"The High Court and the Creative Role of the Common Law Judge"

*Legal Date,*

Warringal Publications.

LEGAL DATE

WARRINGAL PUBLICATIONS

# THE HIGH COURT AND THE CREATIVE ROLE OF THE COMMON LAW JUDGE

The Hon Justice Michael Kirby AC CMG *

---

## Introduction

Approaches by the High Court of Australia to the interpretation of the Australian Constitution and to the Court's own role in our nation have varied over the 93 years of its existence. The **Mabo**[1] decision does not emerge as a bolt from the judicial blue. It is but one of several recent decisions in which the Court is facing up to its function in the era when the declaratory theory of the judicial role is abandoned and the fashioning of a distinctly Australian legal system is being ventured.

## The High Court and the separation of powers doctrine

The High Court in **Mabo** has been criticised as acting legislatively, rather than judicially. This may be unwarranted

---

* President of the Court of Appeal of New South Wales, Sydney, Australia. Chairman of the Executive Committee of the International Commission of Jurists. The author acknowledges the assistance received from Mr Eugene Romaniuk, Research Officer to the Court of Appeal, in the preparation of this paper.

1 **Mabo & Ors v The State of Queensland** (1992) 175 CLR 1.

given the true nature of the judicial function and the High Court's proper role as a court of ultimate authority in this country.

Typical of the criticisms of this kind is that voiced by the Tasmanian Premier, Mr Groom. He said,[2]

> "It seems to me extraordinary that the High Court, an unelected body, could move in one decision to overthrow all of our land tenure laws that have served Australia so well for 200 years."

Mr Groom's statement appears to be prompted by a belief that "the High Court in the **Mabo** case, and many others, had taken on a legislative role that should be confined to democratically elected representatives".[3] Similarly, The Hon Peter Connolly, a former Justice of Queensland Supreme Court, wrote, in response to the rhetorical question: "What was wrong with the decision?",[4]

> "The first answer is that it was sheer invention or, if you prefer a politer word, sheer legislation. As Dr Colin Howard has observed, "The philosophy of the common law is, above all, evolutionary, not revolutionary. Mabo is above all, revolutionary, not evolutionary". In order to emphasise this point, I shall hereafter refer to the decision as the legislation of 3 June 1992... My thesis is... that this is the naked assumption of power by a body quite unfitted to make the political and social decisions which are involved."

---

2 B English "Groom calls for tighter controls on High Court" in The Australian, Monday 13 September 1993, p5.

3 id.

4 P Connolly, "Should the Courts Determine Social Policy" in The Association of Mining and Exploration Companies Inc, The High Court in Mabo, 1993, p5.

## What is the separation of powers doctrine?

In its most basic formulation, the separation of powers doctrine under a Westminster system of government prohibits the legislative/executive branch of government from exercising the powers of the judiciary, and vice versa.[5] The two branches of government are regarded as separate in function. In this respect, the Australian Constitution is much influenced by its American counterpart, in turn affected by the philosophical teachings in vogue at the time when the United States Constitution was written.

In the context of the United States, James Madison wrote,[6]

> "The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

The high watermark of the separation of powers doctrine in Australia was the **Boilermakers'** case.[7] In that case it was held that the Federal Parliament could not, by legislation, confer upon a Federal court both judicial and non-judicial functions. To purport to do so was inconsistent with the

---

5 In the United States the separation of powers doctrine applies as between the legislature, executive and judiciary.

6 The Federalist No 47, reproduced in The Federalist - Sesquicentennial Edition, National Home Library Foundation, Washington DC, p 312 at 313. See also **Springer et al v Government of the Philippine Islands** 277 US 189 (1927) at 201-202.

7 **The Queen v Kirby; Ex parte Boilermakers' Society of Australia** (1956) 94 CLR 254; **Attorney-General (Cth) v The Queen** (1957) 95 CLR 529; [1957] AC 288 (PC)

provisions of the Australian Constitution and also with the very structure of the Constitution. Upon this basis, the Court of Conciliation and Arbitration could not validly exercise both judicial and non-judicial powers. The outcome of the decision was the division of those functions respectively between the Industrial Court (from which has grown the Federal Court of Australia) and the Conciliation and Arbitration Commission (from which has grown the Industrial Relations Commission of Australia).

The decision of the High Court of Australia in **Boilermakers'** was affirmed by the Privy Council. Their Lordships observed,[8]

> "...in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard."

