GLE.Z
2001

FAMILY COURT CONFERENCE

SYDNEY 27 JULY 2001

VALUING COURTS

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Oscar Wilde described a cynic as a person who knows the price of everything and the value of nothing. The same could be said of some of those who measure what courts are doing. They probably think that an address upon the subject of valuing courts must be about real estate. A proper and comprehensive method of evaluating the work of judicial institutions must take account of factors which are presently ignored, perhaps for no better reason than that they are difficult to quantify.

That public institutions in general, and courts in particular, have an economic value is clear. But the fact that nobody ever attempts to measure that value means that there is no conventional method of bringing it to account. Something that cannot easily be cut and dried, weighed and measured is commonly either undervalued or simply ignored. This is a problem Family Court judges must see all the time.

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Ask any wife and mother who devotes the whole of her time to caring for a family. Because she does not receive a wage she is often spoken of as though she does not work. The idea that the only work that matters is work that earns a wage or salary is quite recent. In earlier times working to earn a living was regarded by many people as rather undignified. Barristers and physicians once made it a point of honour that they had no legal right to sue for their fees. Providing services on an honorary basis was seen as more respectable than providing services for payment. The status of amateurs was higher than that of professionals. Now the opposite is true. There has been a complete reversal of attitudes; and one that has gone too far. Now we do not merely say that paid work is no less respectable than work performed in an honorary capacity. We measure the value of work according to what is paid for it. The more people charge for their services, the more valuable they must be. The work of people who are paid little is regarded as of little value. And if people are not paid at all, we do not even admit that they are working. Honorary services are not merely less valuable: they are treated as non-existent. We have progressed from being absurdly snobbish to being absurdly crass. In an age where everything of value has its price, and nothing without a price is valued, courts are at a disadvantage in competing for public esteem.

People and things are also undervalued when they are taken for granted. Consider, for example, the economic importance of a secure and transparent system of title to land, with ready transferability of ownership, backed up by a credible system of judicial resolution of

disputes and enforcement of rights and obligations. These are essential conditions of a market for real estate. The theory of capitalism is that a market for real estate permits transactions that direct land into the hands of those who are willing to pay most for it, and they, in turn, are those who make the best and most productive use of it. Security and enforceability of title results in marketability of land, and marketability tends to maximise productive use. This theory can be tested in practice by comparing the wealth of societies which do not have an efficient market in land with those where land is readily marketable. It follows that an economic rationalist, who wanted to be comprehensively rational, should be concerned with proper registration of land title, and the legal system by which disputes about ownership are resolved, issues of title settled, and contracts of sale and purchase, if necessary, enforced.

The same considerations apply to financial markets. Efficient financial markets tend to produce the result that capital ends up in the ownership of those able to make the most productive use of it. Financial markets depend upon just and effective commercial law, enforced by a judicial system of integrity and credibility, which resolves, with reasonable efficiency, and in a reasonably predictable manner, disputes about rights and obligations.

Predictability is important because no court system could expect to deal, by judicial decision, with any more than a tiny fraction of commercial disputes. Most commercial disputes never get anywhere near a court, because the parties, or their lawyers, are able to predict

with reasonable certainty what the outcome would be if there were litigation. Commercial courts operate to best effect when the parties who disagree receive the same advice from their lawyers as to what the result would be if the dispute went to court. When both sides know that, they do not usually go to court. Predictability of outcome prevents disputes, and promotes their resolution if they arise. This is a function of courts which is quite different from that of arbitration or other procedures of alternative dispute resolution. Private resolution of conflict has value, but it is important not to overlook the public value of judicial dispute resolution in its effect beyond the parties to the immediate task.

Behind all commercial law stands the risk of insolvency. A just and effective law of bankruptcy and corporate insolvency, enforced by competent judges, is an essential condition of any viable system of commercial law and, therefore, of any successful market economy.

The cost of capital is affected by the perceptions of investors as to the competence and integrity with which a system of law and justice will handle claims and disputes arising out of investment. When investors are looking at a country where there is uncertainty about the enforceability of contracts, especially contracts with governments, it becomes necessary to factor into their calculations what is sometimes called "sovereign risk". The greater the sovereign risk, the higher the return required to attract capital. The governments and people of countries with a high level of sovereign risk pay more dearly for foreign goods, services and capital. Conversely, societies with a predictable

and reliable system of law and justice benefit tangibly from a perception that contractual rights and obligations will be enforced, if necessary, not only against individuals and corporations, but also against governments.

