Current Topics

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Every decade or so the High Court of Australia delivers a landmark decision which reminds everyone of its importance in the nation's affairs. The *Engineers' Case*[1] was one such decision. So, clearly, was the *Banking Case*[2] and the *Communist Party Case*.[3] In more recent times the *Tasmanian Dam Case*[4] clearly ranks in the same league.

On 30 September 1992 two judgments were delivered in this class. The first, *Australian Capital Television Pty Ltd and Ors v The Commonwealth*[5] held invalid the great part of Pt IIID of the *Broadcasting Act* 1942 (Cth). That Part had been introduced by the *Political Broadcasts and Political Disclosures Act* 1991 (Cth). Its aim was to regulate broadcasting on television and radio of political advertisements. Australian Capital Television challenged the validity of the legislation. The Commonwealth demurred to the challenge. Substantially, the demurrer was overruled. The orders of the High Court were pronounced on 28 August 1992 so that the Victorian elections, which were then pending, could proceed without being controlled by the invalid legislation. The reasons of the Court were delivered on 30 September 1992.

On the same day the Court handed down its reasons in another case whose decision had likewise been announced in August 1992. In *Nationwide News Pty Ltd v Wills*[6] the Court unanimously held that s 299(1)(d)(ii) of the *Industrial Relations Act* 1988 (Cth) was unconstitutional. Less surprising than the outcome of these constitutional challenges were the reasons proffered, evidencing a singular shift towards acceptance in Australia of a doctrine of implied constitutional rights.

In *Ansett Transport Industries (Operations) Pty Ltd v The Commonwealth*[7] the late Justice Lionel Murphy espoused the opinion that the provisions of the Constitution for the election of the Parliament required freedom of movement, speech and other communication not only between the States but in and between every part of the Commonwealth. He asserted that the system of representative government required the same freedoms between elections. He described such freedoms as "not absolute, but nearly so".[8] He repeated these and like views on a number of occasions.[9]

As Justice Dawson pointed out in *Australian Capital Television*, Murphy's views were then rejected by his colleagues. Thus in *Miller v TCN Channel Nine Pty Ltd*,[10] Justice Mason said: "It is sufficient to say that I cannot find any basis for implying a new s 92A into the Constitution".[11] Justice Brennan declared: "The freedom of interstate communication rests not upon an implied guarantee but upon the express terms of s 92."[12] In a strong dissent, Justice Dawson, in *Australian Capital Television*, urged adherence to this line. He pointed out that the Australian Constitution put its trust in Parliament to preserve the nature of our society and regarded as undemocratic

[1] *The Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[2] *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 (HC); *The Commonwealth v Bank of New South Wales* (1949) 79 CLR 497 (PC).

[3] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

[4] *The Commonwealth v The State of Tasmania* (1983) 158 CLR 1. There would be other candidates for the list. Remarkably, two further decisions of recent weeks could be considered. See *Mabo v Queensland* (1992) 66 ALJR 408 (HC) and *David Securities Pty Ltd v The Commonwealth Bank of Australia* (1992) 66 ALJR 768 (HC).

[5] (1992) 66 ALJR 695 (HC).

[6] (1992) 66 ALJR 658 (HC).

[7] (1977) 139 CLR 54.

[8] Ibid, at 88.

[9] See, eg, *Buck v Bavone* (1976) 135 CLR 110 at 137; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670; *Uebergang v Australian Wheat Board* (1980) 145 CLR 266 at 312. See also Opinias, "Come Back Lionel" in (1992) 17 Alternative LJ 206.

[10] (1986) 161 CLR 556.

[11] Ibid, at 579.

[12] Ibid, at 615.

constitutional guarantees which fettered its powers. The model of the Founding Fathers was "not the United States constitution, but the British Parliament", the supremacy of which was by then settled constitutional doctrine. Justice Dawson argued that the *Engineers' Case* had laid the ghost of the heresy of importing implied limitations into the Constitution by way by preconceptions having their origin outside the Constitution. But the other Justices did not agree, at least so far as the legislation before them was concerned. Chief Justice Mason said that freedom of communication was "indispensable" to the accountability of representatives in Parliament. Only by exercising that freedom could the citizen criticise government decisions and actions, seek to bring about change, call for action when none had been taken and, in this way, influence the elected representatives.

