THE VICTORIAN BAR

REFLECTIONS UPON JUDICIAL OFFICE

A PAPER by

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REFLECTIONS UPON JUDICIAL OFFICE

I

PRINCIPLES

(a) The Source

The source of 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 with 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 on 21 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 oath or affirmation is well handled, and well worn, and well loved like a familiar stone. But it is no "meere stone", to use Bacon's words: it is the cornerstone

1 20 Edw. III, c.1.

2 (1994 – 1995) 183 C.L.R. x.

upon which the temple of justice rests.

Chief Justice French, at the N.J.C.A. Conference *Judicial Reasoning: Art or Science?* held in Canberra in February 2009 stated:

> "Despite legitimate criticisms there is also, I think, a general recognition of the fundamental strengths of the judicial process at its best. They are: its role in maintaining the rule of law which is central to representative democracy, its independence from political, sectoral or special interests and its aspirations to do justice according to law and to do it with openness, fairness and rationality.
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> It is an important aspect of Australia's representative democracy that the judicial process at all levels is not seen to pursue a partisan agenda. It requires of the judges fidelity to the rule of law. It means, as the judicial oath or affirmation requires, administration of justice according to law without fear or favour, affection or ill-will. It requires that interpretation and application of laws made by the parliament be done according to established and well understood rules and constraints. Where the common law or judge-made law is concerned, it requires recognition of boundaries beyond which incremental judicial law-making will not trespass."

The judicial function, extracted from the judicial oath or affirmation of office, involves those elements, so familiar to us all, which judges are required, and seek, to fulfil: integrity and probity; fairness; impartiality and independence; loyalty to the law; and deepest of all, the attainment of justice. Much has been written upon the elements, but they have not been expressed more clearly, and 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 constitute listening – but the actuality of the Socratic injunction.

(b) A calm and listening court

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 on 21 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

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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.

achieved without jeopardising the fact of impartiality or creating the appearance of prejudgment. 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. The unfortunate case of *Damjanovic v Sharpe Hume & Co*[5], is testament to the unhappy consequences of failure to fulfil the first two of Socrates' injunctions.

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 MacKinnon when he wrote over the initials F.D.M. in a Note entitled "The Origin of the Commercial Court":

> "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."[6]

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."[7]

Salutary indeed.

(c) Judicial self-knowledge

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 later, the cusp of the twentieth century saw the publication of Freud's *The Interpretation of Dreams*[8] and recognition of the

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5 [2001] NSWCA 407 (a litigant in person case).

6 MacKinnon L.J. (1944) 60 *Law Quarterly Review* 324.

7 Quoted in Shetreet, S. *Judges On Trial* 241-242.

8 *The Interpretation of Dreams* was printed in November 1899 but published in January 1900 as Freud considered that year was the commencement of the new century. Many cricketers would wish that 99 constituted a century.

role of the unconscious. In their different times and ways, Socrates and Freud provided pathways to knowing oneself. In contemporary performance of the judicial function, the ancient requirement of self-knowledge translates into the need for knowing one's value system, both conscious and unconscious. To a greater or lesser degree judges know the law, both substantively and adjectivally; their knowledge develops as the law develops, legislatively and at common law; and they seek to accommodate and utilise technological change. These are all familiar coins. Judicial competence, of course, is essential. The centrality of competence and of diligence should never be lost sight of. But the judicial function, rightly, now demands more of judicial self-knowledge. In contemporary fulfilment of the judicial function, judges need to examine their values and premises, both conscious and unconscious – that is, unarticulated or assumed or latent or hidden. There are gender and cultural values in the law. The appellate process is no remedy if the appellate court is as blindsided to those values as the court below. Thus not only continuing judicial education generally, but gender and cultural awareness programs specifically. When these first appeared three decades ago, there was a concern expressed that such programs might involve re-education rather than education. But any judge has the intellectual capacity to distinguish between knowledge and propaganda, and I think that such early concern has passed away. So the Socratic pursuit of self-knowledge has a modern resonance for judges.

