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The Future State of the Judicature

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In a speech made in Shanghai last month, at an Asia Pacific Courts Conference, the Chief Justice of Singapore, Chief Justice Yong Pung How, said:

> "The 21st century judiciary must relate to three environments. One is its own organisation where it has control. Beyond that is the transactional environment, comprising its constituents over which it has influence. There is then the contextual environment, which has important repercussions for the judiciary, but over which it has limited influence. The major task for the judiciary in this latter environment is to arrange its affairs such that it remains an effective institution whatever may happen there."

It is impossible to measure the effectiveness of the judiciary as an institution, or to attempt to predict the extent to which such effectiveness may, in the future, wax or wane, without having a reasonably clear idea of the functions historically, and currently, performed by the judiciary as an institution.

It may serve a particular purpose, on occasion, to concentrate on one aspect of the functions of the judiciary, to the exclusion of others. That, however, can present a misleading picture.

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For example, in an understandable response to our modern society's insistence that government institutions be well and effectively managed, and accept an obligation of service to the public, a great deal of attention has been given to the function of the courts as providers of dispute resolution services. A certain awkwardness arises when attention is directed to the administration of criminal justice, where the identity of the consumers of the courts' services is not easy to specify, but that does not discourage people from seeking to characterise the courts, and evaluate their performance, as a government funded service industry. This approach can produce some useful insights, and can disclose valuable lessons to be learned by judges and court administrators. No one would seriously suggest, however, that to characterise the administration of justice in that way presents anything like the whole picture.

Let me take a simple example. When the High Court of Australia, some years ago, gave its decision in the case of *Mabo*, it might be possible to say that what the court was doing was engaging in the resolution of a dispute between the State of Queensland and some people of the Torres Strait Islands. However, even the most committed managerialist would acknowledge that to be a ridiculously incomplete account of the functions the High Court was performing.

Somewhat less obviously, but just as significantly,when a criminal trial court determines, with due process of law, the guilt or innocence of an accused person, and sets an appropriate punishment, the court is doing much more than simply adjudicating in relation to an allegation against a particular individual. The process by which a criminal trial court conducts its affairs, including the openness of the proceedings to the public, the insistence upon proper procedures and methods and

standards of proof, and the maintenance of a presumption of innocence, both reflects, and affects, the aspirations and values of the community. Although we may take it for granted, sometimes things happen to remind us that the way we go about the administration of criminal justice is an important aspect of the quality of life in our society.

If the only objective of the criminal justice system were the efficient determination of the guilt or innocence of accused persons, and the fixing of appropriate punishments, then the system would operate quite differently. An efficiency expert might conclude that the whole thing could be done much more effectively, and economically, behind closed doors, without the interference of lawyers, and without the impediment of rules and procedures which frequently operate to protect undeserving people. That, in fact, is the way in which criminal justice is administered in some places. But our values prevent, and will continue to prevent, such standards prevailing here.

In the administration of civil justice, the activities of the courts, at least superficially, have much in common with the activities of what are nowadays called alternative dispute resolution forums or centres. The very expression "alternative dispute resolution" relates back to the role of the civil courts in resolving disputes between litigants. That view of what the courts are doing represents part of the truth, but not the whole truth.

In this area also, the way in which the courts go about their business reflects, and affects, society's values. For example, the amenability of governments to civil process, the capacity of the courts to intervene in disputes between citizens and governments, the power of judges to make orders binding governments, and the way in which courts handle cases involving claims against the government, reflect an

ideal of equality before the law which is relatively modern, and which is certainly not universal. It is not an ideal which is likely to be displaced in the foreseeable future. Governments will continue to be active litigants, frequently as defendants. The function of the courts in dealing with complaints against governments is likely to expand rather than contract, and that function, in turn, will constantly remind the public of the need for an independent judiciary. The expectations and assumptions made by the public that a citizen engaged in a civil or criminal dispute with the government will receive even-handed justice constitute a vital, but often neglected test of what is sometimes called satisfaction with the performance of the courts. I fact, I can think of no more important test.

Civil courts, especially superior courts, resolve disputes according to legal principles, rather than individual notions of fairness held by particular judges, and in doing so, create precedents which become known to lawyers and the community. A great body of judge made law has been developed in the course of judicial dispute resolution, and the existence of that law is an important factor in dispute prevention. Because civil courts create and apply principles, parties know in advance the likely outcome of most disputes that are brought before courts for resolution. That is how, and why, something like eighty to ninety percent of cases that are commenced in courts come to be resolved by agreement between the parties without the need for formal adjudication. When there is added to that the vast number of disputes that never result in any litigation at all, because the lawyers for the parties are able to advise their clients of what the outcome will be if a case goes to court, it can be seen that the social utility of the dispute resolution activities of courts extends far beyond the interests to the parties to individual cases. That function of courts will remain, although it will be diminished, if only to the extent that private dispute resolution procedures are seen as a replacement of judicial decision-making.

