

# 2017 Sir Ronald Wilson Lecture

Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence

The Hon Robert French AC

Tuesday, 1 August 2017

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**The Law Society of Western Australia**

Level 4, 160 St Georges Terrace, Perth WA 6000 | **Postal:** PO Box Z5345, Perth WA 6831 or DX 173 Perth  
**Phone:** (08) 9324 8600 | **Fax:** (08) 9324 8699 | **Email:** [info@lawsocietywa.asn.au](mailto:info@lawsocietywa.asn.au) | **Website:** [lawsocietywa.asn.au](http://lawsocietywa.asn.au)

## Introduction

Chief Justice Martin; the President of the Law Society, Mr Alain Musikanth; your Honours, ladies and gentlemen: This is the second occasion on which I have had the privilege of delivering the ‘Sir Ronald Wilson Lecture’. I knew Sir Ronald, or ‘Ron’ as he insisted on being called by everyone. I knew him when he was Solicitor-General of Western Australia and after he became the first Western Australian to be appointed to the High Court. He was a strong Federalist, protective of the position of the States in the Federation and conservative in his approach to the interpretation of the Constitution. He had a commitment to social justice. In the early 1970s, he gave strong personal support to the formation of the Aboriginal Legal Service. And many years later, after he had retired from the High Court, he served as President of the Human Rights Commission and, in that capacity, as co-author of *The Stolen Generation Report*. He also had a long-standing commitment to higher education, serving as Chancellor of Murdoch University for many years and being instrumental in the foundation of Perth’s second law school at that University. It is fitting that Murdoch University is a sponsor of this evening’s event and that the Dean of the Murdoch University Law School is present.

He would, I think, be pleased to be remembered by the continuation of this Lecture Series. He would also be pleased to know that a substantial part of the audience consists of Year 12 students — part of the rising generation whose understanding of the working of our representative democracy is essential to its continuing good health.

Tonight I want to say something about the function of the courts in maintaining the rule of law and legal limits on official power, which are essential elements of our representative democracy. In that context I will offer some observations about a phenomenon loosely called ‘populism’ which allegedly, in the name of ‘the people’, or some section of them, sometimes calls into question the legitimacy of the courts and other societal institutions.

## Populism in a Shrinking World

Planet Earth is shrinking. Its physical smallness is more apparent every time we look out into our solar, extra-solar and extra-galactic surrounds. A single, centuries old cyclonic storm, the Great Red Spot on Jupiter, recently observed close up by the NASA probe Juno, is 1.3 times as wide as the Earth. Jupiter, which after all is just another planet in our solar system, could fit 1,300 Earths into its interior.

Our planet is shrinking in another sense. Electronic connectivity, convergent and conflicting

political, social and economic interactions, international and domestic economic inequalities, the unprecedented impacts of the human species on the environment, large scale movements of people displaced across national borders by war, civil conflict, drought and famine, transnational crime and terrorism — have humans rubbing up against each other and their world to an extent never before experienced in world history. This metaphorical shrinkage is stressing nations and institutions in the democratic world and elsewhere. Sometimes it leads to acute discontent with governments and institutions and political systems which are not seen to be dealing effectively with the stressors.

There is a class of social and political expression of that discontent described by the word ‘populism’, which has been in the news in the last few years. Broadly speaking it refers to approaches which seek to denigrate and bypass allegedly underperforming societal institutions and associated ‘elites’. It is an international phenomenon. A report by the Secretary General of the Council of Europe published in May this year entitled ‘State of Democracy, Human Rights and the Rule of Law’ focussed on the topic ‘Populism — how strong are Europe’s checks and balances?’ In that report the Secretary General noted that after the Second World War, Europe’s nations had worked to build constitutional parliamentary systems protecting individuals and minorities from arbitrary power. They had come to understand that democracy was, by definition, pluralist and that giving citizens the right to be different and to criticise authority made their countries more stable, not less. He went on to express concern about European societies seeming to be less protective of their pluralism and more accepting of populism. He explained:

By populist I mean those political forces which appeal to widespread public grievances while seeking to exclude other voices. We should be precise: populism is not a catch-all label for every person or movement which rocks the establishment ... Rather, it describes those who invoke the proclaimed will of ‘the people’ in order to stifle opposition and dismantle checks and balances which stand in their way.<sup>1</sup>

He expressed most concern about governments openly challenging constitutional constraints and disregarding international obligations to human rights.

