

# THE COURTS, THE LEGISLATURE AND HUMAN RIGHTS<sup>1</sup>

J W Shaw<sup>2</sup>

Writing in 1954, the constitutional lawyer Professor Geoffrey Sawer expressed concern about a recent legal development – the 1950 legislation providing for the dissolution of the Communist Party. That Act recited accusations against that Party which, if true, would have justified a prosecution under the ordinary, pre-existing law. He pointed to the potent amendments of the *Crimes Act* in relation to sedition, which cast the burden of disproof on the accused, contained vague definitions of the offence (such as to “promote feelings of ill-will and hostility between different classes of his Majesty’s subjects so as to endanger the peace, order or good government of the Commonwealth”), and by-passed jury trials in relation to associations alleged to be seditious. In that context Sawer expressed the view that: “it is certainly necessary that both the terms of these laws and their administration should be jealously watched, and a Council for Civil Liberties is a very necessary organisation in any society whose formal legal structure on these matters is so elastic”<sup>1</sup>. That observation applies with at least equal force and effect to the legal environment in which we find ourselves 50 years later.

It is true that the dangers of terrorism cannot be ignored by elected representatives. It must also be acknowledged that there are some forces at work which pose a real physical threat to ordinary people and a challenge to liberal democracy and secularism.<sup>2</sup> Notwithstanding these dangers, there is a vital role for informed, reasonable critics to put a countervailing view in relation to legislative intrusion upon the rule of law and freedom of legitimate political dissent. Similarly, we need rational debate about proposed laws which entail indefinite detention without charge or trial and lengthy periods of incarceration for the purpose of questioning without adequate access to legal advice or other assistance.

## **The CCL and me**

I joined the NSW CCL in the early 1970s when I was also part of the H V Evatt Labour Club at the University of Sydney Law School. I retained my membership until being appointed a judge last year. I was not as active as might have been desirable, but as a student, helped to secure the election of Ian Dodd (now Judge Dodd of the

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<sup>1</sup> Edited version of the address to the NSW CCL on 21 May 2004, in the President’s Private Dining Room, Parliament House, Sydney.

District Court) as a CCL council member. As most of you know, Ian then became the Secretary of the CCL for many years and played an active role in its various functions. I valued the friendship of Jim Staples, whom I knew as a member of the Lane Cove branch of the Labor Party, and also came to know Ken and Berri Buckley who were members of the Hunters Hill branch. When I went to the bar in 1976, I read with Jeff Miles, a CCL activist who became the Chief Justice of the ACT Supreme Court.

### **The Separation of Powers**

Thomas Paine in his 1790 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 of the laws are irrational and tyrannical, and the administration of them vague and problematical”<sup>3</sup>. 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.<sup>4</sup> 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.

### **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”.<sup>5</sup> 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.<sup>6</sup> 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 future, the effect of a judicial ruling.

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<sup>2</sup> Jeff Shaw is a judge of the Supreme Court of New South Wales.

It was H V Evatt, as a young Justice of the High Court in the 1930's 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.<sup>7</sup> 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.<sup>8</sup>

### **The importance of individual cases**

Many of the civil liberties battles of the 1960s were fought in our courts. These included questions of censorship (for example the Oz obscenity trial), opposing the segregation of Aborigines, challenging the dimensions of offensive behaviour, supporting conscientious objectors to conscription for war, and seeking to limit the potential oppression of vagrancy legislation.<sup>9</sup>

For some ultra-libertarians, the fighting of individual cases in the courts, even when they succeeded outstandingly, such as the opposition to the banning of D H Lawrence's *Lady Chatterley's Lover* mounted by Penguin Books in England, amounted to a defeat of principled opposition to censorship – nothing else could have been expected, they argued, from a mere court case.<sup>10</sup>

On the contrary, incremental decisions of that era cumulatively led to a freer society, where adults could see and do what they like, provided that innocent third parties were not injured. J S Mill's great principle of liberty was enhanced on a case-by-case basis before judicial officers and juries in the common law world. Mill wrote that "the liberty of the individual must be thus far limited; he must not make himself a nuisance to the people".<sup>11</sup>

In a less well known passage 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".<sup>12</sup> 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".<sup>13</sup> 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 that Court's territorial jurisdiction.<sup>14</sup>

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.<sup>15</sup>

### **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 and amended the law to meet 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 to have 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; 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.<sup>16</sup>

### **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. 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 those institutions play.

### **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".<sup>17</sup>

### **Reformist initiatives by Parliaments**

The legislature has often conferred powers on courts or tribunals which have had significant social impact. Anti-discrimination laws have resulted in tangible measures to reduce harassment and enhance equal opportunity in the workplace.<sup>18</sup> The evolution of administrative law in the last few decades has exposed bureaucratic decision makers to much greater scrutiny. Both as a result of common law and statutory changes, our courts are empowered to require reasons for the ruling, enquire whether the decision took into account all relevant considerations or was otherwise distracted by error or unreasonableness. The expansion of judicial review of public sector decision making has been justified on a number of bases: control of government power, protection of individual rights, improvement of the quality of administration and the fostering of participation. Chief Justice Spigelman has advanced a new description of such review, providing a broader context and protecting the proper role of judges - the "integrity branch of government".<sup>19</sup>