The importance of the administration of criminal justice, not only to public safety and security, but also to the decency of a society, and its respect for human dignity and rights, is too obvious to require elaboration.

Family law courts do not merely provide a dispute resolution service which the government makes available, in the case of relationship breakdowns, to people who cannot agree on issues such as custody of children, maintenance, or division of property. The way in which such courts exercise their jurisdiction, related as it is to the fundamental social unit, has a profound effect upon the morale of the community, and its sense of the dignity of vulnerable people.

Until recently, Australian courts and the public took each other for granted. Most law abiding citizens could expect to go through life having little, if any, contact with a judge or magistrate. Some disappointed litigants might complain, but the competence and integrity of judicial officers generally were not questioned. Courts, for their part, went about their business without worrying too much as to their standing in the estimation of the public. Lately, without any specific evidence of a decline in public confidence in the judiciary, but as a response to consumerism, courts have become concerned about the way they are

regarded by the public. They have become anxious to see that they are responsive to the wishes of those with a particular interest in their activities.

But there is uncertainty as to who those people might be. It has became to fashionable to describe them as "stakeholders". "Stakeholder" is a word like "relationship". It is sometimes used to avoid embarrassing precision. It may obscure as much as it reveals. Executive governments are readily identified as stakeholders. They provide the resources, financial and personal, upon which courts depend for their operations. So they can meet pressure for independence by insisting that courts pay due regard to the concerns of stakeholders, amongst whom, of course, governments are the most prominent. Governments are also stakeholders because, in many courts, they are major and frequent litigants. And it is often politicians, rather than judges or magistrates, who are politically accountable, and who bear the brunt of public dissatisfaction if the courts do not do their job properly. Litigants also are stakeholders, as are members of the legal profession.

The interests of these stakeholders are not all the same. In some respects they conflict. The interests of a government as a litigant may be different from its interests as a provider of resources to the court system. The interests of particular litigants themselves are in a number of respects different. It might be in the interests of one party to frustrate the timely and inexpensive disposition of a case. In the case of the administration of criminal justice, it would be naïve to think that all, or

even a majority, of, persons charged with serious criminal offices are anxious to have their cases brought to trial as quickly as possible. Delay may often be to the advantage of an accused person. Witnesses lose their recollection, die, or become otherwise unavailable. Victims of crime may become less enthusiastic about pursuing their complaints as time passes. Some accused persons want their cases brought on within the least possible time. Others have a different interest. In ordinary civil litigation, the motivations of parties can be various.

It is not easy to state clearly all the purpose which litigation serves in a community. The primary purpose may be more easily identified in the Family Court than in some other courts. At least the litigants in family disputes tend to be people, rather than corporations or governments, and while they may have collateral purposes, those are usually fairly obvious. But if thought is given to some modern mega litigation, usually fought out between substantial corporations, it may be very difficult to assess what the parties are intending to achieve, or what public purpose is being served by a judge who devotes months to presiding over proceedings that are ultimately settled. Court time is not allocated evenly amongst litigants. Especially in commercial disputes, some litigants consume hugely disproportionate amounts of scarce judicial resources. Is this a problem to which courts ought to be responding? If so, what should they be seeking to achieve by their responses? Since the activities of courts have economic value, does it follow that, in so far as that includes a value to individual litigants, the benefits of their activities should be more equitably apportioned? And, if

courts are seen as providing services to litigants, who should bear the cost of the provision of those services?

The idea of the courts as service providers is not easy to relate to the administration of criminal justice. Even in the case of civil justice, it is important to remember that litigants include defendants, and many defendants are brought to court unwillingly. In the area of family law, even the party who institutes the proceedings normally does so under pressure of circumstances rather than in any truly elective manner. So services are provided by courts to people many of whom are unwilling or reluctant consumers. If litigants are customers in any sense, they are hardly typical customers.

