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## Authorised Performances: The Procedural Sources of Judicial Authority

### Abstract

Media criticism of the courts, or perceptions of a declining 'public confidence' in the judiciary have led to concerns over law's authority. There has been debate on concerns over 'judicial activism' in North and South America, Europe and Australia. In Australia this has been played out in political criticism of the judges of the High Court, while other courts have come in for criticism from sections of the media for being too lenient in sentencing and generally being 'soft on crime'. Judicial concern over these criticisms has been expressed in extra-curial responses by High Court judges and in several recent conferences focussing on public perceptions and media representations of the judiciary. Two of these conferences were organised by judicial bodies and all were well attended by judges. Judicial concern over limits and challenges to judicial authority has also been apparent in a number of cases addressing judicial powers.

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# AUTHORISED PERFORMANCES: THE PROCEDURAL SOURCES OF JUDICIAL AUTHORITY

RICHARD MOHR<sup>†</sup>

## I SALIENCE AND CRITERIA OF JUDICIAL AUTHORITY

Media criticism of the courts, or perceptions of a declining 'public confidence' in the judiciary have led to concerns over law's authority. There has been debate on concerns over 'judicial activism' in North and South America, Europe and Australia.<sup>1</sup> In Australia this has been played out in political criticism of the judges of the High Court, while other courts have come in for criticism from sections of the media for being too lenient in sentencing and generally being 'soft on crime'.<sup>2</sup> Judicial concern over these criticisms has been expressed in extra-curial responses by High Court judges<sup>3</sup> and in several recent conferences focussing on public perceptions and media representations of the judiciary. Two of these conferences were organised by judicial bodies and all were well attended by judges.<sup>4</sup> Judicial concern over limits and challenges to judicial authority has also been apparent in a number of cases addressing judicial powers.<sup>5</sup>

In light of these legal issues, political events and judicial responses, it is timely to consider the nature and sources of judicial authority. In order to understand the potential for these events to seriously threaten or erode judicial authority, we need to understand what that authority rests on. Is the authority of

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I am grateful to Margaret Davies for valuable comments on a draft of this paper and to Jiri Priban for challenging and stimulating many of the ideas that led to it.

1 Boaventura de Sousa Santos, 'The GATT of Law and Democracy: (Mis)Trusting the Global Reform of Courts' in Johannes Feest (ed), *Globalization and Legal Cultures* (1999); Carlo Guamieri, *Magistratura e Politica in Italia* (1992); Kenneth Holland (ed), *Judicial Activism in Comparative Perspective* (1991); C Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (1995).

2 Russell Hogg and David Brown, *Rethinking Law and Order* (1998), 29-34.

3 Sir Gerard Brennan, 'The State of the Judicature' (Paper presented at 30th Australian Legal Convention, Melbourne, 19 September 1997); Justice Michael Kirby, 'Teaching Australians Civics' (Paper presented at Queensland University of Technology, Faculty of Law Dinner, Brisbane, 15 August 1997).

4 Judicial Conference of Australia, Sydney, November 1997; Australian Institute of Judicial Administration, Melbourne, September 1998; Courts and the Media, University of Technology, Sydney, November 1998.

5 See, eg, *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] 138 ALR 220.

the judge dependent on the backing of the state? Does it rest on public opinion, or 'public' trust and confidence',<sup>6</sup> or some other popular source? Or does it inhere in the procedures of the court? Is judicial authority based in the formal and rational attributes of the law itself or in some other concepts of fairness? The nature of any threats to judicial authority and the suitability of any responses would depend upon the answers to these and related questions.

Before considering the range of possible foundations of judicial authority, it is necessary to consider what criteria should be applied in considering the extent of that authority. To that end we need to consider the nature of authority and its place in the polity and the rule of law. Authority may be seen in the difference between naked power, a political power which would need to assert itself by continual threat of force, and power which is accepted as valid, right or legitimate. This definition of authority suggests two fundamental criteria. Authority must be *accepted*, which raises the question, 'by whom?'. And it must be *valid*, which raises the question of what constitutes legitimacy.

Each of these questions must be addressed at a different level. The question of acceptance could be posed as an empirical question, answered by opinion polls. This may tell us something about what various proportions of people think (or accept). Yet it may be objected that this would not tell us anything about those decidedly non-empirical concepts of right or validity, to which legitimacy points. These are properly the realm of political or moral philosophy or jurisprudence. To seek the sources of judicial authority in opinion, whether the opinion of the whole population or of some influential subset, also has the disadvantage that it assumes the answer. Judicial authority may have its source in public opinion, but we will not discover whether or not this is the case by canvassing opinion by means of polls.

There is no necessary relationship between empirical measures of opinion or preference and the requirement of validity. Bayles points out that 'voluntary agreement to a procedure' tells us nothing about the justice of that procedure.<sup>7</sup> While voluntary participation may be one among other procedural principles, the analysis of choice does not assist in understanding the binding authority of the judge.

Legal authority is domination based upon a set of rational rules. 'Obedience is thus given to the norms rather than to the person.'<sup>8</sup> Legitimacy is validity determined by a legal order, when its rules (and their application, in the case of judicial authority) are made within that legal order.<sup>9</sup> In these definitions proposed by Weber and Kelsen we find that authority rests in a system of rules or a legal

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6 Brendan Condie *et al*, *Client Services in Local Courts: Standards and Benchmarks* (1996) 21; Commission on Trial Court Performance Standards, *Trial Court Performance Standards* (1990) 20.

