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COURTS VERSUS THE PEOPLE: HAVE THE JUDGES GONE TOO FAR?

The Hon Justice John Perry

"...... Judges should butt out of politics". Those words are part of the heading to an article written by Janet Albrechtsen reported in *The Australian* newspaper earlier this year.[1] The sub-title to the article was "Supporters of Michael Kirby are more partisan than principled". Ms Albrechtsen developed this thesis with observations of which the following is a fair example:

> "Tradition says that judges remain separate from the political process. But Kirby's supporters champion an active judiciary that ensures judges are embroiled in politics. They are the first to throw off such traditional shackles when it gets in the way of their true agenda - entrusting judges with greater power to make laws.
>
> Not content with leaving Parliament to legislate, they want to impose their elitist causes upon the electorate ... What more undermines separation of judicial powers from those of Parliament than judicial law making?"

Ms Albrechtsen's article is but one example of the tendency for perceived incursions by judges upon what is seen to be the exclusive domain of Parliament to provoke strong reactions. It would be possible to quote observations in similar vein by politicians, some of whom combine a particularly rigid view of the doctrine of the separation of powers with indignant and emotionally expressed condemnation of what are thought to be unwarranted transgressions into the exclusive province of Parliament, by judges, inevitably cast as "unelected".

We saw it in the reaction of some politicians to the judgment of the High Court in *Mabo No 2*.[2] We have seen it in the ministerial reaction to the judgment of the High Court in *Teoh*.[3] We see it in the current criticism of the Federal Court, aimed at decisions made in the exercise of its jurisdiction to review administrative decisions concerning refugees.

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[1] 27 March 2002. And see her later article "Injudicious activism on the bench" subtitled "Courts can't take liberties with the law in the service of the human rights industry", *The Australian*, Wednesday 17 April 2002.

[2] (1992) 175 CLR 1.

[3] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 and see the joint press release from the Attorney-General and the Minister for Foreign Affairs of 10 May 1995, in which the decision was said to have created "real uncertainty" in administrative decision making.

It is much easier to give a detached definition of the doctrine of the separate of powers, than it is to deal rationally with the polemics of the debate surrounding these issues.

What the debate illustrates is that feelings are likely to run high, at least on the public and political side of the boundary, when it is suggested that judges have crossed it and entered forbidden territory.

But in answer to the rhetorical question which is part of the topic for this session "Have the judges gone too far", my answer is that the judges have not gone far enough, and that the public will have to get used to the fact that, in particular, human rights jurisprudence should be more clearly recognised and developed by the courts of this country.

It is almost exactly fifty years ago when Sir Owen Dixon made the comment "It may be that the court is thought to be excessively legalistic. I would be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflict than a strict and complete legalism".[4]

What Sir Owen Dixon may not have foreseen was the rapid pace of social change over those fifty years, accompanied by a remarkable growth in the recognition, development and application of human rights principles amongst civilised countries of the Western world.

A later Chief Justice, Sir Anthony Mason, might be thought to have joined issue with Sir Owen Dixon. As long ago as 1987 he wrote:[5]

> "It is not surprising that current legal reasoning extends beyond the narrow confines of legal formalism. It is now accepted that, at the appellate level at least, judges do make law when they extend, qualify or re-shape a principle of law. Equally we accept that the courts have a responsibility 'to develop the law in a way that will lead to decisions that are humane, practical and just', to repeat the words of Sir Harry Gibbs.[6] Judges do not carry out this responsibility in a vacuum, by shutting their eyes to contemporary conditions. They must have an eye to the justice of a rule, to the fairness and the practical efficacy of its operation in the circumstances of contemporary society. A rule that is anchored in conditions which have changed radically with the passage of time may have no place in the law of today."

A decade later, however, he acknowledged that:

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[4] On the occasion of Sir Owen Dixon's swearing in as Chief Justice (1952) 85 CLR, xix.

[5] *Future Directions in Australian Law* (1987) 13 Mon Law Rep 149. See also the Hon Chief Justice J.J. Doyle "Judicial Standards: Contemporary Constraints on Judges - The Australian Experience" (2001) 75 ALJ 96 and by the same author "Judicial Law Making - Is Honesty the Best Policy? (1995) 17 Adel LR 161, and the Honourable Justice Ronald Sackville "Continuity and Judicial Creativity - Some Observations" (1997) 20 (1) UNSW Law Journal 145.

