

# **2013 DEAKIN LAW ORATION**

## **THE COURTS, PARLIAMENT AND THE EXECUTIVE**

**11 SEPTEMBER 2013, GEELONG**

**ROBERT CLARK MP  
ATTORNEY-GENERAL (VICTORIA)**

Thank you for the honour of inviting me to deliver this year's Deakin Law Oration, and to follow the many distinguished speakers who have delivered this oration in previous years.

In constitutional discussions, the relationship between Parliament and the executive receives a great deal of attention. Tonight I want to look at another important aspect of our State's governance, namely the relationships between our courts on the one hand and Parliament and executive government on the other hand.

### **WHAT IS A 'COURT'?**

Let me begin with the single word — 'court' — and some history.

We all know what a court is. There is a courthouse here in Geelong. There are the County Court and Supreme Court based in Melbourne. There is the High Court based in Canberra.

However, the word 'court' can be used in a different context as well. In history books and historical novels we find references to people seeking or having a 'place at court', that is, an office of service to the monarch — hence the word 'courtier'.

There is a third context, too, in which the word 'court' is used, although much less commonly these days. Sir Edward Coke, Chief Justice of England, wrote for example in 1628 that, 'The common law has no controller in any part of it,

but the high court of parliament...'<sup>1</sup> and the Parliament of the United Kingdom can still correctly be described as the 'high court of Parliament'.

### COURT AND CURIA

How is it that the word 'court' can be used in these three different contexts, referring to each of what we now often call the judiciary, the executive and the legislature?

The word 'court' derives from the Latin word *cors/cortis*, or, in its ancient form, *cohors/cohortis*, meaning a yard or an enclosed space. The word cohort, referring to a squad of Roman infantry, derives from the same source. It is not to be confused with the Latin word *cor*, meaning heart. The word reached the English language via the Old French *cort*.

In medieval times, the word 'court' was generally synonymous with the Latin word *curia*, which survives in the legal abbreviation *cur adv vult* — *curia advisari vult* — 'the court wishes to consider', used when a court adjourns after a hearing in order to consider its judgment, rather than delivering judgment *ex tempore*, at the time of the hearing.

The *curia regis* was the court of the king. The king's court attended to all aspects of running the kingdom. The king, or those at court delegated by the king, made decisions, issued commands, dispensed justice to those who broke the king's peace and resolved disputes of all sorts between the king's subjects. Where there were particularly important matters to resolve, be it about waging war, levying a new tax, or determining a complex or unclear dispute or point of law, the king would summon a wider than usual range of persons to take part in the deliberations. Just as Anglo-Saxon kings had summoned the Witan, the wise ones, together for major decisions, so the Plantagenet kings summoned a parliament.<sup>2</sup>

The word 'parliament' derives from the word 'parley', in the same way that the word 'conversation' derives from 'converse'. In its early usage, the word '*parliament*' — with a central 'ia' in its Latinised form, or '*parlement*' with a central 'e' in its original French form — referred to any discussion between people about an issue to be resolved. A husband and wife, for example, might

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<sup>1</sup> *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton, etc.* Electronic versions are available at, eg, <<http://archive.org/stream/cu31924021661693>>.

<sup>2</sup> See, eg, H G Richardson and G O Sayles, *The English Parliament in the Middle Ages* (The Hambledon Press, 1981) 8; R Butt, *A History of Parliament. The Middle Ages*, (Constable, 1989) 5.

be said to parley, or hold a *parlement*, about household affairs. The gathering at Runnymede in June 1215 at which King John gave to his barons the charter later known as the Great Charter, or *Magna Carta*, was also referred to as a parliament.<sup>3</sup>

The word ‘parley’ derives from the French *parler*, meaning to speak, in turn deriving from the late Latin term *parabolare*, to discourse, which also gives us the word ‘parable’.

The Latin synonym for ‘parliament’ was colloquium, a talking together. Early references to Parliaments in the official records of the English Parliament are references to *colloquium quod vulgo dicitur parlamentum*, a colloquium which in the vulgar tongue is called a Parliament.<sup>4</sup> Furthermore, each gathering was referred to as a separate Parliament, hence the title, which continues to the present day, of the ‘Clerk of the Parliaments’ for the senior of the parliamentary clerks.

So in medieval times, a Parliament was simply an expanded gathering of the king’s court, and this is reflected in much of the business it conducted, such as dealing with petitions. Not only did Parliaments receive petitions, they inquired into the matters raised and could grant redress for the wrongs or other problems for which relief was sought.

