

Legal Limits

Book Launch, Chief Justice Robert French AC
17 December 2013, Perth

The American poet Carl Sandburg once wrote poetically and dismissively of the legal profession, which he contrasted unfavourably with useful trades, farmers and creative artists whom he called:

Singers of songs and dreamers of plays
Build a house no wind blows over

And then asked the question:

The lawyers — tell me why a hearse horse snickers
Hauling a lawyer's bones.

Karl Llewelyn in his Bramble Bush Lectures of the late 1920s and early 1930s, challenged Sandburg's premise saying:

To produce out of raw facts a theory of a case is prophecy.
To produce it persuasively and to get it over, is prophecy fulfilled.

Singers of songs and dreamers of plays — though they be lawyers
— build a house no wind blows over.¹

Nicholas Hasluck's, *Legal Limits*, which it is my privilege to launch tonight, speaks across the interface between the world of the law and the social universe in which it is embedded and further falsifies Sandburg's premise.

Judge-made metaphor can be a useful servant but a dangerous master. In considering how to introduce the launch of this book, a culinary term came to mind — degustation. Each chapter in the book is a distinct gustatory pleasure — not only for the often jaded legal palate, but for the probably more discerning tastes of a wider public. And to finish we have Peter Johnston's delicious complimentary petit fours, coffee and the exotic dessert wine of the Hart-Fuller debate and its sequelae.

¹ Karl N Llewelyn, *The Bramble Bush: Some Lectures on Law and its Study* (New York, 1930) 153.

In the first of his essays, which carries the title of the book, Nicholas Hasluck identifies the view traceable to Plato that a legal system should strive for certainty and objectivity and to develop a consistent body of rules that bear upon the realities of the day and can be applied to most cases under well-defined categories of right and wrong. For the imaginative writer, however, it is the litigant's plight that engages interest and sympathy. As Hasluck says:

When it comes to looking for truth, writers are conditioned by their own introspective habits. They are determined to discover, and then express, what they actually feel about a situation as opposed to what they are supposed to feel. They are weary of conventions.

The cast of the legal mind is said to be reflected in Herman Melville's novel *Billy Budd*, which is discussed in more detail in Peter Johnston's Afterword. In that novel a naval captain is required by military law to condemn a fine young sailor to death for striking an officer a fatal blow under the most severe provocation. The young sailor is regarded as morally innocent by the captain and by the court martial officers. The captain nevertheless feels he has to let the law take its course in order to support the authority of the system. Nicholas Hasluck remarks:

A legal mind understands the reasoning behind such an outcome. A layman might simply be appalled.

I remember taking part in a discussion about this case at an Aspen Society seminar in the United States in 2008. It seemed to me then that perhaps a little creativity might have saved the day. If the captain had retroactively and posthumously stripped the officer of his rank for his provocative misconduct, the striking of the officer would not have been a capital offence.

It is suggested in the first chapter that lawyers' natural conservatism makes it difficult for them to respond to literature. That kind of mentality may weigh against attempts to utilise literary skills in a legal context. While this may usually be so in legal writing, it is not universally the case. There is no shortage of examples of literary references in judgments over the years and judges whose judicial writing discloses literary skills. Although Clarence

Darrow is quoted in the chapter for his observation that 'inside every lawyer lies the wreck of a poet', there are plenty of examples of legal and judicial poets. The late John Bray, former Chief Justice of South Australia, was one such, although he did remark ruefully that 'poetry lacks social cachet'. Michael Kirby said of him:

Some people have the power to express themselves in vivid word pictures. Not all of them are poets. But when to discontent with verbal formulae alone is added a considerable power in the use of language, you have a judicial writer of some talent.

Creative opportunities in the law do not stop with judges with literary talent. At least at the trial level, narrative or story telling techniques can be a part of advocacy. Indeed the trial process itself, as the essay shows, can be seen as a contest of opposing narratives. The good advocate will be able to address his audience, judge or jury, at a level that is informed by distinctly non-legal insights into human behaviour.

Looking at the law through the eyes of an outsider takes us into the nightmare world of Kafka's imagination in his novel *The Trial*. As Nicholas Hasluck says, it is a book which still manages to evoke a shiver of recognition. I have a memory from my time as a Federal Court Judge of hearing judicial review cases brought by unrepresented asylum seekers participating by video-link from a detention centre a thousand or more kilometres away from Perth. There was something particularly surreal about a process in which an applicant from a Middle Eastern country, sitting in a detention cell, tried to persuade a judge of a legal system which might as well be on a different planet, of the merits of his case in which the only prospect for success was demonstration of jurisdictional error and the only prospect of its detection lay with the judge unless the respondent Minister made a concession.

Moving from Kafka to Orwell, we find ourselves in Chapter 2 — 'Thought Crimes in Post-Colonial Literature', which is concerned with the powers of surveillance, the corruption of language, the manipulation of public opinion and the subversion of social realities. Nicholas Hasluck remarks persuasively:

As in modern political campaigning no slogan is too obvious if it accommodates the public's secret wish to believe in it.

