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the Hon. J J Spigelman, AC, Chief Justice of NSW in 2002**

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## Foundations of the Freedom of the Press in Australia - The Inaugural Australian Press Council Address

### FOUNDATIONS OF THE FREEDOM OF THE PRESS IN AUSTRALIA

#### THE INAUGURAL AUSTRALIAN PRESS COUNCIL ADDRESS

THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

BANCO COURT, SUPREME COURT OF NEW SOUTH WALES

SYDNEY, 20 NOVEMBER 2002

On the evening of 20 September 1826, two privates in the 57th Regiment stationed in Sydney, Joseph Sudds and Patrick Thompson, stole some calico from a shop in York Street, around the corner from their barracks situated at what is now Wynyard Square. They expected to be caught and sentenced to transportation, which appeared to them to be preferable to the rigours of military discipline. Lieutenant General Ralph Darling, Governor of New South Wales – or, as his commission described his office, Captain General and Governor in Chief – concerned with the maintenance of the discipline of his force over this and similar incidents, including a soldier's self-mutilation with a view to discharge, determined to make an example of Sudds and Thompson. Such behaviour reinforced Darling's opinion, also prevalent in London, that transportation to Australia had lost its deterrent effect and its role as punishment.

Darling set aside the two soldiers' convictions and sentences by a Court of Quarter Sessions, which had ordered them to be transported to a penal settlement for seven years, and directed that they would serve on a chain gang on the public roads of the State for the entire period of their sentence and thereafter would return to their corps.

At 11.00 am on Wednesday 22 November 1826, the two prisoners were brought before the garrison assembled on the parade ground of the barracks. They were stripped naked, dressed in the yellow and grey clothes of a convict and each was then encased in a specially designed set of chains with an iron collar with spikes that prevented lying down and wrist and leg manacles, weighing some fourteen pounds in total. Thus burdened they shuffled from the parade ground with four drummers beating out the *Rogues March*.

Perhaps nothing more would have been heard of this affair but for one unfortunate circumstance. Sudds was critically ill, to the knowledge of his wardens but unknown to Darling. He died five days later on 27 November 1826 [1]. Darling had a public relations crisis on his hands. An incident of this character could permanently damage his career, as he well knew, and as testified by both the volume and obsequious content of his correspondence with London on the subject. One source of hostile information for his superiors in London was the strident reportage and exploitation of the incident by the then new independent newspapers of the colony.

Only three years before William Charles Wentworth and Robert Wardell, the first two barristers admitted as such by the Supreme Court of New South Wales, had commenced publication of the *Australian*, which joined the official *Sydney Gazette*. A year later the *Monitor* began publication under the direction of Edward Smith Hall.

Wardell was a highly competent barrister, who had been passed over for Saxe Bannister as Attorney-General. If Darling had had him as principal law officer, the history I am about to recount would probably have never happened. Wentworth, locally born, and already emerging as the leader of the emancipists, had met Wardell in London in 1819 where Wardell was already an editor, of the *Statesman* evening newspaper. They travelled to Australia together in 1824, accompanied by a printing press. Their approach was clearly stated in their first editorial:

“A free press is the most legitimate, and, at the same time, the most powerful weapon that can be employed to annihilate influence, frustrate the designs of tyranny, and restrain the arm of oppression [2].”

Governor Darling regarded Wentworth as “a vulgar ill-bred fellow, utterly unconscious of the common civilities, due from one Gentleman to another [3].” The very title – the *Australian* – proclaimed Wentworth’s political program. Edward Smith Hall at the *Monitor* deployed different terminology. He denounced the community which would not stand up for their rights as “a poor grovelling race ... they are no longer *Britons* but *Australians*” and spoke of them “degenerating into *Australians* [4]”. Hall was a failed farmer, the first cashier of the Bank of New South Wales, a founder of the Benevolent Society of New South Wales and of the local branch of the British and Foreign Bible Society. He had come to Australia as a lay missionary – “an apostate missionary”, Governor Darling would call him – with a radical’s faith in the perfectibility of Man, undiminished by the experience of the French Revolution - Hall applied his evangelical zeal to everything he did or wrote, never pausing at the border between zeal and self-righteousness.

The day Sudds died, the *Australian* commenced its coverage with a blistering attack on the Governor, the system that permitted action of this character to occur and raised serious doubts about the legality of the Governor’s conduct. The *Monitor*, which had long campaigned against the brutality of the treatment of convicts [5], also took up the cause.

Plainly shaken by the course of events, and by the allegations, Darling belatedly sought legal advice, including an advisory opinion from the Supreme Court, then only two and a half years old. In a joint opinion, Sir Francis Forbes and Justice Stephen ruled against the Governor. Darling had in effect set aside a sentence and imposed a new sentence by executive fiat. This was the assumption of a judicial role. The Governor purported to act under a statutory power, but Forbes and Stephen concluded that that power permitted the Governor to interfere only by reason of conduct subsequent to the sentence of transportation taking effect [6].

The underlying basis of their opinion was the assertion of a clear separation of functions between the judiciary, which imposes sentences, and the exercise of executive authority after a sentence takes effect, pursuant to a statutory power for a specific purpose. It was the clearest possible assertion of the application of the rule of the law to the colony and of the independence of the judiciary.

The strength of Sir Francis Forbes’ convictions on the fundamental significance of these principles had already been manifest in his previous post as Chief Justice of Newfoundland where he had come into conflict with the military Governor of that colony by declaring invalid a range of regulations [7]. Forbes’ strength of character is manifest in the fact that, in neither position, did he have the protection of security of tenure available to the English judiciary since the Act of Settlement of 1701.

The media attack on Darling in the wake of the death of Sudds elevated the injustice of the incident to a symbol of the injustices perpetrated on the residents of New South Wales by reason of the absence of any form of involvement in the legislative process and the absence of trial by jury. There was provision for juries at the time, but such juries, far from being constituted by peers of an accused, were constituted by seven military officers who sat in uniform.

Until this point of time, Darling had allowed the media to develop without interference from the executive. Indeed only shortly before the Sudds Thompson incident, he had refused an application by the head of the Anglican Church, Archdeacon Thomas Scott and the leader of the exclusives, Mr John Macarthur, to direct the Attorney General to prosecute the papers for attacks upon them. Only a week before the delivery of his adverse opinion on the Governor’s powers, Sir Francis Forbes had written to his Parliamentary patron in London, praising the Governor’s restraint. He had said:

“I hold that the Governor’s own good sense had kept him right. It is at all times desirable that the weight of government should be kept out of the scales of justice. Even in England it is so. But the reason that it should is a hundred fold stronger in this Colony, where the Judge that presides holds his place during pleasure; and the jury that try, are military officers, subject in a thousand ways to the feelings and influence of the government, and consequently open to imputation, how conscientiously so ever they may decide [8].”

This harmony would quickly dissipate. Over the next few years there would emerge the most serious conflict between the judiciary and the executive that has ever occurred in Australian history. Fuelled, as it was, by the poisonous banalities of small town politics, there were nevertheless fundamental principles at stake involving the rule of law, the independence of the judiciary and the freedom of the

press. Within a few years these principles were confirmed in a manner and with a force of which we remain the beneficiaries to this day.

In England the political use of actions for libel, particularly for seditious libel and criminal libel, which had been expanded by the judiciary over the course of the 18th century, was decisively wound back by the enactment of Fox's Libel Act of 1792 which restored the general issue to the jury [9]. In New South Wales, however, the peculiar composition of the jury was such as to encourage politically motivated libel actions to proceed. Within a few years there would be a steady stream of such proceedings.

In October of the previous year an action for libel by Attorney-General Saxe Bannister, whom Forbes thought to be intermittently mad, was dismissed by a jury after a scathing summing-up by Forbes. His Honour set out a penetrating analysis of an article in the *Sydney Gazette* which had, if anything, attempted to praise rather than to criticise the hapless Attorney. In the course of his directions to the jury Forbes said:

"It is, however the right of the public to discuss the acts of a public officer, provided it be conducted within the legitimate bounds of fair discussion, but if, on the contrary, it degenerates so as to impute bad motives and wicked conduct, it is then no longer fair, it is libellous [10]."

It is unlikely that Darling, who eventually forced Bannister to resign, would have regarded this libel case as much of a precedent. He was concerned to ensure control of the press through direct means, rather than through the haphazard process of judicial proceedings. Governor Darling was prone to military simplicity – "a perfect martinet in military discipline" was how the senior official in the Colonial Office described him [11]. Darling regarded any opposition as insubordination. His many achievements, particularly in administrative reform [12], have been overshadowed by the controversies in which his intolerance of criticism allowed him to become embroiled.

When Robert Wardell wrote an article in the *Australian* critical of Colonel Henry Dumaresq, the brother of Governor Darling's wife and his personal assistant, Dumaresq challenged Wardell to a duel. They met in a field at Homebush, each fired three shots at the other, all of which missed. Wardell's second, William Charles Wentworth, convinced him to apologise. Honour being satisfied, the parties rode back to Sydney for breakfast. At that time, duelling was the primary form of alternative dispute resolution but, as the incident at Homebush established, it could not be relied upon as a means of controlling the press.

Darling proposed legislation which would establish a licence system for newspapers, provide for the forfeiture of a licence upon conviction for any blasphemous or seditious libel and confer on the Governor an unconfined discretion to revoke a licence. A second Bill would impose a stamp duty on newspaper sales.

Under the *New South Wales Act*, the Colony's first Constitution, which created both the Supreme Court and the first rudimentary, non-representative Legislative Council, legislation by the Council required a certificate from the Chief Justice to the effect that the legislation was not repugnant to and was consistent with the laws of England.

Unlike the British Parliament, the local Legislative Council was a subordinate assembly of limited and defined powers, subject to supervision by the courts at Westminster, the whole of the jurisdiction of which had been invested in the Supreme Court. The certificate was, in substance, an abbreviated mechanism for exercising such supervision. The test was, however, a flexible one. 'Consistency' was required only "insofar as the circumstances of the colony permit". That was a matter on which reasonable minds could differ.

When Darling had raised the possibility of legislation to regulate newspapers, Forbes warned him that he may not be able to provide the requisite certificate. His approach to what "the circumstances of the colony" permitted, differed profoundly from Darling's.

To a conservative military man like Darling, let alone to his troglodyte advisers like Dumaresq and the self-interested stance of the exclusives like Macarthur, Forbes had marked himself out as a man with dangerously liberal ideas, a supporter of convicts and emancipists. He had been born in Bermuda, but it was known that he had visited the United States of America. Forbes' conflict with the Governor of Newfoundland would have been regarded by Darling as a form of disobedience. This created suspicion that he was a man with, what was then called "republican" sentiments – the term "republican" was, at the time, deployed with both the accuracy and the abusive content that applied in comparatively recent

times to the appellation “bolshevik”. Traditional “republicans” were known for their hostility to the indulgences, including the sumptuary indulgences, of a monarchy.

In a letter to his British patron Forbes said:

“Is it because the simplicity of my life and the economy of my habits are at variance with the pride, the pomp and circumstance of my neighbours, that I must be assumed to be an enemy to the substance of monarchy, because I do not ape its shadow. My dear sir, I yield to no man living in my reverence for the British form of government. My opinion is founded on reason – it is not the blind idolatry of ignorance or the hypocrisy of ignorance. I have read and reflected enough to know that the government best suited to any people is that which has gradually grown amongst them ...[13]”

Forbes displayed all these dangerous tendencies in his first few years in the Colony. He refused to permit the adoption of the practice, then still current in England, by which the judges kept the filing fees for themselves. This would be known today as privatisation. Australian judicial posts would never develop into valuable rights of property. The system was strongly supported by Adam Smith [14]. To the consternation of the barristers, whose knowledge of technical procedure was a competitive advantage, Forbes permitted proceedings to be instituted in the Court with the minimum of formality, in much the same manner as has reasserted itself in recent years [15]. It was after his departure, that the bar had his successor insist upon the full paraphernalia of technical pleading on the English model. Perhaps even more dramatically, Forbes – as his formal portrait which hangs in this Banco Court displays – at first abjured the wearing of wigs.

A year after their duel, Wardell and Dumaresq ganged up on Forbes at a dinner party on the subject of wigs which led Forbes to make some sarcastic remarks for which he was admonished from London by his Parliamentary patron. Forbes wrote back:

“Your gentle admonishments, conveyed under the parable of the *gown and the wig* were taken just as they were intended. The first I had always worn, not more from the propriety of the costume, than from my liking for it – Republican as my taste may be supposed, it was but in keeping that I should entertain a liking for the exterior of the Roman citizens: and the second, I immediately assumed on the reading of your letter. But who could have informed you of the only occasion on which I remembered to have laughed at this venerable appendage of the tribunal, I am at a loss to conjecture.”

(Forbes referred to the dinner party with Dumaresq and Wardell)

“I will affirm that upon no other occasion can I charge my memory with the sin of having slandered wigs – on the contrary, I have always supported the propriety of using them in cold countries – and the reason I’ve always assigned for not using them ... is the fact of their being intolerable in the hot months of the year. On many occasions I’ve been compelled to take off even the little band from my neck – you have never sat in a crowded court with the thermometer at one hundred. However, I have given the best possible refutation to one part of the charge against me, by putting on a wig – and it will be a great consolation, when I find my brains boiling under it in summer, to know that I am performing my duty and silencing a great scandal [16].”

Despite his doubts about Forbes’ philosophical predisposition and his prior knowledge of Forbes’ likely response to the validity of the press licensing bill, Darling would have been fortified by the fact that legislation of the precise character which he now proposed for New South Wales had recently been enacted in Tasmania. The wishes of Governor Arthur for such restraint on the media had been approved by a certificate issued by Chief Justice Pedder of the Supreme Court of Tasmania.

Forbes and Pedder had already established a similar divergence of approach in the first constitutional cases in Australian legal history. In 1824, the issue arose whether the Courts of Quarter Sessions were obliged to sit with juries for the trial of free settlers. In *R v Magistrates of Sydney* Forbes CJ concluded:

“It would not merely be against the express language of *Magna Charta* to try free British subjects without the common right of a jury, but against the whole Law and Constitution of England [17].”

Pedder CJ had come to the opposite conclusion in *R v Magistrates of Hobart Town* [18].

Pedder was young, a less experienced lawyer than Forbes, inclined to sycophancy and by no means made of the same strength of character [19]. That the lake named after him has been flooded beyond recognition is not entirely inappropriate.

Forbes refused to certify the crucial provisions of the Bill. He emphasised that a colonial legislature was not a sovereign Parliament but a subordinate body with authority that had been legislatively defined. The provision of the New South Wales Act which required certification by the Chief Justice itself manifested an intention to preserve the uniformity in the laws of the British Empire. He rejected the prior restraint of a licensing system for newspapers. He said:

“By the laws of England, the right of printing and publishing belongs of common right to all His Majesty’s subjects, and may be freely exercised like any other lawful trade or occupation. So far as it becomes an instrument of communicating intelligence and expressing opinion, it is considered a constitutional right, and is now too well established to admit of question that it is one of the privileges of a British subject. ... To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and to make him the arbitrary and infallible judge of all controverted points in learning, religion and government ... It is clear that the freedom of the press is a constitutional right of the subject, and that this freedom essentially consists in an entire exemption from previous restraints; ... By the laws of England, then, every free man has a right of using the common trade of printing and publishing a newspaper; by the proposed Bill, this right is confined to such persons only as the Governor may deem proper. By the laws of England the liberty of the press is regarded as a constitutional privilege, which liberty consists in exemption from previous restraint; by the proposed Bill, a preliminary license is required, which is to destroy the freedom of the press and to place it at the discretion of the government [20].”

Sir Francis Forbes went on to reject the provision for a power to revoke a licence, on the basis that it empowered the Governor to revoke a licence without giving a hearing and, indeed, to do so in circumstances where he would be a judge in his own cause.

Forbes defended the position he took in a letter to his Parliamentary patron in London:

“An English judge cannot be too careful of his reputation for independence. If he loses that, he loses his necessary influence over the public opinion and, on state occasions, he becomes useless to the state [21].”

In this *Newspaper Acts Opinion*, as in his judgments, it is noticeable that Chief Justice Forbes felt quite comfortable with a discourse employing the terminology of “rights”. He referred more than once in this opinion to Sir William Blackstone’s classic text which had proven so influential, only a few decades before, with the American colonists. Book I of *Blackstone’s Commentaries* is entitled “Of the Rights of Persons” and Chapter 1 is entitled “Of the Absolute Rights of Individuals”. For over a century and a half English jurisprudence had been quite comfortable with the language of “rights”, usually referred to in the case of colonial discussion, in Australia no less than hitherto in America, as “the rights of Englishmen” [22]. It is worth recalling the title of Jeremy Bentham’s 1803 tirade against the legality of the powers exercised by the early Governors of New South Wales: it was *A Plea for the Constitution. Shewing the Enormities Committed, to the Oppression of British Subjects, innocent as well as guilty; in breach of Magna Charta, the Petition of Right, the Habeas Corpus Act and the Bill of Rights. As Likewise of the Several Transportation Acts, in and by the Design, Foundation and Government of the Penal Colony of New South Wales*. We don’t get titles like that anymore.

Over the course of the 19th century common lawyers stopped using the language of rights, to the extent that the discourse has only been revived in common law countries in recent times by means of the adoption of international instruments, the provisions of which can be traced back, historically, to 17th and 18th century British texts.

To a narrow-minded military man like Darling, talk of rights was poppycock. Forbes’ rejection of his plans created a decisive and irreparable conflict between the two men.

The second piece of legislation which Darling proposed was the imposition of a stamp duty. This had an extant English precedent, in contrast with the system of licensing newspapers that had been terminated in England, in large measure by inadvertence, in 1695 [23]. The stamp bill was in a different category and, at first, Forbes indicated an intention to issue a certificate. There is some controversy as to the form in which the Act was originally presented to Forbes. The printed form did not contain the precise quantum, but it was claimed that the amount of 4d had been inserted in pencil on the text which Forbes had approved. Whether that be so or not, it is almost inconceivable that Forbes did not know the amount that Darling had in mind.

Forbes took a month to state that the Act, which had been proclaimed, did not have a valid certificate. The delay itself is suggestive of a change of mind. Forbes had gathered information about the likely effect of a duty of this size on the existing newspapers. The proprietors suggested, understandably, that it would drive them out of business. The *New South Wales Act* provided that the purpose for the imposition of a tax had to be distinctly stated in the law. In his letter of explanation to Darling, Forbes noted that the Bill purported to state its purpose as being the creation of a fund for printing public instruments but that a fund created by a levy of 4d on each newspaper would be so “extravagantly disproportionate to the objects proposed by the Act that it were absurd to suppose the duty was imposed merely for such purposes” [24]. Forbes concluded:

“Bringing the 4d Stamp Bill to the test of the law, and looking at the broad facts before me, how was it possible to shut out the conclusion that the Bill had other objects in view, than such as were openly expressed, and in its consequences must work the ruin of those persons, whom it professed merely to tax? And how can this be reconciled either with the general principles of English Law or the provisions of the New South Wales Act [25].”

In short, Forbes had concluded, after consideration of facts made available to him privately, that the quantum of the duty indicated that the Bill had probably been proposed for an improper purpose. Darling disputed these assertions of fact [26], but there were no proceedings in which he could be given a hearing or the matters resolved after full consideration. There was no judgment. Nor, indeed, was there a formal refusal of a certificate. Forbes took the position that he hadn't been asked to certify the Bill in its final form. The published Act had not been certified and was, accordingly, not law. The matter ended in a standoff, with Darling failing to proceed with the proposal. Forbes believed that Darling's failure was due to his realisation that, if he did so, his improper and therefore illegal purpose, would become obvious [27].

Writing to his patron in England, Forbes indicated that the licensing Bill, which he had refused to certify, was intended to silence the opposition newspapers. He characterised the stamp duty Bill as a measure “to effect the same end by secret and disguised means” [28].

Forbes was correct that the true objective of the legislation was an attempt to destroy an independent press. This would have been the result of the licensing system or, failing that, of the imposition of a prohibitive tax. The intervention of Sir Francis Forbes ensured that this did not occur.

The conflict between the Chief Justice and the Governor descended to pettiness. In March 1827, when Forbes invited a group to attend at his house, for dinner with the recently arrived third judge of the Court, James Dowling, Governor Darling called a dinner for the same evening, issuing invitations to many of the same guests and expressly indicating that his invitation should take precedence [29].

Dowling would, in due course serve as the second Chief Justice of the Supreme Court. He was of an altogether different disposition to Forbes. Upon his arrival on a hot February Sydney day, Dowling disembarked to an eleven gun salute and was greeted by a gowned but wigless Chief Justice. Dowling got off the boat both robed and wigged and remained so throughout the day. He confided to his diary that he did not find the experience a pleasurable one and regretted his decision to accept the appointment. He did not refer to the temperature, but his private comments about Forbes were revealing:

“He seemed very unhappy, and had a round head, republican look which was anything but encouraging to a person of my temperament [30].”

To accuse a servant of the Crown of having, with the innuendo of being, a “round head” was suggestive of the regicides of the English Revolution, referring to the short cut hair of the puritans in contrast with the long ringlets fashionable at the Court of Charles I. “A round head republican” was, as I

have noted above, roughly equivalent to “commie bastard”. The difference in philosophy between Forbes and Dowling would soon be reflected in the judgments of the Court. Dowling, the son of a press reporter, who had himself reported on Parliament before being called to the bar in London, would not prove to be as sympathetic to the press as Forbes.

With the primary provisions of his legislative attack in tatters, Darling turned to the use of prosecution for libel as a means of controlling the press. Indeed, Forbes had used the absence of such proceedings as a ground for rejecting the licensing Bill. Such a course was reinforced by that part of the legislation which Forbes had accepted would not be repugnant to the laws of England and for which, accordingly, he issued a certificate. The new Act required any newspaper to identify its ownership. Further, it conferred on the Court a discretion to order banishment after a second conviction for seditious or blasphemous libel.

In the absence of a Legislative Assembly, the courts had emerged as the pre-eminent forum for political conflict. The first prosecution for seditious libel was taken against Wardell for an article in the *Australian* containing a defamatory attack on the Chairman of the Court of Quarter Sessions about the way he had conducted a trial concerning goods stolen from Government House. Forbes had to rebuff overtures from both the Colonial Secretary and the Governor, who each sought to privately make suggestions about how this case should be listed for hearing [31]. The notorious incompetence of the Crown Law officers led to the proceedings being dismissed on technical grounds [32].

A few months later, in September 1827, Wardell was back before the Court on a charge of seditious libel of the Governor himself. He had published in the *Australian* a detailed criticism of a particular aspect of government policy. The issue for the trial was whether or not he had crossed the bounds of permissible public debate and attributed improper motives or conduct to the Governor. The case ended in a hung jury, even though the jury consisted entirely of military officers sitting in judgment on criticism of their commanding officer. A third prosecution of Wardell for the publication in the *Australian* of a letter critical of the Governor occurred in December. This also resulted in a hung jury.

When called upon by the Governor to explain these unexpected results, the Crown Law officers complained about the licence that the Court had given to Wardell, who conducted his own defence, to attack the government for its motive in instituting each prosecution and, generally, about the width of the address that was permitted. Secondly, the officers blamed the favourable directions given by Forbes in his summing-up to the two juries [33].

Forbes had emphasised that it was perfectly permissible for a public writer to debate public issues, but there were boundaries beyond which the writer could not go. He picked up a particular submission made by Wardell to the jury of military officers, and instructed them to determine the matter as if they were a jury of peers sitting in England, rather than to approach the matters as if they were sitting in an ex-officio capacity. To the particular ire of the Crown Law officers, Wardell's argument was given the force of authority from the Chief Justice [34]. Forbes said in the first trial:

“An argument has been addressed on the peculiarity of the situation you are placed in. Give such a verdict as a jury of your country would do under similar circumstances.”

The difficulty of the jurors' position was manifest in Governor Darling's report to London, in which he stated that he was well aware that in both cases there was a majority in favour of conviction: in one case a five to two majority [35]. Bearing in mind that the Governor was the commanding officer of each of the jurors, the fact that no convictions were recorded is extraordinary.

There seems little doubt that the force of Forbes' summing-up had a significant effect. Darling told London that at least one of the jurors had told him that Forbes' summing-up had made it impossible to convict [36] and that he couldn't see any point in continuing with prosecutions of this character [37]. There were no such proceedings during 1828.

At the conclusion of the two trials, Chief Justice Forbes and Justice Stephen wrote a joint letter to Darling on 31 December 1827 stating:

“We do not think that the cases selected for prosecution in this Colony would have been deemed of sufficient importance to have demanded State prosecution in England [38].”

The judges went on to criticise the semi-official *Sydney Gazette*, suggesting that its biased reporting of



the trials constituted an improper attempt to put pressure on the Court, particularly the jury. Referring to the *Gazette* as a "Government paper", their Honours suggested that once the Attorney had instituted the proceedings such a publication should have refrained from publishing material which might prejudice the case. There seems little doubt that the *Sydney Gazette* was seeking to put pressure on the military officers of the jury.

Forbes and Stephen balanced this letter with criticism of the press. In a case in which Wardell and Wentworth were seeking to take proceedings for criminal libel against the Colonial Secretary for certain official publications in the *Sydney Gazette*, Forbes and Stephen publicly stated, the day before the letter to Darling:

"We avail ourselves of the first opportunity which has been afforded us, of expressing our entire disapprobation of the style and manner of discussing public measures in this Colony. It is impossible to say that the press has not transgressed the bounds of fair and temperate discussion – and an intemperate process is no less opposed to the moral laws under which we live, than it is to the good sense, the good taste, and the sober feelings of society ... In these observations we desire to be understood not to allude to any particular publication, or to any individual person. We condemn what we consider to have been a general practice, in the same manner as it is condemned and forbidden by our laws, and we would earnestly recommend all those persons in whose hands the press of the Colony is placed, to be more guarded in the uses which they make of it – they are, to a certain degree, entrusted with the springs of public opinion – they hold a powerful influence over the peace and goodwill of society – it is their moral duty, no less than their legal obligation, to conduct their discussions with fairness, temper and moderation. The law protects them within these limits; beyond them they become criminals in the eye of the law and disturbers of the public peace."

Forbes was increasingly disturbed by the tone and content of the press which he described, in the argot of the era, as "licentious" [39]. However, it is clear that he had a strong belief in the role of vigorous public debate. Further experience with the local press would lead him to emphasise, to a greater degree than he did at first, the necessity for restraint by the press in the special circumstances of the colony. Nevertheless, at first, and to substantial degree throughout, he was a champion of freedom of the press.

I would not wish to create the impression that Forbes partook in anything like first amendment jurisprudence. Writing extra-judicially he said:

"... A free press is not quite fitted to a servile population; it is excellent, indispensable in a free state because of its tendency to counteract that eternal propensity of our social natures to make slaves or dupes of one another, but for that reason perhaps, it is not suited to a state of society, where one half of the community are worked in chains by the other; the direct tendency of the press is, in short, to equalise mankind; and the direct policy of our little state is only an enlarged prison discipline; the first is to set all free; the last to hold one half in servitude ... An unrestrained press is not politic or perhaps safe in a land where one half of the people are convicts, who have been free men; yet I must not leave out of the account that the other half of the people are free, and that, as an abstract right, they are consequently entitled, as of birthright, to the laws and institutes of the parent state. It is a mixed question, and requires to be carefully examined; if you take away the freedom of public opinion upon matters of government, you take away a legal right; necessity you will say justifies it; then the limit of that justification is the necessity which compels it; it should go no further [40]."

One of the provisions of Darling's newspaper legislation which Forbes had approved was a requirement that a copy of any newspaper be delivered to the Colonial Secretary on the day of publication. Edward Hall had changed the *Monitor* into a new form consisting of a number of pages stitched together and retitled *The Monitor Magazine*. In proceedings to recover a penalty for his failure to deliver a newspaper, the Supreme Court held, by the application of the principle that penal enactments must be strictly construed, that the Act did not apply to magazines and the publication was not, in fact, a newspaper [41].

Darling had no doubt as to the source of his embarrassment. On 1 September 1828 he wrote to the Colonial Office, in one of his many dispatches urging the removal of Forbes, and said:

"I've been abused and calumniated since the close of the Year 1826 by the Newspapers,

and I have shewn beyond all doubt that Mr Forbes and his associates ministered to this Abuse and these Calumnies ...”

Darling's letters to London had become a campaign against Forbes' influence and his alleged proclivity to give a legal character to virtually any issue. This made the Chief Justice, according to Darling, “in effect the ruling Authority” [42]. Debates about Bills of Rights, were always thus.

In August 1828, the Secretary of State for the Colonies sent a detailed, scathing dispatch to Darling, with a copy to Forbes, criticising the conduct of both over a series of disputes – Darling coming off significantly the worse. He threatened to recall all the judges and the Governor if the confrontation did not cease [43]. A greater degree of circumspection became evident in Forbes' conduct and correspondence thereafter. The absence of security of tenure must have had its effects.

The next phase of confrontation between the executive and the press began in church. Archdeacon Scott, head of the Anglican Church, formerly secretary to Commissioner Bigge, and, somewhat ironically, given his proclivity to give sermons about drink and the later traditions of the church in Sydney, a former wine merchant [44], was a Government House insider, and, from the time of his visit with Bigge, a friend of John Macarthur.

Hall, the editor of the *Monitor* was, at least on the surface, a religious man. He had come to Australia as a freelance lay missionary with a distinct evangelical bent. Hall rented a pew at St James Church for himself and his six daughters. Probably with the concurrence of Governor Darling, but in any event knowing precisely what the Governor's wishes would be, Archdeacon Scott decided that Hall's pew was far too close to the Governor for the latter's comfort [45].

At first the Archdeacon simply locked the pew. When Hall and his six daughters attended for Evensong, they climbed over the barrier and sat down. Next time the pew had been boarded up and was guarded by constables with staves. Hall and his daughters squatted on the step outside the altar rails, to the inconvenience, Scott would complain, of the children who were permitted to sit there.

Taking up his pen, and dipping it in his usual vitriol, Hall wrote a *Monitor* editorial on 5 July 1828, attacking Scott. He proclaimed: “This is the age of cant – cant political and cant religious. Thus we have Ministers of Jesus Christ thrusting their parishioners out of their pews, and then administering the sacrament [46]”.

In subsequent civil litigation Hall would, eventually, be vindicated. The first action in trespass instituted against Hall by the Crown was successful, because Hall had chosen to defend the case on the basis that he had an exclusive right to the pew, whereas the evidence established that it was shared. Hall's request for a new trial was refused, but Chief Justice Forbes made it clear that some form of notice had been required before the termination of Hall's rights. Nominal damages of one shilling were awarded to the Crown, which had claimed 100 pounds. Subsequently, Justice Dowling applied Forbes' approach to the matter, when Hall proceeded against the Archdeacon for trespass, and was awarded damages in the amount of twenty-five pounds, plus costs of one hundred and forty-nine pounds one shilling and eleven pence [47].

Hall's attack on the Archdeacon in the *Monitor* extended to Scott's attitude to religion, his involvement in politics, his bias against emancipists and the allegation that the Archdeacon “was not a man of peace”. He also attacked the appropriateness of an established church with its “ancient ecclesiastical pomp and authority”. However, he still wanted his pew back.

Ex-officio proceedings for criminal libel were taken and heard by Judge Dowling and a military jury. Hall conducted his own, spirited defence, relying in part on the fact that the Archdeacon was a public figure on a government salary. Anticipating *New York Times v Sullivan* he told the jury:

“A public officer was public property; and he must submit his public actions to the test of public criticism.”

And:

“A public officer must expect to pay a tax for the public good. When a man accepts a public place, he ought to calculate that he will be subject to public animadversion and should act with magnanimity [48].”

Later, Hall would complain bitterly about judicial bias in the summing-up [49]. Dowling's approach was different to Forbes'. There is little doubt that the summing-up was not as favourable as Forbes would probably have given. Specifically, there was no indication to the jury from the bench that they should set aside their military status and act as if they were jurors in England, although Dowling would give such a direction in subsequent cases.

The tone of Dowling's summing-up was clearly in favour of conviction:

"This is an information for a libel upon the character of a gentleman filling the sacred office of a clergyman – a gentleman sustaining the highest church dignity in this remote settlement. Gentlemen, whether the public or private character of a minister of a religion, of whatever denomination he is, be considered, I know of no sort of libel so reprehensible as that which tends to lower him in the estimation of mankind. As it affects his public vocation, it is highly injurious to society, by tending to bring scandal upon religion itself and thereby to dissolve the sacred bonds which bind man to man but above all, as a paramount consideration, to weaken man's confidence in the divine attributes of his Maker."

His Honour went on:

"In this case a dignitary of the Church of England – the very Head of the Establishment in this distant settlement – is compelled to come into a Court of Justice, to seek redress for the publication of a scandalous libel of and concerning him in his sacred office."

He went further:

"Gentlemen, whatever advantages may have been derived, and are daily derived to Society from the just liberties of the public press I believe there is no well-constituted mind can view with complacency, any use of the privilege of the Press, when carried to licentiousness. It is the proper and constitutional province of Courts and Juries to curb licentiousness of this powerful organ of public communication and discussion ... It is not part of the liberty of the Press, to libel the constituted authorities of Government, to blacken the reputation, and wound the spirits of private individuals, and pour forth columns of matter as offensive to good taste and good feeling, as opposed to the real welfare of this promising settlement. An honest, public-spirited writer is allowed a sufficient latitude without fear of incurring the animadversion of the law. Candid and temperate discussion upon public affairs, fall properly within the just bounds of the Free Press."

Dowling J then turned to the submissions made about public figures and instructed the jury:

"It has often been said, and has been said this day, that the characters and conduct of public men are public property. Be it so, but let public men be fairly and candidly dealt with. Let them be shielded from the shafts of malice, and protected against the venom of personal vituperation. The editor of a public newspaper has fearful odds on his side against the victim whom he may have singled out for castigation. He asserts an authority that does not belong to him, and acquires an advantage over his neighbour, as foreign from impartial justice as it is inimical to the public peace and well being of society. The mischief of a libel does not always consist in its grossness; on the contrary, when its bitterness is muffled in the garb of innuendo and latent allusion the malicious purpose is more galling for feelings to the wounded party. Gross and vulgar abuse, carries with it its own antidote. Not so where the venom is wrapped up in obscure suggestion and dropping hints, unperceived perhaps by the common reader, but no less intelligible to him at whom the poisonous shaft is levelled."

Setting aside the high blown rhetoric of the age, the issues raised are with us still. In Dowling's direction there was one very pointed barb. The reference to "personal vituperation" emphasised for the jury that Hall was reporting on his own personal affairs. To the military jury, Hall's assertion that he was performing some kind of public duty must have appeared to be cant. Hall was convicted.

When he came to be sentenced for the offence, Scott asked the court to be merciful. Dowling took the occasion to observe that the press of the colony had been guilty of excesses against which no action had been taken. He expressed in the name of "the Court" a "deep sense of pain and regret that so

valuable an organ of public welfare should have been abused” and expressed concern that the attacks would be taken seriously in London, with adverse consequences on the possibility of reform of colonial governments, which he described as “the fruition of many advantages which Her Majesty’s subjects possess in every region where a British language is spoken and British law is administered” and which his local audience would have understood to refer at least to trial by jury, and probably to a reformed Legislative Council [50].

The hints that the law of libel could be effective, that Darling had received in private from Forbes and in public from Dowling, were taken up in 1829 when the Sudds Thompson affair was suddenly revived. The semi-official *Sydney Gazette* published documents with the assertion that they cleared Darling, who had emerged “like gold purified in a furnace [51]”. This infuriated the *Australian* and the *Monitor*. The new owner of the *Australian*, Attwell Hayes, editorialised [52]:

“... We can never believe and affirm that the author and ostensible executor of Sudd’s punishment, and which terminated in his death, is a fit person to rule over a British Colony [53].”

In the proceedings for seditious libel, Hayes was represented by W C Wentworth. On the day of the trial, Wentworth finally signed and sent a letter to the Secretary of State for the Colonies, a sixty-eight page closely written document attacking Darling’s administration and specifically seeking that he be impeached, including for murder, for his role in the case of Sudds. Wentworth had been sitting on a draft of this charge for two years. Darling’s renewed attack on the press, finally confirmed when this case was listed for trial, spurred him to act. The trial proceeded before Mr Justice Dowling and a military jury.

On this occasion Dowling gave a balanced direction to the jury, noting their peculiar position as military officers. The *Australian* newspaper, itself, described his summing-up as “a most luminous and impartial charge” and said that the finding of guilty had astonished most people [54].

Dowling reserved for consideration by the Full Bench an objection to competency of the jury. Before the Full Bench, Wentworth attacked the constitution of the jury on the basis that a jury of military officers could not validly be constituted in a case in which their commanding officer was the prosecutor. He further relied on the fact that on this particular jury, each officer was paid an additional fifteen shillings a day, a payment in the sole discretion of the Governor. He also noted that the prior system by which jury service of members of the garrison was selected on a roster basis, had been changed so that a process of selection occurred as to which officer would serve on which jury. Warming to his task Wentworth suggested that not only should juries be as “spotless” as Cornelia but should be as much “above suspicion” as Caesar’s wife – his marriage to Pompeia ending in scandal - in effect, the contemporary test of apprehended bias.

Forbes CJ and Dowling J, with Stephen J dissenting, rejected the attack and recorded a conviction. Stephen J pointed out that a military jury could have been composed from half pay officers and naval officers in port, who were not under the direct military control of the Governor. To a modern ear the position taken by Stephen carries much more conviction than the learned discourses of both Forbes and Darling, who applied a literal approach to the peculiar mode of trial – apparently used previously only at Gibraltar - for which the British Parliament had provided in New South Wales.

Hayes spent a period in prison, but his fine was paid by public subscription. Throughout his six months imprisonment, Hayes continued to edit the *Australian*.

This solitary prosecution, on a very narrow basis, of Hayes was mild in comparison with a systematic campaign launched against Hall of the *Monitor*. By the end of 1829 he would be convicted on six separate charges. Two in April and four in December.

The first was a charge of seditious libel of the Governor, for an imputation that he had played an improper role in the selection of the jury in his prosecution for libel of Archdeacon Scott. In the same month, he was also found guilty of criminal libel of the commandant at Port Macquarie, whom he accused of misappropriating government grain. On both occasions, the jury were strictly directed that truth was irrelevant.

In December 1829, Hall had to be brought from prison to stand trial again and again. In four criminal libel prosecutions, Hall was found guilty with respect to allegations he made against the Governor, the Colonial Secretary and two lesser officials [55].

Actions in libel were to become a Sydney sport. Hall himself took proceedings for criminal libel against the editor of the semi-official *Gazette*, as did Wentworth. Sydney's position as a world capital of defamation litigation was established in 1829.

Darling did not rest content with actions for criminal or seditious libel. He sought to muzzle the press by exercising the full weight of his discretionary authority, in some respects, as the Court subsequently found, improperly.

When Hall applied, pursuant to announced government policy, for release of unoccupied lands adjacent to his own land, he was rejected [56]. He was demoralising the community, he was told, by treating the clergy with disrespect [57]. The policy of encouraging migration by land grants was set aside for political reasons.

A more direct attack on both the *Australian* and the *Monitor* was the attempt by Darling to remove employees who were assigned convicts. All private enterprise in Sydney depended, in large measure, on the labour of such convicts. Their withdrawal would cripple any business. In the case of the newspapers, the persons with the technical skills as printers were amongst those persons assigned. The withdrawal of their labour would, in substance, stop the newspapers. Darling's attempt to act in this manner would be declared invalid by the Court [58].

In March 1829 a journalist on the *Australian* was at the Supreme Court taking notes of a trial when a constable entered the Court and took him away to the prisoners' barracks – now the Hyde Park barracks - his assignment as a convict having been withdrawn. On the same day Hall's foreman printer at the *Monitor* was summoned by the Superintendent of Convicts for the same purpose. Hall protected him. However, eventually, the printer was arrested and forcibly dispatched to Wellington, on the other side of the Blue Mountains. Darling defended the withdrawal of the printer on the basis that it would give Hall "less means of disseminating his poison" [59].

The Supreme Court had already handed down a judgment in another case declaring that the Governor did not have an unconfined discretion to revoke assignments of convicts [60]. The executive ignored the judgment. So did the magistrates before whom Hall was prosecuted for harbouring an escaped convict. Hall had attacked the exclusivist magistracy – for receiving stolen goods, torture, harassment, theft of fines, sexually abusing convicts, excessive and improper flogging [61] - as often as he had attacked Darling. The Supreme Court quashed the conviction.

The judges of the Court dismissed, with palpable suppressed anger, criminal proceedings against the magistrates for their obvious abuse of power and contempt of the Court. The Secretary of State for the Colonies in London would send a blistering dispatch regretting the public perception that Darling was "endeavouring by this use of your power to harass a political opponent and to cripple his operations" [62]. Darling was directed never to use the power except for a proper purpose, primarily the welfare of the convict.

In 1827 when Forbes had rejected certain provisions of the Act to license newspapers, some sections were in fact enacted. One of them was a section modelled on a provision of one of Castlereagh's notorious "Six Acts" of 1819 – the attempt by the Tory government to suppress dissent - by which the Supreme Court was given a discretion to banish from the colony any person convicted for a second time of seditious libel. This was a provision capable of having the same degree of finality as the refusal of a licence.

In January 1830 Darling convinced the Legislative Council, of which Forbes was a member, and, it appears without dissent from him, to approve a Bill amending that provision, so that the banishment upon a second conviction for seditious libel became automatic and was not in the discretion of the Court, i.e. mandatory sentencing.

Hall, still editing the *Monitor* from prison, published a depiction of a coffin with an inscription in Latin which, translated, said:

"Under the government of Sir Thomas Brisbane, Knight, liberty of the press was born. Under the government of Ralph Darling, Esquire it was strangled on the 29th day of January 1830. I shall rise again [63]."

Events were turning against Darling. A few months later the British Parliament repealed the provision

permitting banishment in the original Act, which had served as the model for New South Wales. Then, the government of the Duke of Wellington fell and was replaced by the liberal administration of Earl Grey. On advice of his British ministers, the King disallowed the New South Wales Act to make banishment mandatory.

Darling was criticised in dispatches from London for allowing the situation to get out of control and, specifically, for seeking to interfere with free speech to a degree now regarded as unacceptable. There should be no permanent system for controlling the press, the Secretary of State for the Colonies told Darling. Any proceedings against the press should be “confined, under the pressure of extreme necessity, to the occasional exigency of some particular case” [64]. The laws of libel needed no reinforcement and proceedings for seditious or criminal libel should be used sparingly.

In February 1831, Darling released Hall from prison, two years early. When Darling’s six year term expired, his appointment was not renewed and he left Sydney on 22 October 1831. Hall announced the event in the *Monitor* in large capitals on its front page:

“HE’S OFF!  
THE REIGN OF TERROR ENDED.”

Wentworth organised a feast at Vaucluse House where an ox, half a dozen sheep and copious amounts of Coopers and Wrights beer was consumed, together with a thousand loaves of bread. A band played “Over the Hills and Far Away”.

A few years later, in 1835, when Sir Francis Forbes had to leave the Colony, not least for his health, the then new *Sydney Herald* poured scorn on the proposal that a public meeting be held to commemorate his contribution. The *Herald* proclaimed:

“We admit that every Convict in New South Wales is bound, in common gratitude, to sign an address to Mr Forbes ... From this portion of the ‘people’, therefore, Mr Forbes richly deserved, not only an address, but a piece of plate into the bargain; but ... the body of respectable Emigrant Colonists owe him no such obligation [65].”

And so, following quickly on the creation of the Sydney tradition for defamation litigation, another grand Australian tradition was born, the short memory of the media.

The effect of the law of libel on freedom of the press has been the subject of debate in New South Wales for over 170 years. It is surprising how many of the issues and arguments were already current in the 1820’s. One thing is, however, worth acknowledging. The contribution of the first judges of this Court, particularly of the first Chief Justice, to freedom of the press was substantial and worthy of commemoration.

Until comparatively recently, Australian history has generally been told as if it consisted only of the achievement of independence from England: constitutional, political, economic, military, cultural, social and legal independence- “a march towards the light” as one historian has described it [66]. However, many important institutions were created quickly and have developed in a distinctive way over long periods of time. The rule of law, the independence of the judiciary, supported by a vigorous and independent bar, and freedom of the press, driven by cantankerous editors, are such institutions [67]. These were and are interdependent institutions, the strength of which is determined, to a substantial degree, by their longevity. We do well to understand the source of that strength.

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1 The fullest treatment of the Sudds Thompson Affair remains C H Currey, *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales* Angus & Robertson, Sydney, 1968, ch XVIII. The principal official communications and a number of media reports are set out in *Historical Records of Australia*, Series 1, vol XII at 715, 766 (hereafter *HRA* (i) Vol 12). Accurate shorter summaries appear in: C M H Clarke, *A History of Australia*, vol 2, Melbourne University Press, Melbourne, 1968, 71-73; Alex C Castles, *An Australian Legal History*, Law Book Company, Sydney, 1982 159-160; J B Hirst, *Convict Society and Its Enemies: A History of Early New South Wales*, George Allen & Unwin, Sydney, 1983, 177-179. Summaries also appear in the notes to a number of relevant decisions of this Court during the course of the subsequent controversy which appear in the extraordinarily useful compilation of the early decisions of this Court prepared by Professor Bruce Kercher and his associates at the Law School of the University of Macquarie accessible at

[www.law.mq.edu.au/scnsw](http://www.law.mq.edu.au/scnsw). See generally Bruce Kercher "Publication of Forgotten Caselaw of the New South Wales Supreme Court" (1998) 72 *ALJ* 876. Judge Woods appropriately calls these reports "The Kercher Reports" (K.R.). See G D Woods, *A History of the Criminal Law in New South Wales, Federation Press*, Sydney 2002, p xiv. The Subject Index of the site includes a reference to "Sudds and Thompson Case". Many of the cases hereinafter referred to can be accessed via the Subject Index under the headings "Forbes CJ and Governor Darling, Conflict Between", "Criminal Libel", "Seditious Libel" or under the Case Index by case name.

2 Pike et al *Australian Dictionary of Biography*, M.U.P., Melbourne, 1969, vol 2, "Wardell" at 571.

3 *HRA* (i) Vol 12 p736.

4 K S Inglis, *The Australian Colonists: An Exploration of Australian Social History 1788-1870*, M.U.P. Melbourne, 1924, p40.

5 See e.g. Hirst, *op cit*, pp178-179.

6 K.R. see *Transportation Opinion*, 13 December 1826.

7 See e.g. Currey, *supra*, esp 13-14 and 18-19.

8 See J M Bennett (ed), *Some Papers of Sir Francis Forbes: First Chief Justice in Australia*, Parliament of New South Wales, Sydney, 1998 at 110.

9 See generally Sir James Fitzjames Stephen, *A History of the Criminal Law in England*, Macmillan, London, 1883, Ch 24.

10 See *R v Howe*, 20 October 1826, at the K.R. See also Currey, *supra*, at 189-190.

11 A G L Shaw *Convicts and Colonies* Faber, London, 1966, p194.

12 See A G L Shaw, *Heroes and Villains in History*, Sydney UP, Sydney, 1966; B Fletcher, "Administrative Reform in NSW under Governor Darling", 1979, 38 *A J of Public Admin* 246; B Fletcher, *Ralph Darling: a Governor Maligned* (OUP Melbourne 1984).

13 Bennett, *Some Papers of Sir Francis Forbes*, *supra*, 186.

14 See my address "Economic Rationalism and the Law" (2001) 24 *UNSWLJ* 200 at 211-212.

15 The Colonial Office supported procedures that promoted expedition. See Paul Knaplund, *James Stephen and The British Colonial System*, Uni of Wisconsin P., 1953 at 233-234.

16 Bennett, *Some Papers of Sir Francis Forbes*, *supra*, at pp184-185.

17 See K.R., *R v Magistrates of Sydney* at [16].

18 See Castles, *An Australian Legal History*, *op cit* at 185-186, 273. Forbes CJ's judgment was nullified by the British Parliament in the *Australian Courts Act* 1828.

19 See J M Bennett, *Sir John Pedder: First Chief Justice of Tasmania*, University of Tasmania, 1977, esp at 5, 10-14; J M Bennett, *Sir Francis Forbes First Chief Justice of New South Wales 1823-1837*, Federation Press, Sydney, 2001 at 87-88, 91-92.

20 See *HRA*, (i), Vol 13, esp at 282-285. See also K.R., *Newspaper Acts Opinion*, 16 April 1827.

21 Bennett, *Some Papers of Sir Francis Forbes*, *supra*, p120.

22 See, for example, J W Gough, *Fundamental Law in English Constitutional History*, Oxford Clarendon, 1955. On the English background to American rights discourse, see e.g. Bernard Bailyn, *The Ideological Origins of the American Revolution*, Harvard Uni, Cambridge Mass (1992) at 175-198; Gordon S Wood *The Creation of the American Republic (1776-1787)* W W Norton, New York, (1969) esp at 259-268; Gordon S Wood *The Radicalism of the American Revolution*, Random House, New

York, 1893, esp 11-16 and generally John Phillip Reid *The Concept of Liberty in the American Revolution*, Uni of Chicago P, 1988; John Phillip Reid *Constitutional History of the American Revolution: The Authority of Rights*, Uni of Wisconsin P, 1987; John Phillip Reid, *Constitutional History of the American Revolution: the Authority of Law*, Uni of Wisconsin P, 1994.

23 The fullest treatment is Currey, *supra*, ch XX. See also footnote [8] to the "Newspaper Acts Opinion" in K.R.; J M Bennett, *Sir Francis Forbes*, *op. cit.*, at 94-100. The basic correspondence is set out in *HRA* (i), Vol 14, pp374-387 and 391-399.

24 See *HRA* (i), Vol 13, at 395.

25 *Ibid* p396.

26 *Ibid* p398.

27 *HRA* (iv), section A, Vol 1, pp737-738.

28 See Bennett, *Some Papers of Sir Francis Forbes*, *supra*, at 164.

29 *ibid*, at 187.

30 Quoted in Currey, *supra*, at 307.

31 See *HRA* (i), Vol 13, at 429-433.

32 See Currey, *supra*, at 253; the K.R., *R v Wardell (No 1)*, 26 June 1827.

33 See *HRA* (i), Vol 13, 723-724.

34 In K.R., see *R v Wardell (No 2)* and *R v Wardell (No 3)*. See also Brendan Edgeworth "Defamation Law and the Emergence of a Critical Press in Colonial New South Wales 1824-1831", (1990) 6 *Australian Journal of Law and Society*, 50 esp 70-72.

35 *HRA* (i), Vol 13, p718.

36 *HRA* (i), Vol 13, p693; *c/f HRA* (i), Vol 14, p359.

37 *HRA* (i), Vol 13, at 717.

38 See *HRA* (i), Vol 13, at 720.

39 See e.g. *HRA* (iv), section A, vol 1, at 682, 685.

40 *HRA* (iv), section A, vol 1, at 681-682.

41 See K.R., *R v Hall (No 3)*, 7 July 1828.

42 *HRA* (i), Vol 14, p195.

43 *HRA* (i), Vol 14 esp at 365.

44 See R T Wyatt "A Wine Merchant in Gaiters: Thomas, Hobbes Scott, Archdeacon of NSW, 1824-1829" 1949 XXXV *RAHS J. and Proc.* 145.

45 See Bruce Kercher "Establishment, Freedom of Speech and the Church of England: Pew Disputes in Early Nineteenth Century New South Wales and Newfoundland" (2000) 6 *A. J. of Legal Hist.* 135.

46 Wyatt, *ibid* at 239.

47 See Currey, *supra*, at 311-312. The relevant litigation is in K.R. as *R v Hall (No 1)*, 25 September 1828; *R v Hall (No 1)*, 12 March 1829 and *Hall v Scott*, 6 April 1830.



48 K.R., see *R v Hall (No 2)*, 29 September 1828.

49 See Bennett, *Sir James Dowling: Second Chief Justice of New South Wales 1837-1834*, Federation Press, Sydney at pp60-61.

50 For Hall's later complaints about this proceeding see *HRA (i)*, Vol 15, esp 633, 635. Note that at 635 Hall complained that Dowling sat alone on this occasion but the *Sydney Gazette* reproduced in K.R. and *R v Hall (No 2)*, 29 September 1828 suggests that he sat with Forbes. Hall is more likely to be right.

51 See Currey, *supra*, at 352.

52 *Ibid*.

53 See K.R., *R v Hayes*, 14 April 1829.

54 *Ibid* p9-33.

55 See Bennett, *Sir James Dowling*, *supra*, ch 4, esp at 65-68; on the Macquarie site see *R v Hall (No 6)*, 21 December 1829, *R v Hall (No 7)*, 23 December 1829 and *R v Hall (No 8)*, 23 December 1829. See also Currey, *supra*, ch 34.

56 See *HRA (i)*, Vol 14, at p(vi)-(vii).

57 Wyatt, esp at p 245.

58 See K.R., *Hall v Rossi*, 15 March 1830; also *HRA (i)*, Vol 15, at 631, 640. Bennett, *Sir James Dowling*, *supra*, 68-71. See also the K.R., *Convict Assignment Opinion*, 3 October 1827; *HRA (i)*, Vol 13, 608-612.

59 *HRA (i)*, Vol 15, p53.

60 See K.R., *In re Jane New*, 6 March 1829. Forbes' detailed consideration of the statutory provisions, which led him to conclude that the Governor could not revoke the rights of property in an assigned convict, had been known to Darling for almost two years. (See e.g. *HRA (i)*, Vol 13, at p611; Currey, *supra*, ch 31.)

61 David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early NSW*, Cambridge U P, 1991 at 129.

62 *HRA (i)*, Vol 15, p812.

63 See Currey, *supra*, at 371.

64 *HRA (i)*, Vol 16, p11.

65 Bennett, *Sir Francis Forbes*, *supra*, at 125.

66 Alan Atkinson, *The Europeans in Australia: A History*, vol 1, Oxford U P., Melbourne, 1996, p xii.

67 See e.g. Neal, *supra*, esp ch 3 and ch 4.

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## Re-dedication of the Honour Roll in the Original Supreme Court Building

### RE-DEDICATION OF THE HONOUR ROLL IN THE ORIGINAL SUPREME COURT BUILDING REMARKS BY THE HONOURABLE J J SPIGELMAN AC CHIEF JUSTICE OF NEW SOUTH WALES SYDNEY, 11 NOVEMBER 2002

Soon after becoming Chief Justice, I paid closer attention to the buildings of the Court that I ever had occasion to do before. It was for that reason that I first noticed the wonderful war memorial that was located in the vestibule of the King Street entrance of the original Supreme Court building. I was immediately struck by its force and elegance as a sculpture, as well as by the significance of its message as a monument to individual self-sacrifice and civic responsibility.

The problem with this war memorial was that virtually no-one knew of its existence by reason of its location. Like other practitioners, I had walked past it many times without noticing it.

I immediately commenced a campaign with Barry Johnston, the architect responsible for these matters in the Attorney General's Department, to have the memorial moved, preferably to the foyer of the Joint Courts building at Queens Square.

Barry assured me that, when Court 2 was finished, by a process of lighting and other tricks of the trade, the memorial would come to the fore. Afterwards, he agreed that it was still "lost". He pursued the task with particular dedication, to ensure that it would be moved to this new location, where it becomes readily observable for the first time.

I still regret that it has not been moved to a prominent location in the foyer of the new building. As I told Barry, the requirements of the Burra Convention for heritage decision-making could readily have been accommodated by a decision to "read" the building as at the date of the last significant addition to the complex of courts in the 1890's. However, that was not to be. Heritage architects seem to find themselves unnecessarily confined by chronology and geography in a way which denies the true intellectual content of the structure with which they are concerned. I would have thought that the whole point of a war memorial was that it should serve as a memory. How that can be done when no-one can see it, is not something I readily understand. Nevertheless, I am sure that all present today will agree that the new location is a vast improvement.

The planning for this Honour Roll began in July 1915, when the judges of the Supreme Court resolved there should be an official record of all the members and prospective members of the profession who enlisted for active service. It bears the names of all those who either were at the time of their enlistment, or became prior to 1 September 1921, members of the profession.

The enormous impact on Australian society of The Great War, led to a nationwide civic movement on the part of virtually every group in Australia that identified itself as a community, to mark the devotion, self-sacrifice and civic conscience of a generation of young Australians. Every such community raised funds to create an extraordinary number of obelisks, statues, fountains, halls, pavilions, columns, arches and carillons. The legal community reflected this nationwide movement [1].

The Honour Roll of legal practitioners – funded by donations from the profession - was unveiled by the then Chief Justice, the Honourable Sir William Cullen on 3 June 1924, a few weeks after the Centenary of the Court. For the whole of the century of the Court's existence, it had been plagued by the most parsimonious possible approach to the provision of proper accommodation. The Court complex consisted of a rabbit warren of buildings which had never been adequate to the purpose. The only location then capable of accommodating the memorial was the tiny vestibule of the entrance of the original courthouse. So few could attend the official unveiling, that the ceremony for handing over the memorial took place in the Theatre Royal later that afternoon.

This is one component in a long process of restoration of this entire complex, which has been undertaken to date under the direction of Barry Johnston, who recently left the Department. I wish to acknowledge the enormous contribution he has made to this very significant public work. It is rare for a major heritage building to be recycled for its original use. We are lucky that the task has been

undertaken with such professionalism and dedication.

This memorial was designed by the government architect, George McRae and features three different types of marble. The base panels and top section are of white Italian marble; the dedication is inscribed in Cudgegong ivory and gold marble and the centre piece is New South Wales King Edward grey marble. The memorial is embellished with the figures of Britannia and Australia, each holding a memorial wreath. The bronze plates record the names of the members of the profession who served in World War I, with fatalities marked with a cross.

There are many names on this Honour Roll which remain familiar to the current generation of members of the profession, testimony to service to the law of several generations of one family. I have invited two such representatives to speak today. The Former Chief Justice of the Court, Sir Laurence Street, who himself served in World War II, has an uncle inscribed on the Roll. T.E.F. Hughes QC, who also served in World War II, is the son of another whose name is also inscribed. In the spirit of both the continuity and the collegiality of the profession, I invite each of them to address you.

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1. See K.S. Inglis, *Sacred Places: War Memorials in the Australian Landscape*, Miegunyah Press, Melbourne 1998, Chapter 4.

## Address upon the Occasion of the Retirement of the Honourable Mr Justice Philip Powell AM

### ADDRESS UPON THE OCCASION OF THE RETIREMENT OF

### THE HONOURABLE MR JUSTICE PHILIP POWELL AM

### BANCO COURT, SUPREME COURT OF NEW SOUTH WALES, SYDNEY

8 NOVEMBER 2002

The purpose of this ceremonial sitting of the Court is to mark the retirement from the Court, after more than twenty-five years of public service to the administration of justice, of the Honourable Mr Justice Philip Powell AM. Your Honour was appointed as a Judge in the Equity Division of the Court in April 1977 and as a Judge of Appeal in October 1993.

The High Court is sitting in Canberra today. Chief Justice Gleeson has asked me to express his apologies for his inability to attend the ceremony. The other Chief Justice of this Court under whom you served, Sir Laurence Street, also expresses his apologies. He has a prior commitment, dedicated, he assures me, to reducing the workload of this Court.

After graduating from the University of Sydney with first class honours and the Equity Prize, your Honour was admitted as a solicitor of the Supreme Court in 1954 and to the bar in the following year. You took silk in 1970. Your Honour's practice was wide-ranging, extending in your later years at the bar to be leading silk in industrial matters for the State of New South Wales. However, the primary focus of your years at the bar was trial work in commercial and equity suits.

It was in the course of your Honour's practice at the bar that the principal characteristics of your contribution to the law first emerged. Those characteristics included a meticulous attention to detail, not only of the law but of the facts, and a mastery of the intricacies of legal procedure and history. This was a time when arguments of sublime technicality received greater acceptance by the courts than they do now. Your Honour acquired an encyclopaedic knowledge of old and technical law relating to procedure and to the history and evolution of equitable doctrine. This knowledge is also the foundation of the contribution your Honour has made to the people of this State as a Judge of the Court.

Those members of the bar, like myself, who appeared before your Honour as a trial judge came to admire your Honour's learning and attention to detail, though they would not have described the experience as a pleasure, unless they had punctiliously followed the required procedures and were fully prepared. On a number of occasions I, like many others at the bar, was the beneficiary of your Honour's skill in drafting complete and precise orders, interspersed with a question from your Honour: "I suppose Mr Spigelman you would also want ...", identifying a mode of escaping from the clutches of the imperfectly drafted injunction contained in the initiating process, which could only have been imagined by someone with much experience of the darkness of the human soul. The answer was always, "of course".

Your Honour always displayed the utmost courtesy to legal practitioners, litigants, witnesses and court staff. Nevertheless, your Honour did manifest, from the outset, a particular dedication to dispelling the long held prejudice of common lawyers that equity practitioners speak only in whispers.

No litigant or lawyer who appeared before your Honour ever had any doubt that the intricacies of the dispute which had brought them to the Court, and the detail of their argument, received anything but the closest attention and that all the substantive arguments put were dealt with in meticulous detail. Throughout your judicial career you approached your tasks with the appearance that it was a great privilege for you to be allowed to handle the affairs of others. Everyone who appeared before you left the Court knowing that their cases mattered.

