

**Bar Association of Queensland Annual Conference
Hilton Hotel, Brisbane, Saturday, 2 March 2019 at 9:45am**

"Aspects of the relationship between the law, economic development and social change and the importance of stability"

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The Bar as a profession plays an important role in our legal system. It is often overlooked that it is not only judges who participate in the development of the common law. Some important decisions are shaped by the arguments presented by counsel to the court. The adherence by barristers to their duty to the court and of high professional and ethical standards is essential to the maintenance of the rule of law and the stability of the system. It is therefore necessary that the Bar continue. But as in the past, it will in the future face challenges which might be thought to threaten its existence. Its future depends upon whether and how it remains relevant in our society. Conferences such as these provide an opportunity for introspection.

The theme of this year's conference is "influence and alienation". The conference will explore ideas such as the value of stability and innovation in the practice and development of the law; the way in which the law influences, and is influenced by, social and economic changes; and how the law and the Bar address the risk of being alienated from society or parts of the economy.

These are large topics. I propose to touch on just a few aspects of them.

In the first place, I will discuss the relationship between the law and economic development. This will involve some reflection on the development by the courts of commercial law and the importance today placed by economic institutions on our legal systems to support economic development more generally.

The history of the development of commercial law shows that the courts are capable of responding to changing economic conditions and the demands of

commerce. So too is the common law able to adapt to changes in social values and thinking. Rarely, though, will the courts themselves influence economic or social change. That is in large part because the core values of the common law and our legal system are respectively certainty and stability, and these values inform the role of the courts with respect to the development of the common law. In conclusion I will reflect upon what the Bar might draw from these insights.

Law and economics

In an address last year, Professor Sir Ross Cranston considered the question of whether the rule of law was good for the economy and concluded that “the history of English commercial law over the past 200 years lends some support to the link between the law and economic progress”¹.

In the early 20th century, Max Weber, the German philosopher, jurist, political economist and one of the founders of modern sociology, wrote of the mutual interdependence of the rational methods and institutions of modern Western law and the West's economic development. Professor Cranston points to one difficulty in Weber's thesis. It is that in reality the English common law, particularly in the area of commercial law, might be viewed as something of a maze. To take the common law of contract as an example, it may be acknowledged that it developed as a somewhat haphazard set of rules, especially when compared with the commercial codes of the European civil systems.

Nevertheless, there are aspects of the development of English commercial law which may support Weber's theory concerning the relationship between the courts as institutions and economic development.

It is not unimportant to an understanding of the relationship between law and commerce that English contract law was worked out in the late 18th and 19th

¹ Cranston, "The Rule of Law: Good for the Economy?" in *Graya Magazine*, No 132 (2019) 24 at 34.

centuries in the context of litigation involving shipping, insurance, banking and other commercial enterprises. As Professor Cranston points out², the English courts were generally supportive of commerce and attempted to reach commercially helpful results. The approach of the courts was to acknowledge party autonomy or freedom of contract. They even gave certain commercial practices the force of law; for example, in allowing commercial custom or trade usage to be applied in the interpretation of commercial contracts.

The aim of the courts in providing rules about the interpretation, enforcement and termination of contracts was to provide certainty in commercial transactions. In 1774, Lord Mansfield went so far as to say that in mercantile transactions the object of certainty respecting the legal rules was more important than the outcome of a particular case³. Of course the aim of certainty in the law is not confined to commercial law.

The courts not only provided the framework within which commerce could operate, they also provided rational methods of adjudication to which Weber may have alluded. Moreover, the courts themselves developed as institutions in which confidence might be placed for an outcome which was impartial and according to law.

In the late 20th century, very different methods from those employed by Weber were available by which to determine the confidence of investors in markets. In one important study in the field of finance⁴, "data was gathered from 49 countries to match the standard of investor protection, measured by the character of legal rules and the quality of law enforcement"⁵. It was ultimately

² Cranston, "The Rule of Law: Good for the Economy?" in *Graya Magazine*, No 132 (2019) 24 at 33.

