The Role of the Judiciary

*In 1987 the University of New South Wales published a special issue of its Law Journal devoted to the subject of "The Judiciary". The Chief Justice of the High Court, Sir Anthony Mason A.C., K.B.E. wrote the foreword . **

The judiciary continues to be a fashionable topic of discussion. The essays in this volume pursue some of the themes of contemporary debate here and overseas. The essays are perceptive and instructive, none more so than Mr. Justice Thomas' "Epistle from a Judge on Circuit". It provokes me to some reflections on the role of the judiciary in the light of its past and present condition.

One of the Epistle's messages is that the status and importance of the judiciary, as perceived by the community, have diminished significantly in recent times. Why? Partly, I suppose, because we live in a brave new world, created by the media, a world of froth and bubble and sensation, of fleeting images and impressions. There is no place here for detailed and accurate reporting of court cases, with a focus on the legal issues, though such reporting was once a feature of our newspapers, metropolitan as well as provincial and local. Nowadays sensational and bizarre cases are reported. So are those which concern high-profile personalities. Witness a recent contest in the Supreme Court before Hodgson J. over the ownership of a luxurious harbourside mansion bearing a miscellany of exotic names like "Toison sur Mer" and "Paradis d'Or", names which evoke dazzling visions of halcyon days and glittering nights at Cap Ferrat or Cap d'Antibes. One counsel was reported as describing his opponent's submission as sounding like a "press release". The submission attracted much publicity. Perhaps the media thought it was a press release. There followed a flurry of press statements by the parties or their legal advisers culminating in the issue of a writ or writs for defamation and then - mercifully - silence.

Of course there are reports of important cases, but the quality of the reporting, particularly on television, leaves much to be desired. Take the recent television coverage of the application for an interlocutory injunction relating to the Daintree rain forest which I heard in the Coal Industry Tribunal premises in Sydney. The reporter stated quite accurately, if a little resentfully, that the hearing took place in a small room above a coffee lounge. Meanwhile the camera lingered on the entrance to a rather undistinguised looking coffee lounge. For reasons never explained the camera later focussed on the majestic entrance to the Law Courts Building with its coat of arms while the narrator spoke of the case without managing to disclose what were the actual issues. This was understandable if you were watching, rather than listening. Our narrator was enmeshed in a time and place warp for the camera revealed the stern visage of Theo Simos Q.C. manfully leading the Spycatcher cast into the Supreme Court many months earlier. There were some shots of me purposefully striding down a street and of "Geoff Davies Q.C.", to use the reporter's description, at an intersection, looking anxiously at the heavens as if half-expecting a Messerschmitt to dive out of the sun. Then some revealing footage of the back of our respective heads - more revealing in my case than his. The comparison was entirely favourable to Geoff Davies Q.C. His hair, though short, was abundant and kempt - like the Daintree as depicted in the film clips which were part of the report. All this is no doubt explained by the fact that it was Christmas Eve, a time when newspapers and television stations are on the look-out for filler material - a speech by Mr. Justice Kirby or an "in-depth" report on the High Court, these being staple elements in our end of year newspaper reading.

These incidents indicate that, if court proceedings lack dramatic impact, the media will report the "real" story behind the proceedings, using them as an element in that story. The media's quest for material with dramatic impact no doubt encourages some litigants to present court cases in such a way that will result in favourable publicity and it encourages plaintiffs to issue press statements placing the commencement of proceedings against a favourable background. The media's treatment of court cases tends to trivialize the issues and to increase the risk that litigation will become a vehicle, or even a theatre, for public relations or political exercises.

Quite apart from the problems of this brave new world, the area of responsibility of the judiciary, using that term in its restricted sense, has contracted vis-à-vis the executive. With the growth of the welfare state the citizen's rights against government are probably more valuable than his rights against fellow citizens. And rights against government increasingly depend on the decisions of officials and tribunals. There is now a vast network of tribunals outside the established court system. Sometimes specialist tribunals exercise jurisdiction which could as readily be entrusted to the courts. Indeed, some so-called tribunals are in truth courts, the dividing line being by no means clear. Tribunals are deciding an ever-widening range of interesting and important questions, including questions of individual and fundamental rights such as discrimination, equal opportunity and freedom of information, whereas the courts are doing work of a traditional kind. Some judges tend to regard this work as "legitimate" in the sense in which the Shakespearean actor refers to the stage as opposed to film, because the work involves the application of settled principle to facts as found. This tendency, which reflects the judicial model of a bygone era with its sharp distinction between law and policy, is an inducement to confer new jurisdiction on tribunals rather than established courts. Another reason for taking this course is the belief that court procedures are too protracted and too costly.

What I have just said illustrates how our thinking is influenced by notions of status rather than function. We tend to associate the judiciary with those persons who are called judges. But if we look at the matter as one of function, not of status, the judiciary includes not only magistrates but all those persons who exercise judicial power and determine the rights of parties.

The article by Mr. Briese indicates that at long last appropriate steps are being taken to enhance and protect the independence of magistrates as integral elements in our judicial system. Why is

it that law journals, as well as newspapers, devote so much space to the High Court and so little to the Magistrates' Courts? The High Court is predominantly a forum for the resolution of institutional conflicts to which governments, statutory authorities, corporations and trade unions are parties. The Magistrates' Courts dispense justice at the grass-roots - a function of vital importance in a democracy and one deserving of the closest scrutiny.

I have ventured a long way from Mr. Justice Thomas and his Epistle. What I have written will scarcely allay his misgivings. The point is that, if the importance of the judicial function is under-estimated today, it is because the citizen does not see the courts as a valuable source of protection of his rights, particularly his rights against the government. And, assuming this to be so, the fault perhaps lies not in the stars but in ourselves and in the reluctance of judges to embrace any jurisdiction by way of enforcement of individual or fundamental rights. Yet it is a jurisdiction exercised by courts in many other countries with the result that those courts are visibly and tangibly identified with the protection of the rights of the citizen. In Australia, we have not seen this as a function of the courts or the judiciary.

Possibly the time has come for viewing the judiciary and its role through a wider lens and to place more emphasis on the primary role of the Supreme Courts as courts of review. In this way the value of the work of the judicial branch of government in the widest sense of that expression could be more clearly seen and appreciated. This development would bring a greater sense of unity to the judiciary, greater symmetry to our court structure and a more uniform elaboration of the principles of law. ❑

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