*Sir Anthony Mason**

INTERVENERS AND AMICI CURIAE IN THE HIGH COURT: A COMMENT

INTERVENTION AND AMICUS STATUS

SIR Owen Dixon's approach to intervention, confining intervention and virtually destructive of the role of the amicus, was fashioned to meet the High Court's adjudicative function, not its law-making function. The latter function of the Court was obscured, not least by judges who tended to ignore it. There is an inherent tension between the Court's adjudicative function in determining the litigation between the parties in a system of adversarial litigation and the Court's law-making role. The impression created was that the adjudicative function was all that mattered.

When in the 1980s the appeal to the High Court was conditioned on the grant of special leave, the law-making function of the High Court was elevated to a new level of importance. Since then most appeals coming before the High Court involve an important question of principle and have the potential to engage the Court in law-making, even if they do not go beyond the clarification of principle. The special leave requirement recognises and reinforces the importance of the Court's law-making function, notwithstanding that it is incidental to its adjudicative function.

In that situation, especially in constitutional and public law cases, the approach adopted in the *Australian Railways Union Case*[1] would seem to be inadequate both from the viewpoint of interested non-parties to the litigation and from the viewpoint of the Court. If a person has a substantial or significant interest in the resolution of the question or the outcome of the case, even if the person has no right, authority or legal title which will be affirmed or denied by the outcome, then that person should have an opportunity of participating in the proceedings either as an intervener or as an amicus, subject to certain qualifications. The formulation of a contested principle of law in a particular way may have adverse consequences for a range of persons beyond the parties to the particular litigation. Although those persons are not formally bound by the Court's decision because they are not parties, their prospect of challenging in a subsequent case the Court's formulation of principle in the instant case is virtually non-existent.

From the Court's perspective there is a risk, in some cases at least, that the full range of available arguments will not be presented, either because it is not to the interest of the

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1 *Australian Railways Union v Victorian Railway Commissioners* (1930) 44 CLR 319.

actual parties to the litigation to put them or because, for strategic or other reasons, they are not put. In my experience, there have been a number of cases in which possible arguments have not been presented for various reasons. Jeremy Kirk, has drawn my attention to a recent decision of the Supreme Court of the United States, *Romer v Evans,*[2] where, it seems, the Court decided in favour of the plaintiffs not on the arguments presented by them but on arguments presented by persons with amicus status.

Accordingly, in order to ensure that an appropriate range of argument is presented to the Court, the Court should be able to grant intervener status or amicus status to a party who has an interest in the resolution of issues in the litigation and will present an argument which would not otherwise be presented.

Interveners become parties who are liable to an order for costs being made against them: they have the rights of parties. If we want to retain the existing classification of interveners with their existing rights and liabilities, we would be well-advised to structure participation by others around the grant of amicus status. But there is perhaps a case for modestly widening the scope of intervention to include those who have a substantial interest in the case, leaving others to the status of amici.

Intervention status has traditionally carried an entitlement to present oral argument, an entitlement that is both necessary and appropriate to a person who has the status of a party. The rules of natural justice entitle such a party to be heard. Amicus status is different. Underlying the procedure is the notion that the amicus is presenting an argument which will assist the Court. So there is no *entitlement* to present an oral argument and there is every reason for limiting the amicus to cases in which the amicus will deliver an argument which would not otherwise be presented to the Court and limiting the argument to written argument, except in exceptional cases.

In general, I think that there is much to support Justice Kenny's suggestions. Apart from inconveniences mentioned by Justice Kenny, there is the inconvenience associated with generation of additional material for an over-worked court already submerged in an ocean of materials, not all of them relevant and illuminating.

A further problem is the desire of some non-parties, particularly interest groups, to participate in litigation for political purposes in cases which have a political dimension. There is a widely held belief that litigation is a means of focusing public attention on broader political issues. No-one would want to encourage participation in legal proceedings simply for the pursuit of political purposes. Opening up participation will add an extra dimension to that aspect of litigation. Much as we may dislike that result, this is one of the areas where we cannot draw a sharp dividing line between legal and political interests.

