

THE JUDICIARY IN THE MODERN WORLD

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The place of the judiciary in the modern world is a topic much discussed, mainly by judges. The fact that it is much discussed, even if only by judges, indicates just how much the circumstances of the judiciary have changed in recent times. It is not a topic which anyone bothered about in times gone by, even 50 years ago. The judges before whom I appeared when I embarked upon my voyage of discovery as a counsel at that time had no doubt about their exalted place in the world. So what has happened? What are the changed circumstances? How have they affected the judiciary? And how is the judiciary responding and how should it respond? They are some of the questions which we should be addressing.

What are the changed circumstances?

This is not an easy question to answer. The fundamentals of the judicial role remain the same as they were centuries ago. From time immemorial the judge's primary function has been that of adjudicating disputes. The judge's secondary role, that of law-making, has a very long provenance, tracing back through more than 800 years of development of the common law. Judicial independence, the hallmark of our judicial process, has been with us for not less than 300 years. And, though curial procedures have changed in significant respects, the essential elements, such as oral testimony, cross-examination and procedural fairness, remain in place.

Generally speaking, the focus of the contemporary debate about the judiciary is not on its primary function of adjudication, though there is discussion of the elements of decision-making. There is also concern about efficiency and, from

the perspective of the judges, about the funding and resourcing of the court system. The core of the debate is about the role of the judiciary, the qualities which are expected in judges and the mode of appointment and the accountability of judges as well as the secondary law-making role of judges. That debate has arisen from an enhanced awareness of the problems inherent in the relationships between the judiciary on the one hand and the other arms of government and community on the other hand. When you add to these factors the media attention which is currently directed to the courts, you can appreciate why things have changed. The judges formerly worked in a relatively secluded and cloistered world in which they and their decisions were respected. The judges in some jurisdictions could now be excused for thinking that they live in something that resembles a large goldfish bowl and that the culture of respect has given way to that of criticism.

The courts and the community

I begin with this factor because it is a key to understanding some of the matters which I have already mentioned. The relationship between the courts and the community has changed in many respects. There has been some recognition of the important part which the courts play in the life of society. A better educated community is more aware of the courts and what they do, even if the community lacks a finer understanding of the judicial process. More importantly, the courts' role in the enforcement of human rights and in the exercise of judicial review has altered the relative significance of the judiciary vis-a-vis the other arms of government. There has also been a tendency on the part of politicians to leave

important controversial questions to the courts for decision rather than attempt a legislative or executive solution which may alienate a section of the electorate.

Judicial decisions on these questions and on human rights issues (which may involve the invalidation of legislation) along with a stronger tendency on the part of courts to overrule previous decisions - itself a consequence of a society undergoing rapid change - naturally draw attention to judicial law-making and attract media scrutiny.

Perhaps the most important aspect of the changed relationship between the courts and the community is that the courts, through legal aid and other means, are more accessible than they were. This has led to a vast upsurge in the volume of litigation and an expansion in the number of judges who, like professors, have lost the elevated social status they formerly enjoyed. Another development has been the emergence of "the litigious society", which is essentially "rights oriented" and adversarial. A characteristic of the litigious society is that litigants look to the courts to satisfy claims for the enforcement of rights. The disappointed expectations of litigants are not an insignificant element in the relationship between the courts and the community.

A report of a survey recently made in Australia of the relationship between the Australian courts and their public acknowledged that the courts were taking progressive action in a number of areas to improve service to the public. However, the report found that a group of persons taken to be representative of

public users of the court system considered that the courts were not doing at all well in serving the needs of their public and that reforms were not proceeding broadly enough or with sufficient urgency.¹ The report also found:

"There seems to be a widespread perception that the judiciary as a group constitute an obstacle to desirable change. This is coupled with, and possibly related to, a perception that some courts are organised largely for the benefit of judicial officers. Of all the groups discussed in the interviews, judicial officers emerged as the least sensitive to the needs of users".²

Another finding was:

"Courts seem generally to be compared unfavourably with tribunals when it comes to consumer issues. There is thought to be a greater likelihood of client focus in tribunals".³

Although the findings could be susceptible to criticism on the ground of the small number of persons interviewed, we can, I think, assume that there is some evidence to support the findings.

