What is justice?

Remarks by the Honourable Marilyn Warren AC, Chief Justice of Victoria to the 2014 Newman Lecture, Mannix College, Melbourne

20 August 2014

Introduction

In her exquisite story *To Kill a Mockingbird*, Harper Lee looks at justice through the eyes of a child living in a small American town where segregation, discrimination and poverty are the norm. Striding through layers of social under-privilege contrasted with comfortable privilege is the powerful, emblematic figure of Atticus Finch. Yet, even he is vulnerable in his courageous commitment to justice when a lynch mob arrives to take his client, a black man falsely accused of rape. Atticus is saved by the perceptive and penetrating innocence of the child Scout who stands appealingly in the circle of men and pleads for their kindness - a vehicle for justice. So, the mob disperses, the story continues to its climactic conclusion where justice is defeated in a way that is most unexpected. Life then proceeds, mostly as normal, yet differently.

Harper Lee familiarises the reader with justice through a vivid description of injustice.

So let us explore the question.

What is justice? For different people at different times it means different things.

To the ordinary person ‘justice’ will often mean due punishment when a criminal is sentenced for a crime.

To the popular media ‘justice’ will generally mean harsh punishment primarily focused on strong retribution and deterrence.

Then there is a notion of social justice to be compared with legal justice. The basic needs of humanity – shelter, education and healthcare – are sometimes advocated on the basis of a fundamental humane entitlement. If the entitlement is not met then a denial of social justice is asserted. Arguments prevail about the haves and the have-nots. It is said to be ‘unjust’ that some in society are homeless, receive a different standard of education or are unable to access necessary healthcare. In this sense, the concept of justice is merged with factors of equality, opportunity and equity.

In the United States, justice has been equated with social justice in an interesting sense. The authors Taibbi and Crabapple criticise the justice system itself.[1] They assert that the US poverty gap has fostered a ‘legal schizophrenia’ which is harsh on the poor and lenient on the rich. White collar criminals receive comparatively lenient sentences for serious offences whilst the poor are punished severely for social security fraud. The authors contrast the

[1] Matt Taibbi and Molly Crabapple, *The Divide: American Injustice in the Age of the Wealth Gap* (Spiegel & Grave) reviewed by H Smith, ‘Above the Law’ *Australian Financial Review*, 11 July 2014.

treatment of Harlem residents who are arrested and strip searched for blocking pedestrian traffic while fines and deferred prosecutions are meted out to very serious fraudsters.

I do not necessarily accept the thesis applies in Australia. However, the analysis directs our attention to the fact that there are layers of concepts within the concept of justice.

To the politician justice will often equate with a mix of fairness and safety.

To the accused person justice means fairness: a fair hearing, a fair sentence that punishes not too harshly and offers hope.

To the philosopher, justice can be about morality. It can also equate with fairness.

To the lawyer, justice means the application of the rule of law, that is the certainty of applying legal rules developed over centuries to resolve disputes between citizens and the citizen and the state.

To the judge, justice is the application of the rule of law without fear or favour, affection or ill-will.

Let us tease this out a bit.

Justice explored

The commission of a cruel and violent crime offends society. The representative of society, the prosecution, will call for an appropriate degree of punishment for the offender who has

committed such an act. If we take one of the most serious criminal offences, murder, the prosecutor will represent the interests of society in urging a long period of imprisonment. In particularly shocking cases, a life sentence with no minimum term may be thought appropriate.

Immediately after delivery of sentence it often happens that the victim's family and supporters will express their satisfaction or dissatisfaction with the sentence. We sometimes hear the statement 'justice has been done'. We also hear 'justice has been denied to the victim' because the punishment was too lenient.

Victims' rights have been elevated and recognised as human rights and entrenched in legislation.[2] Victims' rights are seen as a 'counter-weight' to the rights of an accused person.[3] They have even been described as the 'forgotten party' in the criminal justice system.[4] In response, victims are now given the opportunity to tell their story in the form of a victim impact statement which is produced or even read out by the victim in Court. Sometimes the rights of victims and the rights of accused persons bang up against each other but other times they can overlap. In Victoria we are able to grapple with this through what we call the 'instinctive synthesis'.[5] For the victim, the meting out of justice is sometimes seen as a set of scales. The leaning of the scale more one way than the other will depend upon the gravity of the offending, the moral outrage of the victims' and their families and the indignation of the society confronted by the particular offending. But the tension for victims is not just between victims' rights and the rights of accused persons, there are also the rights of society enshrined

[2] See, eg, *Victims' Charter Act 2006* (Vic) ss 4, 13, 14.
[3] Michael O'Connell, 'Victims' Rights are Too Often Overlooked as Human Rights' *(*Paper presented at the Human Rights Consultation, Parliament House, Canberra, 1 July 2009).
[4] Ibid.
[5] This approach to sentencing was first described by the Supreme Court of Victoria in *R v Williscroft, Weston, Woodley and Robinson* [1975] VR 292, and was adopted by the High Court in *AB v R* (1999) 198 CLR 111.

in sentencing laws, for example, the goal of rehabilitation and the mercy shown to young offenders balanced by the goal of deterrence.[6]

The sense of justice for victims is vulnerable and subject to emotion and influence. Criminal offending, especially where a person has been killed will provoke profound and enduring grief.

