Chapter Three

The High Court

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I should like to start by reading you some passages that I first read a couple of years ago. I have edited them to the extent necessary to conceal the source long enough for me to make a simple point. I shall identify that source in a moment. These are the passages:

"An early flash point with one clan ... illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the [land,] to dispossess, degrade and devastate the [people] and leave a national legacy of unutterable shame."

"The acts and events by which that dispossession ... was carried into ... effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices."

"[W]e are conscious of the fact that ... we have used language and expressed conclusions which some may think to be unusually emotive for a judgment in this Court."

Well, yes, some may and some, including myself, certainly do. Those passages were of course from the joint judgment of Justices Deane and Gaudron in Mabo v. Queensland [No.2] (1992) 175 CLR 1 at pp.104, 109 and 120. They were written in support of what their Honours candidly admitted, at p.109, was an exercise in justifying the over-turning of, and I quote again, "fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years."

It is almost as if in 1900 or so the House of Lords in England had drastically altered the land law of Scotland to atone for the fact that the English victory in the battle of Culloden in 1746 was followed by a merciless policy of driving the native Celtic highland clans from their glens, never to return. For the English judiciary to have done any such thing would have been regarded as totally out of order and, I have no doubt at all, would have been swiftly reversed by legislation. Not, however, in present day Australia.

In recent years the High Court here has taken a number of initiatives, most conspicuously in the Mabo Case, which have been seen in some quarters, including this Society, as raising questions about the proper role and function of the judiciary under our Constitution. Indeed, the Court has been criticised in terms which drew a personal response from the Chief Justice himself, a notable departure from the usual practice whereby judges are expected to suffer in silence in the interests of our legal system as a whole.

The central feature of the criticisms which have been levelled at the Court is the accusation that it is failing to observe the traditional limits of the judicial function in a common law country and is starting to legislate. Associated with this view has been what some have seen as a lapse in technical standards in order to reach conclusions not readily attainable along orthodox lines.

What I want to do today is consider the validity of these complaints. This will take me into such matters as the nature of the judicial function in a common law democracy; the High Court of Australia as a constitutional but also, necessarily, a human institution; and whether the sentiment in some quarters that "something should be done" about the Court is either legitimate or realistic.

I must make two reservations. The first is that it is impossible, within the limits of a conference paper, to deal with such a far-reaching subject matter otherwise than superficially. Secondly, that that subject matter is itself highly subjective. The most that any commentator can hope to do is to present a reasoned case and avoid the position taken by the tycoon who, on having judgment entered against him, announced that the next time he sued anyone it would be in his own court before his own judge.

I should mention also that, although it is frequently convenient to refer to the High Court as if it were a human monolith with but a single mind, this is often unjust. An outstanding recent instance was indeed the Mabo Case. Rightly or wrongly, that decision attracted trenchant criticism in many quarters. The criticism was largely directed at the Court as a whole, rather than at individual judges. This was, and continues to be, most unfair to the sole dissentient, Mr Justice Dawson. His judgment is a model of the very qualities which the Court was charged with neglecting. I shall try to avoid the monolithic approach.

The judicial system which has become so deeply established in the culture of the English speaking nations originated in the gradual extension of royal power throughout England in medieval times, most conspicuously during the reign of Henry II from 1154 to 1189. As an instrument of royal power its most characteristic feature under Henry II became the circuit.

Under the circuit system, which is still with us, the royal judges travelled regularly to all parts of the country to try cases which had accumulated since the previous circuit. This became known as the assizes, which means of course sittings, and developed into a relatively efficient method of standardising the common law. This expression probably came into use as a reference to the law common to all, as opposed to local customary law.

Our heritage from these distant events is vast, amounting indeed to a powerful social philosophy, an entire way of thinking about society. Its continuing vigour at the present day is constantly evidenced by the passion with which people are prone to argue about such things as juries, justice and the judiciary. For the purposes of this conference however I should like you to ponder one of the most enduring legacies of Henry II's system, its role in the centralisation of power.

Although the system was developed by an exceptionally capable monarch (indeed, in my opinion the best one that England ever had) into a formidable instrument of royal power, it must not be forgotten that there is, except perhaps in a sentimental sense, nothing magic about royalty. (That observation, let me hasten to add, is not intended as a contribution to the current superficial and illinformed debate about monarchy versus republic.)

It follows that although our judicial traditions originated in, and developed through, royal appointments, at first to baronial power and later, as a legal profession emerged, to judicial office, no particular significance should be attached to the word "royal". What is significant is that in our system, just as in the days of Henry II and during all the centuries since, the judges remain fundamentally instruments of central power.

