Australian Bar GAZETTE

October 2006

CONTENTS

ABA CONFERENCE CHICAGO 2007

From Tuesday 26th June to Friday 29th June next year, the ABA will (with the assistance of the American Bar Association) conduct its biennial conference in Chicago. Speakers at the conference will include:

- the Honourable Justice Susan Crennan, High Court of Australia,
- the Honourable Madam Justice Rosalie Silberman Abella, Supreme Court of Canada,
- the Honourable Judge Richard A Posner, US Court of Appeals, 7th Circuit, and
- Karen J Mathis, President, American Bar Association.

The Conference will be held at the Drake Hotel. More information will be available later this year.

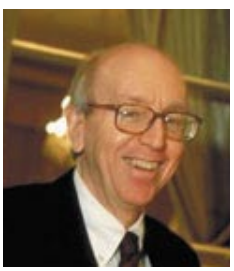
In the meantime, if you wish to have your name entered on the list of expressions of interest, please send your name and full contact details to:

mail@austbar.asn.au

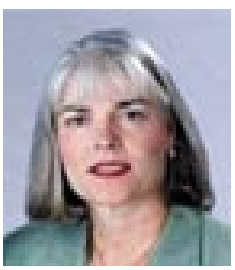
Drake Hotel, Chicago

The Honourable Justice Susan Crennan

The Honourable Madam Justice Rosalie Silberman Abella



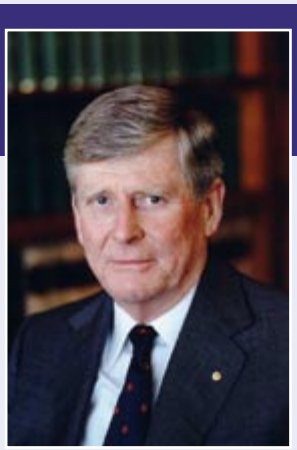
The Honourable Judge Richard A Posner



Karen J Mathis

A CORE VALUE

MURRAY GLEESON*



At the recent Colloquium of the Judicial Conference of Australia the Honourable Murray Gleeson AC, Chief Justice, delivered the keynote address. In it he deals with some of the most important issues facing lawmakers, judges and lawyers in Australia and elsewhere. It deserves the widest possible circulation and so it is, by courtesy of the High Court, reproduced here.

In recent months, Australian values have re-emerged as a subject of political debate and commentary. This time, the context has been immigration, and more specifically, citizenship. Proposals to require declarations of adherence to our national values raise questions about what those values are, and what room there is for diversity. Only a few years ago we were congratulating ourselves on our multiculturalism. A multicultural society is one that accepts some differences about values. Values are part of culture. Surely the variety implied by the word multicultural is not limited to tastes in food and clothing, or preferences between codes of football. At the same time, it seems to be agreed generally that there are basic principles a community may expect to be acknowledged by people who seek formal membership of that community, that is, citizenship. What we are entitled to expect of people who come here without seeking formal membership of the community is another issue. The word "community" implies shared values. How much diversity is consistent with community? Fortunately for judges, that difficult question is not justiciable.

Some of the discussion about our community values has been light-hearted and amusing. Australian values are sometimes presented as a box of soft-centred chocolates, pleasant and easy to consume, and offered in sufficient variety to satisfy all tastes. My purpose is to identify one, more of the hard-centred kind, and of particular concern to judges. It is not a value that figures prominently in the popular lists, but I believe that most Australians accept it. We are entitled to demand, and in fact we demand, that anyone who seeks membership of our community must subscribe to this value. Since 1994, people applying for Australian citizenship have been required to make a pledge of commitment. The Minister for Immigration who introduced the amending legislation said that the pledge reflects the core values of Australia. The form of the pledge refers to the democratic beliefs of the Australian people, and their rights and liberties. New citizens undertake to uphold and obey Australia's laws. The core value reflected in the citizenship pledge is the rule of law in a liberal democracy. We assert this value, and require newcomers to subscribe to it. That suggests we assume a common general understanding of what it means.

