CONCEPTS OF JUDICIAL RESPONSIBILITY: THE CONTRIBUTION OF THE 'ONE OF SEVEN'

THE HONOURABLE JUSTICE SUSAN KENNY*

This article explores the complex issues surrounding the role and responsibility of judges and the pursuit of an ideal of justice. Justice Kenny considers the way in which Justice Gaudron's vision of an open, just and free society is reflected in her approach to themes of judicial process, procedural fairness, democratic ideals and substantive equal justice. The paper concludes that Justice Gaudron's distinctive contribution to Australian law in this area has indeed been remarkable.

What is the particular responsibility of the courts and their judges? Is it merely the application of the law and, if so, to what end? Is it the administration of justice and, if so, by what means? These are great questions, to which each of us may give different answers. As a Justice of the High Court, Justice Gaudron gave more than a different voice to these questions – she gave powerful answers.

For instance, in Re Nolan; Ex parte Young (1991) 172 CLR 460 (Re Nolan), Justice Gaudron held that an open, just and free society – the kind of society to which Australians aspire – depends on the resolution of legal disputes in accordance with the judicial process.[1] Her Honour affirmed that: 'By reason of the interests which the judicial process protects, that process is properly to be seen as partaking of the same fundamental importance as the democratic process.'[2]

For present purposes, two things ought to be noted. First, her Honour did not say that the mere resolution of legal disputes is fundamental to a just society. This would be incorrect. In societies

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1 *Re Nolan; Ex parte Young* (1991) 172 CLR 460 (*Re Nolan*), 496.

2 Ibid 497.

other than ours, disputes may be resolved arbitrarily, according to state policy, or by the use of force. In the Soviet regime, disputes were regularly resolved by reference to state policy and given effect by force. In *Soviet Psychiatric Abuse*,[3] Bloch and Reddaway gave a chilling description of the placement in psychiatric institutions of human rights advocates, nationalists, would-be emigrants, religious believers and others. Of the role of the Soviet courts, the authors said:

> Dissenters who undergo a psychiatric evaluation are usually declared mentally ill and not responsible for the alleged offence. The court almost always adopts the psychiatrists' recommendations …. [T]he dissenter is usually excluded from the trial on the grounds of his ill-health; his family and friends are normally kept out of court by extra-legal means; and the number of witnesses is substantially reduced. The trial, as a result, is often transformed into a mere formality.[4]

The determination of disputes arbitrarily, by reference to state policy, or by force is, plainly enough, incompatible with Justice Gaudron's vision of an open, just and free society. In her insistence on the courts' adherence to judicial process, Justice Gaudron recognised that we cannot take our liberty for granted.

Further, in describing the central importance of the judicial process, Justice Gaudron did not say that a just society depended merely on adjudication 'according to law', although the making of binding determinations of legal controversies about existing rights and duties 'according to law' is often said to distinguish judicial from administrative and legislative power.[5] Instead, so far as Justice Gaudron was concerned, it was 'the judicial process' that was vital to the maintenance of a just society. That is, on this approach, it is the inalienable responsibility of courts and their judges to maintain

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3 S Bloch and P Reddaway, *Soviet Psychiatric Abuse: The Shadow Over World Psychiatry* (1984).

4 Ibid 22.

5 See, eg, *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 268 (Deane, Dawson, Gaudron and McHugh JJ); *Sue v Hill* (1999) 199 CLR 462, 517–18 (Gaudron J).

an open, free and just society, by making binding determinations as to guilt or innocence and as to rights, powers and status[6] – always providing that in every case the judge does so in accordance with the judicial process.[7]

Justice Gaudron explained her position directly and unequivocally in the Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1 (Hindmarsh Island Case):

> So critical is the judicial process to the exercise of judicial power that it forms part of the definition of that power. Thus, judicial power is not simply a power to settle justiciable controversies, but a power which must be and must be seen to be exercised in accordance with the judicial process.[8]

Justice Gaudron's consideration of the judicial process – its features, its importance in the definition of judicial power and its effect on judicial responsibility – is, in my view, her most distinctive and remarkable contribution to the work of the High Court.

What is the judicial process? In numerous cases[9] over the decade from Harris v Caladine (1991) 172 CLR 84 to Sue v Hill (1999) 199 CLR 462, Justice Gaudron identified what were, in her judgment, the features of the process (at least in courts exercising federal jurisdiction). The first, and possibly the least contentious, feature of the judicial process was straightforward enough. Commencing with Justice Kitto's authoritative description of the process in the R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd

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6 *Nicholas v The Queen* (1998) 193 CLR 173, 207 (Gaudron J).

