Sir Francis Burt Oration 2024

The Court of Law and the Court of Public Opinion

Reconciling the judicial process with public perceptions

The Hon Justice Katrina Banks-Smith

Federal Court of Australia, 31 October 2024[*]

I am honoured to present this year's Sir Francis Burt Oration and thank Kim Lendich SC and the Board of Francis Burt Chambers for inviting me to do so.

Here, in Court 1 of this magnificent old Supreme Court building, with an audience primarily of lawyers and portraits, it is safe to assume that we hold a relatively consistent view of what we are talking about when we refer to a Court of Law or legal justice. I will come back to that. It is perhaps less interesting than the Court of Public Opinion.

What even is this Court of Public Opinion? In might once have been thought of as villagers with torches, mob-rule, the kangaroo court. But in more recent times, when the instantaneous and intoxicating accessibility offered by the internet has fundamentally changed the manner of communication, this Court of Public Opinion has been described by one commentator as more a place of 'litigation by hashtag', where the 'one-eyed man with the most followers is king'.[1]

And what goes on in this Court of Public Opinion? We know there are no rules of evidence, no need for reasons, and infinite space for cyber-juries, bias, assumptions, and outrage. I don't intend to talk this evening about the famous and the infamous examples of trials playing out in this world of cyberspace. But that does not mean the voice of this alternative court is not important.

Those who exercise power, including the judiciary, must not rashly discard popular opinions about justice. Legal justice and what I will call popular justice can and do work together to bring about change. It is appropriate that judges have regard to informed public opinion.[2] Indeed, as Sir Gerard Brennan said, one characteristic of a competent judicature is that judges

must observe the limitations on their power but 'within those limitations, develop or assist in developing the law to answer the needs of society from time to time'.[3]

And what I aim to discuss this evening is how the push-pull between those concepts of legal justice and public opinion advance discussions and understandings of justice within this society 'from time to time'.

Legal justice

I will start with just a few comments about some of the well-known tenets of legal justice.

Legal justice embraces the rule of law. We are familiar with the conundrum of trying to define or understand the components of the rule of law. From Aristotle in *Politics* to Lon Fuller's *The Morality of Law*, to Hobbes, Bentham, Amartya Sen and others, those components have been formulated and reformulated.[4]

Not only do courts and judges need to adhere to their responsibilities when it comes to advancing or upholding the rule of law, but always that must be done conscious of the duty to administer 'justice according to law'. So much is reflected in the oath that judges give to 'do right to all manner of people according to law'.

The very phrase 'justice according to law' presupposes that justice itself is a broader concept.[5] Justice takes meaning from a wide arc of philosophy, politics, morality and power. It means different things to different people.[6] We are dealing with notions that are not capable of, or suited to, finely calibrated taxonomy.

But in making decisions and administering courts, there should be little dispute as to the guiding concepts of what legal justice entails. Richard Susskind speaks of seven conceptions that combine to deliver 'justice according to the law'.[7] Justice invokes substantive justice (fair decisions); procedural justice; (fair process); open justice (transparent); distributive justice (accessible to all); proportionate justice (appropriately balanced); enforceable justice (backed by the state); and sustainable justice (sufficiently resourced).

When we think of the conceptions identified by Susskind, we are reminded that we are not just attempting to do right to a particular person. The so-called expressive power of legal justice is not just in a particular outcome in a courtroom for particular litigants, but in the message that the process and the decision send more broadly to the public. As Chief Justice Spigelman said:[8]

> The enforcement of legal rights and obligations, the articulation and development of the law, the resolution of private disputes by a public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of conduct by a public process with public outcomes - these are all public purposes served by the courts, even in the resolution of private disputes.

The expressive function of the law is fulfilled largely through the principle of open justice and the features of our legal system that support it. Those include the requirement for judges to publish reasons, the widespread publication and dissemination of what the law is, and public hearings. The media has an important role in this regard, with court reporters traditionally facilitating the spread of knowledge beyond the open doors of the physical court room. The means by which the media spread such knowledge in current times has dramatically evolved, but the important role remains.

It is artificial to assume that every litigant can have their matter resolved in complete fulfilment of each of those components of legal justice to which Susskind refers. There are no doubt compromises. Many people simply cannot afford to have their day in court. So distributive access is qualified. Mediations, plea bargains and other tools such as deferred prosecution agreements also limit the occasion when certain conduct the subject of legal proceedings might otherwise be exposed or the subject of reprobation.