There were, of course, in such a long career on the bench, cases of considerable public interest and significance. None more so than the Spycatcher trial in which your Honour's judgment (*Attorney-*

*General (United Kingdom) v Heinemann Publishers Australia Pty Limited* (1987) 8 NSWLR 341) was affirmed twice on appeal and made a significant contribution to the law on confidential information, although, in the subsequent television series, your Honour's survey of the law in this regard remained on the cutting room floor.

In *Perpetual Trustee Co Limited v Groth* (1985) 2 NSWLR 278, your Honour affirmed the validity of the Archibald Prize as a charitable trust, your judgment containing a comprehensive survey of the case law relating to trusts of general public utility in relation to the arts and education.

Your Honour also charted a course through the quagmire of artistic temperament, when you admitted to probate the will of the artist Bret Whitely in the form of a document which could not be found after his death, had been witnessed by only one person and had last been seen fixed with sticky tape to the underside of a kitchen drawer. Day after day the people of New South Wales were entertained by the intricacies of s18A of the *Wills Act* and the endless possibilities of informality in will making.

Of course your Honour's views on the law have not always prevailed. There is no judge of whom that is not true. In your Honour's case one example that comes to mind is your Honour's campaign to extirpate the heresy of the Mareva injunction. (See *Ex Parte BP Exploration Co (Libya) Limited; Re Hunt* [1979] 2 NSWLR 406).

Your Honour's judgments have made numerous contributions over a wide range. Some examples are: surveying the law of passing off (*Cadbury Schweppes Ltd v Pub Squash Co Pty Ltd* [1980] 2 NSWLR 854); identifying the indicia of a de facto relationship in the then new legislation (*Roy v Sturgeon* (1986) 11 NSWLR 454); provision for widows under the *Family Provision Act* (*Luciano v Rosenblum* (1985) 2 NSWLR 65); the locus standi of a beneficiary to sue to protect an interest in an estate (*Ramage v Waclaw* (1988) 12 NSWLR 84); the testamentary capacity of a person who suicides after making a will (*Re Hodges* (1988) 14 NSWLR 698); procedure for references out (*Clark Equipment Credit of Australia v Como Factors Limited* (1988) 14 NSWLR 552); the requirements for undue influence affecting a will (*Winter v Crichton* (1991) 23 NSWLR 116); the first judgment on s18A re informal wills (*Re Application of Brown* (1991) 23 NSWLR 535); the practice on discovery of a further will after the grant of probate (*Re Estate of Wilson* (1991) 24 NSWLR 334); testamentary capacity of persons subject to an order under the *Protected Estates Act* (*Perpetual Trustee Co Limited v Fairlie-Cunninghame* (1993) 32 NSWLR 377).

As is usual, the overwhelming proportion of cases that came before your Honour were not of wide interest or public importance but were of high significance, and sometimes of overwhelming significance, to the parties involved. Today I would like to emphasise your Honour's particular contribution to the law in the case of two categories of decisions of the Court which have the greatest effect on the lives of individuals. Your Honour came to serve for a long period as the Judge in the Protective jurisdiction of the Court and then as the Probate Judge of the Court. In both spheres your Honour's judgments, many unreported, decisively developed the law. Further, your administration of the lists ensured that the Court's procedures operated with as much expedition as justice would allow.

The requirements of the Protective jurisdiction include expertise with psychiatry and a personal touch for the disabled. On many occasions your Honour came down from the bench, sat with the disabled person at the bar table and patiently explained what was happening and why. Your Honour's judgments in the field remain a substantial resource to this day. Under the category of Mental Health, the Australian Digest sets out sixty judgments of this Court from its inception in 1824. Twenty of those judgments – i.e. one third - are your Honour's.

Upon your appointment as Probate Judge, the procedures were streamlined, long drawn out and costly inquiries were dispensed with and delays were substantially reduced. Grants of probate which once took up to six months came to be made, and are still made, within a day or two. That advance occurred under your Honour's administration. Abuses of the procedures for caveats were repelled with a firm hand. The Court's substantial, until then, satellite jurisdiction of applications for emergency grants, disappeared.

Your Honour's command of the English language is a singular delight of your judgments. One of the most important contributions that a superior court makes to the administration of justice is the clarification of the law in such a manner as to ensure that clients are able to be advised with assurance. Clarity and lucidity of expression is, for that reason, a primary judicial virtue. Your Honour unquestionably had that capacity.

Whilst the length of your Honour's sentences, often with numerous subordinate clauses, would sometimes leave a reader breathless, the journey was always assisted by the deployment of punctuation with precision and in abundance. These sentences were and are a pleasure to read, but not always so by the litigants and practitioners referred to in them.

In *H v G* (unreported) 24 August 1990, in an extempore judgment, your Honour commenced your judgment with the following:

"At long last, after a delay of the better part of five months, which has been brought about by what I can only describe as blundering incompetence on the part of the Plaintiff's advisers, this application is in a condition in which it can finally be disposed of.

Notwithstanding the delay, and the incompetence, which have marked the application's stumbling and erratic progress to this stage, the Plaintiff's counsel submits that the Plaintiff should have an order that the whole of his costs of the application should be paid out of the Defendant's estate."

It was, perhaps, unnecessary to read the rest of your Honour's careful reasons in order to know the fate of this application.

On other occasions, your Honour's pen was directed to the course of judicial authority:

" 'Words, words, mere words ...' said Troilus (*Troilus and Cressida* V. iii. 109), a sentiment which I am disposed to echo after having spent many hours considering the numerous, and, at times, conflicting, and thoroughly confusing, authorities on the question of whether or not the duties of a director of a limited liability company are, or are not, the same as, or similar to, or analogous to, those of a trustee ... Although – and, once more, I plagiarize the Bard of Avon – I regard the debate as '... weary, stale, flat and unprofitable ...' (*Hamlet* I. ii. 129), I believe that the true position is that, while directors are not, properly speaking, trustees, but fiduciary agents, the range of duties and obligations to which they are subject, or which are imposed upon them, include duties or obligations which place them, in relation to moneys or property which are in their possession, or over which they have control, in a position analogous to, although not identical with, that of trustees."

(*Mulkana Corporation NL (In Liq) v Bank of New South Wales* (unreported) 9 September 1983.)

The litigants in a partnership dispute over a pharmacy were greeted with the following opening sentence in *Taylor v Johnston* (unreported), 14 February 1984:

"After listening, for the whole of the morning, to the evidence, and arguments of counsel, in this matter, I am reminded of nothing so much as the learned gentleman whom Gulliver met on his voyage to Laputa, and who had spent eight years upon a project for extracting sunbeams out of cucumbers which were to be put into phials hermetically sealed, and let out to warm the air in raw inclement summers: I am amazed that, in this proceeding, so much time, money, and intellectual effort has been expended upon a question which has so little relationship to reality."

The sentence contained eleven commas and one colon.

Similarly, the litigants in a landlord and tenant case (*Todbern Pty Ltd v Taormina International Pty Ltd* (unreported) 13 June 1990, were greeted with the following opening:

"Despite the fact that the amount which the Plaintiff, even if it be successful in these proceedings, might recover is not much more than could have been recovered in proceedings regularly commenced in the Local Court at Kogarah, and is not such as would have entitled the Plaintiff, if the proceedings had been commenced in the District Court, or, in the Common Law Division of this Court, to recover full party and party costs, what one can only categorise as a total failure, on the part of the Plaintiff's legal advisers, to understand some basic principles of the law and of practice and procedure has led to these proceedings being commenced by an inappropriate procedure, and in

an inappropriate Division of an inappropriate court.”

Once again eleven commas but no colon.

Your Honour’s predilection for precision is, you should know, much admired. You always stayed on the right side of that fine line between precision and pedantry. The clarity of your Honour’s expression will mean that the judgments you delivered in your long period of service on this Court will stand the test of time. On behalf of all of the Judges of the Court I thank you for your contribution to the people of this State and to the law. I wish you well in your retirement.

# Are Lawyers Lemons? Competition Principles and Professional Regulation

## ARE LAWYERS LEMONS?

### COMPETITION PRINCIPLES AND PROFESSIONAL REGULATION

#### THE 2002 LAWYER'S LECTURE

#### ST JAMES ETHICS CENTRE

#### THE HONOURABLE J J SPIGELMAN AC

#### CHIEF JUSTICE OF NEW SOUTH WALES

#### BANCO COURT, SUPREME COURT OF NEW SOUTH WALES

29 OCTOBER 2002

The 2001 Nobel Prize for Economic Sciences was awarded to three American economists for the creation of a new area of discourse in the field of economics known as information economics. This subject is based on the central significance of information for the functioning of any economy and constitutes a modification, and in some respects a challenge, to the traditional neoclassical model of economics, not least by its attempt to reorient traditional microeconomics to what goes on in the real world [1]. The starting point of modern information economics is the recognition that significant problems arise in real markets by reason of the fact that information is asymmetric in the sense that sometimes sellers know something that buyers don't know or vice-versa and the cost of discovering the information for the deprived party is prohibitive.

The origins of this discourse are to be found in an article published in 1970 by one of the economists who shared the 2001 Nobel Prize, George A Akerlof, a professor at the University of California, Berkeley, entitled "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism [2]". Akerlof used the word "lemons" in the American sense to refer to cars, whether new or used, which are defective. A buyer for a car, Akerlof hypothesised, does not have ready means of knowing whether a particular car on offer is a lemon or not. What the buyer does know is that a certain proportion of cars are lemons. The seller, on the other hand, especially in the case of a used car, does know whether or not the car is a lemon. At any given price a seller of a good quality car is less willing to sell than a seller of a low quality car. Rational buyers, however, know that there is a proportion of lemons in the market and will offer prices accordingly. Furthermore, they will not be prepared to pay a higher price for quality of which they cannot be sure. As a result, high quality products will withdraw from the market, leaving only the "lemons" behind.

In markets where quality can be added by a seller, the seller will have no incentive to increase the quality of the goods or services provided, because that seller cannot receive a higher price for the expenditure involved in improving quality. This is a process referred to by information economists as "adverse selection". The effect is to hinder mutually beneficial transactions. It also systematically depresses the quality of goods or services available for sale. Over time, high quality goods and services are withdrawn from sale, average quality falls and, eventually, the market is filled, primarily, with "lemons" of mediocre or low quality.

#### ***Information Asymmetry and the Legal Profession***

My title for tonight's lecture: "Are Lawyers Lemons?" is a shameless piece of plagiarism, though I could never aspire to reach the poetic heights of the subject of my predation, which was an article entitled "Are Cherries Lemons?" [3]. Subsequent to Akerlof's seminal 1970 article, economists gave more attention to processes adopted to acquire more information [4]. For example, Akerlof did not consider the possible creation of a trusted independent organisation for inspecting used cars, which exists in New South Wales in the form of the NRMA, but may not have existed in California.

Akerlof was, of course, well aware that acquiring information was often possible. The issue is one of cost. Where such costs are substantial, Akerlof's innovative analysis concluded, institutions emerge in



the market place to counteract the effects of asymmetric information. The examples of countervailing institutions identified by Akerlof in 1970 included guarantees, reliance on brand names and other indicators of reputation. He also gave as a specific example, in the context of doctors and lawyers, the role of what he called "licensing practices" as a means of reducing quality uncertainty [5]. This was a reference to professional restrictions on who is entitled to practice. Akerlof regarded such institutions as a means of overcoming the inefficiency or market failure that exists in an unregulated market because of the existence of asymmetric information. They prevent lemons coming to dominate the market.

Traditional economists have often identified professional licensing as a "barrier to entry" and rejected it as such. One of the contributions of modern information economics has been to create a recognition by those responsible for the administration of competition policy that educational and character requirements can, in fact, contribute positively to the efficient operation of markets and thereby promote economic welfare. Professional ethics, in the form of an enforceable code of behaviour, perform a similar function. These traditional professional requirements ensure that the number of "lemons" in a market is minimised.

Akerlof's analysis has been applied to the professions [6]. There is a real risk of market failure in legal practice by reason of the specialised skills usually required and the complex nature of the subject matter often involved. Clients are not able to assess the quality of, or even the need for, a legal service before it is purchased. Even after the service has been purchased such difficulties persist. For example, in the context of unsuccessful litigation, it is often impossible for a client to know whether the lack of success was due to bad performance by the lawyer or because of the inherent nature of the case.

Justice O'Connor of the Supreme Court of the United States identified the significance of information asymmetry, without using that terminology, in *Shapiro v Kentucky Bar Association*, a first amendment case about freedom of commercial speech, not an antitrust case:

"Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful, it would be unrealistic to demand that clients bargain for their services in the same arms length manner that may be appropriate when buying an automobile or choosing a drycleaner. Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are heeded because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialised knowledge that these professionals possess.

Imbuing the legal profession with the necessary ethical standards is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonising is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in a narrow economic sense) among members of the profession [7]."

Justice O'Connor went on to refer to entry requirements, the role of professional associations, strict rules about conflicts of interest, restrictions on advertising and solicitation. She noted that the various kinds of restrictions were not guaranteed to succeed and, accordingly, because of their anti-competitive effect, they should be subject to review and what her Honour called "sceptical criticism".

In *Goldfarb v The Virginia State Bar* [8], the United States Supreme Court struck down a rigid price floor for particular legal services imposed by the rules of the county bar association. This was held to be a violation of the *Sherman Act*. The Court rejected the contention of the bar association that the activities of a profession were wholly outside the sphere of trade and commerce to which the *Sherman Act* applied. Chief Justice Burger, delivering the opinion of the court, identified the important role of legal services in commerce and said:

"It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect ..."

To this observation the Chief Justice appended footnote 17 as follows:

"The fact that a restraint operates upon a profession as distinguished from a business is,

of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect and other features of the professions, may require that a particular practice, which would properly be viewed as a violation of the Sherman Act in another context, be treated differently.”

In a subsequent case (*California Dental Association v Federal Trade Commission* [9]), which one author has described as “The Revenge of Footnote 17” [10], the Supreme Court had before it guidelines of the Dental Association which restricted price advertising, particularly in relation to discounted fees and the quality of dental services. The issue before the Court concerned the approach which ought to be taken to a restriction of this character. Pricing arrangements were generally to be regarded as so obviously anti-competitive that what American jurisprudence refers to as a “quick look” analysis was regarded as adequate to determine the issue. By a majority of five to four the Supreme Court held that that was not adequate in the particular circumstances of the regulation of professional activity. A more detailed factual inquiry was called for. The case does indicate that assumptions that may be readily applicable in other areas of commerce are not necessarily applicable in the professional context.

Justice Souter who delivered the judgment of the majority in *California Dental Association* drew expressly on Akerlof’s analysis of the market for lemons and its identification of the significance of asymmetric information. His Honour said:

“... The quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialised knowledge required to evaluate the services, and partly because of the difficulty in determining whether, and the degree to which, an outcome is attributable to the quality of services (like a poor job of tooth filling) or to something else (like a very tough walnut) ... Patients’ attachments to particular professionals, the rationality of which is difficult to assess, complicate the picture even further ... The existence of such significant challenges to informed decision making by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition [11].”

Souter J went on to note:

“The Court of Appeals ... might have considered the possibility that the particular restrictions on professional advertising could have different effects from those ‘normally’ found in the commercial world, even to the point of promoting competition by reducing the occurrence of unverifiable and misleading across-the-board discount advertising.”

This line of authority offers guidance for our own consideration of the application of competition principles to the legal profession.

### **Countervailing Asymmetry**

As I have noted, in his seminal article Akerlof identified institutions which emerge to counteract the effects of information asymmetry, e.g. guarantees and professional licensing. In the context of the legal profession a number of other such institutions can be identified.

Of particular significance is a fundamental countervailing institution which, to my knowledge, has never been identified, let alone accepted, as such in the literature on the application of competition principles to professions. This institution is the imposition of fiduciary obligations upon legal practitioners.

Fiduciary obligations are imposed on lawyers by reason of their specialised skill and their capacity to adversely affect vulnerable clients. Such fiduciary duties promote economic efficiency by eliminating the necessity, if practical at all, of a client expending monies on surveillance or supervision of the services provided to the client. As Judge Richard Posner put it in his seminal law and economics text:

“The fiduciary principle is the law’s answer to the problem of unequal costs of information [12].”

I am unaware whether this one line reference has ever been taken up. The law and economics literature is now so vast that it is difficult to find out [13].

Although information asymmetry exists over a wide range of legal services, it is not a universal condition. Some clients, referred to in the literature as “repeat players” [14], may have the level of sophistication and frequency of contact with legal professionals to be able to assess the quality and price of the legal services being offered. These consumers of legal services tend to be government departments or corporations. Although the acquisition of such information remains costly, in certain areas of legal practice the problems of information may be similar to those in other commercial relationships. However, if it were to be suggested that some different rules ought be applicable where there is not a marked asymmetry of information, the issue would arise as to whether or not, in such a context, lawyers should continue to owe obligations of a fiduciary character to clients who are capable of looking after themselves.

Another institution that has emerged in the legal services market to adjust for information asymmetry is the centrality of reputation as an assurance of quality. Clients select lawyers on the basis of reputation for skill and expertise precisely because they have few, if any, other means of assessing the quality and necessity of a service. The enhanced role of reputation has often been emphasised in the new information economics. As Joseph E Stiglitz, who shared the 2001 Nobel Prize with Akerlof, said:

“... markets for information are inherently characterized by imperfections of information concerning what is being purchased; and mechanisms like *reputation* – which played no role at all in traditional economic activity – are central [15].”

In the legal profession, reputation is determined to a large extent by peer assessment. Other lawyers are in a better position to judge both skill and integrity than clients, other than those who can afford in-house counsel or second opinions. The mechanisms by which reputation is assessed by fellow professionals perform important functions for the entire body of users of legal services. Any review of regulation of the legal profession should consider the means by which, and the efficiency and accuracy with which, the reputation of legal practitioners may be affected.

Furthermore, as Akerlof said in his Nobel Prize lecture:

“Even when mechanisms such as reputation and repeat sales arise to overcome the problem of asymmetric information, such institutions become a major determinant of market structure [16].”

A number of aspects of the profession may prove to be of critical significance to ensure the accuracy of reputation signals. The new information economics suggests that such institutions are significant in overcoming market failure. Change in the structure of the profession could make the problem of information asymmetry worse.

Existing institutions such as differentiation between solicitors and barristers, the business structures which prohibit control by other occupations, the collegiality of sole practitioners at the bar and the appointment of senior counsel, may well be more efficient and accurate in establishing reputation than anything that can be delivered as a matter of practical reality by the operation of market forces.

There are a number of other practices and rules which affect the legal profession and which are capable of being analysed in terms of redressing the market failure occasioned by the special nature of legal services, particularly the existence of information asymmetry. Lawyers are subject to compulsory professional indemnity insurance and to financial impositions to create fidelity funds for defalcations by their fellow professionals. Furthermore, lawyers are exposed to possible retrospective reduction of fees under various kinds of regime. The system of taxation of costs has been replaced in New South Wales by a system of costs assessment. At the same time a system of disclosure, in advance, of expected fees was established. Lawyers do bear a risk of a retrospective reduction of fees on the basis of a third party decision that the charges were inappropriate.

The various factors to which I have referred – educational qualifications, manifest personal integrity, enforceable professional ethical obligations, the fiduciary relationship, the role of reputation, compulsory insurance, fidelity funds, retrospective control of fees – have a cumulative effect which attenuates to a substantial degree the problem of information asymmetry. By a combination of common law, professional practice and regulation, which emerged long before the explicit application of competition policy to the profession, the supply of legal services has been moulded by the special characteristics of the relevant market, particularly information asymmetry.

In the case of proposals designed to enhance competition with other professions and occupations, the possibility of causing significant distortions in the allocation of resources, on both a comparative statics and dynamic basis, must be considered.

The level playing field problem with other occupations is a very real one. Potential trade rivals like accountants and merchant bankers are not subject to the same restrictions, e.g. fiduciary duties, compulsory insurance, fidelity funds, retrospective fee adjustment. Nor is the content of the educational and character requirements, codes of ethics and statutory behavioural rules necessarily comparable. I give particular emphasis to fiduciary duties.

The lawyer client relationship is not the only commercial relationship in which a fiduciary obligation is imposed but, in Australian law, the intrusion of fiduciary principles into the commercial arena is limited. The position is not analogous to a law of general application such as the prohibition of false and misleading conduct or the prevention of abuse of confidential information, applicable to all traders. Fiduciary obligations do not extend very widely and, for present purposes, do not extend to the full range of other occupations and professions such as accountants and merchant bankers, with whom competition regulators often consider lawyers are, at least potentially, in a position of trade rivalry. Nevertheless, I am unaware of any document in the quite substantial literature on the application of competition principles to the legal profession, which recognises this very significant difference between allegedly rival providers of services.

Particular proposals for change – or “reform” as they are always characterised – should be assessed for the possibility that differences between occupations other than the particular proposal under consideration, may cause distortions unless the putative rivals are subject to the same regime or lawyers are made exempt from those other requirements.

For example, I do not know how a multidisciplinary practice will cope with the major differences in occupational culture about conflicts of interest. Accountants, who see no conflict in combining audit and consulting services [17] and merchant bankers, who have no fiduciary constraints, would regard lawyer’s sensitivities as uncommercial [18].

There is no doubt that fiduciary obligations often interfere with maximising income. The widespread affection for the “Chinese wall” indicates the direction in which competitive pressures and commercial convenience will drive behaviour. The terminology of a “Chinese wall” carries a connotation of ancient wisdom and inscrutable impenetrability [19]. In Australia we should call it the “dingo fence”.

In crucial respects lawyers are prohibited from pursuing their own economic self-interest by which, through the processes of Adam Smith’s invisible hand, the best interests of society are served. It may be that fiduciary obligations are inconsistent with the assumption as to commercial conduct underlying the application of competition principles to the profession. The traditional market model of rivals who maximise benefits to consumers by acting in their own interests is of limited application in this context.

### ***The Basic Paradigm: A Business or a Profession?***

There is a broad consensus that the legal profession relevantly has two quite distinct characteristics. In many respects the practice of law is a business with economic effects. However, it is not *only* a business. There is a public interest and professional dimension of a significance which prevents the profession being treated *only* as a business.

For many years the regulation of the legal profession has been determined on the assumption that the primary characteristic of the lawyer/client relationship is the professional paradigm: a personal bond created in the context of a high degree of personal responsibility. Over recent decades, however, the alternative business paradigm – in which the primary bond between a lawyer and client is commercial - has come to the fore. On the former approach regulation proceeds on the basis that professional practice may require modification for purposes of microeconomic reform, but the basic nature of the relationship would not change. On the latter approach, the activities of legal practitioners are subject to the usual rules applicable to commerce, but they may require modification to serve particular public interests.

There is a tension between the pursuit of commercial advantage, on the one hand, and the ethic of service to clients and the public, on the other hand. The future course of regulation is primarily in the hands of the profession as to which is, and is seen to be, the primary motivator of actual conduct.

There may, however, be an element of self-fulfilling prophecy in the application of competition

principles to the law. If lawyers are treated as if they are only conducting a business, then they will behave accordingly to an even greater degree than they do now. The ethic of service which emphasises honesty, fidelity, diligence and professional self-restraint may, progressively, be lost.

There is no doubt that, in the past, the profession adopted restrictive practices which went well beyond anything that may have been justifiable. Public decision-makers became understandably and properly sceptical of the claims of professional associations that their motives were pure and divorced from vulgar venality. It is as inevitable as it is embarrassing that those of us who wish to defend the ideals of the legal profession find ourselves in alliance with those lawyers who intend merely to defend their income.

### ***Extension of Competition Policy to the Legal Profession***

The application of competition policy to the legal profession was firmly established by the mid-seventies in the United States, with its longstanding and rigorous antitrust tradition [20]. Issues still arose, e.g. as to whether restrictions were, in substance, imposed by private bar associations or by state regulation, which is antitrust exempt [21]. During the seventies American antitrust law was adopted in Australia, the United Kingdom, Europe and elsewhere as a model for a systematic attack on anti-competitive conduct. At first this was not directed to the professions in any systematic way.

Consideration of the application of competition principles to the legal profession in this State commenced in the 1980s. The New South Wales Law Reform Commission in a report on the legal profession considered the introduction of competition principles to professional regulation [22].

At this time the *Trade Practices Act 1974* (Cth) had little direct application to any profession. Although the word "services" in the Act had always extended to encompass "work of a professional nature", the Act did not apply to most professions which were State based, not engaged in interstate trade and not conducted by corporations.

The Trade Practices Commission, as the Australian Competition and Consumer Commission was then known, conducted research into the impact of professional regulation on competition. In December 1990 the TPC produced a general Discussion Paper and in July 1992 an Issues Paper with respect to the legal profession. Further reports were published by the TPC, including its final report on the legal profession in March 1994 [23].

The New South Wales Parliament, in a package of 1993 amendments, introduced a new s38FC into the *Legal Profession Act 1987* which adopted the Commonwealth *Trade Practices Act* as a law of the State. However, the State had no system for administering competition policy. The Trade Practices Commission and the Trade Practices Tribunal, as they were then known, would require Commonwealth legislation in order to exercise jurisdiction under Pt IV of the *Trade Practices Act* as State legislation. The New South Wales provision was superseded by the process which has come to be called "the Hilmer reforms".

In 1992, the Council of Australian Governments (COAG) commissioned the Hilmer Report which was published in August 1993, recommending a broadly based national competition policy encompassing all areas of commercial activity, relevantly, including the legal profession.

In April 1995 the Council of Australian Governments (COAG) adopted a National Competition Policy package. This package consisted of three interconnected parts.

First, under the Competition Principles Agreement (CPA) a range of commitments was made to change public sector conduct and legislation so as to maximise the forces of competition. The National Competition Council (NCC) was established. Secondly, Pt IV of the *Trade Practice Act* was extended to unincorporated businesses, including all professionals, pursuant to a "Competition Code" contained in the new Pt 11A of the *Trade Practices Act*. This Code was expressly adopted in 1995 by complementary Competition Policy Reform acts in all States and by the Commonwealth. That legislation took effect in July 1996. The third component of the Package was an Implementation Agreement which provided, inter alia, that Commonwealth payments to the States were conditional on implementing the National Competition Policy.

By Clause 5 of the Competition Principles Agreement each State was obliged to conduct a review of all legislation which impinged on competition, relevantly for this paper, legislation for the regulation of the legal profession. Under the Implementation Agreement, the new National Competition Council would assess whether the states had fulfilled this obligation.

New South Wales has published its review of the *Legal Profession Act* in accordance with its obligations under the CPA [24]. As I understand the position, Victoria, New South Wales, South Australia and Tasmania have completed the review process with respect to the legal profession. The other States and Territories have yet to do so. The National Competition Council monitors this and similar matters and has periodically published an "Assessment of Governments' Progress in Implementing National Competition Policy". From now until at least 2005, there will be annual assessments. The legal profession is one small part of this process.

In parallel with the above process, drawing on the Hilmer Report, the Trade Practices report on the professions and the report of the Access to Justice Advisory Committee chaired by Justice Sackville [25], COAG instigated a specific review of the legal profession that was published in July 1966 [26]. COAG accepted the recommendation of this report that the National Competition Council should review the restrictions of work which may be done exclusively by lawyers and also of permissible business structures in the legal services market.

The report had also recommended that the Standing Committee of Attorneys General (SCAG) should pursue other aspects of change of legal profession regulation, including the development of a national legal profession. SCAG already had these matters under consideration. Inevitably issues considered in the development of the national model rules will overlap with the work of the NCC, under its review pursuant to Clause 5 of the CPA or as part of its specific reference on the legal profession.

The direction and speed of the processes presently underway cannot be predicted. It is by no means clear who will have the most say at the final table when the various decision-making processes are complete. The outcome may depend very much on the perspective and values of those at the table.

### ***Asymmetry and Competition Policy***

Information asymmetry is frequently referred to in the literature about the application of competition principles to the legal profession [27]. Generally, however, the existence of such asymmetry is only mentioned in passing, as a possible justification for some intervention with the free operation of the market. It does not appear to play much of a role in the detailed consideration of particular restraints on competition. In particular, I am not aware of any analysis which identifies and gives weight to the role of the existing countervailing institutions, such as fiduciary obligations and reputation, in ameliorating the effect of market failure.

The position is well summarised in the basic U.S. antitrust text:

"Antitrust law is largely passive towards informational asymmetries. It seldom attempts to generate or redistribute market information but may take such asymmetries into account when appraising conduct [28]."

The reason for this narrow frame of reference is probably the foundation of competition policy in traditional neoclassical economics, with its assumption of perfect competition. Even within that tradition there is the doctrine known as "The Theory of The Second Best" – co-authored by an Australian born economist, the late Kelvin J Lancaster. That "Theory" established that if any one of the numerous unrealistic assumptions for optimal allocation of resources does not exist, then any attempt to create *some* of the conditions, by making the activity more 'market like', might make things worse. One would have thought this would have made neoclassical economists a little more modest than they usually are about the force with which they advance policy prescriptions. As one author noted:

"A second best market typically has second best forms of accountability – professional norms, government supervision, regulation and subsidy – to which market forces have adapted [29]."

The process of adaptation include the institutions, in Akerlof's sense, which adapt to and ameliorate information asymmetry.

Perhaps more significant, for purposes of the present lecture, is the failure to fully adopt the broad range of insights of other developments in economics, particularly information economics, behavioural economics and institutional economics. Primary reliance is placed on the traditional market of neoclassical economics.

Public decision-makers have come to accept that regulatory institutions, whether governmental or private, have been shown to be so much more likely to cause distortions than any form of market

failure, that it is always best to give the freest possible scope for the operation of market forces. This is not because market failure is unusual, but because it is assumed, on the basis of a broad basis of experience, that any form of regulation is likely to make things worse. I have much sympathy for this working assumption.

The debate about the application of competition principles to the legal profession occurs against the broad background of the change in attitudes to government regulation and the role of a market system that has occurred over the last two decades. The perennial discourse about the proper role of government can be characterised as a debate between those who emphasise government failure and those who emphasise market failure. For about two decades those who emphasise government failure have been in the ascendancy. It would be wrong to assume that this pendulum has come to a permanent rest, but it is clear where it now lies. Recent developments, associated most often with the word "Enron", may suggest that the pendulum is moving again.

### ***The Reassertion of a Professional Paradigm***

Recently in New South Wales, some legislative intervention has occurred on a basis more in keeping with the traditional approach to professional regulation. A number of new regulations have been adopted which will, in due course, need to be justified in accordance with the Competition Principles Agreement.

The first example of this process occurred in the immediate wake of newspaper revelations that a number of barristers had failed to comply with their income tax obligations, in some cases over a substantial period of time, with the result that the barristers took refuge from the claims of the Commissioner in bankruptcy, some more than once. Conduct of this character, when of a deliberate and recurring kind, was inconsistent with the traditional requirements of fitness and propriety for professional practice as clearly asserted by the courts when these matters came to be determined [30].

First by regulation, and then by legislation [31], obligations were imposed upon legal practitioners to report certain offences and bankruptcy events to the relevant Council. The Councils were given additional powers to cancel or suspend practising certificates. With respect to a range of conduct a Council is entitled to refuse to issue or to cancel a practising certificate if the conduct was not explained to the satisfaction of the Council or was committed in circumstances that showed that the applicant or holder was not a fit or proper person to hold a practising certificate. This new scheme indicates clearly that legal practitioners are expected to comply with higher standards of behaviour than virtually all other occupations.

The second change concerns advertising. In 1993 the New South Wales Parliament inserted s38J in the *Legal Profession Act 1987* which entitled a barrister or solicitor to advertise in any way that he or she thought fit. This, of course, was subject to the general restriction on false, misleading or deceptive advertising applicable to all persons engaged in business. These provisions were resisted by the profession at the time they were introduced, in part because they were seen to be inconsistent with the traditions of a profession, although there was no resistance to modification of the practices that prohibited any kind of identification capable of being characterised as self-promotion, e.g. business cards or elaborate letterheads.

By the *Legal Profession Regulation 2002* Pt 14, the advertising of personal injury services is now restricted to advertisements that state only the name and contact details of the lawyer together with information as to any area of practice or speciality of the lawyer and is published in one of certain prescribed, albeit broadly defined, publication methods. Advertisements may not be broadcast on television or radio and may not be displayed at a hospital or in a document sent or delivered to a hospital.

These new regulations were adopted in the context of a broader public debate about the effect of personal injury litigation, particularly on insurance premiums. The specific context included such examples as an advertisement on the ceiling of a hospital lift capable of being observed only by someone flat on their back on a trolley. Some believed that this type of advertising encouraged unmeritorious litigation. On that basis, this form of advertising was prohibited in order to control demand rather than to restrict competition between suppliers. But it also affects the ability of rival suppliers to compete even in the case of meritorious claims, such as people flat on their back on a hospital trolley often are. The restriction reflects a broadly held view that certain kinds of advertising are unacceptable in the case of a professional person.

The third recent change occurred in the same context of concern about personal injury litigation. The

*Civil Liability Act* 2002 imposes an obligation on a legal practitioner not to provide legal services with respect to any claim or defence of a claim for damages unless he or she reasonably believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success. Breach of this obligation could give rise to disciplinary sanctions and personal costs orders. Provision is made for certification of pleadings in this regard. The basic concepts are not essentially different from duties to the court which pre-existed the legislation. Nevertheless, the specificity of the regulatory regime and the facilitation of proof, on some occasions involving a reversal of the onus of proof, does constitute a significant change.

This new detailed regime is, like the new restriction on advertising, inconsistent with the basic idea that drives the application of competition principles to the profession. That idea is that clients are best served by unrestricted competition between rival practitioners as in the normal commercial market place. In each case, the practice of law is subject to unique restrictions designed to restrict rivalry, indeed to inhibit the provision of legal services at all.

### **Competition Policy Issues**

Over the two decades or so that the application of competition principles to the legal profession has been debated, a number of significant changes to the regulation of the profession have occurred. For example, the two thirds rule and the two counsel rule have been abolished, in most States the conveyancing monopoly has gone, in New South Wales participation in incorporated multi-disciplinary practices has been permitted and scale fees no longer exist, except in the form of costs fixed by regulation in some matters, eg workers compensation. These and other similar changes have been driven by competition policy considerations. A number of issues remain under consideration [32].

I am not able, in this address, to systematically review the wide range of issues that have been and are being considered under this general heading. I will make some observations on certain specific matters which have not been selected in any systematic manner.

Economists are very suspicious of qualifications for practice, whether educational or integrity and behaviour standards. As I have said they regard such matters as "barriers to entry". No doubt at certain times, in some professions, such qualification requirements have been used to restrict numbers of persons entitled to practice for reasons of the character feared by economists. If that was ever the case in the legal profession, which I doubt, it has long since ceased to be such. The significant "barrier" is admission as a legal practitioner. The issue of a practising certificate involves limited additional requirements.

There is now a very large supply of admitted practitioners who do not in fact practice. Admissions in New South Wales are now running at the rate of about 2,000 a year. This should be compared with about 20,000 issued practising certificates. Since 1 July 1994, when the new system of admissions was adopted, some 12,500 persons have been admitted to the roll but, of those, only about 8,000 hold current practising certificates. The so-called "barriers to entry" are no longer of any economic importance in terms of restriction on supply. In view of the proliferation of law schools throughout Australia over recent decades I would expect the position would be the same in other States. Furthermore, the steps that have already been taken to permit mobility of lawyers within Australia, and the high probability of the removal of the remaining barriers to interstate movement, enhance this effect.

Until comparatively recently scales of fees for litigation and provision of legal services such as conveyancing and probate were fixed either by professional organisations or by courts. Such scales, although not compulsory, influenced charging practice. Economists would assume, not without reason, that the effect of such scales, even when only of a recommendatory character, was to create a minimum fee. That was undoubtedly the case in many professional contexts.

In the particular context of scales of legal fees there may have been an element in the system which did not just bring everyone up to a minimum fee, but also imposed controls on persons who may otherwise have charged more. It is interesting to note that a recently published thorough review of the economic literature on regulation of the legal profession concluded that it did not appear that the economic theory that abolition of scale fees would lead to a decrease in costs had in fact been borne out [33]. Perhaps the reason for this is the fact that, in the particular context of the legal profession, unlike other professions, scale fees restrained actual charging by reason of mechanisms for recovery of costs. Taxation officers, when they existed, would apply the scale as a standard. In practice this may have operated as a restraint on the amount that practitioners were able or felt able to charge.

In large measure competition regulators in Australia appear content with the present state of affairs in



the legal profession, where professional or regulatory interference with fees has been removed. Whether these changes have resulted in lower fees has never been investigated, I am unaware of any empirical research in Australia. However, the period since scale fees have been abolished has not obviously been an era of price restraint on the part of the legal profession. It was the time that time-based charging, which rewards inefficiency, became ubiquitous.

We have long passed the days when the exercise of self-restraint on fees on the part of professionals, was regarded as a mark of gentility. The temper of the times has come to regard such restraint, not only with scepticism, but as undesirable, even unnatural, and, in any event, quaint. Whether or not the sea change in opinion detectable in the wake of the Enron and other scandals of very recent times will cause this approach to change, I do not know. It has not happened yet.

One of the issues which has received considerable attention in many nations is the existence of restrictions on the organisational form permitted for legal practice, e.g. the requirement that barristers trade as sole practitioners and that solicitors trade in partnerships and without sharing income with non-lawyers. A particular focus has been the removal of restrictions on multidisciplinary practices, in which legal practitioners combine with other service providers in the same firm.

New South Wales now permits multidisciplinary incorporated practices and multidisciplinary partnerships [34]. The assumption is that the profession will be able to regulate individual practitioners, without regulating business structures. If this assumption proves to be wrong then, as a matter of practical reality, I doubt that the new business arrangements will be able to be untangled. It may then be too late to reassert a professional paradigm.

The adoption of multidisciplinary practices has been resisted elsewhere including, significantly, in the United States. The dangers were highlighted by Chief Justice Gleeson who adopted with approval the observations of Justice Sandra Day O'Connor of the United States Supreme Court, when she said:

“One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market [35].”

Chief Justice Gleeson posed the rhetorical question: “How does a person in the service of a multidisciplinary business operation, temper the pursuit of economic success?”

His Honour said:

“The professional associations, if they are to preserve the characteristic of professionalism, will need to ensure that the standards of behaviour they seek to impose and enforce will include such matters as not encouraging fruitless or merely tactical litigation, however profitable it may be to the corporate employer, accepting an obligation to take a reasonable share of pro bono work, and insisting upon full observance of duties to the court as well as to clients, in all aspects of the administration of justice. Of course, there are already lawyers whose observance of professional obligations of this kind is, to say the least, imperfect, but that is a reason for emphasising the obligations, not for relaxing them [36].”

The different traditions of the civil legal system, and the much reduced role of the legal profession in that system, has meant that multidisciplinary practices are common in Europe. The major providers of legal services in Europe are, once, the Big Six and, until recently, the Big Five and, now, the Big Four, accounting firms.

For many years the Netherlands was one of the nations which permitted MDPs. In 1993 Dutch law was amended to prevent such professional partnerships operating in defined circumstances. This law was challenged by Price Waterhouse and Arthur Andersen, of blessed memory. A partner of Arthur Andersen sought to enrol at the Rotterdam Bar. A member of the Amsterdam bar sought to become a partner of Price Waterhouse while remaining at the bar. The Supervisory Board of the Netherlands Bar found that both men would be in breach of the regulation. Certain questions were referred to the European Court of Justice, relevantly whether or not the regulation contravened Article 81 of the European Community Treaty concerning restrictions on, or distortion of, competition. To the surprise of many commentators the accounting firms lost. The European Court of Justice found that the restriction in the Dutch regulations did not “go beyond what is necessary in order to ensure the proper practice of the legal profession [37]”.

Another matter which remains under consideration is the identification of activities that are reserved for members of the legal profession. For example, in some States conveyancing is still a legal monopoly. In the United Kingdom the issue has arisen as to whether the doctrine of legal professional privilege provides an unfair advantage to legal advisers, particularly in the context of their competition with accountants in the area of tax advice [38]. This latter consideration in the Australian context will be affected by a statutory intervention. The full Federal Court has recently determined that the statutory provision for investigations under the *Trade Practices Act* had the effect of overriding legal professional privilege. The case is now on appeal to the High Court. If the decision survives it appears likely that a similar conclusion would apply to the investigatory provisions of the *Income Tax Assessment Act* [39].

The issue of reservation of legal work is a large subject which is likely to be of considerable significance in the years ahead.

### ***The Public Interests Affected***

The characterisation of the legal profession as a provider of services to consumers contains a substantial element of truth. There is a legal services market. For that reason competition principles are and must be accepted to be relevant to the regulation of the profession. However, that characterisation does not represent a complete description of the legal profession. For that reason alone the application of competition principles must be tempered and qualified in a manner not pertinent to other areas of commercial activity.

It is for this reason that economists and public decision-makers who have generally been sceptical of the special claims of professional status – with frequent incantation of scare words like cartel, producers surplus, rent seeking and regulatory capture – have come to temper the criticism to some degree. However, these other public benefits are characterised as “externalities”, terminology which tends to belittle their significance.

No-one would doubt that the administration of justice serves social functions well beyond anything that could be categorised as a benefit or advantage to a client, understood as a consumer. The protection of fundamental rights and liberties, the maintenance of the rule of law, the preservation of non-economic rights and expectations, the control of the exercise of power, particularly governmental power and especially so in the deployment of the power of the state in criminal justice, are all matters served by the administration of justice in which the legal profession, as it has traditionally been structured in common law countries, plays a vital role in the public interest.

Of particular significance is the existence of, and significance of, duties to the court [40]. These duties encompass a wide range of conduct. They override in many cases obligations to a particular client and, accordingly, they override the pursuit of self-interest by legal practitioners. These duties include a duty not to commence or pursue baseless proceedings, a duty not to mislead the court, a duty not to assist any form of improper conduct, a duty to refrain from making allegations of impropriety without adequate cause, a duty to conduct proceedings efficiently and expeditiously. There is no doubt that the application of competition principles is capable of undermining the performance of such duties, not least by giving salience, indeed dominance, to the interests of clients considered only as consumers [41]. Perhaps more than anything else it is the performance of duties to the court which should prevent legal ethics becoming merely a sub-category of business ethics.

The role of the profession in the administration of justice cannot be characterised simply as the provision of services to consumers. There are structural and institutional issues here of great significance. Competition regulators tend not to understand, or if they understand tend not to value, rival institutional traditions to that of the market. A market does not value history and tradition. As I said at my swearing-in a market wakes up every morning with a completely blank mind, like Noddy [42]. A profession values its traditions. This is of particular significance where competition principles are to be applied to aspects of the structure of a profession, as distinct from conduct with respect to particular activities.

Conduct issues include matters such as the monopoly on conveyancing or probate work. Structural issues include matters such as the division between solicitors and barristers, the restriction of permissible forms of business organisation, and also particular aspects such as the appointment of silk. Such traditions become embedded in modes of thought and procedure with effects that are incapable of calibration on the same scale as consumer benefits. The effects of abandoning such traditions are rarely predictable. In these respects there is a crucial interconnection between the structure of the profession and the operation of the courts in the administration of justice. Contemporary experience throughout the world suggests that we would be foolhardy to take these matters for granted. The

traditions of the legal profession, not least by their longevity, contribute significantly to the institutional legitimacy of the administration of justice.

### ***The Balancing Exercise***

All forms of competition regulation accept that there are situations in which regulation or conduct that has adverse effects on competition may be justifiable. However, what is accepted as a justification and what weight is to be given to other considerations must be affected by who it is who does the deciding. There is a clear tendency amongst those responsible for the application of competition principles to adopt a narrower perspective about what matters and what weight to give to countervailing public interests, than others, notably members of a profession, would. There is a real risk that the balancing exercise will be conducted by asking only whether or not a particular restriction provides economic benefits to consumers which are capable of countervailing the economic detriment of a restriction on competition.

Perhaps the most distinctive characteristic of the debate about the relationship between competition policy and regulation is the presumption that has emerged in favour of the operation of market forces. There is what has been called a “regulatory onus”: *any* form of regulation of a commercial activity bears an onus of proof and must be justified. The default position is the operation of a free market. Anyone who wishes to impose any additional requirement, of any character, must justify that imposition.

Clause 5 of the Competition Principles Agreement established a “guiding principle” that legislation should not restrict competition unless it can be demonstrated that the benefits outweigh the costs and that the objectives can only be achieved by restricting competition. This is the basis on which the review of legislation is being conducted [43].

It is important to understand that the idea of public benefit is not limited to economic considerations or benefits to consumers as such. As the COAG guidelines for the legislation review state:

“... a wide array of social and environmental concerns are expected to be considered along with more narrowly economic criteria in arriving at an assessment of overall benefits and costs [44].”

In the case of the legal profession, the National Competition Council has acknowledged that the objective is to protect the public not only to promote the welfare of consumers:

“Some professional regulation ... has broader objectives of ensuring the sound functioning of important social institutions (for example, regulation of the legal profession) [45].”

Similarly, the process for exemption from the prohibitions in Part IV of the *Trade Practices Act* requires an application for authorisation under Pt VII of the Act. That process is based on the assumption that any prohibited conduct is necessarily bad and requires the person intending to engage in it to establish the positive public benefits of such conduct.

In the review of the profession by the NCC the idea that benefits to be considered should be restricted to consumer welfare, which was discernible in earlier reports [46], has not prevailed. Similarly, the process of authorisation by the Australian Competition and Consumer Commission, or on review by the Tribunal, does not, in principle, entail a narrow idea of “benefit to the public”. There is a legal requirement that any such “benefit” must “outweigh the detriment to the public constituted by any lessening of competition”.

Surprisingly, the situation appears to be different in the United Kingdom, so that we must treat their consideration of similar issues with care. The recent Office of Fair Trading report focuses exclusively on consumer benefits [47]. This narrow approach reflects the more recent UK legislative provision. The original UK *Fair Trading Act* 1973, had a broad concept of public interest [48]. However, the *Competition Act* 1998 is modelled on EC law. Under Article 81(3) of the EC treaty and s9 of the *Competition Act*, the criteria for exemption, equivalent to our “authorisation” appear to be economic only [49].

The difficulties posed by a broad approach to public interest should not be underestimated. The benefit and the detriment are in large measure incommensurable. They cannot be reduced to a single scale for purposes of comparison. There are no objective standards to apply which will determine the outcome.

How does one compare, for example, the cost to consumers of not permitting barristers to be employed or form partnerships with other lawyers or with accountants, with the advantage for our judicial system of a large body of experienced trial lawyers whose personal experience of self-reliance and independent cast of mind has played so important a role in preserving judicial independence not least as the primary, but no longer exclusive, source of judges?

What matters enormously to the outcome of the process is the ideological predispositions and intuitive biases of the persons who have to make the balancing judgment. Where you stand, a regrettably anonymous pundit once put it, depends on where you sit. This is a task which calls for quasi-judicial, rather than administrative, skills. The requisite intellectual toolkit cannot be narrowly based.

The Australian Competition and Consumer Commission, the Tribunal on review and the National Competition Council have an inbuilt institutional predisposition in favour of the operation of market forces. It cannot be, and indeed should not be, otherwise. It is understandable that their decision-making processes will have a primary focus on the benefit to consumers of a service that enhanced competition may bring. Matters of broader public benefit, that cannot be reduced to consumer benefit, are accepted to be material, but are unlikely to be given the same weight by this kind of decision making process as they would be in a differently constituted decision making process.

I am not suggesting that the legal profession does not have its own biases which may overstate the benefits of traditional practices. I simply point out that relevant decision-makers have an institutional predisposition to identify the public interest with economic considerations or to give such considerations more weight than others would do. The choice is essentially political, using that word in its broadest sense. For that reason, the special institutions that have emerged to overcome the problem of information asymmetry, and which I have discussed above, should receive particular attention by those who seek to preserve the professional paradigm. They directly address the existence of market failure in terminology more likely to be understood by the likely decision-makers.

When we are dealing with institutions that determine the peace and welfare of society – including the capacity of the economy to operate freely – as we are when changing the structure of the legal profession, then something like the precautionary principle of environmental legislation may be appropriate to counterbalance the assumption that competition necessarily promotes the public interest.

I agree with Rabbi Jonathon Sacks, the Chief Rabbi of the British Commonwealth, when he emphasised that a society with a strong respect for certain kinds of tradition is needed in order to sustain the market economy itself. He was concerned with religion, but his analysis applies to the mechanisms of governance, including the rule of law. He said:

“When everything that matters can be bought and sold, when commitments can be broken because they are no longer to our advantage, when shopping becomes salvation and advertising slogans become our litany, when our work is measured by how much we earn and spend, then the market is destroying the very virtues on which in the long run it depends.

That, not the return of socialism, is the danger that advanced economies now face. And in these times, when markets seem to hold out the promise of uninterrupted growth in our satisfaction of desires, the voice of our great religious traditions needs to be heard, warning us of the gods that devour their own children, and of the temples that stand today as relics of civilisations which once seemed invincible ...

The market, in my view, has already gone too far: not indeed as an economic system, but as a cast of thought governing relationships and the image we have of ourselves ... The idea that human happiness can be exhaustively accounted for in terms of things we can buy, exchange and replace is one of the great corrosive acids that eat away the foundations on which society rests; and by the time we have discovered this, it is already too late.

The market does not survive by market forces alone. It depends on respect for institutions, which are themselves expressions of our reverence for the human individual as the image and likeness of God [50].”

The complex task of balancing the public interests involved in applying competition principles to the law must be affected by the values of those called on to do the balancing. Like Archimedes we can move the world, but first we have to find a place to stand.

Endnotes:

1. For an overview of information economics see the article by Joseph E Stiglitz, one of the economists who shared the 2001 Nobel Prize: "The Contributions of the Economics of Information to Twentieth Century Economics" (2000) 115 *The Quarterly Journal of Economics* 1441.

2. (1970) 84 *The Quarterly Journal of Economics* 488; reprinted in George A Akerlof, *An Economic Theorist's Book of Tales: Essays that Entertain the Consequences of New Assumptions in Economic Theory*, Cambridge U P, Cambridge, 1984.

3. R E Rosenman & W Wilson, "Quality Differentials and Prices: Are Cherries Lemons?" (1991) 39 *Journal of Industrial Economics* 649.

4. See Stiglitz, *supra*, at 1452.

5. See Akerlof, 1984, *supra*, at 21.

6. See e.g. H E Leland, "Quacks, Lemons and Licensing: A Theory of Minimum Quality Standards" (1979) 87 *Journal of Political Economy* 1328; R C O Matthews, "The Economics of Professional Ethics: Should the Professions be More Like Business?" (1991) 101 *The Economic Journal* 737.

7. *Shapero v Kentucky Bar Association* 486 US 466 (1987) at 489-490.

8. 421 US 773 (1974).

9. 526 US 756 (1999).

10. Timothy J Muris, "California Dental Association v Federal Trade Commission: The Revenge of Footnote 17" *Law and Economics Working Paper No 00-30*, George Mason University School of Law, accessible at <http://papers.ssrn.com> and published in (2000) 8 *Supreme Court Economic Review* 265.

11. *California Dental Association v Federal Trade Commission*, *supra*, at 772-773.

12. Richard A Posner, *Economic Analysis of Law*, 5th ed, Aspen Publishers Inc, 1998 at 126.

13. A comprehensive bibliography does not suggest any further consideration. See Howard Gensler "Law and Economics: A Topical Bibliography" (1998) 26 *International Journal of Legal Information* 184.

14. See, for example, David B Wilkins, "Who Should Regulate Lawyers" (1992) 105 *Harvard Law Review* 799 esp at 816-817.

15. Stiglitz, *supra*, at 1449. See also C Shapiro, "Premiums for High Quality Products as Returns to Reputation" (1983) 98 *Quarterly Journal of Economics* 659.

16. George A Akerlof, "Behavioural Macroeconomics and Macroeconomic Behaviour", Prize Lecture, 8 December 2001, accessible at <http://www.nobel.se/economics/laureates/2001/akerlof-lecture.pdf>.

17. The most that is proposed is a level of disclosure, rather than the fiduciary standard of fully informed consent. See Ian Ramsay, *Independence of Australian Company Auditors*, Commonwealth of Australia, October 2001, Pt 5(d) and CLERP 9, *Corporate Disclosure: Strengthening the Financial Reporting Framework*, Commonwealth of Australia, 2002 at par [4.9].

18. These matters are discussed in National Profession Taskforce Multidisciplinary Practices Working Group, *Multidisciplinary Practices: Legal Professional Privilege and Conflict of Interest Issues Paper*, Law Council of Australia, Canberra, September 2000.

19. On the difficulties of Chinese walls see *Mallesons v KPMG Peat Marwick* (1990) 4 WAR 357 esp at 371; Holander and Salzedo (eds), *Conflicts of Interest and Chinese Walls*, London, Sweet & Maxwell,

2000, esp [7-10]; H McVea, "Heard it Through the Grapevine: Chinese Walls and Former Client Confidentiality in Law Firms" (2000) 58 *Cambridge L J* 370 at 377, 387, 384; *MacDonald Estate v Martin* (1990) 77 DLR (4th) 249 at 273-274; *Russell McVeagh v Tower Corp* [1998] 3 NZLR 641 at 670; *Yunghanns v Elfic Ltd* (Supreme Court of Victoria, 3 July 1998, unreported).

20. *Goldfarb v Virginia State Bar*, supra. Antitrust law is sometimes reinforced by First Amendment jurisprudence, e.g. *Bates v State Bar of Arizona* 433 US 350 (1877). See also Thomas D Moran "The Impact of Antitrust Law on the Legal Profession" (1998) 67 *Fordham L Rev* 415.

21. See *Hoover v Ronwin* 466 US 588 (1984); Areeda and Hovenkamp, *Antitrust Law* (2nd ed) Vol 1, Aspen Law & Business, New York, 2000 par 227a.

22. See New South Wales Law Reform Commission, *First Report on the Legal Profession: General Regulation and Structure* (1982) LRC Report No 31. The issue had earlier been discussed in the Commission's Discussion Paper No 4(1), *The Structure of the Profession* (1981), esp at 209 and following.

23. Trade Practices Commission, *Regulation of Professional Markets in Australia: Issues for Review*, December 1990; *Study of the Professions: Issues Paper – Legal Profession*, July 1992; *Study of the Professions: Legal, Final Report*, March 1994. See James Farmer QC "The Application of Competition Principles to the Organisation of the Legal Profession" (1994) 17 *UNSWLJ* 285; Ray Steinwall "Competition Policy – a Stocktake" (1995) 18 *UNSWLJ* 493 at 500-510.

24. New South Wales Attorney General's Department, *National Competition Policy Review of The Legal Profession Act 1987, Report*, November 1998.

25. *Access to Justice: an Action Plan*, Commonwealth of Australia, Canberra, 1994, esp Ch 3.

26. *Reform of the Legal Profession in Australia*, Report to the Council of the Australian Governments by the Legal Profession Reform Working Group, Commonwealth of Australia, Canberra, July 1996.

27. See e.g. Professor Alan Fels "Regulation, Competition and the Professions", Address to the Industry Economics Conference 2001, 13 July 2001, Melbourne at 1-2.

28. Areeda and Hovenkamp, supra, vol 2A, par [410].

29. Robert Kuttner, *Everything For Sale: The Virtues and Limits of Markets*, Knopf, New York, 1998.

30. See e.g. *New South Wales Bar Association v Cummins* (2001) 52 NSWLR 279; *New South Wales Bar Association v Hamman* [1999] NSWCA 404; *New South Wales Bar Association v Somosi* [2001] NSWCA 285; *New South Wales Bar Association v Murphy* [2002] NSWCA 138; *Wardell v New South Wales Bar Association* [2002] NSWSC 548; *Cameron v New South Wales Bar Association* [2002] NSWSC 191.

31. See *Legal Profession Amendment (Notification) Regulation* 2001 and *Legal Profession Amendment (Disciplinary Provisions) Act* 2001.

32. The relevant literature indicates that common themes emerge in all jurisdictions. A good summary of the economics literature, with reference to empirical studies, is Frank H Steven and James H Love, "Regulation of the Legal Professions" in B Bouckaert and De Geest (eds) *Encyclopaedia of Law and Economics*, Aldershot, 2000, also accessible at [www.economics.strath.ac.uk/pdf/rw-fs3.doc](http://www.economics.strath.ac.uk/pdf/rw-fs3.doc). A good example of the categories of issues that arise is found in the N.C.C. staff paper R Deighton-Smith, B Harris and K Pearson, *Reforming the Regulation of the Professions*, National Competition Council Staff Discussion Paper, May 2001 and in COAG Committee on Regulatory Reform, *Guidelines for the Review of Regulation of the Professions under National Competition Policy*, 1999, accessible at [www.appliedeconomics.com.au/pubs/COAG.pdf](http://www.appliedeconomics.com.au/pubs/COAG.pdf) at par [2.13-2.15], and Pt 4.

33. See Frank H Stephen and James H Love, *ibid*. See also Edward Shinnick and Frank H Stephen "Professional Cartels and Scale Fees: Chiselling on the Celtic Fringe?", accessible at [www.ucc.ie/ucc/depts/economics/wp/wp001.html](http://www.ucc.ie/ucc/depts/economics/wp/wp001.html).

34. See *Legal Profession Act* 1987, Pt 3 Div 2A and s48G.

35. *Shapero v Kentucky Bar Association*, supra, at 488.

36. The Honourable Murray Gleeson, "The Changing Paradigm", Address to the Women Lawyers' Association of New South Wales, 26 October 1999, accessible at [www.hcourt.gov.au/speeches/cj/wo261099.htm](http://www.hcourt.gov.au/speeches/cj/wo261099.htm).

37. The judgment of the Court is available [here](#). The background to the case is set out in G Ellis Duncan "The Rise of Multidisciplinary Practices in Europe and the Future of the Global Legal Profession Following *Arthur Andersen v Netherlands Bar Association*" (2001) 9 *Journal of International and Comparative Law* 537. The prediction in that article that multidisciplinary practices would be upheld by the European Court of Justice, and accordingly that pressure would emerge on the American Bar Association to change its policy, proved to be incorrect. See also Laurel S Terry and Clasina B Houtman Mahoney "Future Role of Merged Law and Accounting Firms", in Ch 7 of *Private Investments Abroad*, 1998, accessible at [www.personal.psu.edu/faculty/1/s/1st3/whatiffromswinwp.pdf](http://www.personal.psu.edu/faculty/1/s/1st3/whatiffromswinwp.pdf) which contains the first instance Dutch decision from which the appeal was taken to the European Court.

38. Office of Fair Trading, *Competition in Professions: A Report by the Director General of Fair Trading*, March 2001 at par [47] and Lord Chancellor's Department Consultation Paper, *In the Public Interest? A Consultation Following the Office of Fair Trading's Report on Competition in the Professions* July 2002, Ch 4.

39. See *Australian Competition and Consumer Commission v Daniels Corp. International Pty Ltd* (2001) 108 FCR 123 and see *ANZ Banking Group Ltd v Deputy Commissioner of Taxation* (2001) 46 ATR 451 at [14].

40. See the Honourable David Ipp "Lawyers Duties to the Court" (1998) 114 *LQR* 63.

41. See Richard A Posner, *Overcoming Law*, Harvard U P, Cambridge Mass., 1995 at 93.

42. See (1998) 44 *NSWLR* xxvii at xxxi. Also accessible at [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc).

43. See COAG Committee on Regulatory Reform, *Guidelines*, supra, esp pars [1.8-1.13].

44. *Ibid*, par [1.12].

45. Deighton-Smith et al, supra at 3: see also National Competition Council, *Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms*, June 2001, Canberra at 17.1, 17.5.

46. See Legal Profession Working Group, July 1996, supra at 13, which is the origin of the Terms of Reference of the NCC and which stated:

"The objective of this study is to recommend the appropriate balance between the minimisation of restrictions on competition between legal service providers, including non-lawyers, and *the need to protect consumers* from incompetent and inappropriate service providers.

The onus of the inquiry should be the minimisation of restrictions on competition between legal service providers, including non-lawyers, while recognising *the need to inform consumers* about the quality and value of the various options and to impose a disciplinary regime which offers remedies *without prohibitive cost to consumers*.

Most importantly, the inquiry should ask whether the current reservation of legal work *benefits consumers* and whether such benefits outweigh the costs which then flow from lawyer's market dominance." [Emphasis added]

47. See Office of Fair Trading, *Competition in Professions: A Report by the Director General of Fair Trading*, March 2001, esp at par[11]; Office of Fair Trading, *Competition in Professions: Progress Statement*, April 2002, at par [1.4].

48. See B J Rodger & A MacCulloch, *Competition Law and Policy in the EC and UK*, Cavendish Publishing, London, 1999 at 113-114; Mark Furse, *Competition Law of the UK and EC* (3rd ed) Oxford U P, Oxford, 2002 at 169-171.



49. That the jurisprudence of the European Court of Justice may not take such a narrow view is suggested by the decision on the Netherlands Bar Association rule, see note 37 above.

50. Jonathon Sacks, "Markets and Morals" (2000) 105 *First Things* 23, accessible at <http://www.firstthings.com/ftissues/ft0008/articles/sacks.html> at 30 June 2001.



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## The Idea of a University

**THE IDEA OF A UNIVERSITY  
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
SESQUICENTENNARY COLLOQUIUM DINNER  
MACLAURIN HALL, UNIVERSITY OF SYDNEY  
12 OCTOBER 2002**

An event such as this sesquicentennial celebration of the inauguration of the University of Sydney in 1852, is an opportunity to celebrate the great institutional traditions of which the present members of the University are trustees. Of these traditions, none is more significant than the principle of liberal education which received its most expansive statement in John Henry Newman's classic "*The Idea of a University*", albeit in the overblown rhetoric of high Victoriana. There is an aptness, indeed a poignancy, in the fact that the delivery of the public lectures which form the basis of Newman's book, occurred in the same year as this university was inaugurated. Accordingly, this year is also the sesquicentenary of Newman's contribution to the philosophy of higher education.