Finally, although this consideration is more relevant to some courts than others, the courts play an essential constitutional role determining, amongst other things, the powers of governments and parliaments, enforcing the rights of citizens, and maintaining the federal structure upon which our society is built.

How much of this is likely to alter in the foreseeable future? To what extent is the contextual environment likely to change in ways that will diminish the significance of the various functions that have been described? The subject just mentioned provides an example of the way in which a possible change in the contextual environment could result in an expansion in the role of the courts. Just as relatively recent developments in legislation, and common law principle, permitting judicial review of administrative action resulted in a substantial shift in the balance between the executive and judicial branches of governments, so also possible future developments in the area of human rights law could well have major implications for the role of the courts. Once again the nature of that role would emphasise the need for a judiciary which is independent of government.

In relation to the civil dispute resolution function of courts the environment is rapidly changing. The unsustainable cost of litigation, and the inability of governments to meet demands for legal aid funds, will inevitably result in pressure for alternative, cheaper, and more efficient methods of dispute resolution. Courts, as dispute resolution centres, will be obliged to submit to procedures of accountability designed to maximise their cost-effectiveness. What is difficult to predict is the extent to which the necessity to maintain and respect the other functions to which I have referred will inhibit this drive for efficiency and accountability.

In predicting the future of the courts as civil dispute resolution centres, history has an important lesson to teach us. Over time, there have been readily discernible changes in the nature of the civil disputes which occupy most of the time of the courts. The courts at the end of the last century were preoccupied with issues of property and contracts. Now it is the law of tort which dominates the workload of the civil courts. In major commercial disputation there has been a trend away from litigation to arbitration and, more recently, either forms of alternative dispute resolution. It would be a mistake to think that, because certain types of civil disputes are less frequently brought to court, there is and will be a general reduction in the demand for the courts' dispute resolution services. All that may be happening is a change in the kind of dispute most frequently encountered.

In order to explain what appears to me to be a likely partial resolution of some of the competing pressures which will exist, it is necessary to turn to an organisational aspect of the judicature. For ordinary Australians, the form of justice, civil or criminal, which they are most likely to encounter in practice is summary justice administered in a Local Court by a magistrate. This reality has important implications for issues such as judicial independence, access to justice, the cost of justice, judicial education, judicial ethics and the relationship between the courts and the public. However, it is commonly overlooked, perhaps because such issues are often examined in forums which are dominated by judges of superior courts, or perhaps because people do not take the trouble to observe the way justice is administered in practice. No serious consideration of either the current or the future state of the judicature can properly ignore the role of the magistracy.

There are already clear signs that governments are turning to the expansion of summary justice as a means of responding to some of the

pressures to which I have referred. Although it has not attracted a great deal of public attention, in recent years there has been, in State jurisdictions, a clear trend towards increasing the number of criminal offences which may be dealt with summarily, rather than at a trial before a judge and jury. There is little doubt that this has been driven mainly by cost considerations. Similarly, in the area of civil justice, the jurisdiction of the Local Courts has expanded greatly. Once again, I have no doubt that this has been influenced by a desire, in the interests of costs and access to justice, to extend the range of civil disputes which may be dealt with by summary litigious procedures. The practical importance of the role of magistrates in the administration of civil and criminal justice is constantly increasing, and it is vital that organisations which aim to be representative of the judiciary should be alert to the concerns and interests of magistrates.

There has been recent discussion of expanding the role of summary justice in Federal jurisdictions. If this were to occur, it would follow the trend already set in State jurisdictions.

The workload of the Local Courts is constantly becoming heavier. Entirely new jurisdictions, created by legislation, are being directed to that area. In New South Wales magistrates the best example is to be found in the jurisdiction to issue apprehended violence orders. In the first year in which that jurisdiction existed, the number of applications for apprehended violence orders made to New South Wales magistrates was approximately 50,000. These cases are often sensitive and difficult to handle. Litigants are frequently unrepresented by lawyers and conduct their cases in person, and an over enthusiastic or unthinking application of some of the principles of modern case management to disputes of this kind can be counter productive.