The rule of law is not merely a formal concept, satisfied by the existence of any form of legal authority governing in accordance with rules, no matter how repressive or unjust they might be. In a liberal democracy, the idea of the rule of law is bound up with individual autonomy – the freedom to make choices. It is only if people know, in advance, the rules by which conduct is permitted or forbidden, and the rights and obligations that flow from their conduct, that they are free to set their personal goals and decide how to pursue them. That is the purpose of having law in the form of general rules, of reasonable clarity and certainty, capable of being known by people in advance of choosing to act in a certain way. A system of ad hoc discretionary decisionmaking, even by benign and well-intentioned decision-makers, deprives people of the capacity to know the likely consequences of their actions. There were societies in which the law was known only to the members of a select caste. What more obvious form of repression could there be than not letting people know the legal consequences of their actions?

This relationship between the rule of law, personal autonomy, and freedom of choice has implications both for the substantive content of law and for the administration of justice. It explains why we attach such importance to clarity and reasonable certainty in legal rules. These are aspects of accessibility. An example is provided by real property law, and its relationship to market theory. Without security of land title, and predictable and consistent regulation of land transfer, a market in land cannot develop. Ready marketability of land should mean that land will end up in the ownership of those best able to make productive use of it. The same considerations apply to commercial law generally. A just and predictable system of commercial law is an essential condition

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for commerce. In the administration of civil and criminal justice, inconsistency and unpredictability are badges of unfairness. They are also badges of inefficiency: they impede the capacity of the law to fulfil its function of establishing the conditions essential to free choice.

People understand this intuitively. Unpredictability of judicial decision-making is demoralising. People resent insecurity. Consider an area in which there is a great deal of public commentary on the work of judges: sentencing. The Judicial Commission of New South Wales was established in the 1980s, not because of complaints about leniency in sentencing, but because of complaints about inconsistency. The first task of the Judicial Commission was to establish a Sentencing Information System, designed to reduce inconsistency. Episodic complaints about undue leniency, or severity, sometimes based on misunderstandings and misrepresentations, are fairly easy to answer. What would be more worrying would be complaints of widespread inconsistency.

In popular culture, the value of the rule of law does not receive much promotion. Yet Australians are surrounded by it in their daily affairs. It is not something that is to do only with courts, and judges, and lawyers. It is the foundation of government. It is the assumption that underlies the political process that makes our system of government work in practice.

Our basic law is a federal Constitution. It divides, allocates, and limits all power: legislative, executive and judicial. A V Dicey said that Federalism means legalism. He said it leads to the prevalence of a spirit of legality among the people[1]. Australians are used to thinking of political power in terms of divisions between central and regional authorities. They are accustomed to occasional disputes between governments over the boundaries set by those divisions. They take it for granted that the divisions are established by law, and that disputes will be decided by courts acting independently of the disputing parties and seeking to apply the law. The decisions are open to comment and criticism. The reasons for the decisions are made public, and can be measured against the law. The way in which judges justify their decisions, seeking always to demonstrate that they are in accordance with law, reflects the assumption that judges are applying law, and not merely expressing a personal preference for an outcome. Nothing is more likely to create public alarm than a perception that justice is administered, not according to law, but according to the personal inclinations of judges.

Modern Parliaments are far more active in making and changing the law than Parliaments of earlier times. Much of the work of judges now consists of interpreting and applying Acts of Parliament. In a host of ways, legislators have become more and more involved in the detailed regulation of civil and criminal justice.

That this is now expected of Parliaments by the public is an example of the legalism of our society, and the community's expectation that political power will take the form of intervention in the law and the administration of justice. Defending the nation, managing the economy, and preserving civil order are still primary concerns of the political branches of government, but they are also expected to involve themselves in legal issues that in earlier times were left largely to the judges.

