The Courts and the Future : New Stump Jump Ploughs to Cultivate Old Paddocks.

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In the early days of European settlement here, cultivating land to produce food was a primary challenge. The stump jump plough was an ingenious Australian invention which enabled freshly cleared land to be ploughed although there were still tree stumps beneath the surface (1). When a ploughshare hit a stump it rose and surmounted it, allowing the plough to continue on its work. Australia's early courts also surmounted obstacles in doing their work, so vital for the development and continuance of democracy. This paper looks at the ways for the courts to surmount the daunting obstacles of the millennial challenge.

New Stumps: the millennial challenge.

Almost, but not quite a thousand years ago, the common law began its development which ultimately led to the rule of law and our kind of democracy. Henry II, who became King of England in 1154, initiated that development by exerting the King's power and the law of the King's courts over everyone, particularly the feudal barons (2). The task facing the courts at the beginning of next century is to maintain the effective predominance of the law, not only over government and governed alike, but over market and media barons, operating not from turreted castles but from the strongholds of multinational corporations. That will have to be done in an environment in which the philosophy of the market and media is extraordinarily pervasive and there is a widespread assumption that human nature has abruptly changed for the better and now needs much less regulation. Like the buried stumps that stood in the way of the early ploughs, the obstacles for the courts to surmount next century are hardly perceived.

The Duke of Wellington said that the next greatest misfortune to losing a battle is to win a victory such as Waterloo (3). After years of contest with the communist systems, most of them tyrannies, the democracies were victorious about ten years ago. The price of that contest and victory has been high. The vanquished were based on command economies, the victors on market economies. The outcome demonstrated that for the production and distribution of goods and services the market economy is more efficient. It has been taken to have demonstrated that the market has superlative qualities which Adam Smith would never have claimed. The market is now credited with having superior insights into ethics, planning, community welfare and the social distribution of wealth.

The great speed and extent of the shift of power and influence, from shrinking government to burgeoning market and media, is graphically shown by British journalist, Martin Walker, in his speech this year to the Australian Institute of Political Science (4). That shift comes at the end of 60 years of crisis in which government in the democracies expanded, controlled markets, engaged in production and distribution and attracted much media and community attention. The expansion started in the Great Depression when Roosevelt decided the crisis of capitalism was too important to be left to the capitalists and it continued through World War II. In the 15 years from 1929 to1944, US federal government spending expanded 75 fold. Expansion continued during the Cold War. After the end of the Cold War the need for big government was seen to have passed, so government contracted and taxes eased. Now, so much power and economic authority has shifted to world markets and organisations that Walker sees national parliaments as looking increasingly like rather grand parish councils with localised concerns in which the main art of domestic government is to manage and rearrange the social budget. His point that the stock value of the Disney Corporation is twice the market value of all the stocks listed on the South Korean

Stock Exchange, illustrates the enormous economic power of particular corporations.

Within Australia over the last decade, numerous activities which over the last half century or so were the responsibility of government, have been transferred to private enterprise. Many public utilities have been privatised, work once done by public servants is now being done by contractors and government regulation of many commercial activities has changed to self-regulation.

It is not the purpose of this paper to argue whether or not it is desirable to reduce the responsibilities of the legislative and executive arms of government. It is to examine the impact of that reduction upon the responsibilities and future of the courts. The paper is critical of attributing to the market capacities it does not have, and leaving to it tasks it cannot perform.

The history of democracy has been one of developing community controls over parliament and government and thus over the activities for which they were responsible. The transfers of many of those responsibilities to private interests generally disconnects those controls and diminishes the capacity of the community to exert influence over the activities through the political and administrative processes of government. New controls may be put in place or may develop over time but a remoteness between community influence and the activity is likely to endure. Lacking political and administrative avenues, people are likely to revert to the view prevailing in the first quarter of this century, that their primary form of redress is through the courts.

