

OCCASIONAL ADDRESS

The Hon Justice Jeffrey William Shaw
Justice of the Supreme Court of New South Wales

Delivered at the graduation ceremony for graduates from
the Faculty of Business and the Faculty of Law

Great Hall, City campus, Tuesday 28 September 2004, 10.30am

The Rule Of Law And The Protection Of Rights And Liberties

There is a vital role for informed debate in our society of the decisions of the Courts, but it is one that should entail an understanding of the rule of law as well as the roles of the judiciary and the elected legislature.

In recent times we appear to lack a sustained on debate about law making that entails a reduction in our long held fundamental rights. This is particularly apparent in criminal matters. For us to comprehend the significance of detention without charge or trial and lengthy periods of incarceration for the purpose of questioning without adequate access to legal advice or other assistance, we need first to understand what principles we are eroding. These changes may make the legislators appear to be taking certain threats in our society seriously, but it seems too often, there are some sections of the media relishing in an ill informed coverage of our legal process its checks and balances and the fundamental rights that have been developed to protect these rights.

The Separation of Powers

Thomas Paine in his 1776 work “Rights of Man” was scathing about the lack of a written constitution in England “to restrain and regulate the wild impulse of power.” He argued that “many laws are irrational and tyrannical, and the administration of them vague and problematical.”¹ Instead, Paine contended for a formal constitution, which defined three distinct classes of government – legislative, executive and judicial. He identified the application of laws as being at the heart of judicial power. “It is that power to which every individual has appeal, and which causes the laws to

be executed” he said.² Under this separation of powers doctrine, it is the courts which have the responsibility of implementing, executing, interpreting, applying and considering the validity of those laws passed by the Parliament.

I am on record as advocating a Bill of Rights for Australia and it’s my belief that we need such a statement to protect the rights of all before the law. It is true that there are formidable arguments against such a project, particularly that it vests in unelected judges policy decisions and this detracts from the sovereignty of Parliament. However, there are compromise models which preserve the ultimate authority of the legislature whilst still allowing the courts to declare a particular proposal to be unconstitutional, and then providing an over-riding power of the elected representatives to persist with a controversial proposal. And it is true to say that almost every liberal democracy has adopted some form of human rights regime without the heavens having fallen in.

Judges and Civil Liberty

A fearlessly independent judiciary has been described as “the least dangerous branch, of government.” As Hamilton said in *The Federalist* (1787) “...although individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter.”³ It provides an effective check and balance to legislative and executive decisions. Such a dispersion of powers between the elements of government has the tendency to favour individual rights and to curb authoritarian excesses. This is not to idealise the courts, because it must be recognised as a matter of history and practicality that injustices have occurred within law.⁴ Many judgments of the courts will be controversial and citizens are entitled to argue that they are wrong. But appellate remedies exist within the judicial structure to correct mistakes or excesses and subject to questions of constitutional validity, the democratically elected legislature can override, at least for the effect if a judicial ruling. Some media coverage of recent appeal decisions in criminal matters fails to grasp the importance of the rights that are being protected.

It was H V Evatt, as a young Justice of the High Court in the 1930s who developed a view as to the political role of the courts in the early New South Wales colony up to

the Rum Rebellion of 1808 and provided an insight into the rule of law as a catalyst for democracy.⁵

This thesis was developed by Dr David Neal who argued that the law formed an important part of the “cultural baggage” inherited from England by the colonialists and that the rule of law, including its rules, institutions and reasoning processes, played a prime role in changing New South Wales from a penal colony to a free society.⁶

The independent judiciary, in its role of determining rights and liberties, is a bulwark against the arbitrary power of executive government. The great 19th century English political philosopher, J S Mill’s principle of liberty holding the terms that individuals could conduct their lives provided they did not harm others has been enhanced on a case-by-case basis before judicial officers and juries in the common law world.

