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COMMONWEALTH SECRETARIAT

JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF
INTERNATIONAL HUMAN RIGHTS NORMS

BANGALORE, INDIA 24 - 26 February 1988

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REFERENCE TO INTERNATIONAL HUMAN RIGHTS NORMS"

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THE ROLE OF THE JUDGE IN ADVANCING HUMAN RIGHTS
BY REFERENCE TO INTERNATIONAL HUMAN RIGHTS NORMS

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Abstract

In this paper, the author deals with the "role" of judges in "advancing" human rights. He cautions that the needs of different countries will vary. He starts with a reference to the recent failure of Judge Robert Bork to secure confirmation to the Supreme Court of the United States. Bork had been a long time proponent of judicial restraint in the interpretation of the Bill of Rights, urging that protection of human rights should normally be left to the democratically accountable branches of government - the executive and the legislature. After reviewing the theoretical and practical arguments for and against judicial restraint, the author states his own conclusions. These are that, especially where there is a constitutional charter of rights and particularly in common law countries, judges have an inescapable function in developing the law. Their decisions necessarily advance their view of human rights. In human rights cases, they may nowadays receive assistance from international statements of human rights and the jurisprudence developing around such statements. The author appeals for an international approach but acknowledges that this will be difficult for lawyers, who are traditionally jurisdiction bound. But he warns that there are limits to the "activism" of the judiciary in controversial human rights cases. Judges themselves do well to recognise these limits both for their legitimacy and their effectiveness. An important modern challenge to the judiciary is that of resolving this dilemma between the pressures for restraint and the urgency of action.

"Modern Anglo-American constitutional theory is preoccupied with one central problem. The problem consists in devising means for the protection and enhancement of individual human rights in a manner consistent with the democratic basis of our institutions" T R S Allen, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 CLJ 111.

A VIVID INTRODUCTION TO THE LIMITS OF JUDICIAL POWER

I recently received a vivid demonstration of the limits upon the powers of the judiciary. It happened in, of all countries, the United States of America. I was on my way to a conference, this time in Calgary, Canada. I had a close plane connection at Los Angeles International Airport. The immigration queues were long. I would surely miss my plane, if I waited my turn. I therefore approached an officer with my official passport and asked whether I could secure priority. Eventually I was taken to the head of the queue. But the officer at the barrier was unimpressed. "This is not a diplomatic passport", he intoned. Meekly I pleaded, with an advocate's irrelevant flourish, "In my country, judges are generally regarded as quite as important as diplomats". This official in the administration of the United States then made a telling comment: "Well, Robert Bork thought he was important. But we showed him a thing or two". Just the same, he let me through the barrier. I caught my plane.

As I winged towards Calgary, I reflected on this comment about Judge Bork's unsuccessful bid to receive Congressional consent to his nomination to the Supreme Court of the United States.

The court to which he had been proposed has been described as the "world's first human rights tribunal"¹. The judge who

had so angered the majority of the Senate (and his fellow citizen at LAX) did so ostensibly in the name of a theory of judicial restraint and in defence of the sovereign will of the people, expressed through the elected arms of government both in the executive and legislature². Bork's views were generally propounded not in popular magazines such as one sees at airports but in heavy books, obscure law reviews and, more lately, court judgments. Nor was Bork a lone maverick with eccentric opinions. Amongst the supporters of his general approach might be listed none other than the present Chief Justice of the United States (Rehnquist CJ). In the end, Bork's rejection by Congress appears to have arisen in part from perceived defects of his personal style and presentation; in part, from a politicisation of issues inevitable as a Presidential campaign approached in the United States; and, in part, from the fear of the liberals and so-called "Middle America", that Bork's views, on what may broadly be called human rights issues were unacceptably different from the mainstream.

Because of the crucial role repeatedly asserted by the Supreme Court of the United States in determining the agenda of human rights in that country, the Supreme Court, and its composition are now legitimately, the focus of a great deal of political attention. Impeachment apart, the confirmation process is the one chance, which the democratic legislature has to influence the composition of the court, with such an important functions in striking the human rights "balance" of

the United States. Once through the barrier, the judge may have 20, 30 or more years in which to stamp upon 200 million people his or her viewpoint about the meaning of the Constitution, the limits of government power and the content of the human rights of people in the United States.

It is because that court has such an important function in giving content to the human rights guarantee, contained in the United States constitution, that a great deal of attention is paid (more so of late) to the judicial confirmation process. In most of the countries of the Commonwealth of Nations, there is no such opportunity for prior democratic attention. Judicial appointments are typically the province of the Executive Government. Judicial independence is usually guaranteed by law and by tradition. Unfortunately, such guarantees are not always respected as a number of reports of judicial removals demonstrate³.

To write of the "role" of the judge in "advancing" human rights, presupposes that a judge has such a role. It suggests that it is a role in which he or she should be active and vigorous. It may be that one should conclude that such is the case. Certainly, it has been so asserted in numerous recent considerations of the topic, particularly in developing countries, of the common law. Thus, in a workshop on the theme "The Role of the Judiciary in Plural Societies" held in Kenya and organised by the International Centre for Ethnic Studies of Sri Lanka and the Public Law Institute of Kenya, the following conclusion was reported⁴:-

"An innovative approach to legal training is required to effectively evolve devices of judicial activism which are relevant in African and Asian societies. Legal training in most of our societies is generally based on the study of statutes, precedents, and legal concepts which are often not relevant to our social context. Traditional legal training makes lawyers and judges extremely uncomfortable with doctrines and concepts which are "non-legal" in origin. However, other disciplines, especially the social sciences, may provide the judiciary with data and concepts which are relevant to the actual social reality. Concepts such as "pluralism" attempt to provide the judiciary with legal-political tools for the sensitive implementation of existing law and for the creative development of new and more relevant judicial doctrine.

The report concluded:-

"Judicial activism, far from being a threat to national security or the development of a nation-state, is imperative for the attainment of such objectives. A principal constraint to the principle of judicial activism is the lack of coordination in the responsibilities of the judiciary in aiding the attainment of the goals of national security and societal development".