Earlier in 1993, Professor Thomas Church, a noted American expert on court administration, had said of courts in Australia and elsewhere:

"some of the current public disenchantment with the legal system can be attributed to an unreflective even heedless attitude ... toward the ordinary citizen who ... finds himself on the courthouse steps. Courts ... are not 'user friendly' institutions. It is not so much that they are intentionally impersonal or arrogant in their dealings with the public; rather, I suspect that to-day's courts have simply inherited a mindset that had its origins in a judiciary of a different day. As a result, the tendency is to perpetuate a perspective on the relationship of courts to the citizenry that is ... damaging to ... public support for our judicial system".⁴

¹ S. Parker, *Courts and the Public*, 19998, Australian Institute of Judicial Administration, p. 162.

² *ibid.*

³ *ibid* at p. 163.

⁴ *ibid* at p. 26.

The courts and the media

Effective media scrutiny has been facilitated by a greater willingness on the part of judges to discuss in their judgments substantive issues, including policy issues where appropriate, rather than obscuring these issues under a cloak of formalism. Not that I would discard formalist reasoning and doctrinal reasoning. They, particularly doctrinal reasoning, have an important part to play, though it is certainly not an exclusive part. One consequence of greater judicial openness is the acknowledgement of the law-making function of the judges, a fact notably stated by Lord Reid in the 1970s. Although the existence of the function was obvious - the law of torts, contracts, trusts, equity and crimes representing the vast product of that function - the media have treated it as a relatively modern discovery.

Media interest in the courts can be excited by political criticism of court decisions, as it has been in Australia and the United Kingdom, and all the more so if there is an opportunity of talking up judicial activism and hostility between the judiciary and other arms of government. The comment has been made that:

"from the handing down of the *Wik Case*⁵ just before Christmas 1996, the [High Court of Australia] experienced one of the most difficult periods since [its] creation in 1903".⁶

⁵ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁶ G. Williams, "The High Court and the Media" forthcoming (to be published in the *University of Technology Sydney Law Review*).

One element in the motivation for the criticism was to undermine the authority of the decision in order to pave the way for amending legislation. This is a potential risk to which courts are inherently exposed.

Media criticism of sentencing in criminal cases has a long history. Now it has a greater impact as a result of television which brings into the living room the complaints of the victim's family against the leniency of the sentence. Response to media criticism on sentencing is a problematic undertaking, not least because of the difficulty of articulating the role of the court in reflecting the community's evaluation of the wrongdoing involved.

In passing, I mention that, in some jurisdictions outside Hong Kong, a more relaxed view of the law of contempt may well have encouraged the media to take more liberties in criticising the courts. The media is more critical of the courts than it was in the past, though the disposition to be more critical seems not to be accompanied by a desire to ensure that reports of judgments are accurately stated and well-balanced.

The media is also more critical of judges. In various jurisdictions, including the United Kingdom and Australia, there has been strong criticism of male judges on the score of lack of gender sensitivity. In some instances the criticism in its intensity and continuity verged on a campaign. That criticism has been associated with another criticism, namely that the judiciary is not representative of the community in terms of gender, race, social and cultural background. These

aspects of media treatment of the judiciary create the impression that the judges are elitist, a group apart who do not understand and have difficulty in relating to the community. This impression contributes to an unfavourable perception of the judiciary on the part of the public.

The courts and the other branches of government

Critical media scrutiny extends also to the relationship between the courts and the other branches of government. Judicial law-making amounting to usurpation of the legislative role and wide-ranging judicial review of administrative action are held up as manifestations of judicial activism. The media is not alone in this respect. These days some politicians voice similar complaints, the more so when the prospect of political advantage favours such a course.

Although this attitude on the part of politicians is more common than it was in the past, it is not altogether unexpected. It is inevitable that there will be a continuum of tension in a properly functioning democracy between an independent judiciary and the political process. The existence of that tension is a problem for the judges because politicians have a much greater capacity than the judges to use the media to their own advantage and perhaps there may be a temptation to use the media with a view to influencing or bringing pressure to bear on the courts.