And there is no doubt that potential deficiencies in the justice system - such as delays and costs - might encourage resolution by mediation, that is, other than 'according to law'. Facts other than the relevant legal ones are brought into play. The counter argument is that steps such as directed mediation reflect an appropriate allocation of resources where, objectively, not every matter before the courts must proceed to trial in order for a fair result, and not every party sees a trial as the best means of resolution of their dispute. But I digress. Those are issues of distributive justice for another day.

Public opinion and popular justice

What, then, do we mean when we speak of popular justice? Again, I do not suggest it has firmly defined parameters and different commentators might give it different content. But it is a useful expression to capture the innate sense or instinctive understanding of what justice is, held by different people or groups within our society. It might be described as the moral or philosophical ruleset that our community has in judging what should and should not occur. That concept is undoubtedly broad, and sometimes it is best expressed through our community's reaction to legal outcomes. People will say about a particular court case 'this

result is not just'.[9] People will be dissatisfied with a particular state of the law or a series of cases. Groups will protest about corporations 'getting away with it' or campaign for people charged with certain offences to receive harsher sentences and so on.

These responses are not limited to court outcomes, but may be to the state of the law, or a particular lawful practice. For example, there might be perfectly legal ways to structure a corporate deal to minimise tax. That might be fairly called an injustice by an ordinary person, although strictly speaking no injustice according to the law has occurred. Mandatory sentencing regimes might result in sentences imposed according to law, but many might see injustice in that result.

Public opinions on justice are not uniform. Obviously, different people and different groups will have different views. Elements of different cultures and religions will inform opinions. People change their minds.

Nor does popular justice necessarily set itself against legal justice. It can be assumed that many ideals of legal justice are accepted by or at least *infiltrate* the foundations of public opinion. But there are some key differences. For example, ideas of popular justice do not strictly adhere to the rule of law. That can present problems. Whilst adherence to the rule of law may sometimes seem like Kafka-esque over-regulation, a Lord of the Flies regime evokes its own harmful chaos.

So, returning to those components of legal justice to which Susskind refers, in performing their duties, when and how is there room for judges to take account of expressions of popular justice and public opinion, and to what extent should they? How do they know what public opinion really is?

I aim to discuss four threads that inform these questions. *First*, the intersection of the court of law and politics cannot be ignored. *Second*, there are numerous examples within our justice system where judges are bound to have regard to evaluative norms such as the reasonable person, community standards and community expectations. Such matters are inevitably informed to some extent by public opinion from time to time. I will refer to examples from three areas: commercial law, native title and sentencing. *Third*, I will say something about the role of the media and how judges must preserve the integrity of the trial whilst also acknowledging the vital role of the media and the freedom of the press. And *fourth* - I want to

talk about lawyers and barristers, and their responsibilities and place in this push-pull to which I have referred.

Law and politics

So to the first thread. Judges are not the voice of the community. They are not community representatives. Judges may need to take into account or apply standards of community values or expectations within their decision-making, but judges are not themselves in any way representatives of the people. Nor should they be. In our system, at least, judges are deliberately kept at arms-length from electoral politics. That enables the independence of the judiciary according to the separation of powers. As Chief Justice Murray Gleeson has said, while judges are servants of the public, they are not public servants.[10]

To summarise what we all know, Parliament may override the common law created by judges by passing new statutes, that being the fundamental link that connects our body of law to the collective views of our society. But in turn, Parliamentary lawmaking remains subject to legal limitations, including the limitations of the Constitution. Policies or actions of government and elected officials can be judged unlawful.

Let's look at a few examples that neatly display these principles working in both directions. Some of you may recall that when Chief Justice Peter Quinlan delivered this oration two years ago, his Honour referred to the 2022 decision of *AFZ17 v Minister for Home Affairs (No 4)*,[11] in which Flick J recounted that a representative of the Minister wrote to the successful applicant's legal representative stating in effect that his Honour got it wrong and that pending the outcome of an appeal the Minister did not intend to comply with the Court's orders. His Honour was placed in the position where he considered it necessary to remind a member of the executive government that non-compliance with an order would lead to contempt proceedings being instituted.

