# WHAT IS A QUALITY JUDICIARY?*

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1. The judiciary is a fundamental institution of human society. Every society has laws or rules that mark out the boundaries of right and wrong. Every society has an institution that adjudicates the lawful outcome of a dispute. This can be to determine whether a person has transgressed a law or rule and, if they have, to decide the consequences, or it can be simply to adjudicate the correct legal outcome of disputed facts or legal contentions.

2. A quality judiciary must have as its core values, independence, impartiality, integrity, fairness, transparency and diligence. These core values transcend any particular legal system, such as the common law or the civil law. They reflect a fundamental aspect of human rights – the right of every person to be protected by the rule of law.

3. Courts are not sausage factories. Cases are not mere statistics. The real work of the courts in society cannot be totalled up, and measured by, arbitrary business tools, such as key performance indicators, as some commentators, accountants, economists and politicians may believe. Each case before a court of law involves a controversy that the Court must resolve as the institution in which every member of the community must have confidence. That confidence can only be earned from a society by a judicial system that adheres to the core values that reflect the rule of law.

4. A quality judiciary can, and must, adapt its practices and procedures to ensure that they are appropriate and adequate to do justice according to law. Courts now use case management as a means of ensuring a just outcome. Case management enables the judge to identify the real issues in disputes and to fashion an effective, efficient procedure to enable those issues to be resolved as quickly as possible. In

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* A revision of a paper presented at the Asia-Pacific Courts Conference, 4-6 October 2010, Singapore.

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addition, judicial education is now an accepted means of informing judges of developments and new or alternative possible forensic techniques.

**The rule of law**

5. Why is the rule of law fundamental to understanding what is essential to a judiciary? The answer is because it is a fundamental human right to be governed by the rule of law.

6. On 10 December 1948, in the aftermath of World War II, the General Assembly of the United Nations adopted the *Universal Declaration of Human Rights*[1]. It contained this pivotal recital:

> "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

7. A quality judiciary must uphold the rule of law. Article 10 of the *Universal Declaration of Human Rights* expressed that principle thus[2]:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

8. The rule of law ensures that courts have the power to determine authoritatively the lawfulness of all legislative and executive conduct by the application of the written law and legal principle. Two classic instances of the rule of law in action are judicial consideration of the constitutional validity of legislation and judicial review of decisions of the executive[3].

9. My perspective has been formed principally by my education and experience of the common law system that Australia shares with England and many of her former colonies such as Canada, the United States of America, India, New

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1 Australia has recognised the *Universal Declaration of Human Rights* as an international standard for protecting the universal rights and freedoms of all its citizens, in particular its indigenous peoples; see the preamble to the *Native Title Act 1993* (Cth)

2 A similar right is in Article 14.1 of the *International Covenant on Civil and Political Rights*.

3 cp: The Hon Murray Gleeson AC: *The State of the Judicature* (2003) 77 Aust. Law Journal 505 at 512

Zealand, Hong Kong and Singapore. In Australia, the rule of law is a constitutional assumption that shapes the prism through which the judiciary looks[4].

10. In our region, the 1995 *Beijing Statement of Prinicples of the Independence of the Judiciary in the LAWASIA Region* recognised a common approach to the core values that I have identified above[5]. And, of course since 2008, there is the further insight provided by the *International Framework for Court Excellence*[6].

**Independence**

11. Judges and courts are institutions of government. In the Westminster system the judiciary is known as the third arm of government. It has powers or functions separate and distinct from each of the other two arms, the legislature and the executive (or administration). Each nation achieves that division of powers or functions in its own way. Indeed, the United Kingdom last year evolved to follow the institutional separations that its former colonies had achieved, sometimes centuries ago, when it abolished the judicial role of the House of Lords and established its Supreme Court in its place.

12. Judicial power should be exercised by different persons from those who exercise either legislative or executive power. One of Australia's greatest judges and legal historians, Sir Victor Windeyer, traced the importance of the checks and balances that flowed from the division of powers in this system to the works of the French

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4 cf: *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 482-483 [5]-[6] per Gleeson CJ, 513 [103] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ

5 adopted by the Chief Justices or their representatives at the 6th Conference of Chief Justices of Asia and the Pacific in Beijing, 19 August 1995: see: The Hon D Malcolm AC: *The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (1995) 70 Aust. Law Journal 299; see also: The Hon Michael Kirby AC CMG: *Judicial Independence and Accountability: An Asia-Pacific Perspective* [2009] LAWASIA Journal 1 and the Hon Sir Gerard Brennan AC: *The State of the Judicature* (1997) 72 Aust. Law Journal 33

6 International Consortium for Court Excellence, *International Framework for Court Excellence*, National Center for State Courts – USA 2008: hhtp://www.courtexcellence.com/pdf/IFCE-Framework-v12.pdf

philosopher, Montesquieu. In *L'Esprit des Lois*[7], Montesquieu had written: "Il n y'a point encore de liberté si la puissance de juger n'est pas separée de la puissance legislative et de l'exécutrice". ("Again, there is no liberty if the judicial power is not separated from the legislative and executive power.")[8] In the Constitution of the Commonwealth of Australia, (as in that of the United States) the separation is reflected in Chapters I, II and III which enumerate separately the powers of each arm of government.