The world of next century will have powerful commercial and media organisations integrated together and with their Australian branches. They will be directed by frail humans like the rest of us. We usually apply to those with political power, Lord Acton's axiom that 'Power tends to corrupt and absolute power corrupts absolutely', but it applies equally to holders of economic or media power. The ordinary citizen will have no control over those powerful organisations and little influence on or protection from them. Executive governments without much power or money will stand puny beside them. Yet it is vital that our constitutional system retain the safeguards that maintain its democratic character and thus its responsiveness to the interests and opinions of its citizens (5). It will then be the natural ally and protector of its citizens through its capacity to make laws and enforce court judgments. The rule of law binds everyone to comply with the law in what they do in Australia, including Australian and overseas corporations. In the next century the courts will continue to exercise the responsibility of citizens' protector against abuse of government power, together with an expanded responsibility as protector against abuse of economic and media power. The responsibility of citizens' protection will thus fall upon the courts to an extraordinary extent and they will need great integrity, competence and independence.

The flow of power from big government to big business at the end of this century has been accompanied by exponential growth of the influence of the mass media and its concentration in fewer hands. A democracy needs the mass media to inform people how democracy works and what occurs, but it has real potential to impede the courts.

The courts, the weakest arm of government, are effective only if they have the confidence and respect of the community (6). This has to be earned but the modern media makes that hard. To survive in their very competitive environment those running the media must attract viewers, listeners and readers. They understand human nature and know that what attracts us is that which shocks, alarms and entertains. There is no news value in giving prominence to criminal sentences which would draw community approval but only to those which would not. The judges who work conscientiously and competently day in day out are not news, only the one who does not maintain standards (7). As they are authority figures, ridiculing judges automatically shocks and entertains. Martin Walker says that it is now becoming the function of our diminished political leaders to be used by the media to entertain us. Much the same is starting to happen to the judges. To form a balanced view of its judges the community needs the good information with the bad. Constantly giving an unfavourable impression reduces community confidence and respect.

The highly concentrated and all-pervasive media has, and on occasions uses, the power to make or break

an individual's reputation almost instantaneously. In practice rather than theory, what remedy does the defamed person have other than a court remedy?

Each of the few corporate organisations in which media ownership and control is concentrated, is very influential politically. Walker says, 'It's a foolish Prime Minister who goes out of his way to irritate the press barons'. He quotes Mark Twain, 'Never get into a fight with somebody who buys ink by the barrel load'. There is continual pressure on federal governments to relax the legislation that places restrictions on the concentration of media ownership and control so as to allow one or more of the few present owners to increase their share.

Sometimes people within the media deliberately place obstacles in the way of the courts. Comments which attract great public attention are made while criminal trials are pending or proceeding, which are obviously likely to prejudice a fair trial. Governments, conscious of the risks of provoking political antagonism from the person or media organisation concerned, are reluctant to prosecute for contempt of court. When this occurs it encourages others to disregard the prohibition of prejudicial comment (8). That puts at risk one of the important democratic safeguards against political oppression, the criminal court jury. In some countries where criminal charges are tried by judge alone, oppressive governments have appointed biased persons as judges, who have imprisoned the government's opponents on trumped-up charges supported by manufactured evidence. An Australian jury, selected at random, would not convict in those circumstances (9).

Our kind of democracy, with its rule of law, gives the law an extremely important function. People will only accept the law prevailing over all, if they have confidence in it. They will only have confidence in it if they have confidence in the impartiality of the judges, magistrates and other judicial officers who apply it. Because their impartiality would otherwise be open to doubt, judges must work in a setting where they are obviously independent in the sense of being free of pressures which could influence them to make a decision in a case other than that which their intellect and conscience indicate to them after a genuine assessment of the evidence and an honest application of the law.

History has taught us of the need for particular safeguards to keep judges free from some obviously distorting pressures. Thus they are appointed for a full working life, usually until becoming 70, and it is very difficult to dismiss them. The government has an interest in many court cases and if it could readily dismiss them, or if they were appointed for a period and needed government approval for reappointment, the government could place great pressure on a judge to reach a decision favourable to it by threatening that an unfavourable decision would bring loss of career. That is very obvious to anyone who has learnt from history what has happened when those safeguards have been absent. However, because the market philosophy has taken over much of educational planning, few are learning the lessons of history. Instead of course planners taking the responsibility of ensuring that students acquire the education which will equip them for citizenship in a democracy, they are treated as consumers, entitled largely to choose what attracts them from the available subjects. As a result, history is being learnt by fewer and fewer. Thirty years ago two-thirds of final year students in New South Wales studied history, now less than a fifth do. In Victoria a majority of schools do not even offer history at VCE level (10). It will be difficult to retain those essential safeguards when the majority of people do not understand why they are necessary.