Similarly, major legal issues could be referred to a Parliament for decision, not by way of appeal, but because the referring court considered the issue difficult or important enough to transfer the case to a Parliament.<sup>5</sup> Difficult cases were also referred to higher authority with the marking ‘*loquendum cum concilio regis*’ — needing discussion with the king’s council — or ‘*loquendum cum rege*’ — needing discussion with the king.<sup>6</sup>

In medieval times, a Parliament was not considered to have a legislative role as we know it today, of creating law. Rather, the king in Parliament would declare what the law was, in cases where it was unclear, and would re-affirm ancient liberties. Statutes issued by the king with the authority of a Parliament were codifications of the law, rather than departures from existing law. The word ‘statute’ derives from the Latin *statutum*, meaning *law* or *decree*, from the verb *statuere*, meaning to establish or set up, so that a *statutum* was something that had been established.

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<sup>3</sup> Richardson and Sayles, above n 2, I 150.

<sup>4</sup> Ibid I 152.

<sup>5</sup> Ibid I 162ff.

<sup>6</sup> See, eg, Thomas Madox, *The History and Antiquities of the Exchequer of the Kings of England* (John Matthews, 1708) 620.

Thus, in medieval times, a court was any assembly to exercise a governing function. The Parliament was simply an expanded, or high, court of the king. Other feudal lords also had courts performing similar but more localised functions within their feudal territories.

History is supported by geography. If you visit the Palace of Westminster today, across Abingdon Street opposite the magnificent Victoria Tower of the modern Houses of Parliament, you will find a modest building of immense historical importance. It is called the Jewel Tower. It is one of only a handful of parts of the medieval Palace of Westminster to have survived the terrible fire of 1834. It originally held the king's precious plate and jewels, hence its name, but at the time of the 1834 fire it held records of the House of Lords, including many of the invaluable records of the Parliament Rolls that date back almost continuously to the thirteenth century. The Jewel Tower now has on display both models and artists' impressions of the old Palace of Westminster.

These show the magnificent Westminster Hall, which also survived the 1834 fire, and in which the king's courts sat until they moved to the Royal Courts of Justice in the Strand in 1882. Radiating westwards from the northern end of Westminster Hall was the Exchequer, the treasury. Nearby was the Chancery, the royal secretariat. South of Westminster Hall were St Stephen's chapel, where the House of Commons sat for many years, and beyond that the privy palace of the king, including the Lesser Hall occupied by the Court of Requests and the White Chamber where the House of Lords sat.

Thus, within the one royal palace, the administrative, judicial and legislative functions of the Crown were freely intermixed, without regard to the separation of powers that we can so easily take for granted today. The Palace of Westminster was also where the king himself usually resided when at Westminster, until King Henry VIII decided to move down the road to the Palace of Whitehall that he created from York Place, which he had confiscated from the Chancellor, Cardinal Wolsey, in 1530.

## THE ORIGIN OF JUDICIAL COURTS

How, then, did we get courts in the judicial sense that we know them today? The history can be found in varying degrees of detail in texts ranging from introductions to law through to learned legal histories and journal articles.<sup>7</sup>

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<sup>7</sup> See, eg, Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 2012), J H Baker, *An Introduction to English Legal History* (Oxford University Press, 2007).

In short, courts in the judicial sense came into being because the king delegated the function of resolving various disputes and hearing various causes. In other words, the early gatherings that heard and determined these matters were more akin to sub-committees of the royal court than to independent judicial bodies.

Thus, in 1280, Edward I decreed that:

all the petitions which concern the seal, shall come first to the Chancellor; and those which touch the Exchequer, to the Exchequer; and those which concern the Justices, and the law of the land, to the Justices; and those which concern the Jews, to the Justices of the Jews; and if the affairs are so great, or if they are of Grace, that the Chancellor and others cannot do it without the King, then they shall bring them with their own hands before the King, to know his pleasure; so that no Petitions shall come before the King, and his Council, but by the hands of his said Chancellor, and other chief ministers; so that the King and his Council may, without the load of other business, attend to the great business of his Realm, and of other foreign countries.<sup>8</sup>

Originally, the conduct of these hearings was delegated to officials who also performed other functions. Over time, the officials hearing and deciding cases became more specialised, and were appointed from among those whom we would now call lawyers. However, many of the proceedings still needed to be brought wherever the king and his court happened to be at the time. This, of course, was highly expensive and inconvenient to litigants. Hence article 17 of *Magna Carta*,<sup>9</sup> in which King John promised that common pleas (that is, those not involving the king) would not follow his court but would be heard at some fixed place, which became at Westminster Hall.

Kings also began to commission officials to travel the country to dispense justice. As a chronicler in 1179 wrote of Henry II:

[H]e appointed wise men from his kingdom and later sent them through the regions of the kingdom assigned to them to execute justice among the people ... This he did in order that the coming of public officials of authority throughout the shires might strike terror into the hearts of wrongdoers.<sup>10</sup>

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<sup>8</sup> Joseph Parkes, *A History of the Court of Chancery, etc* (Longman Rees, 1828) 29, citing Ryley's *Placita Parliamentaria* 442.