(d) Impartiality and Independence

The fourth Socratic injunction – to decide impartially – 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. The authorities on impartiality are well known to you.[9] Judicial impartiality and independence are matters of essential significance.

Thus what is required of judges is impartiality, independence, and fairness – with

[9] Eg. *Livesey v NSW Bar Association* (1983) 151 CLR 288; *Re: JRL; Ex parte CJL* (1986) 161 CLR 342; *Antoun v R* (2006) 224 ALR 51; *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd & Ors v ANZ Banking Group Ltd* (2000) 205 CLR 337; *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex parte Pinochet Ugarte (No.2)* (2000) 1 A.C. 119.

knowledge, skill and capacity – and with personal probity.

(e) Alternative Dispute Resolution

Consonantly with the above principles, I think that it is an erroneous course for the judiciary to enter the full field of alternative dispute resolution.[10] It is clear beyond argument that there are benefits in alternative dispute resolution, and the Attorney and some judges consider it is a path judges should go down – a view I acknowledge. However I think that most forms – not all – of alternative dispute resolution are antithetical to judicial office. Alternative dispute resolution including case conferencing and early neutral evaluation which is fully in the presence of all parties and is in public I consider is consonant with judicial office. I strongly support proactive judicial case management, on both the civil and the criminal sides. That path is both consonant with judicial office and is productive and I consider it the path we should follow. However, the nature and incidents of most forms of alternative dispute resolution, being their private character and their inconsistency with the fundamental principle of *audi alteram partem,* render them inappropriate for serving judges. I agree with Bentham:

> "Publicity is the very soul of justice….
> It keeps the judge himself, while
> trying, under trial."[11]

The question is not whether judges can perform the task well or whether it would be productive for judges to do so – the starting points for proponents of this path. The antecedent, and fundamental, question is the appropriateness of judges doing so. I consider that it is inappropriate. There are ample sources for the task – the Bar and retired judges being two – without the allocation of serving judges to an antithetical task. There is a vast

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10 There is much imprecision in the terminology employed in relation to alternative dispute resolution. ADR is the genus; the species (each different) includes arbitration, conciliation, early neutral evaluation, expert determination, facilitation, mediation and much besides.

11 Bentham, J. *The Rationale of Judicial Evidence: Works of Jeremy Bentham* (ed. Bowling J.) 1843, Vol.4, 317; also *Scott v Scott* (1913) AC 417 at 477-8 per Lord Shaw; *Russell v Russell* (1976) 134 CLR 495 AT 520 per Gibbs J. (as he then was).

literature on this subject.[12]

II

RETIREMENT

Once, judicial office was for life. No longer is it so. Fortunately, significantly increasing life expectancy and a commendable inroad into the confines of ageism have combined to make post-judicial life a substantial prospect. Should there be restrictions upon work after resigning or retiring from the Bench? Differing views are held about restrictions on work upon judicial resignation or in judicial retirement. Bar Rules impose periods of preclusion from appearing as counsel before one's former Court -- 2 years if counsel had been a Judge of that Court for less than 2years, up to 5 years if counsel had been a Judge of that Court for 5 years or more – and likewise on appearing before a Court from which appeals lie to the counsel's former Court.[13] There are some restrictions by solicitors' governing bodies upon solicitors who are retired judges appearing in Court. In Victoria, s 83(4)(ii) *Constitution Act* 1975 provides for the suspension of the judicial pension while a retired judge is engaged in legal practice anywhere in the Commonwealth.[14] In Western Australia, s 15(1) *Judges' Salaries and Pensions Act* 1950 provides that a retired judge who engages in legal practice anywhere in the Commonwealth shall