An aspect of law that lends to tensions between the political and the judicial branches of government is the law's insistence on respect for individual rights.

In his recent Magna Carta Lecture in Sydney, the Lord Chancellor referred to tensions in the United Kingdom resulting from what could be described as a process of colonisation by the political branches of government, and the judiciary, of each others' territories. He gave two examples. Sentencing has become a political issue. Until relatively recently, politicians were content, by legislation, to mark the outer boundaries of judicial discretion, and to leave the sentencing function to the experts. Now, there is detailed legislative intervention, and judicial decisions are often the subject of political scrutiny and comment. His second example was of a move in the opposite direction. Human rights legislation, and the development of the common law concerning judicial review of administrative action, has seen judicial power intrude into areas that formerly were matters of exclusively political concern. Politicians now concern themselves with the details of sentencing decisions, and judges now concern themselves with the effect of administrative decisions on the rights of citizens, in ways that would have been regarded as surprising twenty years ago.

Colonisation often leads to resistance. Judges sometimes resent what they may regard as uninformed and inexpert responses to their sentencing decisions. Politicians question the legitimacy of judges making decisions about human rights issues that ought to be the subject of political accountability. Tensions such as this may be uncomfortable, but they are not necessarily a bad thing. If politicians and judges occasionally collide, that might be because somebody is on the wrong course. They are all supposed to serve the public, and what matters is the public interest. The possibility that politicians and judges might have the capacity to make a positive contribution to the way in which the others serve the public interest should not be overlooked.

This intensification of political interest in civil and criminal justice, and of judicial concern with legal issues that have a political dimension, is occurring in all common law countries. It is occurring in all societies in the liberal democratic tradition. It is an aspect of a spirit of legalism which reflects the centrality of law in the life of a community.

An aspect of law that leads to tensions between the political and the judicial branches of government is the law's insistence on respect for individual rights. This is often misunderstood, or misrepresented, as a disregard of community rights. Judges are accused of concentrating their attention on the rights of an individual who has committed, or who is planning to commit, a crime without regard for the rights of the victims, or intended victims. In order to explain why this involves

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JUDICIAL APPOINTMENTS FORUM

In a modern democratic society, it is no longer acceptable for judicial appointments to be left entirely in the hands of a Government Minister Lord Falconer of Thoroton, July 2003

Judicial appointment commissions, in one form or another, exist in England, Scotland, Northern Ireland, Ireland, Canada, South Africa, Israel, France, Germany, Italy, the Netherlands, Portugal, Spain and many states of the USA. Is Australia right to continue with the current system? Or should there be change?

A public forum will be hosted by the Australian Bar Association at which consideration will be given to:

- the current methods used in Australia to appoint judicial and quasi-judicial officers, and
- whether any changes can or should be made to those methods.

The programme is:

10.00	Appointment of Judicial Officers in Australia – *Assoc. Professor Elizabeth Handsley, Flinders University*
10.30	Why we should have a Judicial Appointments Commission – *The Honourable Geoff Davies AO*
11.00 – 11.30	Morning tea
11.30	Why we should not have a Judicial Appointments Commission – *Professor Jim Allan, University of Queensland*
12.00	Has the system failed women? – *Caroline Kirton, Immediate Past President, Australian Women Lawyers*
12.30	The current system works – *The Honourable Philip Ruddock MP, Attorney General*
13.00 – 14.00	Lunch
14.00	The system, its shortfalls, and where it can be improved – *Nicola Roxon MP, Shadow Attorney General*
14.30	Judicial Appointments: Who is really accountable? – *The Honourable Justice Sackville, Federal Court*
15.00 – 16.00	Discussion

DATE AND TIME: 10 am – 4pm, Friday, 27 October 2006 **VENUE:** Sheraton on the Park, Sydney

REGISTRATION: There is no fee for attendance, but you must register for catering purposes. If you wish to attend, please e-mail honsec@austbar.asn.au and give your name and contact details.