[6] On the occasion of his swearing-in as Chief Justice of the High Court on 12 February 1981.

> "...human rights jurisprudence has not had as strong an impact in Australia as it has had elsewhere. Indeed, ... there are grounds for apprehension that Australia is not as deeply committed to *judicial* protection of human rights as a number of Western nations, including the United States, the United Kingdom, Canada and New Zealand."[7]

In Australia, as in most common law countries, the courts have regarded international instruments, more particularly those giving expression to human rights, as having two important functions.

In the first place, it has long been accepted that doubt or ambiguity in the construction of statutes may properly be resolved by favouring a construction which accords with the rules of international law, including the provisions of any relevant international instrument. As it was put by the High Court as long ago as 1908:

> "... every statute is to be so interpreted and applied as far as its language permits as not to be inconsistent with the comity of nations or with the established rules of international law."[8]

Likewise it is well established that in developing the common law, courts may have regard to international law. As Brennan J observed in *Mabo v Queensland (No* 2):[9]

> "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."

Notwithstanding the clarity with which those principles have been enunciated by the High Court and the number of occasions upon which they have been reaffirmed by that court in recent years, the fact remains that State and Territory courts rarely draw upon those principles.[10] The truth is, and I say this with apologies to those of whom it is not true, that, generally speaking, Australian judges at levels below the High Court rarely have regard to international instruments, either in the construction of statutes or in the development of the common law.

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[7] *The Role of the Judiciary in developing Human Rights in Australian Law*, the Hon Sir Anthony Mason AC KBE, in *Human Rights in Australian Law* (1998) Ed. David Kinley (Federation Press) chapter 2 at page 26.

[8] *Jumbunna Coal Mine NL v Victorian Coalminers' Association* (1908) 6 CLR 309 per O'Connor J at 363. And see *Polites v Commonwealth* (1945) 70 CLR 60 per Williams J at 80-81 and the cases there cited.

[9] (1992) 175 CLR 292 at 306. See also *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 per Kirby J at 569, *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 699 and 709 and *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 per Mason CJ and Toohey J at 499.

[10] The Federal Court may have occasion to apply those principles more often than is the case with their State and Territory counterparts.

The reluctance of Australian courts other than the High Court to embrace these principles and make greater use of international human rights jurisprudence is a product of a number of inter-related factors.

The first is that Australian jurisprudence has traditionally exhibited a particularly virulent form of legal positivism. It is as though strict legalism exemplified in the comments of Sir Owen Dixon CJ which I have quoted, has led Australian courts to adopt a culture of suspicion, bordering on scepticism, of broadly expressed international instruments.

Another factor is that, by and large, judges simply *do not read* international instruments.[11] Likewise, counsel assisting the courts do not often lift their sights to become familiar with international law materials which, consistently with principle, may be of value in the two areas where their utilisation has been legitimised.

This is in sharp distinction with developments in the northern hemisphere, particularly in European Union countries.

Even before the passing by the Blair Government in the UK of the *Human Rights Act* 1998, which came into force in October 2000, the courts of that country were heavily influenced by the developing human rights jurisprudence of the European Union, largely based upon the European Convention on Human Rights (ECHR) and by the decisions of the European Court of Human Rights in Strasbourg.

For example, in 1978, Lord Denning observed, after referring to certain provisions of the ECHR:

> "The Convention is not part of our English law, but, as I have often said, we will always have regard to it. We will do our best to see that our decisions are in conformity with it."[12]

Since the passing of the *Human Rights Act* 1998, the question which arises is what further influence has this had on the British legal system, and what lessons are there for us to learn from the changes which have taken place in that country?

To answer that question, it is necessary to understand the manner in which the HRA operates.

It does not give the courts power to strike down legislation incompatible with the ECHR. It has been carefully structured so that the sovereignty of Parliament is recognised and maintained. The relevant provisions provide:

(a) Primary and subordinate legislation must be read and given effect in a way which is compatible with the convention rights.[13]

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[11] For a comprehensive source book, I recommend "Human Rights and the Administration of Justice: International Instruments" International Bar Association Human Rights Institute, Ed. Gang and Mackerel, Kluwer Law International 1997.

