7WUW-DD7A>. See also 'Access to Hearings' (n 18).

[30] 'Digital Lodgment System Information', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au.au/digital-lodgment-system/digital-lodgment-system-information>, archived at <https://perma.cc/EW84-UFHT>.

Court and for parties to start a case and lodge documents 24 hours a day, seven days a week, from any computer or other device anywhere.

The inventory of factors I have listed here is not exhaustive. But it is sufficient to make the point — the impact of any one aspect of the structure and practices of the Court on its institutional integrity cannot, and should not, be thought of or measured in isolation.

IV External Factors

A *Political Culture*

What external factors strengthen the Court's integrity? A key factor is the political culture of the society in which the Court sits. This, of course, invites the question of what exactly 'political culture' really is. It has been said that political culture 'is no single thing waiting for researchers to find it in the world', but we know it exists.[31] For the purposes of this discussion, we can think of political culture as the symbols and meanings or styles of action that organise the way we make political claims and form political opinions.[32] In short, it is the way we approach political questions and tasks in our community.

This is not, of course, simply a matter of how leaders and office-holders approach social problems. Political culture is something shared, and perhaps largely generated, by the general population in everyday settings.[33] For example, there is no culture of judicial celebrity amongst the Australian public — the individual Justices of the High Court tend not to be well-known to non-lawyers. The results of a study published in 2019 in an article titled, 'What the Australian Public Knows about the High Court', reveal that fewer than 1 in 10 participants were able to identify most of the Justices of the High Court.[34] That I am not well-known to at least some members of the public is underscored by the fact that a participant in the study identified Michelle Gordon as the former First Lady of the United States, a 'mix up' with Michelle Obama.[35]

[31] Paul Lichterman and Daniel Cefaï, 'The Idea of Political Culture' in Robert E Goodin and Charles Tilly (eds), *The Oxford Handbook of Contextual Political Analysis* (Oxford University Press, 2006) 392, 392.

[32] Ibid.

[33] Ibid.

[34] Ingrid Nielsen and Russell Smyth, 'What the Australian Public Knows about the High Court' (2019) 47(1) *Federal Law Review* 31, 55.

[35] Ibid 43–4.

As will be self-evident, I am not in favour of what has become known as the phenomenon of 'towering judges'.[36] Promotion of individual judges, let alone self-promotion, necessarily comes at a cost to the institution. Fortunately, judges in this country are able to, and do, carry out their work without a focus on their individual personalities. That aspect of Australia's political culture insulates our work from considerations of ego or celebrity. The absence of these considerations also goes some way to ensuring that decisions and reasons are not swayed by popular opinion. That is one of the chief guarantors of judicial independence and, in turn, the Court's institutional integrity.

Australian political culture also has a general respect for the rule of law, and part of the rule of law is respect for court decisions.[37] Indeed, our legal tradition assumes that individuals will comply with court decisions of their own volition.[38] Professor Jeremy Waldron has said, rightly, that '[r]uling by law is quite different from herding cows with a cattle prod or directing a flock of sheep with a dog.'[39] Rather, ruling by law involves telling people what is required, and allowing those people to go ahead and do it. Thus, as Waldron says, '[u]nsuccessful defendants in private law litigation are expected to pay the decreed damages themselves; rare is the case where the bailiffs have to turn up and take away their property.'[40]

This is crucial for the institutional integrity of a court. A court has no army of its own. It has no power 'over either the sword or the purse'.[41] It is generally incapable, in a practical sense, of ensuring compliance with its decisions. It relies on the executive arm of government to carry them into effect. This might happen by executive officers ensuring that private individuals comply with court orders or, when a remedy is directed to the executive itself, by taking steps to comply with that order.

[36] See Iddo Porat and Rehan Abeyratne, 'Towering Judges in Comparative Perspective: Introduction', *IACL–AIDC Blog* (Blog Post, 4 March 2019) archived at <https://perma.cc/QX4A-BY4R>; Rosalind Dixon, 'Towering v Collegial Judges', *IACL–AIDC Blog* (Blog Post, 6 March 2019) archived at <https://perma.cc/T3AD-BQ6K>; Iddo Porat, 'Joint Symposium on "Towering Judges": The Globalization of Towering Judges', *Blog of the International Journal of Constitutional Law* (Blog Post, 5 April 2019) archived at <https://perma.cc/37CP-8VH4>.

[37] See Jason Bosland and Jonathan Gill, 'The Principle of Open Justice and the Judicial Duty to Give Public Reasons' (2014) 38(1) *Melbourne University Law Review* 482, 489–90.

[38] See Jeremy Waldron, 'The Concept and the Rule of Law' (2007) 43(1) *Georgia Law Review* 1, 27–8.

[39] Ibid 26.

[40] Ibid 27.

[41] Alexander Hamilton, 'Number LXXVIII' in EH Scott (ed), *The Federalist and Other Constitutional Papers* (Albert, Scott & Co, 1894) 424, 425.

By and large, this is not problematic in Australia. That is not to be taken for granted, however. Nearly 30 years ago, a former Commonwealth Ombudsman recounted his experience of an executive department refusing to follow the interpretation of a statute given by a court, because the department considered that interpretation to be wrong.[42] Similarly, the Ombudsman was (rightly, and equally) concerned by cases in which the Collector of Customs was reluctant to reimburse money which courts had found to have been wrongly collected.[43]

These examples may now be considered unusual. But they were not always so. History has run a long course to come to a point where judicial decisions are — generally speaking — respected. That history is often bound up with great social and political struggles, and the relatively recent history of the US shows as much.