7 Michael Bayles, *Procedural Justice: Allocating to Individuals* (1990) 6.

8 Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (German 4th ed, 1956; English translation, 1978) 954.

9 Hans Kelsen, *Pure Theory of Law* (first published as *Reine Rechtslehre*, 1934; English translation, 1967) 34, *passim*.

order. In an inquiry into an aspect of law, this raises concerns over the possibility of circularity. Inquiring into the authority of judges, we meet that circularity as soon as we ask, of any particular decision, 'who decides the law?' To the extent that the law is what the judges say it is, judicial authority resting purely on law raises as many questions as it answers. To gauge judicial authority based on criteria of legal validity would require an independent assessment of their lawfulness which would have to stand outside the law of the judges. This is not my intention.

Against the suggestion that judicial authority should be measured by its legal validity, I have raised the concern that this does not offer any independent measure other than the law that the judge is to pronounce. On the other hand, the opinion of the public provides no measure of authority, but only of popularity. Luhmann distinguishes between investigating 'law' and investigating 'opinions about law'. The limitation of opinion studies in relation to authority is that they tell us how questions are answered in the course of research, but not about 'the readiness to act'.<sup>10</sup> In keeping with Luhmann's view that judicial authority operates as a means of 'processing disappointment', the requirement of compliance with the judicial decision is paramount. This is indicated by the enforceability of the decision, not the satisfaction of either party with their experience. Certainly, the decision is to be complied with voluntarily if possible. Yet we need other means for understanding the legitimacy of judicial authority.

These points lead to a third possible measure of judicial authority: that of efficacy. While Luhmann proposes that public acceptance of authority is best indicated by the readiness to act, Kelsen notes that legitimacy is limited by efficacy. For a norm, or a legal order, to be legitimate it must be effective *as well as valid*. Even though the validity of a legal order ultimately rests on the basic norm, it 'can no longer be regarded as valid when [it] cease[s] to be effective.'<sup>11</sup> In the absence of a foundational faith in the basic norm, I propose adopting, as a criterion of the presence or absence of judicial authority, the criterion of efficacy. That is to say, we may identify judicial authority to the extent that is effective. This is not a classical jurisprudential question, since we are not inquiring into its legal or philosophical foundation. Nor is it exactly an empirical question, of the type addressed by a public opinion poll. The criterion of efficacy has the advantage that it avoids judging the judges using a legal yardstick, while offering a stronger test of authority than could be deduced from an empirical study of public opinion.

10 Niklas Luhmann, *A Sociological Theory of Law* (German, 1972; English translation, 1985) 4. Luhmann's theories of procedure as a source of legitimation are discussed in some detail in this work (pp 202ff). As a precursor to the work of John Rawls and stimulus to that of Jürgen Habermas, both of which are considered below, Luhmann's role as author of *Legitimation durch Verfahren* (1969) must be acknowledged here. However his approach is so different that it requires fuller investigation, with a different focus.

11 Kelsen, above n 9, 212. Max Knight's translation refers to 'effectiveness'; I follow Varga and Priban in using the term 'efficacy'. See Csaba Varga, *The Place of Law in Lukács' World Concept* (1985) 137; Jiri Priban, 'Beyond Procedural Legitimation: Legality and Its "Infections"' (1997) 24 *Journal of Law and Society* 331, 331.

Inquiring into the *efficacy* of judicial authority means asking whether it works. To this end we would want to know whether the judicial pronouncement takes effect in the court and the world outside the court. Does it make a difference? To address the efficacy of judicial authority is to ask whether it brings into existence conditions which would not otherwise exist. 'Validity is an organizing principle within the legal complex and efficacy is what becomes ontologically existent in the actual process of mediation [between legal and other social systems].'<sup>12</sup> Following Varga, this approach to the criteria of judicial authority may be seen as neither an empirical nor a legal, but an ontological one.

Let me sum up the terms of the inquiry as I have developed them to this point. Important legal and political implications follow from the existence of judicial authority. To inquire into the sources of this authority, we first must agree on the criteria which we would apply to identify it. I have suggested that there are three forms of criteria: empirical criteria, such as public opinion; legal criteria, or the legality of judicial actions; and ontological criteria, or the efficacy of the judicial pronouncement. Since the purpose of this inquiry is to discover the sources of judicial authority, it is important to avoid any criteria which foreclose or prejudge the findings. Legal criteria do just that since they unambiguously locate authority in law and its correct application. Empirical criteria deriving from public opinion fail to give us any purchase on the notion of legitimacy or validity. Such a populist test may offer some indications of preferred sources or styles of authority, but is unconvincing as a test of authority. And in the same way as legal criteria foreclose the question by assuming the answer lies in the law, empirical criteria foreclose it by assuming the answer lies in the people, or in whatever segment of the population one were to survey.

Instead I have adopted the ontological criterion, which tells us that judicial authority can be identified to the extent that the judge's decision is put into effect. That is to say, judicial authority exists to the extent that judicial pronouncements are effective in creating conditions in court and outside it. The conditions of judicial efficacy are not only indicated by compliance with final judicial determinations beyond the courtroom walls, but include all those directions and decisions that the judge makes in the course of trials, or other hearings. Judicial decisions are authoritative when they bind people to their enforcement, whether they concern the admissibility of evidence, the sentencing of an offender or the determination of a major land rights case. The important question for this inquiry is: what are the sources of the judicial authority which has these effects?