There are many points in these citations which would catch the eyes of lawyers and judges in developed (and doubtless some developing) countries. The notion of such an active role on the part of judges, particularly in the field of "national security", would strike such readers as novel, if not shocking. Their concept of the judicial function would be more passive, reactive, restrained and limited.

This response requires it to be said, at the outset, that care must be taken in suggesting universal approaches to the discharge of judicial functions, even on human rights questions. By definition, universal human rights are international. They attach to the human person because of that humanness. Lord Scarman recently observed that many of the civil and political rights, at least as stated in recent international instruments, provide no fundamental surprises or

shocks for lawyers brought up in the traditions of the common law. Most independence constitutions of the English speaking world (at least) have been profoundly influenced by the Bill of Rights of 1688 and by the human rights guarantees in the amendments to the United States constitution. Lord Scarman, with just the faintest touch of Anglocentrism, reminds us that the draftsmen of the United States charter:-

"...were in fact English lawyers, brought up in the Middle Temple and other Inns, making sure that for the protection of individuals and the States, the individual States, the English Common Law, with the powers of the Monarch removed, should become the charter for basic human rights. Now, the American Bill of Rights is a very Common Law Document. Strangely enough the European Convention of Human Rights, borrows an enormous amount from the American Bill of Rights. Indeed, we know as a matter of history that much of its drafting was done by two very distinguished English lawyers, one of whom was later a Lord Chancellor. Therefore, it really is a chimera to think that the Bill of Rights is something so vague, and so uncertain that it will mystify British judges. It is no more uncertain than the common law,⁵ and indeed I would say it is very much more precise..."⁵.

Nevertheless, the extract from the Kenya workshop extracted above demonstrates why it may be inappropriate to draw universal conclusions about the "role" of the judiciary in advancing human rights. The conventions and history of the judiciary in different countries will inevitably demonstrate certain differences. The perceived needs for "activism" will also, inevitably, be different in different countries. Particularly in countries upon which has been grafted a foreign legal system, expressing ideas of justice in a foreign language and using procedures which are necessarily different from local custom, the need to adapt the law may be more urgent than in countries the societies of which are more similar, and whose

language is the same, as that in which the law first developed. Furthermore, in many developing countries the priorities of economic and social reform will usually be desperately urgent. Indeed, it is this consideration which is typically used to justify derogations from universal human rights and from adherence to the rule of law. Judges will frequently be among the very few highly educated citizens available for leadership in developing countries. This consideration may justify imposing upon them different duties than would be acceptable in developed countries. Certainly, they will be subject to different pressures.

The very economic plight of a developing country will tend to pull the sensitive judge in the directions of reform and activism. On the one hand, he or she will see the deprivation of human rights and be appalled by them. On the other hand, the stark reality of the economic costs of providing and enforcing ideal standards of human rights may cause restraint. Iest such orders, fully implemented, might be beyond the economic power, even of a government obedient to court rulings.

There are reflections of these competing pressures in the recent decision of the Supreme Court of India such as Tellis & Ors v. Bombay Municipal Corporation & Ors⁶. That was a case where the petitioners were pavement and slum dwellers in Bombay, some of whom were forcibly evicted by the corporation. They claimed (as they had not below) that they had been deprived of their fundamental right to life under Article 21 of

the Constitution of India. The Supreme Court held that the right to life conferred by that Article did indeed extend to protect the right to livelihood. Normally, it was held, the court would have directed the corporation first to permit the dwellers to show why they should not be removed. However, as they had not put that case in the court below, such relief would not be granted in the Supreme Court. Nevertheless, the direction was made that, to minimise hardship, no further evictions should be made until the end of the then current monsoon season⁷. A sensible practical compromise, you might think.

The report from the Kenya conference (above) appears to indicate amongst the unspecified participants, a certain impatience with the caution and restraint of lawyers and judges who too often abstain from active implementation of unspecified goals of national security and social advancement. So much may also be hinted in the notion that judges have a role in advancing human rights. I therefore want to begin by recalling some of the reasons for this irritating habit of judicial restraint. It will be useful to catalogue these explanations in order to judge whether, in current world circumstances, they still apply to the judicial role.

REASONS FOR JUDICIAL RESTRAINT - THE THEORY

In listing the reasons for restraint on the part of judges in the active enforcement of human rights - particularly in the implementation of international norms - I leave aside the municipal constitutional and other laws of our several

countries. The use that may properly be made by judges of these norms will necessarily vary from one jurisdiction to another according to the terms of local law. Instead, I wish to concentrate on the reasons that have typically been given for restraint and "non-activism". They are well known. But they have to be considered in any new thrust which calls upon judges to assume a more positive and activist function - whether in the defence of human rights, the advancement of national goals, the protection of national security or otherwise. The arguments are usually advanced both at a theoretical and at a practical level.

The theoretical arguments relate principally to the conception that is held of the judicial function. Naturally, it will vary from one jurisdiction to another in accordance with the history, constitution and societal needs of each place. Most of our countries have inherited the conception of the judge from England. And in that country - more for reasons of history than legal theory - that function was a powerful, but a subordinate one:-

"Let judges ... remember, that Solomon's throne was supported by lions on both sides. Let them be lions, but yet lions under the throne: being circumspect they do not check or oppose any points of sovereignty."

This statement of cautionary advice by Francis Bacon was written long ago. It was offered even before the notion of Parliamentary sovereignty reached its zenith, with the British Empire, in the late 19th Century. The doctrine of Parliamentary sovereignty is no longer accepted as a universal truth in all countries. Particularly in federations, the basic

law is, generally, provided by the constitution which apportions power. Historically, that constitution may have been derived (as Australia's was) from a former colonial power. It may be derived from a local home-grown constitutional assembly, entirely autochthonous. It may or may not be strictly observed in practice at all times. But whatever the history and formality, the legitimacy of the constitution is normally traced nowadays to the will of the people who live under it.