Fast forward to 2023 and *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*,[12] the High Court decision that resulted in a cohort of immigration detainees with criminal convictions being released into the community. Unsurprisingly, having regard to its subject matter, the decision received considerable publicity. The editor of the Australian Law Journal, Kunc J, commenting on the decision, noted the response of the Commonwealth Attorney General given at a press conference to the effect that he would not apologise for acting

in accordance with a decision of the High Court. Justice Kunc describes this as a 'rare public expression' of the rule of law in action.[13]

But let us go offshore for a different example, now relegated to political history, where statutory law was introduced in response to a court decision. You will recall that the Sunak government had a policy of sending asylum seekers to Rwanda for determination of their claims by Rwandan authorities. If the asylum seeker succeeded, they were to be granted asylum in Rwanda, not the UK. The Supreme Court held that the policy was unlawful in that it offended international law principles of non-refoulement which prevent a country returning refugees to a country where, for a number of reasons, their life or safety might be threatened. The Sunak government then introduced the *Safety of Rwanda (Asylum and Immigration) Act* which required a decision-maker to treat Rwanda as a safe country.[14] It was deemed to be so, and regardless of what events might transpire. The policy was abandoned with the change of government so whether it would have withstood further objection is unknown.

And finally, another very prominent offshore example - this time one that effected a change of law not by statute, but by an apex court overruling itself, a reminder that even with *stare decisis* entrenched as part of the rule of law, there is the potential for decisions of the highest courts to be overturned. Of course I am referring to *Roe v Wade*,[15] decided in 1973, and widely assumed to be binding over subsequent decades. Critics of *Roe v Wade* campaigned against it for many years, and that public campaign and its political ramifications were instrumental. Only the Supreme Court was legally empowered to set the decision aside, and it did so in June 2022 in *Dobbs v. Jackson Women's Health Organisation*,[16] an outcome that, as we all know, was polarising. In his absorbing article, *'Judicial Legitimacy'*, the Hon Stephen Gageler recounts the commentary at the time about the partisan appointment of judges and the make-up of the bench.[17] His Honour's comments were made for the purpose not of criticising but to illustrate the link between judicial impartiality and judicial legitimacy.[18]

So this is one way in which public opinion has a say in legal justice. Politics can be conceived of as a forum for legislators and the executive to give effect to the will of the people they represent. And politics directly, and often (if not always) legitimately moulds the outcomes obtained in the Court of Law.

Judges and the community

Chief Justice Gageler's reference to 'impartiality' leads us to the second thread - the knowledge and views about community expectations that judges bring and must bring to their decision-making.

Plainly, the law cannot be treated as an immutable body of principle standing free of the other currents of life, of which it is but one. In his 2023 collection of essays *Thoughtfulness and the Rule of Law*, Professor Jeremy Waldron observes[19] that:

> the demanding ideal of the rule of law also has to come to terms with the fact that laws are interpreted, applied, and enforced by people, as well as being made by people. And even if the law was made or emerged eons ago, its interpretation and application has to take place in real time now.

It is therefore entirely appropriate that judges bring to that task their own experiences and knowledge, whatever it might be, about what is going on in the community and broader world. This is apparent in all manner of discretionary decisions that must be made on a day-to-day basis, such as assessing the credibility and reliability of witnesses. What is the point of promoting diversity on the bench if we fail to recognise the role of such experiences? That does not suggest it is acceptable for a judge to make a decision based on their personal opinion about a matter or a subjective view of what the public opinion on the matter might be. It simply acknowledges that judges have their own life experiences. And they too are consumers of the media and information and participants in discussion and dialogue.

And the task the judiciary must undertake in putting aside personal views whilst still having regard to broader community standards, expectations or values is not new. There is a search for and recognition of these in much of the court's work. Equity is explicitly based on conscience and good faith, as is much of the common law. Similar principles have been introduced into statutes.

Commercial law

Let us consider examples in commercial law. Concepts such as negligence have long required consideration of what is reasonable in terms of conduct.[20] Contract disputes often require some assessment of good faith, reasonable expectations or unconscionable conduct. Parliament has also moved to express values in statutes that apply to business transactions, generally through the use of open-textured language such as 'good faith' and 'unconscionability'. By use of open-textured terms, we recognise that law depends on language, and language entails relative

indeterminacy - what does 'unconscionable' mean? What is its content? What are its boundaries? To quote HLA Hart, the English language is 'irreducibly open-textured'.[21]

The long and winding road from *Amadio*[22] to *Garcia*[23] to *Paciocco*[24] to *Kobelt*[25] has taught us about the manner in which the judiciary seeks to evaluate such terms.

In *Kobelt*, a majority of the High Court rejected the proposition that Mr Kobelt's provision of book-up credit to a remote Aboriginal community was unconscionable conduct in connection with financial services.[26] Much has been written about the decision elsewhere but perhaps what is most telling is the very division within the Court on what amounts to unconscionable conduct, a division that reveals the difficulty of such assessment when a range of factors and community norms falls to be considered.

