

Judges Under Attack

Justice Kirby Collection

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QUADRANT

JUDGES UNDER ATTACK

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I have just completed ten years service as President of the New South Wales Court of Appeal. I approach my twentieth year as a Judge. You can count on the fingers of your hands the judges of this country who have had a longer service. I have therefore had plenty of opportunity to view the relationship of the community and the judiciary.

When I was first appointed, I still had ringing in my ears Sir Owen Dixon's words of assurance:

"The authority of the courts of law administering justice according to law is a product of British tradition and it is for us to maintain it. There is I believe a general respect for the Queen's courts of justice which administer justice according to law, and I believe that there is a trust in them. But it is because they administer justice according to law.

*It is important to maintain the prestige of the legal profession and it is important to maintain the status of the judiciary."*¹

To say that things have changed from the time of my first appointment in 1974 would be an under-statement

My topic is "Judges under Attack". I should begin by putting the attacks which judges in Australia suffer in proper perspective. In my function as Chairman of the Executive Committee of the International Commission of Jurists, I am closely associated with the work of the Centre for the Independence of Judges and Lawyers (CIJL) in Geneva. That body publishes an annual report *Attacks on Justice*. That report, organised by countries, discloses the many jurisdictions where "attacks" on the judges go far beyond verbal abuse or media harassment. In Colombia, Italy and many other countries, judges in office are killed in brutal retaliation for their decisions or in crude intimidation. In other places they simply disappear after a decision unfavourable to a powerful interest. In my United Nations work in Cambodia, I have met judges who have had to jump out of the window of their courts to escape the retaliation of powerful armed litigants invading their domain in retaliation for an adverse

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finding. Sadly, we have witnessed in this country the murder of judges and members of families. But these attacks are extremely rare. For the most part, the independent judiciary of Australia can go about its work without peril as to physical survival and safety. Our problems lie elsewhere.

The reports on Australia in *Attacks on Justice* tend to concentrate on the attacks on judges by parliaments and by governments of different political persuasions. In recent years we have seen a series of shocking attacks on the tenure of judicial officers. Tenure is the foundation-stone for their independence and courage to do brave and strong things on behalf of society. This form of attack on judges has been developed in Australia to an art form. Courts and tribunals are abolished. A new body is set up. The judges tenured in the old body are not appointed to the new. Labor governments did this to Justice Staples in the Arbitration Commission and to five magistrates in New South Wales. Coalition governments have done it to judicial officers in a number of States. In Victoria last year nine undoubted judges of the Accident Compensation Tribunal were dismissed from office by the simple expedient of abolishing their court. This action extracted barely a whimper from the media.

The Australian media spends so much time gazing at their own navel that they are simply not interested, for the most part, in the defence of the fundamental institutions of our constitution. Any talk about the media and the journalists will seize the headlines. Yet talk about the protection of the liberties of citizens, by the assurance of independent judges, and the media become co-conspirators with opinionated politicians in a veil of silence. This is a truly worrying development in Australia. It has been noted by the CIJL in Geneva. Unarrested, it would pull down judges so that they become little more than another branch of the bureaucracy of the Government of the day. Doing this might salve a few bureaucratic and media egos. But it would not be good for the freedoms we enjoy. Every now and again it is imperative that politicians, bureaucrats and media people should be submitted to independent scrutiny, and reminded of the law which is above us all. None-one can do that, ultimately, but the judges.

If I were to address the topic of "Judges Under Attack" in Australia, these are the themes that I would develop. But I assume that what is intended by the expression is an examination, once again, of the attacks on the judges by the media. This is not simply a local development. Indeed, it is not a development confined to attacks on the authority of judges. It is not even a development without its positive side. But it is clearly one of considerable importance for the rule of law.

FOUR MEDIA PHENOMENA

The Personal Attack: The first thing to notice is the way the media personalises issues. Today there is less hard copy in our news. More mixed news and comment. This is probably a print media response to the necessities of television and to the magazine and pictorial approach to the presentation of news. Lawyers who hanker after serious debate, and judges who are used to it, are bound to be disappointed.

I have told elsewhere of a good illustration of the Australian media's love of confrontation news.² In the course of an unremarkable judgment I drew attention to a perceived injustice

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in New South Wales workers' compensation legislation. This was run seven days later in the media as an "attack on the Premier for being the architect of ... most unjust legislation". This, in turn, provoked a radio interview and the ensuing print headlines "Fahey Hits Back at Kirby's Compo Attack" and "Fahey Lashes out at Kirby Comment". A serious discussion of the perceived source of injustice in the law becomes impossible. Instead, the public has served up to it a highly personal "clash", with "hitting back" and "lashing out". Every week, on *Media Watch*, Stuart Littlemore instances more of these discouraging examples of poor, biased and even mischievous journalism. Judges have had a lot of this treatment, especially in the last three years or so. Their conventions restrain them from discussing publicly - except in their judgments - the merits of their decisions. Judges simply cannot answer back.³ This makes judges shackled combatants in media attacks upon them. And to such attacks must now be added the new peril of judicial life: of cameras following judges from the train station and journalists barking questions at them in the public streets. The public may not understand why the judge cannot answer. The media should know that the judge is accountable through the appellate and review process of the courts. Not to the High Court of 60 Minutes or Four Corners.