³ *Vallejo v Wheeler* (1774) 1 Cowp 143 at 153.

⁴ La Porta et al, "Legal Determinants of External Finance" (1997) 52(3) *Journal of Finance* 1131.

⁵ Cranston, "The Rule of Law: Good for the Economy?" in *Graya Magazine*, No 132 (2019) 24 at 24-25.

concluded that common law countries offer the strongest protections, and French civil law countries the weakest. It placed German and Scandinavian civil law countries in the middle⁶.

Unsurprisingly, it would appear that these conclusions are heavily contested. The methodology is criticised. The common law / civil law divide is said to be overly simplistic. It is pointed out that the study does not explain developments in Asia, and China in particular, where there has been an economic boom despite the absence of many rule of law features and certainty as we know it⁷.

Nevertheless, it is not difficult to conceive of the possibility that strong legal systems, where courts or tribunals are able to operate efficiently in a rule of law context, must be attractive to investors. That is certainly the view for which the World Bank contends.

For some time now, the World Bank has stated that "[j]ustice and the rule of law are central to the World Bank's core agenda of ... promoting shared prosperity"⁸. Publications by senior officials of the World Bank continue to assert that there is a positive correlation between legal stability and economic prosperity.

In one such publication it is said that "[w]ithout the legal institutions that allow innovation and entrepreneurship to thrive, other attempts to spur growth are more likely to fail ... Property, contracts, and corporate law provide the legal framework to overcome distrust and allow innovative business ventures to flourish"⁹. Speaking of the adoption by the United Nations of the 2030 Agenda for Sustainable Development, another contributor observed that "[a] distinct feature of

⁶ Cranston, "The Rule of Law: Good for the Economy?" in *Graya Magazine*, No 132 (2019) 24 at 25.

⁷ Cranston, "The Rule of Law: Good for the Economy?" in *Graya Magazine*, No 132 (2019) 24 at 25.

⁸ World Bank Group, "Justice and Rule of Law" (28 April 2015) available at <<http://www.worldbank.org/en/topic/governance/brief/justice-and-rule-of-law>> .

⁹ Mohieldin "Foreword" in Fariello, Boisson de Chazournes and Davis (eds), *World Bank Legal Review, Vol 7 – Financing and Implementing the Post-2015 Development Agenda: The Role of Law and Justice Systems* (2016) ix at x.

the ... Agenda is its acknowledgement of rule of law and access to justice as integral parts of development and key drivers of the process of making socioeconomic progress sustainable"¹⁰. This author advocates for stability in the law to help unlock the economic potential of nations. She says¹¹:

"Stable, transparent legal regimes are key to economic development. Rule of law brings clarity, certainty, and predictability to business transactions and provides recourse in cases of commercial and civil disputes ... Effective laws and institutions check coercion and predatory behaviour, enhance competition, level the playing field for economic actors, support entrepreneurship and innovation, and bolster small and medium enterprises."

Law and society

It is not just that our courts are rule of law based that accounts for the certainty and predictability of which World Bank publications speak. In the judicial methods it employs for decision-making, the common law itself promotes certainty by ensuring that the development of the law is mostly incremental. Whilst its adaptability is its hallmark, certainty and predictability are seen as virtues of the common law for the reason that they engender confidence. Sudden, significant changes of direction in the law do not.

This is not to say that the common law does not alter or adapt to change. It is not difficult to find statements in judgments and in extra-judicial writings about the need for the law to be developed to meet changing economic and social

¹⁰ Khan, "Shifting the Paradigm: Rule of Law and the 2030 Agenda for Sustainable Development" in Fariello, Boisson de Chazournes and Davis (eds), *World Bank Legal Review, Vol 7 – Financing and Implementing the Post-2015 Development Agenda: The Role of Law and Justice Systems* (2016) 221 at 222.