13. The consequence of the separation of powers is that the legislative branch enacts the law, the executive branch administers and carries the law into effect, and the judicial branch interprets and enforces it by authoritatively declaring what the law is and the parties' rights are[9].

14. In the great constitutional case of *Marbury v Madison*[10], Marshall CJ (giving the opinion of the Supreme Court of the United States) explained the demarcations of power between the three arms of government in a written constitution. He held that such a constitution defined and limited these powers, but that the constitution itself was a paramount law. And he said[11]:

> "It is emphatically the province and duty of the judicial department to say what the law is."

15. In a government of laws, the responsibility of the Courts is to interpret and apply the law. The judiciary, and not the parliament or the executive, is the ultimate

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7 Ch vi of Book xi; see: *The Queen v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 261 at 389-393; see too *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 89ff per Dixon J

8 *Tasmanian Breweries* 123 CLR at 390

9 cp: *James v The Commonwealth* (1939) 62 CLR 339 at 373 per Dixon J

10 1 Cranch 137 at 176-178; 5 US 77 (1803); see too in the Australian context where this principle is accepted as axiomatic: *Reg v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ, see too at 270-271: *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 570 [66] per Gleeson CJ: *Singh v The Commonwealth* (2004) 222 CLR 322 at 330 [7] per Gleeson CJ: see also *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1 at 35-36 per Brennan J; *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at 347-348 [73]-[74] per McHugh, Gummow and Hayne JJ; *Enfield City v Development Assessment Commission* (2000) 199 CLR 135 at 154-154 [43]-[45] per Gleeson CJ, Gummow, Kirby and Hayne JJ discussing the ambit of, and subsceptibility to, judicial review of administrative decisions

11 *Marbury* 5 Cranch US at 177

authority for resolving justiciable conflicts in such a society[12]. The lawful authority of the Courts is to determine, by interpreting and applying the law, whether the other branches of government have exceeded their power. That judicial authority is a fundamental means of protecting human rights. It is the essence of the rule of law and a bulwark of a free society.

16. Independence of the judiciary also involves a concomitant commitment by the other branches of government to provide sufficient resources, within the available means of the State, to the courts to enable them to perform their functions effectively.

17. Judges must have security of tenure[13]. They must be appointed either for life or until a normal or fixed age of retirement. They cannot be removed from office, other than in exceptional circumstances. In Australia, a judge can only be removed by our head of State the Governor-General, after an address (vote) by both Houses of the Parliament on the ground of proved misbehaviour or incapacity[14].

18. In his *Commentaries on the Laws of England*[15], Sir William Blackstone discussed this aspect of judicial independence, he said that it was:

> "… one main preservative of the public liberty; which cannot subsist long in any state unless the administration of common justice be in some degree separated from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated by their own opinions; and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe were it joined with the executive, this union might soon be an overbalance for the legislative."

19. Judges must be remunerated properly and securely. Once appointed, a judge must be entitled to a guaranteed remuneration[16] that cannot be reduced[17]. A judge who

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12 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263 per Fullagar J

13 The Supreme Court has suggested that independence too has an individual and institutional aspect: *Re Provincial Court Judges* [1997] 3 SCR 3 at [120] per Lamer CJ

14 *Constitution* s 72(ii)

15 Sir William Blackstone, *Commentaries on the Laws of England*, 14th ed, A Strahan, Law Printer to His Majesty, London, 1803, Vol 1 at 268-269

cannot make ends meet on his or her judicial salary, or who will live in penury after retirement, cannot be expected to avoid the temptation of corruption.

20. The Supreme Court of Canada has recognised a constitutional implication preventing judicial salaries from falling below a minimum acceptable level in *Re Provincial Court Judges*[18]. Lamer CJ explained that:

> "The reason it does is for financial security to protect the judiciary from political interference through economic manipulation, and to thereby ensure public confidence in the administration of justice. If salaries are too low, there is always the danger, however speculative, that members of the judiciary could be tempted to adjudicate cases in a particular way in order to secure a higher salary from the executive or the legislature or to receive benefits from one of the litigants. Perhaps more importantly, in the context of s. 11(*d*), there is the perception that this could happen. As Professor Friedland has written, *supra*, at p. 53:
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> > We do not want judges put in a position of temptation, hoping to get some possible financial advantage if they favour one side or the other. Nor do we want the public to contemplate this as a possibility.
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> I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friedland has put it, speaking as a concerned citizen, it is "for our sake, not for theirs" (p. 56)."