As indicated in the Secretary General’s report and in much other literature on populism, its practitioners typically claim to represent or speak for ‘the people’ or ‘the real people’. An example

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<sup>1</sup> Thorbjørn Jagland, Secretary General of the Council of Europe, ‘State of Democracy, Human Rights and the Rule of Law: Populism — How strong are Europe’s checks and balances?’, Report by the Secretary General of the Council of Europe, May 2017, 4.

was seen in the language of the British politician Nigel Farage who campaigned for the United Kingdom to leave the European Union and claimed the Brexit vote as a ‘victory for real people’. That class of person did not apparently include the 48% who voted the other way. A similar theme ran through President Trump’s campaign and was reflected in his inauguration speech when he said:

today we are not merely transferring power from one Administration to another ...  
we are transferring power from Washington, DC and giving it back to you, the  
American people.<sup>2</sup>

The term ‘populism’ has been used to describe approaches taken by political leaders and commentators across the spectrum of political beliefs and ideologies. Speaking of Bernie Sanders, the so-called left wing candidate for the Democratic Presidential nomination in 2016, former President Bill Clinton spoke of ‘negative populism’ and ‘positive populism’ and called Sanders a ‘much more positive populist’ than Donald Trump. An essay in the *New Yorker* magazine last year expressed it in ideologically neutral terms when it said:

This new populism ... connotes a deep suspicion of political, corporate, and media élites; an eagerness to mobilize people who are new to politics; and a willingness to embrace policies that have long seemed verboten.<sup>3</sup>

In a recent book entitled *What is Populism*, Jan-Werner Müller, a Professor of Politics at Princeton University, described it as:

a way of perceiving the political world that sets a morally pure and fully unified —  
but ultimately fictional — people against elites, who are corrupt or in some other  
way morally inferior.<sup>4</sup>

He also pointed to the invocation by populists of ‘the real people of the country in which they live’. Müller characterised as the core claim of populism the proposition that ‘only some of the people are really the people.’<sup>5</sup>

Of course it is not unusual for politicians to invoke what they call ‘the real people’ from time to time. While this may be ‘populist’ language it does not necessarily reflect a thoroughgoing populism. In Australia from time to time we hear references to ‘real Australians’ who are contrasted with ‘elites’

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<sup>2</sup> President Donald J Trump, ‘Inauguration Address (As Prepared for Delivery)’ (Speech, Washington, DC, 20 January 2017).

<sup>3</sup> John Cassidy, ‘Bernie Sanders and the New Populism’. *The New Yorker*, 3 February 2016.

<sup>4</sup> Jan-Werner Müller, *What is Populism?* (University of Pennsylvania Press, 2017).

<sup>5</sup> *Ibid.*

who sip lattés or Chardonnay (depending on the time of day, I suppose) and live in leafy, expensive, inner city suburbs. When President Obama visited Australia in 2011 he came to Canberra and then flew to Darwin saying, no doubt upon advice, that he was going to meet some ‘Real Aussies’. That leads to the rhetorical question — if the real Aussies live in Darwin, who are the other 24 million or so people living in the rest of the country? If we extend the class and say that the ‘real Aussies’ live in rural areas, who are the more than 80% of the population who live in the cities?

The use of this type of language by some politicians and some public commentators, paradoxically themselves well within a working definition of ‘elites’, is classic wedge rhetoric. There is economic and social inequality in this country and there are layers of disadvantage. There are respectable and competing arguments about how best to respond to that inequality and disadvantage. There are significant economic challenges facing Australia and respectable but competing arguments about how to respond to them. The same is true of the great environmental challenges of our time so far as they affect Australia. There is also a diversity of attitudes on social and cultural questions. It adds no credibility to the competing arguments about any of those things to try to shore them up by dividing Australia into ‘real’ Australians and ‘elites’ or any other sub-classes such as the ‘rich’ or ‘ordinary Australians’, ‘leaners’ or ‘lifters’. Nor is it helpful, as demonstrated by recent examples in the United States, to refer to the supporters of a political opponent as ‘deplorables’, an expression used by Hilary Clinton, nor to refer to Conservative Southerners as ‘clinging to their guns and their religion’, a term used by former President Obama.