These difficulties are naturally enlarged by judicial enforcement of human rights. That is because judicial enforcement of human rights takes the judiciary into the resolution of what amounts to political issues. But protection of human rights may

ultimately elevate the standing of the courts in the eyes of the community. The high status of the United States Supreme Court in that country is largely associated with its enforcement of the Bill of Rights provisions in the Constitution.

The demand for greater efficiency has resulted in the adoption by the courts of case management techniques, which have been imported from the United States. These techniques, particularly management of a case by the one judge from start to finish, are calculated to generate greater efficiency. Generally speaking, they will reduce the time of hearing but frequently at the cost of more time spent in preparatory work and in interlocutory applications. Case management is a considerable consumer of judicial time so it is essential that the judge is assisted by a legally qualified and competent assistant in undertaking case management work. Only if such assistance is provided does case management result in an overall saving in judicial time.

It must be recognised that the main push for case management comes from governments anxious to reduce the cost of the court system to government. The push does not come so much from the judiciary or the legal profession. Indeed, the judiciary and the profession have reservations about case management, its impact on judicial work and the reaction of litigants to it. There is a tension between case management and the interests of justice. The tension is illustrated in the question: is an adjournment to be refused simply because to grant it would constitute a departure from a case-managed timetable? In *Queensland v J.L.*

Holdings Pty Ltd,⁷ the High Court of Australia held that the court can grant an adjournment if it is necessary to ensure that the interests of justice are served.

For my part, I think that case management will generate greater efficiency. Indeed, it is likely that it will result in a better performance by the judge and the lawyers representing the parties. This would be beneficial but it was not the primary goal of case management; so it is, in a sense, a bonus. Whether these techniques result in a reduction of the cost to government remains to be seen.

We do not know whether case management reduces the costs to litigants. It is distinctly possible that the costs saved by the time saved in the hearing will be counterbalanced by the additional costs of early preparation and interlocutory hearings. There is a professional belief, based on experience, that early preparation is wasted to some extent because the work has to be undertaken again immediately prior to hearing. That said, case management may well facilitate settlements, the more so if it is coupled with emphasis on the prospect of ADR which is now a characteristic of the new approach to litigation, and a fast track procedure for routine cases offers the prospect of reduced costs.

The cost of litigation to the litigants continues to be a central problem. Its significance cannot be over-estimated because it gives the courts a bad name, even though the courts are not responsible except to the extent that court procedures and judicial laxity allow proceedings to take too much time.

⁷ (1997) 71 ALJR 294.

Recently, in a number of jurisdictions, legislatures and governments have insisted on sharp increases in court fees in accordance with the "user pays" principle. This move has not only added to the costs which litigants must bear; it also puts at hazard the principle that the courts are made available by the State for the resolution of disputes. Increased court fees have consequences for access to the courts, more especially when in some jurisdictions legal aid is being effectively reduced.

Response by the judiciary

It is obvious that a number of criticisms made of the judiciary rest on erroneous assumptions. To take one example. The notion that the judiciary should be representative of the community seems to rest on an assumption that the judges' function is to give effect to community sentiments or values. There is a germ of truth in this idea. The judges, successors to the jury in trials of fact, reflect community standards in applying legal standards such as reasonableness and in assessing the credibility of witnesses. But the judges do not decide cases by reference to community views of the outcome of cases. Judges decide cases by reference to the law and legal principle.

On the other hand, a judiciary which is not representative of the community may, in various situations, not enjoy the confidence of the community. So "representativeness" may be desirable, not least in the matter of gender. But the representative character of the judiciary must be considered in common with

other factors such as professional capacity, the more so now that added emphasis is given to efficiency. It would be a mistake to concentrate on "representativeness" at the expense of professional capacity and efficiency.

