**SUPREME COURT OF JAPAN**

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# CURRENT ISSUES FOR THE AUSTRALIAN JUDICIARY

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I am honoured to have been invited by the Chief Justice of Japan to visit your country and your Court, and I am most grateful for the hospitality which has been extended to me. This occasion provides me with an opportunity to learn something of your legal system, and I hope that what I say this morning may give you an insight into some aspects of the work of the Australian judiciary.

The Australian legal system is based upon the common law, which we inherited from England at the time of European

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settlement more than 200 years ago. Aspects of that inheritance include the rule of law, the independence of the judiciary, and what might be described as a culture of legalism, by which I mean attaching importance to legal rights and obligations. Not all manifestations of legalism would be regarded by the people of other countries, or by all Australians, as beneficial, but positive features include general community acceptance of the necessity of obedience to the law, both by citizens and by governments. The enforceability of judicial decisions, even when they go against the government, the police, or the armed services, is not an issue. Australians take it for granted that the orders of courts, made in the course of administering criminal or civil justice, will be put into effect.

At the end of the 19th century, the people of the self-governing British colonies in Australia united in a Federation, known as the Commonwealth of Australia. Federalism brought an added dimension of legalism. A federal system of government requires a written constitution, which makes a formal division of powers between the governments of the component parts of the federation (the Commonwealth and the States), and it also requires a mechanism for resolving disputes arising out of that division of powers. In Australia, if such issues cannot be resolved by the ordinary political process, and they require authoritative decision, they may be brought before the courts in adversary litigation. The role of the judiciary in this respect plainly necessitates manifest

independence from the legislative and executive branches of government. Before Federation, each of the colonies, which later became States, had a Supreme Court. Those courts have continued as State Supreme Courts. The Constitution of 1901 established what it described as a federal Supreme Court, to be called the High Court of Australia, which now consists of a Chief Justice and six other Justices. We have two principal functions. The first is to maintain the Constitution. That involves deciding cases, between governments, or between citizens and governments, which raise issues as to the meaning and operation of the Constitution, including the division of governmental powers and functions made by the Constitution. It also involves enforcing the observance of the law and the Constitution by officers of the Commonwealth. The second function is to act as the final court of appeal from the courts of the States and Territories, and other federal courts, in all civil and criminal matters. The position of the High Court at the apex of the court system secures the uniformity of the common law in Australia. In that respect there is a difference between the role of the High Court of Australia and that of the Supreme Court of the United States. Because the Supreme Court of the United States does not act as a general appellate court of final resort, the common law of that country is not uniform, but may vary from state to state.

By the time of Federation in Australia, the concept that, in a federal system, with a written constitution, it is the role of the courts

to determine the validity of legislation which is claimed to contravene the constitution, had been well established in the United States of America, and was accepted by the framers of our Constitution. A system of what is sometimes called judicial review of parliamentary legislation inevitably gives rise to tension between courts and governments. Australian courts, and especially the High Court, are required, when called upon to do so, to decide the validity of laws enacted by democratically elected legislatures. Their decisions are not always popular. Frustrated legislators may criticise such decisions vigorously. However, the decisions are accepted. A culture of acceptance of the decisions of unelected judges, even when those decisions defeat the will of popularly elected legislators, rests ultimately upon confidence in the independence, impartiality, integrity and professionalism of the judiciary. Maintaining that confidence in a modern democracy is a considerable challenge. That is a subject to which I shall return.

Our legal system also provides mechanisms for judicial review of administrative action. The Constitution provides, as part of federal jurisdiction, for the use of the traditional common law remedies to compel obedience to the law by officers of the Commonwealth. This is one of the means by which the rule of law is secured. In addition, there are federal and state statutes which provide procedures by which citizens can obtain review of the decisions of government administrators. This form of judicial

review is another source of potential tension between courts and governments.