In explaining the meaning of the concept, Gageler J reconsidered his former correlation of unconscionable conduct with 'moral obloquy' in *Paciocco*, acknowledging this term did little to elucidate the normative standard embedded in the statute in a contemporary context, and said:[27]

> What I meant to convey by the reference was that conduct proscribed by the section as unconscionable is conduct that is so far outside societal norms of acceptable commercial behaviour as to warrant condemnation as conduct that is offensive to conscience. To that view of the statutory standard I adhere.

And then consider Nettle and Gordon JJ's statement where they note that such a book-up system would not be acceptable in other areas of Australia and in relation to other groups of people who were not Aboriginal:[28]

> As Wigney J recognised in the Full Court, the terms, nature and circumstances of Mr Kobelt's book-up system bespoke unconscionability and '[m]any, if not most, members of the broader Australian community would probably find some aspects of the system to be surprising, if not extraordinary'. That understates the position.

So there we see it - clear reference to 'societal norms of acceptable commercial behaviour' and the view of the 'broader Australian community'.

It is also worth recalling what was said by Allsop CJ in *Paciocco* as to the evaluative task of assessing unconscionability:[29]

> … The evaluation includes a recognition of the deep and abiding requirement of honesty in behaviour; a rejection of trickery or sharp practice; fairness when dealing with consumers; the central importance of the faithful performance of bargains and

> promises freely made; the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can (but not always) be used in a way that is contrary to fair dealing or conscience; the importance of a reasonable degree of certainty in commercial transactions; the reversibility of enrichments unjustly received; the importance of behaviour in a business and consumer context that exhibits good faith and fair dealing; and the conduct of an equitable and certain judicial system that is not a harbour for idiosyncratic or personal moral judgment and exercise of power and discretion based thereon.

And it would be remiss not to mention the importance of the Financial Services Royal Commission and the Australian Law Reform Commission's report on corporate criminal responsibility in exposing unsatisfactory and indeed dishonest business practices.[30] Such reports are an important source of information about community expectations and responses.

One of the difficulties acknowledged by those reports in securing findings against corporations (and so conveying to the public that wrongdoing has occurred) is that regulating serious commercial misconduct often requires proving a corporate state of mind. It is a real issue, an entanglement in the corporate veil. For a corporation that has no natural mind, whose mind counts for the purpose of proving, say, dishonest conduct, or unconscionable conduct? Attribution of knowledge only goes so far, particularly in a large corporation. And the report of the Financial Services Royal Commission demonstrates that the community knows that is not good enough. It seeks public vindication of wrongful conduct by corporations.[31]

That is a manifestation of public opinion of which the courts can and do legitimately take heed. There have been a number of statutory and judicial responses to the issue of corporate guilt over the years but the High Court's recent decision in *Productivity Partners v ACCC* is in many ways a leap forward.[32]

In that case, the ACCC alleged that a vocational education and training provider, Captain Cook College, was engaging in unconscionable conduct. Students who enrolled at the College took out a loan with the Commonwealth as part of the VET FEE-HELP scheme, which was paid directly to the College. The more students that enrolled, the more profitable it was for the College. The Court found that the College was aware of the risk that students could be enrolled without knowing the full extent of the financial burden they would be incurring. Despite this, the College dismantled a system of controls it knew minimised the exploitation of students, and did so to increase the College's profit.[33]

The Court held that by removing its controls, the College adopted a system that was designed to increase its profitability through the exploitation of students. From analysis of its systems of conduct, it could be inferred the College intended to engage in that behaviour of exploitation, which was unconscionable.[34] What is significant about *Productivity Partners* is that the Court further developed the legal concept that systems employed by corporations, distinct from individual people, are capable of exhibiting discrete mental states such as unconscionability. That finding was made in the context of the statutory unconscionability scheme under the *Australian Consumer Law*, which specifically provides that unconscionability may be found in a system of conduct. However, as Justice Edelman noted, the development of a de-individualised mode of analysis of a corporation's systems has far reaching consequences for both civil and criminal law.[35] It has the power to overcome the problem of corporate size and diffusion of knowledge acting as a shield to corporate liability. And, fundamentally, it allows the law to make the powerful point that a corporation did in fact engage in serious misconduct, a conclusion which aligns with and complements ideas of popular justice.

Native Title

Let's turn to another complex area where the courts have moved to respond to community expectations - that of recognition of native title interests and compensation for their loss.

