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***Contemporary issues for courts – demystifying the judicial
process***

Sian Elias¹

The judicial process when I was a newly admitted barrister in 1970 was fusty and often terrifying. Judges and counsel wore wigs and gowns and detachable collars and bands. Judges were frequently rude to counsel. There were rules of etiquette that were difficult to learn except in the school of hard knocks. There was a lot of bowing. The barrister who wore brown shoes would be told that he could not be heard. Judges were treated with exaggerated respect. There are times when I think wistfully that it would be rather nice to be transported back to those deferential times. They are long gone. Today respect for the courts – without which the rule of law is in trouble - has to be earned and re-earned by doing and the doing has to be painstakingly courteous and fully reasoned. The days when a judge could say “application dismissed” or “five years, stand down” without more have passed. The legal system is all the better for these changes. We look differently, we conduct ourselves differently, we perform our functions differently. Yet the process of demystification, of opening the courts up is only half done. In this paper, in an attempt to stimulate discussion, I touch on some initiatives that are underway in a number of jurisdictions and others that might be considered to keep the courts fit to serve our diverse and modern societies.

What are the expectations of the courts?

Is it romantic to think that the community expectation of the judicial process is that it exists to deliver justice? Certainly some giants of the law have thought so. But it is I think important to remember that law is much more than what statutes say or the courts decide. It is also the collected wisdom to which people adhere and to which they conform their conduct. Sir John Baker, in his “*Why the History of English Law has not been Finished*” referred to the “whole world of law which never sees a courtroom”:²

Law can exist, in the sense that people are aware of it and conform to it, even when it is neither written down in legislation nor the subject of accessible declarations by the judiciary.

¹ The Rt Honourable Dame Sian Elias, Chief Justice of New Zealand.

² JH Baker “Why the History of English Law has not been Finished” [2000] CLJ 62 at 78.

This law-mindedness is critical to the rule of law. It means that men and women can act with security under the law. They cannot do that if the law is inaccessible and technical. What happens in the courts acts as a bridge. What is valued in legal process is what Sir Neil McCormick described as the institutionalised discourse or practice or mode of argumentation.³ If the men and women of our societies feel excluded from this discourse. If it doesn't speak to them, then something important will be lost. The deliberative processes of the courts, where actual controversies are resolved in public and the reasons for outcomes are fully explained must therefore be something which convinces beyond the parties to the litigation. Speaking to the community is a great virtue of legal process. In many controversial cases the patient exposition of why an unpopular cause is right effects a shift in public understanding. In others it sets up a beachhead from which society can adjust to social pressures. These benefits are not obtained if the courts are not trusted or are unknown or if they are not able to communicate except to those who are initiated into their mysteries.

Providing legitimacy, providing the vocabulary with which we can negotiate social conflict, has always been an important function of law. In an age of talk back and populism, there are risks to the rule of law if law is seen as remote, inaccessible, and incomprehensible. A sense of public ownership of law is something to be cultivated and courts have a particular responsibility to promote it. If that challenge is not accepted, the courts will come to be seen as increasingly irrelevant to the societies we serve. Without public support for the courts, the rule of law is vulnerable.

Why are courts mysterious?

Most members of the public have little interaction with the courts. Studies in Australia have shown that only one third of Australians have been present at court proceedings during the past decade (and even then, of that third, 90 per cent have only been once) and only 6 per cent have had contact with the criminal courts in the past year.⁴ This suggests that most members of the public obtain the majority of their information about the justice system from sources such as print and electronic news media, word of mouth, and entertainment (movies, television), rather than their own direct experiences or observation.

Much of the information given to the public from these sources is inaccurate or negative,⁵ creating the view that judges are out of touch with the community. They often portray the judiciary as "a closed, self-reproducing entity, embedded in archaic traditions, resistant to change and disconnected

³ Neil McCormick "Beyond the Sovereign State" (1993) 56 MLR 1.

