"DISPUTE RESOLUTION AND THE RULE OF LAW"

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Australian lawyers and judges treat the rule of law as an essential foundation of their legal system. Like the foundations of any building, the rule of law is not often examined and most people who are at work in the building go about their daily tasks without giving any thought to the nature or existence of its foundations. In order to understand the status, significance and role of dispute resolution within the rule of law it is necessary to look at what is meant by that expression. We must, therefore, leave the building and dig into the foundations upon which it is built before we can look at what is done inside the building.

To do that it will be necessary to begin by examining the historical and institutional influences on the rule of law as an Australian lawyer may understand it, and the role of the courts in Australia. Then, having exposed what may lie behind (and thus may influence) my approach to the subject, seek to identify the content of the rule of law and consider dispute resolution and the rule of law.

The rule of law has traditionally been contrasted with what was referred to as the "rule of men" in the aphorism "the rule of law, not of men". Like all such aphorisms the statement is more powerful than it is revealing. It has generated the creation of other, competing dichotomies – the general rule of law as opposed to the personal discretion to do justice[1]. It is a concept which has provoked great jurisprudential debate among English speaking scholars. To some[2], the rule of law is a prerequisite for any efficacious legal order. To others[3], the rule of law is seen as advancing, even embodying, a particular view of desirable political values. It would be easy to become enmeshed in this debate. To do so would not serve any immediate purpose. It is, nonetheless, important to examine what the "rule of law" conveys to an Australian lawyer. Only by revealing the content of that expression, when it is used by an Australian lawyer, can the relationship which that lawyer identifies between dispute resolution and the rule of law be examined properly.

Historical and institutional influences

The Australian legal system grew out of the English common law tradition. The Australian constitutional structure, on the other hand, is a federal system of government, and drew just as heavily upon the experience of the United States of America as it did on British political experience. Governmental structures in Australia, therefore, reflect both traditions. I mention the origins of Australia's legal system and the origins of its system of government because an Australian lawyer's conception of the rule of law owes much to both of these influences. Indeed, I doubt that a proper understanding of what an Australian lawyer means by the rule of law can be reached without recognising and acknowledging those historical and institutional influences.

The rule of law can be understood from the viewpoint of the individual and by reference only to the relationship which the individual has with others in society.

Viewed from this vantage point, the rule of law focuses upon the identification of external norms of behaviour which will predict, regulate and give content to the rights and duties of society's participants. From this vantage point, the rule of law emphasises that the norms are external to the individual, are applied equally, and are fixed by an external process which will enable their content to be identified, with more or less certainty, before events occur or obligations are undertaken. Looking at the rule of law from this vantage point may not reveal all that is relevant.

Other aspects of the rule of law can be seen where it is viewed from another vantage point: as a means of describing the way in which the law and the State are related one to another. The legal and political history of England can be understood as a conflict between three rival conceptions – the supremacy of the law, the supremacy of the Crown and the supremacy of Parliament[4]. Each sought to relate the law to the State. It sought to relate the place of the legal system to what now would be encompassed by considerations of political power, sovereignty, nationhood and related concepts.

In the Middle Ages in Britain the law was understood as the supreme authority governing the relations of all who possessed power as well as the position of those subject to the power of others. Bracton, the great institutional writer of the 13th century, said more than once that the King was below the law. The rule of law, at that time, was understood to refer to the supremacy of legal rules over the wishes of any individual in society, no matter what the position occupied by that individual.

The growth of the territorial State after the Middle Ages in Europe brought with it the need for one supreme authority, and Europe (including Britain) found the State's source of unity and power in the King. The Crown was understood to embody the sovereignty of the State and the law was merely the mechanism for exercising that sovereign power over subject.

By the end of the 19th century, however, at about the time the Australian colonies were considering whether to federate, the principle that the Crown was supreme had given way. In the 17th century, England had fought a civil war, and had then undergone revolution in order to establish a new principle: the supremacy of parliament over the Crown. A V Dicey, in his work "Law of the Constitution", gave theoretical structure to the proposition that parliamentary sovereignty was the pivot of the English legal system. Even today, in England and in countries where the legal system derives from England, Dicey's proposition that Parliament is the supreme law-making authority has an hypnotic effect[5].