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12 See generally Menkel-Meadow, G. "Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (in some cases)"(1995) 83 *Georgetown Law Journal* 2663; Sternlight, J.R. "ADR is Here: Preliminary Reflections on Where It Fits in a System of Justice"(2003) 3 *Nevada Law Journal* 289; Resnik, J. "Managerial Judges" (1982) 96 *Harvard Law Review* 374; Luban, D. "Settlements and the Erosion of the Public Realm" (1995) 83 *Georgetown Law Journal* 2619; Galanter, M. "The Emergence of the Judge as Mediator in Civil Cases" (1985-1986) 69 *Judicature* 257; Landerkin H.F. and Pirie A.J."Judges as Mediators: What's the Problem with Judicial Dispute Resolution in Canada?" (2003) 82 *Canadian Bar Review* 249; Boulle, L. "Judicial Policies on Mediation and ADR: Australian Trends" (2004) 15 *World Arbitration and Mediation Report* 194; and Otis, L. and Reiter, E.H. "Mediation by Judges: a New Phenomenon in the Transformation of Justice" (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351. The *Guide to Judicial Conduct* at paragraph 4.8 refers to the matter but contains no concluded statement of principle.

13 Australian Bar Association Model Rules Rule 87A; NSW Barristers' Rules Rule 87(j); Victorian Bar Practice Rules of Conduct Rule 92A; Queensland Barristers' Rule Rule 92; Western Australian Bar Association Conduct Rules Rule 79A; South Australian Barristers' Rules Rule 4.7(b)(ii); Conduct Rules Rule 79A Tasmania; A.C.T. Barristers' Rules Rule 87A; Northern Territory Barristers' Conduct Rules Rule 87A.

14 This provision was introduced by the *Constitution Act* 1975 (Victoria) in response to the stated intention of the retired Mr Justice Sholl returning to practice, and thus is colloquially known as "the Sholl clause".

forfeit the judicial pension. Formerly in England, the Lord Chancellor received a prior undertaking from judicial appointees to the High Court not to return to the Bar upon retirement. In his address "A Changing Judiciary"[15] to the Judicial Conference of Australia at Uluru on 7 April 2001, Gleeson CJ spoke of the matter of work in judicial retirement. He observed that some requirements said to be essential and fundamental are in truth not so and only apparently so because they are familiar. He reviewed changing demographic and work patterns of judges and contemplated their consequences on post-resignation and post-retirement work for judges. On the other hand, Dame Roma Mitchell has spoken and written forcefully about the inappropriateness of retired judges returning to professional practice.[16] I must say I am with Dame Roma. Sir Thomas Bingham in his essay "Judicial Ethics" states that "(t)here are in my opinion a number of sound practical reasons which strongly support (the English) rule that a retired judge may not return to the practice of the law."[17] He does not there enumerate them.

Accommodation, even the present accommodation considered by many to be modest, of return to professional practice will I think ultimately diminish judicial office. Judicial office is not merely another step in a continuing professional pathway. It will be harmed if, in Sir Anthony Mason's vivid image,

> "a Judge may be seen to be a bird of passage en route to some other form of profitable employment".[18]

My own view is that judges should move on, not move back. Moving on to high impartial office as Governor, or to high educational office such as Chancellor of a University, has always been accepted and properly so. The role of Chancellor is changing as Universities are changing but I think not so much as to require change to the traditional view. Moving on to the performance of alternative dispute resolution

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15 Internet address in Selected Bibliography.

16 Mitchell, Justice Roma: "The Appointment of Judges and their Return to the Bar" (1986) *NSW Bar News* 5 and "Retirement from the Bench and Life Thereafter" (1989) *Bulletin of South Australian Law Society* 161.

