5TH APJRF ROUNDTABLE

Singapore 2013

JUDICIAL ROLE IN INTERPRETING CONSTITUTIONS AND LAWS

Judicial decisions about the constitutional validity of governmental action are often controversial. The subject matter of those decisions may be issues about which there is intense public and political debate. Sometimes they are decisions which are seen as touching the very heart and soul of the nation.

Likewise, judicial decisions about the proper construction and application of laws will often be controversial and subject to intense public scrutiny and debate. Again, they may be decisions which touch upon fundamental values.

The public and political debates which surround decisions of the kind I have described will inevitably go well beyond purely legal considerations. The more politically sensitive the issue, the more likely it is that the public debates which occur before, during and after the hearing and decision of any relevant litigation will be expressed in the language of politics. It follows that the public debate is often reduced to very simple terms in which one side is treated as entitled to win for reasons which have nothing to do with the legal issues that may be presented by the litigation.

How can the courts perform their task in cases such as those I have described, yet maintain public confidence in the legal system?

First, it is important to recognise how often courts in many countries must confront issues of the kind I have described. There are many legal systems in which the courts are given the task of ultimately deciding upon the limits of the powers of government. If a court is confronted by an issue of that kind, it must approach its task knowing that what it is doing is not unusual. It is not being asked to decide an issue of a kind which should necessarily be decided by some other arm of government.

Whatever may be the political rhetoric which is being used in public discussion of any particular issue, deciding what is the law is a central, I would say "the central", role of the courts. As a very famous United States Chief Justice said[1], more than 200 years ago, "[i]t is emphatically the province and duty of the judicial department to say what the law is". It is therefore unsurprising that, in many legal systems, it is the courts which are given the task of deciding whether the government or officers of government have exceeded the lawful boundaries of their power and authority or have neglected to perform duties which the law or the constitution impose upon them. And if a court is given this task, the court must perform it.

---

1 *Marbury v Madison* 5 US 137 at 177 (1803) per Marshall CJ.

The second point to be made about the exercise of this kind of jurisdiction is that it is, of course, attended not only by controversy but also by some dangers.

The chief danger which the courts run in cases of the kind I have mentioned is the danger of going beyond the boundaries of what the court can do or the boundaries of how and why the court can reach its decisions. A court will very soon cause great damage to confidence in the legal system if it goes beyond the limits of its functions and powers or if it makes its decisions for improper reasons. A court may cause similar damage if it is thought to have gone beyond those limits.

How can these dangers be avoided?

The first and immediate response to this question would be, I suppose, to decide cases according to law. And that response is, of course, unquestionably right. But the response may be masking some more complex problems which it is useful to attempt to identify.

Most constitutional questions concern the powers of government. It follows that most constitutional questions concern questions about which there will be sharply divided political and public opinions. Many years ago, one of Australia's most famous

judges, Sir Owen Dixon, made[2] the obvious but important point about the Australian Constitution: that it is a "political instrument". It is a political instrument because it deals with government and governmental powers. Hence, Dixon went on to say[3], there may not be a sharp division between political and legal considerations when applying constitutional principles.

The conclusion which Dixon reached may be thought to point to how courts can best deal with difficulties of the kind I have described. Dixon may be read as suggesting that dividing considerations into boxes (one marked "political" and the other marked "legal") in matters of constitutional law is neither possible nor profitable. The point which Dixon sought to emphasise was that what is important in constitutional litigation is whether the considerations which are taken into account in applying principles and reaching a decision are *compelling*.

When faced with difficult and controversial issues about the exercise or extent of government power, the most important task of a court is to explain how and why the court arrives at the conclusion it does. In particular, the court must explain to the losing party why it lost the case. And the losing party must know not only that it had

---

2 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82; [1947] HCA 26.

3 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 82.

a fair hearing of its arguments, and that those arguments were heard and understood, but above all, the losing party must know *why* those arguments were rejected.

Parties who win court cases tend to focus on their success rather than on the reasons for their success. Those who favour a particular outcome of litigation (whatever form that litigation takes) are often much less concerned with why their side won than with the fact of winning the litigation.

Parties who lose litigation of any sort must know why they lost. Even when told exactly why they lost, many losing parties will still see the result as wrong, even unjust.

But the confidence which society at large will have in the legal system will not depend upon the opinions of the immediate parties to litigation. Even in the most controversial case, in which the passions of many are engaged, the question for the court must be and remain: what will a dispassionate external observer make of the reasons which are given for resolving the case this way?

That general question should provoke several others. Will the dispassionate external observer know why the case was decided as it was? Will the observer know *why* the losing party lost? Will the observer understand from what the court says and does that *all* of the court's reasons have been revealed and explained? In particular,

will the observer believe that there were no hidden influences at work when the court made its decision? Will the observer think that the considerations on which the court has acted were compelling?

If all those questions can be answered affirmatively, the court has done everything *it* can do to maintain confidence in the legal system. If any one of those questions cannot be answered in that way, there may be dangers, and the court must ask: why is that so?

The ideas which I seek to express are, in the end, very simple. They are ideas which inform the performance of every kind of judicial work. But they are ideas of special relevance to the hard and the controversial case. And giving effect to those ideas, in cases of that kind, may not be quite so easy as stating them.

I look forward to hearing our speakers and then to the discussion which will follow.

K M Hayne