Almost 150 years ago in that country, President Abraham Lincoln purported to authorise the suspension of the writ of habeas corpus during the American Civil War.[44] A man named John Merryman was arrested by the military two weeks later. The Chief Justice of the Supreme Court at the time was Roger Taney, who also sat as a judge of the Circuit Court for the District of Maryland. Justice Taney held that only the United States Congress had the power to suspend habeas corpus.[45] He therefore issued the writ and demanded that Merryman be brought before the Court in Baltimore the following day. The military refused to obey on the basis of President Lincoln's authorisation to suspend the writ,[46] setting up a showdown between the judiciary and the executive. Justice Taney feared that he too would be imprisoned,[47] but nevertheless insisted on the writ and gave reasons, ordering that those reasons be sent to Lincoln himself.[48] The President, in turn, reiterated his own view that the suspension was legal, and Merryman was not released.[49] In short, the executive stood its ground and the Court's decision had no effect.

This stance by Lincoln reflected the earlier view of President Thomas Jefferson. Jefferson was of the view that the executive had '"an equal right to decide

[42] Dennis Pearce, 'Executive versus Judiciary' (1991) 2(3) *Public Law Review* 179, 190.

[43] Ibid 190–1, discussing *Collector of Customs v LNC (Wholesale) Pty Ltd [No 2]* (1989) 19 ALD 341; *Dahlia Mining Co Ltd v Collector of Customs* (1989) 17 NSWLR 688. See also Commonwealth and Defence Force Ombudsman, *Annual Report 1988–89* (Report, 1989) 38–9.

[44] David L Martin, 'When Lincoln Suspended Habeas Corpus' (1974) 60(1) *American Bar Association Journal* 99, 99.

[45] *Ex parte Merryman*, 17 Fed Cas 144, 148–9 (Md Cir, 1861) ('*Merryman*').

[46] Ibid 147–8.

[47] Martin (n 44) 100.

[48] *Merryman* (n 45) 153.

[49] Martin (n 44) 102.

for itself what is the meaning of the [US *Constitution*] in the cases submitted to its action"'.[50] That view was tested by the events which led to the famous case of *Marbury v Madison* ('*Marbury*').[51]

Those events began with Jefferson's predecessor as President, John Adams. Adams and Jefferson were on opposite sides of the political divide at the time between the Federalists and the Republicans (a different party from the modern Republican Party founded in 1854).[52] Adams had appointed 42 Justices of the Peace in his last days as President, though not all of the commissions were delivered to the nominees while Adams was still in office.[53] When he gained power, Jefferson directed that 17 of those commissions be withheld.[54] One of the commissions was that of William Marbury, who applied to the Supreme Court for a writ of mandamus to compel delivery of the commission.[55]

The Chief Justice of the Supreme Court at the time was John Marshall. He faced a dilemma. It was likely that the executive would refuse to comply with any order of mandamus, and thus a decision in Marbury's favour would bring on a 'direct confrontation between the power of the Presidency and the power of the Court'.[56] Given the inability of the Court to enforce its own decisions, it would no doubt have lost that confrontation. It would be shown to be weak and its institutional integrity would have sustained some damage. On the other hand, if the case was decided in favour of the executive, this too may have weakened the relative position of the Court and effectively condoned the executive's behaviour.[57] The political stakes must be emphasised here. Congress had recently suspended a term of the Supreme Court's sittings, and was planning to impeach one of the Court's judges.[58] There were 'open threats … to impeach Marshall himself if he were to decide in favor of Marbury'.[59] The integrity of the

[50] George Lee Haskins and Herbert A Johnson, *History of the Supreme Court of the United States: Foundations of Power* (Macmillan Publishing, 1981) vol 2, 148, quoting Letter from Thomas Jefferson to Spencer Roane, 6 September 1819.

[51] 5 US (1 Cranch) 137 (1803) ('*Marbury*').

[52] See William Nisbet Chambers, *Political Parties in a New Nation: The American Experience, 1776–1809* (Oxford University Press, 1963) 5–6, 11. See generally William E Gienapp, *The Origins of the Republican Party 1852–1856* (Oxford University Press, 1987) 103–6.

[53] Haskins and Johnson (n 50) 183–4.

[54] Ibid 184.

[55] *Marbury* (n 51) 153–4 (Marshall CJ for the Court).

[56] Haskins and Johnson (n 50) 185.

[57] Robert G McCloskey, *The American Supreme Court*, rev Sanford Levinson (University of Chicago Press, 5th rev ed, 2010) 26.

[58] Haskins and Johnson (n 50) 185.

[59] Ibid 185.

Court was therefore directly imperilled by the threat that the executive would take action against it as a result of any adverse decision from Marshall CJ.

Chief Justice Marshall's decision is most widely known for the statement that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'[60] That statement is a very important one in the history of judicial review in the US and has often been cited by the High Court in this country as being 'axiomatic' in our understanding of judicial review.[61] But Marshall CJ did not give Marbury his commission. Rather, he decided that the Supreme Court did not, at that time, have jurisdiction to grant the mandamus sought.[62] The case is therefore more nuanced than is often remembered. It makes a statement of principle which helped to cement the role of the Supreme Court, but deliberately refrained from bringing on a conflict with the executive which would potentially have been very damaging. The likelihood of the executive refusing to implement the Supreme Court's decision was a real factor in the case.

