WHY BE A JUDGE?

New Zealand High Court and Court of Appeal

Judges' Conference, Dunedin

12-13 April 1996 **The Hon Sir Gerard Brennan, AC KBE**

Chief Justice of Australia

12 April 1996

To ask "why be a Judge?" in a paper given at a Conference of judges is at least a work of supererogation, for each of us has addressed that question when the offer of judicial appointment was made. We have given a variety of answers to ourselves and our families when the offer of appointment was accepted. Now, with the benefit of judicial experience and with the wisdom that hindsight confers - as we know, judicial wisdom depends heavily on hindsight - each of us can see whether his or her decision to be a judge was the right or preferable decision. But retrospection is not the chief reason to address the question "why be a judge?". The contemporary public scrutiny of judges and their functions invites us to state for ourselves what we do and how and why we do it.

Once upon a time, judges were revered and invested with an aura of infallibility. That was in days when social institutions were never questioned and the work of the judiciary was not generally understood. You may remember Lord Devlin's observation that "[t]he English judiciary is popularly treated as a national institution, like the navy, and tends to be admired to excess" [1] . The differences between Lord Devlin's England of 20 years ago and the society we know and the doubtful naval analogy should deter us from taking too much comfort from that statement or, for that matter, from the statements of eminent judges in jurisdictions in which social conditions and cultural attitudes are different from our own.

I understand that popular respect for the judiciary in New Zealand is at a high level. It may be that the opinion recently expressed by the distinguished Canadian jurist, Madam Justice McLachlin [2] , that "the public has never held the judiciary in higher esteem" applies in New Zealand. But, whether Madam Justice McLachlin's assessment is correct or not, she is surely right to conclude [3] that -

"Judging is not what it used to be. Judges are more important now; judges are more criticised. And judges face more difficult tasks than they ever have before faced in the history of the Commonwealth."

Criticism and difficulty in performing tasks are hardly the attractive features of any vocation and yet judges accept appointment. It can hardly be to gain personal acclaim, or an easy lifestyle or affluence. If these are not the incidents of judicial office, is it right to say that society esteems judges to be "more important now"? Perhaps we should start by considering the essential judicial functions and the manner in which they are performed. We begin with the *raison d'être* of the judiciary: the maintenance of the rule of law in a free society.

The Rule of Law

It is axiomatic that peace and order in society can be maintained only by the rule of law. Peace and order exist when there is general conformity with a priori rules, breaches of which result in penalties, nullifications, or other disadvantages imposed by the State. If the miscreant goes unpunished by the State, the victim will take the remedy into his own hands. So will the unpaid creditor, the wronged spouse, the injured casualty and the disgruntled citizen. To achieve peace and order, a government must provide laws that, broadly speaking, tend to diminish injustice and a mechanism to redress injustice by application of those laws. The provision of such a mechanism is not an optional benefit which parties in dispute must obtain for themselves and at their own expense. To the extent to which the machinery of government does not provide for the application of law in the binding resolution of disputes, the rule of law is jeopardised. The resolution of disputes then depends upon the actions taken by the disputants: the choice between resolution by raw force or by fairer methods depends on the election of the more powerful party or the desperation and opportunities of the more oppressed. The most basic, the most important and, happily, the least remarkable function of the judiciary is the binding resolution of disputes according to law.

Of course, disputes could be resolved by a judge who, with or without a hearing, would decide the case in accordance with State policy untrammelled by any law which is not compatible with the interests of the State or the policy of its government. Such a totalitarian resolution of disputes would have to be imposed by force, for the judicial *ipse dixit* would carry no authority of its own. It is the hallmark of a free society that disputes are resolved according to law by courts whose authority depends not so much upon the force available to the State as upon popular (if not universal) acceptance of the authority of their decisions. The authority of the courts at all levels is accepted in our society because they are recognized as the dispensers of justice according to law. It is recognized that freedom - not only peace and order, but freedom - depends, as Professor Winterton has said [4] :

"upon impartial enforcement of the rule of law, of which courts are the ultimate guardians. Although, of course, not infallible, impartial and fearless courts determined to exercise their proper powers are our final defence against tyranny."

