# Letting Justice Be Done Without the Heavens Falling

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The title of this lecture series is drawn from the maxim, well known even as early as 1600, 'Let justice be done, though the heavens fall'. Its most celebrated use was by Lord Mansfield in his judgment reversing the sentence of outlawry passed upon John Wilkes for the publication of *The North Briton*. Lord Mansfield said:

> Unless we have been able to find an error which will bear us out, to reverse the outlawry; it must be affirmed. The constitution does not allow reasons of State to influence our judgments: God forbid it should! We must not regard political consequences; how formidable soever they might be: if rebellion was the certain consequence, we are bound to say 'fiat justitia, ruat caelum.[1]

Lord Mansfield was dealing directly with the public clamour that had arisen about the case. He referred to 'audacious addresses in print'.[2] More than that, he referred to threats going further than mere verbal abuse – to threats of personal violence. As to those he said:

> 'The last end that can happen to any man, never comes too soon, if he falls in support of the law and liberty of his country: (for, liberty is synonymous to law and government)'[3]

and concluded by saying:

> 'Once for all, let it be understood, "that no endeavours of this kind will influence any man who at present sits here." If they had any effect, it would be contrary to their intent: leaning against their impression, might give a bias the other way'.[4]

All this is, or at least should be, well known to and accepted by every lawyer. It is as well, however, to examine some of the principles that lie behind these statements, lest they pass unnoticed.

At its core, what Lord Mansfield was saying is that the judge must do justice according to law, whatever may be the consequences of doing so. 'Liberty is synonymous to law and government.'[5] I seek to suggest that this demands two qualities: judicial reticence and intellectual rigour and that it is by the application of those qualities that the heavens may remain in their accustomed place.

References to judicial reticence and intellectual rigour are not often heard as we enter upon the new century. At times they seem to be seen as relics of a bygone day, more suited to the middle of the twentieth century and that time of strict and complete legalism of which Sir Owen Dixon spoke.[6] Spoken or

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1 *R v Wilkes* (1770) 4 Burr 2527, 2561-62 .
2 Ibid, 2561.
3 Ibid.
4 Ibid.
5 Ibid.
6 Swearing In of Sir Owen Dixon as Chief Justice, (1952) 85 CLR xiv.

unspoken, the assumption now is that judicial reticence and intellectual rigour have relevance only to times when it was accepted that the judge did no more than declare the common law and did not make it. Because the view of the judge as declarer of the common law, and not its maker, is a view that can now be seen to be flawed, we are thought to have outgrown ideas like judicial reticence and intellectual rigour. Now is thought to be the time for us to be bold and imaginative, to shape the law to the needs of today's society. It is, after all, sixty years since we were told by Lord Atkin that '[w]hen these ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.'[7] Tonight, however, I want to examine whether we are right to consign precepts of judicial reticence and intellectual rigour to the waste bin.

First, let me speak a little about judicial reticence. It is an expression that carries many meanings, but I want to pay particular attention to judicial reticence in the making of the common law. 'Judicial reticence', in this sense, is connected with two other aspects of judicial reticence - judges and political debates and judges and non-judicial tasks. It is convenient to deal briefly with those two aspects before turning attention to judicial reticence in the making of the common law, if only because both aspects shed light on the role of the judge in our legal system.

## JUDGES AND PUBLIC DEBATE

It is taken as axiomatic in this country that judges will not discuss publicly the cases that they have tried. The reasons for judgment that have been given either sufficiently explain what has been done, and why, or they do not. If they do not, it is too late to supplement them. The judge does not, and cannot, respond to the press campaign about the sentence passed or judgment reached in a case.[8]

This is a rule, however, which may not always be observed in some overseas jurisdictions, even though that would appear to be contrary to the relevant provisions of applicable codes of conduct.[9] You may have seen that one of the complaints made by Microsoft Corporation in its appeal to the US Court of Appeals for the DC Circuit against the orders of a judge of the District Court was that '[t]he district judge apparently started granting press interviews "during trial on the condition that his comments not be used until the case left his courtroom"' and that '[a]fter entry of judgment, the district judge continued to speak publicly about the case - particularly his decision to break up Microsoft - and about his views of Microsoft's character'.[10]

Although the rule against discussing past or pending cases is axiomatic in this country, the rule that in general judges do not speak publicly on any matter of

7 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, 29.

