FROM THE OTHER SIDE OF THE BAR TABLE: AN ADVOCATE'S VIEW OF THE JUDICIARY

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The advocate's life is at once more and less demanding than that of the judge. His advocacy commits him personally to no view, he sets his hand on no rudder, and when the joy or heat of the debate is over, he turns, with relief often, with anticipation always, to the next case or the next opinion. His effect upon the law, and thus upon society is second hand, contingent and transmuted; occasionally burlesqued. It is manifested in the judgments of those he has addressed; sometimes it emerges more powerful, subtle and convincing because of its passage through the prism of another reflecting mind. Sometimes not.

The pressures on the advocate when preparing for and conducting the trial or the appeal are more intense than those of the judge even during the agonies of composition. He is subjected to strains which the judge, at any rate speaking generally, has thankfully left behind. On the other hand, the argument of the appeal is for the judge merely the prelude to his labour — a labour made the more demanding by his knowledge that what he writes commits him forever even if it only be to error.

The advocate and the judge (I am thinking mainly of appellate courts) are locked together in a mutual labour: the making of the common law. Occasionally that partnership may be distasteful to both. There are occasions, for example, when a common misunderstanding or quirk of mind or expression renders each impenetrable to the other. I have known two judges (neither now on the Bench) able to take hold of an argument only if expressed compatibly to their mode of thinking. I am speaking not of a stylistic preference but of a capacity to understand, and each had a powerful mind. But more often it is and should be an exhilarating encounter.

The rituals and traditions of the common law imply a number of imperatives. The advocate must know his brief; he must have reflected upon his arguments and have discarded those without real substance and he must respect in what he says and how he says it the intelligence of those he addresses.

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The traditions demand of the judge that he be accessible both physically and mentally. This imposes great strains upon the short-tempered and the strong-minded, as those with fossil intellects are often called. But then they are better engaged in tyrannising their families or chanting rhythmic slogans at outdoor meetings (nonetheless a surprisingly small proportion of the population's surprisingly large contingent of them feel called to judicial office).

All these requirements for the advocate and the judge spring from the nature of their common task. The advocate endeavours to persuade; the judge must decide. For that they must share or achieve a perception of what the matter for decision is, though not, of course, of its resolution. The isolation of that matter is the most demanding and the most essential of all legal skills. Presenting it clearly, concisely and attractively is the summit of oral advocacy.

At the journeyman levels of litigation the matter for decision is usually clear enough even if its theoretical bases are in a state of upheaval. Whether, for example, a customer falling downstairs in a shop is entitled to recover upon the basis of the strange incantations of occupier, invitee or licensee liability or upon the basis that the general law of negligence applies in such cases is likely to make little difference. The judge who sums up is perhaps better qualified and more lucid if aware of the High Court's and the Privy Council's different views about it. The discussion in *Public Transport Commission of New South Wales* v. *Perry*[1] shows both the difference between the High Court and Privy Council positions and what the Australian law is.[2] Now that the Australia Act 1986 (Cth) has removed appeals to the Privy Council from State Courts in State matters, it has at the same time abolished one of the more absurd consequences of federation (unforseen, unintended and preventable), namely that for some eleven years this country enjoyed the dubious privilege of two co-ordinate ultimate courts of appeal in State jurisdiction. It has also left the High Court free to develop a jurisprudence suitable to our needs.

I have so far concentrated upon the co-operative aspects of the judiciary and the Bar. This co-operation is made easier by the fact that judges are, by and large, former barristers and that in the long run most barristers want to become judges. It has, of recent years, also appeared that some judges want to become barristers. The appearance at the Bar table of the person who yesterday occupied the Bench seems to have had little effect on those still at the Bar or upon those remaining on the Bench. As time goes by, more will early leave the Bench. The demand for judges seems insatiable. Youthful appointments perforce will continue and some will regret their immature choice. They will return to what, from a year or more's absence, seems preferable to the cushioned ease experience has revealed is a bed of nails.

1 (1977) 137 CLR 107.

