

Dinner Address **The State of the Law**

Hon Bill Hassell, AM

I wish to add my own welcome to Western Australia to that you have already received, and observe that, true to the Society's fundamental charter to uphold the Australian Constitution, our organisers over the years have been meticulous in observing the federalist character of our nation in holding the conferences of the Society around the country – even in “remote” Western Australia.

Those organisers are not, of course, in our small Society anonymous back room operatives, but very much our esteemed President, Sir Harry Gibbs, and the indefatigable John and Nancy Stone. Between them, with the very willing support of others, they have set the course for the Society since its foundation, established its style and its character, set in place its standard of excellence and intellectual rigour, and ensured that the mostly learned outpourings of our many presenters of papers are preserved in the volumes of the Society's Proceedings.

Through this remarkable effort, the extent of which is not always understood, the influence of the Society has been recognised by many people who matter in the issues with which the Society grapples. Those who support the aims of this Society may today have some sense of satisfaction from seeing in place a High Court which, through its majority of members, may be seen as having returned somewhat to the more traditional role of a court of law, and especially that of a supreme constitutional Court.

The state of the law may not be overall as we would wish it, and the challenge of some judicial appointments by State Labor governments which are based on sociological and ideological criteria instead of legal excellence and knowledge, will continue to haunt us for many years to come. We must, while we can, be comforted by the approach of the Commonwealth to High Court appointments since 1996, and by the departure of several “activists” from that Court.

I think we should also be mindful that many judges and magistrates – indeed the vast majority – are fully attentive to the heavy responsibility they bear to the community not to become “activist” in the broad sense in which I use that term tonight. They are the epitome of judicial propriety. Unquestionably the most distinguished and respected judges are in this category, which is not to pretend that some of the activists are not extraordinarily able.

But, as John Stone has emphasised in talking to me of tonight's address, an after dinner address is not an academic paper, and it should be alleviated by some shafts of humour, if that is possible in dealing with such a daunting topic as “the state of the law”. I know John will not take offence if I tell you that I chuckled, whilst looking for a particular quotation of Sir Robert Menzies, when I came across one of his gems. Menzies recounted of his colleague, the then leader of the Country Party:

“Jack McEwen has been nicknamed ‘Black Jack’. Now and again I address him as ‘Black’, and occasionally, when in highbrow mood, I call him ‘*Le Noir*’. That's only when I don't want other Country Party men to know what I am talking about”.¹

The actual quotation from Menzies I was looking for I found. Menzies is quoted as saying:

“When I first told Sir Owen Dixon I intended to enter politics he said: ‘It's quite easy to make a good lawyer into a politician, but reconversion is impossible’”.²

Thus I come to you tonight, a former lawyer with no pretence to Menzies' quality as a lawyer, and a former politician, speaking of the state of the law. So I must say very clearly that

my purpose is not to present a legal treatise, nor, you will be relieved to hear, is it possible to begin to cover the whole state of the law with any kind of comprehensive assessment.

Rather I want to skate over some aspects of the present state of the law in Australia, and add my voice to those who see danger in judges who have forgotten the traditional and safe role of the judiciary in our society, and in legal developments which are wholly out of step with community needs and expectations.

The danger from straying judges is very real, as ultimately their activities are undemocratic, and undermine the pivotal place of the law in civilised society. They invite disrespect of the law and its expositors, the judges themselves, and thereby contribute to a lessening of the authority of law as the final and accepted final arbiter of process, constitutionalism and conflict – the very characteristics that distinguish our society from the banana republics of the Zimbabwe variety.

If this charge against judicial activists, as I will call the category of which I am speaking, is true, as I do most passionately believe it is, it is important to remember that the felicitous circumstances which have brought to us the stability, continuity, and certainty of outcomes of our democracy and system of government, are qualities of life still enjoyed by far less than half of the world's population.