The basic themes of Newman's approach are well known:

- Knowledge is an end in itself, to be pursued for its own sake and not for some utilitarian value.
- The university is first and foremost a community of scholars, teachers and students devoted to the pursuit of truth.
- The core of the curriculum is the humanities which represent the highest attainment of cultivated minds.

The "Idea" of which Newman spoke used the word in the sense of "ideal". The model which he urged on his Dublin audience, seeking their support, particularly financial, for the creation of a new Catholic university in Dublin, was that of the unreformed Oxford in which he had spent his formative years. The fact that he had been cast out from Oxford, even before his formal conversion to Catholicism, for his expression of what had become increasingly unorthodox theological opinions, did not, it appears, detract from his concept of the "ideal". His was a Platonic ideal, divorced from practice.

There is, and remains, a high level of irony in Newman's simultaneous advocacy of the virtues of the clash of ideas as a means for discovering the truth, on the one hand, and his preparedness to embrace dogma that, in respects he regarded as most critical to human well being, held that truth had already been discovered, and that there were institutions which could state the truth with complete authority.

Nevertheless, his statement of the core concept of a university has retained its appeal. I select one of a number of alternative formulations of the same idea. It was delivered, appropriately enough, after an expression of hope that "the reader", referred to as such in the Victorian manner in case there was some doubt as to who it might be who was looking at the page, would not be rendered weary by the repetition. The University, Newman said:

"... is the place to which a thousand schools make contributions; in which the intellect may safely range and speculate, sure to find its equal in some antagonist activity, and its judge in the tribunal of truth. It is a place where inquiry is pushed forward and discoveries verified and perfected, and rashness rendered innocuous, and error exposed, by the collision of mind with mind, and knowledge with knowledge. It is the place where the professor becomes eloquent, and is a missionary and a preacher, displaying his science in its most complete and most winning form, pouring it forth with the zeal of enthusiasm, and lighting up his own love of it in the breasts of his hearers."

Newman was writing in the wake of the triumph of utilitarianism as an animating philosophy of English social and political life. We ourselves live in the wake of the triumph of the spiritual descendants of the utilitarians. It is, perhaps, for that reason that his words have a particular resonance for this time.

For several decades, the theme of "education for growth", and the accompanying dominance of a managerialist philosophy in university decision-making, has often led to a failure to give much more

than lip service to the cultural, social, moral and intellectual purposes of higher education. No-one has ever denied such purposes, but any factor incapable of measurement for purposes of accountability or inclusion in a funding formula, has for some time been given little weight. We are all impoverished by this.

At a time when more and more things are judged merely by commercial standards, it is important to assert that there are other values in life. The value of intellectual exchange and endeavour cannot be assessed by short term fluctuations in demand nor by what is bought and sold. Not everything that counts can be counted.

That is not to say that economic welfare is irrelevant. Indeed a strong case can be made for the proposition that a broad based liberal tertiary education is essential for our economic future. The focus on vocational education in the narrow sense of training is distinguishable from inculcation in the historical, social and environmental dimensions of a vocation. The latter requires context and depth. Mere training produces specialists who will find it difficult to adapt to the future demands of their vocation. Nor will it provide us with that substantial body of creative men and women capable of ensuring that Australia has a place at the forefront of the global industry in ideas which - from computer programming to movies, from industrial design to medical invention - has been the most dynamic source of economic progress in the contemporary era.

Consider a mental exercise of estimating the market value of all of the assets in the world, by different classifications, over time. For the whole of human history, until recently, there would be no doubt that the single most valuable asset was real estate. Perhaps one or even two decades ago that changed. In my guesstimate, at some such point, the total value of the world's intellectual property came to exceed the total value of the world's real estate. By now, the latter is a distinct second and will continue to recede.

The creativity required for the continuing development of intellectual property cannot be supplied by narrow vocational education. The well springs of creativity are many and varied. A broad liberal education on its own or as a precursor to, or part of, a vocational degree, is more likely to create that flexibility of mind and capacity for insight that is the source of much intellectual property.

Today, perhaps the most difficult thing to accept in Newman's idea of the university is the use of the definite article. He spoke of *The* idea of a university. His themes, however, constitute only *one* idea of a university. Perhaps a fundamental, or core idea, perhaps a component of any university education. They are not, however, the *only* aspect of such education that is entitled to emphasis.

This University commenced in its first three professorships with an approach similar to the unreformed Oxford model advanced by Newman. That was understandable. In 1852 Oxford and Cambridge were the natural role models for this university. However, his was not the only model of tertiary education, even then. To use an example from the law, with which I am most familiar, vocationally orientated legal education in London was conducted by the Inns of Court, which were referred to as "The Third University".

Within a few decades of its inauguration this University established its major professional faculties. Since that time, this vocational orientation has been an integral part of the University of Sydney's tradition. Newman did not value such a development. In that regard, I believe, he was wrong. One cannot now adopt Newman's concept of the University without amendment. He identifies one, albeit vital, component of our institutional tradition, but it is only one.

The extent to which elements of a broader liberal education have been, or ought to be, an integral component of what is ultimately a vocational degree, has been a subject of continuing debate. I have no doubt that, in the light of the significance and speed of contemporary social and economic changes, the ability to adapt that is the product of a broad education will be in greater demand than it has ever been. That is not to say that the pursuit of knowledge must be justified by its practical utility. It is just that it can be.

It is trite to observe that a very substantial proportion of innovations and ideas that are driven by a determination to be useful have proven useless. Many ideas and innovations that originated in a quest for knowledge for its own sake have turned out to have the greatest practical significance.

Experience suggests that we should display more modesty than we do about our ability to predict what will be useful. For that reason, there is, in my opinion, much good sense in recent debate on

higher education in Australia, a debate into which I tread with trepidation, which emphasises the need to encourage a diversity of tertiary institutions and diversity within institutions. Diversity in our institutional arrangements, including amongst our educational institutions, is as important to the health of our society as bio-diversity is to our ecology. And for much the same reasons. That is one reason why the market system is not a universally applicable model.

In many ways, what I have been saying is a traditionalist approach, which has not been in favour over recent decades. However, I would not wish to be misunderstood as an advocate of a university pickled in last century's aspic. There is a pressing need for the university, like all of our institutions, to adjust and adapt to contemporary pressures. Nothing indicates this better than Newman's own fate.

First, his terms of four years as the first Rector of the new Catholic University of Dublin was a failure. Neither his fundraising capability, nor his capacity to attract students proved equal to his rhetoric.

Furthermore, John Henry Newman would have had no doubt that the study of theology was at the core of a university curriculum. Theology was one of the great traditional professions. It is a much diminished subject and profession today.

Newman's vast bulk of theological writing is studied today by only the most esoteric of scholars. His great works, including *The Idea of a University* and his personal record of conversion, *Apologia Pro Vita Sua*, have stood the test of time.

Samuel Johnson once said:

"A writer is judged by his worst work when he is alive and by his best work when he is dead."

In contrast, Shakespeare had Mark Anthony say:

"The evil that men do lives after them;  
The good is oft interred with their bones."

Newman is lucky that, in his case, it was Johnson who proved to be right.

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## Becket and Henry II: Exile

**BECKET AND HENRY II: EXILE**  
**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**TO THE ST THOMAS MORE SOCIETY**  
**THE FOURTH ADDRESS IN THE BECKET LECTURE SERIES**  
**SYDNEY, 8 OCTOBER 2002**

In 1157, Roland, Cardinal of S. Marco and Chancellor to Pope Adrian IV, created uproar at the Imperial Diet called by the Holy Roman Emperor, Frederick Barbarossa, at Besançon. In the presence of almost everyone that mattered in the Empire and of ambassadors from throughout Europe, Roland read a letter to the Emperor from the pope, reminding Frederick of his coronation by him and expressing the hope at some future date to confer *additional* benefices upon him. The two words he used “conferre” and “beneficia” were technical terms, or at least translated as such, by which a fief is conferred upon a vassal.

At this time, the forged Donation of Constantine was still asserted to be valid. In riposte to the Emperor’s outrage at this terminology of subordination, Cardinal Roland provocatively proclaimed: “From whom does the Emperor hold his office, if not from the Pope”. The answer of the Emperor was, of course: “From God”. The conflict of institutional authority between the Empire and papacy, extant for at least a century, would continue for another.

In September 1159, after Adrian’s death, the 30 Cardinals who assembled in the conclave behind the high altar of the basilica at St Peters, overwhelmingly elected, by prior arrangement, Cardinal Roland as pope. The pro-Imperial faction had prepared what can only be described as a coup. As Roland bent his head to receive the purple mantle of office – the “imantation” - Cardinal Octavian of St Cecilia grabbed it and tried to put it on himself. When it was taken away from him, his chaplain gave him a replica which Octavian put on back-to-front, ran to the papal throne with the fringes of the mantle tangled around his neck, sat down and proclaimed himself Pope Victor IV. The Imperial ambassadors in Rome supported Victor. Roland took the name Alexander III and, after a week besieged in the Castel Sant ’Angelo, fled Rome. His conflict with Frederick Barbarossa would last for seventeen years.

When Becket left England in late 1164, Alexander had been in exile in France for about three years. His highest priority was the maintenance of support of the French and English kings against Frederick. Throughout the conflict about the Constitutions of Clarendon, the gentle, scholarly, prudent Alexander had urged caution. He had written to Becket from Sens on 26 October 1163:

“For with God’s help we shall strive steadfastly to preserve for you the rights and dignities of the Church entrusted to your charge as far as we can, saving justice and reason, as for one whom we find to be a steadfast and able defender of the Church.”

Becket’s exile would depend on the exigencies of Alexander’s own.

Becket travelled to Sens in an entourage of 300 provided by Louis VII of France, who seized the opportunity to discomfort his long-time rival. At one point this procession came within eyesight of the high powered embassy from Henry, led by the Earl of Arundel and including the Archbishop of York, the bishops of London, Chichester and Exeter, together with a clutch of senior officials.

The royal delegation was received by the pope first. In marked contrast with Henry’s letter to Louis VII, containing a futile request that he deny Becket sanctuary, in which Henry denounced Becket as a “wicked and perjured traitor”, Henry’s letter to the pope was more diplomatically phrased, describing Becket as “the disturber of the realm and church”. Gilbert Foliot, bishop of London, gave the opening address:

“There has of late arisen in England a dissension between the King and the priesthood on a slight and unimportant matter which might easily have been ended if a discreet moderation had been shown. But my lord of Canterbury, following his own individual

judgment and not our advice, has pushed the matter to extremes not considering the malice of the times or what harm might arise from this attack.”

Foliot proceeded to attack Becket's rashness and invoked the text: “The wicked fleeth when no man pursueth”.

At this point the pope interrupted: “Have mercy brother”. Foliot, reflecting the misjudgment of the royal delegation as to the strength of its position, said: “My Lord I will have mercy on him”.

Alexander retorted: “I say not brother that you should have mercy on him, but on yourself”. According to Becket's hagiographers Foliot was dumbstruck. Alexander had made it perfectly clear that he was not inclined to sacrifice his archbishop.

Foliot was supported by Roger of York, Bartholomew of Exeter and Hilary of Chester, the latter stumbled over his Latin to the great merriment of the assembled curia. The Earl of Arundel, interrupting the flow of Latin conversation, admitted that he didn't have a clue as to what anyone had been saying for some time, and gave a nice little homily in French about how much Henry loved the pope and how everyone in the delegation was sure that the pope would do the right thing. What Hilary of Chichester had decried only a few moments before as Becket's “boundless presumption”, the earl chided as having been “a little too impetuous”.

The basic request of the delegation was that the pope should appoint a legate with powers of a viceroy who could make an unappellable decision. Becket's biographers would later decry this as a stratagem to exploit the notorious corruptibility of cardinals of the curia. It was also, however, a strategy which would enable a decision to be made in the particular case by a delegate who could act in a way that the pope himself may be constrained from acting for fear of creating an unfortunate precedent.

“Since you have asked for legates” Alexander announced – grasping the opportunity to delay any confrontation on the matter – “you shall have legates”.

Foliot, no doubt unsure as to whether the full implications of the request had been conveyed, repeated:

“We ask if they may be empowered to determine the case without appeal.”

“That”, retorted Alexander, “is my privilege which I shall not give to another and, in truth, when he is to be judged, he shall be judged by us, for it were against all reason to send him back to England to be judged by his adversaries and among his enemies”.

Not even an offer to increase the annual English tribute to the pope, a system unique in Christendom known as Peter's Pence, would convince Alexander to give Henry what he wanted. This was as clear a signal as Alexander could give in the circumstances that important principles were at stake.

A few days later on 29 November, Becket arrived at Sens. He had been fully briefed on what had happened to the royal embassy, Herbert of Bosham had been sent ahead and was present throughout the public sessions.

There is nothing quite like an original document. Becket's first act was to hand to the pope the chirograph original of the Constitutions of Clarendon, “These, Holy Father, are the laws which the Church of God are called upon to receive,” he said.

Alexander had already indicated that the “customs” were unacceptable, indeed only six were even “tolerable”. The contemporary biographies suggest that Becket went through the document point by point at considerable length. As the clauses were read out and debated one by one, no-one in the room could have had any doubt that a number of the English customs were directly contrary to canon law, as it had developed over recent decades. Of particular concern was the paragraph which banned any appeal to the pope until an ecclesiastic case had gone through the full English hierarchy – from archdeacon to bishop to archbishop – and even then required royal permission to go to Rome. Such appeals had expanded considerably over recent decades and had become the principal mechanism for the exercise by the pope and the curia of a Europe-wide authority. Becket had chosen his ground well.

Becket offered to resign his archbishopric. The contemporary texts suggest that the papal entourage was divided over whether the resignation should be accepted. Alexander refused. Acceptance of the offer would have validated the overbearing conduct of a monarch in driving a senior primate from office. The church could not tolerate so abject a surrender to the raw exercise of secular power. Its appointments could not be subject to the pleasure of kings, as Alexander was all too acutely aware from the continued support by the Emperor of an anti-pope.

For the seven years of Becket's exile, Alexander would skilfully negotiate the conflicting demands of principle and pragmatism. He never abandoned Becket or surrendered a point of principle. Confrontation, however, was undesirable – Alexander always sought a negotiated settlement. Confrontation often endangered the broader interests of the church.

Becket could not be removed from office. He could, however, be removed from power. A cooling off period was obviously required. Alexander sent him to a monastery. According to one biographer he said:

“You have hitherto lived in affluence and luxury and that you may learn in future what you ought to be, the comforter of the poor – a lesson which can only be learned from poverty itself, the mother of religion – we have decided to commend you to the Abbot of Pontigny.”

Pontigny was a monastery of the Cistercian order about 55 kilometres south-east of Sens. There Becket would have to submit to the strict discipline and austerity which the order regarded as the sole route to salvation.

In response to Becket's self-imposed exile, Henry invoked the full range of sanctions available to him. Every person close to Becket, relatives, friends and members of his household, whether pregnant, widowed, orphaned, aged or invalid, was banished from England and ordered to leave immediately, with only the clothes on their backs. Many were required to swear an oath that they would join the archbishop at Pontigny and a steady stream of new exiles added to the burden of hospitality of the abbey, until the pope absolved them from their oaths to enable them to find refuge elsewhere in France or Flanders.

By writ addressed to all of the bishops of England, Henry ordered a freeze of the ecclesiastical revenues of any clerk who had fled with Becket or otherwise supported him. He ordered his sheriffs to demand security from the parents, brothers, sisters, nephews and nieces of such clerks, until he had decided what to do – presumably he was considering banishment in their case as well. The sheriffs were ordered to arrest anyone who may have appealed to the pope. Finally, Henry ordered that Peter's pence was to be paid into the royal treasury until he determined what should be done.

The whole of the archbishop's property was confiscated and a simple tough Norman baron, Ranulf de Broc – who had occupied Lambeth Palace and ruthlessly executed the order to drive Becket's relatives and household into exile – was appointed as the custodian of that property, subject to the payment of a fixed amount to the king.

Early in 1165 Henry played the schism card – the ultimate threat against Alexander III. He re-opened negotiations with the Emperor, Frederick Barbarossa, who was in any event his natural ally against Louis of France, for a marriage alliance. In April, Rainald, the Archbishop of Cologne and pointedly, as far as Henry was concerned, also the Imperial Chancellor, came to conduct negotiations for a two-fold alliance: one of Henry's daughters would marry a son of the emperor and another would marry his closest ally, Henry the Duke of Bavaria and Saxony.

The year before, Rainald, compounding his multifarious sins against the church, had spirited away from Milan to his base in Cologne the holy relics of the Three Magi themselves. According to one contemporary record:

“They had been preserved in balsam and other aromatic spices, they continued entire, as far as the skin and hair and outward appearance was concerned.”

Following these negotiations, Henry dispatched two of his most senior officials to the Imperial Court, where, at Würzburg in May, they were present for the debate as to whether the Emperor should continue to support the Anti-pope. One of the key arguments that Rainald was able to deploy for

continuing the policy of opposition to Alexander was the prospect of a change in policy by England. Indeed, according to the record, the two English officials joined in the oath at the end of the council, renouncing Alexander as pope.

In June Alexander wrote to Gilbert Foliot, imploring him to intercede with Henry:

“The King has fallen off much from his devotion to the Holy Church: he has forbidden appeals, he has entered into communications with schismatics and persons excommunicated and exiled from his dominions our venerable brother the Archbishop of Canterbury, by which act he has become even a persecutor of the church. ... You should recall to his mind that unless he repents of his evil deeds, and that speedily, God will most surely visit him with heavy vengeance and the time must at last come when our patience can no longer endure.”

Alexander also raised the question of money. He asked Foliot to attend to the collection of the overdue Peter's pence and inquired whether the bishop could advance the sum of 200 pounds from his own funds, perhaps by way of loan.

In his letter Alexander had referred to only one of the ten Constitutions of Clarendon, being the one that directly affected the pope's own power and authority, i.e. the issue of appeals. Foliot, after consulting Henry, replied in his name offering a compromise:

“[The King] had no wish to interfere in appeals to your Holiness's court but merely claimed for himself the right, in civil cases, to hear the case first, according to the ancient usage of the country; should this decision prove unjust, he would place no further obstacle in the way of an appeal. Moreover should this claim prove in anyway prejudicial to the interests of the church, he pledged himself to submit it to the judgment of the next general English Council.”

Although Alexander would have little cause to permit the English bishops to decide the scope of papal authority – like bishops everywhere they had frequent occasion to regard such appeals as undermining their own jurisdiction – nevertheless there was an opening here for negotiation on the only clause that the pope signalled to be fundamental. As for the overdue Peter's Pence, Foliot said that he found himself a bit short at the time and did not think that he could raise a loan.

With respect to Becket, however, there was no compromise. Henry's personal vendetta would continue:

“With regard to the flight of our father the Lord Archbishop, he assures your Holiness it was not ordered by him; that his lordship's absence is purely voluntary; and that no-one will interfere with his returning whenever he is so minded; only that he will have to answer certain complaints lodged against him respecting a breach of the royal privileges which he is sworn to uphold.”

Alexander was in no position to bring the matter to a head at this time. He threw Becket a few crumbs of consolation. He ordered Clarenbald of St Augustine's, Henry's crony, to make a formal profession of obedience to Canterbury, as his predecessor had done. He also purported to overturn Becket's conviction in the John the Marshall case, which as indicated in the last lecture, was in effect a conviction for contempt of court.

Alexander asserted a sweeping jurisdiction at the highest level of Gregorian rhetoric:

“We, whose responsibility it is to correct faults and to amend what would leave a dangerous example to later ages if left uncorrected, decree that the sentence presumptuously uttered against you by the bishops and barons of England is entirely void in which, contrary to both the form of law and to ecclesiastical custom, the said bishops and barons condemned you to lose all your movable possessions because you did not appear in person at the first citation of the king, especially since you have no movables apart from the goods belonging to your church; and we quash it by Apostolic authority, declaring that it has no force in the future, and cannot cause any prejudice or damage to you or to your successors in the future or to the church entrusted to your charge.”

This was as far as Alexander was prepared to go. It is noticeable that he took no step to interfere in any way with the enforcement of any of the condemned Constitutions. He directed Becket to do nothing rash until Easter 1166, by which time Alexander expected to have re-established himself at Rome and Henry's flirtation with Frederick Barbarossa would have been subject to the inevitable strains of the passage of time.

On 22 August 1165, Alexander wrote:

"Since these are evil times, and much must be borne because of the temper of the times, we ask, advise, counsel, and exhort your discretion to act with caution, prudence, and circumspection in everything concerning your own and the church's affairs; do nothing hurriedly or precipitately, but only soberly and maturely, and labour and strive to recover the grace and goodwill of the illustrious English king by all possible means, as far as you can, while preserving the church's freedom and the honour of your office, and bear with the king until next Easter, so that you take no action against him or his kingdom until that time. For then the Lord will grant better days and both you and we can more safely proceed in this matter."

Becket was a political eunuch. He settled back into the pious austerities and sensory deprivation of an isolated Cistercian monastery – "between the rocks and the monks" as Herbert of Bosham, an urban sophisticate, drearily complained. The elegant simplicity of the white limestone monastery, with its majestic, severe church – almost as big as Notre Dame in Paris - built in the style of the transition from Romanesque to Gothic and which survives to this day, was devoid of ornamentation. Cistercians abjured paintings, sculpture, stained glass or precious metal objects, save for a single chalice which had to be silver gilt and never gold. Between the Ides of September and Easter, when the papal restrictions were to be lifted, the Cistercian regime was limited to one simple meal a day. Religious services took up six to seven hours of every day.

John of Salisbury, wallowing in the comparative luxury of the unreformed Benedictine practice in his separate exile at the abbey of St Remi in Rheims – thought Becket was devoting himself excessively to the study of the canon law. He wrote to him to say:

"Laws and canons are indeed useful, but believe me, these are not what will now be needed ... Whoever rises pricked in heart from the reading of laws or even of canons? ... You would do better to confer on moral subjects with some spiritual man, by whose example you might be kindled, than to pry into and discuss the contentious points of secular learning."

Directed to the study of scriptures, intensively organised for him by Herbert, Becket could fill the gaps of four decades of intermittent religious instruction and identify the parables and dicta which were of greatest comfort to him in his present position – theological crutches which his isolated penance invested with a new intensity.

It is from this period that one can trace many of the later stories of intense and covert piety in Becket's personal conduct. It remains impossible to decide what, if any, credence to give to the tales of abject devotion by mortification of the flesh – the wearing of a hair shirt, exposure to icy streams, regular flagellation and sleeping on a bare floor with a stone for a pillow. There seems no reason to doubt that the enforced isolation and religious observance of this period added an inner spiritual strength and ideological fervour to the course which had already been charted by personal and institutional pride.

As Easter 1166 approached, with the pope's injunction against action by Becket expiring, Henry was resident in his castle at Angers – his ancestral home on his father's side – unrepentant, still demanding Becket's complete humiliation. His revenues were swollen by the substantial incomes of the archdiocese of Canterbury and, before the end, to this would be added the income of five bishoprics falling vacant namely Bath, Lincoln, Hereford, Ely and Chichester. With the pragmatic Gilbert Foliot the effective head of the English church and Becket marginalised, Henry was in no hurry.

John of Salisbury, Herbert of Bosham and other clerks close to Becket, were summoned to Angers to see if they could make a satisfactory arrangement for their own return to England or a restoration of the revenues from their frozen benefices.



John of Salisbury, theologian and author, the most cosmopolitan of the group – maintaining a correspondence with fellow intellectuals throughout Europe – offered the Westminster formula: submission to the king “saving his order”. Henry demanded an unqualified oath and full acceptance of the Constitutions of Clarendon; “Whatever the pope, the archbishop or his bishop might do”. The most that John could conceivably offer was to volunteer to accept anything which the pope and archbishop accepted, he was dismissed, fulminating to his friends that the whole exercise had been a waste of time and had cost him 13 pounds to boot.

Next was Herbert of Bosham, no doubt exhilarated by release on parole from the austerities of Pontigny and from its sumptuary rules. He stepped forward, as William Fitzstephen described him:

“Tall and handsome and splendidly attired, having on a tunic of green cloth auxerre, with a mantle of the same, hanging down, after the German fashion, from his shoulders to his ankles and adorned with suitable appurtenances.”

Henry, knew Herbert from his days as a royal clerk. He muttered in an aside: “Now we shall see a proud fellow”. Herbert audaciously rejected out of hand the terms that had been offered to John and burst into praise for Becket’s in such vociferous terms that Henry exclaimed:

“Is this son of a priest to disturb my kingdom and disquiet my peace.”

“It is not I that do it”, the quick witted Herbert shot back, “Neither am I the son of a priest, as I was born before my father became a priest. Nor is he the son of a king whose father was no king when he begot him”.

This was an accurate but barbed impudence on the part of Herbert, directed at Henry’s own lineage. “Whosoever son he is”, one of the barons was recorded to say, “I would give half my land if he were mine”.

In this period the most perceptive comment that Becket received about Henry – confirming what he must already have understood – came from the opportunistic, world weary Arnulf of Lisieux, later described by Herbert of Bosham as one “whose whole virtue is in his mouth”. Arnulf wrote, accurately:

“He will never submit to compulsion. Whatever he does openly must appear to have sprung from his own will and not from weakness.”

The problem was that Becket had – or at least believed that in the interests of the church he had to display – the same defect at the same level of obsession.

In April 1166, Becket wrote to Henry in respectful terms. The salutation was: “To his most respected ..... Henry ...”. He stressed the dilemma in which he was placed, between doing his duty to his God and to the king. “Difficulties surround me on all sides” he told the king. “Distress and danger have sought me out: set between two very grievous and fearful things and fearful between two very heavy imperatives, between silence and admonition”. This was a reference to admonition of the king. Becket added “But if I am silent, it will be my spiritual death”. The primary message which Becket wished to convey was not put in writing. It was delivered orally by abbot Urban of a Cistercian monastery which was a daughter house of the abbey at Pontigny.

In late May or early June 1166, abbot Urban delivered a second letter to Henry which was read aloud before the king at his castle at Chinon. The tone was no longer conciliatory. Becket referred to Henry first as his “lord”, then as his “king” and, thirdly, as his “spiritual son”.

Becket continued in a hectoring tone:

“It is certain that kings receive their power from the Church and the Church receives hers not from them but from Christ. If you allow me to say so, you do not have the power to command bishops to absolve or excommunicate anyone, to draw clergy to secular judgments, to pass judgment concerning churches and tithes, to forbid bishops to hear cases concerning breach of faith or oaths, and many other things of this kind, which are written down among your customs which you call ‘ancestral’.”

Becket concluded:

“Therefore, my Lord, if you desire your soul’s salvation, do not for any reason take away what belongs to the Church or oppose it in anything beyond what is just; rather, allow it to have in your realm the freedom which it is known to have in other realms ... Restore the church of Canterbury, from which you received promotion and consecration, to the condition and dignity in which it was in the times of your predecessors and ours, and restore in full the possessions belonging to that church and to us – the villagers, castles and estates, which you have distributed at will, and all the goods sequestered from us and the clergy and laity connected with us.”

The final sentence, after a list of such demands, must have infuriated Henry:

“And we are ready to serve you as our dearest lord and king, loyally and devotedly with all our strength in whatever way we can, saving the honour of God and of the Roman Church and saving our order. If you do not, you may know for certain that you will suffer the divine severity and vengeance.”

The final threat was bad enough. But the addition to the qualification of “saving my order”, which Henry had rejected at Westminster, of the two further qualifications, “saving the honour of God and of the Roman Church”, was a request for Henry to humiliate himself.

Later in the year Gilbert Foliot would write to Becket claiming that “the humble mindedness which began to show in you” in the first letter had its effect on Henry and he was intending to act in accordance with an offer to Alexander to modify the Constitutions. Foliot’s assessment was similar to that of Arnulf’s:

“Our lord the King would not have cared for these dignities and Constitutions but for two reasons only. He thought it would be a reproach to him if he should allow the Crown to suffer loss and diminution of the honours which had been handed down to him by his ancestors; and secondly, though he might give up anything for his God, he would nevertheless blush to have it taken from him by violence.”

Foliot went on to refer to Becket’s second letter, and a third delivered, not by the urbane abbot Urban but by a barefoot monk, describing them as “terrible letters savouring neither the affection of a father nor the modesty of a bishop”. He said that it was the receipt of these letters that had turned Henry’s mind against him.

No doubt Foliot was reflecting a conversation with Henry. However, the treatment of Herbert of Bosham and John of Salisbury at Angers does not suggest there is much credence in the implication that Henry was prepared to consider any significant change in his position at this time. Becket would have had no doubt that Henry would remain intransigent in the face of threats but also, with good reason, he would have known that such intransigence required no provocation on his part.

Now safely ensconced back in Rome, the pope removed the restrictions on Becket.

In April or May 1166, before the second letter to Henry, Pope Alexander indicated that he could exercise “ecclesiastical justice when you consider it opportune against those who have done violence or injury to the properties and possessions of your church or against you and yours”. He noted specifically, however, that “We are not giving you a particular mandate concerning the King’s person”.

He reinforced Becket’s restored institutional authority by a restatement of the traditional formula for Canterbury’s primacy and by appointing him papal legate for the whole of England – excepting only the archbishopric of York. Investing Becket with the pope’s own authority in this manner was the clearest possible signal to Henry that the archbishop had the full backing of the Church.

The next move was up to Becket.

Henry must have found Becket’s exile increasingly convenient. In the first half of 1166, Henry and his body of royal officials made perhaps their greatest contribution to the peace and order of the realm, particularly to the legal system. There was, I am convinced, no grand plan. The expansion of royal jurisdiction was driven by a mixture of self interest and duty, adapting rules and procedures to the requirements of the time.

The widespread lawlessness that emerged during the course of the reign of King Stephen took time to overcome. From the outset the restoration of order was Henry's highest priority. The maintenance of order remained a problem a decade after his succession.

Disorder included criminal conduct by clergy, an issue at the heart of the conflict with Becket. In large measure the concern of Henry and his officials was directed at the substantial body of acephalous clerks amongst whom were murders, rapists and thieves in clerical orders, vagabonds with no ties to any bishop or any parish.

The bishops and abbots, with other barons of the realm, attended upon the king in February 1166 at Clarendon, overlooking the valley where Salisbury is located, an establishment which began as a hunting lodge but which by the end of his reign had a great hall with pillared arcades, a chapel with marbled columns and an array of rooms and kitchens and a huge wine cellar. They agreed to a new campaign against robbers, murderers, thieves and receivers.

The agreement was proclaimed in a document, called the Assize of Clarendon: "for the preservation of peace and the enforcement of justice". It was adopted at much the same time as another Assize, thought to exist but which has not survived. This has been called by historians the Assize on Disseisin – using the word "assize" in the sense of a royal enactment – which established the right to approach the royal courts to challenge dispossession from land. In the last lecture I noted the case of John the Marshall, where Becket was the disseisor, perhaps the first recorded case to lead to royal intervention.

Taken together, as they probably should be, the two enactments represent a new systematic approach to royal justice, subsequently reinforced and extended in the 1170s. The two Assizes of 1166 deserve to be recognised together as a foundation document of the rule of law, of significance at least equal to the Magna Carta.

The idea that the king had a responsibility for maintaining peace and good order throughout his kingdom was gradually developed over the course of centuries. In England, it fused with the idea that the king had a supervisory jurisdiction to see that justice was done in the seignorial courts. The concept of the "kings peace" – distinct from the canon law doctrine of "God's peace", which was always general – was specific and limited, extending by incremental steps. Until the time of Henry II, it was limited by time, category and place, e.g. to areas of propinquity to the king's presence, to particular geographical areas such as the royal forests or highways, to certain periods like the octaves of the king's crowning and the feasts of Christmas, Easter and Pentecost. It could be declared on an ad hoc basis for specific occasions. It had been extended to the death of any Norman, requiring proof that a murder victim was English before a shire court had jurisdiction, by the process called presentment of Englishry.

The idea of a general peace extending throughout a kingdom took time to take hold. In 1155 King Louis VII, on his return from the Second Crusade, declared a general peace of ten years throughout his kingdom. Three years earlier, Frederick Barbarossa declared a *Landfriede*, also a general peace throughout the kingdom. The difference between Henry II and the others was that Louis and Frederick declared a peace and left enforcement to the magnates. Henry created his own system of enforcement.

In the Assize of Clarendon and in the probable Assize of Disseisin, Henry II in substance, if not form, declared a kings peace which was so wide ranging as to constitute a general peace. Of particular significance were the mechanisms by which it was to be enforced.

The Assize of Clarendon created a sworn inquest in every county and in every hundred throughout the kingdom. This was the presenting, or what came to be known as the grand, jury which would state on oath whether there was in the area any person known to be a robber, a murderer, or a thief, or a receiver.

This was not the first time such a jury of presentment had been used. However, it was the first time that in a single measure such juries were to be created in every single region. In this, as in so many other things, Henry drew on a local precedent but expanded it, systematised it and made it routine so that, in retrospect, the change was revolutionary.

Detailed provision was made in the Assize of Clarendon for the mechanism of investigation, trial and punishment and for the specific responsibilities of the sheriffs, including their ability to intervene notwithstanding a claim to exemption or privilege. Sheriffs were also directed to investigate the

reputation of persons who had recently come into their areas of responsibility.

The trial of persons accused by presenting juries was to be conducted by itinerant justices. This was Henry II's first Grand Eyre. This was not the first time that the king's justices had been directed to travel and conduct trials. It was however the first time, with respect to a wide ranging criminal jurisdiction, that justices were to travel throughout the realm and do justice in every region. This was the beginning of a professional judiciary, although for some years the justices were to be condemned for their avarice. At the beginning, royal jurisdiction was extraordinary. Then it became concurrent. Quickly, it became dominant.

Specific provision was made in the Assize of Clarendon forbidding monks and canons of any religious community to receive any person as a monk, or canon, or a brother, from what is described as "the lower classes", until that person's reputation was determined, save only in the case of terminal illness. The bishops who agreed to this last provision, there is no record of any controversy or dissent, could not have shared the ideal of non-interference with church affairs, which Becket had declared to be an issue of high principle.

After eighteen months of enforced idleness, Becket prepared to act. At the beginning of June he left Pontigny and travelled north to Soissons. He spent three nights in devout vigil before each of the three shrines of the cathedral in succession. One was dedicated to the Virgin. The second was dedicated to Saint Drausius, the patron saint of those about to face combat. Finally, and perhaps most symbolically, he spent a night before the shrine and relics of Saint Gregory, the eighth century pope who sponsored St Augustine, the founder of the English church and first Archbishop of Canterbury. Gregory the Great was the originating source of all the institutional authority of his archdiocese.

From Soissons, Becket travelled 250 kilometres south, past Pontigny to the small fortified hilltop village of Vézelay, a famous pilgrimage site as the start of one of four routes to Santiago de Compostella. It also had the most important relics in that part of France. Just two years before, in 1164, a secret cavity in a wooden image of the Virgin had disgorged a cornucopia of relics: a hair of the Virgin, a part of her dress, a bone of St John the Baptist, fragments of Christ's purple robe and the clothes of the three companions of Daniel who had defied Nebuchadnezzar himself. Perhaps most significant, were relics of the body of Mary Magdalene herself. Later when it became known that these relics had never actually left their previous location, the attraction of Vézelay as a pilgrimage site rapidly declined, perhaps explaining its almost pristine preservation to this day.

Vézelay was best known at the time as the site at which St Bernard of Clairvaux had preached the Second Crusade on March 31, 1146, enticing Louis VII of France and a small army of aristocrats to take the cross on the spot. One was Eleanor, then Louis' wife and now Henry's. The crusade was directed to save the kingdom of Jerusalem to which Henry may have had a claim, indeed late in his life he was offered the kingdom. The then recently deceased King of Jerusalem, Fulk of Anjou, was Henry's grandfather on his father's side. On the other hand Bernard of Clairvaux, in dispute with Henry's father Geoffrey had once condemned the whole House of Anjou "From the devil they came and to the devil they will return". No doubt, Henry got whatever message Becket was intending to convey by the choice of Vézelay. No-one else has been able to work it out. My own preference is the presence of the relics of the companions of Daniel who defied Nebuchadnezzar, as Becket was to defy Henry – the lion was a Plantagenet emblem and Becket was entering the lion's den. However, that may be an Old Testament bias.

On Whitsunday, 12 June 1166, Becket celebrated mass in the grand abbey church which crowns the hill. Since Saint Bernard had preached the Crusade in 1146, the 200 foot long knave – which had proved inadequate for Bernard's crowd so that he spoke in the open air – had been extended by a narthex. The harmony and dignity of the multi-coloured limestone interior is ethereal in its lightness. With alternating stones of brown and white in the arches between the nave and the aisles and in the semi-circular transverse arches of the groin vaulting, an array of intricately carved capitals on the semi-columned pillars and light streaming from the clerestory windows above the main arches, the church at Vézelay is one of the gems of Romanesque architecture.

After mass, Becket moved to the pulpit to deliver the sermon. There, while explaining the nature of his quarrel with Henry, to the surprise of his own household, let alone the congregation of pilgrims, he announced that the time for action had arrived. He condemned the Constitutions of Clarendon and anathemised all who complied with them. He formally quashed the document, proclaiming it to be ineffective and absolved from their oaths all those who had sworn to uphold it. He specified eight clauses dealing with ecclesiastical jurisdiction, appeals to Rome, and restrictions on excommunication. Interestingly, clauses 11 and 12 dealing with the election to vacant clerical posts

and the obligation of bishops as holders of land were not mentioned. It may be that Becket intended this as some kind of compromise.

True to his word, he proceeded to defy the Constitutions themselves by conducting a ceremony of excommunication, the ultimate ecclesiastical sanction which cut the excommunicate off from all intercourse with other members of the church and carried the perils of eternal torment.

First, was John of Oxford – later bishop of Norwich - who had dealt with schismatics at the Imperial Council in Würzburg, as Henry's representative, where he had, Becket proclaimed, "fallen into vile heresy by swearing the Emperor an impious oath". Furthermore, John had accepted appointment as dean of Salisbury cathedral in defiance of a papal order that no such positions could be filled in the absence from the electoral college of those canons of the cathedral who had followed Becket into exile. This decree, which Alexander was prepared to enforce, was an important component of Becket's long term strategy. Such key offices, from bishoprics down, could not be filled as long as Becket remained in exile. The cumulative effect of such vacancies, growing in number with time, would – whilst a convenient source of additional revenue in the short term – eventually increase pressure on Henry to compromise. Such appointments were Henry's means of rewarding his supporters in the church, especially those who were royal officials. Without such sinecures he would have to pay them himself.

Making full use of his new authority as a papal legate, the archbishop solemnly lit the candle, inverted it and – pronouncing the final sentence on John of Oxford – dashed it to the ground.

The ceremony was repeated on Richard of Ilchester, the other royal official who had accompanied John of Oxford to Würzburg. Richard had worked with Becket as Chancellor and was a relative of Foliot's. He later became bishop of Winchester after Henry issued a writ to the cathedral chapter in the form: "I order you to have a free election, but forbid you to elect anyone but Richard my clerk".

Then Richard de Lucy and Jocelin de Baliol, the two royal officials who Becket believed to be the actual authors of the Constitutions of Clarendon, "those heretical inequities" Becket called them, were made excommunicate. Then it was the turn of Ranulf de Broc and others who had presumed to occupy the lands and usurp the goods of the church of Canterbury.

Becket was probably correct when he identified Richard de Lucy as one of the authors of the Constitution of Clarendon. De Lucy had been a colleague of Becket's when Becket was Chancellor. Personally devout, de Lucy had been on pilgrimage in Compostella and missed the trial at Northampton. He was the first to visit Becket after his exile to try and convince him to return. Eventually Henry would come to call him "Richard the Loyal" and, in effect, entrust him as a viceroy, especially after 1173 when he alone held England for the king during his sons' rebellion. De Lucy had commenced in the king's service in the time of Stephen and was one of the few who was able to transfer his allegiance seamlessly to the new regime. During the trial concerning the privileges of Battle Abbey, discussed in the first lecture, where his Brother Walter was abbot, he and Becket were allies. He had served, and was to serve for many years, in a number of administrative capacities, particularly as the royal justiciar. It seems overwhelmingly probable that de Lucy was also one of the authors of the Assize of Clarendon. He was one of the two itinerant justices sent on circuit to enforce the Assize of Clarendon. He was undertaking this task when he was declared excommunicate by Becket at Vézelay.

In accordance with the directive to be prudent that the pope had given him, Becket contented himself with issuing a public warning to the king that he would move against him unless he repented in full.

Becket also exercised his newly granted legatine authority to suspend Jocelin, bishop of Salisbury – himself, only two years before, the target of Henry's most vindictive threats. He had succumbed to the royal pressure and appointed John of Oxford as dean of his cathedral. Neither Foliot of London, nor Hillary of Chichester – Roger of York being expressly exempted from Becket's legatine authority – was singled out for any special treatment, not even with respect to their occupation of Canterbury property. Becket had turned on Jocelin without notice or trial. "In manifest and notorious crimes a hearing is not required", Becket self-righteously proclaimed. Perhaps he believed Jocelin – originally Henry of Blois's archdeacon at Winchester and appointed bishop under the patronage of that elder statesman of the English church – to be the weak link in the collective failure of his suffragan bishops to sacrifice themselves for his cause. "Wherefore do you not arise with me against my enemies", he implored them when in an Old Testament mood.

Henry responded to Becket's challenge in the only way his pride would allow: he attacked. At his insistence, all the bishops of England formally appealed to the pope against these decisions. The appeals had the consequence of suspending the effect of the excommunications. Henry also turned on Becket's haven at Pontigny. The Cistercian order, which had recently been expelled from the Imperial territories in Germany and Northern Italy, because of the order's support for Alexander, was vulnerable. Henry wrote to the order's General Council, which was about to conduct its annual meeting at the founding abbey at Cîteux, suggesting that if they attached any value to the lands of the order in England they would not continue to harbour his "personal enemy". A delegation led by the abbot of Cîteux called on Becket at Pontigny. He could only approach the matter indirectly:

"My Lord, the chapter does not drive you out of their house in consequence of an order such as this; they merely lay the letter before you that you may consider and decide what is to be done. The chapter knows well ... that your regard for the Cistercian Order is too great to allow a heavy calamity to befall it."

Herbert of Bosham was dispatched to Louis VII to negotiate an alternative arrangement in France. That pious king – who had trained to be a monk before the death of his older brother thrust him into the succession – had no conflict of interest at all. His support of Becket was merely one part of the tectonic friction between his lands and those under the control of Henry. He could afford to wax eloquent, as reported by Herbert:

"Oh religion! Oh religion! Wither art though gone? Lo those whom we suppose to be dead to the world are afraid of the world's threats and for the perishable and fleeting things which they profess to have despised for God's sake they cast out God's cause and Him who is in exile for it."

Accompanied by a mounted escort of 300 Becket left Pontigny for the Benedictine monastery of St Columba near Sens, where the band of exiles was to be supported by the royal revenue. Delighted to be near civilization again, Herbert of Bosham, he who wore his cloak in the German fashion, recorded the transition in an unbridled panegyric:

"Sweet France, truly sweet is she. Her people have made drunken with delight all those that came to her."

Gilbert Foliot, bishop of London, who had emerged as the chief supporter of the king, expressed a widely held view when he said:

"There is no dispute between us about the faith or the sacraments or morals. The whole dispute is with the King or about the King, on account of certain customs which he asserts were observed and maintained by his predecessors and which he himself desires to be observed."

This distinction – compelling to the modern ear – would have appeared to be polemical to those who regard the institutional interests of the church, and particularly of the papacy, as themselves raising issues of faith and morals. Becket and his supporters unquestionably characterised the issues in dispute as involving a high order of theological claim, rather than the mere legal dispute that Foliot suggested.

There was, however, an element of truth in the dismissive conclusion of Foliot's rebuking letter to Becket:

"You should have handled such matters with mature deliberation not with the ardour of a novice."

Whatever Foliot's personal views, he never questioned the pope's authority or Becket's authority as his legate. When he received a direct order from the pope to restore the benefices of Becket's household clerks, to collect Peter's pence and to circulate all the bishops with a copy of Becket's legatine authority, he begged Henry to let him comply, pointing out that there was no appeal from this kind of order. When Becket in exercise of his legatine powers, commanded him to come to France, he proceeded to obey. At Southampton he met John of Oxford, returning from his mission to Rome, John informed Foliot that the pope had backed down.

Responding to the invasion of Italy in November by Frederick Barbarossa, who proclaimed that he would reconsecrate the latest anti-pope in Rome, Alexander's need for Henry's support, and particularly his funding, which Becket's camp believed John of Oxford had liberally distributed in Rome, was more critical than ever. Alexander accepted John's assurances, given without Henry's authority, that something could be done about the more objectionable provisions of the Constitutions of Clarendon. On 1 December, Alexander overturned John's excommunication, personally reinvested him as dean of Salisbury and formally accepted the anticipatory appeal from the bishops about the other excommunications. He restrained Becket from taking any further steps and announced that two new legates would be appointed to settle the dispute.

Foliot was elated: "Thomas will never again be my archbishop", he exclaimed.

The sense of frustration that Becket felt at this time is evident in the first paragraph of his letter of instructions to his representative in Rome:

"The manner in which we were again made a figure of shame to our neighbours, a mockery and delusion to those not only in our circle but indeed to almost all people in both kingdoms, French and English, and even in the Empire, and what kind of rumour, not to say infamy and scandal against the Lord Pope, is flying around the ears and mouths of everyone – which, God knows, we regret more keenly than if it were about ourselves – and the serious verbal attacks, insults, and shameful reproaches being cast against the whole Curia, you can gather to some extent from what is written below, and tell it very privately to the Lord Pope and his friends, if he has any."

Alexander made it clear to his legates that the English dispute must not be allowed to come to a head. They proceeded to France at a leisurely pace. They took almost a year to complete the preliminaries for serious negotiation. Their objective was to restore the peace of the English church, rather than to achieve immediate recognition in England of the proper roles of church and monarchy. Their proposal to Becket was for him to return to England without there being any reference to the Constitutions at all. They told him:

"For it would be a dishonour to the king to be compelled to renounce in words what had been sanctioned by all his barons and prelates as belonging to the Crown. Now if the King grants you peace without mentioning the Constitutions, they are thereby understood to be abolished by implication and as this is the sole cause of the present disagreement you will in reality have gained your cause."

However, all that Henry had in fact offered was to accept the legate's decision if they found he had introduced any innovation. This is a limited promise, albeit not a negligible one. It appears highly likely that virtually every clause did actually reflect past practice. The innovation involved was to put the customs in writing and to obtain an oath from the bishops to uphold them. Even the limitation on appeals to the pope without the king's authority may itself have reflected what actually happened in practice, as distinct from the form. Nevertheless, this provision was seen to be of particular concern to the pope. Foliot, purporting to speak for the king, indicated that the furthest Henry would go was to revoke the clause forbidding such appeals.

Becket, knowing Henry better than all, rejected the idea of going back quietly:

"It is a proverb of our people that silence implies consent. The King would be seen in possession of those customs and would compel the church to observe them unjustly and by force, if the onslaught on them already underway ceased by my silence, especially if this were authorised by the intervention of the delegates of the Lord Pope. It would instantly appear to the King and to other folk that he had won his case."

Becket refused to surrender. He would only return if Henry agreed to the pre-Clarendon formula for his personal submission to the king, with the proviso growing more luxuriant in the hothouse of exile – "saving the honour of God and of the Apostolic See, the liberty of the Church, the honour due to our own person and the possessions of the Church". There was no point in asking Henry for this, as Becket well knew. The legates, contrary to the impression given to Henry, merely had authority to conciliate but not to decide anything. They asked Becket to submit to their arbitration. Knowing that at least one of them was an open advocate of the king's position – Alexander always chose one of each – Becket refused.

Numerous avenues of reconciliation had been explored. Alexander had even written to King Louis inquiring about his attitude to having Becket as the papal legate for the whole of France, a position that would at least appear to be a promotion and save face all round. There is no record of Louis' reply. For all of his piety, he is unlikely to have been enthusiastic.

After a two hour discussion with the legates, King Henry ushered them out with a clear stage whisper: "I hope I never set eyes on a cardinal again". After a full day in conference with the legates, the English bishops and his officials, Henry left in disgust to go hawking. As one of Becket's informants at court told him: "The king seems to have no wish but for your head in a charger".

Gilbert Foliot was spokesman for all the attendant bishops, despite the presence of Roger of York. He indicated that Becket's refusal to account for the 44,000 marks of silver that had passed through his hands as Chancellor were still outstanding: "The Archbishop fancies that consecration wipes out debts as baptism does sin", he quipped. He made no reference to the other matters actually tried at Northampton. Henry never challenged the pope's formal overruling of the judgment given against Becket at Northampton on the contempt charge. However, anything which the pope had not expressly forbidden, including the Constitutions which he had only condemned in general terms but not quashed, were still on Henry's agenda. Henry never gave anything away until he had too.

There was no prospect of settlement. The legates formally revoked any authority Becket might have had to excommunicate the king or his advisers or to place England under interdict, an order which would have prevented any clergyman in England from performing the functions which the population most desired: officiating at weddings, burials, baptisms, performing the mass, even the ringing of bells.

Becket relapsed into maudlin self-pity apparently unable to appreciate Alexander's dilemma. With Frederick Barbarossa advancing in Italy the pope was resisting a mortal threat to the heartland of the Church. Throughout the early months of 1167 Frederick Barbarossa's two armies marched down the Italian peninsula. One of them was jointly commanded by the Archbishop of Cologne, Rainald of Dassel, who was also the Imperial Chancellor, and another warlike ecclesiastic, Archbishop Christian of Mainz. On 29 July 1167 St Peter's fell. On the following day the anti-pope Paschal celebrated mass and invested Frederick as Emperor, without consultation or approval of the Senate and people of Rome. The acronym SPQR was no longer apt.

However, in this time of triumph a calamity befell Frederick. In August a plague attacked his camp decimating his army and killing Rainald of Dassel. The plague swept through Rome. In that religious age no-one could have doubted that the hand of God was behind the cataclysm. Early in 1168 the Emperor was forced to leave Italy.

In May Alexander wrote to Becket indicating that he intended to renew the order suspending his power but promised to lift it at Lent, still some ten months away. He wanted one more effort to resolve the dispute by negotiation. No doubt influenced by the stream of correspondence that had descended upon him from Becket's overwrought pen, the pope wanted Becket to participate in those negotiations without the irresistible temptations of actual authority. Unusually for Alexander, he offered Becket a form of reassurance that restricted Alexander's own future actions. He promised that when the powers were restored to him, no appeal from Becket's decisions would be allowed.

Alexander sent a representative to Henry impressing upon him, in a new demanding tone, the necessity for some form of reconciliation. Henry remained unwilling to risk any irretrievable breach with the papacy. He did not then know that the legates had a second letter threatening to unleash Becket at the beginning of Lent, if the conflict remained unresolved. They were instructed to deliver the letter if Henry proved obdurate. According to John of Salisbury, Henry received the pope's first letter, (but not the threat) in January 1169, just a few days before he was to meet King Louis of France for a peace summit at the hilltop village of Montmirail near Chartres. After two years of skirmishes up and down the border between their territories, Henry and Louis had determined upon a mutual adjustment without surrender.

Henry agreed to acknowledge publicly his position of formal subjection, as a mere duke and count, to his king. John of Salisbury pointedly calling Henry "illustrious" and Louis "most Christian" reported:

"The illustrious English King, although he had often solemnly and publicly sworn that he would never again return his homage and allegiance to the most Christian King of France, so long as he lived, has listened to wiser counsel and changed his mind. On



Epiphany last, he came as a suppliant to the French King at Montmirail in the county Chartres. He offered himself, his children, his lands, his resources, his treasures; placed all under his judgment to use and abuse as he would, the whole to seize give to whom he would as he liked with no conditions stipulated or attached."

In form, Henry gave Louis the honour that was due to him as a king. Obviously, the offer would never have been made if there was the least prospect of the French king taking advantage of the unconditional submission. Henry expected the same kind of offer from Becket. It was a question of face.

Becket arrived at Montmirail with his entire entourage, including the French barons, abbots and bishops who had supported him for five years and his personal household, who had shared his exile. Unanimously they urged him to adopt a similar public posture to that of Henry. As Herbert of Bosham recalled:

"The advice of all parties was that the archbishop should submit the question to the King's mercy and place himself in his Majesty's hands unconditionally. Now he had already, at the instance and by the advice of the mediators, avowed in the present of all of them that he would do this 'saving God's honour'... Now this phrase which was added was similar to that which had been used about the King's Constitutions when we were still in England. The archbishop had there said that he would observe the King's Constitutions 'saving his own order' ... It was now 'saving God's honour'. In the arguments and speeches that were made against the former were now used over again to induce the archbishop to omit the latter. Indeed he would at the present meeting have used the same form which he had used in England, if he had not known that the King would be offended at it. ... Those of his mediators who are most intimate with him, men of experience in council and on whom the archbishop placed the greatest confidence urged him to omit the words 'saving the honour of God', because they said the King would be scandalised thereby. It was therefore the opinion of all that he should submit the whole question to the will and pleasure of the King and so gratify his Majesty by giving him honour before the meeting; at this the King would be pleased and would restore him his favour and make peace with him."

Henry's previous offers to delete the provision from the Constitutions inhibiting appeals to Rome and his offer to have the whole matter referred to a council of the English Church, presumably with Becket presiding, was most likely the basis of the negotiations that had been conducted. Details of the negotiations that must have preceded the urging of Becket's advisers to submit unconditionally have not been fully set out in the biographies. Under intense pressure and numerous private assurances from his closest supporters and genuine mediators, including the archbishops of Rheims, Sens, Rouen and representatives of the king of France, Becket indicated his concurrence.

As John of Salisbury recorded in his contemporary record, echoing the assurances of emissaries of the pope and of the king had conveyed to Becket before Clarendon:

"The King had held out hope of making peace if only the Archbishop would make some show of humility towards him in public and had persuaded the men of religion that he proposed to hold the Archbishop as lord and chief man of the whole kingdom after himself in all honour and preserving the Church's liberty."

Becket came before the two kings, appearing in Henry's presence for the first time since Northampton and, with the requisite humility, knelt before Henry and said:

"Have mercy on me my Lord since I put myself in God's hands and yours, to God's honour and yours."

In form the submission was unconditional. But the intrusion of a reference to "God's honour" as a statement of the purpose of the submission, in addition to the submission to the king, was an unheralded gloss on the negotiated formula. All the accounts are unanimous that the additional words came as a complete surprise to everyone present.

According to one biographer, Geoffrey Ridell, Becket's former associate in the chancery and his successor as chancellor and archdeacon of Canterbury – and future bishop of Ely - exclaimed: "There's sophistry in that!". He was right. What Becket was saying was not a condition as such.

However, it was a reaffirmation that the Archbishop of Canterbury had, at least in spiritual matters, obligations of loyalty which were not filtered through the king. Complete subjection was not possible. His position asserted the existence of rights against the Crown.

At the last moment Becket had been unable to humiliate himself and his office. Henry may or may not have kept his promises, but it is unlikely, in the light of the number and seniority of the witnesses assembled for the settlement, that he would have abused the formal submission, anymore than he would have expected Louis to take advantage of the submission he himself had just made. This was a submission which Henry had to act upon on the spot, as Louis had done with him. That was what was expected by all assembled.

Henry exploded, abusing the archbishop as proud and vain. As Becket had reneged on the arrangement, he felt able to raise the question of the Constitutions. He turned to Becket's protectors assembled including the King of France:

"My Lord King, and you saintly men and princes here present, I ask nothing of the archbishop save that he preserve for me the customs which his five predecessors observed, some of whom are saints and shine brightly with their miracles, the customs which he himself promised to observe."

According to one biographer Henry proclaimed:

"There have been many and holy Archbishops of Canterbury before him. Now let him behave towards me as the most holy of his predecessors behaved before the least of mine and I am satisfied."

Louis who, for all his personal piety, asceticism (unlike his father Louis VI who died of gluttony) and overwhelming sense of sin and guilt, had a temper as bad as Henry's, turned on Becket sarcastically:

"My Lord Archbishop, do you wish to be more than a saint."

Becket had not endured years of exile in order to back down. His own sense of personal honour was now inextricably but seamlessly interwoven with a sincere belief in the spiritual necessity of independence of the church and his religious obligation to maintain the rights and interests of the church of Canterbury. John of Salisbury reported his firm, calm stand reintroducing the old qualifications expressly:

"The archbishop replied that he was prepared to observe the customs to win peace and favour and do all that he could in accordance with the King's will saving God's honour and his own order ... and so the King said 'I will never accept those words or it will appear that the archbishop wishes God's honour preserved and not I, though I really want it preserved more than he does. The Archbishop of Canterbury replied that on the basis of homage and fealty already performed he had to preserve the King's life, limbs and earthly honour, saving his order and that he would promise nothing beyond this."

The prearranged settlement had broken down. As his own entourage left the conference site, most of his close followers were dismayed by their leaders stubbornness. Becket felt the lash of their frustrations in the sarcastic comment of one of his own clerks who tugged on the reigns of Becket's recalcitrant horse, that had stumbled:

"Come up, come up --- saving the honour of God and my own order."

A fortnight later the pope's second letter to Henry was delivered. In two months time, Becket would be free to act. On this occasion, Becket wrote to the pope and various cardinals for support in measured penetrating tones, devoid of theological hectoring and self-pity. The pope decided not to interfere.

In April 1169, Becket travelled over 100 kilometres east from Sens to St Bernard's foundation abbey at Clairvaux. There, on Palm Sunday, he proceeded to perform the awesome ceremony of excommunication on ten individuals and threatened a second named list of sixteen with the same fate, unless they gave satisfaction before Ascension Day, six weeks later. The scope of the categories to which his sentences were directed was made clear from the threatened group excommunication in the following terms:

“All those who with the aid or counsel of the King, or by his mandate or authority, have seized the goods of ourselves or our clerks; those also who notoriously have instigated the King to injure the Church, or to proscribe or banish the innocent and impede the Pope’s messengers or our own, so that they may not discharge the commissions of the church.”

It is perhaps noteworthy that virtually all of the excommunicates had something to do with the confiscation of property of the Church of Canterbury, the restoration of which was accepted by everyone as a pre-condition of the archbishop’s return. Having taken a stand on principle, the now confident archbishop may in fact have been acting pragmatically. In accordance with the restraint which the pope continued to privately urge upon him, the king was spared.

The two most senior men on the list were Gilbert Foliot, bishop of London, and Jocelin, bishop of Salisbury. They were both said to be guilty of gross disloyalty to their superior. Foliot, who had emerged as the leader of the English bishops, was denounced by Becket as “the incensor of all malice”. Foliot remained unrepentant. In response, he proclaimed the independence of the see of London and indeed its entitlement to the archbishopric in lieu of Canterbury, recalling his earlier refusal to make a formal profession of obedience. Becket’s escalation was to be met in kind. Henry who had reinforced London’s role as the capital, particularly by developing the palace at Westminster, would probably have supported moving the archbishopric. It would have been the ultimate humiliation of Becket.

Becket wrote to another bishop:

“The Bishop of London does not abstain from giving offence among other works of his notable wickedness, since he has been delivered up to Satan, has even gone so far as, with insolent audacity and parasitical impiety to lift up his heel against his and your mother, the Holy Church of Canterbury. In presuming to say that he owes it no submission and will pay no obedience to him by whom he was translated to receive and to the weight of his condemnation has added this, that he would be for causing the transfer of the archiepiscopal throne to the See of London ... and has not feared the challenge to the combat the whole community of the sons of the Church of Canterbury, while he is thirsting for the blood of their mother and is forsaking the unity of Catholic concord. For he has written to our Lord the Pope, on behalf of our brother the Archbishop of York, beseeching him, with lying and deceitful testimony, that he will allow him to bear the cross throughout our province, supposing that some great gain will be the result, if through hatred to our person he shall be enabled in any way to inflict an injury upon the Church to which by his canonical profession he had duty of obedience.”

The final formal step in the excommunication of Foliot occurred in a dramatic moment during the mass on Ascension Day at St Pauls Cathedral in London. A young French volunteer, who had carried the crucial letters through the blockade that Henry had proclaimed around England, held out a packet containing the letters as his oblation to the officiating priest. The letter concluded:

“We therefore command you, by virtue of your obedience and in peril of your salvation, your Episcopal dignity and priestly orders, to abstain as the forms of the Church prescribe, from all communion with the faithful, less by coming in contact with you the Lord’s flock by contaminated to their ruin.”

Proclaiming the excommunication, the messenger disappeared in a crowd and evaded the royal search party. Henry wrote to Foliot in support:

“I have heard of the outrage which that traitor and enemy of mine Thomas has inflicted on you and on other of my subjects, and I am as much displeased as if it had fallen on my person.”

Foliot summoned the bishops but found that on this occasion they were not united. Henry of Winchester, pleading infirmity, would not join in any appeal to Rome and scrupulously avoided all contact with the excommunicates. Roger of Worcester, the king’s cousin had already left England in voluntary exile. They all knew, as did Foliot himself, that on this occasion the archbishop’s acts had the authority of the pope. Foliot did appeal the sentence with the support of the London clergy but the members of his own order, revealing the drift of events, excused themselves from joining him on this occasion. Foliot and Jocelin appealed without other bishops in support.

