THE POLITICS OF JUSTICE

An Agenda for Reform

Victorian
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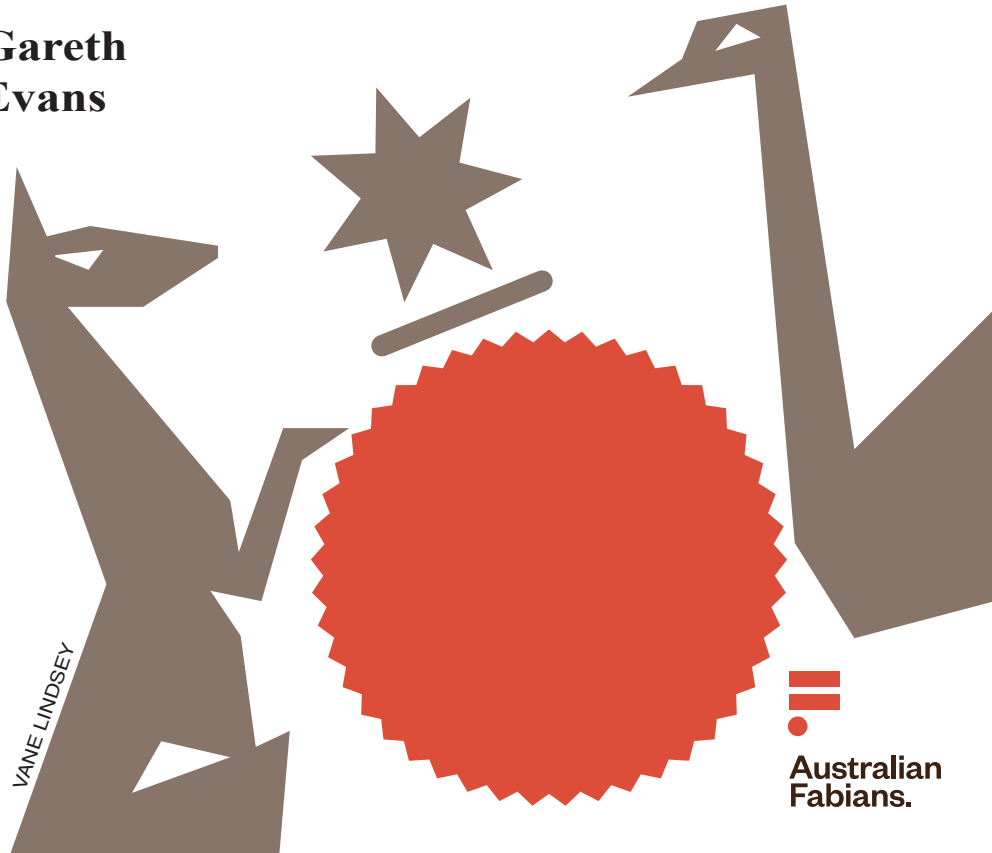
33 One Dollar

Gareth Evans



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THE POLITICS OF JUSTICE

by

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How can we improve the quality of Parliamentary law-making? How can we improve the quality of law-making by the courts, and especially the High Court? What changes are necessary, in both the workings of Parliament and in the style approach, and composition of the courts, to make the law more sensitively reflect ongoing social change? To what extent is it acceptable in principle, and desirable in practice, for Parliament to transfer to the courts key law reform functions which it alone has traditionally exercised?

These are the questions which this pamphlet is principally concerned to address. They by no means exhaust the range of matters with which it would be possible to deal under a title as broad as "The Politics of Justice", but they certainly appear to be the questions of pre-eminent importance. In law reform, as in everything else, if one can get the basic machinery right, it is extraordinary how easily the substantive changes will then tend to flow.

Detailed attention to law and justice issues by the Labor movement seems long overdue. Questions of this kind have usually been regarded as somewhat outside the mainstream of party and electoral politics, that mainstream traditionally being filled by economic issues, social policy and, at times of real or imagined crisis, foreign affairs. The importance of constitutional constraints on the ability of Labor to get into office, to govern effectively and radically while there, and nowadays even to stay in office for a full term, has, it is true, come to be generally appreciated. But these issues apart, legal questions have tended not to receive any really sustained attention on the Labor, or indeed either, side of federal politics.

It is unfortunate that this has been so. Law and justice issues arise across a potentially enormous range of government and private sector activity, and touch in innumerable ways the lives of ordinary citizens. They ought to be thought of not as peripheral, but as central, to the preoccupations of a genuine reform government. It was Lionel Murphy who really showed just how much potential for sweeping and radical change there was locked away in the Attorney-General's portfolio. Who can forget or doubt the beneficial impact of the changes he wrought in areas such as legal aid, divorce and matrimonial relations, race relations, censorship and free speech, control of the bureaucracy, ASIO accountability, trade practices, company and securities law, and electoral law?

The law, moreover, does genuinely need reform. Just as adaptation to change is a condition of the survival of any other organism, so the legal system has to be continually responsive to basic changes occurring in its own social environment. Mr. Justice Kirby[1] has succinctly identified four main forces of change that individually and collectively require ongoing legal renewal: the growth in influence of government and big business, changing social and moral perceptions (themselves a function of changing patterns of education and communications), and what he describes as the "dynamic of science and technology". But the law has tended to limp along in the rear of these changes, and there are dozens of areas where it

provides either no remedies to redress plain wrongs or remedies which are for all practical purposes inaccessible to the ordinary citizen, or where it has become out of step with current morality or social values, or has been overtaken by technology. There are dozens of other areas again where the law is confused, inconsistent, difficult to find or otherwise in need of simplification. There is no shortage of genuine tasks to which the reformer might address himself.

It should be acknowledged that these views are not entirely uncontroversial. The Chief Justice of Victoria, Sir John Young, for example, has firmly and publicly committed himself to the view that all law reform is dangerous, speedy reform even more so, and that reform brought about at the insistence of vigorous minorities is positively destructive of the enduring fabric of our society. He quotes with approval a Delphic utterance from Sir Owen Dixon to the effect that "nearly all the things that require reform were the product of reform", describing this as a "penetrating observation" containing "a profound truth"[2]. There are always some people who are going to disbelieve in evolution.

Another consideration justifying serious political attention being given to law and justice issues is that, by and large, law reform initiatives are remarkably cheap. Compared with health, housing, welfare, transport and the rest, the recognition and protection of civil rights and the development of a humane and effective system of justice involves minimal public expenditure. Legal aid certainly is not cheap, and nor are some particular reforms like the replacement of accident litigation with universal no-fault compensation. But, for the most part, law and justice programs depend on very little more than the political will and capacity to achieve them. Finding the resources, now the overwhelming limiting factor in nearly every other area of government, is very much a secondary consideration.

For these and many other reasons, law and justice issues deserve a place right in the forefront of the Labor movement's political agenda. In selling the details of that agenda — a task which is not here attempted — it is crucial to appreciate the institutional constraints within which the law reform process presently operates. One must be aware, among other things, of the extraordinarily limited role presently played by Parliament and parliamentarians in the whole process (not withstanding the perception of them by most people as the proper focal point of reform-centred activity), and of the very significant political role of the courts (perceived by most people as having nothing to do with law-making or law reform) as initiators and resisters of change. It is with the description of these constraints, and the prescription as to how some of them might be overcome, that this pamphlet is essentially concerned.

THE PARLIAMENTARY POLITICS OF LAW AND JUSTICE

Although substantial law reform measures take up a reasonably significant proportion of Parliament's time, with about a dozen major measures being debated, on average, each year, it is a great mistake to suppose that Parliament plays a significant *legislative* role in relation to law and justice matters — or indeed in relation to anything else. The reality is that Parliament's function as a legislative body, a maker of laws, is probably the least important in practice of all its functions. What matters in practice far more is its role as an electoral college, a showcase for leaders and potential leaders, a

vehicle for monitoring, scrutinising and challenging the Executive, a forum for airing grievances, and perhaps even an institutional opportunity for floating new ideas.

The Parliamentary contribution to the legislative process, as it operates at the moment, is for all practical purposes a charade. Opposition amendments, however well reasoned, are almost never accepted; even when a government is embarrassed into acknowledging that a Bill contains a technical flaw of some obvious kind, or that some unforeseen consequence will flow from the particular drafting approach employed, governments will almost invariably bring forward their own amendment to cover the point, rather than suffer the ignominy of being seen to accept an Opposition suggestion. A good example is the proposed further amendment of S45D of the *Trade Practices Act* in 1980, the original drafting of which, the Government was obliged to concede, had the effect of quite unexpectedly extending heavy sanctions to primary as well as secondary trade union boycotts. More often, Ministers will respond to reasoned criticism by simply parroting a barely understood departmental brief. This happened over and again during the more than thirty hours of Senate debate on the new ASIO legislation in 1979, and also during the long series of debates in the 31st Parliament (1977-80) on the Government's new narcotics and security legislation conferring unprecedented new powers of mail and telecommunications interception on government officials. When grinding ineffectually away in the chamber in the Committee stage of some long and complicated Bill, one is often reminded of Jonathan Swift's dictum that "it is useless to attempt to reason a man out of a thing he has never reasoned into". Whether a law emerges from the legislative process a good law or a bad law has almost nothing to do with the parliamentary input.

