ARTICLES

'Without Fear or Favour, Affection or Ill-Will': The Role of Courts in the Community

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The judicial oath, requiring judges to dispense justice to all 'without fear or favour, affection or ill-will', can be traced to a statute enacted during the reign of Edward III in 1346. This article, which was first delivered as a public lecture in Perth in April 1998, reflects on the continuing importance of the oath for judges today.

WHAT I want to do this evening is to try to convey the importance of the courts to the survival of the society in which we live. This is not a eulogy of judges who must expect criticism together with praise for what they do. But criticism based on hostility or even on misunderstanding can, if sufficiently sustained, undermine any institution. A society that lacks a strong and independent judiciary is in real danger of seeing its civil liberties disappear and ultimately of losing its freedom.

Sometimes, when listening to someone in full flight against the legal profession, reference is made to a passage in Shakespeare's *Henry VI, Part 2*, in which the statement is made: 'The first thing we do, let's kill all the lawyers'. The

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words are often offered as evidence of the unpopularity of lawyers, even in Shakespeare's day. The irony is that the statement was made to the rebel Jack Cade, in recognition of the fact that if society was to be overthrown the lawyers must go and they must go first. This is not because lawyers are by nature a particularly courageous lot; it is simply that the institution of which they are part exists not only to resolve disputes between individuals but to protect the citizen against excesses of State power. If the protection given by the courts is removed, it is hard to see what limits can be imposed upon the authority of the State.

I have taken, for the title of this address, some of the words of the judicial oath of allegiance. A Justice of the High Court of Australia swears or affirms that he or she —

> will bear true allegiance to Her Majesty Queen Elizabeth the Second, Her Heirs and Successors according to law, [and] will well and truly serve Her in the Office of Justice of the High Court of Australia and ... will do right to all manner of people according to law without fear or favour, affection or ill-will.[1]

An oath or affirmation in comparable terms is required of each person undertaking a judicial role. The judicial oath can be traced to a statute enacted by King Edward III in 1346 which referred to justices doing —

> equal Law and Execution of right to all our Subjects, rich and poor, without having regard to any Person, and without omitting to do right for any Letters or Commandment which may come to them from Us, or from any other, or by any other cause.[2]

At a time when judicial decisions are subject to considerable scrutiny, particularly by the media, there is still misunderstanding of the role of the courts — how they operate and the constraints under which they work. There are various reasons for this state of affairs. It is not profitable to explore those reasons on this occasion, except to acknowledge that more could have been done by the courts themselves to strip away the mystique with which it has suited some to surround the law. Much more is being done now and, undoubtedly, still more can be done. But there are limits and it is important that they be understood.

The judicial oath speaks of doing right 'according to law'. One sometimes hears the comment, 'This is a court of law, not a court of justice'. The comment is glib but it contains an important truth. Judges (and I shall use that term to include all judicial officers, judges and magistrates) do not have a free hand to dispose of the cases before them. They cannot go on some sort of roving commission. There is discussion currently about the so-called adversary system operating in this

