Deakin Law Oration

Unelected does not equate with undemocratic: Parliamentary Sovereignty and the role of the Judiciary

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One feature of judicial life that strikes most appointees to judicial office early on is the silence of the judiciary outside our judgments and statements in court.

We are also struck, when we deliver our first judgment that raises controversy or higher public interest, by the vulnerability of the judiciary to criticism, sometimes vehement and trenchant. Judges do not answer back.

With the exception of Chief Justices, judges are generally only heard in court, unless the speaking occasion involves an extra-curial or academic discussion on the law or judicial life. This is properly so. Yet when the criticism comes, it is troubling. Judges understand the constitutional and governmental conventions that operate and within which they work. The conventions are not complicated, in fact, quite simple. The only regret is that they are forgotten or overlooked when the criticism is made.

For this evening's purpose I would wish to reflect on the conventions that judges work within.

I will set out the traditional and modern views on parliamentary sovereignty. I will address the doctrine of separation of powers and the role of judicial power. I will postulate that, in modern

government, it is the rule of law that is sovereign. I will consider the judicial role and the development of the common law. I will address the topics of judicial activism, the election of judges and judicial accountability. I will conclude with the view that the complaint of judicial activism is misplaced and involves a misapprehension of the judicial function.

For some, the high water mark of judicial activism was *Mabo*. For some, the nadir of judicial 'inactivism' was *Al Kateb*. These swings of the pendulum in the discussion of judges' work are not new. In 1956 *Boilermakers* was an unsatisfactory outcome for some. Similarly in 1948 the *Bank Nationalisation* decision provoked criticism. When Chief Justice Dixon restrained the Victorian Government from carrying out the execution in *Tait*, criticism ensued. However, each time judicial power prevailed over parliamentary and executive power. Was that undemocratic?

My discussion does not say anything new. It has been said before. But, it needs to be said again.

I turn then to the topic for consideration.
The role of the judiciary and the nature of judicial power are unique amongst the three branches of government in our democratic system. Unlike the political branches, that is the

executive and the parliament, the judiciary are not held accountable to the people through election. This on occasion leads to the misguided conclusion that 'unelected judges' have a less democratic role to fulfil, or lack democratic legitimacy. But election is not the only hallmark of democracy. An impartial application of the rule of law is essential to the maintenance of a democratic system. The role of impartial arbiter of disputes between citizens and between citizens and the state is best fulfilled by unelected individuals who are independent from the effects of politics and populism. Independence complements impartiality and provides a means through which the judiciary can apply the rule of law without fear, favour or ill-will.

The independent, non-political role of the judiciary within our democratic system creates tension with the political branches who fulfil a very different function. This tension necessarily leads to some disagreement. However, it is an intended consequence of the division of power between different bodies and is aimed at avoiding a situation where power is concentrated in a single authority.

Dicey formulated the comprehensive theory of parliamentary sovereignty. This resulted in the concept gaining significant recognition in Britain and her former colonies. In Dicey's view,

parliamentary sovereignty is a two-pronged concept. It means first, that parliament may make or unmake any law whatsoever; and secondly, that the law does not recognise any other person or body as having the right to over-ride or set aside that legislation.

Academics note that in recent times the correctness of the doctrine of parliamentary sovereignty has come to be increasingly questioned by judges and lawyers in Britain, New Zealand and Australia. In Australia, Chief Justice Gleeson has observed that "there has never been, in Australia, a sovereign parliament" because of the colonial structure established by the Imperial Parliament during the nineteenth century. New Zealand's Chief Justice Elias commented that our fixation with parliamentary sovereignty and the relative democratic merits of parliament and the courts prevents us from taking a broader perspective. She says that a view of the fundamentals of law as a quest for the power that trumps is now obsolete. Rather than looking for supremacy between the courts and the political branches we should recognise that they have separate functions under the law.

Each branch of government has its own role to play in the democratic system. Parliament makes the laws, the executive administers them and the role of the judiciary is to interpret the

law. These roles are quite distinct and performed independently of each other. This independence rests on the doctrine of separation of powers.

