Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium

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INTRODUCTION

Judges in Australia go about their daily work in the belief that they have the confidence of the public. Having the confidence of the public is of fundamental importance. In consequence, the stated purpose of more than one branch of the law in Australia is to maintain that confidence.[1] Moreover, in some circumstances, the Commonwealth Constitution may operate to render invalid legislation which, by virtue of the power it would confer, would tend to diminish public confidence in the integrity of the judiciary as an institution.[2]

But, one may ask, who are the public and why is their confidence so important? Does that public confidence remain, and how is to be maintained? Is it really under threat? These are the matters I wish to discuss today.

THE PUBLIC AND THE JUDICIAL TASK

Who are the public? The question is more easily asked than answered. It cannot be the electorate, for judges are not, under the system of government which prevails in this country, held accountable to the electorate. Nor is it a sector of the community, such as, for example, the media viewing (or reading or listening) public. In the present context, the public cannot be said to be represented by either Parliament or the Executive, for the judiciary is answerable to neither. Less still can the public be taken to be the major institutions, such as the banks, representatives of the major religious faiths, the political parties or sporting clubs. The question, who are the public, must, I think, fall to be answered by reference to the primary task of the judiciary, which is to administer the law by making binding resolutions of disputes according to law. As trustees of the rule of law, the judiciary administers the law not for its own benefit, but for the benefit of each and every member of the community. The public, then, is the whole community — which at times may not be represented by the majority or the media.

The philosophical basis for this in many ways unremarkable task is, I think, best explained by Sir Isaiah Berlin in his book entitled *The Crooked Timber of Humanity*. Sir Isaiah said:

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1 Eg *Gallagher* v *Durack* (1983) 152 CLR 238, discussed below.

2 *Kable* v *Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

> The first public obligation is to avoid extremes of suffering. Revolutions, wars, assassinations, extreme measures may in desperate situations be required. But history teaches us that their consequences are seldom what is anticipated; there is no guarantee, not even, at times, a high enough probability, that such acts will lead to improvement. We may take the risk of drastic action, in personal life or in public policy, but we must always be aware, never forget, that we may be mistaken, that certainty about the effect of such measures invariably leads to avoidable suffering of the innocent. So we must engage in what are call trade-offs — rules, values, principles must yield to each other in varying degrees in specific situations. Utilitarian solutions are sometimes wrong, but, I suspect, more often beneficent. The best that can be done, as a general rule, is to maintain a precarious equilibrium that will prevent the occurrence of desperate situations, of intolerable choices — that is the first requirement for a decent society; one that we can always strive for, in the light of the limited range of our knowledge, and even of our imperfect understanding of individuals and society. A certain humility in these matters is very necessary.[3]

Sir Isaiah elsewhere points out that conflict between values, even within the one-world view, is basic and inescapable, and that in any complex and reasonable society a final resolution of all conflicts and disputes (or even the establishment of arrangements to prevent them) is neither possible nor conceivable. What matters is how a society deals with the myriad disputes that will arise, large and small. The best way to do that is, so Sir Isaiah says, to try to maintain a 'precarious equilibrium' that avoids extremes of suffering.

The courts play an important role in that task, for they are pre-eminently the places where the people bring their disputes to be settled. In many cases before the courts the precarious equilibrium is in danger of being, or already has been, lost, sometimes only for the individuals involved, at other times for a wider circle of the public. The task of the courts is to do what they can, according to law, to shore up or restore the equilibrium. In consequence, public confidence in the judiciary largely depends on how the courts are perceived to succeed in that task. The converse, however, also holds, at least to the extent that in order to succeed in the task, the courts need the confidence of the public. This is because the courts cannot act with effective authority (as opposed to brute force) if those with whom they deal do not take them seriously.

This is, I think, part of what lies behind the constitutional preoccupation with the maintenance of public confidence in the judiciary as an institution. The Commonwealth Constitution, in Chapter III, confers and controls the exercise of judicial authority by the High Court of Australia and other courts created by the Commonwealth Parliament pursuant to s 71. It is accepted that the Constitution prevents the Commonwealth Parliament from conferring power that is not judicial power or a power incidental thereto on those courts.[4] In particular, the Constitution prevents the Parliament from conferring a function on a judge in his or her individual capacity if that function is inconsistent with the exercise of judicial power. Such inconsistency will arise when the

[3] Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (H Hardy ed, 1991) 17-18.

