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# Reflections on Judging: Judging as Application

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**Abstract**

Let me start with the sceptical point - in law decisions have to be made in circumstances where there are often insufficient grounds for doing this. Possibly the law's meaning is unclear or the salient facts not obvious. In these circumstances no application of method or technique can spare judges the task of deliberation and decision. The available methods and techniques will guide the result but do not produce it. As is said in this context - there are no rules governing the reasonable use of rules. Here is a gap calling for deliberation and an act of judgment. Because of this gap there is inevitably a personal dimension to judging and whether through the luck of genetic inheritance or life experiences some people have better judgment, more wisdom, are better practical reasoners, than others.

However when we reflect on legal judgment we are not initially thinking of the personal qualities, or the life plans, of the individual decision-maker. Rather we are considering judging as a social practice; judging as a social role that has an inherited weight of cultural expectations as to how it should be carried out. I am going to offer some suggestions as to how we should understand this role.

# Reflections on Judging: Judging as Application

**Arthur Glass**

I notice I am listed as talking on practical deliberation and the Federal Court. That is not quite my topic. Although I discuss some aspects of practical deliberation and I give some examples drawn from the Federal Court, I took the question for my talk more generally from the subject matter of the session as a whole – reflecting on judging.

## I

Let me start with the sceptical point - in law decisions have to be made in circumstances where there are often insufficient grounds for doing this. Possibly the law's meaning is unclear or the salient facts not obvious. In these circumstances no application of method or technique can spare judges the task of deliberation and decision. The available methods and techniques will guide the result but do not produce it. As is said in this context - there are no rules governing the reasonable use of rules. Here is a gap calling for deliberation and an act of judgment.

Because of this gap there is inevitably a **personal dimension** to judging and whether through the luck of genetic inheritance or life experiences some people have better judgment, more wisdom, are better practical reasoners, than others. It would not be hard to come up with a list of qualities that a good judge should have – impartial, timely, undogmatic, tolerant of different viewpoints, empathetic, open to new experiences, perceptive, and so on. But it is not easy to see how these qualities could be inculcated in those who do not have them, except through more practice. Aristotle makes the point that it is experience that produces practical wisdom. That is why he claimed you do not find it in the young.

An interesting point to be made in passing is to ask whether an immoral person can be a good judge. Clearly a person can be a swine and a yet a good scientist or skilful surgeon. But can one be a swine and a good judge? Aristotle thought not. For the reason that the type of knowledge needed to have good judgment is not separate from

the personality of the person making the judgment, as it is with the technical knowledge of the scientist or the skill of the surgeon.

Good judgement is learnt and cultivated through practical activity and is only available to one who is already experienced. Good judgement for Aristotle is different from cleverness, however. It is not enough to be "the man who knows all the tricks and dodges and is experienced in everything there is". One truly understands only if he or she has sympathetic understanding for others and seeks what is right. The person exercising judgement must have the right *ethos*, the right end in mind. In general terms he or she must seek and wish to preserve the appropriate demeanour and character. As Aristotle explains it, practical deliberation is a type of activity ultimately based upon our responsibility to ourselves. You will not be a good judge, argues Aristotle, unless you have given yourself the end of living a good life.

## II

However when we reflect on legal judgment we are not initially thinking of the personal qualities, or the life plans, of the individual decision-maker. Rather we are considering judging as a **social practice**; judging as a social role that has an inherited weight of cultural expectations as to how it should be carried out. When you became a judge I imagine you were already experienced but this was a new experience. And it was a matter of learning what this role expected of you.

I am going to offer some suggestions as to how we should understand this role. But how are you to judge whether my reflections on judging are better or worse than those of any other commentator? By asking – do they help to explain how the judicial role should be carried out? Making sense of judging, as a social activity, or making sense of the situations being a judge places you in, is a matter of reflecting on concerns local to our present cultural tradition. By this I mean that we might learn something from Aristotle or Aquinas, or how they do things elsewhere or from how we did things in the past, but this will be because we can integrate these ideas into our present cultural understandings. **We are not going to find a useful standpoint outside of these understandings.** The judicial role is of course both a fact and a value. When we reflect upon this practice, try and make sense of this practice, our

subject matter is both something that exists in the world - we can observe our courts and judges at work – and something more than this. For what interests us is not simply an account of what is going on but a normative account of how this practice ought to be carried out. We can ask ourselves what are the ideals or goals of this practice? And in the light of these goals, how should the judicial role be carried out?

