39th Annual Dinner Speech

REFLECTIONS ON THE HIGH COURT OF AUSTRALIA*

SIR ANTHONY MASON†

As a former Chief Justice, I have some misgivings about speaking publicly about the High Court of Australia. Fortunately there are some valuable precedents on which I can rely. Sir Garfield Barwick, who was Chief Justice when I was appointed a Justice, has not hesitated to express his opinion of the Court and its work. Although I consider *Cole v Whitfield*[1] to be the most important constitutional decision in my time, because it rescued s 92 from the quicksands in which it had become enmeshed, Sir Garfield described it as 'tosh'. He was not complimentary about *Mabo*[2] and less than enthusiastic about the so-called 'free speech' cases.[3] And my immediate predecessor, Sir Harry Gibbs, has been critical of *Mabo*, suggesting that to refer to *terra nullius* as the judgments did was to refer to a concept unknown to the common law.

Emboldened by these examples, I feel that I can speak of the High Court. There is, of course, the question whether these precedents justify only critical references to the Court. Indeed, perhaps they do no more than justify critical references to the Court's decisions given after the speaker has ceased to be a member of the Court. So, in speaking generally and uncritically of the Court I may be pressing the precedents too far.

My knowledge of the High Court goes back a long way, to the days when I was a law student at the University of Sydney. With Bob Ellicott, then a fellow law student, later to become Solicitor-General, Attorney-General and, for a time, a Judge of the Federal Court, I attended the High Court in Sydney and heard argument in a number of cases.

Sir John Latham was the Chief Justice of the Court then. His judgments impressed me with their clarity. They were easy to read, in contrast with those of Sir Owen Dixon which were more complex and, as I was to discover, more profound. Sir John Latham seemed like a schoolmaster, painstakingly noting the

* This is an expanded and re-constructed version of an address at the 39th Annual Melbourne University Law Review Dinner held at the Savoy Park Plaza Hotel, Melbourne on 24 August 1995.

† AC, KBE; Chancellor, University of New South Wales; National Fellow, Research School of Social Sciences, Australian National University; former Chief Justice of Australia.

1 (1988) 165 CLR 360.

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

3 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

propositions advanced by counsel, seemingly making sure that he had them right.

I say 'seemingly' because Sir Garfield Barwick, in his recently published autobiography, *A Radical Tory*,[4] says that in the *Banks Nationalization* case[5] in the High Court, Sir John misunderstood the argument presented by Sir Garfield and, through this mistake, demolished an argument that was not advanced — a mistake which Sir Garfield exposed in the Privy Council. I am sure that this mistake, if it was a mistake, was a rare occurrence.

Starke J was a member of the Court at that time. He had a formidable reputation as an interventionist in argument, dating back to the time when he joined the Court, shortly before the *Engineers'* case,[6] in which Sir Robert Menzies, then aged 25, was the successful counsel. Sir Robert Menzies records[7] that, after he began to argue that the doctrine of inter-governmental immunity did not apply in that case because the functions were not truly governmental and were trading or industrial, Starke J said, 'The argument is a lot of nonsense'. Sir Robert assented — it must have been the one and only occasion when Sir Robert admitted to talking nonsense. When Knox CJ asked, 'Why are you putting an argument which you admit is nonsense?', Sir Robert replied that he was compelled to do so by the earlier decisions of the Court.

The report of the *Engineers'* case in the Commonwealth Law Reports contains no account of this preliminary hearing in Melbourne where the case was adjourned to Sydney for what proved to be the real hearing. Sir Robert, curiously enough, was appearing for the Union. His future political rival, Dr H V Evatt, was appearing as junior counsel for the State of New South Wales, intervening to oppose the argument presented by the Union. The report of the case recites that Sir Robert's first argument was, 'The Constitution, as part of an Imperial Act of Parliament, should be interpreted as a statute ordinarily is.'[8] Today, that submission reads somewhat strangely, contrasting with O'Connor J's celebrated statement in *Jumbunna*: 'we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.'[9] The *Jumbunna* statement expresses the prevailing canon of constitutional construction. But it did not prevail in *Engineers'*.

My impression, gained from Sir Robert Menzies and others, is that Isaacs J was a formidable judge from the advocate's point of view — confident, assertive and determined to put his view forcefully. No doubt he was instrumental in giving the Court the character which Sir Owen Dixon later was to deprecate. One of the stories which circulated about Isaacs J when I came to the Bar con-

[4] Sir Garfield Barwick, *A Radical Tory: Sir Garfield Barwick's Reflections and Recollections* (1995) 69-70.