Put simply, the doctrine of separation of powers recognises the separate and unique roles of each branch of government and that separate and unique powers are afforded to facilitate those roles. The primary purpose of the doctrine is to avoid the concentration of power in any one authority, thus ensuring that no single entity wields absolute power.
The division of power is intended to create a tension between authorities in order to achieve a balance in the exercise of power. However, in modern government, this is the theory but not the fact.

To begin with, it is recognised that there is no binding separation of judicial power under the constitutions of the Australian States including Victoria. In addition, the bi-partisan nature of politics and the fact that the executive is drawn from the parliament, means that the division between those two branches is now not so distinct. In fact, executive power has grown to a point where that branch has come to dominate the political sphere. What was intended to be a three-way division of power, has in reality largely become a two-way spilt, with the threads of tension laying predominantly between the executive

and the judiciary. This exacerbates the potential for tension between the judiciary and the executive.

Judicial power is quintessentially different from the power exercised by the executive and parliament. First, judicial power does not function of itself. The exercise of judicial power is not initiated by judges themselves. Unlike India, the higher courts in Australia do not exercise a public interest jurisdiction. An aggrieved citizen in Australia who seeks to have the government restrained or mandated by the courts cannot just issue a proceeding on the ground of public interest. Rather, judicial power is triggered by aggrieved parties bringing a proceeding within the courts' jurisdiction and thus setting in motion the wheels of justice. In contrast, Australian governments have the power to decide when and on what topic they are to exercise their power. Secondly, judicial power is based upon the fundamental tenets of impartiality and independence. The legislature and the executive function of themselves. They do not operate impartially and independently in that they operate politically. So much is expected of the legislature and the executive. Although there may be political consequences of judicial decisions, the judiciary is expected to operate impartially and independently and to not act politically.

How then does this affect our notion of parliamentary sovereignty? To say that parliament is sovereign implies that parliament is above the other branches of government, moving towards the very notion that the separation of powers is designed to avoid, that is the concentration of power in a single authority. The success of the doctrine of separation of powers rests on the equality of the branches of government, the tension between them and their ability to provide checks and balances on each other's power. With the growth of executive power and dominance of that branch in the political sphere, the distinction between the judicial and political branches of government has become even more important to avoiding the concentration of power in a single authority.

When the separation of powers between the political branches and the judiciary is compromised and the rule of law is flouted, democracy suffers. Recent events in Pakistan are illustrative of this. In 2007, the Supreme Court of Pakistan issued an interim order against the Pakistani President's actions in suspending the Constitution and declaring a state of emergency. This prompted the Pakistani army to enter the Supreme Court building and remove the Chief Justice and many other judges. Chief Justice Chaudhry was later suspended from office and 60 judges detained from November 2007 until April 2008 when the new Pakistani Prime Minister, Gillani ordered their release. The

judiciary in this instance were unable to provide the proper checks and balances on a powerful executive. The result was an exercise of state power that was unrestrained except by the exerciser of the power itself. It now seems reinstatement of the judiciary is imminent. The elements of democratic government start to revive.

Despite the fact that strong tensions may exist at times between the judiciary and the political branches, it is this tension that maintains democracy and governance under the rule of law. And it is this phenomenon that is fundamental to the way in which our society operates at both the private and public level.

Given the growth of executive power and its effect on the separation of powers, and parliamentary sovereignty itself, it is accurate to say that those two theories no longer operate exactly as they were intended. Consequently, it may be more advantageous to alter the enquiry. We may benefit from abandoning our quest for an omnipotent institution and, rather than asking "*who* is the supreme or sovereign power" asking "*what* is the supreme or sovereign power?" And the answer to that question may well be the rule of law.

Such an answer is not intended as a repudiation of the concept of parliamentary sovereignty. Nor does it threaten the power of parliament or our elected politicians. Rather, it recognises that parliament, like the other branches of government, has an important and legitimate function within our democratic system. The three branches equally form the apparatus of government, functioning together yet separately to promote a democratic system of governance. This function cannot be usurped by the judiciary, just as the role of the judiciary cannot be usurped by parliament. But it is a role that is carried out under the rule of law.