From this perspective, what are the cultural expectations that attach themselves to this public office? Immediately we are confronted with important institutional concerns. What is the appropriate relationship in our democracy between the Parliament, the Executive and the Courts? A question that raises large issues of the legitimacy and competence of the rival institutions. Speaking in general terms, legal decision-making must satisfy simultaneously the conditions of facticity and validity, as it might be put.[1] There is a need for stable and predictable interpretation (for there are good reasons to respect the existing law) as well as the demand that decision-makers render correct or right decisions (for without this law will lose its legitimacy). We want stability but we also want our decision-makers to reach decisions that are a just result for the participants and an appropriate and acceptable outcome for the community at large.

To make this point differently, the judicial task is to settle disputes through the application of law. But what does this mean? Ronald Dworkin in his new book has an anecdote about Oliver Wendell Holmes and the young Learned Hand. Apparently Holmes gave Hand a lift in his carriage as Holmes made his way to the Supreme Court. As Hand was dropped off he said to Holmes: “Do justice, Justice”. Holmes immediately stopped the cab and returned to the astonished Hand to insist - “That’s not my job”.

There is something right about this of course. Judges in our tradition cannot go straight to moral and social ideas about justice in order to justify their decision. The justification has to be via the law, and the available legal arguments are a subset of all the available moral or other arguments.



[1] J. Habermas Between Facts And Norms (trans) W. Rehg Cam Mass 1996, 197f

But there is also something misleading in Holmes' response. It would be odd if justice was considered irrelevant to legal decision-making. The judge is rightly concerned with the result of the case. The decision ought to be just, as far as it can be. This idea is implicit in the decision. For if there is a choice, no judge has as a sensible goal the aim of promoting an unjust decision over a just decision. However, there is a difference between doing justice according to law and doing justice according to all the relevant concerns legal or otherwise. This makes it a central question for judging - how should a judge think of this law/non-law distinction? How best to think of this boundary between the legal and other considerations? For ideas about how we should treat people – ideas about equality say or autonomy or fairness – would appear to be inside the law as well as outside of it.

**III**

A common approach among the commentators to this problem is to take up the issue of justice at the stage when the law is being found. This makes the problem – should a judge apply to the case at hand a valid and applicable rule of law even though that rule is considered unjust?

Clearly there are crucial "institutional reasons" why decision-makers should not ask *this* question. Law would lose its ability to stabilise expectations and guide behaviour (to say nothing of its legitimacy) if its force was weighed and, if need be, set aside in case after case. For the particulars of the case (whatever they might be) cannot challenge the validity of the law, established in ways other than its reasonableness in the instant case.

I do not question the following positivist assumptions. It is a precondition of the understanding of a legal text for us that the judge presupposes the *authority* or validity of the law. A legal text may be binding even though it has not earned the right to be respected. It is enough if the text has satisfied the formal procedures for it to be considered valid and to give rise to the demand that it be made valid in all appropriate ways. The judge must accept that what these texts prescribe, what they "lay down", is inescapable. Relevant statutes and binding cases must be directly applied to the specific question at hand.

Moreover, not only is it necessary for the legal reader to take up the relevant legal materials but also strictly speaking this is the *basic* material the interpreter works with. Whatever cannot be plausibly connected to these materials is simply legally irrelevant. Or, to put this point concerning laws "completeness" the other way around, there can only be a *legal* problem when it is assumed that the answer can be found in the legal materials.[2] In short, accepting the authority of the law means accepting the limited authority of the interpreter. Limited because in the task of making the law speak to new circumstances the legal interpreter cannot ignore or amend the legal texts. And limited also for the reason that only one attitude should be taken to these texts - a deferential attitude that asks what in the circumstances do the words of the relevant legal materials mean?

But all this establishes, I think, is that *the starting point* of legal deliberation can be fixed without reference to the appropriateness of the law – here are the relevant statutory provisions and case reports. But in *the process of applying* these legal materials to the case at hand the appropriateness of the law may come into question. For granted the force or authority of the legal rule the issue might be and often is: How does this rule (whose authority cannot be questioned) apply to the salient facts? What is the appropriate way to understand this rule? And as there is often more than one legal rule at work: where there is a conflict of valid legal norms, how should these norms be ordered? Further, as legal decision-making occurs for us often in a context of a number of separate but interconnected institutions: Which among the various legal institutions - Parliament, the administrative agencies, the courts - should decide the issue in this case? When is it appropriate for one institution (the courts) to defer to the judgment of another? With these types of questions law cannot so easily stipulate what is to count as a legal concern and what is to be suppressed.