[5] *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1; affirmed (1949) 79 CLR 497.

[6] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers*' case').

[7] Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (1967) 38-9.

[8] (1920) 28 CLR 129, 132.

[9] *Jumbunna Coal Mine N L v Victoria Coal Miners' Association* (1908) 6 CLR 309, 367-8.

cerned his fondness for citing decisions on Indian appeals to the Privy Council, a penchant to which his judgments bear witness. During the course of argument in a case, Isaacs J stated that he had a recollection of a cognate point having arisen in a decision of the Privy Council, the name and citation of which he could not recall. Could counsel assist him? Yes, said counsel, naming the case and giving a reference to it. Counsel added that he was unable to read from the case because he had sought to obtain it from the New South Wales Attorney-General's Department's Library — only to be informed that it had been taken out in his Honour's name the day before.

Starke J did not take kindly to Mr Bernard Sugerman, a Sydney KC, who was a very good lawyer but less than an inspiring advocate. On one occasion he interrupted Mr Sugerman saying: 'When do you propose to cease pursuing your peregrinations around the orb of irrelevance?' It was reported that, when he read of Mr Sugerman's appointment to the Commonwealth Arbitration Commission, he was heard to say that the number of Justices of the High Court would need to be increased in order to cope with the volume of work that Sugerman J's judgments would generate. This comment, if it was made, was, in my view, unfair to Sugerman J who achieved a fine reputation as a Judge and later President of the New South Wales Court of Appeal. Starke J was a judge who saw things in terms of black and white. He may well have felt some irritation with the reservations and qualifications which were recurring elements in the arguments put by Mr Sugerman.

When I began to appear before the High Court, Sir Owen Dixon had become Chief Justice. He did not participate much in argument. That no doubt was due to the adverse reaction to the mode of rigorous interrogation and assertion pursued by the Court when Sir Owen was a leading counsel appearing before the Court. He referred to this on the occasion in 1952 when he was sworn in as Chief Justice. He said:

> When I first began to practise before [the Court] its methods were entirely dialectical, the minds of all the judges were actively expressed in support or in criticism of arguments. Cross-examination of counsel was indulged in as part of the common course of argument ... there was a large body of counsel who disliked that procedure ... I felt that the process by which arguments were torn to shreds before they were fully admitted to the mind led to a lack of coherence in the presentation of a case and to a failure of the Bench to understand the complete and full cases of the parties and I therefore resolved ... that I should not follow that method and I should dissuade others from it.
>
> In the course of years I think the temper of the court has entirely changed but it probably has developed opposite defects.[10]

As I said, Sir Owen Dixon did not say very much. He confined himself to cryptic comments, manifesting a sardonic expression. In manner and appearance, he conveyed that sense of Olympian omniscience and detachment which you get when reading his judgments. Occasionally he would evince surprise when a new perspective on a provision such as s 64 of the Judiciary Act was revealed. He

[10] (1952) 85 CLR xiv-xv.

could be helpful to counsel as he was when I argued *R v Davison*,[11] shortly after I came to the Bar. I always felt that he had no desire to be drawn into an argument with counsel. In another case in which I appeared at that time, an agency case, through a slip of the tongue I incorrectly referred to the English decision *Ogdens v Nelson* as *Ogden v Nash*. Sir Owen Dixon was quick to point out my mistake and in such a way as to imply that I had mis-spent my youth in reading Ogden Nash.

Fullagar J was on the Court at this time. He often gave the appearance of sleeping. But this was deceptive. He would make a perceptive comment when apparently asleep and a joke or witticism would always evoke a laugh or chuckle from him, though it always sounded like a laugh or chuckle from a man waking from a deep sleep.

By the time I became Solicitor-General, the composition of the Court had changed significantly. Sir Garfield Barwick was Chief Justice. He and his colleagues were much more interventionist than their immediate predecessors. In those days, arguing a case in the High Court was a hard day's work for an advocate and, whatever the fee was, it was almost certainly well-earned. I recall Sir Douglas Menzies in the robing room in Sydney, when he was a leader of the Bar, after he had spent the day arguing a case before the Court. He was ringing wet. The stiff collar he wore at that time was limp with perspiration. He was an outstanding counsel in the High Court.

It was important when appearing before Sir Garfield to get one's main point across early because, having a very quick mind, he was likely to reach a conclusion during the course of one's argument. Once he made up his mind, he would proceed to expound his view with considerable vigour and skill. Some counsel found him unnerving. But it was quite a spectacle to see him cross swords with a counsel who was prepared to take him on.