The context of the **Boilermakers'** decision is important. It was decided at a time when the declaratory theory of judicial function was almost universally accepted in Australia. Any notion that the judges invented the law was strongly rejected. Chief Justice Dixon asserted that the law would have no meaning as a discipline if there were not pre-existing norms which the judge merely had to find and then to apply. Such a search might be difficult and, at times, taxing. But aided by "strict and complete legalism", the application

---

8 (1957) 95 CLR at 540-541; [1957] AC at 315.

of logical rules and analogous reasoning, the relevant principles of law would always be found.[9]

While this declaratory theory of strict and complete legalism is still probably accepted by many in the general community and by politicians in Australia, it is a view which is now held by very few Australian and English judges. Lord Reid, in 1972, denounced such a view as a "fairy tale" in which we did not believe "any more".[10]

**Separation of powers, judicial restraint and the High Court**

For the purist the strict separation of powers doctrine requires absolute judicial restraint. The classical theory of judicial restraint dictates that the judges do not have regard to "changing economic, social and political ideas" in the exercise of their judicial power,[11] "unless [such considerations] are specifically commended to the court's attention by the legislature".[12] Strict adherence to the notion of judicial restraint is given considerable weight by two undeniable factors: first, the judiciary's exercise of a power legislative in character is illegitimate as the judiciary lacks accountability and therefore the democratic authority to make radical new laws. Secondly, the judicial process is inapt to provide the appropriate consultative

---

9 Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi at xiv.

10 Lord Reid, "The Judge as Law Maker" (1972-1973) 12 JSPTL 22 at 22.

11 D Menzies "Australia and the Judicial Committee of the Privy Council" (1968) 42 ALJ 79 at 81.

12 P Crisp "Legal Dynamics" (1965) 39 ALJ 81 at 81.

processes which significant reform or change in the domain of the legislature requires.[13]

In recent years there has been a slow, but steady, drift in Australia away from the strict theory of judicial restraint. The exact limits of judicial creativity are yet to be defined - assuming that the boundary could ever be defined with precision. In **Caltex Oil (Australia) Pty Limited v The Dredge "Willemstead"**[14] Justice Stephen recognised that "policy considerations must no doubt play a very significant part in any judicial definition of liability and entitlement in new areas of the law".[15] However, he warned that to "apply generalized policy considerations directly... instead of formulating principles from policy and applying those principles... is... to invite uncertainty and judicial diversity."[16]

Justice Deane in **Oceanic Sun Line Special Shipping Company Inc v Fay**[17] expressed what he took to be the correct approach to be adopted when a judge is invited to change the existing common law and to adopt a new approach. He said,[18]

> "There are three main reference points to which regard should be paid in deciding whether the United Kingdom doctrine should be accepted as the law of this country. They are legal principle, decided authority and policy."

---

13 See the comments of Mason J in **State Government Insurance Commission v Trigwell & Ors** (1979) 142 CLR 617 at 633.
14 (1976) 136 CLR 529.
15 ibid at 567.
16 id.
17 (1988) 165 CLR 197.
18 ibid at 252.

In that particular case Justice Deane went on to find that the arguments for change based upon suggested policy and principle were "not sufficiently strong" to warrant the Court's departing from the established law.[19] He stated that, in such a situation, change was the proper domain of the legislation "enacted after full inquiry and informed assessment of international as well as domestic considerations of a kind which the Court is not equipped to make of its own initiative."[20] Despite these cautious words, one is left with the impression that, if the policy considerations before Justice Deane had been considered more compelling, the judge would have had little hesitation in over-ruling the pre-existing authorities. As such, the comments of Justice Deane represent a clear recognition of the proper and legitimate creative role of the courts - especially of the nation's highest court.

**The High Court "creates" law**

The lesson of the last five years appears to be that the High Court of Australia has substantially abandoned strict adherence to past authority and the notion of judicial restraint. This lesson is evidenced not just in **Mabo**. It can be seen in a number of recent decisions which exemplify that court's heightened creativity.

---

19 ibid at 255.
20 id.

In **Trident General Insurance Co Limited v McNeice Bros Proprietary Limited**[21] the High Court by majority[22] held that a person, not a party to an insurance contract, was entitled to enforce the indemnity against the party's liability to pay damages as the result of a successful claim in negligence against the party. While the ramifications of the decision remain to be explored, the decision may have dispensed with the doctrine of privity of contract. It may have done so by court decision and this despite many calls for legislative reform which earlier fell upon deaf ears in Parliament.

Similarly, in **McKinney v The Queen**[23] the High Court, by majority[24], laid down a "rule of practice for the future" to be applied in the context of confessions made by a person in police custody. The "rule" was that, wherever police evidence of a confessional statement allegedly made by an accused while in police custody was disputed at trial, and its making was not reliably corroborated, the judge should warn the jury of the danger of convicting on the basis of that evidence alone. Law reform bodies had for years cried out for legislative reform in this area (as Justice Brennan noted in a powerful dissent[25]). The court-mandated requirement would have implications for police practice and resources. Yet the High Court would wait no longer for legislation based on law reform

---

21 (1988) 165 CLR 107.
22 Mason CJ, Wilson, Deane, Toohey and Gaudron JJ; Brennan and Dawson JJ dissenting.
23 (1991) 171 CLR 468.
24 Mason CJ, Deane, Gaudron and McHugh JJ; Brennan, Dawson and Toohey JJ dissenting.
25 171 CLR at 478-479.

reports. It acted resolutely itself to defend the justice of proceedings in Australian Courts.

In **The Queen v L**[26] the High Court unanimously[27] rejected the notion that, by reason of marriage, there was an irrevocable consent to sexual intercourse on the part of a spouse. This legal fiction had survived for two centuries. It was peremptorily terminated.