Nowadays this is symbolised by the fact that every judge in the country, on assuming office, becomes a member of the public service, paid and employed by a government. She or he is also appointed by that government. Although we are fortunate in having a judiciary which is entirely free of corruption, and strong laws which protect judicial security of tenure, the obvious potential weakness of such a system, at all events theoretically, is also something which comes down to us directly from Henry II.

It is that Presidents and Prime Ministers have a strong tendency to appoint to the higher and more powerful appellate courts people who are believed either to be already favourably disposed to themselves or likely to become so from gratitude. The best publicised instances nowadays occur in America whenever there is a vacancy on the Supreme Court. Probably there has never been an American President who did not do his best to stack the Court if given an opportunity.

The fact that their expectations of partiality or gratitude have almost invariably been disappointed never seems to discourage them.

The potential for abuse of power in this respect in America however is considerably restricted by the openness of the process and the very public Congressional examinations of presidential nominees. There is also a firmly established practice, arising no doubt out of past disasters, of thorough consultation with legal bodies to ascertain the standing of prospective nominees in the profession.

These precautions contrast with the ludicrous secrecy which, in conformity with the British tradition that we have inherited, operates in Australia. In my view it is highly desirable that in the matter of appointments to the High Court our existing practices be discontinued forthwith and replaced by arrangements along the lines of appointments to the Supreme Court of the United States. I do not on this occasion intend to spell out any particular system in detail.

The essentials are that as soon as a potential appointee is decided upon, the identity of the person concerned be made known, and that she or he be then required to undergo a public examination by a committee which then makes a recommendation to each House of the Parliament. Having regard to the highly polarised and mindlessly combative tradition of party politics in this country, it might be a wise move for the examining committee not to be entirely composed of politicians.

I do not wish to be misunderstood. In making this suggestion, I am neither expressing nor implying any opinion about particular appointments to the High Court, present or past, although of course it would be idle for me to pretend that I do not have any. What I am doing is expressing a belief that the secrecy in which the appointment process is shrouded cannot but encourage suspicions of political partiality whenever, as happens in the nature of things from time to time, the Court hands down a judgment which happens to have political overtones.

One can start almost anywhere, but the period since the second World War yields some striking examples. There was the Bank Nationalisation Case in 1948, 76 CLR 1, in which the Court struck down an attempt by the government of the day to nationalise the banks. In 1951 there was the Communist Party Case, 83 CLR 1, in which the Court struck down an attempt at the height of the cold war to outlaw the Australian Communist Party. Then there was the long series of cases in which the Court was widely perceived to be on the side of the big battalions when it came to tax avoidance. Although not a judicial proceeding, and so strictly speaking not a matter involving the Court as such, although widely perceived as doing exactly that, there was the giving of advice in 1975 by the then Chief Justice to the Governor-General before the dismissal of the Whitlam government.

In 1982 there was Koowarta v. Bjelke-Petersen, 153 CLR 168, on the Racial Discrimination Act and in 1983 the Tasmanian Dam Case, 158 CLR 1, about which I hardly need to remind you. Most recently, in 1992, there has been the second Mabo decision and Nationwide News v. Wills and Australian Capital Television v. Commonwealth, 177 CLR 1 and 106 respectively, on implied freedom of speech.

And for a remarkably sustained expansion of Commonwealth power at the expense of the States, one can start in 1920 and cite all kinds of things, including the extraordinary enlargement during the postwar period of the scope of the external affairs power which I have described on a previous occasion. It is little wonder that the High Court virtually throughout its history has been regularly regarded in one quarter or another as being politically biased, or at the very least overmighty.

It is true that similar charges have been regularly levelled at the Supreme Court of the United States, but with the big difference that every Justice had to run the gauntlet of a sometimes gruelling public examination before being confirmed in office. It is not at all fanciful to see this

as conferring a popular legitimacy which enables that court to play a part in public affairs that would strike many in this country as overmighty if adopted by the High Court.

It is the very lack of that kind of legitimacy that has given rise to the latest wave of unease about the High Court. The lack of it becomes particularly acute in such a case as Mabo, if indeed any previous decision of the Court can be regarded as even remotely comparable when it comes to the creation of new law, the setting aside of well established principles, and the tactic of resorting to emotive language. It becomes all the more acute in such a case because the result, and the manner of arriving at it, is indeed difficult to distinguish from a legislative act.

Obviously all kinds of trivial distinctions between the two processes can be drawn. The manner of debate in Mabo was by formalised legal argument rather than by the relatively flexible expression of political positions. The result is recorded in the relatively flexible form of a series of judgments instead of the formal rigidity of a statute. Such matters do not go to the heart of the difficulty.

