

REFLECTIONS FROM THE CHIEF JUSTICE

DICTUM EDITORS, NOAH OBRADOVIC & NUSSEN AINSWORTH,
PUT CJ ROBERT FRENCH UNDER THE SPOTLIGHT

Dictum: How do you relax and leave the pressures of the Court behind you?

CJ: I go home. I usually have to take work home. I enjoy reading a wide variety of things. The work of the court is pretty relentless both in terms of preparation for cases, reading all the papers, the submissions, the judgments and so forth, looking at background research that might have been prepared by associates, and then of course, after a case has been heard and argued, preparing draft judgments. We sit two weeks on, two weeks off. We have two non-listing periods each year, one in January and one in July. But you don't get much time to down tools.

Dictum: What is your favourite book and movie? Why?

CJ: The book I remember enjoying most was *Lord of The Rings*—I read it a long time ago. I'm presently reading a book about parallel universes, written by Brian Green, a cosmologist. It's very interesting science.

My favourite movie is probably the film of *Lord of The Rings*. It is one of the few films that actually manages to be faithful to your imagination of a book.

Dictum: What sport and team are you passionate about?

CJ: Passion is wasted on sports and teams.

Dictum: What is your favourite lawyer joke?

CJ: I don't remember. They are mostly so old that I don't think I'd call any of them a favourite. Every lawyer joke anyone ever tells me is a lawyer joke I have heard before.

Dictum: What is one thing most people do not know about you?

CJ: I'm not saying.

Dictum: When you started studying law, what were your aspirations?

CJ: Well, my first aspiration was to graduate. I went into law after completing a science degree with no clear idea of what I wanted to do, but with the sense that a law degree would provide a basis for a variety of occupations, only one of which might be a lawyer.

I deferred any decision committing myself to a particular occupation until the end of the law degree. Then I thought well, I'll do my articles and see what happens after that.

And in the course of articles I was exposed to real people and real problems and the notion that one could find legal solutions to problems, and I became really motivated about the law. That is when my interest really took off.

In terms of defining aspirations, I can't say that I formulated some grand vision of my future in the law at that time. It was a narrow focus on doing interesting things, interesting cases looking for solutions to legal problems and bringing to bear some of my science training.

One case early in my career illustrated that. A fellow student was charged with speeding on his motorbike at twice the speed limit, picked up on a radar gun. He swore black and blue that he'd only been travelling at the speed limit. Now, a radar gun sends out a beam that hits the moving object then the beam is reflected and you combine the ingoing beam and the outgoing beam to get what is called a 'beat frequency', which is a function of the velocity of the moving object. I remembered from physics that the velocity of the wheel at the top of the wheel is twice the velocity at the axle. Which means that there might have been a reflected beam from a part of the wheel going twice the speed of the bike. So I brought along to court a friend of mine who was doing his PhD in physics and we brought along a bicycle wheel and audio frequency generator and a source scope. The Magistrate was absolutely transfixed by the physics but ended up side-stepping the whole question by saying that he accepted the police estimate of speed.

It became more serious with things like breathalysing cases. There was lots of science involved in that, scientific assumptions. I enjoyed getting involved in those things.

So my early focus was on developing expertise on particular kinds of cases without any long-term sense of what was going to happen down the track.

Dictum: What is the one piece of advice that you could bestow on a young law student?

CJ: I have got three words here: understand statutory interpretation.

I think that every law graduate who wants to practice law these days will find themselves immersed in a legal environment which is dominated by statutory interpretation. The common law, equity, contracts, tort are very important but all of those things are embedded in statutory frameworks. It's the legal skill of statutory interpretation—being able to read a statute, being able to recognise the relevance and importance of a statute to rights and liabilities even where you've got a predominantly common law case—that is essential to modern legal practice.

I'm not sure there is enough emphasis given to it in legal education today.

Dictum: Do you believe that Australia in the Year 2011 is a tolerant place?