Things need not be so. At least for some kinds of Bills, and certainly for those which may be described as significant law reform measures, there is simply no inherent reason why the Parliament cannot operate as a legislature in the fullest sense of that term. The machinery is there, particularly in the Senate, in the Parliamentary committee system; the will is there, as evidenced by the performance of the Parliamentary committees on the few occasions when they have been given the opportunity to work over and improve the provisions of Bills referred to them; and the Parliamentary time is there, in the sense that the Bills which by their nature lend themselves to this kind of treatment constitute only a small proportion — never much more than 10 per cent and often less — of the Parliament's total legislative business.

There are many examples of the "law reform" measures referred to. Some recent ones include the Freedom of Information Bills 1978 & 1981 (designed to confer a general right of access, though subject to many exemptions, to government documents); the *ASIO Act* 1979 (designed to place the existence, structure, and powers of Australia's domestic intelligence agency on a new statutory footing); the *Australian Federal Police Act* 1979 (creating a new national police force by amalgamating the existing Commonwealth and ACT bodies); the *Customs Amendment Act* 1979 (introducing far-reaching new measures in narcotics law enforcement); the *Telecommunications (Interception) Act* 1979 (conferring new powers of electronic surveillance in respect of national security and major narcotics matters); the Human Rights Commission and Racial Discrimination Amendment Bills 1979 (designed to incorporate the Office of Community Relations Commissioner into a new national human

rights agency with a more wide-ranging charter); the *High Court of Australia Act* 1979 (placing the administration of the Court in its own hands following its permanent new location in Canberra); the *Bankruptcy Amendment Act* 1980 (making major changes to the law and practice of bankruptcy, following a long review of this jurisdiction); and the *Administrative Decisions (Judicial Review) Amendment Act* 1980 (defining, and substantially limiting, the kind of bureaucratic decisions reviewable in the courts under the 1977 parent Act). Also in the "law reform" category, although different to the extent that they were based on co-operative agreements with the States rather than the Commonwealth acting unilaterally, were the packages of offshore legislation in 1980 (instituting a new regime in the ownership and control of Australian coastal waters and the land beneath them), and the Companies and Securities Industries Bills first introduced in 1980 (establishing a National Companies and Securities Commission and a new set of national rules to govern companies and stock markets).

Nearly all of these measures had a substantial policy content, much of it highly contentious. But in many instances, the "policy" portions of the Bill, to which the Government claimed to be irrevocably committed, represented only a small, and severable, portion of the whole. And even in the case of the contentious material, much of it concerned matters sufficiently far removed from the immediate ideological battleground of the respective parties to enable, on the face of it, not only reasoned argument, but also mutually acceptable solutions. Many of the Bills in question were in fact given substantial debating time in Parliament, especially in the Senate, but almost invariably with wholly negative results. The Government had a position, and the same position at the beginning, middle and end of each debate, out of which it would neither be reasoned nor cajoled.

Only one of the measures mentioned, the Freedom of Information Bill 1978, was referred to a Parliamentary Standing Committee for full inquiry and report, with results that are well known. Notwithstanding the Senate Constitutional and Legal Affairs Committee spending a full year on the task, reading 168 written submissions and listening to 129 oral ones, sitting through sixteen public hearings and some thirty-six private meetings, and preparing a 526-page printed report containing 106 unanimously agreed recommendations, the Government responded in September 1980, ten months after the tabling of the Committee's Report, in a fashion that can only be described as derisory, not attempting to meet any of the Committee's major arguments and accepting less than one third of the recommendations — and all of those the relatively innocuous and insignificant ones. A handful of significant amendments was accomplished by the House of Representatives' new Legislation Committees in debating the 1979 Customs and Telecommunications Bills, but overwhelmingly the record over the life of the 31st Parliament — like all its predecessors — has been a thoroughly sorry one. The price that is being paid is graphically demonstrated in the October 1980 decision by Mr. Justice Wilson of the High Court that ASIO, (which the Opposition fought unsuccessfully every inch of the way to make more accountable when its legislative charter was passed in 1979), is for all practical purposes a law unto itself, beyond the scrutiny not only of the Parliament but of the courts as well.

Lamentations upon the demise of Parliament as an effective legislative body in its own right are, of course, about as old as the parliamentary system itself. There is no point in pretending that the current generation of parliamentary

toilers is any more frustrated than those in the golden years of yore, because there never really were any such golden years. The whole inherent character and logic of the parliamentary system, as we have inherited it from Westminster, is built not on the evolution of compromise following reasoned argument by reasonable men, but upon the superiority of the "ins" over the "outs". When you are *in* government you can, subject only to the distant and uncertain sanction of the ballot box, do more or less what you want; when you are *out* of government, you can do no more than press your nose and beat your fists against the window in a rage (sometimes real) about the iniquity and inequity of it all.

This system is one which, when working well — and that means without the distortions imposed either by unjustly drawn electoral boundaries (as ours were nationally for most of the 1950s and 1960s) or by an undemocratic second chamber developing delusions of constitutional grandeur, and with both sides of politics getting a more or less equal share at the helm — is really pretty much to the advantage, and the liking, of both conservatives and progressives. The system appeals to progressives because it means that when government is eventually attained, a good many radical changes can be pushed through in a relatively short time. Certainly it is infinitely more flexible in this respect than the United States presidential system, where no measure — whatever the popularity of the President, or the notional size of the majority his party might possess in the Congress — can get to first base without a laborious process of coalition building in which the trade in pork is usually rather brisker than that in reason. (President Carter's problems with his energy program were but one well known instance of what has been an endemic phenomenon.) Equally, the parliamentary system is a marvellous institutional vehicle in which conservatives can play out their favourite role of industrious inertia: while all the inane procedures of the respective chambers ensure that an appearance of legislative bustle is maintained, the Executive's tame majority ensures that, to apply the memorable dictum of Winston Churchill, no needless innovation ever takes place, especially when guided by logic.

Prolonged exposure to inanity, inaction, and boredom can, however, cause even one's sturdiest intellectual convictions to wobble a little, and it must be confessed that the Parliamentary regime of Senator Durack as Attorney-General, in the three years since he replaced the unlovable but at least active Mr. Ellicott, has to some extent made this writer rethink his hitherto fairly uncritical acceptance of the Westminster "ins and outs" model. The Durack era has been marked above all else by a lack or discernible commitment to law reform movement of any kind, except occasionally backwards — the most spectacular such retreat being the Offshore and Companies packages or Bills which have involved, particularly in the former case, a wholly unnecessary and wholly undesirable abnegation of Commonwealth authority in areas which, on any rational analysis of national needs, cry out for it. Generally speaking, this Attorney-General seems to have accepted the wisdom of Professor Cornford's advice that all important questions are so complicated, and the results of any course of action so difficult to foresee, that certainty or even probability is seldom, if ever, attained, in which case it follows that the only justifiable attitude of mind is suspension of judgment[3]). (Professor Cornford, it will be recalled, is the man who identified, inter alia, the Principle of the Dangerous Precedent, and its corollary that Nothing Should Ever be Done for the First Time.) Caution has in fact prevailed on so many occasions,

and in respect to so many different law reform initiatives taken by so many different responsible bodies both inside and outside Parliament, that it is now clear that the phenomenon at work is not mere chance but a new natural law, which might appropriately be dubbed "Durack's Law", as follows: "The likelihood of a conservative government accepting any given law reform varies in inverse proportion to the importance of the subject matter and the quality of the report recommending it".

Problems of this kind can to some extent be corrected by the changes of personnel and attitudes that will come with a change of government. Certainly an incoming Labor government would adopt a wholly different approach to law reform. It would, for a start, promptly legislate to give effect to — with only such modification as time has made necessary — all the reports of the Australian Law Reform Commission and most of those of the Senate Constitutional and Legal Affairs Committee, now languishing in pigeon-holes. It would also move to adopt a new method of parliamentary and governmental scrutiny (of the kind suggested in the Senate Committee Report on "Reforming the Law")[4] to ensure that the consideration of future reports from these bodies is built formally into the Parliamentary timetable, and that they are not ignored or emasculated.