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a misunderstanding, let me begin by describing a medieval solution to a particular problem, and then move to more modern examples.

In 1209, the Crusaders sent to stamp out the Albigensian heresy in Languedoc besieged the town of Béziers. After the town succumbed, the leader of the crusading forces was directed to enter the town and kill the heretics. He asked the bishop how he was supposed to work out who were the heretics and who were the Catholics. This was no small problem. Telling the difference between a Catholic and a Cathar might have been easy enough in the case of people who spent a lot of time talking about the problem of evil, but ordinary folk do not discuss theology. The reply attributed to the bishop was: "Kill them all; God will know his own". And that is what they did. This was an effective military solution, but it was hardly a rational method likely to be suitable for widespread use. And so the Inquisition was established, its task being to work out, on a case by case basis, who were the heretics. The Inquisition used torture as one of its methods. In doing so, it was doing what ordinary courts of justice of the time did throughout Europe. In 1209, English courts of justice still employed trial by compurgation, and trial by battle. Trial by ordeal, after being condemned by the Lateran Council, was prohibited in England in 1219[2]. Torture was practised in England until 1641, when the Star Chamber was abolished. In a recent House of Lords decision[3], Lord Hope pointed out that, even after the jurisdiction of the Star Chamber was abolished in England, prisoners were transferred to Scotland so that they could be forced by the Scots Privy Council, which still used torture, to provide information to the authorities. His Lordship said that what we now call "extraordinary rendition" was being practised in England in the 17th century. The methods of the Inquisition have long since become unacceptable, but the objective of dealing with suspects individually, rather than killing them all and leaving it to God to sort them out, was a considerable advance on what happened at Béziers.

Let us move forward 400 years, to the beginning of the 17th century. In the House of Lords judgment just mentioned reference was made to an event in England that has a contemporary resonance. Lord Hope said[4]:

> *"[O]n 4 November 1605, Guy Fawkes was arrested when he was preparing to blow up the Parliament which was to be opened the next day, together with the King and all the others assembled there. Two days later James I sent orders*

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to the Tower authorising torture to be used to persuade Fawkes to confess and reveal the names of his coconspirators ... On 9 November 1605 he signed his confession with a signature that was barely legible and gave the names of his fellow conspirators. On 27 January 1606 he and seven others were tried ... Signed statements in which they had each confessed to treason were ... read to the jury."

The story is easily translated into 21st century terms. Some men in London were planning a terrorist attack on a public building. They were militant fundamentalist Christians, said to be encouraged by a foreign power, Spain. One of them was captured, tortured, and forced to reveal his plans and the identity of his co-offenders. They were tried, convicted on the evidence of confessions extracted by torture, and executed. This was a famous event in British history. It is celebrated every year, with displays of fireworks.

There is, however, one problem in the translation. Torture has now been outlawed. Its use was abolished in England in 1640 and in Scotland in 1708[5]. It was never lawful in Australia. It is prohibited by international law. That prohibition enjoys "the highest normative force recognised by international law[6]". The international prohibition of torture "requires states not merely to refrain from authorising or conniving at torture but also to suppress and discourage the practice of torture and not to condone it"[7]. Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 requires the exclusion from evidence of statements made as a result of torture. A comprehensive discussion of the current state of international law in relation to torture may be found in the decisions of the House of Lords concerning the extradition of General Pinochet[8].

Issues of terrorism and public safety present great challenges to the law, and to the courts which are obliged to uphold the law in the face of public impatience, and fear. The community will only value the rule of law, and accept what might appear to be attempts by judges to frustrate measures taken by governments to protect the public, if people are encouraged to understand the issues that are in play. It is necessary to step back a couple of paces to see the wider context in which the problem arises.