The courts depend entirely upon the executive governments for funding and staffing. Judges are appointed by the relevant executive government, state or federal. They enjoy security of tenure, which, in the case of all federal, and some State, judges, is constitutionally protected. They may only be removed from office following a parliamentary resolution; an extremely rare event. Even so, the legal independence of the judiciary, which is essential to the reality and to the appearance of impartial decision-making, exists alongside a practical dependence upon the executive branch of government for the resources necessary for the performance of the judicial function. This reflects the principle that, in a parliamentary democracy, those responsible for spending public funds, and determining priorities as to expenditure, must be accountable to parliament and, ultimately, to the electorate. However, it creates a particular problem in relation to accountability for court performance. Such performance is substantially affected by the extent of the resources made available to courts, but that is a matter over which judges have no control, and very little influence.

In the administration of civil and criminal justice, Australian courts, like most courts throughout the world, suffer from the twin problems of cost and delay.

As part of our common law tradition, we apply the adversary system of justice. The cardinal feature of that system is that the judge, (or, in a serious criminal trial, the judge and jury), must adopt the role of a neutral and impartial adjudicator, leaving it to the parties and their lawyers to define the issues for decision, present such evidence as they choose, and argue the facts and the law as they see fit in their own interests.

I referred earlier to our culture of legalism. Ours is a rights-conscious society, in which citizens demand access to justice, by which many of them mean access to litigation. Australians are not as litigious as people in the United States of America, but they are more litigious than people in Japan. In the last 20 years there has been an enormous expansion in the workload of the courts. Judges, who in the past concerned themselves only with the just resolution of individual cases as they came up for trial, have found it necessary to become more interventionist in the management of court lists in the progress towards trial of cases, and in the conduct of litigation. Case management has been accepted by the judiciary, principally because there is no other practical method of coping with the expanding workload. It means that a substantial new responsibility has been taken on by judges. Instead of simply deciding each case in turn as it finds its way to the head of a queue, judges have assumed the management of the queue. Instead of allowing the lawyers for the parties to run cases at their

own pace, judges have taken to directing more closely the conduct of trials. They have done this out of necessity, and with varying degrees of enthusiasm. It can sometimes conflict with the requirement of strict judicial neutrality. The response to this relatively recent development of the judicial role has been a demand for greater accountability, and for the development of methods of evaluating the performance by modern judges in discharging responsibilities which most of their predecessors never accepted.

Accountability can take many different forms. The primary methods of judicial accountability in a common law system are well established. Courts conduct their business in public. Judges are required to hear arguments on both sides of the question, and to give reasons for their decisions. Their decisions are routinely subject to appeal, both on the facts and on the law. Our system operates with a high degree of transparency. For some people, however, this is insufficient. Although judges, like other citizens, are subject to the ordinary processes of the criminal law, they cannot be punished, or disciplined, for making wrong or unpopular decisions, or for conducting their business inefficiently. To someone with a grasp of constitutional principle, the reason is obvious. To many, however, this is a source of frustration. The development of methods of accountability consistent with independence, and, in particular, consistent with the judicial

function of deciding, impartially, disputes involving governments, is an issue of current debate.

There is also an increasing interest in devising techniques to evaluate the performance of courts as institutions. This is an infant science. Crude measures of performance, based upon turnover of cases, regardless of their length or complexity, or based upon comparisons between courts, regardless of their comparative workloads and resources, are clearly inappropriate. Their principal attraction is to people who prefer to ignore the complexity of the business with which courts must deal. Unfortunately, decisions about funding are often made by people who are driven by a need to establish quantitative measures of outcomes, and who are uncomfortable with qualitative evaluation of process. Reconciling the judicial emphasis on process with the bureaucratic emphasis on outcomes is a problem for those who seek ways to measure court performance.