The Pack Mentality: Monica Attard, with expertise usefully gathered in Moscow, has described the journalism she found on her return to Australia. Her Walkley Lecture⁴ warmed many a judicial heart. She accused her colleagues of poor, unfair and biased coverage of important events; of preconceived views that kill uncongenial stories; of a passion for the "smell of blood" and the pack mentality which turns important and complex issues into reporting that takes on the "aspect of a sporting contest". Another journalist illustrated the same thesis with the unrelenting personalised calumny lately heaped on the Commonwealth Games official, Mr Arthur Tunstall.⁵ Justice Bollen could (had he been free to speak) have told a similar tale. Many members of the Australian judiciary have suffered from this phenomenon. There need to be more exacting standards.

Global Media: The third phenomenon is global media.⁶ Monica Attard in the same lecture spoke, with disdain, of the growing dominance of CNN in the world's television news. But what does that dominance bring to the law? In Lesotho I was badgered by endless television reports of the trial of Mr Kennedy Smith. In Madrid, in January 1994, whilst Australia was aflame, the media - international and local - (with the precious exception of the BBC) was obsessed with the trial of Mrs Bobbitt and the predicament of her husband's reconnected penis. To this extent, our local media have caught the disease of entertainment. The old traditions which separated news and comment, of the serious and the trivial, have almost wholly disappeared. In this way, the fashions of American journalism penetrate, by technology, the four corners of the world. They reach us in Australia. They challenge our notions of the proper balance between free speech and due process. We would not, by our law, have permitted the pre-trial trial media of O J Simpson. Even a celebrity is entitled to a fair trial. Yet American media chiefs are apparently not prepared to allow that their notions of the balance may not be apt for Australia. Instead, Australia's judges are attacked as enemies of free speech or impervious to the blinding light of First Amendment jurisprudence. With global media has come a diet of superficial entertainment. Judges, it seems, must just get

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used to cameo roles as the "fall-guys": dim or obdurate establishment figures ripe to be taken down a peg or two. The stereotyping of the judiciary in this regard is appalling.

The Power Thing: Finally, there is the power thing. I mentioned this in my speech at the seminar on the media and the judiciary in Madrid in January. Pull down the Queen. Pursue the trivial sexual peccadillos of the President. Disparage the churches. Belittle the universities. Laugh at the Parliamentarians. Attack the judges. What will then be left in our society to stand up for the good and the right and the true? You have it. Only the media.

The power of the media - which now stretches globally into every nook and cranny of the earth's surface - has expanded beyond its sense of responsibility. It has outstripped effective national legal regulation. To a large extent it sets the public agenda. It helps to frame public perceptions. But it has a very short attention span. The damaged objects of its attention, if they be judges, must, when the spotlight shifts, simply pick themselves up, dust themselves off and get on with the onerous business of the courts.

A SENSE OF PERSPECTIVE

None of this is to say that some criticism of the judiciary of Australia has not sometimes been warranted and beneficial. Especially on gender issues, on the substance of the law, on its accessibility to ordinary citizens and in relation to other topics of discrimination and minorities, the alert of the mostly young journalists to the mostly older judges has been mainly beneficial. The attention to the judicial institution itself has also been useful. I certainly agree with Sir Anthony Mason that wider discussion of the judiciary, so long as it is informative, will promote better understanding of the law and of what the courts are doing.⁷ Such attention has encouraged many reforms which would probably have happened, but perhaps much more slowly. For all their faults, the media also remain a global force for freedom. But with the ever expanding power of the media must come the obligations of responsibility. That is the lesson of every rule of law society.

The challenge before the Australian judiciary is to reform and adjust an institution eight hundred years old: keeping the professionalism, integrity and independence, which are good, whilst discarding the inefficiency, delay and outmoded attitudes, which are a blight on justice. The challenge for the media is to retain the freshness of new ideas, an adherence to truth (as it is perceived) and provision of differing opinions whilst keeping under control the personality reporting which reduce serious issues to entertainment, resisting the pack mentality and the exertion of brute power.

After the diet of the past few years less entertainment and a more balanced presentation of the judiciary to the people they serve might be in order in Australia.

FOOTNOTES

* Based on an address to the Fifth International Criminal Law Conference, Sydney, 27 September 1994.

1. Address by Sir Owen Dixon upon taking the oath as Chief Justice of the High Court of Australia (1952) 85 CLR xi and xv.

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2. M D Kirby, "Judiciary, Media and Government" (1993) 3 JJA 63 at 69. For a note on attacks on judges see (1991) 65 ALJ 635.

3. See *Reg v Commissioner of Police of the Metropolis; Ex part Blackburn* [No 2] [1968] 2 QB 150, 155.

4. M Attard, Second AMP Walkley Lecture, Sydney, 8 September 1994 noted *The Australian*, 9 September 1994, 3.

5. K Edwards, "Real Heroes and a False Villain" in *Time*, 12 September 1994, 52.

6. M D Kirby, "The Globalisation of the Media and Judicial Independence", Paper for a seminar on the Media and the Judiciary, Madrid, Spain, 18 January 1994 reproduced, in part, in (1994) 1 *Aust Media LR* 125. As to the disease in England, see P Reed, "Sitting in Judgment" (1994) 91 *Law Society Gazette* 20.20.

7. A F Mason, Role of the Courts in the Year 2000, noted *Herald Sun* (Melbourne) 6 November 1993, 22.