It is because of deference to the will of the whole people, encapsulated, by legal theory, in a written constitution, that the judges in most countries will not usually assert that they possess powers which do not derive, ultimately, from the "will" which the "people" have expressed. In one sense, this doctrine of derivative judicial powers is inconsistent with the assertion of judicial review which the United States Supreme Court made so early in its life in Marbury v Madison⁹. That decision has been followed since in most countries with written constitutions. However, judicial review can be justified as a necessary implication derived from the constitution in order to provide a practical means of giving authoritative decisions to resolve conflicts of power between the various arms of government. Less readily justifiable will be assertions of judicial power which were clearly not contemplated in the written constitution and indeed may have been expressly denied when that constitution was first written. It is when judges assert a legal duty to observe human rights which cannot be

traced satisfactorily to a constitution or other enacted law, that they invite criticism. In such cases they are open to criticism as "self willed" and "offenders against government under law"¹⁰. They are placing themselves above the law even though, as President Nixon discovered, our theory teaches that no one is in that position, be he "ever so high"¹¹.

The public's concept of courts is that they are an unbiassed and neutral: applying not making the law. This is one of the points made by Robert Bork. He was critical of the obfuscation by judges in the United States of the sources of their power. All too often, he asserted, the judges dressed their human rights decisions up in the language of the purportedly neutral application of preexisting law; when what they were in fact doing was candidly making the law - new law:-

"One may doubt that there are 'fundamental presuppositions of our society' that are not already located in the constitution but must be placed there by the Court. The presuppositions are likely, in practice, to turn out to be the highly debatable political positions of the intellectual classes. What kind of 'fundamental presuppositions of our society' is it that cannot command a legislative majority?"¹²

The defenders of judicial restraint, including in the field of human rights, constantly remind any judge who may have forgotten that he or she lacks the legitimacy to deal with the broadest issues of public policy. That function is enjoyed only by the elected branches of government. It is because judges are usually unelected - even in the United States where Federal judges, at least, must submit only to a democratic legislature for confirmation - that they are denied the legitimacy of the great sweep of law making. Even in the

highest courts (according to the proponents of restraint) they remain lions under the throne¹³. According to this view, if judges are to observe their proper and limited constitutional and legal function, whilst at the same time retaining their individual integrity, they must be able to trace each and every development of the law to a democratically sustained source of legitimacy. It may most readily be conferred by the express language of a constitutional bill of rights and by the function of judicial review¹⁴. But that language and function, in the view of the restrainers, does not authorise judges to indulge their personal whims in political theory, to treat the constitution itself as a scrap of paper and to ignore the decisions of their predecessors¹⁵. When they do so, they will be criticised as "self appointed scholastic mandarins" laying down the law without any apparent legitimate will of the people to sustain the norms they establish¹⁶.

Critics of the Warren Court in the United States never ceased to remind the liberal proponents of the decisions of that court of the words of the great democrat Jefferson:-

"Our peculiar security is the possession of a written Constitution. Let us not make it blank paper by construction."¹⁷

There were warnings to like affect both before and after Jefferson's. George Washington in his Farewell Address declared:-

"If in the opinion of the People the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in way in which the constitution designates. But let there be no change by usurpation for though this, in one instance may be the instrument of good, it is the

customary weapon by which free governments are destroyed."¹⁸

As to later warnings, it will suffice to cite Robert H Jackson, of the Supreme Court of the United States:-

"The rule of law is in unsafe hands when courts cease to function as courts and become organs for the control of policy."¹⁹

There are many other reasons for restraint from activism by judges which are catalogued by the proponents of restraint. They include the fact that judges who are "active" may be "active" in the right direction. But they may equally be "active" in the "wrong direction" - and difficult to remove or correct, precisely because they are judges. Lord McCluskey, in his recent Reith Lectures, reminded his listeners - in an eloquent appeal against a Bill of Rights for the United Kingdom - that the "broad, unqualified statements of rights" in the United States had sometimes resulted in decisions which, today, are seen as wrong and even oppressive:-

"[They took] a narrow, legalistic laissez-faire perspective on freedom so as to strike down as unconstitutional legislation designed to stop the exploitation of workers, women, children or immigrants. They legalised slavery and when it was abolished they legalised racial segregation. They repeatedly held that women were not entitled to equality with men. They approved the unconstitutional removal by the Executive of the constitutional rights of Americans of Japanese origin after the bombing of Pearl Harbour."²⁰

Depending on the composition of courts and one's own opinion, the judges can go terribly wrong in "advancing" human rights. If the legislature or the Executive Government err, the people, in democracies at least, have the possibility in the long run

of removing their oppressors and reinstating their rights. The sense of frustration about an overly activist court, insusceptible to ready change may, in the ultimate, cause - and even justify - unrest and the very civic disorder which it has traditionally been a function of the judiciary to avoid and replace²¹.

REASONS FOR RESTRAINT - PRACTICAL

To these reasons for restraint which derive from the traditional function and legitimacy of the judiciary can be added numerous practical arguments advanced against activism on the part of a judge in advancing human rights beyond the strict and clear warrant of an applicable legal text.

Judges tend to come from an group in the community which is unrepresentative - compromising as they still do mainly middle class, middle aged, males²². Even if they can find legitimacy for activism in the broad language of a constitutional grant of rights, it must sometimes be doubtful, even in the case of the boldest of judges, that he or she can represent, or even conceive, in his or her own person the needs and wishes of a great community whose rights will be affected by a given decision.

Many, if not most, contentious issues about human rights tend to be emotive. Whether they relate to rights to abortion, rights to desegregation of schools, rights to free speech in conflict with protection from race hatred or the rights of pavement dwellers who are in the path of a modernizing freeway - they are the kinds of issues which agitate great emotions.

Sometimes those emotions surface in the court itself. They may produce strongly worded dissenting judgments²³. But whether reflected in the court or not, these cases typically concern issues which already polarise society. In these circumstances it is usual in democracies at least to consult the community in resolving them. Because this is so, some authors, who envisage a greater activism by the judges, contend that judges too should endeavour, under their modern remit, to consult a wider community²⁴. Yet it is the very inability of judges to do this - confined as they typically are by the primary duty to resolve the case before them - that may put a restraint on the boldest decisions of policy. The judge does not know where that bold decision may lead or what its consequences may be²⁵. These limitations have led some of the advocates of restraint, including in the judiciary concerned about injustice, to urge the alternative model of law reform by agencies which can consult the experts and the people and stimulate the democratic law makers into reformatory action²⁶.