The common law and the Constitutions of the Commonwealth and the States establish a means by which Australian society operates under the rule of law. The rule of law protects the rights of citizens and governs their responsibility to others. The supremacy of the rule of law ensures that citizens are not subjected to the arbitrary exercise of state power.

Governments in this country obey the rule of law as a matter of course. As Chief Justice Gleeson points out, governments and their agencies at all levels come before the courts to bring and answer proceedings. They are sometimes unsuccessful, yet when court orders are made against them they are complied with. Governments in Australia see themselves as bound by the

rule of law despite the fact that the parliamentary role is that of law-maker.

If Australian society and Australian governments operate under the rule of law and executive power has grown to dominate parliament, perhaps it would be better to cease our search for a truly sovereign parliament and instead acknowledge that it is the rule of law that is sovereign, not a particular body or institution. And, also, that each branch of government has a separate function to play in promoting democracy under the rule of law.

Let us turn to examine the role of the judiciary within such a structure. The judiciary is the vehicle for applying the rule of law. It functions to resolve disputes between citizens and between citizens and the state and between entities of the state. Public confidence in the judiciary is the source of its continuing power and rests on public acceptance of judicial decisions. This, in turn, rests on the public's perception that the courts provide an independent and impartial method to resolve disputes.

The separation of judicial power from political power is fundamental to ensuring the independence and impartiality of the judiciary, shielding the courts from undue influence by the

executive and the legislature. The interpreter of the laws is separate and independent from the architect of the laws. This encourages an objective and impartial application of state power.

Although judicial independence is pivotal to the maintenance of the separation between the political branches of government and the judiciary, and thus to the ability of the judiciary to perform its proper function, such a separation has not always been in place. The increasing number of quasi-judicial tribunals whose members lack security of tenure, indicates that it is, in fact, not universal today.

It is informative to briefly survey the historical context of the move towards judicial independence. Sir Henry Brooke notes that prior to 1701, security of judicial tenure was not a feature of the landscape of English governance. Although there was a brief period in the mid 17th century when the maintenance of judicial tenure was based on good behaviour, for the remainder both before and after, judges held their office at the pleasure of the Crown. It was not uncommon for members of the judiciary to be sacked. In 1616, following a series of decisions now foundational to public law, Chief Justice Coke of the King's Bench was sacked. His successor, Chief Justice Montague, was warned by the Chancellor that the dismissal

'was a lesson to be learned of all, and to be remembered and feared of all that sit in judicial places." Charles II sacked 11 judges in as many years and his successor and brother, James II sacked 12 in three years.

It was not until the abdication of James II, when the parliament drew up Heads of Grievances to be presented to the new King, William III, that the issue of judicial independence was addressed in detail. The document included recommendations for making judges' commissions continuous, provision for judicial salaries to be ascertained and established and for judges to be paid from public revenue only, and mechanisms to prevent judges being removed and suspended unless by due cause of law. A provision to this effect was incorporated into the *Act of Settlement* in 1701, thereby relieving the English judiciary from the prospect of arbitrary removal by the King.

History illustrates the original subordinate role of the judiciary in relation to the executive. It is indicative of the larger battle fought between the executive and the parliament. Through a tumultuous period in English history, the separation of power between the executive, parliament and the judiciary developed to a point where the doctrine was evident enough

in practice to be described by Baron de Montesquieu, and discussed more fully by Sir William Blackstone.

Blackstone observed that if judicial and legislative powers were joined,

> "the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinions and not by any fundamental principles of law: which the legislators may depart from, yet judges are bound to observe."

This observation encompasses a paradox that exists today within our system. That is, judges do not only interpret the law made by parliament, when it comes to the common law, they must also make it.

One facet of the judicial function necessarily encompasses development of the common law. Precedent is the critical component of the common law. Despite the fact that the volume of legislation passed by parliament has increased dramatically over the last 50 years, parliament does not have the capacity to legislate in every area, despite the fact that they may have the power to do so. To legislate for every occurrence both foreseen and unforeseen is not possible, yet

parties in dispute require an answer to resolve their situation. In this way, the common law, as developed over the centuries, provides a legal framework where there is no statutory law.