Mill considered the struggle between liberty and authority, declaring that, “...the strongest of all the arguments against the interference of the public with purely personal conduct is that, when it does interfere, the odds are that it interferes wrongly and in the wrong place.”⁷ Amidst today’s controversies about detention without charge, the old common law writ of *habeas corpus*, ordering an imprisoned person to be removed to answer the cause in a court, has been resurrected. As Brennan J said in the High Court: “many of our fundamental freedoms are guaranteed by ancient principles of the common law or by ancient statutes which are so much part of the accepted constitutional framework that their terms, if not their very existence may be overlooked until a case arises which evokes their undiminished force.”⁸ The issue was raised in the Tampa case, but not authoritatively determined because, by the time the special leave application came to the High Court from the majority view in the Federal Court, the rescuees were beyond the Court’s territorial jurisdiction.⁹

The New Zealand Court of Appeal has recognised that *habeas corpus* is not shackled by precedent but “can adapt” and “enlarge” when new circumstances require that.¹⁰

Judicial activism

For some commentators such controversies in the court represent an over litigious society, inappropriate meddling by unelected judges or, in a pejorative sense “judicial activism.” Yet, such creativity has always been part of our common law tradition. The judges have formulated, moulded an amended the law to meeting differing social and economic conditions albeit constrained by clear, valid enactments of the Parliament. In a constitutional court such as the High Court of Australia or the Supreme Court of the United States, judges have exercised the power to declare laws otherwise duly passed to be an excess of constitutional power, *ultra vires*, and therefore invalid or have otherwise contradicted basic human rights whether or not expressed in a Bill of Rights, or necessarily implied in a constitutional compact. Many notable examples are to be found in our law books: the right of an indigent person to legal representation in a trial for a serious criminal offence (or, at least, the right to stay such proceedings in the absence of such representation); the existence of native title to land, over-turning the legal fiction of *terra nullius*; the subsistence of native title despite the existence of a pastoral lease; the finding of an implied right to free speech, impinging upon legislative regimes dealing with defamation, political advertising and contempt of court.¹¹

Checks and balances

It is in this sense that the courts constitute a vital part of the balancing processes between real and pressing concerns of the community and the need for the powers of government, security and law enforcement agencies to be carefully circumscribed, so as not to unduly intrude upon human rights. In doing so, the courts must adhere to the legislature’s intent, whether right or wrong. This strikes the appropriate balance. This is a useful, creative tension which is assisted by civility of discourse between the courts and the legislature, involving an understanding and respect for the different roles which these institutions play.

Political v Judicial Decision Making

Political decision making is inevitably the subjects of conflicting pressures – pragmatism, populism, principle, indecision, dogmatism and the like. To adopt the words of Gutmann and Thompson in *Democracy and Disagreement*, Harvard University Press, 1996, p 3, academic discussion is likely to be “insensitive to the

contexts of ordinary politics: the pressures of power, the problems of inequality, the demands of diversity, the exigencies of persuasion.”

Bismarck was right: “If you like laws and sausages, you should never watch either one being made.”

In a recent paper to a judicial conference of the judges of the Supreme Court of New South Wales, Professor Peter Cane in his paper entitled “Taking Disagreement Seriously: Courts, Legislatures, and the Reform of Tort Law”, the author argued that, by way of contrast with the judicial processes of decision making, “political processes of legislative legalisation are pluralistic and multi-polar rather than triadic and bi-polar.” He put that the political process involved investigation, consultation, deliberation, debate, negotiation, compromise, bargaining at majority voting. Thus, it was said that the pluralism of political processes meant that legislative acts involved a “group activity” and that there was a democratic argument against judicial decision making: courts are neither representative nor responsible whereas are political processes are part of a system of representative and a responsible government, the learned author argued.