The idea that the executive may not comply with a court's decision is not some historical oddity. It is something that continues to present itself in many places in the world. The Constitutional Court of South Africa, for example, was forced to issue a rebuke to the executive in that country in a judgment in 2017 for failing to comply with court orders.[63] The case concerned the way in which social security payments were made by the South African Social Security Agency, which was part of the executive. The making of those payments had been contracted out to a private company, Cash Paymaster Services Pty Ltd ('CPS').[64] The Court found that the contract had been awarded to CPS in a tender process which was contrary to the South African *Constitution*.[65] The Court ordered that payments nevertheless continue, on the 'premise' that the executive would regularise the process.[66] In November 2015, the executive reported

[60] *Marbury* (n 51) 177.

[61] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262–3 (Fullagar J) ('*Communist Party Case*'). See also *Harris v Caladine* (1991) 172 CLR 84, 134–5 (Toohey J); *Commonwealth v Mewett* (1997) 191 CLR 471, 547 (Gummow and Kirby JJ); *A-G (WA) v Marquet* (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Singh v Commonwealth* (2004) 222 CLR 322, 330 [7] (Gleeson CJ); *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, 48 [101] (Kirby J).

[62] *Marbury* (n 51) 176.

[63] *Black Sash Trust v Minister of Social Development* [2017] 3 SA 335 (Constitutional Court).

[64] Ibid 341 [3] (Froneman J, Mogoeng CJ, Nkabinde ADCJ, Cameron, Froneman, Jafta, Khampepe, Zondo and Mhlantla JJ, Mojapelo and Pretorious AJJ concurring).

[65] Ibid.

[66] Ibid.

to the Court that it would take responsibility for making the payments directly.[67]

This did not happen. Rather, when the unconstitutional contract with CPS expired, the executive returned to the Court and informed it that it was incapable of making the payments itself, after all. The only option, it said, was for CPS to continue making the payments.[68] The Court said that the executive had 'walked away from … fundamental pillars' of the Court's initial remedial order.[69] The Court noted that this was a threat to the effectiveness of the constitutional system, saying that 'when the institutions of government established under the Constitution are undermined, the fabric of our society comes under threat'.[70] The Court was plainly displeased at the executive's failure to respect its earlier order.

Not all examples need be so blatant or dramatic. The Supreme Court of Japan provides an interesting example. That Court has repeatedly ruled elections to the national legislature, the Diet, to be unconstitutional because of malapportioned electoral districts.[71] But the political branches and the Court itself have been slow to push for any real change to the electoral imbalance that this malapportionment causes. The Court, for its part, finds provisions of the electoral law to be unconstitutional without finding the provision (and therefore the election) invalid.[72] This gives the legislature time to remedy the electoral boundaries while avoiding a direct confrontation with the other branches of government. But the Diet accepts the Court's decisions only slowly. In 2011, the Court held that the electoral districts used in the 2009 election were unconstitutional.[73] There were 20 months until the next election, in 2012. But the legislature failed to redraw the electoral boundaries until the very eve of that 2012 election, and they did not take effect until 2013.[74] This meant that the 2012 election was undertaken with the same electoral boundaries which had already

[67] Ibid.

[68] Ibid 342 [7].

[69] Ibid 343 [11].

[70] Ibid 343–4 [15].

[71] See William Somers Bailey, 'Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act' (1997) 6(1) *Pacific Rim Law and Policy Journal* 169, 181.

[72] Shigenori Matsui, 'Why Is the Japanese Supreme Court So Conservative?' (2011) 88(6) *Washington University Law Review* 1375, 1392.

[73] Ray Christensen, 'Malapportionment and the 2012 House of Representatives Election' in Robert Pekkanen, Steven R Reed and Ethan Scheiner (eds), *Japan Decides 2012: The Japanese General Election* (Palgrave Macmillan, 2013) 139, 139.

[74] Ibid 140.

been held to be unconstitutional.[75] The legislature failed to heed the Court's ruling and ensure that the election was constitutionally valid.

What these examples show, even though they arise in markedly different contexts from ours, is the importance of respect for courts' decisions. If the decision of a court is undercut by the executive refusing to enforce it or abide by it, the role of the court is also undercut. It becomes, over time, only a shadow institution with a reduced role in the governance of society. This is what would happen if the executive regularly approached court decisions by ignoring them, in the way that the decision of the Constitutional Court of South Africa was ignored. The approach to malapportionment in Japan demonstrates that delayed compliance, although not as serious as ignoring a decision altogether, can also interfere with a court's effectiveness. Similarly, the history of *Marbury* shows that even the *threat* of a court's decision not being complied with can interfere with the processes of the court. The need to ensure that his decision was respected by the executive may well have been a real factor for Marshall CJ in crafting his decision in *Marbury*.[76] The reality and expectation that courts' decisions will be respected and enforced therefore matter to the institutional integrity of courts. It is only if those decisions are respected and enforced that courts function effectively and free from influence.

