

Opening Law Term
Opening of Law Term Speeches
by Chief Justice Spigelman AC 1999-2010

Book Launch

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The Hon Sir Gerard Brennan

When I was invited to launch this book of the Chief Justice's Opening Law Term Speeches, I was happy to accept. It is often times said that the judiciary is not sufficiently accountable to the public, yet here is a publication, spanning the previous 12 years, in which the Chief Justice has given an insightful account of the problems of judicial administration and of the judicial system in general in New South Wales. This account appropriately conveys to the profession and to the public the circumstances in which justice is administered in this State.

It was not only because of the nature of the publication that I was pleased to be invited to launch it, but also because it is published by The Law Society of New South Wales. It is one thing for a Chief Justice to speak and to be listened to; it is another thing for his speech to be recorded and kept for future reference; and another thing again for a Law Society, having kept and recorded the speech, to publish it for the public in general as a permanent record. This is indicative of a healthy relationship between the practising profession and the judiciary. It is a relationship which necessarily must be interdependent – indeed, symbiotic. On the learning, skill, integrity, independence and attitude of the profession, the courts are dependent for their ability to do justice according to law. The judiciary depends to a very large extent on the work of both branches of the profession in ensuring that the wheels of justice turn smoothly. For its part, the profession needs to understand the thinking of a Chief Justice whose functions ensure that he or she influences the ethos of the administration of justice.

The role and function of a Chief Justice are multifaceted. As *primus inter pares*, he or she presides over the court sitting in banc or when sitting

with a number of puisne judges. The atmosphere of the court, the ease of communication, the incisiveness of questioning and the reduction of unnecessary argument are all influenced by the presiding judicial officer. Of course, when it comes to the formation of judgments, the Chief Justice has no prerogative to influence the judgments of his or her colleagues. It was Sir Owen Dixon who, on taking his oath as Chief Justice, observed that “all my judicial experience tells me that a man’s influence on the court does not depend on where he sits”¹. Nevertheless, the Chief Justice bears a responsibility to ensure that cases are heard and judgments are produced in a timely and efficient fashion. The Chief Justice bears the ultimate responsibility of ensuring that the judges are able to work collegially in hearing cases, in thinking about the issues, in deciding, in writing and in publishing their judgments.

Together with other members of the Court, the Chief Justice must keep an eye on the rules and practice of the court, keeping them up to date so as to facilitate the efficient conduct of litigation by eliminating unnecessary formality without losing the identification of the essential issues for judicial determination. The administrative role includes relationships with Government and particularly with the Attorney-General. Not least among those functions are the consultations that take place with respect to the recruitment of judges with the expertise required by the court as a whole. The Chief Justice is also responsible for establishing and maintaining relations with the profession. It is not surprising that judicial speeches often times place great importance on the work of both branches of the profession in elucidating the issues for determination and in presenting them in a fashion which allows for accurate and informed judicial determination.

¹ *Jesting Pilate* p 244 at 246

In giving an account of the administration of justice, a Chief Justice never needs to give nor ever gives an account of the reasons for the court's decisions – those reasons are contained in the reasons for judgment published by each participating judge. An account of the central features of judicial activity is provided by the open conduct of the courts and the publication of reasons for judgment. But it is desirable that the Government, the profession and the public should be given an understanding of the problems which affect the ability of the courts to administer justice according to law. This is what Chief Justice Spigelman has done. His Annual Addresses for the Opening of the Law Term are, so to speak, speeches portraying the state of the New South Wales judicature. They are notable for their broad conspectus of important issues and for the breadth of research and interest displayed by the Chief Justice. These qualities no doubt contribute to the intellectual vitality that enlivens the court over which he presides.

There are some clear themes in these Speeches, and I would mention some of them. First, the nature of the role and function of the Supreme Court. It is not a dispute resolution service available for hire by the litigants. It is a function of the Government of the State. On the performance of this function depends the operation of the rule of law: the performance of the economy no less than the protection of individual freedoms demand the application of the rule of law. The Chief Justice recalls the chaos which ensued over a century ago when Sir Henry Parkes, then Premier of the Colony, directed the police to ignore the orders of the court – an impossible situation, until the Government finally capitulated and grudgingly accepted the court's authority. Without it, as he reminds us, passions would prevail. He has winkled out a dramatic

passage attributed to Shakespeare in a play on Sir Thomas More which had been banned and which was never performed until 1994. It is worth repeating in this gathering the passage which the Chief Justice's research has unearthed as coming from the pen of Shakespeare. It is a passage in which rioters were pressing for the removal of foreigners from London, More's response being as follows:

*“Grant them removed, and grant that this your noise
Hath chid down all the majesty of England;
Imagine that you see the wretched strangers
Their babies at their back, with their poor luggage,
Plodding to th' ports and coasts for transportation,
And that you sit as kings in your desires,
Authority quite silenced by your brawl,
And you in ruff of your opinions clothed;
What had you got? I'll tell you. You had taught
How insolence and strong hand should prevail,
How order should be quelled – and by this pattern
Not one of you should live an aged man;
For other ruffians, as their fancies wrought,
With selfsame hand, self reasons, and self right
Would shark on you; and men like ravenous fishes
Would feed on one another.”*

The citation of this passage is followed by reference to Robert Bolt's “A Man for All Seasons” in which the author has More saying to his ambitious son-in-law, Roper: “I'd give the Devil benefit of law for my own safety's sake”. The Chief Justice comments:

“One of the principal reasons why the judicial task is often thankless and prone to controversy is precisely because we are obligated to protect the legal rights of unpopular people. The judicial oath requires no less.”

Perhaps an encouraging factor is the Australian capacity for diminishing the categories of unpopular people. The Chief Justice refers to “our

extraordinary capacity for the integration of disparate groups into a cohesive, tolerant and inclusive society.” He lauds the adversary system’s acceptance of individual autonomy in the conduct of litigation and the civility of exchanges in the curial environment. Nonetheless, there are occasions when the obligation to protect the rights of unpopular people can give rise to public misunderstanding, particularly in the matter of sentencing. Although many, if not most, people will agree with a sentence once the full facts are communicated, selective reporting tends to create an impression of disparity between the circumstances of an offence and the proper level of punishment. This has the unacceptable result of eroding public trust in the judicial process and sometimes the creation of a regime of mandatory sentences which inevitably produce injustices. Judicial trust in juries has led the Chief Justice to propose, however tentatively, a mechanism for judges to consult with jurors about the appropriate level of sentences. Whatever might be thought about that proposal, it indicates the importance which the Chief Justice rightly attributes to public confidence in the judiciary and the judicial process.

The function of the courts is so central to an ordered society that litigation must be efficiently conducted. The contributors to this ideal are not only the courts but both branches of the profession. Thus the Court supports the development of new technology and the profession avails itself of it to eliminate unnecessary and time consuming searches and filings. The profession’s role in the administration of justice imposes fiduciary obligations on practising lawyers. The profession cannot be organized simply on competition principles which neglect or diminish the ethic of service to clients and the public. The Chief Justice is profoundly sceptical of the device of “Chinese walls” which carry a false aura of inscrutability and ancient wisdom but which he would rather describe as a

“dingo fence.” He sees the financial crisis as renewing the profession’s moral code which emphasises honesty, fidelity, diligence and professional self-restraint and which, he anticipates, “will resume its salience over the pursuit of commercial gain at the core of legal practice.” He voices a concern about costs which are disproportionate to the amount involved in litigation and he is opposed to billable hours as placing a premium on inefficiency.

He welcomes the development of a national profession and is rightly concerned to ensure that a National Legal Services Board should be constituted independently of the Executive Government, a view which carries the authority of the Council of Chief Justices. The Chief Justice suggests that interstate resolution of disputes may be assisted by the uniform adoption of the UNCITRAL Model Law for arbitration, though that model itself has been subject to some criticism². It may be that only a minority of practitioners would wish to practice nationally, but the advantages are worth pursuing.

The Chief Justice would welcome the creation of a national judiciary, fulfilling an aspiration of Sir Owen Dixon that there might have been a judicial system “neither State nor Federal but simply Australian.” If such an aspiration were to be fulfilled, perhaps it would have to be both State and Federal and thus Australian. But in the meantime, judicial exchanges among State and Territory courts contributes to the growing conception of a united judiciary.

² Mantilla-Serano, Fernando and Adam, John *UNCITRAL Model Law: Missed Opportunities for Enhanced Uniformity* (2008) Vol 31 UNSWLJ 307;
<http://search.informit.com.au/documentSummary;dn=150492229875512;res=IELHSS>

The Chief Justice celebrates the virility of the Australian legal profession and the quality and integrity of the Australian judiciary. The reputation of the Australian legal system has given impetus to our relations with the judiciaries and legal professions in Asia and the Pacific. Judicial exchanges have facilitated a cross fertilisation of ideas and an appreciation of factors relevant to litigation of international commercial issues.

This book is designed to record some developments and issues which shape the State's judicial system and give some inspiration to the profession's leaders. As these developments and issues underpin the rule of law and the peace, order and good government which it produces, the publication of this book is a fitting tribute to the reflection and scholarship which inform the Speeches. I have much pleasure in launching "Opening Law Term."