But one would like to think that, along with changes of this kind, it might be possible to work some more fundamental improvements in the whole parliamentary system as it relates to law and justice issues, so as to make Parliament's law reform activities much more effective and sensitive, and much less subject to the vagaries of which party or person is in office. There are those who would reach for this purpose right outside the parliamentary system as it presently operates in Australia, but this writer's own radicalism does not extend that far. Certainly, the United States presidential system — with its coalition building, issue by issue — is not a model we should even think about emulating. Nor should we have any time for the kind of citizen-initiative referendums, much in favour in the United States and with populists everywhere, which the Australian Democrats have recently espoused. Citizen initiative does have some immediate intuitive appeal, but it does not stand up well to any kind of more extended reflection. It is inappropriate when there is any kind of properly functioning representative democracy; it is meaningful only in relation to non-complex issues (which most really important present questions are not); it is unreliable to the extent that the rich and powerful, by saturating the media, can buy a disproportionate influence; it is costly both for the public purse and those of the parties who will have to fight on even more fronts than they do at the moment; and it is dangerous in that it encourages politicians to play on community prejudices and fears and retreat from making hard but principled decisions themselves. Improvements in Parliament's Law reform performance in the reasonably foreseeable future will come not from grand reorganisation of the whole system or the super-imposition of gimmicks upon it. Rather, it will come from Parliament itself, as a result of evolving bipartisan agreement (of which there is some early sign at the moment), significantly altering and improving its own procedures and developing a much more flexible institutional environment than exists at the moment.

The trouble with nearly all previous attempts at parliamentary reform, most of which have led nowhere, is that they have tended to approach particular procedures as phenomena existing in isolation from the functions they serve — thus the concern with such things as gags and guillotines generally, division

times and voting procedures generally, the Committee stages of Bills generally. The fact of the mailer is that, as has been already stated, Parliament performs a number of very different functional roles — grievance monitoring as well as legislating, executive-monitoring as well as idea-initiating, and so on — and that the kinds of debating procedures appropriate to one such function may be much less appropriate, or acceptable, for another. Take, for example, one aspect of the long-deadlocked agreement about the position and powers of the Speaker, the question of whether the Speaker should have an independent discretion to refuse a government gag motion if he believes there has been insufficient debate. It may be that such a power could be acknowledged as appropriate in the context of urgency or other grievance airing debates, but not so as to enable interference with the Executive's ultimate control of its own legislative program.

Just as differences *between* parliamentary functions may be significant in the design and implementation of procedural reforms, so too may be differences *within* particular functional categories. If one takes, specifically, the question of reform of Parliament's legislative function, debate in the past upon this has too often foundered on an unwillingness to make the necessary distinctions between different kinds of legislation. With very few exceptions, governments have insisted on the right to passage, on their own terms, of every last detail of every last Bill, whatever its intrinsic character. Oppositions, on the other hand, have generally insisted on the right to scrutinise, hinder, harass, amend and ultimately reject every kind of government legislative initiative. What both governments and oppositions need to do is acknowledge that legislation is *not* all of a kind, but falls into at least three readily identifiable categories, and that in respect to each of these a quite different approach to parliamentary procedure is appropriate.

In the first place, there is major financial Legislation, for example, the annual Budget and six-monthly Supply Bills, and recurring appropriations for roads, education and the like, on which the government should be entitled to have its will prevail absolutely, so long as it retains the confidence of the popular House. Secondly, there is non-finance legislation to which the government has a clear policy commitment (as evidenced perhaps by its forming part of the platform on which the election was fought), on which again it would appear proper that the government be entitled, on basic principles if not details, to demand support. Reforming governments generate many examples of such legislation, conservative ones much less so; some clear instances from the Whitlam Government period were the Bills to regulate trade practices, outlaw racial discrimination, establish the Petroleum and Mineral Authority, require public projects to satisfy environment prohibition standards, change the formula for determining electoral boundaries, and introduce the Australian Assistance Plan structure. And, thirdly, there is non-finance legislation of a non-policy kind, on which it would appear both appropriate and sensible for governments to allow both their own backbenchers and the opposition a great deal of latitude: this is the kind of legislation where it would be appropriate not only to grant more time and opportunity for the scrutiny and, as necessary, amendment of the government's own Bills, but also to develop appropriate new procedures (especially Private Members' Bills on the U.K. model) to enable the initiation for debate of these matters by members other than Ministers. The clearest example in recent times of legislation expressly being debated on this basis is the *Family Law Act* 1975, introduced by Labor

Attorney-General Murphy in 1973; it is interesting to note in this respect that the bipartisan treatment of family law has continued under the Fraser Government, with its announced intention of granting a free vote to Government-party Members when the first of a proposed series of Family Law Amendment Bills (implementing recommendations of the Joint Parliamentary Committee on Family Law) is introduced in 1981. But Bills, or even just parts of Bills, treated in this way have to date been far more conspicuous for their absence than their presence in the Australian parliamentary tradition.

In Britain, in the mother of Parliaments, distinctions of this kind, between different classes of legislation, have been understood and accepted for years — and administered in practice by the respective Party Whips' offices imposing "three line", "two line" or "one line" whips, or no whip at all, depending on the extent to which the measure is or is not regarded as one of confidence. But in Australia, by contrast, although these kinds of distinctions may be understood and applied in a hazy and informal way (via such mechanisms as Whips' agreements on time allowed for debate) — and although there is, of course, a network of involuntary constraints imposed on any government which happens to lack a reliable majority in the Senate — there is practically no kind of legislation which governments voluntarily will treat unequivocally as in "category three", i.e., legislation as to which the government will welcome change and improvement, and in relation to which it will not ultimately insist on its own policy preferences prevailing.

It is unfortunate that this is so. The situation ought to be changed, and a future Labor Government should take the lead in bringing about such change if our Liberal-National Country Party opponents will not. There is, in fact, scope for a considerable amount of legislation to be treated, in whole or part, as "category three", even if it has not been so regarded in the past. Law and justice legislation, of the kind discussed in this paper, affords perhaps the best and clearest general example. Certainly, it should be possible to regard Bills embodying recommendations of the Law Reform Commission — on matters like criminal procedure, sentencing, privacy and unfair publication, lands acquisition and Aboriginal customary law — as perfectly designed for genuinely open parliamentary debate. This should equally be true for legislation on the jurisdiction and administration of the courts, and on the review (though this can involve some sensitive issues for governments) of administrative decisions by Ombudsmen, appeal Tribunals and the courts. Much business regulation legislation — on trade practices, bankruptcy, insurance, company law, securities and the like — involves technical rather than policy questions once the basic statutory path has been determined, and is capable of being debated in a much more relaxed and constructive fashion than has usually been the case in the past. The same also applies for civil liberties legislation of the Racial Discrimination, Equal Opportunity or even more far-reaching Human Rights Bill kind: while there are bound to be continuing differences between Labor and non-Labor parties on such fundamental issues as, for example, whether such legislation should bind the States or apply only to the Commonwealth, there is ample scope for reasoned discussion of the precise terms in which particular guarantees and protections should be enacted.

It is not being suggested that, even when one leaves aside obvious policy issues like States' rights questions, there is no policy content at all in the kind of provisions here urged to be open for genuinely free debate. On the contrary,

they frequently involve issues of very great difficulty and sensitivity. The point is simply that they are not policy issues on which governments need always, or *should* always, strike initial postures which they then defend unto the death, however absurd and indefensible the position into which such intransigence may lead them. Politicians by and large do have a particular genius for compromise — and a properly functioning legislative system, allowed its head by the Executive, can produce good, workable legislation which will be reflective of and responsive to the social change occurring in the larger community. Law and justice issues will not be taken out of politics — it is rather that they will be, if this achievable change can be made to come about, addressed in a more rational and constructive legislative environment than has hitherto been the case.

The achievement of rational legislation, sensitive to social change, is not the end of the matter. That legislation still has to be interpreted and applied by the courts, and in the event that questions or constitutional validity should arise, those courts — and the judges who constitute them — have, for all practical purposes, the last word. Bearing all that in mind, it is evident that no sketch of the politics of justice would be complete without some attention being paid to the politics of the judiciary.

THE POLITICAL ROLE OF THE JUDICIARY

The starting point in considering the role of the courts is to appreciate that they — and especially the High Court — are essentially political institutions. True, the judges are not elected; true, most would hate to be thought of as having any kind of political role; true, they wear the guise of umpires rather than competitors in the contests that come before them. But what they do, in resolving those contests, has an enormous impact on how the country is governed, and how well it is governed; judges do, whether they like it or not, or would admit it or not, spend a good deal of their time shaping national policy. It is not intended to over-simplify the argument by referring to such obviously pathological cases as the Chief Justice's advisory opinion to Sir John Kerr in 1975. Nor is it intended to take into account the activities of those Judges who are not really judges at all — the legally qualified Deputy Presidents of the Conciliation and Arbitration Commission, which body is and behaves about as much like a court as the Federal Parliamentary Labor Party. Also left out of account are the extra-curricular activities of those judges who, in increasing numbers, are doing the dirty work of the Executive by sitting on committees and commissions of inquiry, the phenomenon Gordon Reid primarily had in mind when he coined the description "judicial imperialism".[5] What is being referred to is what judges do in their ordinary role of hearing and determining cases before them in court.