Again, the High Court in this country has not been subject to quite the same challenges from the executive and legislative branches as courts in other countries. In contrast to Jefferson's view that the political branches had an equal right to interpret the US *Constitution*, it was said by the Speaker of the House of Representatives as early as 1908 in Australia that 'the only body fully entitled to interpret the *Constitution* is the High Court' and that the House had no such power.[77]

It is clear from what has been said that compliance with courts' decisions depends on respect for those courts. That respect can be imperilled by political attacks on courts. Recently in the US, the leader of the Democratic Caucus in the Senate made a speech at the front of the Supreme Court building, spoke of two of the Court's Justices by name and threatened that they would 'pay the price' if they made certain decisions.[78] It is hard to see this as anything other

[75] Ibid 139–40.

[76] Haskins and Johnson (n 50) 185–6; McCloskey (n 57) 25–8.

[77] Commonwealth, *Parliamentary Debates*, House of Representatives, 22 April 1908, 10486 (Frederick Holder).

[78] Ariane de Vogue, 'Chief Justice John Roberts Rebukes Chuck Schumer for Comments about Kavanaugh and Gorsuch', *CNN* (Web Page, 5 March 2020) <https://edition.cnn.com/2020/03/04/politics/schumer-roberts-threats-supreme-court/index.html>, archived at <https://perma.cc/H3X9-SQJ5>.

than an attack on how the Supreme Court does its job. That has real potential to harm the public standing of the institution and interfere with its work. If that attitude to the courts were to take hold in a political culture, it could go a long way to undermining the structural safeguards of the courts' integrity.

Less dramatically, but no less importantly, the Conservative Party's manifesto for the recent election in the UK proposed setting up a 'Constitution, Democracy & Rights Commission' to 'come up with proposals to restore trust in our institutions and in how our democracy operates'.[79] This was prompted, among other things, by a concern that judicial review not be 'abused to conduct politics by another means'.[80] Discussions following from that proposal have led Lord Reed to reject the idea that the courts are attempting to 'grab' power from Parliament and to insist that courts do not make up law as they go along.[81] Lord Reed also felt compelled to warn against politicisation of the courts by way of US-style confirmation hearings.[82] A defence of the courts' position in that country has evidently been considered necessary as a result of the government's proposals.

It should be noted that respect for court decisions is not only a matter of the attitudes of the public or the executive, although those are significant. It is also a matter for courts themselves. A decision in one court will have little effect if it is ignored by other courts. That has been a real concern in the historical development of the judicial system. Thus, the 12th century witnessed conflict between the temporal courts and the ecclesiastical courts in England, and the 16th century saw the great conflicts between the courts of law and of equity.[83] Each jurisdiction was effectively battling for greater control at the expense of the other, trying to weaken the integrity and effectiveness of its opposite number.

The conflicts between the courts of chancery and the common law courts carried on because it was unclear — until the resolution of *The Earl of Oxford's Case* — which had precedence over the other.[84] The courts were arranged such that each was able to claim as much authority as the other. Each saw themselves

[79] Conservative and Unionist Party, *Get Brexit Done: Unleash Britain's Potential* (Manifesto, 2019) 48.

[80] Ibid.

[81] Owen Bowcott, 'Supreme Court Chief Denies Judges Trying to "Grab" Power from Parliament', *The Guardian* (online, 5 March 2020) <https://www.theguardian.com/law/2020/mar/04/supreme-court-chief-denies-judges-trying-to-grab-power-from-parliament>, archived at <https://perma.cc/D3X3-EMJC>.

[82] Ibid.

[83] Sir William Holdsworth, *A History of English Law*, ed AL Goodhart and HG Hanbury (Methuen, 7th rev ed, 1903–66) vol 1, 459.

[84] (1615) 21 ER 485.

as superior, but there was no superiority actually established as a matter of law or structure in the first centuries of their co-existence.[85]

What was needed was some rule or structure by which the decisions of one court were accepted as binding in the other. Contemporary judicial systems achieve this by being arranged in a hierarchical structure. Decisions in higher courts must be followed in lower courts. This ensures that decisions are respected and applied effectively. This idea is accepted and respected in Australia, but has also taken some time to develop into its current form. Prior to Federation, there was a question as to how to interpret a colonial statute which was in the same terms as an Imperial statute. The Privy Council held in *Trimble v Hill* in 1879 that Australian courts should follow the interpretation of the Imperial statute given by the English Court of Appeal.[86] And for many years the High Court would follow the decisions of the English Court of Appeal and House of Lords. Only in 1963, in *Parker v The Queen*, did the Court decide that it would not continue to follow the decisions of the House of Lords 'at the expense of our own opinions and cases decided here'.[87] And it is only in relatively recent times that the High Court has held that an intermediate appellate court in one jurisdiction in this country has a duty to follow the decision of an intermediate appellate court in another jurisdiction, unless it considers the decision to be 'plainly wrong'.[88]

The hierarchical structure of courts therefore contributes to the effectiveness of courts. It helps to ensure that judicial decisions are effective by being followed by others. But that structure is not enough on its own. There must also be a culture of respect for that structure amongst those who inhabit it, and make it live and breathe. When that culture of respect breaks down, so too do the effectiveness and institutional integrity of the courts.