17 Bingham, Sir Thomas: "Judicial Ethics" in R. Cranston (ed.) *Legal Ethics and Professional Responsibility* 35, 51.

18 Mason, Sir Anthony: "The Role of the Courts at the Turn of the Century" (1993) 3 *Journal of Judicial Administration* 156, 159.

is also accepted. The work is impartial, at arm's length, and suited to the former holder of judicial office. Care should be taken, however, to avoid the appearance (or fact) of entrepreneurship; after all, the retired Judge remains in receipt of a substantial, publicly funded, pension. Undertaking Royal Commissions and Commissions of Inquiry is acceptable. Ongoing teaching and writing are acceptable. Such activities all are the activities of moving on. But I think there should be no going back – that is, to the legal profession. Certainly there should be a capacity to return to the profession if only a short time has been served on the Bench and the judge finds judicial life intolerable. I would put such judicial cooling-off period at two years. Views will differ on the extent (if any) of such period. But once a substantial period, howsoever defined, of judicial service has occurred, I think the Rubicon has been crossed. I consider it is inappropriate for a judge upon resignation or retirement to return to active practice.

There are a number of undesirable realities and perceptions which arise upon return to the profession after substantial judicial service. If to the Bar, opposing litigants (and perhaps legal practitioners) are likely to feel unfairly disadvantaged by the retiree's knowledge of judicial cerebration and also by the status of the retiree deriving from prior judicial office. Merely restricting appearances in time or place does not resolve that oppression. Certainly appearing before one's former Court should not be countenanced early (or at all in my view) or before any directly inferior Court. If to the solicitor's branch, advantages to firm and client even in non-litigious work flow directly from judicial experience. Further, the likelihood is that the holding of the former judicial office will be promoted by the firm as a tool. It would be most undesirable if the reality or perception arose that a judge was head-hunted whilst in office by a firm of solicitors. Qualified judicial retirees have substantial pension entitlements, funded by the public. For that reason, and for the more powerful and fundamental reason that inappropriate or excessive retirement activity diminishes judicial office, restraint in retirement is necessary. As many magistrates do not receive non-contributory pensions, the restraint on that account upon work after retirement is much less than for judges. Even so, judgement needs

to be exercised to eschew work which is incompatible with the holder of judicial office. It would be a most unfortunate legacy if inappropriate or excessive activity upon resignation or retirement led to the loss of the judicial pension for our successors.

In his State of the Judicature address to the 32nd Australian Legal Convention in Canberra on 14 October 2001, Gleeson CJ, having foreshadowed the pronouncement by the Council of Chief Justices of its inaugural *Guidelines for Judicial Conduct*, said, with characteristic economy and illumination:

> "I should sound one note of caution. When people are appointed to judicial office, they are not required to renounce the rights and freedoms enjoyed generally by citizens. There are some who, in their zeal to maintain high standards of judicial conduct, or to protect the reputation of the judiciary, occasionally put forward proposals that overlook the fact that judges themselves have human rights. A rule of conduct which impinges on the rights and freedoms of judges can only be justified upon the ground that it is necessary in order to maintain the independence, impartiality, integrity or reputation of the judiciary. If the suggested rule is not necessary for that purpose, it should not exist. And if it is wider than is necessary for that purpose, it should be narrowed."[19]

I respectfully agree. But views will differ on the application of that principle to discrete matters of conduct.

As to the use by retired or resigned judges of the title Q.C., I must say that I do not agree with it. I make no criticism of persons who so use it, and make no reference to individuals; but I think that the Court should not itself adopt the practice, which has developed apace in the past five years. The title Queen's Counsel is not a mere clothing or decoration. It is an office conferred by letters patent for professional distinction, pre-eminently for work in Court. It is of ancient lineage, and, although its historical antecedents are today largely dormant, nonetheless they are articulate and distinct.[20] Doctrinally, upon conferral by letters patent of the office of superior

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19 Gleeson, CJ "The State of the Judicature": Address to 32nd Australian Legal Convention (Canberra, 2001) 7.