Linked with this last consideration is what might be called the economics of human rights. It is increasingly recognised that many human rights decisions have significant economic consequences. This was called to attention by the Supreme Court of the United States in a decision concerned with the requirements of "due process" under the United States constitution²⁷. In Australian courts, specific evidence has been called, eg concerning the costs which would be involved in

giving prisoners an oral hearing when it was asserted that the requirements of natural justice (in Australia not very different from "due process") required that such an oral hearing be given²⁸.

One hurdle which the "activists" have to overcome, in urging the domestic application of international norms, is latent xenophobia, never far from the surface in most countries. For many in the developed world, the United Nations and the other agencies which have chartered many of the international statements of human rights are seen as collections of countries, most of which have autocratic and authoritarian regimes indifferent to human rights, laying down norms which they will not observe themselves but which they readily impose upon others in vaguely worded instruments²⁹. It is instructive, when reviewing the latest publication of the compliance of countries in the Asian and Pacific regions with international human rights instruments, to see that some of those countries with the best record for ratification are not necessarily those which would be described as havens for human rights in an oppressed world. See the schedule³⁰.

The faults of others is not a reason for ourselves not seeking to do better. But this is a major propaganda obstacle to the domestic implementation of international human rights norms, including by the judiciary. Many lawyers are sceptical about such instruments because of their notions about the hypocrisy and double standards of some of their protagonists.

A further obstacle, which relates to the very controversy

of human rights issues, is that, where broad decisions of policy are required, vigorous activism may be positively desirable; whereas for the judiciary activism has traditionally been performed by stealth and, where acknowledged, recognised with embarrassment or even apology, precisely because of the community perception that judges apply and do not make the law.

Finally, there is the fact that many of the new problems for human rights involve knowledge of matters that may not normally be in the possession of the judges. The major human rights debates of the future will concern the impact of technology upon the lives of people³¹. Because of the economic, social and individual ramifications of human rights decisions on matters such as bioethics, informatics, nuclear fission, AIDS and so on, courts may not necessarily be the best places in which to make wide ranging decisions of lasting significance³². There are limits to judicial competence. Saying this involves no disrespect to the judiciary. It simply recognises the obvious fact which derives from the background and experience typically found amongst judges³³. There are some who would seek to correct gaps in judicial knowledge by training in human rights norms. But every time this idea is suggested, at least in Australia and the United Kingdom, the spectre of executive encroachment upon the intellectual independence of the judiciary is raised³⁴.

To sum up, the opponents of judicial "activism" in the field of human rights rest their case in part upon the underpinnings of legitimacy which sustain the rule of law and

the respect for judge-made decisions. In part, they rely upon the dangers involved if judges are drawn too obviously into political decisions of broad application³⁵. The underpinning of legitimacy may be sufficiently answered, if the people so provide, by the provision of constitutional norms - such as exist in most countries although not, so far, (to any significant degree) in the United Kingdom, Australia or New Zealand. But even that underpinning will not remove the concept which the people generally have of judges and the dangers which exist if judges stray too far from that concept.

In the United States, in the context of human rights decisions, the function of the judges in resolving this dilemma was described by Alexander Bickel in terms that:-

"The court should declare as law only such principles as will - in time, but in a rather immediate foreseeable future - gain general assent."³⁶

In other words, it is essential that the courts' expositions of human rights entitlements should not at any given time stray too far from what will be accepted in the community. That way danger lies.

In retrospect, it appears that Robert Bork's invocation of what was felt by some to be an extreme of restraint - and the perceived danger of the revival of constitutional battles settled long ago - led to his unacceptability, as much to the Congress as to the American citizen on the street. In other words, judges, named as such, trade on the political capital that is built up from respect for the authority of the courts which simply apply the law. That respect depends, in part,

upon the popular acceptance of a limited function of the judges. It reserves them to a fundamentally passive role. There are practical considerations which reinforce these reasons of principle. In some developing countries, they can, on occasion, in times of emergency or military rule, involve the very conception of the self preservation of the judiciary - given the vital function which judges can play, even in an undemocratic regime, in the amelioration of tyranny³⁷.

REASONS FOR ACTIVISM OR DYNAMISM - THE THEORY

The debate about the function of the judiciary - and whether it should be "passive" or "activist" and not "dynamic" is not, of course, new. I have already cited Bacon. But even in the context of the United States, where it was to present itself in the Supreme Court soon after the Revolution, the debate was reflected in the Federalist Papers. Hamilton, at least, envisaged a role for the courts as "bulwarks of a limited constitution against legislative encroachments"³⁸. Furthermore, he envisaged that the courts would "construe the laws according to the spirit of the constitution"³⁹. So the debate is not new. For the proponents of judicial activism, the focus of the debate is not be upon whether the judges may make laws and decide important issues of policy. Rather it is upon where they should do so, when and how far they should go.

In Commonwealth countries, the citation usually invoked in support of recognising, rather belatedly, the creative function of the judiciary is that of Lord Reid. He declared that the notion that a judge's role is simply to declare the law is a

"fairy tale" which we did not believe any more⁴⁰. In the United States the same thought was earlier put, in strikingly similar terms, by James Kilpatrick:-

"Somewhere in this broad land, perhaps one or two innocents still truly believe in Santa Claus. And somewhere one or two simpletons still cling to the vacuous notion that 'ours is a government of laws, not of men'. But the image of the Supreme Court is a body of nine gods roosting on a marble Olympus, breathing the rarefied air of pure law and pure justice, is an image most Americans abandoned in their cradles."⁴¹.

