

# Justice in the Eye of the Beholder

## Law & Justice Foundation

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I thank the Law and Justice Foundation for the invitation to present the 2013 Law and Justice Address. The recognition at this dinner of the efforts of those who have been involved in improving access to justice for people across New South Wales is an event of importance and I am delighted to be part of it. As the efforts of the nominees and award winners demonstrate, giving effect to the aspiration to justice is hard work not least because it is often done in a setting in which there is disagreement about what justice requires. That leads to my topic—Justice in the Eye of the Beholder.

Justice may be thought of in many ways. Ambrose Bierce the American author and satirist described it in his Devil's Dictionary as:

A commodity which in a more or less adulterated condition the State sells to the citizen as a reward for his allegiance, taxes and personal services.

While speaking of the devil, let me speak of Dante Alighieri's Divine Comedy written in the 14th Century. It was translated in part, to faint critical acclaim, by Sir Samuel Griffith and more recently to much greater acclaim by Clive James. It offers us one understanding of divine justice at the end of the medieval period.

In the first book, "The Inferno", Dante gives an account of a visit to the nine circles of Hell where, guided by the poet Virgil, he observes the punishments applied to various classes of sinner many of whom seem to be Italians. The divine justice depicted in The Inferno was imaginative and carefully nuanced. All of it involved eternal torment. By way of example, those who practiced simony, the sin of trafficking for profit in things spiritual, were inserted head first into rock holes with

only their feet and calves protruding. Eternal flame was then applied to the soles of their feet.

More benign examples of divine justice in the Christian tradition can challenge the modern reader. The New Testament parable of the workers in the vineyard where those hired for the last one hour's work were paid as much as those who had worked all day may seem at odds with contemporary notions of wage justice. On the other hand it may be that it was really a story about the vineyard owner's generosity which was not to be confined by concepts of justice. To that extent the story is relevant to tonight's award ceremony. The awards are not so much about "justice" in action. They recognise generous action in the cause of access to justice. It is important to distinguish between justice, particularly distributive justice and generosity. The former is important to the working of any society. The latter achieves things beyond the reach of justice.

The idea of justice and just action is one which has been much debated by philosophers, religionists, jurists, lawyers and judges. It cannot escape the contemplation of any person who spares a thought for the state of his or her society or how to conduct himself or herself in relation to other people. The other people may be family members, friends and acquaintances, colleagues in the workplace or the multitude of the nameless who suffer disadvantage visited upon them by tragic circumstance or self-inflicted or a combination of both.

The insertion of a speech in the interval between main course and dessert is often fatal to the enjoyment of dessert. It is not therefore the occasion for an extended discourse on the idea of justice. Nevertheless it is appropriate to acknowledge its complexity and its long evolution in human thought. Plato's concept of "Dikaiosune" expounded in "The Republic" has frequently been translated as "justice". His word however embraced a broad ethical notion applicable to individuals and sometimes translated as "right" or "righteousness", particularly in dealings with others. It was transposed into a desired social structure in which everybody knew his or her place in a hierarchy. On the top were the ruling classes or philosophers, then came the warriors or defenders of society and at the bottom of the heap were farmers and

artisans. No doubt if you were a member of the ruling class you would have thought it a fine arrangement. It is not a structure which our democratic tradition and notions of equality of opportunity would accept as justly structured.

Fast forwarding to the 20th and 21st Centuries leading works on theories of justice have embodied notions of fairness. John Rawls in his "Theory of Justice" proposed a minimum of two rules reflecting that idea in a just society:

- The liberty principle - each person should have an equal right to the most extensive basic liberty compatible with similar liberty to others;
- The difference principle - social and economic inequalities are to be arranged so that they are both:
  - (a) reasonably to be expected to be to everyone's advantage; and
  - (b) attached to positions and offices open to all.

The title of Ronald Dworkin's book "Justice for Hedgehogs" published in 2011 referred to a quote by the Greek poet Archilochus taken up by the philosopher Isaiah Berlin who wrote:

The fox knows many things, but the hedgehog knows one big thing.<sup>1</sup>

For Dworkin the big idea can crudely be stated as moral value providing an objective underpinning for ideas of justice. He wrote:

We cannot defend a theory of justice without also defending, as part of the same enterprise, a theory of moral objectivity. It is irresponsible to try to do without such a theory.<sup>2</sup>

On that basis he was prepared to state his belief that there are objective truths about value and:

...that some institutions really are unjust and some acts really are wrong no matter how many people believe that they are not.<sup>3</sup>

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<sup>1</sup> Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011), 1.

<sup>2</sup> Ibid 8.

<sup>3</sup> Ibid 7.

If you accept that proposition then you accept the possibility that acting in the interests of justice may involve swimming against the tide of public opinion.

