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AUSTRALIAN BICENTENARY

Most lawyers are the captives of their jurisdiction. Even within a Federation (such as Australia or the Federal Republic of Germany) laws tend to be local. For this reason, it is often difficult to get lawyers to lift their sights from provincial concerns and to ponder the universal dilemmas which face every legal system. Especially is it difficult to secure effective communication about the problems facing lawyers who practise in different languages, whose institutions are profoundly different and whose approach to the very notion of law is rooted in concepts that are historically antagonistic.

One distinguished German lawyer, who has transcended the prison of local concerns and has spoken and written on themes of universal importance, is Wolfgang Zeidler. I write of him in the context, congenial to him, about the future of the judiciary.

In 1988, Australia will reach the Bicentenary of its foundation as a modern community. The indigenous Aboriginal population of the Australian continent had been living there, in general harmony with each other and with nature, for more than 40,000 years. On that fateful day in January 1788, a small

fleet of English ships entered Botany Bay and later travelled to Sydney Harbour there they established the British colony which grew into the modern Australian Commonwealth. It is a little known fact that the first Governor of the new colony of New South Wales, Arthur Phillip, was, as the Netherlands anthem says of William of Nassau, a man of German blood. His father was German born. He exhibited in his idealism, good organisation and indefatigable energy, the qualities normally ascribed by foreigners to Germans. Fortunate was the infant colony in its first Governor. His contribution is increasingly being realised. One vehicle for that recognition is the Arthur Phillip Australian-German Foundation, of which I am a Governor.

Australia began its modern history as a by-product of the English common law legal system. The majority of the men and women transported in the First Fleet were not hardy settlers looking for opportunities in a new land. Nor were they the refugees from religious and political oppression, such as many Germans were who later went to settle in the free Province of South Australia. Instead, they were, for the most part, English convicts: sentenced to transportation to the plantations beyond the seas for offences against English law. With the loss of the American colonies and plantations in 1776, the English Government sought temperate colony to which to send these unwanted citizens. It was for this reason primarily that the Australia colony was founded, as a replacement. My immediate point is that it grew out of the needs of the criminal justice system of England. From the very start, law and order were interwoven with Australia's modern history.

The inherited English legal system had a shaky start in the new country. The Supreme Courts of Van Dieman's Land (later

Tasmania) and later of New South Wales were established in 1823. The Court on which I sit traces its origin, over more than 150 years of continuous administration of justice, to the early colonial court. Yet it is only in 1986 that Queen Elizabeth II, as Queen of Australia, terminated the last appeals from Australia to the Judicial Committee of the Privy Council in London. With the severance of the legal umbilical chord to England, it may be expected that the Australian legal system in the future will be more innovative and adaptable than it has been in the past. Yet the link with the English legal system was no misfortunate. After all, that system stretched, with a famous history, over 800 years. It provided a world legal system which still continues to dominate or influence the thinking and daily lives in lands populated by a quarter of the world's people. The common law of England, the English language, cricket and afternoon tea survive and flourish, despite the end of the British Empire.

VOLKSWAGEN AND ROLLS ROYCE

In 1981, a later and also highly gifted visitor of German blood arrived in Australia. Professor Dr. Wolfgang Zeidler was then Vice-President of the Constitutional Court of the Federal Republic of Germany. He was thereafter to attain the Presidency of that Court. He was, in 1981, a guest of the Australian Government and of the Australian Legal Convention. The latter is an assembly, held every second year, of the judges and lawyers of Australia. On this occasion it convened in Hobart, Tasmania.

It was unusual to have a visitor from a country not of the common law tradition. It is normal to have overseas guests from the other legal systems that share the approach of the

common law - such as most of the countries of the [British] Commonwealth of Nations, the United States and occasionally Ireland and Israel. But now a new wind of challenge swept through the Convention. It was brought by the dynamic mind and voice of Professor Zeidler. His commanding presence, his total security in the English language, his open-mindeness and his vivid arguments left many of us deeply impressed. Most impressive of all was his intimate knowledge of analogous developments in the common law, particularly in England and the United States. He was able, by reference to these developments, to bring home his points, and his criticisms, with telling accuracy.

Professor Zeidler's paper for the Australian Legal Convention was titled "Evaluation of the Adversary System: A Comparison, Some Remarks on the Investigatory System of Procedure".[1]

As a clever advocate, he opened his paper by appealing to the natural pride, satisfaction and traditional prejudices of the common lawyers. The high reputation enjoyed by the judiciary in common law countries was contrasted with the more "bookish" intellectual tradition of the Judges from the universities in the civil law countries. The very word "inquisitorial" still has a pejorative meaning in ordinary English parlance. This was admitted. But then, by contrasting the procedures in the Federal Republic of Germany and those in England and Australia, Professor Zeidler made a number of very telling points which struck home.