Judicial appointment

Although I thought otherwise in the past, it now seems to me that the procedures governing judicial appointment should be more transparent. Recommendation by a body such as Judicial Commission with a composition representing various interests, but including the Chief Justice and representatives of the judiciary and the profession, should be required. Likewise there should be a procedure for consultations, perhaps nominations, applications and a report. Naturally procedures might vary according to the circumstances in particular jurisdictions. For my part, I favour appointment by the executive government from a panel of names recommended by a Commission but that preference reflects the circumstances of the Australian jurisdictions. Prescribed procedures and greater transparency might lessen public concern about the judiciary.

Emphasis on transparency in appointment procedures may reduce some of the concern about accountability, a topic which I shall not discuss on this occasion.

Judicial openness

Ignorance of the judicial function and the anonymity of the judges contribute to media criticism and community concern about the judiciary. There is an obvious need for better education about the role of the courts - perhaps as part of a civics

course in school education. There is, in addition, more that the judges can do. They can deliver lectures and addresses on appropriate occasions and deliver papers at conferences and seminars. They can give interviews to journalists in whom they have confidence and on radio and television on suitable topics. They can write articles for journals and newspapers. Sir Stephen Sedley, now a Lord Justice of the English Court of Appeal has written articles for the *London Review of Books*. Justice Michael Kirby is a noted public speaker and writer on legal topics.

The main burden of communicating with the media and the public naturally falls on a Chief Justice or Chief Judge of a court. And it is important that the activities of other judges have the assent of the Chief Justice or Chief Judge. Lord Taylor of Gosforth and Lord Bingham of Cornhill, by means of media conferences and interviews, have done much to convey to the English public a stronger impression of the judiciary and what it does.

All these activities are important in helping to impart better knowledge of the courts and what they do and also in conveying an impression of judges as personalities rather than as stereotyped authority figures. These days the public wants to see and hear the main actors rather than rely on others to speak for them.

Response to particular criticisms of courts and court decisions is a more troublesome question. The judges do not need to put out every brush fire.

Indeed, the judges should only respond to exceptional criticisms and only then when a response will be effective. In the past, the judges could rely on the Attorney-General to defend them on most important issues. However, to judge from the Australian experience at least, Attorneys-General appear to have little enthusiasm for this their traditional role. So the judges must assume this role as part of their responsibility.

Of course, the commentators can play an important part in discussing the courts and in defending them against criticism. The commentators will include academic lawyers. It is imperative that the courts provide promptly to the commentators judgments and materials so that they can express their opinions without delay. In many respects informed opinion offers the best prospect of explaining judicial decisions and court problems to the best advantage.

Information officers

An essential element in informing the media and the public is the appointment of an information officer with media experience. A number of Australian courts have employed information officers. The experience has been beneficial. These officers liaise with the media, provide useful information and advice and serve as a medium between the judges and the media. They can, with the co-operation of the judge, give the media a summary of the decision in a case which is newsworthy. They can also be a source of valuable information and advice to the judges, not least as to the many pitfalls awaiting judges who give interviews. They can sometimes inject balance into a report or story. They can also respond

on behalf of the court when a response at that level is appropriate. The media officer should be responsible to the Chief Justice or presiding judge.

Information officers can also play a part in generating the information which is provided for educational programs and for groups such as school groups which visit the courts.

Court decisions

The claim sometimes made by judges that their judgments sufficiently convey to the public the reasons for the decision cannot be accepted. Judgments are written by the judges primarily for the parties and the legal community. The judgments necessarily deal comprehensively with the arguments which are advanced on behalf of the parties. For that reason they are often technical and prolix. Someone described the characteristic style of the judgments of the High Court of Australia as "dense". Whether this meant "closely compacted in substance", "impenetrable" or "crass, stupid", I was never sure.

More can be done to write judgments in a style which makes them comprehensible to intelligent members of the community. In this respect, the American judgment writing style - sometimes referred to as "the telegraphic style" is instructive. It confines discussion of authorities to what is necessary.

Of greater potential importance is the publication of summaries of more complex judgments (as distinct from judgments which are simply newsworthy) which

enable the media, lay commentators and non-lawyers to understand what the thrust of the decision is and how it disposes of the main issues. The preparation of such summaries is not a task for the amateur or an information officer. It is a function to be undertaken by a skilled lawyer who is responsible to the Chief Justice or Chief Judge.