**IV**

[2] I have made this point about “legal materials” with more force than subtlety and I qualify it below. Basically I see the claim as doing no more than pointing to the need for agreement as to what are the potentially relevant legal texts. In Dworkin’s terms, agreement sufficient for the “pre-interpretive” stage of the interpretive process; Law’s Empire London 1986 65ff

To bring some of these ideas together, we want our judges to apply valid law and to give clear guidance. But we also want them to be concerned with the justness and the appropriateness of these decisions. In these circumstances the directive – follow valid law is both unnecessary and unhelpful. However, the kind of meaning we want the judge to seek in the legal texts is connected up with the decision that has to be made; a decision that is not arbitrary but a just weighing of the relevant concerns of the case. For the basic goal of judging is to do what there is most reason to do, all relevant things considered. Where just what these relevant considerations might be and how they are weighed always turns to some extent on matters local to the case at hand.

From this standpoint we can see a number of things. For example, that the subject matter that the legal texts treat does not come to an end once it has been reduced to textual form. The valid legal texts at any point of time will never fully spell out this subject matter. Whatever ideas or terms it does specify may be subject to cultural and linguistic change. Further, this is a subject matter that must now be made to speak to the present case so that as far as possible a just and appropriate decision is reached. For all these reasons the text has a public meaning (let me call it the subject matter of the text) that concerns the present judge as much as the original author of the text. In these circumstances it is misguided to attempt to make the text familiar independently of its use or its application. For understanding law in these circumstances is not a repetition of an original meaning but a participation in a present meaning.

By the term *subject matter of the text, or subject matter of the case*, I am bringing together a number of ideas. First, it reminds us that the issue before the judge is often not solvable in terms of the immediately available legal concepts; and that behind the available legal material is a larger tradition of understanding. Legal texts are invariably about something and the ideas at play here are always more than their current institutionalisation. Reflection upon this larger subject matter will bring to light ideas and values, and a history of thinking about these matters, which will help us understand the task at hand. Help us to avoid partiality and arbitrariness in our dealings with people and things.



Second, legal understanding takes place within a particular institutional setting. This makes the court's relationship with Parliament, with other courts and with the

executive potentially relevant matters. Many of the methods of statutory interpretation and case analysis make concrete these ideas; the canon of legislative intention or the literal rule for instance or the techniques for identifying the ratio of a case. But beyond these methods the more general ideas remain to exert pressure on the judge.

Third, reflection on the subject matter of the case brings to the fore what motivates legal decision-making (or what should motivate it) - a concern for those before the law. Thinking about their fate will frequently bring out the inadequacies of the law. As is often remarked, interpretation is only called for when the meaning of the law cannot be immediately understood. Lack of understanding may be due to incoherencies in the rules themselves. But it is more likely the attempt to apply the law to the case at hand that discloses its inadequacy. It is the unjust consequences of the law upon individual lives that should trouble decision-makers.

## V

Let me now introduce some **examples** taken from the Federal Courts jurisdiction over migration decision-making. The three examples are (1) the *Al Masri/Al Kateb* problem, (2) the case law on those sections of the *Migration Act* that claim to make their division of the Act a code on the requirements of natural justice and (3) the evergrowing case law that has attached itself to ss 424A and 359A of the Act.

*(1) Al Masri/Al Kateb*

The relevant provisions required that officers detain unlawful non citizens (s 189) and that this detention continue until one of three events occurred - removal or deportation or the grant of a visa (s 196). A temporal limitation to the detention was introduced by s 198 - an officer must remove as soon as reasonably practicable a non-citizen who asks to be removed. But in these cases the problem was the lack of co-operation from other States, not a lack of due diligence on the part of the Department. Because of this lack of co-operation it could not be said when removal would take place, if at all.[3]

3 Section 198 provides:

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed….
(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

In these circumstances did these provisions enforce indefinite mandatory detention? The arguments were numerous including use of overseas authorities and inferences drawn from what might be constitutionally possible as well as our treaty obligations. But the dispute turned basically on the better way to read the provisions. On one view the words of s 196 should be read independently of s 198. The duty to remove was quite separate from the obligation to detain. Section 196 clearly required detention unless one of the three named events took place. This was the view of the Minister, some single judge decisions of the Federal Court and of the majority of the High Court in the later case of *Al Kateb*.