Popular respect for the administration of justice by the courts is essential to peace, order and good government in a free society based on the rule of law. Popular respect has been earned by steady and manifest adherence to the judicial method. In practical terms, that means simply that confidence is inspired by the way in which the judges do, and are seen to do, their work.

The Judicial Method

There are four elements of the judicial method relevant to our present discussion: impartiality, procedural fairness, pursuit of justice in accordance with law and exposure to public scrutiny.

The fundamental postulate of the judicial method is that the judge is impartial. Impartiality is the supreme judicial virtue [5] . And it must not be reasonably open to doubt. Subject to necessity, the rule is that a challenge to a decision on the ground of want of impartiality will succeed if "in all the circumstances the parties *or the public* might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him" [6] or her. This is a high standard that precludes any real possibility of judicial conflict between the judge's interests and his or her duty.

Impartiality has two aspects. First, the judge must be free of relationships that might improperly influence the determination of the case or might be perceived reasonably to do so. We can leave aside the more obvious relationships of influence as requiring no comment, save this: sometimes a judge withdraws from a social situation to avoid any prospect of embarrassment in the discharge of his or her duties. It is regrettable that this self-denying ordinance is sometimes construed as a haughty remoteness. It is one of the aspects of the loneliness of judicial life. Apart from obvious relationships of embarrassment, there are other relationships, especially with Government, that might give rise to subtle and impermissible influences. Sometimes it is hard to draw a bright line by which to divide the relationships which must be avoided from relationships that are permissible. For that reason, judges of the Supreme Court of Victoria (which follows a policy expressed in what is known as the "Irvine memorandum" [7]) generally decline to accept an invitation to perform non-judicial functions. Lord Cooke of Thorndon has taken a more robust view [8] :

"Wherever judicial qualities are called for - that is to say, typically, a calm and objective factual judgment on evidence - in my opinion a Judge should be willing to serve. The essential corollary is a judicial approach."

In Australia, I think it would be right to say that judicial experience has shown that the undertaking of some non-judicial functions can embarrass the exercise of the judicial function or suggest to the public too close a connection between the judge and the government. Much depends upon the manner in which the judge is selected, the nature of the non-judicial function, its political significance, the ongoing nature of the task and the extent of interaction with Ministers and their Departments. If non-judicial functions are to be performed by a serving judge, the involvement of the Chief Justice of the Court in the selection of the judge may provide a measure of protection for both the judge and the Court from undue Executive interference.

The second aspect of impartiality is the cast of mind with which the judge approaches the case. He or she will consciously seek to ensure that every party is treated equally before the law, whoever the parties may be, whatever the facts may be and whatever interests will be advanced or defeated by the judgment. But prejudice based on race, religion, ideology, gender or lifestyle may unconsciously affect the mind of a judge as it affects the minds of others. Unless the basis of prejudice might be material to the merits of the case, the prejudice must be recognized and consciously disregarded. This is easy to say; not always easy to achieve. Indeed, it is sometimes difficult to be sure where the wisdom of human experience ends and prejudice begins. Programmes to raise judicial consciousness of the possibility of impermissible bias are commendable. But, in the enthusiasm to extirpate impermissible prejudice, there is a risk of over-reaction to attitudinal bias, which is at least as dangerous as the risk of bias. Perhaps that is why judges are sceptical of expressions designed to give an assurance of attitudinal correctness.

The next element in judicial method is procedure. Procedural fairness, a fundamental postulate of the common law [9] , governs the work of the courts and, with rare and limited exceptions [10] , governs the performance by judges of any non-judicial functions. Courts not only give the parties a full opportunity to be heard; they are also usually under a duty to state their reasons for decision [11] . No other branch of government is so responsive to every application that is made to it. Every litigant gets a response - though oftentimes, and regrettably, after a lengthy and costly proceeding. But a reasoned response is ultimately forthcoming.