[12] *Ahmad v Inner London Education Authority* [1978] 1 QB 36.

(b) If the court is satisfied that a provision is incompatible with a convention right, it may make a declaration of that incompatibility.[14]

(c) a declaration of invalidity does not affect the validity or continuing operation of any statutory provision with respect to which it is given.[15]

(d) Upon a finding of incompatibility with the convention, the relevant Minister may by order make such amendments to the legislation as he or she considers necessary to remove the incompatibility.[16]

There have been at least three declarations of incompatibility.[17]

The next major feature of the HRA to which reference should be made is its provisions relating to public authorities. Section 6(1) provides:

> "It is unlawful for a public authority to act in a way which is incompatible with a convention right."

Pursuant to subs (2), that provision does not apply if the authority could not have acted differently, having regard to a relevant provision of primary legislation.

"Public authority" is expressly defined to include a court or tribunal.[18] The full ramifications of s 6, particularly in its application to courts, have yet to be worked out.[19] However, clearly it gives a broader right of review of administrative decisions, which otherwise would be reviewable only as to questions of due process or error of law.

The ability to review administrative decisions by reference to compliance with the ECHR, is hardly so radical as it might appear; an analogous power is conferred on the courts of this country by the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), although the range of administrative decisions which may be reviewed under

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[13] Section 3(1).
[14] Section 4(2).
[15] Section 4(6).
[16] Section 10(2).
[17] The cases are referred to in the article by Elizabeth Wicks "The Impact of the Human Rights Act 1998 - An Update from the United Kingdom" (2001) 12 Public Law Review at 167. Since that article was published, at least one other declaration of incompatibility has been made: see *Wilson v First County Trust Limited* [2001] 3 All ER 229 (leave to appeal to the House of Lords was granted on 13 November 2001). It is doubtful that provisions of this kind could validly be enacted by the Commonwealth Parliament, as there are constitutional impediments to Federal courts exercising a non-judicial role. But there is no obvious impediment to State courts following such a course.
[18] Section 6(3)(a).
[19] The topic has generated much academic discussion: see, for example, Phillipson "The Human Rights Act 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999) 62 The Mod Law Rev 824 and the articles there cited; Buxton "The Human Rights Act and Private Law" (2000) 116 LQR 48; Anthony Lester and David Pannick "The Impact of the Human Rights Act on Private Law: The Knight's Move" (2000) 116 LQR 380; and Sir William Wade QC "Horizons of Horizontality" (2000) 116 LQR 217.

s 6 of the HRA and the criteria for review under that Act are obviously much wider than is the case with the Australian legislation.

A novel and important provision to be found in the HRA is s 12, pursuant to which if a court is considering whether to grant relief which might affect the exercise of the convention right to freedom of expression, it must have particular regard to the importance of that right.

Insofar as the passing of the HRA may be likened to the blast of Joshua's trumpet, it cannot be said that the walls of Jericho have yet fallen. Indeed, the impact on UK law has been less drastic than one might think.

In the first place, although almost every issue of the law reports disseminating from England is replete with cases in which there is a reference to the ECHR and the HRA, the number of cases which have been brought *simply* by reference to those provisions is small.

In giving evidence before a joint parliamentary committee on human rights, the Lord Chancellor said the courts in the UK have not been swamped with new cases under the HRA. He added:

> "There are scarcely any cases, either civil or criminal, which are exclusively attributable to the *Human Rights Act*. What the *Human Rights Act* does typically is provide additional points of argument in cases that would in any event be brought forward."[20]

In the second place, the cautious and principled way in which the courts in the United Kingdom have approached the new legislation goes a long way towards answering those critics who would see the overt introduction of human rights principles into the fabric of substantive law as a measure which will put the courts on a collision course with Parliament and the people.

Although the steps taken in this direction in Australia have been far more tentative, there are some parallels to be drawn.

The ability pursuant to the *Human Rights and Equal Opportunity Commission Act* 1986 for the Human Rights Commission to report to the relevant Minister as to any inconsistency between any enactment and a human right as defined in the Act is akin to the power given to the courts in Great Britain to declare incompatibility under s 4 of the HRA.