An interesting feature of the Chief Justice's judgments is the invocation of decisions of the European Court of Human Rights, such as in *The Sunday Times* cases.[13] Chief Justice Mason held that the legislative powers of the Federal Parliament were limited by implication so as to preclude the making of a law trenching upon that freedom of discussion of public affairs and political matters which is essential to sustain the system of representative government prescribed by the Constitution. He proposed, as a test for the validity of a law trenching on such freedoms, consideration of the "proportionality between the restriction which the law imposes on the freedom of communication and the legitimate interests which the law is intended to serve".[14]

Justice Brennan took a somewhat different view. He held that the several provisions of Pt IIID were valid except insofar as they purported to burden the functioning of the States. He pointed to legislation, not dissimilar to that under the scrutiny, in a number of Western democracies. He also pointed out that Parliament was permitted what the European Court of Human Rights called a "margin of appreciation" in the exercise of powers which affected basic rights.

Justices Deane and Toohey, in a joint judgment, reached "a firm view" that the Constitution contained implications of freedom of communication extending to all political matters apt for an ordered and democratic society. They held the régime in Pt IIID to be wholly invalid. So did Justice Gaudron. Justice McHugh did not consider that the prohibition enforced in the Territories was invalid. Only Justice Dawson thought that the entire legislative package was a valid law of the Federal Parliament.

The *Nationwide News* case concerned the validity of a provision of the *Industrial Relations Act* under which a publisher who printed a vitriolic attack on the "Arbitration Commission" and its "corrupt and compliant judiciary" was prosecuted. The High Court unanimously rejected as unconstitutional the provision of the Act making it an offence to write or say anything which was likely to bring the Commission or its members into disrepute. Justices Deane and Toohey pointed out that the total prohibition would operate even if the criticism was wholly justified. The same themes are woven through the other opinions in this case. Justice Brennan, for example, declared that freedom of public discussion of government "is not merely a desirable political privilege: it is inherent in the idea of a representative democracy". Justice McHugh stated that in deciding whether a law for the protection of a quasi-judicial body, such as the Commission, was appropriately connected with a head of Federal power, "the judgment and experience of this Court [that is the High

[13] (1979) 2 EHRR 245 (ECHR). See also *The Sunday Times v United Kingdom [No 2]* (1991) 14 EHRR 229 (ECHR) at 247.

[14] See also *Davis v The Commonwealth* (1988) 166 CLR 79 at 100 where this jurisprudence was foreshadowed.

Court] as the ultimate appellate and constitutional court of the nation make it uniquely qualified to determine whether the law is so adapted".

It was on this footing that Justice Dawson joined with the majority on this occasion. He held that the offending legislative provision was not a law with respect to conciliation and arbitration or incidental thereto.

In the print media, the applause of the editorialists for the "historic ruling" with its backing of "free speech"[15] was muted only by an expressed anxiety on the part of some as to where this more "activist" High Court, with the newly refurbished doctrine of rights implied although not stated in the Constitution, would take the nation.[16] One commentator has already raised the question of whether unequal representation in the Legislative Council of the Parliament of Western Australia would offend doctrines that have now been set running.[17] The Tobacco Institute of Australia announced that it was studying the judgments with a view to considering the ban imposed by Federal legislation on tobacco advertising.[18] Media interests were reported as intending to use a future defamation case by a public figure as an instrument to endeavour to graft onto Australian law the public figure exemption developed by the courts of the United States.

One thing seems sure. The two recent decisions will open up a host of litigation but unarguably on issues of fundamental importance.

Constitutional rethink: a Crowned Republic?

No reader of these pages could have escaped the revival of the debate about fundamental constitutional change in time for the centenary of Federation. There was a like call for constitutional reform to mark the bicentenary of European settlement in 1988. However, the bicentennial referenda did not secure the consensus of the major political parties. They failed abysmally, none of them gaining a majority in a single State.

To promote consideration of the Australian Constitution and how it works today, a new body, the Constitutional Centenary Foundation Incorporated has been established. Its Chairman is Sir Ninian Stephen, past Governor-General and High Court Justice. According to its brochure, the Foundation is concentrating on several issues including the role of Parliament; inefficiencies within the present Federal economic union in Australia; the position under the Constitution of Aboriginals and Torres Strait Islanders; and better education for citizens concerning public affairs, government and the Constitution itself.

The Foundation publishes a newsletter. Its second issue (September 1992) contains an edited version of a speech by the Chief Justice of the High Court, Sir Anthony Mason, at Corowa, 99 years after the Corowa Conference which stimulated the rush to the Federal Constitution.[19]

In his Corowa speech, Chief Justice Mason pointed to the continuity of our constitutional arrangements. The Constitution was not the outcome of a violent break with Great Britain. Changes have occurred, however, as Australia became independent and its population mix less dependent on the peoples of the British Isles.

The Chief Justice acknowledged the need to bring the Australian economy to the growth areas of Asia. He remarked that we would be:

> "better situated if, by some convulsion of nature, the continent was turned upside down so that the south-east became the north-west and was adjacent to the Asian markets that are so important for our future well-being."[20]

[15] See, eg, "Freedom of Speech in Politics", *The Australian*, 1 October 1992, p 10; "High Court in Free Speech Breakthrough" in *Australian Financial Review*, 1 October 1992, p 1.

