*The Australian Judiciary in the 1990s**

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The Australian Judiciary has recently attracted more media attention and public scrutiny than it has previously received at any time in my career. One would like to think that that is because people have begun to recognize the fundamental importance of what the courts do. And it may well be that the widely publicized decisions of the High Court in recent years have had something to do with it.

But the distasteful (and more likely) possibility is that much of the public attention stems from dissatisfaction with the quality of legal services provided to the community. The courts and the judges, along with the legal profession, have been in the spotlight of that attention. Received doctrine has it that, due to the very high cost and the delays inherent in litigation, the accessibility of the court system has failed to measure up to the expectations of the ordinary litigant. Community expectations have almost reached the point that persons who have sustained loss or injury believe that they, at little or no cost to themselves, should be able to sue to recover compensation from someone else. Whether those expectations are realistic or justified is another matter. The point is that many who wish to litigate simply cannot afford to resort to the courts.

The judges are seen as having some responsibility for the present state of affairs. True it is that judges do not fix lawyers' fees and that they have no alternative but to administer the thorough yet expensive common law adversary system of trial. But the judges happen to be identified with that system with all its merits and detriments. In one sense that is right because judges control court procedures and, in some cases, court administration.

The Burgeoning Cost of Litigation and Responses to It

Governments bear a large share of the cost of litigation. Increased litigation, in part a product of the availability of legal aid, has added considerably to the governments' bill for both court funding and legal aid. That meant that governments were no longer willing to maintain an increasing level of funding for the courts and legal aid[1]. One response was to lift the level of

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1. The present level of court funding differs between jurisdictions; some State courts fare not at all well. The "principles" on which funding is based are by no means satisfactory and create difficulties for forward planning. There is a bias in favour of "new initiatives", particularly if the success of a new initiative is a political imperative.

court fees - a move in the direction of user pays which has resulted in additional costs to litigants Another was to insist that courts should become more efficient, i.e., lift the number of cases disposed of

To meet this situation, the courts have introduced streamlining procedures such as case management techniques developed in the United States. They are designed to reduce time spent in court hearings and to eliminate delays These techniques require early preparation of cases and more use of written materials Curiously enough, solicitors have criticized these techniques on the ground that they add to the work of the profession, thereby increasing costs I doubt that there is substance in this complaint Although the new techniques have been successful in civil litigation, there is less scope for them in criminal cases The length and complexity of the criminal process and of trials continue to be a major problem in other common law countries.

For the future, our hopes for reducing pressure on the court system rest substantially on two main possibilities One is greater recourse by litigants to alternative dispute resolution; the other is a lowering in community expectations about litigation as a solvent of problems However, even if these developments take place, their impact in the criminal courts, where we have trial by jury, will be negligible

Except in the realm of family law, alternative dispute resolution has not proved as popular as one might have expected Our legal culture is firmly anchored in the adversary system. There are some signs that the heavy cost of long-running litigation, along with the widely publicized success of some prominent mediation efforts, will eventually work a change in sentiment Such a change would bring Australia more into line with Asian nations where mediation and conciliation are more accepted modes of dispute resolution In passing, I make the comment that our effort to promote alternative dispute resolution is a clear recognition that the adversary system alone is incapable of providing a comprehensive answer to our problems

The Judge as Manager

Making the adversary system more efficient necessitates a change in the traditional role of the judge In civil cases, the judge is now expected to be more of a manager: to keep the parties to the issues, to limit protracted and unprofitable cross-examination and to confine oral argument. In this respect, the role of the common law judge becomes a little closer to that of the judge in the civil law system, though the gulf between the two is still a very large one So far there is no indication that Australia is likely to adopt the European civil law approach which is more inquisitorial in character Such an alteration would call for a massive cultural change, an expansion in the number of judges because that system makes greater use of judges, and the training of judges along very different lines Adoption of the European civil law system might well reduce the cost of litigation to litigants but it

might well increase the cost to governments of funding the court system. However, at the same time, there is some scope for giving the common law judge more control over civil proceedings, e.g., deciding how many witnesses a party should be permitted to call, whether cross-examination should be allowed and for how long. These possibilities have limited application to the criminal trial where scope for the judge acting as a manager is more limited.

Already, in cases involving litigants in person, judges are expected to take a more active role in the courtroom to ensure that a litigant in person is not disadvantaged by his or her lack of legal representation. And other officers of the courts, particularly registry officers, are also expected to provide assistance. This increases the workload of the courts, particularly at a time when litigants in person seem to be becoming more common, due in part to the high cost of professional legal services.

