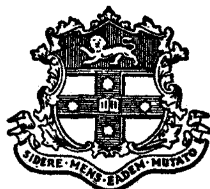
／# THE SYDNEY LAW REVIEW

VOLUME 9, No. 3 MARCH, 1982



COMMENT

JUDICIAL LAW-MAKING — SOME REFLECTIONS

*THE HONOURABLE SIR LAURENCE STREET**

It is ironic that, as we move ever more rapidly into the computer age with its demand for rigid precision in the communication of information, legislatures are at the same time evincing a tendency to break free from the literalism which has pervaded the law for over a century. Precision of expression in computer communications is a prerequisite to the realization of the full potentiality of this technological revolution. And yet, in the regulation of our rights and liabilities, legislatures are moving towards value-based expression and purposive interpretation. My object in this article is to suggest some of the reasons for this legislative trend and to suggest also its significance upon judicial law-making.

In days gone by statutes were comparatively straightforward documents and their fields of operation were not difficult to determine. The growing complexity of society in the twentieth century generated a need for a corresponding growth in the scope of our statutes. We now have a statute book crammed to overflowing with wide-ranging and detailed prescriptions directed to every facet of the daily affairs of society.

The undesirable features of the proliferation of detailed statutes have long been recognized. The device of delegated legislation — the

* Chief Justice of New South Wales.

making by subordinate or executive authorities of regulations, rules and by-laws — was seized upon as the means of enabling parliament to direct its energies and resources to the formulation of the broad framework of the statute law. It came to be recognized, however, that delegation involved a significant shift of quasi-legislative power to the executive, and hence, in practical terms, to the bureaucracy. There was a swing away from delegated legislation back to parliament. But it was a swing with a difference. Parliament, whilst not eschewing detailed prescription in some areas, sought in others to pass over to the courts responsibility, and with it authority, to determine how best to work out and apply the broad purpose to which the legislation was directed. The value-based criterion provided the solution in fields either too complex for, or thought not to require, detailed statutory control.

Let me give some recent examples in the legislation of the New South Wales Parliament.

In 1979 the Land and Environment Court Act was passed. This conferred on the Court wide-ranging powers of controlling real estate development. In the exercise of its jurisdiction to determine environmental planning and protection appeals, local government and miscellaneous appeals and valuation and compensation matters the Court is required to "have regard to this, or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest".

A year later, in 1980, the Contracts Review Act was passed. This Act virtually authorizes the rewriting by the Court of contracts falling within the statutory definition of "unjust". Section 9 provides that in determining whether the contract is "unjust", and in consequence in determining whether to exercise its rewriting powers, "the Court shall have regard to the public interest and to all the circumstances of the case".

A few years earlier the Restraints of Trade Act, 1976, authorized the Court to read down unreasonable (and hence invalid) restraints of trade so as to bring them within the bounds of reasonableness (and hence of validity). The Act confers power on the Court to order that the restraint be "valid to such extent only (not exceeding the extent to which the restraint is not against public policy) as the Court thinks fit".

In these fields public policy, or public interest (the latter is but the former in sheep's clothing) — that unruly horse upon which judges had for so long looked askance — is firmly ensconced in the judicial stable. The Land and Environment Court is confidently seated in its saddle. Under the Restraints of Trade Act judicial skills in equitation have but infrequently been put to the test. And under the Contracts Review Act no litigant has as yet summoned out that horse and required a judge to bestride it. It is more than likely that the existence of this judicial power is in itself a factor leading to negotiation and

settlement of disputes that might otherwise have resulted in legalistic contest in court.

Differing value-based criteria can be found in other Statutes. In 1961, the Money Lenders and Infants Loans Act was amended in pursuit of a similar legislative policy of conferring jurisdiction to overlook non compliance with the requirements of the Act if the lender was "acting honestly and ought fairly to be excused". The jurisdiction extends to superimposing by the Court upon the grant of relief "such directions as it may consider just and equitable".

I resist the temptation to extend the catalogue. The point I make is that parliaments are forsaking the literal and comprehensive prescription of rights and liabilities and delegating to the courts this task. Law making by judges in these areas, expressly sired by an enactment conferring on courts jurisdiction operating on imprecise and value-based criteria such as "public interest", "just and equitable", "reasonable cause" and the like, is legitimate and respectable. The ordinary course of litigation in these areas is thus likened to the constitutional field in which law-making by judges by breathing life into general expressions has a long and creditable history.

This partial shift in legislative authority can have far-reaching effects. One immediate and disturbing consequence is in the field of public law, by which I mean the field in which the citizen and the state may be in dispute. One of the traditional weapons of the citizen confronted by the bureaucrat has been to pin the bureaucrat to the letter of the law — to require him in effect to identify and establish his legal authority. But if the letter of the law is vague and imprecise — if a land development can be allowed or rejected according to whether it is considered to be in the public interest — if a tax is payable because a transaction is considered to be such that the proceeds ought to be regarded as taxable — then the bureaucrat can be far more authoritarian in his dealings with citizens. He can, in effect, "wage his law", calling upon the citizens to take up the challenge in a court. This room for argument and ultimately litigation in the unequal bargaining positions of citizen vis-à-vis bureaucrat could work an enhancement of the power of the bureaucracy in administering public statutes expressed in vague or imprecise terms.