[4] *R* v *Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

performance of non-judicial functions [is] of such a nature that public confidence in the integrity of the judiciary as an institution, or in the capacity of the individual judge to perform his or her judicial function with integrity is diminished.[5]

In such cases, a court is faced with tension between, on the one hand, the value of immediate practical utility of conferring certain functions on judges and, on the other, the broader, less immediate value of having an independent judiciary in which the public can be confident. A court will allow some degree of leeway to the former, but will need to act to reassert the latter in some circumstances in order to maintain Berlin's 'precarious equilibrium'.

In *Kable* v *Director of Public Prosecutions (NSW)* ('Kable') a majority of the High Court held that, by virtue of the integrated structure of state and federal courts created by Chapter III of the Commonwealth Constitution, no state Parliament could validly vest in the Supreme Court of the state a function which was incompatible with federal judicial power.[6] The majority held in *Kable* that the Parliament of New South Wales had, by the *Community Protection Act 1994*, transgressed the limits imposed by Chapter III of the Commonwealth Constitution. The Act was of an unusual kind in so far as it required the New South Wales Supreme Court to make an order depriving a particular individual of his liberty, not because he had committed an offence, but because an opinion was formed, on the basis of material which may not have amounted to legally admissible evidence, that it was probable that the individual would commit a serious act of violence if released. In giving his reasons, McHugh, J said:

> Public confidence in the impartial exercise of federal judicial power would soon be lost if federal or State courts exercising federal jurisdiction were not, or were not perceived to be, independent of the legislature or the executive government .... Public confidence in the exercise of federal jurisdiction by the courts of a State could not be retained if litigants in those courts believed that the judges of those courts were sympathetic to the interests of their State or its executive government.[7]

A similar approach is evident in the reasons for decision of the other members of the majority.[8] As the majority in *Grollo* and *Kable* make plain, the concern is with the whole of the community, and it is a concern which is to be objectively assessed by reference to 'an ordinary reasonable member of the public' or 'a fair minded observer'.[9]

As the form of contempt known as 'scandalising the court' shows, the common law too is concerned with maintaining the confidence of the whole of

[5] *Grollo* v *Palmer* (1995) 184 CLR 348 at 365 ('Grollo'); also *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ('Wilson') at 20 per Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ and 26 per Gaudron J.

[6] (1996) 189 CLR 51, 95 per Toohey J, 102 per Gaudron J, 114 per McHugh J and 136 and 143 per Gummow J.

[7] Id 116-117.

[8] Id 98 per Toohey J, 108 per Gaudron J and 134 per Gummow J.

[9] Id 117 per *McHugh J and Wilson* (1996) 189 CLR 1, 23 per Gaudron J.

the community in the integrity and impartiality of the judiciary.[10] As the majority pointed out in *Gallagher* v *Durack*:

> the law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come into conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that 'it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority'.[11]

As Sir Isaiah Berlin would have it, the law cannot really ever 'reconcile' these equally basic principles, if reconciliation is understood to involve ultimate harmonisation. All that the law can do is to continue to try to be true to both principles as they stand, without bending either too much in the service of the other.

WHY MAINTAIN PUBLIC CONFIDENCE IN THE JUDICIARY?

It is easy enough to show that the law in this country is concerned to maintain the confidence in the judiciary of the whole of the community. But why is this so? This concern is not a characteristic of all societies. In societies other than ours, disputes may be resolved in a final fashion by reference to State policy, given effect by force. In their book *Soviet Psychiatric Abuse: The Shadow Over World Psychiatry*, published in 1984,[12] Sydney Bloch and Peter Reddaway provided a chilling account of just such a regime. They described the placement in psychiatric institutions of advocates of human rights, nationalists, would-be emigrants, religious believers and citizens inconvenient to the authorities. Of the role of the courts, the authors said:

> The dissenter is hospitalised by way of either a criminal or a civil commitment . . . . Dissenters who undergo a psychiatric evaluation are usually declared mentally ill and not responsible for the alleged offence. The court almost always adopts the psychiatrists' recommendations. Their involvement ushers in a number of procedural changes: the dissenter is usually excluded from the trial on the grounds of his ill-health; his family and friends are normally kept out of court by extra-legal means; and the number of witnesses is substantially reduced. The trial, as a result, is often transformed into a mere formality.
>
> What about the role of the defence counsel? He usually challenges the psychiatric findings and may request a second opinion, or a third if two previous reports are discordant. The court virtually always refuses such a

[10] *Gallagher* v *Durack* (1983) 152 CLR 238, 243 per Gibbs CJ, Mason, Wilson and Brennan JJ.