When I commenced law at the University of Melbourne in 1947, Constitutional History and Legal History were both compulsory subjects. In learning the history of our court system we became aware of the abuses and denials of justice in England during the Stuart period, to which the adoption of our present safeguards was an essential response. Now the Law School marketplaces, seeing those subjects as not popular student choices with obvious career advantage, not only do not make them compulsory but usually do not even offer them. Those who will become judges will lack the grounding in history that provides the most effective answer to proposals that the courts should emulate business organisations and have judges appointed for terms of years (11).

Thus the courts entering the new millennium will face a combination of heightened responsibilities and

substantial obstacles. I do not seek to predict how long the particular obstacles will remain in place but they will certainly need to be surmounted in the early part of next century.

Ploughing

Ploughing is just as basic to the production of grain today as it was a thousand years ago and performed in much the same way. Similarly the provision of justice is essential to a good community today as it has been for centuries and done in much the same way — by finding the facts from the evidence and applying the law. The provision of justice is no more novel and exciting than ploughing. People tend to take it for granted.

This should not conceal the fact that if people feel that they are able to get justice according to law they will feel better as citizens, have more confidence in their community and democracy and constitute a more cohesive society.

New Stump Jumps: surmounting the obstacles.

In improving efficiency in dealing with their workload, courts of the future will need to blend what has been learnt from past experience with the promise of new methods. I make two random comments.

Courts will not attract the confidence of citizens unless those who need to resort to them are financially able to do so. Regretfully, I have come to the conclusion that practicality dictates that something less than perfect justice must be accepted. Engineers design water channels on the basis that occasionally they will flood. Balancing the availability of legal aid for those who need it, against the time a case takes, I think consideration will have to be given to limiting the time available for the presentation of a party's case, limiting the issues and perhaps requiring a party in a civil case to show in a very summary way a real prospect of success before being permitted to present or defend a claim. Use of the inquisitorial rather than the adversarial system on aspects of the dispute will also need to be considered. If such methods are adopted a trial judge should be entitled to have confidence that following them will not result in a successful appeal based on a lack of perfect justice.

Alternative dispute resolution has a real capacity for easing the workload of the courts. It is important however that the courts remain central to the resolution of disputes according to law. The courts should set the standards and remain available to enforce those standards over the whole field. I do not have in mind appeals from alternative tribunals but the enforcement of the standards of fair decision-making which people expect when a dispute is to be resolved according to law. If standards of fairness and integrity are not enforced whenever disputes are resolved according to law, that will lead people to lose confidence in their law and democracy. The position is different if someone is appointed to resolve a dispute according to his or her expert opinion.

In light of the crucial role of the courts and the obstacles that will confront them as they enter the new millennium, how are they to surmount the obstacles?

It is a feature of a democracy that it works because those in its various areas, have an interest in making their area work. For those in the judicial arm of government that involves exercising a good deal of influence on others, particularly on the parliament and government which raise and allocate funds and make necessary legislative changes. It also involves having a conscious and effective influence on and through the media. This means that in surmounting the obstacles it is the courts and their organisations which must take the initiative. It is no use waiting and hoping that someone else will volunteer to come to their aid.

The first need is for the necessary financial resources and the other arms of government which provide it have traditionally been parsimonious (12). Providing money for an unexciting operation like that of the

courts does not win elections. To get the funds and any necessary legislative changes the courts must speak persuasively not only to the other arms of government but to the people so that they will exert an influence on the other arms (13). There is goodwill for the courts within the media but it needs to be carefully tapped. Information in a readily useable form should be made available so that the strengths as well as the weaknesses of the courts can be reported (14). Where an unjustified attack is made on a particular judge or a court or on the court system there should be a prompt and balanced answer. It is essential in public life to be able to make a cogent and immediate answer to an allegation while it is still newsworthy. Courts and court systems are now employing media officers and this enables these communications to be made efficiently and effectively. There has been a feeling among judges that the Attorney-General ought to defend them on these occasions but in my lifetime that has seldom occurred and the new century is unlikely to change that (15).

As the lessons of constitutional history are left unlearnt, who should move to change that? Judges have a lot of influence in the community and as the safeguards of the court system depend on a community with an understanding of history, it would be a proper use of their influence to seek to have it taught.

Performing the basic responsibility of providing justice according to law and overcoming the obstacles that will beset the courts, require them to be organised as efficient operating organisations. They also need effective organisations which will assist them and represent them at the levels of their court system and at the national level.