The political character of the courts most obviously appears in the constitutional decisions of the High Court, where the Court has the last word on fundamental questions about the structure of our governing institutions, on the demarcation of power between Commonwealth and States, and on the scope of absolute limitations of

power (e.g. those imposed by Section 92) to which both Commonwealth and Slate governments are subject. But the decisions of courts at *all* levels in the system can have a political impact in practice which is almost equally significant. Take, for example, tax litigation, where decisions adverse to the Commissioner in the construction of section 250, or in respect of artificial avoidance schemes generally, can cost the community hundreds of millions of more or less irretrievable dollars, and cripple the capacity of government to deliver a whole spectrum of social welfare and other programs which would otherwise be implemented. Take the decisions of the industrial courts on the application of both the *Conciliation and Arbitration Act* and the anti-union provisions of the *Trade Practices Act*. Take, again, administrative law decisions of the kind involved in the *Karen Green Case*,[6] where what was in issue was the operation and administration d the whole unemployment benefits system. And take decisions in the area of criminal law and procedure, where the constraints that are set — or more often *not* set — on police behaviour are crucial to the way in which this most visible arm of the authority of the state exercises its power.

It is beyond argument that in all these areas, and others as well, the courts are constantly exercising a creative function which is for all practical purposes legislative in character. The myth that judges do no more than declare the law — applying received and well-understood principles to new fact situations, with the result that, once the facts are elicited, the right legal conclusions follow with logical inexorability — has always been just that, a myth. Even the judges themselves lave long since blown the whistle on this cherished notion of laymen, at least so far as the common law is concerned. Lord Reid, one of the century's outstanding U.K. Law Lords, put it nicely:

> "Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more."[7]

When one turns away from common, or judge-made, law to statute law, one finds the myth dying a little harder. When a particular interpretation of an Act is criticised as ludicrously narrow or palpably at variance with prevailing social values or economic realities (and this is a common criticism, for instance, of judicial interpretations of the *Income Tax Assessment Act*), it is usual for that interpretation to be defended on the ground that all that judges can do is apply the law as made by Parliament and not to improve it.

But this does not hold water either. The trouble is that statutory language, like any other kind, is notoriously open-textured, imprecise and ambiguous. Statutes are not, and cannot be, drafted with mathematical precision to cover all possible contingencies. Judges traditionally get over this difficulty by saying that what they are really doing in interpreting statutes is eliciting the "intention of the legislature". But since no one actually believes that the Parliament (as distinct from the Executive and its draftsmen) does have a collective intention about anything, or that if it did it would be discoverable in the confused flurries of rhetoric that constitute the Hansard record, what actually happens is that judges turn for guidance to one or other of two more or less equally time-honoured, but nonetheless basically irreconcilable, approaches to statutory interpretation. Which one of the two

approaches is chosen seems, on the face of it, to depend as much as anything else on taste, temperament, conscious or subconscious political prejudice, or the state of the judge's liver on the day.

One approach is strict *literalism*, which in essence amounts to this: take the literal words of the statute absolutely at their face value, ignore any absurdity, manifest inconvenience or even conspicuous injustice that would flow from their literal application, and if all this creates a mess, leave it to Parliament to sort it out. The alternative route is the *liberal* approach, which allows the plain meaning of words to be qualified or extended if a strictly literal interpretation would lead to absurd or mischievous consequences or thwart what appears to be the manifest purpose of the statute in question. The fact that these two approaches are more or less flatly contradictory is bad enough, but what really bemuses successive generations of law students — till they come to reorganise the whole judicial non-creativity racket for the charade it is — is to find one and the same judge (and Sir Garfield Barwick has been only the most conspicuous delinquent in this respect) being a narrow literalist in one case and a broad-brush liberal in another.

A classic recent demonstration of these two judicial styles at work was in the *Westraders Case*,[8] in which the High Court, by a 3:2 majority, held that a share trading partnership was entitled to manipulate the price of its trading stock for tax avoidance purposes in such a way as to convert a small real profit into a $6.4 million paper loss. The Chief Justice, delivering the leading majority judgment, on this occasion chose to wear his literalist hat. (This is indeed his usual garb in taxation matters, one which he tends to doff only when section 260 is in issue, that being the provision which, if literally construed, confers a broad and quite unambiguous discretion on the Commissioner to overrule avoidance-motivated arrangements). Mr. Justice Murphy, as usual the leading dissenter, was being his more-or-less consistent liberal self. Sir Garfield Barwick put the matter this way:

> "It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax... It is not for the Court to mould or to attempt to mould the language of the statute so as to produce some result which it might be thought the Parliament may have intended to achieve, though not expressed in the actual language employed... the citizen has every right to mould the transaction into which he is about to enter into a form which satisfies the requirements of the statute... Nor can it matter that his choice of transaction was influenced wholly or in part by its effect upon his obligation to pay tax."

Mr. Justice Murphy's approach was entirely different:

> "It has been suggested, in the present case, that insistence on a strictly literal interpretation is basic to the maintenance of a free society. In tax cases, the prevailing trend in Australia is now so absolutely literalistic that it has become a disquieting phenomenon... Progress towards a free society will not be advanced by attributing to Parliament meanings which no one believes it intended so that income tax becomes optional for the rich while remaining compulsory for most income earners."

It need hardly be said which of these approaches the present writer finds more persuasive. But perhaps it should also be said that I believe Mr. Justice Murphy's approach to be better law.

Certainly, it would be so regarded in Britain, where the courts have in recent years indicated a clear preference for the liberal approach, even in dealing with penal and revenue statutes of the kind which have traditionally been construed very narrowly against the Government. It is interesting to note Lord Scarman's comment in this respect in his Fullagar Lecture at Monash University In September 1980: "When I, an English judge, read some of the decisions of the High Court of Australia, I think they are more English than the English. In London no one would dare to choose the literal rather than a purposive construction of a stature, and 'legalism' is currently a term of abuse."[9]

One does not know how successful this lordly admonition will prove to be in moving any of Australia's literalists, be they of the full-time or part-time variety, to renounce their sins. What may be a little more helpful in this respect is some legislative initiative by the Parliament, of the kind noted, interestingly enough, by Senator Durack recently,[10] whereby the courts would be instructed to take into account accompanying explanatory memoranda when construing complex legislation, in the hope and expectation that their judgments would reflect thereby a greater appreciation of the underlying policy of the legislation in question. This suggestion has a great deal of merit, and the Labor Party — in or out of government — should certainly co-operate in its implementation.

When one turns away from ordinary statutory interpretation to constitutional cases, the situation becomes a little more complicated. Although the Australian Constitution is technically a statute like any other (albeit of the Westminster Parliament rather than our own) it is obviously not as susceptible — to put it mildly — to ready amendment. This means, or ought to mean, that judges are a little more alert to the practical consequences of their decision making than they can afford to be when there is a parliamentary backstop to pick up the pieces. But for every dictum one can find in the cases, and there are plenty, asserting that "it is a Constitution we are interpreting" — that it should be construed as a broad organic instrument and not given a narrow and pedantic interpretation — there are others which insist, following the language of Sir Owen Dixon, that "there is no other safe guide to judicial decisions in great conflict than a strict and complete legalism".[11]

Legalism has been for a long time the prevailing orthodoxy of the High Court. The image that the Court has sought to create for itself is one of being disinterested, above the fray, restrained, concerned with "the law" itself and only marginally with its implications for the real world. This has been reinforced over the generations by a number of specific factors: the language of its judgments (for the most part highly analytical, abstract, dull and prolix), the interpretative techniques it has employed (for the most part biased towards literalism rather than liberalism), its procedures (designed to ensure that problems usually arise for decision in the most abstract possible form) and, not least, its personnel (all males, and overwhelmingly middle-aged WASPS from good private schools who have made a great deal of money at the Bar in appellate commercial and property work).

But it is important to appreciate that "legalism" does not involve a value-free approach to adjudication any more than does the free-wheeling, overtly result-oriented adjudicative style engaged in most often by judges like Mr. Justice Murphy and, rather more selectively, by those like Sir Garfield Barwick. It has come to be accepted that Dixon himself, for all his mastery of conceptual disguise, premised nearly all his constitutional judgments on his own clear-cut value

preferences about the nature of the federal compact and the proper limits of governmental power. And what is true of God is undoubtedly true of the lesser judicial hosts. The point is that values and preferences necessarily intrude into any decisions of any complexity, because problems are simply not capable of resolution by application of "the law" to "the facts": decisions have to be made as to which particular rules of law are relevant and which facts are material. Judicial decision-making, in constitutional law as everywhere else, involves a complex interaction of law, facts and values, in which choices about each influence choices about all the others.