Populism in the sense I have described it is a phenomenon of our time which is not quickly going to go away. It feeds readily into a hyper-adversarial political process. It is, nevertheless, appropriate to point it out for what it offers — rhetoric and words identifying false social diseases, false remedies and false hope — snake oil from the desert fringes of our civil and political discourse.

## **Populism and the Courts**

Populism and populist language is directed, from time to time, at courts. It may be used to reflect impatience or anger with courts, particularly in two settings. The first is in connection with the sentencing of criminal offenders. The second, which is the focus of this lecture, is relevant to the judicial review functions of the courts in determining the limits of legislative and executive power, particularly where decisions of the courts hinder elected governments from doing what they want to do, even to the extent, in some cases, of holding that a law passed by a democratically elected parliament is invalid.

The Secretary General of the Council of Europe in his report earlier this year made the point that impartial and independent judiciaries are the means by which powerful interests are restrained according to the laws of the land. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before those laws. Such judiciaries he described as ‘an obstruction to populism’ because of their refusal to bow to political whims as well as their willingness to assert the rule of law against political agendas which would otherwise trample it. It was therefore no surprise that undermining the judiciary was on the first page of the populist playbook. While politicians, frustrated by judicial decisions, will often blame the law in question and seek legislative reform, the populist response to decisions hindering their political agenda is to blame the courts themselves:

Either the system is declared defunct or individual judges are portrayed as out-of-touch, self-serving or even corrupt. Such criticisms pave the way for political acts which circumvent the established legal order and for reforms which weaken judicial authority and enable greater political influence.<sup>6</sup>

It is not unusual for Australian critics of court decisions in judicial review of executive or legislative action to refer to judges as ‘unelected’ thereby suggesting that they lack a democratic legitimacy enjoyed by members of parliament and Ministers of the Crown who are responsible to the parliament. In some cases ‘unelected judges’ are said to be frustrating the will of the people.

A recent high profile example occurred in the United Kingdom when the High Court of Judicature ruled that the United Kingdom Government could not simply rely upon the referendum decision to leave the European Union. It had to get the authority of the United Kingdom Parliament. The *Daily Mail* newspaper on Friday, 4 November 2016, ran a story on its front page saying that the Court’s decision was in defiance of the 17.4 million people who had voted for Brexit at the referendum. The headline, under photographs of the three judges who had made the decision, read ‘Enemies of the People’. It reflected the degree of debasement of popular newspaper culture in the United Kingdom. It was also profoundly silly. The judges had not decided the Brexit question for themselves. They had said that the law required that, even though there had been a referendum, Parliament must make the final decision. Their judgment was upheld on appeal in the Supreme Court, which is the highest court in the United Kingdom. The newspaper headline reflected what might be called a ‘populist approach’ with its use of the word ‘the people’ even though ‘the people’

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<sup>6</sup> Jagland, above n 1, 15.  
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it referred to were 17.4 million out of a total UK population of 55 million. They were nevertheless a majority of those who voted.

The courts in Australia, as in the United Kingdom and other representative democracies, give effect to the rule of law which is indispensable to the proper functioning of those democracies. Like all human institutions they have weaknesses, they make mistakes and they may be criticised for their decisions and processes. However, criticism is one thing. Populist abuse is another.

The ordinary meaning of the word ‘criticism’ includes expressions of disapproval of someone or something which may or may not be supported by argument. A decision of a court may be criticised because it is said to have been reached by faulty reasoning which may have involved misapplying the law or drawing wrong conclusions from the evidence, or failing to consider some important aspect of the evidence. It may be criticised for the choices which the court has made in interpreting a provision of the Constitution or drawing an implication from the Constitution, interpreting an Act of Parliament or developing a principle of the common law.