8 But see The Hon justice GL Davies, 'Judicial Reticence' (1998) 8 *Journal of Judicial Administration* 88.

9 (1998) 175 FRD 362, Canon 3A(6).

10 *Microsoft Corporation v United States; Microsoft Corporation v State of New York* Nos 00-5212, 00-5213, US Court of Appeals for the DC Circuit; Brief for Defendant-Appellant, 145 (references omitted).

public controversy is under some challenge. It has been said that such a rule interferes with the rights of the judge as an individual citizen.[11]

The Kilmuir Rules have long since ceased to govern the conduct of judges in this country. At once I should say that I do not suggest that we should seek to return to the time when they did. It is, however, necessary to bear steadily in mind that there are dangers in judges entering any public debate. Most of those dangers stem from the difficulty of a judge exercising the judicial function in relation to matters in which the judge is seen as having taken a particular position in the ebb and flow of public debate.

Much of the discussion in the decided cases about apprehended bias has hitherto concerned financial interests in parties or issues in dispute. It is clear, however, from the decision of the House of Lords in *R v Bow Street Magistrate; Ex parte Pinochet (No2)*,[12] that similar questions can be raised as a result of other, non-financial, interests in issues that are in dispute. The later decision of the English Court of Appeal in *Locabail UK Ltd v Bayfield Properties Ltd*[13] examines some of the kinds of argument that parties can advance in this regard. These are issues which, as far as I am aware, have not yet been explored in any depth in the Australian courts but it is, I suppose, inevitable that sooner or later they will be.

There are, however, other dangers than the possible interference with the immediate performance of judicial duties that I have mentioned. In Australia, the wisdom of judges participating in public debate must be assessed against a number of considerations that apply here. First, bear in mind the fact that Australian media reporting is often confrontational. We are not unused to the headline that begins 'Top Judge raps ...' or 'Top Judge slams ...'. Whether that is a matter for admiration or criticism is beside the point. What matters is that it is so and that any distinction which it might be sought to draw between speaking as a judge and speaking as a citizen will usually be lost in any reporting of the judge's contribution to debate. Secondly, media reporting is often abbreviated. And even if that were not so, lawyers are not always very skilled at communicating quickly to an audience the depth, breadth or subtlety of an argument they wish to make. In this regard it may be worth reflecting on the reason which Lord Kilmuir gave for the rules he formulated: 'So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable'. This, though unflattering, contains what Lord Bingham has called 'a hard nugget of truth'.[14] If a judge enters public debate, the reaction to the intervention may not be cast in the restrained or complimentary language of the courtroom.

With these dangers in mind, it is as well, then, to recall that very many kinds of matter can come before a court. Gone are the days when the work of the courts could be seen as standing apart from some areas of public debate. Again, reference need be made only to *Pinochet (No 2)*[15] to see that this is so. There are, therefore, dangers in judges entering public debate, even if the individual judge seeks to do so as an individual citizen.

11 Speech by Mason P, New South Wales Bench and Bar Dinner, 12 May 2000; [2000] *New South Wales Bar News* 18.
12 [2000] 1 AC 119.
13 [2000] QB 451.
14 *The Business of Judging* (2000) 78.
15 [2000] 1 AC 119.

As is well known, in 1923, Irvine CJ sent a memorandum to the Attorney-General of the Victorian government of the day informing the Attorney that the Judges of the Supreme Court of Victoria were all of the view that no member of the court should be made available to act as a Royal Commissioner into some charges made about the Warrnambool breakwater. This memorandum, the Irvine Memorandum, has come to encapsulate a view that can be seen as the mirror image of the attitudes to judicial participation in public debate that I have described earlier. The core of the view was expressed by Irvine CJ as follows:

> The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary. It is mainly due to the fact that, in modern times, at least, the Judges in all British Communities have, except in rare cases, confined themselves to this function, that they have attained, and still retain, the confidence of the people. Parliament, supported by a wise public opinion, has jealously guarded the Bench from the danger of being drawn into the region of political controversy. Nor is this salutary tradition confined to matters of an actual or direct political character, but it extends to informal inquiries, which though presenting on their face some features of a judicial character, result in no enforceable judgment, but only in findings of fact which are not conclusive and expressions of opinion which are likely to become the subject of political debate.[16]

Thus just as judges should not act in some apparently private capacity in a way that would inhibit them in performing their judicial role, so should they confine the public use of their office to the proper performance of that role. Of course we know that effect is not given to this second principle in Britain. As Lord Bingham has said: 'It is scarcely an exaggeration to say that among senior judges 'my inquiry' is the equivalent, in other circles, of 'my operation'.' [17] It is important, then, to assess the wisdom of the principles against the reason which underpins both of them and was identified by Irvine CJ. That reason is that the rules are necessary to ensure that, come the day, the judges may say, 'let justice be done even though the heavens fall', and have their judgment heeded, as the judgment of an impartial judge sworn to do justice according to law.