There are also victims in the civil legal system who may see justice as something compensatory. The Black Saturday Victorian bushfires killed 173 people. If we take the recent Kilmore East bushfire trial, upon the announcement of its settlement for about $500 million, lawyers for the victims within the class action described the settlement as providing a ”measure of justice”.[7] This description evokes a sense of the comfort that justice may bring. One of the victims expressly said, “[b]ut it’s justice. Justice has been done. It’s just been a little bittersweet.”[8]

One lawyer said “[n]early half a billion dollars provides real justice.”[9]

Wave Hill Station is about 600 kilometres south of Darwin. In August 1966, Vincent Lingiari, a Gurindji spokesman, led a walk-off of 200 aboriginal stockmen, servants and their families from Wave Hill as a protest against work and pay conditions. The wages of aboriginal workers generally were controlled and not equal to those paid to non-aboriginal employees. The campaign was important in the lead up to recognition of aboriginal land rights. Plainly the

[6] See, eg, *Sentencing Act 1991* (Vic) ss 1, 5.
[7] John Ferguson and Rachel Baxendale, ‘Black Saturday Record $500 Million Some Small Justice’, *The Australian* (Sydney), 16 July 2014.
[8] Ibid.
[9] ‘Record Payout for bushfire survivors’, *Sunraysia Daily* (Mildura) 16 July 2014.

aborigines involved in the walk-off wanted wage justice but more they wanted land rights justice.

In 1975 then Prime Minister Whitlam negotiated to give the Gurindji back a portion of their land. The hand-back took place in August 1975 and the Prime Minister addressed Vincent Lingiari and the Jurindji saying:

> On this great day, I, Prime Minister of Australia, speak to you on behalf of all Australian people - all those who will honour and love this land we live in. For them I want to say to you: I want this to acknowledge that we Australians have much to do to redress the injustice and oppression that has for so long been the lot of black Australians.
>
> Vincent Lingiari, I solemnly hand to you these deeds as proof, in Australian law, that these lands belong to the Gurindji people and I put into your hands part of the earth itself as a sign that this land will be the possession of you and your children forever.[10]

The Prime Minister poured sand from the ground into Lingiari's hands.

The events at Wave Hill were the forerunner of the decision of the High Court in *Mabo*.[11] The High Court recognised the traditional rights of the Meriam people to their islands in Eastern Torres Strait. The decision altered the foundation of land law in Australia.

---

[10] Australian Broadcasting Corporation, *Gough Whitlam - Great Speeches of Rural Australia* (28 March 2007) ABC Rural < http://www.abc.net.au/site-archive/rural/content/2007/s1883613.htm>.
[11] *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

After the High Court's decision a number of eminent Australians including retired judges published a statement:

> Mabo presents the opportunity to start negotiating a sensible and realistic basis for reconciliation with all aboriginal and Torres Strait islander people ... Its challenge is to accept the fact that the building of modern Australia has involved aboriginal dispossession, and to accept responsibility for dealing justly with the consequences.
>
> What justice requires can only be worked out over time with careful thought and patient negotiation on a basis of equality and mutual respect ...[12]

The Mabo case and other High Court decisions culminated in the *Native Title Act 1993* (Cth). *Yearbook Australia* described Mabo as an important part of the reconciliation process taking place between indigenous and other Australians leading to "a better social and economic future, within a framework of national equity and fairness for all Australians."[13]

Thus in the context of Mabo the concept of justice revolved around land rights and, significantly, reconciliation between the Australian people and the indigenous people.

Equality underpinned the equal pay protest of women in the 1960s. At one point women chained themselves to a Commonwealth government building in Melbourne in protest. They also paid two-thirds of the train fare in travelling to a protest to focus on women receiving only two-thirds of male wages for the same work. By 1972 equal pay for work of equal value was granted to women, but, to be paid in three increments. Those women saw equal pay as

[12] Quoted in Frank Brennan, *One Land, One Nation*, (University of Queensland Press, 1995) 52.
[13] Year Book Australia 1995 (ABS Catalogue No. 1301.0).

pay justice. The equality aspect developed into what came to be known as equality of opportunity.

Equal pay and land rights, reconciliation and indigenous recognition leads into the whole area of human rights. Underpinning recognition and protection of human rights is justice.

If we take the politician, justice is understandably, a term used as a way of describing social balance and equality. It is used as an expression to convey to the community that their government will redress imbalance and protect the community. I give three very different examples.

Sir Robert Menzies, in rebuffing a bishop who had written about the importance of doing justice to workers delivered the 'Forgotten People' speech.[14] In the rebuff, he promoted the social role and significance of the Australian middle class. Whilst the expression 'justice' was not used the concept we now hear of 'social justice' was conjured up.