The third element is the pursuit of justice according to law. The finding of facts, or the giving of directions to a jury with respect to facts, calls for great experience of the human condition. The notion that judges are immured in an ivory tower, shut off from the activities, emotions, virtue and vice of ordinary life is sheer nonsense, as any observer of the sittings of a trial court would testify. Moreover, judges, most of whom have been successful advocates in litigation practices, have gained an unrivalled capacity to appreciate the facts and the nuances of those situations that arise in litigation in their chosen field.

The facts being fairly found, the law must be applied. As Lord Bridge of Harwich has observed [12] :

"The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law."

The general thrust of this observation can be accepted, but the interpretation and application of the law - even statute law - is not the function of a mere automaton. Nor is it a function in which the demands of justice play no part.

In a Parliamentary democracy, it would not be just for the courts to hold the law to be different from that laid down by Parliament [13] ; but neither should the Parliament be easily taken to have intended to create an unjust rule. Accepting statute law as enacted by Parliament, the courts endeavour to give a just interpretation to a statute so far as its terms admit. And the common law is developed and declared so as to do justice in the conditions of contemporary society. Sometimes, abstract justice competes with, and triumphs over certainty which is itself a material element of justice. Sir Stephen Sedley put the position dramatically [14] :

"Law spends its life stretched on the rack between certainty and adaptability, sometimes groaning audibly but mostly maintaining the stoical appearance of steady uniformity which public confidence demands."

This tension calls for a complex of skills in the modern judge. The simple propositions of a student text book may suffice in some cases, but not in others. The modern judge possesses not only a general knowledge of the law but also skill in the interpretation of statutes and of the judgments of superior courts, awareness of the existence and limits of the leeway in judicial decision making, appreciation of community standards and, on occasion, appreciation of enduring community values and the susceptibility of legal rules to their influence. Enduring community values is not a term masking a judicial assumption of legislative power. Though the term cannot be exhaustively defined, its content in a particular context is not reasonably open to controversy. For example, an enduring value of our contemporary community is that every person should be treated by the law with substantive equality, not merely formal equality. Another enduring value is that a

person should not be liable to criminal punishment unless his conduct has breached an existing law and the person had some moral responsibility for that conduct. If their terms permit, statutes are construed to accord with enduring community values [15] and common law rules that are inconsistent with those values are liable to be overruled [16] . The public expectation is that the law will be just. The judicial method reduces any antinomy between justice and law to a minimum and thereby seeks to fulfil that expectation.

Finally, the judicial method requires that, subject to narrow exceptions, every word that is uttered from the opening sentence of a case to the closing words of an appellate judgment be open to scrutiny. Nothing must be hidden [17] . Justice is not a cloistered virtue. In *Russell v. Russell* [18] Gibbs J [19] expressed a long-standing doctrine when he said of the rule requiring proceedings to be conducted "publicly and in open view" [20] :

"This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret ... distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure' [21] ."

Sir Frank Kitto, when he delivered his classic paper on "Why Write Judgments?" to an Australian Supreme Court Judges' Conference, said [22] :

"The process of reasoning which has decided the case must itself be exposed to the light of day, so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance."

Quoting Bentham, he added:

"Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying on trial."

But the finding or holding of the judge may be exposed publicly to be erroneous by an appeal court or by a majority of a collegiate bench; it may be condemned by the powerful interests it offends or by commentators who find it at odds with opinions that they assert with an assumed authority. Those criticisms must be borne with such fortitude as the judge can muster.

It is by manifest adherence to the basic elements of the judicial method - impartiality, procedural fairness, the pursuit of justice in application of the law and exposure to public scrutiny - that judges have commanded the confidence of the community they serve.