21. Thus, independence, to be meaningful, must involve Parliaments providing that judges be paid enough while serving. No doubt this raises a real question whether they should also receive a pension after their service to ensure that they are not perceived to need, let alone do they, need to supplement their income from bribery or other inappropriate sources. Proper remuneration for judges is a necessity. It is part of the price to be paid by society for a quality judiciary.

22. In addition, the courts must be adequately funded to ensure that they can discharge their functions. It is the responsibility of Parliaments to provide

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16 *Constitution* s 72(iii) in which "remuneration includes non-contributory pension plan entitlements": *North Australian Aboriginal Legal Aid Service v Bradley* 218 CLR at 171 [58]

17 *Austin v The Commonwealth* (2003) 215 CLR 185

18 [1997] 3 SCR 3 at [193] per Lamer CJ with whom L'Heureux, Dubé, Sponika, Gonthier Cory and Iacobucci JJ agreed.

sufficient funds to enable the courts to function appropriately. There are several methods by which courts are resourced by the legislature. In Australia, two main models are used; in the federal sphere, the Parliament appropriates a single figure for each of the High Court of Australia, the Federal Court of Australia and the Family Court of Australia. Each of those Courts is self administering and the Chief Justice together with the registrar of each Court is responsible for allocating and spending the amount of the parliamentary appropriation. The Australian States and Territories still treat their courts as dependent on an executive department, usually the Attorney-General's Department or the Department of Justice, to provide administrative and functional resources to the Courts. Those Courts can request, but cannot independently control, the provision or expenditure of any funds or resources.

23. Recently the Chief Justice of Australia, the Hon Robert French AC, re-endorsed remarks of his predecessor, Sir Gerard Brennan AC, on this topic[19]. Both warned that courts could not trim their functions and were bound to hear and determine all cases brought within their jurisdiction. They emphasised that if the Courts could not hear cases because of lack of resources, the rule of law would be immediately imperilled.

24. Thus, it is a fundamental obligation of the legislative branch to provide adequate fiscal support for the judicial branch; both in terms of judicial remuneration and resources for the Courts as functioning institutions.

**Impartiality**

25. It should be axiomatic that judges must be impartial. Impartiality must be an attribute of each individual judge and also of the judiciary as a whole.

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[19] *The State of the Australian Judicature* (2010) 84 Aust Law Journal 310 at 317-318 quoting the Hon Sir Gerard Brennan AC: *The State of the Judicature* (1997) 72 Aust Law Journal at 35

Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system[20].

26. The judicial oath that Australian judges take on assuming office is itself emblematic of the core values. It is a solemn promise to do right to all manner of people, according to law, without fear or favour, affection or ill will. These words can be traced to the promise King John made in 1215 to his barons in the little meadow of Runnymede when he put his seal on the *Magna Carta* – the Great Charter[21]:

> "We will sell to no man, we will not deny or delay to any man either justice or right."[22]

27. In *Marbury v Madison*[23] Marshall CJ referred to the judicial oath as applying to judges "in an especial manner, to their conduct in their official character".

28. The practical working out of this promise came about because of the institution of the jury. The King's judges ruled on the law, but the jury decided the facts, and in particular decided, in criminal cases, guilt or innocence, and in civil cases who won and how much a successful plaintiff should receive[24].

29. As Lord Denning MR once said:

> "Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge is biased' …"[25].

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20 *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 162-163 [27]-[29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ approving what Gaudron J had said in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81]

21 A copy of the 1297 inspeximus issue of the *Magna Carta* by King Edward I is displayed in the Australian Parliament House Canberra.

22 now 25 Ed I c 29

23 1 Cranch at 180

24 see: Sir Frederick Pollock: *The Expansion of the Common Law*: Little Brown & Co Boston 1904 at 41, 48-49

25 *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599F; *The Queen v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 259 per Barwick CJ, Gibbs, Stephen and Mason JJ; *RPS v The Queen* (2000) 199 CLR 620 at 652-653 [96]-[97] per Callinan J

30. Lord Devlin in his book *The Judge*[26] explained the inter-relationship of some of the concepts that I discuss as follows[27]:

> "This is why impartiality and the appearance of it are the supreme judicial virtues. It is the verdict that matters, and if it is incorrupt, it is acceptable. To be incorrupt it must bear the stamp of a fair trial."

31. Impartiality requires not only that the judge have no actual or perceived personal interest of any kind in the result of a case, but also that he or she have the courage to arrive at and enforce the result according to law. In many countries, judges are placed under pressure by government or powerful interests, such as the media, to decide a case in a particular way. Another form of improper pressure has been suggested in one study of the Japanese judicial system. That showed that judges who decided cases against the executive government were subsequently assigned to less attractive posts on the three yearly rotations of their locations[28].

