AUSTRALIAN BAR ASSOCIATION CONFERENCE

NEW YORK, 2 JULY, 2000

JUDICIAL LEGITIMACY

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Political legitimacy is a familiar concept. It is the foundation of community acceptance of authority. The existence of such legitimacy is sometimes contentious, but, where it exists, it secures general obedience to laws even though they do not have universal approval. It is the factor which transforms the will of an electoral majority into a binding rule which the community generally will accept, if not cheerfully, at least as a matter of civic responsibility.

Democracy does not involve the assumption that the wishes or interests of the majority must always prevail over those of minorities. A proper concern for human rights requires that laws, and the exercise of power, should respect minority groups. A decent regard for those who are in a minority in some respects, or on some issues, is for the benefit of society generally. In purely utilitarian terms, enlightened self-interest dictates that those in a

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majority on one issue ought to respect the legitimate interests of the minority, if only because there will be other issues on which they themselves will be in a minority. A weakness of some human rights discourse is that it attributes permanent minority status to particular categories of people, as though we live in a single-issue society. A measure of the quality of a civil society is the respect which is shown for minority views and interests. Even so, laws are generally obeyed, and the power of people in authority is generally accepted, on the understanding that they represent the democratically expressed will of the community. It is political legitimacy which sustains governmental power, and it is the need for such legitimacy which sets the limits of governmental authority.

Questions of judicial legitimacy also arise. Like parliamentarians, judges make decisions which, in the interests of civil order, have to be accepted, even if they are not popular. Since court cases usually have at least one losing party, almost all judicial decisions adversely affect somebody. Some offend large sections of the community, or powerful and vocal interest groups. What ultimately secures their acceptance is not their wisdom, as to which there may be strong disagreement, but their legitimacy. How are the boundaries of judicial legitimacy established?

Judicial power, which involves the capacity to administer criminal justice, and to make binding decisions in civil disputes between citizens, or between a citizen and a government, is held

on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate, and the terms of the judicial oath.

The direct legal source of the power exercised by a judge is statutory. Commissions are issued to Australian judges by the executive government under authority conferred by an Act of Parliament. The executive government which appoints a judge is responsible to a parliament. The will of the people, expressed through Parliament, is the foundation of judicial power. If one looks beyond the direct source of judicial authority to its ultimate constitutional foundation, the same answer follows. When, in 1902, Alfred Deakin, then Commonwealth Attorney General, introduced into the Federal Parliament a Bill for the *Judiciary Act*, he was required to meet objections that it was unnecessary to establish a High Court of Australia, at least at that early stage in the history of the Federation. He answered by making the argument that, although s 71 of the Constitution, which mandated the establishment of the High Court, did not fix a time within which that was to occur, the Constitution was not merely an Act of the Imperial Parliament, but was, more significantly, an expression of the will of the Australian people. He said:[1]

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1 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10967.

> "The High Court exists to protect the Constitution against assaults. It exists because our Constitution, although an Imperial Act, has a dual parentage. It proceeds from the people of the whole continent. It is one of the institutions which the people of Australia, when they accepted the Constitution, required to be established for the purpose of ensuring that there should not be a departure from the bond into which they thereby entered for themselves and for posterity. This Constitution is not the creation of our State Parliaments only, neither is it the creation of the Imperial Parliament only. It draws its authority directly from the electors of the Commonwealth, and it is as their chosen and declared agent that the High Court finds its place in the Constitution which they accepted."

To a lawyer, the characterisation of the High Court as the agent of the Australian people, entrusted with the responsibility of ensuring observance of the Federal compact, signifies the fiduciary capacity in which it exercises its powers.

Judges are appointed to administer justice according to law, and for most of them, in their day to day activities, their duty is clear. The rules, whether of common law or statute, to be applied to the facts as honestly found, are fairly readily ascertained. The capacity of an individual to make an impartial determination of the facts, and to understand and conscientiously apply the law, is the primary requirement of fitness for judicial office. Many of the laws to be applied by judges give them a discretion, and, within the limits of the principles governing the exercise of such discretion, they will find that they have the capacity, and sometimes the obligation, to exercise qualities of judgment, compassion, human understanding and fairness. Our laws were not made to be administered by computers, and judges have ample scope for exercising qualities of

wisdom and understanding without compromising their integrity or their impartiality. Ultimately, however, in the administration of any law, there comes a point beyond which discretion cannot travel. At this point, if a judge is unable in good conscience to implement the law, he or she may resign. There may be no other course properly available. Judges whose authority comes from the will of the people, and who exercise authority upon trust that they will administer justice according to law, have no right to subvert the law because they disagree with a particular rule. No judge has a choice between implementing the law and disobeying it.

