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SESSION: "COURTS VERSUS THE PEOPLE: HAVE THE JUDGES GONE TOO FAR?"

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INTRODUCTION TO SESSION ON "COURTS VERSUS THE PEOPLE: HAVE THE COURTS GONE TOO FAR?'

The title of this session, "Courts versus the People: Have the Courts Gone too Far?" is intended to be a little provocative. The topic reflects common themes in current political discourse (by which I include commentaries in the print and electronic media) in this country. A frequent criticism made of the courts is that they tend to be out of touch with public opinion and that their decisions all too often exceed the boundaries appropriate to the exercise of the judicial function. As Justice Perry points out in his paper, the adjective that most commonly describes judges subjected to criticism of this kind is "unelected". The implication is that judges frequently trespass on the domain of the elected representatives of the people. To the extent that particular decision are seen to be in conflict with public opinion, however measured, the judges concerned may not merely be labelled as remote or aloof, but may be attacked for having misused judicial powers. The judges are seen, in Alexander Bickel's phrase, as a "counter-majoritarian" force. From the critic's perspective, it is the absence of majoritarian support for particular decisions or judge-made principles that implies a lack of legitimacy.

It is true, as the Chief Justice has pointed out in his keynote address, that there is nothing novel in criticism, even strident criticism, of the courts. Nonetheless, in a world of instant communications and more sceptical attitudes towards established institutions, courts seem to attract vehement criticism more frequently than once was the case. In consequence, they tend to adopt a position of institutional defensiveness.

To some extent, this state of affairs reflects the divide between two cultures, the socio-political and the legal, to which the Administrator referred in his address. Those outside the legal community may not understand why judges and lawyers place such store on concepts like the independence of the judiciary and on the rule of law. Particularly is this so when these concepts are employed to justify decisions that seem to produce inconvenient results or that are at odds with prevailing (or fomented) public sentiment. For their part, judges and lawyers are frustrated at their inability to explain why such concepts are fundamental to the preservation of freedom in a democratic society.

The divide between the two cultures is deepened by the differences in perspective between courts and the legal community, on the one hand, and non-legal institutions or groups on the other. Courts are required to decide specific issues presented to them for determination. Although appellate courts often address policy issues, in general courts are concerned with the "micro" rather than with the "macro". A judge assessing damages for a grievously injured accident victim, although bound to apply settled principles, will not ordinarily be concerned with the impact on insurers of an apparently large award, or even a series of similarly large awards. A judge faced with an application for review of a migration decision is, of course, well aware of the constraints upon judicial review, but is necessarily also conscious of the circumstances, often distressing, affecting the individual applicant. The cumulative effects from a "macro" viewpoint, of a series of "micro" decisions may be very considerable indeed. For example, an insurer may find that the super-inflated component of individual damages awards ultimately creates an unsustainable drain on resources. A policy maker may be less concerned with the circumstances of individual claimants seeking protection as refugees than with the overall impact of the system of judicial review on the volume of claims and the speed of the decision-making process.

The need for the judiciary to participate in the debate is sharpened by the importance attributed by orthodox legal principle to the preservation of public confidence in the judicial system. The prohibition on judges entering the field of merits review in administrative law is ultimately founded on the principle that courts ought not to transgress the boundaries imposed by the doctrine of separation of powers lest they risk forfeiting the confidence of the community in the legitimacy of judicial review as an institution. The rationale for the law of contempt is the need to preserve the authority of the courts and promote public confidence in the administration of justice. The task of statutory construction is informed by the search for the intention of Parliament. That is, the court's role is to give effect to the will of the democratically elected Parliament and not to formulate policy independently of the authoritative pronouncements of elected representatives of the people.

It might be thought that criticism of the kind that I have identified is likely to be directed only at the higher reaches of the judiciary. Few lawyers are unfamiliar with the attacks made on so-called judicial adventurism in the aftermath of *Mabo (No 2)* and *Wik.,* but those cases were decided by the High Court of Australia. It was also the High Court that was responsible for controversial decisions such as *Teoh* and *Kable* and the cases finding an

implied guarantee of freedom of political communication in the *Constitution*. The criticism sometimes levelled at the Federal Court in connection with judicial review of migration decisions might be thought merely to reflect the traditional sensitivity of a delicate area of government policy (I do not use "government" in a party political sense). The pernicious influence, as some would see it, of international norms on domestic law, might be said to raise issues that affect appellate, rather than trial courts and magistrates not at all.

In truth, the debate about whether courts have exceeded their legitimate functions affects all judicial officers in their daily work. The area of sentencing is an obvious example. Every judge or magistrate who makes a difficult sentencing decision potentially confronts not only the scrutiny of an appellate court, but the ever-watchful eye of the media and of politicians. Indeed, it is not just sentencing that raises these issues.

The task of construing statutes is a core judicial function and must be discharged by all courts. Most decisions will not be the subject of appeal. What assumptions should judges and magistrates make in performing that task? If the answer to any given issue of construction is not made clear by the statutory language itself (which will often be the case), what principles should guide the judge in attempting to discern the parliamentary intent? What are the proper limits of the judicial function in statutory construction? Similarly, if a discretionary decision has to be made as to the admissibility of evidence in a criminal trial, how far, if at all, is it proper to take account of "community expectations" in exercising that discretion? Does it matter that the beneficiaries of decisions that have a civil liberties or human rights flavour are often seen as particularly unattractive standard bearers for the rule of law?

The topic is also intimately related to a broader issue, namely whether the courts should be entrusted with the task of construing and applying a charter for the protection of individual rights and liberties. One issue upon which there seems to be a current, although not necessarily permanent, political consensus in Australia, is that it is inappropriate to confer additional power on judges in the form of a bill of rights. The consensus seems to hold, regardless of whether the proposal is for an entrenched bill of rights or for a more qualified regime, like the Canadian Charter or the United Kingdom *Human Rights Act*, both of which preserve the ultimate authority of Parliament to override the views of courts. Some see it as curious that Australia, in its second century of constitutional federalism, throughout which

judicial review of legislative action has been regarded as axiomatic, has afforded less protection against legislative intrusion into human rights than that bastion of parliamentary sovereignty, the United Kingdom.

Each of the papers offers a different perspective on these issues. Professor McMillan is critical of the process which has expanded of the boundaries of judicial review. He counsels against further judicial intrusion into the province of administrative decision-making. Mr Lavarch sees judicial law-making as an inevitable concomitant of the "basic truth" that the role of the judiciary in a democratic society is to uphold the rule of law. Justice Perry contends that the courts have not gone far enough in incorporating international human rights norms into domestic jurisprudence. And Ms Debeljak offers a justification compatible with democratic theory for the adoption of a bill of rights.