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2 134 LEd 2d 855; 116 SCt 1620 (1996).

Yet another problem is the perception by some experienced lawyers, including a leading QC, that the support of a party by a number of interveners can advance the presentation of one party's case. It has been suggested, for example, that a party whose case in the High Court is opposed by a slurry of Solicitors-General, is at a disadvantage. Tactical collusion between a party and supporting interveners is a fundamental fact of forensic life.

These difficulties and those mentioned by Justice Kenny do not mean that the High Court should regard the *Australian Railways Union* approach as definitive. On the contrary, an important consideration is making the Court accessible to those who have a substantial or significant interest at stake in the litigation and who will advance an argument different from those advanced by the parties. But it is essential to maintain the efficiency of the Court and protect it from interventions which are pointless or will be time-consuming.

All of which suggests that in addition to intervener status we should structure amicus status along the lines proposed by Justice Kenny or along the lines developed in the United States.

In considering possible approaches, I repeat that it is fundamental that amicus status does confer an entitlement to address the Court. Amicus status should ordinarily not extend beyond written presentation with a strict limit on the material to be presented. The Court would, of course, retain a residual power to accept an oral submission, a power to be exercised, if at all, in exceptional circumstances. Justice Kenny's proposals assume a procedure which results in a discretionary grant or refusal of status by the Court. That procedure may generate more applications for Court decision. Is there any alternative to that model? I would not think so unless the Court is willing to leave the decision to the registrar. That course might well encounter other problems which cannot be developed here.

One point I should make is that if stranger status in the High Court is to be structured in the form of rules or procedures prescribed by practice directions, it would be advisable that it should be linked to stranger status in courts from which appeals are brought to the High Court. It would make sense if High Court procedure were part of a uniform integrated pattern. We should not encourage in High Court appeals the notion that a stranger to the litigation can present an argument not presented to the courts below. That may be justified in exceptional cases, but not as a general rule. Here, again, we encounter that tension between the Court's adjudicative function and its law-making role.

ADVOCATE-GENERAL

A different approach to the problem would be to set up an office such as that of Advocate-General. In case you are thinking that this is a radical proposal which I have conjured up, I hasten to point out that this is a suggestion put forward by the present Federal Attorney-General when he was in Opposition. In a paper presented in 1995, published in 1996, "The

Australian Parliament and the High Court: Determination of Constitutional Questions",[3] Mr Williams QC suggested the possibility of creating an office of Advocate-General, with standing to make submissions to the High Court on constitutional questions. Mr Williams said:

> The submissions would be developed after receipt of representations and advice to the advocate-general's office from any member of the public or interest group.[4]

Unlike the Advocates-General of the European Court of Justice, the Advocate-General would neither sit with the court nor prepare for the court draft reasons for judgment. As Mr Williams said, the creation of the office would, in the public interest, widen the sources of advice to the Court and indirectly provide a mechanism for receipt of advice from experts.

I myself have floated this idea as one which might be considered though I have recognised it might not attract much support. I do not think that the office as just outlined bears much resemblance to that of the European Advocate-General. The office is rather that of Public Advocate who would filter the arguments and submissions of others and decide what merited presentation to the Court.

There was a revealing sentence at the end of Mr Williams' discussion of the proposal:

> it is not to be assumed that governments would necessarily support a proposal the effect of which might be to lessen their influence on the interpretation of the Constitution.[5]

I suspect, therefore, without knowing, that in his present guise as Attorney-General, Mr Williams would not be an enthusiastic supporter of his own suggestion, notwithstanding that it would go some distance in meeting Penny Pether's desire to give a voice to the "invisible" and the "unspeakable".

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3 In Sampford & Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions - Law, Ethics and Public Affairs* (Federation Press, Sydney 1996) p216.

4 As above.

5 As above.