<sup>9</sup> That is, art 17 of the original 1215 version of *Magna Carta* (the text of which is set out in, eg, the Appendix to Norman Vincent, *Magna Carta: A Very Short Introduction* (Oxford University Press, 2012)).

<sup>10</sup> *The Queen as Fount of Justice*, The British Monarchy <<http://www.royal.gov.uk/MonarchUK/Queenandthelaw/SovereignasFountofJustice.aspx>>.

The motive for kings establishing these roving commissions was not solely the better dispensing of justice, but also the better raising of revenue, because the income from the court fees and fines of these courts greatly exceeded the cost of running them, and was a substantial net contributor to royal revenue.

### **THE ORIGIN OF PARLIAMENT**

Alongside, broadly speaking, the establishment of these delegated judicial sittings of the royal court and the itinerant justices, the representatives of the kingdom assembling in the high court of Parliament began to assert and obtain the various roles that the Parliament performs today, in particular, authorising taxation and drawing up bills for statutes to present to the king.

From the time of the model Parliament in 1295, the king issued writs to his sheriffs to conduct elections of representatives from amongst the leaders of the common people, which representatives convened as well as the lords spiritual and temporal to advise the king, and subsequently commenced the practice of assembling and deliberating separately from the lords.

In early times, Parliaments did not have an express right to approve or not approve new taxes. Rather, it was a matter of prudence that the monarch convened and took advice from a Parliament before imposing taxes; the redress by the king of grievances expressed in the Parliament by the representatives of the kingdom was the informal *quid pro quo* for the representatives accepting the need for the proposed tax and being willing to report back to their community on the need for the tax. Over time, it became accepted that the assent of a Parliament was essential for the Crown lawfully to collect a new tax.

### **THE ORIGIN OF EXECUTIVE GOVERNMENT**

What we now regard as the executive government did not develop as a separate institution. Rather, it was the continuation of the core of the business of running the kingdom — everything that was left over after the routine judicial functions were delegated to separate court sittings, and after it became necessary for the king to convene a high court of Parliament in order to exercise various powers.

## THE SIGNIFICANCE OF CONSTITUTIONAL HISTORY

Why is this examination of medieval constitutional history of significance to us today?

First, because these historical origins can prove relevant more often than one might expect to ascertaining the law applicable to modern-day issues.

Secondly, because the fundamental issues and challenges of government have not greatly changed since people first started to live in communities ruled by more than the dictates of one person. Thus it can be informative and helpful to know how other societies and other times have tackled issues similar to those we might face today.

Thirdly, because the history I have recounted shows that there is nothing inevitable about the modern conception of government as having distinct judicial, legislative and executive functions. We thus need to be able to justify our modern constitutional relationships by reference to their advantages and benefits compared to other possibilities, rather than by taking them for granted or as self-evidently superior.

## CHANGING RELATIONSHIPS

Since medieval times, of course, both the nature and functioning of courts and courts' relationships with Parliament and the executive have changed significantly. My purpose tonight is not to trace a full constitutional history of our courts. However, I do mention a few highlights that illustrate key aspects of the development of those relationships.

The first is the consolidation of the judicial role of the English Parliament. In 1399, the House of Commons ceased considering petitions seeking the overturning of judgments of lower courts. Thereafter, all petitions to Parliament against lower court decisions went only to the House of Lords. While the practice of petitioning the House of Lords had fallen into near disuse by the late 16<sup>th</sup> century, its revival in the 17<sup>th</sup> century restored the role of the House of Lords as the highest court in England, alongside its legislative role, until the passage of the *Constitutional Reform Act 2005*, with the UK Supreme Court commencing to sit in 2009.

Secondly, there was the development of prerogative writs, by which the courts came to exercise jurisdiction over other parts of government. While the king could do no wrong, and neither could the royal court acting as such (including, of course, a Parliament), the same was not true of officials of the

king, or of inferior tribunals. These could be subject to commands in exercise of the king's prerogative, issued from the king's courts, to cease or rectify erroneous ways.

Thirdly, there was the development of the practice of appealing to the king's conscience to overturn or render ineffectual for reasons of equity the decisions of his common law courts, or to give remedies when none were available through the common law courts. Through delegation, these powers became vested in the king's chief administrative officer, the Lord Chancellor. In conventional legal history, the development of the doctrines of equity is generally regarded as a 'good thing', as they remedied injustices either caused by the common law or which the common law was powerless to remedy. However, the notion that a senior politician could override the law and the courts is of course alien and objectionable to modern ears.

As many here tonight will recall from their law lectures or textbooks, the role of the courts of Chancery in overriding decisions of the common law courts became a source of great concern to common law courts and lawyers. However, the clash was resolved in the early 17<sup>th</sup> century by the determination, under the authority of King James I, that equitable remedies would prevail over the common law in cases of inconsistency.