Professor DD Raphael wrote in the first chapter of his book "Concepts of Justice", that Justice:

cannot be captured in a simple formula like "the rendering to each person of what is his"...[a] traditional definition from Roman law.<sup>4</sup>

The Roman law formulation does not cover the justice of criminal law or claims made in the name of justice outside the sphere of law. Justice is a protean concept. However a large part of its meaning as Professor Raphael writes is:

...pretty well captured in a more familiar term "fairness" which is not at all obscure and is readily grasped even by young children.<sup>5</sup>

The two ideas are nevertheless not co-extensive. Further we all know that what is fair in a particular case may be a contestable and contested question. There are some cases in which all that the law and Courts can do is fairly allocate the burdens of unfairness—the slings and arrows of outrageous fortune which can fall on anybody—for example where two innocent parties are affected by a third party's fraud. Related to that is the question, to what extent should society contribute its resources to offset the effects of one person's wrongs on an innocent person. Criminal injury compensation is an example of a measure that reflects a societal view that responses to the consequences of crime are not just a matter of doing justice between the State and the offender or between the offender and the victim, but also between the State and the victim. It is a truism that crime is embedded in a social context. While, subject to the principles of criminal responsibility, individuals must be held accountable for their actions, those actions do not occur in a vacuum. There is a societal dimension. In particular there are many cases in which one who was once a victim whether of some form of abuse or gross disadvantage has become an offender. It is no distraction from the concept of individual responsibility to recognise that doing justice in the aftermath of a crime may involve measures to minimise the harm caused to innocent parties by the offence—where mitigation is possible. Nor is it any

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<sup>4</sup> David Daiches Raphael, *Concepts of Justice* (Clarendon Press, 2001), 1.

<sup>5</sup> Ibid.

distraction from that concept to recognise that the State, in its own interest, the interest of potential future victims, and the interests of the offender should be prepared to direct significant resources to rehabilitation where rehabilitation is possible.

Our legislators no doubt aspire to notions of justice and fairness in the laws that they enact. There is a well-established tradition now of Parliamentary Committees for the scrutiny of laws by reference to a number of standards including, at the Commonwealth level, compliance with human rights standards.<sup>6</sup> But the enactment of a law does not settle the debate whether that law is just or fair. Law in the end does not define justice nor tell us what is just in a particular case. It may tell us what we must do or what we have a right to do. Its limits may tell us what we are free to do. In many cases those statements will reflect or embody what most people would agree are principles of common morality. But that is not always so. What is lawful is not always right or just or fair. And as I intimated earlier what is lawful and just and fair may be exceeded by what is generous and altruistic and giving.

There are laws which attract debate because their proponents and their opponents are at odds on what is fair or just in the class of case to which the law is directed. The law governing the treatment of asylum seekers who are unlawful non-citizens is one such class of law. Another is the category of law which provides for the imposition of mandatory minimum sentences for particular classes of offence. The proponents say that such laws meet urgent societal needs to deal decisively with a particular kind of criminal activity and to establish a high level of general deterrence. Their detractors may say that they lead to absurdity and injustice in their application in cases to which the legislators never imagined they would apply. As a general rule, "one size fits all" laws may have the virtue of apparent clarity but can lead to outcomes in some cases which most people would regard as unjust by ordinary standards of morality. There is no bright line test by which such debates can be resolved. They often involve judgments of degree about the priority of one legitimate social objective over another and the proportionality of the measure to its objective. They are debates of the kind regularly conducted in the democratic arena.

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<sup>6</sup> See for example the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

There is a difficulty with laws which lack what I call "moral clarity".<sup>7</sup> A law has moral clarity when it is easy to understand what the law is good for. "Thou shalt not kill" is a command which has moral clarity. Moral clarity is a concept closely connected to that of legislative purpose. When a law has a clear purpose people affected by it have some prospect of knowing what it is good for. The difficulty with a number of our laws is that their complexity makes it hard to discern a particular legislative purpose. That may be because the law gives effect to some political compromise which seeks to strike a balance between conflicting interests.

The area of taxation law is a wonderful laboratory for excursions in purposeless interpretation. *The Goods and Services Tax Act* and the old *Sales Tax Act* offer examples. Much intellectual energy has been spent by Courts deciding whether certain goods or services were inside or outside classifications attracting different rates of tax. Was an office chair which could be used for household purposes able to be classed as "a chair of a kind used for household purposes"? More recently the question—is a mini-ciabatte a biscuit or something else for the purposes of GST—occupied four Justices of the Federal Court, one at first instance and three on appeal.<sup>8</sup>

Intellectual property law is another area where moral confusion can arise. Intellectual property statutes sometimes reflect the tensions between the interests of owners and users. This is particularly so in the field of copyright in the digital age. The difficulty in trying to attach a moral purpose to intellectual property law is reflected in endeavours to devise convincing anti-piracy messages for DVDs. In this connection different people have different ideas of what is fair and just depending upon whether they are the artists and studios who bring copyright works into existence or whether they are users who might regard anything out in the internet as part of the public domain. Messages equating copyright infringement with theft do not

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<sup>7</sup> See further Robert French, 'Law – Complexity and Moral Clarity' (Speech delivered at the North West Association and Murray Mallee Community Legal Service, Mildura, 19 May 2013).