Some criticism doesn’t rise much above an expletive laden expression of disapproval. There are colourful examples in Australian legal history including the use of the word ‘pissants’ by a member of Parliament to describe the Justices of the High Court who decided the *Wik Peoples’ Case* in 1996 and the term ‘blockheads’, by another member of Parliament, to describe the Justices after an extradition decision. That kind of language can be dismissed as part of the colour and movement of Australian civil and political discourse. It does not cause the courts or anyone else to lose much sleep worrying about the future of democracy.

A recent and perhaps more troubling example from beyond our shores was the reaction of President Trump of the United States to the decision of a Federal Judge, Judge Robart, who had issued a temporary restraining order against the implementation of the President’s first Immigration Banning Order. That was Presidential Executive Order of 27 January 2017 entitled ‘Protecting the Nation from Foreign Terrorist Entry into the United States’. The judge was a conservative Republican appointment. He issued the temporary restraining order on the application of the States of Washington and Minnesota. This was an example of a court exercising judicial review of executive action in a dispute in that case between the Federal and State Governments of the United States. Judicial review of executive action is also an important part of the responsibility of Australian courts at both Federal and State levels. In explaining what he was doing, Judge Robart was careful to set out the limits of his judicial function. He said:

Fundamental to the work of this court is a vigilant recognition that it is but one of three equal branches of our federal government. The work of the court is not to create policy or judge the wisdom of any particular policy promoted by the other two branches. That is the work of the legislative and executive branches and of the citizens of this country who ultimately exercise democratic control over those branches. The work of the Judiciary, and this court, is limited to ensuring that the actions taken by the other two branches comport with our country's laws, and more importantly, our Constitution.<sup>7</sup>

That description of the function of the courts in judicial review would be regarded as a fair description of the judicial review of administrative action in Australia. It is reflected in what Sir Gerard Brennan, a former Chief Justice of the High Court, said in a frequently quoted passage from a judgment he delivered in the High Court in 1990:

The duty and the jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.<sup>8</sup>

Despite the uncontroversial explanation by Judge Robart of what he was doing, it seems to have been news to President Trump. In a tweeted comment on the decision the President said: '[T]he opinion of this so-called judge, which essentially takes law enforcement away from our country is ridiculous and will be overruled.' That statement was not a reasoned 'criticism' of the judge's decision. It was troubling because it was expressed as a denigration of the judge and his judicial authority, carrying the implication that his decision was somehow undemocratic. That kind of denigration from a political leader, whether in the United States or Australia, will not deter any judge or court worthy of the name from carrying out its function. Nevertheless, it can be seen as calculated to undermine public respect for the rule of law by calling into question the legitimacy of the institutions that supports it. In that sense, it undermines respect for a fundamental part of our societal infrastructure. Our judges are not 'daffodils' to quote a term recently used by a Western Australian Senator. But the courts as institutions are relatively fragile. They do not have the power of the executive at their disposal. They depend upon public confidence and the support of both the legislature and the executive for their effectiveness.

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<sup>7</sup> *State of Washington v Donald J Trump*, Case No C17-0141, JLR, US District Court, Western District of Washington and Seattle.

<sup>8</sup> *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1, 35–6.

The use of the word ‘populism’ to describe a particular political movement or tactic or approach must be treated, as must any verbal labels, with caution. It should not be used, for example, merely to denigrate a successful politician with whom one disagrees. It can, however, reasonably be attached to political rhetoric that in the name of ‘the people’ or ‘the real people’ devalues institutions and associates them with so called ‘elites’ portrayed as lacking democratic legitimacy and even moral integrity.

The most effective protection against the pernicious effects of populist rhetoric is the work of the courts themselves, expressing in that work their independence, impartiality, competence and efficiency and affirming in every decision that they make, the rule of law. Protection is not to be found in laws which punish populist rhetoric. Indeed, in Australia, some such laws could fall foul of that freedom of political communication which the High Court has found to be implied in our Constitution. That implication first saw the light of day in 1992 following the publication by *The Australian Newspaper* of an article very critical of the Industrial Relations Commission of Australia. It said:

The right to work has been taken away from ordinary Australian workers. Their work is regulated by a mass of official controls, imposed by a vast bureaucracy in the ministry of labour and enforced by a corrupt and compliant ‘judiciary’ in the official Soviet-style Arbitration Commission.