Judicial administration, involving the management of the operations of courts as institutions, and judicial case management, involving the supervision of cases up to and during trial, have, in the last ten years, become subjects of major significance to the Australian judiciary. Governments, and the legal profession, are also closely involved. Governments are politically accountable for the capacity of courts to cope with the business coming before them, and bear the cost of funding the system. They have an

interest in seeking to influence the way in which courts conduct their operations, although the imperative of judicial independence means they have no capacity to control or direct the courts. The legal profession has an interest in the efficiency with which the courts function, and without their cooperation it is impossible to achieve much of what the judges are seeking to do.

The capacity of courts to conduct their business with reasonable efficiency depends to a large extent upon groups who are independent of each other, and whose interests are often in conflict. The executive governments, which fund the courts, the lawyers, and the litigants, all affect the manner in which the "system" functions. Co-operation is not the hallmark of an adversary system of justice.

Our system of administration of justice, like our system of parliamentary democracy, reflects values in addition to the value of efficiency. That does not mean that efficiency is not important. For a system of civil and criminal justice to be sustainable, due regard must be paid to requirements of economy and effectiveness. One of our challenges is to devise methods of co-operation, not inconsistent with our other values, which will enable the judiciary, the executive governments, the legislatures, and the profession, to work together to identify and address problems in the public interest. Judges are naturally, and properly, reluctant to do anything that might compromise their independence, but it does not

follow that they should see themselves as being in an adversarial relationship with governments.

The cost of litigation, which principally involves the fees paid by parties to their lawyers and others whose advice and assistance is needed in the conduct of litigation, is influenced by the length of cases, which has increased substantially in recent years. Judicial dispute resolution is time-consuming and labour-intensive. The common law tradition of oral hearings, together with the insistence upon strict neutrality on the part of the judge, limits the capacity for judicial intervention. Nevertheless, modern judges are taking an increasingly active role in an attempt to contain trials, and appeals, with reasonable bounds. Jury trials in civil proceedings are now relatively rare in Australia, and a judge sitting alone, without a jury, has a greater capacity to control the presentation of evidence and arguments. We still have juries for most major criminal trials, and the increasing length of such trials is a matter of concern.

Most criminal defendants are legally aided by government. There is also some legal aid for civil cases. This gives governments a stake in the cost of litigation. The matter of legal aid funding is a source of contention between governments and the legal profession. This is ultimately a political issue, in which the judiciary cannot become involved. One matter of increasing concern, however, is the litigant who is unrepresented, often as a result of an inability to obtain legal aid. The adversary system

assumes, in the interests of both justice and efficiency, that cases will be presented to courts by skilled professionals. To the extent to which that assumption breaks down, so does the system.

Litigation is not the only, or even the ordinary, process of dispute resolution. Most civil disputes are resolved by agreement between the parties, sometimes assisted by a process such as mediation. Arbitration is widely employed as an alternative to litigation. The great majority of court cases are settled between the parties, before or during final hearing, without the need for a judicial decision.

In a common law system, litigation is not only concerned with dispute resolution. It also fulfils an important function of dispute prevention. Decisions of courts, especially appellate courts, create binding precedents. Parties who might otherwise find themselves in litigation know what the outcome is likely to be if they go to court, and adjust their differences accordingly. There is another respect in which litigation is more than simply one of a number of alternative forms of dispute resolution. A judicial decision is an exercise of governmental power. Making binding and enforceable decisions between disputing parties is essential to the role of government in keeping the peace, and in maintaining the conditions of order and stability which are necessary for the regular flow of commerce and intercourse between citizens. The economic importance of courts as institutions, and of the justice system as a

facilitator of trade and investment, is not widely appreciated. If it were better understood, the issue of court funding might be approached differently.