The real problem is that, although the line between the two cannot be precisely drawn, legislation effects a change in the law as a result of a policy decision by elected representatives of the people, whereas litigation effects a change in the law as a result of formal technical debate among lawyers, none of whom has been elected to do the job.

That of course puts the difference too simply. Once elected, the representatives of most of the people have little influence over anything, owing to party discipline, and the remainder, their leaders, are interested in almost nothing beyond maintaining or recovering power. Equally, almost no case comes before the courts if the issue it raises has been clearly settled already, so in its very nature the judicial process requires constant refashioning of the law.

These things are not important for the present purpose. What is important is that, however difficult it may be to state with precision, a common law parliamentary democracy operates on a fundamental principle that neither judiciary nor legislature exceed the limits of their constitutional function. A legislature offends against this principle if, for example, it pressures judges by withholding funds and facilities, or interferes in the conduct of a case by commenting on it under the protection of parliamentary privilege.

A court offends by, for example, making a change in the law so profound and far-reaching as to require the authority of the legislature. It is no answer to this to say, as has happened with Mabo, that the court is justified retrospectively if the legislature then passes an Act in the same sense. The court may well have made a correct political assessment but that is not what it is appointed to do.

If it falls into such a habit, it is making a yet more fundamental change in the law than the first one, for it is reshaping the entire machinery of government by refashioning its own constitutional function. The situation is also not improved if the original decision goes far beyond the case originally put to the court, overturns principles in accordance with which the community has shaped its conduct for perhaps 200 years and does so in language invoking unutterable national shame.

I have to say that of the instances I cited above of the High Court acting in a manner which excited controversy, only in Mabo am I persuaded that the charge of exceeding its function by in effect legislating is justified, but in that instance I am so persuaded. To repeat the term that I used in reference to the Supreme Court of the United States, the High Court simply does not have the public legitimacy to reshape fundamental institutions in such a fashion.

I turn now to another possible effect of the manner in which the High Court Justices are appointed. I mentioned the invariable optimism with which Presidents and Prime Ministers try to stack courts and the regularity with which the appointees disappoint their hopes. For the latter we can only be thankful, and continue to cherish the independence of mind of which the common

lawyers are justly proud. There is however a more insidious danger to which highest courts of appeal, in their largely unavoidable remoteness, may be vulnerable.

It is inevitable that the highest appellate court in any common law democracy spends a good deal of time in the immediate presence of the other two major institutions of government, which are the legislature and the executive, including the senior public service. No doubt this is largely representational, and in personal terms in court consists almost entirely of appearances by Solicitors-General (in this country) and a relatively small group of regularly briefed barristers, including former Solicitors-General.

The court itself is similarly likely to include a number of members who have direct or indirect experience of the workings of government. Now, this is not necessarily a bad thing. If the highest appellate court is going to have to decide constitutional cases, it can hardly be a handicap for bench and bar to include people who know something about how government actually works, although it is perhaps unwise in the case of the bench to extend this line of thought to include even former Attorneys-General or other legally qualified ex- Ministers.

It is also understandable that Prime Ministers looking for possible judicial allies will think first of people they know. Nevertheless I would not for a moment suggest that mere acquaintance with a Prime Minister should be an automatic disqualification for judicial office, although in some instances it might be a matter suitable for an examining committee to look into.

What a preponderance of appointments to a final court of appeal of persons with direct or close experience of government brings with it, however, is the danger of creating in the Court, through familiarity, a greater receptiveness to the government's point of view than to the concerns of other parties. This danger is not lessened where, as with the High Court of Australia, the Court spends by far the greater part of its working time in the same metropolis as the government, the legislature and the senior public service.

Again I do not wish to be misunderstood. I am not peddling conspiracy theory about Ministers button- holing judges at cocktail parties to tell them how to remain loved and wanted. Neither am I unhappy to see the High Court occupying spacious and handsome accommodation with impressive facilities. What I am not happy about is seeing the Court permanently housed, or indeed housed at all, cheek by jowl with the government in a town which produces almost none of the work of either of them. The ambience is simply wrong and sends the wrong message to the public at large.

The monstrosity of a fortress in which the Parliament now isolates itself from the electorate is surely enough to go on with, without similarly making the High Court seem even more remote than it necessarily has to be. In my view the Court should still be going on regular circuits with principal courts in Melbourne and Sydney. There is no reason of good government, let alone of sensitivity to the wider community, why it should ever sit in Canberra, still less be immured there. At least the politicians do get back to their constituencies now and then. The remoteness syndrome, incidentally, works both ways. I cannot say that I regard the years since 1980, when the Queen officially opened the High Court building, as being the Court's period of greatest glory.