Public Confidence

The earning of public confidence evokes skills and qualities of a high order: unquestioned integrity of character, human understanding, intellectual capacity especially in analysis, knowledge of the law, social awareness, wisdom, patience, industry, and a willingness to expose one's every judicial word and action to public observation and comment. Those who, possessing the necessary judicial skills and qualities, are appointed to be judges are an elite. I do not mean, of course, an elite demanding social rank. I mean an elite because of their pivotal role in securing a peaceful and free society governed by the rule of law. Membership of that elite is no passport to an easy lifestyle. Judging is a lonely life. When the evidence is heard and the argument is over, when the books have been read, we come to the point of judgment. No conscience other than the judge's own can be the guide. No pen but the judge's own can write the reasons for decision or sketch the summing up. No expression of satisfaction can satisfy the judge unless the judge's own standards be satisfied. If the work be done properly, it earns the accolades - albeit seldom expressed - of colleagues who command our respect. The accolades of others, if forthcoming, may give encouragement according to our estimate of their insights.

The dispiriting criticisms that are sometimes offered have led some judges to think that they should undertake a public relations exercise to enhance the judicial image. I suggest that that is a mistake. In the first place, it is difficult to avoid responding to media inquiries that touch upon the decision of actual cases. In responding to such inquiries, a judge may commit himself or herself to a view on a topic that might arise for evaluation in a case for hearing. It is not for a judge to disqualify himself or herself from the full performance of duty by prior public comment. And, at a practical level, few judges have either the skills or the inclination to maintain a relationship with the media which preserves judicial dignity and appropriate reticence while communicating an insight into the work of the courts.

It is one thing to inform the community of the service which the courts provide in securing justice according to law and the way in which they provide that service. That is an objective which enhances public understanding of the courts to the benefit of the community. It is another thing to seek publicity in the hope that media coverage will create a favourable image either for a judge, a court or the judiciary as a whole. Such a hope would be quickly detected by both the media and public. Public confidence must be earned by the regular work of judges in the court room. It is the reality, not the image, which must sustain public confidence.

When ephemeral and unjustified criticism is made of a judge personally or of the judicial institutions to which he or she belongs, it is right to recall what Lord Denning MR said [23] when the then Mr Quintin Hogg QC MP launched a broadside in the press against a judgment of the Court of Appeal:

"It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right".

I do not suggest that judges should shut their ears when criticism is raised, whether in the media or otherwise. Judicial capacity does not include imperviousness to criticism that deserves attention. On the contrary, judicial capacity includes a willingness and an ability to learn from other views, irrespective of the source and irrespective of the terms in which the views are expressed.

Of course, if the public scrutiny of judges is used as the plaything of controversy to destroy public confidence in the administration of justice according to law, an enormous disservice is done to society generally. It should be a sobering thought for captious critics that, if the criticism erodes that confidence, it erodes the protection of the critics to make it. And it should be a comforting thought for the judiciary that the occasions of unjustified criticism are few and that public confidence in the courts is so abiding that those occasions do little to erode that confidence.

However, the burden of heavy caseloads, the tyranny of reserved judgments and the difficult conditions in which some courts operate may depress the judicial spirit. When Governments seem to place little store by the performance of the judicial function, or when media criticism seems to denigrate the judicial office or, particularly, when other judges or the practising profession give some support to these attitudes - whether tacitly or overtly - the judge's perception of the high social importance of his or her work is hard to maintain. At such times, the attraction of judicial office is dimmed. The question "Why be a Judge?" is likely to produce a cynical response. Why be a judge whose every professional word or deed is open to public scrutiny and criticism? Why be a judge who cannot reply to critics lest the appearance - if not the reality - of impartiality be lost? Why be a judge who, under the pressure of work, foregoes other delights of intellectual life - not to mention the demands of family life and the abbreviation of recreational or other extra-curricular activities?

