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INTERVENERS AND AMICUS CURIAE: THE ROLE OF THE COURTS IN A MODERN DEMOCRACY

THE issues addressed by Justice Kenny in her paper on "Interveners and Amicus Curiae in the High Court" have been too often neglected, certainly in academic literature. They take us to the centre of one of modern constitutional law's most important questions: the nature of the distinction between judicial and legislative power, and more specifically the role of the courts in a modern democracy. In this brief comment I would like to reflect a little further on that distinction in the light of *Superclinics v CES*.[1]

The role of the courts in a democratic society is, as Justices Gaudron and McHugh stated in *Breen v Williams*, a limited one:

> It is a serious constitutional mistake to think that the common law courts have authority to "provide a solvent" for every social, political or economic problem. ... In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle.[2]

Thus the High Court eschews any notion that a legislative interest is appropriate to be asserted in judicial proceedings.

In seeking admission to participate in the judicial process, whether as intervener or amicus curiae, a third party must be able to establish an interest greater than a mere (legislative) desire to have the law declared in a particular way.[3] It is parliament which determines

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1 *Superclinics Australia Pty Ltd v CES* (High Court of Australia, No S88 of 1996). Oral argument was presented to the High Court on 11 and 12 September 1996, but the case was settled before it progressed further. I would like to acknowledge the assistance I received from discussions with Professor Regina Graycar and Ms Jo Wainer in relation to some aspects of the conduct of that litigation.

2 *Breen v Williams* (1996) 186 CLR 71 at 115 per Gaudron and McHugh JJ (footnotes omitted). See also per Dawson and Toohey JJ at 98-99.

3 That is the import of the classic statement in *Australian Railways Union v Victorian Railway Commissioners* (1930) 44 CLR 319 at 331 per Dixon J. More recently comments

policy direction and implements this through legislation. Legislative interests, that is concerning policy directions, are to be addressed to parliaments. Parliament, of course, often deals with matters which are within the province of the common law. In the course of oral argument in *Superclinics v CES* Justice McHugh asked whether, given that the current state of the law on termination of pregnancy in New South Wales had stood for the previous 25 years, the legislature might be a more appropriate forum in which to pursue the arguments of the Australian Catholic Health Care Association (the ACHCA) and Episcopal Conference (the Catholic Bishops).[4] Both the ACHCA and the Catholic Bishops have a view on the subject of termination of pregnancy which they might well seek to have represented in parliament. However, the fact of the longevity of the current law on this subject does not alone preclude the issue from being addressed by the Court as a matter of the common law in the interpretation of statutes.

The difficulties currently faced in articulating clearly the foundation upon which participation by a third party in a case, either as intervener or amicus curiae, rests are at least in part a reflection of the fact that our institutions, and the community in which they stand, are not static.[5] In these circumstances theoretical understandings may be challenged because practice determines theory. Simultaneously, because humans are also creative beings, theory determines practice. It is for good reason that feminists reject the dichotomy between theory and practice.[6]

In terms of the traditional understanding of the judicial function, the application by the ACHCA and Catholic Bishops for admission to participate as intervener in *Superclinics v CES* was bound to fail. A direct or substantial affection of interest, such as that of a litigant in a case pending which will be immediately affected by the decision, is required for this.[7] CES's argument that there had been negligence in failing to diagnose her pregnancy did not entail a positive duty for health care providers either to provide any detailed advice to women patients in relation to termination of pregnancy or to perform

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to like effect have been made by Chief Justice Brennan. See *Kruger v Commonwealth*, transcript of proceedings, 12 February 1996, p12.

4 *Superclinics v CES*, transcript of proceedings before the High Court, 11 September 1996, p9.

5 This point has been noted by Justice Kirby in *Levy v Victoria* (1997) 189 CLR 579 at 651:

> However, since those words [of Justice Dixon in the *ARU Case*] were written this Court has become the final court of appeal for Australia. There has also developed a growing appreciation that finding the law in a particular case is far from a mechanical task. It often involves the elucidation of complex legal principle and legal policy as well as decided authority. This appreciation has inevitable consequences for the methodology of the Court. Those consequences remain to be fully worked out.

6 See Davies, "Taking the Inside Out: Sex and Gender in the Legal Subject" in Naffine and Owens (eds), *Sexing the Subject of Law* (LBC Information Services, Sydney 1997).