Another crucial development for our courts in their relationship with executive government followed the so-called Glorious Revolution that placed King William III and Queen Mary II on the throne after King James II had fled the realm and was deemed to have abdicated. Section III of the 1701 Act of Settlement<sup>11</sup> that strengthened the 1689 Bill of Rights provided that:

[The] judges' commissions be made *quamdiu se bene gesserint* [so long as they conduct themselves well] and their salaries ascertained and established; but upon the address of both houses of parliament it may be lawful to remove them.

This was a substantial curtailment of the former power of monarchs to dismiss judges, a power that was fully consonant with judges being the king's delegates for determining judicial matters, but which of course posed a substantial risk to the rule of law if the monarch chose to dismiss judges for unjustified reasons, such as their roles in correcting the shortcomings of royal

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<sup>11</sup> For an online version see John Raithby (ed), William III, 1700 & 1701: An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject [Chapter II Rot Parl 12 & 13 Gul III p 1 n 2] in *Statutes of the Realm: vol 7: 1695–1701* (1820) 636–8, British History Online <<http://www.british-history.ac.uk/report.aspx?compid=46986>>.

officials, as had occurred frequently during the 17<sup>th</sup> century. Security of tenure for judges has subsequently become the position in Australia also.

Next, for Victorian courts, we should note the establishment of the Supreme Court in 1852. As the Supreme Court's website sets out, the Supreme Court was vested with common law jurisdiction defined by reference to that of the three common law courts at Westminster; criminal jurisdiction defined by reference to that of the Court of Queen's Bench at Westminster and the Central Criminal Court in London; equitable jurisdiction defined by reference to that of the Lord High Chancellor; and ecclesiastical jurisdiction defined, in part, by reference to the law of the province of Canterbury.<sup>12</sup>

While these various jurisdictions continued to be administered separately until the commencement of the Victorian *Judicature Act* in 1883, the establishment of a single Supreme Court with these multiple jurisdictions was still a substantial legislative innovation in 1852, when in England courts of common law and equity still sat separately. Nowadays, the jurisdiction of the Supreme Court is simply expressed in the *Constitution Act 1975* (Vic) to be unlimited.

I also mention the Commonwealth *Constitution* of 1901, which in sections 71 and 77 refers to the vesting of Commonwealth jurisdiction in State courts, and which a majority of the High Court has ruled in *Kable*<sup>13</sup> implies a Commonwealth constitutional requirement that there continue in existence State courts that are fit to be repositories of Commonwealth jurisdiction, meaning, according to that majority, that State Parliaments cannot validly legislate in a way that detracts from that fitness.

## THE SEPARATION OF POWERS

Finally, before proceeding to discuss modern-day courts, I want to look at the origins and content of the doctrine of the separation of powers. The doctrine is, of course, often cited in the context of the relationships of courts to Parliament and the executive, and it is therefore important to examine its history, meaning and significance.

The doctrine of the separation of powers is generally attributed to the French writer Montesquieu (Charles-Louis de Secondat). However, much of its origin traces back to John Locke, writing in late 17<sup>th</sup>-century England in the contentious times of King James II.

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<sup>12</sup> Supreme Court of Victoria, *History* (16 October 2012) <<http://www.supremecourt.vic.gov.au/home/about+the+court/history/>>.

<sup>13</sup> *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51.

Locke wrote widely on many subjects, but in the current context his key work is the *Two Treatises on Civil Government*.<sup>14</sup> The first of these treatises is a refutation of a now obscure work by Sir Robert Filmer, asserting the Biblical authority for a divine right of monarchs. However, Locke's second treatise sets out his alternative theory of government, based on the premise that government derives from the reasoned assent of the governed coming together to form a society.

In relation to the separation of powers, Locke's main proposition was that there needs to be a legislature separate from the executive, and drawn from a wide and diverse range of people, in order to prevent the executive using law-making power to coerce the populace.

Montesquieu built on Locke's doctrine in his monumental work known in English as *The Spirit of the Laws*<sup>15</sup>, a tour de force of constitutional and legal history and theory.

In Book XI, entitled *Of the Laws Which Establish Political Liberty, with Regard to the Constitution*, Montesquieu argued for a separation from each other of legislative, executive and judicial power. However, some of his reasons for so arguing are not necessarily what one might expect.

His reason for separating legislative from executive powers is conventional enough, and the same as that of Locke — so that the executive cannot use law making powers tyrannically to impose its wishes on the people:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

However, his reason for separating judicial power from both legislative and executive power was not to protect the people from tyranny by the legislature or executive, but to protect the people from tyranny by over-powerful judges:

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

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<sup>14</sup> For an online version see John Locke, *Two Treatises on Government (1680–1690)*, The Laws of Nature and Nature's God <<http://www.lonang.com/exlibris/locke/>>.

<sup>15</sup> Charles de Montesquieu, *The Spirit of Laws*, tr Thomas Nugent (The Colonial Press, 1899).

