



## 2002 Sir Maurice Byers Lecture

# Legalism, realism and judicial rhetoric in constitutional law

*Delivered by Professor Leslie Zines<sup>†</sup> AO at the New South Wales Bar Association on 16 October 2002*

In the past few years Sir Maurice Byers's peers have testified to his outstanding ability as an advocate in all types of cases, whether involving narrow technical points or broad concepts and principles.

It would be regarded as an impertinence for me to say anything about that – particularly in this company. I do, however, want to express my personal view that Sir Maurice was most joyous when he had a case which provided him with a large canvas on which to work; involving big principles, fundamental doctrines, important policies and large consequences.

During the last years of his life he said that there were four cases of which he was most proud.<sup>1</sup> They were:

1. The *Tasmanian Dam Case*<sup>2</sup> decided in 1983 and which, among other things, gave a broad, one might say national, interpretation to the external affairs and corporations powers and upheld legislation prohibiting Tasmania from building the Franklin Dam.
2. *Australian Capital Television Pty Ltd v Commonwealth*<sup>3</sup> which held in 1992 that there was in the Constitution an implied freedom of communication on political and governmental matters, and which held invalid an attempt to restrict the broadcasting of such matters.
3. *Wik Peoples v Queensland*<sup>4</sup> decided in 1996, which held that the existence of a pastoral lease under Queensland legislation was not necessarily inconsistent with the exercise of native title rights.
4. *Kable v DPP*,<sup>5</sup> decided in 1997, which held that Chapter III of the Constitution — the Judicature chapter — restricted a state's power to control its courts, either if they possessed federal jurisdiction (which is probably all of them) or, alternatively, when they exercise that jurisdiction. The Act providing for the continued detention of Gregory Wayne Kable, subject to periodic judicial review, was held invalid, because it was incompatible with the court's federal jurisdiction.

Each of these cases established new doctrines or principles, which became a new starting point for future development, forensic argument and scholarly exposition. Each of them was, substantially, decided by a majority of four judges. Each of them, within its scope, changed the way we perceive things; that is, what we legally take for granted. Each of them, in varying degrees, caused strong, sometimes bitter, criticism and, in the case of the first three, outrage from a variety of sources. These included business, farming and mining groups, state and federal governments and politicians, editorial writers and what are known as radio 'shock jocks', as well as some lawyers, judges, and former judges.

Sir Harry Gibbs in retirement gave papers and wrote articles attacking the *Tasmanian Dam Case* as a threat to the federal system.<sup>6</sup> Sir Garfield Barwick, after having, in the media, upbraided the court for *Cole v Whitfield*<sup>7</sup> (the case which revolutionised the interpretation of sec 92), which he called nothing but 'tosh', delivered a paper to the Samuel Griffith Society declaring that the *Australian Capital Television Case* threatened Australian democracy.<sup>8</sup>

In all these cases (although to a lesser extent in *Tasmanian Dam*) the arguments which led to success could be described as novel and professionally imaginative. However, an argument which seems to have those qualities to some persons or in one particular period might appear as absurd, way out or illegitimate to other persons or at other times.

Sir Maurice's arguments fell on receptive ears as far as the majority of the court was concerned. But I think it is not improbable that if each of those cases had arisen for decision fifteen or twenty years earlier the arguments which later found favour would have been rejected and, in some cases, quickly rejected.

I well remember Sir Garfield Barwick telling me that he could not understand why Justice Richard Blackburn had taken months to hear and determine the *Gove Land Rights Case*<sup>9</sup> in 1971 (the first attempt at recognition of native title) when he (Barwick) could have wrapped it up in twenty minutes. I do not think he meant that he would have decided in favour of native title.

It is this phenomenon which brings me to the thrust of this address, which could be subtitled 'Changing fashions in constitutional interpretation and judicial rhetoric'.