[16] See, eg, "More Activist High Court" in *Sydney Morning Herald*, 7 October 1992, p 14. Cf M Sexton, "Pursuing the mirage of an activist judiciary" in *Sydney Morning Herald*, 8 October 1992, p 13.

[17] D Solomon, "Freeing up the Future" in *Weekend Australian*, 3 October 1992, p 20.

[18] M Millett, "Tobacco lobby looks at 'Free Speech'" in *Sydney Morning Herald*, 2 October 1992, p 3.

[19] A F Mason, Address to Federation Dinner, Corowa, 1 August 1992 in (1992) 1 *Constitutional Centenary*, p 2.

[20] Ibid, at p 13.

He pointed out that economic links with Asia would "not make us an Asian nation, let alone an Asian people". He deplored calls to divorce Australia from its cultural heritage. He drew a parallel between the debates of the 1890s and those today, concluding: "Our ancestors made the right decisions then. Let us hope we can do as well."[21]

To similar effect was a speech given on 1 October 1992 at the University of Sydney by Sir Zelman Cowen, the former Governor-General.[22] Addressing the Royal Society for the Encouragement of Arts Manufactures and Commerce, Sir Zelman traced the almost imperceptible emergence of Australia to full constitutional and national independence. He described the parallel developments in the office of Governor-General so that, save for the occasional visits of the Queen, the Governor-General, an Australian, discharges Head of State functions, even though he is formally not Head of State. Sir Zelman described the position reached, in the words of historian Professor Geoffrey Blainey, as in practice a Republic — "a Crowned Republic". In response to the assertion of a pro-Republican leader, author Thomas Keneally, that the present constitutional arrangements divided our soul, Sir Zelman confessed: "I do not suffer from the Angst that he experiences". He deplored what he described as the "anti-British aspect" which had crept into the debate about the republic, and concluded:

> "I am not persuaded of the case for a change in the monarchical relationship at this time. My own comparatively recent experience as Governor-General which took me quite deeply into the life of this country, does not suggest that a change to a republic is widely seen as necessary, or that strong feelings expressed by the leaders of the republican movement are sufficiently widely shared. I do not believe that the existing arrangements impair the independent standing of Australia in the world, or any effective expression of our distinctive national interests. I believe furthermore that the process of change will be divisive and problematical: it is not only a change in the Commonwealth level that is called for, but also at the level of the various States. A change has to cover all Australian polities; any other outcome would be absurd."

Many of the leaders of the competing movements for retention of the constitutional monarchy and creation of a republic are Australian lawyers. Readers wishing to follow up these themes should contact

- Constitutional Centenary Foundation Inc,
  109 Barry Street, Carlton, Vic 3053.
- Australian Republican Movement,
  GPO Box 5150, Sydney, NSW 2001.
- Australians for Constitutional Monarchy,
  GPO Box 5205, Sydney, NSW 2001.

Institute for Law, Ethics and Public Affairs

A new Institute has been established by Griffith University in Queensland, to promote the application of ethical, legal and political philosophy to current legal problems. The Director of the Institute is Professor Charles Sampford, Foundation Dean of the School of Law at Griffith University and Morris Fletcher and Cross Professor of Law. He

[21] Ibid, at p 14.
[22] Z Cowen, "Australia — Looking Ahead to the Twenty-first Century", unpublished address, 1 October 1992, at p 15 et seq.

will be supported by Associate Directors from different parts of Australia. They will co-ordinate research involving the Institute's projects and develop projects of their own as part of an overall research plan. Presently appointed Associate Directors include Dr Wojciech Sadurski (New South Wales), Professor Michael Detmold (South Australia) and Professor Tom Campbell (Australian Capital Territory). The Institute will provide a national focus for interdisciplinary research by lawyers, philosophers and others studying current legal problems. The aim will be to tackle wider social problems with a combination of ethical standard setting, legal regulation and institutional reform.

The first conference held by the Institute took place in Brisbane on 11 September 1992. It opened with an address given by this writer to a dinner. In the first business session, Professor Sampford stressed the interdependence of critical ethical discussion, the enforcement of professional standards and the design of legal institutions. He said that in contemporary Australia, discussion of business and professional ethics tended to concentrate on one of these items to the exclusion of others. Critical discussion and ethical exhortation by itself was bound to fail as it provided no constraints for the worst offenders. Disciplinary codes, unsupported by internalised values, would achieve only the most grudging of support. Professor Sampford pointed to the temptation which lawyers often faced to make laws serve the purposes of individual clients when there were competing, and even conflicting, objectives of legal practice to achieve justice and make the law more effective. He suggested that the refinement of the lawyer's obligations in contemporary society presented a real challenge to which, it was hoped, the new national Institute could contribute.