In the Redfern speech,[15] Prime Minister Keating spoke of a 'sense of justice' in the context of indigenous problems: dispossession, cultural denial, social non-recognition and cruelty. He said "… if we can imagine the injustice then we can imagine its opposite. And we can have justice."[16]

In more recent times, following the MH17 tragedy, Prime Minister Abbott spoke of the importance of providing 'justice' for the victims and their families. He said "we have to do

[14] Sir Robert Menzies, 'The Forgotten People' (Speech delivered on 22 May 1942).
[15] Paul Keating, 'The Redfern Speech' (Speech delivered in Redfern, New South Wales, 10 December 1992).
[16] Ibid (emphasis added).

our best to identify the perpetrators and bring them to justice."[17] The Prime Minister also said he wanted to "get justice for Australia, in particular, to get justice for the dead and the living."[18]

Through the concept of justice we see the politician communicating the governmental role of redressing social imbalance and the protection of society. Pausing for a moment, while it is critical that such debate should go on, that there may be many views does not mean all views are equally valid.

Justice in the law

Justice is something we seek because it embodies a foundation value for all communities, peoples and nations. What we seek is not a range of personal preferences but a view, an analysis, that best serves all of humanity.

Lindy Chamberlain, as an accused person within the justice system saw justice as the pursuit of truth. She was convicted of the murder of her baby at Uluru, her defence being a dingo took the infant. Eventually she was vindicated and exonerated. When interviewed after her ultimate release from custody Mrs Chamberlain said:

[17] Nick O'Malley, 'MH17: Tony Abbott Speaks to Vladimir Putin as Australia Pushes for UN Support for Independent Investigation', *The Sydney Morning Herald* (online), 21 July 2014 <http://www.smh.com.au/federal-politics/political-news/mh17-tony-abbott-speaks-to-vladimir-putin-as-australia-pushes-for-un-support-for-independent-investigation-20140721-3c9mt.html#ixzz3846DiJr2>.
[18] Martin Farrer and Tania Branigan, 'MH17: Tony Abbott Increases Pressure on Russia as Bishop Heads for UN', *The Guardian* (online), 19 July 2014 <http://www.theguardian.com/world/2014/jul/19/mh17-tony-abbott-increases-pressure-russia-bishop-un>.

> It's made me very angry to think that I have been told over and over again that if you'd lied and said you'd done it you'd be out of gaol, but if you tell the truth you stay in gaol. You shouldn't have to lie to get justice.[19]

Another demonstration arises from an older case of Colin Campbell Ross.[20] In 1921 Mr Ross ran a wine bar in Melbourne and was said to have enticed a 12-year-old girl called Alma Tirtschke into the bar. The young girl's body was later found in a nearby lane. Mr Ross was charged with her murder. Crown witnesses included people who had seen the girl in the vicinity. There was evidence given by a prostitute and a barmaid about conversations with Mr Ross. Significantly, there was a witness who was a prisoner on remand awaiting trial who gave evidence that Mr Ross confided his guilt to him. There was evidence led about strips of the girl's clothing found some distance from the scene. There was also some forensic evidence relating to some human hairs on a blanket. Mr Ross was convicted, unsuccessfully appealed the conviction and was hanged.

Nearly 90 years later the then Attorney-General asked me,[21] to refer the case to judges of the Supreme Court to provide an opinion following a petition for mercy filed on behalf of the interests of Mr Ross. The judges said:

> At the time of his trial, Colin Ross was deprived of the opportunity of having a comparison of the blanket hairs and those taken from the head of Alma Tirtschke examined by an independent expert. Furthermore, whatever view may be taken of the expertise of [the expert who gave evidence at the trial] it is difficult, if not impossible, to reconcile his conclusions with his observations. In any event, if the jury had had

[19] Ken Crispin, *The Crown versus Chamberlain: 1980-1987* (Albatross Books Pty Ltd, 1987) 236.
[20] *Re: Colin Campbell Ross* [2007] VSC 572.
[21] Pursuant to s 584(b) of the*Crimes Act 1958* (Vic).

> before it a forensic opinion of the type advanced by [the modern day expert who provided a report] a very different view may have been taken, not only of the reliability or veracity of the confessional evidence [to the fellow prisoner] but also of the witnesses [the prostitute and the barmaid] of having observed Alma Tirtschke in the wine saloon.[22]

The judges then proceeded to conclude:

> We are driven to the conclusion that there has been a miscarriage of *justice* as that concept is applied by the appellate court.[23]

The judges next proceeded to point out that their finding did not automatically result in an acquittal but that it would result in the quashing of the conviction and the ordering of an new trial. However, no new trial was possible although the quashing of the conviction of Mr Ross could be achieved. Ultimately, the Victorian Attorney-General granted a pardon posthumously, although, as the Supreme Court judges pointed out, such a pardon is not the equivalent of an acquittal and the conviction itself would remain formally unreversed.[24]