The Samuel Griffith Society focuses its attentions on threats to the essential federal nature of the Constitution of the Commonwealth of Australia. That is of course our charter. But a broader battle for law and democracy is involved in resisting the depredations of High Court Justices and others who are so keen to advocate their perceptions of the inadequacies of our systems and laws, and the so-called "international standards" which such Justices and others would have imposed on us regardless of the will of the Australian people.

This is often done through networks of international organisations at overseas conferences, amongst delegates in many cases wholly unqualified to appreciate our history, standards and most cherished beliefs.

There are several areas of activity in particular where, I believe, some judges should take a good look at themselves in terms of their responsibility to the law and the broad community interest they serve. I refer in particular to:

- those who indulge in a continual stream of social commentary, either through their courts and decisions or outside – including those unable to suppress their own ideological bent in so many areas;
- those who apparently believe that sentencing of criminal offenders is a matter for the sole expertise of judges, and, regardless of the views of the community expressed through the laws adopted by democratic Parliaments, seek to apply their own philosophies to this difficult and important area of the law; and
- the "activist" High Court.

You will now appreciate my reference to skating over these vast and complex areas and, at the same time, my recognition that my bluntly stated views may later be recognised as wholly in error. I can but offer them to the debate. As an American friend of mine has said of himself – often in error, but never in doubt!

My starting point in referring briefly to all of these issues is a truly remarkable paper³ by a then Justice of the New South Wales Supreme Court and Court of Appeal, Justice Dyson Heydon, now a Justice of the High Court of Australia.⁴

On the rule of law Justice Heydon said:

"The rule of law operates as a bar to untrammelled discretionary power. It does so by introducing a third factor to temper the exposure of particular citizens to the unrestrained sense of self-interest or partisan duty of other citizens or institutions – an independent arbiter not affected by self-interest or partisan duty, applying a set of principles, rules and procedures having objective existence and operating in

paramountcy to any other organ of state, and to any other source of power, and possessing a measure of independence from the wrath of disgruntled governments or other groups. These independent arbiters are usually judges

“A key factor in the speedy and just resolution of disputes is the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge

It is largely judges, not jurors, who now decide disputes. In fulfilling that task, judges need a reasonable minimum of application, balance, civility and intelligence: but they need two things above all. One is a firm grip on the applicable law. The other is total probity”.

On judicial activism he said:

“What is below described as ‘judicial activism’ badly impairs both qualities [a firm grip of the law and total probity], and in that way tends to the destruction of the rule of law

The expression ‘judicial activism’ is here used to mean using judicial power for a purpose other than that for which it was granted, namely doing justice according to law in the particular case. It means serving some function other than what is necessary for the decision of the particular dispute between the parties. Often the illegitimate function is the furthering of some political, moral or social programme: the law is seen not as the touchstone by which the case in hand is to be decided, but as a possible starting point or catalyst for developing a new system to solve a range of other cases. Even more commonly the function is a discursive and indecisive meander through various fields of learning for its own sake”.

On change to the common law, and the fierce criticism to which Sir Owen Dixon has been subjected for his orthodox approach, Justice Heydon said:

“The mockery to which Sir Owen Dixon’s enlightened critics, on and off the bench, have subjected him obscures an essential truth. He did not think that the common law was frozen and immobile, fashionable though it is to attribute this caricature of a view to him. He contemplated change in the law as entirely legitimate. When new cases arose, existing principles could be extended to deal with them, or limited if their application to the new cases was unsatisfactory. As business or technical conditions changed, the law could be moulded to meet them. As inconveniences came to light they could be overcome by modifications”.

With the background of those comments, and bearing in mind that Professor Greg Craven will deal specifically with the subject of judicial activism during this conference, I turn to the somewhat broader areas of judicial activism I have chosen to comment on tonight. It will be obvious that my description of “judicial activism” is loose and broad, not falling within the strict limits imposed by Justice Heydon in his particular study.

May I mention in passing that some years ago, when reading with delight the expositions of Greg Craven on some of the extreme centralist interpretations of the Commonwealth Constitution, I first came across the expression he used, “It is *pellucidly* clear that the Founders saw no role for the High Court in relation to this judicial form of constitutional amendment [what he referred to as ‘progressivism’]”.⁵ It was a dash to the dictionary greatly enjoyed in the context of Greg’s bold paper.

