

Law and Media – Adversaries or Allies in Safeguarding Freedom? *

The Hon Justice Michael Kirby AC CMG * *

Law and Justice

I start by thanking the Chancellor, the members of the University and all those present for the invitation to participate in this graduation ceremony.

This is my first visit to Southern Cross University, although the fame of its School of Law and Justice is well established. I am proud to be associated, as a member of the editorial board of the *Criminal Law Journal*, with Professor Stanley Yeo, a world respected expert in criminal law. I have enjoyed frequent contacts with Professor Brian Fitzgerald, past Head of School, who has a global reputation on the interface of law and information science. Professor Fitzgerald, before his departure for the Law School at the Queensland University of Technology, and the present Head of School, Mr Richard Harris, have kept me informed of the law programme of this University. I know and respect other members of the teaching staff. I honour the foundation Dean Professor Jim Jackson. All are welcome guests at the High Court in Canberra.

I support regional and new universities and their law schools. Every year I recruit my associates according to principles of equal opportunity. Other things being equal, I favour appointees from outside the Sydney/Melbourne axis which tends to be very well represented. At the moment, my male associate, Bruce Leishman, is a graduate of Murdoch University in Western Australia. My female associate, Elisa Arcioni, is a graduate of the University of Wollongong. Both of them are the first graduates from their universities to be appointed as High Court associates. This is a sign of the coming tide of talent. In today's world, it is ability that matters.

* Based on an address to the graduation ceremony held at Southern Cross University on 27 April 2002 in the Schools of Law and Justice and of Multimedia and Information Technology.

* *Justice of the High Court of Australia.

Our inter-connections are on the Internet, not in the Old Boy network. I have had some excellent applications for appointment as associate from Southern Cross University. Before I hang up my robe for the last time, or appeal timorously to the High Court in the sky, I hope to recruit a graduate of this University. You can be proud of the achievements of the University. They come together on an occasion such as this. You are permitted a moment of pride and self-satisfaction.

An occasional speaker is obliged to say a few things. But the speech must be short. And that presents terrible difficulties for a lawyer, and especially a judge.

I must not only congratulate the graduates but also their families and friends who supported them on their journey to this moment. For most people, a university degree or diploma is a family effort. For many who graduate in Australia, the occasion is a first such ceremony for the family. Of the present Justices of the High Court none was the child of a university graduate. Access to higher education is now a strength of Australia. Education, including higher education, belongs as of right to all who have the requisite ability.

Think, at this moment of success, on those who are less fortunate. Consider your first class in kindergarten or in primary school. How many of those who sat in that classroom have made it to a graduation ceremony like this? You know that you are no better than the others. Indeed, the prize of education imposes upon you the obligation to remember and serve those who have no degrees. A degree is not just an entry ticket to the world of high incomes. With privileges in life come duties. Always remember the disadvantaged. Practise equal opportunity. Rid your minds of unfounded prejudice. Be the vanguard of a better, juster and more compassionate society.

Never forget that, in this University the legal faculty is called the School of Law and Justice. Those added words “and Justice” carry with them a personal challenge. Law is not enough. Justice is the banner under which all Australians should walk. Justice for women. Justice for children. Justice for the old. Justice for indigenous Australians. Justice for people of all races and religions. Justice for homosexual Australians. Justice for refugees. Justice for all people. Not just for the rich, the popular or the majority. Equal justice under law for all.

Courts & Media

This ceremony involves graduates from two Schools of the University within the Division of Arts. Not only the School of Law and Justice but also the School of Multimedia and Information Technology. It is a natural combination.

Information technology has produced amazing advances during my lifetime. It has the potential to reinforce law and to strengthen justice.

For example, it is now more difficult to hide the acts of oppressors, the cruelty of war, the deceitfulness of leaders and the abuses of human rights that once were hidden because we simply did not know. In a real sense, the fall of the Berlin Wall was a result of the new technology. It became impossible to closet millions of people behind a physical wall that was so easily penetrated by informatics. So it is with the remaining autocratic societies abroad and with unjust laws at home. As more young people gain access to the Internet, it will become impossible to control their minds by the means of the past. The explosion of modern media also represents a healthy antidote to the controlling power of the press barons of earlier times. In Australia, we must ensure that it remains that way. Diversity of opinion defends freedom.