⁴ T Phillips and others *Australian Survey of Social Attitudes 2007* (ANU, Canberra, 2007).

⁵ PD Schultz "Rougher than usual media treatment: a discourse analysis of media reporting and justice on trial" (2008) 17 JJA 223 at 223.

from ordinary citizens”.⁶ Debunking this impression is not helped by the antique costume we cling to in many jurisdictions, the impenetrable language we use, and the rituals we observe. It is also not assisted by the aloofness we have traditionally affected in public. In an age of talkback and instant accessibility of all public figures, judicial detachment needs to be explained and some modifications need to be considered.

There is evidence that judicial disengagement and the lack of contact most members of the community have with the courts is undermining public confidence in the judiciary. In Australian surveys the judiciary does not compare well with other public institutions (respondents had the most confidence in the defence forces, the ABC and the police – respondents had the least confidence in banks and financial institutions followed by the courts and the legal system).⁷

There is also a lack of understanding of the judicial role and the skills required to be an effective judge. Public surveys in Australia rated legal knowledge as the most important quality of a judge followed by impartiality and life experience. Similar surveys of the judiciary found that judges consider impartiality to be by far and away the most important judicial quality, followed by diligence and hard work, followed only then legal knowledge. This difference in assessments of the role of impartiality may reflect different understandings of the concept and its significance to the judicial role.⁸ And the emphasis on legal knowledge stresses technicality and apartness. It was said of one judge – I think Chief Justice Marshall of the United States Supreme Court – that for him law was buxom and jolly. Even if we aren't quite as upbeat, most judges do I think see their function as grounded in real life as serving real men and women. It is clear that we have not done a good job of communicating that to those served by law. There is also a danger if law is seen as technical because it suggests that public understanding of law may see it as a more objective and narrow function than it is in reality. That exposes the legal order to strain when decisions are taken in areas of political controversy.

The more the public is exposed to accurate information about how the judiciary operates the better and more positive their understanding is likely to be. I want to suggest some demystification that could be undertaken to dismantle barriers to understanding of law and promote public ownership of the legal order, but it should be said immediately that to the extent that misunderstanding of law and legal process is based on lack of information and familiarity with the real work of the courts, there is much affirmative action that should properly be taken by the courts themselves to bridge the gap. The opportunity to demystify through laying open the work of the courts has never been greater than now because of modern communication. I do not think many judges need convincing that this is best strategy. The principal

⁶ Sharyn Roach Anlue and Kathy Mack “The work of the Australian judiciary: Public and judicial attitudes” (2010) 20 JJA 3 at 5.

⁷ At 7.

⁸ At 15.

challenge for judges is obtaining the resources to do this work well. And there is need to ensure that it does not compromise or risk judicial function.

The traditional news media

Very often the traditional print media do not demystify. The days when the major dailies had experienced court reporters who understood the work of the courts and covered it accurately are gone. The reporters who attend high profile court cases very often have no background in courts. The press they work for is under huge financial pressure. Reporters are increasingly drawn into the race for news, with the product being increasingly provided to the public not in the printed editions of papers but in their online publications, where the large subscriptions are now to be found. Increasingly these reports are now provided through social media and reporting from the court as a decision is read out or evidence is given (through predictive and progressive tweets) is routine and, routinely, gets things wrong. An example in New Zealand this year was in the reporting of a Supreme Court case of very high political interest when dozens of journalists, in the race to be first with the news, reported the wrong result. (The Court itself has to accept some responsibility since the approach taken in other jurisdictions of early release under lock up conditions is not something we have yet adopted.) This debacle was reported in commentary by an experienced journalist.⁹ Inaccurate, inflammatory, or over-dramatised reporting is also not uncommon. In one recent case in the Supreme Court, the press reported as suggestions from the judges about how the government might act, propositions put to counsel to test his submissions.¹⁰ In some criminal trials media reporting has treated proceedings as public entertainment.