Although proclaiming that his appeal had suspended the sentence, Foliot was a Cluniac monk who had taken an oath requiring implicit obedience to the pope in all things. He had to obey. He suspended himself from performance of his priestly duties and joined the bishop of Salisbury and the king in Normandy.

Alexander appointed his third pair of representatives to negotiate a settlement. One, apparently, was considered incorruptible. One of Becket's supporters said in amazement: "Although a Roman yet he went not after gold". The other took Henry's gifts but, eventually, switched sides. This time their instructions from the pope were resolute. Unless an agreement were reached, the whole of England would be placed under an interdict. To reinforce his determination Alexander imposed a deadline on the legates' powers. If no settlement were effected before 29 September, 1169 they had to return to Rome.

The basic structure of agreement had really been resolved before Montmirail. The status quo before Clarendon would be restored. Becket and his fellow exiles would receive back all their property. The formal promise to uphold the written Constitutions and the sentences at Northampton were to be regarded as ineffective. However, the nature and binding force of the customs was to be left, as it had been before Clarendon, the subject of rival inconsistent claims requiring resolution or, failing resolution, mutual accommodation.

A range of issues had been quickly conceded, e.g. Henry would not press for an account of Becket's revenues as Chancellor. With each concession Henry's reluctance became more manifest. He used every excuse for procrastination as if hoping for a change of circumstances, such as the death of Becket or of Alexander. He twisted and turned, desperately seeking for a way to ensure that he, rather than Becket, could at least appear victorious, as if they were engaged in a petty squabble where the victor was the one who uttered the last defiant word.

Henry used all his old tricks to cower the papal legates: outbursts of fury, storming out with words of defiance, riding off on his horse. One of them calmly responded:

"Don't threaten us Lord. We are emissaries of a court which is accustomed to giving orders to emperors and kings and we fear no man's threats."

If Becket were to swear "saving the honour of God and of his order" then, Henry said, his part of the deal to accept Becket's return in "peace", would have to be made "saving the dignity of the Kingdom". On this formulation any "peace" would be provisional on Becket's future conduct. The legates refused to accept any such condition.

Becket also made it explicit that upon his return he would expect a strict account of the profits earned during his exile, which he continued to treat as an expulsion contrary to Henry's assertion that it was voluntary and unwarranted. No-one, Becket made clear, would be allowed to keep any of their illegitimate gains. No final agreement emerged before the pope's deadline passed.

Henry attempted to turn England into an ecclesiastical fortress. New orders were promulgated, banning all communications to or from the pope and outlawing appeals to the pope. No cleric was permitted to leave the kingdom without a royal passport. All clerics with English estates were ordered home. The property of any supporter of the archbishop was to be confiscated. Anyone bringing an order of interdict into the kingdom was to be treated as a traitor. Anyone who observed any such interdict was to be driven into exile with their extended family. Peter's pence were to be paid into the royal treasury. Every adult - clergy, baron, knight, peasant - was required to swear an oath to uphold these decrees. The consequence was to split England from the papacy, almost as completely as that effected under Henry VIII. It failed.

The records are imprecise and incomplete, but it is clear that the orders were widely disobeyed. According to an exultant Becket, writing at the time, every bishop and every abbot, except the widely reviled Clarenbald at St Augustine's, refused to comply or give, what he described as "the nefarious oaths" to support the new rules. He listed a number of specific acts of defiance.

The bishop of Winchester expressly asserted that he "would obey the apostolic decrees and those of the church of Canterbury". The bishop of Lincoln placed his staff on the altar and said: "He would see who dared extend the hand against the church and its possessions", before retiring to the contemplation and sanctuary of the cloister. The bishop of Chester found refuge over his Welsh

border amongst the king's most turbulent subjects. Even Roger of York, according to William Fitzstephen, refused to take the oath.

This was rebellion. The prospect of massive disaffection within the population, potentially infecting the warrior barons, was a serious challenge. Henry's entire career had been spent moving from one point of disaffection to another: from Wales to Scotland, from Brittany to Poitou, from his border with Louis in the Norman Vexin to Toulouse or Gascony. There was no shortage of local barons, outwardly loyal but inwardly harbouring ambition or relishing the prospect of revenge for a past slight or humiliation. No-one who had cobbled together so extensive an empire so quickly, and then spent almost two decades protecting it, could be free of paranoia or, indeed, of real enemies. Four years later, Henry would face a civil war, provoked by his feuding sons, which rocked his empire to its foundation. Even in 1169, he must have had some inkling of the resentments and frustrations which caused so many of his barons to defect four years later. Personal excommunication of the king and an interdict on the kingdom, including one that extended throughout his French territory, as the pope openly threatened, could quickly ignite rebellion in too many places at once. Henry had to back down.

Travelling to St Denis, north of Paris, for a further meeting with King Louis, he sought a conference with Becket. The meeting was arranged to take place at Montmartre, in the chapel of the Holy Martyrs at the base of the hill which marked the spot of St Denis' martyrdom at the hands of the Romans, before he struggled many miles north to expire at the site where the abbey in his name was and is located. Becket's negotiators presented his demands in writing.

The archbishop would make the following key promise:

"We will perform to him all that an archbishop owes to his King and Prince, saving the honour of God and our own order".

In return, Henry had to reply:

"I remit to the archbishop and his adherents all my anger and offence and I forgive the same all previous quarrel and I grant to him and his adherents true peace and security from me and mine and I restore to him and his adherents the Church of Canterbury ... and likewise I restore to him all the churches and prebends belonging to the archbishopric ... saving the honour of my kingdom."

Becket had accepted the logic of, or at least the symmetry of, Henry's qualification about the honour of his kingdom.

There was considerable haggling about the financial terms. Becket identified a number of specific properties that had been misappropriated each of which had a particular association with the exile. Each matter was a taunt to Henry.

First, there was land at Mundeham of the manor of Pagham, which the king had confiscated from Canterbury and bestowed on John the Marshall, the complainant who had triggered Becket's humiliation at the trial at Northampton.

Second, land at Lese of the Manor of Otford, held by William of Eynsford, a man whom Becket had excommunicated over a property conflict. He had been forced to retract by Henry at the very beginning of the conflict between them. Becket had only withdrawn after a blazing row about the custom that no tenant in chief could be excommunicated without the king's consent. It had been the first argument over what eventually clause 7 in the Constitutions of Clarendon. Then Becket had backed down. Eynsford was to be punished for this past dispute, no doubt as an example to others that taking the side of secular power was not always the profitable course, even in worldly matters.

Perhaps even more significant was the basis on which Becket laid claim to the land at Lese. He wrote at the time of the original dispute:

"We demand likewise the fee of William de Ros, which the King took from us, contrary to the oath he made to King Stephen on being adopted as his son and as his heir to the kingdom. For on that occasion he swore solemnly and publicly that he would preserve to

the church all that his lord and father had bestowed on it.”

Henry had spent his entire reign asserting that his rights dated from the time of his grandfather, Henry I. The alternative root of title was the Treaty of Winchester in 1153, by which Stephen adopted Henry as his son and heir to the kingdom. That starting point would have meant a much weaker monarchy, especially vis a vis the church. Henry asserted and reasserted on many occasions that no rights had been created during the years of Stephen's usurpation. In his claim to the land at Lese, Becket was directly challenging Henry's programme of restoration, at least so far as it affected the church. The church had extracted numerous concessions, commencing with a sweeping charter of liberty, from the embattled Stephen. By directing attention to Henry's oath at the time he negotiated the peaceful succession, Becket was creating a precedent which he, and indeed many others, would be able to use in numerous other disputes.

Each of these properties had already featured in Becket's excommunications earlier in the year. Obviously not knowing precisely who was in occupation at Lese, his excommunication had been delivered in the following form: “The tenant of the land of Mundham (Lese) ... if it be held by any man other than the King”.

Thirdly, he demanded the return to him of all the land which Henry of Essex had held as a tenant of the see of Canterbury at the time that his property was escheated to the Crown, on being found guilty of treason. Becket was well aware before he left England that the fate of that former favourite of the king, now a monk at Reading Abbey, was what had been in store for himself. As Henry I's doctor said of the instability of royal favour: “A king is like a fire: if you are too close, you burn; if you are too far away, you freeze”.

The former property of Henry of Essex included Saltwood Castle, now in the possession of Ranulf de Broc. Before his exile Becket had claimed the castle should have reverted to him, rather than becoming available to Henry to bestow on de Broc. Becket's best biographer, William Fitzstephen – who evaded a banishment order by ingratiating himself with Henry – would later turn to Virgil for an appellation for de Broc: “Monstrous in crime above all others”, he wrote. It would be at Saltwood Castle, in the presence of de Broc, that the four assassins would subsequently gather before their final descent on Canterbury Cathedral.

Becket's correspondence during these negotiations was preoccupied with the detail of the financial terms. He claimed 30,000 marks financial compensation as an estimate of his lost revenues during the period of exile. He would settle for half now.

One thing was absolutely obvious. Becket was not proposing to return in a penitent frame of mind. Every one of these specific demands was calculated to let everyone know, especially Henry himself, that Becket had won. The demands were intended to be humiliating. If he granted them, his authority would be significantly undermined especially vis a vis the English church.

During the meeting at Montmartre, a new formula emerged. Instead of a general submission by the archbishop to the king, to which some form of proviso was attached, a new and entirely ambiguous form of submission was proposed, which carried a proviso within the formula of the submission itself. Soon after the meeting Becket wrote that it would have had the following form:

“He would grant to us and to ours his grace with peace and security together with the restoration of all our possessions, whilst we offered on our part to show towards him all the obedience which an archbishop owes to his King.”

The form of proviso, “saving my order and saving the honour of God” was now subsumed within the words “which an archbishop owes”. What it was that was “owed”, was to be left unspecified.

It is by no means clear that Becket's previous formula encompassed the position of the archbishopric. Becket's “order” was that of a priest, the archbishopric was an office. At the most, the reference “saving my order” would have referred to the clergy as a whole, though that would not have been its primary contemporary meaning. In any event, Becket probably believed, like Anselm, that preserving the rights of the archbishopric was his duty as a priest.

Herbert of Bosham later explained the new position:

“All the objectionable Constitutions, though not expressly yet virtually were withdrawn

and abandoned by the king and full effect was given to the liberty of the Church, though nothing was expressly stipulated by either party on these heads. For all agreed that specification would do harm, because it might tend to impede the reconciliation. The phrase which had always before been added and caused such difficulty, namely 'saving the honour of God' was now virtually suppressed. Nor indeed was it necessary to retain it because there was now no wish shown to subject the archbishop in ecclesiastical matters to the king's will."

All the chronicles indicate that a final agreement was reached on all essential terms. Whatever the form, the provisional nature of the arrangement was not changed. It was at this point that Becket raised a new requirement. He had consulted the pope as to what assurance he could require from the king. The pope said that no oath or pledge was appropriate but "if God willing, you could prevail on the king to let a kiss of peace pass between you with that you might be content". The kiss of peace, in public and on the mouth, was a traditional means of guaranteeing agreements, including truces. It is difficult not to see this as Becket insisting on a final twist which humiliated Henry, a final proclamation identifying the victor.

Henry refused. At the last moment he balked at this indignity. Feebly he excused himself disclosing he had taken an oath not to give Becket such a kiss. "It was", one of Becket's contemporary admirers asserts, "perhaps the only oath he never broke".

Transforming the pope's suggestion into an order, Becket insisted: no kiss, no peace. The talks had broken down again. Becket announced that unless there was a settlement he would place the whole of England under interdict. Baptism, confession and the unction of the dying would be permitted, but no church services of any kind. There would be no burials, no marriages, no celebration of the mass, no ringing of bells. He further indicated that he was now prepared to excommunicate the king.

Alexander backed him up, threatening an interdict over Henry's lands in France, a matter beyond Becket's own competence. He appointed yet another pair of representatives with power to implement such an interdict if they could not finalise the agreement which had seemed so close at Montmartre. They were to attempt to get Henry to give a kiss of peace and were supplied with a papal offer to absolve him from his inconvenient oath. Alternatively, the kiss should be given on his behalf by his son, Henry. Alexander was supporting the archbishop. He sent express orders to each French bishop to enforce any interdict that his legates may declare over Henry's French lands and another to the Archbishop of York and his suffragans to publish and enforce, in his own province, any interdict the Archbishop of Canterbury may lay on his own province.

Henry could not risk any of these measures. He could, however, perform one last act of defiance against Becket. One final twist which would sour Becket's victory. In breach of Canterbury's most cherished privilege, he could have his son crowned as his successor by Roger, the archbishop of York.

It had been in 1161, during the interregnum after Theobald's death, when Becket was still his Chancellor, that Henry acquired written papal permission to have his son crowned by any bishop of his choosing. The pope had reinforced this discretion by an express authority to Roger of York to perform the ceremony if requested.

A coronation of a son during the life of a father was unprecedented in England – indeed Theobald had refused Stephen's request to do so - but it was common in the Empire and had occurred in France.

Early in 1170 the plans for a coronation were hastily implemented. Henry summoned a council of every senior ecclesiastic he could find at short notice, to proclaim his intention to invite Becket and all his supporters to return to England, there to be reinstated with all their former possessions in complete security. All that he required was a general undertaking in the most ambiguous of terms: that Becket would perform every service that an archbishop should render a king. There was, however, no mention of the kiss of peace. Henry, properly, regarded his open promise at the council as performing the function of a personal assurance, as binding as any "kiss".

Becket was on his way to a meeting with Henry at Caen in Normandy when he learned that Henry had precipitously left for England, sailing into the teeth of a gale. The impulsive king was returning to England for the first time in four years, just as his most abject humiliation was about to be consummated.

Becket had anticipated the attempt to crown the young Henry, either because of advance intelligence or because of the example set only a few months before in August 1169, when Frederick Barbarossa had had his son Henry crowned King of the Romans. He did not, however, anticipate Henry's speed.

Upon his return to England Henry summoned a Great Council which assembled at Windsor on April 5. Following the revelations after two years of the, until then, most extensive visitation of itinerant royal justices, in the General Eyres of 1168-1170, Henry appointed a major commission of inquiry composed of teams of commissioners for each province, with authority to inquire into the conduct of all persons in authority during his four years absence. Known to historians as the "Inquest of the Sheriffs", because it led to the sacking of virtually every sheriff in England for corruption or maladministration, its terms were more wide-ranging than that. What Henry had in fact ordered was an inquiry into the official tasks performed by virtually every bishop, abbot, earl, baron, sheriff, forester and verger.

The basic assumption underlying the inquest was that all authority was delegated from the king, including a significant part of the authority of bishops, abbots, archdeacons and deans. The surviving records do not indicate how much of an intrusion into the affairs of the church was intended. This part of the plan was soon suspended by the martyrdom. The commissioners were to report to the Council meeting at London the next June, immediately before the coronation. The insecurity which must have gripped everyone who held office until the inquest was over, would ensure a good and obedient attendance at the event.

At about the same time as Henry crossed over to England, Alexander signed an order addressed to Roger Archbishop of York and all the bishops of England, which was forwarded to Becket for delivery at his discretion:

"As we have been told on the authority of several informants, that the coronation of the Kings of England belongs by ancient custom to the Church of Canterbury, we command you most authoritatively by these our letters, not to crown the King of England's son, if he shall ask you to do so, whilst our venerable brother, Thomas, the Archbishop of Canterbury is in exile."

At about this time, over Becket's furious protests, the pope granted absolution to Gilbert Foliot and Jocelin of Salisbury from the order of excommunication that Becket had imposed. Perhaps in response to Becket's fury, the pope sent another letter to Becket proscribing in explicit terms any coronation of the young Henry. The problem was how to have the pope's orders delivered. Henry had tightened the blockade. "The king", William Fitzstephen later recounted, "caused the ports to be very strictly watched".

Amongst a number of alternatives, Becket personally entrusted copies of the papal letters to Roger, bishop of Worcester, the one bishop who had left England in sympathy with Becket and who was now returning at the specific invitation of the king for the family occasion. Roger was the son of Earl Robert of Gloucester, the bastard son of Henry I and, therefore, a member of the royal family. On hearing that Roger had received such a letter, the constable for Normandy and Queen Eleanor, who was waiting in Normandy with the young Prince Henry for the king's final clearance to cross the Channel, closed the ports of Normandy to Roger, preventing the bishop leaving for England.

Henry's blockade proved effective. Although William Fitzstephen asserted that both Roger of York and Foliot of London had received copies of the papal orders on the day before the coronation, no-one would later come forward to challenge their denial.

On 14 June, Prince Henry was crowned in Westminster Abbey, by Roger of York in the presence of Foliot of London, Jocelin of Salisbury and, perhaps, the unkindest cut to Becket, the aging Walter of Rochester, Theobald's brother and Becket's original patron, not least in his disputes with Roger of York in Theobald's household. Henry had made his point.

Although Prince Henry's wife, Margaret, the daughter of Louis VII of France, had been ready with her husband in Normandy, and her formal coronation robes had been prepared at the considerable expense of 26 pounds 17 shillings and 5 pence, she was left in Normandy to Louis' immediate and predictable outage. Prince Henry was crowned alone. The only explanation that makes sense of this needless slight is that Henry was leaving himself an excuse for holding a second coronation, to appease Becket's wounded pride, without any suggestion of loss of face on his own part. After all, Henry I himself, who was crowned by the nearest available bishop when his brother died in a hunting



accident, had been crowned a second time by Archbishop Anselm on his return from exile.

Immediately after the coronation, Henry had written from Westminster to one of the papal legates indicating his willingness to accept the pope's terms for settlement. He agreed to everything except the kiss of peace. The legates arranged for a new meeting between the king and archbishop to follow another conference between Henry and Louis. It was held on the east bank of the Loire, south of Chartres near the town of Fréteval on 22 July 1170.

Coming forward alone from the two large parties, Henry bounded forward and greeted Becket with studied spontaneity. In his contemporaneous letter, reporting on the meeting to the pope, Becket asserted with an equally studied disingenuousness:

“He drew us apart to the wonder of all and for a long time spoke with such familiarity that it seemed as though there had never been any discord between us.”

This must, of course, be read in the light of the numerous lectures on Henry's capacity for duplicity, which Becket had sent to the pope on previous occasions.

There is no doubt that they had a long conversation, disconcerting their bored entourages on the edge of the field. They ranged over numerous aspects of the dispute. Becket's letter to the pope is the only surviving contemporaneous record. It cannot be checked and must be treated with care. Steeled as he must have been against Henry's talent for dissimulation, Becket was charmed by his wit and exuberance. It was at this point that the requisite public posturing of reconciliation occurred: first a show of humility from Becket and then a show of respect and acceptance from the king.

As Herbert of Bosham, an eye-witness, recalled in his biography:

“The archbishop ... dismounted from his horse and in the sight of all there present humbly prostrated himself at the King's feet. But as he was about to remount his horse, the King held the stirrup for him while all the bystanders gazed in astonishment.”

It was an important symbolic gesture. Holding the stirrup was used as a sign of subjection by the Holy Roman Emperor to the pope, in those periods of history when the pope could command such subjection. Becket dissembled the incident in his report to the pope:

“Then I leapt from my horse and would have knelt at his feet, but he seized the stirrup and compelled me to remount and seemed to shed tears.”

The issue on which Becket spent the most time in his letter to the pope was, however, the coronation of Henry's son. He said that they had discussed at length the propriety of the coronation. Becket explained the special circumstances in the only two cases in which the act had not been performed by the Archbishop of Canterbury, albeit by, regrettably, his two most important predecessors. William the Conqueror had been crowned by the Archbishop of York at a time when the Archbishop of Canterbury was in disgrace. Henry I had been crowned by the bishop of London, when Anselm was in exile. Henry, no doubt as planned, immediately offered to let Becket perform the second coronation on his son to be accompanied, on this occasion, by his wife. Indeed, Henry had promised to do this to King Louis the day before.

Returning to the assembled gathering, Becket proceeded to deliver the formula which had been worked out at Montmartre:

“We asked ... that he would restore us his favour and peace and security to us and ours and the Church of Canterbury with her possessions, which he could read set down in a scroll; and that he should mercifully amend what he had presumptuously done against us and our king in the coronation of his son; promising to him love and honour and whatsoever obedience can be shown by an archbishop to his king and prince in the Lord.”

Becket's entire household came forward one by one and repeated the archbishop's formula. No reference was made to the Constitutions of Clarendon, not even in the cases of Herbert of Bosham and John of Salisbury, from whom an oath to obey had been demanded at Angers in 1166.

There is no reference of even the most oblique character to any of the outstanding issues raised in the Constitutions. Henry abandoned, because he was forced to do so, the strategic objective which he had consistently pressed from the time of the Westminster Council meeting in 1163: his demand for an unconditional undertaking to observe the customs of his grandfather's times. On the other hand there had not been any "kiss of peace", Becket's demand which had prevented the same settlement nine months before.

Becket asserted in his letter to the pope, no doubt to excuse his earlier misjudgment, that such a kiss was offered but, in his own discretion, waived. Herbert of Bosham's version, plainly based on his own discussion with Becket at the time, is that the kiss of peace was not mentioned at all. The other biographers suggest that it was refused, although promised at a future time when it could be given without loss of face. On all accounts the settlement proceeded without it. In this regard Becket had backed down too.

Becket had also not attained the full and precise statement of the terms of restoration of property and payment of compensation, because the pope had not made agreement on such detail one of his terms. Becket had lamented:

"Because you did not order that he should restore to us and ours what has been taken away we could not order it; but neither can we, God willing, yield that point. According to your command the request is deferred not abandoned. Indeed if you had ordered it as forcibly as you expressed your last letters no doubt he would have made satisfaction."

The personal posturing between the two personalities, and the institutional conflict they personified, had not ended. No-one present could have believed that the feud was over. The formal declaration called it a "peace". It was, however, only a truce.

Herbert of Bosham would recall that he had first thought that the open field at Fréteval, where the meeting occurred, was a particularly beautiful spot. He later discovered that the locals called it "Traitors Meadow".

Before Fréteval and immediately after his son's coronation, Henry had left England for Normandy. Near Falaise, he had met Roger, bishop of Worcester who, as I have said, had been prevented from crossing for the coronation because he carried one of the papal letters proscribing it. Henry berated his kinsman as a traitor – refusing at first to believe that he had been prevented from attending the coronation. Henry said:

"You favour my enemy ... do not expect that I shall let you keep the revenues of your bishopric. I will immediately deprive you of them ... you cannot be the son of the good Earl Robert, who brought us both up in his castle together and had us taught the first elements of morals and learning".

Roger responded defiantly, according to William Fitzstephen:

"I am glad things are in their present state and that I was not a witness to the coronation which was unjust, contrary to God's law, not for any fault of the prince, but of the man who crowned him; and if I had been there I would not have allowed it. You say I am not the son of Earl Robert. I cannot tell whether I am or not but I am certain I am the son of my mother, who was the companion of my father in the honours of the protectorate and you are exhibiting a very sorry proof of being nephew to Earl Robert who bred you so honourably and fought against your enemy King Stephen for sixteen years ... . If you had reflected on this you would never have reduced all my brothers to nothing as you have done. Your grandfather good King Henry gave my brother, the Earl, an honour of a thousand knights and you have curtailed it to 250. ... This is your mode of recompensing your relations and friends and now you threaten to take away my bishopric. Be it so if you are not already satisfied with the revenues of the archbishopric and six other sees besides numerous abbeys which you have got hold of at the risk of your soul's salvation".

One of the accompanying courtiers stepped forward to berate the bishop for insulting the king. In a revealing moment, Henry turned on the courtier with venom:

“Do you think, you rascal, if I choose to say what I like to my relation, the bishop, you or any other person is to abuse or threaten him? I can hardly keep my hands off from your eyes. Neither you nor anyone else is to use your tongue in this way to the bishop”.

Roger had stood up for his family’s rights, in the same way as Becket had stood up for the rights of the Church. In his reaction on this occasion, Henry indicated, albeit in the case of claims of blood rather than of theology, that he accepted and admired an individual who championed his own honour. His courtiers should not always assume that the king’s display of anger required action by them. That could lead to tragedy, as we will see in the next and last lecture.

## Convergence and the Judicial Role: Recent Developments in China

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
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TO THE XVITH CONGRESS OF THE INTERNATIONAL  
ACADEMY OF COMPARATIVE LAW  
UNIVERSITY OF QUEENSLAND, BRISBANE, AUSTRALIA  
16 JULY 2002  
CONVERGENCE AND THE JUDICIAL ROLE:  
RECENT DEVELOPMENTS IN CHINA**

Professor Gabriel Moens, Professor of Law at the University of Queensland and chair of the Congress, referred to the theme in the context of recent comparative law literature in the following terms:

"One idea that figures prominently in the relevant comparative law literature concerns an observable tendency of the world's legal families to embrace a common intellectual framework for the consideration and resolution of current problems."

The extent, if any, to which China can now be said to adopt such a "common intellectual framework" is a matter of great significance.

At the level of form and rhetoric, change in the Chinese legal system since 1978 has been nothing short of revolutionary. At the level of practice, change is palpable, but its present significance and prognosis are extremely difficult to assess. There are elements of this development which it is appropriate to analyse in terms of "convergence".

At the time the reforms commenced, China had just emerged from the calamitous years of the Cultural Revolution, during which nothing that could be described as a legal system had been permitted to survive. Although there were some personnel from the previous system that could be drawn on, the era of the Four Modernisations required the reconstruction of legal institutions, virtually from scratch.

There are many aspects of the multifaceted process often described as "globalisation" which manifest the spread of concepts commonly ascribed to the West. Perhaps, none has been more significant than what has been called "the rule of law revival" [1]. The dramatic quality of what is now being contemplated and even attempted in this respect in China, is emphasised by the fact that neither in the previous thirty year history of the People's Republic of China, nor, even more significantly, in the millennia of prior tradition of China's long civilisation, was there an institutional model anything like the rule of law administered by an independent judiciary.

The Chinese tradition is well expressed in one of the aphorisms attributed to Confucius:

"I could adjudicate law suits as well as anyone. But I would prefer to make law suits unnecessary."

Accordingly, an Imperial administrator who had efficiently disposed of a huge caseload would not have received any accolade. Rather, his competence would be questioned for allowing so much contentiousness to exist on his patch. The great Australian sinologist of Belgian origin, Pierre Rykmans, who writes under the pseudonym of Simon Leys, explained this tradition in annotations to his translation of the *Analects of Confucius*:

"... When a nation needs to be ruled by a plethora of new laws, by a proliferation of minute regulations, amendments, and amendments of amendments, usually it is because it has lost its basic values and is no longer bound by common traditions and civilised conventions. For a society, compulsive law making and

constant judicial intervention are a symptom of moral illness." [2]

In this respect, contemporary China has converged with the West.

A rival philosophical tradition in China, known as the Legalists, emphasised severe law and harsh punishments, on the basis of what, in the West, would be regarded as a Hobbesian view of the world. This authoritarian tradition is not a forerunner of a rule of law philosophy. It is *rule by law*, rather than the *rule of law*. [3]

The Chinese tradition never developed a concept similar to the rule of law. Nor did any institution emerge which could be considered to be an independent judiciary. Local prefects operated in a context in which the execution and enforcement of the law and dispute resolution were part of an undifferentiated governmental function. There was, in short, nothing analogous to a separation of powers, nor even of separate institutions sharing power.

The attempt to establish a separate judiciary during the Nationalist era proved of no long-term significance, other than in Taiwan. In the People's Republic of China, the period of Party rule prior to the Cultural Revolution, did lead to the emergence of a separate institution in the form of a hierarchical court structure, based in large measure on Soviet experience. This tradition has proven to be of longer-term significance as a partial model for reconstruction after the end of the Cultural Revolution.

Article 78 of the Constitution of the People's Republic adopted in 1954, stated that "people's courts shall conduct adjudication independently and shall be subject only to the law". Like the famous 1936 Constitution of the USSR, Article 78 did not reflect actual practice. Party control of judicial decision-making at all levels prevented the emergence of an independent judiciary. Whatever development may originally have been intended, party control extending to the disposition of specific cases, was decisively reasserted during the Anti-Rightist Movement of 1957 and 1958. [4]

### **The Stimulus of Economic Reform**

The transformation of the Chinese economy over the last two decades has been extraordinary. The transformation of its legal system has been equally extraordinary. There is no doubt that legal reform has been driven by economic reform. [5]

The linkage recognises the strategic role of the law and of the legal system in sustaining economic progress. The objective is said to be the creation of "a socialist market economy".

Markets in a face-to-face sense - like an Oriental bazaar or a Mediterranean rialto - have existed under all systems of government and law. However, a market economy is a rare phenomenon. Only certain kinds of society, governmental structure and legal system have been able to sustain a market economy. A market economy is not a force of nature. It is a human construct. More than anything else, a successful market economy is the product of good government and of the law. In the Town Hall of Siena, there are two wonderful frescos by Lorenzetti: Allegories of Good and of Bad Government. Even a cursory glance at the latter, with its depiction of decay and chaos, will convince anyone that without law, there can be no market system. [6]

An important motive for reform has been the, now completed accession of China to the World Trade Organisation. The ability of other nations to obtain the benefits of trade agreements depends on domestic compliance with the obligations imposed by such agreements. This is obviously so with respect to the administration of customs matters, but it is also true with respect to a wide range of potential interference with trade in the course of warehousing, distribution, transportation, insurance, transfer payments and various forms of regulation e.g. health.

An obligation to provide an independent judiciary has long existed in Article X of the General Agreement on Tariffs and Trade 1947, now administered by the WTO, albeit expressed in the language of obfuscation, so common a product of the compromises involved in treaty negotiation. The GATT contains an express obligation to publish all relevant laws, including "judicial decisions". There is also an express obligation to administer such laws "in a uniform impartial and reasonable manner" and to create or maintain judicial tribunals for "the proper review and correction of administrative action" in a sphere described as "relating to customs matters", but expressed to extend "inter alia", whatever that might mean. [7]

Although the focus of these obligations is on trade-related activity, the institutional implications cannot readily be restricted to such decision-making. The scope of legal issues capable of impinging upon trade cannot be, and is not, narrowly confined.

These issues were of considerable concern in the process of negotiating China's accession to the WTO. The final Protocol for the Accession of the People's Republic of China to the WTO included obligations for the publication and enforcement of "all laws, regulations and other measures pertaining to or affecting trading goods, services, TRIPS or the control of foreign exchange". [8] The specific obligation with respect to judicial review is in the following terms:

"China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article 1 VI of the GATS and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of a matter." [9]

The Chinese accession to the WTO was based on a Report of a Working Party which commented on issues raised in relation to judicial review as follows:

"The representative of China confirmed that it would revise its relevant rules and regulations so that its relevant domestic rules and regulations would be consistent with the requirements of the WTO Agreement and the Draft Protocol on procedures for judicial review of administrative action. He further stated that the tribunals responsible for such reviews would be impartial and independent of the agency entrusted with the administrative enforcement and would not have any substantial interest in the outcome of the matter." [10]

### **A Legislative Explosion**

A critical component of the process of legal reform has been a formidable body of new statute law. The Criminal Law and the Criminal Procedure Law of 1979 were the first codes promulgated in China since the abrogation of the six Nationalist Codes in 1949. Thereafter, there was enacted the Economic Contract Law of 1981, with substantial revision in 1993. It was replaced by the Contract Law of 1999. The General Principles of Civil Law of 1986 is a codification of large part of civil law. A body of administrative law was adopted in the Administrative Litigation Law of 1990. Regulatory procedures were harmonised in the Administrative Punishment Law of 1996. In 1994, the State Indemnity Law established the possibility of suing government agencies. The Law on Lawyers of 1996 legitimised and regulated a private legal profession. This is only the tip of the iceberg of legislation in what has accurately been described as a "legislative explosion". [11]

The primary model was that of the civilian system. A detailed review of these Codes, I am sure, would identify numerous matters to which the label of "convergence" could properly be applied. The General Principles of Civil Law is derived from the German Civil Code. European law, rather than Anglo-American common law, was the model adopted in the six Nationalist Codes about 90 years ago and that has re-emerged. As one author noted in 1989: [12]

"... virtually the whole technical and conceptual language of Chinese law is translated from European ideas".

More recently some influences from the common law tradition have emerged. Amendment to the General Principles of Civil Law in 1991 changed the duty of the court to collect evidence and transferred the primary burden to the parties to litigation. Trial procedures were amended to become more adversarial and less inquisitorial. New rules of evidence were introduced. [13] Amendments to the Criminal Procedure law in 1996 introduced adversary elements to the fact-finding process in criminal trials. [14]

For a nation in which, not much more than half a century ago, there were foreign enclaves ruled on principles of "extraterritoriality", imposed by force but justified on the basis of the absence of a legal system in China, this body of statute law enacted in a period of about two decades, represents an extraordinary achievement. The issue, of course, is one of enforcement.

This issue gives rise to two distinct matters. The first is the role, and authority of the judiciary, on which I will focus in this paper. The second, and in many respects the more difficult matter, is the enforcement of judicial orders and awards. Difficulty of enforcement of judicial orders is, on the basis of my contact with Chinese judges, a matter of great concern to the Chinese judiciary. It is, however, beyond the scope of this paper.

### The Rule of Law

The idea of 'the rule of law' has played a prominent part in Chinese debate over the last two decades. Although long established in Western discourse, the concept has a chameleon-like quality. [15] It is understandable that in Chinese debate, the terminology translated as 'the rule of law' is not always used in the same sense as the words would be used in the West. [16] The debate over the rule of law culminated in a formal commitment to something like this terminology in 1997 at the XVIth National Congress of the Communist Party of China.

Article 5 of the Constitution of the People's Republic of China was formally amended in March 1999 at the Second Session of the Ninth National People's Congress by adding the following sentence, in the translation available on the website of the Ministry of Foreign Trade and Economic Cooperation. [17]

"The People's Republic of China governs the country according to law and makes it a socialist country ruled by law."

Unofficial translations by academic commentators of the term *fazhi guojia* refer to a "socialist rule-of-law state". [18] That is not necessarily the same as a "socialist country ruled by law", in an official translation. It is not clear that a *Rechtsstaat* is what is intended.

The process that culminated in the constitutional amendment to Article 5 began with a public address in February 1996 by Jiang Zemin, in which he used a four-character slogan generally translated as "govern the country according to law". That formulation is found in the new Article 5. However, in Jiang's address, this terminology formed part of a sentence in which his reference to the law was counterbalanced by the phrase "protect the nation's long-term peace and stability". The terminology of "stability" is often an indirect reference for the continuation of control by the Party. [19]

There remains considerable ambiguity as to the sense in which the terminology of the new Article 5 is to be understood. It may be closer to *rule by law*, rather than *rule of law*. [20] Nevertheless, there is now a substantial Chinese legal literature which propounds the rule of law to be the true intent of the reforms. [21]

There is a basic tension between the idea of the rule of law and other aspects of the Constitution which still reflect an alternative principle that the law must serve the party State.

Article 1 of the Constitution continues to state:

"The People's Republic of China is a socialist State under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."

A socialist system is the basic system of the People's Republic of China. Disruption of a socialist State by any organisation or individual is prohibited."

As one author notes:

"These two principles have co-existed uncomfortably since the inception of legal reform." [22]

Tension between the rule of law and other organising principles of governance is not, however, unique to China. The proper scope of judicial authority in the West, for example in debates over the divine rights of kings and Parliamentary supremacy, have waxed and waned in Western nations over many centuries. These debates continue today in such contexts as judicial review and bills of rights. The issue is one of balance as a matter of substance, not form.

### **Judicial Independence**

In China, the relationship between the Party and the courts remains a critical issue. The prior tradition permitted party intervention in the judicial process by the examination and approval of individual cases by party cadres, a system referred to as *shuji pian*. [23] One of the first clear indications of the reform process was the instruction by the Central Committee of the Party in September 1979 abolishing this system. [24]

However, the Constitution adopted in 1982 reflects the continued tension.

On the one hand, the Preamble to the Constitution refers more than once to "the leadership of the Communist Party" and Article 3 states:

"All administrative, judicial and procuratorial organs of the State are created by the people's congresses to which they are responsible and by which they are supervised."

On the other hand, Article 5 provides:

"All State organs, the armed forces, all political parties and public organisations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated.

No organisation or individual is privileged to be beyond the Constitution or of the law."

At the level of rhetoric, something not dissimilar to a Western conception of judicial independence has emerged over the last two decades. At the very least, direct intervention by the Party in the adjudication process is no longer regarded as legitimate.

The steps that have been taken to strengthen the Chinese judiciary as a separate institution are such as to suggest that real change is intended. The independence of the judiciary from other functions of government is not a matter capable of description with absolute precision. There are questions of degree involved.

The difficulty in the case of China is the reconciliation of an independent judiciary with the maintenance of an official ideology, which appears inconsistent with any level of independence. The State is still said to be founded on the Four Cardinal Principles, namely adherence to the socialist road, the people's democratic dictatorship, Marxism-Leninism and Mao Zedong Thought (with the recent addition of Deng Xiaoping Theory) and the leading role of the Communist Party of China. Nevertheless, some degree of institutional differentiation has appeared, even if it does not constitute a strict separation of powers. The process will obviously take time. This is not unprecedented.

English legal history is, in large measure, derived from an analogous unified concept of the State, encompassed in the idea of the Crown. In English history, the Crown also played a "leading role". It took centuries for the Crown to be clearly divided into its three manifestations. First, as the embodiment of justice in the legal system; secondly, as the executive, and thirdly, as one component part of the legislature. I am not suggesting that the Secretary-General of the Communist Party of China is on the way to becoming some kind of constitutional monarch. I am simply noting that substantial institutional differentiation is possible within a unifying concept. We could not expect that what took centuries to achieve in England, would be done within two decades in China.

The tradition of judicial independence with which we are familiar in Australia extends beyond



independence from external interference to encompass independence from other judges. This is alien to Chinese practice in which a panel of judges in a particular case is expected to consult within the court. Many cases are, in substance, decided by the court leadership rather than the panel. [25] Steps have been taken to limit this practice but this appears to be driven more by economy and efficiency than by any principle of independence. [26] In our tradition, the personal independence of the individual judge is a recognition of professional autonomy.

A tradition of judicial independence depends on the background, quality, training and cast of mind of the judges and on their sense of collegiality. Just over two decades ago, China had no institutionalised judiciary and no judges. It now has something of the order of 30,000 superior judges and 180,000 lower court judges. Inevitably, a very substantial proportion of those who have been appointed have not had appropriate training or background. As I understand the position, a majority are retired officers of the People's Liberation Army. In 1982, the then recently re-established Ministry of Justice, announced that 57,000 "outstanding army officers" were being assigned to the court system. [27] The ingrained mode of decision-making of such recruits was not instinctively such as we would call "judicial". In recent years, determined efforts have been made to change the quality of the judiciary in terms of qualifications, competence, cast of mind and collegiality.

### **The Judges Law**

In 1995, the Standing Committee of the Eighth National People's Congress adopted a new Judges' Law of the People's Republic of China. This was subsequently amended at the Ninth National People's Congress in June 2001. The objective of the law was stated in Article 1 as follows:

"This law is enacted in accordance with the Constitution to enhance the quality of judges, to strengthen the administration of judges, and to ensure that the people's courts independently exercise judicial authority according to law and that judges perform their functions and duties according to the law, and to safeguard judicial justice."

The Judges Law identifies the functions and duties of the judiciary, makes provision for what was described as "rights", including restrictions on interference with judicial functions. It makes express provision for appointment and removal, establishes qualifications, regulates certain conflicts of interests and provides for rewards and discipline. Of particular significance is the requirement for practical training and education as qualifications for appointment as a judge. Only a small proportion of the judges had such qualifications when appointed. In the discussions in which I and other Australian judges have participated, both in China and also with visiting delegations to Australia, it is accepted that it will be some years before the judiciary of China reflects the aspirations laid down in the Judges' Law.

### **Code of Judicial Ethics**

My own interest in, and a substantial proportion of my knowledge of, recent developments in the Chinese judiciary, is based on a visit to China I made last November as one of a team of four Australian judges to lecture at a training course for Chinese judges at the National Judges' College in Beijing. This visit was organised by the Human Rights and Equal Opportunity Commission (HREOC) as part of an intergovernmental programme called the Human Rights Technical Co-operation Programme. [28]

Our task was to lecture on judicial independence and judicial ethics. As events transpired, only a fortnight before our visit, on 18 October 2001, the Judicial Committee of the Supreme People's Court of China had promulgated, for the first time, a Code of Judicial Ethics for judges in the People's Republic. This provided a focal point for our presentation. We participated in the first training session for Chinese judges with respect to the new Code. Our audience consisted of about one hundred intermediate court level judges, in Australian terms, roughly equivalent to a District Court.

The Code of Ethics is an exemplary document. The new Code asserts a number of fundamental principles of judicial conduct:

- Both the fact of and the appearance of impartiality.
- No extraneous interference or influence.

- Disqualification if impartiality might reasonably be questioned.
- Treatment of all parties equally in word and deed.
- A duty to state reasons for judgment.
- No commentary on other cases, including appeals.
- Conduct of cases efficiently and within time limits.
- Case management to avoid unnecessary delay.
- A ban on inducements, gifts, conflicts.
- Observing proper decorum.
- Continuing education.
- Restriction on extra-judicial and post retirement activities.

The new Code of Judicial Ethics represents one part of a systematic effort to improve the quality of judicial decision-making in China. The overall picture is one which suggests that China is in the middle of a very serious effort to establish the judiciary as a separate institution of considerable strength.

### **Towards Institutional Autonomy**

A substantial body of men and women in the Chinese judiciary are actively engaged in this process of institutionalisation. It is not possible to determine the extent to which the growing appearance of institutional autonomy reflects the reality. Although future success cannot be stated with any degree of certainty, it is plainly a serious endeavour. Steps are also being taken to address the traditional low status of judges. I am not aware of the debate that is probably going on internally about the low level of remuneration. Once that becomes a primary focus for concern, Western judges will experience a real sense of convergence.

Only a week ago, the Chief Justice of China announced a new series of measures directed to improving the quality of the judiciary. He indicated that all new judges would have to pass exams and receive special training. Existing judges without a law degree would be required to obtain one within a fixed time. I assume this applies only to senior judges, but it may go further. The present practice by which clerks could be promoted to become judges after a certain number of years is to change. In making the announcement, the Chief Justice Xiao Yang said:

"Courts have often been taken as branches of the government and judges viewed as civil servants who have to follow orders from superiors, which prevents them from exercising mandated legal duties like other members of the judiciary."

He meant, I think, the judiciary outside China, a revealing perspective in itself.

The Chief Justice added that professional judges would:

"... form a chosen group of elites who speak the same legal language, think in a unique legal formula, believe in and pursue social justice."

The Chief Justice predicted:

"Over the years, unique professional traditions and qualities come into being, which will give judges the strength and the power to ward off outside interferences." [29]

The sentiments are, of course, exemplary. The Chief Justice of China was correct to describe this ambition as a "huge system engineering project". It appears designed to create the reality and appearance of institutional autonomy.

The seriousness of the effort is clear from the level of interest and intensity of questioning that I have experienced from visiting Chinese delegations to Sydney and also during the training course in which I participated in Beijing. That course included four lectures from Australian judges and addresses by a number of Chinese judges and legal academics. The training course was based on a volume of materials made available in both English and Chinese. The primary focus was the Code of Judicial Ethics, then some two weeks old. The training materials included a copy of that new Code and of the

Judges' Law of China. It also included, in Chinese and English, the Judiciary Act of Germany, the Judges' Act of Canada, the Judges' Status Law of Russia and, the codes of conduct for judges from the United States, Canada, Italy and the American Bar Association Model Code. It also included the resolution adopted in Milan in September 1985 by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders entitled "The Basic Principles on the Independence of the Judiciary". It did not, however, include a copy of the Beijing Statement of Principles of the Independence of the Judiciary, issued in Beijing on 19 August 1995 and amended in Manila on 28 August 1997, which has been signed by thirty-two Chief Justices of the Asia and Pacific region, including on behalf of the President of the Supreme People's Court of the People's Republic of China. Nevertheless, that was a document to which the Australian judges made reference in the course of our addresses.

An extensive programme of training of judges has been instituted. The National Judicial College was established in Beijing. It conducts residential training of senior judges. There is also a well funded programme encouraging contact with legal systems throughout the world. Delegations of Chinese judges now frequently travel abroad. In the Supreme Court of New South Wales, we now receive up to a dozen delegations a year. This appears to be part of a programme to broaden the perspective of the Chinese judiciary.

A large number of delegations of foreign judges have attended conferences and seminars of Chinese judges, including at the National Judicial College. These have been welcomed at a very high level in China. Late last year a delegation to a seminar of the Supreme People's Court in Beijing, included a judge of the New South Wales Court of Appeal, a judge of the Bundesgerichtshof, the President of the Tribunal Grande Instance Quimper and the Dean of the Law School at Montreal University in Canada. The delegation was welcomed by Li Peng, Chairman of the Standing Committee of the People's Congress and Xiao Yang, the Chief Justice of China. There is no doubt that the programme of judicial reform has support at the highest level.

Of particular significance for the establishment of a tradition of judicial independence is the sense of collegiality amongst the judiciary. This has been fostered in a number of ways as the recent speech of the Chief Justice I have quoted suggests.

Just over a year ago, a new uniform was adopted by the Chinese judiciary, replacing the former uniform with its epaulette and caps, reflecting the military origins of most of the judiciary. The announcement said that the uniform introduced in 1984 looked military and "did not reflect the unique social role of judges". [30] The new dress is a black robe with four yellow buttons on the red front of the robe, the same colours as the National flag. The four buttons represent the four levels of courts in the Chinese hierarchy. The judges are subject to sumptuary laws, requiring them to wear business suits to work - black suits, but grey in summer - with a badge in the right lapel.

Of similar symbolic significance was the appointment earlier this year of forty-one "grand justices", together with a similar number of "grand procurators". This is a new professional title. It appears that those appointed will have a role in resolving complaints about the judiciary. [31]

## **Prospect**

China has an extraordinarily long tradition of beguiling Westerners and deceiving them about how things are working in practice. My own first visit to China was in 1974 as part of the entourage of E.G. Whitlam, then Prime Minister. The public appearance was of sweetness and harmony. However, the Gang of Four was still in control and unspeakable things were happening behind the scenes.

You will permit a historical interlude. The welcoming party for the Australian delegation at Beijing Airport was led by Zhou Enlai. As the Australian jet was approaching, Zhou sought out and warmly greeted a slight figure in the line up. It was Deng Xiaoping. This was the first time that Deng had been seen in public for many years. In retrospect, this public rehabilitation was a moment of monumental significance.

The authority of the courts in China, particularly vis a vis the party, government departments, the military (and their various commercial offshoots) and also vis a vis other parts of the justice system, such as the Procurate, remains problematic. Nevertheless, there do appear to have been significant changes.

The transparency of the judicial process has also increased, although it is too early to say how far the

principle of open justice will be adopted. However, one author observes:

"The main function of a public trial is changing from a method to educate people to abide by law to a means of public supervision of judicial performance". [32]

I have been impressed by the spirit of candour with which the Chinese judges approach their training tasks, both at the National Judicial College in Beijing and in the delegations that visit Sydney. The Chinese judges engage in vigorous dialogue and questioning. They openly acknowledge the problem of corruption within the judiciary and also the existence of limits on the freedom of discussion in which they can openly engage, although plainly those limits as set much wider than had hitherto been the case.

An element of defensiveness is apparent amongst some Chinese judges. Some regard the new requirements as an impediment to the efficient conduct of the courts. It is plain that many regard the new obligation contained in the Code of Ethics to provide reasons for decision as detracting from what they regard to be an efficient system. Many do not see the point of giving reasons, an understandable belief for those originally trained in the People's Liberation Army. Some judges express doubts about the value of impartiality.

I am not able to separate rhetoric from reality, in order to assess the true extent of judicial independence in prospect. It is plain that there are limits to the Party's preparedness to surrender power, but the boundary is not clear. It may be that the most distinctive characteristics of the Chinese authoritarian tradition is that the boundary of permissible behaviour is left deliberately vague. In many cases, vagueness encourages timidity and risk aversion. Clear rules often identify possibilities of evasion and permit risk assessment.

Whatever the future may hold, no lawyer could regard the recent reforms as anything but a positive development. However, our own tradition strongly suggests that true institutional autonomy requires some form of judicial tenure. That does not exist in China. Nor am I aware that it is in contemplation. Furthermore, the traditional style of adjudication and the relationship of judges amongst themselves have a bureaucratic quality which does not reflect a sense of professional independence. [33]

The progress already made is impressive. Convergence, however, remains partial.

### **A Chinese Model**

The ideas of the rule of law and of judicial independence are drawn from the West. I am not sufficiently familiar with the Chinese legal literature to know what, if any, reliance is being placed on Chinese tradition. There is at least one role model for judges in that tradition.

Bao Zheng, known as Bao Gong, born at the turn of the millennium in 999 was an outstanding government official of the Northern Song Dynasty. He is a popular character in Chinese opera, in which he is portrayed with a black face. As I understand it, in Chinese opera a black face may indicate either a rough and bold character or an impartial and selfless personality. It is the latter that applies to Bao Gong. He is known for dispensing justice without fear or favour and with such impartiality, that he punished the son-in-law of the Emperor, the uncle of a high ranked imperial concubine, and many government officials. The Chinese judiciary does not have to look to the West for a role model of judicial independence, integrity and impartiality. [34]

1 Thomas Carothers "The Rule of Law Revival" *Foreign Affairs*, March/April 1998.

2 Simon Leys (Trans) *The Analects of Confucius*, W.W. Norton, 1997 at fn 176.

3 Eric W. Orts "The Rule of Law in China" 2001, 34 *Vanderbilt Journal of Transnational Law*, 43 esp at 52-55; Albert H.Y. Chen "Towards a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law" 2000, 17 *UCLA Pacific Basin Law Journal* 125 at 129-130; John K. Fairbank and Edwin O. Reischauer, *China: Tradition and Transformation* Revised Edition 1989 at 43-54.

4 See Jerome A. Cohen *The Chinese Communist Party and 'Judicial Independence': 1949-1959* (1969) 82 *Harvard Law Review* 967; Larry Smeets "Judicial Independence in the People's Republic of China" (1992) 8 *Australian Journal of Law and Society* 60.

5 See Stanley Lubman *Birds in a Cage: Legal Reform in China After Mao*, Stanford University Press, 1999 esp Chapter 5.

6 Quentin Skinner "Legal Symbolism in Earlier Renaissance Art: Ambrogio Lorenzetti's Frescos in Siena" 1994, *The Cambrian Law Review* 9.

7 *General Agreement on Tariffs and Trade*, 1947 Article X, sub-articles 1, 3(a) and (b).

8 *Protocol on the Accession of the People's Republic of China*, Part 1.2C Transparency.

9 *Protocol on the Accession of the People's Republic of China*, Part 1.2D Judicial Review.

10 "Report of the Working Party on the Accession of China" World Trade Organisation, 1 October 2001.

11 Lubman supra at 173. Lubman has outlined the new legislation esp at 160-168 and 175-183; see also Anthony Dicks "The Chinese Legal System: Reforms in the Balance" 1989 *China Q* 540 at 550-560, 568-569.

12 Dicks supra at 560. See also Perry Keller "Sources of Order in Chinese Law" (1994) 42 *Amer J. of Comparative L.* 711 at 717-719.

13 Xian Chu Zhang "China Law" (1999) *The International Lawyer* 677 at 689..

14 Wang supra at p11.

15 See Keith Mason "The Rule of Law" in P.D. Finn (ed) *Essays on Law and Government: Volume 1 Principles and Values*, Law Book Company Sydney 1995 at 114.

16 See Chen, supra passim; Orts supra esp at 74-77, 106-110; Wang, "The Developing Rule of Law in China" *Harvard Asia Quarterly*, Autumn 2000 (accessible at [www.fas.harvard.edu](http://www.fas.harvard.edu)); Lubman supra esp at 123-131.

17 [http://www.moftec.gov.cn/moftec\\_en](http://www.moftec.gov.cn/moftec_en)

18 See Orts supra at 45 fn 5, Chen supra at 128.

19 Lubman supra at 128-130.

20 Orts supra at 48.

21 Chen supra reviews the literature.

22 Lubman supra at 123.

23 Smeets supra at 70.

24 Smeets supra at 75.

25 See Lubman supra 260-262.

26 See for example the observations of the Chief Justice of China in *China Daily* 3 March 2001.

27 Jonathan D. Spence *The Search for Modern China* Hutchinson, London 1990 p708.

28 I have reviewed this visit in my Address to the Law and Justice Foundation "Law and Justice Address" 2002, 11 *Journal of Judicial Administration* 123.

29 See *China Daily* 8 July 2002; *People's Daily* 8 July 2002; *Sydney Morning Herald* 9 July 2002.

30 *China Daily* 9 March 2000.

31 *China Daily* 23 March 2002.

32 Zhang *supra* at 692.

33 Lubman *supra* at 292-297.

34 On Bao Gong see <http://chinese.culture.about.com/library/weekly/aa110200.bfm>,  
<http://www.c35.org.sg/local/great/baogong.html>, <http://www.chinavista.com/experience/face/face/html>

## **Attachments**

### **The Code of Judicial Ethics for Judges of the People's Republic of China**

#### **Foreword**

To train a group of high-quality judges with firm political position, professional conversance, good conduct and honesty is an important condition for the rule of law and the construction of a socialist country ruled by law and is also an important safeguard for the people's court to implement the Constitution and exercise judicial functions. The high standard judicial ethics of judges is very important to ensure judicial impartiality and to protect the authority and dignity of the Judiciary. This code is enacted in accordance with the Judges Law of the People's Republic of China and other relevant regulations to regulate and improve the standard of judicial ethics for judges, to enhance the professional quality of judges and maintain the good image of judges and the people's court.

#### **Chapter I Safeguard Judicial Impartiality**

**Article 1.** A judge should strive to achieve substantial impartiality and procedural impartiality in performing his duties. A judge should appear to be impartial through his words and conduct so as to avoid any reasonable doubt from the public upon judicial impartiality.

**Article 2.** A judge should perform his duties in accordance with the Constitution and other laws and on the principle of judicial independence. A judge should perform his duties with no interference from administrative departments, social organizations or individuals and no influence other than the influence from laws.

**Article 3.** During the trial process the judge shall abide by recusal principle. A judge shall disqualify himself in a lawsuit in which the judge's impartiality might reasonably be questioned.

**Article 4.** A judge should resist the influence from the parties, attorney, defendants and other people or through their social contacts and should handle the situation according to relevant regulations

**Article 5.** A judge should not, against the will of the parties, use improper means to force the parties to withdraw the proceeding or accept mediation.

**Article 6.** A judge should make all the judgements openly and objectively and accept the supervision from the public. This proscription does not extend to the cases cannot be opened or cannot have an open trial according to law.

**Article 7.** During the process of a lawsuit, a Judge should reason and adjudicate independently and insist the right opinion.

**Article 8.** During the process of a lawsuit, a Judge should not meet one party or his or her agent without authorization.

**Article 9.** A judge should avoid prejudice, misuse of his function and neglect of law in performing his duties.

Article 10. A judge should treat all the parties and participants of the proceeding equally in performing his duties. The judge should not by words or conduct manifest any discrimination. The judge has the responsibility to stop and correct any discriminatory words or conduct by any participants or other people.

A judge should be fully aware of the possible differences may arise from nationality, race, sex, profession, religion, education level, health, residence and other factors and shall safeguard the equally and fully implementation of the litigation right and other rights of all the parties.

Article 11. A judge should be neutral during the trial.

Before the judgment is rendered, a judge should not express his views or attitude towards the judgement through his words, expression or conduct.

A judge should adjudicate according to law and be careful with his words and conduct during the proceedings so as to avoid any reasonable doubts upon his neutrality from the parties and other participants.

Article 12. A judge should specify the reasons for the measures and judgement relating to the substantial rights and litigating right of the parties. A judge should not make a conclusion or take any measures subjectively and unilaterally.

**Article 13.** A judge should respect the right of other judges to perform their duties independently and:

1. should not give any comments on the lawsuits being handled by other court or give any suggestions or opinions on a lawsuit in which he has personal interests. This proscription does not extend to the situation when the judge is exercising his judicial duties or is giving comments or suggestions through proper procedures,
2. should not ask about or interfere in the lawsuits being handled by the subordinate courts without authorization.
3. should not issue his personal views to the superior courts about the second instance cases.

**Article 14.** A judge should not ask for information about the lawsuits being handled by other judges unless he is performing adjudicative or administrative duties.

A judge should not disclose or provide information about a lawsuit, the ways to contact the judge in charge or other related information to the parties, attorney and defendants. A judge should not introduce or contact the judge in charge for the parties, attorney and defendants.

**Article 15.** A judge should avoid improper influence from the media or the public during the process of the lawsuit.

**Article 16.** A judge should refrain from giving any comments in public or to the media, which is detrimental to the seriousness and authority of a valid judgement. If a judge thinks there is something wrong with a valid judgement or the trial process, he may report to the president of the court or report to the relevant courts.

**Article 17.** A judge having definite evidence to believe other Judges may, or have already violated the professional ethics of judges, or other judiciary personnel may or have already violated their professional ethics and these conduct may influence the Judicial impartiality should take appropriate measures or inform the relevant authorities.

## Chapter II Enhance Judicial Efficiency

**Article 18.** A judge should be diligent and devoted to the performance of his duties. A judge's personal matters, schedule or other activities should not conflict with his or her judicial duties.

**Article 19.** A judge should abide by the time limit for lawsuit regulated by law and should accept the case, hear the proceeding and make judgement within the time limit.

**Article 20.** A judge should avoid carelessness and delay without proper reason and dispose his business seriously, promptly and efficiently, and should:

1. enhance efficiency through proper arrangements of judicial business.
2. pay enough attention to the performance of all judicial duties and handle every case with same attention and carefulness and devote reasonably enough time.
3. with the precondition of high quality of judgement, save time for the parties, attorney and defendants and pay attention to the efficient cooperation with other judges and staffs.

**Article 21.** A judge should supervise the parties to abide by the procedures and respect all the time limits, so as to avoid unreasonable or unnecessary delay caused by the parties.

**Article 22.** A judge should take effective measures to enforce the valid judgement as soon as possible.

### **Chapter III Keep Honest and Clean**

**Article 23.** A judge is not allowed to use his capacities directly or indirectly to obtain any improper benefit.

**Article 24.** A judge is not allowed to accept entertainment, money, gifts or other benefit from the parties, attorney and defendants.

**Article 25.** A judge is not allowed to participate commercial or other economic activities which may lead the public to cast doubt on his image of being honest and clean.

**Article 26.** A judge should handle his personal issues properly, and should not disclose his capacity as a judge intentionally for special treatment. A judge should not use the prestige and influence of a judge to seek personal interests for himself, his relatives or other people.

**Article 27.** The life style and standard of a judge and his family should consist with their position and income.

**Article 28.** A judge cannot act as a lawyer or Judicial advisor for enterprises, organizations or individuals at the same time. A judge is not allowed to provide advice or Judicial suggestion on pending cases to the parties, attorney and defendants.

**Article 29.** A judge should report his income and property according to relevant regulations.

**Article 30.** A judge should inform his family members about the requirements for a judge mi judicial conduct and professional ethics and urge his family members not to violate relevant regulations.

### **Chapter IV Observation of Judicial Decorum**

**Article 31.** A judge should strictly observe the Judicial decorum and keep good appearance and conduct, so as to preserve the authority of the people's court and the good image of the judge.

**Article 32.** A judge should respect the human dignity of the parties and other participants, and should:

1. hear the parties and other participants carefully and patiently and should not interrupt or stop a party or other participants unless for the reason of protecting the order of the court or because of the



requirement of a trial.

2. use standard, correct and civilized language and should not admonish or say improper words to the parties or other participants.

**Article 33.** A judge should comply with the rules of the court during the trial and should require all the staff of that court to do so and maintain the dignity of the court, and should:

1. wear robe or uniform according to relevant regulations, wear badge and keep clean and tidy;

2. appear to the court on time, do not be absent or late and do not leave early or enter or leave the court at his pleases;

3. concentrate on the lawsuit and the hearing, do nothing irrelevant with the lawsuit.

## **Chapter V Enhance Self-cultivation**

**Article 34.** A judge should enhance his professionalism and should have high political and professional quality. A judge should implement the Constitution and laws faithfully and serve the people whole-heartedly.

**Article 35.** A judge should have rich social experience and profound understanding to the social reality.

**Article 36.** A judge has the right and obligation to be trained and educated and should study the judicial theory and absorb new knowledge diligently so as to improve his abilities and skills of controlling a trial, deciding evidences and writing Judicial documents. A Judge should possess the necessary knowledge and professional ability to perform his function.

**Article 37.** A judge should be self-disciplinary and without impropriety at his daily life. A judge should cultivate a high standard moral criterion and act as a model of observing public and family virtues.

## **Chapter VI Limitation of extra-judicial activities**

**Article 38.** The extra-judicial activities of a judge should cause no reasonable doubt of the public upon his impartiality and honesty, should not affect the performance of his functions and should not cause negative impact on the trustworthiness of the people's court.

**Article 39.** A judge should refuse and stop any hobby or conduct which is against the public interest, public order, social virtue and customs and may influence the image of judge and his impartiality.

