Courts for the people—not people's courts*

Sir Gerard Brennan**

Alfred Deakin, while a Minister and even while Prime Minister, was an anonymous contributor of articles on Australian affairs to the London *Morning Post*. An article which appeared in that journal on 16 November 1903 spoke of the difficult passage which the *Judiciary Act* had had through the Parliament of the Commonwealth. Deakin, who was then Attorney-General, wrote:[1]

> No measure yet launched in the Federal Parliament was so often imperilled, skirted so many quicksands, or scraped so many rocks on its very uncertain passage.

The *Judiciary Act* marked the fulfilment of Deakin's legislative ambition for the creation of the High Court as the ultimate constitutional tribunal for the Australian Commonwealth. Deakin had fought for this in the movement for federation. He had been a protagonist for cl.74 of the draft Bill for the *Commonwealth of Australia Constitution Act* which would have eliminated appeals to the Privy Council in constitutional matters while allowing appeals in other matters subject to limitation by the Commonwealth Parliament.[2] While the Australian delegates were in London to secure the passing of the Bill, a divisive battle raged over the inclusion of cl.74. Chamberlain's government, in coalition with some colonial representatives, were for deleting cl.74 entirely. Deakin recalls in *'The Federal Story'*[3] that the 'Conservative classes, the legal profession and all people of wealth desired to retain the appeal to the Privy Council and had heartily and openly supported Chamberlain's proposed abolition of clause 74'. The most significant colonial Government to support the deletion of cl.74 was Queensland, influenced by Sir Samuel Griffith, then Chief Justice of the Colony. However, it was he who made the suggestion that appeals to the Privy Council in inter se matters should depend on leave to be granted by the High Court itself and that suggestion, says Deakin, 'provided the golden bridge over which the delegates passed to union'.[4]

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1 Reproduced in J.A. La Nauze (ed.), 1968, *Federated Australia—Selections from Letters to the Morning Post 1900-1910*, Melbourne University Press, Melbourne, 119.

2 See cl.74 in the final draft Bill in the *Official Record of Debates of the Australasian Federal Convention*, vol. V, 2536.

3 Deakin, A. 1944, *The Federal Story—The Inner History of the Federal Cause*, Robertson & Mullens, Melbourne, 156.

4 Ibid.

Deakin, Barton and Kingston had stood firmly in favour of cl.74 throughout the controversy. Ultimately, they salvaged what became s. 74 of the Constitution. That section contains the legislative power which was exercised in time to abolish all appeals from the High Court to the Privy Council.[5]

Deakin's second reading speech on the Judiciary Bill, delivered in the year before its final passage, was immediately hailed in the House as an example of his 'great ability and eloquence'.[6] Much of what he said is as true today as it was 93 years ago. Indeed, it states the basic conceptions on which a federation under the rule of law operates. 'What are the three fundamental conditions to any federation authoritatively laid down?' he asked rhetorically. He answered:[7]

> 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. The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme. The federation is constituted by distribution of powers, and it is this court which decides the orbit and boundary of every power. Consequently, when we say that there are three fundamental conditions involved in federation, we really mean that there is one which is more essential than the others—the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the 'keystone of the federal arch.'

He took that descriptive phrase from another eloquent speaker, Josiah Symon, the chairman of the judiciary committee of the Constitutional Convention meeting in Adelaide in 1897. Symon said[8] that:

> unless you have not only a powerful High Court but a High Court which shall be constituted under such a Constitution that it will maintain its fortitude under all conditions, you will damage what is really the keystone of the federal arch.

The founding fathers clearly saw an independent High Court to be essential to the existence of the proposed Australian Commonwealth. The hard-fought compromise over appeals to the Privy Council could not have been achieved if it were not for the confidence that was then reposed by all parties in the competence and integrity of the judiciary of the Australian colonies. Without that confidence, it is unthinkable that Chamberlain's government would have permitted any limitation of

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5 *Privy Council (Limitation of Appeals) Act 1968* (Cwlth); *Privy Council (Appeals from the High Court) Act 1975* (Cwlth).