[11] 152 CLR 238 at 243 , citing *R* v *Dunbabin; Ex Parte Williams* (1935) 53 CLR 434, 447 per Dixon J.

[12] S Bloch and P Reddaway, *Soviet Psychiatric Abuse: The Shadow Over World Psychiatry* (1984).

> request and does so invariably if a report from the Serbsky Institute is available ....
>
> Civil commitment is the dissenter's other potential route into the psychiatric hospital .... Soviet psychiatrists, as is the case universally, have the legal authority to place a person in hospital without his consent if he is regarded as mentally ill and as a result dangerous to himself or to others ... .
>
> The detainee has no right of appeal at any point during his commitment and no access to legal counsel.[13]

In a system such as that which Bloch and Reddaway describe, whether or not the community has confidence in its judges is immaterial. The system requires an adherence to the State's policies by its judges and that is all.[14]

In a society such as ours, the courts need something other than the force of the State if they are to carry out their task authoritatively. Part of the courts' authority rests upon public confidence in the judiciary. The confidence to which I refer is not a matter of being confident that a regime will enforce its commands; that is more a matter of confident prediction or expectation. Rather, the confidence to which I refer is confidence in the courts as the appropriate agency for adjudicating disputes. What we have here is, of course, a shift from a command conception of the law of the kind advanced by the nineteenth century jurisprudent John Austin[15] to H L A Hart's conception of law as union of primary and secondary rules. Amongst the secondary rules are what Hart calls 'rules of adjudication', which '[empower] individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken'.[16] That is to say, according to Hart, the propositions of law are not true just because they were the commands of people who were habitually obeyed, but by virtue of convention that represents the community's acceptance of a scheme of rules empowering such people or groups to create a valid law. The justification for judicial authority is, therefore, the community's acceptance of the authority of the judiciary. To say, as the courts not uncommonly do, that judicial authority rests on public confidence is, perhaps, just another way of saying the same thing.

In explaining the basis of liability for the contempt of scandalising the court, the majority of the High Court in *Gallagher* v *Durack* may have relied upon the basis recognised by H L A Hart in saying that:

> The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges.[17]

I say, perhaps, because it may be that Hart was generally more concerned with rules and recognisable legal systems rather than with legitimacy issues.

[13] Id 22-25.
[14] R David and J Brierely, *Major Legal Systems in the World Today* (1985) 262.
[15] J Austin, *The province of jurisprudence determined* (H L A Hart ed, 1954).
[16] H L A Hart, *The Concept of Law* (1994) at 96.
[17] See *Gallagher* v *Durack* (1983) 152 CLR 238, 245 per Gibbs CJ, Mason, Wilson and Brennan JJ.

Even more recently, James Boyd-White, in a collection of essays entitled *Heracle's Bow: Essays on the Rhetoric and Poetics of the Law*, wrote:

> The point is that the heart of what we mean by justice resides in questions of character and relationship and community — in who we are to each other — for this is what determines the meaning of what is done. If these things are got right, the material manifestations — the rules, the results — will take care of themselves; if they are not got right, the rules and results will be wrong ... . Talk about justice is at its heart talk about character and relations.
>
> How, then are the judicial opinions of which I speak to be judged: by whom, and under what standards? In the first instance by appellate courts, but ultimately by the community as a whole, by the legal community and the community beyond it.[18]

This is perhaps to do no more than reformulate the relationship between the judges and the community in more contemporary terms.

What, in fact, is the causal or temporal relationship between the loss of public confidence in the judiciary and the failure of the judiciary to perform its function properly or at all? This is by no means an easy question to answer. What would have been the fate of the Supreme Court which struck down so much of Roosevelt's New Deal legislation had there not been fortuitous change in the membership and voting pattern of the Court?[19] The threat to the continued vitality of the Court as then constituted indicates at least one possibility. Without the confidence of the community it seems the courts' capacity to resolve disputes finally, without further disputation, is seriously compromised. Why should this be? The explanation may lie in the nature of judicial power. As Alexander Hamilton wrote some 200 years ago, the judiciary:

> has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[20]

Unless it is regularly to invoke the Executive arm, the efficacy of judgment would seem to depend upon acceptance by the community of judicial authority which, in turn, would seem to depend upon the matter of public confidence. Public confidence, in its turn, depends in part upon public perception or recognition of the courts doing their task as best as can be done.