7 Ibid; see also *Sue v Hill* (1999) 199 CLR 462, 515 (Gaudron J); *Harris v Caladine* (1991) 172 CLR 84, 150 (Gaudron J); *Re Nolan* (1991) 172 CLR 460, 496 (Gaudron J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (*War Crimes Act Case*), 703–4 (Gaudron J); *Leeth v Commonwealth* (1992) 174 CLR 455, 502 (Gaudron J); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (*Hindmarsh Island Case*), 22 (Gaudron J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 103–4 (Gaudron J).

8 *Hindmarsh Island Case* (1996) 189 CLR 1, 22; see also *Nicholas v The Queen* 193 CLR 173, 208.

9 *Re Nolan* (1991) 172 CLR 460; *War Crimes Act Case* (1991) 172 CLR 501; *Leeth v Commonwealth* (1992) 174 CLR 455; *Hindmarsh Island Case* (1996) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Nicholas v The Queen* (1998) 193 CLR 173.

(1970) 123 CLR 361 (Tasmanian Breweries Case),[10] her Honour referred to the determination of legal rights, duties or consequences by ascertaining the facts as they are, identifying the applicable law, and applying the law to those facts.[11]

In so far as the courts are charged to protect the individual from arbitrary punishment and the arbitrary abrogation of rights, this charge is fulfilled by adherence to this aspect of the judicial process. Few, if any, in this country would dissent from the proposition that the courts are bound to protect individuals against arbitrary punishment. The arbitrary infliction of punishment is universally deplored. As Sir Isaiah Berlin explained in *The Crooked Timber of Humanity*: 'Forms of life differ. Ends, moral principles, are many. But not infinitely many: they must be within the human horizon. If they are not, then they are outside the human sphere.'[12]

Notwithstanding the many and great differences in societies located in other places and in other times, differing societies have shared some objective values, including that a judge must act fairly before depriving a person of rights or inflicting punishment upon him. As her Honour observed, the judicial process ensures that any interference with rights or any punishment is a consequence of, at the very least, 'the fair and impartial application of the relevant law to facts which have been properly ascertained'.[13]

This feature of the judicial process has, however, been the source of disagreement. Her Honour joined Justices Deane[14] and McHugh[15] in dissent in *Re Nolan* when she held that Parliament could not validly confer power on service tribunals to hear and determine offences that were the same, or substantially the same, as those under the general criminal law. In her Honour's analysis, in so doing,

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10 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 (*Tasmanian Breweries Case*), 374 (Kitto J).

11 *Re Nolan* (1991) 172 CLR 460, 496 (Gaudron J); *War Crimes Act Case* (1991) 172 CLR 501, 703–4 (Gaudron J).

12 I Berlin in H Hardy (ed) *The Crooked Timber of Humanity: Chapters in the History of Ideas* (1991) 11.

13 *Re Nolan* (1991) 172 CLR 460, 497 (Gaudron J).

14 Ibid 489 (Deane J).

15 Ibid 499 (McHugh J).

Parliament contravened a constitutional guarantee of a fair trial of offences created by Commonwealth law.[16] This guarantee was to be implied, so her Honour held, from the fact that the judicial process was essential to exercises of judicial power; and judicial power is a subject of Ch III of the Commonwealth *Constitution*.

Whilst there is a good deal of consensus that the judicial process protects the individual from arbitrary punishment, there is less consensus about this implied guarantee of a fair trial. It is important, however, to bear in mind that governments of all persuasions over many years have created very many tribunals. The tribunals often perform adjudicatory functions in the place of courts, and a principal difference between the tribunals and the courts is that the tribunals need not comply with the judicial process. Justice Gaudron's analysis is a clear and timely warning against over-reliance on tribunals as an alternative to the courts.

Similarly, referring to the same aspect of the judicial process, Justice Gaudron dissented in Polyukhovich v Commonwealth (1991) 172 CLR 501 (War Crimes Act Case) from the majority opinion that that Act did not usurp judicial power. Justice Gaudron held that the proceedings authorised under the Act did not involve the fair application of the law to facts that a court had properly found, in order that the legal consequences of those facts might be determined.[17] Her Honour concluded that what was involved was the application of a formula and described the task involved in proceedings under the Act as being 'no more than that of ascertaining, as a matter of fact, whether a person charged under the Act fits' the formula.[18] An investigative task of this kind was fit for a royal commission of inquiry, but not for a court since the task denied 'an essential feature of the judicial process, namely, the application of law to facts to determine their legal consequences'.[19]

Postmodernism, which has been highly influential in universities and elsewhere, apparently carries with it the idea that there is no definitely ascertainable core truth. In this respect, at least, Justice

16 Ibid 496 (Gaudron J).

17 *War Crimes Act Case* (1991) 172 CLR 501, 707 (Gaudron J).