One of the most telling of his points is captured in an article in the Adelaide Law Review, the publication of the Law School of the University of Adelaide in South Australia. Titled

"Court Practice and Procedure Under Strain: A Comparison"[2], it records a lecture given in July 1981 in Adelaide to assembled judges, barristers, academics and students. It is in this lecture that Professor Zeidler returned to a theme he first put orally to the silent assembly of the Australian legal profession gathered in Hobart. Essentially, it provides a theme for the future of the judiciary in both Germany and Australia. It is a future which must be grounded in self criticism and cost effectiveness. Speaking of the common law and civil law traditions, Professor Zeidler said:

> "A comparision of the two systems leads to some reflections upon prospects for the future ... As regards quality, I believe that common law procedure has considerable advantages. Even in our mechanised, industrialised and equalised world the administration of justice is still an intellectual process which requires not just expert knowhow and technical knowledge but also the gift of imagination, creativity in the realm of ideas, and the shaping of the structures of society. This task cannot be accomplished by social institutions and organisations; it requires outstanding individuals. The best arena in which to unfold and develop such talent is the common law trial: its dynamic and competitive character is a powerful stimulus to individual effort. By comparision the German system, whilst not preventing individual brilliance, does not supply the right background to encourage it. At a recent annual conference of the German-British Jurists' Association Professor Koetz of Hamburg compared the two procedural systems by using a parable: common law procedure is what a shining Rolls Royce car is amongst automobiles, whereas German

procedure may be likened to a dusty little Volkswagen. I agree, but the question remains: what can you afford to pay, and how often and in what situations are you in need of a Rolls Royce or a Volkswagen?"[3]

In his Hobart address, Professor Zeidler concluded that, generally speaking, the common law adversary system of countries such as Australia, the United States and Britain was gradually moving towards the system of judicial inquiry practised in civil law countries such as German and France. To some extent, the universal technology of information stimulates the development of common systems for solving problems and disputes. To some extent, the readier means of travel and the growth of international transactions stimulate the requirement for similar solutions to common problems. But an important ingredient in the moves towards greater understanding of common issues is the contribution made by outstanding jurists.

Professor Wolfgang Zeidler is undoubtedly in that class. His visit to Australia left a lasting impression. It helped to remove a wall of ignorance. Language differences and complacent self satisfaction had built a barrier against understanding of the legal systems of other countries which did not share the English traditions of the common law and could not be expressed in the English language. It is therefore to Professor Zeidler that I dedicate the remaining remarks of this essay. They touch upon the future of the judiciary. Whilst inevitably my perspectives of that future are moulded by my training and experience in the judiciary of the common law world, I venture to suggest that some of the problems which we can now foresee will be similar to problems in civil law countries. The plain fact is that we need a Zeidler to bridge the gulf of

communication and misunderstanding so that we can see more clearly the shared problems and can learn from each other the approaches which may be taken towards their solution.

Of necessity, my remarks must be selective, general and speculative. The future of the judiciary in the Federal Republic of Germany may take a quite different road to that which we have been travelling along until now in Australia, in company with the judges of England, Canada, New Zealand, the United States and other like countries. By the future, I mean to look no more than a couple of decades ahead. If, despite weapons of mass destruction and persisting examples of international lawlessness, we survive for a longer time, there will doubtless be a Luther of jurisprudence who can light the future way of the law.

And when we ask what the future of the judiciary will be in a 100 years time, we have only to speculate upon what Lord Chancellor Herschell, The Earl of Selborne or Lord Blackburn would have envisaged in 1887 about the future shape of the societies of the then Empire. How could they possibly have predicted interplanetary travel? The microchip? In vitro fertilisation? Nuclear fission? The collapse of the Empire on which the sun never set and the radical social and moral changes which we have seen in a 100 years? This speculation makes us contrite when we contemplate the future. It has been said that if a lawyer of the 19th Century entered a common law court today, whether in England, the United States, New Zealand or Australia, he would immediately feel at home in the basic procedures and with the rules of evidence. So it may also be in the Federal Republic of Germany. The substantive law, the structure of the courts and the court dress might seem a little

different. But the basic methodology of the judicial art has remained remarkably impervious to the enormous changes in the society served by the courts. Will it be so in 2087? That is the taxing question to which Wolfgang Zeidler called his Australian audience. It is the question to which I now turn my attention.

THE JUDICIAL FUNCTION

Cost effectiveness of judging: The fundamental similarity of the judicial function today, with that of a century ago, must give at once reassurance and a cause for some anxiety. The reassurance derives from the fact that, though so much else has changed in the world, the judicial model, established in England centuries ago, has proved so durable that it has survived. Come 10 o'clock, black robed judges, most of them still wigged, enter courts in all parts of the former Empire. They hear oral argument. Most of them listen to evidence. A diminishing number have to charge juries. Rulings are given in open court. Judgments are delivered, published and scrutinised by higher courts. In an age of freedom of information, it is well to remember that important aspects of this process have long been exposed to public gaze and professional and public scrutiny for centuries.

The cause for concern arises from the nagging doubt that an institution, even one with so many admirable features of independence, integrity and industry, should prove so resistant to change, in a time whose watchword is change. Some reassurance on this score is provided by the reminder, that however we organise the judicial system, however many court administrators we appoint and computers we install, the

judicial function will always be a cost intensive one. As well, we are correctly reminded that judicial resolution is "only a very small tip of a very large iceberg".[4] Justice outside the judicial system may sometimes better serve the needs of people in dispute than that which is found within.[5] That is why the number and variety of non-judicial mechanisms for the resolution of disputes has proliferated in recent years. It is why the calls go out for more such extra-judicial mechanisms and why they proliferate and persist.[6]

In the post-Zeidler era, we are all more conscious of the need for cost effectiveness in judging. Ringing statements that "justice is beyond price" nowadays fall on deaf ears, in the hard pressed budget committees of our legislatures, operating in hard times. Such cliches astonish observers of the judicial scene who have the merest acquaintance with economic theory. As an alternative to this naive view, there is a growing appreciation that the judge of the future must be conserved for the functions which judges do best and deployed in activity worthy of the training, intellect, and public cost involved in the expenditure of judicial time.