It may well change in a future that will be shaped and created by the graduates who leave this ceremony today. But it remains true today that most Australians receive their knowledge of the world, of their country and local community, from the daily newspapers and from the television and radio outlets. These are the major sources of information and opinion for most of us. They are therefore the outlets that provide the data upon which the representative democracy, established by the Australian Constitution, operates in practice.

Yet in the High Court in Canberra, I watch with a sense of unease the lack of attention to the decisions of the Court. My reaction is not one of hurt feelings. As a judge of nearly thirty years, I am beyond that. But if your job is that of upholding the Constitution, inevitably you spend a great deal of time with that document. Reading it. Reading between the lines. Thinking about its meaning and operation. Considering how its brief language can operate with law and justice for all Australians in the age of cyberspace and the human genome.

The representative democracy of our Constitution is not confined to a ceremonial visit of electors to the ballot box each triennium. As I read

the Constitution, it envisages a system of government with all power deriving ultimately from the people.¹ It therefore contemplates an informed electorate that has the means to keep in touch with important events that concern the government of the country.

For the most part, in Australia, government is exercised in Parliament, in the ministries or in the bureaucracy. But important questions affecting the Constitution, the common law and the principles by which we live together are also handed down every other week in Canberra. With few exceptions, these decisions of the High Court sink without trace. Last year, the American trial of Timothy McVeigh attracted much more attention in the Australian media than any of the decisions of our courts, including the High Court. The global dimension of multimedia and information technology has meant that, in large part, we have become a segment of the media of the United States. We should resist this tendency. The United States is a different society with a different history and different values. We have our own stories. Some of them, quite interesting and important, are found in the decisions of the courts.

Yet when court decisions are reported in Australia it is usually in terms of personality and controversy. The issues before the High Court are commonly reduced to such terms. The recent decision of the Court² upon the challenge by the Roman Catholic Bishops' Conference to a decision of the Federal Court of Australia³ was widely reported in the Australian media as an endorsement by the High Court of the quest by an unmarried woman who was seeking in vitro fertilisation therapy to have such treatment. This was not what the Court decided. In fact, it held that it could not decide that question. A majority concluded that it was impermissible for constitutional reasons. A minority concluded that it should not be done for discretionary reasons. None of the Justices dealt with the merits of the patient's claim or the bishops' objections. Yet ordinary Australians, reading or viewing most of the media reports about the decision, could be forgiven for concluding that there was a unanimous judgement of the High Court on the factual merits of the case and the

¹ *McGinty v Western Australia* (1996) 186 CLR 140 at 237; *Grain Pool of Western Australia v The Commonwealth* (2000) 200 CLR 479 at 523 [113]; cf Kirby M D, "Popular Sovereignty and the true foundation of the Australian Constitution" (1996) 3 *Deakin Law Review* 129 at 135-139.

² *Re McBain; Ex parte Australian Catholic Bishops' Conference* (2002) 76 ALJR 694.

³ *McBain v State of Victoria* (2000) 99 FCR 116.

legalities of the applicable Victorian legislation. Those merits might, or might not, have been with the patient concerned. But the High Court said nothing about them. The inaccurate presentation of the decision then becomes an element in the social and political maneuvering and posturing. At the least, the people of Australia deserved a more accurate portrayal of what the High Court actually said and what its decision held to be the law.

A few years back several of the major news outlets in this country employed dedicated journalists who covered accurately the decisions of the High Court. Today, virtually no newspaper and no television network has such a special correspondent. The result is that the news coverage of the third branch of government is largely handed over to political correspondents based in Canberra. When, occasionally, they glance down the hill from Parliament House to the High Court, they often fail to adjust their spectacles. All too frequently they think that our work can be reduced to the banalities of personality conflicts. The hard yards of understanding, analysing and constructively criticising the decisions of the High Court are, it seems, normally beyond the interest or talent of the Australian media.