In *Mabo v Queensland (No 2)*[36] the High Court rejected the common law fiction by which the rights and interests in land of Aboriginal people were disregarded. In Brennan J's frequently cited lead dictum, his Honour rejected this fiction for a number of reasons, one of which was that he considered the doctrine was inconsistent with the contemporary values of the Australian people. Within the confines of principle, the legal system can be modified to bring it into conformity with 'contemporary notions of justice and human rights'. In referring to contemporary values his Honour had regard to the expectations of the international community, reflected in the International Covenant on Civil and Political Rights.[37]

As we know, the *Native Title Act* was introduced after *Mabo*,[38] formally establishing the statutory regime for the recognition of native title rights, and also introducing a regime for compensation. And it has recently become apparent that in a sense, public opinion is 'baked in' to that regime.

That became evident in the *Timber Creek* decision,[39] which provided the first line of authority on how difficult issues of assessing compensation might be addressed for types of loss not

previously the subject of enunciated criteria or benchmarks; for example, loss referred to (for want of better terms) as non-economic loss, or spiritual or cultural loss.

At first instance, Mansfield J assessed compensation for cultural loss on an *in globo* basis at $1.3 million. The Full Court did not disturb this figure. Nor did the High Court, which acknowledged it was the first such compensation determination to come before it. It noted the trial judge had detailed the evidence from the members of the claimant group about their connection to the land and the impact, under their laws and customs, when country is harmed. It was not necessary to approach the assessment with particular restraint or limitation.[40]

For the majority of the High Court, the lodestar for the assessment of this loss was what the Australian community would regard as 'an appropriate award for what has been done; what is appropriate, fair or just' and this requires a 'social judgment' about how cultural loss is to be justly compensated.

Clearly there is no scientific or mathematical manner for quantifying such loss. Nor can there be any assumptions about consistency or comparisons in the nature or enduring impact of cultural loss, having regard to the different nature of native title interests and connection to country held by hundreds of different claim groups across Australia. Quantifying such loss is an inherently qualitative assessment. How judges are to make this social judgment is a difficult question at present. Over time it may become easier when we have a body of decisions that provide some further guidance, and as discussion of such decisions continue. And no doubt public reaction to some of these decisions will have a role to play in the court's determination of what is 'appropriate, fair or just'.

Crime and sentencing

And finally, to an area where there is no shortage of public opinion; crime and sentencing. You will be familiar with the usual criticism of judges in this regard, particularly apparent if you make the error of diving into the comments on social media. Judges are too soft on sentencing, out of touch, and so on.

Crime, both real and fictional, interests the public. It is newsworthy. We are all surrounded by reporting and public feedback on crime and offending every day. Understandably, people feel strongly about crime.

However, there are obvious reasons why judges should not be responsive to media or community outrage in a particular case or type of case. Judges must dispense justice according to law, 'in accordance with principle and without giving way to popular urgings or public opinion polls'.[41] They must have regard to the purpose of sentencing, of which protection of the community is but one element. They must have regard to mitigating and aggravating factors. They must have regard to the individual circumstances of the offender and the offence. All of this is constrained by well-recognised statutory and common law principles of sentencing which must be applied consistently, regardless of whether the offence has been met with media attention. Judges do not have a discretion at large. They must guard against being influenced by public opinion, which may or may not be informed.

However, that does not mean judges are oblivious to outrage or community concerns. Indeed, statutory obligations in sentencing will often require a court to recognise the harm done to the community.[42] Judges in criminal jurisdictions are acutely aware of how crime plays out in the community. As Bathurst CJ has said:[43]

> Judges are not isolated from the reality of crime. Not only are judges members of the community, but sentencing judges have seen more of the reality of crime than most members of the community can imagine. With great respect to the media, the community and members of Parliament, it is judges who day after day have contact with people from disadvantaged social backgrounds, both offenders and victims of crime; it is judges who review gruesome exhibits; it is judges who hear evidence of violence and abuse in criminal proceedings; it is judges who read victim impact statements and see in court the grief of victims whose lives have been torn apart; it is judges who grapple with the history that many offenders have of addiction, mental illness and neglect; and it is judges who try to balance an often impossible set of competing considerations to come to a result that is appropriate according to law. To accuse the judiciary of not understanding crime simply fails to take account of these matters and is incorrect.

It does not follow from this that judges are immune to criticism from the community, or should just ignore it. We cannot treat every public outcry about the legal system as a 'sledgehammer to the rule of law'.[44] Fundamentally, a willingness and indeed an obligation to listen and engage is in everybody's interests. But this needs to run in the right channels. I will turn to the role of the media shortly, but it is plain that paying attention to the knee-jerk reactions that endlessly repeat in the service of the 24-hour news cycle is not the right way to take account of public opinion. And there is no need to do so. Criminal law is an area where legislation frequently responds to changes in societal norms. We see this in, for example, legislative responses to domestic violence in sentencing (such as recognition that an offender and the victim of an assault being in a family relationship is a circumstance of aggravation). We also see it in the

introduction of statutory offences such as stalking and strangulation.[45] That recognition only touches the surface of these insidious problems, but it is a reflection through legislation of society's increased understanding and condemnation of such behaviour.