[18] J Boyd-White, *Heracle's Bow: Essays on the Rhetoric and Poetics of the Law* (1985), 134.
[19] R K Carr, *The Supreme Court and Judicial Review* (1942) 258.
[20] A Hamilton, J Madison and J Kay, *The Federalist* (B Wright ed, 1961) 489

MAINTAINING PUBLIC CONFIDENCE

Does public confidence in the judiciary remain? Almost twenty years ago Lord Devlin was able to say that there was 'virtually no popular criticism of the judiciary' in England.[21] He went on to say:

> The English judiciary is popularly treated as a national institution, like the navy, and tends to be admired to excess. People suspect mysteries and crafts and it is partly because the judges are free of these that they are popularly respected.[22]

One cannot say this of either the English or Australian judiciary today. Professor Shetreet, in an article published in 1986, supplied evidence of increasing public distrust of judges in England and Australia.[23] Others who have examined the question have taken a different view.[24] But, whatever the true position, the fact is that serious questions are now regularly raised in all forms of the media and elsewhere about the identity and the competence of Australian (and English) judges comprising courts at all levels.[25] But it is not, I think, yet said that the capacity of the courts to resolve disputes is in jeopardy. Given that the courts are bringing disputes finally to an end each working day, one must conclude that, even if public confidence is failing, there is not yet so great a crisis as to prevent the judiciary from performing its primary task.

What then maintains the public confidence? Is it sufficient to say that it is maintained by adherence to what one may call 'due process' or the precepts of 'natural justice' or procedural fairness? Does public confidence exist because the judges carry out their primary task impartially and in public; because they act in accordance with received principles stating reasons which are subject to public scrutiny; and because they acknowledge the supremacy of Parliament, subject to constitutional considerations? These are all part of the answer.

There is, I think, a consensus about the minimum objectives which are to guide the judiciary in a free society if it is to secure public confidence. The possibility of consensus exists, perhaps, because of our shared human experience. I return to Sir Isaiah Berlin who affirmed that:

> [t]here is a world of objective values. By this I mean those ends that men pursue for their own sakes, to which other things are means. I am not blind to what the Greeks valued — their values may not be mine, but I can grasp what it would be like to live by their light .... Forms of life differ. Ends,

[21] P Devlin, *The Judge* (1979) 25.

[22] Id 25-26.

[23] 'Judicial Accountability - A Comparative Analysis of the Models and the Recent Trend' (1986) 11(2) *International Legal Practitioner* 38, 40.

[24] B McLachlin 'The Role of Judges in Modern Commonwealth Society' (1994) 110 *Law Quarterly Review* 260; McEachern 'The Changing Face of the Judiciary and the Legal Profession' (1995) 29 *The Law Society Gazette of Upper Canada.*

[25] H Brooke 'Judicial Independence - Its History in England and Wales', in *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (H Cunningham ed, 1997) 109; G Brennan, 'Why be a Judge?' (1996) 14 *Australian Bar Review* 89, 95; A Mason 'The Appointment and Removal of Judges' in *Fragile Bastion*, op cit (fn 26) 2.

> moral principles, are many. But not infinitely many: they must be within the human horizon. If they are not, then they are outside the human sphere. If I find men who worship trees, not because they are symbols of fertility or because they are divine, with a mysterious life and powers of their own, or because this grove is sacred to Athena — but only because they are made of wood; and if when I ask them why they worship wood they say 'Because it is wood' and give no other answer; then I do not know what they mean. If they are human, they are not beings with whom I can communicate — there is a real barrier. They are not human for me. I cannot even call all their values subjective if I cannot conceive what it would be like to pursue such a life.[26]

That is, notwithstanding the many and great differences between societies located in other times and places, differing societies share some objective values by virtue of their common humanity. So it is, I think, possible to discern objective values upon which the differing groups within our society can agree. Some of those values relate to the judiciary and judging.

PROCEDURAL FAIRNESS

There is, I think, a consensus of this kind that, for there to be public confidence, a judge must be and perceived to be impartial. 'Justice' lies partly in what Edmund Burke called the cold neutrality of impartial judges. The common law recognises as much: it precludes judges from acting in cases where there is a reasonable apprehension of bias on their part.[27] In a practical sense, this has come to mean that a judge must be free of any relationship which might improperly affect the determination of the case, or might reasonably be perceived to do so. Accordingly, judges regularly decline investment opportunities available to others, and withdraw from political and social activities which might compromise or be seen to compromise their impartiality.

