

the difference in time and context between, for example, the establishment of the US Supreme Court and the Australian High Court. Viewed in their proper historical context, these changes were not 'slow in coming' at all, but were arguably well-advanced.

In Pierce's view, the Mason High Court injected into legal formalism something that he defines as legal realism:

'Changes came in a number of areas ... and depicts a judiciary moving from a pre-legal realist stage to a realist stage; from a judicial role that sees legal reasoning in mechanical terms to one that recognises discretion and choice.'

Pierce identifies two especially fundamental matters. First, as choice and discretion are unavoidable, judges should be forthright in acknowledging actual influences on their legal reasoning, including community values. Second, a shift occurred in relation to implied rights jurisprudence, the attitude to the doctrine of precedent and to the use of other sources to inform constitutional debate.

Pierce analyses the reasons why the transformation occurred and then what he describes as recent retreats from the role, drawing largely on his interviewees' perceptions and opinions. This approach has its limits, as the interviewees do not give consistent reasons for why the transformation occurred when it did. Pierce is left to conclude that 'their

collective account suggests an interplay of individual political and institutional factors to bring about the transformation. No single variable can explain it.'

Pierce very thoroughly examines and analyses the various appointments to the High Court bench and, from time to time, the political aspect of such appointments, particularly the 'balance' that apparently must be maintained between appointments from various states of the Commonwealth.

In Chapter 8 he assesses the future of the High Court's judicial role transformation. Pierce concludes that, although not as influential in recent years, the Mason Court's transformation of the judicial role was significant; while 'it may lay dormant in the near term ... it is now available as an intellectual fount and reference point for future lawyers and judges'.

Pierce has thoroughly researched his subject and, for that reason, this book is a worthwhile addition to any library. However, its thesis that the Mason Court radically changed the High Court's role over-simplifies an event in Australia's judicial history that was more evolution than 'revolution'.

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Watching Brief: Reflections on Human Rights, Law and Justice **by Julian Burnside QC**

By Tilda Hum

Justice is a vague concept. While the general public often links the law with justice, those involved in the legal system often come to realise that the two are not as closely aligned as we would wish.

In *Watching Brief*, distinguished barrister and Australian Lawyers Alliance member, Julian Burnside QC, explores the notion of what is fair and just through the prism of contemporary Australian issues and personal experiences. He begins by reflecting on his school days and early years as a fledging lawyer, furiously reading the biographies of esteemed lawyers before him. Sir John Young's advice continues to resonate for him: 'In a solicitor's office, and in a barrister's

chambers, every matter is important to someone.'

The book's most passionate and disturbing section discusses Australia's treatment of asylum-seekers. After canvassing international human rights instruments, it becomes apparent to the reader that Australia is in clear breach of its obligations as an international citizen, but also lacks the compassion and empathy that a civilised democratic country with means to assist others should have. Insights are also given into the daily life and torment of refugees languishing in detention, with affidavits revealing the kinds of physical and emotional conditions that are generally considered characteristic of barbaric dictators or military

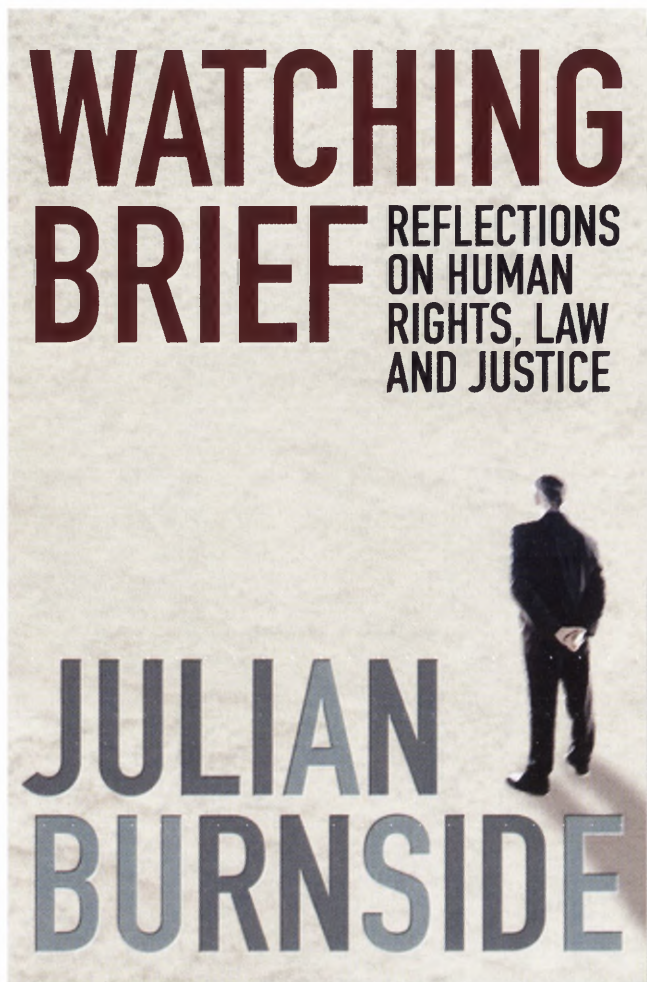
regimes, not our own backyard. Burnside confronts the common misconceptions surrounding the *Tampa* crisis in a characteristically measured way that is clear, logical and convincing. He also comments on the manipulation of the public's fears and misunderstanding through clever language, media censorship, indifference and opposition complacency.

The *Tampa* litigation led to Burnside's first encounters with death threats, as he endorsed and promoted a view of the refugee situation that clashed with public opinion. Of particular interest, however, are his revelations of the stigma that he encountered from his colleagues when he began publicly advocating against Australia's refugee policy. That the upper echelons of the legal fraternity would frown upon a colleague condemning the denial of legal rights to such a vulnerable group is both surprising and concerning.

The book then moves into the age of terrorism, a concept that has a history stretching from the Gunpowder Plot of 1605 to modern-day Guantanamo Bay. These chapters criticise the suspension of rights and decent values under the guise of 'national security,' which Burnside argues was a favoured *modus operandi* of the Howard government. Australia's approach to the imprisonment of David Hicks is condemned, and Burnside explains the deficiencies of the military commission system in straightforward and compelling terms. Methods of torture are described with vivid and gruesome detail, laying the foundation for the chapter that calls for a bill of rights, despite the author's own initial scepticism of its necessity. Burnside's own conversion from bill of rights sceptic to advocate stems from what he describes as the unprecedented erosion of human rights over the past decade.

The final chapters explore cases of legal injustices – from the Adolf Beck case to the recent execution of Van Nguyen – to demonstrate that the law is not infallible and does not always produce just results. A constant vigilance and numerous checks and balances are necessary to avoid significant miscarriages of justice.

The introduction to *Watching Brief* warns that it is not a comprehensive text, rather a compilation of edited speeches and essays. While a compilation inevitably lacks the fluidity of a thesis, it provides a fascinating patchwork of thoughts and responses that give an insight into the atmosphere and political climate surrounding key human rights issues over the past decade.



While the book relates to the Howard years, the recent change in government does not make it outdated. When it comes to rights, what is lost is very hard to regain. It will be interesting to see how Rudd's government responds to the challenges posed by *Watching Brief*.

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