It may be necessary to resolve the competition between these ideas if setting out to design a new system of government. But once it is recognised that these ideas are conceptual tools of analysis and are to be used to explain what is happening rather than prescribe what should be done, the need to reconcile them is less pressing. If reconciliation of these competing ideas is thought to be necessary, it is to be found in recognising the subtlety of the interplay between them. No less importantly, it is necessary to recognise that there is continuous evolution of governmental and legal structures as well as evolution and development of understanding about them. It is not necessary to choose one theory over the others and declare it victor.

One example will suffice to illustrate the importance of recognising that neither governmental structures nor theoretical analyses of those structures are static. In the

later part of the 20th century, in parliamentary democracies organised along British lines, theories about the rule of law have had to deal with a changing relationship between the legislature and the executive. Parliamentary sovereignty in such societies was, in the minds of some at least, underpinned by the proposition that the executive was, and must be, controlled by parliament. By the late 20th century, the contrary was the case in many parliamentary democracies of the British pattern – the executive controlled parliament.

The connection between these matters of governmental structure and an understanding of the rule of law is not self-evident. It becomes apparent only when two further steps are taken in the analysis. First, what role do the courts have in developing norms of behaviour in society? Secondly, what role do the courts have in deciding whether laws enacted by the legislature or conduct by the executive is lawful? Both of those questions require consideration of the relationship between the legal system and the political system. How and where do they intersect? In case of conflict, which prevails?

The role of the courts in Australia

The Anglo-Australian tradition is a common law tradition. Not all law, not all norms of conduct, find expression in statutes passed by a legislature. Important parts of the criminal and civil law depend upon judge-made rules. In many States of Australia the law of homicide is largely judge-made law. In most States of Australia, at least for the moment, the civil liability of a person who acts negligently (that is, without reasonable care for the safety of another thereby causing damage) is regulated by judge-made law. How do these judge-made rules take their place in the rule of law? What place do they have when it is recognised that judge-made rules can be modified or abolished by statute? What place do they have when it is recognised that, subject to constitutional limitations[6], legislation may be passed which reverses the outcome of civil litigation?

The rule of law must, in an Australian context, seek to describe and accommodate this relationship between the courts and the legislature.

In Australia the description of the relationship between courts and legislature must take account of a further very important consideration, derived from America and, until recently, entirely foreign to British law. In Australia, it is for the courts, and ultimately the High Court of Australia, to say whether legislation enacted by the legislature is constitutionally valid. In addition, and this is not at all foreign to the British tradition, it is for the courts to say whether the acts of the executive government are lawful. The power of judicial review of both legislative and executive actions is fundamental to an Australian lawyer's understanding of the rule of law. In the words of Marshall CJ in *Marbury v Madison*[7], "It is, emphatically, the province and duty of the judicial department, to say what the law is." Where does this fit into the rule of law? For an Australian lawyer the power and duty of the courts to carry out these tasks of judicial review are central elements in the rule of law. They are central because they provide the citizen with the means of ensuring that governments act lawfully within the limits of the powers that they have.

The matters of legal and political history which I have mentioned reflect on the content of the rule of law. Because they are matters which have grown out of legal and political history, they may well find different expression in societies having a

different historical experience or different governmental structures. One example will serve to make the point. To an Australian lawyer, judicial review of the constitutional validity of legislation enacted by the legislature is, as I have said, a foundation of the Australian legal system. Until recently, a British lawyer would have found the notion of judicial review of the validity of legislation, as distinct from the lawfulness of action taken apparently under legislative authority, very strange indeed. Even now, with the introduction of devolution of legislative and other powers to Scotland and Wales, and the adoption of the *Human Rights Act*, there would be many lawyers in Britain who would see judicial review of the validity of legislation as anything but an essential part of the rule of law.