In other words, modern arguments to support a separation of judicial and legislative powers, such as that legislatures should make laws in clear and general terms rather than particular laws targeted at particular individuals or particular outcomes, or that a separate judiciary is necessary in order to keep the executive within the law, were not the key arguments Montesquieu put forward in support of his doctrine.

There are further aspects of Montesquieu's writing that also tend to undercut popular modern interpretations of his doctrine.

Although Montesquieu is often associated with American revolutionary writing and the founding of the US constitution, he was in fact no revolutionary. He wrote during the French *ancien régime*, and was an advocate for reform of the monarchy, not for a republic.

In fact, the model that best met Montesquieu's aspirations was the 18<sup>th</sup> century UK constitution, where the powers of the monarch were limited, but where within those powers the monarch still truly governed, both in person and through the monarch's chosen ministers. Although the monarch and his advisers needed to secure taxation and supply through Parliament, the notions of later times that Parliament could dictate the monarch's choice of advisers, and that the monarch has no real option but to act on the advice of those advisers, were alien to Montesquieu's thinking.

Thus Montesquieu wrote:

The executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one than by many: on the other hand, whatever depends on the legislative power is oftentimes better regulated by many than by a single person.

But if there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.<sup>16</sup>

In other words, in a contemporary Australian context, Montesquieu would be opposed both to democratically elected governments and to responsible government in which the Ministry must have the support of, and be accountable to, the Parliament.

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<sup>16</sup> Ibid, Book 11, pt 6 'Of the Constitution of England'.

While the 18<sup>th</sup> century doctrine of the separation of powers may have been hard-wired into the United States constitution, British and Australian constitutional theory has moved on since then. Whatever weight should be given to the doctrine of separation of powers in deliberations about Victorian constitutional arrangements must therefore be based on its merits in any particular context, rather than on appeal to history or authority.

Although my main focus tonight is on the courts, I would observe in passing that one consequence of the development of responsible government is to strengthen the traditional role of Parliament as the high court of the realm, that is, as the supreme deliberative and decision-making body of the community.

While it is customary to regard the word 'Parliament' as being virtually synonymous with 'legislature', in the English and Victorian constitutional models the Parliament has never been solely a legislature. The existence of responsible government both demonstrates and reinforces that position.

### **COURTS, PARLIAMENT AND THE EXECUTIVE TODAY**

Where does all this leave us in relation to the courts, Parliament and the executive today?

It is clear that a simplistic notion of government operating in three silos is not supported either by history or by principle. Interactions between the different facets of government are both necessary and desirable. Responsible government is one example; the accountability of the courts to Parliament for their use of public resources is another.

On the other hand, it is clear that certain separations and immunities between the different facets of government are also vital. The independent tenure of the judiciary is one example. The sovereignty of Parliament under the law is another example.

When we set about assessing what is working well in our governmental structures, and where there might be room for improvement, we need to be informed by history and by the reasons history shows for why things are done as they are. In particular, we need to understand what are the risks to good government that history has shown can arise, and how our modern governmental structures have been shaped by the protections against those risks that our forebears developed.

If we are minded to make changes to current structures, those changes should be determined having practical regard to what will work today, informed by

constitutional reasoning, but not driven by blind adherence to a theory with misconceived application.

### THE ROLE AND QUALITIES OF COURTS AND JUDGES

In relation to the judiciary, I respectfully venture to say that we in Victoria have generally been very well served by our courts and by the judges who comprise them. However, that is not to say that there are not opportunities for improvement — improvements that can be made both by the courts themselves, and by Parliament and indeed by the executive.

Fortunately, the centrepiece of what we look for in our judiciary today is as clear and well-established as it always has been. It is, of course, the dispensing of justice, the righting of wrongs according to law, and the bringing of malefactors to account, thereby upholding confidence in the rule of law and the willingness of all to obey the law. In so doing, our courts respond to the universal human cry for justice that has arisen since before the beginnings of history.

From this role derives much of what is necessary or desirable in our courts and in the relationships between the courts, Parliament and the executive.

There have been many descriptions given of the necessary or desirable qualities of judges and courts. Former Chief Justice of the High Court, the Hon Murray Gleeson, argued in 2007 that: ‘Competence, independence and impartiality are the basic qualities required of judges as individuals, and of courts as institutions.’<sup>17</sup> Another former High Court Chief Justice, Sir Gerard Brennan, has observed that, ‘Public confidence in the courts arises from the public perception that judges are men and women of competence and unshakeable integrity.’<sup>18</sup> Indeed, one can expand these lists to add other qualities, which can be enumerated in many different ways.<sup>19</sup> I would venture to divide these qualities broadly into what could be termed moral qualities and performance qualities.

Moral qualities for judges and courts include:

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<sup>17</sup> Chief Justice Murray Gleeson, ‘Public Confidence in the Courts’ (Speech delivered at the National Judicial College of Australia, Canberra, 9 February 2007) 1: <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj\\_9feb07.pdf](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_9feb07.pdf)>.

