

THE ROLE OF THE JUDICIARY IN A MODERN DEMOCRACY

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The Judicial Conference of Australia is to be congratulated upon arranging this symposium, in which a number of important issues concerning the role of the judiciary in a modern democracy will be discussed.

It is not my purpose to intrude into the subjects which will be dealt with in the various papers and panel sessions. My purpose is simply to identify some considerations which seem to me to form part of the context in which these subjects arise.

Debate about the role of the modern judiciary is often focused upon issues which have little practical relationship to the day to day work of the great majority of judges. Those members of the judiciary who sit on the High Court, or intermediate Courts of Appeal, are usually of greater interest to commentators than trial judges. However, they represent a very small, although important, part of the judiciary. The essential role of judges today is as it has always been, that is to say, the administration of civil and criminal justice, impartially, according to law. The great bulk of civil and criminal justice is administered at the trial, not the appellate level, and it is at the trial level that the community and the judiciary have their most important contacts. Discussion of the role of the judiciary which concentrates on appellate courts tends to ignore this reality.

Most judges spend little, if any, of their time dealing with exciting questions such as the proper relationship between parliament and the judiciary, the virtues of incremental as opposed to radical change in legal principle, or the proper role of international conventions in the interpretation of local statutes. Most working judges look on with bemused resignation as competing groups berate the judiciary as a class either for their imperialist adventurism, or for their shellbacked conservatism. The truth is that most judges have a job to do which gives little opportunity for indulging in predilections of that kind.

The role of judges in any particular community is manifested in what they do and how they do it. The nature of the work which courts are given to do is what primarily determines their place in the scheme of things. It is interesting to reflect on how much of the High Court's modern reputation, in some quarters, for radicalism, can be explained by reference to the fact that there has occurred, in relatively recent times, an important change in the character of the business that goes to the court. It always has been the case that a large part of the day to day work of the High Court has consisted of hearing civil appeals, in the exercise of the court's role as an ultimate court of appeal.

For most of this century, provided a case involved money or property of a relatively modest amount or value, civil litigants could appeal to the High Court as of right. Most civil appeals to the High Court were brought as of right. Any judge would know that most cases of that character can be decided by the application of well established principles of law. A court whose workload consists in large part of such cases, (and this still applies to intermediate courts of appeal), is likely to appear conservative. Most of its decisions will be based on the application of precedent and settled principle. Only in a minority of cases will the court be called upon to develop or alter the common law. However, since statutory changes in the early 1980's produced the result that civil appeals could only go to the High Court by special leave, then the result has been that most civil appeals before the court are cases in which at least one party intends to argue that established common law principles should be modified or changed, or that existing precedents

should not be followed. A court whose business consists largely of dealing with cases of that character is more likely to take on the appearance of being radical, not necessarily by reason of the disposition of the members of the court, but by reason of the nature of its business.

I do not suggest that this is the only factor at work in relation to judicial law-making at the appellate level, but it forms an important, and frequently overlooked, practical aspect of the context in which that issue arises.

Another matter worth considering might be the changing attitude of the legal profession, and others, towards the use of litigation as a technique for achieving political and social objectives. We have long been accustomed to the use of litigation as a weapon in corporate and commercial rivalry, but we are seeing an upsurge in what might be described as the politically and socially aggressive use of litigation. This has also resulted in a change in the character of the work coming before some courts, and has a significant effect on the way in which courts appear to the public to behave.

Of course, these are areas in which matters of cause and effect can be difficult to disentangle.

The nature of the work assigned to trial courts can vary from time to time and place to place. It is only necessary to think of the subject of judicial review of administrative action to understand how the nature of what courts are required to do affects their relations with other institutions of government and with the community.

Who writes the job description of a judge in any given community? Mainly history, I suppose. It alters over time. The job description of an Australian judge has altered significantly, in various ways, during my time in the law and, for that matter, during my time in the court.

Democracy itself can hardly be said to contain an inherent definition of the role of the judiciary. The role of judges in such modern democracies as France, Germany or Italy is substantially different from the role of judges in England, or the United States or Australia. The French Revolution assigned to judges in France a function very different from the function assigned to the English judges by what is sometimes called the Glorious Revolution.

The role of the judiciary in the community is manifested not only in what judges do but also in how they do it. This might be called judicial style.

There seems to be a major difference between the style of judges in common law jurisdictions, and the style of judges in civil law traditions. I have in mind, particularly, the techniques by which judicial decisions are made, and the manner in which they are expressed.

