The Future of the High Court of Australia*

The Hon. Sir Anthony Mason A.C. K.B.E.**

I do not know that there is anyone who can speak with confidence about the future of the High Court of Australia except to say that its future is guaranteed by the Constitution, barring radical amendment to that instrument. As I do not claim descent from gypsy stock and as I read judgments, not tea leaves, I have no particular claim to speculate about what the High Court may do or say in the years to come.

In the days when I was on the Court, I pointed out that there was even difficulty in determining what the Court had done in the past and was doing in the present. That was because the Court was said to speak with seven discordant voices. What, for example, was the ratio decidendi of the two *Caltex* cases, *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad*[1] on the recovery of economic loss, and *Environmental Protection Authority v Caltex Oil (Aust.) Pty Ltd,*[2] on the privilege against self-incrimination as applied to corporations? Someone once suggested, rather unkindly, that there was one decision in which the seven discordant voices had expressed nine different opinions. The implication was that at least one Justice had, unwittingly, contradicted himself in the course of his judgment. I am sure that the critic's account of the decision was apocryphal.

In recent years, there has been continuous comment about the Court, much of it inaccurate. That has come about because political journalists in Canberra discovered the Court. They do not understand the way in which courts work. So they tend to endow the High Court Justices with the characteristics of the inmates of the political institutions with which they are familiar. They speak of Justices "voting" as if a judge is engaged in some form of political activity and as if the Court has an

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1 (1976) 136 CLR 529.

2 (1993) 178 CLR 477.

agenda. They reduce individual Justices to stereotypes and describe them in simplistic terms which are borrowed from some unidentified social sciences lexicon. The terms commonly used are "radical", "progressive", "civil libertarian", "authoritarian", "conservative", "centralist", "States rightist".

One columnist, Mr Padraic McGuinness, a tribune of the people who writes in "The Sydney Morning Herald" and "The Age" in Melbourne, features a wheel of fortune of his own design in which he rates High Court Justices and describes them by these or similar adjectives. He used to treat me as a schizophrenic personality who had undergone some form of doctrinal conversion on an imagined road to Damascus. So I appeared on the wheel of fortune twice as Mason Mark 1 and Mason Mark 2.

In every case, the chosen label does less than justice to the complexity of the thinking of the individual Justice as disclosed by a reading of his or her judgments. A judge might be regarded as "conservative" in matters of public law and "progressive" in private law. What is "conservative" and what is "progressive" depends upon the eye of the beholder. But the real point is that, in giving decisions and in writing judgments, judges are responding to particular legal questions rather than open-ended questions and those legal questions have to be resolved by reference to the corpus of legal doctrines and principles, even if there is uncertainty about some aspect or aspects of them, when it may become necessary to have regard to a range of considerations, including policy and values.

The High Court, like other courts, does not set its own agenda. The litigants set the Court's agenda, except in so far as the jurisdiction to grant or refuse special leave to appeal enables the Court to determine which of the proposed appeals brought to it are worthy of its attention. As you probably know, the Court hears special leave applications from Brisbane, Adelaide, Perth and Hobart by video link or digital transmission. It has been a very successful initiative, though on one occasion the transmission from Perth was suddenly interrupted. On the screen which counsel was watching the image of the judges was replaced by that of Ernie, Elmo and Big Bird, the well-known characters in Sesame Street. The present Federal Attorney-General, Mr Daryl Williams QC, was one of the counsel appearing in the case. As I tell the story, his comment was that he didn't notice much difference. However, the then High Court Registrar tells me that I made the comment "I don't suppose counsel could tell the difference" and that counsel agreed when the comment was reported to them. I should add that there is no truth in the pervasive rumour that Big Bird was my role model when I was Chief Justice.

One criticism of the Court was that it had usurped the role of the legislature. This criticism ignores the fact that, except in matters of constitutional interpretation, any decision given by the High Court is capable of being overruled by legislation. Indeed, the Keating Government proposed to overrule legislatively the controversial decision of the Court in *Minister for Immigration v Teoh.*[3] You will recall

3 (1995) 128 ALR 353.

that just before I retired last year the High Court handed down its decision in *Teoh*. By a majority, the Court held that the provisions of article 3 of the Convention on the Rights of the Child –

> [I]n all actions concerning children ... the best interests of the child shall be a primary consideration –

generated a legitimate expectation so that an administrative decision-maker proposing to decide that a child should be deported was required to notify the child or its parents in the event that the decision-maker did not intend to apply the Convention. The Convention which had been adopted by many nations had been acceded to by Australia but had not been implemented by legislation.