In countries such as the United States, India and other lands with a written constitution, the democratic legitimacy for judicial decisions of great significance for policy, economics, national security and the like can be attributed, with varying degrees of conviction and persuasiveness, to the authority of the written constitution. In this way, it can generally be traced back to the authority of the people. They either made, or have acquiesced in, that written body of fundamental law. But even in such societies, the Grundnorm of acceptance of the authority of that constitution remains, virtually, a common law principle. That is that the constitution will be obeyed and enforced by the courts. It is this fact which has lately led to new assertions of a judicial function, even in countries without a written Bill of Rights, to declare that the common law preserves and respects some rights. There may be no difficulty in so holding where, say, a "right" to speedy trial of criminal charges is asserted⁴². More controversial is the suggestion by Sir Robin Cooke of New Zealand that there are some fundamental rights which lie so deep that even the democratic Parliament cannot disturb them

for they repose in the people⁴³. That suggestion recently enjoyed little success in my own court for the reasons there given⁴⁴. But three members of the Court, at least, reserved the broader question of what would happen in a constitutional emergency where only the courts stood between the people and gross oppression by the legislature.

The realists of the "activist" or "dynamic" school point to the curiously old fashioned ring nowadays of a Privy Council assertion in 1903 that policy is of no concern to the courts⁴⁵. Today, even the most "conservative" judges are rarely so naive. Furthermore, in the function of courts in giving meaning to a written constitution, to legislation on human rights expressed in general terms or even to old precedents inherited from judges of an earlier time, there is often plenty of room for judicial choice. In that opportunity for choice lies the scope for drawing upon each judge's own notions of the contents and requirements of human rights. In doing so, the judge should normally seek to ensure compliance by the court with the international obligations of the jurisdiction in which he or she operates⁴⁶. An increasing number of judges in all countries are therefore looking to international legal developments and drawing upon them in the course of developing the solutions which they offer in the particular cases that come before them. In this way international legal instruments are not coercive of municipal law. Nor are they given local operation where municipal law does not itself justify their direct application. They are

simply used as useful background material and as indications of the developments of international customary law with which a municipal judge may properly seek to bring domestic law into harmony⁴⁷. A decision may have greater legitimacy if it accords with international norms that have been accepted by scholars and then by governments of many countries of the world community than if they are simply derived from the experience and predilections of a particular judge.

In the field of human rights protection, at least, the point is often made that courts have an important function as a teacher of the community. Their decisions not only resolve the conflicts of the parties before them. They also quite frequently expound principles of general application in circumstances which are analogous to those considered in the instant case. It is in this way that courts - and particularly final courts - in countries where information is freely exchanged, take a part in the continuous process of influencing opinion. Conversely, courts themselves are inescapably affected by community opinion on issues as that opinion is perceived by the judges. Eugene Rostow wrote in the context of the United States Supreme Court:-

"The process of forming opinion in the United States is a continuous one with many participants - Congress, the President, the press, political parties, scholars, pressure groups and so on. The discussion of problems and the declaration of broad principles by the Court is a vital element in the community experience through which American policy is made. The Supreme Court is, amongst other things, an educational body and the justices are inevitably teachers in a vital national seminar."⁴⁸

To the same effect Bickel once observed:-

"Virtually all important decisions in the Supreme Court are the beginnings of a conversation between the Court and the people and their representatives. They are never, at the start, conversations between equals. The Court has an edge, because it initiates things with some immediate action, even if limited. But conversations they are, and to say that the Supreme Court lays down the law of the land is to state the ultimate result, following upon a complex series of events, in some cases and in others it is a form of speech only. The effectiveness of the judgment universalised depends on consent and administration."⁴⁹

This perception of the function of courts in human rights questions is one which I find persuasive. It is not to say that courts always give the "right" answers on such questions. It is not even to concede that there are necessarily "right" answers to be given to some questions involving human rights. Nor does the "rightness" of the answer offered by the court necessarily endure for all time. What would have been "right" for limitations on free speech of, say, a Nazi supporter in 1946 may not, necessarily, be right years later when Nazism may have become largely irrelevant to immediate community concerns. There is no getting away from the fact that, in important decisions on human rights, the courts have frequently cut the Gordian knot where the legislature and the executive have lamentably failed to do so. It is in this sense that, by its dialogue with the people and the other branches of government, the courts become a kind of "political conscience" of the community which they serve.

Many and varied are the solutions which the Supreme Court of the United States has offered on human rights questions. They include:-

- * the limits of telephone tapping⁵⁰;

- * whether the mentally subnormal could be compulsorily sterilised under State law⁵¹;
- * whether minimum wages laws could be enacted⁵²;
- * whether capital punishment was permitted by the Constitution⁵³;
- * whether married couples could lawfully use contraceptive devices⁵⁴;
- * whether the President was subject to the criminal law⁵⁵;
- * whether the Constitution prohibits laws restricting access to abortion and, if not, with what exceptions⁵⁶;
- * how electoral boundaries should be drawn⁵⁷;
- * whether school children could be required by law to salute the United States flag⁵⁸;
- * Whether the races could be segregated on trains⁵⁹ and in schools⁶⁰;
- * whether women could be barred from practising law⁶¹; and
- * the limits to police power in the investigation of crime⁶².

Even Lord McCluskey, who does not much like the notion of a written statement of rights or activist judges to interpret them, concedes:-

"Without doubt the exercise by the Supreme Court [of the United States] of its great imperium has been, on the whole, a force for good."

His basic misgiving is that those who can be "active" and "inventive" in the assertion of rights can get it wrong, just as readily as they can get it "right". Judge Douglas of the Supreme Court of the United States, himself no slouch in the

application of the Bill of Rights, captured this idea in Poe v Ullman⁶⁴:-

"For years the Court struck down social legislation when a particular law did not fit the notions of a majority of the Justices as to legislation appropriate for a free enterprise system."

Accordingly, the genius of a legal system which reposes such enormous powers in judges tends only to be acknowledged when, as Bickel put it, the court gets it right. Then, at least, the court is playing its part as an element in a complex and interrelated system of governmental institutions with functions to inch society gradually towards conditions which the majority of the people accept as just and desirable⁶⁵.

PRACTICAL REASONS FOR JUDICIAL ACTIVISM --

In addition to these reasons, a number of practical arguments have been put forward to justify an "activist" role on the part of the judiciary in the protection of human rights.