6 *Hansard*, 18 March 1902, 10989, per Sir William McMillan.

7 *Hansard*, 18 March 1902, 10966-10967.

8 *Official Record of Debates of the Australasian Federal Convention: Adelaide 1897*, vol. III, 950.

appeals to the Privy Council or would have allowed the Commonwealth to limit the matters in which leave to appeal to the Privy Council might have been asked. It is not without significance that the final great issue that stood in the way of Federation was the finality of the jurisdiction to be allowed to the Courts of this country. As we approach the centenary of Federation, it is useful to consider the importance of public confidence in the courts of the Commonwealth, States and Territories and the means by which that confidence is maintained.

The rule of law depends on and is perhaps synonymous with confidence in the courts. If we regard the law as the expression of the values of our civilization, to govern the conduct and the relationships of powerful and weak, rich and poor, government and governed, the majority and a minority, there must be an arbiter whose authority will be accepted by all parties. The law would not be effective if conformity to its precepts depended on force or the imminent threat of force. Such a situation would consume the resources of the nation if it did not first destroy the nation itself. And, in such a situation, what would happen if the State, the enforcing power, refused to accept the arbiter's decision? No, the rule of law must rest on a surer foundation than force or the imminent threat of force. It must rest on the common acceptance by all who are subject to the jurisdiction of the courts of the authority of the courts to determine cases and controversies. The rule of law in a free society can be maintained only if, in the event of dispute, it is accepted that curial judgments will prescribe the norm to which all parties will conform.

The rule of law assumes its equal application. The principle of equality under the law is based on respect for the equal dignity of every person. By equal application of the law, the rule of law is made to govern every case, so that justice according to law is administered. It is a corollary of the principle of equality that no person is so powerful or so privileged as to avoid the law to which that person is subject. These principles can operate in practice only if there be such a degree of public confidence in the courts that neither power nor riches, nor political office nor numerical superiority can stand against the weight of the court's authority.

To destroy public confidence in the courts is to destroy the foundation of the rule of law. Without the rule of law as we know it, we would experience tyranny and oppression. Professor Winterton, commenting on the *Communist Party* case,[9] said that it 'demonstrated that our freedom depends upon impartial enforcement of the rule of law, of which courts are the ultimate guardians. Although, of course, not infallible, impartial and fearless courts determined to exercise their

9 *Australian Communist Party v. The Commonwealth* (1951) 83 CLR 1.

proper powers are our final defence against tyranny'.[10] Of course, we take the rule of law for granted. We do not perceive a risk to the capacity of our courts to exercise their allotted jurisdiction. Ours is a settled and secure society. That, at least, is the public rhetoric and the private assumption. Reflecting on the factors which inspire public confidence and those which sap it, history demonstrates what can be done to create and sustain it, but some contemporary phenomena reveal a risk to its maintenance. Public confidence in the courts arises from the public perception that judges are men and women of competence and unshakeable integrity.

Judicial competence

The rule of law is effective only if its true terms are discovered and applied. You need competent people to do that. Competence, as well as authority, was the concern of Lord Coke's famous rejection in the case of *Prohibitions Del Roy*[11] of King James I's pretensions to judge:

> then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace.

Back to the time of Edward I, so Holdsworth[12] tells us, the bench was 'recruited from among those who had passed their lives practising at the bar'. This training ground of the judiciary produced judges who were learned in the law so that, as Maitland[13] pointed out, the qualities that saved the common law in the Tudor age were 'strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries'. Recruiting from the ranks of barristers of proved competence went a long way towards ensuring that the judges would not only know the law but also would have the practical ability to try cases expeditiously and to determine the relevant facts on the evidence adduced.

