JUSTICE MASON: A TIME TO KEEP SILENCE, AND A TIME TO SPEAK

The issue of whether judges should speak out extrajudicially has increasingly become a matter of discourse within the judiciary and legal profession. The Hon. Justice Keith Mason spoke to the NSW Bar Association on the subject at their annual Bar and Bench Dinner in Sydney on 12 May 2000. His speech is reprinted here.

Until fairly recently, few doubted or challenged the view that it was the duty of judges always to keep their opinions to themselves and not to speak or write extrajudicially on matters of controversy. Reference is often made to the so-called *Kilmuir Rules*. In a letter to the Director-General of the BBC written in 1955, the Lord Chancellor has said:

> But the overriding consideration ... is the importance of keeping the Judiciary in this country insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the actual performance of his judicial duties, must necessarily bring him within the focus of criticism...

Somewhat sanctimoniously, Lord Kilmuir noted that it would in any event: "...be inappropriate for the Judiciary to be associated with ...anything which could be fairly interpreted as entertainment.'

The entertainment that Kilmuir feared was a series of radio lectures about great judges of the past. Little wonder that many of us Scots have a reputation for being killjoys. What will be next? Are judges to be forbidden even to indulge in humour from the bench? We await guidance from the head of the judiciary in this country, himself of Scottish ancestry.

Now there were several unstated exceptions to the *Kilmuir Rules*. It hardly comes as a surprise that the Lord Chancellor did not intend to limit his fellow Law Lords from plunging into controversial waters when wearing their legislative hats as members of the British Parliament. Indeed, there are many recent examples of serving Law Lords becoming involved in politically contentious issues. Thus, Lord Taylor of Gosforth, as Lord Chief Justice, supported a controversial Government measure which encroached upon the right of the accused to remain silent. On the other hand, he opposed mandatory custodial sentences. Lord Browne-Wilkinson was strongly critical of a Government measure empowering the police to conduct electronic surveillance without a warrant. When Master of the Rolls, Lord Woolf opposed the provision in the Criminal Justice Bill 1997 (UK) for mandatory sentences (1).

But the *Kilmuir Rules* had more problems than the element of double standards. In some respects they were against the public interest, not to say the rights of individual judges as citizens. I do not believe that they can or should be supported, for reasons which I shall endeavour to explain.

No one questions the right of a judge expressing opinions in an official capacity.

Indeed, a judge has a duty to expose his or her true reasons for decision, no matter how unpalatable. The freedom extends to *obiter dicta* and is occasionally used by some judges to question the wisdom of legislation, or official action; and frequently used to criticise antisocial conduct by litigants or other representatives. Many judges who act this way would strongly endorse the *Kilmuir* principles and see no incongruity in their own conduct even though it may bear on 'controversies of the day'.

Of course, a judge will be accountable on appeal and in the court of public opinion for anything said, whether by a studied judgement or a loose off the cuff remark. And unrestrained utterances may possibly be used as the basis of an application to have the judge removed from office. These exceptions really prove the rule, which is that there is public interest in freedom of speech even though some may abuse the freedom.

Of course, the *Kilmuir Rules* never applied after a judge retired. The much-speaking former judge is now commonplace, despite rumours that every retired judge carries an Acting Judge's baton in his knapsack. I understand that Justices of the High Court entertain some doubt as to whether they turn 70 according to the lay understanding or a day earlier, according to the quaint common law doctrine explained in *Prowse v McIntyre*(2). But I suspect that the real reason why recent Chief Justices have hastened off the bench a day early is their desire to become social commentators at the earliest moment. Indeed, it is widely rumoured that Kirby J is being forced into early retirement because his judicial function precludes him from expressing any views on matters of controversy.

Another exception to the *Kilmuir* principle, now widely recognised, is the right of judges, especially Chief Justices, to speak out on matters affecting the interests of the judiciary. This has coincided with the lapse into silence of most Attorneys General as protectors of the judiciary. Fortunately the Bar has not been found wanting. It should be pointed out that 'the interests of the judiciary' extend to terms and conditions of employment, with the corollary that it is all right when its pocket is affected.

