

LawRight Public Interest Address

Monday 25 October 2021

**Customs House
Brisbane**

"The role of courts in our society"^{1}*

**The Hon Susan Kiefel AC
Chief Justice of Australia**

Madam President, judicial colleagues, ladies and gentleman. Thank you for inviting me to speak on this occasion, which marks the twentieth anniversary of LawRight's foundation. In 2001 it was known as the Queensland Public Interest Law Clearing House, or QPILCH. Its original function was to act as a facilitator for *pro bono* legal assistance between the community and the legal profession. Since then the organisation has developed to incorporate a broader range of projects and programs that have helped to facilitate access to justice by the community.

It is difficult to understate the significance of public interest litigation in the development of the law. Many landmark cases in law, from *Donoghue v Stevenson* to *Mabo*, involved lawyers acting *pro bono publico*. That Latin expression, meaning "for the public good", is an appropriate description for the practice. It represents the interest that the public has in the administration of justice in individual cases. This was recognised in a decision of the Federal Court concerning asylum-seekers, where it was said:

* I am grateful for the assistance of Jonathan Tjandra, Legal Research Officer at the High Court of Australia.

“The counsel and solicitors acting in the interests of the rescuees in this case have evidently done so *pro bono*. They have acted according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions. In so doing, even if ultimately unsuccessful in the litigation they have served the rule of law and so the whole community.”¹

Another case involving *pro bono* counsel is *Plaintiff S157*². In that case, the plaintiff, an asylum seeker, sought to invalidate certain privative clauses in the *Migration Act 1958* (Cth) that purported to restrict the availability of judicial review of certain decisions of the Refugee Review Tribunal. The High Court unanimously held that the clauses were valid but were ineffective to restrict the High Court’s jurisdiction under s 75(v) of the Constitution in relation to decisions affected by jurisdictional error.

Plaintiff S157 is a case in which high constitutional principle was developed as a result of *pro bono* litigation. It is authority for the principle that there exists “an entrenched minimum provision of judicial review” in the Constitution³. In so holding, the High Court articulated a particular role for courts in Australian society. During the Convention Debates, Sir Edmund Barton explained that that s 75(v) was designed to allow the High Court to “exercise its function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution”⁴.

While this role is undoubtedly significant, courts also have a much broader purpose in our society. Law has often been described as that which binds a society. Speaking on the occasion of the 90th anniversary of

Vanderbilt University in 1963, John F Kennedy observed that “law is the adhesive force in the cement of society, creating order out of chaos and coherence in place of anarchy.”⁵ Sir Gerard Brennan once remarked that there are two basic functions which the courts must perform to ensure the cohesion of society: “settlement of disputes between individuals or between individuals and the Government, and declaration of the law as it applies to the settlement of disputes.”⁶

Settlement of disputes

One of the primary functions of a court is to articulate legal principles in the context of disputes between parties. The court creates precedent for future parties in the same situation to follow, thereby setting norms of conduct and behaviour. This is true even if a case appears to have no significance beyond the interests of individual parties. It fulfils what Chief Justice Murray Gleeson called “an important demonstrative function.”⁷ He observed, that:

“A court case between two neighbours in disagreement about the cost of a dividing fence does more than simply resolve the dispute between those two neighbours. It demonstrates to the public the system by which disputes of that kind are dealt with. That helps prevent other disputes from arising, and permits disputes, if they do arise, to be settled more readily. From a wider perspective, it reassures the public that there is a procedure, other than the exercise of economic or physical force, by which problems of that kind can be sorted out.”⁸

The English jurist Sir Frederick Pollock considered that the foundation of democratic parliamentary government is a settled and regular legal system. He wrote that “[l]aw is to political institutions as the bones to

the body. It is the framework from which institutions take their form."⁹ In providing for the settlement of disputes by a fair and impartial tribunal, and in ensuring that each party has a right to be heard, our system of law has a stabilising effect on the institutions in society.

It is often said that there is a positive correlation between legal stability and economic development. In early English commercial and contract law, courts were concerned with laying down clear rules about the interpretation, enforcement and termination of contracts in order to provide certainty in commercial transactions. In 1774, Lord Mansfield went so far as to say that in mercantile transactions, "it is of more consequence that a rule should be certain, than whether a rule is established one way or another"¹⁰. Of course, the aim of certainty in the law is not confined to commercial law.

It is generally understood that the need for certainty is greatest in the criminal law. It requires that laws be comprehensible and be applied consistently. That is why the High Court strives to speak with one voice as much as possible in criminal matters and not leave it to trial judges to attempt to find the ratio of a decision of the Court or to cause them to be otherwise confused. An example of the Court achieving the aim of certainty is the decision in 2018 of *The Queen v Bauer*¹¹, which settled issues concerning the admissibility of tendency evidence in single complainant sexual offences. Since the decision in *HML v The Queen*¹² in 2008, different views had been expressed by members of the Court on the topic. The unanimous judgment in *Bauer* said the admissibility of evidence of this kind "should be as straightforward as possible consistent with the need to ensure that the accused received a fair trial. With that objective, the Court has resolved to put aside differences of opinion and speak with one voice on the subject."

