PRINCIPAL ISSUES CONFRONTING DIFFERENT COURTS OF FINAL JURISDICTION ON THE EVE OF THE 21ST CENTURY

LOOKING TO THE FUTURE

"PRINCIPAL ISSUES CONFRONTING DIFFERENT

COURTS OF FINAL JURISDICTION ON THE EVE

OF THE 21ST CENTURY"

THE MASON COURT & BEYOND CONFERENCE

MELBOURNE, 8-10 SEPTEMBER 1995 The Hon. Sir Gerard Brennan, AC KBE

Chief Justice of Australia

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The challenges confronting the High Court on the eve of the 21st century is a topic difficult to address. It is difficult to foresee the future, even the immediate future. More significantly, one cannot identify any legal issues that will constitute challenges confronting the Court, for the Court has no agenda in relation to particular issues.

In retrospect, as we have heard in many of the papers here, it is possible to find a unifying theme running through a series of judgments of the High Court. It is one thing to discover a theme that has emerged in past judgments; it is another thing to predicate of a court that it entertains some intention to give effect to a particular policy in future cases. Only in so far as the past cases have produced a principle of law applicable in future cases is it possible to postulate the future course of decision. Of course, a retrospective analysis that reveals a theme is the very technique by which a court derives either the principles or the guidelines for future decision-making. When we look to the future - to the "beyond" after the period comprehended by the Mason Court - all that can be said about the development of the substantive principles of law by the High Court is that it must be the outcome of the application of the judicial method to the cases that come before it.

As to what areas of law will be developed, the court is, in a sense, in the hands of the litigants. It is their problems which are brought to the Court for decision. It is their transactions that frame the issues for determination. The Justices of the Court do not seek opportunities to expound legal theories or expand legal principles. Sometimes a submission is advanced to support an application for special leave to appeal that the case will give the Court an opportunity to hold this or that proposition to be the law. That submission has a singularly high failure rate. A submission of a different kind - a submission inviting the Court to resolve conflicting views of intermediate appellate courts, especially on a point of interpretation of a High Court judgment - has a much higher rate of success. The one submission suggests that the Court has agenda which it wishes to pursue - a proposition that is without even anecdotal support; the other submission fastens on the Court's duty to settle the law for application by the courts of this country. All I wish to say on this aspect of the topic is that the challenges confronting the Court will not be of the Court's choosing except in the sense that, where special leave to appeal is required, the Court will have the discretion whether or not to grant it. I venture to suggest that, far from seeking opportunities for new adventures in the law, the Court is more likely to leave a novel issue for mature consideration by intermediate courts until the true scope and implications of the issue are revealed by decisions of those courts.

I confess to a degree of surprise at the papers which have reviewed the work of the Court during the period of Sir Anthony's Chief Justiceship. As I said to him yesterday, I didn't know we had done so much! But it must be so, and those of us who were privileged to serve on the Court during this

period are conscious of the continual, if demanding, stimulus of the varied cases listed for hearing month after month. However, the technique of developing new propositions of law gives some indication of the nature of future work on the Court. In recent years, earlier authority has been analysed and overarching principles have emerged to explain them. Then the instant case has been held to fall within or without the overarching principle. But the full content of that principle may need to be spelt out in future cases, and that is as much a part of the process of developing the law as the revelation of the principle itself. I do not suggest that the Court will change in its interests, but it will not be surprising if future cases are seen as consolidating the advances that have been made or giving to those advances a more finely honed expression. This may not be as glamorous work as the initial task of stating the principle, but it is just as important to the organic development of a living legal system.

I am also somewhat surprised by the importance attached to policy by many of the papers. Of course, many of the significant cases have related to areas where the law has been demonstrably uncertain (as in Cole v. Whitfield 1 or unjust (as in Mabo [No.2] 2) or where the interpretation of the spare constitutional text can rationally go either way (as in Street's Case 3). In such cases as these, where precedent fails to provide a solution, or offers a solution that is inconsistent with basic notions of justice or mocks the substance of a constitutional guarantee, the Court is forced to frame a new precedent that will not exhibit those defects. But that is not an exercise in idiosyncratic policy formation.

This is not the occasion to expound what are, in my view, the limits of judicial policy in particular fields of law. It is sufficient to say that I would not expect to see the course of argument to be diverted by consideration of the kinds of factors which are legitimately considered by those engaged in the formulation of political policy, that is, the political branches of government, Law Reform Commissions and regulatory agencies. The fundamental duty of the Court when special leave to appeal is given or when the original jurisdiction of the Court is invoked is to decide the issues between the parties. The exposition of the law is a concomitant of the performance of that duty but, as In re Judiciary and Navigation Acts 4 shows, the exposition of the law divorced from the issues in litigation is not a function that the Constitution permits the High Court to perform.

The mix of jurisdictions vested in the High Court is a significant influence on the judicial method adopted by the Court. The traditional methods of expounding the common law become the methods of constitutional adjudication. That is a considerable discipline. On the other hand, the duty of construing a Constitution applicable to the changing circumstances of national life drives home the realization that the law generally must answer the needs of contemporary society. And so the judicial task is as Learned Hand once defined it 5 :

"A judge ... must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time - at all hazards he must maintain that tolerable continuity without which society dissolves, and men must begin again the weary path up from savagery."