Which, by a circuitous route, brings me back to judicial reticence and intellectual rigour in the development of the common law.

As I have already said, it is now well accepted that judges do not simply discover and declare the common law. The common law is made and developed, it is not found and declared. The discovery of this truth does not mean, however, that judicial reticence is no longer to be seen as a fundamental informing principle for every judge at every level in the judicial system.

Some years ago, Gleeson CJ (when Chief Justice of New South Wales) delivered a paper entitled 'Individualised Justice - The Holy Grail'.[18] In it he

[16] See The Hon Sir Murray McInerney, 'The Appointment of Judges to Commissions of Inquiry and other Extra-Judicial Activities' (1978) 52 *Australian Law Journal* 540, 541-2.

[17] Above n 14, 76.

[18] (1995) 69 ALJ 421.

discussed what Professor Atiyah had concluded was the move away from the application of general principles in the law, towards what Atiyah described as a search for individualised justice.[19] This, as Gleeson CJ observed, can be seen as leading to the increasingly important interventions of equitable principles in commercial transactions (through doctrines of estoppel and the like) and to the increasing legislative reliance (in statutes like the *Evidence Act* 1995 of both the Commonwealth and New South Wales) on the conferring of wide-ranging discretion on judges. (I leave aside the increasing use of similar techniques in revenue legislation which leaves the liability of the taxpayer dependent upon the formation of an opinion by the relevant administrator of the legislation.)

The search for results which are seen as giving a just result in the individual case, by using techniques which employ such apparently open-ended concepts as 'unconscionability' or 'discretion', taken with the realisation that the common law is *made* by judges, not simply discovered, provides a heady cocktail for the unwary judge. The alcoholic content of that beverage is not lessened by the experiences of any common lawyer who has seen the tort of negligence, with its apparently open-ended concepts of duty of care, continue upon its imperial march across the landscape of civil litigation to the point where almost any injury in any circumstances may be thought by some to be compensable.

Why do these three apparently disparate ingredients combine to produce such a cocktail? I should stay to say something about each of them.

First, the search for individualised justice and the techniques which are used to find it are couched in terms that seem, at first glance, to appeal only to the individual judge's sense of what is fair and what is not. Identifying some conduct as unconscionable or unconscientious is a statement of conclusion which would sit as well in the discourse of an ethicist, as it does in reasons for judgment. But, in the law, they are not terms that invite, or even permit, recourse to a judge's idiosyncratic sense of justice.

What sets apart the two fields of discourse of the ethicist and the judge is the need for the judge to articulate what it is that leads him or her to the conclusion that the conduct in question should wear this label. And when those reasons are articulated, it is necessary, in those reasons, to locate the conduct in the relevant field of discourse by reference to some organising set of principles. For the judge the fundamental organising principle that is relevant is the doctrine of precedent and its proper understanding and application. That will require the judge to analyse the matter at a level of refinement which is far more detailed than the bare conclusory statement 'I find the [party's] conduct in this matter to have been unconscionable'.

Similarly, if a judge has a discretion to exercise, for example, whether or not a particular piece of evidence is to be admitted, it tells the judge nothing at all to say that the discretion must be exercised 'judicially'. Of course it must. But what does that mean in the particular context? What are the factors which can, or should, be taken into account in exercising this discretion? The relevant factors will be found (in the case of a statutory discretion) by reading and understanding the relevant Act, an activity which some seem to find distasteful. Regrettably, however, there is nowhere else to start in such a case.

[19] Patrick Selim Atiyah, *From Principles to Pragmatism,* (1978) 15.

As I have said, developments in the law of negligence have not diluted the cocktail. One need only refer to what Lord Bridge of Harwich said in *Caparo Industries Plc v Dickman*[20] about the so-called three part test for identifying duty of care which is sometimes attributed to him to see why that is so. He said:

> What emerges [from the cases to which his Lordship had earlier referred] is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. [21]

I need hardly add that more recent decisions in the area have been seen as not providing more certain guidance but let me leave aside for a moment the difficulties that are presented in that particular area of the law and return to more general considerations.