Members of the public need to know what conduct is proscribed by the law if they are expected to abide by it. Courts have developed several principles of statutory interpretation in order to give effect to this purpose. The principle of legality, which holds that the courts will not interpret legislation as abrogating common law rights and freedoms in the absence of express language or necessary implication, is one¹³. Another is the principle of strict construction, which holds that if ambiguity in a penal statute remains even after the ordinary rules of interpretation are applied, as a last resort the ambiguity should be resolved in favour of the subject¹⁴. A third is the presumption against retrospective or retroactive application of statutes, particularly criminal laws.¹⁵

Our system of common law itself promotes certainty by ensuring that development of the law is mostly incremental. Although the common law is flexible enough to accommodate changes in circumstances, certainty and predictability are seen as the virtues of the common law because they engender confidence.

The decision of the majority in *Dietrich v The Queen*¹⁶ that the courts have the power to stay a criminal trial where an indigent accused has no legal representation was a significant development of the law, particularly as it would have an effect on legal aid resources. Justice Deane, who was in the majority, considered that this step was justified on the basis of social need. In his view, such an approach is “an unavoidable concomitant of the judicial function if the law is not to lose contact with the social needs which justify its existence and which it exists to serve.”¹⁷

In dissent, Justice Brennan said changes in the common law should be subject to constraints if courts are not to cross “the Rubicon that divides the judicial and the legislative powers”¹⁸. His Honour considered that change

needed to be logically explained in order to avoid uncertainty. He said “[t]he tension between legal development and legal certainty is continuous and it has to be resolved from case to case by a prudence derived from experience and governed by judicial methods of reasoning.”¹⁹

It is undoubtedly the case that development of the law is necessary to meet changing economic and social conditions. For the most part, however, the common law reflects rather than influences changes in social values or thinking²⁰. Sir Harry Gibbs noted that the circumstance that warrants a court’s divergence from earlier decisions is when the earlier decisions “appear to be out of accord with contemporary principles”²¹. Nevertheless, consistently with our common law tradition, the courts should have a “modest and constrained role” in this regard²².

The need for the law to demonstrate flexibility is aptly demonstrated by the role of equity in our system of law. The English historian FW Maitland identifies the primary role of equity as being to abate the rigour of the common law²³. The purpose of developing a branch of law such as equity was to provide relief from the stricter rules of the common law. In turn, this ensured that the legal system as a whole retained the confidence of the community by ensuring that legal outcomes maintained a connection to the community’s conception of justice.

It is well settled that the method of reasoning utilised in equity differs from other areas of law. It has been observed that, “Equity in general operates by principles rather than by rules.”²⁴ In other words, equity operates on discretionary considerations which might be regarded as ethical or moral in order to do justice in particular cases. While this may create some inherent uncertainty in individual cases, it also allows courts to apply equitable

principles flexibly to meet new circumstances, such as might apply for example to intangible forms of property that exist only in cyberspace²⁵.

It would be wrong to say that equity's flexibility causes instability in the legal system. Individuals and corporations routinely use the principles of equity to organise their affairs, such as through trusts, and to internalise norms of conduct, such as compliance with fiduciary duties²⁶. As my colleague Justice Keane remarked in a 2009 lecture, "[e]quitable intervention in commerce is exceptional"²⁷. In general, a court is involved only when parties dispute the operation of equitable principles. The court's function is the same regardless of whether it is applying equitable principles, common law rules, or statutory provisions.

Maintaining confidence and stability

It is generally understood that a function of the courts is to maintain the fact and perception of the legal system as strong and stable. Chief Justice Brennan cautioned that, to the extent the Courts cannot, or do not efficiently, perform their basic functions to resolve disputes and declare the law, it "saps confidence in the rule of law on which the stability of society depends"²⁸. Likewise, Chief Justice Gleeson said that in declaring and developing the common law, the "guiding principle" of the courts is "legitimacy"²⁹. "Legitimacy", "sustains the willingness of the public and other arms of government to trust and accept their decisions."³⁰

Trust and confidence in the role of the courts is sustained by ensuring that courts are independent, that its processes are rational and fair, and that the rule of law is observed. In that latter respect, the legal profession has an important role to play. A "strong and independent legal profession" is a "mainstay" of a strong and independent court³¹.