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10 'The Significance of the Community Party Case' (1992) 18 *Melbourne University Law Review* 630 at 658.

11 (1607) 12 Co Rep 63 at 64-65; 77 ER 1342 at 1343.

12 *A History of the Laws of England*, vol. ii, 229.

13 *Selden Society Year Book Series*, vol. I, xviii; cited by Sir Owen Dixon in 'De Facto Officers', *Jesting Pilate*, 1965, Law Book Co. Ltd, Sydney, 229.

Not all the British colonies were as fortunate as the Mother Country. Anthony Stokes,[14] writing in 1783, noted that:

> Wherever a salary is annexed to the office of [a colonial] Chief Justice, and the income is sufficient to induce a man of abilities to accept of it, a proper person is appointed from England to fill such office; but ... the Assistant Judges are, in general, appointed [by] the Governor, and are almost always unacquainted with the law.

He instanced some gross miscarriages of justice as the result.

Familiarity with the sources of law not only ensures that a judge can apply the law; it enhances the judge's ability in controversial cases to speak with the authority which inspires public confidence in the court's application of the rule of law. Thus Judge Learned Hand said in his tribute to Justice Cardozo:[15]

> His authority and his immunity depend upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate.

The need for judicial competence increases with the increasing complexity of the law. When I first practised at the Bar, the assessment of damages for personal injury was a relatively simple matter. Actuarial calculations would then have been regarded as clever attempts to confuse what was essentially a matter of impression. By the time I sat on *Todorovic v. Waller*,[16] the significance of discount rates had been explored at appellate level on many occasions. Today's plethora of statutes and statutory instruments, the contemporary appellate development of the law in various fields, the surfeit of published decisions from all courts and tribunals and the explosion of legal sources on computer data bases tax the ability of any lawyer to ascertain confidently the law to be applied in a problematic case. In *Grant v. Downs*,[17] the Court spoke of the law as 'being a complex and complicated discipline'. There is practically no field of law within the jurisdiction of superior courts today in which problems drawn from other fields of law do not intrude.

A judge who is incompetent in finding his or her way through the areas of law touching the jurisdiction to be exercised is a bull in the judicial china shop. Not all the broken pieces can be put together on appeal and, even if they be restored, the pecuniary and personal cost is

14 *A View of the Constitution of the British Colonies in North-America and the West Indies,* 1783, 264-265.

15 (1939) 52 *Harvard Law Review* 361.

16 (1981) 150 CLR 402.

17 (1976) 135 CLR 674 at 685.

unacceptable. Sometimes, in discussions about judicial appointments, the criterion of professional merit seems to receive mere lip service. Yet, since it is one of the critical factors in the capacity of the courts to maintain the rule of law, it is one of the most important factors on which public confidence in the courts depends. Competent, well-furnished lawyers, with the experience and capacity to preside over trials of complex issues are needed to constitute the benches of the trial courts. They are in short supply and many who are fitted for judicial appointment decline or defer acceptance for years.

Judicial integrity

Confidence in the courts would be destroyed if judicial integrity were suspect. Judicial integrity in a system that applies the rule of law equally to all is manifested by impartiality between the parties, procedural fairness and a rigorous application of the law. Impartiality, as Lord Devlin remarked, is the supreme judicial virtue. The Judge must not only be but also appear to be impartial. Lord Devlin commented:[18]

> The Judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails.

Want of impartiality poisons the stream of justice at its source; an appearance of partiality dries it up.

Judicial impartiality is not a quality that is picked up with the judicial gown or conferred by the judicial commission. It is a cast of mind that is a feature of personal character honed, however, by exposure to those judicial officers and professional colleagues who possess that quality and, on fortunately rare occasions, by reaction against some instance of partiality. Impartiality may produce a peaceful and courteous demeanour in court, but it produces more than demeanour. This indefinable quality governs the conduct of the proceedings, the evaluation of evidence, the conclusion of facts and the analysis and application of legal rules.