Other papers at the conference came from Dr Stephen Parker (ANU), Professor Richard Tur (a visiting Professor at the Institute) and two Brisbane solicitors, partners in major law firms (Mr David Searles and Mr Peter Short).

Dr Parker presented some of the issues arising from the discussion paper on legal ethics prepared by him for the Senate Enquiry into Costs of Legal Services and Litigation.[22]

Professor Tur examined confidentiality and conflict of interest, including the ways in which ethical rules might be used for dubious ends both by unscrupulous clients and by their lawyers. He argued that, behind the rhetoric of liberalism and the lawyers' traditional role, often lurked self-interest.

Mr Short commented on Dr Parker's paper. He said the solicitor in practice had to beware against "delusions of grandeur" — usurping the role of the judge or jury and forgetting the function of fairly and lawfully advancing the cause of the client.

Mr Searles identified three reasons for transgression of ethical rules by lawyers: dishonesty, ignorance and lack of interest. He suggested that, if the legal profession did not decide itself the standards by which it is to operate and failed to ensure that those standards were met, there was a real risk that the profession (at least as it has operated) would disappear.

The conference closed with a useful discussion of "Chinese walls" within large legal firms. Speakers, including Brisbane solicitor Elisabeth Nosworthy, advocated the amendment of ethical rules to take into account the reality of very large legal firms and the damage which could be done to clients who were forced to lose experienced representation during the course of litigation. This cri de coeur prompted Professor

[22] Australian Senate, Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation*, Discussion Paper, 1992.

Julian Disney (ANU) to express the view that this was one of the problems inherent in mega legal firms and one of the reasons why they should be "down-sized". A good opening gambit for an important new national Institute.

For further information contact Griffith University, School of Law, Nathan Campus, Brisbane, Qld 4111.

Codifiers at work

The conflict between proponents of codes and advocates of the common law is older than the Australian federation. Under the influence of Bentham, English law went through a major period of codification at the turn of the century. This movement was reflected in Australia by the Criminal and Defamation Codes of Queensland which were adopted in other States. Codes tended to take off in Queensland, Tasmania and Western Australia but they struck difficulties in other jurisdictions.

Now the codifiers are at work again. The latest part of the *Criminal Law Journal*[24] contains word of the meeting of the Society for the Reform of the Criminal Law held in Brisbane to discuss the desirability of producing a Uniform Criminal Code for Australia. According to the article, by Mr Graeme Scott QC (Crown Counsel for Western Australia), substantial agreement was reached at the seminar organised by the Society. The project was then adopted enthusiastically by the Standing Committee of Attorneys-General. They formed and allotted funds to a Criminal Law Officers' Committee (CLOC). This comprises senior lawyers with expertise in criminal law from all jurisdictions of Australia. They were instructed to prepare a Uniform Criminal Code. According to Mr Scott, at the Queensland Conference the desirability of a Uniform Code on criminal matters was not challenged.

There have been earlier attempts to secure codification of Australia's criminal law. One of them was supported by the Law Council of Australia and came to nothing, largely because of the then disputes about reform of the law relating to sexual offences.

Acknowledging that Victoria, New South Wales and South Australia will remain steadfastly "common law jurisdictions" so that the large majority of the population of Australia is not subject to a Code of criminal offences, Mr Scott suggested that a "common law-based model" Code was "clearly the answer". The review of criminal law which is current both in Victoria and New South Wales provides a good occasion for introduction of a national Criminal Code. This could also provide the occasion for the adoption of much needed revisions of the nineteenth-century Griffith Code still operating in the Code States which Mr Scott declared to be anachronistic and due for "remodelling".

Comments on a chapter issued by CLOC on general principles of criminal responsibility were invited. Those interested to comment should write to Dr David Neal, Director of Policy and Research, Attorney-General's Department, 200 Queen Street, Melbourne, Vic 3000, from whom copies of the paper can be obtained.

At least in the case of the Criminal Code there are working models in four jurisdictions of Australia. Another Victorian agency tackled the even bolder project of developing a Code of the Law on Contracts. The Law Reform Commission of Victoria, in September 1992, issued a Discussion Paper entitled *An Australian Criminal Contracts Code*.[25] The

[24] (1992) 16 Crim LJ 350. See also note (1992) 30 Law Soc J (NSW) November 73.
[25] Melbourne, 1992, Discussion Paper.

project arose out of a reference given to the Commission instructing it to prepare a draft Code "to replace the existing common law rules that affect contractual transactions". The Commission set itself the task of developing a Contracts Code which can be read and understood by people who are not lawyers. With tongue in cheek, the Commissioners asserted that it was possible to read their entire Code in the time it took to travel the two kilometres between Collins Street, Melbourne and Gratton Street, Carlton, by the number 19 tram. With such a provocative introduction many readers will be inspired to persist.