The decision excited the then Attorney-General, Mr Lavarch, and the then Minister for Foreign Affairs, Senator Evans — so much so that they introduced legislation into the Parliament to provide that no international convention which had not been legislatively implemented should give rise to a legitimate expectation. The proposed legislation was in turn criticized by human rights supporters. The bill lapsed as a result of the calling of the election earlier this year when the present Government was elected.

These days there are comparatively few instances of legislative overruling of court decisions. That is because a court decision has an important influence on the moulding of public opinion. Though some people say that judges are not well regarded by the community — on what evidence I do not know — in my view the community accepts court decisions and governments are disinclined to run the risk of adverse popular reaction by seeking to overrule them.

Mabo is a case in point. The former government not only accepted *Mabo* but went beyond it in enacting the federal *Native Title Act* 1993. While the present Government may make some amendments to the Act, it is committed to acceptance of *Mabo*. In the result, a decision which was controversial at the time it was delivered consolidated public opinion to the point that no political party was prepared to depart from it. Of course, the decision was itself reinforced by the subsequent enactment of the federal *Native Title Act* 1993.

The overseas experience has been similar. New Zealand has a statutory Bill of Rights which is subject to legislative override. Although it might seem that the New Zealand government has not evinced unalloyed delight with all the N.Z. Court of Appeal decisions on the Bill, it has not sought to initiate any legislation overruling a court decision. Again, the explanation would lie in a desire to avoid electoral unpopularity.

The persistent desire of governments to appoint judges to conduct Royal Commissions and inquiries, often of a highly political nature, certainly supports the view that a decision by a judge on matters of general importance carries great weight. But the conduct of such inquiries plunges the judge or, for that matter, a retired judge into political controversy. Witness the savage attacks made on the

Commissioner in the Carmen Lawrence Inquiry. Whether these attacks indirectly undermine public confidence in the justice system is difficult to determine. But it is a matter of concern to judges of whom many believe that judges should not conduct such inquiries.

Judicial decisions can themselves be controversial. There is no way that judicial decision-making can be shielded from controversy. You don't need a *Mabo* or a constitutional implication to generate controversy. The recent case between the Australian Rugby League and News Corporation is an illustration. You may recall the derogatory parting comments of Mr Murdoch directed at the primary judge Justice Burchett, and earlier the adverse comments made by the then Minister for Aboriginal Affairs, Mr Tickner, about Justice O'Loughlin's decision at first instance on the Hindmarsh Island Bridge affairs. Such comments are to be deplored. However, as the courts continue to decide newsworthy cases, the judges will continue to attract criticism and controversy. The sentencing of offenders, particularly for offences against women and children, has always aroused debate and criticism and that will not somehow mysteriously come to an end.

For a long time judges have sought to remove themselves from controversy. There were two main reasons for this. One was to preserve neutrality. The other was to ensure that there was no loss of public confidence in the administration of justice. So judges emphasized the autonomy of the law and its existence as an independent body of rules. But it is not possible to mask the fact that the raison d'être of the body of rules is to serve society by leading to just outcomes. And there has been a tendency on the part of politicians to leave the decision of controversial questions to the courts in order to avoid the odium of making a decision. *Mabo* is a striking example. The Commonwealth went to the lengths of withdrawing as a defendant and becoming an intervener, but ultimately made no submission to the Court.

The community, at least the intelligent section of the community, is taking more interest in the law and the way in which the courts work. That is only to be expected because increasingly our system of democracy is one in which legal processes are very often working in conjunction, though not necessarily in harmony, with political processes. I could give countless illustrations of that proposition. The entire history of conflict between the Commonwealth and the States over the exercise of power in the Australian Federation is one example of a struggle fought on political and legal battlegrounds. The conflict between the environmentalists, on the one hand, and governments and the timber industries on the other hand, is another example, as is the struggle of the Aboriginal people to advance their interests over a range of issues, especially land rights.

Resort to legal proceedings as an element in an overall political strategy designed to achieve legal and political goals is not an uncommon tactic. The indirect effect of this tactic is to focus attention on legal issues and the law and to sharpen public focus on the decision-making processes of democratic government. That is because the legal proceedings are often directed to securing judicial review of administrative decisions. The on-going campaigns relating to the extension and use

of Sydney Airport and the Hindmarsh Island Bridge affair are recent illustrations. In other words, our system of democratic government is evolving in a way in which law is playing a prominent part in setting the ground rules for democratic decision-making and in supervising the way in which decisions are made. Law is providing practically, as well as theoretically, the framework for Australian democracy.