To consider courts as merely providing particular services to litigants, which are capable of equitable apportionment, and of appropriate cost recovery, is to take too narrow a view of their role. This is most obvious in cases which establish some legal precedent, or determine issues of widespread contention or importance. But it is also true of cases which, at first sight, appear to have no significance beyond the interests of the individual parties. Even in such a case, the court is fulfilling an important demonstrative function. A court case between two neighbours in disagreement about the cost of a dividing fence does more than simply resolve the dispute between those two neighbours. It demonstrates to the public the system by which disputes of that kind are dealt with. That helps prevent other disputes from arising, and permits disputes, if they do arise, to be settled more readily. From a wider

perspective, it reassures the public that there is a procedure, other than the exercise of economic or physical force, by which problems of that kind can be sorted out. The same applies on a much larger scale to family disputes. The existence of an institution, and a system of law, for peaceable resolution, in a systematic and equitable fashion, of problems arising from the breakdown of marriage, is a part of the context in which the institution of marriage functions in a modern community. It is far too narrow a view of the jurisdiction and role of a Family Court to see it as merely dissolving marriages, granting and refusing access or custody, and ordering some people to pay money to others. If the system is working fairly and justly, and giving expression to the values and legitimate expectations of contemporary Australians, then the role of marriage and the family should be supported, not threatened.

One of the main differences between a court and a service provider is that service providers generally aim to please all their customers. That being their aim, it is usually fair to judge them by how successful they are in achieving it. But a judge who set out to please all parties to matrimonial disputes would not have a high success rate. The judge can preside over a particular case courteously and efficiently, treat the parties with dignity, and, if they cannot agree upon the outcome, apply the law, and exercise the available discretions, fairly and reasonably. That might please neither party. It is almost certain to displease one of them. The work of a judge in an individual case is not to be counted a success or a failure according to the approval rating which the parties give to the outcome. The same applies in any

commercial dispute, and even more obviously in the case of a criminal trial. The administration of criminal justice is not evaluated by opinion polls taken at Long Bay gaol. Even when civil litigants are questioned, as they sometimes are, as to their estimation of the process in which they have been involved, that estimation is likely to be heavily influenced by their satisfaction, or lack of satisfaction, with the outcome. I have seen questionnaires prepared for answer by litigants at the end of their cases. If I were preparing such a questionnaire, the first question I would ask would be: "Did you win or lose?" Even that is a question which may not be easy to answer. But a litigant would have to a model of detachment, a person of almost saintly disposition, not to allow his or her estimation of the litigation process to be affected by disappointment or pleasure at the outcome. I suppose there are people who find divorce a satisfactory experience. It is curious that some people who are quick to accuse judges or magistrates of bias rely so readily upon comments made about judges by disappointed litigants.

An expression which we all use is "public confidence in the judiciary". Most people, I think, have rather a loose idea of what that involves. It certainly does not mean popularity. It does not even mean general approval of judicial decisions. Approval may be measured at a very superficial level. At a recent judicial conference in Vancouver, a Canadian analyst of public opinion gave the results of a survey taken for the purposes of the conference. It was similar to surveys that have been conducted in most common law jurisdictions. And the results, everywhere, are almost always the same. People were asked about

sentencing. In Canada, as in most common law countries, 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. Results like that show as much about public opinion, and public opinion polls, as they show about sentencing. The poll also showed that, while Canadian judges ranked high in public esteem and trust, the occupational group which consistently rank highest are the caring professions. This is hardly surprising. People tend to admire and respect those whose job it is to care for others, provided the job is done reasonably well. Politicians usually rank well down in surveys of that kind. But, to be fair to them, that must be at least partly because politicians, in the nature of their work, have to take hard decisions: decisions that hurt people. Part of the business of government is to ration scarce resources. It is interesting to speculate what would happen to the popularity rating of members of the caring professions if they were put in charge of rationing scarce resources among needy people, of if they were given responsibility for taxation policy. The fact that judges rank high, even though they are often obliged to make tough decisions, decisions that hurt people, is encouraging.

It is a good thing if a judge is caring and compassionate. But a judge's primary duty is to the law. His or her principal responsibility in decision making is to be just. The administration of justice, from time to time, requires a judge to decide that a person has been guilty of a crime, and must be punished; or that a witness is not to be believed; or that one spouse has been unreasonable in financial dealings with another, or that a person in business has broken his or her contractual obligations, or that one person has negligently injured to another. Administering justice according to law often means making decisions that harm or offend people. Nothing would more quickly diminish public confidence in the judiciary than the idea that judges seek popularity, or applause. It would result in contempt, not respect, for the judiciary. Judges are not meant to be crowd pleasers. Above all, they are not meant to seek to please governments, political parties, or other vocal and powerful people or organisations. Personal and institutional integrity, independence, and commitment to justice, are the qualities that generate public confidence in the courts.