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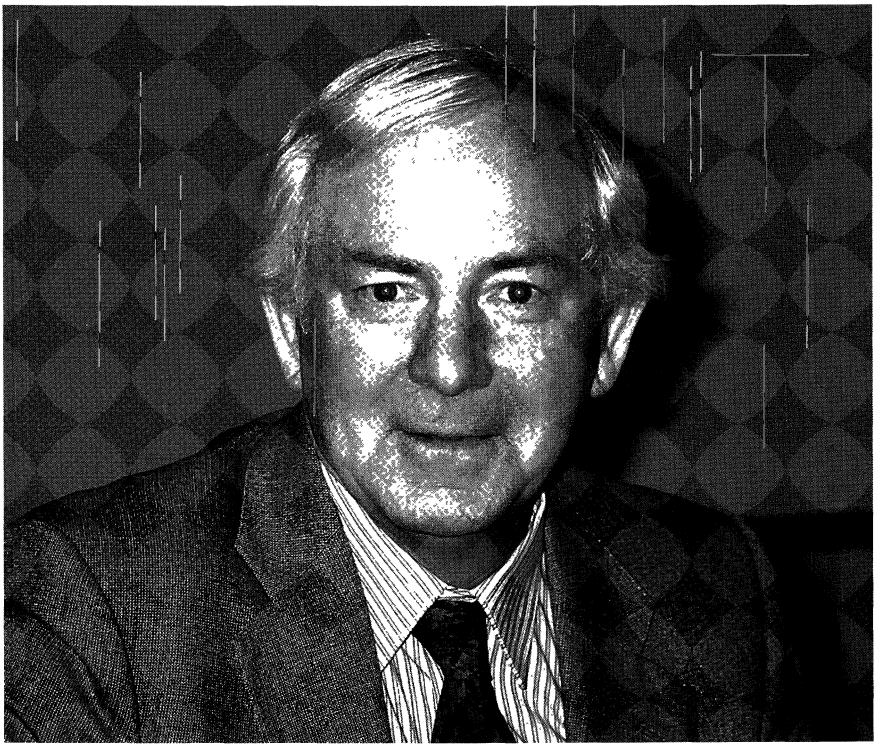
1. High Court of Australia Act 1979 (Cth) s 11.
2. 20 Edw III c 1.



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country and, for that matter, operating in other common law countries, compared with the so-called inquisitorial system prevailing in many European countries. Whatever the system, a judge must act according to the law as he or she understands it. In this country the law is to be found in Acts of Parliament, federal and State, and in the many regulations made under those statutes. It is also to be found in the decisions of the courts, whether in the interpretation of those statutes or in the development of the common law that we inherited from England. In turn, both statute and common law must comply with the provisions of the Australian Constitution. Parliament, if it wishes, may change the law which results from decisions of courts. For that reason and because it does not control the purse strings, the judiciary is sometimes referred to as the weakest and least dangerous arm of government. There is one area where, in a sense, the courts have the last word and that is in respect of the role of the High Court in interpreting the Constitution. Even then, of course, the Constitution may be amended by the will of the people manifested in a referendum.

The adversary system and the inquisitorial system are compared by some enthusiasts as if all the advantages were with the latter. In particular, it is said, the

adversarial system conceals the truth while the inquisitorial system aims to find it. This is a subject warranting an address in itself. The search for truth is an attractive concept; we would all like to know where the truth lies in a criminal trial for instance. Some might think that extracting a confession by whatever means, even by force or deception, is an efficient way of ascertaining the truth. The Spanish Inquisition and the Star Chamber apparently thought so. Totalitarian regimes have always thought so and still do. Is this a price we are prepared to pay in the interests of learning the truth? And given the long history of false confessions, how would we know that we had found the truth? Is a confession obtained by force or deception anything more than a convenient way of relieving the State of the onus of proving guilt? A few nights ago I caught a section of the TV comedy, 'The Third Rock from the Sun', in which one of the aliens opted for jury service. He could not understand how the jury could determine guilt or innocence when the accused had chosen not to give evidence. It was explained to him that if the State accuses someone of a crime, it must prove its case, if necessary without hearing from the accused. It is not hard to criticise rules of evidence and procedural matters, but the basic proposition that criminal prosecutions must proceed according to law is one that most would regard as critical to a democratic society.

Legal philosophers have long debated the boundary between the requirements of law and of morality, indeed whether there is any true boundary. Certainly there are occasions when, in acting according to law, a judge is required to exercise a judgment according to values rather than according to detailed rules. To take one instance, some legislation empowers a court to set aside a contract which is unfair or which has been entered into as a result of unconscionable conduct by one of the parties. While the legislation may give some guide to the courts as to the circumstances in which the contract may be set aside, essentially the question is whether one of the parties has so far acted against good conscience that the court should intervene. Another illustration is the power of a court, in family cases, to make adequate provision for a member of a family where the testator has failed to do so. This is a function which requires recognising and applying prevailing community standards as to what a moral duty requires.