Another example, to be contrasted with the *Ross* case, occurred nearly 90 years later when DNA forensic evidence was available. Famah Jama was convicted of rape and sentenced to six years imprisonment. He was alleged to have raped a woman known as 'M' at a night club in Doncaster. M was found unconscious in a toilet cubicle, locked from the inside. She said she had been raped and most likely drugged. The following morning, M was tested by a doctor from the Victorian Institute of Forensic Medicine. Swabs were taken from M which matched Jama's DNA. At the trial, the prosecution relied solely on the DNA evidence obtained by the

[22] *Re: Colin Campbell Ross* [2007] VSC 572 [83]-[85].
[23] Ibid [87] (emphasis added).
[24] Ibid [90].

institute from M to support the case. Mr Jama's defence argued it could not have been him because he was a 19-year-old student who did not drink alcohol, was not seen at the club on the night in question (which was an over 28s venue), was a thin, darked skin teenager of African appearance and his presence was not noted by anyone, the timeframe within which the events would have had to occur was so short that it was improbable that the rape happened and, significantly, Jama's DNA was found on only one of four swabs taken from M. Mr Jama appealed and meanwhile the Office of Public Prosecutions conducted an internal review of the conviction. Eventually, the prosecution accepted that there had been a miscarriage of justice and the conviction of Mr Jama was quashed and a not guilty verdict entered.[25]

An official government enquiry found that there had been accidental contamination of the swab taken of M with material that had been taken from another person known as 'B'. Some hours before M was examined by the doctor, the same doctor had taken a sample from B who had in fact coincidentally engaged in consensual sexual activity with Mr Jama.

Former Appeal Judge, the Honourable Frank Vincent AO QC conducted the government enquiry. He reported:

> It is almost incredible that, in consequence of a minute particle, so small that it was invisible to the naked eye being released into the environment and then by some mechanism settling on a swab, slide or trolley surface, a chain of events could be started that culminated in the conviction of an individual for a crime that had never been committed by him or anyone else ...[26]

[25] *R v Jama* (Unreported: Victorian Court of Appeal, Warren CJ, Redlich & Bongiorno JJA, 7 December 2009).
[26] Julie Szego, 'Wrongfully Accused', *Sydney Morning Herald* (online), 29 March 2014 <www.smh.com.au/national/wrongfully-accused-20140324-35cga.html>.

This was a classic case of injustice where justice, in the pure legal sense was ultimately achieved. Mr Jama as well as being acquitted was paid some financial compensation.

Justice in academia

Now to the philosopher and the academic, who have been asking the question 'What is justice?' for millennia.

In 1957, the Oxford positivist H.L.A. Hart gave a provocative lecture at Harvard Law School entitled 'Positivism and the Separation of Laws and Morals' in which he argued that no necessary connection existed between law and morality or justice.[27] When this article was published in the *Harvard Law Review*, another legal academic, Lon Fuller – who had been pacing "back and forth at the back of the lecture hall like a hungry lion"[28] during Hart's lecture – demanded a right of reply. Fuller's essay argued strongly that law is not a morally neutral concept and that to describe an unjust legal system as a system of law was to misapply that term to a form of oppression.[29]

Fuller responded to Hart's example of a German woman who was charged after World War II for denouncing her husband to the state during that war for the then capital crime of slandering Hitler. The defence that the wife's behaviour was lawful at the time was rejected by the German court which held that such laws were "contrary to the sound conscience and sense of justice of all decent human beings."[30]

[27] H.L.A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593.
[28] 'Foreward: Fifty Years Later' (2008) 83(4) *New York University Law Review* 993, 994-5.
[29] Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Hart' (1958) 71(4) *Harvard Law Review* 630.
[30] H.L.A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593, 619.

John Rawls, an important thinker on the issue of substantive justice in the twentieth century; attempts to overcome the problems associated with the conflict between positivism and natural law by proposing a thought experiment in which a group of people are invited to rationally formulate the institutions under which they were to live in complete ignorance of all those peculiarities about themselves that would otherwise cloud their understanding of justice.[31] From this 'original position' (also known as the 'veil of ignorance'),[32] Rawls develops an understanding of justice as fairness and formulates a number of propositions about liberty and distributive justice that he believes would logically flow from such an original position.

Professor Amartya Sen identifies awareness of 'redressable injustice' as central to the theory of justice.[33] He suggests the Parisians would not have stormed the Bastille; Ghandi would not have challenged the British Empire; and the Rev. Martin Luther King would not have fought white supremacy without each individual having a sense of manifest injustice that needed to be overcome.[34]

In the legal setting, Professor Julius Stone in an address to the International Commission of Jurists described his observations and experiences of the Eichmann trial in Jerusalem. He spoke of a "passion for justice", the "tradition of justice according to law" and the "appearance of justice … before the whole of mankind".[35]

Interrelationship between justice and the law

[31] John Rawls, *A Theory of Justice* (Harvard University Press, 1971).
[32] Ibid.
[33] Amartya Sen, *The Idea of Justice* (The Belknap Press of Harvard University Press, 2009) vii.
[34] Ibid.
[35] Julius Stone, *The Eichmann Trial and the Rule of Law* (International Commission of Jurists, Aust. Section, 1961) 20-1.