Courts do not have agendas. Unlike the political branches of government, they have little capacity to choose the issues with which they will deal. When the jurisdiction of a court is regularly invoked in a criminal or civil case, subject to very narrow exceptions the court must decide the case, and deal, according to law, with the issues that are presented for decision. In a criminal case, those issues will concern the conduct of an individual or, occasionally, a small group. If an accused person is convicted, he or she will be dealt with individually. The punishment must fit both the offence and the offender. In the sentencing process, close attention will be given to the circumstances of the particular offender.

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That does not mean the sentencing judge overlooks wider considerations. The reason the law makes the conduct of the offender a crime is to protect the public, and to vindicate human rights of safety and security. The law of homicide exists to vindicate the most fundamental of human rights; the right to life. The law of larceny protects the right to property. Laws against violence protect the rights of citizens to live in their homes, and to go about their ordinary affairs, with security. Sentences are required to take account of the objective seriousness of the offence, and that seriousness consists of the invasion of rights or interests involved in the offending conduct. The modern sentencing process is designed to make the sentencer aware of the impact of a crime upon a victim, or a victim's relatives, and on the community. The severe penalties that are commonly imposed for serious cases of drug trafficking, for example, reflect the harm that results from that form of crime. If a sentencing judge fails to take proper account of the seriousness of an offender's conduct, and thus of the rights or interests invaded by such conduct, and a manifestly inadequate penalty is imposed, there are established procedures for the prosecuting authorities to seek appellate review of the decision. I would reject any suggestion that, in the administration of criminal justice, there is a systemic disregard for the rights and interests of victims and the public, and an undue concern with the rights of offenders. Such a disregard is not made out by pointing to particular cases of error, especially where that error may be corrected on appeal. It is not unusual to hear people find fault with some sentencing decisions; it is unusual to hear critics address the principles, or the procedures, which sentencing judges and magistrates are bound to follow, and explain where they are at fault. If it were seriously claimed that there is a systemic failure of the kind mentioned, then that is the level at which the argument should be conducted. A case that the legal system disregards community rights, and has disproportionate concern for the rights of offenders, could only be made out by engaging with the sentencing principles by which courts are bound, and critics rarely undertake that engagement.
The criminal justice system deals with individual cases, but it is quite wrong to say that it disregards community rights and interests. On the contrary, the criminal law exists to protect the public.

Many laws, whether made by a Parliament or judge-made, represent an accommodation between competing rights or interests. Often, the accommodation that is reached is inconvenient for some; sometimes it is inconvenient for the government. The rule against the admissibility of involuntary confessions is no doubt an inconvenience for those who enforce the criminal law. It is an inconvenience they are obliged to accept. The alternative, that is to say, receiving evidence of forced confessions, is a price we are not willing to pay in order to secure convictions. Laws regulating official surveillance, or search and seizure, are carefully structured to reflect what Parliament regards as a just compromise between the rights of individuals and the public rights and interests protected by the criminal law. People may disagree

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about whether an appropriate balance has been struck, but some form of balance is necessary. Very few public policies are pursued at all costs.

Laws enacted by Parliaments often have built in to them elements which oblige courts to make normative choices between competing considerations or interests. The same is true of many principles of common law. The whole law of negligence, for example, turns on judgments about what is reasonable; judgments that used often to be made by juries applying community standards. Many laws require courts to take account of broad discretionary considerations. Life would be more comfortable for judges if the judicial function consisted only in the mechanical application of rules made by others. That, however, is not the nature of our law. Judicial officers routinely make contestable value judgments which expose them to challenge.

Most normative or discretionary decision-making seems to be accepted by the community as a necessary feature of a rational system of justice. People accept that the law cannot take the form of a rigid set of rules to be applied by judicial automatons, or by computers. They understand also that the legal process often takes the form of a contest between a citizen and a government, and that the integrity of the process requires a decision-maker who is manifestly impartial and independent. They value this as part of the rule of law. A test of public commitment to the rule of law comes when the judiciary is required by law to make decisions, based on normative judgments, that may compromise the capacity of government to protect public safety and security.