Alternatively, the Act could be seen as silent with regard to the particular issue before the Court and s196 could be linked to s198 as introducing a temporal limitation to the detention power. In this way if the removal was not reasonably practicable the detention was no longer authorised. This was the view of the single judge and the Full Court in *Al Masri* and the minority of the High Court in *Al Kateb*.

As is not uncommon with issues of statutory interpretation, where you start from is critical to where you end up. The second group of judges commenced their interpretive work clearly troubled by the consequences of the law – indefinite administrative detention and its abrogation of the basic right to personal liberty.[4] Did

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(a) the non-citizen is a detainee; and
(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
(c) ...
(i) the grant of the visa has been refused and the application has been finally determined;
... and
(d) the non-citizen has not made another valid application ...

Section 189 provides that, if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

Section 196, dealing with the period of detention, provides:
(1) An unlawful non-citizen detained under section 189 must be kept in immigration detention until he or she is:
(a) removed from Australia under section 198 or 199; or
(b) deported under section 200; or
(c) granted a visa.

[4] Gleeson CJ, refers to the "principle of legality" at 1105. The is a term used in recent UK case law for the long standing assumption of statutory interpretation that the lawmaker will clearly manifest any intention to abrogate basic rights and freedoms. See *R v Secretary of State for the Home Department ex*

the Act specifically call for this? Was another reading of the Act reasonably open? The first group, for their part, commenced with the statutory text; the clear words of s 196 – detention must continue until the happening of one of the three named possibilities (removal or grant of a visa or deportation). For McHugh J - the words of the sections were "too clear to read them as being subject to a purposive interpretation or an intention not to affect fundamental rights". For Hayne J the words were simply "intractable".

But when interpreting the words of statutes, clarity is not a quality of the language alone. What makes s 196 unclear is not some ambiguity in the words used but that the otherwise followable words of the section lead to a significantly unjust consequence – in this case, indefinite administrative detention. It is reflection upon the consequence of the law, not upon the clarity of its language that gives rise to the interest to see whether other interpretations are open. Some of the judges were motivated to find another interpretation. With respect, the interpretive possibilities to achieve a just result in these cases were present although some judges did not take these up.

*(2)* In a context where denial of procedural fairness potentially affecting the outcome of the proceedings is a jurisdictional error, *parts of the Act dealing with decision making are said to be* "an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with" (ss 51A, 357A, 422B). How should these words be applied?

For some judges the words "in relation to the matters it deals with" allows an argument that aspects of natural justice not specifically dealt with remain alive. For the words used assume this distinction. Accordingly, if the breach of procedural fairness is not dealt with by a specific provision it is not affected by the claim that what follows is an "exhaustive statement". More persuasively, it is argued that the provisions dealing with the right to a hearing carry within them common law procedural fairness obligations. I notice the High Court in *SZBEL v Minister* has recently adopted this type of argument by focusing on the statutory invitation to a hearing which includes the words – "the Tribunal must invite the applicant to appear

*parte Pierson* [1998] AC 539; *R v Secretary of State for the Home Department ex parte Simms and Another* [1999] 3 WLR 328.

to give evidence *relating to the issues arising in relation to the decision under review*". It is said that this formulation obliges the decision-maker at the hearing to give the applicant a chance to respond to adverse material relevant to these issues.[5]

The rival view points to the explanatory memorandum to the Act which introduced these sections. The intention, it is said, was to overcome the decision in *Miah* that held that the common law hearing rule was implied by the provisions of the Act unless excluded. And that is what these sections achieve. On this view - if the manner of the hearing is defective – say, the hearing is shortened without warning, the questioning overbearing or if the member promises to direct the applicant to helpful material but does not – these clear breaches of the common law fair hearing rule have been excluded and can no longer be complained about.

Here we see the point that the legal concepts at work in any particular case are always more than their current institutionalisation. Of course Parliament can withdraw the common law rules of natural justice from, say, tribunal hearings; but there is nothing sinister in the courts looking closely at this withdrawal and limiting its effects. When judges try to work out the meaning of legislation in the light of the subject matter of due process and its value, this is not simply the judges "on a frolic of their own," as the previous Minister of Immigration was fond of suggesting.

*(3) But the main avenue for judicial oversight of tribunal procedures these days focuses on* ***ss 359A and 424A*** – the obligation to give the applicant particulars of certain information which is adverse and invite comments.