18 Ibid 708.

19 Ibid.

Gaudron rejects postmodernism. In *Telling Lies About Hitler: The Holocaust, History and the David Irving Trial*, Richard J Evans affirmed that 'we *can* tell the difference between truth and lies in history' (emphasis added).[20] Her Honour accepted the validity of this proposition, which is illustrated so graphically by Evans in his account of the David Irving Trial.[21] Just as her Honour did not deny historical truth, equally she affirmed it was possible (indeed courts were obliged) to ascertain what, if anything, had really happened in the past to attract the operation of the law. Central to her judgment in the *War Crimes Act Case* was the proposition: '[T]he relationship or the conduct which is the basis of [legal] rights … must be real and not fictitious.'[22]

It followed from this that Parliament could not require the courts to apply the law to facts that it invented. Indeed, a court that tolerated and participated in this kind of make-believe would make a 'travesty of the judicial process'.[23] It would not exercise judicial power. Since the exercise of judicial power is the responsibility of the courts, then the courts have a responsibility not to make a travesty of the judicial process. They can, therefore, act only on facts properly ascertained by reference to law fairly identified. This is a difficult task.

Justice Gaudron's judgment in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 was the rational development of her analysis in the War Crimes Act Case. The plaintiff challenged the validity of an Act, which purported to enable the Supreme Court to order his detention 'if … satisfied … that [he was] more likely than not to commit a serious act of violence; and … that it [was] appropriate, for the protection of … persons or the community'.[24]

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20 R J Evans, *Telling Lies About Hitler: The Holocaust, History and the David Irving Trial* (2002) 1. See also R J Evans, *In Defence of History* (1997).

21 Compare Justice S Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26(1) *University of New South Wales Law Journal* 210, 215–16.

22 *War Crimes Act Case* (1991) 172 CLR 501, 704 (Gaudron J).

23 Ibid.

24 *Community Protection Act 1994* (NSW) s 5, as cited in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 104 (Gaudron J).

The Act authorised significant departures from the rules of evidence in proceedings brought under it. As her Honour said, the statutory power called on the court to make an order depriving someone of liberty, 'not because he has breached any law … but because an opinion is formed, on the basis of material which does not necessarily constitute [admissible] evidence'.[25]

Leaving fact-finding and related matters aside, the judges' responsibility to be, and be seen to be, impartial is not merely a by-product of how they do their work. It is itself a constitutional responsibility, as has been evident since the *Hindmarsh Island Case*, where this responsibility formed the focus of Justice Gaudron's judgment. The constitutional concept of impartiality is a broad one. It is not limited to the more traditional idea that a judge should not be, or be seen to be, compromised by his or her personal concerns. Rather, the concept has a distinctly federal and institutional aspect. As Justice Gaudron put it in the *Hindmarsh Island Case*, 'impartiality requires that the courts … be and be seen to be completely independent of the legislatures and executive governments' that constitute the Australian federation.[26] Judges cannot, even in their individual capacities, perform functions that place them, or appear to place them, in a position of subservience to the other arms of government. This extended notion of impartiality rests, according to her Honour, on the need to maintain public confidence.[27]

The notion of a fair and impartial trial unwinds in her Honour's judgments into, at least, a judicial responsibility to be, and be seen to be, independent of the other arms of government as well as of improper personal interests; to find the relevant facts on probative evidence;[28] and, in the case of the criminal law, to apply the law as it stood at the time of the conduct under scrutiny.[29]

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25 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 106 (Gaudron J).

26 *Hindmarsh Island Case* (1996) 189 CLR 1, 25 (Gaudron J). See also *Ebner v Official Trustee* (2001) 205 CLR 337, 362–3, where her Honour held that the concept also applied to State and Territory courts.

27 *Hindmarsh Island Case* (1996) 189 CLR 1, 25 (Gaudron J).

28 *Sue v Hill* (1999) 199 CLR 463, 519 (Gaudron J); *Re Nolan* (1991) 172 CLR 460, 497 (Gaudron J); *War Crimes Act Case* (1991) 172 CLR 501, 704 (Gaudron J).

29 *War Crimes Act Case* (1991) 172 CLR 501, 705–6 (Gaudron J).