¹¹ Khan, "Shifting the Paradigm: Rule of Law and the 2030 Agenda for Sustainable Development" in Fariello, Boisson de Chazournes and Davis (eds), *World Bank Legal Review, Vol 7 – Financing and Implementing the Post-2015 Development Agenda: The Role of Law and Justice Systems* (2016) 221 at 232-233 (citations omitted).

conditions, social values and habits of thought. And it must frankly be acknowledged that some judges are more pro-active and see the law as adaptable to meet a perceived social need, rather than as responding to a position which society itself has reached. In *Jaensch v Coffey*, for example, Justice Deane said that a final appellate court may be obliged to reassess a legal rule "if the law is not to lose contact with the social needs which justify its existence and which it exists to serve"¹².

But for the most part, judges do not speak of the courts as agents for change or the law as pre-empting social opinion. Rather, they speak of the law being changed or adapted to reflect current thinking. Sir Harry Gibbs, a voice of reason as well as caution, said that the courts should not feel necessarily constrained to follow earlier decisions, but that the circumstance which warrants this divergence is when the earlier decisions "appear to be out of accord with contemporary principles"¹³. Sir Gerard Brennan likewise observed that the judicial development of the law might be considered to be a duty of the court "where values change and where the relationships affected by law become increasingly complex"¹⁴.

One of the clearest acknowledgements of a shift in social thinking was made in *R v L*¹⁵, the rape in marriage case. The husband was charged with two counts of rape of his wife. He challenged the validity of the statute creating the offences. He contended that all Commonwealth legislation relating to marriage preserved the view of the common law that there was a continuing obligation on the part of a spouse to consent to sexual intercourse. The Court did not accept that this accurately reflected the common law at any time, but three judges observed that even if there had been early authority to support the husband's argument, "this Court would be justified in refusing to accept a notion that is so out of keeping

¹² *Jaensch v Coffey* (1984) 155 CLR 549 at 600; [1984] HCA 52.

¹³ *Jaensch v Coffey* (1984) 155 CLR 549 at 555.

¹⁴ *Gala v Preston* (1991) 172 CLR 243 at 262; [1991] HCA 18.

¹⁵ (1991) 174 CLR 379; [1991] HCA 48.

with the view society now takes of the relationship between the parties to a marriage"¹⁶.

To acknowledge that the law reflects rather than influences changes in social values or thinking is to accept that the courts have a relatively limited role in social change. This is consistent with the requirement that changes in the law must logically or analogically relate to existing common law rules and principles¹⁷. It is also to acknowledge that whilst there is a need, "from time to time, to reformulate existing legal rules and principles to take account of changing social conditions", it is nevertheless the case that the courts have a "modest and constrained role" in this regard, consistently with the common law tradition¹⁸.

In a lecture given in 1972, Professor Lawrence Friedman observed "that the *idea* of law and social change is relatively newly-minted. Before the Industrial Revolution, ideas of law were, on the whole, quite different ... [t]here was no current, accepted conception of regular change in the law"¹⁹. People were aware that the law was not static, but it would have been inconceivable to view the law as moving in some direction. He said that at least from the 19th century, informed public opinion was willing to conceive of law as a social process²⁰. He was of the view that "law is intimately involved in social change, both as cause and effect"²¹. Subsequently, in his text on law and society, Professor Friedman was to say that "[i]n modern legal culture ... it is hard to conceive of major changes in social life,

¹⁶ *R v L* (1991) 174 CLR 379 at 390 per Mason CJ, Deane and Toohey JJ, see also 402 (Brennan J), 405 (Dawson J).

¹⁷ *Breen v Williams* (1996) 186 CLR 71 at 115 per Gaudron and McHugh JJ; [1995] HCA 63.

¹⁸ *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334 at 350 [26] per French CJ, Kiefel, Bell and Keane JJ; [2015] HCA 35.

¹⁹ Friedman, "General Theory of Law and Social Change" in Ziegel (ed), *Law and Social Change* (1973) 17 at 18 (emphasis in original).

²⁰ Friedman, "General Theory of Law and Social Change" in Ziegel (ed), *Law and Social Change* (1973) 17 at 18.