The fact that a hierarchical structure is not enough, and that a culture of judicial respect for decisions of higher courts is also needed, was seen in often dramatic examples in the US in the civil rights litigation of the 1950s and 1960s. *Brown v Board of Education of Topeka* ('*Brown*') was decided by the Supreme Court of the United States in 1954, requiring the desegregation of public schools on the basis that, under the equal protection clause in the Fourteenth

[85] See WS Holdsworth, 'The Early History of Equity' (1915) 13(4) *Michigan Law Review* 293, 295–7.

[86] (1879) 5 App Cas 342, 344–5 (Sir Smith for the Court).

[87] (1963) 111 CLR 610, 632 (Dixon CJ).

[88] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ), cited in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). See also *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 412 [49] (Gummow, Heydon and Crennan JJ).

Amendment of the US *Constitution*, 'separate' was not 'equal'.[89] A subsequent decision in 1955 then called for desegregation to be implemented 'with all deliberate speed'.[90] Famously, in 1957, President Eisenhower enforced the Supreme Court's decision at Little Rock Central High School by dispatching paratroopers to the city and federalising the Arkansas National Guard.[91] But judges in lower courts critical of desegregation significantly delayed practical implementation of the decision elsewhere, undercutting its effectiveness.

One example of this is the case of a man called Virgil Hawkins, who relied upon the decision in *Brown* to seek admission to the University of Florida's law school.[92] *Brown* should have decided the matter once and for all, but the Supreme Court of Florida took it upon itself to weigh up the supposed dangers of desegregation in the name of 'sound judicial discretion'.[93] The Court twice refused to issue an order to the law school requiring it to admit black students. A segregationist federal court judge then deliberately delayed issuing such an order when the matter was remanded to him.[94] Nine years ultimately elapsed between the start of Virgil Hawkins' litigation and the eventual issuing of an order to the law school requiring it to admit black students.[95]

There are other, more macabre examples. Richard Hodder-Williams recounts the following from the state of Georgia:

> Aubrey Lee Williams, a black [man] sentenced to death for murder, had appealed his conviction and sentence on the grounds of an unconstitutionally impanelled jury. The [US] Supreme Court, relying on one of its own recent decisions, remanded Williams's appeal back to the Georgia Supreme Court; Felix Frankfurter authored the brief opinion and noted that the [US Supreme] Court 'rejected the assumption that the courts of Georgia would allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impanelled'. The response from Georgia contradicted Frankfurter's assumption. 'We will not supinely surrender sovereign powers of the State,' the unanimous opinion of the Georgian Supreme Court thundered, and it went on to read a lecture to the [US] Supreme Court on its reprehensible oversight of the

89 347 US 483, 495 (Warren CJ for the Court) (1954).

90 *Brown v Board of Education of Topeka*, 349 US 294, 301 (Warren CJ for the Court) (1955).

91 Tony A Freyer, 'Enforcing *Brown* in the Little Rock Crisis' (2004) 6(1) *Journal of Appellate Practice and Process* 67, 68.

92 See Richard Hodder-Williams, *The Politics of the US Supreme Court* (George Allen & Unwin, 1980) 111.

93 Ibid, quoting *Florida ex rel Hawkins v Board of Control*, 83 So 2d 20, 25 (Roberts J) (Fla, 1955).

94 Hodder-Williams (n 92) 111.

95 Ibid. See *Hawkins v Board of Control of Florida*, 162 F Supp 851, 853 (DeVane J) (ND Fla, 1958).

> Tenth Amendment and reaffirmed the death penalty. On 30 March 1956 Aubrey Williams died in the electric chair.[96]

This incredible example demonstrates that a hierarchical judicial structure is important to the effectiveness of judicial decisions, but a culture of respect for that structure is necessary on the part of judges themselves. That is not only a historical concern. At the beginning of 2020, a District Court Judge in the US accused the Supreme Court of 'actively participating in undermining American democracy', identifying particular decisions of the Supreme Court as having achieved that result.[97] The judge also labelled the statements of Chief Justice John Roberts at his Senate confirmation hearing as 'a masterpiece of disingenuousness'.[98] Judges can certainly be expected to hold opinions on how legal issues should be resolved — that is their job, after all. But publishing personal attacks on particular decisions can only harm the public's perception of the courts. They also call into question whether lower courts would follow the decisions of higher courts so as to ensure that the law of the land is properly and effectively applied.

The High Court has been free from problems such as these. Its decisions have been respected in the judicial hierarchy, by the people and by the other branches of government. This is achieved in large part by the fact that the work of the Court is not politicised even though much of its work is concerned directly with governmental power. More than 70 years ago, Dixon J said that '[t]he *Constitution* is a political instrument. It deals with government and governmental powers.'[99] It follows that, although the Court makes decisions on a legal basis, the High Court must make decisions which *affect* political issues. But, as Dixon J also said, the reference to questions as 'political' is 'easy to make [and] though it has a specious plausibility … it is really meaningless'.[100] What is important to notice is that the decisions which the High Court has made, even in matters of intense party-political controversy, like in *Australian Communist Party v Commonwealth*, have been accepted by the government of the day as concluding the legal and constitutional issues which the Court decides. By and large, there has not been the partisan criticism of decisions, by either the political branches of government or the media, which now seems so common in some other well-developed jurisdictions. And the dangers of injecting such

96 Hodder-Williams (n 92) 111–12 (citations omitted).

97 Lynn Adelman, 'The Roberts Court's Assault on Democracy' (2019) 14(1) *Harvard Law and Policy Review* 131. See especially at 131.