7 See *Australian Railways Union v Victorian Railway Commissioners* (1930) 44 CLR 319 at 331 per Dixon J and more recently *Levy v Victoria* (1997) 189 CLR 579 at 600-603 per Brennan CJ.

such terminations. Further, even if it did, the impact arising from this case on the ACHCA would have been simply the usual operation of the doctrine of precedent, thus giving it only an indirect interest in the case.[8]

The application to participate as amicus curiae was different. Part of the classic conception of judicial power is the determination of a controversy between parties according to existing law.[9] Between the particular issues in dispute between the parties and the idea of an independent and objectively existing law governing their relations there is the possibility of a space which an amicus curiae can fill, offering to address the Court on relevant matters of fact or law and on which it will not otherwise have such assistance.[10] In *Superclinics v CES,* the ACHCA and the Catholic Bishops opened to question the lawfulness of a termination of pregnancy, which all of the litigants had accepted right from the beginning of their controversy. When counsel for CES, Mr Calloway QC, argued against allowing the ACHCA and Catholic Bishops to participate in the proceedings Justice McHugh reminded him that "although this is litigation between parties, part of the consequences of this Court's function is to declare the law for the nation and that means the Court has to look at issues that go beyond, or sometimes, the particular parties".[11]

The submission of the ACHCA and the Catholic Bishops changed the case, *Superclinics v CES*, into the "test case on abortion", because there had been no actual termination of a pregnancy in this case and the question of lawfulness had to attach to a hypothetical termination of pregnancy, or termination of pregnancy in a general sense. CES might have sought to terminate her pregnancy not only in New South Wales, but elsewhere in Australia or, perhaps, in another country.[12] Thus the arguments in the case would have inevitably widened beyond the interpretation of the *Crimes Act* 1900 (NSW) and the correctness of *Wald*[13] (and *Davidson*[14]) and extended to the law of other Australian jurisdictions, such as South Australia (where statute expressly allows termination of pregnancy in circumstances defined in slightly different terms from the principles in *Wald* and *Davidson*),[15] and beyond. Complex issues of the nature of the common law and its relation with statute would necessarily have been raised and would have had to be dealt with by the Court.

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8 Justices Dawson and Toohey both observed this: *Superclinics v CES*, transcript of proceedings, 11 September 1996, p8.

9 See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 and *R v Trade Practices Tribunal; Ex parte the Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J.

10 *Levy v Victoria* (1997) 189 CLR 579 at 604-605 per Brennan CJ.

11 *Superclinics v CES*, transcript of proceedings, 11 September 1996, p15 per McHugh J.

12 Justice Gaudron saw that the appellants would have to address the issue in these broad terms: *Superclinics v CES*, transcript of proceedings, 11 September 1996, pp43 and 48.

13 *R v Wald* (1971) 3 NSWDCR 25.

14 *R v Davidson* [1969] VR 667.

15 See *Criminal Law Consolidation Act* 1935 (SA) s82A. This legislation also carries a residency requirement. However, the constitutionality of this under s117 is questionable.

For women, such a case on the subject of termination of pregnancy would be one concerning their fundamental, or common law constitutional, rights: "The right to reproduce or not reproduce ... is properly perceived as an integral part of modern woman's struggle to assert *her* dignity and worth as a human being."[16] Hilary Charlesworth has reminded us, in her paper in this collection, that there is no dichotomy between human rights and constitutional rights. If women's voices were to be excluded in a case regarding an issue of such profound significance to them,[17] and the voice of others such as the Catholic Church were to be included, there is a serious risk that the place of the Court would be damaged by the perception that its justice is partial. Yet at present there is, as Justice Kenny has pointed out, a very real procedural advantage to the party who gets in to court first. In *Superclinics v CES* the impact of allowing the ACHCA and the Catholic Bishops to address the Court as amicus was that the whole nature of the case changed immediately and the parties whose case this was had to develop arguments to meet the altered situation. Given this necessity, the admission of further third parties as amici curiae was less certain as any later applications would then be less likely to be able to meet the test of providing to the Court information not otherwise available to it. Comments such as "it is an argument which could be put by the parties. We do not need to hear an amicus on that" and "it is the extent to which you can offer assistance to the Court on an issue which, it appears, will not be dealt with by the parties" from some of the judges in response to the application of the Abortion Providers for permission to make submissions to the Court on the second day of oral argument in *Superclinics v CES* demonstrate this.[18] Only when the Abortion Providers contended that their argument would differ in some way to that of the parties were they admitted. By contrast, in *Kruger's Case,* the ICJ, which had sought to support the Aboriginal plaintiffs, had failed in its application for admission as amicus curiae specifically because it had been unable to demonstrate that the latter were unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case.[19] A third party applicant thus risks casting themselves in a patronising role as they push to participate in a case. Had *Superclinics v CES* continued before the Court, it was by no means certain that the Women's Electoral Lobby (WEL)[20] or any other group which wished to represent a voice for women would have been granted permission to participate in the proceedings as amicus curiae.

