In Judgment

A Talk by The Hon. P.D. Cummins
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The source of the judicial function is the oath or affirmation of judicial office. Twenty- one years ago I swore that I will at all times and in all things do equal justice to the poor and to the rich and discharge the duties of my office according to law and to the best of my knowledge and ability without fear, favour or affection. Those words or their kind resonate with all judges. They echo down the years, for they can be clearly heard in the command of Edward III in 1346:

> "We have commanded all our justices that they shall from henceforth do equal law and execution of right to all our subjects, rich and poor, without having regard to any person, and without omitting to do right for any letters or commandment which may come to them from us, or from any other, or by any other cause" [1]

Upon his swearing in as Chief Justice of Australia in the High Court in Canberra in April 1995, Sir Gerard Brennan reflected upon the judicial oath. In a lovely passage, he said:

> "It is rich in meaning. It precludes partisanship for a cause, however worthy to the eyes of a protagonist that cause may be. It forbids any judge to regard himself or herself as a representative of a section of society. It forbids partiality and, most importantly, it commands independence from any influence that might improperly tilt the scales of justice. When the case is heard, the judge must decide it in the lonely room of his or her own conscience but in accordance with law. That is the way in which right is done without fear or favour, affection or ill will". [2]

The judicial function, extracted from the judicial oath or affirmation, involves those elements, familiar to us all, which judges are required, and seek, to fulfill: integrity and probity; fairness; impartiality; independence; loyalty to the law; and deepest of all, the attainment of justice. Much has been written on the elements, but they have not been expressed more clearly, or more simply, than by tradition attributed to Socrates:

> " Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially."

What is required is not the form – silence does not constitute listening – but the actuality of the Socratic injunction.

[1] 20 Edw. III, c.1
[2] (1994 – 1995) 183 C.L.R.x.

The Socratic injunction, translated into contemporary performance of the judicial function, involves the shaping of enduring requirements to modern needs. Hearing courteously and answering wisely have always been required of judges, not only for their own sake (sufficient justification alone) but also to avoid the appearance of bias. Bacon wrote:

> "Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well-tuned cymbal. It is not grace to a judge to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions though pertinent". [3]

Sir Owen Dixon, speaking upon taking the oath of office of Chief Justice in Sydney in April 1952, reflected upon an earlier period of judicial reception in the High Court in which

> "....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 a failure of the Bench to understand the complete and full cases of the parties..."[4]

Counsel's submissions should always be " fully admitted to the mind".

A modern court is a proactive court. It is one which identifies the real issues early and eliminates irrelevance and waste. Rightly so. The courts are public entities, not the playthings of the parties. But the discipline and benefit of a proactive court are not achieved by judicial arrogance. They are achieved by the judge being on top of the material and by penetration of mind. Spare and relevant judicial questions are much more productive than rudeness or bluster, which should have no place in a court. Counsel respond positively to knowledge and to relevance. Judicial management and entirely proper accountability for time and cost can be achieved without jeopardizing the fact of impartiality or creating the appearance of pre- judgment. That is a modern tension which can be resolved, and daily is resolved, by judges. The tension between restraint and efficiency should not be resolved by abandoning the one or the other.

Listening courteously and answering wisely are the clothes of fairness. Fairness is the abiding operational virtue of judging. Its absence was sharply put by Lord Justice Mac Kinnon when he wrote over the initials F.D.M. in a Note entitled " The Origins of the Commercial Court" and by Cyril Harvey in *"The Advocate" Devil* in 1958:

[3] Bacon, Sir Francis:"Of Judicature": Essay LVI, in Essays or Counsels Civil and Moral (1625: Oxford 1911) 162.
[4] (1951-1952) 85 CLR xiv-xv.

> "Mr. Justice J.C. Lawrance was a stupid man, a very ill-equipped lawyer, and a bad judge. He was not the worst judge I have appeared before: that distinction I would assign to Mr. Justice Ridley. Ridley had much better brains than Lawrance, but he had a perverse instinct for unfairness that Lawrance could never approach." [5]

Cyril Harvey in The Advocate's Devil wrote in 1958:

> "In my time there have been some dreadfully bad judges. None was worse than Lord Hewart CJ. Though he had many good qualities which brought him to the front rank in law and politics, he lacked the one quality which should distinguish a judge: that of being judicial. He remained the perpetual advocate." [6]

The third Socratic injunction – to consider soberly – has both ancient and modern lineage. In fifth century Athens, Socrates constantly sought in himself and others, self-knowledge. Two and a half millennia, the cusp of the twentieth century saw the publication of Freud's *The Interpretation of Dreams* and recognition of the role of the unconscious. In their different times and ways, Socrates and Freud provided pathways to knowing oneself. There are gender and cultural values in the law and we need to be aware of them. The appellate process is no remedy if the appellate court is as blindsided to those values as the court below.

The fourth Socratic injunction – to decide impartiality – also is both ancient and modern. Impartiality has always been a pivotal requirement of judicial function. Related to it is independence - of the arms of government and of other external influences. These are essential judicial elements. Our system of government rests upon the separation of the powers: of Parliament, the Executive, and the Judiciary. Each is complementary but different. Acts of Parliament are scrutinized by the Courts. Actions of the Executive are judged by the Courts. The State often is a party before the Courts. Indeed the Secretary often has been a party before me – not personally, but in a representative capacity. It is essential thus that the Executive and the Judiciary are separate. There is no higher honour than to be a public servant – to serve the public. Judges serve the public, but are not and cannot be public servants. Impartiality and independence of the other arms of government are essential to the judicial function.

I have spoken of judges judging. What of judging judges? Judges in the performance of their judicial function are constantly judged. We sit in public; we give reasons which are published and can be examined; and there is an appellate process. However, judicial conduct off the Bench, and some judicial conduct on the Bench, such as rudeness, sexism, or slowness, are not the subject of appellate process. Traditionally it is the Head of Jurisdiction who deals with such matters, in private. In the modern world of transparency and responsibility, I think that this is not enough. We are moving in the right direction -

[5] Mac Kinnon L.J. (1944) 60 Law Quarterly Review 324.

[6] Quoted in Shetreet, S. Judges on Trial 241-242..

the 2005 legislation following the Sallman Report, and Justice Statement Two of 2008 - but we are not there yet. I consider that the time has come for a permanent, independent body in relation to judicial conduct on and off the Bench, such as a Judicial Complaints Commission. There are eight points I would make about such a Commission. First, judges are both independent and accountable: the two characters are not mutually exclusive. Second, a Commission should be independent of the Executive. Third, it should be formal and transparent: at least its decisions and reasons should be public; how much of the process is public (the more the better) may depend upon the nature of the matter. Fourth, there should be a strong filter: most complaints will be misconceived ("I lost"), frivolous or subjective, or subject to the appellate process. Fifth, it should deal with removal from office cases and also cases involving less than removal, for prophylactic reasons. Sixth, it should deal with conduct both on and off the Bench. Seventh, resignation from judicial office should be no bar to pursuing and finalizing an inquiry: we have heard enough of the euphemism that the subject has resigned "to protect the reputation of the Court". And finally, I would commend a small and focused Commission, not a large bureaucracy. In the end, judicial officers are public persons who should be accountable in order to protect the integrity of the administration of justice.

I thank you for inviting me to address you and I wish all of you well.

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