Two recent decisions of ultimate courts, one in the United Kingdom and one in the United States of America, illustrate the problem. These cases provide examples of the responsibility that a rule of law society imposes on the judicial branch of government; a responsibility that may bring it into tension with the political branches of government. International terrorism is a threat to public safety in those two countries, and Australia, and is likely to remain so for a long time. The primary responsibility of government is to protect the safety of the people – *salus populi suprema lex*. All government is subject to law, and the three branches of government are beneath the law - in Australia, the Constitution. The political branches of government formulate and implement the means adopted to protect citizens against the threat of terrorism. They may do so only by lawful means; and the ultimate responsibility of deciding issues of lawfulness rests with the judicial branch of government.

Judicial officers routinely make contestable value judgments which expose them to challenge.

The case of *A v Secretary of State for the Home Department*[9] was decided by the House of Lords in December 2005. Following the events of September 11, 2001, in the United States, the United Kingdom Parliament enacted legislation providing for the detention of suspected international terrorists. Detainees had a right to appeal to a tribunal called the Special Immigration Appeals Commission. The litigation concerned the use in evidence, in proceedings before the Commission, of information which was alleged to have been obtained overseas through torture. The House of Lords was unanimous in holding that if it appeared that such evidence had in fact been obtained through torture, it could not be received by the Commission (although the use that the executive government could make of information that came to its attention, even if illegally obtained, was a different question). However, their Lordships divided 4 to 3 on an important legal issue. The majority held that, where there was a dispute as to whether evidence had been obtained by torture, the Commission should consider whether it was shown on a balance of probabilities that it had been so obtained; that if the Commission was so satisfied it should decline to receive the material; but that if it was doubtful, it should admit the material, bearing the doubt in mind in evaluating it.

Regardless of whether you prefer the reasoning of the majority or the minority, the case presents a typical rule of law issue: what was the Commission dealing with special detainees to do with evidence which was said to have been obtained by torture? The conclusion was that if the evidence was shown to have been obtained by torture it was to be excluded, but their Lordships divided 4 to 3 on what was to be done in cases of doubt. It was half a win, by a narrow majority, for the Government. Lord Hope said[10]:

> *"[I]t is one thing to condemn torture, as we all do. It is another to find a solution to the question that this case raises which occupies the high moral ground but at the same time serves the public interest and is practicable. Condemnation is easy. Finding a solution to the question is much more difficult."*

Unfortunately, the high moral ground does not provide a refuge from the necessity of making hard practical decisions. In the same case, Laws LJ said in the Court of Appeal[11]:

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Media, Bench and Bar Conference
Sydney
Friday 1 December 2006

1 A Matter of Trust?

Why won't barristers talk to the media? Should they? Should judges?

2 What do the Media want?

Just a good story or accurate, timely information? What are the pressures on print/electronic journalists?

3 How can the Bench and Bar assist?

4 How can we improve public understanding of the legal system?

These issues, and others, will be considered at a conference being conducted by the ABA on Friday, 1 December in Sydney. It will be open to all journalists, judges and barristers.

Further details will be provided soon. In the meantime please send any enquiries to **mail@austbar.asn.au**

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This grave and present threat [of terrorism] cannot be neutralised by the processes of investigation and trial pursuant to the general criminal law. The reach of those processes is marked by what can be proved beyond reasonable doubt ... In these circumstances the state faces a dilemma. If it limits the means by which the citizens are protected against the threat of terrorist outrage to the ordinary measures of the criminal law, it leaves a yawning gap. It exposes its people to the possibility of indiscriminate murder committed by extremists who for want of evidence could not be brought to book in the criminal courts. But if it fills the gap by confining them without trial it affronts 'the most fundamental and probably the oldest, most hardly won and the most universally recognised of human rights': freedom from executive detention."