The newspaper was prosecuted for a breach of s 299 of the *Industrial Relations Act 1988* (Cth) which provided that:

- (1) A person shall not:
  - ...
  - (d) by writing or speech use words calculated:
    - ...
    - (ii) to bring a member of the [Industrial Relations] Commission or the Commission into disrepute.

The High Court held the section to be invalid. Three members of the Court held that it infringed an implied freedom of political communication derived from the text and structure of the Constitution relating to representative democracy and the election of parliamentary representatives by the people. The content and application of that implied freedom was developed in a number of cases which have followed over the years.

An important long-term strategy against populist attacks calculated to undermine the courts is to promote the widest possible understanding in the Australian community of the important features of our representative democracy, and particularly the idea of government responsible to the parliament, of independent courts and the rule of law which governs private action and public power. Against that background it is helpful to say something about the rule of law.

## The Rule of Law

The meaning of the term ‘rule of law’ is much debated. A core element of it is that nobody, private citizen, public official, judge or government is above the law. A famous English Judge, the late Lord Thomas Bingham, wrote a celebrated book on the subject in 2010 in which he explained the rule of law as follows:

All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.<sup>9</sup>

That formulation fits into the Australian legal order.

Under the Commonwealth Constitution with its division of law-making power between the Commonwealth and the States, the limits it imposes on those powers and its separation of the judicial from the legislative and executive branches of government, there is no such thing as unlimited official power. Section 75(v) of the Constitution provides that:

In all matters:

...

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;  
the High Court shall have original jurisdiction.

That provision has the effect of conferring authority on the High Court to hear cases in which the decisions or conduct of Commonwealth Ministers and officers is challenged on the basis that they have exceeded their constitutional or statutory powers or have refused to carry out obligations imposed on them by law. The Federal Court is given similar authority by the *Judiciary Act 1903* (Cth).

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<sup>9</sup> Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 8.  
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Former Chief Justice Murray Gleeson described s 75(v) as providing in the Constitution a ‘basic guarantee of the rule of law’.<sup>10</sup> Because it is a constitutional provision it cannot be taken away by anything other than a constitutional amendment which would require a referendum of the Australian people. It follows that Commonwealth executive action cannot be immunised against legal challenge and scrutiny for its lawfulness in the courts. The High Court has implied the existence of a similar protection in relation to the Supreme Courts of the States.<sup>11</sup> Moreover, the continuing existence of those courts was guaranteed by the High Court’s decision in *Kable v Director of Public Prosecutions (NSW)*.<sup>12</sup> The Supreme Courts of the States cannot be abolished. The High Court has also held that the courts of the States cannot be made subject to the direction of the executive governments of the States.<sup>13</sup> Nor can they have imposed on them or their judges functions which are incompatible with their essential characteristics. Those essential characteristics include generally open hearings, procedural fairness and publicly available reasoned decisions. There is, to the extent I have described, a pervasive constitutional protection for the rule of law across State and Federal jurisdictions in Australia in relation to the exercise of official power which enables its limits to be policed and enforced on the application of persons affected by its exercise.

It follows from all of this and from other court decisions in Australia, that in relation to the exercise of official powers:

1. All official power, including law-making or legislative power, executive power and judicial power, derives from the Commonwealth and State Constitutions or laws made under those Constitutions.
2. There is no such thing as unlimited official power, be it legislative, executive or judicial.
3. As a general principle, the powers conferred on public officials by law must be exercised lawfully, rationally, fairly and in good faith. Failure to comply with those requirements can constitute jurisdictional error and make the purported exercise of the power invalid.
4. The courts have the ultimate responsibility of resolving disputes about the limits of official power and in so doing they, like those whose decisions they review, must act lawfully, rationally, consistently, fairly and in good faith and within the proper limits of their constitutional function.

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<sup>10</sup> A M Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 67.

<sup>11</sup> *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

<sup>12</sup> (1996) 189 CLR 51.

<sup>13</sup> *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 219.