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16 *R v Morgentaler* [1988] 1 SCR 30 at 172 per Wilson J.

17 For a recent report on the impact of the issue of termination of pregnancy on the lives of Australian women see National Health and Medical Research Council (Australia), *An Information Paper on Termination of Pregnancy in Australia* (National Health and Medical Research Council, Canberra 1996).

18 *Superclinics v CES*, transcript of proceedings, 12 September 1996, p82 per Dawson J and p83 per Toohey J.

19 *Kruger v Commonwealth*, transcript of proceedings, 12 February 1996, p12.

20 For an account of the efforts of WEL in preparing to seek permission of the High Court to appear in *Superclinics v CES* see Wainer, "Abortion Before the High Court" (1997) 8 *Aust Feminist LJ* 133.

The problems raised here are linked to a number of themes raised in this conference. Significantly, our legal system is most often understood as presenting a clearly defined dichotomy between private, or common, law issues and those which are public, or constitutional, law matters.[21] In matters of constitutional law the representation of the public interest by the Attorneys-General of the States is all but automatic.[22] If the Attorneys-General of New South Wales or Victoria had sought leave to intervene in *Superclinics v CES* on the basis that the legislation of those States, as interpreted in *Wald* and *Davidson*, was being questioned they would no doubt have been given permission to appear. Yet other interests which are understood to be "private" are not so guaranteed a voice. In part this is because those interests are seen as multiple and irreconcilable (as is thought proper in the private sphere) and speaking only for themselves. They are not capable of being unified (as is considered a characteristic of interests in the "public" arena) and able to embrace a perspective which takes account of all. In this way the rights of women (and other marginalised groups) can continue to be labelled as private, not human or constitutional rights at all. The privatisation of the interests of some groups in the law also means that they are inevitably faced with other problems, such as economic and organisational difficulties, which the Women's Electoral Lobby faced in relation to *Superclinics v CES*, which hinder equity of access to justice. In law, as in other areas, the public/private dichotomy continues to do harm to women (and other marginalised, vulnerable groups).[23]

For all these reasons I believe that the proposals for reform contained in Justice Kenny's paper would go some way to assist in the delivery of justice in our society. They provide a procedural mechanism to ensure not only that the courts deliver equal justice, but also that they are seen to be doing so. They also pay appropriate respect to the particular nature of the judicial process in a democratic community, ensuring that the role of the court is not elided with that of the parliament. The model of practice followed by the Canadian Supreme Court seems to incorporate many of the suggestions made by Justice Kenny. The Rules of the Supreme Court of Canada are expressed broadly so as to allow the judge a broad discretion: any person interested in an appeal may, with the leave of the judge, intervene on such terms and conditions as the judge sees fit.[24] Since the introduction of Rule 18 in 1987 the Supreme Court of Canada has adopted the practice of allowing public interest interveners to make representations. Now, in Canada, the practice is to limit the length of both written submissions (to 20 pages) and oral submissions (to 20 minutes).

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21 See as recent examples *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Kruger v Commonwealth* (1997) 146 ALR 126; 71 ALJR 991.

22 See *Levy v Victoria* (1997) 189 CLR 579 at 603.

23 For a recent collection of essays exploring this dichotomy see Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, Melbourne 1995).

24 Rule 18(1).

Submissions must be "useful to the court and different from those of the other parties".[25] The organisation known as LEAF (Women's Legal Education and Action Fund) has taken a prominent role in many cases before the Supreme Court of Canada, especially in the presentation of argument in cases dealing with women's equality rights under the Canadian Charter of Rights and Freedoms. The role of LEAF is not confined to intervention in cases, but extends to assisting litigants in the preparation of their case and to fund raising. LEAF, therefore, has a role in addressing the way in which other important concerns of the legal system, such as efficiency and minimisation of costs, are dealt with in the process of securing equal justice. The Australian Law Reform Commission's Report, *Equality Before the Law: Women's Equality*, made various recommendations which are broadly consistent with the system proposed by Justice Kenny, though its recommendations also went further to address a broader range of issues.[26] The evidence for the need for some modification to the existing practices in Australia seem obvious if equal justice is delivered and it is to be hoped that the discussion of these issues at this conference will assist in bringing about that change.

25 Rule 18(3)(c). Here Justice Kenny's proposals seem to be slightly different, and, I think, an improvement in that they counter the problem of tactical advantage that is gained by those who come to court first.

26 See Australian Law Reform Commission, *Equality Before the Law: Women's Equality* (Report 69, Part II, 1994) especially pp123-133.