There are two institutional arrangements which Australian lawyers would regard as being an integral part of the rule of law. They are notions of separation of powers and judicial independence. Doctrines of separation of powers can be traced to the work of Montesquieu. They have found their most elaborate governmental expression in the Constitution of the United States of America with its system of checks and balances between the three separate branches of government – legislative, executive and judicial. In Australia, separation of powers has found a different kind of institutional expression. Australia adopted English systems of parliamentary and cabinet government with the executive therefore being largely drawn from the legislature. But as a consequence of adopting a federal system of government, a sharp line is drawn, at the federal level, between the judicial and the other branches of government. This division has been understood as an inevitable and essential consequence of a federal system. The federal Constitution is rigid. The government it establishes is a government of defined powers within which it must be paramount but beyond which it is incompetent to go[8]. Because the respective powers of the federal and the State governments are limited, there must be a method for deciding where those limits lie. That is a task given to the federal judiciary. In Australia, the consequence which is seen as flowing from these considerations is that non-judicial power cannot be given to a federal court and federal judicial power cannot be given to any body except a federal court[9]. It must be noted, however, that this is a consequence of the adoption of our federal Constitution. Hitherto it has not been seen as a necessary element of the rule of law and, subject to some limitations, State courts, and State organs of government generally, do not necessarily reflect this separation of power[10].

That may be contrasted with the institutional arrangements concerning the independence of the judiciary. That is regarded in Australia, as an essential element of the rule of law – that judges should be independent of, and should act independently from, other elements of government. The means adopted to ensure judicial independence can again be traced to political upheavals in Britain long before Australia was settled by Europeans – to the deposing of James II and the later Act of Settlement 1701[11] with its provision that judges should hold office during good behaviour without diminution in their remuneration and can be removed from office only by extraordinary parliamentary steps. These provisions find reflection in s 72 of the federal Constitution[12] and in State constitutions[13]. An independent judiciary is seen as a necessary element of the rule of law.

The rule of law requires that norms of behaviour, and the content of an individual's rights and duties, should be capable of identification before events occur. That is, the rule of law requires predictability and certainty in law. Yet, to an

Australian judge or to an Australian lawyer who works in the courts, dispute and uncertainty about the content of the law is essential to their daily experience. How can this be consistent with the rule of law rather than the rule of individuals?

Some disputes centre upon identifying what has happened rather than on any difference about the applicable legal principle. They are disputes about facts not law, although that is a distinction which it is not always easy to make. But even if factual disputes are excluded from consideration, there are many disputes in which there is real and lively debate about the content of the applicable legal principle. In such cases how can it be said that the law is predictable and certain? Moreover, to many kinds of legal dispute there may be more than one correct answer. The judge may have some discretion in framing the order which is to be made. In many criminal cases there is no fixed penalty, only a range of penalties up to a defined maximum. Again, how is this consistent with the rule of law not of individuals? Are not the judges acting as rulers in such cases?

This lengthy examination of what an Australian lawyer may mean by a reference to the rule of law may serve to reveal some important aspects of it. First, its particular content will reflect the legal and political history of the society. Secondly, it is an expression which embodies general principles, the implementation of which, in any particular case, will require careful analysis. The analysis may give a range of answers from which a choice must be made and the choice that is made will be contestable. Nevertheless, the making of those choices requires an understanding of what is meant by "the rule of law".

Are there essential elements of the rule of law or, as the title of this paper suggested, "the modern rule of law"? Are there any elements that are universal, absolute, and immutable?

Content of the rule of law

Human society does not ordinarily admit of descriptions or prescriptions that are universal, absolute or immutable. It would be surprising if a concept like the rule of law, which is concerned with fundamental aspects of the organisation of society, were to yield to an analysis which identified some universal, leave aside immutable, elements when societies can be and are organised so differently. I therefore begin from the premise that the rule of law finds its most useful expression as a set of general principles, departure from which cannot be always excluded but must in every case be justified. Because the rule of law is inextricably entwined with matters of governmental structure and system, the methods by which departures from the general principle can be sanctioned, or are to be justified, may vary from society to society. In the end, however, the rule of law will be seen to be concerned primarily with whether norms of behaviour and the rights and duties of participants in society, and the consequences that will follow from a failure to observe them, are both ascertainable and predictable.