The legal system, of course, embraces far more than laws about the extent of official power. It covers a vast array of Acts of Parliament, regulations, bylaws and rules made under such Acts, and policies for their implementation covering a very large number of topics. The legal system also includes the common law, which is the judge-made law, developed case-by-case over many years. It deals with the rights and liabilities of people in relation to such things as contracts, property, employment relations, and the duties and responsibilities of people towards each other, including their duties of care. There are a large number of Acts of Parliament which have modified or added to and, in some cases, abrogated common law rules. However, the common law still plays a very fundamental role in our legal system.

The rule of law provides a kind of societal infrastructure for our representative democracy. It creates and maintains the space within which we can enjoy our freedoms, exercise our rights, develop our capacities, find opportunities, take risks and generally pursue life goals. It gives shape and definition to Australia as a particular kind of society in the global community of nations.

### **Procedural Fairness**

The rule of law in Australia, as just described, involves independent courts which have certain essential characteristics, including open hearings, procedural fairness and publicly available and reasoned decisions. Procedural fairness is a particularly important aspect of the work of the courts. It is a requirement which also extends to official decision-making. The common law or judge-made law generally requires that officials, including Ministers of the Crown, when making decisions which are likely to affect the rights, interests, livelihoods or liberties of persons should accord them procedural fairness, a term which use to be covered by the words 'natural justice'. Procedural fairness has two important components. One is called 'the hearing rule', that is that a person likely to be affected by a decision should have an opportunity to be heard before that decision is made. If one person sues another a court will not hear the case if the person being sued has not been notified of it or had an opportunity to file a defence to challenge the plaintiff's case and witnesses, to give evidence himself or herself and to call his or her own witnesses and to put arguments to the court by way of defence. The same principle applies, even more strongly, to persons accused of criminal offences.

Similarly, by way of example in the field of administrative law, if a public official or authority were to decide to cancel a person's licence to carry on a particular profession or business because of alleged misconduct that person would have to be given the opportunity to show that he or she had

not committed the misconduct or that it was not serious enough to warrant suspension of the professional or business licence. Examples of this kind can be multiplied indefinitely.

The second component of procedural fairness is the rule against bias. It requires that a decision-maker not be biased against the person to be affected by the decision nor that there be the appearance of bias from the perspective of a reasonable observer. So if a public official had to make a decision about who would get a licence to operate a business it would not be right for him or her to make that decision if a spouse or partner was an applicant. Even if the official were able to be completely neutral, the appearance of bias from the perspective of a reasonable person could be such that the official could be prevented from proceeding to make the decision. And if the decision were made and the licence granted to the spouse or partner, then it could be set aside in a court.

The rules of procedural fairness are common law rules which have been developed by judicial decisions over many years. They are subject to parliamentary control and parliament can make laws which narrow the scope of procedural fairness in some classes of decision. Attempts to make such laws in relation to court processes would be at risk of being held unconstitutional

There are many justifications for procedural fairness in the way the courts conduct their proceedings and in the standards of procedural fairness which they require from administrative decision-makers. Those justifications include the following:

1. That procedural fairness is an aid to good decision-making — if a decision-maker does not hear from an affected party he or she may not have all information relevant to making the best decision. If he or she is biased then the decision may be made for the wrong reasons.
2. Procedural fairness supports the rule of law by promoting public confidence in official decision-making.
3. It gives due respect to the dignity of individuals.
4. It is democracy's guarantee of the opportunity for all to play their part in the decision-making process.

There is a tendency sometimes to regard procedural fairness as a kind of ethical ornamentation, invented by lawyers which act as a drag on efficient decision-making. As one leading English textbook on administrative law observed 'it is natural that administrators should be tempted to regard procedural restrictions, invented by lawyers, as an obstacle to efficiency.'<sup>14</sup> That approach is reflected in some Acts of Parliament which expressly exclude procedural fairness from certain

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<sup>14</sup> Wade and Forsyth, *Administrative Law* (Oxford University Press, 8<sup>th</sup> ed, 2000) 435-6.  
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kinds of decision-making. There are many examples of these kinds of provisions which typically provide that the relevant decision-making authority 'is not bound by the rules of natural justice' or 'is not required to observe the rules of natural justice'. Provisions like that and other provisions which limit the scope of procedural fairness raise the question — did parliament contemplate some tolerable level of bias or apparent bias or unfair refusal to hear from a person affected by a decision? That raises the related question — is procedural fairness necessary to justice? In decision-making by the courts the answer to that question is plainly 'yes'. When one goes to decisions by administrators as distinct from courts there will be those who say it depends on what you mean by justice. The most powerful arguments for its application are that it is likely to lead to better informed decisions and to maintain public confidence in the decision-making process.