In seeking to be, and be perceived to be, impartial, judges seek to give effect to one of the two basic precepts of procedural fairness, otherwise called 'natural justice' or 'due process'. The second basic requirement is that each party be accorded a fair opportunity to advance its case before the judge and that the judge must listen attentively to it. One contemporary philosopher has described this aspect of the judicial process in the following terms:

> We are entitled not to 'like results' but to 'like process' (or 'due process'), and this means attention to the full merits of a case, including to what can fairly be said on both sides: to the fair-minded comprehension of contraries, to the recognition of the value of each person, to a sense of the limits of mind and language.[28]

[26] Op cit (fn 3) 11-12.
[27] Eg *Livesey* v *The New South Wales Bar Association* (1983) 151 CLR 288; *Webb* v *The Queen* (1994) 68 ALJR 582.
[28] Op cit (fn 18) 134.

These precepts, although not usually expressed in such literary terms, govern the work of the courts.[29]

Procedural fairness is, perhaps, a somewhat mundane or workaday precept upon which to rest a claim to the public's confidence. One may be forgiven for thinking that there must be more to the judicial task than this and, of course, there is. Procedural fairness, whether described as due process or natural justice, has, however, an abiding importance which is illustrated every day in the work of the courts in free societies.

The significance of this aspect of the judicial process was very much brought home in the trial of Adolf Eichmann in Jerusalem, 1961. Hannah Arendt has reported that the presiding judge, Moshe Landau, was moved to say in protest against the many in Jewish society who wanted to make the trial a show trial that:

> We are professional judges, used and accustomed to weighing evidence brought before us and to doing our work in the public eye and subject to public criticism. ... When a court sits in judgment, the judges who compose it are human beings, are flesh and blood, with feelings and senses, but they are obliged by the law to restrain those feelings and senses. Otherwise, no judge could ever be found to try a criminal case where his abhorrence might be aroused. ... It cannot be denied that the memory of the Nazi holocaust stirs every Jew, but while this case is being tried before us it will be our duty to restrain these feelings, and this duty we shall honour.[30]

Moreover, this duty was to be honoured because it was part of the process of doing justice — the one purpose of the trial. The judge's point was, as Raimond Gaita has said, not simply that justice should be done to Eichmann's victims but that, in order to do justice to them, the justice that was similarly owed to Eichmann had also to be done to him.[31] These precepts apply notwithstanding that, in applying them, the judge stands against the tide of popular opinion. For the condition of public confidence to be maintained, it seems, therefore, that the public must be confident that the judiciary will apply these precepts, come what may. Perhaps, it is not surprising that this tends to be forgotten by many, in the course of debating an issue of moment.

PUBLICITY

The Eichmann trial also demonstrated another of the rules agreed upon as a condition of maintaining public confidence, namely, that from the opening of a case to its conclusion, the proceedings take place in public, subject to the public's scrutiny. As Gibbs J said of the rule that proceedings be conducted 'publicly and in open view':

[29] Eg *Cooper* v *Wandsworth Board of Works* (1863) 14 CB (NS) 180, 190 & 194; 143 ER 414, 418 & 420.
[30] H Arendt, *Eichmann in Jerusalem: A report on the Banality of Evil* (1963), 208-9.
[31] R Gaita, *Good and Evil: An Absolute Conception* (1991), 6-7.

> This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials 'for publicity is the authentic hall-mark of judicial as distinct from administrative procedure'.[32]

The exceptions to the principle of open justice are again limited and rare.

REASONS

Closely associated with the principle of open justice is the requirement that judges announce their decision and give their reasons in open court. The reasons are designed to expose fully why it is, in the circumstances of the case, that the submissions made by the parties were accepted or rejected; and, in this country, one can be confident that the author of the reasons is, in fact, the judge who put them forward. The contrary is, not uncommonly, the case when a senior bureaucrat is requested to put forward reasons for a decision. To adopt the contemporary language of James Boyd-White again:

> Many-voicedness; the integration of thought and feeling; the acknowledgment of the limits of one's own mind and language (and an openness to change them); the insistence upon the reality of the experience of other people, and upon the importance of their stories, told in their own words.[33]

Or, to use the more familiar language of lawyer and judge,

> The process of reasoning which has decided the case must itself be exposed to the light of the 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.[34]

Are these authors talking of the same thing? I think they are. Reasoning is but the integration of thought and feeling. And, more significantly, reasoning is, according to both, to be tempered by humility. That is, the judge herself recognises that she is but the servant of the law, and is informed by the experience of others.