Courts as "user friendly" institutions

Much can be done to improve the relationship between the courts and those who resort to the courts. In some older courts there is inadequate accommodation for witnesses and members of the public. Generally speaking, these problems are being overcome. Court officers are available to provide information. More efforts are now made to ensure that the time of witnesses is not wasted. It is important that judges treat litigants and witnesses, as well as lawyers, with courtesy unless good reason emerges to the contrary.

The judiciary and the political and administrative process

Traditionally the judiciary has refrained from discussing with politicians and administrators the problems that arise between the judiciary and the other branches of government. There are exceptions to that broad proposition. Funding and resourcing the courts, court administration, court structures, jurisdictional and other particular questions have been regularly discussed, notably between a Chief Justice and an Attorney-General or Law Minister and officers of those departments.

More recently there have been dialogues between judges, politicians and administrators at legal conferences and seminars. This has been a useful development which promotes better mutual understanding. Judges constantly express concern about lack of political understanding of the judicial process. But judges often lack knowledge of the political and legislative process; for example, the process of legislative drafting.

The suggestion has been made, based on a United States model, that there should be periodic meetings between representatives of the judiciary, the legislature and the executive government, to inform each group about the perspectives of the others and to iron out avoidable differences.⁸ The holding of such meetings certainly has the potential for reducing, if not resolving, some of the current tensions. But there are inherent problems. Take political and administrative criticism of judicial review, more particularly as it applies to contentious issues in immigration and deportation cases. Is there not a risk that judges may be influenced or seen to be influenced in relation to issues which will arise for later decision? What are the safeguards for judicial independence in meetings of this kind? Informal casual dialogue between individuals at conferences and seminars is one thing but regular meetings between representatives raise the discussions to a higher plane of significance. The traditional principle has been that the judicial decision is based on argument presented in open court and that alone.

⁸ S. Parker, Courts and the Public, *Australian Institute of Judicial Administration*, 1998, p 165.

Here I should mention a recent initiative on the part of Chief Justice Spigelman of the Supreme Court of New South Wales concerning the perennial problem of sentencing. In New South Wales, law and order politics, along with media criticism of leniency in sentencing and complaints of inconsistent sentencing, had created a problem in terms of public perception of what the courts were doing. A Court of Criminal Appeal constituted by five judges with the Chief Justice presiding - the Court is normally constituted by three judges - decided to issue guideline judgments in order to ensure consistency in sentencing decisions.⁹ The technique of issuing guideline judgments had been initiated by the English Court of Criminal Appeal. The technique involves, as you no doubt know, the formulation of general principles and sometimes an indication of the appropriate range to guide trial courts. Guidelines are indicative only. They are not intended to be applied in every case as if they are binding rules.

The judgment was significant in its recognition of the important element of maintaining public confidence in sentences actually imposed and in the judiciary. In this respect, guidelines have a role to play in ensuring an appropriate balance between the broad discretion that is necessary to ensure that justice is done in the individual case, on the one hand, and, on the other hand, the desirability of consistency in sentencing and the maintenance of public confidence in sentences imposed and in the judiciary as a whole.

⁹ *Reg v Jurisic* (judgment delivered 12 October 1998). The appeal by the DPP was against a sentence for home detention for 18 months for occasioning grievous bodily harm by dangerous driving. The appeal was allowed, a term of 2 years imprisonment being substituted for home detention.

Chief Justice Spigelman expressed his agreement with a speech made by Lord Bingham of Cornhill to the Police Foundation on 10 June 1997 and went on to say that -

"The seriousness with which society regards offences - reflected in maximum permissible penalties - is an important consideration in sentencing ... Significant disparity between public opinion and judicial sentencing conduct will eventually lead to a reduction in the perceived legitimacy of the legal system.

- As in England, it appears that trial judges in New South Wales have not reflected in their sentences the seriousness with which society regards the offence of occasioning death or serious injury by dangerous driving."