Legal Complexity

There is undoubted scope for reducing the complexity of our law. Legal complexity is a significant contributor to costs inside and outside the courts. The *Income Tax Assessment Act* and the *Corporations Law* are well known examples of the complexity of modern legislation. There are, I am glad to say, proposals to simplify them. But, as they stand, they represent the tip of a very large iceberg which includes many instances of prolix or poorly expressed legislation. Legal complexity is not merely a matter of drafting inadequacies. Very often it is the product of ill-judged policy decisions or expedient political compromises. Another contributing factor is the widely held belief that every problem has a legislative solution. In other words, the passing of a new law, like the waving of a magic wand, will solve fundamental community problems. I happen to think that belief is mistaken but, so long as it holds firm, we shall remain a community beset by law and legal disputation.

The principles of both statute law and judge-made law are expressed, to a greater extent than before, in terms of standards rather than strict rules. It is said that the prescription of standards leads to an element of uncertainty. However, the prescription of standards results in justice in particular cases and the element of uncertainty decreases as court decisions reveal how the standard is applied.

The Expanding Role of the Judge

Just as the judge is becoming more of a manager of the litigation, so the judge is also likely to become more of a constructive interpreter of legislation. That will happen as the so-called "plain English" reforms in legislative drafting find their way into the statute book. The movement away from detailed regulation, which reached its apogee in the *Income Tax Assessment Act* and the *Corporations Law*, to the broader statements of principle

characteristic of United States legislation and, to a lesser extent, of United Kingdom legislation, will leave the courts with more to do. The judges will be called upon to spell out the interstices of the legislative provisions. In doing so, they must resolve questions of interpretation by reference to the policies and purposes which are reflected in the legislation.

What I have just said may not be welcome news to those who believe that the courts do no more than apply precedents and look up dictionaries to ascertain what the words used in a statute mean. No doubt to those who believe in fairy tales that is a comforting belief. But it is a belief that is contradicted by the long history of the common law. That history is one of judicial law-making which shows no signs of unaccountably coming to an end. However, a distinction must be made between appellate judges and primary or trial judges who, generally speaking, are confined to applying settled principles of law to the facts as they are found.

Changes in the principles of substantive law attract criticism in varying degrees. But, interpretations of the Constitution apart, although it is always open to the legislature to repeal or amend the common law as the courts declare it or the interpretation which the courts give to a statute, legislative overruling or amendment of a judicial ruling is a relatively rare occurrence.

Sometimes judicial initiative is inevitable. That was the case when the High Court decided two years ago that the common law did not entitle a husband to sexual intercourse with his wife against her will despite old authorities which suggested otherwise[2]. It is no longer feasible for courts to decide cases by reference to obsolete or unsound rules which result in injustice and await future reform at the hands of the legislature. There is a growing expectation that courts will apply rules that are just, equitable and soundly based except in so far as the courts are constrained by statute to act otherwise. Nothing is more likely to bring about an erosion of public confidence in the administration of justice than the continued adherence by the courts to rules and doctrines which are unsound and lead to unjust outcomes.

Judicial Appointment

There were several sub-themes in the media campaign directed at lack of gender awareness on the part of judges. It was suggested, following the example of the English press, that judges are an out-of-touch élite, set apart from the community by gender, class and race. This led to a call for a more representative judiciary - more female judges, more judges educated at State schools, more judges from non-Anglo-Celtic backgrounds. And a more public process of judicial appointment was suggested.

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2. *Reg v L* (1991) 174 CLR 379. In England, the old rule, described as "anachronistic and offensive" by the Court of Appeal, was also overturned: *R v R* (1991) 2 WLR at 1074; affd House of Lords (1991) 3 WLR 767.

The Judiciary, like other institutions - for example, our Parliaments - is not fully representative of the various elements in Australian society Although a more representative Judiciary may assist in maintaining public confidence in the administration of justice, it is essential that that be achieved without any diminution in the quality of judicial performance The insistent demand for enhanced judicial performance requires the appointment of those who are best qualified A diminution in the quality of judicial performance would impose an even greater burden on courts of appeal which are already struggling with a massive workload It would also erode the essence of the existing system which depends on decision-making as well as presentation of argument by highly-skilled professionals.

The demand for judges to represent sections of the community may be misunderstood as a statement that, in deciding cases, a judge acts as a representative of a section of the community That, of course, would be completely inconsistent with the judge's paramount responsibility to act impartially That is why we continue to protect judicial independence, though the value of the concept may not be fully appreciated by the public. Unfortunately, the public may have gained the impression that judicial independence is a cloak for judicial privilege.