The reasons relied upon by a judge reflect the essence of judicial method which is rational, rather than arbitrary. In reaching their decisions, judges are controlled by what other judges have decided before them. That is, they are

[32] *Russell* v *Russell* (1976) 134 CLR 495, 520; *McPherson* v *McPherson* [1936] AC 177, 200 and *Scott* v *Scott* [1913] AC 417, 441.
[33] Op cit (fn 18) 132.
[34] F Kitto 'Why Write Judgments?' (1992) 66 *ALJ* 787, 790.

controlled by what are sometimes called the 'rules' of law laid down upon an earlier occasion, re-formulated, where necessary, to meet the circumstances of the case. That is, the judicial method emphasises the importance of continuity.[35] Perhaps more importantly, the judicial method emphasises predicability and the need, in the interests of fairness, to treat like cases in a like way. If judges are, as Ronald Dworkin says, essentially 'backward looking',[36] it is not because they have a personal preference for conservatism, but because they recognise that this aspect of the judicial method promotes those minimum values which are conducive to the maintenance of public confidence in the judiciary. Further, this 'backward looking' process is tempered by the judiciary's acceptance of the fact that it must either give effect to whatever valid legislation is enacted, whatever moral or other objection a judge may privately entertain, or cease to be a judge. Ultimately, then, the public can afford to have confidence in the judiciary which, by virtue of its own practice, is controlled by the Parliament, which is, in turn, controlled by the political will of the community.

WHY SUGGEST THAT PUBLIC CONFIDENCE IS IN DECLINE?

Why, then, is it suggested by some that public confidence in the judiciary is in decline? There is, so far as I am aware, no evidence that the judiciary in Australia is failing to observe any aspect of the judicial process or method designed to secure the public's confidence. It has not been said that judges as a group are denying parties a fair opportunity to present their cases, or are failing to listen attentively to them. Nor has it been suggested that judges are proceeding to hear cases in secret cabal or that they are not publishing their reasons, or that the reasons, when given, are not genuine reasons. So what is the occasion for doubt?

Broadly speaking, the threats to the public's confidence appear to be of three kinds. First, there are perceived deficiencies in judicial performance. Secondly, there are perceived deficiencies in the legal system which in turn affect public confidence in the judiciary. Thirdly, there appears to have been a lack of balanced public debate about the judiciary, which has contributed to a perception that public expectations about the judiciary are not being fulfilled.

PERCEIVED DEFICIENCIES IN JUDICIAL PERFORMANCE

Few would demur to the proposition that if the judges are to fulfil their primary task so as to retain public confidence, they must render decisions promptly. Further, few would demur to the proposition that the judges should dispose of the cases before them with as much efficiency as the law, including the rules

[35] A R Blackshield, 'The Legitimacy and Authority of Judges' (1987) 10 *UNSWLJ* 155, 157.
[36] R Dworkin, *Law's Empire* (1986) 413.

of procedural fairness, will allow. Today courts up and down the country seek to meet these objectives. The Victorian Court of Appeal heard 113 criminal appeals and 90 civil appeals in the last twelve months. Judgment in two-thirds of these appeals were reserved. In these cases the average time between hearing an appeal and giving a decision was 1.9 months. To the extent the courts fail to deliver decisions promptly and act efficiently, there is the possibility that public confidence in them will diminish. But, while there is no cause for complacency, the most recent reports on the justice system do not indicate that deficiencies of this kind are the occasion of diminishing public confidence.[37]

PERCEIVED DEFICIENCIES IN THE LEGAL SYSTEM

What about perceived deficiencies in the legal system? The law administered by the courts is admittedly complex. The body of statutes and subordinate legislation alone is now enormous. The number of rules and disallowable instruments in the Commonwealth has more than doubled between the period 1982-1983 and 1990-1991. In 1982-1983 the Senate Standing Committee on Regulations and Ordinances reported 553 statutory rules and 150 disallowable instruments, making a total of 703. By 1990-1991, the Committee reported 484 statutory rules and 1,161 other disallowable instruments, making a total of 1,645.[38] In many areas this very complexity operates to exclude all but the lawyers from obtaining a grasp of the law's operation. This may mean that, whilst the judge's reasons for decision are open to public scrutiny, there are few, save for other lawyers, who can assess those reasons critically. If this is so in a case of a marked social consequence, it is perhaps no small wonder that the public may doubt whether the task of the judge has been adequately performed. It may well have been, but how is the public to know if it cannot comprehend what is said? I am not suggesting that, in this circumstance, the judge is at fault, for the judge must give reasons in the terms of the law, however complex. But there may be a need in such a case for some translator to translate the judge's reasons into a form which may be understood beyond the legal community.[39]