**Article 40.** A judge should be careful in making social contacts and friends. A judge should carefully handle the contacts with the parties, lawyers and other persons who are possible to influence the image of the judge, so as to avoid the impression of public that the judge is not impartial or not honest and avoid the possible confusion and embarrassment in the performance of his functions.

**Article 41.** A judge should not join any organization with a nature of evil religion.

**Article 42.** A judge should not disclose or use the judicial information of a close trial or business secret, personal privacy and other confidential information acquired during the process of a lawsuit.

**Article 43.** A judge should not join any profit-making organization or any organization may make profit by using the influence of the judge.

**Article 44.** A judge may participate in academic research and other social activities which are helpful in promoting judicial construction and judicial reform. However, these activities should be in compliance with the law, construct no obstruction to Judicial impartiality and the preservation of judicial authority and will not conflict with the judge's judicial function.

**Article 45.** A judge should be cautious in publishing a paper or interview with the media. The judge should not issue any improper comments on specific lawsuits or parties so as to avoid reasonable doubt upon judicial impartiality caused by improper wording.

**Article 46.** After retirement, a judge should continue to maintain a good image and should avoid the reasonable doubt of the public upon judicial impartiality caused by his improper words or conduct.

### **Supplementary Provisions**

**Article 47.** The courts at different levels should provide guidance and exercise supervision in the implementation of this code in their own court.

**Article 48.** The jurors shall be administered by this code when they are exercising judicial function. The administrative personnel and judicial police shall be administered with reference to the relevant provisions of this code.

**Article 49.** The Supreme Court will be responsible for the explanation of this code.

**Article 50.** This code shall come into force as of the date of issue [18 October 2001].

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### **JUDGES LAW**

#### **JUDGES LAW OF THE PEOPLE'S REPUBLIC OF CHINA**

*(Adopted at the 12th Session of the Standing Committee of the Eighth National People's Congress on February 28, 1995, And amended according to the "Decision on the Revision of the 'Judges Law of the People's Republic of China' adopted at the 22" Session of the Standing Committee of the Ninth National People's Congress, on June 30, 2001)*

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#### **CHAPTER I GENERAL PROVISIONS**

Article 1 This Law is enacted in accordance with the Constitution to enhance the quality of judges, to strengthen the administration of judges, and to ensure that the People's Courts independently exercise judicial authority according to law and that judges perform their functions and duties according to law, and to safeguard judicial justice.

Article 2 Judges are the judicial personnel who exercise the judicial authority of the State according to law, including presidents, vice presidents, members of judicial committees, chief judges and associate chief judges of divisions, judges and assistant judges of the Supreme People's Court, local People's Courts at various levels and special People's Courts such as military courts.

Article 3 Judges must faithfully implement the Constitution and laws, and serve the people wholeheartedly

Article 4 Judges, when performing their functions and duties according to law, shall be protected by law.

## **CHAPTER II FUNCTIONS AND DUTIES**

Article 5 The functions and duties of judges are as follows:

- (1) to take part in a trial as a member of a collegial panel or to try a case alone according to law; and
- (2) to perform other functions and duties as provided by law.

Article 6 Presidents, vice presidents, members of judicial committees, chief judges, associate chief judges of divisions shall, in addition to the judicial functions and duties, perform other functions and duties commensurate with their posts.

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### **CHAPTER III OBLIGATIONS AND RIGHTS**

Article 7 Judges shall perform the following obligations:

- (1) to strictly observe the Constitution and laws;
- (2) to take facts as the basis, and laws as the criterion when trying cases, to handle cases impartially, and not to bend law for personal gain;
- (3) to protect the litigation rights of the participants in proceedings according to law;
- (4) to safeguard the State interests and public interests, and to safeguard the lawful rights and interests of natural persons, legal persons and other organizations;
- (5) to be honest and clean, faithful in the discharge of duties, and to abide by discipline and professional ethics;
- (6) to keep State secrets and the secrets of judicial work; and
- (7) to accept legal supervision and supervision by the masses.

Article 8 Judges shall enjoy the following rights:

- (1) to have the power and working conditions which are essential to the performance of functions and duties of judges;
- (2) to brook no interference from administrative organs, public organizations or individuals in trying cases according to law;
- (3) to be not removed or demoted from the post or dismissed, and to be not given a sanction, without statutory basis and without going through statutory procedures.,
- (4) to be remunerated for work and to enjoy insurance and welfare benefits;
- (5) to enjoy the safety of the person, property and residence as ensured by law;

- (6) to receive training;
- (7) to lodge petitions or complaints; and
- (8) to resign their posts.

#### **CHAPTER IV QUALIFICATIONS FOR A JUDGE**

Article 9 A judge must possess the following qualifications:

- (1) to be of the nationality of the People's Republic of China;
- (2) to have reached the age of 23;
- (3) to endorse the Constitution of the People's Republic of China;
- (4) to have fine political and professional quality and to be good in conduct;
- (5) to be in good health; and
- (6) to have worked for at least two years in the case of graduates from law specialties of regular colleges or universities or from non-law specialties of regular colleges or universities but possessing the professional knowledge of law, or to have worked for at least three years in the case of judges of the High Court and the Supreme Court; those who have Master's Degree or Doctor's Degree of Law or of non-law specialties but possessing the professional knowledge of law shall have worked for at least one year, or to have worked for at least two years in the case of judges of the High Court and the Supreme Court.

#### **JUDGES LAW**

The judicial personnel who do not possess the qualifications as provided by sub-paragraph (6) of the preceding paragraph prior to the implementation of this Law shall receive training. The specific measures shall be laid down by the Supreme People's Court.

Where there are really difficulties in implementing the academic qualifications as provided by sub-paragraph (6) of the first paragraph, with the examination and approval of the Supreme People's court, the academic qualifications of Judges may be extended to graduates from law specialties of professional training college within certain time limit.

Article 10 The following persons shall not hold the post of a judge:

- (1) to have been subjected to criminal punishment for commission of a crime; or
- (2) to have been discharged from public employment.

#### **CHAPTER V APPOINTMENT AND REMOVAL**

Article 11 A judge shall be appointed or removed from the post in accordance with the limit of authority for, and procedures of, appointment or removal as prescribed by the Constitution and laws.

The President of the Supreme People's Court shall be elected or removed by the National People's Congress. The vice-presidents, members of the judicial committee, chief judges and associate chief judges of divisions and judges shall be appointed or removed by the Standing Committee of the National People's Congress upon the recommendation of the President of the Supreme People's Court.

The presidents of the local People's Courts at various levels shall be elected or removed by the local

People's Congresses at various levels. The vice-presidents, members of the judicial committees, chief judges and associate chief judges of divisions and judges shall be appointed or removed by the standing committees of the people's congresses at the corresponding levels upon the recommendation of the presidents of those courts.

The appointment or removal of the presidents of the intermediate People's Courts set up in prefectures of the provinces or autonomous regions or set up in the municipalities directly under the Central Government shall be decided on by the standing committees of the people's congresses of the provinces, autonomous regions or municipalities directly under the Central Government on the basis of the nominations made by the respective councils of chairmen. The vice-presidents, members of the judicial committees, chief judges and associate chief judges of divisions and judges shall be appointed or removed by the standing committees of the people's congresses of the provinces, autonomous regions or municipalities directly under the Central Government upon the recommendations of the presidents of the higher People's Courts.

The presidents of the local People's Courts at various levels set up in the national autonomous areas shall be elected or removed by the people's congresses at various levels of the national autonomous areas. The vice-presidents, members of the judicial committees, chief judges and associate chief judges of divisions and judges shall be appointed or removed by the standing committees of the people's congresses at the corresponding levels upon the recommendations of the presidents of those courts.

The assistant judges of the People's Courts shall be appointed or removed by the presidents of the courts where they work.

The measures for the appointment or removal of the presidents, vice-presidents, members of the judicial committees, chief judges and associate chief judges of divisions and judges of the special People's Courts such as the military courts shall be formulated by the Standing Committee of the National People's Congress separately.

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Article 12 Persons to be appointed judges for the first time shall be selected through strict appraisal, from among those having got the certificates through the state uniform judicial examination and the best qualified for the post, and in accordance with the standards of having both ability and political integrity.

Persons to be appointed presidents, vice-presidents shall be selected from judges or from among those who are best qualified for the post.

Article 13 If a judge is found to be in any of the following circumstances, a report shall be submitted according to law concerning the removal of his or her post:

- (1) having forfeited the nationality of the People's Republic of China;
- (2) having been transferred out of this court;
- (3) having no need to maintain his or her original post after a change of post;
- (4) being determined to be incompetent in the post through appraisal;
- (5) being unable to perform the functions and duties of a judge for a long period of time due to poor health;
- (6) having retired from the post;
- (7) having resigned the post, or having been dismissed;
- (8) being disqualified from continuing to hold the post because of violation of discipline, law or commission of a crime.

Article 14 If the judge is appointed in violation of conditions provided by this Law, the organ who makes this appointment shall rescind it as soon as detected. If the higher court detects the lower court's appointment is in violation of conditions provided by this Law, it shall propose the appointment to be rescinded according to law by the lower court or by the Standing Committee of the People's Congress at the corresponding level upon the recommendation of the lower court.

Article 15 No judges may concurrently be members of the standing committees of the people's congresses, or hold posts in administrative organs, procuratorial organs, enterprises or institutions, or serve as lawyers.

#### **CHAPTER VI POSTS TO BE AVOIDED**

Article 16 Judges who are connected by husband-wife relationship, or who are directly related by blood, collateral related within three generations, or closely related by marriage may not, at the same time, hold the following posts:

(1) the president, vice-presidents, members of the judicial committee, chief judges or associate chief judges of divisions in the same People's Court;

(2) the president, vice-presidents, judges or assistant judges in the same People's Court;

(3) the chief judge, associate chief judges, judges or assistant judges in the same division; or

(4) presidents or vice-presidents of the People's Courts at the levels next to each other.

Article 17 A judge may not act as a defender or an agent *ad litem* in the capacity of a lawyer within 2 years after leaving his or her post from the court.

A judge may not act as a defender or an agent *ad litem* in the case handled by the court which he or she had, worked in before leaving his or her post.

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A judge's spouse and children may not act as a defender or an agent *ad litem* in the case handled by the court which the judge belongs to.

#### **CHAPTER VII GRADES OF JUDGES**

Article 18 Judges are divided into twelve grades.

The President of the Supreme People's Court is the Chief Justice. Judges from the second grade to the twelfth grade are composed of associate justices, senior Judges and Judges.

Article 19 Grades of judges shall be determined on the basis of their posts, their actual working ability and political integrity, their professional competence, their achievements in judicial work and their seniority.

Article 20 The grades of judges shall be established and the measures for their evaluation and promotion shall be formulated separately by the State.

#### **CHAPTER VIII APPRAISAL**

Article 21 Appraisal of judges shall be conducted by the People's Courts the judges belong to.

Article 22 The appraisal of judges shall be carried out objectively and impartially, through the combined efforts of the leaders and masses, and routinely and annually.

Article 23 The appraisal of judges shall include their achievements in judicial work, their ideological level and moral characters, their competence in judicial work and their mastery of law theories, their

attitude in and style of work. However, emphasis shall be laid on the achievements in judicial work.

Article 24 The results of the annual appraisal shall fall into three grades: excellent, competent and incompetent.

The result of appraisal shall be taken as the basis for award, punishment, training, removal or dismissal of a judge, and for readjustment of his or her grade and salary.

Article 25 A judge shall be informed of the result of the appraisal in written form. If the judge disagrees with the result, he or she may apply for reconsideration.

## **CHAPTER IX TRAINING**

Article 26 Theoretical and professional training for judges shall be carried out in a planned way.

The principles of integrating theory with practice, giving lectures in light of 'the needs, and emphasizing practical results shall be applied in the training of judges.

Article 27 The judges colleges and universities of the State and other institutions for training judges shall, in accordance with the relevant regulations, undertake the task of training judges.

Article 28 The results of the studies of judges and the appraisals made during their training shall be taken as one of the bases for their appointment and promotion.

## **CHAPTER X AWARDS**

Article 29 Judges who have made significant achievements and contributions in judicial work, or performed other outstanding deeds shall be rewarded.

The principle of combining moral encouragement with material reward shall be applied in rewarding judges.

Article 30 Judges who have any of the following achievements to their credit shall be rewarded:

(1) having achieved notable successes in enforcing laws and handling cases impartially;

## **JUDGES LAW**

(2) having accumulated rich experience in judicial practice that may serve as a guide in judicial work;

(3) having made proposals for the reform of judicial work that have been adopted and have produced remarkable results;

(4) having performed outstanding deeds in safeguarding the interests of the State, the collective and the people against heavy losses;

(5) having performed outstanding deeds by bravely fighting against illegal or criminal acts;

(6) having made judicial proposals that have been adopted, and have produced remarkable results, or having scored outstanding successes in publicizing the importance of the legal system and guiding the work of the people's mediation committees;

(7) having scored outstanding achievements in protecting State secrets and secrets of judicial work; or

(8) having performed other meritorious deeds.

Article 31 The awards include: Citation for Meritorious Deeds, Merit Citation Class III, Merit Citation Class II, Merit Citation Class I, and a title of honour.

The awards shall be authorized and procedures gone through in accordance with the relevant regulations.

## **CHAPTER XI PUNISHMENT**

Article 32 No judges may commit any of the following acts:

- (1) to spread statements damaging the prestige of the State; to join illegal organizations; to take part in such activities as assembly, procession and demonstration against the State; and to participate in strikes;
- (2) to embezzle money or accept bribes;
- (3) to bend law for personal gain;
- (4) to extort confessions by torture;
- (5) to conceal or falsify evidence;
- (6) to divulge State secrets or secrets of judicial work;
- (7) to abuse functions and powers; and to infringe upon the legitimate rights and interests of natural persons, legal persons or other organizations;
- (8) to neglect his or her duty so as to wrongly judge a case or to cause heavy losses to the party concerned;
- (9) to delay the handling of a case so as to affect the work adversely;
- (10) to take advantage of the functions and powers to seek gain for himself or herself or other people;
- (11) to engage in profit-making activities;
- (12) to meet the party concerned or his or her agent without authorization and attend dinners or accept presents given by the party concerned or his or her agent; or
- (13) to commit other acts in violation of law or discipline.

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Article 33 A judge who has committed any of the acts listed in Article 30 of this Law shall be given sanctions; if the case constitutes a crime, he or she shall be investigated for criminal responsibility.

Article 34 Sanctions include a disciplinary warning, a demerit recorded, a grave demerit recorded, demotion, dismissal from the post and discharge from public employment.

The salary of a judge who has been dismissed from the post shall at the same time be reduced and his or her grade be demoted.

Article 35 A sanction shall be authorized and procedures gone through in accordance with the relevant regulations

## **CHAPTER XII SALARY, INSURANCE AND WELFARE**

Article 36 The salary system and scales for judges shall, in light of the characteristics of judicial work, be formulated by the State.



Article 37 The system under which the salaries of judges are increased regularly shall be practiced. The salary of a judge who has been confirmed through appraisal as being excellent or competent may be raised in accordance with the regulations; the salary of a judge who has made special contributions may be raised in advance in accordance with regulations.

Article 38 Judges shall enjoy judicial allowances, regional allowances and other allowances and insurance and welfare benefits as prescribed by the State.

### **CHAPTER XIII RESIGNATION AND DISMISSAL**

Article 39 If a judge requests resignation, he or she shall present an application in written form before he or she shall be removed in accordance with the procedures as provided by law.

Article 40 A judge shall be dismissed if he or she is found to be in any of the following circumstances:

- (1) to be confirmed by annual appraisal as being incompetent for two successive years;
- (2) to be unqualified for the present post and decline to accept other assignments;
- (3) to refuse to accept reasonable transfer, which is necessitated by restructuring of the judicial organ or reduction of the size of the staff;
- (4) to have stayed away from work without leave or to have overstayed his or her leave for fifteen days or more in succession, or for thirty days or more in a year aggregated; or
- (5) to fail to perform a judge's duty, and make no rectification after criticism.

Article 41 A judge who is dismissed shall be removed from the post in accordance with the procedures as provided by law.

### **CHAPTER XIV RETIREMENT**

Article 42 The retirement system regarding judges shall, in light of the characteristics of judicial work, be formulated separately by the State.

Article 43 After retirement judges shall enjoy the insurance of old age pension and other benefits as prescribed by the State.

### **CHAPTER XV PETITION AND COMPLAINT**

Article 44 If a judge disagrees with the sanction or other disciplinary action given to him or her by a People's Court, he or she may, within thirty days from the date of receiving the decision on the sanction or other disciplinary action, apply for reconsideration to the organ which handled

### **JUDGES LAW**

the case and shall have the right to appeal to the organ at a level higher than the organ which handled the case.

The organ that receives the appeal must make a decision on it in accordance with regulations.

Execution of a decision on a sanction or other disciplinary action given to a judge shall not be suspended during the period of reconsideration or petition.

Article 45 If a State organ or any of its functionaries commits an act infringing upon the rights of a judge as provided by Article 8 of this Law, the judge shall have the right to make a complaint.

If an administrative organ, a public organization or an individual interferes in a case that a judge is trying according to law, that organ, organization or individual shall be investigated for responsibility according to law.

Article 46 The petition or complaint made by a judge shall be true to facts. If a judge makes up a story or lodges a false accusation against an innocent person, he or she shall be investigated for responsibility according to law.

Article 47 Where a sanction or other disciplinary action given to a judge is wrong, it shall be put right without delay; if it has damaged the judge's reputation, the reputation shall be rehabilitated, the ill effects shall be eliminated and an apology shall be made; if it has caused financial losses to the judge, compensations shall be made. The persons who are directly responsible for retaliation shall be investigated for responsibility according to law.

#### **CHAPTER XVI COMMISSION FOR EXAMINATION AND ASSESSMENT OF JUDGES**

Article 48 A People's Court shall establish a commission for examination and assessment of judges.

The functions and duties of a commission for examination and assessment of judges are to guide the training, examination, appraisal and assessment of judges. Specific measures therefor shall be formulated separately.

Article 49 The number of persons on a commission for examination and assessment of judges shall be five to nine.

The chairman of a commission for examination and assessment of judges shall be assumed by the president of the court it belongs to.

#### **CHAPTER XVII SUPPLEMENTARY PROVISIONS**

Article 50 The Supreme Court shall, according to the requirement of judicial work, formulate together with other departments measures on manning quotas of judges of People's Courts at various levels.

Article 51 The State organizes uniform judicial examinations on persons to be judges and prosecutors for the first time and for lawyer's qualification certificate. Measures for implementing the judicial examination shall be formulated by the judicial administrative department of the State Council together with the Supreme People's Court and the Supreme People's Procuratorate.

Article 52 The executors of the People's Courts shall be administered with reference to the relevant provisions of this Law.

Measures for the administration of the clerks of the People's Courts shall be formulated by the Supreme People's Court.

The, administrative judicial personnel of the People's Courts shall be administered in accordance with the relevant regulations of the State.

Article 53 This Law shall come into force as of July 1, 1995.

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## Convergence and the Judicial Role: Recent Developments in China

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE CHINA EDUCATION CENTRE, UNIVERSITY OF SYDNEY  
11 JULY 2002  
CONVERGENCE AND THE JUDICIAL ROLE:  
RECENT DEVELOPMENTS IN CHINA**

The XVIth Congress of the International Academy of Comparative Law will be held in Brisbane commencing this weekend. The general theme of the Congress is "Convergence of Legal Systems in the 21st Century". Professor Gabriel Moens, Professor of Law at the University of Queensland and chair of the Congress, referred to the theme in the context of recent comparative law literature in the following terms:

"One idea that figures prominently in the relevant comparative law literature concerns an observable tendency of the world's legal families to embrace a common intellectual framework for the consideration and resolution of current problems."

The extent, if any, to which China can now be said to adopt such a "common intellectual framework" is a matter of great significance.

At the level of form and rhetoric, change in the Chinese legal system since 1978 has been nothing short of revolutionary. At the level of practice, change is palpable, but its present significance and prognosis are extremely difficult to assess. There are elements of this development which it is appropriate to analyse in terms of "convergence".

At the time the reforms commenced, China had just emerged from the calamitous years of the Cultural Revolution, during which nothing that could be described as a legal system had been permitted to survive. Although there were some personnel from the previous system that could be drawn on, the era of the Four Modernisations required the reconstruction of legal institutions, virtually from scratch.

There are many aspects of the multifaceted process often described as "globalisation" which manifest the spread of concepts commonly ascribed to the West. Perhaps, none has been more significant than what has been called "the rule of law revival" [1]. The dramatic quality of what is now being contemplated and even attempted in this respect in China, is emphasised by the fact that neither in the previous thirty year history of the People's Republic of China, nor, even more significantly, in the millennia of prior tradition of China's long civilisation, was there an institutional model anything like the rule of law administered by an independent judiciary.

The Chinese tradition preferred the rule of man to the rule of law. It is well expressed in one of the aphorisms attributed to Confucius:

"I could adjudicate law suits as well as anyone. But I would prefer to make law suits unnecessary."

Accordingly, an Imperial administrator who had efficiently disposed of a huge caseload would not have received any accolade. Rather, his competence would be questioned for allowing so much contentiousness to exist on his patch. The great Australian sinologist of Belgian origin, Pierre Rykmans, who writes under the pseudonym of Simon Leys, explained this tradition in annotations to his translation of the *Analects of Confucius*:

"... When a nation needs to be ruled by a plethora of new laws, by a proliferation of minute regulations, amendments, and amendments of amendments, usually it is because it has lost its basic values and is no longer bound by common

traditions and civilised conventions. For a society, compulsive law making and constant judicial intervention are a symptom of moral illness." [2]

In this respect, contemporary China has converged with the West.

A rival philosophical tradition in China, known as the Legalists, emphasised severe law and harsh punishments, on the basis of what, in the West, would be regarded as a Hobbesian view of the world. This authoritarian tradition is not a forerunner of a rule of law philosophy. It is *rule by law*, rather than the *rule of law*. [3]

The Chinese tradition never developed a concept similar to the rule of law. Nor did any institution emerge which could be considered to be an independent judiciary. Local prefects operated in a context in which the execution and enforcement of the law and dispute resolution were part of an undifferentiated governmental function. There was, in short, nothing analogous to a separation of powers, nor even of separate institutions sharing power.

The attempt to establish a separate judiciary during the Nationalist era proved of no long-term significance, other than in Taiwan. In the People's Republic of China, the period of Party rule prior to the Cultural Revolution, did lead to the emergence of a separate institution in the form of a hierarchical court structure, based in large measure on Soviet experience. This tradition has proven to be of longer-term significance as a partial model for reconstruction after the end of the Cultural Revolution.

Article 78 of the Constitution of the People's Republic adopted in 1954, stated that "people's courts shall conduct adjudication independently and shall be subject only to the law". Like the famous 1936 Constitution of the USSR, Article 78 did not reflect actual practice. Party control of judicial decision-making at all levels prevented the emergence of an independent judiciary. Whatever development may originally have been intended, party control extending to the disposition of specific cases, was decisively reasserted during the Anti-Rightist Movement of 1957 and 1958. [4]

### **The Stimulus of Economic Reform**

The transformation of the Chinese economy over the last two decades has been extraordinary. The transformation of its legal system has been equally extraordinary. There is no doubt that legal reform has been driven by economic reform. [5]

The linkage recognises the strategic role of the law and of the legal system in sustaining economic progress. The objective is said to be the creation of "a socialist market economy".

Markets in a face-to-face sense - like an Oriental bazaar or a Mediterranean rialto - have existed under all systems of government and law. However, a market economy is a rare phenomenon. Only certain kinds of society, governmental structure and legal system have been able to sustain a market economy. A market economy is not a force of nature. It is a human construct. More than anything else, a successful market economy is the product of good government and of the law. In the Town Hall of Siena, there are two wonderful frescos by Lorenzetti: Allegories of Good and of Bad Government. Even a cursory glance at the latter, with its depiction of decay and chaos, will convince anyone that without law, there can be no market system. [6]

An important motive for reform has been the, now completed accession of China to the World Trade Organisation. The ability of other nations to obtain the benefits of trade agreements depends on domestic compliance with the obligations imposed by such agreements. This is obviously so with respect to the administration of customs matters, but it is also true with respect to a wide range of potential interference with trade in the course of warehousing, distribution, transportation, insurance, transfer payments and various forms of regulation e.g. health.

An obligation to provide an independent judiciary has long existed in Article X of the General Agreement on Tariffs and Trade 1947, now administered by the WTO, albeit expressed in the language of obfuscation, so common a product of the compromises involved in treaty negotiation. The GATT contains an express obligation to publish all relevant laws, including "judicial decisions". There is also an express obligation to administer such laws "in a uniform impartial and reasonable manner" and to create or maintain judicial tribunals for "the proper review and correction of administrative action" in a sphere described as "relating to customs matters", but expressed to extend "inter alia", whatever that might mean. [7]

Although the focus of these obligations is on trade-related activity, the institutional implications cannot readily be restricted to such decision-making. The scope of legal issues capable of impinging upon trade cannot be, and is not, narrowly confined.

These issues were of considerable concern in the process of negotiating China's accession to the WTO. The final Protocol for the Accession of the People's Republic of China to the WTO included obligations for the publication and enforcement of "all laws, regulations and other measures pertaining to or affecting trading goods, services, TRIPS or the control of foreign exchange". [8] The specific obligation with respect to judicial review is in the following terms:

"China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rulings of general application referred to in Article X:1 of the GATT 1994, Article 1 VI of the GATS and the relevant provisions of the TRIPS Agreement. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of a matter." [9]

The Chinese accession to the WTO was based on a Report of a Working Party which commented on issues raised in relation to judicial review as follows:

"The representative of China confirmed that it would revise its relevant rules and regulations so that its relevant domestic rules and regulations would be consistent with the requirements of the WTO Agreement and the Draft Protocol on procedures for judicial review of administrative action. He further stated that the tribunals responsible for such reviews would be impartial and independent of the agency entrusted with the administrative enforcement and would not have any substantial interest in the outcome of the matter." [10]

## **A Legislative Explosion**

A critical component of the process of legal reform has been a formidable body of new statute law. The Criminal Law and the Criminal Procedure Law of 1979 were the first codes promulgated in China since the abrogation of the six Nationalist Codes in 1949. Thereafter, there was enacted the Economic Contract Law of 1981, with substantial revision in 1993. It was replaced by the Contract Law of 1999. The General Principles of Civil Law of 1986 is a codification of large part of civil law. A body of administrative law was adopted in the Administrative Litigation Law of 1990. Regulatory procedures were harmonised in the Administrative Punishment Law of 1996. In 1994, the State Indemnity Law established the possibility of suing government agencies. The Law on Lawyers of 1996 legitimised and regulated a private legal profession. This is only the tip of the iceberg of legislation in what has accurately been described as a "legislative explosion". [11]

The primary model was that of the civilian system. A detailed review of these Codes, I am sure, would identify numerous matters to which the label of "convergence" could properly be applied. The General Principles of Civil Law is derived from the German Civil Code. European law, rather than Anglo-American common law, was the model adopted in the six Nationalist Codes about 90 years ago and that has re-emerged. As one author noted in 1989: [12]

"... virtually the whole technical and conceptual language of Chinese law is translated from European ideas".

More recently some influences from the common law tradition have emerged. Amendment to the General Principles of Civil Law in 1991 changed the duty of the court to collect evidence and transferred the primary burden to the parties to litigation. Trial procedures were amended to become more adversarial and less inquisitorial. New rules of evidence were introduced. [13] Amendments to the Criminal Procedure law in 1996 introduced adversary elements to the fact-finding process in

criminal trials. [14]

For a nation in which, not much more than half a century ago, there were foreign enclaves ruled on principles of "extraterritoriality", imposed by force but justified on the basis of the absence of a legal system in China, this body of statute law enacted in a period of about two decades, represents an extraordinary achievement. The issue, of course, is one of enforcement.

This issue gives rise to two distinct matters. The first is the role, and authority of the judiciary, on which I will focus in this paper. The second, and in many respects the more difficult matter, is the enforcement of judicial orders and awards. Difficulty of enforcement of judicial orders is, on the basis of my contact with Chinese judges, a matter of great concern to the Chinese judiciary. It is, however, beyond the scope of this paper.

### **The Rule of Law**

The idea of 'the rule of law' has played a prominent part in Chinese debate over the last two decades. Although long established in Western discourse, the concept has a chameleon-like quality. [15] It is understandable that in Chinese debate, the terminology translated as 'the rule of law' is not always used in the same sense as the words would be used in the West. [16] The debate over the rule of law culminated in a formal commitment to something like this terminology in 1997 at the XVIth National Congress of the Communist Party of China.

Article 5 of the Constitution of the People's Republic of China was formally amended in March 1999 at the Second Session of the Ninth National People's Congress by adding the following sentence, in the translation available on the website of the Ministry of Foreign Trade and Economic Cooperation. [17]

"The People's Republic of China governs the country according to law and makes it a socialist country ruled by law."

Unofficial translations by academic commentators of the term *fazhi guojia* refer to a "socialist rule-of-law state". [18] That is not necessarily the same as a "socialist country ruled by law", in an official translation. It is not clear that a *Rechtsstaat* is what is intended.

The process that culminated in the constitutional amendment to Article 5 began with a public address in February 1996 by Jiang Zemin, in which he used a four-character slogan generally translated as "govern the country according to law". That formulation is found in the new Article 5. However, in Jiang's address, this terminology formed part of a sentence in which his reference to the law was counterbalanced by the phrase "protect the nation's long-term peace and stability". The terminology of "stability" is often an indirect reference for the continuation of control by the Party. [19]

There remains considerable ambiguity as to the sense in which the terminology of the new Article 5 is to be understood. It may be closer to *rule by law*, rather than *rule of law*. [20] Nevertheless, there is now a substantial Chinese legal literature which propounds the rule of law to be the true intent of the reforms. [21]

There is a basic tension between the idea of the rule of law and other aspects of the Constitution which still reflect an alternative principle that the law must serve the party State.

Article 1 of the Constitution continues to state:

"The People's Republic of China is a socialist State under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."

A socialist system is the basic system of the People's Republic of China. Disruption of a socialist State by any organisation or individual is prohibited."

As one author notes:

"These two principles have co-existed uncomfortably since the inception of legal reform." [22]

Tension between the rule of law and other organising principles of governance is not, however, unique to China. The proper scope of judicial authority in the West, for example in debates over the divine rights of kings and Parliamentary supremacy, have waxed and waned in Western nations over many centuries. These debates continue today in such contexts as judicial review and bills of rights. The issue is one of balance as a matter of substance, not form.

### Judicial Independence

In China, the relationship between the Party and the courts remains a critical issue. The prior tradition permitted party intervention in the judicial process by the examination and approval of individual cases by party cadres, a system referred to as *shuji pian*. [23] One of the first clear indications of the reform process was the instruction by the Central Committee of the Party in September 1979 abolishing this system. [24]

However, the Constitution adopted in 1982 reflects the continued tension.

On the one hand, the Preamble to the Constitution refers more than once to "the leadership of the Communist Party" and Article 3 states:

"All administrative, judicial and procuratorial organs of the State are created by the people's congresses to which they are responsible and by which they are supervised."

On the other hand, Article 5 provides:

"All State organs, the armed forces, all political parties and public organisations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated.

No organisation or individual is privileged to be beyond the Constitution or of the law."

At the level of rhetoric, something not dissimilar to a Western conception of judicial independence has emerged over the last two decades. At the very least, direct intervention by the Party in the adjudication process is no longer regarded as legitimate.

The steps that have been taken to strengthen the Chinese judiciary as a separate institution are such as to suggest that real change is intended. The independence of the judiciary from other functions of government is not a matter capable of description with absolute precision. There are questions of degree involved.

The difficulty in the case of China is the reconciliation of an independent judiciary with the maintenance of an official ideology, which appears inconsistent with any level of independence. The State is still said to be founded on the Four Cardinal Principles, namely adherence to the socialist road, the people's democratic dictatorship, Marxism-Leninism and Mao Zedong Thought (with the recent addition of Deng Xiaoping Theory) and the leading role of the Communist Party of China. Nevertheless, some degree of institutional differentiation has appeared, even if it does not constitute a strict separation of powers. The process will obviously take time. This is not unprecedented.

English legal history is, in large measure, derived from an analogous unified concept of the State, encompassed in the idea of the Crown. In English history, the Crown also played a "leading role". It took centuries for the Crown to be clearly divided into its three manifestations. First, as the embodiment of justice in the legal system; secondly, as the executive, and thirdly, as one component part of the legislature. I am not suggesting that the Secretary-General of the Communist Party of China is on the way to becoming some kind of constitutional monarch. I am simply noting that substantial institutional differentiation is possible within a unifying concept. We could not expect that what took centuries to achieve in England, would be done within two decades in China.

The tradition of judicial independence with which we are familiar in Australia extends beyond

independence from external interference to encompass independence from other judges. This is alien to Chinese practice in which a panel of judges in a particular case is expected to consult within the court. Many cases are, in substance, decided by the court leadership rather than the panel. [25] Steps have been taken to limit this practice but this appears to be driven more by economy and efficiency than by any principle of independence. [26] In our tradition, the personal independence of the individual judge is a recognition of professional autonomy.

A tradition of judicial independence depends on the background, quality, training and cast of mind of the judges and on their sense of collegiality. Just over two decades ago, China had no institutionalised judiciary and no judges. It now has something of the order of 30,000 superior judges and 180,000 lower court judges. Inevitably, a very substantial proportion of those who have been appointed have not had appropriate training or background. As I understand the position, a majority are retired officers of the People's Liberation Army. In 1982, the then recently re-established Ministry of Justice, announced that 57,000 "outstanding army officers" were being assigned to the court system. [27] The ingrained mode of decision-making of such recruits was not instinctively such as we would call "judicial". In recent years, determined efforts have been made to change the quality of the judiciary in terms of qualifications, competence, cast of mind and collegiality.

### **The Judges Law**

In 1995, the Standing Committee of the Eighth National People's Congress adopted a new Judges' Law of the People's Republic of China. This was subsequently amended at the Ninth National People's Congress in June 2001. The objective of the law was stated in Article 1 as follows:

"This law is enacted in accordance with the Constitution to enhance the quality of judges, to strengthen the administration of judges, and to ensure that the people's courts independently exercise judicial authority according to law and that judges perform their functions and duties according to the law, and to safeguard judicial justice."

The Judges Law identifies the functions and duties of the judiciary, makes provision for what was described as "rights", including restrictions on interference with judicial functions. It makes express provision for appointment and removal, establishes qualifications, regulates certain conflicts of interests and provides for rewards and discipline. Of particular significance is the requirement for practical training and education as qualifications for appointment as a judge. Only a small proportion of the judges had such qualifications when appointed. In the discussions in which I and other Australian judges have participated, both in China and also with visiting delegations to Australia, it is accepted that it will be some years before the judiciary of China reflects the aspirations laid down in the Judges' Law.

### **Code of Judicial Ethics**

My own interest in, and a substantial proportion of my knowledge of, recent developments in the Chinese judiciary, is based on a visit to China I made last November as one of a team of four Australian judges to lecture at a training course for Chinese judges at the National Judges' College in Beijing. This visit was organised by the Human Rights and Equal Opportunity Commission (HREOC) as part of an intergovernmental programme called the Human Rights Technical Co-operation Programme. [28]

Our task was to lecture on judicial independence and judicial ethics. As events transpired, only a fortnight before our visit, on 18 October 2001, the Judicial Committee of the Supreme People's Court of China had promulgated, for the first time, a Code of Judicial Ethics for judges in the People's Republic. This provided a focal point for our presentation. We participated in the first training session for Chinese judges with respect to the new Code. Our audience consisted of about one hundred intermediate court level judges, in Australian terms, roughly equivalent to a District Court.

The Code of Ethics is an exemplary document. The new Code asserts a number of fundamental principles of judicial conduct:

- Both the fact of and the appearance of impartiality.
- No extraneous interference or influence.



- Disqualification if impartiality might reasonably be questioned.
- Treatment of all parties equally in word and deed.
- A duty to state reasons for judgment.
- No commentary on other cases, including appeals.
- Conduct of cases efficiently and within time limits.
- Case management to avoid unnecessary delay.
- A ban on inducements, gifts, conflicts.
- Observing proper decorum.
- Continuing education.
- Restriction on extra-judicial and post retirement activities.

The new Code of Judicial Ethics represents one part of a systematic effort to improve the quality of judicial decision-making in China. The overall picture is one which suggests that China is in the middle of a very serious effort to establish the judiciary as a separate institution of considerable strength.

### **Towards Institutional Autonomy**

A substantial body of men and women in the Chinese judiciary are actively engaged in this process of institutionalisation. It is not possible to determine the extent to which the growing appearance of institutional autonomy reflects the reality. Although future success cannot be stated with any degree of certainty, it is plainly a serious endeavour. Steps are also being taken to address the traditional low status of judges. I am not aware of the debate that is probably going on internally about the low level of remuneration. Once that becomes a primary focus for concern, Western judges will experience a real sense of convergence.

Only a week ago, the Chief Justice of China announced a new series of measures directed to improving the quality of the judiciary. He indicated that all new judges would have to pass exams and receive special training. Existing judges without a law degree would be required to obtain one within a fixed time. I assume this applies only to senior judges, but it may go further. The present practice by which clerks could be promoted to become judges after a certain number of years is to change. In making the announcement, the Chief Justice Xiao Yang said:

"Courts have often been taken as branches of the government and judges viewed as civil servants who have to follow orders from superiors, which prevents them from exercising mandated legal duties like other members of the judiciary."

He meant, I think, the judiciary outside China, a revealing perspective in itself.

The Chief Justice added that professional judges would:

"... form a chosen group of elites who speak the same legal language, think in a unique legal formula, believe in and pursue social justice."

The Chief Justice predicted:

"Over the years, unique professional traditions and qualities come into being, which will give judges the strength and the power to ward off outside interferences." [29]

The sentiments are, of course, exemplary. The Chief Justice of China was correct to describe this ambition as a "huge system engineering project". It appears designed to create the reality and appearance of institutional autonomy.

The seriousness of the effort is clear from the level of interest and intensity of questioning that I have experienced from visiting Chinese delegations to Sydney and also during the training course in which I participated in Beijing. That course included four lectures from Australian judges and addresses by a number of Chinese judges and legal academics. The training course was based on a volume of materials made available in both English and Chinese. The primary focus was the Code of Judicial Ethics, then some two weeks old. The training materials included a copy of that new Code and of the

Judges' Law of China. It also included, in Chinese and English, the Judiciary Act of Germany, the Judges' Act of Canada, the Judges' Status Law of Russia and, the codes of conduct for judges from the United States, Canada, Italy and the American Bar Association Model Code. It also included the resolution adopted in Milan in September 1985 by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders entitled "The Basic Principles on the Independence of the Judiciary". It did not, however, include a copy of the Beijing Statement of Principles of the Independence of the Judiciary, issued in Beijing on 19 August 1995 and amended in Manila on 28 August 1997, which has been signed by thirty-two Chief Justices of the Asia and Pacific region, including on behalf of the President of the Supreme People's Court of the People's Republic of China. Nevertheless, that was a document to which the Australian judges made reference in the course of our addresses.

An extensive programme of training of judges has been instituted. The National Judicial College was established in Beijing. It conducts residential training of senior judges. There is also a well funded programme encouraging contact with legal systems throughout the world. Delegations of Chinese judges now frequently travel abroad. In the Supreme Court of New South Wales, we now receive up to a dozen delegations a year. This appears to be part of a programme to broaden the perspective of the Chinese judiciary.

A large number of delegations of foreign judges have attended conferences and seminars of Chinese judges, including at the National Judicial College. These have been welcomed at a very high level in China. Late last year a delegation to a seminar of the Supreme People's Court in Beijing, included a judge of the New South Wales Court of Appeal, a judge of the Bundesgerichtshof, the President of the Tribunal Grande Instance Quimper and the Dean of the Law School at Montreal University in Canada. The delegation was welcomed by Li Peng, Chairman of the Standing Committee of the People's Congress and Xiao Yang, the Chief Justice of China. There is no doubt that the programme of judicial reform has support at the highest level.

Of particular significance for the establishment of a tradition of judicial independence is the sense of collegiality amongst the judiciary. This has been fostered in a number of ways as the recent speech of the Chief Justice I have quoted suggests.

Just over a year ago, a new uniform was adopted by the Chinese judiciary, replacing the former uniform with its epaulette and caps, reflecting the military origins of most of the judiciary. The announcement said that the uniform introduced in 1984 looked military and "did not reflect the unique social role of judges". [30] The new dress is a black robe with four yellow buttons on the red front of the robe, the same colours as the National flag. The four buttons represent the four levels of courts in the Chinese hierarchy. The judges are subject to sumptuary laws, requiring them to wear business suits to work - black suits, but grey in summer - with a badge in the right lapel.

Of similar symbolic significance was the appointment earlier this year of forty-one "grand justices", together with a similar number of "grand procurators". This is a new professional title. It appears that those appointed will have a role in resolving complaints about the judiciary. [31]

## **Prospect**

China has an extraordinarily long tradition of beguiling Westerners and deceiving them about how things are working in practice. My own first visit to China was in 1974 as part of the entourage of E.G. Whitlam, then Prime Minister. The public appearance was of sweetness and harmony. However, the Gang of Four was still in control and unspeakable things were happening behind the scenes.

You will permit a historical interlude. The welcoming party for the Australian delegation at Beijing Airport was led by Zhou Enlai. As the Australian jet was approaching, Zhou sought out and warmly greeted a slight figure in the line up. It was Deng Xiaoping. This was the first time that Deng had been seen in public for many years. In retrospect, this public rehabilitation was a moment of monumental significance.

The authority of the courts in China, particularly vis a vis the party, government departments, the military (and their various commercial offshoots) and also vis a vis other parts of the justice system, such as the Procurate, remains problematic. Nevertheless, there do appear to have been significant changes.

The transparency of the judicial process has also increased, although it is too early to say how far the

principle of open justice will be adopted. However, one author observes:

"The main function of a public trial is changing from a method to educate people to abide by law to a means of public supervision of judicial performance". [32]

I have been impressed by the spirit of candour with which the Chinese judges approach their training tasks, both at the National Judicial College in Beijing and in the delegations that visit Sydney. The Chinese judges engage in vigorous dialogue and questioning. They openly acknowledge the problem of corruption within the judiciary and also the existence of limits on the freedom of discussion in which they can openly engage, although plainly those limits as set much wider than had hitherto been the case.

An element of defensiveness is apparent amongst some Chinese judges. Some regard the new requirements as an impediment to the efficient conduct of the courts. It is plain that many regard the new obligation contained in the Code of Ethics to provide reasons for decision as detracting from what they regard to be an efficient system. Many do not see the point of giving reasons, an understandable belief for those originally trained in the People's Liberation Army. Some judges express doubts about the value of impartiality.

I am not able to separate rhetoric from reality, in order to assess the true extent of judicial independence in prospect. It is plain that there are limits to the Party's preparedness to surrender power, but the boundary is not clear. It may be that the most distinctive characteristic of the Chinese authoritarian tradition is that the boundary of permissible behaviour is left deliberately vague. In many cases, vagueness encourages timidity and risk aversion. Clear rules often identify possibilities of evasion and permit risk assessment.

Whatever the future may hold, no lawyer could regard the recent reforms as anything but a positive development. However, our own tradition strongly suggests that true institutional autonomy requires some form of judicial tenure. That does not exist in China. Nor am I aware that it is in contemplation. Furthermore, the traditional style of adjudication and the relationship of judges amongst themselves have a bureaucratic quality which does not reflect a sense of professional independence. [33]

The progress already made is impressive. Convergence, however, remains partial.

### **A Chinese Model**

The ideas of the rule of law and of judicial independence are drawn from the West. I am not sufficiently familiar with the Chinese legal literature to know what, if any, reliance is being placed on Chinese tradition. There is at least one role model for judges in that tradition.

Bao Zheng, known as Bao Gong, born at the turn of the millennium in 999 was an outstanding government official of the Northern Song Dynasty. He is a popular character in Chinese opera, in which he is portrayed with a black face. As I understand it, in Chinese opera a black face may indicate either a rough and bold character or an impartial and selfless personality. It is the latter that applies to Bao Gong. He is known for dispensing justice without fear or favour and with such impartiality, that he punished the son-in-law of the Emperor, the uncle of a high ranked imperial concubine, and many government officials. The Chinese judiciary does not have to look to the West for a role model of judicial independence, integrity and impartiality. [34]

1 Thomas Carothers "The Rule of Law Revival" *Foreign Affairs*, March/April 1998.

2 Simon Leys (Trans) *The Analects of Confucius*, W.W. Norton, 1997 at fn 176.

3 Eric W. Orts "The Rule of Law in China" 2001, 34 *Vanderbilt Journal of Transnational Law*, 43 esp at 52-55; Albert H.Y. Chen "Towards a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law" 2000, 17 *UCLA Pacific Basin Law Journal* 125 at 129-130; John K. Fairbank and Edwin O. Reischauer, *China: Tradition and Transformation* Revised Edition 1989 at 43-54.

4 See Jerome A. Cohen *The Chinese Communist Party and 'Judicial Independence': 1949-1959* (1969) 82 *Harvard Law Review* 967; Larry Smeets "Judicial Independence in the People's Republic of China" (1992) 8 *Australian Journal of Law and Society* 60.

5 See Stanley Lubman *Birds in a Cage: Legal Reform in China After Mao*, Stanford University Press, 1999 esp Chapter 5.

6 Quentin Skinner "Legal Symbolism in Earlier Renaissance Art: Ambrogio Lorenzetti's Frescos in Siena" 1994, *The Cambrian Law Review* 9.

7 *General Agreement on Tariffs and Trade*, 1947 Article X, sub-articles 1, 3(a) and (b).

8 *Protocol on the Accession of the People's Republic of China*, Part 1.2C Transparency.

9 *Protocol on the Accession of the People's Republic of China*, Part 1.2D Judicial Review.

10 "Report of the Working Party on the Accession of China" World Trade Organisation, 1 October 2001.

11 Lubman supra at 173. Lubman has outlined the new legislation esp at 160-168 and 175-183; see also Anthony Dicks "The Chinese Legal System: Reforms in the Balance" 1989 *China Q* 540 at 550-560, 568-569.

12 Dicks supra at 560. See also Perry Keller "Sources of Order in Chinese Law" (1994) 42 *Amer J. of Comparative L.* 711 at 717-719.

13 Xian Chu Zhang "China Law" (1999) *The International Lawyer* 677 at 689..

14 Wang supra at p11.

15 See Keith Mason "The Rule of Law" in P.D. Finn (ed) *Essays on Law and Government: Volume 1 Principles and Values*, Law Book Company Sydney 1995 at 114.

16 See Chen, supra passim; Orts supra esp at 74-77, 106-110; Wang, "The Developing Rule of Law in China" *Harvard Asia Quarterly*, Autumn 2000 (accessible at [www.fas.harvard.edu](http://www.fas.harvard.edu)); Lubman supra esp at 123-131.

17 [http://www.moftec.gov.cn/moftec\\_en](http://www.moftec.gov.cn/moftec_en)

18 See Orts supra at 45 fn 5, Chen supra at 128.

19 Lubman supra at 128-130.

20 Orts supra at 48.

21 Chen supra reviews the literature.

22 Lubman supra at 123.

23 Smeets supra at 70.

24 Smeets supra at 75.

25 See Lubman supra 260-262.

26 See for example the observations of the Chief Justice of China in *China Daily* 3 March 2001.

27 Jonathan D. Spence *The Search for Modern China* Hutchinson, London 1990 p708.

28 I have reviewed this visit in my Address to the Law and Justice Foundation "Law and Justice Address" 2002, 11 *Journal of Judicial Administration* 123.

29 See *China Daily* 8 July 2002; *People's Daily* 8 July 2002; *Sydney Morning Herald* 9 July 2002.

30 *China Daily* 9 March 2000.

31 *China Daily* 23 March 2002.

32 Zhang *supra* at 692.

33 Lubman *supra* at 292-297.

34 On Bao Gong see <http://chinese.culture.about.com/library/weekly/aa110200.bfm>,  
<http://www.c35.org.sg/local/great/baogong.html>, <http://www.chinavista.com/experience/face/face/html>

## **Attachments**

### **The Code of Judicial Ethics for Judges of the People's Republic of China**

#### **Foreword**

To train a group of high-quality judges with firm political position, professional conversance, good conduct and honesty is an important condition for the rule of law and the construction of a socialist country ruled by law and is also an important safeguard for the people's court to implement the Constitution and exercise judicial functions. The high standard judicial ethics of judges is very important to ensure judicial impartiality and to protect the authority and dignity of the Judiciary. This code is enacted in accordance with the Judges Law of the People's Republic of China and other relevant regulations to regulate and improve the standard of judicial ethics for judges, to enhance the professional quality of judges and maintain the good image of judges and the people's court.

#### **Chapter I Safeguard Judicial Impartiality**

**Article 1.** A judge should strive to achieve substantial impartiality and procedural impartiality in performing his duties. A judge should appear to be impartial through his words and conduct so as to avoid any reasonable doubt from the public upon judicial impartiality.

**Article 2.** A judge should perform his duties in accordance with the Constitution and other laws and on the principle of judicial independence. A judge should perform his duties with no interference from administrative departments, social organizations or individuals and no influence other than the influence from laws.

**Article 3.** During the trial process the judge shall abide by recusal principle. A judge shall disqualify himself in a lawsuit in which the judge's impartiality might reasonably be questioned.

**Article 4.** A judge should resist the influence from the parties, attorney, defendants and other people or through their social contacts and should handle the situation according to relevant regulations

**Article 5.** A judge should not, against the will of the parties, use improper means to force the parties to withdraw the proceeding or accept mediation.

**Article 6.** A judge should make all the judgements openly and objectively and accept the supervision from the public. This proscription does not extend to the cases cannot be opened or cannot have an open trial according to law.

**Article 7.** During the process of a lawsuit, a Judge should reason and adjudicate independently and insist the right opinion.

**Article 8.** During the process of a lawsuit, a Judge should not meet one party or his or her agent without authorization.

**Article 9.** A judge should avoid prejudice, misuse of his function and neglect of law in performing his duties.

Article 10. A judge should treat all the parties and participants of the proceeding equally in performing his duties. The judge should not by words or conduct manifest any discrimination. The judge has the responsibility to stop and correct any discriminatory words or conduct by any participants or other people.

A judge should be fully aware of the possible differences may arise from nationality, race, sex, profession, religion, education level, health, residence and other factors and shall safeguard the equally and fully implementation of the litigation right and other rights of all the parties.

Article 11. A judge should be neutral during the trial.

Before the judgment is rendered, a judge should not express his views or attitude towards the judgement through his words, expression or conduct.

A judge should adjudicate according to law and be careful with his words and conduct during the proceedings so as to avoid any reasonable doubts upon his neutrality from the parties and other participants.

Article 12. A judge should specify the reasons for the measures and judgement relating to the substantial rights and litigating right of the parties. A judge should not make a conclusion or take any measures subjectively and unilaterally.

**Article 13.** A judge should respect the right of other judges to perform their duties independently and:

1. should not give any comments on the lawsuits being handled by other court or give any suggestions or opinions on a lawsuit in which he has personal interests. This proscription does not extend to the situation when the judge is exercising his judicial duties or is giving comments or suggestions through proper procedures,
2. should not ask about or interfere in the lawsuits being handled by the subordinate courts without authorization.
3. should not issue his personal views to the superior courts about the second instance cases.

**Article 14.** A judge should not ask for information about the lawsuits being handled by other judges unless he is performing adjudicative or administrative duties.

A judge should not disclose or provide information about a lawsuit, the ways to contact the judge in charge or other related information to the parties, attorney and defendants. A judge should not introduce or contact the judge in charge for the parties, attorney and defendants.

**Article 15.** A judge should avoid improper influence from the media or the public during the process of the lawsuit.

**Article 16.** A judge should refrain from giving any comments in public or to the media, which is detrimental to the seriousness and authority of a valid judgement. If a judge thinks there is something wrong with a valid judgement or the trial process, he may report to the president of the court or report to the relevant courts.

**Article 17.** A judge having definite evidence to believe other Judges may, or have already violated the professional ethics of judges, or other judiciary personnel may or have already violated their professional ethics and these conduct may influence the Judicial impartiality should take appropriate measures or inform the relevant authorities.

## Chapter II Enhance Judicial Efficiency

**Article 18.** A judge should be diligent and devoted to the performance of his duties. A judge's personal matters, schedule or other activities should not conflict with his or her judicial duties.

**Article 19.** A judge should abide by the time limit for lawsuit regulated by law and should accept the case, hear the proceeding and make judgement within the time limit.

**Article 20.** A judge should avoid carelessness and delay without proper reason and dispose his business seriously, promptly and efficiently, and should:

1. enhance efficiency through proper arrangements of judicial business.
2. pay enough attention to the performance of all judicial duties and handle every case with same attention and carefulness and devote reasonably enough time.
3. with the precondition of high quality of judgement, save time for the parties, attorney and defendants and pay attention to the efficient cooperation with other judges and staffs.

**Article 21.** A judge should supervise the parties to abide by the procedures and respect all the time limits, so as to avoid unreasonable or unnecessary delay caused by the parties.

**Article 22.** A judge should take effective measures to enforce the valid judgement as soon as possible.

### **Chapter III Keep Honest and Clean**

**Article 23.** A judge is not allowed to use his capacities directly or indirectly to obtain any improper benefit.

**Article 24.** A judge is not allowed to accept entertainment, money, gifts or other benefit from the parties, attorney and defendants.

**Article 25.** A judge is not allowed to participate commercial or other economic activities which may lead the public to cast doubt on his image of being honest and clean.

**Article 26.** A judge should handle his personal issues properly, and should not disclose his capacity as a judge intentionally for special treatment. A judge should not use the prestige and influence of a judge to seek personal interests for himself, his relatives or other people.

**Article 27.** The life style and standard of a judge and his family should consist with their position and income.

**Article 28.** A judge cannot act as a lawyer or Judicial advisor for enterprises, organizations or individuals at the same time. A judge is not allowed to provide advice or Judicial suggestion on pending cases to the parties, attorney and defendants.

**Article 29.** A judge should report his income and property according to relevant regulations.

**Article 30.** A judge should inform his family members about the requirements for a judge mi judicial conduct and professional ethics and urge his family members not to violate relevant regulations.

### **Chapter IV Observation of Judicial Decorum**

**Article 31.** A judge should strictly observe the Judicial decorum and keep good appearance and conduct, so as to preserve the authority of the people's court and the good image of the judge.

**Article 32.** A judge should respect the human dignity of the parties and other participants, and should:

1. hear the parties and other participants carefully and patiently and should not interrupt or stop a party or other participants unless for the reason of protecting the order of the court or because of the

requirement of a trial.

2. use standard, correct and civilized language and should not admonish or say improper words to the parties or other participants.

**Article 33.** A judge should comply with the rules of the court during the trial and should require all the staff of that court to do so and maintain the dignity of the court, and should:

1. wear robe or uniform according to relevant regulations, wear badge and keep clean and tidy;

2. appear to the court on time, do not be absent or late and do not leave early or enter or leave the court at his pleases;

3. concentrate on the lawsuit and the hearing, do nothing irrelevant with the lawsuit.

## **Chapter V Enhance Self-cultivation**

**Article 34.** A judge should enhance his professionalism and should have high political and professional quality. A judge should implement the Constitution and laws faithfully and serve the people whole-heartedly.

**Article 35.** A judge should have rich social experience and profound understanding to the social reality.

**Article 36.** A judge has the right and obligation to be trained and educated and should study the judicial theory and absorb new knowledge diligently so as to improve his abilities and skills of controlling a trial, deciding evidences and writing Judicial documents. A Judge should possess the necessary knowledge and professional ability to perform his function.

**Article 37.** A judge should be self-disciplinary and without impropriety at his daily life. A judge should cultivate a high standard moral criterion and act as a model of observing public and family virtues.

## **Chapter VI Limitation of extra-judicial activities**

**Article 38.** The extra-judicial activities of a judge should cause no reasonable doubt of the public upon his impartiality and honesty, should not affect the performance of his functions and should not cause negative impact on the trustworthiness of the people's court.

**Article 39.** A judge should refuse and stop any hobby or conduct which is against the public interest, public order, social virtue and customs and may influence the image of judge and his impartiality.

**Article 40.** A judge should be careful in making social contacts and friends. A judge should carefully handle the contacts with the parties, lawyers and other persons who are possible to influence the image of the judge, so as to avoid the impression of public that the judge is not impartial or not honest and avoid the possible confusion and embarrassment in the performance of his functions.

**Article 41.** A judge should not join any organization with a nature of evil religion.

**Article 42.** A judge should not disclose or use the judicial information of a close trial or business secret, personal privacy and other confidential information acquired during the process of a lawsuit.

**Article 43.** A judge should not join any profit-making organization or any organization may make profit by using the influence of the judge.

**Article 44.** A judge may participate in academic research and other social activities which are helpful in promoting judicial construction and judicial reform. However, these activities should be in compliance with the law, construct no obstruction to Judicial impartiality and the preservation of judicial authority and will not conflict with the judge's judicial function.



**Article 45.** A judge should be cautious in publishing a paper or interview with the media. The judge should not issue any improper comments on specific lawsuits or parties so as to avoid reasonable doubt upon judicial impartiality caused by improper wording.

**Article 46.** After retirement, a judge should continue to maintain a good image and should avoid the reasonable doubt of the public upon judicial impartiality caused by his improper words or conduct.

### **Supplementary Provisions**

**Article 47.** The courts at different levels should provide guidance and exercise supervision in the implementation of this code in their own court.

**Article 48.** The jurors shall be administered by this code when they are exercising judicial function. The administrative personnel and judicial police shall be administered with reference to the relevant provisions of this code.

**Article 49.** The Supreme Court will be responsible for the explanation of this code.

**Article 50.** This code shall come into force as of the date of issue [18 October 2001].

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## **JUDGES LAW**

### **JUDGES LAW OF THE PEOPLE'S REPUBLIC OF CHINA**

*(Adopted at the 12th Session of the Standing Committee of the Eighth National People's Congress on February 28, 1995, And amended according to the "Decision on the Revision of the 'Judges Law of the People's Republic of China' adopted at the 22" Session of the Standing Committee of the Ninth National People's Congress, on June 30, 2001)*

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### **CHAPTER I GENERAL PROVISIONS**

Article 1 This Law is enacted in accordance with the Constitution to enhance the quality of judges, to strengthen the administration of judges, and to ensure that the People's Courts independently exercise judicial authority according to law and that judges perform their functions and duties according to law, and to safeguard judicial justice.

Article 2 Judges are the judicial personnel who exercise the judicial authority of the State according to law, including presidents, vice presidents, members of judicial committees, chief judges and associate chief judges of divisions, judges and assistant judges of the Supreme People's Court, local People's Courts at various levels and special People's Courts such as military courts.

Article 3 Judges must faithfully implement the Constitution and laws, and serve the people wholeheartedly

Article 4 Judges, when performing their functions and duties according to law, shall be protected by law.

## **CHAPTER II FUNCTIONS AND DUTIES**

Article 5 The functions and duties of judges are as follows:

- (1) to take part in a trial as a member of a collegial panel or to try a case alone according to law; and
- (2) to perform other functions and duties as provided by law.

Article 6 Presidents, vice presidents, members of judicial committees, chief judges, associate chief judges of divisions shall, in addition to the judicial functions and duties, perform other functions and duties commensurate with their posts.

## **JUDGES LAW**

### **CHAPTER III OBLIGATIONS AND RIGHTS**

Article 7 Judges shall perform the following obligations:

- (1) to strictly observe the Constitution and laws;
- (2) to take facts as the basis, and laws as the criterion when trying cases, to handle cases impartially, and not to bend law for personal gain;
- (3) to protect the litigation rights of the participants in proceedings according to law;
- (4) to safeguard the State interests and public interests, and to safeguard the lawful rights and interests of natural persons, legal persons and other organizations;
- (5) to be honest and clean, faithful in the discharge of duties, and to abide by discipline and professional ethics;
- (6) to keep State secrets and the secrets of judicial work; and
- (7) to accept legal supervision and supervision by the masses.

Article 8 Judges shall enjoy the following rights:

- (1) to have the power and working conditions which are essential to the performance of functions and duties of judges;
- (2) to brook no interference from administrative organs, public organizations or individuals in trying cases according to law;
- (3) to be not removed or demoted from the post or dismissed, and to be not given a sanction, without statutory basis and without going through statutory procedures.,
- (4) to be remunerated for work and to enjoy insurance and welfare benefits;
- (5) to enjoy the safety of the person, property and residence as ensured by law;

- (6) to receive training;
- (7) to lodge petitions or complaints; and
- (8) to resign their posts.

#### **CHAPTER IV QUALIFICATIONS FOR A JUDGE**

Article 9 A judge must possess the following qualifications:

- (1) to be of the nationality of the People's Republic of China;
- (2) to have reached the age of 23;
- (3) to endorse the Constitution of the People's Republic of China;
- (4) to have fine political and professional quality and to be good in conduct;
- (5) to be in good health; and
- (6) to have worked for at least two years in the case of graduates from law specialties of regular colleges or universities or from non-law specialties of regular colleges or universities but possessing the professional knowledge of law, or to have worked for at least three years in the case of judges of the High Court and the Supreme Court; those who have Master's Degree or Doctor's Degree of Law or of non-law specialties but possessing the professional knowledge of law shall have worked for at least one year, or to have worked for at least two years in the case of judges of the High Court and the Supreme Court.

