Spann Oration 2000: Public Administration, Social Justice and the Law: An Inevitable Symbiosis

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The title of this oration has been something of a work in progress. An invitation to give a public address such as this on the basis that the topic is one of my own choosing, subject only to the condition that it deal with an aspect of public administration, presents a challenge to marshall a myriad of thoughts and ideas into a coherent whole. I have enjoyed the challenge. It if should later be said that I have strayed from the subject that the title suggests, let it be put down to the lesson of experience.

Rather than keep anybody guessing to the last as to my main thesis, let me outline it at the outset.

Social justice is an oft used phrase across the broad spectrum of social, political and legal discourse. It is a phrase that I observe is used increasingly frequently in liberal social democratic societies to express a wide range of ideas to aspire to, or as principles that should be seen to underwrite government policy and decision-making. To the extent that there is a generally understood meaning to the phrase social justice, to which I shall return, I would wish to develop my thesis by suggesting that once defined in its widest context, the affirmation, review and enforcement of such rights rest significantly and increasingly with the courts.

Law and Poverty in Australia, a report presented to the Commonwealth government in 1975, expressed the view that the legal system itself can be a powerful force for social good, noting that:

> … despite the healthy respect for precedent, which is an essential part of the common law tradition, the law is capable of providing an important impetus for social and economic change. Not only is reform of the law often essential to overcome obvious inequalities and injustices in society, but the reforms can markedly influence community attitudes and behaviour.

On one view of that statement, it could be argued that the judiciary becomes the ultimate guardian of the basic rights of the people. That latter statement alone raises some interesting arguments as to a perceived usurpation by the judiciary of the powers of a democratically elected legislature. It is not an argument I propose to develop this evening. I will content myself with exploring the role of the courts in the area of the review and enforcement of rights,

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taking account of the realities of governance in a complex society with changing political, social and economic considerations.

I then wish to develop the final theme in the trinity of phrases embraced within the title of this address — that of public administration. I believe that it is only with the proper participation of the public administrative arm of government that one can realise the practical and effective implementation of social justice rights to their fullest extent. Rights without effective enforcement and implementation are but hollow words indeed. While the role of the courts and the attendant legal process are fundamental in affirming and reviewing rights within a common law, constitutional and/or bill of rights framework, it is public administration to which one must turn to convert policy, process and review into the reality of the enjoyment of rights.

Having laid out my fundamental premise, let me develop it by defining what I mean by social justice. In saying that, I acknowledge that there are those who would differ from the general proposition I intend to adopt — more I suspect because of the words used than because they have any underlying disagreement as to what constitutes social justice. It is a phrase driven by an acknowledgment of equitable access to rights. In the first instance I am attracted to the compelling statement from the First Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner (1993:10) which tells us that:

> Social justice is what faces you when you get up in the morning — it is awakening in a house with an adequate water supply, cooking facilities and sanitation. It is the ability to nourish your children and send them to a school where their education not only equips them for employment but reinforces their knowledge of and appreciation of their cultural inheritance. It is the prospect of genuine employment and good health: a life of choices and opportunity, free from discrimination.

If you want the more prosaic definition generally favoured by some governments in expressing their commitment to social justice principles in the discharge of their responsibilities to the community, you can usually find it expressed as a commitment based on the four interrelated principles of equity, access, rights and participation (Cabinet Office 1997) — something of a fair go all round would be one way of expressing it.

That we as individuals have rights is not a new concept. The existence and extent of them have been debated throughout history; wars and revolutions have been waged to establish and uphold them and nations have been created around them. In historical terms, one need go no further than the English Bill of Rights of 1689 which reaffirmed certain rights and liberties of the subject under the Crown, and the wonderfully uplifting Declaration of the Rights of Man approved by the National Assembly of France in 1789 declaring unequivocally that:

> Men are born and remain free and equal in rights.