The appearance of impartiality is as critical to the confidence reposed in the courts as impartiality itself. No unsuccessful party should be left with any reasonable apprehension of bias affecting the decision. Nor should the public have any ground for concern on that score. For that reason, the courts themselves have laid down the rule[19] that a challenge to a decision on the ground of bias will succeed if 'in all the circumstances the parties or the public might entertain a reasonable

18 'Judges and Lawmakers' (1976) 39 *Modern Law Review* 1 at 4.

19 The rule does not apply when, of necessity, a particular judge must sit on a case.

apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him'.[20]

The second aspect of judicial integrity is procedural fairness. That is a fundamental postulate of the common law[21] on which the courts insist. In an adversary system, the parties must be left to conduct their cases as they see fit, but the procedure must be such that each party has a fair opportunity to present his or her case.[22] And, in the case of an unrepresented person on trial for a criminal offence, a further duty is imposed on the trial judge: the judge must inform the accused of his procedural rights.[23]

Judicial integrity also calls for a rigid application of the relevant rule of law. In the lower courts, the relevant rule of law must be ascertained in strict accordance with the decisions of courts higher in the curial hierarchy. But, in the higher appellate courts and particularly in the High Court, the relevant rule of law must be ascertained in strict accordance with the judicial method. The judicial method allows for some development of legal principle, but it is subject to clear limitations. No court is authorized to change a rule of law fixed by the Constitution of the Commonwealth or the Constitution of a State or fixed by a valid statutory provision. Those areas apart, the higher appellate courts have the authority—indeed, the responsibility—by analogical reasoning and by reference to the enduring values of the society which the law is designed to serve, of maintaining the rules of law in a state which commands the respect of the contemporary community. That is not to say that the outcome of particular cases will be pleasing to all or even to a majority of the community. But it does mean that a fair and informed analysis of the principles which have determined the outcome will be found to be in accord with enduring values. Enduring values are not to be equated with popular opinion on some issue of transient interest. Enduring values are the bonds of a civilized society that lives in peace; lesser values are the stuff of controversy within such a society, settled if need be by the political process.

This is not the occasion to expound the scope of the jurisdiction of appellate courts to develop the law. It is sufficient to rebut the notion that courts which develop the law or reveal the implications of a constitutional or statutory text are exceeding their proper function. There is a natural tension between maintaining the certainty of the law

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20 *Grassby v. The Queen* (1989) 168 CLR 1 at 20 per Dawson J citing *Livesey v. New South Wales Bar Association* (1983) 151 CLR 288 and *Reg. v. Watson; Ex parte Armstrong* (1976) 136 CLR 248.

21 *Cooper v. Wandsworth Board of Works* (1863) 14 CB (NS) 180 at 194; 143 ER 414 at 420.

22 See, for example, the procedural steps insisted on in *Smith v. NSW Bar Association* (1992) 176 CLR 256.

23 *MacPherson v. The Queen* (1981) 147 CLR 512.

and developing the law to answer contemporary needs, but that has to do with the desirable pace of change and the weight attributed to different factors relevant to legal reasoning. That tension is not unique to this country. Activism and self-restraint are the descriptions given to the differing approaches of courts in the common law world. It is interesting to note that the tension between them has been experienced in Europe as a Judge of the Court of Justice of the European Community recently remarked:[24]

> In Europe the problem was not dressed up as activism/self-restraint; because of different historical circumstances, it remained as a problem of respect for the separation of powers.[25] However, the historic necessity came to Europe too, with the Community, and rendered the activism of the Court of Justice expedient... .[26]

In 1902, Deakin did not envisage the function of the High Court to be the exposition of the static content of the Constitution. He saw the Court as an interpreter of the Constitution as an organic instrument, answering the needs of the nation as it grew and changed. In his second reading speech on the Judiciary Bill, a passage[27] appears which, despite its length, is worth remembering 93 years later:

> the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary ... It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.