Sir Garfield was at pains to discourage counsel from referring to too many authorities and from reading lengthy passages from the cases. In this way he had a lasting impact on the way in which cases came to be argued in the High Court. The past practice had been to read lengthy passages from the cases. Indeed, argument sometimes consisted mainly of a recitation of cases, with relatively little discussion of principle and underlying policy considerations.

Lest you should think otherwise, I should mention that most of Sir Garfield's colleagues were as interventionist as he was. Menzies, Kitto and Taylor JJ were adept at asking difficult, though perceptive, questions, the effect of which was to interrupt the flow of counsel's argument, though in the case of Menzies J it was usually accomplished with wit and humour. Menzies J had a unique perspective on things, as you may divine from the distinctions made in some of his judgments. But this unique perspective was often apparent in the questions which his Honour would ask during argument and they often threw new light on the question under discussion.

Though regarded as a Victorian, he was a Tasmanian. That is why he intro-

[11] (1954) 90 CLR 353 (where the Court struck down a section of the Bankruptcy Act 1924 (Cth) authorising a registrar to make a sequestration order on a debtor's petition).

duced me to Mr Bill Harris, then a QC, as 'the one honest counsel in Victoria', adding, 'He's a Tasmanian.' In one case, when a Solicitor-General was addressing us, he concluded the first part of his argument with the words, 'That concludes the first branch of my argument.' Menzies J responded by saying 'Mr Solicitor, would not "twig" be a more appropriate word?'

For a period of three years, I was a member of the New South Wales Court of Appeal and in that capacity my judgments were overruled by the High Court on a number of occasions. So I was surprised to find on my elevation to the High Court that my judgments at first instance were invariably upheld by the Full Court. I have always been puzzled by the different outcomes. It is not explicable on the footing that when I arrived at the High Court I received an injection of judicial wisdom.

My appointment to the Court was the fourth in the course of a fairly short period of time, Walsh, Gibbs and Stephen JJ having been appointed in the preceding two years or so. The appointments of these courteous judges transformed the style of the Court. And the appointment of a second judge from Victoria gave us a better image in Melbourne. Previously, when Menzies J was the sole Victorian justice, Victorian lawyers referred to the Court somewhat sarcastically as 'The High Court of New South Wales'.

At that time, the Court was peripatetic, sitting in each of the State capitals. At least 50 percent of the work was in Sydney. Nine sitting weeks were allotted to Melbourne (three periods of three weeks each) and two weeks to each of the four smaller State capitals. In Melbourne, little more than half the allotted sitting time was needed as there was a shortfall of work here. Indeed, for much of my time on the Court, Queensland generated as much, if not more, work than Victoria. The fact is that Victoria is less litigious than New South Wales and Queensland. When I was appointed to the Court, it was said by Victorians that the shortfall of High Court work was due to the fact that the Supreme Court of Victoria was better than the other Supreme Courts. That may have been so then. But it does not account for the position in more recent times.

Because the High Court was a judicial caravan moving with its staff around Australia, even a Sydney-based judge spent up to fifteen weeks a year away from home and a Melbourne-based judge even more time than that. The standard of advocacy varied considerably. New South Wales and Victoria counsel were better than their counterparts in other States, though Queensland was not far behind. In the intervening years, the difference between New South Wales and Victoria and the other Bars has virtually disappeared. Queensland has produced some of Australia's leading counsel. Mr David Jackson QC from Queensland, now practising in Sydney, appears more frequently than any other counsel in the High Court. Mr Ian Callinan QC, also from Queensland, is a noted trial counsel who appears in other States. Justice Doyle, now Chief Justice of South Australia, formerly Solicitor-General of that State, was an outstanding counsel in constitutional cases. So the overall standard across Australia is much more even than it was.

Chief Justice Doyle, as a counsel, was an exponent of what I have described as 'the conversational style' of advocacy, a style earlier practised by Sir Maurice

Byers QC, formerly Solicitor-General for the Commonwealth, and subsequently by Mr Michael Black QC, now Chief Justice of the Federal Court. The object of the conversational style is to open up a dialogue with the Bench, in which counsel encourages the Justices to identify difficulties, thereby providing the opportunity for a response. The conversational style calls for a willingness to make reasonable concessions as an essential pre-condition to worthwhile discussion and that, in turn, calls for a clear appreciation of the ramifications of one's argument.

