

ABORIGINAL LAND CLAIMS - AN AUSTRALIAN PERSPECTIVE, Brennan J

THE COURTS AND CULTURE

6TH CONFERENCE OF CHIEF JUSTICES OF ASIA

AND THE PACIFIC - BEIJING The Honourable Sir Gerard Brennan, AC, KBE

Chief Justice of Australia

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A conference of judges is not like a conference of political leaders or leaders of commerce. We have no responsibilities for the making of treaties or the important diplomatic discussions that foster international peace. We negotiate no commercial transactions; we have nothing to buy and sell. We have nothing to trade but ideas; no agreements to make except the agreement of friendship and mutual respect. But the ideas we have to exchange are concepts of the laws of our countries and those laws are the expression of the culture of our peoples. We come from the nation States of Asia and the Pacific and we are drawn from a variety of cultures and systems of government. While every society at formative stages of its history looks to the experience and systems of other societies and adopts features which suit its particular conditions, every society nevertheless generates a distinctive political and legal system. Every legal system evolves to meet the different challenges within its particular society. So the ideas we have to exchange will be different one from the other.

Of course, we learn that there are common problems: the pressure of pending cases awaiting hearing and decision, increasing complexity of trading arrangements, the control of drug related crime. We learn of solutions adopted in some countries that may be useful in our own: mediation, alternative dispute resolution, computer assistance, judicial training institutes. We hope to derive benefits from our discussions and to strengthen the mutual respect which each national court system should entertain for the court systems of other nations. But those benefits will be diminished and that respect will not be given unless we appreciate the differences in the conceptions of law and the functions of the courts which distinguish the legal systems of the region.

Some societies insist that there be a division between religion or morality on the one hand and law on the other, although the law can be formulated so as to produce minimum inconsistency between the two; other societies deny the validity of endeavouring to separate those concepts. Some societies regard the primary purpose of the law to be the moulding of individual conduct so as to be conducive to the maximum benefit of the community; others regard the law's primary purpose to be the protection of the rights of individuals against the demands of the community. These trends can be seen in tension in every legal system. The secular-religious tension can be seen in the common law countries in the laws relating to blasphemy and obscenity. The balance between community protection and individual freedom in commercial matters is struck by the laws of every country. The balance between objectives of the legal system that are in tension are struck differently by each legal system. Nevertheless, we are here to exchange ideas and there is nothing so infectious as the contagion of ideas 1 . Roman Law entered Germany not by any edict of a king or legislature but by an appreciation on the part of German judges that the logic of Roman Law answered the needs of the time 2 . Legal ideas which grow and bloom in one garden can be transplanted into other gardens where the soil of tradition and the political and economic climate are similar. Or they may undergo a mutation where conditions, though similar, are not the same. Our gardens are not all planted with the same plants, and the plants of the same genus may flower differently in different gardens. In the long run, the law must accord with the culture of the peoples of our respective countries or our societies would break down. Law necessarily reflects basic human values, but cultures differ and the systems of government differ. Those differences are reflected by laws which govern

us.

We are drawn from countries which have different systems of government and, even amongst those countries which have similar systems of government, the dynamics of domestic culture may produce differing conceptions about the manner in which power may be exercised. For those who belong to the tradition of the common law operating under a written Constitution, the division of power among the legislative, executive and judicial branches of government is taken for granted. That division of power and, in particular, the jurisdiction of the judicial branch of government to ensure that the executive branch exercises its powers in accordance with law, are governed by particular and well-known rules. We have a conception of law as an abstract body of principles which stand independently, and govern the exercise, of the powers of the three branches of government. The legislature and the judiciary are each given a function of adding to or qualifying the body of law but ultimately it is the law itself, considered as an abstract body of rules, which governs our societies. The courts are the ministers of this law. The advantages of that system for the societies it serves may be as difficult to appreciate for those living under a different system and coming from a different culture as their system is difficult to appreciate for those living under a written constitution enlivened by the tradition of common law. The laws and the function of the courts differ from country to country because the expectations of the people and the system of government of each country dictate that the law should be so administered as to govern society in different ways.

It is not for judges, each of whom must be faithful to the laws of his or her own country, to pass judgment on the culture of another people or on the functions assigned to the courts by the system of government of another country. International comity demands a respect for the differences as well as for the similarity of functions. When there is a disparity in conceptions as to the nature and source of law, the respective systems cannot be the same. The relationship between the courts and the other branches of government will not be the same. It would therefore be erroneous for the judges of one system to find a ground of criticism of judicial work which, though faithful to its system, is different from our own. If criticism is to be made, it must be criticism of the system itself and that is a matter of high policy for consideration and discussion by the governments concerned. That does not mean that any of us must concede the superiority of a foreign system of law. For myself, I am proud of the capacity of Australian law to serve the interests of the Australian people in a free and confident society and to protect the multicultural values of our nation. In this international year of tolerance it is incumbent on the judges of each nation to endeavour to understand the legal systems of other nations and the assumptions which underlie them. In that way misunderstanding is avoided and mutual respect is fostered. In that way also respect is given to the international integrity of each state's own culture and system of government.

There are, however, some requirements of a judicial system which are universal. The courts, as the judicial branch of government, must apply the law equally to all who come within its terms; they must ascertain the facts of each case as fairly as the rules of procedure permit; and they must reach a decision in the case without allowing themselves to be influenced or controlled by those who do not have the legal responsibility for the rendering of the decision. The duty to apply the law equally includes procedural equality in the practical administration of the law. It involves the right of an accused person to a fair trial in which he has as substantial an opportunity effectively to challenge the prosecution as the prosecution has to assemble and present its case. If the courts fail in any of these essentials, they forfeit not only the respect of their international colleagues but they fail to perform their solemn duty to the people whom they are appointed to serve. I do not suggest that these requirements exhaust the expectations of the international legal community but they are, I suggest, the minimum indicia of any institution that claims the judicial character. At gatherings of this kind, the resolve of judges of good faith to serve their people faithfully according to the laws by which they are governed can be strengthened by contact with other

judges of like mind.

Although there are differences in our legal systems, the growth of international law points the way to the common aspirations for the legal system which are shared by human kind. Domestic law and international law will, through a process of dialectic, infuse all our domestic legal systems with principles which, once adopted, will diminish tensions between nations and promote a greater understanding of the aspirations of all the diverse peoples who populate this planet. This may be an exercise proceeding at a glacial pace, but its onward movement is irresistible if we are to survive as the human family, respecting the dignity and the cultural differences of all its members.

In the centuries of the new millennium our societies will inevitably be drawn closer together. Differences may become more noticeable, perhaps more abrasive, as we come to learn more about one another. But the disappearance of the fences in our global village will benefit all nations if we start with a respect for the culture and the genius of our neighbours.

We are indebted to his Excellency Mr Ren Jianxin for bringing together such a stimulating and useful meeting. He has the ultimate responsibility for administering justice to nearly a quarter of this planet's population. That is a task which those of us from smaller countries can hardly contemplate. In the midst of those onerous duties we are grateful for the opportunity that he has given us to meet and get to know each other personally and to exchange our views. Our laws are the distillation of the culture and genius of our societies. A growth in understanding of those laws offers no threat to any nation. It controls no market. It produces no power but it is a cogent instruction about the world in which we live.

1A phrase of Sir Owen Dixon in "Concerning Judicial Method" reproduced in *Jesting Pilate* (1965) at p.154.

2Dr. Oskar Bulow "Gesetz und Richeramt" (1885) published as "Statutory Law and the Judicial Function" (1995) 39 *American Journal of Legal History* 71 at p.85.