For the organisation of a court itself I have no doubt that the collegiate form of court governance pioneered by the High Court in Australia, is by far the best. It has many advantages over the model of a Public Service department where all the responsibility is held by the Chief Justice. I have stated my reasons for that conclusion (16).

Turning to the national level, I will discuss the role of the Judicial Conference of Australia and its relationship and co-ordination with the Council of Chief Justices and the Australian Institute of Judicial Administration (AIJA).

Having proposed the Judicial Conference of Australia in a paper given just before I ended as a judge, I am delighted to see its strong and rapid development. I am pleased to see that its membership consists of judges of the High Court, Federal Court, Family Court, Supreme Courts, Land and Environment Court of NSW, District and County Courts and magistrates who are appointed, tenured and dismissible on a similar basis to a judge, which includes almost all the magistracy. I am glad to learn that over half of the judges of Australia are already members of the Conference and almost half of all judicial officers. Providing for a Governing Council to include a judge of and appointed by each of the courts named above, and a magistrate of and appointed by the Magistrate's Court or Local Court of each State and Territory, ensures control by a Council representative of the whole judiciary. I congratulate all concerned.

I have had the advantage of speaking to the leaders of the Council of Chief Justices, the Judicial Conference and the AIJA and am pleased to learn how careful consultation has achieved co-ordination and avoided friction.

The Conference and the AIJA are active in substantially separate fields but co-operate together in some areas. As Bagehot says of the institutions of a constitution, they are not 'separable with microscopic accuracy, for the genius of great affairs abhors nicety of division'. It seems to me that the AIJA concerns itself primarily with assisting all those concerned with the judicial process to make the best use of resources consistent with high quality justice and it studies the circumstances and relationships which promote that. It has researched and reported on subjects related to judicial independence, court governance, court funding and many others. It may be described as a primary source of knowledge for and upon the Australian judicial system. It has particular knowledge and training expertise upon judicial administration and judicial education. Based on and involving all concerned with the judicial process, it has been remarkably successful.

I see the Judicial Conference as primarily forming opinions among judges as to what steps should be taken to maintain an effective, independent judiciary. Its activities are centred less on learning and teaching than on building a consensus among judges as to policies to be supported or opposed. It is essentially concerned with the external affairs of the judicial arm of government. It can rely in part on knowledge accumulated by the AIJA. People sometimes describe the Conference as the judges' trade union and to a very minor extent it directs its attention to the conditions of service of judges. I think it is best to acknowledge that, but to emphasise that it is concerned with the whole field of the practicalities of maintaining an independent judiciary, something obviously very much in the public interest and something on which it is highly expert.

When the Conference has built a consensus on a policy to be advanced or resisted, how is that to be implemented? To date there has been a lot of consultation between the leaders of the Conference and the Chief Justice of Australia who chairs the Council of Chief Justices. That is very wise. Within the judiciary, courses of action always have a better prospect of success if the Chief Justices support them. There would be advantage for some co-ordination upon topics to be considered by both bodies.

The issue involved, will generally determine who takes the responsibility to act in implementation of the policy. Sometimes the Council of Chief Justices might be prepared to take it up. On some issues the leaders of the Conference could act. On issues particularly affecting one court, its Chief Justice would usually be the appropriate one. This is a topic which would benefit from discussions between the Conference and the Council. I mention that it is important that public action be taken and statements made only by the head of organisation or someone delegated by the head. Similarly, on a court only the head of the court or a delegate of that head should speak on behalf of the court, or represent it in dealing with others.

It is very much in the interest of facilitating the best exercise of the responsibilities of the judiciary to this democracy, for those representing or reflecting the opinion of courts upon the Council of Chief Justices, the Governing Council of the Judicial Conference or the Council of the AIJA, to report to and represent the opinions of the judges of their courts.

Old Paddocks: remaining obviously judicial

When the courts are equipped for their task with modern stump jump ploughs they should in my opinion resist the temptation to use them anywhere but in the traditional judicial paddocks. Parliaments can be tempted to find new provinces for law and order and confer jurisdiction on courts in cases whose decision produces political resentments whatever is decided, because they have substantial political and policy components. In particular judges should resist having jurisdiction conferred which would bring them into the political process.