Invariably, it seems to me, the affirmation of rights such as those just referred to, as well as for example, the US Constitution and the initial Bill of Rights amendments embraced within it, concentrated predominantly on affirming civil and political rights such as the right to vote, freedom of assembly, religion and association as well as freedom from arbitrary arrest and detention. It is true that affirmation as to such rights was, more often than not, accompanied by rights as to social equality. But that equality has not necessarily been carried through in practice — nor have such declarations as to rights and equality been sufficient to ensure the social and economic rights of many citizens in countries which can point to foundation documents attesting to such rights.

As support for that statement we need only compare two countries at the opposite end of the political spectrum — the former Soviet Union and the USA. The constitution of the former Soviet Union guaranteed the entitlement of citizens to work, to education and to medical treatment but essentially ignored their civil and political rights. In the USA, civil and political rights are guaranteed by the Constitution and fiercely protected and enforced by the courts; yet great numbers of its citizens live in poverty and are homeless (Riordan 1993:3). It seems to me that when we talk about social justice rights we must ideally encompass civil, political, social and economic rights. To do otherwise is simply to perpetuate injustice and discrimination. It is from that all-encompassing perspective that I make the comments I do tonight.

While in Australia the distinction between civil and political as opposed to economic and social rights might not be seen as significant, a failure to include all of them as part of a total rights package can create real and fundamental disadvantage for many. As a report of the South African Law Commission pointed out:

> It is all very well for freedom of speech and of assembly to be guaranteed, for arbitrary arrests and detentions to be outlawed, for the right to vote and participate in the political life of the country to be secured. But these are the preoccupations of those with the time and inclination to write or read books, to make or listen to speeches, to concern themselves with public affairs, to stick their necks out. What matters to most of the men and women living in Soweto, in Guguletu, in Kwa Mashu, is a full stomach, employment, housing, health care and an education for their children. What use to them is a bill of rights which may not ensure that needs so basic are met? (Didcott 1991).

It is self-evident that the foundations for securing the fullest complement of rights in any community are a constitutionally based, democratically elected system of govern-ment committed to adherence to the rule of law, an independent judiciary and a public sector administrative infrastructure ultimately capable of implementing, where necessary, the basic rights of the community — whether that be adjudged to be services such as judicial administration, housing, education or health services.

In many respects, with regard to the experiences of the citizens of many countries throughout the world, Australia has been relatively fortunate in its acknowledgment and enforcement of basic rights. By the very nature of our colonial settlement, we inherited the immense pedigree of the English common law and a parliamentary system of government with adherence to the rule of law as our rights foundation. That inheritance has in no way ensured the absence of discrimination or precluded inequalities existing within our nation — particularly with respect to our indigenous communities. On that issue it is worthwhile to reflect on how the courts and public administrative initiatives have put some flesh on the bones of indigenous rights. That process commenced with the constitutional amendment of 1967, which gave our indigenous people that most fundamental of rights —the right to vote. The Commonwealth Racial Discrimination Act 1975 commenced the legislative and legal process that had been foreshadowed in the Law and Poverty Report (1975:288), commenting on the need for fundamental reform in relation to indigenous rights, which it stated, were:

> … connected with the political subjugation and alienation of Aboriginals and the destruction, over many years, of Aboriginal culture, identity and dignity.

The most striking culmination of the process commenced in 1967 was, in my view, the Mabo decision of the High Court. As Justice Ronald Sackville (1995:213–14) of the Federal Court has noted:

> that the legal system can be a force for significant social and political change is now firmly implanted in the public consciousness in Australia. The irony is that the institution primarily responsible for this development has been the High Court … as a result of the High Court's decision in Mabo … the Commonwealth faced no practicable alternative other than to acknowledge and make legislative provision for claims based on native title.

Since then, the ongoing process of negotiation and, in some cases, the determination of native title claims has been a major responsibility of public administration at both federal and state level.