A further exception, one that starts to drive a cart and horse through any principle, is the recognised right of a judge to criticise laws or government policies through participation in a law reform commission, as a textbook writer or as the holder of a royal commission. If a judge has something useful to contribute in these areas, then he or she may publish personal views. Of course, those views cannot qualify the judge's sworn duty to uphold current 'laws and usages' if the matter arises in a case. Obedience to the law is surely essential, but obedience and criticism are never confused in these areas.

"Sometimes, for some judges, speaking out may be more than a right, it may be a moral duty"

By now you will have guessed that I support the *right* of every judge to contribute to public debate on 'the controversies of the day.' I am not advocating that we all speak out. Indeed, I would prefer that most of my colleagues would keep their views entirely to themselves, especially those with which I disagree. And if they speak out, I would hope that the arguments would be compelling and appropriately restrained, as befits a judge. But it would not surprise me that I did not approve of everything written or the style in which it is written. That is a small price to pay for an important principle.

Significant contributions to the marketplace of ideas have been made in recent years by serving judges speaking or writing in their private capacities on a range of topics of current political controversy, including the republic, a *Bill of Rights*, sentencing, drug control and aspects of environmental law. Other judges have done controversial things within broad subsets of society, involving for example churches, environmental matters and the National Trust. Some of the judges in each category would subscribe strongly to the *Kilmuir Rules*, while treating them as inapplicable to what they considered were their own (restrained) political discourse.

Sometimes, for some judges, speaking out may be more than a right, it may be a moral duty, one deserving of praise and encouragement.

Last November, Justice James Wood spoke a the Uniting Church, Ashfield on the topic of 'Matters of Principle: A reflection on the Judicial Conscience'. He reminded us of brave individual judges who stood out against the majorities and mobs of their day in South Africa and the Southern United States. He contrasted those brave spirits with judges who collaborated in Nazi Germany, Eastern Europe and South America by their silent conformity with g ross structural injustices. He wrote:

> Disgracefully, the judges of Nazi Germany took no collective stand against the removal from the Bench of their Jewish colleagues, 643 of them in 1933 alone, the passing of the Nuremberg race laws, or the other horrors of this era. The only known occasion on which they collectively stood up to Hitler was when they wrote a letter to him complaining of a proposed alteration in their pension rights.

Not every judge wants to exercise the freedom to be a public commentator. Some maintain that their job is to speak only through their judgements. That is their right. (Indeed it is their duty if they get seriously behind in reserved judgements.) But even these reticent judges tend to have nonjudicial lives and they choose to speak out on matters that interest them in these venues. Thankfully we are a pluralistic society and free to indulge in our several passions. One person's area of acute concern may be an immense bore for others. My colleague Mr Justice Meagher still finds immense controversy in a single footnote in a set of out-of-print lectures on equity published by Sir Frederick Jordan in the 1920s (3). Sir Frederick might have said that there are controversies and controversies.

For some people in Australia today Aboriginal reconciliation in any form is controversial. On my reading of the *Kilmuir* principles as expounded by their defenders it would be improper judicial conduct even to show support by attending a public meeting relating to that issue.

This audience needs no reminding about the capacity of debate to hammer out truth. But even if truth does not prevail, there are significant public benefits in allowing freedom of discourse. Indeed, it is the unpopular or unfashionable view that may be most deserving of being ventilated and tested with a view to rebuttal or adoption. Sometimes judges have

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useful contributions to make. Furtherance of these free speech values is a small price to pay for wincing at extrajudicial utterances that go over the top.

It is only when a judge says something that is counter-cultural that he or she can expect to receive anything but applause or ennui. The judge who makes a politically correct statement on or off the bench will attract no censure and probably no attention. Of course attention is not an end in itself.

Lord Kilmuir's 'controversies of the day' is more often than not doublespeak for matters which displease the government of the day or the supporters of mainstream political parties, whether in government or opposition. And this really is the rub, because ruling majorities (in politics or public opinion) never like being challenged in their certainties, especially by articulate contenders.

Very recently the Honourable Athol Moffitt QC wrote in *Quadrant* defending the *Kilmuir* principles and strongly criticising one of my colleagues on the Court of Appeal for breach of them (4). It was suggested that a judge is in breach of public duty if he or she expresses a personal view of the merit of any valid law. To describe a law as 'unjust' was said, to use a judicial term, to confuse the public that the person is speaking as a judge, to breach the separation of powers doctrine and to mount a direct attack on judicial independence. With the utmost respect, I strongly disagree.