Although development of the common law involves judicial discretion and judgement, this discretion is not an unlimited or arbitrary power. It must proceed on sound judicial method if the legitimacy of the rule of law is to be maintained. Views on the precise nature of judicial method vary, however the core features are the same; the focus is on process not outcome (this is maintained by methods of legal reasoning); decisions must not be based on a judge's personal opinion (to do so would undermine the legitimacy of the decision and the judiciary as a whole); and, considerations of fairness may only be applied within strict discretionary limits. When the judiciary develop the common law, they do so within these limitations, and they do so to fulfil their public duty within our system of government.

Like the political branches, the judiciary must operate under the rule of law and in compliance with the power granted to them. They must develop the common law in conformity with the relevant structures, conventions and constitutions. Some may disagree with the outcome, but it is not the outcome that is integral to the judicial function, it is the process by which the

answer is arrived at. Judges disagree on the weight to be given to one principle over another, they arrive at different decisions, but provided they steer a course of logic and reason, and draw on established legal principle, the process is sound. Provided the common law is developed with an eye to fundamental legal principles, the danger envisaged by Blackstone is avoided.

Disagreement as to the outcome of judicial decisions leads to criticism of the courts for frustrating parliament's legislative intentions, thwarting the effectiveness of executive policy-making and engaging in law-making – often termed 'judicial activism'. When such criticisms are made without a proper understanding of the judicial function and role within the separation of powers they undermine judicial integrity and imply abuse of judicial power.

The word activism is regularly used in a derogatory or critical sense, implying a focus on the end result or a desire to bring about change in line with a particular judge's personal opinion or predisposition. This is not a part of the judicial function. Judges do not decide what the answer is and then work out how to arrive at it. A result-oriented approach is not appropriate to the role. It constitutes a breach of the judicial oath.

When comment is couched in terms of judicial activism, it is often a thinly veiled accusation that a particular judge is outcome focused. But, one struggles to think of an instance where even a so-called 'activist' judgment was not reasoned along the lines of legal principle and logic. A plurality of views, persuasion and disagreement are features common to a democratic society and inevitably to the judicial process.

The judicial function necessarily involves an element of discretion and judgement. Judges do not simply discover the law as if it had always existed and were somehow to be found through tenacious exploration. Choices must be made as to how to interpret the Constitution, the meaning to ascribe to broadly couched or ambiguous legislative provisions, and in which direction to develop the common law where the existing precedents do not provide an answer in a new situation. These decisions are not made lightly. They are not made on a whim but are carefully arrived at through a process of reason and logic.

Most disputes are resolved before they come before the courts. This leaves the difficult or vehemently contested disputes to be resolved by judicial determination. The courts, save the High Court, do not have the ability to choose the cases they hear.

The parties most often come before the courts because the law is unclear. If there were a clear answer to the dispute they likely would not require an independent arbiter to decide the question. Yet, no matter how difficult the decision, no matter how important or what consequences may flow from it, a judicial officer cannot simply choose not to decide, for this would be shirking the responsibility of the office. It is incumbent upon a judge, once a case is heard, to provide the parties with an answer to their dispute.

Variations in facts mean that different arguments can be made as to the application of the rules to present circumstances. Different lines of authority may be applied or different interpretations of that authority may result in conflicting submissions even though they are based on the same material. In other cases, a new legal question may arise requiring the application of a new rule. Inevitably, judges must use their discretion and judgement to decide which of these conflicting arguments is correct. In doing so, judges must seek to draw from existing principle to interpret or develop the law in a logical and rational way. This is not judicial activism but the proper function of a judge.

Criticism of judges as activists often stems from a disagreement regarding the proper outcome of a particular decision.

Judicial decisions may have political ramifications and these may, on occasion, be controversial, but there is an important difference between political actions and political consequences.

The criteria upon which each judge bases his or her choice, or the weight given to any one criteria over another will necessarily differ. Judges are not machines. The judicial decision-making process does not have the advantage of mathematical certainties. Judges must use their discretion and judgement in decision-making if they are to discharge their duty. They are provided with judicial power on the basis that they will decide the cases before them. They do not have the choice not to decide.