2 See now *Australian Safeway Stores Pty Ltd* v. *Zalvzna* (1987) 61 ALJR 180.

The Honourable Dame Roma Mitchell discussed the question of judicial return to the Bar in a paper she delivered to the Second Biennial Conference of the Australian Bar Association.[3] She mentions the English position (not allowed), the American position (allowed), and expresses her own distaste for the practice and concern lest litigants appearing against a former judge in that court feel disadvantaged. In this respect the administration of justice would not be well served. The Bar's attitude is reflected in a rule of the N.S.W. Bar Association forbidding such appearances.[4] But how is one to prevent it? Surely not by law. And are appearances before one's former colleagues so undesirable? That judges disagree is at once fortunate and obvious. And it is manifestly better to have a good advocate than a bad judge. It is not long, moreover, before the former judge is indistinguishable from his colleagues and his former occupation either forgotten or as unremarkable in the present as it is likely to be in history.

One cannot practice for long at the Bar without being impressed by the flexibility of judge-made law. The common law is contingent and temporary because it is embodied in the judges. Their judgments are not only discourses, they are also the law. The law is coherent because judicial techniques have been developed and employed to make it so. At least this is mostly the case. In this way a certain predictability essential to the law's continued functioning is maintained; for argument, where nothing is known, is impossible. The predictability is only approximate, not because no two cases are ever exactly the same, but overwhelmingly because past decisions act as beacons to indicate the future path; but they do so only broadly. In any event, those decisions or some of them may cease to be such once the instant case has been decided.

Too assiduous a respect for what has been said in the past cripples the law's development and hamstrings both the advocate and the judge. To those on the Bench of an ultimate appellate court its past decisions are no more than the conclusions of those situated as they are. Age does not necessarily merit respect. And though judges are wont to refer to decisions as right or wrong, what they mean by "right" is "not yet departed from" and by "wrong" "temporarily in the discard". Where every decision may be overturned, none is final and, in the law, correctness and finality, however contingent, are synonyms.

In Sir Owen Dixon's reign (for such it was), this is how a departure in principle was arrived at:

> [i]t needs no argument to show that reckless disregard of the presence of a man must include not only the case of a man who is there but also of one whose coming is expected or foreseen. But the application of the rule is modified to the point of exclusion by

3 Dame Roma Mitchell, "The Appointment of Judges and their Return to the Bar" [1986] *Bar News* (Spring).

4 Rule 7 provides: "[a] barrister who is a former judicial officer... shall not practise as a barrister in any court or before any officer exercising judicial or quasi-judicial functions if he has been a member of or presided in such court or exercised such function."

> inferring a licence from circumstances notwithstanding the unreality of the supposition that there was any actually consenting mind or will. The process of inference is then transmuted to a different and wider conception, that expressed by Lord Goddard, conduct on the part of the occupier of such a kind that he cannot be heard to say that he did not give a licence. At that point, by precluding the denial of a licence, the law has surely reached the use of fiction, and if now we boldly look at the facts which give rise to the imposition in this manner of the liability it will be but to complete the course of development by a process for which the history of the law furnishes many precedents... Why should we here continue to explain the liability which that law [i.e. of Australia] appears to impose in terms which can no longer command an intellectual assent and refuse to refer it to basal principle?[5]

Some thirty-five years before, Sir Owen, as counsel, had pressed upon the High Court the need to follow the decision of the English Court of Appeal in *Bolton Partners* v. *Lambert*.[6] Sir Isaac Isaacs after referring to the lapse of time and change of circumstances since the Privy Council's rather arrogant directions to colonial courts in *Trimble* v. *Hill*,[7] remarked: "[b]ut, short of emanation from a supreme source, every potion should at least be tasted and appraised before being swallowed."[8] It is not clear whether Sir Isaac had hock or hemlock in mind.

Recently Sir Anthony Mason concluded his Wilfred Fullagar Memorial Lecture "Future Directions in Australian Law"[9] as follows:

> [o]ur evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual. The proper function of the courts is to protect and safeguard this vision of the democratic process.[10]

This is a fresh and welcome voice.

