Criticism of the judiciary and contempt of court

By Anthony Cheshire SC

The last sitting of Bergin CJ in Eq concluded with a greeting from the bench to those assembled in the court of 'good morning'. That might not seem worthy of note, save that her Honour was well known for tearing a strip off any advocate who dared to wish her Honour a good morning rather than confining him or herself to the formalities of the matter in court. Still, an opponent would be unlikely to accuse such an exchange between bar and bench in breach of this rule as a 'sucking up' or a 'lapping up the Cristal champagne' with each other. There are at least three reasons for this.

First, when Malcolm Turnbull hurled those insults, he did so not at the judges in the *Spycatcher* case, but rather at Bill Shorten in parliament, where such behaviour seems to be acceptable, if not indeed the norm (see for instance 'a shiver waiting for a spine', 'a conga line of suckholes' and 'a boy in a bubble').

Secondly, as Pembroke J observed in *McLaughlin v Dungowan Manly Pty Ltd (No 3)* [2011] NSWSC 717:

> The promiscuous use of extravagant language tends to obscure the value that may exist in the underlying submission. It is timely to repeat the compelling wisdom of the words attributed to Lord Bingham of Cornhill by Lord Mackay of Clashfern in his address at the Thanksgiving Service for Lord Bingham; *The Times*, 26 May 2011:
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> The effective advocate is not usually he or she who stigmatises conduct as disgraceful, outrageous, or monstrous, but the advocate who describes it as surprising, regrettable or disappointing.

Thirdly, any such accusation might well constitute a contempt of court as having a tendency to undermine public confidence in the administration of justice and also as scandalising the court.

In *R (on the application of the A-G (Vic)) v Herald & Weekly Times Ltd* [1999] VSC 432, Balmford J considered proceedings for contempt arising out of newspaper articles headed 'Never let him out' and 'Don't let him out' in the context of proceedings for a major review of a custodial supervision order.

Her Honour cited with approval at [63] the *dicta* of Myers CJ in *A-G v Tonks* [1939] NZLR 533 at 537:

> The Court must not only be free - but must also *appear* to be free - from any extraneous influence. The appearance of freedom from any such influence is just as important as the reality. Public confidence must necessarily be shaken if there is the least ground for any suspicion of outside interference in the administration of justice. Any publication therefore that states or implies that the sentences imposed by the Court are, or may be, affected by popular clamour, newspaper suggestion, or any other outside influence is, in my opinion, calculated to prejudice the due administration of justice. [Emphasis in the original]

She concluded at [73]:

> I have found that each headline would be read by most people as a recommendation or direction to the judge, and that finding, to my mind, carries with it an implication of a serious risk that the Court would appear not to have been free from the influence of that recommendation or direction.

Although her Honour's decision on this ground was overturned on appeal ([2001] VSCA 152), the Court of Appeal applied the same test, albeit in reaching a different conclusion on the facts.

The essence of the offence of scandalising the court has been described as including:

> …interferences…from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.

(see *R v Dunbabin; Ex parte Williams* [1935] 53 CLR 434 at 442 per Rich J, cited with approval by Gleeson CJ and Gummow J in *Re Colina ex parte Torney* [1999] 200 CLR 386 at 390).

A publication of material with a tendency to disparage the authority of the court will amount to a contempt even if published after a case is over, although 'the court takes far more seriously misrepresentations whilst the case is pending' (per Young CJ in Eq in *Yeshiva Properties No 1 Pty Ltd v Lubavitch Mazal Pty Ltd* [2003] NSWSC 775 at [49]). As Rich J continued in *Dunbabin*:

> The jurisdiction is not given for the purpose of protecting the Judges personally from imputations to which they may be exposed as individuals. It is not given for the purpose of restricting honest criticism, based on rational grounds, of the manner in which the court performs its functions. The law permits in respect of Courts, as of other institutions, the fullest discussion of their doings, so long as that discussion is fairly conducted and is honestly directed to some definite public purpose. The jurisdiction exists in order that the authority of the law as administered in the Courts may be established and maintained.