The distinguished former judge conceded that it was OK for judges to say controversial things *after* retirement, or in secret gatherings where reporters where not present, or in exercise of powers conferred as a royal commissioner. The justification suggested for the last mentioned privilege was that the royal commission gave the judge 'executive authority or justification' to be a critic. The corollary appears to be that the ordinary judge lacks this executive authority to speak his or her mind.

Herein lies the heart of my concern with any variant of the *Kilmuir* principles. Thus analysed, they are the very antithesis of judicial and personal independence. No one's right (or duty) to speak comes by way of permission from the Government or the societal members of the day, least of all members of the judiciary. Judicial independence may be a 'fragile bastion' that rests upon structures, conventions and practices (5). Its genuine aspects need constant tending, especially by the judiciary itself. But judicial independence has nothing to do with quiet subservience to perceived injustice. Independence relies not on a judge's silence out of court but on ensuring that he or she decides cases fairly, according to law, irrespective of political pressure. Surely a person who is a judge is free as a citizen to describe laws as 'unjust' without betraying the judicial oath or putting judicial independence at risk.

"I support the *right* of every judge to contribute to debate on 'the controversies of the day"

As with all freedoms, some will speak or write in a manner that others find offensive. Some may succeed in doing so in a manner that all find offensive. But a freedom to speak only as others want you to speak or on topics of their choosing is no freedom at all.

Judges are expected to have calm dispositions. But do we really want them to have no fire in their bellies about anything? We might agree with McReynolds J who wrote in 1921 that '...while "an overspeaking judge is no well tuned cymbal", neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power.'(6)

But warning bells would start ringing when we read the adjacent sentences in the judgement of this noted misogynist and anti-semite, one described by his own Chief Justice as 'fuller of prejudice than any man I have ever known'. McReynolds J wrote:

> Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. A pubic officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place.

This is the very antithesis of proper judicial disposition. The fire in the judge's belly should not colour or give the appearance of colouring decision making in particular cases.

There are obvious dangers that the prudent judge should take into account before going into print. The judge may find himself or herself unable to sit in judgement in a manner touching that cause. But it does not follow that the judge who feels passionately about some cause and keeps his or her opinions to himself will avoid the duty of recusal. May it therefore not be better to allow judges to render themselves more truly accountable by letting them publish and perish?

When Lord Kilmuir said that 'so long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable,' he was making almost a direct take from the Book of Proverbs, where it is written that: 'Even a fool, if he holdeth his peace, is deemed a man of understanding.'(8)

Is this really a good reason for enforced judicial silence? If it is, why not extend it to judgements as well, and abolish the requirements to give reasons? Why should judges only be allowed to make fools of themselves in their official capacities? And does judicial silence really shore up the reputation of impartiality? Sometimes, at least, it causes problems in the opposite direction, as Lord Hoffman discovered recently in *Pinochet No 2* (9).

There is always danger that a person who makes a controversial public utterance will say something foolish or say something wise in a foolish manner. Judges are not immune from this — on or off the bench. A deserved or undeserved reputation for wisdom may suffer and there may be a slight trickle-down effect that makes life uncomfortable for colleagues. But judicial independence produces broad shoulders and we should be able to carry each others burdens in this matter. We may wince when Justice X is reported to have said something outrageous, but more often than not it is because we disagree with the particular sentiment. We can at least rejoice that

federal judges who use words calculated to bring their own court into disrepute are no longer at risk of being held in contempt, thanks to a High Court ruling of 1992 (10).

A last resort for those who would silence judges minded to say anything politically controversial is to tell them: 'If you want to speak on these matters you should come down from the Bench and stand for election'. This is a cheap shot because the right of freedom of speech is not the monopoly of the elected or those seeking election. If it were otherwise, then our politicians had a simple method of silencing any criticism from women who dared to speak out before the 20th century, Aboriginal people who dared to speak out before 1967 and children who still dare to speak out on any political office. The simple fact is that many people are too busy doing other useful things to wish to stand for (or in the United States, run for) political office.