Recognition of the fact that the common law is *made* by the judges may be thought to suggest that there is less need to find an anchor for the conclusion that is reached in a case governed by the common law in the bedrock of principle and precedent. That is not so. Sight must never be lost of the critical fact that there are very few cases indeed in which, having found the facts, precedent will not then bind the judge to a particular outcome. Lord Devlin suggested that this was so in 90 per cent of cases.[22] But I suggest that this is a considerable underestimate in all but the High Court. The judge who sits at first instance seldom encounters cases in which statute or precedent does not provide a binding answer (notwithstanding the great number of first instance judgments that find their way into the law reports). Indeed, as statutes come to play an even larger part in matters going to litigation, the occasion for consideration of the common law is still rarer. Judicial reticence requires the judge to recognise that precedent will bind in all but the exceptional case.

Faithful application of precedent is at the heart of the judicial task. The justice which a judge must do, is justice *according to law*. The judge, particularly the judge at first instance, is *not* free to recast the law at will, whatever he or she may think of it. As Samuel Johnson said:

[20] [1990] 2 AC 605.
[21] [1990] 2 AC 605 ,617-8.
[22] Patrick Devlin, 'The Judge as Lawmaker', *The Judge*, (1st ed, 1979) 3.

> To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that *public* wisdom by which the deficiencies of *private* understanding are to be supplied. (emphasis added).[23]

From time to time the High Court finds it necessary to point out this fact.[24]

The judicial task, in applying precedent (as in so many other aspects of its performance) requires not only judicial reticence, it requires the application of intellectual rigour. As I have said, the task requires judicial reticence in the sense that it requires the judge to identify first whether the state of precedent is such that it is open to that judge to make some change. If that question is answered affirmatively, dealing with the second question (what is the change that should be made?) also requires judicial reticence. Neither of the two questions I have identified may be easy but the judge must begin from a sure understanding of the present state of the law in the area *and* a sure understanding of the principles which underlie that law.

Understanding the present state of the law and its underlying principles is not achieved by resorting to slogans: slogans which seek to attribute irrelevant characterisations to particular judgments as 'timid or bold, vigorous and imaginative, or subservient and regressive'.[25] It is achieved only by close examination of the reasons for decision in the relevant cases for the relevant legal rule or principle. That is an intellectual exercise. It is not an exercise in polemics or an exercise in emotion. It is a task that requires intellectual rigour.

Primary responsibility for proper performance of the task lies, of course, with the judge. But others have important roles to play. The role of the advocate in the adversary system is critical. In addition, however, the law teacher and the legal scholar have much to offer. The teacher has much to offer because the law student who will be the advocate of tomorrow, and later the judge, must be given the tools to undertake the tasks of identifying the state of the law and identifying the principles that underpin particular decisions.

It is inevitable that in the study of any area of the law, the teacher and the taught will give special attention to the difficult areas in which clear principle may not have emerged or in which the principle that has emerged is contested. Examining such areas is a matter for commendation, not criticism. There are, however, times when focus on the edges of an area distracts attention from an understanding of the inner structure and coherence of the larger body of the law. I sometimes wonder whether some younger lawyers have lost sight of that larger body and focus too much on the edges. It is for teachers to do their best to offer students the means of adjusting their gaze to take in the whole picture.

It is also very important that the student learns early that examining legal principle is a process that is intellectual, not emotional or polemical, and that it requires careful attention to the reasons for judgment of the court, not someone's attempt to digest their understanding of what the case might stand for. All too often, however, it is apparent that there are those who will not read what is

[23] James Boswell, *Life of Johnson*, (1976) 496.

[24] cf *Ravenor Overseas Inc v Readhead* (1998) 72 ALJR 671, 672 [3] (Brennan CJ); *Federal Commissioner of Taxation v Ryan* (2000) 74 ALJR 471, 478 [34]; 168 ALR 704, 712.

[25] The Hon Justice Murray Gleeson, 'Judicial Legitimacy', (2000) 20 *Australian Bar Review* 4, 10.

written but prefer to rely on the snappy seven second sound bite that someone has given.