98 Ibid.

99 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82.

100 Ibid.

considerations into debate are revealed by the experience in those other jurisdictions. Of course, nothing I have said is intended to ignore or discourage the importance of critical analysis of the decisions of courts. Critical, informed analysis is not only healthy, but essential, in a democracy.

It has taken a long time for courts to build the integrity which they now have. The idea that judicial decisions will be respected by the political branches of government no matter the outcome was not at all taken for granted in the US in Lincoln's time,[101] and up until the 17th century the English judiciary 'still cowered to the whims of the monarch, who expected judges to serve and protect the royal interest'.[102] Nor have courts themselves always respected the decisions of other courts, often battling for control amongst one another.

In short, the effectiveness of judicial decisions has been consistently undermined or compromised throughout history. It is only as a result of successive political, social and judicial upheavals that a culture of respect towards decisions of courts like the High Court has been established. That respect is a historically contingent fact — it is not some necessary truth about the order of things. What that means is that we need to work to ensure that a culture of respect for judicial decisions continues. That culture will not take care of itself.

All who care for the wellbeing of our system of government must do whatever they can to support that culture. They must do that recognising the related considerations of fragility and response to change. As we respond to change, we must be mindful of how the response affects our institutions of government and, in the case of the courts, whether the change that is made supports and enhances a culture of respect for judicial decisions. And in thinking about these matters, we must pay close attention to our constitutional settings. The preservation of the integrity of all arms of government created by the *Constitution* is necessary for the maintenance of the strength of each arm of government.

B *Constitutional Setting*

The High Court is not a freestanding institution. It is one part of an overall system of government which was established by a written document: the *Constitution*. The fact that our *Constitution* is written matters to the High Court's institutional integrity. It means that the position of the Court within the governmental framework is fixed unless altered in accordance with the procedure established by s 128 of the *Constitution*. That procedure is complex: it requires an Act of Parliament passed in each House and a referendum gaining the

[101] See above 11.

[102] Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 2–3.

support of a majority of voters in a majority of states, as well as a majority of voters in the nation as a whole.[103]

This can be contrasted with the UK, where there is no written constitution. Until relatively recently, the highest court in the UK was a committee of the House of Lords. It lost that role in 2009 with the creation of the UK Supreme Court. That great institutional change — removing the highest judicial body from the legislative environment in which it had always sat — was achieved simply by the passage of legislation in Parliament.[104] No referendum or any other complex process was required, precisely because the UK operates with a largely unwritten constitution which has parliamentary sovereignty at its heart.

Australia's written *Constitution* does not only insulate the Court from the threat of legislative change. It also sets up particular guarantees of institutional integrity. The first of these is in s 72, which says that judges shall be appointed to the Court and not removed except for proved misbehaviour or incapacity. Both aspects of this section are important. The fact that judges of the Court are appointed insulates them from the political pressure which comes with popular election. This reflects the fact that the proper function of a court is to 'apply the law, not public opinion'.[105] We are accustomed to the appointment of judicial officers in this country but, by contrast, nearly 90% of state judges in the US 'face some kind of popular election'.[106] This also brings a need to raise funds for election campaigns. The risk of bias when involving money in matters of legal judgment has led the US Supreme Court to require a judge to recuse himself when faced with a case involving a party who donated significantly to the judge's election campaign.[107]

The fact that judges cannot be removed from office except for proved misbehaviour or incapacity has a similar effect. It ensures that a judge can work independently; that is, 'insulat[ed] from the political and personal consequences of [their] legal decisions'.[108] Unlike the threat of impeachment hanging over the head of Marshall CJ when deciding *Marbury*, Justices of the High Court are free to decide cases on their merits without fear of retribution. The

[103] *Constitution* s 128. Cf *Constitution of India 1949* (India) art 368.

[104] *Constitutional Reform Act 2005* (UK) s 23.

[105] Justice Michael McHugh, 'Tensions between the Executive and the Judiciary' (Speech, Australian Bar Association Conference, 10 July 2002).

[106] Jed Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (Harvard University Press, 2012) 3.

[107] Justice Benjamin of the West Virginia Supreme Court of Appeals had to recuse himself from hearing an appeal because the appellant had financially contributed to Benjamin J's election to the Court: *Caperton v AT Massey Coal Co*, 556 US 868, 884–6 (Kennedy J for the Court) (2009).

[108] Shugerman (n 106) 7.

work of the Court is not compromised by such fears; it retains its integrity in carrying out its task.

Beyond s 72, the *Constitution* gives strong support to the institutional integrity of the Court by establishing a separation of powers. That separation has some distinct and important characteristics. It is practical, not theoretical.[109] One of its fundamental purposes and effects is to seek to isolate the judicial branch from the political branches of government and the partisan divisions that are an intrinsic part of the political branches. As noted earlier, that division has been remarkably effective in Australia, where there is no evidence that courts make decisions in line with the governments who appointed them.[110]

Again, that separation of powers is not just something which is part of our written *Constitution*. It is part of the spirit in which the Court works. The strength of the separation of powers depends upon its respect by the members of the Court. This, too, should not be taken for granted. The US *Constitution* also establishes a separation of powers, but a recent dissent by Sotomayor J in that country's Supreme Court suggested that this was not being properly respected. In *Wolf v Cook County, Illinois*, her Honour argued that the Court had been 'all too quick' to accede to the executive's applications for a stay of decisions of lower courts.[111] In her Honour's eyes, this 'benefited one litigant over all others'.[112] Justice Sotomayor said that she 'fear[ed] that this disparity in treatment erodes the fair and balanced decision-making process that this Court must strive to protect'.[113] This dissent reminds us that separation of powers is something which must be put into practice — it is not an abstract principle, or something which must be raised in submissions in order to have some application to a case. It concerns the relationship between different institutions of government, and that has application to many matters which come before the Court.