The sources of judicial authority may be *external* to the judicial function or they may be *internal* to it. I use the term 'judicial function' rather than 'law' here because, as will become clearer, I see the activities of the judge as including 'the law' (in a narrow sense) as well as a potentially wider range of actions which may not be so easy to characterise. I will return to these.

12 Varga, above n 11, 137. Given the difficulties in Kelsen's notion of validity resting on the basic norm, Varga's subordination of 'validity' to 'efficacy' is a valuable methodological device. However, it is less attractive politically, as will be discussed in more detail when considering Carl Schmitt, below.

As discussed, 'the people' (or one might say popular will) is one possible external source of judicial authority. What other contenders are there? The state clearly plays a part in underwriting judicial authority, so it must be considered as another possible external source. When we come to look in more detail at the judicial function, it will be clear that the actions of the judge continuously constitute judicial authority. We must then ask how it is that the judge can constitute his or her own authority, relying upon what sources.

The judicial function relies on the law as 'a system of consciously made rational rules',<sup>13</sup> as one possible internal source of authority. Further analysis will allow us to identify the actions and context which are necessary for the enactment of those rules. These need to be carried out within a legal (or at least not illegal) framework, and include a range of factors which may be codified to some extent as 'procedure', but include other elements which are not included within those 'consciously made rational rules'. These include the judge's performative utterance and the conditions which authorise it, as well as the ritual elements of court procedure, including those covered by procedural rules as well as those which may fall outside any legal code.

## II THE STATE

The efficacy of judicial authority is backed by the power of the state. To the extent that the state enforces judicial decisions, particularly in the criminal law, it may appear that the state underwrites the authority of the judge. Here we must be cautious about a term such as efficacy, and recall that we are looking not at power but at authority. While power may be effective in applying the physical force necessary to detain someone convicted by a judge, this is not an exercise of authority. State implementation of judicial decisions reflects the state's respect for the authority of the judge, but it institutes power, not authority.

If we follow Weber's formulation on legitimacy, we see that the boot is on the other foot. Authority is *legitimate* domination, and the legitimacy of the state is determined by 'formal legality'.<sup>14</sup> Given its basis in the formal system of law, the authority of the state depends upon the authority of the judge. In politico-legal terms the doctrine of the separation of powers is intended to avoid disputes over authority, notably those between a popular legislature and the judiciary. From a sociological perspective, however, the doctrine raises more issues than it resolves. The separation of powers has been a remarkably tenacious ideology since it was proclaimed by Montesquieu a quarter of a millennium ago and subsequently entrenched, alluded to, or fudged in any number of constitutions.

Important critiques, from both left and right which arose in the early twentieth century, are illuminating. Gramsci saw the doctrine of the separation of powers as

<sup>13</sup> Weber, above n 8, 954 (emphasis in original).

<sup>14</sup> Ibid 216.

an elaborate ideological construction for the interpretation and justification of legal and political arrangements. He saw the doctrine as encapsulating the entire liberal ideology, and so it was particularly significant in supporting the continued legitimacy of liberal regimes.

It is to be noted how lapses in the administration of justice make an especially disastrous impression on the public: the hegemonic apparatus is more sensitive in this sector, to which arbitrary actions on the part of the police and political administration may also be referred.<sup>15</sup>

While Gramsci was writing these words as a prisoner of Fascist Italy, Schmitt was supporting the rise of Nazism in Germany. Gramsci's materialist debunking of the doctrine highlighted its narrow frame and historical specificity. If it arose out of the interests of a specific class in a particular historical moment, the separation of powers could hardly be seen as the perpetual guarantor of good government. Schmitt's critique was potentially more damaging. In his enquiry into sovereignty, which he defined as the power to decide the exception, Schmitt placed the power of the state above the legitimacy of the law. The notion of sovereignty is founded in the personality of the monarch and its power cannot be negated by asserting that law's right trumps the state's might. Schmitt thus took Kelsen's point, that validity is limited by efficacy, to its logical conclusion: the validity of legal right is overwhelmed, at those crucial moments when it really counts, by sovereign power. The sleight of hand by which the modern law-giver is thought to be 'omnipotent' is revealed not only in the theological origins of such an expression, but, more damagingly, in the ultimate power which resides in the state.

The connection of actual power with the legally highest power is the fundamental problem of the concept of sovereignty. All the difficulties reside here.<sup>16</sup>

The state and the judiciary are mutually dependent on each other's authority, and the judiciary is dependent on the state's use of force. Taken together these facts point to the serious difficulty facing the judiciary in any attempt to rely on the state for authority. The very fact that the judiciary relies on state *power* indicates the unreliability of the state as a source of *authority*. And, as Gramsci pointed out, the state's reliance on the judiciary as a source of legitimacy makes the relationship between the state and the judiciary threatening to the legitimacy of both. The separation of powers doctrine, administered by the judiciary, is crucial to this legitimacy.

### III THE PEOPLE

We are well accustomed to that democratic theory which sees the people as the source of authority. Consequently it seems obvious that we should consider this as a possible source of judicial authority. However credible this theory may be in relation to the democratic state and its elected governments, there are major arguments against this view in the case of the legal authority of the judiciary. One of these arguments follows on from the above conclusion that the separation of

<sup>15</sup> Antonio Gramsci, *Selections from the Prison Notebooks* of Gramsci (1971) 246.

<sup>16</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1985) 18.



powers doctrine is a source of the legitimacy of the state as well as of the judiciary. The other derives from political philosophy, and distinguishes the rule of law from democracy as a source of legitimacy. These both constitute strong arguments against a popular source of judicial authority, and I will consider them before turning to alternative views. I rely on two recent pertinent statements of these arguments.