In her 1997 Spann Oration Lowitja O'Donoghue gave an insight into the implement-ation of a rights initiative for Aboriginal people under the umbrella of public sector administration. By her own admission the presence of such administration in the form of a bureaucracy is a 'dirty word' and 'a contentious area' to the Aboriginal community. And yet, some, albeit limited, progress has been made. As O'Donoghue (1997) detailed, Community Development Employment Projects (CDEPs) enable participants to work on community projects or enterprises in return for part-time wages. That program is currently the main source of employment in indigenous Australia.

I quote that example from O'Donoghue's speech not to suggest that disadvantage and

discrimination no longer exist in relation to our indigenous people — far from it — but to highlight that positive progress in the implementation of rights initiatives can be, and more often than not is, undertaken under the auspices of a public sector administrative framework.

Returning to what I will refer to as the mainstream consideration of rights in Australia, it is clear that the common law, to the extent that it has been called upon to do so, has provided equivocal assertion as to our fundamental rights. In 1997 when addressing the issue as to the need for a Bill of Rights in Australia, Justice Michael Kirby (1997:3) noted that:

> In the common law, decisions of the High Court of Australia sometimes demonstrated, even to sceptical observers, of the need for bill of rights protection to override old inherited laws and to reflect notions of fundamental rights and human equality.

In citing examples in support of that statement, Justice Kirby noted that more recent decisions of the High Court have been much more sensitive to the protection of basic rights, citing the Mabo (No. 2) decision with respect to international human rights, Dietrich v The Queen in relation to the provision of legal representation and the Capital Television decision which affirmed the right to free public discussion of matters of politics and economics.

Justice Kirby (1997:3) suggests that the lesson of the more recent decisions of the High Court:

> is that we are on the path towards a judicially created bill of rights. The common law has always protected certain rights. But its protection against a clearly expressed statute could not always be effective. Against the common law the will of the legislature will ultimately prevail.

One is tempted to conclude that the somewhat muted concern expressed by Justice Kirby that the power of the common law to assert and protect fundamental individual rights can sometimes be found wanting was a factor in the decision of the founding fathers of the USA to imprint their Bill of Rights into its larger constitutional framework. The view has consistently been expressed that the stated and defined rights within the US Constitution has allowed minority groups to argue before the courts for their liberty, equality and justice and their legitimate claims upon power (Westin 1983:29). In other words, notwithstanding what the relevant constitutional amendments have long asserted, the prevailing social and political constructs of that community have continued to deny those rights to many. It is only the courts that have affirmed and upheld them. Civil liberties advocacy based on stated rights is essential to improve social and government policy because it is said:

> … those in power give nothing without challenge, and that the history of the expansion of rights and liberties is always a matter of demanding change from those who only reluctantly give minorities access to opportunities, benefits, and rights in the society (Westin 1983:30).

Putting aside the experience of racially discriminatory policies and disadvantage in the USA, we only need to consider ever so briefly the history of disadvantage and discrimination encountered by racial, ethnic and minority groups in our own community to know the resonance of that statement to Australia.

In addition to those rights as afforded by common law, Australia has at both Commonwealth and state level moved to provide legislative protection for a full range of basic rights. For example, the Commonwealth Human Rights and Equal Opportunity Act, and Australia as signatory to the International Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights (among others), have given significant additional fertile areas of jurisprudence to bolster the common law and our courts in the affirmation and defining of our rights in the community.

The International Covenant on Economic, Social and Cultural Rights is the only major international human rights instrument not included within the ambit of the Human Rights and Equal Opportunity Commission system in Australia. Because of that, the provisions of the covenant are not directly domestically applicable. Nevertheless there would seem no reason why the Covenant could not be relied upon by the courts for interpretative assistance in administrative and judicial decision-making where legislation is ambiguous. Just as

importantly, implementation of the obligations arising under the covenant can and do take place through non-legislative measures such as administrative or financial programs committing the Commonwealth government to progressive implementation of those rights embraced within the covenant, and which include:

- the right to work
- the right to social security
- the right to an adequate standard of living including housing and food
- the right to physical and mental health
- the right to education, and
- the right not to suffer discrimination with respect to these rights (Otto and Wiseman 2000:9).