Scholarly analysis of the law is self-evidently important. But the process of examining legal principle is not assisted by the analysis of a case which says only that the decision is wrong and offers no alternative outcome consistent with principle. I do not for a moment suggest that scholars or others may not suggest that particular decisions are wrong. I have often referred to the statement of Sir Robert Megarry in *Erinford Properties Ltd v Cheshire County Council* that '[n]o human being is infallible, and for none are there more public and authoritative explanations of their errors than for judges'. [25] The authoritative explanation may come from the appellate court, but scholarly criticism is nothing if not public.

Criticism is vital to the health of the system. But saying only that a particular decision is wrong is of no assistance to anyone. What is important is to articulate *why* it is said to be wrong. It is only then that the critic will disclose how, consistent with established principle, some other answer should have been reached.

The point that I seek to make can be illustrated in this way. To say of a particular decision that it leads to inconvenient results, carries with it a large number of unstated premises. What is meant by inconvenient? How great is this inconvenience and to whom? If the result is, in some relevant sense, 'inconvenient', was a more 'convenient' answer properly open? In particular, what is the step in the legal reasoning which the court whose decision is criticised should or should not have taken? Analysis of this kind may not make good television but television is a medium of entertainment not a medium for scholarly debate.

The role which the most thoughtful legal scholars of this country play in shaping the development of the law should not be underestimated. Those who think deeply about a subject and articulate relevant principles have much to offer and their writing is read with great care. There is much to offer in relation to both of the questions which I identified earlier: is the state of precedent such that it is open to a judge to make some change and, if it is, what change should be made? The former of those questions, although framed as one relating to the application of the doctrine of precedent, will often require consideration of whether any change should be left to the legislature, rather than for the judiciary to make it. Some of those issues were touched on in *John Pfeiffer Pty Ltd v Rogerson*.[26] Much more often than not it will be necessary to recognise that the parties to the particular litigation, with their properly narrow and self-interested focus, will provide little information from which a judge could, if so minded, make an assessment of some kinds of policy issues or the ramifications of some kinds of choice. Plainly the scholar has much to contribute in this regard. But so too does the scholar have much to contribute in the articulation of unifying principles which may suggest that the law should develop in a particular way.

In *Wik Peoples v Queensland*,[27] Gummow J referred to Lord Radcliffe's view of the common law as 'a body of law which develops in process of time in

[25] [1974] Ch 261, 268.
[26] (2000) 74 ALJR 1109; 172 ALR 625.
[27] (1996) 187 CLR 1,179.

response to the developments of the society in which it rules'.[29] Gummow J described this as 'a broad vision of gradual change by judicial decision, expressive of improvement by consensus, and of continuity rather than rupture'. As Gummow J went on to say:

> Movement also may plainly be perceptible, and there may be an explicit change of direction, where, in the perception of appellate courts, a previously understood principle of the common law has become ill adapted to modern circumstances. ...
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> Again, it may emerge that the rationale of a particular cause of action is the product of a procedural fiction (eg, an implied promise to pay) which should no longer be supported after the demise of the old forms of action. ... More simply, upon analysis it may appear that a particular principle (eg, as to the irrecoverability of payments made under a mistake of law) rests upon a dubious foundation in the case law which has not been accepted in this Court.[30]

Sometimes, then, there will not only be perceptible movements in the common law, there will be defined points at which the move is significant. For all that however, change, when it occurs, must be change in accordance with principle and the orderly development of the common law. As Gaudron and McHugh JJ said in *Breen v Williams*:

> Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must 'fit' within the body of accepted rules and principles. The judges of Australia cannot, so to speak, 'make it up' as they go along. It is a serious constitutional mistake to think that the common law courts have authority to 'provide a solvent'[31] for every social, political or economic problem. The role of the common law courts is a far more modest one.
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> 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. But such steps can be taken only when it can be seen that the 'new' rule or principle that has been created has been derived logically or analogically from other legal principles, rules and institutions. [32]

That process of analogical and logical derivation requires judicial reticence and intellectual rigour. The heavens *will* fall if idiosyncratic ideas of fairness are allowed to supplant the proper methods of developing the common law. Only if there is judicial reticence and if intellectual rigour is applied will there be justice according to law. Only if there is justice according to law may the judge say 'fiat justitia'.

29 *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, 591-2.
30 (1996) 187 CLR 1, 179-80.
31 *Tucker v US Department of Commerce* (1992) 958 F 2d 1411, 1413.
32 (1996) 186 CLR 71,115 (references omitted).