The nineteenth-century historian, Thomas Babington Macaulay, would occasionally introduce some obscure fact, for example relating to the Aztec empire, by saying 'As every schoolboy knows'. I think I am fairly safe in saying that, as many Australian lawyers know (and the rest ought to know), Sir Owen Dixon on being sworn in as chief justice fifty years ago said he would be sorry if the High Court was *not* regarded as excessively legalistic, because there was no other safe guide to constitutional decisions than a strict and complete legalism. It was the only way to maintain the confidence of all parties in great federal conflicts.<sup>10</sup>

Whatever Sir Owen meant by that, it did not stop him from inferring a particular theory of federalism and intergovernmental relations, not from any specified provision or group of provisions, but from what he called 'the very frame of the Constitution'.<sup>11</sup>

Legalism did not prevent the Dixon court from finding a broad doctrine of the separation of judicial power in Chapter III of the Constitution, resulting in the overthrow of the Arbitration Court, which had been thought valid for thirty years.<sup>12</sup>

Section 90 of the Constitution, making exclusive Commonwealth power in respect of customs and excise duties and

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bounties, was interpreted by Dixon J in accordance with a policy he divined of giving the Commonwealth a real control of the taxation of commodities and, therefore, of the levels of production, unhampered by state taxation policies.<sup>13</sup>

In the *Communist Party Case*<sup>14</sup> he resorted to the broad political and philosophical concept of the rule of law, as an ‘assumption’ of the Constitution, to determine the scope of Commonwealth power.

It is clear that whatever ‘strict and complete legalism’ referred to, it was not inconsistent with the finding of some large implications in the Constitution, with attributing broad social and economic purposes to particular provisions, or with the application of external theories and concepts in constitutional interpretation.

But what one did not find, generally speaking, was any recognition that legal reasoning applied to the provisions of the Constitution could, at least sometimes, lead to more than one legally sustainable conclusion from which a judge had in some way to choose. This might rationally require consideration of what in the circumstances was either just or socially desirable; in other words, of values or policies. That in turn might require an examination of the social consequences of any particular interpretation.

Under legalism any difference among judges was put down to a difference of ‘impression’ (to use the language of Gleeson CJ) or of ‘perception’, as used by Stephen Gageler in a concise and lucid entry on legalism in the *Oxford Companion to the High Court of Australia*.<sup>15</sup>

Sir Owen Dixon elaborated on the matter in a lecture given at Yale Law School in 1955, but this time in the context of common law and equity. His aim was to show how it was, sometimes, possible to avoid an undesirable conclusion that seemed to follow from a simple application of legal rules by means of an aspect of legal methodology, which he called ‘logic and high technique’.<sup>16</sup>

He spent little time, however, on the motive for using the high technique, namely, to ensure a just or socially preferable decision. Sir Owen declared that a legal principle should not be abandoned in the name of justice or social necessity or of social convenience. Yet it appears that those ends could be the spur for the use of logic and high technique in order to achieve them. What this came down to was that change had to come out of existing doctrine.

In his lecture he said that it was taken for granted that the court’s decision will be ‘correct’ or ‘incorrect’, ‘right’ or ‘wrong’, as it conforms with ascertained legal principles. The court would, he declared, feel that the function it performed had lost all meaning and purpose if there were no external standard of legal correctness.

In the case of the Constitution the standard is the text and the legal rules and principles that govern its interpretation.

Sir Garfield Barwick (who had expressed support for Dixon CJ’s remarks, as providing for stability in constitutional law)<sup>17</sup> was presumably applying the method of strict and complete legalism when, in 1980 in the last important sec 92 case he presided over,<sup>18</sup> he said, in relation to the words ‘absolutely free’, that his duty was merely to give effect to the language of sec 92. Nothing he had ever written, he added, had depended on any other consideration than the words of the Constitution.<sup>19</sup>