32. To bow to that pressure, is just as corrupt as to take a bribe. That is because the judge would not then decide the case on its merits, but according to an outside and wholly improper influence. The consequence would be that the community would not be able to have confidence that the judge or court would decide cases in a way that did not suit the source of that pressure.

33. It is easy, in one sense, for me to say this because Australia is a democracy where judges can freely decide cases: indeed, the judicial power can declare any Act of the Federal or State Parliaments to be invalid. However, that does not mean that there are no outside pressures that must be resisted. The media can be a powerful force of public criticism of decisions. The media and politicians also campaign for a result in certain cases or classes of case. This is particularly evident in criminal sentencing decisions. Impartiality requires judges to ignore those influences. There are many countries where judges receive phone calls or visits from government officials and are told how to decide cases.

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26 Patrick Devlin, *The Judge*, Oxford University Press, 1979 at 4

27 see *RPS* 199 CLR at 653 [97]

28 J Mark Rasmayer & Eric B Rasmusen: *Judicial Independence in a Civil Law Regime: The Evidence from Japan*: (1997) 13 JL E Con & Org 259

34. These pressures are not new. In 1607 Sir Edward Coke LCJ was confronted by King James I. The King wanted to decide cases. Coke, with the support of all the judges told him that "the King in his own person cannot adjudge any case", nor could the King take any case out of a court. Coke relied on c 29 of the *Magna Carta*. In a famous passage Coke recorded the end of his exchange with James in *Prohibitions del Roy*[29]:

> "the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*."

The Latin translates to:

"The King is not under any man, but under God and the law."

35. Now that took courage. In those days the King could remove a judge at any time for no reason. (Indeed, Coke was removed in 1616 and later went on to serve as a member of the House of Commons in the British Parliament). The later years of the Stuart Kings in the 17th Century were full of instances where judges, who had not pleased the King, were removed. That conduct ultimately led to the provision in s 3 of the *Act of Settlement 1701* (Imp) providing for security of tenure and judicial remuneration. This is the source of the principle of legislatively entrenched judicial independence[30].

36. Having courage to do justice according to law, whatever the consequences, is essential to the maintenance of judicial independence. In the late 18th century, Lord Mansfield CJ once famously used a Latin aphorism[31] to describe the Court's obligation in giving a decision in a highly topical and controversial case. He said:

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29 (1607) 12 Co 63 at 64 and 65: (77 ER 1342 at 1343)

30 see too: Blackstone, above n 16 at 267-268

31 *R v Wilkes* (1770) 4 Burr 2527 at 2562: Lord Mansfield was giving reasons for finding invalid a declaration outlawry of John Wilkes, the publisher and politician, despite the significant animus both his Lordship and Mr Wilkes shared for the other: (see 4 Burr at 2566)

> "We must not regard political consequences: how formidable soever they might be: if rebellion was the certain consequence, we are bound to say '*Fiat justitia, ruat caelum*'."

The Latin translates to:

> "Let justice be done, though the heavens fall."

**Integrity**

37. Integrity is another aspect of the attribute of impartiality essential to the attainment and maintenance of public trust in the judiciary. A judge must be honest. An accepted principle of the common law is that it is of "fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen, to be done"[32].

38. Judicial integrity is bound up with impartiality. The public must be able to have confidence that the judge is honest in all aspects of his or her conduct. Intellectual integrity is as vital as integrity in other spheres of a judge's life. The reasoning and decision-making of a judge must have intellectual integrity so that the result at which he or she arrives is not only right, but can be seen to have been the consequence of a rational application of the law to facts honestly found.

39. A great deal of judicial decision-making involves a judge having to choose between two, or sometimes more, reasonably acceptable alternatives. How the judge makes such a choice is often what matters to the litigants and the public. Sometimes, especially where the judge is making a finding about which witness or version of contested events he or she believes or accepts, the judge's choice cannot be analytically or satisfactorily reasoned. It can come down to a choice of one or other witness' version based on what the judge believes about their reliability or credibility. For the public to trust the result of such a choice, they must be confident in the judiciary's integrity, just as they are when a jury makes

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[32] *Rex v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 257 at 259 per Lord Hewart CJ; *Ebner v Official trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ

such choices. When the solution to a dispute depends on one witness' word against another's, often the judge has a stark choice to make. If there is no reason for the public to doubt that the judge has made an honest choice, doing the best he or she can on only the evidence in the case, the integrity of that result will make it acceptable.