Whereas Lord Denning in the (English) Court of Appeal took the view that an implied or constructive trust could be used to divide the beneficial ownership of property, either within or without the bounds of matrimony, the Australian courts found such heterodoxy "unattractive".<sup>20</sup> In the area of domestic relationships, courts of equity were cautious about implying a trust to facilitate the fair division of property in relation to de facto and same sex relations.<sup>21</sup> However, in 1999 the New South Wales Parliament acted, bringing in an innovative, non-discriminatory property relationships law.<sup>22</sup>

In Australia, the conferral by legislatures of powers to deal with industrial issues has, with free labour market advocates dissenting, generally been seen as an enlightened exercise favouring a more egalitarian society and minimising the existence of the “working poor”.<sup>23</sup>

In the United States, the (*New Deal*) *Wagner Act* of 1935 created a National Labour Relations Board to regulate bargaining in good faith and prohibit unfair labour practices, a law which the United States Supreme Court upheld as supportive of the fundamental rights of workers.<sup>24</sup>

It would be simplistic to attribute all positive initiatives to one or the other sphere of government. The creative tension between the reformist impulses within elected legislature and the appointed, tenured judges should be recognised, not deprecated.

I wish the CCL well for the future and thank you for the invitation to address you today.

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<sup>1</sup> Geoffrey Sawer, “Constitutional Issues” in ed. Allan Davies and Geoffrey Serle, *Policies for Progress*, F W Cheshire, Melbourne, 1954, pp 29,30

<sup>2</sup> David McKnight, “Clear Thinking, Dogma and the War on Terrorism” *The Sydney Papers* Vol 16 No 1, Summer 2004, ed Anne Henderson at p 97.

<sup>3</sup> Thomas Paine, *Rights of Man* (first published in England in 1791), The Penguin American Library, 1984, p 195

<sup>4</sup> *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

<sup>5</sup> Alexander Hamilton, *The Federalist*, London, 1787, p 484

<sup>6</sup> 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 Buckley, et al, *Doc Evatt*, Melbourne, 1994) pp 114, 115.

<sup>7</sup> H V Evatt, *Rum Rebellion*, Angus and Robertson, Sydney, 1938; cf. the attack on Evatt’s scholarship by M H Ellis, “Rum Rebellion Reviewed” (1958) Vol II, *Quadrant*, p13

<sup>8</sup> 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 Neals’ work in more detail in his book review in the *Sydney Morning Herald*, 29 February 1992).

<sup>9</sup> See generally, Ken Buckley, *Offensive and Obscene: a Civil Liberties Casebook*, Ure Smith, Sydney, 1970

<sup>10</sup> G Molnar, “Their Fair Lady”, *The Sydney Line: a selection of comments and criticisms by Sydney libertarians*, Sydney, 1963, pp 18, 19.

<sup>11</sup> J S Mill, *On Liberty*, 1859, Ch 3

<sup>12</sup> *ibid*, ch 4

<sup>13</sup> *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 530.

<sup>14</sup> See generally Michael White, “Tampa Incident: some subsequent legal issues” (2004) 78 ALJ 249 at 254, 255.

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- <sup>15</sup> *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NSWLR 617 at [60] – [61].
- <sup>16</sup> M D Kirby, “Judicial activism? A riposte to the counter-reformation” (2004) *Australian Bar Review*, p219
- <sup>17</sup> E P Thompson, *Writing by Candlelight*, Merlin Press, 1980, p 169
- <sup>18</sup> Chris Ronalds, *Discrimination: Law and Practice*, Federation Press, 1988 p 2
- <sup>19</sup> Spigelman CJ, The Integrity Branch of Government – The first lecture in the 2004 lecture series for the Australian Institute of Administrative Law, Sydney 29 April 2004; see Lord Hewart, *The New Despotism*, Ernest Benn Ltd, London 1929, a critique of the pretensions and encroachments of bureaucracy.
- <sup>20</sup> *Cooke v Head* [1972] 1 WLR 518; *Eves v Eves* [1975] 1WLR 1339.
- <sup>21</sup> See for example, *Allen v Snyder* (1977) 2 NSWLR 685; W M Gummow “New Model Constructive Trusts in Australia” (1978) 94 *Law Quarterly Review*, p 351; this conservative approach was not without its critics: see Helsham CJ in Equity, “Comment: De facto relationship and the imputed trust”, (1979) Vol 8, No 3, *The Sydney Law Review*, p 571; see also John Wade, “Trusts, the Matrimonial Home and De Facto Spouses” (1979) Vol 6 *University of Tasmania Law Review* p 97, in which the writer suggested that the judgment of Mahoney JA “represents a movement towards the referring end of the stability-flexibility common law pendulum”; Sir Anthony Mason, in his case note “Declarations, Injunctions and Constructive Trusts; Divergent Developments in England and Australia” (1979) Vol II, No 1, *University Queensland Law Journal*, p 1221 at 130, 131 contrasts the English approach with that of the Australian courts which had held that the “fairness or justice of a given result is not a sufficient foundation for saying that there is a constructive trust.”
- <sup>22</sup> J W Shaw, “Law reform happens”, (1999) Vol 24, No 5 *Alternative Law Journal* p247
- <sup>23</sup> Mark Perlman, *Judges in Industry: a study of Labour Arbitration in Australia*, Melbourne University Press, 1954
- <sup>24</sup> Lawrence M Friedman, *American Law in the 20<sup>th</sup> Century*, 2002, Yale University Press, p 167 *et seq.*