

Law Service Address 2014

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My Saturday paper was headed by a lengthy feature on Schapelle Corby. And my Sunday paper carried a lengthy feature on Schapelle Corby. My Monday paper, published just ahead of her release carried a further lengthy feature on Schapelle Corby. And then the internet headlines on Monday afternoon wondered “Have Australians tired of the Schapelle Corby Story?”

Of course by Monday evening, the media was covering the media covering the Schapelle Corby story.

Darling or drudge, there’s a story in it. What we should think, what we do think. What they think we think.

We barely have time to make up our own minds. Whether it is public opinion on Schapelle Corby, licensing hours in the Cross or mandatory sentencing for king-hits, the half-life of an op-ed can be measured in the nano-seconds it takes for a re-tweet to go viral.

One of my favourite childhood memories was a trip to the English National Opera mid 80’s production of Offenbach’s Orpheus in the Underworld. It was famous for the wicked and witty translation by the late Snoo Wilson and the character Public Opinion presented in the unmistakable, strident nanny persona of Prime Minister Margaret Thatcher.

“I knew that one day the public would see
That morals had loosened since they
supressed me.

So when my presence is almost forgotten
I shall step forwards to censure the rotten.”

Public opinion, the driving force of the Nanny-State.
The guardian of morals and censor of standards.





Within the libretto there's a nuanced elision between Public Opinion as righteous moral commentator and the self-righteous, moralising harangue of public sentiment. What is firmly asserted in the morning papers is repudiated by lunchtime. The voice of the people is a bastion of democracy – but a surrender to a Tsunami of sentiment is a poor recipe for good government.

Of course, opinions change and reasoned opinions change with reasoned argument. However, public sentiment is fickle and emotionally reactive. Often when there are complaints that judges or religious leaders are out of touch with public opinion, the criticism comes from one who has confused the thinking public with the ranting shock-jock and his or her phone-in audience.

The Chief Justice opened his 2014 Law Term address noting that “Criticism of the judiciary has a long, if not illustrious history.” He mentioned the large piece of flint thrown at Judge Richardson in the Salisbury Assizes of 1631, for which, incidentally, the offender had his hand amputated in court. Also, the 1877 case where Vice Chancellor Malins had an egg thrown at him by an American citizen, Robert Cosgrave. The latter was imprisoned and deported after 5 months for his contempt. Malins quipped that the egg was more probably destined for his colleague Bacon V-C. A contemporary journal records that Cosgrave had a loaded pistol on his person at the time of the offence. The Vice Chancellor might have been slower with his wit if Cosgrave had been quicker on the draw.

Projectiles of protest are nothing new. Even the Talmud tells of an incident where an officiating High Priest conducted the water libation according to the Sadducee rite. En masse, the angry congregation took their etrogim, the citrons used in the Sukkot or Tabernacles celebration and they stoned him with them. The commentators do not let the priest off lightly. They add that the public also threw rocks.

Your honours, in your courtrooms, the precedents for contempt stem from the slinging of a solitary slug. However in the Temple, I must fear for a frenzied flinging of fruit.

But back to the first recorded Jewish courtroom experience. We don't know the facts of the earliest dispute. All that is recorded is criticism and public dissatisfaction at the conduct of the case. The





scene is set in Exodus Chapter 18. It is Moses who is judging the people.

Moses is sitting hearing case after case. The people are standing from morning to evening. Moses' father in law, Jethro speaks out. "What are you doing to the people?" he complains. "Why do you sit alone with all the people

standing by?" "Lo Tov!" says Jethro. "It is not good." In all the Five Books of Moses, the admonition "Lo Tov" is used only twice; once by God, and once here, by Jethro.

Moses explains that the people are coming to him to learn the judgement of God. "It is not good," says Jethro. "You will be worn out and they will be worn out." Jethro advises that Moses appoints leaders of the thousands, the hundreds, the fifties and the tens and that justice is delegated. Better human judges than a prophet, says Jethro. They should be people of distinction, God-fearing people, lovers of truth, who despise money.



What does it mean "who despise money"? Are we arguing for an impoverished judiciary. On the contrary. It means that a judge should be sufficiently comfortable that he isn't going to be swayed by bribes or that he won't be influenced on way or another by bombastic displays of wealth by the people before him.

"If you do this," says Jethro, "You shall endure, and the entire people, too – and you shall arrive at your destination in peace."