The first is the recognition of the universal failure of legislators in a democracies to attend to many urgent tasks of law reform, relevant to the protection of individual liberties⁶⁶. In this context, those who call for "strict construction" of laws providing for human rights must often be taken to be actually calling for inattention to rights, despite the fact that those who have studied and thought about them consider such rights to be in need of urgent practical protection. In Commonwealth countries, including Australia the law reform agency model, advising the legislature, has been only partly successful. This is not so much because of the

rejection of law reform reports; but simply because of the legislative and administrative log jam which has prevented the prompt attention being given to many of them especially at State levels. In such circumstances, judges, considering what to do in a particular case before the court, may often have little confidence that restraint on their part will be rewarded with a finely tuned, sensitive and energetic protection of rights by the vigilant executive and legislative branches of government.

This sobering realisation may act as a stimulus to some judicial "activism" - particularly if the injustice caused by judicial restraint is so glaring and obvious that action and innovation are judged to be urgent and likely to accord with the community conscience⁶⁷. This is not the whole justification. Rights matter most when they concern unpopular minorities or "marginal persons"⁶⁸, eg prisoners, mental patients, drug victims, AIDS patients, criminal suspects etc. In the interrelationship of the arms of government, the democratic institutions may ignore, or even penalise, these minorities⁶⁹. The modern liberal democracy tempers the tyranny of transient majorities by protecting the correlatively varying minorities. And the most potent instrument of protection is quite frequently the judiciary.

A further practical reason for a degree of activism is that some things are simply and plainly unacceptable in a civilised and democratic society. This is where international statements of human rights may be specially useful. If the representatives of many lands can agree, in terms that are

sufficiently clear and applicable, that this or that conduct is forbidden, their definition of the proscription may encourage the municipal judge to confirm his or her opinion, to the same end.

The harsh implication of a narrow restraint on the part of the judiciary in the definition and enforcement of human rights is a recognition of the fact that great wrongs will otherwise be sanctioned by the law. In the United States, for example, there would probably have been no means of ridding that country of the blight of segregation, save for the courts⁷⁰. The activist judiciary became an essential component in the processes of institutional activity which achieved that unarguably desirable end.

Similarly, Donald Woods, a self exiled South African journalist, has written of apartheid:-

"The obscene laws which constitute apartheid are not crazed edicts issued by dictators, or the whims of a megalomaniac monster, or the one-man decisions of a fanatical ideologue. They are the result of polite caucus discussions by hundreds of delegates in sober suits, after full debate in party congresses. They are passed after three solemn readings in Parliament which opens every day's proceeding with a prayer to Jesus Christ. There is a special horror in that fact."⁷¹

This vision of the judicial function, not as a final act of automatons dispensing edicts based upon rules which are clear but as components of interdependent interacting institutions of government may offend the purist, whose eyes are fixed resolutely on the separation of constitutional powers. But, almost certainly, it is the way the social scientist would portray the judicial function. It envisages that there will

rarely be a final answer to questions of human rights. Discourse in courts will invariably be provisional in character. The lack of electoral accountability and the limitations in the materials and consultation available to the judiciary may be reasons for prudent caution by the judges in some cases. The preservation and, if possible, enhancement of judicial authority upon which respect for the orders of the judges depends may also be a reason, on occasion, for caution. But wrongs will sometimes be so glaring as to require redress and correction if that be possible. It is then that judges must act to defend human rights. They must be satisfied that they have a basis in law for doing so. Because the law of human rights is often expressed (whether in constitutions, statutes or court decisions) in language of great generality, there will frequently be opportunities for judicial choice. It is then that the judge must decide how far he or she will go.

In striking new ground, it is then a comfort to find authority in the developing international customary law of human rights. But it is a wise caution, in every country, to keep Bickel's warning in mind. The judiciary should not expend in unacceptable, futile or failed endeavours its capital of public and political acceptability. This acceptability depends, in part at least, upon the community's persisting adherence to the automaton image of the judicial role, individual integrity and respect for the rule of law. That image necessarily put a brake on the boldest strokes of judicial activism on human rights.

CONCLUSIONS

The purpose of this paper has been to provide a background to a discussion of the adaptation in the judicial method to the use of the developing norms of international law concerning human rights. In the age of rapid international travel, nuclear fission, satellites and the communication revolution, as well as the biological challenges that confront all mankind, it behoves the judiciary to struggle for release from a too narrow and provincial conception of its role and duties. Cases do present where judges can opt for an internationalist approach to the issues before them. They may for example involve such questions as the respect of the laws of other fora and the principles of forum non conveniens⁷². Attitudes to such questions may differ⁷³. Our duty as lawyers is to make ourselves aware of the gradual evolution of international statements of human rights and the jurisprudence developing around them, even where domestic law does not bind us to apply them. They are becoming part of the law of the world we live in.

Although many members of the general public still cling to the "slot machine" notion of the judicial function, the judges, at least, know better. Particularly in common law countries, judges have inescapable opportunities for choice, decision and judgment. Particularly is this so where necessarily general statements of human rights are must be applied. One source of guidance in the performance of the tasks of choice, decision and judgment is that body of law which is being developed by

international agencies with authority and expertise in the field of human rights.

The first step on the path to the domestic application of such norms, where that would be appropriate, is knowledge of their existence and content. In Australia, the Human Rights and Equal Opportunity Commission proposes to take an initiative in 1988 to introduce judges and lawyers to the international jurisprudence of human rights obligations. In the burdensome development of domestic law, there will be many who will question the relevance of such additional instruction. But in the world after Hiroshima, all educated people have a responsibility to think and act as citizens of a wider world. There will, no doubt, be resistance from the hide bound provincialists. The law, by its duty to its own jurisdiction, tends to breed many of this conviction. It will take an act of will on the part of a generation of judges gradually to place domestic law into its international setting. But this will happen. It is happening already. Most vigorously, it is happening in those countries which have accepted the direct application to their citizens of international statements of human rights⁷⁴. But even in other countries in our region, which have nothing equivalent to the European Convention on Human Rights, we can sometimes draw upon international human rights statements simply because of the leeways for choice afforded by the domestic law to its judges⁷⁵. There are limits in doing this. It may sometimes be risky if the judge goes too far ahead of an apparent legal warrant. In such a

case there may be difficulty in securing the acceptance of the instruction by the society receiving it.