<sup>8</sup> *Lansell House Pty Ltd v Federal Commissioner of Taxation* [2010] FCA 329; [2011] FCAFC 6.

always compute for these people. My favourite anti-piracy message is that which was posted by an American performer, Louis CK, who made a video of one of his performances for online purchase for \$5.00. His message was:

Please bear in mind that I am not a company or a corporation. I am just some guy. I have paid for the production and posting of this video with my own money. I would like to be able to post more material to the fans in this way which makes it cheaper for the buyer and more pleasant for me. So, please help me keep this being a good idea. I can't stop you from torrenting; all I can do is politely ask you to pay your five little dollars, enjoy the video and let other people find it the same way.<sup>9</sup>

That was a message which had moral clarity. The justice of the artist's position was eloquently and clearly expressed.

It is sufficient to say that the complexity of law today can deprive it of moral clarity and thus detach it from concepts of what is just and fair. To that extent, the perceived legitimacy of the law may depend more upon the fact that it has been enacted through democratic process than because people think it is a good law. That may be sufficient for most. However it makes the job of securing compliance more difficult.

The idea of justice remains a larger idea for most people than "justice according to law"—a larger idea than the allocation of rights, duties, liabilities and punishments and the award of legal remedies. There is a story of a prominent legal practitioner in the Northern Territory in about 1911 whose client said—"I want justice". The lawyer responded:

We can probably do better. I think we can win your case.<sup>10</sup>

Can Courts deliver justice? The answer to that question is yes but there is a limitation. The justice which the Courts can deliver must be justice according to law not what the Judge thinks is a fair thing divorced from statute or legal principle. Sometimes the law requires the Court to give a decision which many would think of as unjust even though it is according to law. Sometimes the Court will say so in order to direct attention to the need for reform of the law. Sometimes apparent forensic

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<sup>9</sup> Louis CK word - *Live at Carnegie Hall*.

<sup>10</sup> Douglas Lockwood, *The Front Door: Darwin 1869-1969* (Rigby, 1968), 234.

failure will lead to a significant change in the law. The failure by the plaintiffs in the *Nabalco Case* in 1971<sup>11</sup> to secure recognition at common law of their customary native title was an important factor in the convening of the Woodward Royal Commission. That Royal Commission in turn recommended the establishment of a statutory land rights regime "as a matter of simple justice". *The Aboriginal Land Rights (Northern Territory) Act* 1976 created a system of fee simple titles for traditional land owners in the Northern Territory. It was a heavily litigated statute. There were no less than 14 cases in the High Court involving that Act prior to the High Court's decision in *Mabo (No 2)*<sup>12</sup> in 1992. It may be that that litigation which involved a statute in which the concept of traditional connection with country was embedded, helped to prepare the High Court for its consideration of the issues which led to its decision in *Mabo (No 2)*.<sup>13</sup>

Closely connected to basic concepts of justice in our society is the idea of the Rule of Law.

The Rule of Law has a close connection with the notion of administrative justice. That kind of justice is a thin concept but its significance is not to be underestimated on that account. It provides the skeletal infrastructure within which official power of any kind which may affect individuals must be exercised. It involves at least the following elements:

1. Lawfulness—that official decisions are authorised by statute, prerogative or constitution.
2. Rationality—that official decisions comply with the logical framework created by the grant of power under which they are made.
3. Consistency—that official decisions apply legal rules consistently to all to whom the rules apply allowing for different outcomes where there are relevant differences between cases.

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<sup>11</sup> *Milirrpum v Nabalco Pty Ltd*, (1971) 17 FLR 141.

<sup>12</sup> (1992) 175 CLR 1.

<sup>13</sup> Robert French, 'The role of the High Court in the recognition of native title' (2002) 30 *University of Western Australia Law Review* 129.

4. Fairness—that official decisions are reached fairly, that is, impartially in fact and appearance and with a proper opportunity to persons affected to be heard.
5. Good faith—official decisions must be made honestly and with conscientious attention to the task required of the decision maker—this also may be seen as an aspect of rationality in decision making.

Those criteria are also applicable to official decisions in the exercise of judicial power. Without that skeletal framework of public justice reflecting the Rule of Law, the implementation of more substantive concepts is unlikely.

Justice has many faces, many dimensions. What it means in particular cases is contestable and often contested. Justice according to law provides a measure of justice but not complete justice. Justice itself, however expansively it is defined, does not embrace the generosity of spirit and the commitment to providing access to justice which are recognised in tonight's awards ceremony.

Thank you for inviting me to speak to you.