This principle is reflected in the provisions of the Australian Constitution. Covering clause 5 provides that the Constitution, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding "on the courts, judges, and people of every State and of every part of the Commonwealth". It is the binding force of the Constitution, as the basic law, upon courts, that is the source of the power which courts exercise when they review legislative and executive action. This was the point made by Marshall CJ, almost two hundred years ago, in *Marbury v Madison*[2]. The concluding paragraph of the judgment in that case reads:

> "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the

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2 (1803) 1 Cranch 137.

> principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."

The principle that courts are bound by the Constitution, and all other laws, defines the relationship between judges and the community. It is the condition upon which judges and courts are invested with authority.

Like other members of the community, individual judges will, on occasion, disapprove of some of the laws enacted by Parliament. Provided their capacity to administer the law impartially is not compromised, they are free to criticise the law, and to propose change. In fact, judges regularly point out defects in the law, and make proposals for law reform. Many Australian courts have established procedures for drawing to the attention of Parliaments, and Law Reform Commissions, suggestions for changes in the law. Judges are often especially well placed to understand, and comment upon the implications of, legislative measures. The qualification earlier expressed, however, is important.

Impartiality is a condition upon which judges are invested with authority. Judges are accorded a measure of respect, and weight is given to what they have to say, upon the faith of an understanding by the community that to be judicial is to be impartial. Judges, as citizens, have a right of free speech, and

there may be circumstances in which they have a duty to speak out against what they regard as injustice. But to deploy judicial authority in support of a cause risks undermining the foundation upon which such authority rests.

The principles of judicial legitimacy, which sustain the acceptability of judicial authority and decisions, are most easily seen at work in the context of the day by day application of statutory rules and settled legal principles. But legal principles sometimes need to be changed or developed, and the meaning of statutes is not always clear.

The methodology by which judges carry out their function, in appropriate cases, of developing and refining the principles of the common law, was the subject of detailed examination by McHugh J in a paper delivered to this Conference two years ago[3]. The views there expressed, with which I respectfully agree, have an important bearing on the legitimacy of the judicial process. I simply refer to them, without repeating them.

Statutory interpretation is a function which sometimes leads to accusations that individual judges, under the guise of construing a statute, are in truth amending it. When such a charge is made, it

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3 The Hon Justice M H McHugh AC, "The Judicial Method" (1999) 73 *Australian Law Journal* 37.

is an imputation of illegitimacy, and implies not merely error but abuse of power.

In practice, judges have three major sources of protection against such an accusation. First, the principles according to which disputes about the meaning of statutes are resolved by courts are reasonably well established, and generally accepted. They are similar in most common law jurisdictions. In many respects they are reinforced by Acts of Parliament governing the subject of statutory interpretation. There are differences between individual judges in approaches to questions such as textual or purposive construction, the utility of various aids to construction, such as the parliamentary history of an Act, and other matters. By and large, however, it is a rare judge who strays so far from the ordinary canons of construction as to produce a result which gives rise to a charge, not merely of error, but of usurpation of legislative authority. If such a deviation does occur, it is likely to be readily identifiable. Secondly, the appeal process results in a fairly large measure of conformity amongst judges in their approach to statutory interpretation. Thirdly, if Parliament does not like the way a statute has been construed by the courts, it has it within its power to amend the statute. It is not uncommon for parliaments to respond in this way to a judicial decision which places an unexpected or unintended meaning upon legislation. The capacity of Parliament to do this serves a useful function in cooling down controversy which might otherwise call into question judicial integrity.

The area of judicial activity which gives rise to most questioning of judicial legitimacy is judicial review. Judicial review of legislative action causes tension between the judiciary and the legislature. Judicial review of administrative action causes the same kind of tension between the judiciary and the executive.

There is no provision in the Constitution of Australia, just as there is no provision in the Constitution of the United States, which expressly provides that legislation enacted in excess of the powers conferred by the Constitution, or contrary to some expressed or implied constitutional limitation on power, can be declared by a court to be invalid. At the time of the decision in *Marbury v Madison*, in 1803, it was not the universal opinion in the United States that the Supreme Court had the that power. Thomas Jefferson did not think that the judiciary should have the power to pass upon the validity of acts of the legislature or the executive. His opinion of the judiciary was, to say the least, cautious. He wrote[4]:

> "It is not enough that honest men are appointed judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence. To this bias add that of the esprit de corps, of their peculiar maxim and creed that 'it is the office of a good judge to enlarge his jurisdiction,' and the absence of responsibility, and how can we expect

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4 Jefferson, "Autobiography" in Peterson (ed), *Jefferson – Writings* (1984) at 74.