The Code contains only 27 articles. They are stated at a high level of generality. According to the authors, this makes it possible to embody the whole of contract law within the Code. Such a high level of generality is only made possible by the "central role" played by the concept of "unconscionability". The proposed Article 27 declares "a person may not assert a right or deny an obligation to the extent that it would be unconscionable to do so". Whilst it is obviously desirable to simplify the concepts of contract law, the still further erosion of rules giving rise to legal obligations by the notion of unconscionability is a controversial idea.[25] Many decisions, including those of the High Court of Australia, contribute legitimacy to this concept.[27] However, warning bells have been sounded against the substitution of judicial consciences for bargains struck by parties, who should normally be held to the terms of the agreements they have executed.[28]

In a letter invoking attention to the Discussion Paper, the VLRC Commissioner in charge of the project, Mr Ted Wright, pointed out that legal services are a significant part of the economy's infrastructure costs. It was estimated that the amount spent on fees to lawyers in private practice amounted to nearly 1 per cent of the gross national product. The present Australian common law of contract was said to be contained in over 4,200 reported decisions. This body of law is increasing by about 200 new cases each year. The result is "a vast number of minutely detailed rules — involving many abstract and sometimes arcane concepts".

There is no doubt that a simplified law of contract, if it could be attained, would make a major contribution to a hard-pressed economy. The attempt to secure a uniform contract law for the United Kingdom by a common project of the English Law Commission and the Scottish Law Commission broke down because of irreconcilable differences. The project was abandoned. The history of the Australian Federation suggests that agreement on such a matter, which would require voluntary adherence to a Code, would need a great deal of institutional support if it were to get off the ground. Yet the arguments for moving towards an Australian Uniform Contracts Code were eloquently collected nearly 20 years ago by the former Editor of this Journal, Professor J G Starke.[29] The new project of the Law Reform Commission of Victoria seemed to answer his call. But soon after the publication of the Code — and following the Victorian elections — the new Government of Victoria announced the abolition of the VLRC, a poor start for the project. Nevertheless, a copy of the draft Code can be obtained from, and comments made to, the Victorian Law Reform Commission, 160 Queen Street, Melbourne, Vic 3000 or, in the event of its demise, to The Secretary, Department of Justice, 200 Queen Street, Melbourne, Vic 3000.

[26] *J & C Reid Pty Ltd v Abau Holdings Pty Ltd* [1988] NSW Conv Rep 55-416 (NSWCA) at 57, 805.

[27] See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

[28] See, eg, *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (CA), 585. The comment concerned equitable relief *from* obligations in a written contract executed by well advised, substantial parties. See also *Bridge v Campbell Discount Co Ltd* [1962] AC 600 (HL) at 626 and Preface to 3rd ed, R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies*, Butterworths, Sydney, 1992, p xi.

[29] See J G Starke, "A Restatement of the Australian Law of Contract as a First Step towards An Australian Uniform Contract Code" (1975) 49 ALJ 234.

For a copy of the Discussion Paper contact: the Law Reform Commission of Victoria, 160 Queen Street, Melbourne, Vic 3000; tel (03) 602 4566.

Women's judgments

As far as history records, Queen Eleanor is the only woman to have been appointed Lord Chancellor and the Lady Keeper of the Great Seal.[30] The event took place in the Summer of 1253 when King Henry III went off on an expedition into Gascony to quell an insurrection. The Queen was to act on the advice of the King's brother and others of his Council. She held office for nearly a whole year, performing all of its duties "as well judicial as ministerial". The historian of the Lives of the Lord Chancellors noted (with apparently grudging obligation), "I am thus bound to include her in the list of Chancellors and Keepers of the Great Seal, whose lives I have undertaken to delineate".

According to the history, Queen Eleanor sat as judge in the *Aula Regia*. But the sittings had to be interrupted by "the *accouchement* of the judge". When she took office, the Lady Keeper had been left in a state of pregnancy. In November 1253 she was delivered of a princess, baptised Catherine because of the day on which she was born. After having been "churched", the Lady Keeper resumed her place in court. It seems that she enforced rigorously her dues. Her "arbitrary proceedings caused the greatest alarm and consternation" in the City of London which had hitherto been a sort of free republic in a despotic kingdom. Parliament, in 1254, responded in a traditional way, by refusing supply. In consequence, the Great Seal was transferred into other hands and the Queen joined her husband in France where the Kings of England, France and Navarre in a great banquet sought to outdo each other in splendour and courtesy.