This raises the question of the relationship between justice and the law.

For the lawyer, the concept of justice is usually very black and white. It is understood from a negative construct of perceived 'injustice'. A person wrongly convicted will have a strong sense of injustice. I have already discussed the strong sense of personal wrong felt by Lindy Chamberlain, and it would not be speculative to reflect upon the sense of injustice felt by Mr Ross as he was led to the gallows. Other examples of such miscarriages of justice are seared into the public consciousness. In the United Kingdom, the Guilford Four and the Maguire Seven became famous after their wrongful imprisonment for the 1970 IRA bombing of the Guilford and Woolwich pubs. In apologising to them for their convictions and imprisonment, then Prime Minister Tony Blair, spoke of the 'injustice' which they had suffered.[36]

In the United States, the famous Scottsboro Boys case[37] highlighted the effect of racial prejudice on the proper application of justice to an accused person. Nine black teenage youths, later described as 'hobos', were riding a freight train in the United States South during the Depression. They were accused of rape by two white girls who had been travelling on the same train and a posse was sent to hunt them down. They were charged, inadequately represented at trial and found guilty. Their convictions were only overturned after a series of appeals where it was found that the boys had been denied competent legal counsel.

In these cases where a wrong had been done the word 'justice' appears in the context that an injustice has been done or justice has miscarried. There was an innate sense of wrongness in what had been done to the individual accused. The reasons varied. In some instances evidence

[36] 'Blair Apologises to Guilford Four Family', *The Guardian* (online), 10 February 2005 <http://www.guardian.co.uk/politics/2005/feb/09/northernireland.devolution>.
[37] See, eg, Dan T Carter, *Scottsboro: A Tragedy of the American South* (Louisiana University Press, 2007).

was wrongly admitted or insufficiently tested. In others false, or flawed evidence had been admitted. In most of these cases the rules had not been correctly applied.

Sometimes, the lawyers' role is preventative rather than curial. So, where the evidence is wrongly or unfairly obtained through duress the lawyer will insist on the strict application of the rules.

But we may ask: do lawyers and judges act according to the demands of two different expressions of justice – one, justice as embodied in the application of the rule of law and legal principles developed over the centuries and, two, justice, as a guiding, philosophical and moral imperative?

Whilst cases involving criminal offences may be the most high profile arena for competing understandings of justice to play out, justice is not a captive of the criminal law. It is a concept that applies and arises just as much in civil disputes, albeit a little more quietly and less obviously. What is fair and just is often a key point of contention in civil cases.

Let us explore how justice is done in the sphere of civil disputes. In the *Amadio*[38] case, two elderly non-English speaking migrant parents were persuaded by their son to mortgage their home as security to guarantee a loan to their son by the bank. The son defaulted on the loan and the bank called up the guarantee. The elderly couple faced losing their home. The High Court held that, because of their personal circumstances, the parents were under a special disability when they executed the guarantee and because of this disability it was unfair or unconscionable for the bank to enforce its contractual rights without discharging an onus to

[38] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

show that the transaction in question was "in point of fact fair, just and reasonable."[39] In other words there was something inherently 'unjust' in allowing the bank to act on a guarantee given by individuals at a significant legal and factual disadvantage.

In the *Verwayen*[40] case stemming from the Melbourne- Voyager disaster in which 81 navy men were killed, the Commonwealth Government had told the plaintiff, an injured seaman, that it would not rely on a technical defence (to avoid liability) and then changed its position. The High Court said the Commonwealth could not do that. The Court said the result must "be moulded to do justice between the parties and to prevent a doctrine based on good conscience from being made an instrument of injustice or oppression."[41]

A few years ago, the Victorian Parliament passed legislation called the *Civil Procedure Act 2010* (Vic). One of the primary purposes of this Act is to ensure that each set of civil proceedings commenced in Victoria is conducted so as to "facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute".[42] There are still a number of questions for the courts to grapple with when dealing with this Act: what does the concept 'just' as used in this piece of legislation mean in the differing circumstances of civil proceedings? Will it be about fairness? Reasonableness? Legal principles? Or something else? Will the concept of what is 'just' be understood by the other descriptors of efficiency, timeliness and cost effectiveness?

[39] Ibid 479 (Deane J) , citing *Fry v Lane* (1888) 40 Ch D 312, 321 (Kay J), citing *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484, 491 (Lord Selborne).
[40] *Commonwealth v Verwayen* (1990) 170 CLR 394.
[41] Ibid 442 (Deane J).
[42] *Civil Procedure Act 2010* (Vic) s 1(1)(c).

Justice is not solely about justice between the parties in a court case. It is also about justice to society.

As I have already discussed, to the judge, justice is a concept that really equates to an application of the rules to achieve an outcome.