> impartial decision between the General government, of which they are themselves so eminent a part, and an individual state from which they have nothing to hope or fear. We have seen too that, contrary to all correct example, they are in the habit of going out of the question before them, to throw an anchor ahead and grapple further hold for future advances of power."

Similar criticisms, and apprehensions, have been repeated many times during the 19th and 20th centuries. Federal judges, Jefferson said, are influenced by interest, by which he did not mean only, or even mainly, financial interest. Partiality was what he had in mind. They have a propensity to expand their own jurisdiction. They are relatively unaccountable. They are appointed, paid, and in some cases, promoted by the federal government, and have no connection with the state governments. They do not confine themselves to deciding the issues that require decision in particular cases, but lay down wider principles with a view to extending their own power. For these reasons, according to Jefferson, they are not to be trusted with determining issues between federal and state governments as to the validity of legislation.

By the time the Australian Constitution was drafted, the framers had before them the example of one hundred years of judicial review in the United States. They took for granted the principle established in *Marbury v Madison*. Moreover, as Attorney General Deakin pointed out in his speech to parliament on the Judiciary Bill in 1902, the Australian colonies in the 19th century were familiar with legislatures of limited capacity, and with courts pronouncing upon the validity of legislation. The enactments of

Australian colonial legislatures were frequently scrutinised for validity, both by the Supreme Courts of the respective colonies and by the Privy Council. Indeed, before there was either responsible or representative government in the colony of New South Wales, legislation propounded by the Governor-in-Council was not effective unless the Chief Justice of New South Wales certified that it was not repugnant to the laws of England. From the earliest days of European settlement we had judicial review of legislation.

Attorney General Deakin, referring to the American precedent, said[5]:

> "The special political function of the Supreme Court of the United States is that of pronouncing upon the validity of legislation – the function of determining whether an Act comes within the powers of Congress or is reserved to the State legislatures. That is a power which to foreigners appears almost inexplicable – so strange is it to their experience that any judicial body should have so vast a power. To us, as to our Canadian kinsmen, and the founders of the American Republic, there is no such surprise. In the old colony days, before the American Constitution was established, the State courts were accustomed to pronounce upon their own statutes, and to determine whether or not they conflicted with the Royal charters under which those colonies existed. So in Canada, since the establishment of the Union, without any obvious extension of authority, the supreme and local courts of that country have freely pronounced upon the validity of provincial acts, or upon those of the Dominion Parliament. .. We had precisely similar experiences in these States when they were colonies. We have seen Acts rejected or set aside because they conflicted with the Constitutions of these colonies."

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5 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10969.

It is of the essence of a federation that there be a written instrument distributing legislative power between the parliaments of the entities which comprise the federation, and in Australia we consider that, of necessity, part of the judicial power is to determine disputes as to that distribution. Attorney General Deakin said:[6]

> "What are the three fundamental conditions to any federation authoritatively laid down? The first is the existence of a supreme Constitution; the next is a distribution of powers under that Constitution; and the third is an authority reposed in a judiciary to interpret that supreme Constitution and to decide as to the precise distribution of powers. .. What the legislature may make, and what the executive may do, the judiciary at the last resort declares".

The power to declare invalid an expression of the will of a democratically elected legislature involves a responsibility of a special kind. The existence of an unelected body with a capacity to decide that an enactment of an elected parliament is without effect will only be accepted if the community is confident that the power will be exercised for the purpose for which, and in accordance with the conditions upon which, it was given. This was the reason behind Sir Owen Dixon's famous observation concerning the need for strict and complete legalism in the resolution of federal issues.

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6 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 18 March 1902 at 10966-10967.

It is sometimes overlooked that what he said, in its context, contained a challenge. He asked, in effect: what is the competing view? If the High Court is not to resolve federal conflicts by a legalistic method, what other method is it to employ? Different lawyers have different ideas as to the techniques that are appropriate to strict and complete legalism, but who would care to suggest an alternative to legalism? A complaint that a judgment is literalistic is one that I can understand, and with which, on occasions, I may agree. But what exactly is the meaning of a complaint that a judgment is legalistic? Judges are appointed to interpret and apply the values inherent in the law. Within the limits of the legal method, they may disagree about those values. But they have no right to throw off the constraints of legal methodology. In particular, they have no right to base their decisions as to the validity of legislation upon their personal approval or disapproval of the policy of the legislation. When they do so, they forfeit their legitimacy.