There is ample opportunity in practice for value-preferences to intrude into constitutional decision-making, whether a judge is purporting to operate within the legalistic tradition or whether he chooses to overtly step outside it. For a start, the Constitution is littered with words and phrases either inherently imprecise[12], or capable of varying meanings depending on whether they are read broadly or narrowly, literally or liberally, or given an historic or contemporary meaning[13]. Then there is the opportunity for judicial maneuvering which arises out of the process of characterisation: determining whether or not the subject matter of a Commonwealth act is such that it comes within the Commonwealth's narrow catalogue of powers[14]. Again, political values can readily intrude in the way one applies the doctrine of precedent. Although the High Court is always technically free to overrule its own previous decisions, most judges are reluctant to do so when an issue has been fully argued and decided only a short time before — even including Mr. Justice Murphy, who generally thinks of precedent as "a doctrine eminently suitable for a nation overwhelmingly populated by sheep"[15]. But twice now recently, following fortuitous changes in the composition of the Court, matters the subject of very recent Full Court decisions have been reargued with the Chief Justice as cheer leader: these were the cases involving the Territory Senators, in which the Chief Justice's gambit proved unsuccessful, and the Wheat Board, where there remains a good prospect of him ultimately succeeding.[16] Yet another device up the sleeve of any judge not averse to using it is the power of delay. The tardiness of one judge in producing reasons for a decision holds up the entire Court. In this respect, it may not have been entirely fortuitous, to take one example, that the decision favourable to the Commonwealth in the *Offshore Petroleum Case*[17] did not come down until just after the Whitlam Government had been dismissed and the Fraser Government elected. Of course, another kind of delaying power that has traditionally been available to High Court judges is in the timing of their retirements. Few judges have acted in a more blatant political manner than Justices Rich and Start, who notoriously delayed their long overdue retirement until 1950, when they were aged 87 and 78 respectively, so their replacements would not be selected by the Chifley Labor Government.

That there are *opportunities* for judges to apply the values they undoubtedly possess in their decision-making is scarcely controversial; what becomes more so is the claim that any particular judge has been moved by any particular values do significantly determine judicial series of cases. This is not the occasion to review it, but there has in fact been a substantial amount of analytical work done in recent years in Australia to determine whether the patterns of agreement and disagreement that show up over time in the work of particular judges on particular courts are more regular than could be ascribed simply to statistical chance: such analysis does

in the view of this writer offer real and substantial evidence that underlying motives and values do significantly determine judicial behaviour[18]. This is not to say that "jurimetrics" — as the Americans have, inevitably, dubbed this kind of analysis — is either very popular or universally accepted within the practising profession. After all, as one writer has put it, "the very act of analysis is regarded by many as sacrilege when the subject of analysis is the decision of a judge, the object is to detect bias, and the means is mathematical".[19] Nor is it to say that these techniques are so refined that one can precisely pin down what has moved, or is likely to move, a judge in a particular case; one of the problems here is that real world problems do not come in neatly labeled boxes, and one's own values often find themselves in competition. Contemplate, for example, the dilemma confronting the subconscious of Sir Garfield Barwick in the *Territory Senators* cases. On the one hand, his long conspicuous centralist instincts would have been inclining him toward upholding the Commonwealth legislation giving Senate representation to its own Territories; on the other hand, his conservative bicameralism, which may or may not in turn have been influenced by his association with the Liberal Party, would have been urging him to find a basis for throwing (as he eventually did) the whole thing out.

What has been said so far about the courts essentially amounts to this: that they, and especially the High Court, do have a major political impact both on the working of other institutions in the system and on the formulation and implementation of national policy; that judges do exercise a creative, essentially legislative, function; and that judicial decision-making is significantly influenced (even if one cannot precisely analyse or predict what is going on in any individual case) by the judge's own values and experience in those numerous situations where the law is either not clear, or if it is clear, is nonetheless seen by the judge to produce an unconscionable result.

There are at least two substantial issues thrown up by all of the foregoing that should now be pursued a little further. One is the question of how judges — and especially High Court judges — ought to be appointed: what criteria should be relevant, and what kind of people should be excluded or included? The other is the question of with what kinds of new powers, if any, these apolitical political institutions can and should be entrusted: in particular, is it consistent with democratic principle, and wise in practice, that the courts be vested with the jurisdiction to enforce an Australian Bill of Rights?

THE APPOINTMENT OF JUDGES

The appointment of judges is a sensitive business. In every Australian jurisdiction it is a matter for the Executive acting alone; there has never been any inclination to toy with a system of electing judges, as is the practice in some States of the U.S.A., nor is there any provision anywhere comparable to the United States requirement that Federal judicial appointments be made subject to the advice and consent of the Senate, nor has there ever been much enthusiasm for the proposals that surface from time to time for judicial appointments to be made by, or at least with the advice of, an independent Judicial Commission. It has been the practice, in some jurisdictions, for the Executive Government, acting through its Attorney-General, to consult with the Chief Justice as to possible

candidates before appointments are finally made; in the case of the High Court the basis of consultation has been taken a significant step further recently by the 1979 enactment of the *High Court of Australia Act*, section 6 of which requires the Commonwealth Attorney-General to consult with the Attorneys-General of the States before any vacancy is filled. It will be appreciated that the obligation here extends only to consultation; there are no voting rights or veto powers of any kind vested in the States.

Although the Constitution sets no limit on the number of High Court judges who may be appointed, there has never been any occasion in Australian history when the stacking of the High Court — of the type proposed by Roosevelt in the 1930s, and which concentrated the mind of the United States Supreme Court wonderfully at that time — has been seriously contemplated. Conservative governments have never found such crudity necessary; Labor governments — though often enough sorely tempted — have never dared to. In fact, for all the sound and fury that greeted the appointments of McTiernan (and to a lesser extent Evatt) in 1930, and Murphy in 1975, the most obvious characteristic of Labor's judicial appointments has been their timidity. Gavan Duffy, Powers, Rich, Webb, Jacobs: none of these were calculated to stir a flutter in the Melbourne or Australian Clubs, and none of them did.

Because it is obvious that a great deal of what the courts do — and especially what the High Court does — has a significant impact on national policy; because the judicial process is and ought to be creative; because it is not and cannot be value free or value neutral; because there is ample evidence that individual judges in making their individual decisions are significantly influenced by their own values and experience, however hard they may try to expunge any such considerations from their mind; because the only way forward is for judges to be far more candid than they have been in articulating all the reasons (or at least all the conscious reasons) for their decisions and, as a corollary, to take into account a broader range of considerations, and materials, than they are now accustomed to do; because of all these things, there is no point at all in the government of the day being coy or hypocritical about the appointment of judges. It should not relinquish the power of appointment to anyone else, and should use such opportunities as come its way to appoint to the Bench men — and women — who are known to be in general sympathy with its own aims and perspectives. This will happen anyway, just as appointments have always been made on this basis in the past. The notion that it is possible for the benches of the courts of the land, and especially the High Court, to be composed of wholly disinterested, wholly dispassionate, ideological eunuchs is another one of those fairy stories which we should have all outgrown.

The High Court is a highly political institution at the moment, but it is not frankly and openly so. The occasions are extremely rare when the judges clearly acknowledge the poverty of legal formulae in resolving complex economic or social questions before them, and go so far as to explicitly identify the social or economic or institutional or philosophical considerations which finally move them to decide as they do. Mr. Justice Murphy does it most of the time; Sir Garfield Barwick did it erratically; the other judges almost never. The joint judgment of Justices Mason and Jacobs in the *Clark King Case*, in which they upheld the wheat stabilisation scheme from section 92 challenge on the basis that it was "the only practical and reasonable manner of regulation of trade and commerce... in wheat" is one of the

few recent exceptions to stand out in one's memory.

There is a real, practical point about coming clean on the question of appointments. It is that if lawyers are appointed to the Bench with the acknowledged expectation that they will, when the occasion demands, bring to bear certain policy perspectives, then they might be inclined to engage less in lawyer's games and more in genuine and open debate as to which legal alternatives are in the national interest. The object is to remove *all* the various kinds of mystique which have been used to hide the real policy questions inherent in so many decisions. This is because, as Louis Jaffe has succinctly put it, "If the judges can be persuaded to allow the underlying policy questions to be brought out into the open, these questions would then become arguable and, in that way, subject to a higher degree of rational consideration and control".[20] Justices Mason and Jacobs have been attacked for their judgment in the Wheat Board case at least as much for getting their economics wrong as their law wrong; it maybe that if their cards had been more openly on the table during the conduct of this litigation, and much more material as to economic and social consequences had been allowed to be put in evidence and argument, a more generally acceptable, and accepted, decision would have resulted.