Equally as important, the judicial process in Justice Gaudron's vision was, ordinarily, an open and public enquiry in which procedural fairness (or natural justice) was observed.[30] In *Re Nolan*, she explained:

> Quite apart from the public's right to know what matters are being determined in the courts and with what consequences, open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice.[31]

The principle of open justice is now generally taken for granted, although the detention and trial of the detainees at Guantanamo Bay appears to threaten it. Nevertheless, it would be unthinkable for the judges of today to hear a divorce suit (or any other matter) in the judge's library, behind an outer door marked 'private', as was once done in Canada. Australian judges are all aware that, as the Judicial Committee of the Privy Council said of that case, 'publicity is the authentic hall-mark of judicial … procedure'.[32] As Chief Justice Spigelman said in an address to the Australian Legal Convention: 'The principle that justice must be seen to be done … is one of the most pervasive axioms of the administration of justice in our legal system.'[33]

Certain aspects of 'open justice' are not so well recognised, however, and even less observed. It is important for open justice that the courts make their process, their decisions and their reasons accessible to as wide a membership of the public as possible. For this to occur, judges must express themselves directly and in a way that as many people as possible can understand. Justice Gaudron knew this: her judgments expose her reasons right down to their very foundations. Courts are responsible for delivering open justice, and

30 *Re Nolan* (1991) 172 CLR 460, 496 (Gaudron J).

31 Ibid 496–7.

32 *McPherson v McPherson* [1936] AC 177, 200 cited in Justice D Drummond, 'Towards a More Compliant Judiciary? – Part I' (2001) 75 *Australian Law Journal* 304, 308.

33 Justice J Spigelman, 'Seen to be Done: The Principle of Open Justice (Part I)' (2000) 74 *Australian Law Journal* 290, 292.

that includes writing plain, readable and honest reasons for their decisions.

All would agree with Justice Gaudron too that judges are responsible for ensuring that the demands of natural justice are met. Judges cannot act in cases where there is a reasonable apprehension of bias on their part.[34] They must ensure that the parties have an opportunity to put their case and to answer the case made against them.[35] One contemporary philosopher has described this aspect of the judicial process in the following terms:

> We are entitled not to 'like results' but to 'like process' (or 'due process'), and this means attention to the full merits of a case, including to what can be fairly said on both sides: to the fair-minded comprehension of contraries, to the recognition of the value of each person, to a sense of the limits of mind and language.[36]

Although not usually expressed in such a literary fashion, procedural fairness is, as Justice Gaudron indicated, a critical responsibility.

These workaday principles are particularly important for judges. Their significance has been most recently bought home in the work of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The fundamental importance of procedural fairness was earlier demonstrated in the trial of Adolf Eichmann in Jerusalem in 1961. In an eloquent statement of the importance of the judicial process, the presiding judge, Moshe Landau, was moved to say:

> We are professional judges, used and accustomed to weighing evidence brought before us and to doing our work in the public eye and subject to public criticism. … When a court sits in judgment, the judges who compose it are human beings, are flesh and blood, with feelings and senses, but they are obliged by the law to restrain

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34 See, eg, *Webb v The Queen* (1994) 181 CLR 41; *Ebner v Official Trustee* (2000) 205 CLR 337.

35 *Sue v Hill* (1999) 199 CLR 462, 519 (Gaudron J); *Re Nolan* (1991) 172 CLR 460, 496–7 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 208 (Gaudron J).

36 J Boyd-White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985) 134.

> those feelings and senses. Otherwise, no judge could ever be found to try a criminal case where his abhorrence might be aroused. … It cannot be denied that the memory of the Nazi holocaust stirs every Jew, but while this case is being tried before us it will be our duty to restrain these feelings, and this duty we shall honour.[37]

In her writings and elsewhere, Justice Gaudron expressed commitment to the ideal of justice. A decade ago, Sir Anthony Mason remarked on the courts' rediscovery of the 'fundamental truth' that they are concerned with the administration of justice,[38] observing:

> There was a time when it was thought that the courts administered the law as distinct from justice. That is not the position today. And judicial concern with the ideal of justice is at bottom one of the reasons why the courts have refined some of the principles of substantive as well as procedural law.[39]

Justice Gaudron's commitment to an ideal of justice found a natural, if somewhat contentious, expression in the proposition espoused by her in *Leeth v Commonwealth* (1992) 174 CLR 455 that the concept of equal justice is fundamental to the judicial process.[40] The equal justice to which her Honour referred was substantive and not merely procedural in kind.[41] Her Honour admitted that '[o]utside the field of mathematics, "equality" is an infuriatingly illusive concept'.[42] She was, however, an intellectually courageous judge. If, as she maintained in *Leeth*, equal justice was inherent in the judicial

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37 H Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1976) 208–9; cf R Gaita, *Good and Evil: An Absolute Conception* (1991) 6–7.