It cannot really be said that this rather unfortunate beginning for the place of women on the bench in our legal tradition explains the great delay in appointments which ensued. The role of women in the Australian judiciary was discussed at the third Australian Law and Literature Conference held in Sydney at the end of July 1992. A report on that Conference has only now been received. Participants included Justice Mary Gaudron of the High Court of Australia, Justice Jane Mathews of the Supreme Court of New South Wales and other Australian women judges and lawyers. The participants conducted a special forum titled "Women's Judgments: Can They Make a Difference?". According to the report, the conclusion was that, whilst Australian women in the judiciary have come a long way since women first entered the legal profession at the turn of the century, the dominant force of the legal world in Australia remains, resolutely, the Anglo-Saxon male. The report states that the forum was told that legal reasoning in the Australian courts was still "impervious to anything outside the values of white middle class males". Although half of the Australian law graduates were now women, few of them eventually became barristers. Although progress in female appointments to the judiciary was acknowledged, the forum noted that there was still a great gender imbalance in the top echelons of the judiciary.

Justice Gaudron told the Conference that, while some old barriers for women in the judiciary had been breached, new ones were being erected. Many male judges, she declared, still adhered to the traditional

[30] See John Lord Campbell, *Lives of the Lord Chancellors and Keepers of The Great Seal of England*, 4th ed, London, Vol 1, p 123 et seq. By way of contrast, see M Martin, "Women Judges — When?" in (1992) 66 Law Inst J (Vic) 393.

role of men and women in society. Their attitudes would need to change for the legal system to become fairer to women. An interesting case in which Justice Gaudron's views about the development of legal principle to correct the previously disadvantaged position of women, is *Baumgartner v Baumgartner*.[31] There she propounded the view that non-financial contributions "should be taken into account" in determining a constructive trust to be imposed by the Court as between parties to a de facto relationship who had separated.[32]

Justice Mathews told the Conference that areas of law such as anti-discrimination law, domestic violence and sexual assault, required "input" from women, including women lawyers. This was where women's judgments were likely to make a difference. Associate Professor Regina Graycar, of the University of New South Wales Law School, stated that the use of the term "woman judge" itself reinforced the stereotype that judging was "a male activity". A question whether women's judgments could make a difference presumed that "all women were the same". Professor Graycar stated that it was wrong to assume that "everything will change with women on the bench". She stated that judgments which upheld women's inequality were not given only by men. The reverse is also surely true.

One of the disturbing points to come out of the forum was the evidence that admission of women to the Bar of New South Wales has actually been decreasing in recent years. Only 12 per cent of admissions to the New South Wales Bar in 1991 were women compared with more than 50 per cent of law graduates. According to Professor Graycar, similar erosion of apparent recent achievements could be seen in other jurisdictions. Thus, in the United States, there were fewer judicial appointments of women in the 1980s than in the 1970s, doubtless as a result of the move from a Democratic to a Republican administration. Perhaps with the election of Governor Clinton to the White House, this trend will be reversed.

One correspondent to the *Sydney Morning Herald*[33] quoted Justice Gaudron's statement that there was still "massive discrimination" against women, with structural barriers such as unequal distribution of childcare in the community at least partly responsible for their disadvantaged position in the legal profession. The forum ended by questioning the assumption that women's numbers in the judiciary of Australia would increase as soon as formal equality between women and men was achieved. The Chief Justice of the Family Court of Australia (Justice Nicholson) later called attention to the large number of women judges in the Family Court. However, this position is not yet reflected in other courts. The House of Lords in modern England is yet to have a woman Law Lord. The reason surely cannot lie in the absence of female toilets in the Palace of Westminster.

Human Rights Committee appointment

The delivery of so many recent judgments of the High Court having significance for human rights in Australia and the acknowledgment by that Court of the inevitable impact of human rights jurisprudence on the Australian common law,[34] make it important to note the recent election of Justice Elizabeth Evatt to the United Nations Human Rights Committee for a term of four years commencing 1993. The election was held at a meeting of the States Parties to the *International Covenant on*

[31] (1987) 164 CLR 137 at 155.

[32] Ibid, at 156. See also more recently *Lamberrus van Gerven v Andrew Arthur Fenton*, Unreported, High Court of Australia, 28 October 1992, per Gaudron J at p 20, in which "Women's Work" is discussed with reference to legal and other authority. Cf *Hayden v Hayden* [1992] 1 WLR 986 at 995 (CA).

[33] *Sydney Morning Herald*, 4 August 1992, p 14.

[34] See *Mabo v Queensland* (1992) 66 ALJR 408 (HC) at 422 (Brennan J). See also *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635.