In those quieter moments that we allow ourselves for reflection, we know that the dignity and the fulfilment of the aspirations of free men and women in our complex society depend on the faithful performance of judicial duty. In a complex society, justice would be unattainable without the sophisticated skills and unquestioned integrity of the judiciary. The high importance of the judicial office makes it a privilege to be invited to the bench; the responsibilities of the office create a continuing challenge to proper performance. The trust reposed by the community in the judiciary is an enduring comfort. The stimulus of judicial work is enhanced and its burdens lightened by the support of other judges whose character, intellect and industry command our unfeigned respect. The satisfactions of judicial life of necessity flow from an inner conviction of the service of society in a pivotal role, from the satisfaction of the aspirations of litigants, of the profession, of the public and most importantly, of oneself, and from the mutual esteem of judicial colleagues. These are the considerations, I suggest, that give the true answer to the question: Why be a judge?

1 *The Judge* (1979), at 25.

2 Of the Supreme Court of Canada in her paper: "The Role of Judges in Modern Commonwealth Society", delivered at the 10th Commonwealth Law Conference, Cyprus, 1993 and printed in (1994) 110 *Law Quarterly Review* 260 at 261.

3 ibid at 269. J B Thomas J chronicles some changes in Circuit courtesies in Queensland in his "Epistle from a Judge on Circuit" in (1987) 10 *University of New South Wales Law Journal* 173.

4 ″ The Significance of the *Communist Party* Case" (1991-1992) 18 *Melbourne University Law Review* 630 at 658.

5 See Devlin ″ Judges and Lawmakers ″ (1976) 39 *Modern Law Review* 1 at 4, reproduced in Devlin, *The Judge* (1979) at 4.

6 *Grassby v The Queen* (1989) 168 CLR 1 at 20 per Dawson J citing *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 and *Reg v Watson; Ex parte Armstrong* (1976) 136 CLR 248; *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 at 152-153.

7 Letter of 14 August 1923 from Sir William Irvine to Sir Arthur Robinson, quoted in McInerney ″ The Appointment of Judges to Commissions of Enquiry and Other Extra-Judicial Activities ″ , a paper delivered to the 1974 Annual Judicial Conference.

8 "The Courts and Public Controversy", (1985) 5 *Otago Law Review* 357 at 365.

9 *Cooper v Wandsworth Board of Works* (1863) 14 CB(NS) 180 at 190, 194 [143 ER 414 at 418, 420].

10 G *rollo v Palmer* (1995) 69 ALJR 724; 131 ALR 225.

11 *Deakin v Webb* (1904) 1 CLR 585 at 604-605; *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 666-667; *De Iacovo v Lacanale* [1957] VR 553 at 558-559. And see *Potter v New Zealand Milk Board* [1983] NZLR 620 at 624-625 per Davison CJ.

12 *X Ltd v Morgan-Grampian Ltd* [1991] 1 AC 1 at 48.

13 cf the views of Cooke P in *New Zealand Drivers' Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121; *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398.

14 "Human Rights: a Twenty-First Century Agenda" (1995) *Public Law* 386 at 387.

15 *He Kaw Teh v The Queen* (1985) 157 CLR 523.

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

17 See Devlin, *The Judge* , at 26-27.

18 (1976) 134 CLR 495; and see *Dickason v Dickason* (1913) 17 CLR 50 at 51; *H (falsely called C) v C* (1859) 29 LJ (P & M) 29 at 30.

19 (1976) 134 CLR 495 at 520.

20 *Scott v Scott* [1913] AC 417 at 441. See *Skope Enterprises Ltd v Consumer Council* [1973] 2 NZLR 399.

21 *McPherson v McPherson* [1936] AC 177 at 200.

22 (1973), published in (1992) 66 *Australian Law Journal* 787 at 790.

23 *Reg v Commissioner of Police of the Metropolis; Ex parte Blackburn (No.2)* (1968) 2 QB 150 at 155; see *Attorney-General v Blundell* [1942] NZLR 287 at 289.