What then of magistrates and judges who have adopted the role of social advocates and social commentators? We have recently seen a South Australian magistrate publicly rejoicing in relation to a decision affecting refugee children in custody; a former Chief Judge of the Family Court of Australia fulminating through the public media on various issues; the Chief Judge of the ACT Supreme Court only last week addressing the National Press Club on his views of the government’s anti-terrorism laws; and our own Chief Justice of the Supreme Court of Western Australia a frequent comment-er, if not commentator, on various social, legal and quasi-legal issues. Justice Michael Kirby of the High Court has a firm view on what he regards as social

reform, human rights and Australia's international obligations, which he expresses, with his customary vigour, thorough research and great authority both within and outside Australia.

I might say in passing that I share at least some of Chief Judge Higgins' concerns about the raft of anti-terrorism laws rushed through Australian Parliaments in recent years – but it is not for Judge Higgins to be saying it. He may well have to sit in judgment on the application of such laws.

I wonder what happens to the judicial method, or as put by Justice Heydon, to “the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge”, when these judicial activists are confronted by cases which come before them at first instance, or on appeal, and such cases fall within the area of interest on which the learned judicial officer has been a commentator or public advocate of change?

Well, do I wonder? Rather do I fear that litigants and public alike will have a glimmer of concern as to the total impartiality of such officer of the law, that solicitors for parties who have a point of view in such matters will try so to manipulate the lists in the various courts that the cases in which their clients have an interest will come before a judge whose views are assessed as favourable to the client's case.

We cannot, I think, expect that the judiciary should be in these times hidden away, remote from public scrutiny and comment, and in an ivory tower of isolation from the reality of intense media scrutiny over high profile cases of public interest. It is for this very reason, this new reality, that judicial officers at all levels should be wary of entering the game, should keep back from the comings and goings of media commentary, keep clear of the issues to be decided by the court of public opinion, in Parliaments and by elections, and leave to Attorneys-General the role of representing the law to the public and moving for its reform if its outcomes are unsatisfactory.

If judges become advocates, of whatever cause, however good and worthy, however much in line with our supposed international obligations, or with whatever seemingly indisputable perception of human rights, the inevitable result will be that, in our free and open society, the judiciary will become politicised, will be dragged into the cut and thrust of the passing mood of public and political opinion. There will be, as there have been already, demands that judges become in some way accountable for their decisions, that their appointments be vetted by Parliament, or that the judges be elected.

In her retirement speech to the High Court Dinner of the Law Society of Western Australia in 2002, former Justice Mary Gaudron referred briefly, and in passing, dismissively, but as always incisively, to critics of the Court's activism who have sought some redress through systemic reform. She need look no further than her own sociological and ideological remarks in her judgment in the *Mabo Case* to realise, as I am sure she is capable of realising, why there were calls for changes of the kind she clearly abhors.

The Children's Court of Western Australia has become a long running battleground of judicial activism versus community activism in the matter of sentencing. In my first experience of that institution it was a creature of the then Department for Community Welfare, of which I was from 1980 to 1982 the Minister. Its quasi-judicial status was unsatisfactory, and I supported Labor government moves a few years later to reform it, and establish a truly independent court that would properly take care of the rights of those brought before it.

Unfortunately the Labor government appointed a District Court judge to the Court whose views on sentencing were, to say the least, progressive. When the revolving door syndrome became a scandal in the public arena, the Court Liberal government introduced the mandatory sentencing “three strikes and you're in” for burglary law. This, along with similar Northern Territory laws, brought howls of protest from many eminent persons, including complaint from the Chief Justice of Western Australia, and objections from the Law Council of Australia

– which never sought its members’ views before speaking out in angry protest, allegedly on behalf of those members.