20 *Attorney-General for the Dominion of Canada v Attorney-General for the Province of Ontario* [1898] AC 247;

court Judge, the lesser office of Queen's Counsel also conferred by letters patent is forfeited by incompatibility of office. A Judge is not counsel. We remain on the Bar Roll (Division BII) as a matter of courtesy and which does not involve any matter of substance. Or, as J.D. Merralls Q.C. maintained in (1994) 89 *Victorian Bar News*, the title ceases upon judicial office by operation of merger. I see no reason in principle or doctrine why the office of Queen's Counsel should remain dormant during judicial office. I consider that the office, and title, of Queen's Counsel does not revive upon judicial retirement or resignation.[21]

The title S.C., occurring in Victoria since 2000, does not involve the above doctrinal considerations as it is not an office and (other than in the first couple of years following its institution) is not conferred by letters patent: Rule 14.10 of Ch. II. Honourable though it is, it is a form of professional recognition. For reason of policy rather than doctrine – namely that retired or resigned judges should not give colour to the notion that they are counsel – I consider that such judges should not use the title S.C. either.

Finally, I commend the Bar for its principled stand in relation to the acting judges provision, now contained in s 80D *Constitution Act* 1975 (Vic). The provisions, although doubtless well meaning, offend the vital principle of judicial independence with which we commenced this Paper. For that reason the Supreme Court has informed the Attorney that its judges unanimously oppose the provision. Rightly so.

III

A FINAL REFLECTION

Over my twenty years in judicial office the constitution of the courts has changed. No longer are the superior courts comprised even primarily of former senior silks, often Chairmen of the Bar or the like, whose lives were consumed by work. There is

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Re Treacy's and Another's Application for Judicial Review [2000] NI QB 6.

21 *Marks v Commonwealth of Australia* (1964) 111 CLR 549 at 589-590 per Windeyer J. See Merralls, J.D.: "Some Marginal Notes about Queen's Counsel" (1994) 89 *Victorian Bar News* 51; McCormack, L.: "Effect on the Queen's Counsel Commission of a Judge's Commission" 2008 *Supreme Court of Queensland History Program Yearbook* 25; and Thomas, The Hon J.: *Judicial Ethics in Australia* (3rd ed., 2009), 273 paras 15.6 and 15.7. In this brief section Thomas raises no objection to the practice.

a general policy of judicial diversification. I think that this is a good and healthy development, if the work inherent in judicial office is accepted.

Judicial office involves constant work and personal limitations. There is dignity in work and it should not be the occasion for complaint. Given the high office and the significance of the work of judges, I think that a reasonable expectation for judges is a working week of a minimum of sixty hours. Judges are the third arm of government. Our work has constitutional significance beyond the parties before us, central though they are. With that parameter, a reasonable work-life balance can be achieved because, unlike the Bar, judges do not have the demands and pressures of client conferences and of irregular and unpredictable hours and can work at home at night and on weekends. The regularity of judicial work enables family life, especially children's commitments, to be comprehended in ways difficult to secure in heavy practice at the Bar. Significantly also, judges have secured employment and have the judicial pension for retirement.

The Supreme Court is, and always has been, a great Court. Under our respected Chief Justice it has become a modern court, securing ancient ideals and responsive to modern needs. I warmly commend judicial office to you. I do so for five good reasons, which I rehearse from the least to the most important. There is status in judicial office; less than in earlier times, which I think is a healthy development. There is financial security in retirement: so long as it is not lost for all judges by judges returning to active practice. There is intellectual and personal satisfaction: the work is always significant, and of high importance to the parties, to others affected, and to the wider community. Judges serve the public and are the third arm of government. Judges secure and develop human rights and the rule of law: necessary, but not sufficient, conditions for a just society. These are profound values and satisfactions. And so in the end, one might retire with the honour of Othello's words:

"I have done the state some service, and they know't –

No more of that".[22]

In conclusion, Mr Chairman, I wish to say that I have a profound confidence in, and love for, the Bar. Your responsibility is heavy, and deep, and often lonely. You discharge it in the highest tradition. You fulfil a legal and constitutional function of the highest order. We – the courts and the community – are most fortunate to have you. I most warmly wish you well.

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[22] *Othello,* V.2. 382-383.

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