Judicial training and continuing education is a subject of current interest in Australia. As in most common law countries, our judges are mainly appointed from the ranks of experienced legal practitioners, usually in middle age. It used to be assumed that they required no formal training, because they would have spent many years practising in the courts, watching judges in action, and learning all they needed to know to fit them for the task. That assumption is no longer accepted. Partly because of the increasing specialisation of legal practice, few practitioners, however experienced, know everything they need to know in order to be judges. Furthermore, the increasing complexity of the task of being a judge, and of the law itself, makes formal continuing education necessary. We do not yet have a National Judicial College, although I hope one will be established. There are, however, programmes for newly appointed judges and magistrates, and most courts have internal programmes of continuing education. The Australian Institute of Judicial Administration, in cooperation with the Judicial Commission of New South Wales, conducts an annual orientation course for newly appointed judges. Participants have come from most Australian jurisdictions, and from Papua New Guinea, the Solomon Islands, Indonesia and Hong Kong. Topics

covered by the programme include trial management, decision making, judgment writing and the use of information technology.

As you would assume, Australian trial and appeal courts make extensive use of information technology. Video links are routinely used by many courts, for the convenience of litigants and the profession. The work of the High Court of Australia provides a good example. Our court sits mainly in the national capital, Canberra, although we travel, annually, to some State capital cities. Appeals do not come to the court as of right, but require a grant of leave to appeal. Unlike our counterparts in the United States and Canada, we retain a system of oral argument on leave applications, although the time for argument is limited, and the parties also file written argument. Because of the distances parties and their lawyers would otherwise have to travel, (Canberra is further from Perth than London is from Moscow), we hear many leave applications by video-link, with the judges sitting in, say, Canberra and the lawyers appearing in, say, Perth, or Adelaide, or Brisbane.

You do not need me to explain to you the benefits to judges, both at trial and appellate level, of information storage and retrieval, and imaging technology. There is, however, a negative aspect of this, with which you are also undoubtedly familiar. Information overload is just as much a problem for modern courts as it is for the workplace generally. There are pressures on lawyers, including, perhaps, apprehensions about liability for professional negligence,

which magnify the quantity of information with which courts are provided, at the expense of quality and selectivity. It is unnecessary to develop this point. It is an aspect of living in the information age.

An issue which is of concern to Australian judges, as it is to judges in other countries, is the need to improve techniques for the screening and evaluation of scientific evidence. A system in which the parties and their lawyers select the evidence on which they seek to rely needs to find ways of identifying and rejecting the products of "junk science". The adversary nature of the system, in which witnesses put forward as experts will ordinarily be tested by cross-examination by a lawyer advised by an opposing expert, provides a measure of protection, but the system is not foolproof. Rules concerning the admissibility of opinion evidence, and requirements for judicial instructions and warning to juries in criminal trials, are also of some assistance. Nevertheless, the ability of the justice system to protect itself against technical misinformation is less than it should be. This is a subject of study and scholarly debate.

The need to provide greater assistance to parties involved in litigation of a trans-national character is emerging as an issue. The movement of people, goods, and capital, across borders, is now so easy, and the dissemination of information so rapid, that there has been a substantial increase in the number of cases, especially

commercial cases, which require the taking of evidence abroad, or the enforcement of judgments and orders in another country. Mutual judicial assistance in criminal matters is well-established, but is not yet highly developed in civil cases. Recently, Australia and Korea entered into a Treaty on Judicial Assistance in Civil and Commercial Matters. A bi-lateral treaty of such a kind, between a country with a common law system and a country with a civil law system, provides an interesting example of a response, in the Asia-Pacific region, to a developing modern need.

I referred earlier to the extent to which our constitutional arrangements depend upon public confidence in the impartiality and professionalism of the courts and, at the same time, give rise to tensions between the judiciary and popularly elected parliaments and governments. In a well-informed, rights-conscious, democratic society, which demands accountability of public institutions and officials, how do unelected judges, whose independence requires security of tenure, maintain the public confidence upon which the system depends?

In some respects, our system has inbuilt features which help to provide part of the answer. Transparency in decision-making has always been fundamental. The obligation to give reasons for decisions, backed up by the appellate process, involves a substantial level of accountability. Even so, human institutions are

fallible. The system makes mistakes, and people make mistakes, sometimes in a highly visible form.