More importantly in exposing the point of these remarks, a subsequent Children’s Court judge sought to read down the mandatory sentencing law, with intent to negate the full extent of its operation as intended by Parliament. Meanwhile the Labor Party, having succumbed to the reality of public anger at the depredations of multiple-repeat young offenders, came to office on a promise to leave the mandatory sentencing law in place. A cynic may say it has been comfortable to leave it with its limited operation, under a judicial regime determined from the outset that the full intent of Parliament and public to reform the appalling record of the Children’s Court would, in the matter of sentencing, be thwarted.

There are three aspects of judicial activism in the High Court of Australia on which I want to comment briefly tonight:

- the Court’s introduction of new law, which goes far beyond the process of legal development described by Justice Heydon;
- the Court’s long history of distortion of the Constitution, from at least the *Engineer’s Case* forward, to centralise power in the Australian Commonwealth in a manner never intended by those who framed the Constitution, nor by those who voted for its adoption at the creation of Federation, nor approved by the electors of Australia at referenda under the mechanism for change incorporated in it; and
- the incorporation in domestic law of foreign treaties not adopted as domestic law by the Parliaments of Australia.

The *Mabo* decision creating native title rights to land in favour of Aboriginal Australians was a high point of the High Court in its legislative mode. The issues arising in the community from *Mabo* are yet to be resolved, and will long confront us. The vast cost will continue to be imposed on generations of Australians.

The principle of racial inequality imposed by *Mabo* should continue to disturb all those who believe that equality before the law is fundamental to our system of liberty and democracy.

It is to be noted with interest that the New Zealanders are now realising the reality of their own *Mabo*-like decisions and seemingly moving back from them.

When *Mabo* was first decided its vociferous defenders said that it was not a new law. When they discovered that argument was hopeless in the face of a radical decision inventing radical title, they argued that the courts had always changed the law and it was entirely a legitimate process. They clearly did not have the benefit of Justice Heydon’s analysis of common law development.

For my part, even now after the long period since the *Mabo* decision was handed down, I cannot accept it as a legitimate exercise of judicial power.

Leaving aside the particular case before the Justices, which had to be decided between the parties, they deliberately created a general regime of native title rights applicable to a different race of people, and covering the whole of Australia.

I can only believe that it was a conscious decision of six Justices to do something they believed should be done, which they knew legally could be reversed by the Parliament, but politically could not.

It was a fine judgment by the six, and a clever one, but not a proper one.

When Australia acceded to the international treaty extending the territorial limits 200 miles out to sea, the Federal Parliament enacted the *Seas and Submerged Lands Act*, asserting Commonwealth sovereignty over the vast area of seas around Australia. That was perhaps as it should have been, but one would naturally have expected that as an accretion to a federal nation, the seas would become part of the federation of Australia. That did not happen – an ever predatory Canberra claimed sovereignty for the Commonwealth to the exclusion of the

States, and the High Court of Australia upheld the claim.

So Australia moved from being a federation of States with some minor federal Territories, the only significant one being and remaining a candidate for statehood, to being a federation surrounded by a vast area under a unitary system of government. Of all the decisions of the High Court which were anti-federalist, that upholding the *Seas and Submerged Lands Act* of the Commonwealth must rank as one of the most damaging, and most inexplicable.

Although a political arrangement was made in relation to local laws and enforcement of them offshore, no economic regime in favour of the littoral States of the Commonwealth was ever put in place. Thus, when the multi-billion dollar arrangements were recently concluded for the development of the off-shore Gorgon gas fields in Western Australia, the outcome will result in no revenue passing to the State for royalties, resource rentals or otherwise over the whole long life of the project.

A tough State government might have used the powers available to it onshore to veto the project unless satisfactory arrangements for revenue sharing with the State were first put in place. It might have at least insisted on a regime of sharing, such as that agreed at a political level years ago to apply to the North-West Shelf development. But that was not done by the Gallop Labor government and the opportunity has now passed.