I would have much preferred to see the principle adopted which applies in South Africa, of all surprising places. It is the only country I know of, unless the latest Constitution has changed this, which has three capitals. The executive capital and centre of government is Pretoria, in the Transvaal. The Parliament sits in the legislative capital, which is Cape Town, in Cape Province. The judicial capital is Bloemfontein, in the Orange Free State. This is an excellent arrangement in principle, and I like to think that it may have assisted towards the fine record of the South African senior judiciary over many harrowing decades.

However that may be, my next suggestion for heightening public and professional confidence in the High Court is to take it out of Canberra. No doubt one ground on which this idea is sure to be resisted is expense. Whilst getting the Court out of Canberra might not in itself make a great deal of difference to the inherent danger of the Court's tending to see the government's point of view rather more readily than other people's, I think it would be a useful component of a policy which had as its central plank the examining committee idea that I advocated earlier. The financial cost of the policy would, I am sure, be a good investment in the public interest.

Summing up therefore, I think the present appointment procedures and physical arrangements for the High Court tend to diminish respect for it in entirely unnecessary ways. This in turn means that decisions of the Court on issues that arouse strong feelings in the community, and are hence exploited by governments and others for political advantage, leave the Court vulnerable to questioning of its intellectual integrity.

This is not in the public interest because faith in the rule of law, which includes faith in those who are entrusted with administering it, is of profound importance to our culture. Furthermore, a danger has now clearly appeared that the Court is failing to perceive the limits of what I have called its public legitimacy, meaning the acceptability of the changes it makes to the law and the manner in which it makes them.

I am particularly concerned about what the next preoccupation will be of a Court which has so recently clearly demonstrated insensitivity to the value of restraint in its approach to its constitutional responsibilities. A Court of this temper is hardly likely, for example, to set a limit to continued exploitation by federal governments of the Parliament's power to legislate with respect to external affairs. The morally self-indulgent spirit of the age being what it is, it is far more likely that we shall now have to endure a comparable amplification of the power to enact racially discriminatory laws.

In my view this would be a disaster. Far from being exploited by governments and broadened by courts, it should be recognised that a power to enact racially discriminatory laws ought to have no place in the constitution of any civilised country. Additionally, in Australia the power has been much misunderstood, and so brings with it the potential for creating the very thing it is mistakenly thought to prevent: racial discrimination. This has happened twice already, in the Mabo Case and in the enactment of the Native Title Act 1993. The Racial Discrimination Act 1975, although not dependent on the race power for its validity, displays the same dangerously muddled line of thought.

It would be sad indeed if, on top of Mabo, the High Court became minded to arrive at further decisions of a comparably radical nature in the belief that the passage of the Native Title Act was in some sense confirmation of the propriety of a court, any court, taking upon itself, at the expense of the law of the land, the teaching of an ill- considered lesson in atonement for supposedly inherited guilt.

Yet I know of no rational ground on which such apprehensions can be put aside. The membership of the High Court will of course continue to change. Unless the present total lack of public scrutiny of proposed appointments is remedied, the danger of any particular High Court assuming a role beyond its functions will always be present. It is true that public scrutiny is no more a guarantee of how an incumbent will act in the future than is prime ministerial guesswork. The process can however be revealing, and is likely to make a prospective appointee think more carefully about her or his answers and future role than may always be the case at present.

One last point. It has been suggested from time to time that the High Court's marked centralising tendency could be countered by ensuring in some way that every State should have at least one Justice on the Court. This approach has received a token degree of acceptance in that by s.6 of

the High Court of Australia Act 1979 the Attorney-General of the Commonwealth is required to consult with her or his State counterparts before a proposed appointment is made.

To judge by the appointments that have been made since 1979 and the present makeup of the Court, not to mention the constitutional decisions that have been handed down during that period, this provision has been ineffective. I am not perturbed by that, because I do not think it achieves anything to turn the High Court into a kind of judicial Senate, or seek State opinions which will undoubtedly be ignored if the Prime Minister disagrees with them.

The basic reason why such measures achieve nothing is that the problem of High Court appointments, and there certainly is a problem, is not one of categories but of secrecy. It does not matter where a proposed appointee comes from. What matters is that there be an opportunity for anything in her or his background which throws light on the proposed appointee's attitude to the job to be thoroughly and publicly explored.

At the outset of this address I said that one of the matters to which it would lead me would be a consideration of whether the sentiment in some quarters that "something should be done" about the High Court is either legitimate or realistic. You will have gathered that I think that sentiment is legitimate to the extent that I have outlined. As to realistic, all I can say is that every time concern is expressed on reasonable grounds about the composition, circumstances and performance of our highest judicial institution, changes become that much more realistic.