A consequence of the complexity of the law is that most who come to court need a lawyer to speak on their behalf, and professional costs are, almost inevitably, substantial. If costs stand in the way of going to court, the judges may not be called upon to fulfil their primary task as often as they should. The public may well say, where is the benefit in the judiciary's administration of the law, if the judiciary cannot be reached? Confidence in the judiciary may be diminished, even indirectly, by escalating costs. Again, I hasten to add that the judiciary itself may not be primarily responsible for the prohibitive effect of the cost of coming to court. Excessive cost may be due to the conduct of

[37] Report of the Access to Justice Committee (1994), Chapter 15 Ch 15, p 20 para 3

[38] Administrative Review Council, *Report to the Attorney-General: Rule-Making by Commonwealth Agencies*, (1992) 7.

[39] N Stephen, The President's Luncheon' Address at the Law Institute of Victoria, 19 August 1998.

others. Ultimately, it seems to me the matter is one for the community as a whole, in so far as the community as a whole must determine whether, and to what extent, it wishes to pay for the maintenance of the rule of law, just as it must do for roads and hospitals. There is, however, a need for the community to understand the nature of the choices which it is called on to make.

In an age where Australians of all backgrounds are called upon to serve the community in its major governmental institutions, it is a matter of some concern that the level of participation by women and people from non-Anglo-Celtic backgrounds in the administration of the legal system is so low. Having said that, I note that the position with regard to women in Victorian courts at least would appear to be improving.

This lack of participation is not, I think, disturbing because it leads to a want of impartiality or to some other failure in the judicial process or method. It is disturbing because it indicates that there may be a fundamental inequality of opportunity to participate in the administration of the rule of law in this country. It is this possibility which, in my view, raises a legitimate doubt in the public's mind. It is a doubt which is capable of affecting public confidence in the judiciary. Is there, the public may well ask, some systemic bias in the legal system itself which limits opportunity for women and other groups and, if so, to what extent, if any, is the judiciary as a major participant in that system responsible? Even if the question is not properly addressed to the judiciary, it must be answered. But the real question is again, by whom and in what way?

LACK OF BALANCED PUBLIC DEBATE ABOUT THE JUDICIARY

As argued earlier, public confidence in the judiciary depends largely upon courts doing and being seen to do their job well. Part of the process of being seen in this way lies in the courts presenting themselves as clearly as they can to the public, without undermining their capacity to decide cases which is their primary task. Equally as importantly, though, is that such efforts be recognised and interpreted responsibly by the media, for the fact is that relatively few members of the public have sufficient on-going or direct dealings with the courts to enable them to form an independent judgment. The fact is that it falls to the media to disseminate reliable information about these matters. And it follows from what I have said thus far that if public confidence in the judiciary is to be promoted, then, the media, in all its forms, ought to be encouraged to present a balanced account of the work of the judiciary; to act as the informed translator of judicial decisions for the community at large; to raise for careful public consideration the question whether the public purse should be spent upon the administration of law, and to enquire as to the means by which participation in the administration of the law can be more broadly based. I can but agree with the Chief Justice of South Australia that, generally speaking, 'media scrutiny and criticism of the courts is healthy'.[40]

[40] J Doyle, 'The Well-Tuned Cymbal' op cit (fn 25) 39.

A major problem arises, however, if the media do not seek to gain a full understanding of the judiciary's task but fan community fear, in a self-indulgent way. If the media do not engage in balanced debate, they do a disservice not only to the judiciary but to the community at large. The disservice to the community is of the very worst kind, for it undermines, without adequate cause, the judiciary's trusteeship of the rule of law and it puts nothing comparable in its place.

It must be borne in mind that, unlike other significant institutions, the judiciary is, by convention, severely restricted in its ability to present its own account of how the judiciary works. A judge cannot engage in public discussion about a case which he or she is hearing, or a judgment which he or she has given. To engage in such a process is to compromise at least the perception of impartiality. For the reasons I have given earlier, it should be sufficient to refer to the judge's reasons for a statement of why a decision was made. Further, if judges were to enter the arena of debate upon social, ethical or political issues in any partisan way a question would inevitably arise as to their ability to remain impartial should a related issue arise in their courts. The judiciary is plainly an easy target for bullying.[41]

There are other inhibitions, of a practical nature, upon judges entering public debate. As Sir Anthony Mason has said '[t]he burden of work undertaken by intermediate courts of appeal in Australia and in other major common law jurisdictions is truly daunting'.[42] A mountainous workload is not the sole preserve of intermediate appellate courts. As things presently stand, there is very little time for a judge to engage in any other activities beyond the primary task.