The access of the news media to court hearings has been greatly enhanced by recent legislation, indicating popular support for the idea that the news media are the “eyes and ears” of the public and enable proceedings to be conducted in public, even if some temporary bans on reporting are necessary for fair trial or other reasons. So “accredited news media” are now entitled to be present in chambers hearings and at interlocutory hearings. Some of the assumptions on which access has been extended have been overtaken by developments. So, for example, there are real issues about when a blogger is to be treated as news media.

Televising court proceedings

New Zealand has permitted television filming in courts since 1995, at first under a three year pilot. Guidelines set out conditions. The move was

⁹ Toby Manhire “Broken news: the Supreme Court Mighty Power ruling a Twitter mess” (27 February 2013) www.listener.co.nz/commentary/the-internaut/broken-news-the-supreme-court-water-ruling-a-twitter-mess.

¹⁰ See, for example, TV3 News “Chief Justices suggests 25 per cent cap on asset sales” (31 January 2013) www.3news.co.nz/Chief-Justice-suggests-25-percent-cap-on-asset-sales/tabid/1607/articleID/285138/Default.aspx

spearheaded by the then Chief Justice and the President of the Court of Appeal in the interests of open justice. It was believed that allowing cameras into courts would contribute to public understanding of what goes on in court. Judges also hoped that they would be able to control the media scrums outside courts by making it a condition of in-court filming that outside court ambushes of witnesses and parties would not be allowed. The guidelines, which have been refined in the intervening years, now extend to all courts of general jurisdiction, including appellate courts, and other specialist courts.

Guideline restrictions such as a “ten-minute” rule delaying broadcasts to enable consideration of suppression, has been overtaken by those courts which permit live-streaming. Similarly, guidelines based on television crews bringing their own cameras into court have set up expectations of access which is unnecessary in courts (such as the Supreme Court) where fixed cameras record the proceedings and television and radio coverage can be taken directly from the court. The television channels much prefer to have their cameras because they dislike the static filming in courts which are enabled for live streaming. Having cameras in the courts are however quite disruptive on occasion and it is to be hoped that live or delayed streaming from cameras installed in the courts over the court’s website will replace them. There are however resourcing implications in setting up such a system.

As for the results of allowing television in the courts, the views are strongly divided. Many think that, far from giving the public an accurate impression of court proceedings, televised hearings have sensationalised the sad and sordid or the personalities of witnesses and parties. Administering the guidelines (the status of which is unclear) does entail work for judges which is not. Enough disquiet has been raised to have prompted a review of the way the whole system is operating. Developing technology now offers opportunities not available when the present arrangements were put in place. What I think is clear is that denying access is not an option.

Access to judicial decisions

In most jurisdictions, modern technology allows judicial decisions to be accessed upon delivery from the court’s website. In New Zealand, for some years we have put up on the courts of New Zealand website “decisions of public interest” on which all sentencing notes and judgments of public interest are placed immediately they are publicly released. Setting up the site had an immediate impact on errors in reporting of sentencing decisions, a source of much misinformation and criticism of the judiciary. In addition, the Ministry of Justice publishes all higher courts decisions online and the Minister of Justice has indicated this publication is to be extended to the lower courts also. There have been technological problems with this site (which carries a huge volume and is not easily negotiated) and there have been some breaches of suppression orders for which no ready solution has yet been devised.

It is important for the public to be able to access the decisions of the court because they are our product. Lord Denning once said “we must rely on our

conduct itself to be its own vindication”.¹¹ The availability of judgments enables that vindication. Such publication also enables the public to see the product of the judicial process (an accountability which we should welcome and for which reports of disposals and other statistics are no adequate substitute).