The extent to which it will be appropriate and useful to look to international standards may vary from one country to another. In developing countries, where laws suitable to local circumstances are more urgently needed, there may be a readier inclination to look to such international norms. Sometimes, simply because there are more of them, the developing countries may have influenced the expression of, and priority given to, particular rights of greater relevance to them.

This said, it remains, to the end, important for judges, drawing on such norms, to remember their limited functions in a democratic society. Even armed with a constitutional statement of rights, an ambiguous statute or a precedent decision expressed in broad terms, the judge remains a "crippled law maker". This is so precisely because of the limitation that arises because of the lack of democratic accountability. In the context of the High Court of Australia, this dilemma was described recently in these terms:-

"The High Court is not an assembly of Wise Persons, free to soar on the wings of policy as it sees fit. Nor is it an assembly of legal automatons, releasing the law on the slot machine theory of jurisprudence. It hovers somewhere between these two extremes endeavouring not to stray so far from the latter that it endangers its legitimacy, nor to come so close to it that it endangers its credibility."⁹⁶

The last words, which contain a cautionary encouragement but also a salutary warning, belong to Judge Learned Hand:-

"I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, they are false hopes. Liberty lies in the hearts of men and women; when it dies there no

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constitution, no law, no court can save it; no
constitution, no law, no court can even do much to help
it. While it lies there it needs no constitution, no law,
no court to save it."77.

SCHEDULE

**Human Rights
International Instruments**
Signatures, Ratifications, Accessions, etc.,
September, 1985

States	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22
Algeria																						
Australia	x	x																				
Bangladesh																						
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Burma																						
China																						
Democratic Kampuchea																						
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Zambia																						
Zimbabwe																						

- x Ratification, accession, notification of succession, acceptance or adherence signature
 s Signature not yet followed by ratification
 a Declaration recognising the competence of the Human Rights Committee under article 41 of the International Covenant on Civil and Political Rights
 b Declaration recognising the competence of the Committee on the Elimination of Racial Discrimination under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination

FOOTNOTES

- * President, Court of Appeal, Supreme Court of New South Wales, Australia. Commissioner, International Commission of Jurists. Formerly Judge of the Federal Court of Australia and Chairman of the Law Reform Commission of Australia. The views stated are personal views.
1. P Seighart, "The Lawful Rights of Mankind", 1985, 29.
 2. See eg R Bork, "The Legacy of Alexander M Bickel" 6 Yale L Rep 9 (1979).
 3. See discussion S F Nariman, "The Judiciary Under Martial Law Regimes" (1984) 14 CIJL Bulletin 41. See also (1985) 16 CIJL Bulletin where the position in Bangladesh is discussed.
 4. See "The Role of the Judiciary in Plural Societies" (1985) 16 CIJL Bulletin 45, 46.
 5. Lord Scarman in discussion in J H McCluskey, "Law, Justice and Democracy", the Reith Lectures 1986, Sweet & Maxwell/BBC Books, 1987, 108 (hereafter "McCluskey").
 6. [1987] LRC (Const) 351 (Chandrachud CJ).
 7. ibid. 379, 382.
 8. Francis Bacon, "Of Judicature" cited in McCluskey, 108.
 9. 5 US 39 (1803).
 10. Frankfurter J cited R Berger, "Government by Judiciary", Harvard UP, Cambridge, Mass. 1977, 258 (hereafter "Berger").
 11. As Lord Denning stated in Gouriet v Union of Post Office Workers & Ors [1977] 1 QB 729, 761-2 "To every subject of this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago: 'Be you ever so high, the law is above you'".
 12. R Bork, supra n2.
 13. A F Bayefsky, "The Judicial Function under the Canadian Charter of Rights and Freedoms" (1987) 32 McGill LJ 791, 826-7 (hereafter "Bayefsky").
 14. Bayefsky, 794; Berger, 285.
 15. Berger, 286.

16. Ibid, 322.
17. T Jefferson, "Writings of Thomas Jefferson" 247 (Ford ed, 1892) cited Berger, 291.
18. G Washington, Farewell address, cited Berger 299.
19. Jackson J, cited Berger, 298.
20. McCluskey, 50.
21. R Bork, "Neutral Principles and Some First Amendment Problems" 47 Ind LJ 1, 1 (1971).
22. Bayefsky, 827.
23. See eg the recent dissent of Brennan J in the school magazine censorship case of Hazelwood School District et al v Kathy Kuhlmeier et al decided 13 January 1988 and reported in 98 L Ed 2d 592; 108 S Ct 562; 56 USLW 4079.
24. Bayefsky, 394.
25. Cf Mason J in State Government Insurance Commission v Triggwell (1979) 142 CLR 617, 633 ["...But there are very powerful reasons why the court should be reluctant to engage in such an exercise [of radical change]. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility. They are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor does the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law. In short, the court cannot, and does not, engage in the wide ranging enquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature"].
26. ibid.
27. Mathews v Eldridge, 424 US 319 (1976). See also J L Mashaw, "The Supreme Court's Due Process Calculus for Administrative Adjudication" 44 Uni Chicago L Rev 28 (1976).
28. Johns v Release on Licence Board & Ors (1987) 9 NSWLR 103.