This primary concern of the rule of law can be expressed in different words. Dicey identified, as critically important characteristics of the rule of law, first, freedom from the exercise of arbitrary power by government and, secondly, equality before the law. The same ideas find more recent expression by MacCormick[14] when he said that:

"Where the rule of law is observed, people can have reasonable certainty in advance concerning the rules and standards by which their conduct will be judged, and the requirements they must satisfy to give legal validity to their transactions. … This is possible, it is often said, provided there is a legal system composed principally of quite clearly enunciated rules that normally operate only in a prospective manner, that are expressed in terms of general categories, not particular indexical, commands to individuals or small groups singled out for special attention. The rules should set realistically achievable requirements to conduct, and should form overall some coherent pattern, not a chaos of arbitrarily conflicting demands[15]."

My references to the law being predictable and certain in application are but another form of seeking to capture the same fundamental ideas.

There was a third element of Dicey's conception of the rule of law which I mention in order only to put it on one side. Dicey made a virtue out of necessity when he linked the rule of law with the absence of any written English Constitution. For him this had led to the establishment of basic liberties by the provision of common law remedies administered by the courts. This, in Dicey's view, related the rule of law and general rights and freedoms, such as the rights to personal freedom, freedom of discussion and freedom of assembly. This was to be contrasted, in Dicey's view, with constitutional declarations of rights which could be suspended.

The place that should be given to constitutional or other statements of rights and freedoms is another large, and separate topic. It is a matter about which opinions differ and, from time to time, can be a matter of political controversy. This last consideration would provide reason enough for me not to enter upon the debate. But even if that were not so, I do not think that it can be said yet that constitutionally entrenched rights and freedoms are an essential element of the rule of law. Whether Dicey was right to praise the British system as he did is a matter about which views differ[16]. It is, however, not a question which I would regard as being central to the relationship between the rule of law and dispute resolution and it is to that subject which I now turn.

Dispute resolution and the rule of law

It is relevant to speak of the rule of law in connection with dispute resolution only if the dispute concerns legally enforceable rights and duties and only if the parties to the dispute wish or are required to have their dispute determined in accordance with those rights and duties. Not all disputes concern legal rights and duties. Not all disputes about legal rights and duties must be resolved by reference to those rights and duties. Two simple examples will illustrate what I mean.

If parties to a commercial transaction fall into dispute about whether some new transaction should be made, there may be no existing rights and duties which are to be adjudicated, only the possibility that some future rights and duties might have been created. By contrast, if parties to a commercial transaction are in dispute about the performance of obligations under that existing contract, it may be that the maintenance of harmonious relationships between them is more important to them than deciding whether one has failed to perform its obligations.

In the second case, the rule of law will have little or nothing to say to the parties. They will adjust their relationship in whatever way they agree. In the former

kind of dispute, however, the rule of law will have an important part to play. It is only by the application of known and predictable rules that it will be possible to decide whether rights and duties have been created and which will oblige the parties to transact future business together. The conclusion that there have been no new rights and duties created is a conclusion which requires the application of identifiable and certain rules.

No less importantly, in the second case I mentioned, where continuing relationships between the parties are seen as important, the conclusion that the rule of law has little or nothing to say to those parties depends critically upon *both parties* being of that view. If one of the parties attaches less importance to maintenance of the relationship than the other party does and wishes to have the rights and duties of each decided, the rule of law requires that the dissatisfied party be able to seek external resolution of the dispute according to known and predictable laws. It is no answer to say that the other party or someone else may think that the maintenance of good relations is important to continued performance under the contract.

There are some important premises for what I have said about these two examples which it is as well to expose. The two most important premises are, first, that each party may choose whether to submit the dispute to external resolution rather than reach an agreement with the opposite party, and, secondly, that there is an established and accessible body to resolve the dispute by application of what I have described as known and predictable laws.

The freedom to choose external dispute resolution may not be absolute. It may come at a cost. In many, but not all legal systems, the party that loses a civil dispute must pay some or all of the other party's costs of resisting the claim. Even if the parties resort to the ordinary courts rather than some private form of dispute resolution they may, in some systems, have to contribute to the cost of providing the tribunal. Plainly, there can come a point at which the penalties for seeking resolution of a dispute are so large as to prevent all except the very rich or the very determined from doing that. Yet, at the other end of the spectrum, if there is no detriment suffered, trivial and frivolous claims may occupy too much court time, at the expense of more substantial disputes. How and where to strike a balance between the two extremes remains one of the more pressing problems for some legal systems.