Mr Conroy interjected:

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24 Judge C N Kakouris, during the ceremony of his nomination for an honorary Doctorate of Laws at the University of Athens, ms. para. 25.

25 'Constitutional courts were established in Europe only after World War II. In Germany and Italy initially, as a reaction to totalitarian regimes. And their activism—without the term—was observed mainly in connection with human rights, together with the renaissance of natural law. The German Bundesverfassungsgericht, however, did mention activism in its judgments.'

26 The Judge notes that 'the Court of Justice is not bound by its previous judgments, unlike the Supreme Court [of the United States] with its *stare decisis*, which constitutes some limitation. Another method of self-restraint is the so-called 'political question doctrine', which is reminiscent of the doctrine of acts of government in Europe.'

27 *Hansard*, 18 March 1902, 10967-10968.

> But we cannot read into the Constitution something which is not there.

To this, Deakin replied:

> Perfectly true. Yet if he takes the doctrine of implied powers as developed by the Supreme Court of the United States, I will undertake to say that the ablest of its earliest lawyers—even Hamilton or Madison—could not have discovered the faintest evidence of the existence of a power which now authorises many of the greatest operations of its government, and which has been of incalculable advantage to the United States. Why? Because the law, when in the hands of men like Marshall or those trained in his school, or of the great jurists of the mother country, becomes no longer a dead weight. Its script is read with the full intelligence of the time, and interpreted in accordance with the needs of time. That task, of course, can be undertaken only by men of profound ability and long training. It is to secure such men that we desire the establishment of a High Court in Australia.

It is not for me to say whether the present Court, which happily includes a distinguished woman in its membership, answers that lofty description. But when activism is paraded as a ground of criticism, it is as well to remember that, from a time before its creation, the Court was intended to speak with a voice that interpreted the spare text of the Constitution for each generation of the nation. In today's changing world, the courts would forfeit their integrity if they failed to exercise their legitimate jurisdiction to declare the general law in terms which, while truly giving effect to organic and statutory law, accord with the enduring values of our society.

So long as the judges are impartial, procedurally fair and rigorous in the application of the law, the judiciary has done what it can to preserve that confidence in the courts which ensures that our society enjoys freedom under the rule of law.

Of course, that does not guarantee, nor should it guarantee, immunity from criticism. Nor do judges expect to be immune from criticism. Sir Frank Kitto, in his splendid paper 'Why Write Judgments?'[28] said:

> Every Judge worthy of the name recognises that he must take each man's censure; he knows full well that as a Judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in retrospect may it weigh with him that the harvest he gleans is praise or blame, approval or scorn. He will reply to neither; he will defend himself not at all.

That is a statement of prudence; it is also a statement of the resoluteness of a judge. Every judge is conscious that, at some time, a judgment will be unpopular with the powerful, or hurtful to one whom the judge

28 Delivered 1973, published in (1992) 66 *Australian Law Journal* 787 at 790.

would not needlessly hurt, or satisfying to a cause with which the judge has no sympathy. The foresight of such consequences cannot be permitted to influence the judgment. Independence from improper influences is, in the first place, something that each judge must consciously and self-confidently achieve. Nevertheless, if our system is to buttress the fortitude of mind expected of a judge, it must afford the judge some protection against external influences. Chief among these influences is the power of the political branches of government.