The appointment of Lionel Murphy to the court in 1975 put an

end to the view Dixon had expressed in his lecture that the court had produced no deliberate innovator bent on express change of acknowledged doctrine, but Murphy did not seem to influence other judges, at any rate while he was on the bench. Nevertheless there was some movement away from strict legalism, as understood by Sir Owen Dixon, in the late 1970s. In 1977 the court was asked to overrule a case, decided only the year before, upholding legislation providing for full Senate representation for the two mainland territories.<sup>20</sup> It was argued that that case should not be followed because it was ‘plainly wrong’. Stephen J and Mason J, who had been on opposite sides in the earlier case, each said that that decision could not be called, in any true sense, right or wrong because, so far as the text and recognised legal principle were concerned, the competing arguments were all rational.<sup>21</sup> As Stephen J put it, ‘no one view could be regarded as inherently entitled to any pre-eminence in conforming better than others to principle or precedent’.

The issue in the first case was thus which of two competing values or policies should prevail: federalism or representative government?<sup>22</sup>



Members of the Tasmanian Wilderness Society celebrate the High Court decision to prevent a dam being built on the Gordon-below-Franklin river. July 1983. Photo: News Image Archive

The first of the four cases mentioned by Sir Maurice Byers — the *Tasmanian Dam Case* — was probably the beginning of an express recognition that the text and accepted legal rules and principles of interpretation will not always determine the issue, and that it may be necessary to resort to other factors if a reasoned conclusion was to be reached; that is, one not fudged or disguised by indeterminative doctrinal language.

The majority and the minority judgments are replete with policy considerations and value judgments. While the issue was the meaning of ‘external affairs’, the judicial debate was about the place of Australia in the world and the relationship of the states to the nation.

In 1986, the year before he became chief justice, Sir Anthony Mason, in a lecture delivered at the University of Virginia, said that the court was moving away from the doctrine of legalism ‘toward a more policy oriented constitutional interpretation’.<sup>23</sup> Later he referred to the new approach as ‘a species of legal

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realism'.<sup>24</sup> He said that the judges took account of the relevant policy considerations for the principles of law and, where appropriate, of community values. In his view the 'ever present danger is that 'strict and complete legalism' will be a cloak for undisclosed and unidentified policy values'.<sup>25</sup>

During the time Sir Anthony was chief justice other members of the court accepted this general approach, which was not, of course, limited to constitutional law. Deane J, for example, spoke of occasions where the ordinary practices of legal reasoning are inadequate or the court finds it is necessary to reassess a rule 'in the context of current social conditions, standards and demands and to change or reverse the direction of the development of the law'.<sup>26</sup>

Both before and after his appointment to the High Court McHugh J wrote articles which described the limits of legalism and the necessity for the application of values or the pragmatic consideration of social interests, even in constitutional and statutory interpretation.<sup>27</sup>

Sir Gerard Brennan adopted the same approach, but seemed to make an exception in the case of constitutional law which is difficult to understand. He said that strict and complete legalism masked the truth of judicial method.<sup>28</sup> In a tribute to Sir Anthony Mason he also said that 'the risk of confusion between judicial policy and political policy had to be run in order to guarantee the integrity of the judicial process and to bring the influence of contemporary values to bear on modern expositions of legal principle'.<sup>29</sup>

This was no doubt particularly so because, as he said in his address on being sworn in as chief justice: '[T]he court has had to grapple with issues on which two or more views can reasonably be held'.<sup>30</sup> Yet in *Theophanous v Herald and Weekly Times Ltd*<sup>31</sup> he said that, unlike the situation in respect of common law, 'In the interpretation of the Constitution judicial policy has no role to play! If that is so he did not explain how the matter is resolved when the principles of interpretation lead, in his words, to 'two or more views that can reasonably be held'. Later, in the *Oxford Companion*,<sup>32</sup> he said that changing values might call for new applications of the text in the light of contemporary conditions.

The period from the mid-1980s to mid-1990s, known as the Mason court, saw striking changes to our law in nearly all areas — common law, statutory interpretation, administrative law and constitutional law. In constitutional law an assault was made on what was seen as one aspect of legalism, namely formalism. This manifested itself in the creation of a formula for determining whether a law came within a constitutional provision, usually a guarantee or a restriction on power.