Something should be added in deference to those, like Mr. Justice Murphy, who have repeatedly urged that the judiciary reflect some kind of balance not only so far as conservative and non-conservative values are concerned, but in the number of women, and persons of non-British origin, appointed to it. While this is obviously a worthy goal and one which is capable of achievement over the State and federal judiciaries as a whole, it is not one that may be achievable easily so far as any particular court, including the High Court itself, is concerned. What matters most is that the members of any particular court, whether they are Tasmanians or Victorians, male or female, black or while, or anything else, be the kind of people who will honestly and openly articulate, and rationally defend, the kinds of values they are in fact applying to the resolution of those many cases where the law has to he made and not simply taken down from the shelf and applied.

It is inevitable that the position outlined will be construed by someone, somewhere, as amounting to no more or less than a plea for the highest court in the land (and a few others as well) to be filled with malleable party hacks. Nothing could be further from the truth. I am a fierce defender of judicial independence, in the sense that judges must be guaranteed freedom from Executive government and other external institutional pressure. I would be appalled at the appointment of anyone whose intellectual or professional capacity or integrity was no more than that of a hack, and — while I unashamedly advocate governments doing what they can to appoint people sharing their own general values — this need have nothing whatever to do with known party membership or party loyalties.

I believe that there are six basic criteria which must be satisfied in the appointment of any High Court judge. That might appear a rather large number, but as Phillip Kurland has nicely remarked in the context of the United States Supreme Court, a little more is needed than "an average IQ and a distaste for venality".[21]

The first criterion is simply intellectual capacity: appointees should have first class minds, a good all-round knowledge of the law, and — by no means least important — be able to communicate lucidly.

The second is intellectual creativity, or at least receptivity to creative initiatives by others. Some people can go their

entire career very effectively analysing and articulating, but without ever having a new idea about anything. This is not to say that a judge should be expected to throw out new ideas like sparks from a Catherine wheel: on the Bench, as elsewhere, this can be rather tiring for everyone else. But in a changing world, every little bit helps.

The third criterion is intellectual integrity, and this is perhaps the most important requirement of all. It encompasses the notion of impartiality at least to the extent that it means that a judge should not prostitute his intellect in the service of his instincts and emotions; it means that his judgments should be draftsmanlike, meticulously and honestly argued, and consistent over time. If precedents are to be cited in support of an argument, they should be cited for what they do stand and not for what the judge would like them to stand; if a judge is to vary his position or approach on an issue from case to case, then the reasons for that variation should be honestly explained; if non-legal considerations have, in the final analysis, determined which legal route the judge has chosen, then those values should so far as possible be articulated. As Sir Kenneth Jacobs wrote in a law review article before he was appointed to the High Court, "A lawyer who frames his reasoning as if his conclusion is logically compelled, when its motivations or processes are finally uncontrolled by logic, is indulging in rationalisation... I do not see why this should deserve any praise."[22] Good, intellectually honest judicial draftsmanship involves, to my mind, something more than the kind of deft manipulation of concepts and language for which the judgments of Sir Owen Dixon remain so famous, although that is how many lawyers would best understand the term. It should consist of "the full and open exploration, and then the rational and consistent application, of all the materials relevant to the solution of the problem in hand: strictly legal materials where the principles to be applied are beyond doubt; and when — as more often — they are not, then appropriate social, economic and other non-legal considerations as well".[23]

The fourth criterion for appointment to the High Court Bench — and this is more relevant to the High Court than any other court in the system — is experience, or at the very least understanding, of the real political world. In the first decades of the Court's existence there seemed to be little argument about this, and fully eleven out of the fifteen judges appointed between 1903 and 1935 had been either federal, State or Colonial politicians in earlier incarnations.[24] Since 1935, however, there have been only two such appointments, both notorious; those of Sir Garfield Barwick in 1964 and Lionel Murphy in 1975, and there has been an evident tendency in recent times to regard the appointment of politicians — even former Attorneys-General with distinguished ministerial careers — as somehow disreputable. Thus the Melbourne *Age* on 7 July 1980, commenting disapprovingly on the prospects of the Hon. R. J. Ellicott, Q.C., M.P. being the next Chief Justice, quoted with enthusiasm a pronouncement by Sir Owen Dixon that "Once a politician, never again a good lawyer", and described all precedents involving leaps from politics to the bench as "bad". This kind of criticism appears fundamentally wrong. While close personal experience of public affairs does not in itself guarantee that a person has learnt anything thereby, it at least makes it far more likely that he or she will understand and be sensitive to the practical consequences of decisions affecting the operation of political institutions, and public policy generally, than someone whose professional life has been largely preoccupied with private commercial and property disputes. Constitutional cases

may in the past have occupied only about one place in twelve in the Court's lists, but they are the most important of all for the Court to get right, In any event, with the recent shedding of unwanted minor jurisdiction back to the Federal Court and State Supreme Courts, the proportion of constitutional cases in the High Court's total workload is steadily growing, as is its role in public law generally; this being administrative law, industrial law and criminal appeals. In all of these areas the utility of some rough-and-tumble real political experience far outweighs the dangers, even though it carries with it a certain risk that the appointee will come to the bench with certain axes even more ready to grind than would otherwise be the case. If public confidence in the courts is still thought to be at stake, then that can be best maintained by ensuring that politician-appointees unequivocally satisfy all the other suggested criteria especially that of intellectual integrity,

The fifth criterion can be described as personal integrity. Putting it simply, there ought be no shadow of suspicion that the appointee's personal background, and in particular his financial dealings and interests, have been otherwise than honourable.

The sixth, and last, criterion is that the appointee have a capacity to inspire general respect and confidence. In large part this requirement is an amalgam of the first five criteria already listed: someone who has all the characteristics already identified will be well on the way to satisfying this one. Some may be tempted to say that the fourth criterion, so far as it relates to political experience, is wholly incompatible with the commanding of general respect and confidence, but that is just a little too cynical; moreover, the requirement here is not that the person has been the subject of universal affection, only that he have a capacity — which will perhaps only come to be realised on the bench to command general respect. Additional factors, apart from those mentioned, come into play as well. One relatively minor, but not totally unimportant, one is the nature of the appointee's personality: if it is thoroughly and relentlessly authoritarian, or notably difficult or erratic in some other conspicuous respect, then the judge in question is unlikely ever completely to win the confidence and respect of his brethren, the profession, or anyone else who cares about these things.

It might be a diverting exercise now to apply these various criteria to the past and present incumbents of the High Court bench to see how they measure up, but — in the absence of any readily available means of correcting mistakes already made the temptation to be explicit shall be resisted, and the criteria and the facts on public record shall be left to speak for themselves.

THE PROPER LIMITS OF JUDICIAL POWER: THE CASE OF A BILL OF RIGHTS

There has for many years now been momentum developing behind the idea that Australia should have its own national Bill of Rights: both to symbolise our commitment to all those traditional civil and political rights (of speech, assembly, association, religion, conscience and equal voting rights; of nondiscrimination; of just treatment by the legal process; and of privacy), which are almost wholly neglected in our present Constitution, and to operate as a brand new weapon in the protection of rights which have been put at serious risk over the years by innumerable pieces of federal and State legislation, by countless acts of uncontrolled police, bureaucratic

and executive behaviour, and by the failure of the courts themselves to do much more than timidly acquiesce in what has been happening.

The question of whether Australia should have an enacted Bill of Rights or at least have such basic rights implied and enforced in decisions of the judiciary, is one that raises squarely and graphically the remaining issue with which this pamphlet deals. This issue is one that arises naturally from any discussion of the role of the courts, their composition, performance, political impact and general credibility. It is that of the proper limits of judicial power. It is the issue of the extent to which the courts — composed as they are of judges who are unelected, irresponsible and not all that radical — should be entitled, or encouraged, to exercise functions which have traditionally been left to the people's elected representatives in Parliament.

It has long been accepted in Australia, as in other federations, that the courts do have a proper and useful role in umpiring the distribution of power between the different levels of government, to ensure that each does not exceed its own defined area of constitutional responsibility. Judicial review in this sense was built into the terms of our national Constitution, and we have long been accustomed to the courts second guessing the Parliaments in constitutional controversies. When the question arises these days, as it often does, as to how much decision-making should be left to the judges, or how far the judges can be trusted to exercise new kinds of authority in the national interest, the battleground is invariably that of human rights.