The legal argument which insists on differentiating judicial authority from popular sources has been succinctly stated in a discussion of a number of recent judgments of the High Court of Australia relating to judicial powers.<sup>17</sup> Noting a number of judicial references to public perceptions of the judiciary, Handsley criticises the presumption that the place of the judiciary is to be determined, at least in large measure, by public opinion or 'ephemeral perception'. Worse still is the presumption of judges to make these decisions on the basis of their attempts to second guess public opinion, while having 'no evidence as to the effect of a particular arrangement on public perceptions of the judiciary'.<sup>18</sup> Handsley's defence of an independent role for the judiciary is based in the constitutional separation of powers and a democratic theory of law emphasising the distinction between judicial and electoral responsibilities.

The political philosophy argument sees democracy and legal principles as two foundational versions of contemporary legitimacy which must balance each other. In the modern liberal state fundamental legal principles are based in liberalism. While proposing that 'the combination of liberalism and democracy' is 'the greatest single invention in modern politics',<sup>19</sup> Heller sees such difficulties in this balance that she suggests that the 'tension between liberalism and democracy is very likely to become one of the major conflictual fields of the early twenty-first century'.<sup>20</sup> Noting that equality is the central value of democracy, she points out how many decisions which rely on this value could have the effect of working against the liberties of particular groups, including cultural elites or immigrants. This derives from the second aspect of the democratic ethos, which is the principle that the majority is always right. Thus the political ideal of equality is translated into a quasi-epistemological principle, reinforcing the moral power of the majority to make judgements or decisions for all members of the polity.<sup>21</sup> Liberalism, with its emphasis on independent thought, is clearly inconsistent with this view. Beyond this, the liberal notion of rights sets standards of freedom for individuals and minorities which may well be at odds with majority views.<sup>22</sup>

It is not hard to see parallels between the clash of liberal and democratic values and the conflicts facing Australian judges as they try to uphold legal

17 Elizabeth Handsley, 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 *Sydney Law Review* 183.

18 *Ibid* 214.

19 Agnes Heller, 'The Complexity of Justice (a Challenge to the Twenty-First Century)' (1996) 9 *Ratio Juris* 138, 138.

20 *Ibid* 138.

21 *Ibid* 143.

22 *Ibid* 144.

principles while maintaining public trust and confidence, particularly where that is interpreted as public popularity. If decision making were to be based on majoritarian principles, decided by referenda rather than law and judges, there would be quite different outcomes in many cases. So the people cannot be the source of judicial authority in any sense as direct as one which decides outcomes or pits the views of the majority against the decisions of judges.

Heller sees contemporary efforts to formalise liberalism moving from reliance on rights to a reliance (following Rawls) on procedure.<sup>23</sup> If the content of popular decisions were to be so different from that of judicial decisions, we may have to retreat to a position that rested on the appropriate procedures to follow in making these decisions.

This is just the position that we find in Habermas's discourse theory which founds political legitimacy in the means of communicative action, including all those procedures which purport to ensure participation in decision making. The people, excluded from authorising judicial authority substantively, as decision makers, or through their opinion of the judiciary or of any particular decision, re-emerge through the medium of public reason based in communicative action. '[P]opular sovereignty withdraws into democratic procedures and the demanding communicative presuppositions of their implementation.'<sup>24</sup>

However, the attempt to resolve conflicts over outcomes by consensus on procedures raises the question of the appropriate procedures to follow. The following consideration of *procedures* must inquire whether there is any conflict between popular and judicial procedures, just as Heller suggests a conflict between popular and judicial *decisions*.

#### IV PROCEDURE

The interaction of the rational, codified law and the physical presence of the judge (discussed at section V, below) suggests that the impersonal law is inadequate to constitute judicial authority, but requires the judicial presence. The simple observation that there can be no trial without a judge leads to a number of questions about the role of the judge and the context in which judicial authority is invoked. This context includes the courtroom setting and the roles of other participants in the trial. Many of these issues fall under the category of 'procedure'. We must now distinguish several uses of this term, embedded as it is in any number of legal and sociological theories.

'Procedure', as discussed in legal and curial debates, normally refers to such formal minutiae as discovery, the forms used to specify causes and matters in dispute and adjournment policies. Of equal social importance are those procedures

23 Ibid 145.

24 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (German, 1992; English translation, 1996) 486.

which determine where cases will be held, how the court will be physically arranged, how it will use what technology, and how the public may become aware of the proceedings. No evidence may be admitted unless by authority of the judge. The trial itself cannot proceed unless the judge determines that the court has jurisdiction. The trial is constructed out of numerous decisions about how to proceed, timing, interim orders, admissibility, discovery and so on. These 'interlocutory' decisions mark out the boundaries of the case and constitute 'meta-stories' out of 'the opposing stories of the parties involved'.<sup>25</sup> In this way the judge is continually constituting the institution of the court throughout a trial.<sup>26</sup>

It may seem commonplace to suggest that procedures of this type have critical importance in the public perception of the judiciary: they even determine, quite literally, how the public will (or will not) see the judge. Adopting efficacy as the criterion of judicial authority leads us to ask what it is that these procedural devices accomplish. Law, jurisprudence and the social sciences have developed divergent theoretical approaches to procedure.