Justice Beaumont of the Federal Court showed me an interesting article, published in April 1995, in the Yale Law Journal (Volume 104, No. 6, p1325) by a French lawyer entitled, "Judicial Portraits". The purpose of the article was to explain to readers with a common law background what the author described as the official French portrait of the civil judge, and then to contrast that with what was called the unofficial French portrait of the civil judge.

The first point made by the author, and one which perhaps contains the seeds of an argument that may be of some local relevance, is that, in France, the principle of separation of powers is regarded as having as its most significant implication the proposition that judges must not make, or appear to make, law. It is the separation of legislative and judicial powers which is emphasised. Historically, this is related to the pre-Revolutionary activities of the French *parlements*, which were gatherings of judges exercising legislative functions that were widely resented.

This principle is reflected in the form taken by decisions of French courts. To the eyes of someone from a common law jurisdiction, they are remarkably brief. The court speaks with one voice, there being no provision for concurrence or dissent. Above all, the decision is structured so as to give the appearance that

the outcome was inevitable. The author says (on pp 1341-1342):

"The French judicial decision, in its paradigmatic form, possesses a univocal quality that denies the possibility of alternative perspectives, approaches, or outcomes. This univocal quality is further promoted by the collegial style in which the decisions are rendered. The French judicial decision is rendered by the entire court as a unit; individual judges do not sign opinions. Dissenting and concurring opinions are forbidden.

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The grammatical and structural form of the judicial decision portrays the depersonalized judge as merely plugging applicable legislative provisions and the bare minimum of relevant facts into the formal mold, mechanically producing the judgment. The mechanics of the French judicial decision is that of the "judicial syllogism": "In France, the decision is as short as possible, as irrefutable as possible. Our ideal is the decision ten to fifteen lines long constituting, if possible, a syllogism with a major [premise], a minor [premise], and an unstoppable conclusion." The given legislative provision constitutes the major premise, the facts constitute the minor premise, and "the declaration of what the statutory law commands regarding the controversy" forms the conclusion. According to the structure of the civil judicial decision, it is exclusively the statutory law that dictates the outcome of legal controversies."

The author goes on to describe the procedures, private to the judges, by which, in dialogue which is remarkably similar to common law practice, but which is never published, they reason about legal problems. Their public style is expressed in their decisions. That, in turn, says a great deal about what is regarded as the role of the judiciary in that modern democracy.

This may be contrasted with the style of decision making and judgment writing at all levels of the Australian judiciary. We go in for what the French would regard as amazingly detailed examination and analysis of the facts, and, often, lengthy and discursive reasoning about the law. Some judges appear to delight in exposing the doubts and uncertainties which have attended their decision making, and in magnifying the range of choices they see as available to them. Trial judges seem to be encouraged by appellate courts to spell out their reasoning in ever increasing detail. This would be anathema to a French judge. It seems to say a good deal about what our community expects, or at least is assumed to expect, of judges. Perhaps the validity of that assumption might one day make a worthy subject of study. To what extent is our role selfcreated, and to what extent is it a response to the community's needs or expectations? To what extent have we ourselves created those expectations? Should we, in some respects, take the initiative in redefining our role, or in altering the community's expectations?

There are certain features of modern democratic life, some of which will be explored at this symposium, to which the judiciary needs to accommodate itself. Such accommodation, however, is not always easy.

The modern insistence upon satisfactory accountability of all governmental institutions, which needs to be reconciled with principles of independence, has to be accepted and addressed. A great deal of public money is invested in courts, and the community is entitled to demand that they be administered efficiently and effectively. The public are entitled to expect that individual judges will do their work efficiently, as well as fairly, will manage cases with due regard to considerations of economy, and will deliver judgments reasonably promptly. If judges themselves do not take the lead in developing appropriate techniques of accountability in relation to questions such as this, others will, and those others might not share our understanding of, or respect for, principles of independence.

Professional training and education of judges is a subject receiving increasing attention. In recent years there has been a development in formal arrangements in New South Wales for continuing legal education of judges and magistrates, and also for training and orientation programmes for new appointees. Once again, it is essential that the judiciary should take charge of these programmes.

The modern judiciary has to come to terms with the role played by the media in the relationship between judges and the general public. This is an important subject which I understand will receive particular attention tomorrow.

I am delighted that the Supreme Court of New South Wales has been able to provide the venue for this important occasion. I am sure the symposium will make a major contribution to the debate within the judiciary, and amongst members of the public, about many important issues.