CJ: I think by global standards it is a tolerant place. Obviously we have some people who are less tolerant than others and there are areas of difference—sometimes discrimination, sometimes negative things said by one group or people about another. But looking around the rest of the world I think, without being complacent, that we are relatively tolerant.

Dictum: You've expressed your hope for Australia to become a republic. What are the three main benefits for Australia in becoming a republic?

CJ: I've said nothing about that since becoming Chief Justice. That debate is now for others and I have no part to play in it.

Legal issues

Dictum: A recent study by the University of New South Wales Gilbert & Tobin Centre for Public Law found that 24 of the 48 decisions decided by the High Court in 2010 reached a unanimous decision. Historically, this is a very high level of agreement. Can you elaborate?

CJ: Well, it's partly a function of the way the judges work together. We are a very collegial group of judges. We have a conference after every case. Not infrequently, if there's a consensus reached, one judge will prepare a draft and if the other judges are happy with the draft then they'll be joined in it.

But it's not a universal thing. You will see in some of our decisions there are separate judgments quite apart from dissents, that is, separate concurring judgments. And the incidence of that sort of thing and the incidence of unanimous joint judgments in the history of the court is in a sense an accident of the particular composition of the court at the time and to some extent the personalities of the judges. And sometimes also due to the character of the cases which come before the court. So I don't think I can draw out any grand principle or theory for you, except to simply say that the judges work together and are working together well.

Dictum: Have the judges historically gone to conference after all cases or is that new?

CJ: I don't know if they've always done that historically, but certainly in my time, the time of my predecessor and I can't say precisely how far back before that, there has been a conference after each case. And as a rule, we'll also have a conference in advance of each sitting to discuss the cases coming up—in a general way without reaching any concluded views—just to explore among ourselves the issues that are likely to arise.

Dictum: How does the court react to criticism from the community, including the media and politicians?

CJ: It doesn't.

Dictum: What are the big issues that the High Court will be facing in the next five years?

CJ: I don't know. They'll be defined by the cases brought to the court. Those cases tend to reflect contemporary social and perhaps political issues, or issues of contemporary social and political significance. The court itself doesn't have any agenda or program; it simply responds to the cases brought before it.

People don't always recognise that. I remember one journalist a couple of years ago asking me about my agenda as Chief Justice of the High Court. I said to him 'I don't have an agenda and nor does the court'.

Our constitutional function is to hear and decide the cases that come before us. Now plainly, by the time those cases get to the High Court they will involve, for the most part, questions of important principle. They may be constitutional matters. They may be matters of private law or public law, but it's very much a reaction to what the community throws to the court.

Dictum: Previous judges seem to have demonstrated different judicial personalities following their appointment to the High Court. As someone who has sat on many courts and tribunals, how has your judicial personality changed with each appointment?

CJ: I'm the wrong person to ask. [Laughs.] Nobody can judge themselves in that way, but I don't think it's changed.

Questions submitted by Victoria Law School faculty and students.

Dictum: Should law schools continue to provide content-rich and largely theoretical courses or offer degrees built around strengthening practical legal skills?

CJ: Well, I think the obvious answer is that you need a balance between the two. Without technical legal skills, the practitioner is useless to the client, if you're talking about practicing lawyers. On the other hand, without some level of understanding of the historical and theoretical foundations of the law, the practitioner's ability to look beyond the narrow focus of particular problems would be confined, and their ability to adapt and participate in the development of law in terms of suggesting reform, would be under-developed. But a point I've often made, not just to students but others who are interested particularly in social justice agendas and public interest law is that you really have to have the technical legal skills to be useful in those areas—in other words, to play a part on that larger stage.

There's a sermon I like quoting, which was given in England in 2006 at a Sunday service at Gray's Inn. The minister talked about the life of St. Paul and ended up by saying 'what the life of St Paul tells us, is that God helps the meek and the humble. He also helps the articulate and the pushy and particularly, the competent'. In other words, it is not enough to be on the side of the angels. If you're going to be useful, you've got to be able to know how to marshal a legal argument, interpret a statute, identify the appropriate remedies, and find the appropriate legal process to follow if it is a matter of litigation.