To some extent, the blame for this neglect must be shared by judges themselves. Typically, their reasons are detailed. They make few concessions to easy communication. They are in writing, not oral. There are no summaries. No interviews. No press conferences. No “angles” or “spins”. Decisions tend to come down together, on the same day, often in large numbers. It is all too difficult to digest and communicate them. Perhaps the journalists are afraid of making mistakes. Perhaps it is easier to use emailed press releases from others to meet the deadlines or to grab a byline – another feature of contemporary mass media, the personality journalist.

Should our courts make it easier, so as to reach out, through modern technology, to the people whom they serve? Should our highest court, like the Supreme Court of Canada, participate in a dedicated television channel that covers the arguments and decisions of the top judges? Should the High Court provide summaries of its decisions so as to encourage more and more accurate coverage of its important cases? Would that attempt make any difference in a news media increasingly dedicated to conflict, mixing fact and opinion and pandering to the views of puffed up commentators?

The Supreme Court of the United States, like the High Court of Australia, has resisted television cameras in court. Even when *Bush v Gore*⁴ was argued, the cameras stayed outside in the snow. But the Supreme Court Justices in Washington in 1973 appointed a public information officer. In his recent autobiography, the first such officer-holder has revealed his often discouraging experience⁵. With some exceptions, journalists were as unaware as most citizens of how the apex court actually functioned. Most were just not interested to cover the actual work of the court. Most wanted information, often trivial, on the habits of the Justices. Is there a risk in engaging such a person - that their presence will encourage more personality coverage rather than more substance? Personality and entertainment rule. All too often Hollywood trumps law and justice. In America, Judge Judy may appear the nation's highest judge. In Australia perhaps it is the League judiciary. If you read or watch the Australian media there is probably more coverage of that famous judicial organ than of the nation's constitutional court.

Does it matter? Is it a happy land that knows nothing, and cares less, about the decisions of the third branch of its government? I believe that it does matter. Now, the High Court is fighting back. Its decisions are on the Internet within ten minutes of delivery. They reach out directly to all citizens who are interested. This very day, by decision of the Justices of the High Court and for the first time, an advertisement is being published nationally, offering for appointment a new position of public information officer of the High Court. Most State and all federal courts have such an officer. Now, on the eve of its centenary year, the High Court will move in the same direction.

Yet the moulders of opinion and the manipulators of power could not, it seems, care less. The decisions of the High Court, big and small, mostly sink like stones - without trace. Those that are reported are all too often misunderstood or so abbreviated in the report as to give a mangled idea of what actually happened. Perhaps a skilled public information officer will at last turn this culture of indifference and misunderstanding around. Time will tell.

If our concern, as judges and citizens, is with law and justice, we must make sure that information technology is more than a medium of

⁴ 531 US 98 (2000).

⁵ McGurn B, *America's Court, the Supreme Court and the People* Fulcrum, 1997, 167-174.

entertainment. But can the settled ways of the Australian mass media be changed? Can the courts bring their important doings into the homes of the nation? Can multimedia and information technology come to the rescue of law and justice? Or is the new technology the ultimate nemesis of the judges, condemning them, in Australia, to the irrelevancy of trivia whilst the truly important things of life grab headlines and sell media space and time?

It is appropriate that at this University these two Schools should graduate together. The future of democracy in Australia and everywhere else depends upon the way in which each serves the community. If law serves only the rich and the media and its technology are the new opiate of the poor, civilisation will be in danger.

Today I stopped first at Ballina in New South Wales, near Byron Bay and the campus of this University, before I came to this ceremony in Lismore. I stood on a promontory and saw the waves of the Pacific Ocean come washing in to this most Eastern extremity of our country. I thought of the thousands of kilometres each wave had travelled and of the thousands of kilometres behind me to the far coast in the west of our continental nation. It is a land indeed blessed with beauties rich and rare.

We can certainly say that the blessings upon Australia involve a strong, honest and independent legal system and a media that is not controlled by overweening governmental or military power. But we must dedicate ourselves afresh to ensure that our law serves justice and basic human rights and that our media and information technologies advance the causes of truth and diversity of opinion, not just entertainment. Only then will civilisation advance in Australia. Only then will we be worthy of the trust we hold over so large a portion of the surface of the world.