Civil Political Rights held in New York. Australia has for some time been a Party to the Covenant. In December 1991 Australia also adhered to the First Optional Protocol to the Covenant. Broadly, this will permit Australians who have exhausted domestic remedies in the legal system of Australia to take to the Human Rights Committee complaints that Australia's laws and practices do not conform to the standards laid down by the International Covenant.

In other regions of the world, courts or commissions have been established to receive citizen complaints and hand down decisions of varying degrees of authority. A glance at the recent decisions of the High Court of Australia will show the growing influence in its reasoning of the authoritative decisions of the European Court of Human Rights which obliges Member Countries in Europe to bring their laws into conformity with its rulings. The Inter-American Court of Human Rights plays an important role in the Americas. The African Commission on Peoples and Human Rights has a much more patchy record. In Australia's region of the world, Asia and the Pacific, there is no equivalent court. This makes the Human Rights Committee more important to Australia. It renders Justice Evatt's election to the Committee one of great significance.

Already, the first complaint from Australia has been lodged with the Committee. Brought by Mr Nicholas Toonen, the day after Australia's subscription to the Protocol came into effect, this complains that Tasmania's laws which criminalise homosexual acts between consenting adults in private, breach Art 17 of the International Covenant which guarantees a right to privacy, and Art 26 which guarantees a right to equality before the law and equal protection of the law.

Under the Committee's rules of procedure,[35] the Australian Government, as the international representative of Australia, has been asked to provide information relevant to the question of the admissibility of Mr Toonen's communication. Various human rights bodies throughout Australia urged the Federal Attorney-General (Mr Michael Duffy) not to contest the admissibility of the complaint. It is understood that the Government has resolved not to dispute admissibility. If the Human Rights Committee, in accordance with its rules, accepts the complaint, the next stage will be consideration of Australia's response to the substantive issues raised. In this respect, it will be relevant to take into account two decisions of the European Court of Human Rights which have held that the United Kingdom in Northern Ireland[36] and the Irish Republic[37] were obliged to bring their law into conformity with the Europe-wide established standard abolishing criminalisation of consensual adult homosexual conduct. Interestingly, one of the senior advocates in the case of the successful complainant against the Irish Republic was Mrs Mary Robinson SC, a Commissioner of the International Commission of Jurists and now President of Ireland. President Robinson and her husband visited Australia as official guests of the Australian Government during October 1992.

New judicial appointments in Britain

Controversy about the wearing of wigs by barristers in the United Kingdom has given way to more substantive debate. With the retirement of Lord Donaldson of Lymington on 3 September 1992, the decade of his leadership of the English Court of Appeal came to a close. Lord

[35] For the procedures see United Nations Human Rights Committee, Rules of Procedure of the Human Rights Committee, 14 December 1989 (document CCPR/c/REV.2). See also D Mason, "Procedure Under the First Optional Protocol to the International Covenant on Civil Political Rights, a Supplement to the CCH *Australian and New Zealand Equal Opportunity Law and Practice*, 7 August 1992; cf J Elkind, "The Optional Protocol and the Covenant on Civil and Political Rights" [1991] NZLJ 409.

[36] *Dudgeon v The United Kingdom* (1981) 4 EHRR 149 (ECHR).

[37] *Norris v Ireland* (1989) 13 EHRR 186 (ECHR). *Cf David Norris v The Attorney General* [1984] IR 36 (S C Ireland).

Donaldson was dedicated to a more businesslike approach to the management of that busy appellate Court. At a gathering of 80 judges to mark his retirement, he indicated that there were nearly 1,000 civil appeals outstanding at the end of the year and these had risen by nearly 15 per cent each year. Lord Donaldson's contribution, by way of innovations in the administration of justice and legal procedure, was handsomely acknowledged on his retirement. Amongst his innovations were better case management; the introduction of written argument; the handing down rather than reading of reserved judgments and the publication of an annual review of the Court of Appeal's performance.

The new Master of the Rolls is Lord Justice Bingham. Like Lord Taylor of Gosforth, the new Lord Chief Justice, Sir Thomas Bingham takes on his functions at a comparatively early age of 58. Amongst early controversies to be considered by him will be the Lord Chancellor's proposal that rights of audience be given to civil service barristers, particularly in the Crown Prosecution Service and to solicitors in private practice. Considering that these facilities have been available in Australia for more than a century and that Lord Justice Bingham has a reputation as a reformer, it seems unlikely that he will tarry long over such minor matters.

In his first public statement after his appointment, Lord Justice Bingham urged the incorporation into English domestic law of the European Convention on Human Rights.[38] This would, he pointed out, allow British rather than European judges to determine and protect the rights of British citizens under the Convention. In his speech, which was noted as being unusually controversial for an English judge, Lord Justice Bingham declared that Britain was now more *mixed* in racial, religious and cultural terms than ever before. There was the need to ensure happiness and fulfilment of all its citizens. The need for British citizens to go beyond British courts to get their rights protected had weakened public confidence in the courts. It had also led to the frequent reversals of United Kingdom Court decisions by the international tribunal in Strasbourg.