Sir Gerard Brennan has described the judge's role as being "to serve the community in the pivotal role of administering justice according to law."[43] In the cases I mentioned, identification by a judge of the miscarriage of justice rather than the perpetration of an injustice has been the central feature. When judges determine that a miscarriage of justice has occurred they are, in effect, saying that the rules of justice, that is, the rule of law has been incorrectly applied.

Turning back to the *Ross* case. After having his first appeal dismissed, Mr Ross appealed to the High Court of Australia.[44] Although, he lost this appeal, the decision was not unanimous. Sir Isaac Isaacs, who dissented, carefully analysed the trial process and demonstrated, in his own view, flaws in the chain of reasoning in respect of the confessional evidence used, and referred to the possibility that Mr Ross had killed the girl unintentionally, possibly when trying to prevent her from calling out. The judge encapsulated the right to justice of an Australian citizen as follows:

> …an Australian citizen does not approach this court, in either civil or criminal matters, as a suppliant asking for intervention by way of grace … *He comes with a right to ask*

[43] Sir Gerard Brennan, 'The Role of the Judge' (Speech delivered at the National Judicial Orientation Program, 13 October 1996).
[44] *Ross v The King* (1922) 30 CLR 246.

> *for justice, and … our sole duty in such a case is to see whether justice to him requires an appeal to be allowed.*[45]

Does this suggest that a judge's duty is to focus on applying the law justly, not to seek a just outcome per se? In other words, while the individual judge may always want a just outcome, the judge's pursuit of justice is constrained by the application of the law according to the established legal rules and processes.

This view, strictly applied, could see a judge acting correctly according to law, but enabling an outcome which, from a broader view, was arguably unjust. For example, mandatory terms of imprisonment directed by the Parliament to be applied arbitrarily with no or limited judicial discretion may cause injustice.

When a victim cries out that there is 'no justice' in a particular result, for example, when commenting upon a sentence the victim regards as totally inadequate, the victim is not concerned with the application of the rule of law or the just application of legal principle. The victim is speaking from an innate sense, from an instinctive understanding, of what justice is, to say 'This result is not just'.

Is it not possible that the judge in question might agree privately with the victim, more or less, because he or she shares the same broad view of justice, and taking that view, feels that the sentence was inadequate but is constrained by legal principle?

A number of views or understandings of the term justice can be at play at the same time.

[45] Ibid 259 (emphasis added).

Justice as a core value

Another way of comprehending 'justice' is to view it as a core value.

If we reflect on our quintessential values – what it is that makes us Australian, what makes us proud of ourselves as a people and our land as a nation?

We talk about our values of fairness and fair go, helping the disadvantaged, resilience in the face of adversity, friendship, mateship and loyalty.

One special value we do not talk about very much and mostly take for granted is justice. Without justice we could not celebrate a strong democratic nation. In the last part of 2010 Australia, and then Victoria, experienced democratic elections for government. The lead up to the elections was tense and hard-fought. After the initial counting of votes the result was unclear in both elections. After knife-edge delays governments were formed and the governing of the people by duly elected federal and state governments continued. No gun was fired. No citizen was imprisoned without trial or placed under indefinite house arrest. No citizen was killed. The public service turned to the newly elected government and asked: how might we serve?

Underpinning the political, constitutional, electoral and administrative processes was a judicial system. If a challenge had arisen to the declaration of the election of a candidate in a seat then the courts would have determined the outcome. In both elections, as the result came down to the narrowest of margins, the presence of the courts was crucial. They were there, if needed, constituted by judges who would have determined the outcome impartially, without

political adherence and devoid of corruption. Justice in the sense of the rule of law had been achieved.

So how does justice play out as a value in Australian society? How does the ordinary citizen become a participant in the delivery of justice?

Over the last one hundred years, the evolution of Australian society has been underpinned by our civic involvement. Public participation is both a check on arbitrary power and a source of the democratic dynamism which renews and invigorates our nation. It is most obvious in our democratic system of government and the *Australian Constitution* which requires the Parliament to "be directly chosen by the people".[46]

The maintenance of these democratic rights is constantly renewed. In the GetUp! case in 2010, the High Court held that laws reducing the time in which people could enrol to vote once an election was called were invalid.[47] The High Court ordered the electoral rolls for the federal election to stay open for at least seven days to allow people to update their enrolment or enrol for the first time. This meant that about 100,000 people – mostly young people – were able to exercise the democratic right to vote and choose the members of the federal parliament.

Equally as important as the right to vote is the right to have one's criminal guilt decided by a jury of one's peers. The jury is not simply part of the legal system, but a critical part of the "structure of government adopted by, and for the benefit of, the people of the federation as a whole."[48]

[46] *Commonwealth of Australia Constitution Act 1900* (Cth) ss 7, 24.
[47] *Rowe v Electoral Commissioner* (2010) 243 CLR 1.
[48] *Brown v R* (1986) 64 ALR 161, 182.