This development is threatening the monist theory of democratic government. According to that theory, a government is elected to take such action as it thinks fit while it is in office, the only recourse of the electorate being to vote it out of office if the electorate is not satisfied with its performance. That is a somewhat dispiriting view of democratic government, one not calculated to make government directly responsive to the will of the people. Yet it is held by many politicians — so long as they are in office. Fortunately, that view is giving way to a more responsive notion of democratic government.

Indeed, if the TV program "Yes, Minister" is an accurate barometer of how politicians behave, politicians are too responsive to instant electoral whims. I am reluctant to rely on "Yes, Minister" as an authoritative program because that will only encourage others to rely on "Rumpole of the Bailey" as an authoritative depiction of the judge. Seen through the eyes of Rumpole, the English judge is an oafish monster oozing class prejudice from every pore and deaf to all arguments calling for justice or fairness.

Recent decisions of the High Court reinforce responsive democratic government. First, there are the decisions recognizing the implied freedom of communication as to political discussion. They promote the concept of deliberative democracy and enhance the democratic processes of government. Secondly, there is the decision in *Coco v The Queen* in which the High Court insisted on an unmistakably clear expression of legislative intention to abrogate or curtail a human right or a right protected by the common law. That principle will ensure that the legislators' attention will be directed to any legislative violation of such rights. In one sense all these decisions may be regarded as decisions which protect human rights. But they are, in my view, more accurately regarded as cases in which the Court established principles of public law which enhance and protect the processes of democratic government.

Whether the High Court will imply further rights in the Constitution is a question for the future. For my part, I doubt that the Constitution provides particularly promising material for the implication of an array of fundamental rights. I should say, however, that Ch. III of the Constitution has generated more implications than any other part of the Constitution and it may well continue to do so. In earlier days before the Constitution was amended to provide that federal judges should retire at 70, the High Court discovered an implication that federal judges were to be appointed for life. The Constitution was silent upon the question.

I became a judicial victim of the amendment. I was appointed to the High Court in 1972 before the amendment so my appointment as a Justice was for life. By the time I was appointed Chief Justice in 1987, the amendment was in force so, in effect,

by accepting appointment as Chief Justice, I sacrificed an appointment for life for one with a fixed term. According to the theory of inconsistent commissions, a subsequent commission revokes an earlier inconsistent commission. Appointment as Chief Justice is, on that account, regarded as revoking an earlier appointment as a Justice.

I have had some misgivings about the theory of inconsistent commissions. Why does it not operate only to the extent of any inconsistency? In my case, that would still leave me as a Justice of the Court.

When I was Solicitor-General for the Commonwealth in 1965, the then Attorney-General, Mr B.M. Snedden, wanted me to challenge the correctness of the implication that federal judges were appointed for life. He urged me to put to the High Court there was an analogy with imprisonment for life — it does not mean service for life. I succeeded in persuading him that the argument was more likely to enrage the judges than convince them.

In the United States, it is said that in the Supreme Court there is a prevailing tension between the need to respect human rights or human dignity and the need to pay deference to legislative judgment. The tension is not quite so evident here simply because we do not have a constitutional Bill of Rights, but it is present nevertheless. It was evident in the judgments in the so-called free speech cases where the Justices expressed varying points of view with respect to the deference to be paid to legislative judgment. In *ACT TV*, one question was: should the Court defer to Parliament's view that the regulation of radio and television political broadcasting was a reasonable balance between freedom of communication and the public interest in restricting saturation broadcasting which trivialized political issues or should the Court examine the balance for itself or adopt a mid-way approach? That tension will continue to exist and how it works out will be interesting to follow.

Far be it from me to predict what is likely to happen in the field of Commonwealth-State disputes over legislative powers. I don't even know what questions will be agitated. That, it seems to me, is an insuperable difficulty confronting those who endeavour to predict what a Court will do in the future. With so many non-Labour governments now in office in Australia, it is possible that agreement could be reached on greater devolution of central power with a lessening in litigation between the Commonwealth and the States. I doubt that greater devolution will survive long-term if the States continue to be largely dependent on Commonwealth funding. The situation would be different if agreement were reached on a constitutional amendment which would entitle the States to raise additional revenues or even if the States were given access to income taxation.