We are then taken into the world of South Africa under the apartheid regime as depicted by JM Coetzee in 'Waiting for the Barbarians' and in 'The Native Commissioner' by Shaun Johnson. Hasluck links their works to notions of freedom of expression and says of their novels that they:

are concerned in part with the formation and gradual shaping of opinions; they are works about what happens when someone holds the wrong opinion.

In Chapter 3: 'Being Somewhere Else', the author reflects upon notions of home, and distance from home, and how people far away from home shape their ideas of its reality. David Malouf's novel, *The Conversations at Curlow Creek* is discussed in that context. In that novel an officer of the Crown and a condemned outlaw talk to each other about where they come from, who they are and whether they will be remembered by those at home. The author refers to a refrain that haunts the story, namely how the presence of the law suggests that we are always living in the shadow of long-established customs, rules created to address in a propensity for wrong-doing the crimes we might commit but haven't as yet actually perpetrated. Many of those dilemmas have to be resolved by reference to our essential natures, rather than by an appeal to some clumsy system of rules and regulations.

In the same chapter, with a connected theme, is a consideration of a book which gives an account of the life and times of Jack Bohemia, an Aboriginal tracker who was born in the early 20th century at Fitzroy Crossing. He was assisted in the writing of the book by a linguist Bill McGregor. The transcription of his speech by McGregor reveals what the author calls 'a strange milieu — a vast terrain littered with waterholes, dried up gullies, abandoned stockyards, flooded river crossings and isolated stations.' The reader is obliged to look at the progress of investigation in such a landscape in an entirely new light. The person being tracked when at a distance is a spectral being who is presently somewhere else, but will soon become the real thing, an authentic presence when the pursuit ends and the one pursued becomes flesh and blood.

As the author observes, the book about Bohemia encourages its readers 'to dwell upon the breadth and variety of human experience, to take account of the challenges faced and difficulties overcome.' It seems to be implicit in the author's comments that they are directed to the lawyer's tendency to look for facts that confirm beliefs already formed. The author further observes:

They read the past backwards from the present, excluding matters that might damage their cause, simplifying the tale they have in mind to tell. A well-researched and fully-rounded book like that about Jack Bohemia 'will inevitably bring with it a deeper understanding of society and a modesty of outlook that is bound to enhance the management of present day affairs.'

In Chapter 4 we move to Buenos Aires and Jorge Luis Borges. There is much about the history of the region and perceptions of Peru through the author's eyes on a visit there some years ago with his wife. The historic explorations of Peru undertaken by Colonel PH Fawcett are mentioned, as is their apparent inspiration for the Conan Doyle novel *The Lost World* published in 1912, in which pre-historic monsters who are isolated from changing environmental conditions by forests and cliffs threaten explorers who enter their previously undiscovered realm. I remember reading the book as a boy and seeing an early version of the film. It has been cloned by Hollywood in a variety of ways, not least of which, or perhaps least of which, is Jurassic Park. Nicholas Hasluck speaks also of his visit to Machu Picchu and gives an account of the American explorer Hiram Bingham, who claimed credit for the discovery of the site, although when he first found it he only spent a single afternoon exploring it and was not particularly impressed by what he saw. It was only when he realised the importance of the site that he wrote a book presenting its 'discovery', as if it were the climax of his expedition. It will surprise no-one to learn that he later went into politics and became a US Senator. This chapter has little to say about the law and that is certainly no criticism.

Chapter 5 entitled: 'Vanishing Borders', begins with Franz Kafka's book *The Great Wall of China*. The story-teller points to many gaps which had been left in the Wall as supervisors transferred laboring groups from one neighbourhood to another. Against that background Nicholas Hasluck reflects upon the suggestion that contemporary times are characterised by vanishing borders and a belief that we now all live in a global market place which is indifferent to national boundaries. He poses the question whether globalisation has transformed the nature of nation States to such an extent that politicians and the people they represent have a greatly reduced capacity to influence events. In the context of law and literature he argues that notwithstanding the tendencies associated with globalisation and its indifference to borders, talk about rights and the provision of remedies can't be divorced from local ways and legal processes. He says:

The freedom to hold opinions and to speak freely may prove to be illusory unless human rights are properly understood in the community directly affected by what is thought and said. The customs and innate wisdom of the relevant community are likely to have a bearing upon rulings concerning such matters.

That observation leads into a discussion about human rights, reflected in the Universal Declaration of Human Rights and the various Covenants to which it has given birth. There follows a consideration of the perennial problem of the generality of the language used in relation to protected rights and the extent to which they may be curtailed by competing rights and limitations referable to communal needs. In an observation, which I particularly liked, he compares freedom of speech to Kafka's vision of the Great Wall of China:

far from complete, being principally renowned for its many gaps and omissions — a show of strength riddled with insecurities.