Unlike the United States, where the Fifth and Fourteenth Amendments contain 'due process' clauses, Australia has no such constitutional provisions. Apart from some references to United States provisions,<sup>27</sup> Australian courts have generally held that there is little general content to any procedural requirements, beyond the Constitution's s 80 reference to trial by jury and vague statutory requirements that 'only in common law courts should persons be tried for crimes and only by recognized procedures.'<sup>28</sup> A number of specific matters may constitute grounds for appeal. Extensive as these may be they do not add up to a general specification of procedural requirements or due process:

There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial . . . resulted in the accused being deprived of a fair trial and led to a miscarriage of justice.<sup>29</sup>

While legal theories of procedure tend to concentrate on classification<sup>30</sup> of procedural issues or comparison<sup>31</sup> of procedural regimes, it is in jurisprudence and social science that we find analysis of direct relevance to the present inquiry. Several of these approaches offer valuable, if mutually conflicting, insights into the role of procedure in legitimising judicial authority.

In the English speaking world the notion of 'procedural justice' is usually

25 Michel de Certeau, *The Practice of Everyday Life* (first published as *Arts de Faire*, [1984]; English translation, 1984) 122.

26 Csaba Varga, *Theory of the Judicial Process: The Establishment of Facts* (1995) 132-34.

27 Notably Gaudron J in *Dietrich v The Queen* (1992) 177 CLR 292, 371.

28 *Ibid* 307 (Mason CJ and McHugh J), on the intent of the *Imperial Acts Application Act 1980* (Vic).

29 *Ibid* 300 (Mason CJ and McHugh J).

30 Robert Millar, 'The Formative Principles of Civil Procedure' (1923-24) 18 *Illinois Law Review* 1.

31 J A Jolowicz, 'The Active Role of the Court in Civil Litigation' in Mauro Cappelletti and Jolowicz (eds), *Public Interest Parties and the Active Role of the Judge in Civil Litigation* (1975).

associated with Rawls's *Theory of Justice*. Postulating an original position from which one could derive mechanisms of justice with universal applicability, Rawls proposed procedures which he called 'pure', 'perfect' and 'imperfect' procedural justice.<sup>32</sup> Although he identified the actual conduct of trials with 'imperfect procedural justice', the very idea that procedure could form a basis of justice was to lead to several fruitful lines of inquiry. These are, broadly, philosophical and empirical. Philosophers have used procedural principles to argue for universally valid ways of making decisions and solving disputes.<sup>33</sup> Empirical research has, on the other hand, investigated the types of procedures which elicit the greatest acceptance, or which have 'consequences for evaluations of authorities and institutions'.<sup>34</sup>

I have referred above to Habermas's notes on the relationship of procedure to popular sovereignty. Turning to judicial procedure, we see that he has also specified a range of requirements for decision-making processes which can be applied universally. These include a notion of discourse as a rational and fair mode of argument, forgoing the use of force and seeking after truth.<sup>35</sup> Communicative action is not merely a description of the ways in which societies get things done: it includes prescriptions for ethical life.<sup>36</sup> The ideal speech situation is both efficacious and ethical. In common with traditions of public reason which Habermas identified with the rise of the bourgeois public sphere, his communicative action is based in a reason which transcends any individual consciousness. In Habermas's turn to communicative action and the ethics of discourse as sources of social right we discover the power of procedure in the economy of legitimation. Decisions are just to the extent that they proceed from just and rational communicative regimes.

Philosophers including Habermas and Rawls suggest there may be a minimum ideal content for procedural fairness. Habermas's ideal speech situation is, like Rawls's pure procedural justice, so ideal that it bears little resemblance to the real communication in a courtroom. But more recent work of Habermas or Bayles,<sup>37</sup> has greater programmatic content, to the extent that it could be used to evaluate real procedural regimes, rather than simply playing a role as a Rousseauian thought experiment.

This overview of procedure as a possible source of judicial authority suggests a number of key points. In the absence of reliable and consensual sources of substantive justice, philosophers have turned, particularly in the second half of the twentieth century, to sources of procedural *justice*. Empirical studies have identified opinions among disputants or potential litigants as to which forms of

32 John Rawls, *A Theory of Justice* (1972) 85.

33 Bayles, above n 7 and Stuart Hampshire, *Innocence and Experience* (1989).

34 Stefan Machura, 'Introduction: Procedural Justice, Law and Policy' (1998) 20 *Law and Policy* 1, 3. Machura here provides a comprehensive overview of the work of E Allan Lind, Tom Tyler, John Thibault and Laurens Walker and others.

35 Jürgen Habermas, *Legitimation Crisis* (German, 1973; English translation, 1976) 107-8.

36 Jürgen Habermas, *Moral Consciousness and Communicative Action* (German, 1983; English translation, 1990).

37 Habermas, above n 24, Bayles, above n 7.

procedural justice are preferable. Yet the a priori studies seek a source other than that of voluntary choice or public opinion. From the viewpoint of gauging the efficacy of a procedure, it is important to understand the likelihood of compliance and the source of that authority which compels compliance.

The principles of writers such as Habermas or Rawls operate in two ways in constructing procedural authority. On the one hand, as discussed above, they provide criteria for evaluating communicative competence or procedural justice. They also constitute a language and narratives which we may apply in assessing fairness. That language of procedural fairness may be used to interrogate particular legal regimes. We may ask of them whether, for instance, all parties have equal opportunities to be heard, whether the adjudicator is impartial, or whether (following Habermas) 'all motives [are excluded] except that of the cooperative search for truth'.<sup>38</sup> If these criteria are central to our perceptions of justice, we may expect judicial authority to benefit from conformity with such standards. But does the authority of the judge really rely on these standards? Are they not somewhat out of line with people's expectations and experience of judicial procedures?