Unfortunately, there is no simple and universal criterion by which "importance" can be determined, warranting a case as worthy of judicial activity. Nor are opinions unanimous on those subjects which (because of tradition or modern relevance), should be retained for the judges. It is sufficient to note a few developments which have already occurred. They point the way to likely developments in the future.

Doing without judges: One simple example is the diversion of some traffic offences out of the criminal court stream.[7] In Australia, the introduction of "on the spot traffic fines"

which, if unchallenged, involve no expenditure of court time at all illustrate the model of complete diversion from the courts. In Canada, the diversion has been typically out of the ordinary courts and into courts of non record.

Even where matters stay within the ordinary courts, science has come to the aid of the law. The breathalyser, accepted throughout Australia to analyse alcohol levels in the breath of motorists, has removed the necessity of tedious oral evidence of police concerning impressions of the accused's state of intoxication. It seems likely that many future techniques of this kind will reduce areas of controversy and, in some cases, remove the possibility of controversy altogether. Thus, one of the principal arguments for the introduction of sound and video recording of confessions to police is the removal of the courtroom debates, so difficult to resolve, about the lawfulness and voluntariness of such confessions.

Even more radical ways of saving judicial time can be found in alterations to the substantive law. If divorce can only be granted for a matrimonial offence, the opportunities for dispute and the needs of judicial resolution abound. But if there is substituted a single criterion of breakdown of the relationship, evidenced by a period of separation, the opportunities for simpler, administrative disposal of the issue are clearly presented. In Australia, it is now possible, where there is no relevant dispute and no issue of custody of children, to secure divorce by post.[8]

Similar savings in judical time, reflective of changing attitudes in society, will be found in alterations to the criminal law. Removal of criminal penalties on so called

victimless crimes will release some judge-time in the criminal courts. Even more significant, for the saving of time, is the prospect of reducing the judicial input into personal injuries litigation by the introduction of schemes for no fault accident compensation. In Australia at least, such is the amount of judicial time expended in personal injury cases, that the substitution of a social security or no fault insurance principle would immediately release probably 60% of the judicial hours presently expended in the resolution of such actions.

There would be some offsetting time needed for the occasional cases of judicial review. But the generally successful introduction of accident compensation in New Zealand and the projected or accomplished moves towards no fault compensation in various States of Australia[9] suggest that in the short term in the Antipodes, and in the longer term in North America, the legal system will at last adapt to a more rational acknowledgement of the need to compensate victims of injury in a universal and cost effective manner. Such a system would clearly avoid the inevitably expensive and time consuming procedures involved in judge and jury decisions upon such subjects.

In the criminal sphere, community dissatisfaction with features of judicial sentencing has led to various proposed solutions to remove or reduce the ambit of judicial input. One solution, as it seems to me, the least preferable, is for the legislature, by mandatory sentences to impose fixed penalties for certain offences, once proved. The consequence of this solution, if it becomes widespread is, as former Chief Justice Bird pointed out in California, a rapid and crippling increase

in the levels of incarceration.[10] Another solution, also with faults and weaknesses, is to remit the real penalty to be imposed on convicted criminals from judges to branches of the Executive Government, including bodies such as Parole Boards and early release authorites. A third solution involves the control of judicial discretion in sentencing by reference to guidelines developed by a commission, in which judges participate. This last-mentioned solution has been adopted in a number of jurisdictions of the United States, including in the Federal sphere. It has much to recommend it.[11]

Applying Bills of Rights: Three problem areas should be specifically mentioned. They raise questions about the future role of the judiciary and the adaptation of the judicial art. The first lies in the field of human rights decision making. In the United States, the judges have for nearly two centuries enjoyed the responsibility of interpreting and enforcing the Bill of Rights. The same has been true in the Federal Republic of Germany since the post War Constitution. The result has been that the judiciary of those countries has adapted to the role of an accelerator of government activity, rather than a brake on it. Particularly has this been so in recent years.[12]

> "In the last few decades the courts have given broad construction to affirmative personal rights and manifested an increasing willingness to articulate and implement new ones. The roll call of causes dealt with by the judiciary sounds like a litany of the most vexing questions in current American political history: racial discrimination and segregation, school admissions and affirmative action, busing, free speech and political protest, internal and foreign security, the rights of criminal defendants, church-state relations from prayers

> in public schools to public funding for parochial schools, legislative reapportionment, obscenity, the draft, abortion, the death penalty, women's rights and ecology. Moreover, the complex subject matter of modern statutes and Congress's tendency to legislate by exhortatory generality have propelled the courts into what may appear to be an unaccustomed regulatory and quasi-legislative role. Both the pettiest details and the broadest concepts of government have come within the judicial ambit. Ideally, a modern judge should be, in the phrase describing Justice Brandeis, a master of both microscope and telescope.[13]"

Until lately the judges of Canada and Australia, like their progenitors in England, could distain such quasi legislative functions. However, with the passage of the Charter in Canada and the prospect of similar legislation in other countries (together with the stimulus provided by international declarations of basic human rights that followed the Second World War) the judiciary increasingly face the resolution of what would hitherto have been thought of as purely political issues.[14] This development will impose on the judges the need to develop attitudes and techniques to meet the new challenge. There will be a need to make policy choices. Some will be in fields that are familiar, particularly in the criminal law. Others will be in fields that are quite novel. The Operation Dismantle litigation[15] represents a vivid case in point.