One's estimate of the judiciary is of course influenced, if not determined, by the openness of mind, intellectual capacity and independence of spirit of the judges. The law is an expression of the whole personality and should reflect the values that sustain human societies. The extent to which those values influence the formulation of the law varies according to the nature of the particular legal rule in question. This means that the judges must appreciate what they are doing and what the consequences of their decisions may be for their society. This could be done by an informed use of existing and accepted judicial techniques but progress would be slow and that mode of evolution of judge-made law illustrated by Sir Owen's remarks surrenders in considerable measure the future to the values of the past.

Sir Owen's remarks indicate the manner in which change was achieved by the tools of legalism and a kind of inspired semantics. The means of the future will no doubt be different in the sense that the only recognised agent of

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5 *Commissioner of Railways (N.S.W.)* v. *Cardy* (1960) 104 CLR 274, 285.
6 (1889) 41 ChD 295.
7 (1879) 5 App Cas 342, 344.
8 *Davison* v. *Vickery's Motors Ltd (In Liquidation)* (1925) 37 CLR 1, 14.
9 Unpublished lecture, 1987.
10 *Ibid.*

change need no longer be found implicit in the past. The judge is then left free to perform his task guided by such values as the present Chief Justice indicated in the passage I have quoted and able to employ a freer, less arthritic judicial process but still one yielding that predictability the system demands. Of course it remains yet to be seen whether the Court as a whole adopts Sir Anthony's approach.

The High Court's practice of requiring a statement of the heads of argument has given the advocate the opportunity to make himself early understood and the judge the chance early to understand. Previously this essential could be obscured by a flurry of questions from judges bent on preserving their views of what the law was or should be. There should be a vigorous interchange between Bench and Bar. It helps keep the advocate alert in his preparation if he knows he will be tested in Court. And it must for the judge relieve the intolerable tedium of listening, particularly when the argument becomes repetitive. Judicial intervention to prevent this and to test the argument helps both the Bar and the Bench. A silent judge disrupts the process as much as an over-talkative advocate.

The device I have mentioned enables the judge to listen. He can see from the heads of argument whether what is to be said bears upon what is to be decided as he then sees it. If he thinks not, he may be persuaded, and can in any event suggest the omission or misconception. This at the least enables the advocate some entry into the judge's mind.

The argument still sets the boundaries of decision. The custom of reserving judgment encourages the judge to exceed these or to decide the case upon a matter not argued or raised in discussion with the advocate. This is, in my experience at least, extremely unusual. The system does not require that the reasons for decision be confined only to those argued as distinct from what they may have implied or suggested.

Confining the reasons for decision more or less within the argument also facilitates predictability of decision and thus of a measured progress of judge-made law. When the time has come for re-assessment of a principle, that can be made known so that departures are not unheralded and startling. So it is, as it seems to me, that the judges now behave.

The problem at the heart of juridical evolution of rules and principles is not so much how it should be done but what is the target to be aimed at. The objective is always beyond the horizon, but which horizon? The law of negligence, for example, was evolved to favour the person injured whether the agent of injury was physical or corporeal or something incorporeal, such as an opinion or a statement.

These changes have had vast economic consequences. Is the necessity for the change to be found only in the compulsion of intellectual assent or must the judges undertake an examination of the insurance trade and other material events such as no-fault liability schemes? The truth is that there is no universal rule to guide them either in this field or in others. But the necessity is there and the law's salvation has been in the gradualism of its inevitable changes.

When the law faces this question, it faces its own origins. The formulation of general, if ad hoc rules, from reasons for decision in particular cases is likely to move slower than the society which surrounds it. In the past when the gap prompted the call to kill the lawyers, the Chancellors closed it, at least in many cases. The rules they applied then lay outside the common law. Now they are well within it and rejoice in the maxim that equity follows the law. The advocate by the originality of his argument must afford the judge the opportunity to adjust the rules when the occasion is ripe.

But the nature of judge-made law precludes the existence of general rules for its evolution. One is not glossing a code where the principle is settled for all time leaving to the judge only the task of applying it. The common law judge makes the rules, but with the yeast of the past. Of course, the amount he uses and of what kind is more or less up to him, subject, that is, to the agreement of any higher court. By this process the judge's selection is either accepted or rejected by his brethren of the judicial community. By acceptance or rejection it is brought into or excluded from the canon and becomes true or false or right or wrong in the sense I have earlier mentioned.