Even if the standards of procedural fairness are generally complied with in typical Australian trials (and that is an empirical question), there remains a curious surplus of procedure. By this I mean that to satisfy the criteria of impartiality, opportunity to be heard, and the rest, requires certain minimal standards of participation, of understanding and of independence. Yet in their actual operation, the courts introduce additional procedures such as testing and admitting evidence, and locating trials in the specific setting of the courtroom, with all its conventions of design, dress and behaviour. Many such procedures seem not only to add little to what I have called minimal standards, but in many cases they appear to work against the requirements of ideal communication or procedural fairness. This is particularly obvious in aspects of formality and tradition where the array of performative and ritual devices is simply inexplicable except as 'noise' in a system dedicated to communication or fairness.

## V PERFORMATIVE AND RITUAL

A key source of the authority of the law is founded in its rational structure and methods, so this suggests itself as an apparent source of impersonal authority on which judges may rely. The judge applies a rational method, or draws on a rational set of codes which are external to the judge, yet internal to the law. Looking behind this simple formulation, we discover a number of complications which arise in attempting to found judicial authority on the law as a rational system. One obvious difficulty arises out of the judge's role as the source of law. As we delve deeper into this objection, which is fairly simple on the surface, we find other layers of difficulty.

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38 Habermas, above n 35, 108.

If judicial authority were based in positive legal codes, then the judge would have an exclusive responsibility to apply those codes conscientiously to each case. This argument is implicit or explicit in calls for narrow judicial interpretations and sensitivity to judicial activism or creativity. Without needing to rehearse the many arguments of that debate, it is worth noting, here, some basic points about judicial application of the law.

Even if the judge were merely a passive conduit through which the law passed, the agency and presence of the judge would still be necessary to law's application. Obvious as it is, this point leads to some important implications. These apply both to the legal institution of the court and to judicial decisions, neither of which could exist nor have authority without the presence of the judge.

Firstly, on the institution, we can see that the judge does not enter the court only at the moment of the written decision. Despite the well known passivity of the judge in the adversarial system, the trial cannot proceed without the judge. The judge must not only 'hear' the case, but must authorise its entry to the court, through the procedural devices discussed above.

When we come to the decision, which is to say the final decision which concludes the case, we see other ways in which the simple presence of the judge is essential to the authority borrowed from the law. Even if the decision, which 'adds nothing, and it adds itself,'<sup>39</sup> were nothing more nor less than the law, it could not be made without the judge. The judge is the one inescapable condition of the decision. The judicial decision, as it is pronounced from the bench, is the critical moment in law's authority. 'The constraint of enunciation, as a general constraint of the *existence* of discourse, is just precisely the constraint of *juris-diction*.'<sup>40</sup> In this way Nancy takes the source of law back to its enunciation as a performative. And Baldus reminds us that the personal presence of the judge is fundamental even to law's enunciation: 'wanting a person, Reason and Justice act nothing'.<sup>41</sup>

Weber's theoretical attempt to base the authority of the liberal state in the power of reason rather than that of the person encounters its greatest difficulty here, in the judicial pronouncement. We see this in Schmitt's criticism: 'Because the legal idea cannot realise itself, it needs a particular organisation and form before it can be translated into reality.'<sup>42</sup> Davies also draws attention to the deliberative processes in exploring the place of the decision-makers and procedures which say the law. With Schmitt, she discovers behind the appeal to universality — whether positivist or rationalist — the performative which enacts the law, 'a picture of law as a performance, not as a static set of norms.'<sup>43</sup> The structure which is law in its own self-image exists nowhere but in its continual renewal and reassertion in the performative of successive decisions.

39 Jean-Luc Nancy, 'The Jurisdiction of the Hegelian Monarch' (1982) 49 *Social Research* 481, 504.

40 Ibid 505.

41 Quoted, Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1957), 142.

42 Schmitt, above n 16, 28.

43 Margaret Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (1996), 98.

However fallible a judge may be, and however dependent upon the positive law or the reasoning that supports it, without the judge there is no law. Under these conditions judicial activism is of no relevance. The least activist judge goes beyond the codified law, as is necessary, simply in order to convene a court, to cause a trial to progress, or to pronounce a decision. By this circuitous path we return to the enigma of judicial authority. It invokes the rational norms of positive law, but finds these insufficient without the authority bestowed by the judicial presence itself.

Jurisdiction, as Nancy reminds us, is sought in the saying of the law.<sup>44</sup> Austin called the utterance which becomes law as it is spoken the 'performative'. Unlike the constative, which may be judged true or false, the performative may work or it may not: in Austin's terms it may be felicitous or infelicitous.<sup>45</sup> Hence, in examining the conditions of judicial authority, the key question becomes: under what conditions does judicial authority *work*, in the sense of being felicitous? More critical still, under what conditions could it be infelicitous? And where is the line between the *two*? We may begin from Austin in exploring the conditions for the felicitous judicial performative. Revealingly, and very helpfully, Austin is acutely aware of the risks to successful performance:

Speaking generally, it is always necessary that the *circumstances* in which the words are uttered should be in some way, or ways, *appropriate*, and it is very commonly necessary that either the speaker himself or other persons should *also* perform certain *other* actions, whether 'physical' or 'mental' actions or even acts of uttering further words.<sup>46</sup>

The context of the utterance is crucial. Performative language has the force of action where the words are uttered within an accepted convention by those authorised to utter them. Participants must adhere to the conventional procedure.