Like the Supreme Court of the United States, the High Court of Australia is composed entirely of lawyers. Unlike the Supreme Court of the United States, a large part, in fact the bulk, of the work of the High Court consists of applying the civil and criminal law as members of the court of final appeal from other Australian jurisdictions. The expertise which the members of the Court are required to bring to bear on that function is their expertise as lawyers. What else could it be? Similarly, they interpret and apply

the Constitution, which is the basic law, as lawyers. The Australian community would be properly concerned if they decided to base their decisions upon the exercise of other supposed talents. What those talents might be, when and how they were acquired, and by whom they might be assessed, are questions that would need examination if legalism were to cease to be the base of decision-making.

Decisions of the High Court are not subject to the usual form of judicial accountability, that is to say, the appeal process. The only form of accountability which applies is the requirement to give reasons. The outcomes of cases may be the occasion of a applause or disapproval. The reasons may appear more or less convincing. But the reasons have one thing in common. They take the form of exercises in legal reasoning. It is by the standards of legal reasoning that they are to be measured.

The process by which a judge explains the reasons for a decision is an intellectual process undertaken in a manner which conforms to the requirements of legal discipline. In 1973, Viscount Radcliffe criticised some of the fashions adopted by commentators on the work of the House of Lords. He referred to those who

categorise judges as timid or bold, vigorous and imaginative, or subservient and regressive. He said:[7]

> "What we have here is romantic writing, and it can be useful only to fellow romantic spirits. The differences of point of view that are being alluded to are intellectual differences to which epithets of heroism and gallantry are comically inappropriate. .. The time has not come in this country when a judge has to summon up any reserves of heroic quality in order to express a novel opinion on a constitutional matter or one possibly unwelcome to the executive of the day. I am not aware that anyone tried to send Lord Atkin to prison for dissenting from the majority of the Law Lords in *Liversidge v Anderson* or that Lord Reid has been the victim of any official persecution because he could not agree with his colleagues in *Shaw v DPP* ... The three Law Lords who certainly embarrassed the government by allowing the *Burmah* appeal seem to have escaped any serious consequences."

The same is true of Australia. Only someone given to mock heroics, or lacking a sense of the ridiculous, could characterise differences of judicial opinion in terms of bravery. The occasions are rare in which an Australian judge is at risk of any personal, financial, professional, or social penalty as a result of the way a case is decided. That is the way the system is meant to work. No doubt, there exist occasions when a judge needs to show moral or even physical courage but these are aberrations. By and large, judges operate in an environment which is almost uniquely secure, and which rarely tests their resources of heroism, no matter how

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7 "Review: Final Appeal – A Study of the House of Lords in its Judicial Capacity. By Louis Blom-Cooper and Gavin Drewry" (1973) 36 *Modern Law Review* 559 at 564.

exciting it may be to think otherwise. Furthermore, as Viscount Radcliffe pointed out, even if one retreats to the more modest concept of "creativity", that word is usually employed without any intellectual content and "as a signal for general applause and as denoting the presence of some numinous quality which it is death to oppose."[8]

The quality which sustains judicial legitimacy is not bravery, or creativity, but fidelity. That is the essence of what the law requires of any person in a fiduciary capacity, and it is the essence of what the community is entitled to expect of judges. There is often room for disagreement amongst lawyers and judges as to what the law requires, but the terms of the trust upon which judges are invested with authority set the boundaries within which the contest must be conducted. In the case of the resolution of federal issues, it is fidelity to the Constitution, and to the techniques of legal methodology, which is the hallmark of legitimacy.

The same considerations apply to judicial review of executive action. The Constitution, the legislation governing judicial review, and the relevant principles of the common law, define the limits of the authority of courts to override administrative decisions. The

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8 "Review: Final Appeal – A Study of the House of Lords in its Judicial Capacity. By Louis Blom-Cooper and Gavin Drewry" (1973) 36 *Modern Law Review* 559 at 563.

legislation changes from time to time, and the common law principles develop. But the Australian statutes on the subject, and the principles of common law, distinguish between review of the merits of administrative decisions, which is usually undertaken by specialist tribunals, and judicial review based upon principles of legality. The difference is not always clear-cut; but neither is the difference between night and day. Twilight does not invalidate the distinction between night and day; and *Wednesbury*[9] unreasonableness does not invalidate the difference between full merits review and judicial review of administrative action.

Australian lawyers are familiar with recent examples of criticisms of courts for supposedly overstepping the boundaries of judicial review, and of legislative response to those criticisms. Internationally, allegations have been made that a process of judicialization of public policy is subverting principles of government[10].

The most effective response to such a concern is for judges to continue to respect, and be seen to respect, the terms of the

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9 *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

10 Tate and Vallinder, *The Global Expansion of Judicial Power* (1995).

trust upon which they exercise their authority. Like fairness, legitimacy should be constantly on display in courts.