38 Sir A Mason, 'The Role of the Courts at the Turn of the Century' (1993) 3 *Journal of Judicial Administration* 156.

39 Ibid 165.

40 *Leeth v Commonwealth* (1992) 174 CLR 455, 502 (Gaudron J). See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 107 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 208–9 (Gaudron J).

41 *Street v Queensland Bar Association* (1989) 168 CLR 461, 569 (Gaudron J).

42 Justice Mary Gaudron, 'In the Eye of the Law: The Jurisprudence of Equality' Mitchell Oration (24 August 1990) Equal Opportunity Commission South Australia, Adelaide <http://www.eoc.sa.gov.au/public/mitchell_oration90.html> at 29 October 2004.

process, then it was incumbent on her, as upon others, to articulate and secure equality. Starting from the proposition that equal justice requires the like treatment of like persons in like circumstances and the appropriate recognition of genuine differences, her Honour held, in *Leeth*,[43] that there was no exercise of judicial power in a power that failed to treat like offences in a like manner. There was, therefore, no exercise of judicial power in *Leeth* because the content of the power varied according to the place of the defendant's conviction. This was a breach of the equal justice criterion and inconsistent with the judicial process.[44]

Justice Gaudron's vision of judicial responsibility was not confined by history, doctrine or text. Upon joining the High Court in February 1987, her Honour said:

> Social, political, technological and economic changes have placed added demands on the law, and have also given impetus to new patterns of jurisprudential thought and a requirement for the critical evaluation of conventional judicial method.[45]

In developing this idea of equal justice, she drew not on the jurisprudence of the common law, but on the French revolutionary tradition, United States constitutional learning on the privileges and immunities clause, and contemporary anti-discrimination law.[46] Her vision was open to receiving contemporary ideas and responding to changes in government and society.

It is likely that Justice Gaudron would have agreed with Beverley McLachlin, now Chief Justice of the Supreme Court of Canada, that: 'The judges in modern society are not potentates: they are rather servants, servants of the people in the highest and most honourable sense of that term.'[47]

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43 *Leeth v Commonwealth* (1992) 174 CLR 455, 502 (Gaudron J).

44 *Leeth v Commonwealth* (1992) 174 CLR 455, 503.

45 Justice Mary Gaudron, 'Speech at the Swearing in of the Honourable Justice Gaudron' (1987) 68 *Australian Law Review* xxxiii, xxxviii.

46 Cf *Street v Queensland Bar Association* (1989) 168 CLR 461, 566, 572 (Gaudron J).

47 B McLachlin, 'The Role of Judges in Modern Commonwealth Society' (1994) 110 *The Law Quarterly Review* 260, 262.

Justice Gaudron understood that she was a servant of the people in this sense. She recognised that, ultimately, the courts must fail if they lose the confidence of the community. For her, the maintenance of public confidence depended on the courts and their judges exercising the power that had been conferred on them, by the community, only in accordance with the judicial process as she expressed it.[48] Her insistence that the judicial process was as important as the democratic process to the maintenance of an open, just and free society is to be understood in this way. It was at this point that her vision of judicial and societal responsibility met, and led her to affirm that '[p]ublic confidence cannot be maintained in a judicial system which is not predicated on equal justice'.[49]

It is impossible to predict where the future will take her conception of judicial responsibility, with its fidelity to the *Constitution*, its ideal of substantive equal justice and sensitivity to democratic values. There is no doubt, however, that Justice Gaudron's contribution has been remarkable, and that many in the community shall find in it comfort and assistance well beyond our own days.

In February 1987, Justice Gaudron said that she wanted 'to be, and to be perceived to be, simply one of seven'.[50] As a Justice of the High Court of Australia, she has been, and perceived to have been, much more than this. The British novelist and playwright, Enid Bagnold, might have had Mary Gaudron in mind when she wrote: 'Judges don't age. Time decorates them.'[51]

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48 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 107 (Gaudron J); *Hindmarsh Island Case* (1996) 189 CLR 1, 25–6 (Gaudron J).

49 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 107 (Gaudron J).

50 Justice Mary Gaudron, 'Speech at the Swearing in of the Honourable Justice Gaudron' (1987) 68 *Australian Law Review* xxxiii, xxxviii.

51 E Bagnold, *The Chalk Garden* Act II (1953).