The policy that had been declared to be the object of sec 90 was converted in the case of excise into a formula, namely whether the criterion of liability of the tax was the process of bringing goods into existence or passing them down the line to the point of receipt by the consumer.<sup>33</sup> Attention was, for a number of judges, concentrated on the interpretation and application of the formula (as to which minds differed) rather than directly to the declared purpose of the provision and the practical effect of the Act in

relation to that purpose.

Although the Dixon court (with the approval of the Privy Council) held that the object of sec 92 was to give the individual a right to engage in interstate trade, the test of whether the section was breached was whether the criterion of operation laid down in the legislation was an act of trade, commerce or intercourse or its interstate aspect.<sup>34</sup> Economic and practical effects and social policies were said to be irrelevant,<sup>35</sup> although they would occasionally sneak in under cover of a heap of technical language.

Section 117 prohibiting discrimination against non-alien residents of other states was held in 1973 not to be breached by a law which required twelve months residence in South Australia for admission as a legal practitioner of that state.<sup>36</sup> The reason was that the criterion of operation in the Act was not *permanent* residence.

It was difficult, in many cases, to see the point of these constitutional provisions or their declared purposes if they could be easily avoided by technical means and clever drafting.

The purpose of creating rules and formulae such as these seems to have been to confine the matters for judicial consideration to strict legal interpretation and to exclude taking into account social or economic effects in the particular case or the necessity to balance conflicting social interests or values. It did not work.

For one thing, the principles themselves needed interpreting. Some judges did so in a way that ignored the policy that begat the formula, some interpreted them in the light of the policy at the cost of some straining of the language, while others interpreted the formula with the purpose of impairing the original policy and to see it replaced by a new one.<sup>37</sup> A forthright attack was made on this approach in respect of all these constitutional provisions.<sup>38</sup> It was summed up in *Cole v Whitfield*<sup>39</sup> where the court made reference to

[T]he hazards of seeking certainty of operation of a constitutional guarantee through the medium of an artificial formula. Either the formula is consistently applied and subverts the substance of the guarantee or an attempt is made to achieve uniformly satisfactory outcomes and the formula becomes uncertain in its operation.

Therefore, during this period in many areas there was a rejection of formal criteria, a more open application of policy considerations, and, where appropriate, a deliberate balancing of conflicting social interests or values.

Another characteristic of this period was the use of rights and freedoms in the development of the common law, in statutory interpretation and administrative law.<sup>40</sup> In the case of constitutional law, apart from the few express provisions, rights and freedoms have arisen as incidents of institutions implied in the Constitution, namely, representative government and the separation of judicial power.<sup>41</sup>

It is not my purpose to discuss the nature of constitutional implications. An able and sophisticated description and analysis has been given by Dr Jeremy Kirk in two articles in the *Melbourne University Law Review*.<sup>42</sup>

Also, I do not propose to discuss, generally, the place of rights and freedoms in High Court decisions. But two aspects of that subject are relevant to the general theme of constitutional interpretation. One concerns an attack on the court's methodology in 1996 by McHugh J. The other is an approach to constitutional interpretation in this area by Deane and Toohey JJ which even those who had expressly rejected the earlier legalism could not

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accept.

As I have mentioned, the decision in *Australian Capital Television* that the Constitution required representative government and that this necessitated a degree of freedom of communication in respect of public affairs caused considerable criticism, exceeded perhaps only by outrage of some people by *Mabo (No 2)*<sup>43</sup> and *Wik*.<sup>44</sup>

The reasoning of the majority was that various provisions of the Constitution such as secs 7 and 24 requiring senators and members of the House of Representatives to be directly chosen by the people, secs 62 and 64 requiring ministers to be members of parliament and advisers to the Governor-General, and sec 128, the amending provision, impliedly prescribed a system of representative government. That system required freedom of communication about governmental affairs.