In the case of the judicial performative, the context seems clear enough. The proceedings should take place in a courtroom, except under such circumstances as taking a view of a site, or accepting remote evidence by video. The correct form of language should be adhered to, by the judge and by other participants, so as not to risk a mistrial by admitting inadmissible evidence, or pronouncing an ambiguous sentence. The person who pronounces a judicial decision must be a judge, unless they are a magistrate or perhaps a master or registrar (under certain circumstances). As in Austin's analysis, the exceptions and risks quickly multiply.<sup>47</sup>

Some of these exceptions are covered by the law. If the correct procedure is not fully executed, then there is provision for appeal, mistrial and setting judgment aside. These are generally the infelicities which Austin classifies as 'misexecutions': 'the procedure is all right, and it does apply all right, but we muffle the execution of the ritual with more or less dire consequences'.<sup>48</sup> But we may still

44 Nancy, above n 39, 505.

45 J L Austin, *How To Do Things With Words* (first published 1962, 2nd ed, 1975), 12-14.

46 *Ibid* 8. Emphasis in original.

47 *Ibid* 14-18.

48 *Ibid* 17.

have a nagging doubt about what the correct procedure is, or whether it is appropriate for these participants to enact it, or this judge to pronounce on it ('misinvocations').

The use of performatives in an Australian court is marked by specific gestures or set wording. Those moments when a performative is to be uttered are signified by the court 'coming to order', in the demeanour of the lawyers, or the exhortation of a court officer. Apart from the solemn moment when the judge enters or leaves the court, and 'all stand', these are among the most highly charged rituals. The most critical performative moments in an Australian court occur when a witness is sworn to 'tell the truth' and when the judge passes sentence. When a witness is sworn to truthfulness, the court officer hands him or her a Bible, demands that the court be silent, and utters the prescribed form of words asking if the witness swears 'by Almighty God'. The response, 'I do', is one of Austin's classic performatives. The witness is not, at this point, giving evidence (stating facts), but is taking an oath, performing an act which asserts and obliges the truthfulness of the subsequent evidence. The witness's account of the facts, signified or 'bracketed' by this performative, is then able to enter the court as evidence, subject to its admissibility according to the judge.

The moment at which the decision is announced is the critical point at which the deliberations of a rational system of law is translated into action in the world of human affairs. In any court it is a moment of solemnity. The judge utters specific forms of words, making the decision legally clear and referring to the legal basis of the decision. Even in the summary justice of the lower criminal courts, the defendant is required to stand and face the judge while being sentenced. In the wordy decisions of the higher courts, the reasoning behind the judicial opinion is given in ritualised forms, as Brion has noted in regard to United States courts.<sup>49</sup>

The court and its rituals constitute the context which lends authority to the court's performatives. A sociological response to Austin insists that he sees in language what we should really be looking for in delegated authority or in ritual. Bourdieu has responded to Austin that the power of the performative derives not from the language but from the authority of the speaker. Habermas, with Austin, stands accused by Bourdieu of a formalism which attributes authority to speech itself.

The power of words is nothing other than the *delegated power* of the spokesperson, and his speech . . . is no more than a testimony, and one among others, of the *guarantee of delegation* which is vested in him.<sup>50</sup>

Since the source of judicial authority is none other than the question posed at the outset of this paper, we find ourselves no better off if we must simply accept that law's power derives from the authority of its judges. Bourdieu provides some further analysis of the grounding of the authority of the performative. He claims we cannot find the source of authority in language, but must see language as

49 Denis Brion, 'The Ritual of the Judicial Opinion' in J Ralph Lindgren and Jay Knaack (eds), *Ritual and Semiotics* (1997).

50 Pierre Bourdieu, *Language and Symbolic Power* (J B Thompson, ed. Collection first published in English translation 1991), 107.



simply one cue to the authority delegated to the proper official. He goes on to analyse the rituals performed by the official together with the speech acts which contribute to the recognition of the delegation of authority. It is not language but ritual, a thing outside language, which carries the authority of the performative. Winn has gone further to claim that 'what Austin called a "performative" is simply what anthropologists have called a ritual.'<sup>51</sup>

There is a sense in which 'ritual' may be used in an iconoclastic sense to suggest some ancient and irrational practices. While drawing attention to some of the ways in which legal ritual draws on a type of reason which is not strictly modern, and based in acts as much as words, there is no pejorative intent. Kertzer has examined the many roles of ritual in modern political life, showing just how pervasive its functions are in political transitions, legitimation, and other critical moments. One important element of ritual is its own autonomy, which becomes a source of power which can be shifted from its original delegate:

Yet once the rituals become established, they take on a life of their own in the same way that culture itself has an existence that transcends the changing collection of individuals who participate in it. The ritual legitimizes the power and institutionalizes it, but at the same time the role of power holder itself becomes transferable, no longer the property of any particular individual.<sup>52</sup>

In tracing the court's use of performatives through various procedural matters to a final decision, we see the means by which judicial authority is constituted in a succession of rituals in the proper context. These performatives and rituals constitute the institution of the court on each occasion that they are invoked.

The efficacy of judicial performatives derives from each of these circumstances, in the right combination. While Austin emphasises the power of language, he is not blind to the significance of context and authorisation. Bourdieu emphasises the symbolic power of the authorised official, in this case the judge, while recognising other elements of the ritual which invokes that authority. Kertzer's analysis of ritual indicates some of the ways in which each of its elements combine to produce efficacious authority, through legitimacy and transferability.