<sup>18</sup> Sir Gerard Brennan, ‘Courts for the People, Not People’s Courts’ (1995) 2(1) *Deakin Law Review* 1, 4.

<sup>19</sup> See, eg, E Bell, ‘Judicial Qualities: Illustrations from Past Lives’ (2008) 8(2) *Judicial Studies Institute Journal* 18.

Independence — that judges are not subject to, and would not succumb to, external pressures that could improperly affect decision-making accordingly to law;

Impartiality — that judges do not have improper favouritism towards one side or other in a dispute, either because of who those parties are, or because of what they stand for;

Detachment — that judges demonstrate and reinforce their independence and impartiality by standing aside from public controversies and debates, and avoiding public comments that could reasonably be seen as inconsistent with their role as judges;

Legitimacy — that judges do not try, and are not required, to go beyond their proper role into areas that are not appropriate. In particular, that judges act, and are seen to act, as umpires not players;

Integrity — that judges don't do, and are not even tempted to do, anything dishonest or improper;

Dedication — that judges put into their role a level of time and effort commensurate or more than commensurate with their office and with the remuneration they receive from the public purse.

Amongst performance qualities for judges and courts I would list:

Predictability — either predictability of outcome, that parties can be confident in knowing what the decision will be if the matter goes to trial or, failing that, predictability of approach, that the parties will at least be able to understand how the decision was arrived at in accordance with the predictable application of known methodology;

Competence — that the judge knows what he or she is doing and does it in a just, timely, economical, efficient and effective manner;

Capacity — that courts and judges have the facilities, staff and other resources they need to do a proper job in resolving the cases that come before them in a just and timely manner, assuming they are acting economically, efficiently and effectively;

Accountability — that courts account for how they are conducting themselves and making use of the public resources they are provided with. This is both a means to other ends and a responsibility in itself,

in order to promote public understanding of and confidence in the courts;

Best practice — that within the law and their role as courts, courts are proactive in considering whether the way they are currently doing their jobs is the way that best achieves their objectives, and are proactive in making or seeking changes where opportunities for improvement are identified.

Concern as to whether various of these qualities are being advanced or threatened underlies many aspects of contemporary debate and discussion about the roles of courts and judges on the one hand, and of governments and Parliaments on the other.

### **CHANGING AND CONFLICTING VALUES**

One critical question is whether, in the context of changing, and sometimes radically conflicting, values in the community, Parliaments or the community are expecting judges to go beyond their proper role by expecting them to supply unstated values to the resolution of disputes, and whether that is threatening either the ability of judges to do their job properly or public confidence in the courts' dispensing of justice, or both.

Again, I quote the Hon Murray Gleeson, who set out the issue well in his sixth Boyer lecture in 2000:

The method by which judge-made law is developed and modified is fundamentally different from the method by which parliaments make law. This subject is sometimes complicated by an indiscriminate use of terms such as 'policy' and 'values'. It is sometimes argued that courts in developing the common law should be guided by considerations of policy, or give effect to their values, or community values, and should be more explicit in acknowledging the choices said to be open to them. It is necessary to be clear about what is meant by policy and by values. It is true that the common law is informed by certain values and policies, but they are generally not of the same character as the policies which are in issue at an election.

The method of the common law is based upon experience, reflected in precedents. From precedent, principle is derived and the application of principle creates further precedent. The development of principle sometimes involves departure from earlier precedent, but the technique always requires an understanding of the policy of the law. It does not turn upon the personal

choices or preferences of individual judges. Legal reasoning that commands respect does so upon the basis of adherence to legal principle.<sup>20</sup>

Similarly, Justices Gaudron and McHugh of the High Court have said:

Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles. The judges of Australia cannot, so to speak, 'make it up' as they go along. It is a serious constitutional mistake to think that the common law courts have authority to 'provide a solvent' for every social, political or economic problem. ... The technique is inductive and pragmatic, rather than ideological and legislative.<sup>21</sup>

### **VALUES AND 'IMMORALITY'**

It follows that judges should not be required to bring personal choices or preferences to decision-making.

Where society has common values, it is consistent with judicial method for judges to be asked to apply those common values, because those values can be a known and predictable underpinning to the explicit provisions of the law.

Thus, when there were common standards about immorality, judges could readily determine what contracts were void as being contrary to public policy because they furthered immorality.

However, this is much harder for judges to do these days, when community values are more likely to be contested, save perhaps by applying precedents established in former times.

### **VALUES AND 'REASONABLENESS'**

Similarly, standards of reasonableness in relation to the law of negligence can readily be applied if and when everyone knows what the 'man on the

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<sup>20</sup> Chief Justice Murray Gleeson, 'Lecture 6: The Judiciary' (ABC Boyer Lecture delivered on 24 December 2000) <<http://www.abc.net.au/radionational/programs/boyerlectures/lecture-6-the-judiciary/3483326#transcript>>.