The jury system in Australia was an offshoot of the great English tradition of jury trials whose origins can be traced back almost one thousand years to the *Magna Carta*. It is part of our constitutional pedigree. The jury trial has been described as "the lamp that shows that freedom lives".[49] This is so because the first object of any tyrant would be to reduce or abolish parliament and next to overthrow trial by jury. No tyrant would want a person subject to the independent judgment of twelve peers.[50]

The connection between the right to vote and the right to trial by jury is something we should celebrate. It is no co-incidence that juries are selected from those whose names appear on the electoral roll. It is also no coincidence that during the nineteenth century, jury trials in Australia operated as an important safeguard for those who were unable to express themselves through the democratic process when their rights and liberties were threatened.

Victoria provides one example. The wealth generated by wool and particularly gold in the second half of the nineteenth century made Melbourne one the colossal cities of the British Empire. Whilst the gold rush brought wealth and importance to the colony, it also brought social and political instability and eventually civil unrest, culminating in the Eureka Stockade. The crisis point was the treatment by the government of the enormous influx of miners to the goldfields. The miners were denied the right to vote. Ultimately, they built the Eureka Stockade, unfurled the famous Southern Cross flag and then spilled their blood. Twenty-two miners and six soldiers were killed. Martial law was declared and 155 miners were arrested. The Victorian public, rejecting what was seen as the heavy-handed and unjust position of the

[49] Sir Patrick Devlin, *Trial by Jury* (Stevens & Sons Limited, 1956) 164.
[50] Ibid.

authorities, protested. Ultimately, only 13 of those arrested were sent to trial, all charged with the capital crime of high treason.

Despite evidence against them that could arguably justify conviction, all 13 accused of the Eureka Stockade trials were acquitted.

In a climate of government heavy-handedness, the Eureka juries were a circuit breaker that rejected the interest of executive power in securing convictions and suppressing any further civil disobedience. The Eureka juries represented a sense of popular justice.

Contemporary society has become sophisticated, cosmopolitan and modern. We sometimes see footage on news screens of war-zones, soldiers, homeless peoples and destroyed towns. We hear of a chief justice being sacked and armed soldiers barring entry to courts and parliaments. Sometimes we might be desensitised to these places and their circumstances. We cannot take our democracy for granted. Just imagine, if an Australian judge arrived at court one day to find a notice on the court door announcing that persons of a certain ethnic origin could no longer work in that court. What if the judge felt compelled to flee the country as a refugee? In places many judges have been killed and their courthouses bombed for political reasons. These events have occurred around the world where justice is not a core value.

In Australian society, justice, in its essential way, plays out as a value to be nurtured and loved.

Having justice as a value brings us closer to answering the question, what is justice, but do we not come back to the context of the term ‘justice’, especially its legal setting?

If we believe that a particular law, properly made in parliament then properly applied by the authorities and the courts nevertheless produces injustice in the community, what is the nature of lawyers and judges' pursuit of justice as compared with the pursuit of justice by other participants in a civil, liberal and democratic society?

Justice compared

How does the judge's pursuit of justice compare with the politician's pursuit of justice, or the victim's or the public's?

It could be argued that the 'just' application of the rule of law and legal principles is really the correct application of the rule of law and legal principles and that both are merely mechanisms aimed at and designed to achieve justice.

On this view they do not embody justice but exist to enable justice to be achieved. They are the best tools we know to maximize the chances of justice but they do not guarantee it. They may be necessary but they are not sufficient to guarantee justice.

Presumably, that will also require just laws, that is, laws which, when properly applied through the rule of law and established legal principles, will maximize the chances of a just outcome.

And who is responsible for ensuring just laws? Well the obvious answer is that it is the responsibility of all the adult members of society to play their own best part in ensuring that all laws are just.

While politicians may enact the laws in Parliament, the citizenry elects the politicians. We all have the responsibility to ensure just laws. While the way in which a society should operate politically to involve the citizenry in such an achievement is the subject of another enquiry, the issue 'What makes a law just?' takes us directly back to the fundamental question 'What is justice?'

What I want to suggest is not that I or anyone can resolve this question once and for all, but rather that the best we can do is to continue to tease out why we sense something is just or perhaps more importantly why something is unjust.

The meaning of such an important and complex concept as justice has developed through the interaction of the development of civil society, the development of human language and the total living experience of our species.

It has brought about in each of us a notion or a sense of a just outcome or a just state of human affairs and experience. We feel we usually know when justice has been achieved or injustice has been inflicted on us or someone else.

I am suggesting that perhaps the best way of comprehending justice is to have faith that in every such instinct there is at least a partial truth. We need to extract from our feeling or our sense of justice or injustice why the reality in question produces our verdict.

We need to listen carefully to others who take a different view on the justice of the particular human reality in question. We need to encourage them to identify the underlying principles which lead them to take their view. We need to engage in 'discussion', in an examination of the relative merits of the conflicting principles that may emerge and then identify elements of

our common humanity which might act as a guide to choose between these conflicting principles and/or values.