In a society living under the rule of law, this dilemma is to be resolved by law, and if the lawfulness of the solution adopted is called into question then it has to be decided by the courts. Furthermore, as in the English case just mentioned, even when Parliament, acting within legislative power, adopts a solution, the implementation of that solution is likely to require judges to make contestable, normative decisions on issues that may have an important bearing, not only on the rights of suspected terrorists, but on the right to life and safety of their possible victims. Such decisions are bound to be subject to public scrutiny and, possibly, to hostile criticism. They may turn upon the views of a narrow majority in a divided court. Judicial divisions may make it obvious that there is no cut and dried legal answer to a question. The law itself may be notoriously unclear. In a climate of fear and insecurity, the public's commitment to the rule of law, and its confidence in the power of an independent judiciary, may be tested in the furnace.

The second case to which I would refer is *Hamdan v Rumsfeld*[12], a decision of the Supreme Court of the United States given on 29 June 2006. By a majority of 5 to 3 (the Chief Justice did not participate) the Court held that Congress had not authorised the President to create military commissions of the kind that had been set up to deal with charges of conspiracy laid against the petitioner following his detention at Guantanamo Bay. As you would know, the decision was followed by further dealings between the President and Congress to obtain the necessary authorisation. At the end of their opinion, the majority said (at 72):

"We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge - viz, that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."

Within executive governments, and their agencies, there will always be some pressure to push the exercise of power to its limits; limits which will be marked out by the legislature, or by the Constitution, and which must be decided ultimately by the courts.

In that paragraph, again, there appears a distinction drawn by the House of Lords in the earlier case: a distinction between the lawful exercise of executive powers for investigative or protective purposes, and due process of law as administered in the case of trial and criminal punishment. In our jurisprudence, we are familiar with distinctions between the use that investigative agencies may make of information unlawfully obtained, and questions of admissibility of evidence in the course of legal process. Distinctions of that kind are not always easy to explain and justify to the public.

Although the problem is especially acute in the face of a threat to public safety from terrorism, it is not unique. Indeed, terrorism itself is not new. Conventional warfare has always created tensions between lawfulness and necessity; and government of civil societies in time of war has brought the need to resolve similar tensions. Ordinary policing, and investigation of criminal activity, raises issues that require a balance between individual rights and public interests, sometimes involving public safety.

Within executive governments, and their agencies, there will always be some pressure to push the exercise of power to its limits; limits which will be marked out by the legislature, or by the Constitution, and which must be decided ultimately by the courts. Public emotions such as anger and fear, may create a climate in which declaring those limits is an unpopular task. An atrocity could create a wave of public dissatisfaction with the level of protection given by the law and the legal process, especially if it is apparent that the limits are not clear-cut.

The uncertainty of some aspects of the law, reflected in diversity of judicial opinion in the highest courts, or in the scope for normative judgment involved in particular legal rules or standards, cannot be ignored. These are inescapable features of a rational, tolerably flexible, system of law, capable of adjusting to the demands of circumstances. But they can shake confidence unless people understand that, in its nature, law requires the exercise of judgment, and issues for judgment are often contestable. It is a mark of political maturity and sophistication that the Australian community accepts that the law is not rigid and inflexible, and that judges are not automatons.

Another matter that cannot be left out of account is that judgments about difficult legal issues are often made in a context of political conflict, and parties to that conflict may seek to enlist judicial outcomes in aid of their own purposes. Again, this is inevitable. It is part of the democratic process. What it means, however, is that the public will accept the process only if they are sufficiently confident that the participants adhere to their proper roles. It does not devalue the rule of law that independent, apolitical judges make contestable decisions about

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matters that are the subject of political conflict, or that politicians sometimes seek to make political capital out of those decisions. That is what you would expect.