Following delivery of the judgment, the Chief Justice made a public statement about the effect of the judgment. He also wrote a short article on the judgment which was published in a leading Sydney morning paper.¹⁰ The rival newspaper¹¹ then published a story which related that some nine weeks before the judgment the Chief Justice and the Chief Judge at Common Law had given an audience to two Opposition MP's who had secured more than 30,000 signatures to a petition complaining of over lenient and inconsistent sentences, that being a matter of undoubted community concern. The Chief Justice has made no comment on this story. The Court's judgment has been welcomed by the Government and members of the Opposition and as well by the media.

¹⁰ *The Daily Telegraph*.

¹¹ *The Sydney Morning Herald* (17 October 1998, p. 36).

The newspaper account of the meeting with Opposition politicians recorded the State Government as asserting that it had nothing to do with the origins of the judgment. The account reported that, asked whether he had discussed with the Chief Justice public concern at sentencing, the Attorney-General replied -

"Only in the most general ways. I speak to the heads of jurisdictions every week or so and, of course, we discuss issues of general concern. But certainly the Government put no submission to the court, nor has it applied any pressure to the court to act in any particular way."

This statement reveals no more than what one would expect of communications passing between an Attorney-General, a Chief Justice and heads of jurisdiction, communications which do not concern particular cases and do not attempt to influence the court to reach particular outcomes.

For those of you who may be interested in the place of public opinion in sentencing, the matter is discussed in an interesting article in the (1998) *Criminal Law Review*.¹² The ways in which judges are to derive information about community standards generally is likely to become a topic of debate.

Litigants in person

The adversarial system, especially the jury trial, is not well geared to deal with the litigant in person. The emphasis given by the adversarial system to examination and cross-examination of witnesses places the litigant in person at a distinct disadvantage. The so-called inquisitorial system is less of a handicap for the litigant in person simply because the role of the advocate in shaping the proceedings is rather more confined. The litigant in person is at a very severe

¹² S. Shute, "The Place of Public Opinion in Sentencing Law" (1998) *Criminal Law Review* 465.

handicap when he is an accused in a serious and complex criminal trial. It is extremely difficult for the trial judge to ensure that such an accused receives a fair trial without compromising the judge's position of independence. That is one reason why, in the High Court of Australia, we decided that an indigent person, charged with a serious criminal offence, who through no fault of his or her own cannot obtain legal representation, is entitled to a stay of proceedings to enable such representation to be provided at the expense of the State.¹³

The International Covenant on Civil and Political Rights (1966), like the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), provides for a qualified right to legal representation. The High Court decision, basing itself on the common law right to a fair trial, achieves a similar result. If, as is the case, a qualified right to legal representation is thought to be necessary in jurisdictions where an inquisitorial procedure prevails, its desirability in a common law system can scarcely be disputed.

The problem presented by the litigant in person in our system of justice is likely to become more acute and not simply for economic reasons. In the United States, Federal Courts a very high percentage of cases are "pro se" cases (where the litigant appears in person). It is likely that the percentage will rise in other jurisdictions. So it is imperative that we devise suitable procedures for handling such cases and, in doing so, we must be careful about drawing unnecessary distinctions between cases in which a litigant is represented and a litigant is

¹³ *Dietrich v The Queen* (1992) 177 CLR 292.

unrepresented. Some differences cannot be avoided in order to ensure that the time of a court is not wasted. The increasing percentage of cases involving litigants in person and the undesirability of making unnecessary distinctions is an additional reason for placing more emphasis on the submission of written material, especially written argument.

Conclusion

At the end of the day the problems facing the judiciary and the remedies to those problems are associated with the role of the courts in the modern world. The courts are now seen as important public institutions which not only maintain the rule of law but also protect the rights of individuals. As such they must exercise their powers not in the interests of the judges and the legal profession but in the interests of the community. Acceptance of that proposition entails the provision of information, the promotion of accessibility, regard for the interests and convenience of others. It also entails taking account of criticism and, where necessary, responding to it appropriately.¹⁴

¹⁴ For more detailed suggestions, see S. Parker, "Courts and the Public", *Australian Institute of Judicial Administration* (1998).