Only ten days ago the Attorney-General for New South Wales announced that the State would advertise for expressions of interest from persons seeking judicial appointment and that their names would be put on a list Critics of the proposal suggest that it will lead to speculation about appointments, lobbying for appointment and the best qualified persons declining to put their names forward.

The proposal is said to have two advantages. The process of appointment is made more public I suppose the inference to be drawn is that the Attorney, if not Cabinet, considers the names on the list But that would not tell us why the government appointed A instead of X, Y or Z and who was consulted as to the relative merits of A, X, Y and Z? The keeping of the list will avoid an Attorney's embarrassment at being turned down by many prospective appointees, as has happened in recent times However it will only avoid that problem if all suitably qualified persons willing to accept appointment register their interest The possibility remains that an Attorney will be compelled to look beyond the list if he or she is looking for the best appointment and that is what an Attorney should be doing It would be a step backwards if the new procedures excluded the best qualified persons from consideration simply because their names were not on the list We should continue to seek to appoint the best qualified person and, if need be, to persuade that person to accept

The debate and the proposal do not focus on the core of the problem - the difficulty of attracting the best qualified persons to accept judicial appointment[3]. The gulf between the higher reaches of professional

3. See "A judge? I'd rather be a QC, thanks", *The Times*, 22 February 1994, at 33

remuneration and judicial remuneration is an obstacle Quite apart from that, there are various disincentives Judges are saddled with a daunting and difficult workload; they do not enjoy the status their predecessors enjoyed; they have been subjected to strong criticism, some of it quite unfair Their situation is scarcely an inducement to the leaders of the profession to change course.

Judicial Retirements

The phenomenon of early judicial retirement, itself some indication of lack of judicial job satisfaction, is more a problem in New South Wales than elsewhere in Australia, though it is beginning to surface in Victoria as well It is a reflection of a problem that has assumed serious proportions in the United States Already it has focused attention on the terms of the judicial pension Some may think it desirable to restructure the pension entitlement with a view to discouraging judges from early retirement On the other hand, the pension has been a major factor in attracting the best lawyers to accept judicial appointment It is of vital importance that changes to the judicial pension do not make it even more difficult to recruit quality judges

Judicial Independence

There has been talk, some of it ill-informed, of threats to judicial independence The real threat to judicial independence is that the public and the media do not fully understand its importance It seems to me that, subject to constitutional limitations, governments acting with legislative authority are entitled to restructure courts and tribunals when restructuring is necessary in the public interest In some situations, hopefully rare, that may mean that it is difficult to continue to provide suitable work for a judge or tribunal member The problem generally arises with a specialist court or tribunal whose members have particular qualifications We need to devise appropriate protection for a judge and a tribunal member whose court or tribunal has no effective work to do and who may lack the qualifications or capacity to take up another appointment What judicial independence does mean is that those persons coming before the courts, particularly in cases involving a contest with the government, can rely on the judge to be fair and impartial and not subject to pressure or influence by the government or any other person That is why appointment of the best qualified persons is so vital and a reason why, in the past, barristers, with their reputation for independence, have been the principal source of appointments

Relationship with the Media

In the last 12 months judges have shown a greater willingness to communicate with the media The Federal Court and the Supreme Courts of New South Wales and Victoria have appointed information officers Judges have discussed judicial problems openly in public speeches and have given

interviews For various reasons, I have supported this change of direction. Attorneys-General do not and cannot always be expected to speak up for the judges Even if they did, their remarks lack impact These days people expect the actors themselves to speak so that they can form some picture of them as personalities More than that, judges are in a better position than anyone else to give an account of what they are doing and enhance media and public understanding of the role of the courts Greater communication by the judges will, I hope, lead to a better understanding of what the courts are doing and more informed debate about proposals for change which affect the Judiciary

Conclusions

I have said enough to indicate that today's judges are working in an era of rapid and substantial change. The directions of change are not completely apparent. There are important questions which call for answers and much depends upon those answers. I conclude by identifying some of those questions:

(1) How much of our national income are we willing to provide for the funding of the legal system, including the courts?

(2) What will be the terms and conditions, including salary and retirement benefits, of judicial appointment?

(3) What is the future of judicial independence and how will we best protect it?

(4) Are we prepared to make more radical changes to the common law adversary system which would bring it closer to the civil law system?

(5) What role are we prepared to assign to the judges? For example, are we prepared to give them a jurisdiction to enforce a Bill of Rights, a jurisdiction exercised by courts in all major common law countries except Australia and the United Kingdom?