The biggest problem in these days of mass communication with judicial decisions is not disseminating them but understanding them. We all try to write for a general audience, even if the subject matter of the decision is technical. We should acknowledge that we need some help in understanding how wide of the mark we can often be. I do not suggest that judges should be writing for an average age of 13 years (or whatever the newspapers pitch to). But we do need to make better efforts with plain English. I am as bad an offender as anyone. Every time I write “pursuant to section X” I tell myself that I should do better – next time – and then hurry on to the next overlong sentence. If we are to use the opportunity provided by modern communications to communicate, then we need to pay closer attention to expression. The days in which a competent journalist would translate the effect accurately have passed. Some of the senior courts of the world employ editors to help in making judgments more accessible. That is not something we have had the resources to do in the Supreme Court of New Zealand or in the other senior courts of our jurisdiction. I think it would be money well spent if we are serious about making courts more accessible.

Most of us produce press statements to accompany our judgments. Journalists are no longer the primary audience for such statements. Rather, such statements constitute the report of the judgment for all those who do not make the effort to read it. It seems to me that in New Zealand we are too casual about these statements and that we could do with professional assistance in putting them together rather than relying on judges and clerks to do it.

Communicating with the public - websites

The development of the internet has been important for judiciaries in establishing an easily accessible new public face. The creation of court websites is part of any court’s strategic communication. They are particularly effective because they make it possible to combine in one place elements of many other public-facing activities such as museums, tours or broadcasts.¹² The primary audience of judicial websites are the broader public and those “consumers” who use the judicial system on a regular basis (such as lawyers and litigators).

For the general public, judicial websites provide an easy point of access to information about the role of the judiciary and the judges who operate within it. A judicial website enables large amounts of information to be conveyed easily

¹¹ *R v Commissioner of Police of the Metropolis (No 2)* [1968] 2 WLR 1204 (CA) at 1207.

¹² Paul Martin and Patrick Schmidt “The New Public Face of Courts: State Judicial Systems and the Internet as Political Resource” (2003) 24 Just Sys J 118 at 120.

to various targeted groups within the broader public. The “Courts of New Zealand” website, for example, includes a virtual visitor centre (including information on the structure of the courts, lists, court locations and frequently asked questions), media centre (within information on media guidelines, releases and contacts) and information for students.

The judicial website is also a focal point for communication with those who use the court system. It guidelines, practice directions and other important information (in New Zealand, for example, matters being considered by the Rules Committee).

Websites can also play an important symbolic role, creating an image of the judiciary consistent with its fundamental values and aims. Martin and Schmidt observe that all state judicial websites include some form of imagery and symbolic elements on their homepages, ranging from state seals and exterior architecture to classical motifs of “justice”.¹³ Similar features can be found on the New Zealand Courts website. Imagery and symbolism feature on the homepage includes the New Zealand seal, Maori design and te reo, and images of exterior architecture and members of the judiciary. These symbols reflect important features and values of the New Zealand judiciary.

The challenge in using the opportunity provided by this form of communication technology is to treat it seriously and to put into it the resources needed to make it truly useful. In New Zealand, we have not been successful in making full use of the opportunities because we have lacked the resources to develop our site fully.

Social media

In the meantime, the wave of social media is passing many courts by. In a recent speech on “Open Justice in the Technological Age”, Chief Justice Warren of Victoria has addressed the implications of the new social media for the traditional relationship between courts and media. The challenge is that these forms of media “driv[e] the courts towards direct community engagement in order to preserve the operation of open justice”.¹⁴ We now have a 24 hour “fast-paced, active and responsive 24 hour news cycle” which follows high profile court cases.¹⁵ The sense of anonymity of this medium means that it is conducted not only at a fast and furious pace but often with casual carelessness about language and information. Complex legal matters are not easily reduced to the Twitter limit of 140 characters. It is not surprising that the sensational dominates and context is almost non-existent. Or that many using this medium do not find it necessary to make any inquiry before launching into sweeping condemnations and opinions.

¹³ At 125.

¹⁴ Hon Marilyn Warren AC, Chief Justice of Victoria, 2013 Redmond Barry Lecture “Open Justice in the Technological Age” 21 October 2013 at 1.

¹⁵ At 7.