Although a decision of the High Court could before 1975 be brought before the Judicial Committee by virtue of the prerogative of appeal, the High Court has always behaved as a final court of appeal. It developed its method of conducting oral argument suitable to the Australian temperament. This involved, and involves, a more personal relationship between the Bench and the Bar than that congenial to the English temperament. The ideas and assumptions of the judges are openly expressed in, and a natural part of, the context in which argument takes place. It helps the process of decision by letting the judge express, and enabling the advocate to learn, what aspect needs exploration. This eases the act of decision and the presentation of argument. Those emerging scarred from the ordeal can easily give vent to their feelings in the privacy of the robing room and improve their skill in the future. I would hope that argument continues to be so conducted.

It is better for all that a judge's preconceptions or prejudices be confronted and dealt with in a courteous and civilized way. This is particularly so in constitutional cases where sometimes the factor motivating decision lies hidden outside the threshold of the written judgment. The notion that an application of the external affairs power to every treaty enables the Commonwealth to increase at will its legislative power is one such. It ignores, of course, the fact that while the executive may enter into the treaty, it is the Parliament that makes the law. And if an argument is based on or embodies a fallacy, the sooner it is exposed the better.

I have so far concentrated upon the mechanisms for debate between judge and advocate. I have used the word "tradition" to characterise what the debate entails or imposes. Those imperatives derive from the nature of judicial reasoning. Some describe it as logical, as indeed Sir Owen Dixon does in the passage I have quoted. In the sense of the necessity for a connection between successive ideas that no doubt is true. But the connection is not one of logic, but of a traditionally accepted canon. I do not intend to subject High

Court or other judgments to the analysis of which one article is a somewhat cruel example.[11] For those interested, a close examination of the reasoning of the majority in *The Queen* v. *Kirby; ex parte Boilermakers' Society of Australia* [12] shows circularity of reasoning and great semantical skill.

However it is impossible to justify the system of precedent by reasoning. It is just there. A hierarchy of courts exists and has done in the country which generated the common law for hundreds of years. Within it or out of it we have notions of *stare decisis* and the elaborate justifications for departure from previous decisions. An ultimate court of appeal will depart from its previous decisions when and if necessary. And no one can judge of that but the ultimate court itself since by hypothesis there is no higher court.

This system requires that the public have confidence in the purity of the motives and the reasonableness of the judgments of the courts. It means as well that the advocate, if he requires the continuance of the system, must abide by what is necessary for its functioning. He represents his client best when he does this, bearing in mind that he is more than a "mouthpiece" for some person or interest. He must decide what needs to be said and how it may best be said consonantly with the system's necessities and he must accept responsibility for what he does.

A federal system involves a tension between the High Court and the Parliament and the executive. Recent years have seen this increase because interpretations of the Constitution have become party dogma. The Court's constitutional decisions are seen by many of the uninformed and quite a few of the informed as bearing upon party political questions. When, as in the case of Mr Justice Murphy and to a much less degree Sir Garfield Barwick, a former political figure, hands down a judgment he attracts the animus and often the abuse of some in Parliament. Section 72 of the Constitution leaves him exposed to the attack of his opponents and the often doubtful support of his former friends. Whether Parliament may itself decide the judicial question of his fitness for office or "proved misbehaviour or incapacity" is at the least doubtful. But the Court should not be exposed to this hazard. A Commission of judges whose membership rotates is called for. The Constitutional Commission's Judiciary Committee has recommended a judicial committee. The notion of a rotating membership is to avoid the appearance of judges having an authority over their fellows.

What I have written is rambling to a degree and severely practical. That is how advocates do regard the judiciary. But both sides of the Bar table would, I hope, share the view that the nourishment of the law requires hard thinking, courtesy and straight talking from them all and that the community is entitled to no less.

11 See W.T. Murphy and R.W. Rawlings, "After the Ancien Regime: The writing of judgments in the House of Lords 1979-1980" (1981) 44 *Mod L Rev* 617; (1982) 45 *Mod L Rev* 34. The author is indebted to the Honourable Mr Justice Priestley for the reference.

12 (1956) 94 CLR 254.