One of the future challenges for all courts, and not merely Local Courts, will be the management of cases conducted by unrepresented litigants. What the Americans call pro se litigation will, as the mismatch between supply and demand for legal and funds inevitably increases, become a major problem for judges, magistrates, and court administrators. That is a topic that would be worthy of a paper on its own.

It is not only at the level of the magistracy that the justice system has, in the past, attempted to respond to cost pressures by making available less complex and expensive procedures of adjudication. District and County Courts were established in the nineteenth century for exactly that reason. When the District Courts of New South Wales were first created they were called "the peoples' courts". They were not courts of pleading, and their rules and procedures were intended to be less formal, and less expensive, than those of the Supreme Courts. It might be thought that this aspiration is at least as valid now as it was in the last century. The tendency for the rules and practices of District Courts to imitate those of Supreme Courts might well come to be seen as something that ought to be reversed, not promoted.

Judicial training and continuing education is an area which demands emphasis. The developments that have occurred in judicial education in the last ten years, have, by previous standards, been remarkable. The work of the Judicial Commission of New South Wales in relation to introductory training, and continuing legal education, of magistrates, would repay detailed study. When the Commission was set up in 1986 its officers made a survey of New South Wales magistrates to obtain their views on what could be done to assist them in relation to materials and resources. The most frequently received request from magistrates was for their own copies of the Crimes Act.

Now the Judicial Commission runs formalised programmes of training and continuing education for magistrates, and great attention is paid to providing them with necessary resources, material and electronic.

The development and enforcement of standards of competence and diligence is a difficult issue with which courts and legislatures will have to grapple. The requirements of independence and accountability are not mutually inconsistent but they can, in some circumstances, conflict. The resolution of such conflict will be a pre-occupation of those concerned with the governance of courts over the next decade.

Other speakers at this forum have dealt with the issue of information technology. I will not go into it, not because I regard it as unimportant, but because there is nothing I can usefully add to what has already been said.

The ideas I have expressed may, I believe, be summarised as follows:

1. Any measure of, or prediction about, the effectiveness of courts as institutions must begin with an analysis of the functions they perform. Some of those functions may be modified, perhaps significantly; others may expand.

2. The civil disputes resolution function of the courts is that most likely to undergo substantial modification, because the cost of performing that function in the manner in which it is presently performed is not sustainable.

3. The constitutional role of the courts, involving not merely the enforcement of the Federal compact contained in the

Commonwealth Constitution, and the enforcement of the various State constitutions, but also the more general function of upholding and maintaining the rule of law, is essential and inalienable and will not be modified.

4. Whilst there will be pressure to limit the function of the courts in relation to judicial review of administrative actions, there will also be countervailing pressure for formalised recognition of certain human rights, which could have a major effect on the role and workload of the courts.

5. Governments will continue to respond to the tension between ever-increasing demands for access to justice and the unsustainable cost of justice by increasing the role of summary justice, administered by magistrates or equivalent judicial officers. A greater proportion of criminal offences will be dealt with summarily; the civil jurisdiction of Local Courts will continue to expand. It is also likely that the utility of the role originally intended to be performed by District and County Courts will be forced upon the consciousness of Governments.

6. In superior courts, one of the responses to cost pressures will be a search for techniques to identify cases which can justly be dealt with in a more summary fashion than is demanded by other cases. To the extent to which courts can be regarded as providers of dispute resolution services they are going to have to ration some of those services to the extent to which they can do so without departing from their fundamental obligations.

7. One of the most obvious targets for rationing is time. Judges will need to discriminate between cases and activities which must be allowed to take their own time, and cases and activities which may properly be subjected to rationing of time. The capacity for such discrimination will come to be recognised as an element of judicial competence.

8. As the emphasis on summary justice, civil and criminal, increases, so will the importance of the role of the magistracy. This will require particular attention to issues such as the recruitment of magistrates, their qualifications, training and continuing education, their terms and conditions of service, and their full participation in the independence of the judiciary.

9. Training and continuing legal education will be recognised as a matter of importance for the judiciary generally and will be formalised as existing trends continue to develop.

10. Problems of reconciling the demands of independence and accountability of judges will not be fully resolved, but will command the attention of courts and governments.

11. So long as we continue to enjoy the rule of law, courts, consisting of professional lawyers, and independent of the executive government will continue to fulfil a necessary and vital function. In some respects their effectiveness will wax; in other respects it will wane. On balance, however, in a rights-conscious, litigious, society, in which citizens demand justice, not only from one another, but also from governments, and insist, if necessary on the capacity to

enforce those demands, the role of the courts will remain at least as important as it is at present.