#### **JUDGES LAW**

The judicial personnel who do not possess the qualifications as provided by sub-paragraph (6) of the preceding paragraph prior to the implementation of this Law shall receive training. The specific measures shall be laid down by the Supreme People's Court.

Where there are really difficulties in implementing the academic qualifications as provided by sub-paragraph (6) of the first paragraph, with the examination and approval of the Supreme People's court, the academic qualifications of Judges may be extended to graduates from law specialties of professional training college within certain time limit.

Article 10 The following persons shall not hold the post of a judge:

- (1) to have been subjected to criminal punishment for commission of a crime; or
- (2) to have been discharged from public employment.

#### **CHAPTER V APPOINTMENT AND REMOVAL**

Article 11 A judge shall be appointed or removed from the post in accordance with the limit of authority for, and procedures of, appointment or removal as prescribed by the Constitution and laws.

The President of the Supreme People's Court shall be elected or removed by the National People's Congress. The vice-presidents, members of the judicial committee, chief judges and associate chief judges of divisions and judges shall be appointed or removed by the Standing Committee of the National People's Congress upon the recommendation of the President of the Supreme People's Court.

The presidents of the local People's Courts at various levels shall be elected or removed by the local

People's Congresses at various levels. The vice-presidents, members of the judicial committees, chief judges and associate chief judges of divisions and judges shall be appointed or removed by the standing committees of the people's congresses at the corresponding levels upon the recommendation of the presidents of those courts.

The appointment or removal of the presidents of the intermediate People's Courts set up in prefectures of the provinces or autonomous regions or set up in the municipalities directly under the Central Government shall be decided on by the standing committees of the people's congresses of the provinces, autonomous regions or municipalities directly under the Central Government on the basis of the nominations made by the respective councils of chairmen. The vice-presidents, members of the judicial committees, chief judges and associate chief judges of divisions and judges shall be appointed or removed by the standing committees of the people's congresses of the provinces, autonomous regions or municipalities directly under the Central Government upon the recommendations of the presidents of the higher People's Courts.

The presidents of the local People's Courts at various levels set up in the national autonomous areas shall be elected or removed by the people's congresses at various levels of the national autonomous areas. The vice-presidents, members of the judicial committees, chief judges and associate chief judges of divisions and judges shall be appointed or removed by the standing committees of the people's congresses at the corresponding levels upon the recommendations of the presidents of those courts.

The assistant judges of the People's Courts shall be appointed or removed by the presidents of the courts where they work.

The measures for the appointment or removal of the presidents, vice-presidents, members of the judicial committees, chief judges and associate chief judges of divisions and judges of the special People's Courts such as the military courts shall be formulated by the Standing Committee of the National People's Congress separately.

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Article 12 Persons to be appointed judges for the first time shall be selected through strict appraisal, from among those having got the certificates through the state uniform judicial examination and the best qualified for the post, and in accordance with the standards of having both ability and political integrity.

Persons to be appointed presidents, vice-presidents shall be selected from judges or from among those who are best qualified for the post.

Article 13 If a judge is found to be in any of the following circumstances, a report shall be submitted according to law concerning the removal of his or her post:

- (1) having forfeited the nationality of the People's Republic of China;
- (2) having been transferred out of this court;
- (3) having no need to maintain his or her original post after a change of post;
- (4) being determined to be incompetent in the post through appraisal;
- (5) being unable to perform the functions and duties of a judge for a long period of time due to poor health;
- (6) having retired from the post;
- (7) having resigned the post, or having been dismissed;
- (8) being disqualified from continuing to hold the post because of violation of discipline, law or commission of a crime.

Article 14 If the judge is appointed in violation of conditions provided by this Law, the organ who makes this appointment shall rescind it as soon as detected. If the higher court detects the lower court's appointment is in violation of conditions provided by this Law, it shall propose the appointment to be rescinded according to law by the lower court or by the Standing Committee of the People's Congress at the corresponding level upon the recommendation of the lower court.

Article 15 No judges may concurrently be members of the standing committees of the people's congresses, or hold posts in administrative organs, procuratorial organs, enterprises or institutions, or serve as lawyers.

#### **CHAPTER VI POSTS TO BE AVOIDED**

Article 16 Judges who are connected by husband-wife relationship, or who are directly related by blood, collateral related within three generations, or closely related by marriage may not, at the same time, hold the following posts:

(1) the president, vice-presidents, members of the judicial committee, chief judges or associate chief judges of divisions in the same People's Court;

(2) the president, vice-presidents, judges or assistant judges in the same People's Court;

(3) the chief judge, associate chief judges, judges or assistant judges in the same division; or

(4) presidents or vice-presidents of the People's Courts at the levels next to each other.

Article 17 A judge may not act as a defender or an agent *ad litem* in the capacity of a lawyer within 2 years after leaving his or her post from the court.

A judge may not act as a defender or an agent *ad litem* in the case handled by the court which he or she had, worked in before leaving his or her post.

#### **JUDGES LAW**

A judge's spouse and children may not act as a defender or an agent *ad litem* in the case handled by the court which the judge belongs to.

#### **CHAPTER VII GRADES OF JUDGES**

Article 18 Judges are divided into twelve grades.

The President of the Supreme People's Court is the Chief Justice. Judges from the second grade to the twelfth grade are composed of associate justices, senior Judges and Judges.

Article 19 Grades of judges shall be determined on the basis of their posts, their actual working ability and political integrity, their professional competence, their achievements in judicial work and their seniority.

Article 20 The grades of judges shall be established and the measures for their evaluation and promotion shall be formulated separately by the State.

#### **CHAPTER VIII APPRAISAL**

Article 21 Appraisal of judges shall be conducted by the People's Courts the judges belong to.

Article 22 The appraisal of judges shall be carried out objectively and impartially, through the combined efforts of the leaders and masses, and routinely and annually.

Article 23 The appraisal of judges shall include their achievements in judicial work, their ideological level and moral characters, their competence in judicial work and their mastery of law theories, their

attitude in and style of work. However, emphasis shall be laid on the achievements in judicial work.

Article 24 The results of the annual appraisal shall fall into three grades: excellent, competent and incompetent.

The result of appraisal shall be taken as the basis for award, punishment, training, removal or dismissal of a judge, and for readjustment of his or her grade and salary.

Article 25 A judge shall be informed of the result of the appraisal in written form. If the judge disagrees with the result, he or she may apply for reconsideration.

## **CHAPTER IX TRAINING**

Article 26 Theoretical and professional training for judges shall be carried out in a planned way.

The principles of integrating theory with practice, giving lectures in light of 'the needs, and emphasizing practical results shall be applied in the training of judges.

Article 27 The judges colleges and universities of the State and other institutions for training judges shall, in accordance with the relevant regulations, undertake the task of training judges.

Article 28 The results of the studies of judges and the appraisals made during their training shall be taken as one of the bases for their appointment and promotion.

## **CHAPTER X AWARDS**

Article 29 Judges who have made significant achievements and contributions in judicial work, or performed other outstanding deeds shall be rewarded.

The principle of combining moral encouragement with material reward shall be applied in rewarding judges.

Article 30 Judges who have any of the following achievements to their credit shall be rewarded:

(1) having achieved notable successes in enforcing laws and handling cases impartially;

## **JUDGES LAW**

(2) having accumulated rich experience in judicial practice that may serve as a guide in judicial work;

(3) having made proposals for the reform of judicial work that have been adopted and have produced remarkable results;

(4) having performed outstanding deeds in safeguarding the interests of the State, the collective and the people against heavy losses;

(5) having performed outstanding deeds by bravely fighting against illegal or criminal acts;

(6) having made judicial proposals that have been adopted, and have produced remarkable results, or having scored outstanding successes in publicizing the importance of the legal system and guiding the work of the people's mediation committees;

(7) having scored outstanding achievements in protecting State secrets and secrets of judicial work; or

(8) having performed other meritorious deeds.

Article 31 The awards include: Citation for Meritorious Deeds, Merit Citation Class III, Merit Citation Class II, Merit Citation Class I, and a title of honour.

The awards shall be authorized and procedures gone through in accordance with the relevant regulations.

## **CHAPTER XI PUNISHMENT**

Article 32 No judges may commit any of the following acts:

- (1) to spread statements damaging the prestige of the State; to join illegal organizations; to take part in such activities as assembly, procession and demonstration against the State; and to participate in strikes;
- (2) to embezzle money or accept bribes;
- (3) to bend law for personal gain;
- (4) to extort confessions by torture;
- (5) to conceal or falsify evidence;
- (6) to divulge State secrets or secrets of judicial work;
- (7) to abuse functions and powers; and to infringe upon the legitimate rights and interests of natural persons, legal persons or other organizations;
- (8) to neglect his or her duty so as to wrongly judge a case or to cause heavy losses to the party concerned;
- (9) to delay the handling of a case so as to affect the work adversely;
- (10) to take advantage of the functions and powers to seek gain for himself or herself or other people;
- (11) to engage in profit-making activities;
- (12) to meet the party concerned or his or her agent without authorization and attend dinners or accept presents given by the party concerned or his or her agent; or
- (13) to commit other acts in violation of law or discipline.

## **JUDGES LAW**

Article 33 A judge who has committed any of the acts listed in Article 30 of this Law shall be given sanctions; if the case constitutes a crime, he or she shall be investigated for criminal responsibility.

Article 34 Sanctions include a disciplinary warning, a demerit recorded, a grave demerit recorded, demotion, dismissal from the post and discharge from public employment.

The salary of a judge who has been dismissed from the post shall at the same time be reduced and his or her grade be demoted.

Article 35 A sanction shall be authorized and procedures gone through in accordance with the relevant regulations

## **CHAPTER XII SALARY, INSURANCE AND WELFARE**

Article 36 The salary system and scales for judges shall, in light of the characteristics of judicial work, be formulated by the State.

Article 37 The system under which the salaries of judges are increased regularly shall be practiced. The salary of a judge who has been confirmed through appraisal as being excellent or competent may be raised in accordance with the regulations; the salary of a judge who has made special contributions may be raised in advance in accordance with regulations.

Article 38 Judges shall enjoy judicial allowances, regional allowances and other allowances and insurance and welfare benefits as prescribed by the State.

### **CHAPTER XIII RESIGNATION AND DISMISSAL**

Article 39 If a judge requests resignation, he or she shall present an application in written form before he or she shall be removed in accordance with the procedures as provided by law.

Article 40 A judge shall be dismissed if he or she is found to be in any of the following circumstances:

- (1) to be confirmed by annual appraisal as being incompetent for two successive years;
- (2) to be unqualified for the present post and decline to accept other assignments;
- (3) to refuse to accept reasonable transfer, which is necessitated by restructuring of the judicial organ or reduction of the size of the staff;
- (4) to have stayed away from work without leave or to have overstayed his or her leave for fifteen days or more in succession, or for thirty days or more in a year aggregated; or
- (5) to fail to perform a judge's duty, and make no rectification after criticism.

Article 41 A judge who is dismissed shall be removed from the post in accordance with the procedures as provided by law.

### **CHAPTER XIV RETIREMENT**

Article 42 The retirement system regarding judges shall, in light of the characteristics of judicial work, be formulated separately by the State.

Article 43 After retirement judges shall enjoy the insurance of old age pension and other benefits as prescribed by the State.

### **CHAPTER XV PETITION AND COMPLAINT**

Article 44 If a judge disagrees with the sanction or other disciplinary action given to him or her by a People's Court, he or she may, within thirty days from the date of receiving the decision on the sanction or other disciplinary action, apply for reconsideration to the organ which handled

### **JUDGES LAW**

the case and shall have the right to appeal to the organ at a level higher than the organ which handled the case.

The organ that receives the appeal must make a decision on it in accordance with regulations.

Execution of a decision on a sanction or other disciplinary action given to a judge shall not be suspended during the period of reconsideration or petition.

Article 45 If a State organ or any of its functionaries commits an act infringing upon the rights of a judge as provided by Article 8 of this Law, the judge shall have the right to make a complaint.

If an administrative organ, a public organization or an individual interferes in a case that a judge is trying according to law, that organ, organization or individual shall be investigated for responsibility according to law.



Article 46 The petition or complaint made by a judge shall be true to facts. If a judge makes up a story or lodges a false accusation against an innocent person, he or she shall be investigated for responsibility according to law.

Article 47 Where a sanction or other disciplinary action given to a judge is wrong, it shall be put right without delay; if it has damaged the judge's reputation, the reputation shall be rehabilitated, the ill effects shall be eliminated and an apology shall be made; if it has caused financial losses to the judge, compensations shall be made. The persons who are directly responsible for retaliation shall be investigated for responsibility according to law.

#### **CHAPTER XVI COMMISSION FOR EXAMINATION AND ASSESSMENT OF JUDGES**

Article 48 A People's Court shall establish a commission for examination and assessment of judges.

The functions and duties of a commission for examination and assessment of judges are to guide the training, examination, appraisal and assessment of judges. Specific measures therefor shall be formulated separately.

Article 49 The number of persons on a commission for examination and assessment of judges shall be five to nine.

The chairman of a commission for examination and assessment of judges shall be assumed by the president of the court it belongs to.

#### **CHAPTER XVII SUPPLEMENTARY PROVISIONS**

Article 50 The Supreme Court shall, according to the requirement of judicial work, formulate together with other departments measures on manning quotas of judges of People's Courts at various levels.

Article 51 The State organizes uniform judicial examinations on persons to be judges and prosecutors for the first time and for lawyer's qualification certificate. Measures for implementing the judicial examination shall be formulated by the judicial administrative department of the State Council together with the Supreme People's Court and the Supreme People's Procuratorate.

Article 52 The executors of the People's Courts shall be administered with reference to the relevant provisions of this Law.

Measures for the administration of the clerks of the People's Courts shall be formulated by the Supreme People's Court.

The, administrative judicial personnel of the People's Courts shall be administered in accordance with the relevant regulations of the State.

Article 53 This Law shall come into force as of July 1, 1995.



The Australian Institute of  
Judicial Administration Incorporated

# GUIDE TO JUDICIAL CONDUCT

Published for  
The Council of Chief Justices of Australia  
by The Australian Institute of Judicial Administration  
Incorporated

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The Australian Institute of Judicial Administration Incorporated (“AIJA”) is an incorporated association affiliated with the University of Melbourne. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organisations interested in improving the operation of the justice system.

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## ACKNOWLEDGMENTS

In 1996, Professor Wood of the Faculty of Law in the University of Melbourne was invited by the Council of Chief Justices to prepare a paper which was subsequently published by the AIJA under the title *Judicial Ethics – A Discussion Paper*. In the paper, Professor Wood acknowledged that its purpose was “to raise issues for discussion, not to attempt to settle them”.

Subsequently, the Council of Chief Justices asked two retired Supreme Court judges to undertake a limited survey of judicial attitudes to issues of judicial conduct, and then to prepare a succinct draft statement of principles affecting the conduct of members of the judiciary, and their relevance to specific issues, for the guidance of members of the judiciary. They generously agreed to do so.

The Council selected the Hon Sam Jacobs AO QC, a former judge of the Supreme Court of South Australia, and the Hon John Clarke QC, formerly a judge of the Court of Appeal of the Supreme Court of New South Wales. In the later stages the Hon John Clarke QC was replaced by the Hon Brian Cohen QC, also a former judge of the Supreme Court of New South Wales. All have given their services in an honorary capacity. Administrative assistance to the authors has been provided by the AIJA which also appointed an Advisory Committee to assist them. The advice of that committee is gratefully acknowledged.

For the purpose of a survey of judicial attitudes in Australia, the drafters prepared a detailed questionnaire, drawing its contents partly from their own experience, but mainly from three important texts:

- The Hon Justice J B Thomas AM, *Judicial Ethics in Australia* 2<sup>nd</sup> ed (1997);
- The Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991); and
- The Canadian Judicial Council, *Ethical Principles for Judges* (1998), a first draft of which was made available on a confidential basis prior to publication.

The assistance derived from this source material is gratefully acknowledged.

The Chief Justices of the Federal Court, the Family Court, and each Supreme Court, the Chief Judge of each District or County Court, and the Chief Magistrate in each State and Territory nominated three members of their respective courts to answer the questionnaire, which was also available to other members of the judiciary. The answers were provided to one or other of the nominated authors. They were collated and compared in the hope of disclosing the degree of unanimity or controversy as the case may be, as well as any significant “territorial” differences. The authors made themselves available for personal consultation on request, but that was rarely sought. Their draft report was considered by the Advisory Committee, and submitted to the Chief Justices, for their consideration and revision.



## PREFACE

The members of the Australian judiciary aspire to high standards of conduct. Maintaining such standards is essential if the community is to have confidence in its judiciary.

The Australian Chief Justices decided that it was time to provide members of the judiciary with some practical guidance about conduct expected of them as holders of judicial office, and that such guidance should reflect the changes that have occurred in community standards over the years.

At the request of the Chief Justices, the AIJA agreed to prepare written guidelines for consideration of the Chief Justices. I acknowledge the generous contribution by the Hon S J Jacobs AO QC, the Hon M J R Clarke QC and the Hon B J Cohen QC, who undertook the necessary task of consultation and drafting, and the work of the Advisory Committee established by the AIJA.

The document assumes a high level of common understanding on the part of judges of basic principles of judicial conduct, many of which are the subject of settled legal rules. It sets out to address issues upon which there is more likely to be uncertainty and upon which guidance will be helpful.

The Council of Chief Justices of Australia has approved of the publication of these Guidelines by the AIJA, on their behalf.

Murray Gleeson  
Chief Justice of Australia  
June 2002



# CHAPTER ONE

## 1 INTRODUCTION

### 1.1 Purpose of this publication

The purpose of this publication is to give *practical guidance* to members of the Australian judiciary at all levels. The words “judge” and “judiciary” when used include all judges and magistrates.

*Importantly, this publication seeks to be positive and constructive, and to indicate how particular situations might best be handled.*

There is a range of reasonably held opinions on some aspects of the restraints that come with the acceptance of judicial office and allowance has been made for that in this guide.

Over the last 20 years or so, the conduct of judges has come increasingly under public scrutiny, with a growing interest in standards of judicial conduct. Sometimes public comment on judicial conduct has been influenced by false notions of judicial accountability which fail to recognise that *a judge is primarily accountable to the law, which he or she must administer, in accordance with the terms of the judicial oath, “without fear or favour, affection or ill-will”.*

Some judges respond to the pressures of greater public scrutiny by adopting what has been described as a “monastic” lifestyle, believing that the less judges are involved in non-judicial activities, and the more they limit their social contacts, the less likely they are to put at risk public respect for the judiciary. While that view is understandable, it may well create as many problems as it solves, and not only by limiting the attractiveness of judicial office. Judges “increasingly have to deal with broad issues of social values and human rights, and to decide controversial moral issues that legislators cannot resolve” (Wood, *Judicial Ethics – A Discussion Paper*, AIJA (1996) at 1). A public perception of judges as remote from the community they serve has the potential to put at serious risk the public confidence in the judiciary that is a cornerstone of our democratic society.

The preferred position, which is supported by a clear majority of judges who responded to the survey undertaken for the purpose of this publication, is that judges – subject always to the priority to be given to judicial duties and other necessary restraints – should be, and be seen to be, involved in the community in which they live, and should enjoy the fundamental freedoms of other citizens. In the words of an American commentator (McKay “The Judiciary and Non-Judicial Activities” (1970) 35 *Contemporary Legal Problems* at 9, 12, cited by Wood at 3 - 4) it is appropriate that judicial officers “live, breathe, think and partake of opinions” in the real world and “continue to draw knowledge and to gain insights from extrajudicial activities that would enhance their capacity to perform the judicial function”.

Once again, however, it is important to emphasise that what follows is not intended to be prescriptive, unless it is so stated. This publication recognises that in cases of difficulty or uncertainty, the primary responsibility of deciding whether or not a particular activity or course of conduct is or is not appropriate rests with the individual judge, but it strongly recommends consultation with colleagues in such cases and preferably with the head of the jurisdiction.

## 1.2 Scope of this publication

This publication does not purport to be a code in any sense of that word, or to lay down rules. It purposely avoids using the expression “judicial ethics” or describing conduct as “unethical”. A brief explanation of the reasons is necessary.

There can be little disagreement with the following statement of Thomas (*Judicial Ethics in Australia*, 2<sup>nd</sup> ed (1997) at 9):

No one doubts that judges are expected to behave according to certain standards both in and out of court. Are these mere expectations of voluntary decency to be exercised on a personal level, or are they expectations that a certain standard of conduct needs to be observed by a particular professional group in the interests of itself and the community? As this is a fundamental question, it is necessary to make some elementary observations. We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not some day depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations. ...

If these standards are not effectively maintained, public confidence in the independence and trustworthiness of judges will erode and the administration of justice will be undermined.

It is possible to identify principles or standards of conduct appropriate to the judicial office, but their application to particular issues may, sometimes, reasonably give rise to different answers by different judges. The answer may vary according to the jurisdiction of the court or the place in which the court sits. To give to such standards of conduct the status of rules is to invest them with a prescriptive role which may well be inappropriate.

This publication does not refer to relevant academic literature or the voluminous case law, particularly on the topic of bias, actual or apprehended. It is directed to the Australian judiciary who will find in the work of Justice Thomas and Professor Wood a much fuller discussion, with copious references to source material in academic journals and decided cases.

Finally, this publication does not pretend to be exhaustive, but topics it fails to address may well be discussed in the two principal sources already referred to.

## CHAPTER TWO

### 2 GUIDING PRINCIPLES

The principles applicable to judicial conduct have three main objectives:

- To uphold public confidence in the administration of justice;
- To enhance public respect for the institution of the judiciary; and
- To protect the reputation of individual judicial officers and of the judiciary.

Any course of conduct that has the potential to put these objectives at risk must therefore be very carefully considered and, as far as possible, avoided.

There are three basic principles against which appropriate judicial conduct should be tested to ensure compliance with the stated objectives. These are:

- Impartiality;
- Judicial independence; and
- Integrity and personal behaviour.

This chapter will deal briefly with some aspects of each of these principles, to be followed in later chapters by their application to a selected range of topics or situations. It will become apparent that these basic principles are not in watertight compartments, and may often overlap.

#### 2.1 Impartiality

The large volume of case law involving challenges to judicial impartiality testifies to its importance and sensitivity. There is probably no judicial attribute on which the community puts more weight than impartiality. It is the central theme of the judicial oath of office, although the same words of that oath also embrace the concepts of independence and integrity, and indeed, in many cases, those concepts are involved in acting impartially.

The application of the requirement of impartiality is always subject to considerations of necessity. This may mean that in a small court, or in a court that sits in an isolated location, or in a court such as the High Court where members have a constitutional responsibility to sit, the significance of the matters identified later will differ.

It is easy enough to state the broad indicia of impartiality in court – to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides. None of this, however, debars the judge from asking questions of witnesses or counsel which might even appear to be “loaded” in order to gain a better understanding and eventual evaluation of the facts, or submissions on fact or law.

The more difficult and often controversial area concerns the judge's extra-judicial activities, which may give rise to a challenge to impartiality by reason of apprehended:

- Bias;
- Conflict of interest; or
- Prejudgment of an issue.

These matters are dealt with in Chapter 3.

## **2.2 Judicial independence**

Much has been written about judicial independence both in its institutional and individual aspects. Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, whereas it is in fact a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. There are two aspects of this concept that are important for present purposes: Constitutional independence and independence in discharge of judicial duties.

### **2.2.1 Constitutional independence**

#### **(a) The principle**

The principle of the separation of powers requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and be seen to be, independent of the legislative and executive arms of government.

The relationship between the judicial arm of government and the other arms should be one of mutual respect, each recognising the proper role of the others (see par 5.6).

Communication with the other arms of government on behalf of the judiciary is the responsibility of the head of the jurisdiction or of the Chief Justice. Judges may take advantage of appropriate opportunities to inform the public about the concept of judicial independence and its importance, and to raise issues of legitimate and serious concern. Prior consultation with the head of the jurisdiction is desirable.

It is not uncommon for the executive government, or even Parliament itself, in matters affecting the administration of justice generally, to want to use the expertise of judges other than in the exercise of their judicial duties. The fact that the High Court has recently held the conferral of certain non-judicial functions on judges to be invalid (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51) does not necessarily mean that any such request for extra-judicial advice or service must be refused, but acceptance requires very careful consideration and appropriate safeguards (see Chapter 4).

#### **(b) Attacks upon constitutional independence**

Two important attributes of constitutional independence, namely security of tenure and financial security, are sometimes misunderstood, criticised, threatened, or even ignored. When these are the subject of debate, any response on behalf of the judiciary should come from the head of the jurisdiction or from the Chief Justice. This does not preclude appropriate intervention by individual judges, but it is preferable that they should consult the head of the jurisdiction.



## **2.2.2 Independence in discharge of judicial duties**

### **(a) The principle**

Judges should always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence.

The terms of the judicial oath by which all judges should be guided in the discharge of their duties have already been referred to in par 1.1, but judges should at all times be alert to, and wary of, subtle and sometimes not so subtle attempts to influence them or to curry favour.

It is likely that at some time in a judicial career, a case to be decided (or similar cases) will have been the subject of discussions in the media, sometimes calculated to arouse and even to inflame public opinion. It is easy enough to assert that a judge is, and must be, immune to the effects of publicity, whether favourable or unfavourable, and fearless, but it is less easy to deny the insidious pressure of such publicity.

The independence of the judiciary and of the individual judge will best be served by reliance on personal integrity and the dictates of conscience. Indeed, these brief comments show that the concept of judicial independence is another aspect of judicial integrity and judicial impartiality. Attempts to curry judicial favour can more conveniently be considered when dealing with those topics, with some specific situations to be addressed, in later chapters.

### **(b) Threats to independence in discharge of judicial duties**

Occasionally judges receive letters or other communications containing threats to the safety or welfare of themselves or members of their family, in an effort by or on behalf of disgruntled parties, or special interest groups, to influence a judicial decision.

Conduct of this nature will not, of course, have any effect, but this does not mean that it should be ignored. It is prudent to report any such threat to the administrative or judicial head of the jurisdiction and, if appropriate, to a senior police officer.

Judges should also be alert to observe other conduct which may not be a direct attempt to influence the judge, but may nevertheless be aimed at obstructing the course of justice. A typical example is the intimidation of a witness by the presence in court of persons hostile to that witness, particularly in criminal cases. Appropriate steps to protect such a witness are not inconsistent with judicial impartiality.

A judge who becomes aware of unlawful or improper conduct in connection with the discharge of the judge's judicial duties will have to consider whether that conduct should be reported to the police or to some other appropriate person and whether it should be disclosed publicly by making a statement in open court or in some other way. The timing of any such action by a judge can be particularly delicate. This is a matter on which discussion with the head of the jurisdiction or with an experienced colleague is desirable.

### 2.3 Integrity and personal behaviour

As a general proposition, judges are entitled to exercise the rights and freedoms available to all citizens, and while appointment to judicial office brings with it limitations on the public and private conduct of a judge, it is in the public interest that judges participate as fully as their office permits in the life and affairs of the community. These two general considerations have to be borne in mind in considering the duty of judges to uphold the status and reputation of the judiciary, and to avoid any conduct that might diminish public confidence in, and respect for, the judicial office.

In this area, “there can be few absolutes since the effect of conduct on the perception of the community depends on community standards that may vary according to place or time”. (Canadian Judicial Council, *Ethical Principles for Judges* (1998) at 14). Judges should be experienced in assessing the perception of reasonable fair-minded and informed members of the community in deciding whether conduct is or is not likely to diminish respect in the minds of such persons. Within that framework, however, there are some precepts which, as a guide to judicial behaviour, are not controversial:

- Intellectual honesty;
- Respect for the law and observance of the law (although a judge like any other citizen, through ignorance or error, may well commit a breach of a statutory regulation which will not necessarily reflect adversely on judicial integrity or competence);
- Prudent management of financial affairs;
- Diligence and care in the discharge of judicial duties; and
- Discretion in personal relationships, social contacts and activities.

It is the last of these precepts that is likely to cause the most difficulty in practice. As a general rule, it permits a judge to discharge family responsibilities, to maintain friendships and to engage in social activities. But it requires a judge to strike a balance between the requirements of judicial office and the legitimate demands of the judge’s personal life, development and family. Judges have to accept that the nature of their office exposes them to considerable scrutiny and to constraints on their behaviour that other people may not experience. Judges should avoid situations that might reasonably lower respect for their judicial office or might cast doubt upon their impartiality as judges. They must also avoid situations that might expose them to charges of hypocrisy by reason of things done in their private life. Behaviour that might be regarded as merely “unfortunate” if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others.

Some specific situations are addressed in Chapters 4, 5 and 6.

It is not necessary for present purposes to address the power of parliaments to remove a judge for proved misbehaviour or incapacity. A discussion of the topic can be found in Thomas, *Judicial Ethics in Australia* 2<sup>nd</sup> ed (1997) at 15-19.

## CHAPTER THREE

### 3 IMPARTIALITY

A judge should try to ensure that his or her conduct, in and out of court, in public and in private, maintains and enhances public confidence in the judge's impartiality and in that of the judiciary.

This chapter deals with aspects of a judge's private life that can raise matters that have the capacity to affect adversely the public perception of a judge's impartiality. Chapter 4, which deals with conduct in court, also raises some matters relevant to impartiality.

For present purposes it is not necessary to do more than identify some broad areas of sensitivity in no particular order of importance. The list is not exhaustive, but may help to keep judges alert to any risk of a challenge to their impartiality. They are in the nature of warning signs, and the direction in which they point in some common factual situations will be examined more closely in Chapter 4.

#### 3.1 Associations and matters requiring consideration

Professional or business associations requiring consideration include those, past and current, involving directly or indirectly:

- Litigants;
- Legal advisers of litigants; and
- Witnesses.

Other matters requiring consideration are:

- Close relationship to persons in the previous categories;
- Social contact with parties or witnesses; and
- Public statements or expressions of opinion on controversial social issues, or matters in issue in litigation made before or after appointment.

#### 3.2 Activities requiring consideration

- Current commercial or business activities – likely in any event to be limited in scope;
- Personal or family financial activities, including shareholding in public or private companies or other investments; and
- Membership of or involvement with educational, charitable or other community organisations if they become parties to litigation.

There are some well-established limitations and principles for a judge to consider in relation to extra-judicial activities:

- Although active participation in or membership of a political party before appointment would not of itself justify allegations of judicial bias or an appearance of bias, it is expected that a judge on appointment will sever all ties with political parties. An appearance of continuing ties such as might occur by attendance at political gatherings, political fundraising events or through contribution to a political party, should be avoided.
- The judge's primary task and responsibility is to discharge the duties of office. A judge should avoid extra-judicial activities that are likely to cause a judge to have to refrain from sitting on a case because of an appearance of bias or because of a conflict of interest that would arise from the activity.

Judges should be aware that the majority of complaints to the Judicial Commission of New South Wales involve allegations of bias against a party, or failure to give a fair hearing. For the most part such complaints have not been sustained, but they indicate the need for care to avoid them.

The guiding principles are:

- Whether an appearance of bias or a possible conflict of interest is sufficient to disqualify a judge from hearing a case is to be judged by the perception of a reasonable well-informed observer. Disqualification on trivial grounds creates an unnecessary burden on colleagues, parties and their legal advisers;
- The parties should always be informed by the judge of facts which might reasonably give rise to a perception of bias or conflict of interest but the judge must himself or herself make the decision whether it is appropriate to sit.

Judges should be careful to avoid giving encouragement to attempts by a party to use procedures for disqualification illegitimately, such as in an attempt to influence the composition of the bench or to cause delay. (The observations of members of the High Court in *Ebner*, set out at the end of par 3.3.1 are relevant here.)

### **3.3 Conflict of interest**

Some common situations are mentioned in this chapter, but whether or not such situations disclose a relevant conflict of interest is often debatable.

#### **3.3.1 Shareholding in litigant companies, or companies associated with litigants**

Relevant questions for the judge to consider are:

- (a) Is the shareholding sufficiently large to enable the judicial or related shareholder to influence the decisions of the company?
- (b) Is the value of the judicial or related shareholding likely to be affected by the outcome of the litigation?

But the ultimate issue is whether a fair-minded lay-observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case.

If the answer to either question is in the affirmative, it is clearly a case for self-disqualification, but if the answer to both questions is negative, the basis for disqualification is much less obvious. Nevertheless, it is important to make full disclosure to the parties before making a decision, although a failure to do so in some circumstances may not be critical.

The judge should disclose the fact of the shareholding in open court thereby giving the parties an opportunity to make any submissions with respect to disqualification or otherwise.

It may be wise, but not obligatory, to limit the range of investment in public companies, to minimise the need for frequent disclosure. Shareholding in a public investment company or in managed funds may be a sensible alternative.

For a more comprehensive examination of the relevant principles with respect to judicial shareholding in litigant public companies as a sufficient reason for disqualification see *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* [2000] HCA 63; (2000) 75 ALJR 277; 176 ALR 644.

The application of these principles, and the making of a decision whenever issues of possible bias are raised, call for a good deal of care and common sense. It is useful to bear in mind the remarks of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner* at [20]:

This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.

### **3.3.2 Business, professional and other commercial relationships**

Business, professional and other commercial relationships have the capacity to cause a judge to have a potential interest in the outcome of litigation, and so to raise the question of possible disqualification. If such a relationship means that a judge has a “not insubstantial, direct, pecuniary or proprietary interest in the outcome of litigation” (*Ebner* at [58]), disqualification will ordinarily be necessary.

The circumstances requiring consideration are varied. A judge should consider any current commercial or business activities, although it is likely that they will be limited. A judge should also consider any such activities undertaken by close relatives. Although these are properly to be considered under the heading “Personal relationships” (below), a financial interest of a close relative might be regarded by an observer as equivalent to a financial interest on the part of the judge.

The relationships or associations that require consideration under this head include relationships such as insurer and insured, banker and customer, local government body and ratepayer, school and parent of child attending school. In some circumstances such a relationship could give rise to a disqualifying interest in the outcome of litigation. The judge should consider any such relationship that arises on the facts.

The judge should also consider whether any such relationship might give rise to a conflict of interest because of an appearance of predisposition in favour of or against the other party to the relationship. There is, for example, an obvious difference between the situation of the judge who is negotiating, say, the terms under which a bank will extend a significant overdraft, and that of a judge whose relations with a bank do not involve the bank doing anything more than honouring its obligations as a banker. Similarly, a judge who is a ratepayer and is also an objector to a rate assessment or an objector to a planning application, will be in a different situation to a judge who is merely a ratepayer. A judge whose claim under an insurance policy is questioned by the insurer is in a different situation to a judge who is merely a policy holder or whose claim under the policy is quite uncontentious.

### **3.3.3 Judicial involvement with litigant community organisations**

Questions similar to those posed with respect to judicial shareholdings and commercial relationships may again be relevant, ie is the judge able to influence decisions of the organisation; is the litigation likely to have an effect on the organisation that is involved? But even if a negative answer is given to those questions, disqualification may be the most prudent course to adopt where a relationship exists. There may be no significant conflict of interest, but a real risk of the appearance of bias by reason of the judge's empathy with the organisation.

### **3.3.4 Personal relationships**

There are many personal relationships to be considered. The most important relationships may be categorised for present purposes as:

**First degree** – parent, child, sibling, spouse or domestic partner;

**Second degree** – grandparent, grandchild, “in-laws” of the first degree, aunts, uncles, nephews, nieces;

**Third degree** – cousins and beyond;

And such relevant relationships may exist with:

- (i) Parties;
- (ii) Legal advisers or representatives of parties;
- (iii) Witnesses.

In addition to such relationships, friendship or past professional or other association with such persons needs to be considered in some situations. There are no hard and fast rules, but the following guidance is offered.

- (a) A judge should not sit on a case in which the judge is in a relationship of the first, second or third degree to a party or the spouse or domestic partner of a party.

- (b) Where the judge is in a relationship of the first or second degree to counsel or the solicitor having the actual conduct of the case, or the spouse or domestic partner of such counsel or solicitor, most judges would and should disqualify themselves. Ordinarily there is no need to do so if the matter is uncontested or is a relatively minor or procedural matter. Nor is there a need to do so merely because the person in question is a partner in, or employee of, a firm of solicitors or public authority acting for a party. In such cases, it is a matter of considering all the circumstances, including the nature and extent of the involvement in the matter of the person in question. Some judges may be aware of cases involving such a relationship when the judge has sat without objection, but current community expectations make such conduct undesirable.

In most of these situations, Bar Rules in each jurisdiction require a barrister to return a brief to appear in a contested hearing, so the occasion for a judge to disqualify himself or herself should arise infrequently.

There may be a justifiable exception by reference to the principle of necessity (see par 2.1), or where the solicitor-relative is a partner or employee of the solicitor on the record, but has not been involved in the preparation or presentation of the case. There may also be a justifiable exception where, notwithstanding the relationship, the parties to the case consent to the judge sitting but that may depend upon the nature of the relationship, which should be disclosed to the parties before the judge decides whether to sit or not to sit.

- (c) Personal friendship with a party is a compelling reason for disqualification, but friendships should be distinguished from acquaintanceship which may or may not be a sufficient reason for self-disqualification, depending upon the nature and extent of such acquaintanceship. The judge should consider whether to inform the parties of an acquaintanceship before the hearing begins.
- (d) A current or recent business association with a party will usually mean that a judge should not sit on a case. For this purpose a business association usually does not include associations such as insurer and insured, banker and customer, rate payer and local government body, but might do so, depending on the circumstances.
- (e) Past professional association with a party as a client is not of itself a reason for disqualification unless the judge has been involved in the subject matter of the litigation prior to appointment or unless the past association gives rise to some other good reason for disqualification.

If the judge has been involved in the subject matter of litigation, the judge should not sit, but otherwise the decision to sit or not to sit may depend upon the extent of previous representation and when it occurred. It may be desirable to disclose the circumstances of such representation to the parties before deciding what to do. The nature and content of anything learned, or any views formed, bearing upon the credibility of the party may need to be considered.

- (f) Friendship or past professional association with counsel or solicitor is not generally to be regarded as a sufficient reason for disqualification.
- (g) Where a person who is in a first degree relationship to the judge is known to be a witness, the judge generally should decline to take the case, unless the witness is to give only undisputed narrative testimony. In such a case, and if no objection is taken by the parties, the judge may decide to sit, but may well choose not to do so.

- (h) Where the relationship of a witness to the judge is of the second or remoter degree, disqualification by the judge is less compelling, but again the decision to sit or not to sit may depend upon the nature of the testimony and the issue, if any, of credibility.
- (i) The mere fact that a witness is personally well known to the judge, may not of itself be a sufficient reason for disqualification of the judge. If however the credibility of the witness, as distinct from opinion, is known or likely to be in dispute, the judge should not sit.
- (j) A recent business association between a judge and a witness will not necessarily be a basis for disqualification of the judge, particularly if the association involved only an isolated transaction, but all of the circumstances should be carefully considered.

In the latter two cases, the fact of the relationship or friendship, and ordinarily its nature, should be disclosed to the parties.

### **3.4 Other grounds for possible disqualification**

If a judge is known to hold strong views on topics that are relevant to issues in the case by reason of public statements or other expression of opinion on such topics, possible disqualification of the judge may have to be addressed, whether or not the matter is raised by the parties. In such a case, the judge will have to assess, and respond to, the risk of an appearance of bias. The risk is especially significant where a judge has taken part publicly in a controversial or political discussion. (Discussions of that nature concerning the administration of justice are dealt with as a separate matter in par 5.6.)

What a judge may have said in other cases by way of expression of legal opinion whether as *obiter dicta* or in dissent can seldom, if ever, be a ground for disqualification.

Where a close member of a judge's family is politically active, the judge needs to bear in mind the possibility that, in some proceedings, that political activity might raise concerns about the judge's own impartiality and detachment from the political process.

### **3.5 Disqualification procedure**

- (a) If a judge considers that disqualification is required, the judge should so decide. Prior consultation with judicial colleagues is permissible and may be helpful in reaching such a decision. The decision should be made at the earliest opportunity.
- (b) In cases of uncertainty where the judge is aware of circumstances that may warrant disqualification, the judge should raise the matter at the earliest opportunity with:
  - (i) The head of the jurisdiction;
  - ii) The person in charge of listing;
  - (iii) The parties or their legal advisers;not necessarily personally, but using the court's usual methods of communication.



- (c) Disqualification is for the judge to decide in the light of any objection, but trivial objections are to be discouraged.
- (d) It will generally be appropriate in cases of uncertainty for the judge to hear submissions on behalf of the parties and that should be done in open court.
- (e) The judge should be mindful of circumstances that might not be known to the parties but might require the judge not to sit, and of the possibility of the parties raising relevant matters of which the judge may not be aware. It is not appropriate for a judge to be questioned by parties or their advisers.
- (f) If the judge decides to sit, the reasons for that decision should be recorded in open court. So should the disclosure of all relevant circumstances.
- (g) Consent of the parties is relevant but not compelling in reaching a decision to sit. The judge should avoid putting the parties in a situation in which it might appear that their consent is sought to cure a ground of disqualification. Even where the parties would consent to the judge sitting, if the judge, on balance, considers that disqualification is the proper course, the judge should so act.
- (h) Even if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge's own view, there is any objection.
- (i) The judge has a duty to try cases in the judge's list, and should recognise that disqualification places a burden on the judge's colleagues or may occasion delay to the parties if another judge is not available.

There may be cases in which other judges are also disqualified or are not available, and necessity may tilt the balance in favour of sitting even though there may be arguable grounds in favour of disqualification.

### **3.6 Summary**

If these guidelines do not lead the judge to a conclusion, there is a large volume of case law and academic writing that may assist the judge, but in the end the decision to sit or not to sit must rest comfortably with the judicial conscience.



## CHAPTER FOUR

### 4 CONDUCT IN COURT

#### 4.1 Conduct of hearings

It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. The trial of an action, whether civil or criminal, is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided that it does not embarrass a party or witness. Indeed it sometimes relieves tension and thereby assists the trial process.

Nevertheless, the entitlement of everyone who comes to court – litigants and witnesses alike – to be treated in a way that respects their dignity should be constantly borne in mind. It is worth remembering that many complaints to the Judicial Commission of New South Wales by litigants and their lawyers have had as their foundation remarks made by judicial officers in the course of proceedings. The absence of any intention to offend a witness or a litigant does not lessen the impact.

A judge must be firm but fair in the maintenance of decorum, and above all even-handed in the conduct of the trial. This involves not only observance of the principles of natural justice, but the need to protect a party or witness from any display of racial, sexual or religious bias or prejudice. Judges should inform themselves on these matters so that they do not inadvertently give offence.

A judge should remember that informal exchanges between the judge and counsel may convey an impression that the judge and counsel are treating the proceedings as if they were an activity of an exclusive group. This is a matter to be borne in mind particularly in a case in which there is an unrepresented litigant, but the caution extends to all cases.

#### 4.2 Participation in the trial

It is common and often necessary for a judge to question a witness or engage in debate with counsel, but the key to the proper level of such intervention is moderation. A judge must be careful not to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion.

#### 4.3 Private communications

The principle that, save in the most exceptional circumstances, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of a party) otherwise than in the presence of, or with the previous knowledge and consent of, the other party (or parties) once a case is under way is, of course, very well known. The principle is referred to by McInerney J in *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122 (at 127) in a statement approved in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 by Gibbs CJ (at 346) and Mason J (at 350-351). An approach to a judge in chambers by the lawyers for one party should not be made without the presence, or the knowledge and consent of, the lawyers for the other party. It is important to bear in mind that breaches of the principle can occur through

oversight, sometimes when attempts are made to adopt what may seem to be practical, convenient, or time-saving measures. Care should be taken, for example, on country circuits if suggestions are made about shared travel that seem sensible at the time, but may in fact involve a breach of the principle.

#### **4.4 Criminal trials before a jury**

It is of particular importance in a jury trial that the nature or extent of judicial intervention in the course of evidence or argument does not convey to the jury a judicial view of guilt or innocence.

#### **4.5 Revision of oral judgments**

##### **4.5.1 Oral judgments**

A judge may not alter the substance of reasons for decision given orally. That is the basic principle. Subject to that, a judge may revise the oral reasons for judgment where, because of a slip, the reasons as expressed do not reflect what the judge meant to say, or where there is some infelicity of expression. Errors of grammar or syntax may be corrected. References to cases may be added, as may be citations for cases referred to in the transcript.

##### **4.5.2 Summing up to a jury**

The transcript of a summing up to a jury is, like the transcript of evidence, intended to be a true record of what was said in court.

Apart from errors of spelling or punctuation which may alter the meaning if uncorrected, there should be no change to the transcript of a summing up unless it does not correctly record what the judge actually said. Where time and opportunity permit, it is desirable for a judge to prepare written notes of the intended charge to the jury, particularly with respect to directions on the law, which may help to validate any proposed change to the transcript of the summing up. If the transcript is corrected, and a fresh transcript of the summing up incorporating the corrections is to be prepared, the original transcript should be retained on the court file.

#### **4.6 Reserved judgment**

A judge should aim to prepare and deliver a reserved judgment as soon as possible, but it sometimes happens that circumstances lead to an unacceptable accumulation of reserved judgments. A judge should speak to the head of the jurisdiction about the situation before the delay has become a problem.

#### **4.7 The judge as a mediator**

Many judges consider that the role of a mediator is so different from that of a judge that it is undesirable for a serving judge to act as a mediator. The difference lies in the interaction of a mediator with counsel and parties, often in private – ie in the absence of opposing counsel or parties, which is seen to be incompatible with the way in which judicial duties should be performed, with the risk that public confidence in the judiciary may thereby be impaired. Many judges would see this as a matter of court policy.

In some courts, the Rules of Court with respect to mediation specifically recognise the appointment of a serving judge as a mediator. The success of judicial mediation in those jurisdictions appears to justify the practice. The statutory obligation of confidentiality binding upon a mediator, and the withdrawal of the judge from the trial or an appeal, if the mediation fails, should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary.



## CHAPTER FIVE

### 5 ACTIVITIES OUTSIDE THE COURT

This chapter deals with specific examples of conduct or activities of a legal nature, but, as indicated in Chapter 1, it does not seek to be prescriptive. Opinions about such activities may vary, but the cardinal test for each judge in considering what to do is to seek to conform with the guiding principles dealt with in Chapter 2.

Principle and protocol require that if the executive government is seeking the services of a judge for a non-judicial appointment, the first approach should be to the head of the jurisdiction, seeking the approval of that person for the appointment of a judge from that jurisdiction, and approval to approach the judge in question. The head of the jurisdiction will consider the propriety of the judge accepting the appointment, with particular reference to the maintenance of the independence of the judiciary and to the needs of the court. The head of the jurisdiction will consult with other members of the jurisdiction as may seem appropriate. If there is no objection in principle, the head of the jurisdiction will consider whether the judge can be made available, and whether the first approach to the judge in question should be from the head of the jurisdiction or from a representative of the executive government.

It is inappropriate, subject to legislative provision, for a serving judge to accept payment other than reimbursement of expenses or an equivalent allowance, in connection with a non-judicial appointment.

#### 5.1 Membership of a government advisory body or committee

There is no simple answer to the question whether a judge should serve on a statutory or government body or committee.

It is generally not inappropriate for a judge to be a member of a committee dealing with matters having a direct relationship with judicial office such as court structures, law reform (but as to this, see below) or other legal issues, and there may be other cases in which it would be desirable in the public interest to have the benefit of a judge's expertise and experience on a government committee or advisory body. Much will depend upon the role and terms of reference of the committee or advisory body. But in weighing the options, a judge should remember that membership of a permanent body might involve advising on controversial issues, which may be inconsistent with the perceived impartiality and political neutrality of a judge.

#### 5.2 Submissions or evidence to a Parliamentary inquiry relating to the law or the legal system

It is appropriate for a judge to make a submission or give evidence at such an inquiry if care is taken to avoid confrontation or the discussion of matters of a political rather than a legal nature, but prior consultation with the head of the jurisdiction is desirable. Again, the expertise or experience of a judge can be of great assistance in the examination of issues relating to legal or procedural matters. As long as discretion is exercised, this would not detract from the independence of the judiciary from the legislative and executive arms of government.

### **5.3 A judge as a law reform commissioner**

Judges have been appointed as part-time commissioners at both state and federal level on many occasions, although in some States it is thought that judges should not accept such an appointment. As long as time spent in the work of the commission does not interfere with judicial duties, and if the approval of the head of the jurisdiction has been given, there need not be any conflict between the role of the commissioner and judge.

As in situations dealt with already, the experience of a judge can be valuable in considering the need for reform in a particular area of the law, and in looking at the effect in practice of proposed changes. This need not be in conflict with a judge's judicial duties or detract from judicial independence.

### **5.4 Membership of a non-judicial tribunal**

The head of the jurisdiction should be consulted about the proposed appointment. If the appointment is made by a Minister or a government officer, the protocol outlined at the beginning of this chapter should be observed.

There are a number of tribunals in respect of which there is statutory authority for judicial membership, but in some other cases – particularly if decisions of the tribunal are likely to be controversial as in the case of some sporting disciplinary tribunals – the judge should weigh the risks of involvement and adverse publicity before accepting appointment. In the case of private or sporting tribunals, the judge should consider whether any apparent conferring of judicial authority on the tribunal is appropriate.

### **5.5 Membership of a parole board**

In some States it has been common practice for serving and retired judges to be members of parole boards on which their judicial experience is undoubtedly valuable. If legislative provision is made for judicial membership of a parole board, there is no objection to membership. Absent legislative provision, the risk of conflict with a sentencing judge and a threat to judicial comity, however slight, might be seen by some judges as making membership undesirable.

### **5.6 Public comment by judges**

#### **5.6.1 Participation in public debate**

Many aspects of the administration of justice and of the functioning of the judiciary are the subject of public consideration and debate in the media, at public meetings and at meetings of a wide range of interest groups.

Appropriate judicial contribution to this consideration and debate is desirable. It may contribute to the public's understanding of the administration of justice and to public confidence in the judiciary. At the least, it may help to dispose of misunderstandings, and to correct false impressions.

Considerable care should be exercised to avoid using the authority and status of the judicial office for purposes for which they were not conferred. Points to bear in mind when considering whether it is appropriate to contribute include the following:

- A judge should avoid involvement in political controversy, unless the controversy



itself directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice;

- The place at which, or the occasion on which, a judge speaks may cause the public to associate the judge with a particular organisation, group or cause;
- There is a risk that the judge may express views, or be led in the course of discussion to express views, that will give rise to issues of bias or prejudgment in cases that later come before the judge;
- Other judges may hold conflicting views, and may wish to respond accordingly, possibly giving rise to a public conflict between judges which may bring the judiciary into disrepute or could diminish the authority of a court;
- A judge, subject to the restraints that come with judicial office, has the same rights as other citizens to participate in public debate;
- A judge who joins in community debate cannot expect the respect that the judge would receive in court, and cannot expect to join and to leave the debate on the judge's terms.

If the matter is one that calls for a response on behalf of the judiciary of the State, Territory or court collectively, that should come from the relevant Chief Justice or head of the jurisdiction, or with that person's approval. Subject to that, and bearing in mind the points made above, care is called for before contributing to community debate using the judicial title, or when it will be known that the contribution is from a judge.

### **5.6.2 Public debate about judicial decisions**

It is well established that a judge does not comment publicly once reasons for judgment have been published, even to clarify ambiguity.

On occasions decisions of a court may attract unfair, inaccurate or ill-informed comment. Many judges consider that, according to the circumstances, the court should respond to unjust criticism or inaccurate statements, particularly when they might unfairly reflect upon the competence, integrity or independence of the judiciary. Any such response should be dealt with by the Chief Justice or other head of the jurisdiction.

### **5.7 Writing for newspapers or periodicals; appearing on television or radio**

There is no objection to judges writing for legal publications and identifying themselves by their title. Care must be taken, however, not to express a view about the law where that same question may have to be decided by the judge in court.

There is no objection to articles in newspapers or non-legal periodicals and other contributions intended to inform the public about the law and about the administration of justice generally but before agreeing to write such an article, it is desirable that the judge should consult with the head of the jurisdiction.

Judges are occasionally asked to take part in radio talk-back or television programs on matters of public interest. Such activities, if they are to take place, are best carried out by or after consultation with the head of the jurisdiction, and should usually be restricted to matters affecting the administration of justice. The matters raised in par 5.6.1 will usually require consideration.

There seems to be no objection in principle to a judge writing in a private capacity on a non-legal subject.

### **5.8 Legal teaching**

It is common for judges who lectured at law schools before their appointment to continue to do so after they are appointed. As long as this does not interfere with judicial duties, there is an advantage in having a judge give lectures to students. In aspects of a course where there may be differences of views, discretion will have to be exercised – particularly where the lecturer may later have to decide the question as a judge.

### **5.9 New books – prefaces and book launches**

Legal textbooks frequently have prefaces written by judges and such an activity is unlikely to be open to any reasonable objection. In writing a preface for, or agreeing to launch, a non-legal book, some care and discretion is called for. Both the subject matter of the work, and the relationship of the judge to the author, need to be weighed, in order to avoid any perception that the judge may be promoting a particular cause or taking a political stance, or that the author's reason for seeking to involve the judge might be more mercenary than personal.

### **5.10 Payment for writing legal books**

Judges also write and contribute to legal textbooks. This is not controversial and it is not wrong for a judge to receive payment for writing of this nature. As a practical matter these payments are unlikely to be large. The writing of a book should not, of course, interfere with the performance of a judge's judicial duties.

### **5.11 Taking part in conferences**

Judges may, and frequently do, deliver papers at legal conferences. Participation in, or the giving of papers at, non-legal conferences, without a fee, is not objectionable, but it would generally be advisable to avoid speaking or writing on controversial or politically sensitive topics.

## CHAPTER SIX

### 6 NON-JUDICIAL ACTIVITIES AND CONDUCT

This chapter poses, in no particular order of importance, a number of specific questions that a judge may have to answer, always within the framework of the guiding principles discussed in Chapter 2.

#### 6.1 Commercial activities

The permissible scope of involvement in commercial enterprise concurrently with judicial office is limited by a number of factors:

Judicial office is a full-time occupation and the timely discharge of judicial duties must take priority over any non-judicial activity;

The benefits of office, including pensions or superannuation, should give a comfortable level of financial security for life to obviate the need to augment earnings by activities that might generate a conflict of interest or otherwise pose a potential threat to public confidence;

Directorships of public companies should be resigned on appointment and not thereafter accepted while in judicial office.

It is not possible to be definitive about the commercial activities that are appropriate and inappropriate. The judge should consider how the judge's involvement (whatever it is) might reflect on the judicial office. Any activity that will, or might, involve the judge in unlawful activity, obviously should be avoided. A commercial activity that might give rise to public controversy seems undesirable. The issue is one on which consultation with colleagues may be helpful.

A judge should not engage in any financial or business dealing that might reasonably be perceived to exploit the judge's judicial position, or that will involve the judge in frequent transactions or business relationships with persons likely to come before the judge in court.

Some small-scale non-judicial activities that might be perceived as commercial are quite common and not objectionable, particularly if they are primarily recreational. Examples (and there are many others) are:

- Hobby farms and other agricultural enterprises;
- Larger managed enterprises that do not require "hands on" responsibility;
- Directorship of small family companies.

#### 6.2 Judges as executors or trustees

The management of deceased estates for close family members, whether as executor or trustee, is unobjectionable, and may be acceptable even for other relatives or friends if the administration is not complex, time consuming or contentious.

The risks associated with the office of trustee, even of a family trust, should not be overlooked. Beneficiaries are not always happy with management or discretionary decisions taken by a trustee, and a judge would be wise to weigh such factors before accepting the office.

### **6.3 Acceptance of gifts**

It is necessary to draw a distinction between accepting gifts in a personal capacity unrelated to judicial office, eg from family or close friends, and gifts which in some way relate, or might appear to relate, to judicial office. It is only in the latter category that acceptance of gifts or other benefits needs careful consideration.

Some such gifts are unobjectionable, for example a small gift such as a bottle of wine or a book by way of thanks for making a speech or otherwise participating in a public or private function.

Some benefits which may well be legitimate marketing or promotional activities may nevertheless cause difficulties. Refusal of such a benefit may seem churlish or even offensive if it imputes or implies improper motives, but the short answer is that there is no good reason why judges should receive free benefits that others have to pay for. On the other side of the same coin, it is axiomatic that judges must not exploit the status and prestige of judicial office to solicit or obtain personal favours or benefits.

Judges should be wary about acceptance of any gift or benefit that might be interpreted by others as an attempt to woo judicial goodwill or favours. Gifts or other benefits from practising members of the legal profession may fall into that category.

### **6.4 Engagement in community organisations**

Prior to their appointment, many judges have been actively engaged in community organisations, particularly but not exclusively educational, charitable and religious organisations. Such engagement as a judge is to be encouraged and carries a broad based public benefit, provided it does not compromise judicial independence or put at risk the status or integrity of judicial office. It is the proviso that helps to define the limits, namely:

- Such activities should not be too numerous or time consuming;
- The judicial role should not involve active business management;
- The extent to which the organisation is subject to government control or intervention must be weighed.

The governing bodies of universities, public or large private hospital boards or other public institutions invite special attention. Although the management and funding structures of such organisations are complex, and are often the subject of public debate and political controversy, many judges, present and past, hold or have held high office in such organisations without embarrassment by regulating the nature or extent of personal involvement in contentious situations.

The role of many such public institutions is, however, changing. They are often encouraged to be more entrepreneurial, and commercial activities as well as industrial

issues or disputes are likely to appear on their agendas. The more that the business of their governing bodies comes to resemble that of the board of directors of a public company, the less appropriate judicial participation may be. There is, however, no embargo on such an activity. It is for the individual judge to weigh the “pros and cons” by reference to the suggested guidelines.

Any conflict of interest in a litigious situation must of course be declared.

### **6.5 Public fund raising**

Organisations of the kind referred to in the preceding paragraphs are often engaged in public fund raising.

It is undesirable for the name and title of a judge as a member of the governing body of the organisation to appear on the letterhead or other documents specifically associated with an appeal for funds. A judge should not personally solicit funds from a legal practitioner or any other prospective donor.

Publication of the name of a judge as a subscriber is not itself objectionable, but many judges may prefer anonymity. It is a matter of personal taste.

### **6.6 Character and other references**

The Judicial Commission of New South Wales (the members of which include the heads of the six courts in that State) in 2000 expressed a view that judicial officers should not give character evidence or issue written testimonials directed to the same issue. This is subject to two exceptions:

- Where it would be unjust or unfair to deprive the beneficiary of special knowledge possessed by the judicial officer; and
- Where a member of the judicial officer’s staff is given a reference relating to employment.
- The second of these exceptions does not deal with character evidence.

In other States a less strict view may be held. There are different opinions, but they appear to justify the following summary:

- (a) There is no objection in principle to a judge giving a reference as to character or professional competence of persons who are well known to the judge, and preferably favourably known – a wise person takes care in choosing referees. It is permissible to use a judicial letterhead for a reference as to legal professional competence of a former member of the judge’s staff, but in other cases it is more appropriate to use a private letterhead.
- (b) Whether a judge should give character evidence in court or otherwise is a vexed question that can be resolved only by the individual judge in the context of a particular case. The issues to be weighed include:
  - It may seem unfair to deprive the person concerned of the benefit of such evidence.
  - If the person concerned has generally been of good repute, there are probably others who can so testify.

- Such evidence from a judge may well put pressure on the trial judge or magistrate.
- The outcome, whether favourable or unfavourable to the person charged, may well become the subject of ill-informed publicity, referable to the judge's involvement.

It would be wise to consult the head of the jurisdiction if asked to give such evidence.

### **6.7 Use of the judicial title**

Although there should be no need for a judge to conceal the fact that he or she is a judge, care should be taken not to create an impression that a judge's name, title or status is being used to suggest in some way that preferential treatment might be desired or that the status of the office is being used to seek some advantage, whether for the judge or for someone else.

### **6.8 Use of judicial letterhead**

Judges should avoid the use of a judicial letterhead in correspondence unrelated to their official duties in circumstances where the use of the letterhead might be taken to suggest a request for, or expectation of, some form of preferential treatment. To take a very obvious example, if a judge were to write a letter complaining to a service company about a defective repair job, it would be wrong to use a judicial letterhead. Similarly, if a judge had a disputed claim on an insurance policy, it would be unwise to use a judicial letterhead even though it may very well be a fact that the insurance company knows that their insured is a judge. It is, however, customary and proper for a judicial letterhead to be used for some private purposes connected with a judge's office, such as writing or responding to notes sent on the occasion of a friend's appointment or retirement from the bench.

### **6.9 Protection of personal interests**

Judges should be circumspect about becoming involved in personal litigation, even if the litigation is in another court. Good sense must prevail and although this does not mean that a judge should abandon the legitimate pursuit or defence of private interests, their protection needs to be conducted with great caution to avoid creating any impression that the judge is taking improper advantage of his or her position.

### **6.10 Social and recreational activities**

There is such a wide range of social and recreational activities in which a judge may wish to engage that it is not possible to do more than suggest some guidelines.

Judges should themselves assess whether the community may regard a judge's participation in certain activities as inappropriate. In cases of doubt, it is better to err on the side of caution, and judges generally will be anxious and careful to guard their own reputation. A brief reference, far from exhaustive, to some "grey" areas may help judges to make their own decision with respect to those and other activities.