It appears beyond argument that the Charter in Canada and perhaps the proposed New Zealand Bill of Rights can be expected to increase the power and influence of the judges.[16] There will be the risk of occasional confrontation between the elected

Parliament and the appointed judiciary. There are some who fear the tension that will develop and the potential damage to the judicial institution by the unaccustomed instrusion of the judiciary into issues such as legislative reasonableness. On the other hand, the movement represented by the Charter is a world wide development which reflects the growing effort to state and enforce, in the domestic law of members of the international community,internationally accepted human rights. It will be a slow process. But we are, on the international stage, at a point akin to that of England in the 13th century, after Magna Carta was signed at Runnymede. What has to be recognised is that not only will judicial work change - as judges are increasingly called from familiar territory as I have described - but the skills and techniques that are needed for the new functions will be significantly different. A lifetime's experience in personal injuries litigation or even familiarity with the statute of uses or of Quia Emptores may not be the best preparation for evaluating the philosophical choices posed by the general language of the Charter.

Administering administrative law: The other likely growth area, if recent experience is any guide, is administrative law. This is scarcely surprising because of the advance of the power and influence of the central bureaucracy which accompanied and followed the Second World War. The courts have been propelled into supervision of administrative agencies. The result has not always been praise for the judiciary. On the one hand, there are those who criticise the traditional approach of the common law as one obsessed with form and neglectful of the substance of administrative justice. A system which confines its scrutiny

to the "face of the record" and examines meticulously how things are done not what is done, lends itself to criticism as one obsessed with peripheral and procedural matters, rather than the real merits in issue. On the other hand, defenders of judicial restraint in the field of administrative law point to the dysfunction which can arise through the over judicialisation of the bureacuracy.[17] Judges may be propelled into detail and factual review which effectively reduces them to little more than members of the bureaucracy themselves. At least the traditional limits of judicial review had the merit of confining the judges to familiar territory. Once they enter the territory formerly marked "policy - lawyers keep out", the application of judicial techniques of decision making becomes more problematic. Particularly is this so, if the judges confine themselves (as the bureaucrats do not) to rules of evidence and procedure which blinker and bridle their resolution of the problem in hand.

Resolving scientific disputes: A third field of controversy relates to the future role of judges in resolving disputes with a high content of science and technology. There is a point, in the complex world of modern technology, where the limits of judicial competence are reached. A recent decision of the High Court of Australia dealt with the technological as well as the legal complexities involved in copyright of computer software programs.[18] It has been suggested that the courts have displayed special difficulties in resolving cases involving complex technological issues.[19] One of the basic problems is that the adversary system focuses on victory rather than truth.[20] But an even more fundamental problem may be that the

experience of lawyers, and their education is such as to make the detailed understanding of the language of science and technology uncongenial or even impossible.

Various solutions to this problem are proffered, ranging from the use of scientific arbitrators, the appointment of court experts, the system of scientific assessors or the creation of a "science court".[21] As more issues of a scientific content arise for resolution, the need to provide judges with the ability to master the scientific theory and the technological developments is manifest. Can we be sure that our law schools, and the educational systems that proceed them, can produce the paragons who not only uphold the honourable judicial traditions of the past but understand the philosophical, administrative and scientific questions that will be presented for their resolution in the future?

JUDICIAL TECHNIQUE

Using technology: The reference to science and technology is a suitable point from which to approach the suggestion for the future of judicial technique. There is no doubt that our court procedures will adapt significantly to the opportunities and challenges of the new technology.

The Canadian Supreme Court has led the way in the use of the satellite to permit the argument of cases across the continent. In Australia, a similar innovation is under study.[22] Other uses of technology abound. They include telephone conferences. These are commonly utilised in North America.[23] In Australia, they have been pioneered by the national Administrative Appeals Tribunal. They present a means of

securing the cost effective resolution of social security appeal. It would simply not be feasible, in a continental country, to provide on-the-spot tribunal attention to the case of every social security appellant. The case is of great importance to him or her. But the cost infrastructure of sending a tribunal to remote townships is so prohibitive that an alternative mechanism had to be found, if justice was to be provided. Hence the telephone conference and hearing. The procedure has proved so successful it has now spread to the Supreme Court of New South Wales. In recent amendments to the Court Rules, a facility for telephone hearings has been introduced in building disputes.[24] We will doubtless see more use of the telephone to cut costs and to provide speedy determinations, particularly of interlocutory, pre-trial motions. The prospect of video links to reduce travel to and from courts can also be confidently predicted.

The computer has already been used for improved judicial administration. Sir John Donaldson told the last Australian legal convention of the innovations he had introduced in the Court of Appeal in England.[25] The prospect of on-line filing of court documents by solicitors who can directly file their process in the court registry by electronic means, is just around the corner. Linkages of this kind will require new attention to the provision of security for confidential material in the courts computer files. Only slightly further away is the prospect of the deposit, in electronic form, of video clips of evidence in substitution for the cold print of affidavits. It may readily be contemplated that the depositions of witnesses in the future will be filed in advance, in

appropriate cases with cross-examination and pre-trial deletion of irrelevant or objectional material, so that the time of the trial can be conserved.