Thus in *Fitzgibbon v Barker* [1992] 111 FLR 191 a newspaper article implying that fathers were imprisoned by the Family Court for wanting to see their children was held to be a contempt when the true position was that a father had been imprisoned for repeated breaches of non-molestation orders protecting his wife, it being also held that intention was irrelevant; and in *AG (Qld) v Lovitt* [2003] QSC 279, a comment that a presiding magistrate

was ‘a cretin’ was held, even though it had not been heard by him, to impair the authority of the court and therefore to be a contempt.

Thus far, the boundary between the rough and tumble of politics and the more sensitive world of the law might seem clear and well-policed, but there has been a recent blurring of that boundary in the United Kingdom and the United States.

After the United Kingdom High Court’s recent decision holding that the Brexit referendum could not be acted upon by the executive without the authority of parliament, photographs of the three judges were published in newspapers with headlines: ‘Enemies of the people’ and ‘The judges versus the people’. Indeed one article included the following: ‘The judges who blocked Brexit; One founded a European law group, another charged the taxpayer millions for advice and the third is an openly gay ex-Olympic fencer.’

While slurs about judges’ sexuality are sadly not unknown, although one had hoped they were consigned to a different era, the use of ‘ex-Olympic fencer’ as an apparently derogatory term is novel. Amid a storm of protest that these criticisms of the judges rather than of the decision itself were unacceptable, the lord chancellor, whose duty it is to police these matters having sworn an oath to uphold the independence of the judiciary and the rule of law, responded belatedly after two days and then only in the following terms:

> The independence of the judiciary is the foundation upon which our rule of law is built and our judiciary is rightly respected the world over for its independence and impartiality. In relation to the case heard in the high court, the government has made it clear it will appeal to the supreme court. Legal process must be followed.

The president of the Supreme Court, Lord Neuberger, later responded with remarkable restraint and indeed understatement:

> After the [High] Court hearing, I think [the politicians] could have been quicker and clearer. But we all learn by experience, whether politicians or judges. It’s easy to be critical after the event. They were faced with an unexpected situation from which, like all sensible people, they learned.
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> [The judges] were certainly not well treated. One has to be careful about being critical of the press, particularly as a lawyer or judge, because our view of life is very different from that of the media. I think some of what was said was undermining the rule of law.

A former lord chief justice, Lord Judge, went further in claiming that the lord chancellor’s silence constituted a ‘very serious’ failing in her legal obligations. Further:

> If I am right, the Lord Chancellor asked the Prime Minister or No 10 to have some sort of input into what she said about attacks on the judiciary. And the whole point of the Lord Chancellor’s job is that he or she is there to take an independent line.

As the shadow lord chancellor, Richard Burgon, wrote:

> A mature democracy – and a mature government – doesn’t stand by while the judiciary gets a roasting.

In the United States, President Trump had a few things to say about the judicial process by which his travel ban was challenged. After the first instance decision putting in place a temporary suspension on the travel ban, he tweeted:

> The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned.
>
> What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into US?
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> Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!
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> Because the ban was lifted by a judge, many very bad and dangerous people may be pouring into our country. A terrible decision.

Even taking into account that these statements were made after the decision, it is difficult to see how this could be regarded as ‘honest criticism, based on rational grounds, of the manner in which the court performs its functions’ or ‘discussion…fairly conducted and…honestly directed to some definite public purpose’.

Indeed it would appear clearly to ‘detract from the authority and influence of judicial determinations’ and to be ‘calculated to impair the confidence of the people in the court’s judgments’ by ‘lowering the authority of the court as a whole or that of its judges and excit[ing] misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office.’

Furthermore, given the invitation to the American population to blame the judge in the event of any person who would have been excluded by the travel ban committing for instance a terrorist atrocity, one might expect the judge to feel under considerable pressure in the event of being called upon to adjudicate in any future dispute concerning the executive.