Even without legislative intervention, judges who are listening can and do make a difference, within the constraints of their duties. A non-controversial example is provided by the response of a group of judges in the UK who, having seen the play *Prima Facie*, changed the content of their direction to juries in certain sexual assault cases. Those of you who attended the Black Swan Theatre event held in this court room in July 2024 with the playwright Suzie Miller and others on *Truth, Power, Consent & the Legal System* will recall the discussion about that significant development.

The media

More often than not, legal justice and the media are viewed as being in conflict, but really that conflict is as designed, and consistent with a healthy coexistence between the two.

The media provides for the instant vocalisation of what is happening in court and opinions on outcomes. It informs the community. It informs the Court of Public Opinion, and while aspects may overlap, it is not to be confused with it.

I have already referred to the role of the media in disseminating information about the work of the courts but it flows both ways.

The media, and in particular the mainstream media and informed investigative journalism, has the capacity to disclose issues that are not sufficiently addressed by the justice system at a particular time, and so is a powerful driver of change.

A recent example is the investigative journalism and public discourse that led to the Royal Commission into the Robodebt Scheme. As the Royal Commission found, decisions of the former Administrative Appeals Tribunal that found aspects of the Robodebt Scheme unlawful were not circulated or otherwise publicised, diminishing the prospect of appeals to courts, public scrutiny and a wider community understanding of how law and policy was being applied.[46]

There is no reason why judges cannot look to informed public debate in the media as a general source of information about matters of public concern. Although it is necessary to guard against subjective evaluation, Sir Anthony Mason has observed that in some cases it may be

possible to identify matters of public concern with some confidence.[47] However, it goes without saying that as the triers of fact, judges must be assiduously careful not to be influenced by the media in relation to any particular case before them. Furthermore, they must be assiduously careful to preserve the integrity of any proceedings, criminal or civil, that are before them.

One can accept that having regard to the competitive nature of both print and electronic media, there is a risk of sensationalism and distortion in reporting, despite the fact it can also be assumed that journalists generally seek to report accurately and with integrity. This risk is one that must be accepted as part of the all-important freedom of the press. It may, regrettably, be one that is increasing, as the rise of social media continues to strangle the flow of resources to mainstream print and broadcast journalism. In any event, judges must not be influenced by media reporting at the extremes. It would be wrong if that were to occur. Judges as factfinders are attuned to the search for evidence. They are experienced in assessing what they should and should not listen to and what evidence they should or should not reject. They are used to tempering the extremes. Moderating intemperate positions on all sides of a contentious issue is one legitimate outcome of a proper exercise of the judicial function.

While this is not the occasion to launch into the debate about the effect of suppression and non-publication orders on open justice, courts still can and do impose limits. They direct juries not to access media that might relate to the trial at hand. They may restrain media publication to preserve an accused's access to a fair trial. They may sanction conduct with contempt findings.[48] Again, we see the push-pull in action.

The role of lawyers

Finally, what about the lawyers? The role of the profession as a link between public opinion and the justice system is vital. The progress of the law is often dependent upon members of the profession having the courage to take on novel matters, to think laterally, and to pursue cases that once might have been thought unwinnable.

The Hon Michael Kirby once said of lawyers:[49]

> Where there is no independent legal profession there can be no independent judiciary, no rule of law, no justice, no democracy and no freedom.

You as lawyers have your ears to the ground. You hear about injustice. You have the capacity to work on it. For example, we are seeing some really interesting developments with class

actions in the social justice space at the moment. Some are before the courts and it is inappropriate to say too much about them. But it is public knowledge that class actions have been instituted relating to matters as diverse as Aboriginal employees and stolen wages, juvenile detention conditions and public housing. The profession is well-attuned to public discourse on such matters. It is indeed part of it. And bringing such matters before the courts, provided that they have a proper basis, is an appropriate way of making judges aware of conditions in the community and different views as to how they might (or might not) be improved. While that does not turn the judges into legislators, or at least it should not, it is another example of an entirely legitimate interface between community expectations and courts of law.