As one of the more dogged proponents over the years of the Bill of Rights concept, I am well aware that the whole Bill of Rights question is not a simple one, and that whether a Bill of Rights is worth having depends on the answers to a whole series of questions. These include the nature of the instrument in which the Bill is enshrined, the nature of the rights which are identified, the way in which those rights are defined, the mechanisms which are available for their enforcement, and the nature and extent of the detailed backup measures — legislative and otherwise — which exist to supplement the necessarily more general guarantees in the Bill of Rights itself. Of all the various objections to the Bill of Rights concept, however, the most persistently recurring and this is what makes it so relevant to the present discussion, is the argument that it is inappropriate for the courts to be involved, as they would probably have to be in one way or another (though not necessarily as the only mechanism), in enforcing human rights guarantees. The courts, it is said, should not be involved in second-guessing the legislature in matters as sensitive, delicate and politically highly charged as this.

The attacks come from right across the political spectrum. From the right, the argument is to the effect that a Bill of Rights function would politicise the courts, destroy the aura which has traditionally surrounded them, and lessen respect for the judiciary generally. From the left, the argument is rather that you cannot trust the judges anyway — that however bad the present system is, with the sort of people judges are, giving them more power will only make things worse. And from the left, right *and* centre comes the argument that whatever the importance of the libertarian principles that might thereby be served, it offends democratic principles for unelected judges to have any kind of role in overturning decisions of the Parliament.

About the argument from the right, little more need be said than has been already. The notion that the courts do not already play a political role is nonsense; if adjudicating a Bill of Rights does make the existence and interplay of competing values on the courts, and

especially the High Court, more visible, then so much the better; and if the Court is to maintain and enhance such prestige as it already possesses, then this will happen not by trying to go on sheltering behind a mystique propped up by an ever-dwindling band of fundamentalist believers, but rather by the Court earning respect through the quality and craftsmanship (in all the senses of that word previously outlined) of its performance.

The argument from the left, that the judges simply cannot be trusted to construe and apply Bill of Rights questions in a humane, literate and sensitive way, is a little more difficult to answer because it has a good deal of data to support it. For all the familiar Menzian rhetoric about the majesty of the common law, and the Anglo-Saxon tradition of judicial commitment to the liberty of the subject, the record of Australian courts in creatively developing common law protections, in interpreting authoritarian legislation in the least restrictive way, or construing the existing handful of constitutional guarantees (e.g. the right to trial by jury) so as to give them real meat and substance, has been a far from proud one.

Two recent examples from the High Court are the *Darcy Dugan Case*[25] in which the court held that a person convicted of a capital offence lost his civil rights to approach the courts and could not sue for libel, and *McInnis's Case*[26] in which it was held that a prisoner defending a serious rape charge, and abandoned by his barrister when legal aid was refused, was not entitled to legal representation as of right. Another less recent example, but one which has assumed a good deal of importance in recent years, has been the flat refusal of the Court to recognise or develop a common law right of privacy.[27]

But against this it must be said that there are some encouraging signs. In the area of criminal investigation and the control of police powers — notoriously one of the most troublesome for civil libertarians — the High Court has in fact moved much more rapidly in recent years than anyone could have expected, in particular with its decisions in *Driscolls Case*[28] and *Bunning* v. *Cross*[29] concerning the control of interrogation and the exercise of the discretion to exclude evidence unlawfully obtained. Again, in the *General Practitioners Case*[30] the Court — in refusing to accept the doctors' contention that legislative provisions governing the administration of pathology tests amounted to the kind of "civil conscription" protected by section 51(23A) of the Constitution — adopted a wholly more rational construction of that section than that which had prevailed since the Court's 1949 decision on this clause in the B.M.A. Case[31] . And, in the *Defence Papers Case*[32], decided by Mr. Justice Mason in December 1980, an extraordinary blow for free speech and freedom of information was struck in the Court's rejection of a Government claim to be entitled to suppress at will the publication of "confidential" government papers.

While current evidence of how the High Court is behaving on civil liberty issues is thus perhaps equivocal, what can be said with some confidence is that the enactment of a Bill of Rights would completely change the parameters within which these decisions are made, and must have a significant longer term effect even if early progress is slow. The point about a Bill of Rights is that it will give both judges and litigants at all levels in the system new tools with which to work — litigants new arguments for challenging unjust and oppressive laws, and judges new reasons for striking them down. No longer, for example, will defendants facing prosecutions under Queensland or W.A. street assembly laws be limited, as they are at the moment, to either groping for some inconsequential technical error

or making some hopeless appeal to general principles: they would be able to rely, one assumes, on an overarching guarantee of freedom of peaceful assembly which would have the effect of requiring that a prohibition have some reasonable basis in all the circumstances of the case before a prosecution could be launched. Of course it will take time for conservative judges reared in a conservative, legalistic tradition to learn to read a Bill of Rights as something more than just another Traffic Act or Dog Act, but one must have some confidence that over time the atmosphere would change, and that a Bill of Rights would come to be accepted by everyone as an indispensable tool — quiet lacking at the moment — in enabling some kind of counter-weight to governmental authority, and an extremely valuable balance to be drawn and maintained between the rights of individual citizens on the one hand and the legitimate interests of the community as a whole on the other. A sole reservation I would have relates to giving the judges the *last word* in disputes between citizens and the Parliament, at least until the educative process had had some years to work itself out: this is a point returned to below.

What has been described as the attack from the centre — the argument that judicial review in the civil rights area is incompatible with democratic principles — is regarded by many as the most conclusive objection to a judicially enforced Bill of Rights. The judges, it is said, are irresponsible — they are not elected by or answerable to the people in the same ways as parliamentarians, and are not subject to any other kind of democratic control. Whatever their other merits, therefore, and whatever the precedents may be for this kind of review in the courts' present constitutional jurisdiction, they should not be given new jurisdiction to strike down, by reference to higher standards laid down in general terms in a Bill of Rights, laws properly made by the representatives of the people. If the laws made by the Parliament are explicit and unambiguous, they should be given effect accordingly; if those laws are bad, as they often have been and will continue to be, then the remedy lies in the ballot box.

This argument is not, however, especially convincing. The major objection is that it is premised on a single, very narrow conception, that democracy means accountability through the ballot box. A broader concept of democracy, which more fully recognises the contribution that theories of individual rights have made to the formulation of modern democratic theory, is that democracy is to be regarded as requiring a fair decision-method in which the rights and interests of minorities are protected against unfair or unreasonable majority attack. If this is accepted then it follows naturally enough that a system of judicial protection of individual and minority rights may not only be compatible with a working democracy, but in the absence of other forms of institutional protection — may be indispensable to it.

A further consideration to bear in mind is that it has generally been accepted as an indispensable element of the institutional apparatus of working democracies that there be some separation of powers, some system whereby — in Anthony Blackshield's description — "governmental power should be distributed among different kinds of institutions, all exerting a partial check and a partial control on each other, and none having absolute power".[33] From this perspective, of course, the judicial check upon the legislature implied by a court-enforceable Bill of Rights is entirely consistent with the democratic ideal.

Another thoroughly democratic justification for judicial review is that it may be necessary to ensure that the majoritarian foundations of a democratic

system are in fact maintained. If there is one principle which can be regarded as absolutely fundamental to the working of Western liberal democracies, it is that of "one person, one vote, one value". If ever there is an occasion, accordingly, where judicial review would be said to be acting in the service of "democracy", it would be when, in applying a Bill of Rights guarantee of equal voting rights, the courts directed the redrawing of electoral boundaries so as to ensure parity of voting strength between different sections of the electorate,

Yet another answer to the objection based on a strictly majoritarian theory of democracy is one that takes this objection directly on its own terms and asks *who* precisely is the "majority" whose voice must prevail. The notion of a popular majority only makes sense in the context of some defined political or geographical unity — and in a federal system, there are of course a number of such units. A legislative measure in Queensland or Western Australia which may reflect majority support in that State may very conspicuously lack it when the views of the other States, or the nation as a whole, are taken into account. One of the strongest arguments for a *national* Bill of Rights in Australia is that it will in fact enable some more civilised standards to prevail in those cultural and ideological backwaters where there has been a long history of indifference to minority rights,

It will be appreciated that to some extent this whole debate has the characteristics of an old-fashioned semantic controversy, with almost everything turning on what meaning one ascribes to the term "democracy". Certainly, the initially obvious character of the democratic objection to judicial review in the civil rights area becomes much less so on any kind of close examination. Probably the most that can really plausibly be said on behalf of that position is that if a device like judicial review is to be introduced, which does tend to have the capacity to frustrate the wishes of the popular majority, then it must be justified by cogent reasons.[34] In the case of a properly drafted Bill of Rights, it appears clear that the cogency of the argument in favour of a measure of judicial review is self-evident.