### **6.10.1 Social contact with the profession**

There is a long-standing tradition of association between bench and bar, both in bar common rooms and on more formal occasions such as bar dinners or sporting activities. Many judges attend Law Society functions by invitation. The only caveat to maintaining a level of social friendliness of this nature, one dictated by common sense, is to avoid direct association with members of the profession who are engaged in current or pending cases before the judge. A similar test should be applied in cases of private entertaining, unless the other parties to the litigation have been approached and have no objection.

Circuit courts, however, may pose some difficulties. It is common for members of the legal profession in country areas to entertain the judge, either in a group or in private homes. The judge in accepting or offering hospitality must be and be seen to be even-handed towards legal practitioners engaged in the current sittings. The judge should not be regularly entertained by or retain too close a relationship with a practitioner who regularly has litigation before the court.

Similarly, in country sittings involving criminal cases, care must be taken not to accept assistance outside the court from police who might be appearing in cases in the sittings. Some judges consider that they should not rely on the police to supply transport to and from the courthouse in order that it might not be thought that the judge is siding with those regarded as representing the prosecution.

### **6.10.2 Membership of clubs**

Assuming that there is no breach of the law involved, this is a matter for the individual judge to decide. There is a view held by some judges that it is undesirable for a judge to be a member of a club or society that permits only exclusively male or female membership. Other judges disagree. Some judges have been members of such clubs or societies without giving rise to any embarrassment in the discharge of their judicial duties, or without affecting the reputation of the judiciary. This is not an issue on which there is any generally held view, but opinions may well be changing.

### **6.10.3 Visits to bars and clubs; gambling**

This is also a matter for the individual judge. A judge should give thought to the perceptions that might arise from, for example, the reputation of the place visited, to the persons likely to be present, and any possible appearance that the premises are conducted otherwise than in accordance with law.

### **6.10.4 Sporting and other club committees**

There is in general no objection to a judge serving on such committees so long as they do not make unreasonable demands on a judge's time. Some judges consider that a judge should not sit on a committee exercising disciplinary powers.





## CHAPTER SEVEN

### 7 POST-JUDICIAL ACTIVITIES

The purpose of this chapter is not to dictate to retired judges, but to give guidance to serving judges who are contemplating or planning for their retirement.

#### 7.1 Professional and commercial activities

There are many judges, particularly those who have remained in office to the age of statutory retirement, who choose to undertake only recreational activities in retirement. They thereby avoid the sometimes difficult and controversial decisions that have to be taken by those who seek a more active and remunerative role.

The receipt of a judicial pension, for the most part publicly funded, is not in itself a bar to post judicial remunerative activities. Most judges on appointment make a substantial financial sacrifice in terms of earning capacity. Nor does it seem necessary, in the discussion that follows, to draw any distinction in principle between:

- Those who have reached the statutory age of retirement;
- Those who, after quite lengthy judicial service, have chosen to retire early for reasons other than ill-health;
- Those relative few who have found themselves ill-suited to the judicial role and have resigned after a short term in office.

If there is one guiding principle, a former judge should be satisfied that any proposed professional or commercial activity is not likely to bring the judicial office into disrepute, or put at risk the public expectation of judicial independence, integrity and impartiality.

#### 7.2 Professional legal activities

##### 7.2.1 Practice at the Bar

This is a “grey area” in which it is not possible to formulate Australia-wide guidelines. A judge contemplating retirement should consult the Australian Bar Association, and the local Bar Association or Law Society for relevant rulings. All however proscribe appearance as counsel in a court of which the judge was formerly a member, for various periods ranging from two to five years.

Australian experience suggests, however, that this topic is most likely to concern those who have resigned soon after appointment.

##### 7.2.2 Practice as a solicitor

Active association with a firm of solicitors, whether as a partner, consultant, or in some other capacity, is permissible, but preferably not sooner than a year or so after retirement. Some judges consider that care should be taken to ensure that the firm does not take active steps to promote itself by overt reference to the judge’s former judicial status.

### **7.2.3 Alternative dispute resolution – mediation and arbitration**

It has become quite common for judges who have retired, whether early or at full retirement age, to be appointed or to offer their services as mediators or arbitrators. Although some judges do not approve of such activities, they are not at present subject to any legal or professional restraint.

### **7.2.4 Appointment as an acting or auxiliary judge**

Many States make provision for a retired judge to return to the court, for temporary or intermittent periods, as an acting judge.

A retired judge who sits from time to time as an acting or auxiliary judge should consider carefully the appropriateness of other activities that the retired judge might be undertaking. The exercise of the judicial office on a part-time basis may require the observance of, or at least consideration of, some of the restrictions identified in this publication. Particular care should be exercised in relation to activities undertaken concurrently with part-time judicial work.

### **7.3 Commercial activities**

It is permissible to engage in commercial activities. However, a retired judge should consider whether his or her activities might harm the standing of the judiciary, because of a continuing association in the public mind with that institution.

### **7.4 Political activity**

The restraints that prevent a serving judge from having any involvement in politics cease to apply on retirement but, as with commercial activity, the retired judge should consider whether the particular activity undertaken might reflect adversely on the judiciary, because the public might continue to associate the retired judge with that institution.

### **7.5 Participation in public debate**

A retired judge has the same freedom as an ordinary citizen to engage in public debate, and in many cases is well qualified to do so, particularly in matters touching the administration of justice generally. A retired judge should, however, consider whether a contribution to public debate is appropriately identified as coming from a retired judge.

A retired judge should not use the former title "Justice" or "Judge" in connection with activities of a political nature. A retired judge should not act in such a way as to create the impression that he or she is speaking with judicial authority.

### **7.6 Community and social activities**

A retired judge has the freedom of any citizen to engage in chosen recreational and other community and social activities untroubled by the risks of a conflict of interest or perception of bias which have to be weighed by a serving judge, as earlier discussed.

Even in retirement, however, a former judge may still be regarded by the general public as a representative of the judiciary, and any activity that might tarnish the reputation of the judiciary should be avoided.

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## The Maintenance of Institutional Values

### THE MAINTENANCE OF INSTITUTIONAL VALUES

#### ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

#### CHIEF JUSTICE OF NEW SOUTH WALES

#### COLLOQUIUM

#### RESEARCH LIBRARY FUTURES: STRATEGIES FOR ACTION

#### STATE LIBRARY OF NEW SOUTH WALES, SYDNEY

17 MAY 2002

The contribution that is made by the administration of justice to the social and economic welfare of Australia is in large measure based on institutional traditions such as the independence of the judiciary, the incidents of a fair trial and the principle of open justice. These institutional traditions reflect values of abiding significance. Each generation of judges is a trustee of those traditions. It is for that reason that I have sought over a period of time to both articulate the continued significance of those traditions and to warn of some of the dangers that arise from other pressures impinging on the administration of justice [1].

In the addresses I have given on this subject there has, inevitably, been a certain degree of repetition, and I apologise to any member of this audience who has heard some of this before.

The pertinence of these issues for the present Colloquium arises from the fact that the pressures on the Courts reflect pressures to which all areas of public sector activity have been subjected over recent decades including, I am sure, libraries. I would not presume to lecture an audience such as this on the institutional values and traditions of our great public libraries. Nevertheless, I have found that when addressing contemporary pressures from the perspective of the administration of justice, the experience of other public activities is relevant to the administration of justice, and our own experience is relevant to others.

The Courts are an arm of government. They have not been, and cannot be, insulated from changes in attitude about the proper role of government and the appropriate ways to conduct governmental activities. In the case of libraries, whether the major public library or academic, specialist or local libraries, I assume that the pressures have been and are similar.

The pressures to which I refer include demands for different kinds of, and a greater level of, accountability and transparency in decision making and the recent pre-eminence of commercial or economic values in public decision making, accompanied by the greater salience of what has been called the three "E's" – economy, efficiency and effectiveness – in competition with other values of government activity such as accessibility, openness, fairness, impartiality, legitimacy, participation, honesty and rationality. This has often involved an increase in significance of managerial values over what may be called the professional values of an institution's traditions.

There seems to be in some circles a belief that it is always possible, without exception, to achieve more with fewer resources. I have in mind the response of an ardent micro-economic reformer who noticed that a string quartet performs a work by Mozart in exactly the same time in 2002 as it had been performed in 1802. For 200 years there has been no increase in productivity whatsoever. This reformer, sure that he has discovered a great scandal in the form of a collusive arrangement amongst professional musicians, believe the Australian Competition and Consumer Commission should investigate.

Some things take time. Justice is one of them. In some spheres of conduct productivity improvements are not possible without diminution of quality. That does not mean, however, that productivity is not an

appropriate focus of attention.

Accountability of course is something that everyone is “for” – like democracy or freedom. As always it is the detail that matters: accountability to whom and what. A central consideration for all public activities is the fact that they derive funds, in large measure, from taxation. This imposes a duty to account for the efficiency and effectiveness with which such funds are used.

One aspect of the new managerialism in the public sector – sometimes referred to as “the new public management” – is the assumption that better decisions will be made by exposing public sector decision makers to market forces or by seeking to replicate such forces. Over recent decades the values of commercialism have swept aside many other values and have come to dominate public debate to an unprecedented degree. A physical manifestation of this is in the form of our cities. They were once dominated by public buildings – a parliament, a court, a town hall, a cathedral. Now all such buildings are dwarfed by commercial office blocks. Indeed, public buildings are now often constructed in a form indistinguishable from commercial buildings, of which the “new brutalism” of the Supreme Court building is merely the most egregious example on the Sydney skyline.

There are, in my opinion, dangers in such uniformity. Diversity in the organising principles of our social institutions is as significant for the health of our society as bio-diversity is for our ecology. A monoculture is inherently unstable. In the context of the values of the legal system, truth, justice and fairness are not necessarily compatible with the unbridled operation of market forces. Nevertheless, over recent decades, the balance of influence between the political ideology that emphasises market failure and that which emphasises government failure has, in relevant respects, shifted in favour of the latter. This change has effected all aspects of government including, inevitably, the courts and, I assume, libraries.

I have no doubt that in some areas of government the introduction of a market perspective has proven to be entirely salutary. Such success is not however a proper basis for an assumption that this approach can be applied to every area of government activity. There are important differences between different parts of the public sector, and between different functions performed within any particular area of the public sector, with regard to these issues.

In some cases it is entirely inappropriate to reduce citizens to consumers and to treat governmental institutions merely as providers of services. It is not the case that all areas of human life can be characterised as a series of consumer choices. Citizens have rights and duties. Consumers have desires or needs. A person’s interest as a “consumer” is only one part of a person’s status as a citizen. The consumer analogy has become, in many respects, a feral metaphor that has acquired a disproportionate degree of prominence.

Rabbi Jonathon Sacks, the Chief Rabbi of the British Commonwealth, has argued that the kind of society that gives rise to and is able to sustain a market economy tends to be a society with a strong respect for certain kinds of traditions. Rabbi Sacks expressed concern that traditions were being undermined by the power of the market. He identified the global triumph of a market based approach as perhaps the market economy’s own worst enemy. He said:

“When everything that matters can be bought and sold, when commitments can be broken because they are no longer to our advantage, when shopping becomes salvation and advertising slogans become our litany, when our work is measured by how much we earn and spend, then the market is destroying the very virtues on which in the long run it depends.

That, not the return of socialism, is the danger that advanced economies now face. And in these times, when markets seem to hold out the promise of uninterrupted growth in our satisfaction of desires, the voice of our great religious traditions needs to be heard, warning us of the gods that devour their own children, and of the temples that stand today as relics of civilisations which once seemed invincible ...

The market, in my view, has already gone to far: not indeed as an economic system, but as a cast of thought governing relationships and the image we have of ourselves ... The idea that human happiness can be exhaustively accounted for in terms of things we can buy, exchange and replace is one of the great corrosive acids that eat away the foundations on which society rests; and by the time we have discovered this, it is already too late.

The market does not survive by market forces alone. It depends on respect for institutions, which are themselves expressions of our reverence for the human individual as the image and likeness of God.”

In my various addresses on this subject I have sought to emphasise that it is a gross over-simplification to treat the courts as delivering some kind of “service”. The courts administer justice in accordance with law. They no more deliver a “service” in the form of judgments and decisions than a parliament delivers a “service” in the form of debates and statutes. I do not doubt that courts serve the people, but they do not provide services to the people.

The enforcement of legal rights and obligations: the articulation and development of the law, the public affirmation of who is right and who is wrong, the denunciation of conduct in both criminal and civil trials, the deterrence of other conduct by a public process with public outcome. These are all public purposes served by the courts, even in the resolution of private disputes.

I do not presume to intrude into consideration of the various functions performed by a library. No doubt there are functions which can be seen to be accurately described in terms of providing a service to a particular person or persons and others which are more appropriately understood in terms of public purposes. A clear differentiation in this regard may not always be possible. However, it may be important, in the light of current pressures, to attempt some form of differentiation if the full range of values of the institution are to be served.

Efficiency is not the only value in life. Our system of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of government. In all these respects we have deliberately chosen inefficient ways of decision making in order to protect rights and freedoms and to ensure that governments act with the consent of the governed. These are values of a sufficiently high order to be protected in constitutional terms. That is not so for other areas of government activity. However, the general principle remains applicable: not everything is capable of being reduced, either directly or by analogy, to some form of market.

One of the most distinctive characteristics of the “new public management” is that it adopts a “one size fits all” approach that assumes that the same procedure is appropriate in every area of the public sector. Generally there appears to be required a hierarchy of documentation. At the highest level of generality or abstraction is a document described variously as a strategic plan, corporate plan, charter or mission statement. The level below concerns the process of annual implementation, variously called business plans or performance plans and the like. These plans are required to contain goals, objectives, targets or standards at a level of generality that is implementable and, preferably, capable of measurement and stated in quantitative form. Further down the hierarchy is what is frequently called performance indicators, which are required to be measurable, concrete, collectable at reasonable cost and comparable either between institutions or over time for the one institution. Finally, the process must be capable of independent evaluation, both within the unit of public administration and by investigatory and regulatory bodies such as finance departments, auditors-general and parliamentary committees. Although the nomenclature varies from one country to another, and from one area of public administration to another, the broad lines of these requirements appear to be similar in many countries and spheres of discourse.

At the level of strategic plans, mission statements, charters and the like, one generally finds the broadest of platitudes, unlikely by their nature, to have any effect on actual behaviour. No doubt there are some areas of public administration for which clarification of objectives at this level of generality performs some useful function. I do not myself accept the proposition that one cannot plan for the future unless one writes it down. However, in the immortal words of an English footballer:

“If you have the courage to look far enough ahead, you too can see the carrot at the end of the tunnel.”

And so we should.

The position in this regard is not a static one. The enthusiasm for strategic plans or charters or mission statements appears to me to have waned somewhat. The presumed benefits from clarification of objectives do not seem to be attainable when the objectives are stated at a high level of abstraction. It is not sufficiently appreciated that management is, in some respects, a fashion industry.

Although at any point of time the requirements of good management are stated with certitude, those requirements change over time. For example, in the United States with respect to budgeting processes there has been a succession of passions: in the 1950s there was "performance budgeting"; in the 1960s it became "programme budgeting"; in the 1970s there was "management by objectives"; in the 1980s the current approach with the hierarchy of documentation which I have referred came to be required by statute. Each of the previous approaches was accepted, on each such succession, to be a failure.

Scarcely a week goes by without some new volume proclaiming the abiding utility for managers of glue factories, of the insights to be found by an obscure author whose work is available, if at all, only in the Penguin Classic series or of other insights which are to be deduced from some catchy aphorism. Management fads of this character come and go with bewildering rapidity. Nevertheless one can also identify phases of management belief structures which take root for longer periods with more widespread application. These more permanent models pass through phases of enthusiasm, dissemination, disappointment and decline. One American author has recently identified a range of consecutive management fads which were applied in higher education in the United States over the course of the last two or three decades: the Planning Programming Budgeting System was replaced by Zero-Base Budgeting which was replaced by Management by Objectives – that is to say PBS followed by ZBB followed by MBO. Subsequently, there was an emphasis on strategic planning and benchmarking and then Total Quality Management (TQM) and then Business Process Re-Engineering (BPR) [2].

A critical manifestation of all managerial approaches to decision making is the centrality that is attributed to quantification of both inputs and outputs. That is not to say that managers do not understand the concept of quality. They do and regard it as an important consideration. There is, nevertheless, a fear of any subjective dimension when making judgments about quality. So there is a never-ending and, usually unrequited, search for measurement of quality, to introduce an objective element into the process. In the case of manufacturing goods for example, defect rates and customer satisfaction may be an appropriate indicator of quality. This cannot, however, be applied to all areas of governmental activity.

I do not doubt that there are perfectly acceptable and legitimate purposes served by quantitative indicators. In the context of managing the Supreme Court I refer regularly to many statistics on matters such as case load and delay. However, in some areas of government activity performance indicators have been reduced to funding formulae and, particularly in that form, have come to be applied in a mechanical and rigid way to determine not only budgets but also remuneration and tenure. This has had the most dramatic effects on the operations of the organisation, effects which no-one would have chosen by a more broadly based decision-making process.

The root of the difficulty is one of perception. Quantitative measurement appears to be objective and value free. Qualitative assessment appears to be subjective and value laden. In fact quantitative measures – whether in the form of a funding formula or of a performance indicator – contain and conceal important value judgments. There may indeed be an institutionalised bias against qualitative assessment because of the benefits that arise when decisions become virtually automatic. Where persons, by reason of their institutional position, have ongoing relations with each other, it is easier to say that a decision is determined by a formula. It is harder to make a decision which is based on an express assessment that one person or institution is not as good as another, or not as good as they should be.

There appears to me to be a power struggle between the managers – people like Treasury officials, departmental finance officers and auditors – and the professionals - like teachers, doctors, lawyers, librarians – in this context. Such professionals tend to emphasise the significance of qualitative considerations. Managers tend to emphasise measurable indicators and objective formulae.

It is perfectly understandable why this should be so. To the extent to which qualitative considerations are given weight, the professionals will have the greater say. Unless matters can be reduced to measurable standards and indicators, the managers will not be able to exert significant influence. The managers simply do not have the capacity to make qualitative judgments. As a regrettably anonymous pundit put it:

"Where you stand depends on where you sit."

In many areas of public decision making, including the administration of justice, there is simply no

escaping qualitative judgments. Not everything that counts can be counted. Many decisions can never be made automatic. Quantitative measurement is, by its very nature, partial and incomplete. Decisions based on measurable factors reflect a very partial rationality. However, measurement by reason of its concreteness, tends to acquire a disproportionate and inappropriate influence over the more amorphous considerations of quality, with results that are capable of being profoundly irrational.

There is a tendency amongst managers to regard measurement as benign and that no harm can be done from quantification, even if it does not prove to be useful. That is wrong. The process of deciding what and how to measure so-called "performance", is capable of having very real effects on behaviour and to distort actual conduct in a manner that no-one would actually choose. This is a critical manifestation of the irrationality of partial rationality.

Of course such consequences depend upon how performance indicators are used. If they are used for internal management purposes then it is unlikely that such a consequence will follow. If, however, they are used for external accountability purposes then the possibility of unintended adverse consequences is higher. If they are used for purposes of allocation of resources and determination of job security and remuneration, then distortions are virtually guaranteed.

Although managers tend to think of themselves as applying a market driven private sector model, there is a different perspective. An emphasis on strategic plans, business plans and performance indicators was the primary characteristic of the long tradition of socialist planning. The one thing of which there was no shortage in the former Soviet Union was performance indicators. They called it a five year plan. The Soviet experience indicates dramatically the distortions that can arise by reason of an emphasis on quantification.

Nikita Khrushchev, in one of his speeches attacking what he called "the steel eaters" of heavy industry revealed that when the five year plan for nail manufacturers identified output in terms of tonnes every manufacturing plant in the country made large nails and there was a shortage of small nails. Accordingly, in the next five year plan, output was stated in terms of number of nails. The inevitable happened. Everyone made small nails and there was a shortage of large nails.

It is of central importance to recognise that measurement is not neutral in its effects. Measurement has consequences. Indeed it is expected to have consequences. However, what occurs may not be as intended. The more significant the application of quantitative measurement, the more likely it is that it will have unintended consequences. Only some matters are capable of measurement and what is measurable will receive greater salience than what is not measurable. This may not be of concern. In some areas of government activity what can be measured may include the things that matter most, including aspects of quality. However, to the extent that what matters cannot be measured, then it is necessary to be concerned about the pathology of measurement.

There is a substantial body of literature showing the distortion effects of measurement in both the private and the public sectors. One Harvard Business School Professor calls the process of paying bonuses for performance as "paying people to lie". He concludes:

"Tell a manager that he or she will get a bonus when targets are realised then two things are sure to happen. First, managers will attempt to set targets that are easily reachable, and once the targets are set, they will do their best to see that the targets are met even if it damages the company to do so." [3]

The kinds of difficulties that arise are well stated in assessment of American universities of the emphasis given to publication and the grant of tenure for American academics. It is worth quoting at some length:

"As long as the candidate proves an inoffensive teacher and a reasonable department member, only one question sits on the meeting room table: Is the research project finished? If the junior colleague has a book in hand or an acceptance letter from the director of the university press, tenure is a fait accompli. If the work remains in manuscript, promising but incomplete, no promotion. That is the employment equation. Tenure has boiled down to a six-year composition scheme. Junior faculty now face a demystified production schedule, and senior faculty enter the tenure meeting with a one-checkbox form in their heads. No more messy discussions about quality. No more anxiety about whether the department has enough discernment, or too much. Administrators have an objective criterion to point to should any outsiders challenge the

proceedings. Judgment has been externalised, handed over to the university editorial board. The assistant professor has inherited a job task that takes priority over teaching students, that is, marketing his revised dissertation to academic press editors.

While the book criterion has clarified the tenure process, it has fundamentally altered the nature of scholarship in the humanities. The system discourages research that is time-consuming, that involves tracking down information secreted in libraries and archives, that may yield numerous dead ends before a discovery occurs. Junior faculty must envision book-length projects that can be executed well in advance of the crucial tenure meeting, which takes place in the middle of the candidate's sixth year of employment. ... Books that require lengthy inquiries do not get written. ... Clear-sighted professors will avoid empirical methods, aware that it takes too much time to verify propositions about culture, to corroborate facts with multiple sources, to consult primary documents, and to compile evidence adequate to inductive conclusions. They will seek out research models whose premises are already in place, not in need of proof, and whose exercise proceeds without too much deliberation over inquiry guidelines. Speculation will prevail over fact-finding, theory and politics over erudition. Inquirers will limit their sources to a handful of primary texts and broach them with a popular academic theory or through a socio-political theme. In sum, facing a process that issues in either lifetime security or joblessness, junior faculty will relax their scruples and select a critical practice that fosters their own professional survival, a practice that offers timely shortcuts to publication and still enjoys institutional sanction." [4]

The central theme of this article is that these pressures have distorted American intellectual life by creating an environment in which post modernism in its various simplistic forms can flourish. As can be seen from this experience, the attempt to abolish judgment and replace it by an allegedly "objective" criterion can have significant distorting effects.

Mine is not an argument against measurement. My concern is to prevent measurement becoming determinative in decision making processes where qualitative judgments are essential. Experiences from different areas of the public sector can be of significance to such application of the management techniques to new areas.

I note that the International Standard Organisation has adopted ISO-11620 on the subject of "*Information and Documentation – Library Performance Indicators*". No doubt reflecting a broader debate in your community, ISO-11620 adopts a long list of indicators including: user satisfaction, cost per user, cost per library visit, library visits per capita, titles availability, required titles availability, percentage of required titles in the collection, medium time of document retrieval from either closed stacks or open access areas, collection turnover, loans per capita, costs per loan, speed of inter-library lending, title catalogue search success rate, medium time of document acquisition or processing, etc. Many of these measurable standards are of significance, particularly for management decision making. In respects such as these changes within the one institution over time can be of significance. Similarly, with respect to comparing the performance of different administrative units performing the same functions within the one organisation, e.g., different branches of the same library.

Difficulties begin to emerge very quickly once one steps beyond such use. One does not even need to go to the stage of performance linked funding or remuneration. Even at the level of benchmarking by invidious comparison between institutions, significant distortions can arise.

In the context of courts there is a single annual publication which purports to compare different courts in the States and Territories and the Commonwealth Courts, with respect to matters such as delay. Such performance tables have become a frequent occurrence in many areas of activity over recent years. The media love their essential simplicities.

In the case of the courts in the federal structure of Australia, this comparison is almost completely valueless. It is simply not the case that courts which have the same name in the respective States and Territories – say, the supreme court – do the same kinds of things. They do not. There is a reasonable level of comparability between the Supreme Courts of New South Wales and of Victoria, however, the Supreme Court in every other State or Territory has a completely different caseload in terms of the balance between matters that are capable of quick disposition and those which are not. The annual table which is published is almost completely valueless.

I note that ISO-11620 identifies that one purpose of the performance indicator data is "to encourage meaningful and useful comparisons across different libraries". The experience of the courts is that



qualificatory adjectives such as “meaningful and useful” are more often than not lost, particularly in media reporting.

In all of these areas there are difficulties of knowing what the data really means. I don't know whether a higher cost per visitor to a library is a good thing or a bad thing. It may be an indication of a higher level of service or it may be an indication of inefficiency. Similarly, is a higher percentage of required titles in the collection better than a lower percentage? It may indicate a more accurate matching of acquisitions to demand. It may also indicate a downgrading of the archival function of a library. No doubt it depends on the library and its particular role in the community. These sorts of questions also highlight the dangers of comparison which are much too glibly made, not only in the tabloid media, but by Treasury officials and head-hunters.

The fear is that the pressure of managerial values will degrade the significance of professional values with an end result that is the opposite of that intended, even by the managers. The intrusion of managerialist requirements may progressively undermine the ethos of public service which is of abiding significance in all public sector institutions, particularly those with a strong professional tradition. All such institutions must adapt to the limited resources made available for purposes of the respective functions. In doing so we all have to be conscious that there *is* such a thing as productivity in the performance of public functions. An institution's values and traditions will be best served by maximising such productivity. The issue is how you achieve that objective.

Significant rewards arise from the sense of public service and that still motivates the best of the professionals in the public sector. It is for that reason that such occupations were seen as a particularly fulfilling way of earning a living and, at least until recent years, were afforded a higher status by reason of that fact. In many spheres of governmental activity the paraphernalia of strategic plans to performance indicators will generate a large volume of documentation, the significance of which never rises above the decorative. It may very well still prove to be the case that the sense of public service and professional responsibility is the primary means of ensuring performance. The danger is that the intrusion of managers and market values will be such as to undermine the sense of public service and of professional responsibility, with results diametrically opposed to those intended to arise from the implementation of the managerial techniques. Unfortunately, by the time we realise that, it may well be too late.

#### **Endnotes**

1. “The Qualitative Dimension of Judicial Administration” 1999 4 *The Judicial Review* 179; “Seen to be Done: The Principle of Open Justice” 2000 74 *ALJ* 290, 378; “Economic Rationalism and the Law” 2001 24 *UNSWLJ* 200; “Citizens Consumers and Courts” 2001 60 *Australian Journal of Public Administration* 5; “Judicial Accountability and Performance Indicators” 2002 *Civil Justice Quarterly* 18; “The ‘New Public Management’ and the Courts” 2001 75 *ALJ* 748; “Quality in an Age of Measurement” 2002 *Quadrant* (March 2002) 9.

2. See Robert Birnbaum *Management Fads in Higher Education: Where they come from, What they do, Why they fail*. Jossey-Bass, San Francisco, 2000.

3. Michael C Jensen “Paying People to Lie: The Truth about Budgeting Process” Harvard Business School Working Paper No 10-072 April 2001 accessible at [www.papers.ssrn.com](http://www.papers.ssrn.com).

4. Mark Bauerlein “Social Constructionism: philosophy for the Academic Workplace (2001) LXVIII(2) *Partisan Review* [www.bu.edu/partisanreview/](http://www.bu.edu/partisanreview/)

## Negligence: The Last Outpost of the Welfare State (Summary)

**NEGLIGENCE: THE LAST OUTPOST OF THE WELFARE STATE  
SUMMARY OF AN ADDRESS  
BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
TO THE JUDICIAL CONFERENCE OF AUSTRALIA  
COLLOQUIUM 2002  
IN LAUNCESTON ON SATURDAY, 27 APRIL 2002**

In many respects the law of negligence is the last outpost of the welfare state. Notwithstanding that the system is based on a finding of fault, the practical operation of the law of negligence suggests that an element of welfare state paternalism, driven by compassion, may well exist. Furthermore, on some occasions there may have been inadequate weight to the principle that an individual should take responsibility for his or her own actions.

From the 1960's to the 1990's, a long-term trend of judicial decision making can be discerned by which liability and damages expanded. However, that trend has, in recent years, been decisively stopped and reversed. There is now a significant body of recent High Court decisions, and an even larger body of intermediate court of appeal decisions, which find in favour of defendants, when the opposite decision would have been made if the long-term trend had continued.

Over the years there were a large number of comments by judges criticising the previous trend and advocating its reversal.

For many years, the judiciary was regarded as too conservative and pro-defendant. Various statutes extended liability to situations that would be denied at common law. Commencing about twenty years ago, the process appears to have been reversed. Judges came to be regarded as too pro-plaintiff. Throughout Australia, statutes restricted the scope of liability at common law in major areas of conduct including motor vehicle accidents and industrial accidents and, in New South Wales last year, in medical negligence cases. Similar change is now in prospect with respect to public liability insurance. It is sometimes said that legislatures should not interfere with common law rights. That does not always recognise the degree to which, as a matter of practical significance, past amendments of the common law by statute have expanded the range of liability. What many regard as "common law rights" are, in fact, statutory rights which abolished common law restrictions.

In the three major legislative schemes limiting common law actions – for motor vehicles, industrial accidents and medical negligence – the New South Wales Parliament has adopted a variety of different provisions as the basis upon which liability can be established and damages calculated. There is no discernable principle lying behind these differences. Persons who suffer injuries in the three different ways are subject to quite different caps and thresholds and different heads of damages can be recovered in different ways.

The primary reason for the creation of such differences is that all of the schemes – and presumably the public liability insurance scheme now in prospect – have been determined by the need to control or reduce insurance premiums in each of the different contexts. The primary source of the ideas about the changes has been insurance underwriters seeking to limit claims (and therefore premiums) or the equivalent perspective of a public instrumentality responsible for a government-backed scheme. The reforms are underwriter driven.

In my opinion, in the long run, it is quite likely that the significant differences in compensation based on how an injury occurs, rather than the need for compensation, will create resentment in the community. Why should compensation be fundamentally different depending on whether injury occurred in a car or in a car park or at work or on the operating table or in a public swimming pool or at a supermarket? It will be very hard to retain a sense of fairness for the system as a whole. This is an inevitable result of underwriter driver reform.

There is an alternative model for legislative intervention, which I call 'principle driven reform', and which is equally capable of restricting liability and damages in accordance with the application of universally applicable principles. Changes to the present law have been articulated by judges, members of the legal profession and legal academics. Judgments that have been overruled and, dissenting judgments often contain useful insights. These sources identify a wide range of changes which could, cumulatively, achieve the apparent objective of reducing the total amount of resources that the community is required to make available for purposes of compensation.

Changes based on principle could include the following:

- Changing the test of foreseeability of risk so that it excludes a broader area than risks that are

“far fetched or fanciful”.

- Establishing that the remoteness of a risk is always pertinent when determining whether a duty has been breached.
- Restricting the circumstances in which one person must guard against the failure of another to take care for their own safety.
- Re-introducing the test for professional standards, the effect of which was that it is not open for a court to find a standard medical practice to be negligent.
- Consider the introduction of a form of proportionate liability for property damage or pure economic loss, so that a defendant who is only partially responsible for the damage does not have to bear the whole of the loss when some other person is insolvent.
- Reconsider the circumstances in which offsetting benefits, such as the returns from private insurance or superannuation entitlements based on employer contributions, are taken into account by way of reducing damages otherwise payable.
- Reduce death benefits for relatives, in the same way as damages would be reduced for a plaintiff who had survived, when the deceased has been guilty of contributory negligence.
- Limit the amount recoverable for economic loss so that higher earners are required to take out their own insurance for loss of income above this level.
- Reconsider the basis on which damages are payable for gratuitous services, to which interest is attached, perhaps by exempting from such damages services which would have been provided even if there had been no accident.
- Reduce the interest payable on damages in those States where, in recent times, they have been between 4 and 6 percentage points above that of other States.
- Increase the discount rate used to determine the present value of future losses above the rate determined by the High Court in 1981.

The cumulative effect of some or all of such changes would be to achieve the objective, now apparently widely held, of reducing the total amount that the community must make available for the purposes of compensation by insurance premiums, insurance company returns and taxes. Such changes can probably not be adopted on the urgent time scale which appears to be driving the current decision making process. However, changes of the character I have identified may make it possible to alter some aspects of the special regimes adopted for motor vehicles, industrial accidents, medical negligence and, in prospect, public liability, so that the kinds of differences and anomalies that have arisen through an underwriter driven reform process are eventually removed. Such an approach would, in my opinion, achieve the result now sought to be achieved in a manner more likely to be regarded in the long term as fair and therefore to receive broad community acceptance.

[The full text of this address is available on the NSW Supreme Court website [www.lawlink.nsw.gov.au/sc](http://www.lawlink.nsw.gov.au/sc)].

## Negligence: The Last Outpost of the Welfare State

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC  
CHIEF JUSTICE OF NEW SOUTH WALES  
THE JUDICIAL CONFERENCE OF AUSTRALIA: COLLOQUIUM 2002  
LAUNCESTON, 27 APRIL 2002**

### NEGLECTANCE: THE LAST OUTPOST OF THE WELFARE STATE

I had occasion to observe last year that in many respects the tort of negligence is the last outpost of the welfare state [1]. This observation prompted the following comment by Professor Harold Luntz, in the preface to the fourth edition of his text on damages [2]:

"No welfare state would ever have created a system so irrational, expensive, wasteful, slow and discriminatory."

Professor Luntz, himself long an advocate of a system of community responsibility for accidents of the character in existence in New Zealand, expresses a view as to the practical operation of the tort of negligence that is shared by a substantial number of significant community decision makers.

Public debate about tort law reform has perhaps never been as intensive as it is at the moment. It is a debate to which the judiciary collectively has much to contribute. The purpose of this paper is to make, but more importantly to entice, such a contribution. There are many serving judges who have a very good understanding of the development of the law of negligence over the last two or three decades.

Many of you know from your experiences as advocates in crucial turning point cases, or as dissentients, how the law developed in the way it has and what the road not taken was. Many who are presently involved in formulating reform proposals do not have such an understanding. This is because virtually no one reads dissenting judgments or overruled cases.

In discussing the issue of tort law reform I am reminded of the blistering attack on reformers by Senator Roscoe Conkling, a Republican machine party boss in New York City, who said in 1880:

"Some of these worthies masquerade as reformers. Their vocation and ministry is to lament the sins of other people. Their stock in trade is rancid, canting, self-righteousness ... Their real object is office and plunder. When Dr Johnson defined patriotism as the last refuge of a scoundrel, he was unconscious of the then undeveloped possibilities of the word 'reform'." [3]

Plainly, the New Zealand type of non-fault scheme is the quintessential product of the welfare state. My characterisation of the fault based tort of negligence as the last outpost of the welfare state may appear somewhat anomalous. My observation is based on the practical operation of the law of negligence in our courts.

The idea that governments are in some way responsible for caring for all citizens - as it was put, "from cradle to grave" - contains a strong element of paternalism that has now been rejected in most advanced industrial countries as the basis of government intervention to attain social policy objectives. An element of welfare state paternalism, driven by the same sense of compassion, is not absent from day to day judicial decision making about when a person ought to receive compensation, even in our fault based system.

There are many undefined elements leading to a final award of damages and this permits expansion of liability and damages: What risk is foreseeable? What damage is remote? What does "commonsense" suggest is the cause? When is a contribution to the creation of a risk "material"? Should a limitation period be extended? Should the plaintiff's medical evidence - even if idiosyncratic - be accepted? Should the plaintiff be believed about the effect of a hypothetical warning? etc etc. There is much flexibility in the outcome of negligence litigation.

A second characteristic of the welfare state was the way it encouraged individuals to hold others responsible for looking after them and protecting them from the consequences of their own conduct. The practical operation of the tort of negligence sometimes gives inadequate weight to the conduct of the plaintiff. There has been a significant change over recent decades in expectations within Australian society about persons accepting responsibility for their own actions. This change is already being reflected in judicial decision making, a process that is not complete, but which may very well be reinforced by legislative intervention. Again I believe that the judiciary has a capacity to collectively contribute to the debate as to the desirability and content of such intervention.

#### **The Trend of Judicial Decisions**

Over a few decades - roughly from the sixties to the nineties - the circumstances in which negligence would be found to have occurred and the scope of damages recoverable if such a finding were made, appeared to expand considerably. Professor Atiyah referred to this long term historical trend as "stretching the law" [4]. There may be an equivalent parallel trend, perhaps of even greater practical significance, of "stretching the facts".

There seems little doubt that the attitude of judges has been determined to a very substantial extent by the assumption, almost always correct, that a defendant is insured. The result was that the broad community of relevant defendants bore the burden of damages and costs awarded to an injured plaintiff. Judges may have proven more reluctant to make findings of negligence, if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home. The line between the kinds of mistakes or unfortunate results that are an inevitable concomitant of conduct or professional practice, on the one hand, and the sorts of mistakes or results which should not occur at all, on the other hand, may have been drawn in a different way on many occasions, in the absence of the ubiquity of insurance. The proposition that any degree of fault - whether minor or gross - justifies compensation for the whole of a plaintiff's loss - whether catastrophic or minor - may also not have been applied in quite the same way, in the absence of the ubiquity of insurance.

There is a growing body of recent High Court decisions in favour of defendants. Those decisions would have gone the other way if the trend had continued [5]. The number of such cases is multiplied manifold in recent judgments of intermediate courts of appeal. In my opinion, the long term trend has been reversed. There is, however, real doubt as to whether the parliaments have enough patience to allow this development to work itself out. This may be affected by a perception that the trend in High Court authority is not reflected in some areas, e.g. in relation to the liability of public authorities [6].

It is not possible in this paper to consider the various social functions performed by the law of torts or the philosophical underpinnings of that law. The principles involved in ensuring a fair system of compensation, the desirability of behaviour modification or deterrence and the moral foundations of the relevant legal principles - frequently referred to in terms of "corrective justice" - are material and relevant considerations to the process of decision making currently underway. There is a significant range of permissible opinion about the weight to be given to these various considerations.

The traditional function of the law of negligence, reinforced as this function is in almost all cases by insurance, of distributing losses that are an inevitable by-product of modern living (the theme of Fleming's *Law of Torts* on which many of us were weaned) appears to have reached definite limits as to what society is prepared to bear. Furthermore, there is a substantial body of anecdotal evidence of undesirable side effects of the present system: rural GP's that have ceased doing obstetrics; councils that have removed such lethal instruments as swings and seesaws from children's playgrounds; charitable fund raising events that have been cancelled. The only reason why all our rock ledges and cliff tops are not festooned with signs is that nobody believes that they would actually affect the outcome of litigation and would probably make things worse.

For those of us who came to maturity during the years of the welfare state, the relevant "progressive" project for the law was to expand the circumstances in which persons had a right to sue. We were brought up on "*Australia Unlimited*" supplements in the quality newspapers. We are now more conscious of limits - social, economic, ecological and those of human nature. Hobbes has triumphed over Rousseau. For several decades now, the economic limits on the scope of government intervention have received primacy in more and more areas of social discourse. The law cannot be insulated from such broader trends in social philosophy. Progressively, such limits have been introduced in legislation qualifying the common law. Much more is in prospect.

### **Pressure on Premiums**

A central concern of the past and prospective statutory modifications to the common law has been the increase of premiums for contracts of liability insurance. This has generally been the primary focus of attention, to the virtual exclusion of other policy considerations that are pertinent to the decision making process. It is the primary focus of attention in the current debate. I accept that it is a consideration of critical significance. The nature of the legislative changes that have already been made, and which are now in prospect, strongly indicate that the community is not prepared to pay for the level of compensation which the judiciary, and the legal profession generally, has come to regard as appropriate.

Government concern with the social and economic effect of premiums is now reinforced by the substantial interest of taxpayers in the operation of the insurance system. It appears that government has accepted the position of reinsurer of last resort. This is reflected in the taxpayer funded protection of policy holders of HIH; Commonwealth support, temporary and possibly long term, of the financial capacity of the major medical insurer; guarantees by the governments of two States after the withdrawal of a major reinsurer from the market of the system of "insurance" established with respect to building defects and the insolvency of builders; proposals for government underwriting of risks associated with terrorism.

It took many years for the government role as "lender of last resort" to take the institutional form of a contemporary central bank. We are at the early stages of institutional development of the "reinsurer of last resort" function. In this regard we will not deny ourselves the tortured delights of federalism, that so obviously await us.

I have long accepted that pressure on premiums is a pertinent consideration for judges who are asked to extend the law in some manner or another. I hope you will pardon me the sin of self-quotation, but I do so in order to indicate that this is not a matter that has emerged as a concern of mine only in the light of recent debate. In 1999, I said:

"The judiciary cannot be indifferent to the economic consequences of its decisions. Insurance premiums for liability policies are, in substance, a form of taxation (sometimes compulsory but ubiquitous even when voluntary) imposed by the judiciary as an arm of the State. For many decades, there has been a seemingly inexorable increase in that form of taxation by a series of judicial decisions, on substantive and procedural law." [7]

I believe that this remains an appropriate perspective.

### Judicial Concern

Over the period that the courts have, to use Professor Atiyah's phrase, "stretched the law", a number of judges have noted with concern the implications of what was happening. On occasions that has led judges to express their dissent in strong terms. Let me remind you of just a few expressions of opinion of this character.

Justice McHugh, at the time that he was a Judge of Appeal in New South Wales said, in 1985:

"I think that it is impossible to read recent decisions of the High Court of Australia without realising that employers are now required to comply with safety standards which, only 20 years ago, would have been seen as imposing an onerous, even an absurd burden on employers. Cf *Turner v State of South Australia* (1982) 56 ALJR 839 with *Skinner v Barac* (1961) 35 ALJR 124 and *Commissioner for Railways v O'Brien* (1958) 100 CLR 211.

Throughout the common law of negligence, but particularly in the employer/employee field, the standard of care required of a defendant has moved close to the border of strict liability." [8]

The reference to "strict liability" was not, of course, a reflection of an appropriate legal test, but an indication of what appeared to his Honour to be the practical outcome of the application of the law. The use of the terminology of "strict liability" was not treated with favour on appeal in the High Court [9].

As Clarke JA pointed out in a case about diving into a swimming pool, the applicable law:

"... effectively places the Council in the position of an insurer"

and

"... the present situation in which liability is imposed for negligence in circumstances which a lay person could be forgiven for thinking bore little relationship to the failings of the reasonable person. Indeed, although McHugh JA's statement in 1985 ... that the 'standard of care has moved close to the border of strict liability' was criticised in the High Court ... it seems to me accurately to reflect the modern law.

There may be a view, even a preponderant view, that this is a desirable development of the law because otherwise seriously injured plaintiffs may be forced to rely on social services supplied by the government. But there are, as it seems to me, serious implications flowing from the far reach of the present doctrine ... Will, for instance, local councils...[be] unable economically to secure public liability insurance and will they then close down their pools?" [10]

Meagher JA made observations to similar effect [11].

Last year, Thomas JA said:

"[4] The rules currently embraced by our system include:

1. A reduced level of causation necessary to sustain a claim [The substantial lowering of the principles of causation previously recognised is discussed in *Wylie v ANI Corporation Ltd* [2000] QCA 314, paras [43-48], and in *Hawthorne v Thiess Constructors Pty Ltd & Anor* [2001] QCA 223, paras [10-12]; cf *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506, 509-516].

2. The rule, epitomised in *Watts v Rake* [(1960) 108 CLR 158], that a defendant 'must take his victim as he finds him and pay damages accordingly'.

3. Relaxation of control devices such as remoteness of damage to stem the arguable endlessness of the consequence of every human act.

4. Common use of hindsight, despite frequent disavowal, in concluding that virtually anything that has happened was reasonably foreseeable.

5. Ever-increasing levels of damage, aided by the methodology of economic rationalism, unalleviated by collateral benefits actually received [*National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569; Fleming, J, *The Law of Torts* 9th ed LBC, Sydney, 1998 pp274-281], and aggravated by the inclusion of heads of damage that a claimant does not suffer [*Griffiths v Kerkemeyer* (1997) 139 CLR 161] assessed at 'commercial' rates.

These are some of the tools that increasingly permit unrealistic results in such cases, in both liability and quantum. Today it is commonplace that claimants with relatively minor disabilities are awarded lump sums greater than the claimant (or defendant) could save in a lifetime. The generous application of these rules is producing a litigious society and has already spawned an aggressive legal industry. I am concerned that the common law is being developed to a stage that already inflicts too great a cost upon the community both economic and social.

[5] In a compensation-conscious community citizens look for others to blame. The incentive to recover from injury is reduced. Self-reliance becomes a scarce commodity. These are destructive social forces. Also much community energy is wasted in divisive and non-productive work. A further consequence is the raising of costs of compulsory third party, employer's liability, public risk and professional indemnity insurance premiums. These costs are foisted upon sectors of the public and in the end upon the public at large. I would prefer that these problems be rectified by the development of a more affordable common law system, but in recent times its development has been all in one direction - more liability

and more damages.

[6] I express these concerns in this particular case because authority constrains me to participate in pushing the boundaries further when I think that the time has already been reached when courts should be seriously re-considering a reformulation of firmer control devices than those that currently exist. I fear we are developing a creature we can no longer control." [12]

His Honour recently repeated some of these observations in the course of his farewell speech as a Judge of Appeal of the Supreme Court of Queensland.

Justice Fitzgerald when he was a Judge of the New South Wales Court of Appeal expressed similar sentiments when he said:

"[43] An infinite variety of circumstances produce a foreseeable risk of injury which could often be eliminated or reduced. The current tendency to consider only individual circumstances which produce injury and the means by which those circumstances could have been changed and the injury avoided is redefining the foundation of the law of negligence by impermissibly expanding the content of the duty of care from a duty to take reasonable care to a duty to avoid any risk by all reasonably affordable means. Such an approach pays insufficient regard to the degree of the risk of injury from the particular circumstance which caused injury and to the time, effort and cost of avoiding the risk of injury from all circumstances which might have caused injury and the financial capacity of a defendant to undertake such a task. A situation immune from criticism by an imaginative forensic engineer cannot be achieved by the removal of isolated risks but necessitates the removal of all sources of risk.

...

[45] Ridiculous and exaggerated claims, sometimes followed by appeals when they are unsuccessful, are increasingly frequent. Employers, motorists, hospitals and schools, for example, or rather their insurers, have become virtual insurers of those who are injured by their activities. There might be good policy reasons for this. However, unless its evolution is appropriately controlled by judicial commonsense, fundamental concepts will be incrementally eroded and the law of negligence will eventually require each citizen to make life a risk-free activity for everyone else." [13]

### **Expansion by Statute**

For many years parliaments acted on the basis that judges were too conservative and pro-defendant. Legislative intervention commenced in the 19th century when Lord Campbell's Act overturned the common law rule against recovery of damages for the death of another person.

Similarly, the British *Employers Liability Act* of 1880, eventually adopted throughout Australia, abolished the doctrine of common employment by which an injured worker was denied a right of redress against his or her employer, whenever injury resulted from the act of a fellow worker.

At common law the Crown was immune from suit. Such immunity was progressively removed in Australia in the 19th century, but not until the mid 20th century in Britain and the United States. [14]

The creation in the early 20th century of no-fault workers compensation schemes ensured some level of recovery for injured workers, with compulsory insurance protecting the workers from insolvency of their employers.

Further legislative reform in the middle years of the 20th century was also generally beneficial to plaintiffs. For example, the compulsory third party motor vehicle scheme, adopted in New South Wales in 1942, ensured that in this major category of accidents plaintiffs would receive compensation in practice.

Other reforms in New South Wales, contained in the *Law Reform (Miscellaneous Provisions) Acts* of 1944 and 1946, enabled plaintiffs to make claims directly on insurers, established third party procedures and permitted claims for nervous shock in circumstances which had been refused at common law [15].

Of particular significance was the legislative creation of an apportionment regime, commencing with the British Act of 1945, not adopted in New South Wales until 1965, overturning the position at common law in which contributory negligence was a complete defence, albeit subject to a good deal of "stretching" [16].

I have referred to the New South Wales legislation with which I am most familiar. Legislation to similar effect was adopted in all Australian states, often earlier than in New South Wales.

In the course of debate on these matters, it is frequently said that Parliament should be slow to abolish common law rights. But it is not often appreciated how much of what is now regarded as common law rights is in fact the creature of statute.

The overwhelming majority of industrial accident claims would not be maintainable if statute had not abolished the doctrine of common employment. Many motor vehicle accidents could not have been pursued as a practical matter, if the legislature had not created a compulsory system of third party insurance. A significant proportion of common law claims, relevantly in the public liability area, may not have been pursued if the common law principle that contributory negligence was a complete defence had not been replaced by apportionment legislation. Governmental instrumentalities appear frequently as defendants. They can only be sued at all because statute has abolished the common law doctrine of Crown immunity.

No doubt, in many respects, the common law would have developed in a way that ameliorated the original position, even in the absence of statute. Nevertheless, to a significant degree, contemporary



proposals to change the law would have the practical effect of changing statutory rights which abolished common law restrictions rather than abrogating "common law rights".

### **Restriction by Statute**

By about 1980 the process of statutory intervention to overcome what was seen as conservatism by the judiciary in awarding damages to plaintiffs had ceased. From the 1980s to the present time, legislative intervention has been based on the alternative assumption that the judiciary was too plaintiff oriented. A generational change in the judiciary, involving a less conservative orientation, appears to have coincided with a change in social philosophy in the broader polity, which moved in a more conservative direction. There may be an iron law which dooms judges to always be a decade or two behind the times.

Throughout Australia, major parts of the law of negligence have been removed from the decision making authority of the judiciary. Common law principles have been replaced by a bewildering variety of statutory formulations in an ever expanding proportion of the heartland of the tort. The detail varies from State to State, but the direction is the same. Again I will concentrate on the New South Wales legislation with which I am most familiar, although similar kinds of developments have occurred in all States and Territories.

Substantial amendments to the common law began in New South Wales with respect to motor vehicles in 1984 and industrial accidents in 1987. The respective schemes have since been modified from time to time (including modifications temporarily restoring some common law rights after a change of government in 1988), culminating in major amendments to the motor vehicle scheme in 1999 and to the industrial accident scheme in 2001, the latter encompassing both the workers compensation system and common law [17].

The *Health Care Liability Act* 2001 made major changes to the common law for recovery in medical negligence cases. Further significant changes in this field are in prospect. There will also be legislative intervention, possibly on a national basis, restricting the common law relating to public liability claims. A wide range of other changes to the law of torts is under investigation, with a significant possibility of national intervention, but a high probability of change in New South Wales.

There is now considerable diversity in the rules applicable, depending on whether someone has a motor vehicle accident, an industrial accident, is injured by means of medical negligence or falls outside a statutory scheme. No doubt, there will be further differences in the context of public liability insurance [18]. The kinds of differences that presently exist in New South Wales between the different bases of liability include the following.

For motor vehicle accidents and medical negligence cases, economic loss can now only be recovered up to a maximum of \$2,603 per week (indexed). In the case of motor vehicle accidents a threshold excludes the first five days of loss. In the case of an industrial accident, there is a threshold of 15 percent of whole person permanent impairment and a maximum of \$1,000 per week (indexed), with no recovery for loss of earning capacity after the age of 65. No such limits apply at common law for other types of injuries.

In the case of non-economic loss, there is no maximum amount at common law generally. In the case of industrial accidents, this head of damage is not now recoverable at all. For motor vehicle accidents, there is a maximum of \$284,000 (indexed), with a threshold of 10 percent permanent impairment. In the case of medical negligence, the maximum is \$350,000 (indexed), with a threshold of 15 percent of the most extreme case, and a sliding scale in between.

*Griffiths v Kirkmeyer* damages are not now available at all for industrial accidents. In the case of motor vehicle accidents and medical negligence, such damages are only available if the services would not have been provided but for the injury, but in the case of motor vehicle accidents, there is a threshold and a cap for such recovery.

Interest on damages awards in the case of industrial accidents is available only as a penalty and at 75 percent of the rate fixed by the Supreme Court for common law actions. In the case of medical negligence, no interest is payable on non-economic loss and interest on economic loss arises only when the loss is incurred and is payable at the ten year Commonwealth Bond rate. In the case of motor vehicle accidents, no interest is payable on non-economic loss, or on past gratuitous care. For economic loss, interest is payable only in certain specified circumstances and is paid at 75% of the rate fixed by the Supreme Court for common law actions.

The differences between the three statutory schemes, with no doubt further differences to come in the proposed scheme for public liability, are a reflection of the fact that the persons driving the reform process are insurers or public instrumentalities with equivalent interests. Different insurers and administrators are involved in the different areas of liability. The primary source of ideas about what changes are required have come from the perspective of insurance underwriters seeking to limit claims (and therefore premiums), or their functional equivalents in a government backed scheme seeking to restrict the call on public funds, often in the context of substantial unfunded liabilities.

Generally the objective of the change is a specific target of an insurance premium for a particular activity. The 1999 changes in New South Wales to the motor vehicle scheme were specifically directed to "achieve a \$100 reduction in the average price of greenslips", as promised by the recently re-elected government at the previous election [19]. Similarly the major changes in 2001 to the workers



compensation and common law systems were directed expressly to reducing premiums to 2.8 percent of the payroll, from an estimated 3 percent of payroll at the time [20].

Inevitably, different areas of liability will end up with different schemes, creating inexplicable and unjustified variations in the rules that are applied to determine what a plaintiff may recover. In the long term, in my opinion, these differences are likely to create resentment in the community. Why should compensation be fundamentally different depending on whether injury occurred in a car or in a car park or at work or on the operating table or in a public swimming pool or at a supermarket? It will be very hard to retain any sense of fairness for the system as a whole. This is an inevitable result of underwriter driven reform.

A feature of some of these schemes is the imposition of a cap on recovery for a head of damage, such as general damages, with a statutory deeming of this amount to be a fictional "worst case" to which all cases must be adjusted. There is no principle in such a cap. Similarly, thresholds, as variously expressed, are said to be based on a policy to refuse small claims, but it is hard to discern any principle in determining the cut off point. Such anomalies are also an inevitable result of underwriter driven reform.

### **Principle Driven Reform**

There was, at all times, an alternative model for legislative intervention - which can be called principle driven reform - that was equally capable of restraining escalation in insurance premiums, by restricting liability and damages in accordance with the application of universally applicable principles. These kinds of reforms are, however, very difficult for underwriters to price. They also require a higher degree of sophistication about the origin and history of various rules and principles that interact in the judicial process to produce the end result of awards for damages.

A good example of the alternative approach of principle driven reform is to be found in the *Personal Injury Damages Bill* 1990 which was introduced into the New South Wales Parliament, but which did not proceed. That Bill proposed a variety of changes: including abolition of the defence of voluntary assumption of risk, whilst allowing a reduction in damages where the defence would have otherwise been available; requiring damages for economic loss to be reduced by the amount of certain payments that the plaintiff would receive; restricting recovery with respect to gratuitously provided home care; prohibiting the award of exemplary damages; requiring a court to have particular regard to the failure by a defendant to take precautions and steps to minimise risks; proposing limits on the amount of damages for non-economic loss. Some or all of these kinds of restrictions are included in the special schemes, under their various Acts, to which I have referred. The most significant matter, however, is that the 1990 Bill was intended to apply to all kinds of actions for personal injury.

It is possible to identify a wide range of changes which could, cumulatively, achieve the apparent objective of reducing the total amount of resources that the community is required to make available for purposes of compensation through insurance premiums, insurance company returns on funds and taxes. Changes based on principles are, in my opinion, more likely to prove satisfactory. A useful source of such principles is the judgments which would have limited recovery in some way and which were overruled on appeal or were dissenting judgments in the High Court or were superseded judgments of the High Court.

### **Reasonable Foreseeability**

If it were necessary to identify a single point of departure for the imperial march of the tort of negligence, and the process of what Atiyah calls "stretching the law", it is probably the reasons that Lord Reid delivered for the Privy Council in *Wagon Mound No 2* [21]. This was an appeal directly from a single judge of the Supreme Court of New South Wales, Mr Justice Walsh, later to serve on the High Court. There was no intermediate court of appeal which may have expressed divergent points of view. The judgment of the Privy Council was delivered at a time when the practice of the Board was to deliver a single inscrutable judgment which has all the power of a legislative enactment, precisely because it is bereft of that divergence of reasoning amongst different judges in a final court of appeal, that is more appropriate for the principled development of the law.

A comparison of the closely reasoned and nuanced first instance judgment of Walsh J [22] with the Delphic simplicities of the judgment of the Privy Council [23] - sometimes the product of the compromises required for a joint judgment - is not such as to give great confidence in the reasoning of the latter. Nevertheless, at a time when Australian judges were more deferential to English judicial reasoning than they have been in recent years, *Wagon Mound No 2* proved to be a decisive point of departure.

In rejecting the case in negligence, Sir Cyril Walsh placed particular weight on his assessment of the relevant facts in which the likelihood of an oil spillage catching fire was something that "very rarely happened" and that was likely "only in very exceptional circumstances" [24]. This was rejected as an appropriate test in the Privy Council, which applied a test of whether or not something was "a real risk" in the sense that it would not be brushed aside as "far-fetched" [25].

The test of foreseeability for purposes of creating a duty of care has since been accepted to be

satisfied even if a relevant risk is a mere remote possibility. It is most frequently referred to in terms of the language of the High Court in *Wyong Shire Council v Shirt* [26]: a risk of injury is foreseeable unless it can be described as "far-fetched or fanciful". Issues of likelihood or probability are said to arise in the context of reasonableness of conduct at the level of breach. Wilson J dissented, rejecting the idea that "a real risk" could be identified with a "remote possibility" [27].

Lawyers tend to continue to refer to the test as being one of "reasonable foreseeability". I cannot see that "reasonableness" has anything to do with a test which only excludes that which is "far fetched or fanciful". The test appears to be one of "conceivable foreseeability", rather than "reasonable foreseeability".

I am reminded of the observations of George Orwell in his great 1946 essay *Politics and the English Language* where he said:

"... the English language ... becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts."

And

"But if thought corrupts language, language can also corrupt thought. A bad usage can spread by tradition and imitation even among people who should and do know better."

So it appears to be with the continued use of the terminology of "reasonable foreseeability".

The problem is most acute in terms of what a cognitive psychologist would call hindsight bias. As Sir Owen Dixon expressed it, in the course of argument in *Chapman v Hearse* [28]:

"I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence."

If we had kept a firm hand on the idea of "reasonableness" as a limiting factor, rather than dismiss foreseeability as "undemanding" [29], we would never have needed the flirtation with "proximity". Nor would the English have needed their flirtation with the two stage *Anns* test [30]. The search for a unifying principle in the law of negligence has proven to be as futile as the search for a unifying principle in the laws of physics.

There are indications that the High Court will revisit the "undemanding" nature of the test. Whether by High Court decision or by statute, change can be effected. The case law suggests alternative formulations. For example, a negative formulation favoured by Sir Garfield Barwick was whether or not injury was "not unlikely to occur" [31]. We could do a lot worse that adopt the test of Walsh J in *Wagon Mound No 2*: a test of "practical foreseeability" [32].

I do not suggest it is necessary to establish a new test by way of legislation. However, it may be desirable to reject the extension of liability to remote possibilities, by overruling the restriction inherent in the "far-fetched and fanciful" test [33].

## Breach

On the issue of breach, Walsh J in *Wagon Mound* rejected the suggestion that a reasonable man ought to have taken precautions wherever there appeared to be a possibility of danger. His Honour confined the need for precautionary action to circumstances in which the risk was "significant enough in a practical sense" [34]. In this regard the Privy Council adopted a criterion which was expressed in three different ways. First, the risk, however small, should not be neglected "if action to eliminate it presented no difficulty, involved no disadvantage, and required no expense", secondly, whether or not the injury was "easy to prevent" [35], and thirdly, in the case of a very low probability occurrence:

"A reasonable man would only neglect such a risk *if he had some valid reason for doing so*, e.g., that it would involve considerable expense to eliminate the risk." [36] [Emphasis added]

This approach has been followed in Australia. On one occasion Gibbs CJ expressed the test of breach as satisfied where there is "little difficulty or expense" even in a case of a remote risk [37].

The judgment of Mason J in *Wyong v Shirt* removed questions of probability and reasonableness to the level of breach. Mason J said:

"The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position." [38]

Notwithstanding the balancing exercise for which Sir Anthony called, there appear to be many cases in which it has not been undertaken. Very serious consequences can be occasioned by extremely unlikely events which could have been prevented by slight expenditure. By reason of *hindsight bias*, all too often the focus of attention is only on the expenditure that would have been required to avoid the particular incident that actually occurred, without consideration of what would have been required to avert a myriad of other conceivable but equally remote contingencies.

Perhaps the high water mark of the High Court's expansion of negligence was *Nagle v Rottnest Island Authority* [39]. This was a case in which the cost of a sign (in other cases a verbal warning) was virtually zero and was contrasted with the consequences of the admittedly foolhardy conduct of diving into water from a rock ledge.