Despite these formidable challenges, commentators like Chief Justice Warren see that Twitter and other new media provide an opportunity for the public to be informed about the role of courts “unmediated by journalists and editors”. Most importantly, it is a way of reaching the young.¹⁶ The Supreme Court of Victoria is on Twitter, with nearly 2,500 followers. It is now moving to Facebook and is following up on LinkedIn.¹⁷ Chief Justice Warren regards technology and social media as providing an “exhilarating opportunity for the Courts to tell the public we serve who we are, what we do, how we do it and why the rule of law matters”.¹⁸

Court visits

Many courts encourage visits. Now that we have a new building for the New Zealand Supreme Court, we are on the tour trail for schools and for retirement villages. In 2012 we had 3,728 visitors who came to look at the Court and watch the very simple video that we screen. That is well short of the 15,000 students that visit Parliament annually. But unlike Parliament and unlike the superior courts of some other jurisdictions, we have no educational programme as such and no resource to undertake it. Even so, the school children who come on the tour get an opportunity to hear about the structure of the courts and their constitutional position.

Interviews with judges

In an age when the public has come to expect immediate access to public figures, I do not think that judges can expect to keep aloof. In a number of jurisdictions, Chief Justices and other judges regularly tweet, are on Facebook, and give interviews or write opinion pieces. In several jurisdictions judges have participated in television programmes about their work, often entailing coverage of their day. In other cases Chief Justice or other members of the judiciary have been interviewed about particular issues. The former Chief Justice of South Australia, appeared regularly on talk back. If there is a particular crisis which could affect public confidence in the judiciary some response may be essential. At other times, speaking on a matter on which the judges’ have particular expertise may be important in itself. Of course care must be exercised, both to avoid disqualification in upcoming cases and to avoid treading on toes (and there are rightly great sensitivities on the part of the other branches of government about any encroachment by the judicial branch).

In the United Kingdom the Supreme Court has made itself available in a way that would have been unthinkable a few years ago. It has followed up personal profiles about the judges with press conferences – the latest a few weeks ago at the start of the legal year. This seems to be a programme of building up knowledge about the Court and raising its profile in the community.

¹⁶ At 10.

¹⁷ At 20.

¹⁸ At 22.

In our jurisdiction we have been less organised, more ad hoc. A strategic programme is something that may require more professional advice and preparation than has been available to us. But those occasions when Chief Judges and other judges have made themselves available have been generally very successful.

How we look

Symbols are important. In many modern courthouses (such as those of the Federal Court in Melbourne or the Law Courts complex in Brisbane) open justice has been a principle of the design. Such courthouses typically make the public feel welcome, and let light into the gloom that characterised the courts of my youth. The Supreme Court in New Zealand allows the public on the street to see that the court is sitting and to look into the courtroom before they enter it.

Court signage and the symbols of the court are matters to which much greater attention is paid than in the past. Typically those entering now encounter a reception desk. The aim is to let the public know what is going on and where to go. It is part of making the public feel that the courts are not the preserve of those initiated into its mysteries.

Courts should speak to their societies. When we built the Supreme Court in New Zealand, the architect incorporated into the design of the courtroom symbols of our country which are unmistakable to New Zealanders. It is a place where they feel at home and of which they feel proud.

In general, the humans who work in the courts lag in two respects. First, although in the Supreme Court we have given up gowns as well as wigs as everyday dress, the other courts continue to wear robes and the judges of the superior courts wear full-bottomed wigs and red robes for ceremonial occasions. The result is that judges are always caricatured in full-bottomed wigs and red robes although that garb was never working costume in New Zealand (where the reds were introduced in 1949 to add a splash of colour to the state openings of Parliament). Many judges want to retain the ceremonial garb. I think it is seriously alienating costume that we should leave behind as part of the demystification of our work. Secondly, we open and close our courts and are dressed in a way which makes no acknowledgment of our Pacific heritage and language. We are taking steps to change that. It may not be demystification exactly, but it is intended to make us recognisably part of New Zealand society and its traditions.