Indeed, in addition to the issue of contempt, any litigant involved in proceedings against the executive might well be inclined to seek the disqualification of that judge on the basis that ‘a fair-minded lay observer might reasonably apprehend that judge might not bring an impartial mind to resolution of question judge was

required to decide' (*Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337). Then after the hearing of the appeal, but before the decision, the president said:

> If these judges wanted to, in my opinion, help the court in terms of respect for the court, they'd do what they should be doing.
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> I mean, it's so sad. They should be, you know, when you read something so simply and so beautifully written and so perfectly written…and then you have lawyers, and I watched last night in amazement and I heard things that I couldn't believe, things that really had nothing to do with what I just read.
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> I don't ever want to call a Court biased, so I won't call it biased and we haven't had a decision yet but Courts seem to be so political and it would be so great for our justice system if they would be able to read a statement and do what's right.

This brings to mind that old chestnut of being asked what the first thing is that comes to mind when told not to think about a pink elephant, but it is worse than that since the president did not say that the court was not biased, but rather that he did not want to call it biased. One suspects that a comment to the presiding magistrate in *AG (Qld) v Lovitt* 'I don't ever want to call you a cretin, so I won't call you a cretin' would have been met with a similar finding of contempt. The presidents' comments during the appeal had the additional vice that they were made before the court had delivered its judgment. Then after the judgment on the appeal upholding the suspension of the ban, the president tweeted:

> SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!

and then told reporters:

> It's a political decision.

Although these comments were moderate when compared with the president's response to the first instance decision, they were still, applying his epithets, 'bad' and 'so sad'. Stephen Miller, one of the president's senior policy advisers, was, however, not so restrained. He said:

> We have a judiciary that has taken far too much power and become in many cases a supreme branch of government. Our opponents, the media and the whole world will soon see as we begin to take further actions, that the powers of the president to protect our country are very substantial and will not be questioned.

It is difficult to know how best to characterise an assertion that 'the powers of the president…will not be questioned', but it certainly cannot be described as enhancing an appearance of the court as being free from any extraneous influence. Furthermore, during the hearing and before the decision of the 9th Circuit Court of Appeals, the Republicans on Capitol Hill pursued efforts to break up that circuit on the basis that it is too big, too liberal and too slow. Following the decision of that court, the president then said the following:

> Extreme vetting will be put in place. And it already is in place in many places. In fact we had to go quicker than we thought because of the bad decision we received from a circuit that has been overturned at a record number. I've heard 80 percent. I find that hard to believe. That's just a number I heard, that they are overturned 80 percent of the time. I think that circuit is — that circuit is in chaos, and that circuit is frankly in turmoil. But we are appealing that. And we are going further.

So the lesson of the process in the United States would seem to be that the court is not entitled to question the powers of the president; and if it does, then it is biased, it is exercising a political rather than judicial function, the relevant judges will be personally responsible for any atrocity that may result from the president's will being thwarted and action may be taken to break up the relevant court.

All of this diminishes the authority of the entire judicial system and would, at least in this jurisdiction, amount to a contempt of court. Further, given that the comments were not limited to the particular judges, any litigant opposing the executive in proceedings in the United States might fear that any judge might feel inclined to bow to this pressure. Although the doctrine of necessity would prevent a successful application for ostensible bias being made against every judge, this is not a particularly attractive proposition.

Honest and robust criticism of judicial decisions is a healthy part of our system and helps shape the development of the common law, but we all have a duty to be vigilant to ensure that personal insults and criticisms that are the meat and drink of the political process do not encroach into the legal arena.

The pervasiveness of the internet makes effective policing difficult and means that any response or attempted enforcement action may simply provide unwarranted publicity and attention to an offending article.

Higher profile or more serious offences may, however, require the intervention of the chief justice at least with a rapid public response, but against a background where any contempt proceedings may be seen as reinforcing the divide between the establishment and populism that contributes to the problem in the first place.