I do not attempt a forecast of the fields of future litigation before the Court, for all that I can offer is speculation about the likely fashions in litigation. That there are fashionable fields in litigation is not reasonably open to doubt. Once a new ray of light is shone by judgments on one area of law, the prospect of further illumination seems irresistible. Thus Nationwide News 6 and ACTV 7 were quickly followed by Theophanous 8 and Stephens 9 . But your speculation as to the Court's diet of cases in the years ahead may well be better informed than mine. However, there can be no doubt that in future years, international law will flow into and mix with our municipal law. There will be debate as to the entry points and the rate of flow. And new approaches will be required to ensure that the law applicable to a particular transaction is internally consistent and judicially manageable.

There are two challenges of the immediate future that do face the Court, but neither of these relates to legal principle. One challenge is, in a sense, administrative; the other concerns public appreciation of the Court's function.

In the 1970s, the burden of work on the High Court was relieved in part by vesting in other Courts some of the jurisdiction that had previously been exclusive to the High Court. Then, in 1977, the Federal Court undertook some of the original and appellate jurisdiction of the High Court. In the 1980s, rights of appeal to the High Court were removed and the appellate jurisdiction regulated by the requirement of a grant of special leave. The reform has been successful in the sense that, for the most part, the Court's appellate list is now filled with cases of importance and difficulty. But two factors have combined to make the special leave system a source of work that tends to divert the Court from its primary function of determining the appellate and original jurisdiction cases awaiting hearing.

In the first place, the procedure adopted for orally hearing special leave applications and the practice of giving short reasons in the event of refusing special leave have converted applications for special leave, in the view of many counsel and solicitors, into mini-appeals. The parties do not get the final opinion of 5 or 7 Justices, but they do get the tentative view of three Justices. They do not get full reasons for dismissal, but unsuccessful applicants often receive enough to satisfy them that they would not have succeeded on a full appeal. Conversely, if special leave is granted, there is an indication that the Court thinks the applicant's case is arguable. And, of course, the cost of presenting an application for special leave is a fraction of the cost of an appeal. The consequence is that the number of special leave applications has increased and a greater proportion of the time of 3 Justices is spent in reading application books, considering the judgments in the Courts below, in research and in recording their tentative views.

The second factor is the increase of applications for special leave and of actions in the original jurisdiction of the Court prosecuted by litigants in person. The court system in general, and the appellate system in particular, relies heavily on the work of competent counsel. If the material filed is irrelevant and the arguments presented are misconceived, judicial time is wasted. The desire to ensure that no litigant is unjustly denied relief heightens judicial anxiety in considering cases presented by litigants in person. The resulting burden is large and it is disproportionate to the number of occasions when it is necessary for the appellate court to intervene.

This is a problem which will have to be addressed. I do not propound a solution. The problem will have to be discussed with the professional bodies, among others, and a solution devised.

The second and major challenge, however, arises from the Court's perception of the function which it is appointed to fulfil and the essential conditions which must be satisfied to permit fulfilment. Yesterday we heard a moving and instructive account by Justice Ismail Mahomed of the daunting charter of the Constitutional Court of South Africa. We must pay our respects to their Lordships as they grapple with the constitutional problems of the new South Africa. To those of us who have known only the tranquillity of Australian society, however, the function of the Courts in safeguarding - much less creating - the fabric of peace, order and good government, is like the air we breathe: it is known to be important, pollution is objected to, but it does not feature greatly in our consciousness. Yet, without a competent and independent judiciary and, I would add, without a competent and independent legal profession to administer the law that protects our freedoms and regulates our relationships with Government and with one another, our society would be hostage to the holders of power and human rights and fundamental freedoms would vanish like desert snow. The function of the Court, like the function of the Constitutional Court of South Africa, is to administer, competently and impartially, the rule of law. It is a function

of service to the community, not of the exercise of power over it. The function can be performed only by understanding, refining, adjusting and applying that complex body of principles that has been developed by the patient work of legislators and judges over the centuries.

To perform this function, the Courts need the understanding and support of the people. The work of the High Court, which must of necessity be the arbiter of contests of great public interest, will generally not be understood by the public. The concepts are often too abstract, the refinements too nice, to lend themselves to exposition by the popular media. How then is the public understanding to be fostered and the support of the people secured? There is no simple answer in practice, though a clear answer can be given in theory. In theory, once the role of the courts as the guardians of the rule of law and thus of the freedom of society is appreciated, it should be easy to focus public interest on the Court's definition of a rule of law. In practice, however, public appreciation of the role of the courts is formed largely by reports of decisions that are represented as good, bad or indifferent according to the result of a case, rather than by reference to the rule of law applied by the Court. The work of the Court then comes to be evaluated by debate about the desirability of the result from standpoints other than the rule of law. The problem is difficult of solution. It is a problem for lawyers generally, for the legal profession itself is justified only by the function it plays in administering the law.

We are all involved in the achieving of justice according to law and thereby maintaining a free and confident Australia. That is an aspiration that we share. It is the aspiration which gives purpose to our work.

1(1988) 165 CLR 360.

2 Mabo v. Queensland [No.2] (1992) 175 CLR 1.

3 Street v. Queensland Bar Association (1989) 168 CLR 461; cf Henry v. Boehm (1973) 128 CLR 482..

4(1921) 29 CLR 257.

5(1939) 52 Harvard Law Review 361.

6 Nationwide News Pty. Ltd. v. Wills (1992) 177 CLR 1.

7 Australian Capital Television Pty. Ltd. v. The Commonwealth (1992) 177 CLR 106.

8 Theophanous v. Herald & Weekly Times Limited (1994) 182 CLR 104.

9 Stephens v. West Australian Newspapers (1994) 182 CLR 211.