The injustice of this outcome is palpable. The State will bear huge costs over the years in supporting the developments which will underpin the Gorgon project, but will receive no revenue from the natural resource it produces. I am amazed that it was not made into a major political issue. But what is really riling is that this is a High Court outcome – an outcome from a Court created with the very purpose of maintaining the federal balance in a federation.⁶

Finally and briefly, to *Teoh's Case*⁷ This case has been the subject of a paper to this Society last year by our esteemed President, Sir Harry Gibbs⁸ and I will not repeat his analysis or comments.

Suffice to say the case has established a doubt as to the well established general principle, as stated by Sir Harry:

“ that when a treaty is ratified, although it becomes binding on Australia in international law, it does not become part of the law of Australia unless it has been given the force of law by statute a treaty not incorporated by statute does not affect the rights or liabilities of Australian citizens”.

Again I refer to a particular aspect of the situation, that being the manifest inclination of some judges to apply laws to us which are not part of our common, constitutional or statute law, but which are the outcome of the work of international networks of bureaucrats and judicial administrators who *want* to establish an international regime which is not answerable to any elected Parliament – certainly not one we have elected.

Whether this tendency is part of a trend to globalisation, the current fashion of right-thinkers, or simply further manifestation of the megalomania of those who believe they have risen above the common man and are best qualified to decide his standards for him, does not in the end matter. What does matter is that it should be resisted at all costs, as surely it will destroy our democracy.

I remain committed to the sovereign nation state as the greatest hope we have to protect our heritage, our culture, our history, our rights and obligations, our opportunities to participate and influence decisions about our lives and laws. The international networks of United Nations bureaucracies, judges at their conferences, and other linkages between peoples, nations, professions, interest groups and occupations have their place in advancing civilisation in the long term, but no evidence currently available to me suggests that my life or liberty would be enhanced by my being subject to laws created by any United Nations agency.

I remain willing and eager to rely on the Australian system of government with all its flaws and deficiencies. At least I occasionally get to vote for or against the governments elected under that system. I have never had a vote for the anonymous bureaucrats of the United Nations, or for Mary Robinson, the one-time United Nations Commissioner for Human Rights, who by-passed the horrors of Africa *en route* to Australia and her lectures about our laws.

Nor for that matter have I ever had a vote for Justice Michael Kirby of the High Court, who presumes so often to lecture me, my fellow countrymen and the international legal fraternity on the obligations he believes the government I did get to vote for has.

Again I draw on the enlightened words of Justice Heydon:⁹

“The *soigné*, fastidious, civilised, cultured and cultivated patricians of the progressive judiciary – our new philosopher-kings and enlightened despots – are in truth applying the values that they hold, and which they think the poor simpletons of the vile multitude ought to hold even though they do not”.

WS Gilbert, in collaboration with Arthur Sullivan, produced the Savoy Operettas. He had one of his characters describe his “little list”. The list included a “judicial humorist”, who, along with all others thereon, would not “be missed”.

Would that all we had to contend with today were the judicial humorist. I would add to Gilbert’s list the judicial activist. I’m sure he’d not be missed.

Endnotes:

1. From *The Wit of Sir Robert Menzies* compiled by Ray Robinson, publisher Leslie Frewin: London, 1966, p. 65.
2. *Ibid.*, p. 55.
3. I recognise that the author was not referring specifically to all these matters, and in relation to some his remarks may have limited or no application.
4. *Judicial Activism and the Death of the Rule of Law*, published in *Quadrant*, January-February, 2003. I am indebted to a Justice of the Supreme Court of Western Australia, who sent me the paper with the cryptic comment, “I am sure it will be of interest to you”.
5. Gregory Craven, Foundation Dean and Professor of Law, University of Notre Dame Australia, the Alfred Deakin Lecture 1997, *The High Court of Australia: A Study in the Abuse of Power* (Emphasis added).
6. A former Treasurer of the State has suggested to me that in 15 years the State Treasury will be in a parlous condition as this project reaches its maturity.
7. *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273.
8. *Teoh: Some Reflections* in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 15 (2003), May, 2003.
9. Quoted by columnist Paul Murray, writing in *The West Australian*, 29 November, 2003, *Agendas drive justice off the rails – A bench full of High Court judges with their own barrows to push would be a dangerous thing*