These provisions are a testament to the accidentality of law reform. They were proposed in 1997 in a Bill that took away the right of the review applicant to a hearing.[6] Sections 359A and 424A protected an aspect of due process in the anticipated circumstances of a paper review. The sections mirrored similar provisions that applied to the delegate and to MIRO, the migration internal review officer. As it

[5] *SZBEL v Minister* [2006]HCA 63 (15 December 2006). This was a pre s 422B case as the review application was lodged just prior to 5/7/02.
[6] Whether a hearing was held or not was left to the discretion of the Presiding Member. See Migration Legislation Amendment Bill No 4 1997, s 360.

turned out the Senate blocked the changes to the right to a hearing, this right remained, but these "partial due process" sections were implemented nonetheless.

Initially their scope was limited. If, for example, there was a "dob-in letter" on the files, prior to the hearing this "information" would be disclosed to the applicant for comment. But, as was observed by the Full Court of the Federal Court in *SZEEU*[7], it was the combination of *Al Shamry* and the High Court decision in *SAAP* that made these sections such a potent means for destabilising tribunal decisions. *Al Shamry* expanded the reach of the provisions by limiting the exclusion of information given by the applicant to apply only to information given by the *review* applicant at the *review* stage, not to information given earlier. And *SAAP* decided that *any* breach of these sections was a failure to observe an "imperative duty" and thus rendered the decision invalid. Gone now was the flexibility to ask whether the breach of these provisions had in fact led to some actual unfairness.

These provisions have attracted a thicket of case law as to the meaning of their operative terms. For example, what information is covered by the provisions?; a question that might turn on the distinction between the thought processes of the Member and the information the basis for these thoughts. What if the Member relies on a lack of information rather than on positive information? How does the exclusion of information work that is not specifically about the applicant and is about a class of persons of which the applicant is a member? What if the review applicant at the review stage adopts prior statements provided in earlier dealings with the Department?

Most significant is the consequence that if the information played any part no matter how slight in the reason for affirming the decision then a failure to give particulars of this and invite comment renders the decision invalid. The only escape from this result is to find that although the information was mentioned in the decision record it played no role in the Tribunal's reasoning. This approach acknowledges, as it is nicely put –



[7] SZEEU v Minister 24 February 2006

that "tribunals no less than courts engage in their own species of dicta often enough for reasons related to haste and pressure of composition".[8]

I don't have the figures but many cases are remitted back to the Tribunals because of a 359A or 424A defect. And many more are remitted by consent because counsel consider there is some risk of this. Merit review is now skewed as Members either try to base their decision only on matters disclosed at hearing but then they need to obtain again at the hearing all the basic information that is on the Department files. Alternatively, Members spend a disproportionate amount of time drafting these letters after they have decided to affirm. Letters which will not change the decision, as these matters have already been put at the hearing, but which have a fair chance of proving inadequate, as the provisions as interpreted rely on fine distinctions.

Presumably this is why the Migration Amendment (Review Provisions) Bill 2006 proposed changes to allow these obligations to be discharged orally at the hearing, at the Member's discretion. And to reduce their scope by enlarging the exception of material provided by the applicant for the purpose of the application to include information that the applicant provided during the process that led to the decision under review (except information provided orally).

This Bill is unlikely to be enacted. Recently the Senate Committee on Legal and Constitutional Affairs did not recommend the first change, unless the applicant consents. But saw merit in the second change. (It agreed that that it was "overly prescriptive" and an unintended consequence of the drafting of these provisions if the "information" that had to be disclosed extended to information that the applicant had given in support of the visa application.[9])

The problem now is clearly the lack of flexibility on judicial review. Tribunal decisions will be held invalid if discussions of background information, say, family composition or passport details, or discussions of the absence or limited nature of the information on file, feature in the decision record but are not the subject of a 359A/424A letter; even if due process was given about these matters at the hearing.

[8] *VAF* Finn and Stone 33
[9] Report of 20/2/07

The writing of these letters, absurdly, has become a central feature of merits review displacing the hearing.

What does this sorry tale tell us about the possibilities of judging? Perhaps that the Full Federal Court approach in *SAAP* was more sensible[10] or that an overzealous scrutiny of the "information" referred to in the decision record might be misplaced. But I grant that these developments speak more to poor law-making (rather than to inadequate judging).

