Chapter 20

Limits to the Powers of Ultimate Appellate Courts*

What follows deals with what final appellate courts often see as the limits of their powers to develop the common law, as distinct from merely adjudicating on disputes by applying it,[1] and with seven related temptations or dangers to which they are exposed. It does not deal much with statutory construction, or at all with constitutional questions.

Lord Hope of Craighead recently suggested that the powers of ultimate appellate courts are very wide. He said that subject to the doctrine of parliamentary sovereignty, it was for the House of Lords "as the ultimate court, to define the limits of its own jurisdiction. It can take as its starting point the inherent power which it has under the common law to do whatever is necessary to serve the interests of justice [subject to the] fact that the inherent power which is vested in the House in its appellate capacity is a judicial power, not a legislative one".[2] Now a court which can define the limits of its own jurisdiction is a court to be watched. The only limits on power, said Lord Hope, are the limits of "*judicial* power". Are those limits marked by anything more concrete than the need to serve the interests of justice?

Glass JA advocated narrower limits, using a well-known Kipling phrase:

> [T]he power of the courts to renovate the law is not untrammelled. It is subject, one must assume, to a condition that it be exercised with a due sense of responsibility.[3]

The difficulty in ascertaining the limits is illustrated by the career of a judge almost invariably praised by those who advocate extensive judicial power to change the law. The aging Churchill, looking back to the politics of his youth, said of Joseph Chamberlain that "'Joe' was the one who made the weather".[4] It is certainly true that in the 1960s and early 1970s, Lord Reid was his judicial equivalent. How often do

---

* This is a revised version of an address delivered on 7 July 2005 at Keble College, Oxford, in memory of the late Professor JW Harris, and of an address delivered on 23 October 2005 in Melbourne at The Boston, Melbourne, Oxford Conversazioni on Culture and Society: "Judicial Activism: Power Without Responsibility?". Previously published in (2006) 122 *Law Quarterly Review* 399.

1 See also JW Harris, "Towards Principles of Overruling—When Should a Final Court of Appeal Second Guess?" (1990) 10 *Oxford Journal of Legal Studies* 135; BV Harris, "Final Appellate Courts Overruling Their Own 'Wrong' Precedents: The Ongoing Search for Principle" (2002) 118 *Law Quarterly Review* 408. A more sceptical approach than that of the courts themselves is stimulatingly presented in D Robertson, *Judicial Discretion in the House of Lords* (Clarendon Press, 1998).

2 *Re Spectrum Plus Ltd* [2005] 2 AC 680 at [69].

3 *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 471 per Glass JA (dissenting).

4 W Churchill, *Great Contemporaries* (The Reprint Society, 1941) p 58.