Judicial Conference of Australia Symposium
The Role of the Judiciary in a Modern Democracy

Judicial Reticence Session

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Asking a journalist about judicial reticence is rather like asking a poacher about game-keeping. I imagine that judges and journalists approach the subject of judicial reticence with different questions. Perhaps judges ask themselves, what compelling reason is there for me to speak? Journalists ask, what compelling reason is there for anyone in public life to stay silent?

If reticence is the traditional discipline of the judge, openness is the occupational expectation of the journalist. So why ask a journalist about judicial reticence? When judges do decide to speak, and want to reach a wide audience, they do so through the mass media. Presumably judges ask themselves not just what they should say but how it will be heard. The media, for good or ill, has a great influence on what is heard. So if judges could learn what journalists as a class think about judicial reticence, it might change the way the judges approach the question of extra-judicial speech.

I suspect most journalists do not think much at all about "judicial reticence" as a subject in itself. But they do approach any debate about the courts with that traditional expectation of openness. There are various reasons for this expectation, to do with history, self-interest and the public interest. But that expectation has been reinforced by factors general to society and specific to the judiciary. Institutions are now subject to unprecedented scrutiny and criticism. This is often presented as a challenge to legitimacy, a challenge that demands a response. Fairly or not, silence may be interpreted as evidence of illegitimacy in an institution.

Some categories of this criticism are clearly relevant to the judiciary. One of the most dominant can loosely be called the "economic rationalist". This is the reformist ethos of efficiency, competition, and accountability. It tends to be hostile to regulation, restraint and reticence. A profession may insist it defends its traditional values and practices in the public interest. But it is likely to be attacked as merely another vested interest resisting necessary reform. Judicial independence is typically seen as a personal security for the judges, and reticence as a shield against accountability. There is also a "new left" critique of institutions such as the courts. Here, attitudes and decisions are seen as determined by membership of social categories - male or female, "anglo-celt" or those from "non-English-speaking backgrounds", the "indigenous" or "non-indigenous", heterosexual or homosexual. One example of the new left critique of the judiciary was the "gender bias" controversy of a few years ago. It seized upon remarks made by male judges in cases that could be viewed through a feminist prism.

Perhaps a more topical critique of institutions can be termed the "provincial battler". Here, institutions are seen as having been "hijacked" by metropolitan elites whose concerns are remote or antithetical to those of the majority. No doubt there is some truth in each one of these categories of criticism. But they can work as voguish stereotypes, and they certainly influence the kind of media coverage institutions receive. For example, a judge who offers a traditional defence of judicial independence, couched in a formal or abstract way, may well find there is little media interest. Few people watching a television news bulletin would have the grounding in civics to appreciate this kind of traditional defence. But there is likely to be greater media interest in the remarks of a judge who criticises the inefficiency of court procedures, who suggests that discrimination explains the small number of women on the bench, or who insists that judges must make their reasoning more understandable to ordinary people. So, these factors, general to institutions, incline the mass media and its audience to expect openness. And the rhetorical success of certain kinds of criticism means that when judges speak, the hearing of the public may often be selective.

But these criticisms themselves are not unassailable. A direct and vigorously expressed rebuttal of a criticism that has attained the status of a truism may receive considerable media coverage. It may be seen as newsworthy precisely because it runs counter to the accepted view. For example, there seems to be mounting opposition to what is regarded as inappropriate application of free market policies.

Senior judges have pointed to the tension between justice and the "user pays" principle, and their remarks have been prominently reported. But if judges do not take into account the prevalence of certain kinds of criticism of institutions, they could well find the public response (or non-response) to their extra-judicial remarks rather puzzling. There are also factors specific to the judiciary which have reinforced the expectation of openness. There is a lively debate about the proper relations between the judiciary and the political branches. Senior judges have talked more openly about the inevitable judicial choices confronting them. They have dismissed the fairy tale of the declaratory theory. Debating contentious High Court decisions, judges have spoken of giving effect to the contemporary values of the Australian people. They have talked of the ever-greater impact of international law on Australian law. They have said parliaments sometimes prefer to leave the hard policy questions to the courts. They have warned that parliaments are less able to stand between the people's liberties and the power of the executive government.

Some judges have agreed they should try to make more use of the mass media in order to explain to the people what it is that judges do. Judges have made these statements in public speeches, journal articles and media interviews. These statements invite supplementary questions (of the kind Justice Kirby grappled with in his New Delhi lecture on "judicial activism" last January). They are part of debates that seem open-ended.

So it seems unlikely that the pressure for judicial openness will suddenly abate. And it seems likely that most public attention will be captured by extra-judicial speech that in some way engages with the popular criticism of institutions, or with the debate about the respective roles of the judicial and political branches.

But there is nothing to say that the underlying social trends must continue unchanged, indefinitely. It would be surprising if the experience of greater debate about the courts did not have a modifying influence.

No doubt some judges have been trying to weigh the advantages and disadvantages of less judicial reticence. It is striking that the period of strongest criticism of the courts has coincided with the greatest judicial openness. To speculate about cause and effect would be premature. More aware of the nature of criticism directed at institutions, judges may find new ways to communicate traditional values and principles.

Journalists and the wider community may become more conscious of judicial openness as a phenomenon, and reflect on its significance. They may wonder, for example, how representative are the views of those judges who do speak. They may find some contributions dramatically increase their understanding of our system of government. In some instances, they may discover the attraction, as if for the first time, of the traditional arguments for judicial reticence.