My remarks tonight are themselves controversial. An opposing view is forcefully stated by Mr Justice Thomas in his book *Judicial Ethics in Australia*. However, I draw comfort from the announcement of Lord Mackay of Clashfern (yet another Scot) in 1987 that the *Kilmuir Rules* should be abolished in the United Kingdom. His Lordship said:

> ...I believe that [judges] should be allowed to decide for themselves what they should do ... Judges should be free to speak to the press, or television, subject to being able to do so without in any way prejudicing their performing of their judicial work ...It is not the business of the Government to tell the judges what to do. (11)

I would not want it to be thought that I am encouraging any judge to seek publicity or to see his or her office as a springboard for causes (however worthy). Controversy causes pain and the judge who speaks out on anything should weigh anxiously the cost to colleagues and the institution of justice. Sir Anthony Mason reminds us that:

> Judicial reticence has much to commend it; it preserves the neutrality of the judge, it shields him or her from controversy, and it deters the more loquacious members of the judiciary from exposing their colleagues to controversy. Judges are not renowned for their sense of public relations. (12)

We all have a number of callings. One of them is to be a humane and moral citizen. For all of us there is 'a time to keep silence, and a time to speak' and each one of us will enter these times in different ways and on different issues. (13) Our right to do so and the public interest in doing so should be recognised.

1. For these and other examples, see *JUSTICE, the Judicial Functions of the House of Lords*, 19 May 1999, pp 6-7.
2. (1961) 111 CLR 264.
3. The Hon. Mr Justice RP Meagher, 'Sir Frederick Jordan's Footnote' (1999) 15 JCL 1.
4. Athol Moffitt, 'Judges, Royal Commissioners and the Separation of Powers' *Quadrant*, May 2000.
5. Judicial Commission of New South Wales, *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Sydney, 1997).
6. *Berger v United States* 255 US 22, 43 (1921), dissenting judgement.
7. B Schwatrz, A History of the Supreme Court, (New York, Oxford University Press, 1993) p.124.
8. Proverbs 17:28 (KJV).
9. R V Bow Street Metropolitan Stipendiary Magistrates and Ors, ex parte Pinochet Ugarte (No 2) (1999) 1 All ER 577.
10. Nationwide News Pty Ltd v Wills (1992) 177 CLR 1.
11. The Times, 4 November 1987, p3.
12. Mason, Sir Anthony, 'Some Problems Old and New' (1990) 24 (2) University of British Columbia Law Review 345 at 352.
13. Ecclesiastes 3:7.

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BOOK REVIEW

Marketers and the law, Clark, Cho, Hoyle, LBC

By Gail Humble, Cridlands

A well balanced Verdelho at the poolside was the primer for survival and navigation through, what appeared to be, a law book! The quaff, however, became less interesting as the thirst for knowledge was whetted.

Such cynical beginnings questioned whether the title should have been "*The Law and Marketers*" as opposed to "*Marketers and the Law*", despite the fact that the latter has a greater pull factor (after all it would be provocative but nevertheless true to say that until recently lawyers have deprioritised their connection with marketing rather than recognising it to bridge law and marketing). This book comprehensively identifies the legal issues with which marketers industry-wide should be familiar.

For a reference book, the language is refreshingly readable and the approach both practical and resourceful. I found particularly useful the highlighted case examples in each chapter and the checklists for marketing principles.

Although the presentation could have endeared itself more to the marketing principles of alignment and balance, the book has an easy reference guide, is rather contemporary in it's chapter on electronic commerce and has excellent further reading and website references. A marketer is not lured on first viewing the chapter headings; it is a known fact that consumer law, finance law and international trade law are not big turn ons for marketers on face value!!! A better response is almost guaranteed with competition law, advertising law, intellectual property law and product and services standards and liabilities. The authors position each chapter well in relation to the issues facing both marketers and lawyers in a rapidly changing marketplace.

As a reference book it pushes traditional boundaries in the way it integrates contemporary and topical business issues with the legal framework. This book will sit comfortably in a position of prominence on the desktops of students in law and marketing and both marketing and legal professionals ... with or without the Verdelho! In a nutshell it is an interesting and educational read and a possible passport between two worlds.