But more than that, and to focus briefly on the independent lawyer, barristers have long been the defenders of the unliked, have advocated against popular views and protected citizens against the State, which often has 'excessive public opinion' on its side, to paraphrase Professor Andrew Boon in his recent text 'Lawyers and the Rule of Law'.[50] Indeed it has been said that the only way to make the law work is to have an independent bar.[51] This is a particularly apposite note to end on, having regard to this audience and the legacy of Sir Francis Burt, reflected in the central role that Francis Burt Chambers continues to play in encouraging and facilitating the independent bar in Western Australia.

Conclusion

I have highlighted four areas in which the Court of Law and the Court of Public Opinion engage in what, in my view, is largely a fruitful dialogue. Most obviously, our legal system is accountable to the will of Parliament, but that is not the end of the story. The law must be accountable to the public more broadly. It must listen and engage with the public outside the more formal mechanisms of our system of government.

Accordingly, in undertaking their duties in many scenarios judges must have regard to community expectations. Whilst it is not for them to subjectively attempt to discern any particular public opinion from the range available, there are a number of sources that should reflect informed public opinion and community expectations.

In turn, legal justice tempers the demands of public justice, and in doing so shapes the way our community thinks about justice. In delivering decisions, our courts exercise the expressive power of the law, which is fundamental to upholding public concepts of justice and public

confidence in our institution of justice, and can advance discussions and understandings of justice within broader society. That expressive function can provide a healthy counterpoint to the role played by the media, which is just as legitimate, but works with different materials to a different timetable. And in all this, and as in all things in our legal system, the independent and creative role of practising lawyers is essential.

Disharmony between legal outcomes and prevailing community views is natural and not inherently undesirable. So despite the contrasts I drew at the beginning, the Court of Law and the Court of Public Opinion are not contradictory. The inevitable and eternal tension between them is a productive one. While the law is a formidable edifice, there are cracks in it, through which community standards can seep in order to make it stronger. Those cracks are not accidental; they're deliberate. They are, after all, 'how the light gets in'.[52]

[*] I gratefully acknowledge the assistance of my research associate, Nicholas Cokis, in the preparation of these remarks.

[1] To paraphrase the Canadian legal commentator Dahlia Lithwick, 'Woody Allen v Dylan Farrow' *Slate* (online, 5 February 2014) <https://slate.com/news-and-politics/2014/02/woody-allen-v-dylan-farrow-the-court-of-public-opinion-is-now-in-session.html>.

[2] See Chief Justice Tom Bathurst, 'Community Confidence in the Justice System: The Role of Public Opinion' (2014) 12(1) *The Judicial Review* 27.

[3] Sir Justice Gerard Brennan, 'Courts, Democracy and the Law' (1991) 65(1) *Australian Law Journal* 32, 33-4.

[4] Chief Justice Peter Quinlan, 'The Rule of Law in a Social Media Age' (Sir Francis Burt Oration, 3 November 2022) 5-6; Tom Bingham, *The Rule of Law* (Penguin Books, 2011) ch 1.

[5] Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2021) 72.

[6] Chief Justice Marilyn Warren, 'What is Justice' (Newman Lecture, Mannix College, Melbourne, 20 August 2014).

[7] Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press, 2021) 73.

[8] James Spigelman, 'Judicial Accountability and Performance Indicators' (2002) 21 *Civil Justice Quarterly* 18, 22.

[9] See Chief Justice Marilyn Warren, 'What is Justice' (Newman Lecture, Mannix College, Melbourne, 20 August 2014) 2-3, 19.

[10] Chief Justice Murray Gleeson, 'Who Do Judges Think They Are?' (Sir Earle Page Memorial Oration, 22 October 1997). See also Chief Justice RS French, 'In Praise of Unelected Judges' (Public Policy Forum, The John Curtin Institute of Public Policy, Perth, 1 July 2009).

[11] *AFZ17 v Minister for Home Affairs (No 4)* [2020] FCA 926; (2020) 279 FCR 170.

[12] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37.

[13] Justice François Kunc, 'Current Issues: Upholding the Rule of Law' (2024) 98(2) *Australian Law Journal* 87, 87.

[14] *Safety of Rwanda (Asylum and Immigration) Act 2024* (UK).

[15] *Roe v Wade* 410 US 113 (1973).

[16] *Dobbs v. Jackson Women's Health Organisation* 597 US 215 (2022).