The second premise is that there is an established and accessible body to resolve the dispute and to which the dissatisfied party can go. A court system established by the State must be and remain the centrepiece of dispute resolution in accordance with the rule of law. The application of public power in enforcing society's rules must ultimately find its roots in structures established by society. That has several consequences. Some of those consequences concern the structure of the system that must be established. Other consequences concern the relationship between dispute resolution that occurs outside the court system and the courts themselves.

The structural consequences to which I wish to draw attention are those which arise in connection with the resolution of civil rather than criminal disputes. The structure of the criminal justice system, with its attendant questions about the investigation, the prosecution, the determination and the punishment for breaches of the criminal law is a very large, but separate subject.

To identify the structural consequences of the proposition that application of public power to the resolution of disputes must be rooted in structures established by the society it is useful to identify one feature of civil disputes. The adjudication of civil disputes is largely, but not entirely, backward looking. It requires identification of what *has* happened. It requires identification of what *are* the rights and duties of the parties. Seldom, at least for an Australian lawyer, does it concern the formulation of new rights and duties which are to govern the parties into the future. Of course, there will be cases where one party seeks to prevent the other from doing something in the future which, if it were done, would be in breach of that party's obligations. Further, in cases affecting the status of parties (as, for example, in family disputes) the judgment of the court will directly affect the future rights and duties of the parties. Nonetheless, the civil law is essentially backward looking in its resolution of disputes.

That is an inevitable corollary of the rule of law. Because the parties have made some relevant transaction, or one stands in some identified relationship to the other, each of the parties has certain rights and duties. The rights and duties which each has may be enforced and it is no answer to that claim to say that it would have been better if the rights and duties had been structured differently.

The most important institutional consequence of the proposition that the application of public power to the resolution of disputes must be rooted in structures established by society is that the adjudicator must be independent of the parties. Not only must the adjudicator be independent of the parties, the adjudicator must be independent of other influences. At first sight the proposition is paradoxical. Why should the adjudicator who is applying *public* power in resolving a dispute be free from influence by other elements of the structures by which society is governed? What would be wrong with the adjudicator taking account of what those who have charge of economic or other policy say would further that policy in the interests of the society as a whole?

The answer lies in the requirement that the law should be predictable and capable of being ascertained before parties act or undertake obligations one to another. If the adjudicator is not independent of external influence, the rules which are given effect in resolving the dispute are not the known and predictable rules upon which the parties were and must be entitled to act. A new and different consideration has intruded in the dispute. In the example I gave, the case would be decided not by reference to the parties' rights and duties. It would be decided in the way that was thought to advance a particular policy objective.

Independence of adjudication will ordinarily be assisted by a requirement that proceedings for the resolution of the dispute take place in public. The public performance of the task tends to expose the existence of preconceptions about a dispute and tends to expose the existence of any inappropriate external influence on the process.

Two other institutional consequences should be noticed. Whatever may be the procedures adopted in a court system (adversarial, inquisitorial or as is increasingly the case, a mixture of the two) representation of parties by skilled lawyers permits an adjudicator to consider competing contentions with a degree of detachment that is not possible if the adjudicator has had to be responsible for identifying and formulating the competing contentions. The more complicated the dispute, the more necessary it

is for the adjudicator to be assisted by the parties in formulating not only the issues to be decided, but also the arguments that are advanced in support.

It cannot be assumed that a court will always be right. The distinguished English judge, Sir Robert Megarry, said[17]: "No human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges." The legal system, being a human system, is inevitably fallible. A system of appeal or review is therefore necessary to deal with some of the errors that are made. You will notice that I say "some" of the errors that are made, not all. It is, I think, beyond human capacity to achieve absolute perfection. Further, not only is it unrealistic to attempt to achieve such perfection, finality of judicial decision-making is essential. Statutes or other principles which limit the time within which claims may be made or limit the circumstances in which a dispute may be reopened are fundamental to the proper ordering of society. Another distinguished English judge, Lord Wilberforce, said[18]:

"Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth … and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

The decision about how many appeals, or reviews, a case may have is not without difficulty. The general rule adopted in many legal systems is that the parties should have a right to seek one review of what has been decided but that any later review should be only with the permission of the higher court. Whatever may be the detail of the rules that are adopted, the institutional consequence which it is important to recognise is that there must be some system for appeal or review of decisions in all but exceptional cases.