External influences

Hamilton,[29] observing that the judicial branch of government did not command the force of the executive or the power of the legislature, held the judicial branch of government to be 'the weakest of the three departments of power'. He thought 'that all possible care is requisite to enable it to defend itself against [the] attacks [of the other two departments]' and that 'from the natural feebleness of the judiciary, it is in continual jeopardy of being over-powered, awed, or influenced by its co-ordinate branches'. The safeguards devised to protect the judiciary from the Executive branch of government and, at the same time, to facilitate the exercise of judicial power independently of other alien influences were put in place by the *Act of Settlement 1701.*

Prior to that time, English judges were appointed by the Crown during the Crown's pleasure. Those judges who opposed the Crown were often dismissed. The Crown consulted the judges on forthcoming cases, particularly if they were of a political nature. In 1637 in *Hampden's Case*[30] the judges upheld the Crown's power to exact ship money in the exercise of the Royal prerogative without the authority of Parliament. But a compliant judiciary was the harbinger of revolt. Holdsworth regards the judgment in *Hampden's Case* as containing the most logical expression of the theory of sovereign prerogative power just before its final overthrow.[31] Then, after the Bill of Rights reined in the prerogative, s. 3 of the *Act of Settlement 1701* provided that upon the Hanoverian accession:

> Judges commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them.

Tenure and conditions of service conferred security and independence on the judiciary. Elsewhere[32] I have described tenure and conditions of service as the 'twin pillars' of independence. Tenure and an irreducible

29 Hamilton et al, in *The Federalist Papers*, No. 78, 1961, Mentor edition, New York, 465-466.

30 (1637) St Tr 825.

31 *A History of English Law*, vol. vi, 28.

32 'Courts, Democracy and the Law' (1991) 65 *Australian Law Journal* 32 at 40-41.

salary are secured for Federal judges by s. 72 of the Constitution. The tenure of State and Territory judges of superior courts is not constitutionally entrenched except in New South Wales.[33] In recent times, security of tenure has been legislatively undermined. Nominal tenure of judicial office has been preserved in some cases while the jurisdiction of the Court to which the Judge was appointed has been removed. Examples can be found in the statutes of both the Commonwealth and the States.

The undermining of security of judicial tenure by this device has been attributable to the desire of governments either to strip a particular appointee of jurisdiction or to redistribute a specialist jurisdiction. In other words, governments have sought to undo decisions which have proved unsatisfactory to the government of the day. Government decisions on the creation of specialist courts, on the vesting of particular jurisdictions and on the appointment of judges have a long life. If judicial independence is to be maintained as a cornerstone of our society, these decisions, once made, must be recognized as beyond recall. They must therefore be made with all due deliberation. They should not be undone by interfering with the security of tenure which is essential to the protection of judicial independence. The risk of such interference for the impartial application of the rule of law is manifest.

Of further concern is the want of an adequate mechanism for determining judicial remuneration. Inflation was not a concern when the Commonwealth Constitution precluded the reduction of judicial salaries. But the recent report on remuneration by Professor Winterton for the Australian Institute of Judicial Administration[34] has demonstrated that the political branches of government have acquired what they were denied by the *Act of Settlement 1701,* namely, financial power over the judiciary. The Report cites[35] a Canadian Commission on Judicial Remuneration which remarked:

> the mere appearance of the judges having to negotiate with the executive branch would only erode the public perception of judicial independence.[36]

The AIJA Report proposes an independent tribunal to review remuneration annually.[37] That proposal seeks to reconcile judicial independence with Parliament's control over appropriation. That would remove the possibility, not unreal, that satisfaction with a court's

33 *Constitution Act 1902* (NSW) s. 53, entrenched by amendments made to s. 7B, pursuant to the *Constitution (Entrenchment) Amendment Act 1995* (No. 2 of 1995) (NSW).

34 *Judicial Remuneration in Australia* (1995).

35 Id at 77.

36 *Report and Recommendations of the 1989 Commission on Judges' Salaries and Benefits* (5 March 1990), 6.

37 Fn. 34 at 81-84.

decisions by the Executive or by those who influence the Executive might be a condition of updating remuneration.

Judicial immunity

At the same time as English judges acquired security of tenure under the *Act of Settlement 1701*, the judges of the superior courts of record developed a common law immunity from civil suits[38] for an act done judicially in good faith and in the belief that there was jurisdiction to do it.[39] If a judge were subject to civil liability in respect of his or her judicial acts, the judge would be tempted—and, where the aggressive and powerful were involved, the temptation would be hard to resist—to decide cases in such a way as to eliminate or reduce the risk of being sued. The equal application of the rule of law would be impossible generally to maintain.