## VI

This last example leads me to speak more generally about the criticism of John McMillan, among others, of what is seen as the over-zealous role of the Federal Court in vetting the "procedural style" of the migration tribunals.[11] Whether this level of scrutiny is driven by "result-oriented jurisprudence" as he claims, is debatable.[12] But there is no doubt that in the period he discusses (basically 1994 to 2001) the criteria for lawful decision-making became more demanding. However concentrating on this aspect of the Court/tribunal relationship overlooks other ways in which tribunal work has been enhanced by the work of the Federal Court. I note three of these other ways, form the perspective of he MRT.

Judicial review helps to promote *consistency* as Court decisions bind the Tribunal. For instance, a not uncommon problem concerns the retrospective reach of new provisions to matters not finally determined. A Court decision can settle this point conclusively.[13]

Second, judicial review *refurbishes* the Act and Regulations in the light of basic legal principles. For one thing, the Court unlike the Tribunal is in a position to question the validity of the Regulations.[14] For another, the judges see the basic notions of migration law from a different perspective. Such ideas as "spouse", "special need

[10] Although I acknowledge that this decision was pre S157
[11] "Judicial Restraint and Activism in Administrative Law" 30 FLR (2002) 335
[12] at 365
[13] *Pradhan* (1999) 94 FCR 91
[14] *Din* (1997) 147 ALR 673, *Seligman* (1999) ALR 173

relative"[15], "orphan"[16] "dependence"[17], "usual residence"[18], "compelling circumstances", "domestic violence" and so on look different to the Court. Not just because judges decide few cases on these topics while the Tribunal decides many; but because judges understand these notions in a different framework. The Tribunal works with a context of specific criteria, policy, selected dicta and many examples. The Court works with the regulatory definitions and places these in the larger context of other legal ideas. This allows the Court to cut through restrictive understandings of these terms.

Third, judicial review helps the Tribunal maintain a degree of *independence* from the Department and others. It facilitates the questioning of policy that seems unfair in the particular case.[19] It adds weight to the Tribunal's position in its dealings with "third party decision-makers".[20] For the Court requires the Tribunal to ensure (as far as it can) that the medical officer or relevant trade assessor give assessments via the criteria in the migration regulations and not some other criteria.[21] More controversially the Court is in a stronger position to interpret the Regulations in a way that leads to justice in the particular case.[22] Potentially the Tribunal can follow these decisions.[23]

Finally, there is another type of example that is worthy of comment. At times the law-maker grounds the entitlement to an entry permit or visa in words that are a term of art among the administrators. However, in the hands of a review Court these words take on a more capacious meaning. With the result that many more applicants succeed under these categories than was initially envisaged.

[15] *Narayan* [2001] FCA 789
[16] *Phung* (1997) 49 ALD 566
[17] *Ha* [1996] FC 21 August 1996
[18] *Gauthiez* (1994) 35 ALD 439
[19] *Bagus* (1994) 33 ALD 601
[20] By this I mean other bodies who make decisions often relevant to migration decisions, medical officers of the Commonwealth, bodies carrying out trade assessments.
[21] *Bui* (1999) 85 FCR 134, *Alkaab* [1998] FCA 1353, I*nguanti* [2001] FCA 1046 (but see *Blair* [2001] FCA 1014)
[22] *Nong* [2000] FCA 1575, *Shrestha* [2001] FCA 359
[23] The question of the penetration of the Court's decisions, in the sense of their immediate influence upon tribunal practice, is another matter.

For example, in 1981 the *Migration Act* granted a limited amnesty via s 6A(1)(e). An entry permit could be granted to an onshore applicant if there were "strong compassionate or humanitarian grounds" for doing so. The Department guidelines restricted this category to where after the arrival of the applicant in Australia there was a natural disaster or war in the country of origin. When enacted these provisions were understood by their drafters to be a way of easing the political pressure on the Minister, as an entry permit could be granted under this provision only if this type of compassionate or humanitarian ground could be made out. However in a series of decisions in the late 1980s the Federal Court understood these words as granting an entitlement to an entry permit if a departing applicant faced a situation in his or her country of origin which would evoke feelings of pity in an ordinary Australian. What was intended to be a residual category attracting less than 100 people a year had by the time of the sections repeal in 1989 some 8000 claimants with an additional 2000 family members.[24]