Contrast the traditional style of advocacy formerly in vogue in Victoria. It was what I call 'set-piece advocacy' more in keeping with the trench warfare on the Western front in the Great War, featuring a long build-up before entry into that grey no-man's land where the battle is won or lost. Modern advocacy is more fluid, as it has to be, as the time taken in oral argument is much shorter than it used to be.

In my earlier years on the High Court, two trends became noticeable. One was increased reference in the judgments to North American authority and the other was increased reference to academic writings. I suppose that Sir Garfield Barwick would regard the first development as the first step in what he terms 'the Americanization of the High Court', a view with which I do not agree. For very obvious reasons, the Court had paid great attention to English authority. But once the appeal to the Privy Council was eliminated, the influence of English authority waned.[12] In any event, it was only natural that the Court should heed the way in which the common law had developed in other jurisdictions, particularly the United States, Canada and New Zealand. At the same time, it is necessary to recognise that there are difficulties in looking to the United States for guidance. There is a lack of uniformity of rules across the individual States — you can find authority for almost any proposition. So it is wise to confine your searches to courts of established authority and the judgments of the leading judges.

The Court's references to authority in other jurisdictions are now very frequent. The same pattern can be discerned in the judgments of the Supreme Court of Canada and the New Zealand Court of Appeal. This is not at all surprising in view of what is now called the internationalisation or globalisation of law. But it is interesting to note that the High Court was very much a leader among ultimate courts of appeal in having regard to comparative common law. Unquestionably, that path will be heavily trodden in the future.

It would be a mistake to suggest that the High Court in my time first made extensive use of academic writings. Windeyer J, who was a very considerable legal scholar and historian, earlier made much use of academic materials as his judgments reveal. But the use of academic materials has gathered pace since then. Again, it is noticeable that other courts, notably the Supreme Court of Canada and the House of Lords, are moving along the same path. And, once again, it can be said that the High Court was a leader in this field.

At one stage, virtually all the research was undertaken by the Justices them-

[12] *Cook v Cook* (1986) 162 CLR 376.

selves. Counsel placed little in the way of academic material before the Court. That has changed. Counsel now regularly give references to academic writings and rely upon them. In addition, the Court has an excellent library with a reference librarian and two research assistants. Add to that the Justices' associates, who are generally graduates with first class honours in Law, and you will see that the Court is well equipped to keep pace with developments in legal thinking here and abroad. The Justices do not have as many associates as Justices of the Supreme Court of the United States have clerks. Each Justice of the US Supreme Court has five clerks. And in Canada, the Justices have three or four clerks. But the Law Lords have no associates and they share the use of secretaries. What is more, by our standards, they lack adequate accommodation and facilities. That is the penalty you pay when you are a member of what has been called the most exclusive club in the world — the House of Lords.

One consequence of the examination of comparative law is that the volume of materials which the Court is required to consider is quite daunting. The explosion in the number of law reports and academic writings since I entered the profession, and for that matter since I was appointed a judge in 1969, has been remarkable. That is one of the problems facing the Court — how do you digest and distil all this material within a reasonable time frame? That is why some judges believe that fewer cases should be reported.

Another consequence of reference to comparative law and academic materials is that the judgments tend to become longer. Indeed, there has been criticism of the length of the Court's judgments. In the past, I have seen some virtues in the 'telegrammatic' judgment style in vogue in the United States. It is more reader friendly. On the other hand, the reputation of the High Court, not only in Australia, but overseas, rests on the scholarship of the judgments and that is not a reputation to be sacrificed. For whom should the judges be writing? That is one question on which you can speculate.

Likewise, in constitutional cases, there has been a vast increase in the amount of materials presented in argument. The Court's decision that the Convention Debates are a legitimate source of information and the Court's use of history as an aid to interpretation have played a part in this, though I do not think that the Convention Debates take much time in argument. But the information now provided goes well beyond these materials, resembling an unstructured version of the Brandeis brief. In the same way, the recognition that Hansard may be a legitimate source of information in connection with statutory interpretation is another vehicle for submerging the Court in paper. But, like the Convention Debates, reference to Hansard takes little time in argument.

In the light of these developments, it is not surprising that more use is now made of written argument. Written argument now plays a prominent part in the hearing of special leave applications. The imposition of time limits on oral argument in these applications has meant that counsel have been compelled to present persuasive written argument. It is generally agreed that the new system is working well. In longer constitutional cases and appeals, comprehensive written argument is usually filed and served. The written argument reduces the time that would otherwise be taken in oral argument. But I do not think that written

argument in these cases is of the same quality or that it has proved quite as successful. No doubt it is a matter of becoming adjusted to procedure. The old Privy Council books are a very good model of what written argument in an appellate court should be.