It is perhaps important to add that the common law rules of procedural fairness are not one size fits all rules. They are adapted to the kind and volume of decision-making involved. For example, they do not require a personal conversation between the decision-maker and somebody affected by a decision. They do not require decision-makers to act like courts.

### **Separation of Power and Judicial Independence**

It is an important feature of the Commonwealth Constitution that the courts do not exercise executive or legislative power and that the Executive and the Parliament do not exercise judicial power. The courts must apply the law but they can't be directed by the Executive how to decide particular cases. If that were possible, the Executive would end up indirectly exercising judicial power.

The idea of a division of governmental functions in society is an old one. It can be traced back to Greek philosophers, including Plato and Aristotle. Aristotle identified deliberative, magisterial and judicative elements in State power.<sup>15</sup> While he did not propose that those powers be separated, their identification laid the foundation for our contemporary understanding of separation of powers. In the United Kingdom from which we take much of our constitutional and institutional heritage, the courts of law found their independence in terms of their relationship with the King. In the 15th century, the Chancellor to King Henry VI, John Fortescue wrote that the King's subjects could only be sued at law before a judge where they would be treated with mercy and justice according to the laws of the land. They could not be arraigned for any capital crime however heinous except before the King's judges and according to the laws of the land.<sup>16</sup>

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<sup>15</sup> Aristotle Politics, Book 4.

<sup>16</sup> Fortescue, *De Laudibus Legum Angliae* (trans: F Gregor) (c 1470) (reprinted by Legal Classics Library, 1984) 139-146.

The notion of separation of judicial and executive power was still developing in the 17th century. King James I believed in the divine right of Kings to govern. On 10 November 1612, Sir Edward Coke, Chief Justice of the Court of Common Pleas and the other judges of that Court were summoned to the King. The Court had made an order preventing a purported expansion of jurisdiction by a 'court of high commission' created by the King. The judges were told by the Archbishop of Canterbury that they were the King's delegates and the King could decide any case for himself. Coke told the King that all cases concerning the life or property of his subjects were to be decided 'by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognisance of it'. He was later removed from office.

Under the *Act of Settlement 1701* judges were given security of tenure during good behaviour and the King's power to remove a judge could be exercised only on an address of both Houses of Parliament. The protection for the judges affected by the *Act of Settlement* is reflected in s 72 of the Constitution of the Commonwealth of Australia and like provisions in State Constitutions. The judges are also protected from reductions in their remuneration during their term of office. That is to say, they can't be punished for decisions of which government disapproves by reducing their pay. It underpins judicial independence from the Executive.

A separation of the Commonwealth judicial power from legislative and executive powers is established under the Constitution and was explained by the High Court in 1956 in the '*Boilermaker's Case*'.<sup>17</sup> There is no written expression of the separation of judicial from executive and legislative powers in the State Constitutions. There are, however, conventions which underpin a degree of political respect for that principle and the independence of the judiciary. As a former Chief Justice of South Australia, the Honourable Len King said in a paper on separation of powers given in 1994:

The constitutional arrangements which existed in England in the 18th century, being the separation of powers resulting from the post-1688 Settlement upon which responsible government was engrafted, flowed into the constitutions of the Australian colonies and, hence, into the constitutions of the present Australian states.<sup>18</sup>

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<sup>17</sup> *R v Kirby; Ex part Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>18</sup> King L, 'The Separation of Powers' in Courts in a Representative Democracy: A Collection of the papers from the National Conference Courts in a Representative Democracy presented by the Australian Institute of Judicial Administration, the Law Council of Australian and the Constitutional Centenary Foundation, Canberra, 11-13 November 1994, (AIJA Incorp, 1995) 5.

