JUDICIAL RETICENCE[1]

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As many of you know, a little over 40 years ago Lord Kilmuir, then Lord Chancellor, wrote a letter to the Director-General of the BBC, the terms of which were to become known as the Kilmuir Rules which would, for many years, be a guide for judges in making public statements. A lot of water has flowed under the bridge since then. In particular both politicians and the press now feel much freer to engage in criticism of judgments and judges than they did 40 years ago. Up to a point, that is a good thing. Informed criticism of judgments and even judges is a sign of a healthy democracy and, on the whole, is not a question which need concern us. But what about uninformed criticism, of which there has been a great deal recently? Let me turn to two of Lord Kilmuir's statements.

The first is that, so long as a judge keeps silent, his reputation for wisdom and impartiality remains unassailable. As recent events have shown, I think, that is no longer true.

The second of those statements is that every utterance which a judge makes in public, except in the actual performance of his or her duties, must necessarily bring the judge within the focus of criticism. That statement is as true today as it was 40 years ago. But the fact that the first statement is no longer true highlights the modern dilemma for the judiciary. Uninformed and wrong criticism, unanswered, is likely to diminish the reputation of the judiciary for wisdom and impartiality; there is now no-one else who will answer that criticism; yet if judges answer it they may bring themselves within the focus of further criticism.

That dilemma gives rise to a number of questions which I think it worthwhile considering this morning.

1. How can we diminish the extent of uninformed criticism by ensuring that, in particular, politicians and the media are better informed about the role of the judiciary in general and about particular judgments?
2. Who is to answer for the judges?
3. When is it appropriate to answer? and
4. How much should be said?
   There is a related but separate question which should also be addressed. That is:
5. When should judges speak or write publicly, not to answer or forestall criticism, but because it is in the public interest that they should speak or write?

I propose to say something about each of these questions, not so much with a view to suggesting the complete answers but rather, I hope, to stimulate debate.

1. Ensuring that politicians and the media are better informed

There are, of course, two aspects of this; informing them better about the functions of the judiciary and informing them better about specific judgments.

No doubt our education system is partly to blame for the general community ignorance of the functions of government and its tri-partite division between legislature, executive and judiciary. But I think that we are also to blame in failing to better explain our role. There are two main but related areas of sensitivity and consequently criticism. The first is when a judge declares legislation invalid or gives it a narrower or different construction from that which the legislators thought it was going to have or when a judge overrules an executive decision. It is important for the judiciary, not only that those decisions be specifically explained but, more generally, that the role of the judiciary in making decisions of that kind be explained; how the legislature and the executive are, like the judiciary, constrained by principles of law and how the courts apply and enforce those principles.

The second area of sensitivity and criticism lies in a misunderstanding of the law making role of courts. It is commonly said, and no doubt believed by many, that parliament should make the law and courts should merely interpret it; as if there were some clear dividing line between the two and as if courts had only recently strayed from this narrow path. Of course we all love certainty and statements of this kind have an air of certainty which is likely to increase their public acceptance. But we have an obligation to explain that, in their law making role, judges are not acting idiosyncratically but are themselves constrained by principles of law; and to explain how those constraints operate.

I think that this Conference has an important role to play in conducting symposia with each of the other arms of government and the print and electronic media to discuss these topics; and to initiate and encourage continuing dialogue between the judiciary on the one hand and each of those bodies on the other. The judiciary has a continuing obligation to ensure not only that they exercise restraint in their control of legislative and executive power and in their law making role but also in ensuring that the manner and extent of that restraint is communicated to the public through the media and to those who feel that their power is threatened.

Courts and judges also have an obligation to explain their reasons for judgment in a simple and summary way. I do not think it is sufficient for us to say that we have given a sufficient explanation of our judgments in our reasons for, as we all know, in some cases our reasons will be unintelligible to a non-lawyer and in many will be too long, too complex and, in appeals where there are differing reasons, too diverse for public digestion.

In the Tasmanian Dams case the High Court produced a useful summary of its decision in terms which could be readily understood by non-lawyers. I think it forestalled a good deal of criticism and at least ensured that, on the whole, criticism of it was better informed. I cannot see why such a summary could not have been produced in Mabo or Wik. In making that criticism I appreciate that I come from a glass house for I do not think that my own Court has ever produced such a summary. Indeed most courts do not have either the time or the resources to do this. But if we are to reduce the extent of uninformed criticism of specific judgments I think we must do that.

2. Who is to answer for the judges?

I have already said that I think that this conference can play a useful role in speaking for the judiciary generally. But I doubt whether it can play any useful role in answering specific criticism, whether of a judgment or of a judge. And I think that we must realistically accept that Attorney-Generals will not do so even if otherwise that would seem to us to be appropriate.

Nor do I think that a judge whose decision is criticised or, especially, a judge who is personally criticised,

should answer the criticism. That is likely to increase the risk, to which Lord Kilmuir referred, of further criticism. Generally the most appropriate person to answer the criticism is, in my view, the Chief Justice or Chief Judge of the court concerned. Of course speed is of the essence and Chief Justices may need some media training.

3. When is it appropriate to answer criticism?

This is a question about which, I think, it is difficult to usefully generalise. Plainly not every uninformed criticism should be answered. It should be answered only when it is likely to put at risk the reputation of the courts in the impartial administration of justice. Then and then only is the rule of law at risk.

But I do not think that there is any need to urge restraint in this. The tendency so far has been generally not to reply at all but to silently seethe.

4. How much should be said?

On this question and on how it should be said courts and judges need advice. Many courts now have media officers who know, better than we do, how a communication should be made with some expectation that it will be best understood and, in the case of the media, published. That is one of the many useful functions that media officers can perform.

I turn briefly to my final question.

5. When should judges speak or write publicly in the public interest?

It is rare to see or hear of judges speaking to or writing in the media on judicial or legal matters. No doubt generally that is a good thing for the reason given by Lord Kilmuir. On the other hand it is a pity that there are some questions which become the subject of public debate on which, because of their expertise and experience, judges could make a useful contribution yet do not do so because of the reticence of which I have been speaking. Let me give an example of a subject close to my heart, civil justice reform. I have spoken on this topic now on many occasions but, until recently, only at conferences organised by and for practising lawyers and judges. Recently I spoke at a conference organised by and for litigants and litigants' representatives. I found them much more receptive to proposals for reform of our system than either lawyers or judges yet although I and others had been speaking for years on these topics, my views were new to them. The views had simply not filtered through to them. There must be a case in this and in many other areas for more direct communication between the judiciary and the public.

Footnotes

1 A paper delivered at the Second Annual Symposium of the Judicial Conference of Australia Inc. "The Role of the Judiciary in Modern Democracy", Sydney, 8 November 1997.

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