In exploring the role of the courts in the area of rights review and enforcement, I must have regard to the realities of governance in a complex society with changing political, social and economic considerations. Very often courts will have to choose between competing values and make sophisticated judgments as to their relative weights. At issue here is the way in which individual rights have to be balanced and possibly curtailed not only to accommodate the different and conflicting interests of individuals and groups within society, but also to provide for the rights of some in a number of areas.

Isaiah Berlin (1991:12–13) illustrates the problem comprehensively when he notes that:

> Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted … Equality may demand the restraint of the liberty of those who wish to dominate; liberty — without some modicum of which there is no choice and therefore no possibility of remaining human as we understand the word — may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice of fairness to be exercised.

Apart from the obvious need to curtail unfettered individual freedoms against the countervailing claims of other members of the society, the most obvious and increasing reason for balancing individual versus community rights is that of limited resources. Nowhere has this debate been more evident than in considerations as to the provision of those basic services that are seen to make up our social and economic rights — employment, housing, health and education. For example, to what extent is a community prepared to underwrite employment-creating initiatives, taking into account all of those social, skill development, education and training, financial, trade and global considerations that inevitably blend into policy and decision-making in this area? To what extent is a community prepared to fund a universal health scheme with access to all on the basis that health care is a right with no limitation as to cost? How and to what extent does a community finance housing infrastructure in a way that ensures that the cost of housing is accessible to low-income groups?

The relevance of the law to these questions is, I suggest, self-evident. If Australia's courts have not yet been required to address some of the hard issues involved in the questions raised, the same cannot be said of others. For example, the dilemma confronting health authorities in the balancing of scarce resources has been confronted by the English Court of Appeal which, when upholding a local health authority's decision to refuse expensive treatment for a seriously ill child, stated that:

> Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make (R v Cambridge Health Authority 1995:906).

For similar reasons the Constitutional Court of South Africa recently refused an appellant to their court access to a renal dialysis program necessary to keep him alive (Soobramoney v Minister of Health 1997). In coming to that decision the court acknowledged that:

> The provincial administration has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in

> good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters … the state's resources are limited … There are also those who need access to housing, food and water, employment opportunities, and social security. These too are aspects of the right to … human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity.

It seems to me to be true that the priority attaching to a perceived basic right, and the relative ability of an individual to demand enforcement of it, depend entirely on the social, political and economic realities of the community to which the individual belongs. For some in this world their daily priority would be that of a meagre existence stripped of all human dignity and rights with little likelihood of such in the foreseeable future. In a country as relatively affluent as Australia, the challenge I think is more one of equitable distribution and access to those rights. The economic and social foundations of our community have the potential to create great divisions of affluence and accordingly great disadvantages and potential discrimination to be occasioned to some in accessing their basic rights. The role of the courts in enforcing those rights is critical. In circumstances of limited resources that role is, I suggest, ultimately circumscribed by the policy framework, funding priorities and limitations determined by government, subject only to the review test of good faith, equity and reasonableness. At that point it seems to me that the policy framework comes under critical scrutiny.

If a policy framework is to be truly effective it must include preventive as well as reactive strategies so the basic rights of a community are equitably addressed both in the immediate and long term.

The current debate about mandatory sentencing is a case in point. Part of the background to the debate about mandatory sentencing has its genesis far from the courts but ultimately comes before us as factors relevant to the exercise of judicial discretion. I refer to those pre-existing social inequalities that precipitate the appearance of so many people before our courts — particularly but not exclusively our criminal courts.

Those factors critical to an individual's ability to function effectively and potentially free of offending behaviour in a community are well known: for example, the presence of

- functional family and social relationships
- adequate income support
- basic educational preparation
- employment opportunities, and
- proper housing.