An example of this is the situation faced in the recent decision of *The Queen v Flaherty*. This was the first Victorian Supreme Court decision to address the new requirements of section 6AAA of the *Sentencing Act 1991.* It requires the Court to state the sentence and the non-parole period, if any, that would have been imposed but for the offender's plea of guilty. Such a provision is based on the policy that the public interest is served by encouraging pleas of guilty thus minimising the impact of proceedings on witnesses and reducing the temporal and financial burden on the justice system. It is also

aimed at enabling the community to better understand how the judge concluded upon the particular sentence.

The factors that are to be taken into account in determining the weight of a guilty plea are variable and complex and *Flaherty* is a good example of this complexity. The factors operate on each other to affect the weight of the guilty plea and the guilty plea itself operates on other factors to be taken into account in determining the appropriate sentence. The sentencing process has been determined at common law to be a process of synthesis. The process is not formulaic.

Now, to postulate the case as it would have unfolded but for the guilty plea involves an examination of a hypothetical scenario. It is a mercurial exercise to separate a guilty plea from the circumstances surrounding it. Nevertheless, the judiciary is bound to uphold and apply the rule of law and must therefore make such a separation. Even if the task is difficult (and in some cases it will be), the policy aim of the provision is evident and the judiciary will be faithful to the intent of the legislation, upholding the rule of law as passed by parliament, the elected representatives.

There are times when a judge will decide a matter, applying the rule of law, which leads to an outcome the judge regards

as wrong or morally repugnant. The personal view of the judge is irrelevant. He or she will decide the matter according to law. Although repetitive, the spectre of the judicial oath and its significance weighs upon each judge during every day of their term of judicial office.

The unelected status of judges does not place them outside the democratic process.

Along with 'judicial activism' the phrase 'unelected judges' is employed as a means to call into question the legitimacy of the judicial function. The choice of appointment, rather than election, of the judiciary is an important distinction that maintains a separation between that arm and the political branches. To raise the unelected status of judges as a point to imply that the judicial arm is somehow undemocratic, or does not contribute to democracy, or leads to judges doing things with the law that are none of their business, demonstrates a misguided understanding of the nature of our democratic system of governance.

Unelected does not equate with undemocratic. Although members of the judiciary are appointed they have as much to contribute to the functioning of democracy as do members of the political branches. Each branch has its own role to play in

the doctrine of the separation of powers and each facilitates the successful execution of democratic governance in this country.

Arguments against introducing elections for judges are powerful. In particular, election politicises judicial appointments and thus interferes with judicial independence. This results in the judiciary potentially being captive to a strong executive with a consequent break-down of the dividing line between those who would administer the law and those who would apply it. When taken with the lack of clarity in the division between parliament and the executive, this would result in the very folly the doctrine of separation of powers was intended to avoid – concentration of power in a single authority.

Even if an absolute authority is elected, a democratic system of governance is not the result. Election is not the sole hallmark of democracy. Montesquieu quite rightly observed that the concentration of power in one authority ultimately results in a loss of liberty. If there is nothing to prevent the arbitrary exercise of state power, there is nothing to prevent the use of that power in an oppressive manner. Regardless of whether the holder of that power is elected or not, such a state of affairs is not democracy, it is tyranny.

Certainty is an important factor in maintaining the legitimacy of the rule of law. It enables citizens a fair opportunity to foresee how government power will be exercised and function accordingly. But complete predictability is not possible. This is so in all areas of human endeavour, the law is no different. In the law, this disagreement is not only a feature of judicial development of the common law, it extends to the interpretation of statute and judicial review of administrative action. But it can be protected against through principled reasoning, interpretation and development of the law. Certainty of quality of outcome can be maintained through application of the proper process.

Recognition of judicial authority depends on public acceptance of judicial decisions. As a result, the independence, impartiality and integrity of judges is highly important to the maintenance of public confidence in the system of government. But public confidence does not equate with popularity. Judges must seek to apply the law impartially and objectively. They must not seek to please the public, or politicians. Their decisions will, on occasion, be unpopular, but so long as they are just and involve an impartial application of the law, the judiciary has discharged its public duty. As Chief

Justice Gleeson observed, "Confidence in the courts includes trusting them to pursue justice, not applause."