<sup>21</sup> *Breen v Williams* (1996) 186 CLR 71, [46], as cited also by the Hon M Gleeson in his Boyer lecture: *ibid*.

Clapham omnibus' considers reasonable, to cite Lord Justice Greer's memorable expression in 1933 in *Hall v Brooklands Auto-Racing Club*.<sup>22</sup>

However, where views about reasonableness differ widely, this becomes much harder to do.

## VALUES AND SENTENCING

Another example where difficulties have emerged is sentencing law. Parliament has traditionally set maximum penalties for offences, leaving it to courts to judge the gravity of each individual case of offending in comparison to the maximum sentence, and to set a penalty accordingly.

However, for many offences the typical sentence imposed has over time become only a small fraction of the maximum, to the point where some sentences handed down by courts have become a matter of considerable public controversy and disquiet.

In these circumstances, it is the responsibility of Parliament on behalf of the community to specify more clearly what is expected in terms of sentencing, rather than leaving judges exposed to criticism for what are ultimately policy decisions.

That is one of the reasons why the Government has been preparing and bringing to Parliament legislation that not only will in our view make sentencing in Victoria stronger and more effective, but will also give clearer guidance as to legislative expectations and reduce an unfair burden on the courts.

Legislation either enacted or in preparation is abolishing suspended sentences, introducing statutory minimum sentences for assaults of gross violence, and establishing baseline sentences that will indicate the median sentence that Parliament expects to apply to various offences.

These reforms retain judicial discretion where appropriate, but strike a better balance in what the former Chief Justice of the NSW Supreme Court, the Hon James Spigelman, has described as the 'tension between the principle of individualised justice and the principle of consistency'.<sup>23</sup>

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<sup>22</sup> *Hall v Brooklands Auto-Racing Club* (1933) 1 KB 205, 224.

<sup>23</sup> 'Consistency and Sentencing' (Keynote Address to the Sentencing 2008 Conference, National Judicial College of Australia, Canberra, 8 February 2008) <<http://www.lawlink>.

## VALUES AND RIGHTS LAWS

The application of rights laws is a particularly vexing example of the demands being placed on judges. Rights laws, for example under the Victorian *Charter of Human Rights and Responsibilities Act 2006*, can be regarded simply as an extension of the development of common law presumptions, and indeed several judicial decisions have drawn that analogy. However, there are challenges to this approach, particularly in jurisdictions where bills of rights are constitutionally entrenched or expressed to override other laws.

Again, I refer to the Hon Murray Gleeson, who in 2004 pointed out that:

There are two notable features of commonly accepted civil and political rights: first, rights are rarely absolute; secondly, some rights may conflict with other rights.

He also pointed out that

When rights conflict, a decision as to which right is to prevail, and to what extent, can only be justified rationally by reference to some value external to the ‘balancing’ process.<sup>24</sup>

Just as intelligible argument depends on shared values, so a court’s judgment can only justify a judicial choice between competing interests if it explains the choice by reference to values that are shared by the reader of the judgment.

It follows that if we are to require judges to weigh competing rights, or to apply broadly expressed rights, we must either give them the criteria, the values, as the then Chief Justice put it, by which to undertake such weighing, or else we must leave judges at large to supply such values as they see fit. Since we live in a time when values are often hotly contested, if legislatures simply leave judges at large to be the ‘custodians of community values’ they risk putting judges in difficult situations that could ultimately harm the institution of the judiciary.

Mr Gleeson explained this risk very clearly in 2007:

There are some who say that impartiality is a myth; that, whether they realise it or not, judges are controlled by personal impulses and inclinations,

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nsw.gov.au/lawlink/Supreme\_Court/ll\_sc.nsf/vwFiles/spigelman080208.pdf/\$file/spigelman080208.pdf>.

<sup>24</sup> ‘Rights and Values’ (Speech delivered to the Melbourne Catholic Lawyers Association, Melbourne, 18 June 2004) <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj\\_18june04.html](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_18june04.html)>.

perhaps formed unconsciously; and that the best judges are those who break free of the myth of impartiality and exercise judicial power in order to promote social ends. If this were ever to become a general opinion of the way judges behave, then there could be no public confidence. Manipulating the law in pursuit of a judge's personal agenda might seem clever to an enthusiast for a cause, but it would be destructive of the authority of courts and therefore, ultimately self-defeating. If the idea of judicial impartiality is consigned to the intellectual scrap heap, judicial authority will soon follow it.<sup>25</sup>

Justice Dyson Heydon pointed to a further dimension of the risk in 2002, saying:

When judges detect particular community values, whether in the Australian community or the international community, as supporting their reasoning, they may sometimes become confused between the values which they think the community actually holds and the values which they think the community should hold.<sup>26</sup>

## VALUES AND PARLIAMENT

It follows that the rule of law under a Westminster system is best advanced when Parliament accepts that its role is to frame laws that do not unreasonably require judges to supply their own values in deciding cases before them. When Parliament avoids imposing unreasonable requirements of this sort, long established principles of judicial interpretation should and generally do operate well to determine how judges go about resolving issues of ambiguity and uncertainty.