Slightly further down the track may be the introduction of artificial intelligence to support (or in some cases to replace) judicial decision making. In a recent part of the Modern Law Review is an essay on "expert systems in law" and the application of "artificial intelligence to legal reasoning".[26] The author rejects the notion that artificial intelligence somehow "deprecates the dignity to be associated with human intelligence".[27] He sidesteps the core question of artificial intelligence, namely whether machines can meaningfully be said to "think". He simply uses the label of artificial intelligence to refer to "what it seems that certain computer systems possess to some degree".[28] We should not laugh at this possibility of utilising artificial intelligence to assist or replace judges, considering that we are so indispensable that no machine could ever replace us. Artificially intelligent computer behaviour is already performing highly specialised functions, such as the translation of languages, the recognition of images and objects of the physical world, the playing of complex games such as chess, the learning from examples and precedents and even the writing of further programs to generate more complex understanding, automatically.[29] The prospect of the application of these developments of computer technology to legal problem solving is by no means fantastic. On the contrary, with rudimentary changes in the substantive law designed to reduce the variables and to reduce matter requiring evaluative

judgment, the prospect of processing many legal issues by facilities of this kind becomes quite realistic. As is repeatedly pointed out, the introduction of computers in such highly important activities as life-saving medical applications, national defence systems, public banking networks and space exploration make the prospect of using artificial or automated intelligence in the justice system not only feasible in the long term but probable in the short term.[30]

Already, writers are urging that computers should be used to assist judges in sentencing decisions.[31] Allied with a system of sentencing guidelines, artificial intelligence could undoubtedly enhance the judicial function, not necessarily by replacing it, but by performing certain preliminary steps, leaving only the criticial input of human evaluation to be performed by the judge. It is clear that the interaction between the human mind and artificial intelligence will not pass by the law and the judiciary. Nor can there be much doubt that, as claimed by the author in the Modern Law Review:

> "The successful construction of expert systems in law will be of profound, theoretical and practical importance to all whose concern is the law."[32]

The litigation explosion: After the dynamic of science and technology, the most obvious stimulus to change in the judicial function, presenting itself in all our countries, is the rapid increase in the work load of the judiciary. Judge Richard Posner has described the development in the United States Federal courts as a "litigation explosion" which has been converted into a "crisis".[33] Certainly, Posner demonstrates the staggering growth of the Federal docket in the last 25 years in

the United States. From what he describes as "the eve of explosion" in 1960 until 1983, the number of cases filed annually in the United States District Courts rose from 80,000 to 280,000 - a 250% increase. This increase compares with less than a 30% increase in the preceding quarter century. The growth in the U.S. Courts of Appeal is even more pronounced. The case load has increased from 3,765 cases in 1960 to 29,580 cases in 1983. This is a 686% increase. Nor does the number of cases filed tell the whole story. The result has been a significant, continuing and burdensome increase in the workload of judges at both levels of the Federal judiciary in the United States.[34]

This increase in workload has parallels in Australia, New Zealand and England. Perhaps it is also true in the Federal Republic of Germany as Professor Zeidler's 1981 Adelaide Law Review speech suggests. If our increase has not yet measured up to the United States proportions, the developments in that country represent, as usual a premonition and a warning for us of what may lie ahead. There are some who suggest that the "explosion" in the United States could never occur in our countries because of the different organisation and cost rules of the legal profession and the different attitudes to litigation and substantive law. But these differences are diminishing. Furthermore, we cannot be sure that in our societies, with improving education and community expectations, our citizens will be content necessarily to be fobbed off without a remedy that provides a "day in court".

For present purposes, the important concern to which Posner calls attention, is the impact which this explosion is

having on the art of judging. In response to the great increase in work load, the United States Congress has appointed some extra judges. But its basic response has been to enlarge the specialist courts, to increase the supporting personnel of the judiciary and to enhance the courts' administrative bureaucracies. The result of this has been what has been described as "the bureaucratisation of the judiciary".[35] Specifically, Posner laments the consequence of the insupportable case load upon appeal judges. He suggests that it has caused a significant decline in the average length of oral argument, the "dominance" of law clerks in opinion drafting, the consequential increase in prolix, unimaginative, indecisive and unconvincing judgments, the increased use of unpublished opinions which endangers the disciplining functions of opinion writing. As a result of all this Posner asserts that there has been a reduction in the quality of justice administered in the United States Courts of Appeals.

The suggested "domination" of law clerks comes as astonishing news to judges brought up in the British tradition. When once asked why the Supreme Court of the United States was so respected in Washington, Brandeis is said to have replied that the answer lay in the fact that the nine justices were the only senior officials in Washington who still wrote their own decisions - and did not simply initial, with occasional modification, the outpourings of others. However, according to the Brethren and other books providing insight into the workings of the courts in the United States, such may not still be the case today. This reflection is offered without criticism. The judges of that litigious country have had to

devise a mechanism to get through their work load, frequently amounting to more than a 1,000 cases a year. The steady pace of elegant and individualistic opinion writing would not suffice if the judges were to see to it that the court docket was cleared within available judicial personnel and in better than Bleak House time.