²¹ Friedman, "General Theory of Law and Social Change" in Ziegel (ed), *Law and Social Change* (1973) 17 at 20.

which do not take place in and through law"²². But "law", he explained, "means, mostly, statute law ... The courts have played, on the whole, a minor and declining role in socio-legal change"²³.

It might be thought that the courts do not keep to this more limited role in some landmark decisions. My former colleague from the Federal Court of Australia, Justice Ronald Sackville, has argued to the contrary²⁴. Writing extra-judicially, he suggests that in reality most landmark decisions merely reflect societal views of the time. He provides examples to make good his argument.

The *Communist Party Case*²⁵, he says, might be thought to have promoted libertarian values at a time, post World War II, when there were strong anti-communist feelings. He argues that the decision was not in fact out of step with public sentiment about the attempted use by government of its powers. This was confirmed by the failed attempt, by a referendum held shortly after the Court's decision, in effect to overturn it²⁶.

The decision of the Supreme Court of the United States in *Brown v Board of Education*²⁷ – the anti-segregation case – is another example. Recent scholarship, he said, did not suggest that the decision itself brought about a sea-change in community values and attitudes; rather there had for some time been larger forces at work in the transformation of American society. And it was this that made the decision possible²⁸.

²² Friedman, *Law and Society: An Introduction* (1977) 164.

²³ Friedman, *Law and Society: An Introduction* (1977) 164. But see the discussion of some exceptions at 164-165.

²⁴ Sackville, "Courts and Social Change" (2005) 33 *Federal Law Review* 373.

²⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; [1951] HCA 5.

²⁶ Sackville, "Courts and Social Change" (2005) 33 *Federal Law Review* 373 at 388.

²⁷ 347 US 583 (1954).

²⁸ Sackville, "Courts and Social Change" (2005) 33 *Federal Law Review* 373 at 384-387.

Justice Sackville also argued that the decision in *Mabo [No 2]*²⁹ can be viewed in the same light. I found this rather surprising, for my recollection was of a rather panicked reaction on the part of the media and some angst in the community. Elsewhere I have expressed the view that the *Mabo* decision might be viewed more of an appeal by the Court to a future understanding and acceptance of the decision which the majority had reached concerning the common law and terra nullius³⁰. But it is my former colleague's view that by the time *Mabo* was decided, in 1992, the Australian community had become much more aware of and sympathetic to issues concerning Indigenous people in Australia; the *Constitution* had been amended to remove discriminatory references to them; and land rights legislation had been in force for 15 years in the Northern Territory³¹. Moreover, the fact that Parliament promptly endorsed the concept of native title in terms similar to that adopted by the High Court suggested to him that the decision in *Mabo* "was in keeping with mainstream views of the time"³². Needless to say, I would prefer that his argument is correct.

Why then does the court, for the most part, see its role in developing and shaping the law as limited to incremental steps? It is for the reason given so long ago by Lord Mansfield respecting the rules of mercantile law. The courts understand that it is necessary that the law be certain if society is to have confidence in it; that confidence would be jeopardised if it were to take sharp and unexpected changes of direction. Especially would this be so if it were to do so in pursuit of a social agenda, which is best left to the legislature to determine and implement.

²⁹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1; [1992] HCA 23.

³⁰ Kiefel, "The Adaptability of the Common Law to Change" (The Australasian Institute of Judicial Administration, Brisbane, 24 May 2018) 8 available at <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/KiefelCJ24May2018.pdf>>.

³¹ Sackville, "Courts and Social Change" (2005) 33 *Federal Law Review* 373 at 388.

³² Sackville, "Courts and Social Change" (2005) 33 *Federal Law Review* 373 at 389.

Likewise, it is the aim of the courts to maintain the fact and the perception of legal systems as strong and stable. They do so in part by ensuring that their processes are rational and fair and that the rule of law is observed. And in that latter respect, the Bar has an important role to play, as I observed at the outset.

Certainty and stability are core values of the courts, and the strengths of the law and our legal system. They are how confidence is maintained and why financial institutions such as the World Bank connect them with economic progress.