**Fairness**

40. What is fairness in this context? A judge's fundamental role is to do justice according to law. Where choices have to be made, they should be fair and be seen to be fair. Sometimes a judge must be merciful, not because he or she would like to be, but because that is the just and right way to decide the matter according to law. And this is only possible, if the law allows the judge the ability to be merciful. The dilemma is as old as time itself. Shakespeare captured it graphically in Portia's speech to the Duke in *The Merchant of Venice*[33]:

> "The quality of mercy is not strain'd,
> It droppeth as the gentle rain from heaven
> Upon the place beneath: it is twice blest;
> It blesseth him that gives and him that takes:
> 'Tis mightiest in the mightiest: it becomes
> The throned monarch better than his crown;
> His sceptre shows the force of temporal power,
> The attribute to awe and majesty,
> Wherein doth sit the dread and fear of kings;
> But mercy is above this sceptred sway;
> It is enthroned in the hearts of kings,
> It is an attribute to God himself;
> And earthly power doth then show likest God's
> When mercy seasons justice."

41. When the choice is between exercise of governmental power and a right of a person to human freedom or property, judges must make fair decisions according to law. That involves selecting rules or principles of law as determinative between the contending parties' positions. Slaves had been regarded as the property of their owners. Slavery was legal in 1772 in Virginia then a British

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[33] Act IV; i; 184-200

colony. In *Somerset v Stewart*[34] Lord Mansfield CJ[35] accepted that in Virginia the slave was the property of his owner, but he said famously:

> "The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political ; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."

42. The rule of law values individual liberty and the dignity of human life. Of course, statutes can provide that fundamental rights or immunities be abrogated or curtailed. But the Courts have held that if this is the intention of the legislature, the words of the statute must be unmistakably clear[36].

**Transparency**

43. Generally, judges are unelected in the common law system. They hold office for long terms. They are not answerable to anyone for their work although their decisions can be over-turned on appeal. They exercise great power, conferred by law, over the litigants before them. The only legally enforceable checks on a judge are those provided by an appeal or, in extreme cases, the power to remove him or her from office. So, what safeguard is there against a judge abusing or misusing his or her power? In what way does the community hold a judge to account?

44. The principle of open justice is an essential part of a quality judiciary. It requires all that a court does to be exposed to publicity. This ensures that the public may scrutinize how the judge uses the power he or she exercises. The public have a right to attend, see and hear what occurs in every court in the land unless the court

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34 (1772) 1 Lofft 1 at 19; 98 ere 499

35 giving the judgment of the Court of King's Bench

36 *Coco v The Queen* (1994) 179 CLR 427 at 436-439 where Mason CJ, Brennan, Gaudron and McHugh JJ surveyed English, Canadian and United States cases to the same effect and the principle was recently applied in *Saaed v Minsiter for Immigration and Citizenship* (2010) 267 ALR 204 at 219 [58] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ

decides that it is necessary in the interests of justice to exclude the public or limit access to the evidence or arguments on which the court is asked to act[37].

45. A concomitant of this right, is the important common law right of any member of the public, including the media, to publish fair and accurate reports of court proceedings[38]. An equally important, indeed vital, concomitant is the right of everyone to criticise judicial decisions and behaviour. Because justice is administered in public, the public are entitled to scrutinise how well they think it has been administered.

46. Every time a judge enters the court room, he or she is in the public eye. He or she must justify any decision by giving public and transparent reasons. These must explain and justify the process by which he or she has arrived at the decision. The discipline imposed on judges by the requirement that they give reasons ensures public accountability. This demands that the judge demonstrates that he or she had considered and discussed the critical facts and law apposite to justify the particular exercise of judicial power in determining any controversy[39].

47. The common law gives very considerable scope to the public's right to criticise judges and their decisions. Lord Atkin explained the right as follows[40]:

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune.

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37 *Hogan v Australian Crime Commission* (2010) 267 ALR 12 at 19 [30]-[33] per French CJ, Gummow, Hayne, Heydon and Kiefell JJ; *Dye v Commonwealth Securities Ltd (No 2)* [2010] FCAFC 118 at [120]-[124] per Marshall, Rares and Flick JJ

38 *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 481 per McHugh JA, Glass JA agreeing; *Llewellyn v Nine Network Australia Pty Ltd* (2006) 154 FCR 293 at 300 [36] per myself

39 see too: *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J; the Right Hon Beverley McLachin (Chief Justice of Canada), *Courts, Transparency and Public Confidence – To the Better Administration of Justice* (2003) Vol 8 Deakin Law Review (No 1) 1 at 8-9

40 *Ambard v Attorney-General of Trinidad and Tobago* [1936] AC 322 at 335

> Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

48. It is because the Courts protect this right of the public to criticise their decisions and the conduct of judges, that the public can have confidence in the judiciary. It is no accident that totalitarian systems of government seek to stifle criticism. They lack the self confidence that, in a free and open society, they would win support. It is for precisely this reason that courts must, and do, allow vigorous public debate over their decisions and what occurred in the course of arriving at them.