The Commonwealth Constitution, as I have already mentioned, has also been held by the High Court to protect the essential judicial character of State courts.

I have spoken to this point about limits on the power of law-makers and public officials and the role of the courts in enforcing those limits. The courts themselves, of course, are confined by constitutional and conventional boundaries on the exercise of their functions.

## Judicial Activism

Although there is a separation of powers under the Commonwealth Constitution and, by convention, in the States, courts do have a limited law making function. The 'common law' is a term which refers in part to the principles of law developed by English courts over centuries and inherited by the Australian colonies and developed by Australian courts. The process of development is incremental decision by decision. Canada, New Zealand and the States of the United States have also inherited that common law tradition.

As already pointed out, the common law covers areas of the law such as contract, civil wrongs including negligence and deceit, aspects of the law of property and the rules of equity and trusts. Parliament can abrogate or alter common law rules. They are after all merely made by the judges. Where judges consider a change or development of the common law they generally take a conservative approach. Too great a change from an established principle may unsettle existing arrangements that people have made on the strength of their understanding of the settled law. The courts may decide that a change involves such important consequences and a variety of conflicting policy considerations that it is better left to Parliament. Sometimes a significant change to the common law by the courts may lead to the judges being accused of going too far — of doing something which should have been left to the Parliament. Then the judges may be accused of 'judicial activism'. The High Court's decision in the *Mabo Case*, that the common law could recognise Aboriginal native title namely, interests in land and waters derived from traditional law and custom, generated great controversy. That was because of the effect it was said to have on pre-existing understandings of the law of property in Australia.

When judges interpret the Constitution or statutes they often have to make choices between competing meanings which are open on the words of the provision which they are interpreting. In the case of the Constitution, which is expressed in very general terms, the High Court has from time to time drawn implications which do not appear expressly in the text. The making of interpretive choices involves a kind of interstitial law-making function. When the court chooses one

available meaning over another, it determines what the law is and in that limited sense may be said to make law. So too, when it draws an implication. There are debates from time to time about whether courts have gone too far in their interpretive choices or in the implications they have drawn. Sometimes judges are accused of making an interpretive choice which is designed to get a result which they favour for social justice or ideological reasons. In such cases the term 'activists' is generally deployed.

Much discussion of 'judicial activism' is really a discussion about separation of legislative, executive and judicial power and the reciprocal restraints that accompany that separation. In the Australian context, the separation of judicial power from the other branches of governments has constitutional underpinning, but is not always defined by bright lines. The restraint by the judges and by the other branches of government is, in part, a matter of convention and mutual respect which cannot be written down.

'Activism' is a term which is sometimes applied as an element of what could be called 'populist' rhetoric to label decisions with which someone disagrees. It is not a particularly useful word. It is, however, always meaningful to ask whether a judge has exceeded his or her proper function by creating rules beyond the permitted interstitial law-making which is necessary to dispose of the matter before the court. The question may properly be asked in the context of judicial review of executive action, whether a judge or a court has entered upon the rather ill-defined territory of 'merits review' and sat in the seat of the executive to substitute its own view of the correct or preferable decision rather than stay within the boundaries of review of process and lawfulness. The question may also be asked whether the judge or a court has applied to the task of constitutional or statutory interpretation the principles generally regarded as accepted or legitimate and, if not, why they have been departed from. Each of these questions raises a different kind of legitimate concern. Their sharpness is lost and the seriousness of the debate about the judicial function which they raise is compromised if they are swept up under the almost meaningless term 'judicial activism'.

## **Conclusion**

The courts are indispensable to the rule of law in our society. The rule of law is indispensable to the enjoyment of our rights and freedoms and to respect for the democratic process under which elected parliaments make the law, an executive government responsible to the parliament carries it out, and the courts determine its meaning and application in disputed cases.

There will always be debates about what the courts do, whether they are doing it well and whether they have kept to their proper constitutional function. Informed debate about such matters is a sign of a healthy democracy. That health is not enhanced by the use of populist rhetoric. The courts and our democracy are too important for that.