Dictum: Post *Mabo*, the legislature has played a central role in regulating native law. What role do you think the judiciary has in the future in continuing to promote Aboriginal land rights?

CJ: It's really not the judiciary's role to promote Aboriginal land rights—that's a role for activists within the community and for legislators and the executive. The judiciary is there

to interpret and apply the law including the common law of native title and statutory land rights schemes.

The High Court made a lot of decisions in that arena under the Northern Territories Land Rights Scheme. In relation to the development of the common law which was reflected in the *Mabo* decision, the High Court didn't, as it were, suddenly decide one day to promote Aboriginal land rights. It responded to submissions put to it that the common law could recognise traditional Aboriginal title. There was a very important shift in the common law from what had existed before, when the High Court decided *Mabo*, but I wouldn't call that the judiciary promoting Aboriginal land rights. There are people in the community who promote Aboriginal land rights, but the judiciary's role is not to be a political actor in that sense. If it starts getting into the political arena it compromises its real power to maintain and uphold the rule of law and allow for the development of the common law and the interpretation of the constitution and statutes, and so forth.

Dictum: Do you think that general theories of justice or theories of legal interpretation, such as those proposed by Rawls or Dworkin can be of use to judges and lawyers, or do you consider philosophical debates about law and justice to be of no practical value?

CJ: I think it is always useful to have a larger view of what I might call, the alternate theoretical universes of the law, and of course, there is no single theory of everything.

There's a statement—I think by a cosmologist—which I like about theories of everything, which of course everyone in physics is looking for. This cosmologist said 'there is more to everything than meets the eye'. I don't think there is a single all-embracing theory of how the law works in society. There are a number of different perspectives that are offered by different theoretical approaches, and I think they all have their own value. It is important not to become reductionist or fundamentalist by adhering to one or the other. However, there is great value in taking time out to think about how what you are doing fits in to a larger sphere of considerations. In terms of our judicial systems and the concepts of justice embedded in our laws, one has to ask to what extent do they have theoretical coherence and to what extent can those considerations inform the development of principle.

Dictum: Over the years the bench of the High Court has had some marked differences of opinion. However, justices have not (ostensibly at least!) displayed the same kind of hostile behaviour that seems to be currently permeating federal politics. What do you make of the current political climate and could politicians take any lessons in conflict resolution or diplomacy from the Judiciary?

CJ: Short answer to that is, no comment! [Laughing.]

Dictum: What is your greatest hope for Australia's future? What is your greatest fear for Australia's future? And what do you think will be a certainty in Australia's future?

CJ: Well, I'll duck the certainty question, but if I were to express a hope it is the modest one that the country will continue to be a successful representative democracy which

provides equality of opportunity, recognising that there are many different ways in which that hope can be realised.

I think the thing we do have to worry about is cynicism and disillusionment with democratic institutions. This tends to be corrosive. That's not to say you shouldn't have skepticism and I use the term in contrast to 'cynicism' and 'disillusionment'. I think we always need a healthy questioning skepticism about institutions and how they operate and how they are composed and so forth. Cynicism is the sort of view that says that the whole thing is rotten to the core, there's never any good going to come out of it, and there's no good doing anything to help to improve society and help our institutions, or to work for change.

I think the abandonment of hope is the one thing we have to fear. Where law students are concerned and law graduates: I think it's important to have a sense of a wider role in society. Legal practice needs people who have a wide perspective on what they are doing and who make a contribution in the ways I've indicated.

Dictum: Have you had any experience with student law journals? As the inaugural and flagship law journal of Victoria Law School, what advice can you give to DICTUM?

CJ: No, the only journal I ever edited was a science student's law journal. We put a picture of a comet on the front of it and it sold well, so maybe you can do that with yours. [Laughing.]