49. Chief Justice Gleeson explained how the right of public criticism can be a reflection of the rule of law and the confidence of the public in the judiciary. He instanced a judicial decision that had declared unconstitutional, and invalid, legislation which had enjoyed significant community approval saying[41]:

> "The rule of law depends upon peaceful acceptance of those decisions, and compliance with court orders, even if they are strongly resented."

50. The Court explains in its reasons for judgment how it arrived at a decision by applying the law to the facts of a case. That discipline emphasises the confidence of the judicial system that each decision is a manifestation of the application of the rule of law in a free society.

**Diligence**

51. The promise not to delay justice derives from *Magna Carta*[42]. It requires courts and judges to be diligent. Justice delayed is justice denied. Because the judicial system is often society's last, and sometimes only, resort for the resolution of disputes, the longer the time before resolution occurs, the greater the strain on the persons who are kept in a state of uncertainty. Moreover, witnesses' memories

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41 The Hon Chief Justice Murray Gleeson AC: *Public Confidence in the Judiciary* (2002) 76 Aust Law Journal 558 at 560; *Dickson v The Queen* [2010] HCA 30 at 32 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ applying *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28] per French CJ, Gummow, Crennan, Kiefel and Bell JJ

42 c 29

fade, or over time, deteriorate. Once some fact is forgotten, it may never be remembered. Lord Hailsham LC once said that where there is delay the whole quality of justice deteriorates[43]. So, one challenge for the Courts in a world that is increasingly litigious, is the need to deal with cases as quickly as possible consistently with the imperative to arrive at a just outcome according to law.

52. In 2000 the then Chief Justice of Australia, the Hon Murray Gleeson AC, observed that in the previous 20 years there had been an enormous expansion in the workload of courts[44]. The next 10 years have not seen a diminution in the exponential effects of this explosion.

53. The ability of the hardest-working of judges to do justice according to law today is constrained by a sometimes overwhelming amount of detail that they must comprehend. First, technology has increased the size of commercial, and some other categories of, cases exponentially. In the late 1970s, when I first began in legal practice, a frequent lament was the curse of the photocopier. Now, with email, and computer generated and retained drafts, every version of every iteration of a document, series of communications or "thought bubbles" – if some emails can be so dignified – must be reviewed by lawyers for discovery. The cost of this must be justified, so more, not less is sought to be tendered. Secondly, modern legislation has had at least two impacts on the time that litigation takes. The first impact is that new or alternative causes of action are created expanding the disputatious horizon. The second is that the legislation itself must be construed and then applied to the facts of each case.

54. In many areas, disputes thus have more apparent factual material than in the past. And with an increasing population, there are more disputes to resolve, taking longer and involving more complexity. This is reflected in the increasing length and complexity of reasons for judgment over the same period. And there is no one like Lord Denning MR now to tell us that "old Peter Beswick was a coal

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43 *Reg v Lawrance* [1982] AC 510 at 517B

44 The Hon Murray Gleeson AC: *Current Issues for the Australian Judiciary* (2000) speech to the Supreme Court of Japan 17 January 2000: www.hcourt.gov.au/cj/dj_JapanJ.htm

merchant in Eccles, Lancashire"[45] when commencing a classic, but succinct, judgment on the law of contract, specific performance, the right of third parties and succession that ran for 10 pages in the law reports. In addition, modern statutes, at least in Australia, are often written with Byzantine complexity. This requires the judge to deal with pages and pages of obscure text in interpreting the legislation[46].

**The resourcefulness of the Courts**

55. These pressures have required courts to become more and more resourceful in developing new strategies to ensure that they fulfil their ultimate responsibility of doing justice according to law. The last thirty years have seen increasing judicial management of cases before they are brought to trial. Obviously, one size will not fit all and one tool will not be appropriate to every court or in every case.

56. As a relatively new judge, I can only speak from a brief judicial experience. In 1997 the Federal Court of Australia, on which I sit, introduced the individual docket system as an aid to case management. The Court's civil practice and procedure is now governed by an overarching purpose[47]. That purpose is to facilitate the just resolution of disputes according to law, and as quickly, inexpensively and efficiently as possible. That purpose is probably inherent in the judicial function.

57. Each first instance civil proceeding that is filed in the Federal Court of Australia is docketed – allocated – to an individual judge who will hold a first directions hearing within a few weeks of the filing[48]. That judge will make all procedural directions and manage the case for a hearing that he or she will conduct.