In the highest courts of Australia, Canada and England control of the work burden may be exerted by the necessity of leave to appeal. But in other courts, the work keeps coming without respite. If the flow cannot be controlled by leave, other judicial techniques must be developed. What will they be for us, if we are not to forfeit our opinion writing to young law graduates? I find it difficult to foresee that New Zealand or Australian judges, let alone the English judiciary, will consign opinion writing to law clerks. What other possibilities present?

One is the reduction of multiple judgments. Although these have been defended[36] and although, as Lord Reid once pointed out, they provide the means of ensuring light shade and stimulating legal development[37], they certainly involve inefficiencies. They frequently involve obfuscation of legal principles for trial judges and the profession who look to the higher courts for guidance. They also involve some needless repetition of judicial work. Constant writing may deprive the judge of the opportunity for reflection that is imperative for the clearer and simpler performance especially of appellate duties.[38] More time might mean better judgments - including judgments which are simpler, more conceptual in expression and more persuasive as literature.[39] A recent analysis of the

length of judgments and the number of dissents in the State Courts of the United States shows a significant increase in both.[40] I doubt if the position is different elsewhere. To some extent the proliferation of authority itself presents this burden. Part of the problem may be a disproportionate expenditure of time spent in court and an insufficient expenditure of effort (whether by discussion or assignment) on the part of the appellate judges out of court.

Although oral argument is undoubtedly beneficial, that is not the issue. The question posed by the increasing work load of appellate courts is the extent to which the marginal value of more time in oral argument could not be surpassed by increased time for discussion amongst the judges, research of the issue, consideration of written argument and, above all, time for reflection and refinement of legal principle. Considerations such as this that led in the United States to the assignment of fixed times for oral argument. Similar rules have been introduced in Canada for applications for leave to appeal to the Supreme Court. In Australia, the last bastion of oral argument, the merest suggestion of such limitations causes consternation at the Bar. However, in my own court times have been fixed in large cases within which the oral argument must be presented. And there is an increasing tendency to insist upon written submissions, including in big and complex cases, full written briefs after the model of the Privy Council practice.[41] None of this would be regarded as radical to a German lawyer. But to lawyers of the oral tradition of the English common law such measures were regarded as revolutionary.

The use to which different appeal judges put oral argument varies according to their personality and inclination.[42] At the last Australian legal convention, commenting on a paper by Justice Willard Estey, I proposed that thought should be given to introducing a new system by which the task of the Bar could include the presentation of alternative drafts of the judgments, as favoured by each party. Effectively, this is what is done by the briefs filed in the United States. This suggestion produced the denunciation of one senior barrister. He indicated, as if self evidently unacceptable, that it would lead to the necessity of judges publishing their judgments in draft for the criticism of counsel in oral argument. Having come to the appeal bench from the unusual discipline of law reform, I do not find that objection persuasive in the least. I am far from convinced that a system by which appeal courts published a preliminary and tentative draft of their judgment and exposed the same to criticism before final judgment was manoeuvred, would not produce a more efficient resolution of appeals than the present system. At least in ultimate appellate courts, the issues are often well refined by the time they come up for judicial consideration. A preliminary draft judgment would focus advocacy and permit the refinement of principle, the exposure of error and the criticism of suggested illogicality. Especially in courts which seek to get through their workload by a heavy proportion of ex tempore judgments, the necessity of preliminary work on the part of the court is self evident. It is but a small step from this pre hearing preparation to the exposure of a draft judgment. I am not convinced that this idea

deserved the premptory dismissal it received in Melbourne.[43] We may live to see it introduced into judicial practice as a means of getting through the work in a just and efficient way.

Management or adjudication: A third concern, that derives from the growing workload both in the trial and appellate courts is the extent to which judges should become involved in the management of the litigation assigned to them. There are some who regard this activity as a waste of judicial time and an inappropriate function for people trained and paid to be adjudicators.[44] Whilst different considerations apply, to some extent, in appellate as against trial courts, the sheer pressure of the case load, and the dutiful desire of judges to move things along, inevitably produces suggestions for increased judicial involvement in managing the litigation. Otherwise the litigant with the longest pocket may, by endless interlocutory argument effectively frustrate access of a meritorious litigant to justice. This was the point made by Wolfgang Zeidler in response to Professor Koetz.

It is right, as Shimon Shetreet reminds us, that judges must not become so obsessed with speed and efficiency that they forget the essential functions of the judicial role to uphold legality and fairness.[45] By the same token judges tend to be highly responsible people. So it is likely to remain in the future. If faced with a heavy and increasing work load, they will tend to explore, in company with their colleagues, ways to manage the litigation. In some cases it will be possible and appropriate to send the litigation elsewhere, to counsellors for conciliation or to arbitrators for adjudication.[46] In other cases it will be possible to introduce penalities which

discourage unnecessary litigation, especially penalties as to costs.[47] In some appeal courts the expedient has been introduced of reducing the number of judges typically sitting in court divisions, from the traditional three to two.[48] However, the work which will devolve upon the judiciary from the operation of the Charter in Canada and a Bill of Rights in Australia and New Zealand, is likely in time to significantly change the activities that are expected of judges in common law countries. If American experience under their Bill of Rights is any guide, our judges may become involved in detailed supervision not only of the conduct of the parties before and during the litigation but also their conduct in pursuance of complex orders made under a Bill of Rights. These were described as

the "worst possibilities facing Canadian judges" as a result of the Charter when Justice Blair gave his view of the Charter from the Bench.[49] He pointed out that American courts administer prisons in 32 States. They have revised Congressional voting constituencies. They have supervised desegregation, introduce busing and involved the judiciary in detailed considerations even down to the purchase of tennis balls for a high school, taken over by the courts.[50] Will it come to this?