Subsequent authorities, including in the High Court, appear to require more in terms of breach [40]. I refer to the detailed analysis of the complexities potentially involved in assessing breach in such a

case, recently given by Justice Bryson in a case about slipping at the Bondi rock pool [41]. My preference would be to go back to what Sir Cyril Walsh said in the *Wagon Mound* and start again. However, we may need some legislative help to step over the Privy Council judgment. We need to reverse the process described by Fitzgerald JA, quoted above, by which a "duty to take reasonable care" has become a "duty to avoid any risk by all reasonably affordable means". What may be appropriate is legislation that permits reappraisal and future development of the common law, rather than a code that prescribes a test. A provision which states that, in determining whether a duty of care was breached, a court must always have regard to the remoteness of a risk irrespective of how readily it could be avoided, would probably be enough.

### Obvious Risks

An increased emphasis is now given to the autonomy of the individual [42]. As Lord Hoffman expressed it [43]:

"... there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualistic philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions."

The re-emergence of such a perspective needs to be reconciled with the principle underlying the apportionment legislation, that contributory negligence is not a complete defence.

Part of the contemporary pressure for legislative intervention is based on a perspective that the practical operation of the law does not require persons to take responsibility for their own actions. Communal expectations appear to have shifted in this respect. Once again, an analysis of past cases may indicate the direction of desirable change.

Jacobs J sought to confine both the duty and the standard of care to the specific circumstances of each case, rejecting the proposition that a duty of care could exist in the abstract[44]. His Honour's approach would have denied recovery for risks that should have been obvious to the particular plaintiff. The approach was rejected by the High Court [45], which established a doctrine that the scope of the duty of care required a defendant to regard as foreseeable, and guard against, the possibility that individuals would fail to have regard for their own safety.

The foreseeability of inappropriate conduct by a plaintiff was originally expressed in terms such as "thoughtlessness" or "inadvertence" or "carelessness" and even, subsuming a legal test, "negligence" [46]. This principle drew on the case law which established that negligent conduct by an intervening third party was foreseeable. In each respect, the practical operation of the principle sometimes goes well beyond mere "inadvertence" etc.

*Again Nagle v Rottnest Island Authority* may constitute the high point. The joint judgment said: "It is now well established that a person who owes a duty of care to others must take account of the possibility that one or more of the persons to whom the duty is owed might fail to take proper care for his or her own safety." [47]

In his dissent in *Nagle v Rottnest Island Authority* [48] Brennan J concentrated on the status of the defendant as a public authority. His Honour said:

"... in practice and with the wisdom of hindsight, a concentration on the gravity of the particular plaintiff's injury, the foreseeability of such an injury occurring (albeit contributed to by the plaintiff's own carelessness) and the modesty of the cost of fencing off or warning against the danger causing the injury would tend to impose on the public authority a liability which might not have been imposed if attention had been focussed on the duty owed by the public authority to the public at large. The test expressed by Dixon J in *Aiken v Kingborough Corporation* [(1939) 62 CLR 179 at 204] focuses attention on the nature of the danger itself assessed prior to the event according to the obviousness of the danger and the care ordinarily exercised by the public." [49]

Accordingly, by reason of the fact that the duty was owed to the public at large, his Honour applied a different test. He asked whether the danger was "apparent and not to be avoided by the exercise of ordinary care" [50].

In 1986, in one of the High Court cases which established this principle, Mason, Wilson and Dawson JJ said:

"What is considered to be reasonable in the circumstances of the case must be influenced by current community standards." [51]

Those standards seem to have changed.

It may be that contemporary community standards suggest that recovery should no longer occur where the conduct of a plaintiff or a third party, cannot be characterised as "inadvertent" or "careless" or "negligent" but constitutes gross negligence. Such a development may still be open at common law but, in view of the actual result in *Nagle*, courts may find it difficult to apply.

### Specific Rules of Liability

The High Court decision in *Concrete Constructions v Nelson* [52] prevented the tort of negligence being entirely subsumed by the imperial march of s52 of the *Trade Practices Act*. That enabled the imperial march of negligence to proceed, colonising such areas as the doctrine in *Rylands v Fletcher*

[53] and subsuming, within the general neighbour principle, specific rules that had been developed over many years. Sometimes this occurred in the expectation that the limitations inherent in the special rules would be replaced by the limitation of the operation of "proximity", but the rules did not revive when "proximity" went.

Sir Gerard Brennan was frequently a dissenting voice advocating the retention of the traditional rules relating to special categories as an important aspect of certainty of the law of negligence.

To similar effect, the replacement of categories of relationship by a general standard requiring individual consideration in each case, was one of the examples Chief Justice Gleeson gave, writing extra-judicially, of the search for the holy grail of "individualised justice" [54].

On one occasion, Sir Gerard emphasised the need to identify:

"... those further elements which are appropriate to the particular category of negligence and which confine the duty of care within narrower limits than those which would be defined by an unqualified application of the neighbour principle." [55]

When rejecting the then dominant test of proximity, Sir Gerard Brennan stressed the significance of: "...appropriate limitations in particular propositions of law, applicable to differing classes of case." [56] His Honour said that such limitations enhance the certainty of the law, a matter of crucial interest to insurers.

One such development was the removal of the categories of occupiers liability [57], although they were, by then, said to be "special duties" co-existing with the general duty. A clearer example of replacing a special category by the general test is the abolition of the highway rule in *Brodie v Singleton Shire Council* [58]. In both those respects there may be a principled basis for differentiation: a clear statement of a lower level of responsibility to trespassers and the inappropriateness of judges, in substance, determining expenditure priorities for elected governmental bodies. It is open to Parliament to restore the pre-existing rules to some degree, although it is difficult to identify a principled basis for restoring all the categories of occupier's liability, and no point in doing so if such duties were concurrent with the general duty.

#### *Mental Trauma*

Of all the floodgates waiting to be opened, none is of greater significance than the special rules restricting liability for mental trauma. The English position, with its distinction between primary and secondary victims, is not a model of precision. In Australia, actual decisions in many cases appear to be undermining the control devices. This sometimes appears to be the case because counsel simply do not rely on such devices, so that they are not referred to in the reasons for judgment with the result that the case is subsequently referred to as authority inconsistent with the control [59]. The pressure to rationalise this area of the law is considerable. The less I say about it the better. The High Court is reserved on this issue in two cases, including in an appeal from one of my own judgments [60].

#### **Standard of Professional Negligence**

Until *Rogers v Whitaker* [61] some Australian courts had followed the English *Bolam* test [62] which, in substance, meant that it was not open to a court to find a standard medical practice to be negligent. That test applies not only to matters of diagnosis and treatment, but also to information and counselling [63].

The reinstatement by legislation of the *Bolam* test was considered in New South Wales last year in the context of the adoption of the *Health Care Liability Act 2001*. This was not done. No doubt it is a matter again under consideration. It represents a principle that could be adopted and which restricts findings of breach. It is difficult to see any other change which will restore balance in those cases that are particularly likely to engage the compassion of the judiciary e.g. obstetrics cases which always concern injured children, or the tragic side effects that may accompany neurosurgery.

There does not seem to be any reason why the *Bolam* test, if adopted, should not extend to all areas of professional negligence.

#### **Proportionate Liability**

In this address I have been primarily concerned with recovery for personal injury. This has been the focus of most of the recent debates. Nevertheless, the issues are more wide ranging, extending to the basis of recovery for property damage and the expanding, but uncertain, scope of recovery for pure economic loss.

One of the changes that was considered a few years ago, particularly in the context of pecuniary damages, is some form of proportionate liability in lieu of solidary liability: a defendant who was only ten percent responsible for the injury would only bear ten percent of the damages. This would create the possibility of less than full compensation to an injured plaintiff. Such a result could be regarded as of less concern in the case of financial loss, than in the case of personal injury. It is by no means clear why one defendant, because it is wealthy or insured, should, in effect, become an insurer against the insolvency or impecuniosity of co-defendants, who have contributed substantially to the pecuniary loss in question.

The recent proposal for the introduction of a proportionate liability system in this area did not lead to

change [64]. As I understand what happened, the proposal ultimately floundered by reason of opposition within the Commonwealth Treasury, which had administrative responsibility for the consumer protection provisions of the *Trade Practices Act 1974* (Cth). It is unquestionably the case that any attempt to limit recovery for property loss or pure economic loss in this, or any other way, would prove futile unless parallel restrictions were incorporated in the *Trade Practices Act* and the *Fair Trading Acts* of the States.

It may well be that, in the current climate, the issue of proportional liability will receive further attention. It would be, for example, a matter of great significance for professional liability of auditors, lawyers and other professionals.

### **Death Benefits and Contributory Negligence**

Relatives claiming under the *Compensation to Relatives Act 1897* upon the death of a relative find themselves in a better position than the deceased would have been if he or she had survived and sued. There is no apportionment under that Act for contributory negligence of the deceased [65]. Each of the specific regimes in New South Wales - for motor vehicle accidents, industrial accidents and medical negligence - have changed this position. This is a reasonable principle that could be adopted as a general rule.

### **Damages: Offsetting Benefits**

One matter of significance for the size of damages awards involves the treatment of offsetting benefits. When are such benefits to be treated as acceptable double recovery and when are they to be deducted from an award of damages? In a joint judgment, Justices Mason and Dawson once approved a statement that in this area of the law "logic is conspicuous by its absence" [66]. Professor Luntz emphasises the considerable uncertainty that has long plagued this topic [67].

The High Court's decision that invalid pensions would not offset compensation [68] was reversed by statute. Similar action may be appropriate in other respects.

The rule permitting double recovery in some circumstances is long established and has been articulated and defended on a number of occasions in judgments of the High Court [69]. There are good reasons for the rule. Nevertheless it does involve a focus on the liability of the defendant, rather than on the need of a plaintiff for compensation. This focus may no longer be appropriate in the context of the kinds of changes to community attitudes to compensation which now appear to have emerged. Any change in this regard would require statutory intervention.

It has long been held that any recovery by a plaintiff pursuant to a first party personal insurance contract is not a matter to be taken into account by way of reduction of damages payable by a defendant [70]. The results may be bizarre. Defendants of a deceased may take advantage of s3(3) of the *Compensation to Relatives Act* and recover substantial amounts under a death or accident policy, but at the same time they may recover damages as if the estate of the deceased included no such asset. This occurs irrespective of how many premiums may have been paid by the deceased. Any statutory intervention would need to make allowance for premiums paid by the deceased, with compound interest, and for any outgoings not recovered in litigation.

This issue also arises when pension or superannuation entitlements become available to an injured worker ceasing employment. A pension is not to be taken into account in the assessment of damages [71]. In one case in which a policeman was injured, the Court found itself dealing with a situation in which the State of New South Wales was, at the same time, the employer, the tortfeasor and, to a predominant degree, the contributor to the police superannuation fund. The damages were assessed without deduction of the superannuation benefits [72]. Again allowance would need to be made for any employee contributions with an appropriate rate of return.

Professor Luntz considers a number of suggestions for reform of various kinds [73]. The Chief Justice of Canada also considered a range of policy alternatives in a dissenting judgment [74]. In the current context of concern about the impact on insurance premiums, these are matters it is appropriate to address.

### **Economic Loss**

As noted above, in New South Wales, economic loss can only be recovered up to a maximum of \$2,603 a week (indexed) in motor vehicle and medical negligence cases. The policy adopted is that persons who earn above, relevantly \$135,000 per annum, can reasonably be expected to take out first party insurance against loss of income above that level. I would not wish to be understood to advocate any particular level, but it is a policy that could be adopted more generally. This is a "cap" based on a principle, rather than on a fictitious "worst case".

### **Gratuitous Services**

*Griffiths v Kerkemeyer* damages have been abolished or modified in different contexts in different States [75].

In New South Wales the three different legislative schemes contain three different legislative responses, ranging from abolition to the imposition of caps. Some important policy issues arise in this

area, including questions of gender bias of the law in not valuing services generally provided by women to the same degree as economic loss. Similar principles have been adopted to allow recovery for other forms of voluntary services [76].

The difficulties and anomalies that arise in this context were acknowledged in a joint judgment of four judges of the High Court [77]. Justices Kirby and Callinan have more recently identified many anomalies [78].

The amount awarded under this head now represents a substantial proportion, often about half, of a damages award. It has been extended, by a majority decision of the High Court, to allow interest on past services at full commercial rates. The two dissentients in the Court would have allowed interest at a more moderate rate [79].

One form of restriction on such damages is suggested in intermediate courts of appeal decisions, subsequently overruled, and in the dissenting judgment in the High Court case which effected the overruling.

In *Van Gervan v Fenton* [80] the majority expressly overruled a number of decisions which suggested a qualification that could appropriately be adopted in this regard based on notions of marital or family obligation [81]. The formulation of Samuels JA, in one of the judgments so overruled, is suggestive:

"... I do not believe that any head of policy (or theory of loss distribution) requires the ordinary currency of family life and obligation to be wholly ignored; or the inclusion in the area of compensation of the support commonly expected and received amongst the members of a family group, even though the actual occasion for its provision may be the tort - caused disability of the recipient." [82]

Deane and Dawson JJ dissented in *Van Gervan v Fenton*. Their Honours said that such damages should not extend to "services and companionship which would have been provided in any event as an incident of a pre-existing and continuing relationship" [83]. Their Honours expressly referred to the fact that it is the community as a whole which, in substance, bears the burden of such damages through the compulsory insurance system, rather than the individual defendant who caused the loss [84].

This approach suggests a significant, but appropriate, restriction on recovery of damages for gratuitous services that could be adopted by statute. It appears to have influenced the form of restriction adopted in a number of specific contexts, including in New South Wales.

### Interest

There is one matter which is, generally, within the province of the courts. The respective Rules Committees of the Courts often determine the appropriate rate of pre-judgment and post-judgment interest. There are two distinct groupings of State and Territory practices in this regard. A comparison of such rates, prepared in the middle of last year, indicates that at that time the Supreme Courts of Western Australia, South Australia and the Northern Territory applied a rate of about six percent per annum, whereas all other State and Territory Supreme Courts, and the two Federal Courts, applied rates of four to six percentage points above that rate. The degree of difference will have diminished since that time, by reason of subsequent reductions in rates, likely to have been greater in the States with higher rates.

Nevertheless, there is a clear distinction between the two kinds of approaches. In part this may be due to a difference as to the appropriate foundation principle. Should a person who has been kept out of his or her money receive interest on the basis of what that person could earn if he or she had the money to invest or what that person would have to pay if he or she wished to borrow? That differentiation would amount to several percentage points, not explaining, however, the entirety of the difference that appears to have existed last year between the respective State Supreme Courts in this regard.

In the current climate it may be appropriate for those courts that apply the higher rates of interest to review the reason for the differentiation that appears to exist. Insofar as the higher rate was intended to be an encouragement for insurance companies to settle, that may no longer be an appropriate consideration.

### Discount Rate

A factor which has a substantial impact on the total amount payable is the discount rate used to determine the present value of future loss. In 1981 [85] the High Court compromised on a figure of three percent. The high rate of inflation, which had then recently been experienced, tended to push the rate down and, accordingly, pushed lump sums up. That consideration may be differently assessed today. It would be appropriate for the High Court to consider a review of the now twenty year old decision.

The three percent rate has been modified in various States, in different ways in different areas. In every case the statute increased the discount rate. In New South Wales, for each of the special regimes in motor vehicle, industrial accidents and medical negligence, the rate has been increased to five percent. That rate of five percent appears frequently in other States, but in Western Australia a rate of six percent applies and in Tasmania the rate is seven percent. There is considerable variation between the States as to the elements and the categories of negligence to which the modified rate is applicable [86].

In all cases of statutory modification it appears that the High Court compromise is regarded as resulting

in lump sum damages which are too high. There is no reason in principle why statutory modification should not go further and establish a higher rate applicable to all categories of negligence and all elements in the award of damages.

### Conclusion

The considerations referred to above are by no means a complete list of changes that could lead to a reduction of the pressure on premiums in a principled way. Further review of the case law and legal literature will no doubt reveal many other matters that have been raised for consideration, or which are suggested by overruled or dissenting judgments. There are, no doubt, numerous other elements in the cause of action for negligence, and in the principles applied to the determination of damages, which could be reconsidered in a principled way.

I refer, for example, to the development of the doctrine of non-delegable duties [87], the application of the test of "material contribution" in the case of multiple causes and the suggestion that the onus of proof may shift where a risk has materialised [88], and the issue of causation more generally [89]. Some combination of the matters to which I have referred may, if implemented, permit substantial reform of the underwriter driven special regimes, such as those established in New South Wales for motor vehicles, industrial accidents, medical negligence and, in prospect, public liability. An approach that restricts liability and damages in a principled manner is capable of resulting in the same degree of control of insurance premiums as that achieved by these special schemes. Such an approach would, in my opinion, achieve that result in a manner more likely to be regarded in the long term as fair and, therefore, to receive broad community acceptance.

At present, the pressure for change, particularly in some areas of insurance, is regarded as acute and requiring immediate action. Not all of the matters to which I have referred can properly be attended to in a short time span. What appears to be required is a longer term process of systematically reviewing a range of options, broader than the specific items that I have identified on this occasion. I regard this address as being very much a work in progress.

An appropriate way of approaching such a task would be to invoke the resources of all of the law reform commissions throughout the Commonwealth and to allocate specific matters for inquiry to individual commissions. The entire project could be supervised under the auspices of the Standing Committee of Attorneys-General.

No doubt there will be some reluctance to allow the lawyers to control the agenda in this regard. The comments by judges and others, to which I have referred in this address, should indicate that there is a widespread understanding within the legal community of the difficulties that are posed by the present law, accompanied by a preparedness to recommend meaningful change. It is desirable that this resource is applied to that task.

### Endnotes

1 *Reynolds v Katoomba RSL All Services Club Limited* [2001] NSWCA 234; Aust Torts Reports 81-624 at [26].

2 Luntz, *Assessment of Damages for Personal Injury and Death* 4th ed (2002) Butterworths at x.

3 Dorothy Truesdale, "Rochester Views the Third Term 1880" (1940) 2(4) *Rochester History* 1 at 5.

4 Atiyah, *The Damages Lottery* (1997) Oxford, Hart Publishing, Chapters 2 and 3.

5 See e.g. *Agar v Hyde* (2000) 201 CLR 552; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164; *Rosenberg v Percival* (2001) 75 ALJR 734; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867; *Sullivan v Moody* (2001) 75 ALJR 1570; *Woods v Multisport Holdings Pty Ltd* (2002) 76 ALJR 483; *Derrick v Cheung* [2001] HCA 48.

6 See *Crimmins v Stevedoring Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 75 ALJR 992.

7 *Kinzett v McCourt* (1999) 46 NSWLR 32 at [97] cf at [116].

8 *Bankstown Foundry Pty Ltd v Braistina* (1985) Aust Torts Reports 80-713 at 69, 127.

9 See *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 esp at 307; see also *Mihaljevic v Longyear (Australia) Pty Ltd* (1985) 3 NSWLR 1 esp at 9-10 per Kirby P and *Liftronic Pty Limited v Unver* (2001) 75 ALJR 867 at [37]-[38] per McHugh J.

10 See *Inverell Municipal Council v Pennington* (1993) 82 LGERA 268 at 275, 278-279; (also reported in (1993) Aust Torts Reports 81-234).

11 Ibid esp at 283. See also Mahoney JA at 273-274.

12 *Lisle v Brice* [2001] QCA 271.

13 *Rasic v Cruz* [2000] NSWCA 66.

14 See Paul Finn, *Law and Government in Colonial Australia* (1977) Melbourne, Oxford UP, Chapter 6.

15 See e.g. *Chester v Waverley Municipal Council* (1939) 62 CLR 1.

16 See e.g. *Alford v McGee* (1951-1952) 85 CLR 437; Trindade & Cane, *The Laws of Torts in Australia* 3rd ed (1999) Melbourne, Oxford UP at 562-564.

17 The major steps in the legislative history are as follows: *Motor Vehicles (Third Party Insurance) Amendment Act* 1984; *Transport Accidents Compensation Act* 1987 (introduced in the "Transcover" scheme); *Motor Accidents Act* 1988; *Motor Accidents Amendment Act* 1995 and *Motor Accidents Compensation Act* 1999. With respect to industrial accidents: *Workers Compensation Act* 1987; *Workers Compensation (Benefits) Amendment Act* 1989; *Workers Compensation (Benefits) Amendment Act* 1991; *Workers Compensation Legislation (Miscellaneous Amendments) Act* 1994; *Workers Compensation Legislation (Further Amendment) Act* 2001.

18 For a useful comparison of the different systems applicable at the relevant time, see Appendix J of *The Commission of Inquiry into Workers Compensation Common Law Matters: Report by The Honourable Justice Terry Sheahan AO*, 31 August 2001.

19 See Second Reading Speech *Motor Accidents Compensation Bill*, *Hansard*, NSW Legislative Council, 3 June 1999 at 902 (The Hon J J Della Bosca, Special Minister of State, and Assistant Treasurer).

20 Justice Sheahan's Report, supra esp at 19 and 21.

21 *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617.

22 *The Miller Steamship Co v Overseas Tankship (UK)* (1963) 63 SR(NSW) 948.

23 [1967] 1 AC at 643-644.

24 See (1963) 63 SR(NSW) at 977.

25 See [1967] 1 AC at 643.

26 (1979-1980) 146 CLR 40 at 47.

27 Ibid at 53.

28 (1961) 106 CLR 112 at 115.

29 *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 641 per Glass JA.

30 *Anns v Merton London Borough Council* [1978] AC 728.

31 See e.g. *Caterson v Commissioner for Railways* (1973) 128 CLR 99 at 101-102.

32 See (1963) 63 SR(NSW) at 958-959 referring in terms to *Morison* (1961) 34 ALJ 317 esp at 322.

33 See generally the judgment of Clarke JA in *Inverell Municipal Council v Pennington* supra and see also the additional observations at the end of the judgment of Meagher JA. See also McHugh JA in *Bankstown Foundry v Braistina* supra at 69, 127.



34 See (1963) 63 SR(NSW) at 957.

35 Respectively [1967] 1 AC at 643G-644A and 644C.

36 [1967] 1 AC at 642.

37 See *Turner v The State of South Australia* (1982) 56 ALJR 839 at 840. See also McHugh JA in *Bankstown Foundry v Braistina* supra at 69, 127, referring to both *Wyong Shire Council v Shirt* supra at 46-48 and also *Turner v The State of South Australia* at 840.

38 See *Wyong Shire Council v Shirt* supra at 47-48.

39 (1992-1993) 177 CLR 423.

40 See *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431. Also, for example, *Mountain Cattleman's Association of Victoria Inc v Barron* (1998) 3 VR 302 esp at 308-309.

41 *Waverley Council v Lodge* [2001] NSWCA 439 at [32]-[37].

42 See e.g. *Perre v Apand* (1999) 198 CLR 180 at [114]-[115]; *Agar v Hyde* (2000) 201 CLR 552 at [89]-[90].

43 *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 at 368.

44 *Sydney County Council v Dell 'Oro* (1974) 132 CLR 97 at 118-121.

45 See *Bus v Sydney County Council* (1989) 167 CLR 78 at 87-88.

46 The development of this doctrine may be traced through *McLean v Tedman* (1984) 155 CLR 306 at 311-312; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309; *Bus v Sydney County Council* supra at 90-91; *March v E & M H Stramare Pty Ltd* (1990-1991) 171 CLR 506 at 520, 536-537. See Fleming, *The Law of Torts* 9th ed (1998) Sydney, LBC at 134-136, 250-252; and Balkin & Davis, *Law of Torts* 2nd ed (1996) Sydney, Butterworths at 278-279.

47 (1993) 177 CLR 423 at 431.

48 (1993) 177 CLR 423 at 436-437.

49 Ibid at 440.

50 Ibid.

51 *Braistina* (1986) 160 CLR 301 at 309.

52 *Concrete Constructions (NSW) Pty Limited v Nelson* (1991) 169 CLR 594.

53 See *Burnie Port Authority v General Jones* (1994) 179 CLR 520.

54 Gleeson, "Individualised Justice - The Holy Grail" (1995) 69 ALJ 421 at 428.

55 *Jaensch v Coffey* (1984) 155 CLR 549 at 576 and see also *The Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at 481.

56 *San Sebastian Pty Ltd v The Minister Administering the Environmental Planning & Assessment Act* (1986) 162 CLR 340 at 369.

57 See *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479 esp at 499-500.

58 (2001) 75 ALJR 992.

59 For example in *State of New South Wales v Jeffery* (2000) Aust Torts Reports 81-580, no reliance was placed on either the proposition that there was no "sudden assault on the senses" or on the person of normal fortitude test of Butler "Voyages in Uncertain Seas with Dated Maps" (2001) 9 TLJ 14.

60 *Morgan v Tame* (2000) 49 NSWLR 21 and *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35.

61 *Rogers v Whitaker* (1992) 175 CLR 479.

62 *Bolam v Friern Hospital* [1957] 1 WLR 582.

63 See *Sidaway v Bethlehem Royal Hospital* [1985] AC 871.

64 Davis, *Inquiry into the Law of Joint and Several Liability: Report of Stage Two* (Commonwealth of Australia, 1995); New South Wales Law Reform Commission, *Contribution between Persons Liable for the Same Damage* (1997) Discussion Paper No 38; New South Wales Law Reform Commission, *Contribution between Persons Liable for the Same Damage* (1999) Report No 89, esp at chapter 2; Swanton and McDonald, "Reforms to the Law of Joint and Several Liability – Introduction of Proportionate Liability" (1997) 5 TLJ 109.

65 In *Bus v Sydney County Council* supra, the contributory negligence of an electrician who came into contact with wires he knew to be live was, accordingly, irrelevant, see at 91.

66 *Redding v Lee* (1983) 151 CLR 117 at 133 quoting from *Browning v The War Office* [1963] 1 QB 750 at 762.

67 See Luntz, supra at par 8.1.2.

68 *The National Insurance Co of New Zealand Limited v Espagne* (1960-1961) 105 CLR 569.

69 See e.g. *ibid* esp at 588-589; *Redding v Lee* supra at 138. See also *Cunningham v Wheeler* (1994) 113 DLR (4th) 1 at 10.

70 See *Bradburn v Great Western Railway Co* (1874) LR 10 Ex 1 at 2-3; *State of New South Wales v Davies* (1998) 43 NSWLR 182 at 187.

71 See *Graham v Baker* (1961) 106 CLR 340.

72 *State of New South Wales v Davies* supra.

73 See Luntz, supra at pars 8.1.3-8.1.5.

74 See *Cunningham v Wheeler*, supra at 24-41 per McLachlin J.

75 See Luntz, supra at par 4.6.5.

76 See *Sullivan v Gordon* (1999) 47 NSWLR 319.

77 See *Kars v Kars* (1996) 187 CLR 354 at 379-382.

78 *Grincelis v House* (2000) 201 CLR 321 at [25]-[26] per Kirby J and at [60]-[63] per Callinan J.

79 In *Grincelis v House*, *ibid*, the dissentients Kirby and Callinan JJ would have applied the more moderate rate of interest referred to in *MBP (SA) Pty Limited v Gogic* (1991) 171 CLR 657.

80 (1992) 175 CLR 327.

81 The authorities overruled in *Van Gervan v Fenton* were *Johnson v Kelemic* [1979] FLC 90-657; *Kovac v Kovac* [1982] 1 NSWLR 656; *Carrick v Commonwealth* [1983] 2 Qd R 365; *Veselinovic v Thorley* [1988] 1 Qd R 191.

82 *Kovac v Kovac*, supra at 668E.

83 *Van Gervan v Fenton*, supra at 345-346.

84 See *ibid*, at 346.

85 (1981) 150 CLR 402.

86 See Luntz, supra at par 7.4.9.

87 See e.g. *Kondis v State Transport Authority* (1984) 154 CLR 672 at 690; Trindade & Cane, supra at 731 suggesting "deep pockets" to have been a material consideration in the development of the concept.

88 See *Chappel v Hart* (1998) 195 CLR 232 at [27]; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at [31] and [127]. See also *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 esp at 315-316 and *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 at 278-280.

89 See e.g. Travers "Medical Causation" (2002) 76 ALJ 258 esp at 268.

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## Formal Opening Ceremony Court of Criminal Appeal at Dubbo

IN THE COURT OF  
CRIMINAL APPEAL

SPIGELMAN CJ  
WOOD CJ at CL  
KIRBY J  
FINNANE DCJ  
COUNCILLOR G PEACOCK

FRIDAY 8 FEBRUARY 2002

### FORMAL OPENING CEREMONY COURT OF CRIMINAL APPEAL AT DUBBO

Representatives of original land owners - Mrs Narelle Boys, Mr Russell Ryan,  
Mr Will Burns.  
Mr G Dawe QC, on behalf of the Bar of NSW  
Ms K Cull, President, NSW Law Society  
Mr M Butcherine, President, Orana Law Society

1 **SPIGELMAN CJ:** Mrs Boys.

2 **MRS N BOYS, REPRESENTATIVE OF ORIGINAL LAND OWNERS:** Spigelman CJ, Wood CJ at CL and Kirby J, welcome to all of you. I am a direct descendant of this area and I welcome this Court of Appeal to the region as I understand this is only the second time this has happened. I welcome you on behalf of our forefathers to this area that extends from Wagga Wagga to Coonamble, Mudgee and back to the Blue Mountains. This is the largest tribal area in New South Wales and I welcome you on behalf of our local Dubbagar-Wuthery Red Ochre people.

3 I welcome you as the eldest living daughter of a daughter of Sarah Burns, matriarch of the Burns clan. Welcome to you all.

4 **SPIGELMAN CJ:** Mr Ryan.

5 **MR R RYAN, REPRESENTATIVE OF ORIGINAL LAND OWNERS:** I was born in Dubbo on 13 September 1939 and I have been a proud person to be a part of Dubbo. I go back to the horse and cart days. I go well back here and Dubbo has always been a good place.

6 I have lived here and I grew up here. My family were given the first Housing Commission place in the area and we lived at 209 Wingewarra Street. That was the first Housing Commission in Dubbo.

7 As Mr Peacock knows, we were well-respected people in the community. I went away and spent some time in Coonamble in the railway and I was very disappointed when I come back to see the goings on in the city of Dubbo, a place I am very very proud to be a part of. The things going on here now, it makes me sick to the stomach but there's nothing people can do but I would like to welcome you and I hope you have a good time. Thank you.

8 **SPIGELMAN CJ:** Mr Burns.

9 **MR W BURNS, REPRESENTATIVE OF ORIGINAL LAND OWNERS:** As an elected member of the traditional owners of Dubbo and as a spokesman, it is my honour and privilege to welcome the Court of Criminal Appeal to Dubbo. I would like to firstly to thank Michael Butcherine and the local Law Society for the invitation to open these proceedings this morning.

10 I would like to, in my best rendition of my grandmother's tongue, welcome you to our country.

Marrung ngarri nggurrnabang thubba-gah wirather. Welcome to the country of the Red Ochre people of the Wiradgi nation.

11 **SPIGELMAN CJ:** Thank you for your welcome. Councillor Peacock.

12 **COUNCILLOR G PEACOCK:** May it please the Court, Spigelman CJ, Wood CJ at CL, Kirby J, distinguished jurists, on behalf of the Council and the citizens of Dubbo it gives me great pleasure indeed to welcome your Court of Criminal Appeal to Dubbo. Unfortunately the Mayor, Alan Smith, sends his regrets for not being able to attend this morning but he has a very important engagement of long standing.

13 However, I am personally gratified that he is not here and I am, because this is a truly historic occasion, and an occasion of great importance to our city.

14 Dubbo, as most people know, is a vibrant, energetic and progressive city. Its population of 38,000 continues to grow and with such growth comes development and maturity which we, as a Council and a community, desire to maintain.

15 There have been many outstanding developments in Dubbo over the years and one such is its firm position as the legal centre for over a quarter of the State. The Supreme Court has held sittings here for an extremely long time, although this is the first time that it has done so in its appellate jurisdiction.

16 Indeed, this magnificent court building was one of the first major public buildings constructed when it was a village. I think only some churches, a few shops and about forty pubs preceded it.

17 Dubbo is now developing into a centre of education excellence with the recent establishment of the Dubbo campus of the Charles Sturt University and the proposed development of the University of Sydney's Clinical School bringing Dubbo to the fore as an education mecca for the Orana and Far West Regions.

18 This sitting, in a sense, is another aspect of this growth in education, because it gives our people an opportunity to see how another facet of law is administered at first hand.

19 We are greatly honoured not only to have this sitting take place in our city, but also to have three such learned jurists in our midst. I think I can safely say that in extending this welcome to you I do so on behalf of the citizens of the whole of the Western Region as well.

20 I would also like to say that our people understand the extraordinarily difficult task the judiciary faces in modern times in finding the correct balance to ensure that justice is done to all parties, and they also understand that we, as a community, have a role to play in preventing people drifting into criminal activity in the first place.

21 I trust that this visit will present you with an opportunity to observe some of the aspects of local criminal activity of concern to local residents. We do have at Dubbo City Council a committee to look at the crime situation to see what we can do to try to ameliorate crime and stop people getting into criminal activities in the first place. I believe the chairman of that committee will deliver his first report to council in the near future. We accept our responsibility to see that your workload diminishes in the future and we hope we are successful in that.

22 I believe this is only the second occasion on which the Court of Criminal Appeal has sat outside the metropolitan area. This is a very auspicious, dignified and important occasion to Dubbo and I sincerely thank you for being here today and for promoting the idea that this court needs to be kept in touch with all facets of New South Wales and the people in the country as well as the city.

23 I welcome you on behalf of the Council and I hope your stay is pleasant, that you enjoy it, and perhaps learn a little as to what makes this place so great.

24 **SPIGELMAN CJ:** Mr Dawe.

25 **MR W DAWE QC, DEPUTY SENIOR CROWN PROSECUTOR:** May it please this Honourable Court. It is with Honour that I, on behalf of the Bar of New South Wales, have the opportunity to welcome your Honours and the Court of Criminal Appeal to Dubbo.

26 This is only the third time this Honourable Court has sat outside Sydney. The first was in February 1999 at Newcastle, followed in March of 2000 in Wagga Wagga. For the first time in history this Court is now in Central Western New South Wales. Many folk in rural areas have held the belief that those in the corridors of power have considered the letters NSW to stand for Newcastle, Sydney and Wollongong. Your Honours by bringing this State's highest criminal court to Dubbo and other country centres are doing much to dispel that belief.

27 Of course, courts travelling and bringing justice to the people is a tradition which dates far back to the English forebears of this Court. Back in Saxon and then Norman times the King's court and later circuit courts comprising three judges travelled the English countryside, dealing with all manner of things from dog bites to the destruction of castles which may have posed a threat to the monarchy. A much wider variety than shall confront this Honourable Court here in Dubbo.

28 This magnificent courthouse is a reminder to all who see it that the Supreme Court in its original jurisdiction has been coming here to this rural area and other such centres for the greater part of our relatively short history. I am informed that that would have been at least before 1877 in Dubbo as the first hanging here was in 1877.

29 It is mainly due to the initiative of your Honour, the Chief Justice, that this new practice of bringing criminal justice at its highest level in this State to the people is occurring. This initiative comes at a time when much uninformed criticism of the judiciary, particularly in the criminal jurisdiction, has been borne of ignorance of the judicial process in some circles.

30 This practice of bringing the Court out to the people will do much to resolve that ignorance. The Court is open to the public and it brings an opportunity not before available to the people of this important rural centre of Dubbo, to observe the workings of the Court. The Court's proceedings are here, open for all to see. The reasons for the Court's determinations are available for scrutiny. This is no Star Chamber. The court is not clothed in secrecy.

31 Your Honours, the Bar of New South Wales welcomes this Honourable Court to Dubbo. May it please the court.

32 **SPIGELMAN CJ:** Ms Cull.

33 **MS K. CULL, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** I am delighted to speak today on behalf of the 16,000 practising solicitors of New South Wales at this important occasion.

34 As a solicitor with many years experience working in the country, I appreciate fully the significance to the justice system and the local community of having a Supreme Court sitting at appellate level in a major regional centre such as Dubbo. The court sitting today shows commitment to ensuring that our justice system is accessible and open. It is important that justice be "seen to be done".

35 For the city of Dubbo and surrounding areas, this occasion creates an opportunity for local people to see how the justice system functions at its highest level.

36 I know that the occasion is also an opportunity for visiting members of the judiciary, their support staff, solicitors, barristers and others, to experience the dynamics and values of country communities.

37 The Law Society recognises how essential it is to have direct and open lines of communication. The Society is connected to its members and their clients through a flow of information and activity by regional Law Societies located throughout the State. We have many country representatives on our committees, reviewing laws and suggesting improvements, including criminal, family, property and personal injury law, education and rural issues. Their reservoir of experience and skills plays an important part and liaison role so that the relevance of our profession, its obligations to the community and its accessibility are evident to all.

38 The Council of the Law Society is extremely well represented by country members. I am a former Armidale resident and I continue to travel there each weekend and John North, President just two years ago, remains in practice here.

39 By allocating valuable resources to hear matters in Dubbo, the visibility and authority of the Supreme Court is evident to the community upon which our legal system relies. May it please the court.

40 **SPIGELMAN CJ:** Mr Butcherine.

41 **MR M BUTCHERINE, PRESIDENT, ORANA LAW SOCIETY:**

I respectfully acknowledge the traditional owners. The Orana Regional Law Society consists of seventy-three practising solicitors, more than half of us being found in Dubbo. Our area runs from Wellington and Mudgee in the east to Bourke in the west, and from Dubbo to Walgett and Lightning Ridge. There are four and sometimes five learned counsel who live and have chambers in the city and when they permit us to do so, we also claim them as our own.

42 We have a permanent magistrate who is in Dubbo and magistrates on circuit travel through the surrounding areas.

43 We get regular visits from the District Court in both civil and criminal jurisdictions and less frequently we welcome the Supreme Court. It is difficult to overstate the importance to us of this court sitting in Dubbo. It is a reminder to our practitioners of the significance of the legal system within which we all operate and it is also a clear signal to the community both of the importance of the rule of law and of the powerful ability of the court to recognise that the law does not exist in a vacuum.

44 It is, of course, signally appropriate that the court is here with the welcome of the traditional owners. The meeting of the two great currents of the centuries of learning represented by this learned court and the millennia of wisdom represented by the traditional owners is powerful symbolism indeed.

45 The business of today's sittings will be deadly serious. We hope that after the sittings are concluded the court will experience the hospitality of the people of the region and enjoy some of its attractions. On behalf of the Orana Law Society, I welcome the court to Dubbo.

46 **SPIGELMAN CJ:** I would like to join with you in acknowledging the traditional owners of the land, the Aboriginal people. I think it is of particular significance that a ceremony of this character is commenced with a welcome of the kind we have had.

47 In May 1999, when the Supreme Court of New South Wales celebrated its 175th anniversary, the ceremonial sitting also commenced with a welcome from the traditional owners of the land in Sydney. That was the first time that, on a public occasion, a welcome of that character had been given in New South Wales. It has happened frequently since that time. It is a tradition that is worth maintaining. It offers hope for reconciliation of the community that I may be seen to represent with the Aboriginal community.

48 It is a particular pleasure to be in this magnificent courtroom. I must say I have not been in it before. I did not see it until yesterday. However, I knew of it. Its architect, James Barnet, was one of the great Government architects in New South Wales history. We have been exceptionally fortunate with our Government architects in this State over many years. Barnet designed, amongst other things, the GPO building in Sydney, the Customs House in Sydney, and a number of other public buildings including the little architectural gem in which we now sit. The people of Dubbo should be very proud of having a building of this quality. It is still being used for its original purpose.

49 Other speakers have mentioned why the court has developed the policy of travelling with the Court of Criminal Appeal. The Supreme Court does not conduct the same level of activity in rural New South Wales that it once did. Much of the civil jurisdiction it exercised has now been taken over by the District Court. Whilst there are still Supreme Court cases in rural areas, they are much fewer than they used to be.

50 The Court must not be seen to lose touch with a significant part of the community. It is not always possible to arrange a full agenda of cases on the same timetable. I promised John North a few years ago, the President of the Law Society of New South Wales, that we would come to Dubbo. It did not occur on his watch but it occurred shortly thereafter. I know I speak on behalf of both Wood CJ at CL and Kirby J when I say that we are very pleased to be here.

51 The jurisdiction we exercise is a criminal jurisdiction. It is the appellate criminal jurisdiction. There is no doubt that this is the most important task performed by the judiciary of New South Wales, both in the conduct of criminal trials and in the sentencing of convicted offenders.

52 These matters engage the interest and sometimes the passion of the public at large perhaps more than anything else judges do. The public attitude to the way judges perform this task, and in particular with regard to sentence, determines to a substantial extent the state of public confidence in the administration of justice.

53 Regrettably this has not always been based on full information as to what judges do. There is a great deal of misinformation about, for example, the levels of sentence and the principles applied in the administration of criminal justice. Travelling the Court of Criminal Appeal to rural centres is one means of informing the public more widely as to what it is we actually do.

54 There is a considerable body of research which indicates that public attitudes and public beliefs as to what occurs in the justice system, particularly with regard to sentencing, is not in accordance with actuality. This is no doubt based in large measure on the fact that it is only certain cases which become controversial enough to be talked about and to be fully reported in the media. The broad range of day in, day out, criminal trials and sentences pass without comment because they are not controversial and are generally acceptable. Accordingly, a great deal of emphasis is given to what I believe to be occasional aberrant sentences, where something has gone wrong in the process either with the trial or the sentence imposed. It is the task of this Court, the Court of Criminal Appeal, to ensure that where something of that character goes wrong, that it is fixed. It is our task to do that. I trust that people will have the impression that we do it well. Even though many of you may not have been exposed to the operations of this Court at all, we do not get anything like the publicity that trial judges get. That is probably a good thing in many ways. But it does mean that often people are left with a misleading impression of where the criminal justice process ends up. In many cases it ends up in this Court. With special leave, it can go to the High Court, but in most cases it does not.

55 There is an important task of educating the public about what judges do in the criminal justice system and what sentences are actually imposed in the system. Through the general media, the public really only gets part of the story. Inevitably there are differences on the part of judges in terms of their approaches to the exercise of the sentencing task. There are such differences in the community as a whole and it is inevitable that there is a range of beliefs by judges about what should be done when people offend. In that respect judges reflect in many respects the very wide range of beliefs that exist in the broader community on the same matters.

56 There is a significant section of the community, I appreciate, which believes that sentences should be generally harder and tougher than they in fact are. There is also a section of the community that believes that the objectives of rehabilitation are better served by a different approach than the imposition of higher or tougher penalties. Both of those opinions are legitimate and from time to time one is perhaps more representative of the community than the other.

57 The range of permissible judicial opinion is necessarily narrower than the range of actual public opinion. The reason it is necessarily lower is because of the principle of equality of justice. One of the major tasks of the Court of Criminal Appeal is to attempt to ensure that there is some sort of consistency in the sentences actually imposed, so that offenders do not feel a sense of grievance that they happen to have drawn a particularly harsh judge, and that victims do not feel a sense of grievance that a particular offender has drawn what is regarded as a particularly lenient judge. That principle of equality means that the range of legitimate judicial opinion, as I have said - although there is a range - is narrower than the range of public opinion.

58 I regret to say that that means that at any point in time, judges are likely to disappoint one section of the community or another. That is a problem that just goes with the job and we have to bear it.



59 I would like the community in Dubbo to understand that judges operate under constraints requiring them to have comparability with respect to sentences. That must mean that those who favour either lenient or harsher penalties will necessarily from time to time feel disappointed by the result. That occurs because we have to uphold the principle of equality of justice in outcomes. I regard the maintenance of that principle as a particularly important aspect of maintaining public confidence in the administration of justice.

60 I trust that our deliberations in this community will assist the educational task to which I have referred. I thank all of those who have spoken for their comments and look forward to a return to Dubbo and other rural communities in New South Wales with this court in future years.

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## Opening of Law Term Dinner 2002

**OPENING OF LAW TERM DINNER  
NEW SOUTH WALES LAW SOCIETY  
PARLIAMENT HOUSE, SYDNEY  
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The sentencing of convicted criminals is one of the most important tasks performed by the judiciary. Sentencing engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public attitude to the way judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.

I venture to suggest that in all of recorded history, there has never been a time when crime and punishment has not been the subject of debate and difference of opinion. This is not likely to change in the future. The problem may be said to have started in the garden of Eden when God called Adam to account for his transgression. He, of course, blamed his wife. She – more imaginatively - blamed the snake. All three were the subject of condign punishment. For millennia, theologians and others have been debating whether the punishment has had the desired effect of general deterrence and what are mankind's prospects of rehabilitation.

I am concerned that public confidence in the administration of justice and public respect for the judiciary, is diminished by reason of ignorance about what judges actually do in terms of the sentences that are imposed. Plainly there are occasions when a particular sentence attracts criticism and that criticism is reasonably based. What concerns me is that such cases appear to be widely regarded as typical, when they are not.

The Chief Justice of Australia, the Honourable A. M. Gleeson, has recently summarised the result of public opinion polls about sentencing not just in Australia but also in the United Kingdom and North America:

“... when people are asked whether they think the sentences imposed by judges are too lenient, or too severe, or just about right, most say that the sentences are too lenient. However, when they are then given the facts of individual cases, and asked what sentences they themselves would have imposed, a majority come up with sentences that are more lenient than sentences that were actually imposed by judges. The same results have shown up in similar surveys in other countries. When people are questioned in more depth, and are made to think more closely about an issue, their responses change A. M. Gleeson AC “Valuing Courts” 2001 13 *Judicial Officers Bulletin* 49 at 51.  
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There is a considerable body of research which indicates that with respect to crime and, particularly with respect to sentencing, there is a significant disparity between what actually happens and what a majority of the public believes happens. Research shows, for example, that the public believes that crime is going up, when in fact it is going down and that the amount of violent crime is greater than it actually is. Members of the public believe that they are much more likely to be the victim of crime than the objective facts suggest. Many believe that judges generally sentence much more lightly than they actually do.

Detailed research in many nations, including Australia, has shown that when the full facts of particular cases are explained, the public tends, to a very substantial degree, to support the sentences actually imposed by judicial officers or, at least, to express the opinion that the sentences were lenient to a significantly lesser extent than answers to general questions about judicial leniency in sentencing, would suggest See the references collected in J. J. Spigelman “Sentencing Guideline Judgments” (1999) 73 *ALJ* 876 at fn 23-28.  
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This is not an area in which there can ever be unanimity. The most that can be expected is that when

the facts of particular cases are known, the proportion of the public which believes that the judge's sentence was too high, is of the same order of magnitude as the proportion which believes that the judge's sentence was too low. That is in fact what research studies, in which the public knows or is informed of details of the case, establish to in fact be the case. There is a very real discrepancy between public perception and reality with regard to sentencing practice. The integrity of our judicial system requires us to do what we can to minimise that discrepancy.

In this context I was pleased to read the Bureau of Crime Statistics and Research report on *Trends in Sentencing in New South Wales Criminal Courts: 1990-2000*, released last week *Crime and Justice Bulletin Number 62*. That report made it clear that the criminal courts have, over the course of that decade, increased the severity of sentences imposed for serious offences. The percentage of convicted offenders sent to prison has gone up for offences like assault, sexual assault against children, robbery, break and enter, fraud. This has occurred in a context where public opinion supporting increased sentences has been reflected in various statutory changes to the applicable sentencing regimes, including reclassification of offences and increases in maximum penalties.

There are occasions when public criticism of specific sentences for leniency is justified. These criticisms are not always able to be rectified on appeal. There are significant inhibitions on the Crown initiating appeals on sentence at all. When they are instituted, appellate courts approach such appeals with the application of the principle of double jeopardy and manifest self restraint from interfering with the exercise of the sentencing discretion. Nevertheless, the appeal process does ensure that both inadequate and excessive sentences are generally changed.

The occasional inadequate sentence receives much more significant public exposure through the media than the continuing, day in and day out, imposition of sentences that are generally regarded as correct and, for that reason, pass without comment. It is an invariable rule that when a first instance decision that has attracted howls of controversy is overturned on appeal, the appellate decision receives virtually no publicity.

In such a context, judges are entitled to feel a little irritated when, although they apply themselves diligently to a difficult task, they are frequently accused collectively of excessive leniency and of being out of touch.

There is an important task of educating the public about the actual level of sentences imposed. The media, with its understandable focus on high profile cases and controversy, fails to inform the public about what judges are actually doing in the normal line of case. There are not adequate alternative means of public information. What is required is a widespread recognition, on the part of the public, that it is only getting part of the story.

There is a wide spectrum of legitimate opinion about appropriate levels of punishment for criminal offences. There have been periods in the history of all societies when the public believed in the need for the imposition of severe punishment. In the past, that has taken the form of death, mutilation, whipping and other forms of infliction of pain. In our own times the call is for significant periods of incarceration.

It is, of course, impossible for courts to satisfy all sections of the community with respect to a matter like sentencing, about which there are such significant divisions of opinion within the community. There is a distinct view held by some that sentencing should be more severe than it in fact is, at least for certain kinds of offences. In the broad spectrum of community opinion those who have that view are often balanced by another distinct view, that sentences at the present level of severity, let alone any increased level of severity, do not serve what that group believes to be the proper function of punishment: deterrence or rehabilitation.

The judiciary cannot satisfy both points of view. The permissible range for the reasonable exercise of the sentencing discretion on the part of the judiciary is necessarily narrower than the broad range of opinion held by significant sections of the community. The reason for this is that the core value of fairness in the administration of criminal justice requires the range to be narrow, so that criminal justice is seen to operate reasonably equally.

Inevitably there will be differences on the part of judges in terms of their philosophical approaches to the exercise of the sentencing task. Nevertheless, it would fundamentally undermine public confidence in the administration of criminal justice if it became widely believed that the result was a complete lottery based on who the judge was. It is, I believe, essential for the maintenance of public confidence

in the administration of justice that the outcomes of similar cases are, within reasonable bounds, the same. Consistency in sentencing must be more than empty rhetoric. That is a primary task of the Court of Criminal Appeal.

The range of permissible judicial discretion is much narrower than the range of actual public opinion. For that reason, the outcome of the judicial sentencing task will, necessarily, not be acceptable to some segment of public opinion. It is, of course, permissible for that segment to seek to have its opinion prevail by statutory change. Unless this happens, however, it is important for the legitimacy of our judicial institutions, that any disaffected segment of the public appreciate that judges operate within constraints that do not permit decisions at either extremity of public opinion.

The reason why debate about sentencing will know no rest, is because the ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. It has always been thus. Requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. Specifically, the requirements of justice, in the sense of just desserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.

Centuries of practical experience establishes that the assessment of the multiplicity of factors involved in the sentencing task is best served by the exercise of a broad discretion. That same practical experience, over centuries, suggests that this difficult process of weighing and balancing all of the relevant considerations is best done by an independent, impartial, experienced, professional judge. It is not best done on talkback radio.

The existence of sentencing discretion is an essential component of the fairness of our criminal justice system. Unless judges are able to mould the sentence to the circumstance of the individual case then, irrespective of how much legislative thought has gone into the determination of a particular rule or regime, there will always be the prospect of injustice in the individual case.

The history of the imposition of severe punishment in the past has been that at a certain level of severity, the punishment becomes tolerable no longer. It comes to be regarded by many to be virtually as repulsive as the crime. There appears to be a natural oscillation in the balance of outrage in such matters.

Significant issues have been debated about legislative interference with the exercise of the sentencing discretion, particularly in Western Australia and the Northern Territory. It is not an issue wholly absent from the New South Wales justice system. With respect to certain driving offences there is statutory provision for automatic suspension of a driving licence. This can operate in an exceptionally harsh way, for example to a farmer who lives many miles from the nearest town, with no possibility of public transport or support from another family member. Judges are placed in the invidious position of either refusing to record a conviction or imposing a penalty which operates harshly. Surely provision could be made for the truly exceptional case.

There is nothing new about the debates we have had in recent times in this regard. In 1883 the New South Wales Parliament passed legislation which created a sentencing structure with five distinct steps or categories, including both minimum and maximum sentences. The scheme led to palpable injustices, so that the *Sydney Morning Herald* editorialised on 27 September 1883:

“We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass the sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.”

The scheme was abandoned by statute a year after its introduction. As the philosopher George Santayana put it:

“Those who forget the past are condemned to repeat it.”

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Over recent years I have taken the opportunity at this dinner to inform the profession about the

operation of the Supreme Court. It is convenient to do so again.

Over the course of the year 2000 the Court has made substantial progress with its backlog, notwithstanding an increase of filings.

In the Common Law Division civil filings increased from 4,177 in 2000 to 5,032 in 2001. However, the pending caseload as at 31 December of each of those years declined from 4,716 to 4,039. The number of criminal filings remained at the historically high levels of 127 and 126 in the respective years, but the number of cases pending as at 31 December fell from 97 cases to 82 cases.

In the Equity Division the pattern was similar. The number of filings increased from 4,478 in the year 2000 to 5,493 in the year 2001, but the case load pending as at 31 December fell from 3,291 to 2,914.

In the Court of Appeal the number of new cases increased from 483 in 2000 to 504 in 2001. However, there was a substantial fall in the number of pending cases as at 31 December, from 460 to 337.

In the case of the Court of Criminal Appeal there was a substantial increase in the number of filings from 867 in 2000 to 940 in 2001. In this case, alone, the Court was not able to reduce its backlog. The pending caseload as at 31 December increased from 750 to 767.

The Court of Criminal Appeal planned for a substantial reduction in the backlog over the year. This was frustrated by reason of the very substantial increase in the number of filings. However, there would have been no increase in the number of cases outstanding at the end of the year, if all the dates which the Court had made available for sittings of the Court of Criminal Appeal had been used. Because not enough appeals were ready to be heard, the Court found that it had to vacate several weeks of sittings. Steps have been taken to ensure that this does not happen again. I am reasonably confident that it will not.

The result of these developments is that the delay in the criminal list has been reduced very substantially already. I anticipate a significant reduction in delay in the Court of Appeal during this year. Subject to the rate of new filings, further progress is likely across the board.

At this dinner last year I announced that in every area of the Court there was no longer a holding list in the sense of a list of matters ready for hearing, but which could not be given a date. Over the course of 2001 that remained the case. All matters that became ready for hearing were immediately placed in call up lists and, in a short time, were offered a date. Clearly longer matters are not able to be accommodated as readily as short matters, but the position as I indicated it to be last year remained so over the course of the year and is likely to remain so for the next year.

Perhaps, the most significant change in 2001 was in the practice of the Common Law Division with respect to cases that exceed their time estimates. Until last year such cases were adjourned, usually for many months, with substantial costs imposed on all parties and on the Court. Primarily because of the availability of acting judges, such adjournments are no longer necessary. I regard that as a substantial improvement.

During the course of my address last year I noticed a certain degree of agitation, perhaps even an expression of disagreement, when I said that those who traditionally advise clients on the basis that it takes years to get a case on for a hearing to the Supreme Court should change their advice. I said it was no longer true and it is no longer true. For those practitioners who are capable of preparing their cases expeditiously, the Court is now in a position to reward them for their efficiency, to the advantage of their clients and the enhancement of their reputations. It is clear that over the course of 2001 better organised practitioners have taken advantage of this opportunity. Nevertheless, there remains a very large number of cases that should be ready for trial and are not.

As at 31 December in the Supreme Court there were over 1,000 cases in the Common Law Division and over 300 cases in the Equity Division which were filed more than two years ago and which are not ready for hearing. I accept that there are circumstances in which a delay of more than two years in preparing a case for trial can be justified. But the overwhelming bulk of these cases is not of that character.

I indicated last year that the legal culture in this State which accepted that it took years to get a case on for trial in the Supreme Court had to change. The better practitioners have adjusted to that change.

But the culture has still not gone. I reiterate that the profession must accept that delays in excess of two years in preparing a matter for a first instance trial in the Supreme Court is no longer appropriate, in the usual case.

During 2001, the Court has focused its case management to ensure that there was a flow of cases ready to proceed. There has, at times, been a certain hand to mouth quality about the process of case management. Practitioners frequently express reluctance to take early dates for hearing when they are offered. The Court has become less and less tolerant of such a response. The uptake of cases from the pending caseload to the status of ready for hearing remains slower than desirable, particularly in the Common Law Division. So far the Court's case management has been limited in the degree to which it overrides the wishes of the parties in terms of time for preparation, at least in the way those wishes are expressed by their legal representatives. Unless the flow of cases ready for hearing improves in the future, it may become necessary for the Court to override those wishes more and more frequently.

G Lindsay, *No Mere Mouthpiece: Servants of All Yet of None*, Chatswood,  
LexisNexis Butterworths, 2002

## FOREWORD

BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

Every investigation of the history of Australian legal institutions reveals the omnipresence of both continuity and change. The essays collected in this volume reflect this proposition. The capacity of our legal system, together with the institutional components of that system, to simultaneously deliver the legitimacy which longevity provides and adaptability to changing circumstances, makes a fundamental contribution to the social stability and the social progress of this nation.

Over the decades since the publication of Dr Bennett's *A History of the New South Wales Bar* in 1969, with which period the essays in this volume are primarily but not exclusively concerned, there have been numerous changes in the structure of the Bar and to its practices and procedures. Many of these changes have resulted from pressures for the expansion of access to justice. Others have arisen from the application of competition principles to the legal profession. This course is not yet complete. The debates over these decades have caused the Bar to focus, perhaps more than it would otherwise have done if it had been left alone, on those aspects of its practices and procedures that are of enduring significance.

The independence of the Bar has been reaffirmed as a fundamental element of the administration of our traditional system of justice. As our greatest lawyer, Sir Owen Dixon, said upon taking the oath of office as Chief Justice of Australia:

“The Bar has traditionally been, over the centuries, one of the four original learned professions. It occupied that position in tradition because it formed part of the use and the service of the Crown in the administration of justice. But because it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the Bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence, and owing allegiance to none.”<sup>1</sup>

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<sup>1</sup> *Jesting Pilate* 1965 p245

Whilst his Honour's use of the male pronoun was understandable in 1952, it would not be applied today. Subject to that matter, his Honour's observations remain entirely apt.

The structural independence of the Bar as a corporate entity is based on the independence of its individual members, who are neither employees nor partners. By having to rely on their own resources, barristers develop an independent cast of mind and a capacity for objectivity. These qualities have always been, and remain, at the heart of our adversary system of justice. The single minded pursuit of the interests of clients, who after all will determine the earnings of a barrister, are often made subservient to the interests of the system, as reflected in the performance of duties to the Court. As a human institution, the system does not always operate to perfection in this respect. It does, nevertheless, operate to a substantial degree in accordance with these principles.

Experience at the Bar remains the most appropriate background and training for the replenishment of an independent judiciary, from which the Bar is primarily, though no longer exclusively, drawn. A tradition of such significance is worth commemorating when an appropriate milestone occurs. The centenary of the New South Wales Bar Association is such an occasion. I am sure all members of the profession will welcome this volume.



**FOREWORD**

**BY THE HONOURABLE J J SPIGELMAN AC**

**CHIEF JUSTICE OF NEW SOUTH WALES**

In his *Life of Johnson*, Boswell records Samuel Johnson saying:

It is more from carelessness about truth than from intentional lying, that there is so much falsehood in the world.

In large measure, the law of evidence is concerned to minimise the amount of 'carelessness' and, accordingly, the amount of 'falsehood' in legal proceedings.

The pursuit of truth is not, however, the only value reflected in the law of evidence. Other matters of public interest are often engaged. As Knight Bruce VC said in *Pearse* (1846) 63 ER 950 at 957:

Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much.

The law of evidence has developed over the centuries in the context of an adversary system of justice based on practical experience of the search for truth in the context of other values, upon which such search may impinge.

The common law of evidence has been modified from time to time by statute and is now, in substance, codified in the New South Wales, Tasmania and Commonwealth jurisdictions. The Evidence Act 1995 in large measure repeats the common law but modifies it in important respects. The prior law of evidence had become second nature to practitioners and the judiciary, so that evidence issues could often be disposed of with facility. That is not to say that important questions did not often arise, particularly in the course of criminal trials, but the range of disputation was more limited than has arisen under the new regime. By reason of the introduction of the new Evidence Act, and by reason of the scope and significance of the changes to the pre-existing law which it contains, over recent years the courts have had to give attention to evidence issues to a much greater degree than had hitherto been the case. The difficulties have also been reflected in a significant number of successful appeals, resulting in new trials. If the authors of the Evidence Act expected that the Act would produce efficiencies in the conduct of litigation then, at least in the short term, that expectation has not been realised.

There is now a substantial body of case law dealing with a wide range of issues under the Act. It is essential that judges and practitioners have access to the case law in an ordered and readily accessible format. Practitioners outside New South Wales, the Australian Capital Territory and Tasmania, must maintain mastery of the common law of evidence, as modified by statute in that State or Territory,

whilst simultaneously acquiring familiarity with the 1995 Act to be able to conduct litigation in the Federal Court or the Family Court. The present work includes an alphabetical guide to the Act which permits such judges and practitioners to look up common law concepts which will lead them to relevant provisions of the Act.

Practitioners will, no doubt, gradually develop the kind of familiarity with the terminology of the 1995 Act that they once had with common law concepts and which may still linger. In New South Wales, in the second half of 2002, there is a discernible increase in the comfort level with which concepts and section numbers of the 1995 Act are employed. This publication will, no doubt, further enhance that comfort level.

The authors bring this topic a depth and diversity of experience of the law of evidence. They are to be commended for making a large and rapidly growing body of the law accessible to the judges, practitioners, scholars and students for whom the work is intended.