In **Australian Capital Television Pty Limited v The Commonwealth [No.2]**[28] the High Court, by majority[29], held invalid key provisions of the Political Broadcasts and Political Disclosures Act 1991 (Cth) upon the ground that they involved a severe impairment of freedoms previously enjoyed by Australian citizens to discuss public and political affairs and to criticise Federal institutions. An implied guarantee of freedom of speech with respect to public and political discussion was found to be inherent to a constitutional democracy such as Australia.[30] This was despite the fact that previous suggestions that the Australian Constitution required freedom of speech and other communication[31] had been strongly rejected.[32]

---

26 (1991) 174 CLR 379.
27 Mason CJ, Brennan, Deane, Dawson and Toohey JJ.
28 (1992) 66 ALJR 695 (HC).
29 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.
30 See also **Nationwide News Pty Ltd v Wills** (1992) 66 ALJR 658 (HC).
31 See **Ansett Transport Industries (Operations) Pty Limited v The Commonwealth & Ors** (1977) 139 CLR 54 at 88 per Murphy J.
32 See, for example, **Miller v TCN Channel 9 Proprietary Limited** (1986) 161 CLR 556 at 579 per Mason J.

In **David Securities Pty Limited & Ors v Commonwealth Bank of Australia**[33] the majority[34] held that a rule, well settled for nearly two hundred years, precluding the recovery of money paid under mistake of law should no longer be regarded as part of the law of Australia.

In **Dietrich v The Queen**[35] the majority[36] held that, in the absence of exceptional circumstances, a judge should, on application, adjourn, postpone or stay a criminal trial where an indigent accused person, charged with a serious offence is, through no fault of their own, unable to obtain legal representation. If such an application were refused and the resulting trial were unfair, the conviction might be quashed upon the ground of miscarriage of justice. This decision was in marked contrast to the earlier decision of the High Court in **McInnis v The Queen**.[37] The dissent of Justice Murphy in that case was approved, and followed, in the **Dietrich** case.

These examples clearly demonstrate the High Court's present tendency toward judicial creativity. Against such a pro-active and reformatory approach, it ought not have come as any real surprise to the astute observer of the judiciary in Australia that the High Court in **Mabo** would adopt the course which it did. No doubt the **Mabo** decision is creative. No doubt

---

33 (1992) 175 CLR 353.
34 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.
35 (1992) 67 ALJR 1 (HC).
36 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.
37 (1979) 143 CLR 575.

it sits upon the fine line which separates a truly legislative act from the exercise of true judicial function. But it is certainly consistent with the recent approach of the High Court to many difficult problems where injustices have long survived and been completely ignored by the legislature despite repeated calls for urgent reform.

A system based upon the common law, of its nature, requires a creative judiciary. If the judges of the common law did not so act where plain justice demands action, the law would fail to adapt and change to modern society. In the past, the declaratory theory had even great legal intellects deceived - or ready to indulge the fiction. Nowadays, a mature common law system requires that strict and complete legalism be tempered by judicial consideration of both principle and policy in stating what the law is. Strict and complete legalism, giving effect to simple views concerning the separation of powers doctrine, has become specially inappropriate to a contemporary common law system. This is particularly the case where the system operates under a written constitution designed to endure indefinitely. The recent increase in apparent creativity on the part of the courts in Australia, led by the High Court, may be the more noticeable only because of their earlier abstinence long maintained. That abstinence may have created a log jam of injustice which, only now, the High Court and other Australian courts are striving to clear.

Where inquiry is focussed upon the creative nature of the judiciary, except in very clear cases, the debate often turns to emotive, rather than substantive, questions. **Mabo** is a very clear example of this. The essential complaint is not about the legal accuracy of the **Mabo** decision. It is not easy to accept that six of the seven experienced Justices of the High Court simply got the law wrong. The essential complaint, as I understand it, is that the Court ought not have done what it did in this case. Yet **Mabo**, reduced to fundamentals, says only that: (a) our system of real property law accommodates native title; (b) native title may be extinguished; (c) it may be extinguished in a number of ways by either the Crown or by the indigenous people themselves; and (d) where it has been extinguished there may (or may not) be a right to compensation.

Whether the High Court ought to have ventured upon this re-statement of the law, in the facts of **Mabo**, invites conflicting opinions about the proper limits of judicial creativity. In my own respectful opinion, the High Court acted appropriately in overturning a doctrine which was inherently discriminatory and which no longer conformed (if it ever did) to modern notions about the rights of indigenous peoples and their legitimate claims upon settler societies. In acting as is did, the High Court undoubtedly overturned and restated aspects of the common law of Australia. But in so acting, it was not effecting a usurpation of the legislative function. It was merely performing one aspect - the creative aspect - of

the Court's own judicial function and its duty to the Australian community.

Let no one doubt that judges of the common law have been making up law for centuries. That is the very nature of the system. That is the reason why its highly practical techniques of problem solving have outlasted the British Empire and are in operation in the busy courts of the four corners of the world, serving about one-third of humanity. It is why the common law is such a flexible instrument to permit succeeding decades and generations to come at justice.