The Bar and the future

What, if anything, do these insights about our legal system convey about the future of the Bar? The Bar has dealt with many challenges. In the not-so-distant past it was the loss of self-regulation and then the growth of national and international law firms which, together with multidisciplinary practices, were expected to reduce the work of the Bar. The reality is perhaps more complex. Now there are other forces to contend with.

In a recent article in the *Asian Jurist*, the Chief Executive Officer of a legal business consultancy described the changes taking place in legal practice³³:

“The legal profession is becoming subsumed by the legal industry. Legal practice is no longer synonymous with legal delivery, and lawyers are not the exclusive providers of legal services. New expertise, organisational structures, economic models, delivery options, tech-driven solutions, knowledge management systems, process and process management, and

³³ Cohen, “Legal Delivery at the Speed of Business (and Why It Matters)”, *Asian Jurist* (October 2018) 34 at 37. cf Legg, “New Skills for New Lawyers: Responding to Technology and Practice Developments” in Lindgren, Kunc and Coper (eds), *The Future of Australian Legal Education: A Collection* (2018) 373 at 379.

financing for customer-centric solutions are hastening the sunset of the legal guild. Not only is the cost of legal services coming under intense scrutiny (even as law firms continue to raise rates and incoming associate salaries), but also the speed and efficiency of legal delivery is increasingly held to business – not legal – standards.”

On one view, it might be said that the fees of counsel, senior counsel in particular, are always being attacked for being too high. But for members of any Bar in Australia, the reality now is that competition occurs in a truly national market. No Bar in any State can consider itself as isolated from the forces of this wider market. One needs to take account of the levels at which others of similar experience and standing are prepared to make their services available, for that may be the correct benchmark. A proper understanding of the market within which one operates is essential to the survival of any professional person.

Technology is no longer seen merely as a tool to facilitate the delivery of legal services. It is also portrayed as a possible threat, particularly in the continuing development of artificial intelligence. This might be something of a distraction. Very few commentators with an understanding of legal advice, advocacy, adjudication and dispute resolution would suggest that they could be completely overtaken by AI. Justice Nettle clearly does not think so.

Speaking at this Association's annual conference in 2016, Justice Nettle suggested that there are at least two aspects of legal work that are likely to survive the effects of computational law. In his view, the intellectual processes involved in the evaluation of evidence in litigation where there are disputed facts "are so complex and so much informed by human intuition and experience as to defy synthesis by any presently available artificial intelligence system"³⁴. He

³⁴ Nettle, "Technology and the Law" (Bar Association of Queensland Annual Conference, 27 February 2016) 9 available at <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/nettlej/nettlej27Feb2016.pdf>> .

considered that even if future advances in technology make such synthesis possible, it is questionable whether society would accept the use of computers to assess oral evidence.

The other aspect his Honour identified involves "the application of open-textured laws"³⁵. There is a difference, he observed, between the scientific reasoning employed by computers and legal reasoning. Scientific reasoning assumes there can only ever be one proper outcome, whereas where a law is open-textured, "logic and reason (as applied under the rubric of legal reasoning) will often yield more than one possible outcome"³⁶.

There will always be issues for the Bar to grapple with. It can never afford to feel comfortable about its survival. But just as the courts adhere to core values in defining their roles and maintaining public confidence, so too should the Bar reflect upon its strengths, its enduring qualities. They are clearly identifiable. The Bar is a true profession – not just a means of making money through the pursuit of business models. For society to view the Bar as having a continuing role, it is necessary that those qualities which engender confidence and trust are maintained. They are integrity, independence, intellectual rigour, a strong sense of public duty, and of course obedience to their duty to the courts. These qualities must be maintained regardless of pressure which may be felt for change, if the Bar is not to lose its relevance.

³⁵ Nettle, "Technology and the Law" (Bar Association of Queensland Annual Conference, 27 February 2016) 9 available at <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/nettlej/nettlej27Feb2016.pdf>> .

³⁶ Nettle, "Technology and the Law" (Bar Association of Queensland Annual Conference, 27 February 2016) 16 available at <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/nettlej/nettlej27Feb2016.pdf>> .