Chapter 6 entitled: 'Seeing What Happened', focuses on the area of anti-discrimination law in which the author played an important role as President of the Equal Opportunity Tribunal of Western Australia. He makes the point that it was important to convince the public that the administration of justice in this area would be undertaken fairly and in accordance with natural justice. There can be a perception readily nourished, that tribunals concerned with such matters are staffed by zealous ideologues. In this context, I remember an observation of Sir Sydney Kentridge QC, who represented such disparate clients as Nelson Mandela in South Africa during the apartheid days and the Country Alliance — the fox hunters of England — 'human rights does not mean the plaintiff always wins'. Hasluck cautions:

An even-handed approach is essential. The legislation is based on respect for the rights and freedoms of each individual to be treated equally.

The title of the next chapter: 'In Cupid's Court' belies its dark topic — the treatment of persons who are characterised as 'dangerous sex offenders'. Kafka again provides a point of departure for the discussion. The chapter, however, particularly focuses upon a publication by McSherry and Keyzer, *Sex Offenders and Preventive Detention* which explores the perennial question of what to do with dangerous offenders. In that context there is a

discussion of the High Court's constitutional decision in *Fardon v Attorney-General (Qld)*.² At the end of the chapter Nicholas Hasluck refers to a work by William Godwin, published in the 18th century and entitled *Enquiry Concerning Political Justice*. Hasluck points to Godwin's observation, which he paraphrases, saying:

no vice can be more destructive than that which teaches us to regard any judgment as final, and not open to review, for upon the subject of crimes and punishment, perceptive men will take account of the impenetrableness of the human heart.

Chapter 8 takes us to the less fraught topic of whether judges should be mediators — although it is a topic which has excited robust and occasionally overheated debate in Australia. There is a useful discussion in this connection about the risk of devaluing the judicial role by undue emphasis on alternative dispute resolution and the confusion that may arise between alternative dispute resolution services and the exercise of judicial power. There is also an interesting comment at the end of the chapter based upon an observation by Justin Gleeson SC in his book *Rediscovering Rhetoric*, published in 2008. Gleeson referred to the overwhelming pressure to confine the role of the adversarial system. As Hasluck paraphrases him:

It saves time and cost to limit the scope of oral advocacy. One by one, various areas of the law are reduced to administrative fiat for the supposed good of society. Yet Cicero demonstrates that the ability to context, orally and in public, questions of innocence and guilt, liability or immunity, and the making of wise choices about the governance of the State, is fundamental to the health of society.

The ninth chapter 'Beyond the High Court' involves a consideration of the life and writings of Ian Callinan and, in particular, his book *The Lawyer and the Libertine*, whose leading characters are strongly suggestive of Sir Garfield Barwick and Lionel Murphy. These and other novels by Callinan show the way in which the novel can be used to advantage in exploring legal themes.

The tenth chapter: 'The Whitlam Dismissal Revisited', concerns the dismissal of 1975 and Nicholas Hasluck's own book about it. As to that, all I can say is read the chapter then read the book — you will not be disappointed.

² (2004) 223 CLR 575.

The last and eleventh chapter: 'Constitutions and Reconstitutions' discusses the rule of law and its treatment in the author's novel *The Bellarmine Jug*, which is also discussed in considerable detail in Peter Johnston's Afterword. It also concerns the way in which different interpretations of history can affect the outcome of constitutional issues in the courts. There is a nice comparison in this respect between two observations in the *Gilt Dragon Case*³ in which the High Court was evenly divided. Sir Garfield Barwick said:

to my mind by no stretch of imagination could it be said that the declaration of marine archeological sites or of ancient wrecks on the bed of the sea 'off the coast of Western Australia' was really a matter of concern for the peace, order and good government of the State of Western Australia. With a degree of artistry these ancient wrecks were described as 'historic'. So they might properly be styled in the history of navigation but scarcely in the history of the Colony or State of Western Australia.

On the other hand, Sir Harry Gibbs said:

The wreck of the *Gilt Dragon* is part of the history of Western Australia. The Dutch sailors who, albeit in some cases by accident, discovered and explored the coasts of Western Australia played a part of the early history of what is now the State. The preservation and public display of the relics of their voyages is a legitimate concern of the people of Western Australia.

Finally, Peter Johnston provides a scholarly and engaging Afterword on *The Bellarmine Jug* and the extent to which it was influenced by Nicholas Hasluck's study of jurisprudence at the University of Western Australia and at Oxford. His essay covers law and literature as a field of study and legal themes as metaphor, including a discussion of *Billy Budd* as a model for analysis.

As I said at the beginning this book is a delightful degustation with complimentary petit fours, coffee and dessert wine. It is a product of a mind well furnished with knowledge of law and literature. I congratulate Nicholas Hasluck and Peter Johnston for this work and declare the book launched.

³ *Robinson v Western Australian Museum* (1977) 138 CLR 238.