Lord Justice Bingham is no stranger to difficult tasks. In 1977 he was appointed by the Labour Government to head the politically charged inquiry into allegations that certain oil companies had breached Rhodesian sanctions. In 1991 he was again called on, this time to inquire into the collapse of the Bank of Credit and Commerce International (BCCI). His report, strongly critical of the Bank of England, was published in late October 1992.[39]

In legal circles, however, he is best known as the first senior judge to speak out in favour of Lord Chancellor Mackay's proposals to reform the legal profession. He condemned the Bar's negative response as a message of "doom, decline and decay".

Further evidence that the English judiciary at the highest levels is undergoing a sea change can be found in the recent appointments to the House of Lords of Lord Browne-Wilkinson and Lord Slynn of Hadley. Now Sir Harry Woolf of the Court of Appeal has been appointed a Law Lord. According to David Pannick QC, quoted in the London *Times*,[40] these appointments foreshadow a shift in the tenor of judgments of the Law Lords with a greater attention to the European Convention on Human Rights and a larger sympathy to European law. In particular, a strong development of administrative law to build on recent English achievements, is predicted.

[38] *The Times*, London, 8 August 1992, p 3.
[39] Ibid, 28 September 1992, p 4.
[40] F Gibb, "Lords take a liberal turn" in *The Times*, London, 15 September 1992, p 25.

An important decision which may shortly come before the new Law Lords is the appeal in *Derbyshire County Council v Times Newspapers Ltd.*[41] The case concerns an aspect of the right to freedom of communication. Urgent inquiries have been received in Australia from London barristers seeking copies of the High Court decisions in the *Australia Capital Television* and the *Nationwide News* cases. Although the constitutional position is different, the invocation of basic rights to free expression presents a common theme.

International Commission of Jurists — Australian Section

The Australian Section of the International Commission of Jurists (ICJ) was established by Sir Owen Dixon soon after the ICJ was created in 1951. The mission of the ICJ is the defence of the rule of law, basic human and peoples' rights and the independence of the judiciary and of lawyers.

The Australian Section has long been active in Sydney where the Secretary-General, Mr David Bitel can be contacted at GPO Box 173, Sydney, NSW, 2001. Readers in Victoria wishing to know more or to join can contact the Victorian Secretary, Mr Paul Bravender-Coyle, GPO Box 1094J, Melbourne, Vic, 3001.

New branches have recently sprung up in Western Australia and the Northern Territory. In Western Australia the Secretary is Ms Meredith Wilkie, Crime Research Centre, The University of Western Australia, 14 Parkway, Nedlands, WA 6009. In the Northern Territory the contact is Ms Jenny Blokland, Law School, University of the Northern Territory, P O Box 40146, Casuarina, NT, 0811.

It may be hoped that branches will be established soon in Queensland, South Australia and Tasmania. An increasing focus of the work of the ICJ, with its headquarters in Geneva, is the Asia and Pacific region evidenced by recent Mission reports on the Philippines,[42] Hong Kong,[43] Burma[44] and East Timor.[45]

The impact of the introduction of the new Div 3A into the Industrial Relations Act 1988 (Cth)

The Hon J T Ludeke QC, a former Deputy President of the Australian Industrial Relations Commission has written an article in this issue (see page 800) on the impact of the introduction of the new Div 3A into the *Industrial Relations Act* 1988 (Cth). In a covering letter submitting the article he writes:

> "The introduction of the new Div 3A ... marks a turning point in the interaction of the Executive and its Tribunal. For the first time, I believe, the Government of the day has legislated to set aside wholly the principles of wage fixation determined by the Federal Tribunal (in this case the Enterprise Bargaining Principle of October 1991) and placed in the statute its own version of that Principle.
>
> At the same time, it has deprived the Commission of jurisdiction to apply the public interest test to single enterprise agreements, which are by far the greater part of such agreements. This article seeks to come to grips with some of the consequences."

[41] [1992] 3 WLR 28 (CA) at 43, 60.

[42] The International Commission of Jurists (ICJ), *The Failed Promise: Human Rights in the Philippines Since the Revolution of 1986*, Geneva, 1991.

[43] ICJ, *Countdown to 1997: Report of a Mission to Hong Kong*, Geneva, 1992.

[44] ICJ, *The Burmese Way: To Where? Report of Mission to Myanmar (Burma)*, Geneva, 1992.

[45] ICJ, *Timor Tragedy — Report of Trial Observance in Relation to the Massacre at Dili Cemetery*, Geneva, 1992.