It is an important lesson that is taught here. Not simply that there must be delegation to a hierarchical system of courts, nor simply that justice delayed is justice denied. Jethro is admonishing Moses that judicial leadership entrusted only to the one individual who has God on his speed-dial will wear society down. People might even believe that justice and leadership are exclusively the purview of an inaccessible and remote spiritual elite.

"It is not good," says Jethro. And it shall fail.

Implicitly, the judges appointed under Jethro's instruction will be more fallible than Moses. But if we are led by people who are fearful of God and respectful of standards they will merit the confidence of the people and should lead them to their





destination and to peace.

Jethro sets standards which enable the judges to censure the rotten. Indeed, a judge is entitled to shape public opinion – not just reflect upon it or respond to it. But the judge works in a world of opinions. The judge weighs the merits of this opinion and that, this discretion and that, this circumstance and that. The judge balances rights. There is a world of difference between the judge who is in touch with opinion and the judge who caves to ever changing sentiment.

It is a tenet of our constitution that Parliament enacts the laws and that the courts are charged with applying them.

The great 19th Century Jewish ethicist, Rabbi Yisrael Salanter taught that “Not everything that is thought should be said; not everything that is said should be written; and not everything that is written should be published.” We should exercise discretion. One might augment that not everything that could be legislated should be legislated. We run grave risks and surrender society’s safeguards when we tie the hands of our judiciary.



From a Jewish perspective, at every level, respect is accorded to the individuals who are fearful of God and respectful of standards. We are taught that at Sinai was given both the written law and the Oral tradition. Why not just one God-given code? Transmission of an oral law requires the mentoring of leaders according to experience and traditions. It leaves room for thought and equity. It keeps us from slavish adherence to the written word.

The codices of Jewish law were written by the greatest sages, renowned for their hair-splitting logic and nit-picking attention to detail; however, conventionally, when a question arises as to (for



example) the kashrut of a chicken, the householder doesn’t seek out an ivory tower scholar to rule on the bird. Instead he goes to the local communal rabbi who understands the principles of law and the circumstances of the family. That Rabbi might apply



norm.

the strictures. That rabbi might find cause to be lenient.

Individual communities might elect to set a high standard – Well might they declare “we don’t want to eat a chicken where there has even been a question to ask.” However, the poor could starve if that high standard became a mandatory

In his recent book “David and Goliath”, Malcolm Gladwell explores the Californian three strikes law enacted after the brutal killing of 16 year old Kimber Reynolds, who had the temerity to resist her purse being snatched. Her father drove the campaign to have third time offenders sentenced to a mandatory 25 years to life. Initially it seemed that violent crime diminished under the law. However the trend was matched by other states with no such policy. There were well publicised cases like Curtis Wilkerson with two prior robbery convictions, who received a life sentence in 1995 for the theft of a \$2.50 pair of socks.

The policy, legislated on the back of public sentiment was flawed. Gladwell highlights the ripple effect of mass incarcerations upon the families and communities. The end result is more crime, not less and greater public distrust of all those charged with enforcing the law. “When a teenage father is sent to jail, his children will statistically have a much higher disposition towards psychological problems and other negative effects.”

Despite the pernicious stereotype of Old Testament Justice as inflexible, harsh, even vindictive, the reality is that in the Torah, instance after instance sees judges required to look to the impact of their rulings; to consider the consequence to the servant, the stranger, the widow and the orphan. In case after case they are reminded that true justice is compassionate.

Maimonides directs, “Even though the law is such, the trait of piety and the path of wisdom insists that an individual be compassionate and a pursuer of righteousness, understanding that from one womb emanated both the master and the servant, that one womb formed them both.” Maimonides concludes by insisting that we are commanded to be godly, meaning





compassionate. “And it is that principle of compassion which we must always express in executing our laws”.

Compassion is an extension of judicial discretion. It is the ability to examine all the circumstances of a case and deliver a meaningful opinion which is not held hostage to public sentiment or the fetters

of mandatory sentences. Of course Parliament should legislate against social ills. But it should not legislate against discretion or compassion. For that excises justice from judgement.

Chief Justice, this is my tenth and final Law Service. The occasion has been an annual highlight and pleasure for me; the chance to celebrate the administration of godly values with your judiciary and with our most senior law officers.

I thank you for the honour of your ongoing participation; as people of distinction, God-fearing people, lovers of truth gather here at the beginning of Law Term and acknowledge the sacred values which underpin their endeavour.

May your judiciary continue to strengthen our society, upholding the values we cherish, in touch with the community it serves.

May God bless you to judge with wisdom, compassion and discernment. And may it be His will that you ever be held in the high regard and confidence of the public as you guide them in the path of the just.