## JUDICIAL CONTRIBUTIONS TO BETTER LAWS

That is not to say that judges do not have an opportunity, or indeed a responsibility, to contribute to making laws better. They do so through providing expert suggestions, feedback and advice on possible legislation, not in a policy sense, but in terms of making practical improvements to how courts and the law operate.

In this way, judges have made invaluable contributions in recent times to improvements in civil and criminal procedure laws, criminal and civil appeals,

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<sup>25</sup> Gleeson, above n 17, 10.

<sup>26</sup> 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110, 131.

jury directions, sexual offence laws, family violence laws and many more besides. However, judges rightly do so on the clear basis that they are providing expert advice and suggestions only, and that any legislation to be put before Parliament is a matter for the government of the day to propose and for the Parliament to decide upon.

There is also a further opportunity for judges to contribute to possible improvements in the law through indicating in judgments matters that they consider may require Parliament's attention, while of course exercising care to avoid expressions of personal opinion on matters of policy debate. This is in some respects the modern day equivalent of the *loquendum cum concilio regis* — needing consultation with the king's council — that the early English courts practised when the law was unclear.

### **STRENGTHENING COURT ADMINISTRATION**

Another important aspect of the relationship between courts and executive government is that of court administration.

It is a surprise to many that, while judges are independent of executive government, the administrative staff who support the courts are public servants who ultimately answer to the Secretary of the Department of Justice, and thus to executive government. This derives from long standing practice. Courts are an arm of government under the Crown, and thus the Crown needs to provide the means for courts to undertake their functions.

However, while the Crown needs to provide the administrative support for the courts, it is bad in principle and bad in practice for that support to be provided via a government department.

It is bad in principle, because it opens the potential for executive government to interfere in the operations of the courts, and bad in practice because it has meant that much of the operational functioning of the courts has been outside the courts' control. Court administrations have, for example, been heavily dependent for facilities construction, IT and personnel services on other parts of the Department of Justice, parts which also have responsibilities for supporting diverse other functions of the Department.

The courts, both in Victoria and in other jurisdictions, have for a number of years been seeking to be vested with control of their own administrations. This occurs at a Commonwealth level, with administration generally vested in individual courts, and in South Australia, where a Courts Administration

Authority provides administrative support for the Supreme, District and Magistrates' courts.

The Victorian government has committed to reforms in Victoria using the South Australian model as the starting point, and those reforms are now well advanced. Already, many of the functions supporting the courts have been consolidated into a separate division within the Department of Justice — the Courts and Tribunals Service — with an advisory board chaired by the Chief Justice and consisting of the head of each court and VCAT. Legislation is in preparation to establish a separate entity, to be known as Court Services Victoria, to be governed by the heads of jurisdiction.

Under this model, the courts will remain part of the Crown, but Court Services Victoria will be headed by a chief executive officer answerable to the heads of jurisdiction rather than to the Secretary of the Department of Justice. Parliament will continue to determine through the budgetary process the allocation of public resources to each court, and Court Services Victoria will provide administrative staff and facilities to each court in accordance with the resourcing level determined by the Parliament.

## COURTS AND ACCOUNTABILITY

Another topic, on which I will touch only briefly this evening, is that of the accountability of courts and judges. This is both a sensitive topic, because accountability needs to be carefully considered in relation to independence, and an important topic, because all facets of government need to account for what they do, and those facets of government that receive public money need to account for how that money is spent and what is being achieved with it.

As Chief Justice French has put it in relation to performance measures:

There is no point in courts and judicial officers bristling at attempts to measure directly or indirectly what they do. What is important is that the limitations of measurement are acknowledged and the boundary conditions which affect their application are accepted.<sup>27</sup>

Victorian courts fully embrace the need for accountability. The Victorian Supreme Court is one of the founding members of the International Consortium for Court Excellence, and accountability is recognised as a vital element of the establishment of the new Court Services Victoria.

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<sup>27</sup> 'Boundary Conditions: The Funding of Courts within a Constitutional Framework' (2009) 19 *Journal of Judicial Administration* 75, 82.

Under those reforms, individual courts will continue to account to Parliament, as they already do, for their performance and for what they have achieved with the public resources they have been provided with, and Court Services Victoria will account to Parliament for its provision of administrative support to the courts through its financial accounts, narrative reporting and performance measures.

### **OTHER REFORMS**

Other aspects of the relationships between the courts, Parliament and the executive where reform is currently underway in Victoria include the independent examination of complaints against judges, magistrates and VCAT members, and consideration of the appropriate role and scope for the Auditor-General in relation to auditing aspects of the functioning of courts and of VCAT.