On the other hand, there are situations in which the conduct of a person might clearly be regarded as immoral but which carries no legal consequences. Perhaps the sharpest illustration of this is in the so-called duty to rescue cases. If I see a person in a situation of danger, for instance having fallen into a river, and I am able to help, either because I am a good swimmer or there is a rope at hand, and I do nothing, what is my legal position? As the law stands, I incur no legal liability under the criminal law unless I stand in some particular relationship to that person, for instance as a parent or guardian. Nor do I incur any civil liability unless, again, I stand in a particular relationship to the person. And what of the doctor who refuses or fails to attend on a person who is not a patient but who is in a life-

threatening situation? How far should law and morality correspond? That is another ongoing debate.

When the judicial oath speaks of doing right 'according to law', where is the law to be found? As I have said, broadly speaking it is to be found in the enactments of legislatures and the decisions of courts. But what if the point has not arisen before or, at any rate, has not arisen in the particular form in which it now comes before a judge?

Until well into this century the accepted doctrine was that judges do not make law but only declare what has always been the law. In his *Commentaries*, Blackstone referred to judges as 'depositories of the laws, the living oracles'.[3] While it may be flattering to be described as a living oracle, no one believes that any more, least of all the judges. The theory was that the law in all its manifestations existed, to be unearthed by the researches of counsel and the judges. That is not to say that manifest inadequacies and injustices were not remedied by the courts but it was because bad law was said not to be the law.

In 1972, at a meeting of the Society of Public Teachers of Law in England, Lord Reid remarked:

> There was a time when it was thought almost indecent to suggest that judges make law — they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more.[4]

If it is accepted that judges, particularly the judges of the final court of appeal, do make law, questions inevitably arise as to the basis upon which they do so and the value judgments they bring to bear. While the community is glad to see a court right a manifest injustice, concern is expressed by some at what is referred to as 'judicial activism', particularly in the area of constitutional interpretation.

This is something of importance to the community and that importance is heightened when the desire to curb so-called activism threatens the independence of the judiciary. These are matters about which I would like to say something. In particular there are two points which are often overlooked in this area of debate.

The first reflects an important distinction between the legislature and the judiciary. Subject of course to political considerations and to constitutional constraints, it is a matter for a legislature whether to initiate or amend legislation

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3. W Blackstone *Commentaries on the Laws of England* 1st edn (Oxford: Clarendon Press, 1765-1769).
4. JSC Reid 'The Judge as Law Maker' (1972) 12 JSPTL 22.

on a particular subject. It may decide to take no step in that direction. It may regard the subject as too controversial. That is not an option available to the courts. A court can neither seize nor reject issues. On the one hand, it must wait until an issue is presented to it in a case. On the other hand, if proceedings are commenced, the court cannot refuse to hear the matter so long as it is justiciable, that is, so long as it raises a matter within the jurisdiction of the court. A decision may have political, social or economic implications; it may be highly controversial. But the court cannot refuse to deal with it for that reason. It often happens that in determining the issue before it, a court reaches a decision which affects the lives of many sections of the community. It is sometimes said that in a matter of great controversy the legislature may be quite happy to leave the matter to the courts.

One sometimes hears that the High Court is master of its own destiny because there is no appeal as of right to that Court from the courts below. That sort of comment fails to take into account two things. The first is that not all cases come to the High Court through the procedure of special leave to appeal. The Commonwealth may be sued directly in the High Court and most cases in which the validity of federal legislation is challenged come to the Court in this way. Where a case does come before the Court on an application for special leave to appeal, a grant of special leave will ordinarily be made if the case is one of public importance. Thus *Mabo v Queensland (No 2)*[5] began in the High Court although the case was remitted to the Supreme Court of Queensland for the taking of evidence before it returned to the High Court to determine questions of law. There was no basis upon which the High Court could refuse to deal with the important issues raised by that case. What is known as *Marion's Case*[6] concerned the ability or power of parents to have an intellectually disabled child sterilised. This raised questions of the powers of the Family Court and of parents, questions which had to be answered notwithstanding their serious implications for the community. In *R v L*[7] the High Court had to determine whether there could be rape within marriage. And what of all the so-called free speech cases that have been heard in recent years, involving the freedom of political communication? These cases raised serious questions of constitutional law which, again, had to be answered, though the answers directly affected the right to speak out on political matters, measured against the right to be protected from defamatory statements. Those cases came to the Court because in one instance members of the Western Australian Parliament,[8] in another a member of the federal Parliament[9] and in a third a former Prime Minister