But allowing for these limitations, is there anything to be said for the view that if the judiciary are to maintain public confidence, then, in the absence of a champion, the judiciary must set about the task of providing a great deal more information than in the past about what the courts do, the nature of their task, how it is performed and why?

At the Commonwealth level, it seems the judiciary's former champion has all but left the field. The Attorney-General for the Commonwealth of Australia has recently made it clear that in his view,

> [t]he judiciary can no longer stand by and presume that the political office of the Attorney General can or should adequately represent judicial interests in [their broader and more general dealings with the public, the media and governments].[43]

The judiciary should, the Attorney-General said, place greater store by the Judicial Conference of Australia. But one may take leave to doubt whether the Conference or, indeed, any of its constituent members would render more than modest assistance. In *Law's Empire*, Dworkin has written:

41 Id 44-46 and J H Phillips, 'The Judiciary and the Media' (1994) 20 *Mon L R* 12 et seq.
42 Mason A 'The Appointment and Removal of Judges' op cit (fn 25) 6.
43 'Independence to the Judiciary - Some Federal Government Initiatives' op cit (fn 25) 82.

> No department of state is more important than our courts, and none is so thoroughly misunderstood by the governed. Most people have fairly clear opinions about how congressmen or prime ministers or presidents or foreign secretaries should carry out their duties, and shrewd opinions about how most of these officials actually do behave. But popular opinion about judges and judging is a sad affair of empty slogans, and I include the opinions of many working lawyers and judges when they are writing or talking about what they do.[44]

Given that this most respected author has spent a lifetime of studying the work of judges and judging, this is a most depressing comment. Is there any reason to believe that judges will do better in the future?

I do not mean to suggest that the judiciary should not try to do better and to take what steps they can to encourage better informed public debate. The problem is, as I see it, how best to bring about some conjunction between public expectations about the courts and judges and what in fact the courts and judges in the Australian constitutional setting in fact do.

In 1994, the Report of the Access to Justice Advisory Committee recommended that each federal court and tribunal adopt a charter 'specifying standards of service to be provided to members of the public coming into contact with the court or tribunal'. The charter was to deal with such matters as 'the physical facilities of the court or tribunal'; 'information made available by the court or tribunal'; 'time limits and efficiency in their delivery of services, including the delivery of judgments'; 'courtesy towards members of the public'; 'access to the courts and accountability for service delivery, including complaints handling procedures and methods for drawing the existence of these procedures to the attention of members of the public'.[45] The idea was not entirely novel. The Committee, in making this recommendation, drew upon the Courts Charter for England and Wales, published in 1992 by the Lord Chancellor, the Attorney-General and Home Secretary.[46]

Who is to be heard to say that, in the public mind at least, the dissemination of a document such as this would not assist in mending any breach between the judiciary and the community which it serves? Perhaps this is one relatively direct and certainly public way in which the courts could promote conformity between public expectations about the judiciary and the judiciary's task. It, however, is unlikely to afford more than limited assistance.

CONCLUSION

In this area, one can, I think, be sure of only one thing. In a society such as ours, the judiciary needs the full confidence of the public if it is optimally to perform its task of helping to maintain the 'precarious equilibrium'. Public confidence is, however, elusive: it may not at times be measured by the

[44] Op cit (fn 36) 11.
[45] Op cit (fn 37) 370.
[46] Lord Chancellor's Department, 'Courts Charter 1992 and Access to Justice Report' 349.

majority's opinion or by what is said in the media. It is easier to see when it has gone than when it remains. It is easier to say what should protect it than what actually threatens it. What is plain is that not all threats to public confidence are of the judiciary's own making. The community has its own role to play in maintaining the precarious equilibrium; and the entire community needs to take a genuine and constructive interest in its judges. The judges are there only to serve the community, and they will serve it all the better with the community's confidence. A society may be on its way to losing the precarious equilibrium of which Berlin spoke when its members do not actively seek to inform themselves about the work of the courts. Perhaps, this conclusion is a little dull. Certainly, it does not call for heroic action.[47] If there is a need for heroic action in this context, then it seems the precarious equilibrium is, or is in the process of being, lost.

[47] cf op cit (fn 3) 19.