The structural considerations to which I have been referring are those which affect the adjudication of civil disputes by courts. What if both parties choose to resolve their dispute by some other means? First, it must be the voluntary decision of both parties. Secondly, if it is done, there may come a point in that process where a party seeks to have the State give effect to the outcome that is achieved. That can be done only if the processes which the parties employ lead to rights and obligations which can be enforced or do not affect pre-existing rights and obligations.

The extent to which provision is made for private arbitration of disputes and the enforcement of resulting awards may vary from jurisdiction to jurisdiction. Many large commercial transactions contain arbitration clauses requiring resolution of

disputes by means independent of the court systems of jurisdictions with which the parties or transactions may be said to have some connection. The arrangements that are made under such arbitration provisions may preclude review of what is decided, they may adopt procedures very different from those that are adopted in court proceedings. For example, it is now not uncommon in international arbitrations for the arbitrators to say that each side has a limited time in which to present the whole of its evidence and argument and that it is for the parties to decide how they will allocate that time. If it is accepted that these arrangements are made willingly, they present no challenge to rule of law principles.

Much of the remaining part of this seminar will focus upon alternative forms of dispute resolution. What I have said has sought to provide what an Australian lawyer understands to be the relevant context for that discussion. It is, however, a context that is described from my perspective and, as I have sought to emphasise, the rule of law is a concept that, in some respects, reflects the society to which it applies. As the world becomes smaller, and all peoples and nations deal more and more with each other, these differences may lessen. For my part, I look forward to learning much from the topics that we will hear later during this seminar.

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[1] Scalia, "The Rule of Law as a Law of Rules", (1989) 56 *University of Chicago Law Review* 1175 at 1176.

[2] Fuller, *The Morality of Law*, (rev ed 1969) at 33-94.

[3] For example, Rawls, *A Theory of Justice*, (1972) at 235-243; R Dworkin, *A Matter of Principle*, (1985) at 11-12.

[4] Dixon, "The Law and the Constitution", in Woinarski (ed), *Jesting Pilate and other Papers and Addresses*, 2nd ed (1997) 38 at 39.

[5] *The Broken Hill Proprietary Company Ltd v Dagi* [1996] 2 VR 117 at 204; Finn, "A Sovereign People, A Public Trust" in *Essays on Law and Government Volume 1: Principles and Values*, (1995) at 19-21.

[6] At a federal level in Australia, the limitations derived from Ch III of the Constitution, and from s 51(xxxi) with its requirement for just terms if a federal law provides for the acquisition of property, would require consideration.

[7] (1803) 1 Cranch 137 at 177; 5 US 87 at 111.

[8] *R v Kirby; Ex pare Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267.

[9] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 271.

[10] *City of Collingwood v State of Victoria [No 2]* [1994] 1 VR 652.

[11] 12 & 13 Will 3 c 2.

[12] "The Justices of the High Court and of the other courts created by the Parliament:

(i) shall be appointed by the Governor-General in Council;

(ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;

(iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age."

[13] See, for example, *Constitution Act* 1975 (Vic), s 77 and *Constitution Act* 1902 (NSW), ss 53-55.

[14] MacCormick, "Rhetoric and the Rule of Law", in Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order*, (1999) 163 at 165.

[15] The locus classicus for this type of account remains L Fuller, *The Morality of Law*, (rev ed 1969), Ch 2.

[16] Craig, "Dicey: Unitary Self-Correcting Democracy and Public Law", (1990) 106 *Law Quarterly Review* 105; Patapan, "The Author of Liberty: Dicey, Mill and the Shaping of English Constitutionalism", (1997) 8 *Public Law Review* 256.

[17] *Erinford Properties Ltd v Cheshire County Council* [1974] Ch 261 at 268.

[18] *Re Ampthill Peerage* [1977] AC 547 at 569.