In our adversarial system of litigation, the judge is a neutral arbiter, deciding issues presented by the parties and argued by their counsel. Unlike a Law Reform Commission or a Parliament, courts do not have the power to investigate issues or declare the law independently of a matter coming before the court. And in those matters, courts are reliant on counsel to provide sufficient facts and context in order to fulfil the adjudicative role.

Lawyers are therefore active and essential participants in the court's role in maintaining confidence and stability in the legal system. As part of the legal profession, it is necessary that lawyers too maintain those qualities which engender confidence and trust. Those qualities include integrity, independence, intellectual rigour, a strong sense of public duty and commitment to justice, and obedience to their duty to the courts.

The strength of our legal system depends on the certainty and stability maintained by the courts in the resolution of disputes. In the provision of essential legal services to individuals, organisations like LawRight contribute to advancing the rule of law for the benefit of the whole community.

¹ *Ruddock v Vadarlis* (2001) 110 FCR 491 at 548-549 [216] per French J.

² *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

³ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.

⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, at 1885.

⁵ John F Kennedy, "An Address by the President of the United States Commemorating the Founding of the University: The Educated Citizen's Responsibility in an Age of Change" (1963) 17 *Vanderbilt Law Review* 171 at 174.

⁶ Sir Gerard Brennan, "Courts, Democracy and the Law", Blackburn Lecture, speech delivered to the Law Society of the Australian Capital Territory, 7 August 1990 at 22.

- ⁷ Murray Gleeson, "Valuing Courts", speech delivered at the Family Court Conference, Sydney, 27 July 2001.
- ⁸ Murray Gleeson, "Valuing Courts", speech delivered at the Family Court Conference, Sydney, 27 July 2001.
- ⁹ Frederick Pollock, *Jurisprudence and Legal Essays*, ed AL Goodhart (St Martin's Press, 1961) at 187.
- ¹⁰ *Vallejo v Wheeler* (1774) 98 ER 1012; 1 Cowp 143 at 153.
- ¹¹ (2018) 266 CLR 56 at 82.
- ¹² (2018) 235 CLR 334.
- ¹³ E.g., *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 per Gleeson CJ; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 264-265 per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.
- ¹⁴ E.g., *Beckwith v Gibbs* (1976) 135 CLR 569 at 576 per Gibbs J; *Waugh v Kippen* (1986) 160 CLR 156 at 164 per Gibbs CJ, Mason, Wilson and Dawson JJ; *Minogue v Victoria* (2018) 264 CLR 252 at [47] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.
- ¹⁵ E.g., *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 609 per Deane J, at 688 per Toohey J; *PGA v The Queen* (2012) 245 CLR 355 at 444 [245] per Bell J; *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459 at 479 [48] per French CJ, Hayne, Brennan, Kiefel, Bell and Keane JJ.
- ¹⁶ *Dietrich v The Queen* (1992) 177 CLR 292.
- ¹⁷ *Dietrich v The Queen* (1992) 177 CLR 292 at 329.
- ¹⁸ *Dietrich v The Queen* (1992) 177 CLR 292 at 320.
- ¹⁹ *Dietrich v The Queen* (1992) 177 CLR 292 at 320-321.
- ²⁰ See., e.g., Sir Anthony Mason, "PILCH: Access to Justice and the Rule of Law" [2004] (Spring) *Victoria Bar News* 43 at 47.
- ²¹ *Jaensch v Coffey* (1984) 155 CLR 549 at 555.
- ²² *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334 at 250 [26] per French CJ, Kiefel, Bell and Keane JJ.
- ²³ F W Maitland, *Equity: A course of lectures*, ed John Brunyate (Cambridge University Press, 2nd rev ed, 1949) at 3.
- ²⁴ *Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd* [2020] AC 1161 at 1181 [64], per Lady Arden.
- ²⁵ *Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd* [2020] AC 1161 at 1182 [65].
- ²⁶ See Matthew Harding, "Equity and the Value of Certainty in Commercial Life" in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2019) at 151.
- ²⁷ Patrick Keane, "The 2009 WA Lee Lecture in Equity: The conscience of equity" (2010) 84 *Australian Law Journal* 92 at 98.
- ²⁸ Sir Gerard Brennan, "Courts, Democracy and the Law", Blackburn Lecture, speech delivered to the Law Society of the Australian Capital Territory, 7 August 1990 at 22.

- ²⁹ Murray Gleeson, "The Judiciary as the Third Arm of Government", speech delivered to the Judicial College of Victoria, 15 March 2013, at 11.
- ³⁰ Murray Gleeson, "The Judiciary as the Third Arm of Government", speech delivered to the Judicial College of Victoria, 15 March 2013, at 11-12.
- ³¹ Murray Gleeson, "The Judiciary as the Third Arm of Government", speech delivered to the Judicial College of Victoria, 15 March 2013, at 14.