Access to the United National Human Rights by individuals who assert that rights protected by the International Covenant on Civil and Political Rights, secured by Australia's accession to the first optional protocol to the ICCPR, has some parallel

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[20] Lord Chancellor's evidence to Joint Committee on Human Rights, Minutes of Evidence, 19 March 2001, reply to question 50, cited in Wicks (supra) at 169.

in the ability of citizens of the United Kingdom to seek redress for breaches of the ECHR by application to the European Court of Human Rights in Strasbourg.

But by comparison with the developments in Great Britain and in the European Union countries, these measures in Australia seem to be little more than a stretching of wings.

Having regard to the northern European experience, particularly the example given by the United Kingdom, there is a risk that with our traditional reluctance to embrace the widespread, universal growth of human rights jurisprudence, the development of our common law may become stunted, if not sterile. I quote from a recent paper delivered by Chief Justice Spigelman:[21]

> "This is an important turning point for Australian lawyers. One of the great strengths of Australian common law is that it has been able to draw on a vast body of experience from other common law jurisdictions. Now, both Canada and England, and to a lesser extent New Zealand, may progressively be removed as sources of influence and inspiration. Australian common law is threatened with a degree of intellectual isolation that many would find disturbing."

What must be understood is that the passing of the HRA in the UK does not mean that longstanding principles of the common law will be thrown out and replaced with nebulous and uncertain expressions of human rights values. On the contrary, what the cases are demonstrating is that a careful and principled re-examination of common law precepts against the ECHR enables the courts to reformulate those precepts so that they are more attuned to the values of contemporary society, and to the global recognition of human rights which is increasingly becoming part of those values.

This is to be contrasted with the opaque shroud which envelops the processes of strict legalism. As it was put by Sir Anthony Mason:[22]

> "Legalism, when coupled with the doctrine of *stare decisis*, has a subtle and formidable conservative influence. When judges fail to discuss the underlying values influencing a judgment, it is difficult to debate the appropriateness of those values."

An example of the beneficial effect which the ECHR may have upon the development of the common law is its influence upon the recognition in Great Britain of a right to privacy. The alleged off-field sexual exploits of a footballer with a premier division football club in England[23] and the admitted abuse of narcotic drugs by British super-model Naomi Campbell,[24] have illustrated how the HRA brings fresh

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[21] The Hon Chief Justice J.J. Spigelman "Rule of Law - Human Rights Protection" (1999) 18 Australian Bar Review 29.

[22] "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 Federal Law Review 1 at 5.

[23] *A v B and C* [2002] EWCA Civ 337, 11 March 2002.

[24] *Campbell v Mirror Group Newspapers* [2002] EWHC 499 (QB) 27 March 2002.

perspectives to bear in the approach of the courts to the perennial tussle between rights of privacy and freedom of expression in the media.[25]

Furthermore, one of the most important aspects of the changes in the UK is that the reappraisal of common law principles engendered by the HRA is a process which is open and transparent; it is plain for all to see that the reappraisal is taking place against the touchstone of the provisions of the ECHR, which are highly published in those countries to which it applies.

It has been recognised in the UK that an important aim of the HRA is to develop a "rights culture". The Home Office in that country has put it this way:[26]

> "The Act is intended, over time, to help bring about the development of a culture of rights and responsibilities across the UK. This involves looking beyond questions of technical compliance. The Convention rights need to be seen as a set of broad basic values which are accessible to and integrated into the democratic policy making process."

If, by following the UK example, we can by one means or another develop a "rights culture", decisions of the courts which give increasing recognition to human rights will be much more readily accepted by the community.

The tension between the people and the courts implied in the title of this session will then, hopefully, to a large extent subside.

Judges' Chambers
Supreme Court
Adelaide

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[25] See also *Douglas and Ors v Hello!* Ltd [2001] 2 All ER 289. High authority in Australia still falls short of recognising a tort of privacy, although the gap is closing; see *Australian Broadcasting Corporation v Lenah Game Meat Pty Ltd* (2001) 185 ALR 1.

[26] Home Office Memorandum to the Joint Parliamentary Committee on Human Rights, *Implementation and Early Effects of the Human Rights Act 1998*, para 6.