The maintenance of public confidence

This is a brief and incomplete review of the factors which, on the one hand, maintain public confidence in the courts and, on the other, present some risk to the maintenance of public confidence. Public confidence depends both on the reality and the perception of a judiciary that is competent, of unshakeable integrity and isolated from influences that might improperly affect the administration of justice according to law. Its awesome powers must be exercised always in the service of others. It must always respond to any application duly made to it. And it must account publicly and to the parties for the reasons for its decisions. It is a judiciary for a society living under the rule of law. Its standards must be, and be seen to be, unimpeachable.

Our traditions and our system know nothing of decisions reached according to mass opinion or popular acclaim. If mass opinion or popular acclaim were the reference points, courts could trim their decisions to accord with public sympathy or outrage, or the policies of the government of the day, or popular political opinion, or the pontifical pronouncements of the columnists. But they could not maintain the rule of law. In our courts, popularity of decisions is no criterion of the true discharge of judicial duty. The rule of law must stand, when needed, against the power of public opinion and those who might influence it. That is not to discount the enduring values of society but it does mean that the true accord between society and the law by which it is ruled is to be found in the principles of law expounded in a court's reasons for judgment—not necessarily in the result.

The reasons for judgment give a public account for the exercise of judicial power. The judge, who is bound by the law and by the facts of the case but who is accountable to no government, must expose the

38 Holdsworth, *A History of the English Law*, vol. vi, 234.
39 See *Sirros v. Moore* [1975] 1 QB 118.

reasons for judgment to public examination and criticism. To quote Sir Frank Kitto again:[40]

> The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance. Jeremy Bentham put the matter in a nutshell ... when he wrote ... :
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> > Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying on trial.

Given the safeguard of publicity, the exercise of judicial power according to law can command the continued confidence of the community. Of course, publicity is not always accurate and criticism is not always informed. That must be accepted. Judges are not fitted to promote or defend themselves or their decisions. Not for them are information agencies, confidential briefings or personal relationships with the moulders of public opinion. They have neither talent nor time to seek public favour for decisions reached in discharge of their duty. Even if there be a scandalous disparagement of a court or judge, the judge will regard 'the good sense of the community [as] a sufficient safeguard'.[41]

Perhaps there are risks in that sanguine approach, for it would be an injury to society itself if the courts were so portrayed as to lose public confidence or if misleading publications disheartened the judges in discharging their lonely duty. Inaccuracy of reporting, trivialising of issues, misunderstanding of principle or a desire to subject a remote judiciary to the buffeting of public opinion could erode public confidence in the courts. But that stage has not been reached. To be sure, there are some petulant or pusillanimous annoyances from time to time but these are seen by the community and by the judiciary alike to be insubstantial. Far more important are the large debates on issues of principle. These debates are to be welcomed. When they are fostered by informed reports, the community gains an interest in the legal principles which govern important aspects of our lives and relationships. By such debates, Australians have been informed about native title, the treatment of refugees, the power to impose taxes, the operation of corporations, the investigation and punishment of crime and the awarding of compensation for loss. It is a sign of vigour in the judicial

40 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787 at 790.

41 *Gallagher v. Durack* (1983) 152 CLR 238 at 243; *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1 at 33.

branch of government that informed discussion on the administration of justice is, and always has been, a feature of Australian life.

After a lifetime in the law, I count myself fortunate to have known the Australian judiciary as an institution who, by their competence and unshakeable integrity, have given the nation its confident freedom under the law. That is the aspiration which Deakin entertained for the Australian courts. It is an aspiration which the graduates of the Deakin Law School may entertain as they place their talents and their training at the service of the nation.