[17] The Hon Justice Stephen Gageler, 'Judicial Legitimacy' (2023) 97(1) *Australian Lawn Journal* 28, 31-3. See also Jeremy Waldron, *Thoughtfulness and the Rule of Law* (Harvard University Press, 2023) 181-4.
[18] Stephen Gageler, 'Judicial Legitimacy' (2023) 97(1) *Australian Law Journal* 28, 32.
[19] Jeremy Waldron, *Thoughtfulness and the Rule of Law* (Harvard University Press, 2023) 151.
[20] Indeed, former Chief Justice Mason observed that articulation of the neighbour principle in *Donoghue v Stevenson* was the adoption of an enduring moral value as the basis of a legal principle: Sir Anthony Mason, 'The Court and Public Opinion' (National Institute of Government and Law public lecture, Parliament House, Canberra, 20 March 2002) 33.
[21] HLA Hart, *The Concept of Law*, ed Joseph Raz and Penelope A Bulloch (Oxford University Press, 3rd ed, 2012), ch 7.
[22] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.
[23] *Garcia v National Australia Bank Ltd* [1998] HCA 48; (1998) 194 CLR 395.
[24] *Paciocco v Australia and New Zealand Banking Group Ltd* [2016] HCA 28; (2016) 258 CLR 525.
[25] *ASIC v Kobelt* [2019] HCA 55; (2019) 267 CLR 1 (***Kobelt***).
[26] Pursuant to s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth).
[27] *Kobelt* [92].
[28] *Kobelt* [259].
[29] *Paciocco v ANZ Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199, [296] (Allsop CJ, Besanko J agreeing at [371], Middleton J agreeing at [398]).
[30] Commissioner Hayne found that the practice of taking fees for no services was fundamentally dishonest: see *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) 138-45. See also Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report No 136, April 2020).
[31] See generally Elise Bant, 'Culpable Corporate Minds' (2021) 48(2) *University of Western Australia Law Review* 352, 358-68.
[32] *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* [2024] HCA 27 (***Productivity Partners***).
[33] *Productivity Partners* [111] (Gordon J).
[34] *Productivity Partners* [143] (Gordon J), [247]-[248] (Edelman J).
[35] *Productivity Partners* [198] (Edelman J).
[36] *Mabo v Queensland (No 2*) [1992] HCA 23; (1992) 175 CLR 1 (***Mabo***).
[37] *Mabo* 29-32.
[38] *Native Title Act 1993* (Cth).
[39] *Griffiths v Northern Territory (No 3)* [2016] FCA 900; *Northern Territory v Griffiths* [2017] FCAFC 106; (2017) 256 FCR 478; *Northern Territory v Griffiths* [2019] HCA 7; (2019) 269 CLR 1 (***Griffiths***).
[40] *Griffiths* [236]-[237].
[41] Sir Anthony Mason, 'The Court and Public Opinion' (National Institute of Government and Law public lecture, Parliament House, Canberra, 20 March 2002) 35.
[42] Chief Justice Tom Bathurst, 'Community Confidence in the Justice System: The Role of Public Opinion' (2014) 12(1) *The Judicial Review* 27, 28.
[43] Chief Justice Tom Bathurst, 'Community Confidence in the Justice System: The Role of Public Opinion' (2014) 12(1) *The Judicial Review* 27, 31.
[44] TF Bathurst, 'Who Judges the Judges, and How Should They be Judged?' (2019) 14(2) *The Judicial Review* 19, 29.
[45] For example, *Sentencing Act 1995* (WA) s 97A(4)(b); *Criminal Code* (WA) s 298, ss 338D, 338E.
[46] *Royal Commission into the Robodebt Scheme* (Final Report, July 2023) ch 20. See also the discussion of Justice Kyrou, President of the new Administrative Review Tribunal, and Professor Terry Carney, in their interview with Damien Carrick: 'Justice Emilios Kyrou on his New Role', *The Law Report* (ABC Radio National, 22 October 2024) <https://www.abc.net.au/listen/programs/lawreport/j-emilios-kyrou-on-administrative-review-tribunal/104386940 https://www.abc.net.au/listen/programs/lawreport>.
[47] Sir Anthony Mason, 'The Court and Public Opinion' (National Institute of Government and Law public lecture, Parliament House, Canberra, 20 March 2002) 36.
[48] See *R v Herald & Weekly Times Pty Ltd* [2021] VSC 253.
[49] The Hon Michael Kirby AC CMG, cited in Presidential Task Force, International Bar Association, *The Independence of the Legal Profession: Threats to the Bastion of a Free and Democratic Society* (Report, September 2016).
[50] See Andrew Boon, *Lawyers and the Rule of Law* (Hart Publishing, 2022) 136-52, 413-5, 474-5.
[51] Andrew Boon, *Lawyers and the Rule of Law* (Hart Publishing, 2022) 468.
[52] Leonard Cohen, 'Anthem' (1992).