However, I would argue that this characterisation of the political process is an idealisation of what is often a messy, unsatisfactory and ill-conceived means to reach a policy conclusion. The judicial process is open to scrutiny: there are appellate remedies to correct error, reasons for decision must be given, and all relevant processes (apart from the writing of the judgment itself) are conducted in open court and are subject to public examination. By way of contrast, the legislative process is replete with compromise, wheeling and dealing and the manipulation of numbers and voting in a bi-cameral legislature. A sovereign parliament is vitally important. It is a democratic institution. However, one should not elevate its status to an extent beyond the exigencies of the political process in the real world.

Political radicals and the defence of ancient institutions

There is nothing incongruous about those on the radical, reformist side of the political spectrum defending ancient institutions, which are, in their practical application,

supportive of individual liberty. In such debates, they may find common ground with those of a more conservative inclination.

Take British historian, E P Thompson's defence of the jury trial against its dilution in the face of Irish republican terrorism of the 1970s. "The jury system" he wrote "is not a product 'bourgeois democracy' (to which it owes nothing) but a stubbornly maintained democratic **practice**; its practice can never have risen higher than the common sense and integrity of the jurors, but it has provided repeatedly a salutary inhibition – especially in matters of conscience and political behaviour – upon executive power."¹²

The coming together of conservatism and reformism in defence of liberty is illustrated by another passage from Thompson where he argued that although an institution is not necessarily good because it is old, "...I do not think each generation is well advised to act as if it had never had a past." Some institutions, he thought, have been the focus of intense historic struggles . . . and have proved to be "...flexible, capable of modification through centuries of conflict, and even, after protracted struggles, of reform."¹³

I would place the rule of law and the independence of the courts in that category. Well-informed citizens should defend the robust impartiality of the courts to interpret and apply the legislation enacted by Parliament.

¹ Thomas Paine, *Rights of Man* (first published in England in 1791), The Penguin American Library, 1984, p 195.

² *ibid*, p 199; for the Australian born pre-historian, V Gordon Childe, it was the adoption of a common code of written law which was one of the indicators of Babylonia becoming a "political reality" c. 1800 BC: *Man Makes Himself*, Library of Science and Culture, 1936, Fontana Library, 1966, p 156.

³ Alexander Hamilton, *The Federalist*, London, 1787, p 784.

⁴ Scathing criticisms of the conservative judicial Establishment are to be found in J A G Griffith; *The Politics of the Judiciary*, Fontana, 1981; Peter Hain, *Political Trials in Britain*, 1984, Penguin, London; and *Injustice Within the Law* was the title of H V Evatt's book on the Tolpuddle martyrs: Law Book

Co, Sydney, 1937, a book which argued that the Home Secretary and the landowner magistrates conspired to prosecute six labourers to make an example of them to others who may have considered joining a trade union (see Buckely, et al, *Doc Evatt*, Melbourne, 1994) pp 114, 115.

⁵ H V Evatt, *Rum Rebellion*, Angus and Robertson, 1938; cf. the attack on Evatt's scholarship by M H Ellis, "Rum Rebellion Reviewed" (1958) Vol II, *Quadrant*, p 13.

⁶ David Neal, *The Rule of Law in a Penal Colony: Law and Power in early New South Wales*, Cambridge University Press, 1991, p 85, 86 et. seq. (The writer has discussed Neal's work in more detail in his book review in the *Sydney Morning Herald*, 29 February 1992).

⁷ *ibid*, ch 4

⁸ *Re Bolton: ex parte Beane* (1987) 162 CLR 514 at 530.

⁹ See generally Michael White, "*Tampa Incident: some subsequent legal issues*" (2004) 78 ALJ 249 at 254, 255

¹⁰ *Bennett v Superintendent, Rimutaka Prison* [2002]1 NSWLR 617 AT [60] – [61].

¹¹ M D Kirby, "Judicial Activism? A riposte to the counter-reformation" (2004) *Australian Bar Review*, p 219

¹² E P Thompson, *Writing by Candlelight*, Merlin Press, 1980, p 169.

¹³ *ibid*, pp 229 230