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45 *Beswick v Beswick* [1966] Ch 538 at 549; reversed [1968] AC 58

46 see e.g. The Hon Nye Perram: *Context and Complexity: some reflections by a new judge*: paper presented at the Challis Taxation Discussion Group, Sydney, 6 August 2010: http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_perramj1.html

47 Pt VB of the *Federal Court of Australia Act 1976* (Cth) ss 37M-37P which commenced on 1 January 2010

48 The docket judge is the next judge in rotation of those in the registry of filing.

58. The underlying principle of the docket system is that once allocated to a particular judge the case remains with that judge from commencement to disposition. This enables the judge to become familiar with the issues, to help the parties refine them, to ensure that the case is properly managed so that it will be presented at trial in the way it most likely to achieve an efficient presentation of the real issues in dispute and their speedy determination. In addition, the individual judge managing the case will be able to, where appropriate, suggest or order mediation. The Court also has the facility to order a case management conference, that is, a less formal form of directions hearing in which the judge and the parties sit around a table and seek to deal with the procedural management of the case generally or in respect of particular issues.

59. The docket system operates by the Registry allocating each new matter to a judge in strict rotation as it is filed. Where the matter is urgent it is referred initially to the duty judge if the docket judge is either not then available to deal with it or it has just been filed, then, it will still be added to the docket of the judge who would have received it in the ordinary course. A second exception is where the matter falls within the scope of one of the specialist panels or the admiralty and maritime national arrangement. In the larger registries, particularly New South Wales and Victoria, several panels in speciality areas have been established. Judges with expertise in those areas are assigned by the Chief Justice to the panels[49].

60. If I can be permitted to boast on behalf of the Court, when I attended at the International Bar Association Conference in Singapore in October 2007, I happened to walk into a session on litigation. The speaker was the group counsel for Citicorp Asia-Pacific, Royce Miller. He said that his best experience in litigation "on four continents" was in the Federal Court of Australia. He praised the way in which the Corporations Panel docket judge - Jacobson J - had managed

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[49] In the larger registries (Sydney, Melbourne and Brisbane) judges can be allocated to a number of specialist panels, such for cases involving Patents, Taxation, Admiralty, Competition, Corporations or Industrial/Labour law issues, where there are panels cases falling within a panel's area are docketed to the next judge in rotation who is on the panel.

and decided, from start to finish over 15 months, a complex insider trading case brought against his company. That is typical of the advantage of the Federal Court's docket system. Mr Miller disclaimed being influenced by Citicorp's success.

61. In today's world, there is an increasing risk that by allowing cases to become over-complex or overlarge, their very size will overbear the judge or judges who must hear and decide them. Recently, a number of trials in Australia have taken over 100 days to hear. Judges and jurors have limited capacities to take in, comprehend and assimilate information. The analysis of evidence and submissions in such litigation is an obviously daunting task. The probability is that there will be a mistake or error by the judge or jurors just because of the volume of the task. Two questions, at least, that arise are:

    (1) Can the Courts limit the scale of this material, and, if so, how?

    (2) Should more judges in common law jurisdictions sit together as trial judges?

**Limiting Litigation**

62. No business or other executive decision-making process requires a decision-maker to grapple with almost unlimited amounts of detail. A board of directors could not run an enterprise if it had to descend into a myriad, indeed a maze, of detail. Rather, the board is presented with a brief that analyses and synthesises the detail into a manageable articulation of the issues together with the critical points for and against the proposal. It makes a decision on the basis of that distillation. The Westminster system of cabinet government works similarly. If each member of a board or cabinet had to pour over every document that had been reviewed to prepare the brief given to the director or minister, no decisions would ever be made. No-one has that unlimited time to spend. Yet, this is what courts are now becoming required to do.

63. How much detail does a court really need in order to decide a dispute justly according to law? Can the Courts simply require the parties in "mega-litigation"

to synthesise the facts and issues into an intelligible and small compass? After all, if these enormous cases continue to enter the court system, judges will become decidated, sometimes for years, to hearing them while other litigants must wait for that case to be decided before the judge will become available again for other work[50].

64. These difficulties are not only seen in civil or commercial cases. Criminal cases, especially those involving conspiracy or drugs, now take inordinate time to hear. The risk of a misdirection to a jury, or in a judge alone trial, increases with the volume of material admitted into evidence. This does not necessarily help either the prosecution or the accused. An accused will feel the stress of a long trial, whose commencement has been delayed by the assembly and then review of voluminous evidence. He or she may remain on remand in custody for a longer time before and during such "mega-trials". Moreover, there will be few people in the community who could afford to spend the money to defend such a case and fewer still who could afford to spend months of time on a jury. This may affect the quality of the experience jurors could bring to the assessment of the evidence in such cases. More importantly, it may deny almost every member of the community a fair trial because none but the rich and powerful can afford the cost.