Regrettably, the working of the courts is not well understood in the community. Although the jury system in criminal trials provides a valuable form of citizen participation in the administration of justice, most people have limited, if any, contact with courts. People outside the legal profession are generally not well-informed about the work of courts as institutions, or of judges as individuals.

Many Australian courts now employ Public Information Officers. One duty of such officers is to facilitate communications between courts and the media, who may require and welcome assistance in connection with the reporting of legal proceedings, or who may seek information in connection with stories they are running concerning some aspect of a court's work. However, their responsibilities are wider than that. They arrange and conduct guided tours of the courts by groups of interested people, prepare literature as to the operations of the courts for public dissemination, and respond to enquiries, from various sources. They fulfil an important community education role.

Judges, and especially those in positions of leadership in the judiciary, seek ways, consistent with the need to preserve their independence and impartiality, of informing the public on issues of

public interest concerning the courts, their problems, and the way in which they are addressing those problems. Judges cannot engage in the political process, and they do not, (or at least, should not), aspire to political legitimacy, or seek popular acclaim. A judge should have no constituency. His or her duty is to maintain both the reality and the public appearance of impartiality.

Some judges have a personal inclination towards reticence. Some have the opposite inclination. One thing is clear. Judges may not engage in public debate over the merits of their decisions. They give their reasons for their decisions – once. If it were otherwise, their impartiality would be compromised. This leaves them, on occasion, exposed to criticism, some of which may be valid, and some of which may be ill-informed or misguided, or even malicious. Public confidence in the judiciary can be eroded by such criticism, but judges themselves are limited in their capacity to respond.

The role of the High Court in judicial review of legislation provides a topical example. The limitations upon the law-making power of the Federal Parliament are spelled out in the Constitution. If a citizen, or a State Government, challenges the validity of a law enacted by the Federal Parliament, it is the duty of the High Court to determine the issue raised. The Court does that by interpreting and applying the Constitution. To represent such an exercise as a judicial challenge to the supremacy of Parliament is manifestly

unfair but such a representation is not uncommon. When the Parliament is acting within the limitations upon its power set by the Constitution, then its law-making capacity is supreme; but the ultimate supremacy is in the Constitution itself. Some who applaud the outcome of a case will depict the Court as the guardian of the Constitution. Some who regret the outcome of the case will depict the Court as a group of unelected judges subverting the will of the democratically elected legislature. But the judges themselves remain silent. What else can they do? A court's Public Information Officer can take steps to ensure that the media are fully informed of the nature of the issues in the case, and the essence of the reasoning of the court. Judges themselves can do their best to express their reasons in a form which minimises the possibility of misunderstanding or misrepresentation. Steps such as this may provide a safeguard against innocent mistakes, but they will do little to deflect a determined campaign, whatever its motivation may be.

In the final analysis, the question is not only one of the community's confidence in the judges; there is also a question of the judges' confidence in the system of which they are a part. We live in a society committed to democratic values, which include the right of all people, even people who are wrong-headed, or confused, or mistaken, or worse, to express their opinions on matters of political interest. The consequences may sometimes be disagreeable, and damaging, but we regard the system as better than any available alternative. When judges assume the

responsibility of interpreting and applying the Constitution, they are committing themselves to those democratic values. They may have cause to regret particular manifestations of a free exchange of ideas and opinions, but they cannot regret the system; they are a part of it, and it is from the system that they derive their authority. Judges whose status is sustained by a collective reputation for impartiality developed by the judiciary over a long history would be undermining that status, if they were to succumb to a temptation to engage in political advocacy, even if only by way of response to what they regard as unfair criticism. The better answer lies in using all available means to promote public understanding of the role of the judiciary and of the place of the courts in the constitutional scheme. Achieving that is one of the most important challenges facing the modern judiciary.