All too often the absence of one or all of the above factors precipitates a lifestyle characterised by increasingly dysfunctional and abusive behaviour patterns that tip a person over the boundaries of acceptable behaviour to criminally offending behaviour. All too often we read of these circumstances in the fact sheets and pre-sentence reports that come before us. As judicial officers, we can play no active role in the public and political debate that arises in any consider-ation as to the problems that increasing social inequalities create in our community or the social and economic policies that are developed to deal with them. But to the extent that on so many occasions the end result of these inequalities are placed before us as subjective and mitigating features in the sentencing process then we are entitled, even obliged, to consider them.

The powerful tool that we have at our disposal in order to deal with those inequalities is the proper exercise of our judicial discretion. The retention of that discretion is critical to the ability of the courts to dispense justice rather than simply apply the law. Mandatory sentencing removes that discretion and with it any ability that the courts may have, or be willing to use, to temper the end result of social inequalities with notions of rehabilitation rather than retribution.

Putting aside for the moment all of the other problem areas that a debate about mandatory sentencing provokes, it has long been recognised that some individuals or groups in our community become caught up in the criminal justice system simply because they have not had, or enjoyed, fair and proper access to those rights enjoyed by others in the community and which enable most of us to remain functionally free of offending behaviour. A brief reflection of our history as a nation would confirm that, in addition to our indigenous community, one could also properly include children, the mentally ill or minority groups based on race, gender or sexuality who have all encountered discrimination and disadvantage in their ability

to enjoy the full extent of their rights in the community, and who have turned to the law for reaffirmation of those rights.

Accepting the policy framework and priorities of government is one thing — acknowledging the ever-present cry of funding limitations is also an imperative. But to deal with access to rights by constantly tolling 'the bell of tight resources' (R v Cambridge Health Authority 1995:906) seems to me to be innately simplistic and one-dimensional. Underpinning the funding constraints of any government in the provision of services allied to rights must be the presence of sound strategy, policy and planning, capable of implementation. That surely is what public sector administrative leadership is all about.

Inevitably when one talks about strategy and policy in the same breath as public administration one is confronted by the arguments surrounding the politics–administration dichotomy that has plagued the role of public sector administration for decades. In his Spann oration only last year, David Richmond noted that policy advice as part of public service leadership had become 'a contestable function'. Acknowledging that 'for ministers to rely only on agency heads for policy advice would be folly', Richmond (1999) nevertheless was firm in his view that:

> a high priority of public service leadership is to re-assert the role of agency head as key, if not principal policy adviser to the Minister

and that:

> An important part of that role is the ability to not only analyse but also to synthesise such advice with that of others, and on occasions, to put a contrary view to others.

On balance I think Richmond is right to assert a policy role for public administration. To suggest otherwise seems to me to be denying commonsense, reality and the accumulated experience of continuity by suggesting such clearcut divisions between power, politics and administration. As Spann himself suggested, there is a class of writers in public administration, to which I would suggest he belonged, that saw 'the whole governing process as having some kind of organic coherence' (Spann 1981:16). In doing so he drew our attention to the words of the former political scientist and Commonwealth public servant Pearce Curtin, who succinctly and quite correctly asserted that:

> In politics there are no clear cut divisions of power … watertight compartments are the rule on ships, not in social affairs.

If a policy role is to be asserted by public sector leadership, as I believe it should be, it must be a role that is capable of dealing competently with all of the competing demands of that leadership. Whether that means striking a balance between the private and public sector roles, or being prepared to examine innovative schemes associated with financing infrastructure in new urban development, or developing a crime prevention or diversion strategy for young people, the end objective is still the same — that of delivering rights through the provision of services. It would be my view that the principles that drive that process should be those social justice principles of equity, access, choice and participation. To the extent that the law can affirm and review them it is ultimately public administration that will deliver them.

Thus is the symbiotic relationship complete.

Note

* May I express my thanks to the Council of the Institute of Public Administration for the invitation to deliver this year's Spann oration. I am greatly honoured. Unlike the speakers of the last two years, I did not have the pleasure of knowing Professor Spann during his tenure in the Chair of Government and Public Administration at the University of Sydney. This invitation has spurred me to learn more about the man who, by all accounts, made a significant and learned contribution to the study of public administration in the affairs of government.

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