5. (1992) 175 CLR 1.
6. *Dept of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.
7. (1991) 174 CLR 379.
8. *Stephens v WA Newspapers* (1994) 182 CLR 211.
9. *Theophanous v Herald and Weekly Times* (1994) 182 CLR 104.

of New Zealand[10] issued a writ for defamation and was met with a constitutional defence.

But, it might be said, it is one thing to say that a court must deal with the cases that come before it. It is another thing to say how the cases should be dealt with and whether, in disposing of them, a court may go beyond the accepted limits of determining the law and of constitutional interpretation. That in turn invites the question — what are the accepted limits? It is not my intention to canvass particular decisions but a reference to them leads me to the second of the two matters I suggested earlier have been overlooked in this context. A judge who makes a decision developing or indeed changing the law is sometimes referred to as 'activist', perhaps unduly activist. The implication seems to be that the judge who decides that the law should not be developed or changed in a particular way has somehow done nothing. But in each case the judge has had to consider the material furnished in the course of the hearing and the arguments of counsel. In each case the judge has had to come down with a judgment based on a consideration of these matters. That judgment may favour or it may oppose moving the law from where it presently stands. One judge may decide that the true nature of the relevant law demands some change; another judge may recognise an injustice but consider that any change is for the legislature. The question is not so much whether one is right or one is wrong; the point is that each has to arrive at a decision by the same process of decision-making, the non-activist judge no less than the so-called activist judge.

It is cries of activism that have led to suggestions that Justices of the High Court should be appointed on a short-term basis or that the members of the Court should be elected by popular vote or, it would seem in some cases, both. There is also the suggestion of some sort of confirming process. I recall a round table discussion on radio by constitutional lawyers following the *Wik* decision[11] and a suggestion that had been made of short-term appointments to the High Court. One of the lawyers described the suggestion as 'loopy', the others all seemed to agree and the discussion moved on to some other aspect.

While 'loopy' is not a term I ordinarily use, the description has something to be said for it. And I think it is important to see why the suggestion is objectionable. It is not because judges stand in some position that makes them unaccountable. There are many persons occupying high office in this country who are on contracts limited to a term of years. But no true analogy can be drawn with such persons as indeed no analogy can be drawn between judges and members of Parliament who are elected. It is not the function of the courts to give effect to the policies

10. *Lange v ABC* (1997) 189 CLR 520.
11. *Wik Peoples v Qld* (1996) 187 CLR 1.

of government; equally it is not to thwart those policies. Their function is to apply the law as they see it. This may lead to legislation being held unconstitutional as it was in the Communist Party[12] and bank nationalisation cases,[13] but that is a consequence of the law as applied.

It may be said that if a judge has shown himself or herself to be incapable of doing the job or has acted in some way on or off the Bench as to demonstrate unfitness for judicial office, why should that person continue in office? The answer of course is that a judge can be removed from office on the ground of proved misbehaviour or incapacity. But short-term appointments enhance the scope for government to appoint to the Bench those most likely to favour it in litigation. A judge true to the judicial oath will not allow that consideration to intrude upon judgments, but the judge whose decisions are thought to be adverse to government will almost certainly pay the penalty when the time comes for the renewal of appointment. When we speak of the independence of judges and when we say, 'without fear or favour, affection or ill-will', we are asserting the independence of judges in all situations. But history and experience, including contemporary experience in other countries, teaches us that a judiciary which is dependent upon the goodwill of the government of the day must inevitably lose the confidence of the community. And when that happens, the administration of the law is brought into disrepute and one of the two bastions against excess of governmental power (the media is the other) loses its force.