Justice must in the end be about the state of human experience as lived by individuals, families, groups and nations. It cannot be divorced from discussion about what constitutes our humanity operating at its best. What forms of human experience and living best embrace and encourage each individual's capacity to develop fully and contribute to the happiness and welfare of every person in our society is an inherent component of the discussion.

So in a way, the question 'What is justice?' can be tackled as narrowly or as broadly as you like. You can examine the question from the point of view of a lawyer or a judge and I would suggest then the discussion will largely, but not always, be about process, principles, practices, rules, laws and institutional mechanisms.

You can also examine the concept from the point of view of the philosopher where justice might intersect with morality, truth, human rights and goodness.

The focus of the politician will be about, or perhaps I should say, should be about, the character and quality of life of the members of society.

For each one of us as citizens of society, our notion of justice may well centre around the fairness of our own life and the lives of our family members compared with the lives of our neighbours, fellow citizens and human beings throughout the rest of the world.

The concept of justice has many meanings. On the other hand, justice as a concept should not be appropriated for convenient political or popular descriptors. Justice should not be equated

with comfort and feel good phrases in the lexicon. It is serious concept that carries gravitas and warrants respect. For example, in Australian states, departments concerned with a range of activities well beyond courts are sometimes called the 'Department of Justice'. We see facilities for a conglomerate of activities in some way remotely connected with the law - payment of fines, community corrections officers, sheriff's officers and the like described as 'justice centres'. It is as if these centres are providing a commodity when in fact all they do is provide a service related to or somehow underpinned by the legal system.

Defining justice may be like justice itself – it is an aspiration, but it might just be one of our most important and central quests.

Perhaps justice, like the rule of law, is an elusive notion analogous to the notion of *the Good* in the sense that "everyone is for it, but have [sic] contrasting convictions about what it is".[51] One commentator described justice as "[a] commodity which is a more or less adulterated condition the State sells to the citizen as a reward for his allegiance, taxes and personal service."[52]

I think such a view is cynical and unreflective of the discussion that occurs in our community. We need only read our daily press and listen and view our daily media. The courts occupy the media in a way that did not occur in past decades. Whilst this is in part due to the Information Age, the Digital Age and an informed society's innate fascination with the process of the law, our modern sophisticated society takes a real interest in this concept 'justice'.

[51] Lord Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 68, citing Brian Tamanaha, *On the Rule of Law* (Cambridge, 2004) 3.
[52] Robert French, 'Justice as Fairness – A Contested Ideal', (Speech delivered at the University of Western Sydney Biennial Dinner, 7 May 2010), citing Ambrose Bierce, *The Devil's Dictionary* (Axam Publishing, 2005) 116.

The American jurist, Learned Hand, when asked to describe the meaning of 'the spirit of liberty' said: "[t]he spirit of liberty is the spirit which is not too sure that it is right".[53] Similarly, we might say that justice is not a concrete term. We may not know always what it means, yet, we can say how it feels.

If we feel very sharply about what is just and what is not, it is not an accident. It is because the concept intersects with all that is important in the human experience, the state of our physical, social, intellectual and spiritual lives, the relationships which exist between individuals, between groups of people and between the social, economic, religious and political institutions we have created.

Each of us should advance our view of what is just and why it is so and see how it stands against the views and perspectives expressed by others.

And this analysis should not be the preserve of philosophers and academics. Hart, Fuller, Rawls and Dworkin might have been the professionals that thought, wrote and theorised about justice but if the term has any application, value and moral significance it is the general population that should be involved in the debate. That population should be engaged in the search for deeper meaning and understanding and be assisted in the process by the professionals, the great intellects, taking up the challenge to make their work, theories and arguments accessible and part of mainstream community discussion and the quest for a more just and better world.

[53] Learned Hand, 'The Spirit of Liberty', *The Spirit of Liberty: Papers and Addresses of Learned Hand* (Irving Dilliard, 2nd ed, 1953) 190.

Epilogue

So, what role can we play? What can we do?

For a start, Google the word "Justice". It is fascinating to see what comes up. From Aristotle to modern commentaries, Google provides a rich launching pad. Listen to and read the media - note how frequently the word "justice" is used. Question its application.

Read modern writers such as New York University Professor Dworkin's book "Justice for Hedgehogs". A terrific book written by a teacher of both law and philosophy.

More actively, start student tutorials or discussion groups. Discuss justice in theory and in practice - and do not let the lawyers or the philosophers seize the agenda. Perhaps ask for formal recognition in curricula. For example, a literature programme could include Dickens, Dostoyevsky, Kafka and even Chamberlain. Indeed, discussion could (and should) be cross-disciplined.

If you wish to be informed, stimulated, inspired and entertained view, on line, Harvard Professor Sandel's 12 lecture series on justice. The professor in a lively auditorium setting using interactive techniques covers moral dilemmas, the value of human life, redistributive taxation (taxing the rich to give to the poor), the rights of the majority as against universal unalienable rights, war and conscription, duty, equality, diversity, freedom of choice, personal conflict with the universal obligation to humanity and, a new politics of the common good.

So, some ideas to consider.