The priceless possession of a judiciary is a reputation for impartiality. When I was a judge and some friend had been involved as a party, witness or juror in a case before the Court, I would often ask who was the judge. The friend seldom knew, which I took to be a great compliment to the Court as indicating that people did not think it made much difference which judge heard the case.

There are suggestions that judges be given jurisdiction to decide cases which would have them seen in a political light. Decisions on a bill of rights giving vague guarantees such as freedom of speech, would have that effect. So would an obligation to ascertain, declare or order compliance with constitutional conventions or with codified versions of them. Those on the losing side would tend to think they had lost because of political or social bias in the judge. In my early days as a barrister, recovery of tenanted premises depended on the landlord establishing a ground, then the magistrate had a discretion to make or refuse an order for recovery. To the junior Bar, every magistrate was categorised as a landlord's man or a tenant's man.

I mention in conclusion that, having seen judges in the last twenty years shift decisively from passivity to their present position of active responsibility for the efficiency and independence of their courts, and

noting the leadership by the Council of Chief Justices, the Judicial Conference of Australia and the AIJA, I am confident that the Australian judiciary and those allied with them in the judicial process will provide the citizens of the third millennium with justice according to law.

I have ploughed my paddock and I wish you well.

Endnotes

1 Samuel Wadham, *Australian Farming 1788-1965*, Cheshire, Melbourne 1965, p.26.

2 W.J.V. Windeyer, *Lectures on Legal History*, Law Book Co., Sydney 1938, pp. 42-61: W. Friedmann, *Legal Theory*, 2nd edn, Stevens, London 1949, pp.384-5.

3 S. Rogers, *Recollections,* 1859, p.215.

4 'Politics and the Media Circus', broadcast in *The Media Report*, ABC Radio National, 13 August 1998 (transcript available).

5 As to the main safeguards of democracy, see my Paper 17, 'Preserving the Democratic Character of Government, including the role of the Courts', at the Internet address **http://www.chilli.net.au/~mcgarvie.** A number of the views I now express, I have expressed in more detail before. I give reference to the earlier writings, not because they are the best statement of the point, but in order to give further and better particulars of what I write now.

6 R.E. McGarvie, 'Equality, Justice and Confidence', (1996) 5 JJA 141.

7 A reference to judges usually includes a reference to magistrates and other judicial officers.

8 A highly qualified and experienced Committee chaired by Fr Frank Brennan recommended that a Revised Code of Ethics for journalists include, 'Respect every person's right to a fair trial': *Ethics in Journalism,* Report of the Ethics Review Committee, Media Entertainment and Arts Alliance, Australian Journalists' Association Section, Melbourne University Press, 1997, pp.15, 54 and 126. The provision is not to be included in the Revised Code of Ethics to be formally adopted by the Federal Council of the Media Entertainment and Arts Alliance in January 1999: *The Age Code of Conduct*, October 1998, p. 9.

9 R.E. McGarvie, 'Trial by Jury', *Papers Presented at the V.C.E. Legal Studies Symposium, Caulfield Grammar School*, Melbourne, 9 May 1992, p. 73.

10 Ray Cassin, 'A good companion', *The Age*, 18 October 1998, p.22, quoting Professor Stuart Macintyre.

11 R.E. McGarvie, 'Legal Education: Pulling its Weight in the Nineteen Nineties and Beyond', (1991) 17 Mon LR, p.6.

12 Alan Barnard and Glenn Withers, *Financing the Australian Courts*, AIJA, Melbourne 1989.

13 R.E. McGarvie, 'The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence', (1992) 1 JJA pp.267-73.

14 'The Ways Available', p.268-9.

15 'The Ways Available', p.270.

16 R.E. McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy', (1991) 1 JJA, pp.22-32; 'The Ways Available', pp.246-57; R.E. McGarvie, 'Judges, the Challenge of the 1990's',

Papers from the Judicial Development Conference, Queenscliff 1992, Family Court of Australia, AGPS, pp.4-9.

17 'The Ways Available', pp.261-5.

18 Walter Bagehot, *The English Constitution* (1867), Fontana edn, Collins, Glascow 1963, p.61.

19 R.E. McGarvie, 'A Practical Bill of Rights for Victoria', *Laura*, Journal of LaTrobe University Legal Studies Students Association, 1983, p.15. Note that 'bad general statement' on p.17 should be **'bald** general statement'.