C *Representative and Responsible Government*

Having dealt with s 72 the *Constitution* and the principle of separation of powers, it is also important to recognise that there is an equally fundamental aspect of our constitutional inheritance which affects the institutional integrity of the

[109] See *Davison* (n 6) 370 (Dixon CJ and McTiernan J), quoting *Prentis v Atlantic Coast Line Co*, 211 US 210, 226–7 (Holmes J for the Court) (1908).

[110] See above nn 23–4 and accompanying text.

[111] (US Sup Ct, No 19A905, 21 February 2020) slip op 6.

[112] Ibid 6.

[113] Ibid 7.

Court; that is, the centrality of representative and responsible government to our constitutional system.

So far, the 'external' factors I have spoken of as affecting the High Court's integrity have been matters of either constitutional law or political culture. Representative and responsible government are something of a mix of the two. The idea that government in this country is representative is, most certainly, part of our constitutional law. Sections 7 and 24 of the *Constitution* guarantee that the Senate and House of Representatives, respectively, will be 'directly chosen' by the people. Responsible government, in turn, 'provides the framework of principle through which [that] representative democracy is translated into effective government in the Commonwealth and all States'.[114] Representative government ensures that the legislature is responsive to the people of the country, because the electoral pressure on members of parliament and senators means that the Parliament 'only goes where it thinks in the end the nation will follow'.[115] Responsible government, in turn, ensures that the executive retains the confidence of the elected members and takes responsibility for the administration of government. Bicameralism, with the Senate elected by the people but according to a method different from the House of Representatives, provides a further check on the power of both the House of Representatives and the executive government formed by the majority in that House.

The importance of these principles to our constitutional system cannot be overstated. They are central pillars of the Westminster form of government. Responsible government was described in *R v Kirby; Ex parte Boilermakers' Society of Australia* as 'the central feature of the Australian constitutional system'.[116] The Australian *Constitution* does not adopt the Westminster form of government in its entirety, of course. We have a federal system and the Commonwealth Parliament is not sovereign as Westminster is in the UK, for example, as it is limited to specific heads of legislative power under the *Constitution*.[117] Nevertheless, the assumption that representative and responsible government would be the foundation for the workings of our governmental system manifests itself in a number of ways, some small and some large. These instances reflect the idea that happens to be the description which the UK Attorney-General has put as her Twitter account biography: 'Making law and

[114] Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) 147.

[115] Walter Bagehot, *The English Constitution* (Keagan Paul, Trench, Trübner, 1922) 131.

[116] (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers' Case*').

[117] See, eg, *Constitution* s 51.

politics work together at the heart of the UK constitution'.[118] The importance of representative and responsible government to our own constitutional system makes that idea equally applicable and important for us. Politics and law are considered part of the same enterprise of governing in our systems.

One of the larger impacts of the centrality of the ideas of representative and responsible government is the fact that, putting to one side limited protections such as those in relation to trial by jury[119] and freedom of religion,[120] the Australian *Constitution* has no bill of rights. Representative and responsible government assume that, in short, Parliament will 'do the right thing'. It is a political philosophy which assumes that the best protector of individuals' liberty and rights is the accountability of the political branches of government to the people, who will not blithely accept incursions on their freedoms. Thus, Robert Menzies said that responsible government was 'the ultimate guarantee of justice and individual rights' in our society.[121]

This political ethos is thought to be stronger than words on a piece of paper in the form of a bill of rights or other such document. Whether or not that is true does not matter here — what matters is that there has been a deliberate choice of constitutional design which focuses on Parliament 'doing the right thing', and the legacy of that choice is still with us.

There are other manifestations of the same idea on a smaller scale. The principle of legality is one of them. The principle of legality says that when a court comes to interpret a statute, it will not find that Parliament has infringed fundamental common law rights unless Parliament has expressed an intention to do so in clear terms.[122] This is based on the same assumption already discussed: namely, that Parliament is an organ which is representative and responsible.[123] As such, it will be loath to infringe the rights of those it represents, and to whom it is ultimately accountable.

[118] 'Attorney General', *Twitter* (Web Page) <https://twitter.com/attorneygeneral>, archived at <https://perma.cc/3XGP-R8HL>.

[119] *Constitution* s 80.

[120] Ibid s 116.

[121] Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell Australia, 1967) 54.

[122] *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes*, rev J Anwyl Theobald (Sweet & Maxwell, 4th rev ed, 1905) 122; *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), quoted in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [20]–[21] (Gleeson CJ).

[123] See Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37(2) *Melbourne University Law Review* 372, 413.