When I joined the High Court, an appeal from it to the Privy Council and appeals as of right lay to the High Court. In addition, the High Court exercised a significant original jurisdiction which meant that individual justices were sitting alone when not required for the Full Court. The High Court dealt with most taxation matters. The Full Court often sat as a court of three because an appeal lay from a single Supreme Court Judge to the High Court. In all these respects, the situation has changed.

The appeal to the Privy Council went first in relation to federal matters or questions, and finally from all Australian courts, leaving the High Court to declare exclusively and finally what was law for Australia. One very important reform was the elimination of the appeal as of right to the High Court so that an appeal is now conditioned upon the grant of special leave. That means that the Court will, except in exceptional circumstances, refuse special leave to appeal from a decision of a single Supreme Court judge on the ground that the matter should first be taken to an intermediate court of appeal. The establishment of the Federal Court and its investment with the High Court's original jurisdiction in a wide variety of matters enabled the Federal Court to take on the High Court's taxation work. Although the High Court cannot be deprived of its constitutional jurisdiction under s 75 of the Constitution, it has power to remit such matters to the Federal Court or a Supreme Court, a power which it has shown no disposition to exercise sparingly.

These reforms transformed the High Court into the ultimate national court of appeal and equipped it better to discharge that function as well as its function as a constitutional court. More than that, the abolition of the appeal to the Privy Council meant that the Court was no longer under any necessity to defer to Privy Council precedent or indirectly to English precedent. It means that the High Court is at liberty to declare the common law for Australia, free from the constraining influence of English authority on those occasions where it is appropriate to do so. In saying that, I do not wish to be taken as asserting that such an occasion arises with any frequency. But it is unlikely that the long line of landmark judgments delivered by the High Court in the last decade in constitutional law, public law, common law and equity would have been delivered if the appeal to the Privy Council had still been on foot or, if they had been given, it is improbable that they all would have survived an appeal to that august body.

Now, as things stand, the approach taken by the High Court is substantially similar to that taken by the Supreme Court of Canada and the New Zealand Court of Appeal, though those two courts are interpreting Bills of Rights, one constitutionally entrenched, the other based in statute. There is no Bill of Rights in the United Kingdom or Australia, but the English Courts, in their formulation of public and private law, are being influenced more and more by the European Convention on Human Rights and the interpretation given to it by the European Court of Human Rights in Strasbourg. It is unlikely that Australia will remain

wholly immune from these developments. And it is quite possible, now that the composition of the House of Lords has changed significantly, that some of the differences — and there are not that many — between the English common law and the Australian common law may well disappear.

One thing that is now apparent is that the questions and problems facing courts of last resort, at least in advanced societies, are very similar. Even in jurisdictions which lack a Bill of Rights, like Australia, there is statutory and common law protection of fundamental rights, so the questions arising are of a similar kind, especially in the field of public law. The consequence is that in the jurisdictions with which we are familiar, the courts are now recognised as playing a fundamental role in the protection of the rights and interests of the individual, in shaping and refining our constitutional arrangements and in maintaining integrity in government and public administration.

Much is made of the importance to our system of justice of judicial review of administrative decision-making. But it has a consequential importance which is largely overlooked. The decisions made by government are the battleground of today's democratic politics. More often than not, you will find that the making of these controversial decisions is associated with legal proceedings in a court or a tribunal. In other words, the law is playing a vital part in connection with those decision-making processes of government which are at the heart of political contention. That may help to explain why so much interest is now taken in the composition of the High Court. On the other hand, the law does not play a prominent part in the intellectual life of the community. Perhaps that will change in the future. So far there is little sign of it.

Of the High Court in the future, I am ill-equipped to speak. I lack the qualities of a seer. And, the High Court, like other courts, does not set its own agenda. It decides those cases which are brought before it by litigants. What can be said is that the Court will continue to be called upon to decide questions of public importance which are central to the framework of Australian government and to the life of the community. In a very recent book, *Brennan vs Rehnquist: The Battle for the Constitution*,[13] the author Peter Irons sees the tension in the Supreme Court of the United States as involving a conflict between respect for human dignity and judicial deference to legislative judgment. That is a perceptive observation which may provide an insight into what lies ahead in Australia.

[13] Peter Irons, *Brennan vs Rehnquist: The Battle for the Constitution* (1994).