These conclusions may be applied to the characteristics of judicial authority that have been discussed here. The requirements of performative power, in language, context and authorised personnel, explain much of the procedural baggage of the trial. I called this a 'curious surplus of procedure' since it exceeds any prescriptions of procedural justice or discourse theory. Many of the elaborate procedural devices employed by the judiciary and the legal profession in court do little to ensure 'fairness' in any popular sense. Instead they ensure legality. This is done by founding the authority of the judge and the proper conduct of the trial in a range of traditional practices and legal requirements, many of which are not codified, let alone 'rational' in a Weberian sense. The specific combination of symbolic power, the context of place, set patterns of language and procedure can all be identified as constituting ritual. This ritual, based in specific forms of *legal*

51 Peter Winn, 'Legal Ritual' (1991) 2 *Law and Critique* 207, 213.

52 David Kertzer, *Ritual, Politics, and Power* (1988), 51.

reason (written and traditional), serves to constitute judicial authority in court, and to ensure its efficacy.

## VI CONCLUSIONS

Judicial authority, in the sense of an assurance that judicial power will be effective, has been seen to have several possible sources. The state is the guarantor of last resort: it will back judicial power with its monopoly on the legitimate use of force. But the very legitimacy of this force, as of its own authority, must be circumscribed within a framework set by the rule of law, hence by the judiciary. While the judiciary relies on the force of the state, the state relies on the legitimacy of the judiciary.

This distinction between the rule of force and the rule of law highlights the formal appeal of the judiciary to 'the law'. We see this at several levels: in rational, codified law; in the law of procedure; in procedural and discourse theories of justice; and in the performatives of courtroom ritual. Each of these aspects of the law is interlinked, while each succeeding one is further from the bare rational bones of formal law. Analysis of law usually confines itself to written sources, which rarely discuss the actions by which the law is invoked, as it makes its way from the codes to the courtroom. To the extent that law in action in the courtroom is subject to analysis, it is usually at the level of procedure. Yet we have seen that formal analysis and codification of legal procedure only touch some aspects of the rituals and performatives which bring the law to life in judicial authority in court.

Popular sources of judicial authority weave in and out of this analysis. At one level, judicial authority cannot be effective unless the people can be expected to recognise and obey it. However, it is important to distinguish the authority of the judiciary, based in notions of rights and law, from the popular legitimacy of the democratic legislature. The beliefs of the people are clearly a factor in the acceptance of authority, though these are more complex than the data of public opinion research, and must be sought at a deeper level of cultural life.

Since the decline of the usual consensual sources of substantive justice, ideas of procedural justice constitute something of a minimal claim. We have seen in the work of Habermas, Rawls and other philosophers some versions of the place of procedure in justice claims and effective legal action. These theories themselves may assist in the legitimation of judicial authority to the extent that people are convinced that legal processes conform to ideal processes of communication or procedural fairness. However, they may also provide a yardstick by which law is found lacking in its accessibility or communication, which could serve to undermine judicial authority.

Some of the shortcomings of law's communicative and procedural methods derive from ritual elements based in longstanding tradition and extreme formalism.

Rather than dismissing these as dysfunctional remnants of a past age, a study of the place of the judge at the centre of courtroom ritual suggests a more important and continuing role. Formal law is only brought out of abstraction into efficacy in the world of human affairs by means of the judicial performative. It is here that we find the most fundamental level of judicial authority. The judge invokes the law and is legitimised through it. At the same time, it is only through the authority of the judge that the law is realised. The judge's authority is established not only by the law itself, but also by the invocation of the correct form of words in the right place at the right time. This procedural or ritual foundation of judicial authority is fundamental to its efficacy. Judicial authority, whatever else it may do under law or in the interests of communicative competence, is fundamentally directed at establishing itself through the performatives which institute the court on an on-going basis, and which pronounce the final, binding decision.

This brings us back to the basic paradox of judicial authority. The requirements of formal procedure, at the level of ritual, cut across the requirements of discourse theory or procedural justice which suggest that decisions are only fair to the extent that everyone participates equally, communicates clearly, and so on. This demonstrates another of the limits of popular belief as a source of judicial power. There remains a scepticism as to whether judicial authority is consistent with procedural fairness.

An optimistic program of procedural justice would suggest that judicial procedures simply need to be brought into line with its prescriptions. Perhaps they are not so far apart after all, and the interests of justice and of the parties are best served by an open adversarial hearing, not unlike that of the common law court.<sup>53</sup> With the decline of narratives about natural justice and a common moral purpose, procedural justice narratives have stepped in to explain, justify and evaluate dominant decision-making processes in terms of a universally fair procedure. The argument runs that even if we cannot agree on outcomes, at least we can agree on processes.

The limits to this program can be found, however, in the divergent sources of legitimation required by the processes of law in court and of discourse in an ideal speech situation. While law draws on consistency, codification and abstraction for its justification, discourse theory seeks inclusive participation and a language shared among the participants. The more weight procedure must bear in legitimising judicial authority, the greater the tensions and higher the stakes involved in reconciling discourse with law, and open debate with judicial performatives. Despite the apparent conflicts between these procedural styles which I have described here, it is unclear from the present inquiry whether they will turn out to be fundamentally incompatible.

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53 This view is encountered among English-speaking philosophers eg Hampshire, above n 33, 53-54.