It will also be interesting to see what, if any, are the consequences of the increasing internationalization of Australian law. *Teoh's Case*, which I have already mentioned, is the tip of an iceberg which threatens to become larger. With the rise of economic rationalism and the power of mega-corporations to drive an international agenda with the support of the United States and the EC, it is probably beyond the effective capacity of the individual nation State to regulate these mega-corporations

effectively. The GATT and TRIPS agreements made in Marrakesh in 1994 in which countries like Australia traded off greater protection for intellectual property, including copyright, for increased access to markets for primary produce, show us that decisions made at an international forum, without comprehensive public debate in this country, can effectively determine questions of fundamental importance to Australians.

Just how our decision-making processes adjust to this development and whether it will result in the emergence of international and regional regulatory régimes are important questions. The answers to those questions may have a profound impact on our domestic law. One distinct possibility is that in order to regulate effectively the activities of the mega-corporation an international legal régime enforceable according to domestic laws will be necessary.

One aspect of the relationship between international conventions and domestic law which I should mention is the Optional Protocol to the International Covenant on Civil Political Rights. It generated the decision of the United Nations Human Rights Committee in Geneva on the provisions of the Tasmanian Criminal Code prohibiting homosexual conduct in private between consenting adults. The Committee in the *Toonen Case* held that the provisions contravened the Covenant. Australia has acceded to the Covenant, but has not implemented it by legislation. To give effect to the decision, the Commonwealth Parliament enacted legislation inconsistent with the Tasmanian provisions so that s. 109 of the Constitution would operate.

The Optional Protocol, as exemplified by the *Toonen Case*, enables alleged violations of the Covenant to be taken to the Human Rights Committee. A decision given by the High Court on the Australian common law might not conform to the provisions of the Covenant giving rise to the possibility that the Committee could decide that Australian law violated the Covenant. The possibility that our courts could be required to apply principles of law inconsistent with the Covenant so as to lead to such a result is clearly unsatisfactory. It is a reason for endorsing so much of the *Teoh* decision as permits subject to certain qualifications recourse to a convention in formulating the common law.

Indeed, in an article published in a recent issue of the *Melbourne University Law Review*, Mr Geoffrey Lindell has referred to the possibility that a person punished by the Federal Parliament for contempt of Parliament could invoke the Optional Protocol and procure from the U.N. Human Rights Committee a decision that the punishment by Parliament without a trial in a court violated the Covenant. In other words, he suggests that the Committee could hold that the cases of *Browne* and *Fitzpatrick*, in which I appeared in my very early days as a barrister some 40 years ago, were wrongly decided.

So far as the development of general law is concerned, it is largely a matter of ascertaining what is happening in other common law systems to which we have looked in the past — the United Kingdom, the United States, Canada and New Zealand. The issues which arise in those jurisdictions will arise sooner or later in

Australia. The High Court takes close account of the decisions reached by ultimate appellate courts in those countries. A pattern of consistent decisions in other jurisdictions is often persuasive. But the High Court does not always follow overseas decisions. The very recent refusal of the High Court in *Nelson v Nelson* to follow the 1994 decision of the House of Lords in *Tinsley v Milligan* is a salutary reminder to us of that proposition. A cynic might say that the unifying theme in the four separate judgments delivered in *Nelson v Nelson* was disapproval of the House of Lords' decision. But I am no cynic.

I should conclude with a comment about a procedure that could affect the future of the High Court and that is the possibility that U.S. Congress style confirmation hearings of judicial appointments might be introduced. I think that is unlikely because it would operate to fetter the discretion of the Executive Government to appoint the person it wants to appoint. It is significant that Attorney-General Lavarch's proposals published two years ago for opening up the procedures for appointing federal judges fell by the wayside. There are other objections to confirmation hearings. The principal objection is that they do not appear to provide useful information about the candidate's capacity to serve as a Justice of the Supreme Court.

But they certainly make great entertainment. Justice Deane and I were attending an international judicial conference in Washington when the confirmation hearing of Justice Soutar's appointment to the Supreme Court of the United States was being televised. We found it provided compelling entertainment. Justice Soutar was very adroit in answering difficult questions.

Over time, our own system of appointment has served us well. It should not be abandoned for a different system whose main purpose would be to provide further grist for the media mill.

I conclude by saying that most of my professional life has been centred on the High Court of Australia. I have always taken great pride in the High Court — in my view it is Australia's greatest institution — and I continue to do so now that I have left the Court.