The strength or weakness of *all* of the arguments against judicial review of a Bill or Rights depends primarily on precisely what *kind* of judicial review is in issue. If a Bill of Rights is made part of the Constitution, with no special provision attached to enable its ready amendment by the Parliament, the result will be that for all practical purposes the judges have the last word: that is to say that if they interpret and apply a Bill of Rights in a narrow, conservative, restrictive way — if they depart in any significant way from the obvious intention lying behind the original enactment of the Bill (as the Canadian Supreme Court, for example, has done on numerous occasions in interpreting the equality and anti-discrimination provisions of the 1960 Canadian Bill of Rights) — then the only available remedy is the amendment of the provision in question by the referendum process. If, on the other hand, a Bill of Rights is made relatively easily amendable — either as a result of some special procedural provision in the case of a Bill of Rights made part of the Constitution, or alternatively simply as a result of a Bill of Rights being enacted as an ordinary piece of legislation — then unsatisfactory interpretations are in no real danger of becoming permanent, and judicial review is to that extent less dangerous.

It therefore appears preferable that a national Australian Bill of Rights not be entrenched, or more effectively unamendable, in the first instance. It *will* take time for the courts and judges to grow accustomed to interpreting such a document in a sympathetic and sensitive

way, and there would be a danger in giving the judges the last word; a danger probably greater in practice than in allowing Parliament to retain the power to repeal or undermine by amendment the basic protections contained in such a Bill. It would be desirable, and certainly legally possible, to include in a legislative Bill of Rights a provision stating that no future enactment, however inconsistent with the original Bill of Rights, should be treated as implicitly repealing or amending it unless the enactment contained an explicit statement of such intention. A provision of this kind, excluding implied repeal, while not a very formidable obstacle to any later government or Parliament determined to reduce the scope of the Bill's protection, would at least mean that such a step would have to be taken openly and explicitly, and as a conscious act of political choice, and that as a result no government would lightly take the political risk of being seen to undercut fundamental rights and liberties in this way.

All things considered, the most appropriate course of action — and one that a Labor Government is likely to adopt — would be as follows: First, a statutory, unentrenched Bill of Rights would be enacted as an ordinary piece of Commonwealth legislation; and secondly, after several years of experience of the operation of that legislation (assuming for this purpose it survived constitutional challenge), then — and only then — an attempt would be made to incorporate an entrenched Bill of Rights into the Australian Constitution itself. In this way, and perhaps only in this way, the very real concern that many Australians feel about entrusting their rights to the judges could be accommodated with the equally great concern that is felt about leaving rights to the mercy of the legislators.

CONCLUSION

There is no simple solution to the problem of ensuring for our society a system of law and justice which is wise, humane and continually sensitive to the changes always occurring in our social and economic environment. Courts and judges, Parliament and parliamentarians, Ministers and officials and the constituencies they respectively serve — will always be with us, and however much one struggles to create institutions and to devise mechanisms and procedures better equipped to achieve the ends that most of us regard as desirable, one is always coming face to face with the stark reality that those institutions are manned, and those mechanisms and procedures administered, by human beings, with all the fears and prejudices and biases, and conscious and unconscious irrationalities, to which human beings are prone. Some such biases and prejudices may well be reflected in the views expressed in this pamphlet; and those views, both on the state of law and justice in this country and on the personalities involved, should obviously be evaluated or discounted accordingly.

If law and justice changes are going to occur — as they must — then it will not be as a result of revolutionary prescriptions from above, but rather from an evolutionary process in which the relationship between Parliament, Executive and Judiciary is constantly being modified and adjusted in the light of experience. It is to be hoped that the contents of this pamphlet may make some small contribution to that evolutionary process.

FOOTNOTES

I. M.D. Kirby, "Four Forces for Legal Change", Background Paper for Australian Frontier National Conference on Future Directions, 10-14 August 1980 (mimeo).

2. Sir John Young, "The Influence of the Minority", 45th Sir Richard Stawell Oration, 3 May 1978 (mimeo).

3. F.M. Cornford, *Microcosmographia Academica* (Bowes and Bowes, 5th Edition, 1953), most accessibly recently summarised in Michael Zander, "Promoting Change in the Legal System", (1979), 42 Modern Law Review 489, at p.490.

4. Report from the Senate Standing Committee on Constitutional and Legal Affairs on the Processing of Law Reform Proposals in Australia (APGS, 1979).

5. G.S. Reid, "The Changing Political Framework", *Quadrant* Jan-Feb 1980, p5.

6. *Green* v. *Daniels* (1977) 51 ALJR 463.

7. Lord Reid, "The Judge as Law Maker", (1972) 12 JSPTL 22, cited in J.A.G. Griffith, *The Politics of the Judiciary* (Manchester UP, 1977).

8. *Federal Commissioner of Taxation* v. *Westraders Pty. Ltd.* (1980) 30 ALR 353.

9. Lord Scarman, "The Common Law Judge and the 20th Century — Happy Marriage or Irretrievable Breakdown?" (1980) 7 Monash Law Review l.

10. Senator Peter Durack, Speech to Australian Society of Senior Executives on Reform of Government Regulation, Sydney, 19 September 1980 (mimeo). See "Wanted: A Guide to What the Law Really Means", *Aust. Fin. Review* 22 September 1980, and "Imposing Responsibility on the Law" (Editorial), *Aust. Fin. Review*, 23 September 1980.

II. Sir Owen Dixon, Speech on taking Office as Chief Justice (1952) 85 C.L.R. xiv.

12. E.g. "trade, commerce and intercourse among the States... shall be absolutely free" (s.92). "fails to pass" (s.57).

13, E.g. "adult" in s.4lm "interstate" in s.51(1), "telegraphic, telephonic and other like services" in s.51(5) "trading corporations" in s.51(20).

14. Take, for example, a Commonwealth anti-inflation measure in the form of a heavy company surtax, rebatable if the corporations in question observe price restraint: would this be a law with respect to taxation, or corporations, or both (in which case it would be within power), or would it be a law only capable of characterisation as one with respect to prices (in which case it would be outside Commonwealth competence), or would it be characterised as being with respect to both taxation and price control (in which case, on one view, it would be within power, but on another view, outside it)?

I5. Lionel Murphy, "The Responsibility of Judges" in Gareth Evans (ed.) *Law Politics and /the Labor Movement* (LSB 1980) p.5.

16, Tile 1975 Territory Senators case, *Western Australia* v. *Commonwealth* (1975) 50 ALJR 69 was re-argued in 1977 following the replacement of McTiernan J. with Aickin J. but in *Queensland* v. *Commonwealth* (1977) 52 ALJR 100, Gibbs and Stephen J.J. who originally had supported Barwick C.J. in dissent, voted to maintain the status quo. In *Clark King & Co. Pty. Ltd.* v. *Australian Wheat Board* (1978) 52 AUR 671, a 3:2 majority upheld the compulsory acquisition power of the Board against a section 92 challenge, but barely a year later — with the only relevant change in circumstance being the replacement of Jacobs J. with Wilson J., the matter was re-argued in *Uebergang* v. *Australian Wheat Board* (1980) 32 ALR I.

17. *New South Wales* v. *Commonwealth* (1975) 58 ALJR 218.

18. For a full description of this work, see Gareth Evans, "The Most Dangerous Branch — The High Court and the Constitution in a Changing Society" in Hambly and Goldring, eds., *Australian Lawyers and Social Change* (Law Book Co., 1976), pp.51-64.

19. R.N. Douglas, Review article in (1969) 2 Melb. J. Politics 75, p.77.

20. L.L. Jaffe, *English and American Judges as Lawmakers* (1969), p.92.

21. P.B. Kurland, *Politics, The Constitution and the Warren Court* (1970), p.205.

22. K.S. Jacobs, *"Lawyers Reasonings: Some extra Judicial Reflections"* (1965-7) 5 Syd. L.R. 425, at p.429.

23. Evans, cited supra n.18, p.73.

24. Namely, Chief Justices Griffith. Isaacs, Knox and Latham, and Justices Barton, O'Connor, Higgins, Piddington, Powers, Evatt and McTiernan.

25. *Dugan* v. *Mirror Newspapers Ltd.* (1979) 53 ALJR 166.

26. *R.* v. *McInnis* (1979) 54 ALJR 122.

27. *Victoria Park Racing* v. *Taylor* (1937) 58 C.L.R. 479.

28. *Driscoll* v. *R.* (1977) 51 ALJR 731.

29. (1978) 52 ALJR 561.

30. *General Practitioners Society in Australia* v. *Commonwealth* (1980) 31 ALR 369.

31. *British Medical Association in Australia* v. *Commonwealth* (1949) 79 C.L.R. 201.

32. *Commonwealth* v. *John Fairfax & Sons Ltd.* (1980) I Solomon's Legal Reporter No. I1.

33. A.R. Blackshield, "Judicial Innovation as a Democratic Process" in F*uture Questions in Australian Politics: 1979 Meredith Memorial Lectures* (La Trobe University, 1979), p.47.

34. Cf. Joseph Jaconelli, *Enabling a Bill of Rights: The Legal Problems* (Clarendon Press, Oxford, 1980), p.203.

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