Both of these aspects of our law — the lack of a single, written rights document and the principles by which courts interpret Acts of Parliament — reflect not only our constitutional law and arrangements, but also part of our political culture. The structure of government *assumes* that the issues which our society faces from time to time can be dealt with by Parliament. This is consistent with the general common law approach of our courts, which proceed cautiously and on the basis of precedent — as McHugh and Gaudron JJ once said, '[i]t is a serious constitutional mistake to think that the common law courts have authority to "provide a solvent" for every social, political or economic problem.'[124] The making of good law in Australia is not assumed to depend to any large extent on the activity of courts.

None of this is to say that courts simply defer to all judgments of the political branches in all matters. That is clearly not the case. The *Constitution* establishes a system in which the High Court has the role of ensuring that legislatures remain within the bounds of their constitutional powers,[125] and that the executive remains within the bounds of the powers set down in statutes, in turn, by those same legislatures.[126] The point, rather, is that the constitutional system we have — with representative and responsible government at its heart — is one that assumes that most problems will be dealt with in a responsible manner by Parliament, and not by the courts.

What does this have to do with the institutional integrity of the High Court? The institutional integrity of the Court depends in large part on the political system maintaining the tradition of representative and responsible government in good health. As I have explained, the role of the High Court is shaped by the assumption of the framers of the *Constitution* that the political branches will operate in accordance with the dictates of representative and responsible government — hence the lack of a bill of rights in our system, and the application of doctrines like the principle of legality. The *Constitution* assumes that Parliament will protect and respect the rights of individuals. The corresponding role of the High Court is shaped by that assumption. The Court has an important role in ensuring that legislative power is exercised only within constitutional bounds, but it has a more circumscribed role in the protection of rights than, for example, the Supreme Court of the United States or the Constitutional Court of South Africa. It is not assumed that courts, including the High Court, will regularly be expected to venture into contentious political matters. The High Court, as the final appeal court for the whole of the Australian legal

[124] *Breen v Williams* (1996) 186 CLR 71, 115, quoting *Tucker v US Department of Commerce*, 958 F 2d 1411, 1413 (Posner J) (7th Cir, 1992).

[125] See generally *Communist Party Case* (n 61).

[126] See generally *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

system, has a much wider jurisdiction than other courts, including the Supreme Court of the United States[127] and, at least until amendments in 2013, the Constitutional Court of South Africa.[128] This much wider jurisdiction means that the Court deals with many cases that are not immediately politically controversial. Rather, contentious political matters are expected to be dealt with by the political branches themselves. This protects the institutional integrity of the Court by ensuring that the Court is not seen to be taking sides in partisan contests. The role of the Court is to decide matters of law, and its integrity would be damaged if it did otherwise.

This is in accordance with constitutional principle in this country but, importantly, it is also in accordance with the expectations of most people. Those expectations matter. As we have seen, part of what gives an institution its integrity is that its actions are respected. Actions are respected only when institutions play the role which people expect them to play.

What that role is differs between different institutions in different places. As a former Chief Justice of the Court, Robert French, said, the proper limits of judicial activity depend upon 'constitutional structures, the historical role of the judiciary and what … society expects of its judiciary'.[129] The Chief Justice gave the example of the public interest jurisdiction exercised by Indian courts which, he said, 'would probably be seen by Australians, if undertaken by Australian judges, as an unwarranted intrusion into executive functions'.[130]

As noted earlier, each of the three arms of government must fulfil their own functions. And they do that through different functionaries according to their own different skills and professional habits. The judicial branch should not intrude into executive or legislative functions. But so too the legislative and executive branches should not intrude into judicial functions. The fragility of this separation is illustrated by the difficulty of drawing a line between legitimate criticism of, and comment about, judicial decisions and the application of pressure on the courts to render more popularly accepted decisions.

V Conclusion

What all this comes to is that the institutional integrity of the Court relies on a constitutional structure. Internal factors — how and where the Court operates,

[127] See *United States Constitution* art III § 2.

[128] See *Constitution of the Republic of South Africa Act 1996* (South Africa) s 167; *Constitution Seventeenth Amendment Act 2012* (South Africa).

[129] Chief Justice RS French, 'Judicial Activism: The Boundaries of the Judicial Role' (Speech, LawAsia Conference, 10 November 2009) 1.

[130] Ibid.

and its internal structure and arrangements — promote institutional integrity but they rely on, and operate within, a constitutional structure. It is only if that constitutional structure remains intact that the Court can fulfil its role. And it is only if that constitutional structure remains intact that the role of the Court will meet the needs of our society. The effectiveness of the Court depends upon the effectiveness of the other branches of government, precisely because those branches are part of the constitutional structure in which the Court was created, and in which it continues to sit.

Maintenance of that constitutional structure depends on two things: a political culture and a culture of politics. A political culture in which there is respect for court decisions is vital to the integrity of courts — that is, their ability to function effectively and free from influence. A political culture in which there is respect for individuals' rights is, similarly, part and parcel of our inheritance of a Westminster form of government.

Aside from this political culture is, as I said, the importance of a culture of politics. What this means is a culture in which the social, political and economic challenges which the country faces over time are dealt with, and are expected to be dealt with, through political avenues. The constitutional structure assumes that Parliament deals with those challenges through political means. Australia is lucky to have inherited a tradition of responsible government and to have kept it alive. The integrity of all our institutions depends on it staying in good health.

But on the High Court rests 'the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole [constitutional] system was constructed'.[131] When the Court fulfils its role, it upholds the institutional integrity which has been built over more than a century.

[131] *Boilermakers' Case* (n 116) 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).