It may be that the risk of increase in bureaucratic power flowing from value-based public statutes will require courts, particularly appellate courts, to expound guidelines translating the general into the precise. This indeed could be seen as the effectuation of the transfer by parliament to the judiciary of legislative authority within the field covered by the statutory generalities. But, moving on from the field of public statutes to those regulating rights between citizens (such as the Contracts Review Act, Restraints of Trade Act, the Money Lenders and Infants Loans Act, etc.), I, for one, welcome this tendency to

involve the courts more meaningfully in the regulation of the affairs of society. The growth of the common law and of equity jurisprudence are classic examples of the ability of courts to play a constructive role in a manner relevant to the demands and requirements of contemporary society.

What I have attempted in this article thus far is to note the developing practice of legislatures to forsake the conventional comprehensive literalism of statutes, to note the reasons for this practice, stemming as they do from increasing complexity of society and disaffection from the device of delegated legislation, to note the risks involved in forsaking literalism in the field of public law, and to note the capacity of the courts to carry into effect value-based criteria.

Into this measured progress of adjustment away from literalism in the *expression* of our laws there has recently intruded a legislative edict governing their *interpretation*. This, if given an unrestricted operation, is such as to thrust further significant legislative authority on to the courts. Section 15AA (what a checkered, scissors-and-paste aroma is given to the history of a statute by such double-lettered sections!) of the Acts Interpretation Act of the Commonwealth has now cast courts adrift from the discipline of submitting to the will of parliament as actually expressed in the words of a statute. As the provision is so recent, I quote it in full:

> 15AA. (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
>
> (2) Nothing in sub-section (1) shall be construed as authorizing, in the interpretation of a provision of an Act, the consideration of any matter or document not forming part of the Act for any purpose for which that matter or document could not be considered apart from that sub-section.

This is a general rule for interpretation of Commonwealth legislation, a rule to be applied in all courts throughout the land. "Purposive interpretation"! The words have an exciting, Denning-like challenge about them. But, as with some other Denning-like challenges, they bring with them the risk of uncertainty and inconsistency. Equality of status before the law is not the only equality to be pursued. Equality of result is no less important. If the law is to operate equally across the community, it must be certain and it must be capable of being applied consistently.

It is not within my scope in this article to examine how the canon of construction in s. 15AA, if given unrestricted application, would affect such such time-honoured notions as the need for clear statutory expression to create a criminal offence (what is the purpose or object

of the Crimes Act?). Nor do I wish to develop the prospects of uncertainty as judges and magistrates across Australia (some authors and some connected with schools) contemplate the purpose or object of the new Copyright Act. What is important to my present subject is the shift of further legislative authority from parliament to the judiciary.

The history of similar, but not quite such far-reaching, provisions elsewhere indicates that courts have, in effect, read them out of the law. They have been treated as going little, if at all, beyond established rules of statutory interpretation. Whether that approach is taken in Australia remains to be seen. Whatever view the courts may ultimately take, the section is significant as part of the machinery by which parliament may progressively abandon the conventional literalism in which it formulates its statutes and gives expression to its legislative purpose. We have moved from literalism in that we now see the enactment of value-based, rather than precisely and exhaustively stated, criteria for the creation of rights and liabilities; the responsibility for giving specific content to the value-based criteria is being passed to the courts. Section 15AA could be regarded as going yet further and as freeing the courts from the inconvenient discipline of statutory wording which, although clear and meaningful, offends the purpose and object underlying the Act. Perhaps we may be heading for a philosophy of statutory drafting which states the purpose and object of the Act and leaves it to the courts to flesh out its operation!

The trend in this country is in line with trends in other common law parliamentary democracies. Writing in The Futurist in 1980 Arnold Brown said in reference to the U.S.A.

> As the conflict between Congress and the President intensifies, the third branch of U.S. Government — the judiciary — assumes a greater role, even to the point of becoming a de facto legislature. This, together with the Congress's efforts, tends in the long run to limit the powers of federal regulatory bodies that have heretofore been relatively unaccountable. The sum of all this confusion is, remarkably, a governmental system that is considerably more responsive to the needs of the day than is generally perceived. In the process, substantial and significant changes are taking place within that system.

I have, perhaps, in this article, rambled into controversial fields. I should like to make it clear that I have, in that rambling, merely looked about in those fields and discussed a little of what I see in them at first glance. Many contentious points may come forward for decision from these fields and I hold no preconceived views as to the outcome. My interest has been essentially to expose some aspects of the anatomy of the developing legislative authority of judges. The source of that authority rests ultimately with parliament. Legislative trends evidence a shift of some law-making responsibilities to the

judiciary. Returning to my opening theme, the shift is evidenced perhaps most strikingly by parliament's retreat from literalism both in detailed prescription and in its expectations of the courts in interpretation. Precision and certainty — consistency of interpretation and equality of application — are no less, indeed if anything they are more, requisite in the modern communication-conscious society. But it is to the judiciary, on the invitation of parliament, that the community may in the future have to look increasingly for the precision and certainty that are prerequisites to equality and justice in the operation of the law.