Election for judicial office has a deleterious effect on the independence and impartiality of the judiciary because election places judges squarely in the political realm. The principles of justice regularly do not match what is politically advantageous. In situations where a fair and impartial interpretation and application of the law does not conform to political goals, a judge may take the view that to judge according to the rule of law, rather than political ends, would be judicial suicide. The effect is a partial application of the rule of law.

The possibility that judicial officers must campaign for election creates more difficulties. Election encourages candidates to campaign on their own political agenda. This very often spills over into decision-making where the political agenda for which a particular judge was elected becomes a dominating factor in decision-making, rather than the objective of an impartial application of the law. The judicial role is unable then to provide a check to prevent the arbitrary use of state power. Elected judges may also find themselves involved in arbitrating cases involving persons or entities who were their campaign donors, or even at risk of political corruption.

The criteria for an effective politician and an effective judge must necessarily be different. Both have a distinct and separate role to play in the governance structure. To incorporate election would collapse these criteria causing the appointment of judges to become a political popularity contest. Of course, it happens around the world but we have the best system. Our citizens enjoy a quality of democracy developed and tested time and time again over centuries.

Being entrusted with power by the citizens through appointment, not election, does not bring a special responsibility to discharge one's duties in a proper manner. Such a duty is common to all public roles, whether the officer in such a role is elected, as in the case of a politician, or unelected as in the case of a judge or public servant. Yet it is the judge who stands between the government and the citizen. It is the judge who enjoys long tenure and may only be removed by parliament. Judges are not removed because of a vote of no confidence for politically unpopular decisions. Although they are not elected, judges are accountable to the people by other means. Means that are more compatible with judicial independence.

A tension exists between notions of judicial independence and judicial accountability. In order to maintain independence and the separation of powers, the judiciary cannot be answerable at the ballot box in the same way as a politician may be. Such accountability is incompatible with notions of judicial independence which form the basis of the separation of the judiciary from the political branches. Judicial accountability exists but is necessarily expressed in a different form to the accountability of the political branches.

Court proceedings are conducted in public, except in rare instances. Judicial decisions are made available to the public. This is one means by which the judiciary are accountable to the public for their actions. When a judicial decision is handed down it is accompanied by a usually lengthy discussion of how the decision was made, the reasoning process behind it and the principles under-pinning it. Generally, court judgments provide a different and more comprehensive explanation than that required of politicians for a decision. Written judgments expose judicial decision-making to appropriate scrutiny by the political branches and the public to ensure accountability. Whereas a politician will reach a decision based on various sources of advice, consultants' reports, opinion polls and media sensitivity, the judge engages in a very different process of reasoning and judgment.

The appellate structure of our legal system also provides accountability. The decisions of lower courts are reviewed and, if error is demonstrated, they are supervised by the higher courts. Appellate proceedings are conducted in public and the decisions of appellate courts are public.

The media also have a critical role in scrutinising judicial decisions and providing a further mechanism for judicial accountability. But, in doing so, they should be cognisant of the differences between the political branches and the judiciary, understand the theory behind these differences, and the role each plays in the democratic system.

The three recognised arms of government, the executive, parliament and the judiciary, function together, yet separately, within our common system of governance. Each must fulfil its role within the boundaries of the powers conferred upon it and within the environment of competing powers which necessarily creates a tension between them. This tension is one aspect of a healthy representative democracy, preventing any one branch exercising arbitrary power. The fact that one branch, the judiciary, is not elected by the people does not equate with an undemocratic element to our system of governance. The judiciary have a legitimate democratic role to play in

ensuring the maintenance of democracy. Judges are a fundamental part of the democratic process. To suggest otherwise demonstrates a misunderstanding of concepts fundamental to our system of democratic governance.

Judicial opinion will differ on the proper approach to the discharge of the judicial function, but that is the reality of the society we live in – people have different opinions, judges are no different. Debate about such matters is a healthy indicator of democracy, where a plurality of views can be expressed without fear of reprisal. And we should particularly keep this last phrase in mind. When the discussion becomes emotive or is designed to elicit a reactionary response, or is in the nature of personal or political attack, we devalue our democracy.