The prospect of judges becoming involved in activities of this kind fills some of their number, brought up in our British tradition, with despondency, if not alarm. By such activities, the judge would be moved effectively from an adjudicative to a legislative or bureaucratic function. On the other hand it must be acknowledged that many conflicts in our society are resolved

by default rather than by reason and law. Although the Charter, with its prospect of greater judicial activism, involves the possibility of risks to the public perception and acceptance of the neutral judiciary, it also opens up the prospect of practical attention by the judiciary to serious matters of widespread community concern. If the result is the diversion of highly talented and highly paid public officials from the comparatively simpler tasks of awarding damages in running down cases to the more taxing responsibilities presented by the Charter, it is a challenge that should be welcomed. Those who reflect on the 800 year old tradition, to which we are heirs, will not have doubt as to the the readiness and ability of the judges to meet challenges of this kind. They should, however not be surprised at the need for an initial period of adjustment to a significantly different function.

WHO ARE THE PARAGONS?

Quitting the monastery; I previously asked the question: who are the paragons who will rise to these changes in the judicial art? One thing must be recognised by Governments and by the people. The unacceptable increase in judicial workload, without the prospect of relief, is a cause for much stress. There is no doubt that the phenomenon of stress, until recently rarely remarked upon, is causing judges to quit, joining colleagues who resign because they find the work boring or because they feel insufficiently paid for such heavy and burdensome responsibilities.[51]

Until quite recently, appointment to judicial office, at least in the superior courts in common law countries, was regarded as a life sentence. Judges entered a monastery from

which they could not return. Nowadays, increasing numbers of judges are returning, including in Canada, the United States and Australia although not yet in Britain or New Zealand. There are, however, some instances even in England. This phenomenon, has implications for judicial pensions, the ethics of the Bar and public perceptions of the judiciary. It is now being suggested that, so common has judicial resignation become that it should not be seen as exceptional. Upon this view judges may, in their careers be expected to go on to other activities in the law or public life.[52] It seems likely to me that as the stresses of change in the judicial function increase with the work load and rewards diminish comparative to the practising profession more and more judges will be affected. There will be an increasing tendency for them to resign. Many will return to private practice. The implications of this revolution in judicial conduct have still to be considered. Pension, early retirement and other benefits, may persuade judges to remain in their posts, notwithstanding the unprecedented difficulties and novel burdens they nowadays face.

Conserving the judges: In recognition of the problem and even the undesirability, of requiring the judiciary to process large numbers of cases involving repetitious consideration of like factual material, we are seeing the beneficial development of alternative dispute resolution machinery. The growth in community justice centres[53] and specialist lay tribunals, with expertise incorporated in the decision making body, recognise that, just as there are horses for courses, so judges must be used in activities that are appropriate to and worthy of their training, skills and role in the community. With the decline of

the jury and the move away from lay magistrates to trained justices and District Court judges, there is a need to reconsider new mechanisms of dispute resolution which will provide access to justice by citizens in a more cost effective, speedy and informal way than judges can typically provide.[54]

With the massive expansion in the public service during and after the Second World War, a vacuum was created in the effective supervision of a vast range of decisions affecting the everyday lives of citizens in critical ways. Judicial review was quite frequently an ineffective guardian, because of its concentration on procedural rather than substantive questions and because of the many technicalities which typically litter the path of such litigation. Ministerial responsibility and complaints to a member of Parliament were likewise ineffective because of the unreality of expecting a government to fall because of a mistake by or insensitivity on the part of a lowly counter clerk. This is why there have been such significant developments in the field of administrative law. Those developments have included the proliferation of tribunals. Though modelled after the courts and providing adjudication, they did not typically use judges. They provide a quicker, cheaper and more informal venue for the resolution of complaints.

But it is noteworthy that even this procedure was found insufficient. In most common law jurisdictions, the Ombudsman phenomenon has been accepted. Significantly, the Ombudsman operates, as one would expect from the origins of the office, by a non-adjudicative, non-adversarial, inquisitorial procedure. No public hearings are typically held. Complaints

are generally dealt with on paper. This successful and pervasive alternative to the judicial model teaches an important lesson. The judiciary must be conserved to functions it performs best. And although those functions are themselves changing, with the addition of new responsibilities and the alteration of social perceptions of what is important, there will remain the hard fact that inherent in the judicial function is that concern for legality and fairness that will not permit the reduction of the judge to a mere functionary of the bureaucracy. Efficiency is not, ultimately, our guiding star.

YOU CANNOT FIGHT THE FUTURE

Gladstone, introducing the Second Reform Bill said to his opponents:

> "You cannot fight against the future. Time is on our side."[55]

Reflection on our judicial tradition, particularly in countries of the English common law, is usually a cause for self satisfaction, complacency and self congratulation. But to the question whether time is on the side of the judiciary, as presently organised, the answer is uncertain. The work is changing. The techniques expected of us are changing and adapting. The personnel who offer themselves to the monastery and their attitudes and those of their fellow citizens are changing too. In a time of rapid change, we can certainly derive institutional strength from the history and integrity of our forebears. After all, they survived wars and revolutions, threats from the Executive Government and attacks from the

Fourth Estate. They came through earlier times of rapid social change.