65. The issue is whether justice and the requirement of a fair trial would allow less, not more, evidence to be used than the current norm in order to conduct such litigation. At some point, the courts will have to consider how to devise a fair, but truncated, means of hearing such cases or they will become inaccessible. That will be because no-one will be able to afford to litigate and because the judges as well as juries will all be absorbed in hearing mega-cases, having no time for other ones.

66. At least in commercial disputes, judges may need to experiment with requiring the parties to present no more than, say 200 or 300 pages of *all* the material that they would put before their board of directors to enable it to take a decision whether or

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[50] cf: The Hon Ronald Sackville: *The C7 Case: A Chronicle of a death foretold*: Speech to New Zealand Bar Association International Conference, Sydney 15-16 August 2008

not to litigate, with the chief executive officer or chairman of the board personally verifying that this material meets this requirement.

**Two trial judges**

67. The other suggestion is that sometimes two judges, not just one, should hear trials in common law cases. Experience of sitting in appeals with one's colleagues, often enables a colleague to dispel some idea or problem in a way that the advocates for the parties cannot. And, sometimes a thought occurs to you which, once you mention it to a colleague, he or she answers quickly. In addition, splitting the workload in writing reasons for judgment in long cases may also provide relief and be likely to lead to a quicker decision.

**Judicial Education**

68. Nowadays, judicial education is an accepted norm of informing judges of new developments in the law. Almost every profession maintains programs for continuing education as knowledge, technology, regulation or experience develops in our rapidly changing society. Not only can judges benefit from being informed about new legislation or its impact, but they also can benefit from exposure to papers or lectures on areas of relevance or interest to the jurisdiction they exercise.

69. When judges in the Federal Court of Australia nominate for specialist panels (to which matters are docketed) they accept that they will attend conferences or other educational events with the profession in that panel's area of expertise. This not only benefits the individual judges, who themselves will often be presenters, but also it demonstrates to the profession the commitment to high standards and excellence to which the Court aspires.

70. Australia now has a National Judicial College. This is fulfilling an increasing role in judicial education. In addition, the oldest Australian institution providing judicial education is the Judicial Commission of New South Wales. It has been a world leader in this field and continues to perform outstanding work. One example is its Criminal Trial Courts Bench book. This gives sample jury

directions with very detailed and helpful case and statute law analysis. It is available in hard copy and on-line[51].

**Can Quality be Measured?**

71. There is no simple answer to the question whether the quality of a judiciary can be measured. If the question is addressed qualitatively, the answer may be, yes. This is because a society that values, and has confidence in, its judiciary as adhering to the core values I have discussed, will have, and see, the quality. But, if the question is addressed to quantitative measures, the answer is an emphatic, no. That is because courts do not perform a function that is susceptible of quantitative evaluation. One case may take 10 minutes to hear and determine, another 10 months. The statistics will reflect that each was one case but one took many times longer to decide. Did that mean the second judge was less efficient, or less good, than the other? Of course, any attempt at comparison would be not only meaningless, it would be fundamentally misleading.

72. As Chief Justice James Spigelman AC has explained, the desire of bureaucrats and others to measure performance risks the wood being missed for the trees. He described the desire to measure everything with the old word "pantometry" and debunked the thesis in his speech "*Measuring Court Performance*"[52].

73. Each case presents its own unique set of facts and issues. The role of the judicial branch is to do justice according to law in each case – not in a selected number of cases or by some statistically verifiable methodology. Justice cannot be made to fit the statistician's or bureaucrat's facts or figures. A case that takes a short time to hear, may involve legal issues of great significance or difficulty that will take a judge or judges considerable time to consider and resolve, before he, she or they can deliver reasons for judgment. There is no valid relationship between the time

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51 A number of jurisdictions also have statutory bodies whose function is to consider or filter complaints against judicial officers: e.g. the Judicial Commission of New South Wales, the Canadian Judicial Council and the New Zealand Office of the Judicial Conduct Commissioner.

52 Address to the 24th Annual Conference of the Australian Institute of Judicial Administration (2006: Adelaide), published Vol 16(2) Journal of Judicial Administration, Nov 2006: 69-80

it takes to hear a case and the time it takes to decide that case or between the time one case takes to hear and determine as against that taken with any other.

74. Courts must not be required or measured to meet targets, or the management school's holy grail of key performance indicators. They are not production lines intended to meet other people's targets. They are an independent arm of government for a very good reason. It is so that they may continue to perform their central function of doing justice according to law.

**Conclusion**

75. There can be no prescriptive rule for ascertaining quality in a judiciary. One size most certainly will not fit all. A busy trial court, such as a court of summary jurisdiction presided over by a magistrate, will perform a very different role to a superior or appellate court. But each judge, in whatever court he or she sits, must bring to their task the core values that I have identified, if they are to gain the confidence of the society whose judicial power they exercise.