In every generation of judges, issues arise that test their hold on public confidence, and the extent to which people understand and value the rule of law. One of the responsibilities of those with executive power is to protect public safety and security. The law sets boundaries on that power. The law limits the capacity of the government to respond to threats to the public. In declaring those limits, courts may attract executive frustration, political criticism, and public alarm. How do they respond? The judicial branch of government does not employ public relations consultants. It has no advertising budget. It does not campaign for popular acceptance of its decisions. It avoids political entanglements. It makes a conscious effort to keep out of the cut and thrust of policy debate, which is the normal process by which ideas and opinions compete for acceptance.

Although the rule of law gives judges certain powers, and imposes on them certain responsibilities, it is not something in which they have a proprietorial interest. The rule of law does not exist for the benefit of judges, any more than democracy exists for the benefit of politicians. Everybody has a stake in the rule of law. It supports the conditions essential for a free society; it provides the context for all political activity; it promotes trade and commerce, and sustains business and employment; and it means that government is something which protects people, not something from which people need protection.

Consider the challenges that have been faced by judges in Northern Ireland, or Israel; not to mention countries in the Pacific region. Australian judges work in a culture that has a strong appreciation of the benefit of law. People will argue vigorously about what the law ought to be, and will demand fairness and efficiency in its administration. Judges do not need to engage in political advocacy to convince the public to value their work. To do so would be counter-productive.

A proselytising judiciary would itself cause alarm and insecurity. Because society values the rule of law judges can exercise their powers, and discharge their responsibilities, independently and confidently. Declaring the limits of the power of the other branches of government is not a task that leads to easy popularity, but judges are not involved in a popularity contest. Their job is to give practical expression to a hard-core value.

* Chief Justice of Australia

1 A V Dicey *Introduction to the Study of the Law of the Constitution*, London: Macmillan, 1959 10th ed 175.

2 Holdsworth, *A History of English Law*, 7th ed, Vol 1 (1956) at 299-311.

3 *A Secretary of State for the Home Department (No 2)*, [2006] 2 AC 221 at 285.

4 [2006] 2 AC 221 at 284.

5 [2006] 2 AC 221 at 247.

6 [2006] 2 AC 221 at 255.

7 [2006] 2 AC 221 at 255.

8 eg *R v Bow Street Metropolitan Stipendiary Magistrate (No 3)* [2000] 1 AC 147.

9 [2006] 2 AC 221.

10 [2006] 2 AC 221 at 283

11 [2005] 1 WLR 414 at 461.

12 548 US.....(2006)

Above: The Bar's Law Library, Belfast.

Below: Four Courts, Dublin.

WORLD CONFERENCE OF ADVOCATES AND BARRISTERS DUBLIN AND BELFAST 27 – 30 JUNE 2008

The International Council of Advocates and Barristers will be holding its fourth world conference in Dublin and Belfast from 27 to 30 June 2008.

The International Council of Advocates and Barristers is an organisation formed by the Bar Associations in jurisdictions where there is a separate profession of an independent referral Bar. Its members are the Bar Associations of Australia, England and Wales, Hong Kong, the Republic of Ireland, New Zealand, Northern Ireland, Scotland, South Africa and Zimbabwe. The objects of the Council include the promotion and maintenance of the rule of law and the effective administration of justice. Its focus falls on matters particularly important to the Bar worldwide, including: regulatory issues, better training for the profession, and strengthening the independent Bar as a prerequisite to an independent Bench.

Very successful conferences have already been held in Edinburgh and Cape Town, Hong Kong and Shanghai Those who have attended have had the benefit of hearing from a wide range of speakers such as Mary Robinson UN Commissioner for Human Rights, the Hon. Anthony Gubbay (the former Chief Justice of Zimbabwe), Param Cumaraswamy, UN Special Rapporteur on the Independence of the Judiciary, Lord Goldsmith (UK), Justice Ian Callinan (High Court of Australia), and Justice Dikgang Moseneke (Constitutional Court of South Africa) and barristers from each of the constituent members of ICAB. Speakers of similar calibre will participate in the next conference.

When further conference details are available they will be posted at **www.worldbaronline.com**