Many of the ethical principles that govern the behaviour of judges exist for the purpose of stamping judicial decision-making with the marks of impartiality and disinterestedness. Although a display of partiality will usually be greeted with applause by some of those who are barracking for the same team, I am convinced that the public generally, and litigants in particular, set store by the reality and the appearance of judicial neutrality. Judicial officers who behave in court with detachment and

dignity, and who conduct themselves out of court with discretion, are valued by the profession and the public. A good practical test of this is to be seen in the readiness with which politicians, the media, and the public, call for judicial inquiries into various subjects. This is almost never because judges are regarded as having any special expertise of a kind that could not be matched by others, including other lawyers. It is because of the judiciary's collective reputation for independence and impartiality. That reputation is our principal asset. It represents capital that has been built up by generations of judicial officers. We hold it on trust. It is not ours to fritter away as we please.

In our time, less honour is given generally to the virtue of disinterestedness. It has been said to be a word in danger of losing its meaning; and when the meaning goes, so will the quality it signifies. What many people now look for, and respond to with applause, is commitment. Enthusiasm for good causes is a sign of public virtue. But it has also been said that enthusiasm is rarely compatible with impartiality; and never with the appearance of impartiality. It may be that many people would not mention disinterestedness if they were asked to compile a list of qualities a judge should display. On the contrary, they may say they wanted to see enthusiasm for what they regard as good causes. This would be only a superficial appraisal. I am confident that, upon reflection, most people value judicial impartiality, and are able to identify behaviour which puts it at risk.

The legal profession remains the largest single influence in forming the public's attitude to the judiciary. It is not sufficient that we enjoy the confidence of the profession; but it is necessary. If the profession, the people from whose ranks most of us are drawn, the people who see us at our daily work and evaluate our performance, at least subconsciously, lack confidence in our competence and integrity, then it is impossible that we could be held in esteem by the general public. The public do not accept uncritically everything they are told by their lawyers, but disrespect for the judiciary on the part of lawyers would soon be communicated, and would be impossible to counter. Those who are concerned with the public image of courts should not to overlook lawyers. Practising lawyers are keen and well-informed observers of judicial performance, and we would do well to take note of their opinions.

The current emphasis on court management is natural and appropriate. The operations of courts involve the expenditure of scarce public resources, and governments are entitled to reasonable assurance that those resources are being applied efficiently and effectively, and are dealt with in a manner that responds to the demands of accountability. Those demands are not inconsistent with the imperative of independence; although the appropriate resolution of the two might occasionally involve some difficulty. And litigants, and lawyers, have a legitimate interest in court management. People whose cases cannot be brought on for hearing within a reasonable time are not interested in whether that is the fault of the legislative, or the executive, or the judicial

branch of government; any more than people who cannot get necessary hospital attention are interested in who is most to blame. If courts are too slow, and costly, or if delays are unacceptable, the public will probably blame everybody: legislators, administrators, public servants, lawyers and judicial officers. And the requirements of judicial independence mean that some aspects of court administration can only be controlled by the judiciary: listing of cases and assignment of judges are obvious examples. They can only be done by judges, or by people who are acting under the direction of judges.

Even so, it would be unfortunate if the requirements of management were to take on an exaggerated importance compared to our primary goals. It was reported recently that some people concerned with education had come to the remarkable realisation that the people whose work most influences the quality of a school system are teachers. Managers sometimes tend to set standards, including standards of performance, and standards of remuneration, solely by reference to managerial functions and goals. This is reflected in the work of some consultants, who tend to rate, and reward, people according to their managerial responsibilities. A person who administers a large organization is regarded as much more important than a lone decision-maker who has no budget and a small staff, regardless of the skill and responsibility involved in the decision-making. Managers are uncomfortable with activities that cannot be counted. They like judges and magistrates to be sitting in courts; not working in their chambers or,

even worse, at home. They know how to measure the use that judicial officers make of their seats, but not of their heads.

We are not entitled to complain about people trying to introduce better standards of court management. But we are entitled to insist that people who assess the value of courts do so according to the standards which govern the administration of justice; which are not the same as the standards that apply to the administration of an Army, or a hospital, or a factory. Managers have a lot to teach us about how to be more effective in the application of the resources we are given. We have a lot to teach them about the demands of justice, and due process of law. The public will benefit if we learn from each other.

It is essential that judges and magistrates see their work in its true perspective. It is easy, for a busy judicial officer, in the daily grind of an oppressive caseload, to overlook the wider importance of the job. Those who administer justice not only exercise power and responsibility; they share in a privilege. Of all people, they should appreciate the value of courts.