A confirming process, such as exists in the United States, might seem to have its attractions. Why should not prospective appointees to judicial office, particularly on the High Court, be questioned about their attitudes towards the Australian Constitution and basic rights? The American experience has shown that such a procedure inevitably focuses, for political reasons, on what are thought to be the candidate's disqualifications rather than the qualifications they can bring to the office. But more than that, what in the end the questioner really wants to know is what decision the candidate is likely to make in a particular legal situation. Otherwise, what is the point of the questioning? And of course that is the one answer that cannot be given. No one who intends to be true to the judicial oath can say what they will decide until they have considered the evidence and the argument. And because that is the answer that will be given, attention inevitably shifts to the candidate's personal qualities or lack of them. During the hearings on Robert Bork's nomination to the US Supreme Court in 1987, one journalist published, as apparently relevant, a list of the films Bork had rented at his neighbourhood video store.[14]

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12. *Australian Communist Party v Cth* (1951) 83 CLR 1.
13. *Bank of NSW v Cth* (1948) 76 CLR 1.
14. SL Carter *The Confirmation Mess* (New York: Basic Books, 1994).

It also means that the candidate who, over the years, as a legal practitioner or academic, has written on legal subjects runs the risk that something he or she has written will be held against them. The refusal to confirm Robert Bork is a good example of this. Over the years he had written on a host of legal topics. The candidate who has never written for a legal journal or spoken publicly (what the Americans call the 'stealth candidate') stands in a much better position of passing the process.

The confirming process, like short-term appointments and the election of judges, seems to me to proceed on a quite false footing. A judge who is appointed to any court brings with him or her a view on a whole range of matters relating to the law, a judicial philosophy if you like. But that philosophy is not fixed; it will develop as the judge has to grapple with specific legal issues. And the fact that the judge is dealing with specific legal issues means that a decision has to be reached according to the law relevant to those issues. That does not mean that all judges will reach the same result but it does mean that they will reach a result according to the law as they understand it. The obligation on a judge to give detailed reasons by reference to the evidence and to statute law and decided cases puts a considerable restraint on what a judge may take into account in reaching a decision.

When lawyers speak of judicial independence it tends to be with reference to the power of executive government. That is in large part because it was the clash between Chief Justice Coke and King James I in the seventeenth century that brought into sharp focus the issue whether the deciding of cases and hence the path that the common law would take was the prerogative of the Crown or belonged to professional judges, trained in the law. It was by the Act of Settlement 1701 that Parliament accepted that it was for the judiciary to determine disputes between the Crown and Parliament. As a consequence, the Act of Settlement provided that thenceforth judges should not hold their commissions at the will of the Crown but should hold office during good behaviour, only liable to be removed upon an address of both Houses of Parliament. Thus a fundamental principle was established, the rule of law to which all, including the Crown, are subject. A cynic might say that Parliament took this step in 1701, not so much because it recognised the importance of the rule of law but in order to ensure its supremacy over the Crown. That may be so but often important principles are established in this way, just as Magna Carta enshrined many of our basic rights because of the desire of the barons to curb King John.

But judicial independence has a wider meaning than independence from the executive government. Society must have confidence that the courts will act impartially, free from any influence that might be thought to lessen the capacity of judges to act 'without fear or favour, affection or ill-will'. Of course judges must understand what people in the wider community are thinking and they must make some assessment of community values. That is not always easy, particularly if a section of the media runs a strong line on some issue, for instance sentencing of

offenders. But the courts are not there to respond to popular demand. Nor are they there to bow to the will of the government of the day. This is not a form of arrogance; it is a necessary consequence of the existence of a strong and independent judiciary as the third arm of government.