But changes are increasing in number and complexity. The beginning of wisdom, and the only anchor for speculative futurology, is an understanding of the forces for change. Only if we understand those forces can we successfully adapt the precious institution that is in our charge to continued, relevant service to our citizens: at once independent, honest and diligent; modern, creative and technologically literate.

This was the message given to the assembled judiciary, lawyers, academics and students of Australia by Wolfgang Zeidler in 1981. He left a lasting impression because he tackled directly universal legal and judicial needs from the point of view of modernity, technological adaptation, international open mindeness and, above all, an economic and cost effective judicial performance in the delivery of justice to the people. It was a timely message. It was given in a manner of high intelligence. It was well directed to shake an all too often complacent audience. We need more judges and lawyers of his kind. They can take a lamp and "lift it high and show us the future. Ultimately, that lamp must shine with a concern for our fellow citizens. If the rule of law is to be more than a cliche or a shibboleth, we need to find its light. And we need watchmen like Wolfgang Zeidler, to point us in the right direction.

FOOTNOTES

* President of the Court of Appeal, Supreme Court of New South Wales, Sydney; formerly Chairman of the Australian Law Reform Commission (1975-84); Judge of the Federal Court of Australia (1983-84).

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2. (1982) Vol 8 Adelaide Law Review 150-162.
3. ibid, 159.
4. E.A. Cherniak, Response to Professor Arthur's in Canadian Institute for the Administration of Justice, Cost of Justice, 1980, 15.
5. Cf H.W. Arthurs "Alternatives to the Formal Justice System: Reminiscing About the Future" in ibid, 1.
6. See eg The Suggestion of Chief Judge Lively in 18 Third Branch, 4 (June, 1986).
7. P.S. Millar and C. Baar, Judicial Administration in Canada, 1981, McGill - Queen's University Press, 392.
8. Family Law Act 1975 (Aust), s 98A.
9. Accident Compensation Act, 1972 (NZ). See New South Wales Law Reform Commission, "Accident Compensation: Transport Accidents Scheme" LRC 43/1, 43/2 (1984).
10. R.E. Bird, "The Instant Society and the Rule of Law", 31 Catholic Uni Law Rev, 159, 165 (1982).
11. Australian Law Reform Commission, Sentencing of Federal Offenders, ALRC 15, 1980.
12. I.R. Kaufmann, "Chilling Judicial Independence" 88 Yale L.J 681, 685 (1979).
13. ibid, 685-6.

14. D.G. Blair, "The Charter and the Judges: A View from the Bench" (1983) 13 Manitoba L.J., 445.

15. Operation Dismantle Inc & Ors v The Queen & Ors (1985) 18 DLR (4th) 481. See discussion M.D. Kirby, "Human Rights - the Challenge of the New Technology" (1986) 60 ALJ 170, 173.

16. See Sir Robin Cooke, "Practicalities of a Bill of Right" (1986) 2 Australian Bar Review 189; J.A. Smillie, A Bill of Rights for New Zealand? An Alternative Proposal (1986) 6 Otago L Rev 175. Cf W.R. Lederman, "The Power of the Judges and the New Canadian Charter of Rights & Freedoms (1982) UBCL Rev 1 and see A. Petter, "The Politics of the Charter", (1986) 8 Supreme Court Law Rev 473.

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22. H. Gibbs, "Appellate Procedure in the High Court" (1986) 2 Aust Bar Rev, 1, 4.

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25. J. Donaldson, "The Challenge of the Future" (1985) 59 ALJ 448, 454.

26. R.E. Susskind, "Expert Systems in Law: A Jurisprudential Approach to Artificial Intelligence and Legal Reasoning" (1986) 49 Mod L Rev, 168.

27. Ibid, 171.

28. Loc cit.

29. Id, 172.

30. B. Grainger, "Hard Times and Automation: Should Computers Assist Judges in Sentencing Decisions?" (1984) 26 Canadian J Crim, 231, 232.

31. Ibid.

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33. R.A. Posner, The Federal Courts: Crisis and Reform, Harvard University Press, 1985. See Review by H.P. Monaghan "Taking Bureaucracy Seriously" in 99 Harvard L Rev, 344 (1985).

34. Posner, 62-5.

35. O.M. Fiss, "The Bureaucratization of the Judiciary" 92 Yale L.J, 1442 (1983).

36. Gibbs, op cit, n 22, 9.

37. Lord Reid in Cassell & Co Ltd v Broome & Anor [1972] AC 1027, 1084-5.

38. Cf Frankfurter, J in Dick v New York Life Insurance Co, 359 US 437, 458-9 (1959).

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40. L.M. Friedman, R.A. Kagan, B. Cartwright and S. Wheeler, "State Supreme Courts: A Century of Style and Citation, 33 Stanford L Rev, 773 (1981).

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48. Ibid, 453.

49. Blair, op cit n 14.

50. Ibid, 451.

51. Nejelski, op cit n 23, 216.

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54. Arthurs, op cit n 5, 6.

55. Gladstone, cited by S. Crennan, "The Supreme Court of Victoria: Past and Future" (1984) 58 Law Inst. J. 218, 221.