29. Cf M J Perry, "The Constitution, The Courts and Human Rights - An Enquiry in the Legitimacy of Constitutional Policymaking by the Judiciary" Yale U.P. New Haven, Conn. 1982, 151. (hereafter "Perry").
30. Lawasia, Human Rights Bulletin, Vol 5 No 2, 1986.
31. M D Kirby, Human Rights - The Challenge of the New Technology (1986) 60 ALJ 170.
32. McCluskey, 38.
33. Perry, 151.
34. P Devlin, The Judge, OUP, 1979, 82. Cf Lord Scarman in McCluskey, 67.
35. McCluskey, 54.
36. A Bickel, cited Perry, 124. Emphasis added.
37. G J Alexander, "The illusory Protection of Human Rights by National Courts during Periods of Emergency" (1984) 5 HRLJ 1, 49. (Hereafter "Alexander"). The author there discusses the position of the emergency in India under Prime Minister Indira Gandhi. He cites with apparent approval U. Baxi, The Indian Supreme Court and Politics, 1980, 39.
38. Federalist Papers, Number 78. See Berger, 293.
39. Federalist Papers, Number 81.
40. Lord Reid, "The Judge as Lawmaker", (1972) 12 Journal of Public Teachers of Law 22. See discussion M D Kirby, The Judges, Boyer Lectures, 1983, 60 ff.
41. J Kirkpatrick, cited Perry, 141.
42. See eg Herron v McGregor & Ors (1985) 6 NSWLR 246 (NSWCA).
43. See Cooke J in L v M [1979] 2 NSWLR 519; Brader v. Ministry of Transport [1981] 1 NZLR 73; New Zealand Drivers' Association v New Zealand Road Carriers [1982] 1 NZLR 374, 390 and Fraser v State Services Commission [1984] 1 NZLR 116. See also J J Caldwell, "Judicial Sovereignty - A New View" [1984] NZLJ 357.
44. Building Construction Employees and Builders' Labourers' Federation of New South Wales v Minister for Industrial Relations & Anor. (1986) 7 NSWLR 372 (NSWCA).
45. Cunningham v Toomey Homa [1903] AC 151, 155 ("The

question which their Lordships have to determine is which of these two views is the right one, and, in determining that question, the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider".] See discussion, Bayefsky, 795.

46. See eg R v Secretary of State for the Home Department: ex parte Phansopkar [1976] QB 606, 626 (HL). The reference was to the European Convention on human Rights. See also R v Secretary of State for the Home Department & Anor: ex parte Bhaijan Singh [1976] 1 QB 198.
47. See discussion Australia, Human Rights Commission, Human Rights and the Deportation of Convicted Aliens and Immigrants, AGPS, Canberra, 1983, 23 ff.
48. E Rostow, "The Democratic Character of Judicial Review", 66 Harvard LRev 193, 208 (1952).
49. A Bickel, "The Supreme Court and the Idea of Progress", 1970, 177. See also Perry, 113.
50. Katz v United States 398 US 347 (1967). The succeeding cases are catalogued in McCluskey, 35.
51. Buck v Bell, 274 US 200 (1927).
52. West Coast Hotel v Parrish 300 US 379 (1937).
53. Woodson v North Carolina 428 US 280 (1976).
54. Griswold v Connecticut 381 US 479 (1965). See also Eisenstadt v Baird, 405 US 438 (1972).
55. United States v Nixon 418 US 683, (1974).
56. Roe v Wade, 410 US 113, (1973).
57. Baker v Carr 399 US 186 (1962). See also Reynolds v Sims, 377 US 533 (1964).
58. West Virginia School Education Board v Barnett E 319 US 624 (1943) reversing Minersville School District v Gabis 310 US 566 (1940). It was held to be in breach of the First Amendment guarantee.
59. Plessy v Ferguson, 163 US 537 (1896).
60. Brown v Board of Education (1), 347 US 483 (1954).
61. Bradwell v Illinois 83 US 16 (1873).

62. Miranda v Arizona 384 US 436 (1966); Mapp v Ohio 367 US 643 (1961).
63. McCluskey, 60.
64. (dissenting) 367 US 497, 511 (1961).
65. Cf Perry, 113-4.
66. Berger, 287.
67. Alexander, 49.
68. Perry, 149.
69. As for example the treatment of Japanese citizens in the United States and Canada during the Second World War. See eg E Rostow, "The Japanese - American Cases - A Disaster" 54 Yale LJ 489 (1945). Cf Berger, 331-2.
70. See Perry, 142.
71. D Woods, "The Indictment", 1978, cited Perry, 142.
72. Oceanic Sunlight Shipping Co Inc v Fay (1987) 8 NSWLR 242 (NSWCA). Cf Spiliada v Maritime Corporation v Cansulex Limited [1987] AC 460.
73. The High Court of Australia has granted special leave to appeal. The decision is reserved. See comment (1987) 61 ALJ p 434.
74. See eg X v Sweden 4 EHRR 398, 410 (1981); X v United Kingdom (1981) 4 EHRR 188; East African Asians v United Kingdom (1973) 3 EHRR 76, 91; Her Majesty's Attorney General v The Observer Ltd & Guardian Newspapers Ltd & Ors C/A (Eng) 10 February 1988; Waddington v Miah [1974] 1 WLR 692, HL; Blathwayt v Baron Cawley [1976] AC 397, HL; R v Lemon [1979] AC 617 HL; Science Research Council v Nasse [1980] AC 1028, HL; Attorney General v British Broadcasting Corporation [1981] AC 303 HL; United Kingdom Association of Professional Engineers v Advisory Conciliation and Arbitration Service [1981] AC 424; Gold Star Publications Ltd v DPP [1981] 1 WLR 732; Raymond v Honey [1983] AC 1 HL; Attorney General v English [1983] AC 116 HL; Home Office v Harman [1983] AC 280, HL; Cheall v APEX [1983] 2 WLR 679 HL; and R v Barnett LBC [1983] 3 WLR 16 HL; R v Secretary of State for the Home Department, ex p Bhajan Singh [1976] QB 198, 207, CA; R v Secretary of State for the Home Department, ex p Phansopkar [1976] QB 606, 626 CA.
75. See the Australian cases cited in the Human Rights Commission Report, op cit n 47, pp 25 ff; Daemar v Industrial Commission of New South Wales & Ors CA 4 March

1988; S & M Motor Repairs Pty Ltd & Ors v Caltex Oil (Aust) Pty Ltd & Anor CA 11 March 1988.

76. M Coper, "Encounters with the Australian Constitution" CCH Aust, Sydney, 1987, 422.

77. Learned Hand J, in "Spirit of Liberty: Papers and Addresses of Learned Hand", 1953, cited McCluskey, 60. Note also Cardozo J's admonition in "The Nature of the Judicial Process" 141 (1921):-

"The judge, even when he is free, is still not wholly free. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to "the primordial necessity of order in the social life". Wide enough, in all conscience, is the field of discretion that remains."

See also M H McHugh, "The Law-making function of the Judicial Process" (1988) 62 ALJ 15.