Society looks to the courts to protect minorities and individuals against what a former Chief Justice of Australia called in an address a year or so ago 'the overreaching of their legal interests by the political branches of government'.[15] I do not suggest that the courts have an unblemished record in this area. The common law was slow to develop some aspects of human rights. The protection of minorities and individuals by the courts will sometimes be unpopular. One outstanding example can be found in the decision of the Supreme Court of the United States in *Brown v Board of Education of Topeka*[16] which struck down segregation laws in the education of children. The decision caused a huge outcry. It was not a popular decision, certainly not in the southern States. And yet would anyone now say that it was not the right decision in the sense that the rule of law demanded it?

Independence also demands that in determining disputes between citizen and citizen, especially in those areas where value judgments are required, the judges act with impartiality. All judges come to the Bench with a 'baggage' of attitudes to race, religion, gender, politics and so on. They have to be alive to influences that consciously or unconsciously influence them. They can learn through race, gender and other programmes. But in the end society is dependent on the quality of the judges who are appointed.

While I have expressed opposition to any sort of confirming process, there can be no argument but that appointments must follow a more open process. That will ordinarily take the form of consultation between the Attorney-General, State or federal, and the Chief Justice, other judges, the Law Societies and the Bar Associations. If that consultation is on a wide enough basis, it should ensure suitable appointments. But the process of consultation should also have greater openness than it presently does. The community is entitled to know not only who has been consulted but, at least in a general way, the result of that process.

In all of this I accept it as fundamental that courts must earn respect by the way in which they perform their functions. Rather, my concern is that the way in which they perform their functions is understood. Time prevents me from developing this theme any further, save in one respect.

The patience of every judge is tried at times, that of magistrates probably more so because of the number and nature of the cases with which they have to

15. G Brennan 'Judicial Independence' (Canberra: Australian Institute of Judicial Administration Conference, 2 Nov 1996).
16. (1954) 347 US 483.

deal. But it is critical to the administration of justice that everyone who enters a courtroom as litigant or witness leave with their personal dignity intact unless by their own actions they have forfeited the right to be so treated. The judge should be able to and usually does rein in his or her feelings. It was not always so. But there is also an obligation to rein in any counsel who hectors or bullies a witness, who tries to be smart at the expense of a witness (perhaps borrowing some technique from American television) or who engages in a long and debilitating cross-examination. In my view a judge has an obligation to protect a witness from unfair tactics, whether or not objection is taken by the counsel who calls that witness. I do not suggest that this sort of conduct is common but if it is allowed to happen it brings the courts and hence the administration of justice into disrepute.

The rule of law, the concept that we are all subject to the law and that noone is above it, is an essential element of a free society. The importance of the law has rarely been put better than by someone who was not a lawyer, the playwright Robert Bolt. There is a scene in *A Man For All Seasons* which deals with the Lord Chancellor, Thomas More, whose execution Henry VIII secured. More, in the company of his wife Alice, his daughter Margaret and his son in law William Roper has rejected the approach of Richard Rich who will betray him and himself become Lord Chancellor. There follows this dialogue:

Margaret: Father, that man's bad.

More: There is no law against that.

Roper: There is! God's law!

More: Then God can arrest him.

Roper: Sophistication upon sophistication!

More: No, sheer simplicity. The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal.

Roper: Then you set Man's law above God's!

More: No, far below; but let me draw your attention to a fact — I'm *not* God. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester. I doubt if there's a man alive who could follow me there, thank God.

Alice: While you talk, he's gone!

More: And go he should if he was the devil himself until he broke the law!

Roper: So now you'd give the Devil benefit of law!

More: Yes. What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned round on you — where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast — Man's laws, not God's — and if you cut them down — and you're just the man to

> do it — d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.[17]

More's words, as Bolt has conjured them up, give us some understanding of what the term 'law' means to society and hence of what the courts are about.

17. R Bolt *A Man For All Seasons* (London: Heinemann, 1980) 38-39.