Undoubtedly this type of judicial interpretation will frustrate an immigration programme in which each year the entitlements for on-shore applicants is deducted from the number of off-shore places available. But it is hard to see what else the Court could do in these circumstances. The question for the Court is – do the applicants circumstances come within the regulatory words? While the administrators may be guided in the application of these words by such matters as - the stock examples set out in binding policy, the numerical consequences of their decision-making and the experience of processing and refusing many claimants - these matters are excluded from the Court's interpretive context.[25]

Another example of this divergence of approach is where the Migration Regulations require skilled work and policy has in mind work skilled to a level of completing an apprenticeship or an Advanced Diploma. But if the visa turns simply on the term

[24] Evan Arthur "The Impact of Administrative Law on Humanitarian Decision-Making" 66 Canberra Bulletin of Public Administration (October 1991) 90-96.

[25] A similar but less dramatic example is the Court's interpretation of the limited amnesty provided in December 1990 when via reg 131A(1)(d)(v) an illegal entrant was entitled to an entry permit if:

> there is any other *compassionate ground* for the grant of an entry permit, to the effect that refusal to grant the entry permit would cause *extreme hardship* or *irreparable prejudice* to an Australian citizen or Australian permanent resident (emphasis added).

"skilled work" then in the hands of the Court any work with a degree of training and a degree of difficulty above picking up sticks can reasonably be called skilled work.[26]

I do not see these types of decisions as inappropriate applications of the law. This is Courts doing what they do – interpreting words to determine the rights of individuals. A given right cannot be taken away because the law-maker did not intend this consequence. Just which class of persons should be granted visas is an example of what Lon Fuller called a "polycentric problem"; a problem that requires the consideration of a number of independent and interacting factors.[27] Clearly Courts are inappropriate forums for making these types of decisions. But Courts cannot alter their style of decision-making because the decisions they make have consequences for those who have to make these decisions. The fact that a court decision affects polycentric decision-making does not of itself mean that the court has moved beyond its proper sphere.[28]

## VII

**In Conclusion**

I have argued that the judicial role is better understood if we think about what is expected of the judge at the point of applying the law, rather than at the point of finding the law. To adapt a remark of Paul Ricoeur - the basic goal of legal understanding is better thought of as existing not behind the law (in the author's intentions) or in the law (in the meaning of words) but in front of the law where it is put into play.[29] From this perspective understanding the meaning of the law is not to be thought of only in the context of the relevant legal texts. For judges it is also a matter of learning to see what the situation expects of them.

Basically, legal decision-making is a matter of doing what there is most reason to do, all relevant things considered. What I have called the subject matter of the text, or the subject matter of the case, reminds us that this relevant material can extend to a

[26] *Kumar*, Class 816 entry permits
[27] "Forms and Limits of Adjudication" in The Principles of Social Order Selected Essays of Lon Fuller ed. K Winston Oxford 2001, 101-140.
[28] Above 135
[29] Paul Ricoeur Hermeneutics and the Social Sciences (trans) J Thompson, Cambridge, 1981, 143 and see Gerald Bruns, Hermeneutics Ancient and Modern, New Haven, 1992, 105, 106 , 239

consideration of and a weighing of, ideas drawn from – the subject matter that the legal texts are about, the institutional setting for the decision and the consequences of the decision for those before the law. Focusing on these matters is a productive way of disclosing matters significant for legal decision-making. However, being concerned about these matters is one thing, what can be done about them is another. At the least, the judge should have in mind the aim of exploring the legal possibilities to the full.

I do not claim that these ideas are novel, only that in accounts of judging they can be downplayed. And, in any event, you should be suspicious of commentators who explain the role of the judge in unfamiliar ways. For they are not discussing our *existing* practice of judging, but some other practice.

As is often remarked judging must hold together two matters often in tension - the need for consistent decision-making and the need for justice in the instant case. Neither condition can be ignored, either in accounts of the practice or in the practice itself. But like so much of law (and life) it's a matter of emphasis. No doubt, ultimately where you put the emphasis is a matter of what worries you more - judges appropriating a problematic independence from those bodies that have democratic credentials[30] or bureaucrats without spirit. I think that we do not worry enough about the second problem. With the result that judges do not always explore the potential of their office to the full. Is the problem – how can we restrain judges who outside of a closely prescribed area lack legitimacy and knowledge? Or, how should legal ideas be understood so that judges can respond adequately to the situations they find themselves in?



[30] J Habermas "A Short Reply" 12 (1999) *Ratio Juris* 445 at 447.