This implied freedom was made applicable to the common law of defamation in *Theophanous v Herald and Weekly Times*<sup>45</sup> by the court declaring a new constitutional defence where political communication was involved. It was this decision which caused McHugh J, in a later case, to denounce the whole approach of the majority in the implied freedom cases.<sup>46</sup> He accused them of departing from legitimate judicial reasoning, and not following recognised standards of interpretation. The court had, he said, gone outside the text and structure of the Constitution. The majority of judges had, contrary to the principle established in the *Engineers' Case*,<sup>47</sup> resorted to an external political theory, namely a free-standing concept of representative democracy, for the purpose of finding implications in the Constitution.

By then Sir Anthony Mason and Sir William Deane had retired and Gummow J appointed (to be followed shortly by Kirby J), with Sir Gerard Brennan as chief justice.

Gummow J had expressed some sympathy with McHugh J's criticism. Dawson J, who had thoroughly rejected the implied freedom, said in court during the hearing of another case in which the freedom was in issue,<sup>48</sup> that it appeared there were now four members of the court against the principle as stated in *Theophanous*. It was therefore challenged in another defamation case: *Lange v Australian Broadcasting Corporation*.<sup>49</sup>

The result was what in constitutional law is always a minor miracle, namely a single unanimous judgment; but in this case it was a major miracle explicable only by divine interference with the forces of nature. Despite all the differences of opinion displayed in the previous implied freedom cases, and the strong views expressed in *McGinty*, all the judges accepted the principle that the Constitution embraced, in the federal sphere, a system of representative government requiring freedom of political communication.

While the judgment rejected the view in *Theophanous* that the Constitution could *directly* affect the rights and duties of private persons in their mutual relations, it was held that the common law had to conform to the Constitution. That seems to amount to the same thing. A new defence of qualified privilege was fashioned in the light of the implication.

It seems that the concerns of those who thought that the court had previously departed from the text and structure of the Constitution were satisfied by ensuring that after any reference

was made to representative government there were added words such as 'as provided by the Constitution'. As I have explained elsewhere,<sup>50</sup> the express provisions of the Constitution did not seem to add to, or qualify very much, the general concept. In any case the principle as stated in *Lange* does assume an external standard or theory, which has a place in interpreting the Constitution. The same, of course, was true in respect of the doctrine of the separation of powers<sup>51</sup> and the concept of federalism in respect of inter-governmental immunities.

Although the court in *Lange* altered the formulation of the new defence as stated in *Theophanous*, in both cases it could be said that the defendant acquired a defence by virtue of the Constitution, and, in so far as that was the case, it could not be restricted by statute.

In the general area of rights and freedoms, however, Deane and Toohey JJ went beyond the methods employed by the rest of the court. They expounded doctrines which had less connexion with the text of the Constitution and which would have opened up a vast area of judicial power in respect of the formulation of entrenched individual rights. They put forward the principle that



1996 Cape York Aborigines & Thayorre v Queensland land case opened in Canberra 11 June 1996. Photo: Michael Jones / News Image Archive

federal power was limited by fundamental rights and freedoms recognised by the common law in 1900.<sup>52</sup>

This seems to have been based on the view that the framers and the people assumed that common law rights would be preserved and, therefore, found them unnecessary to include in the Constitution. Accepting the validity of the assumption, it is not explained why that should not be regarded as the framers and people putting their trust in parliament and the political process to preserve those rights. Deane and Toohey JJ applied their principle in *Leeth v Commonwealth*<sup>53</sup> where, in a dissenting judgment, they held, on that and other grounds, that Commonwealth legislative powers were limited (in the absence of a contrary indication) by an underlying doctrine of the equality of the people of the Commonwealth, which, it was said, was a basic common law principle. (The common law's treatment of women was dismissed as a past anomaly.) The general doctrine would have, of course, the same effect as *Dr Bonham's Case*.<sup>54</sup> It would have transferred large powers to the judiciary, with little in the way of limiting criteria.

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This is brought out in a paper delivered by Toohey J, where he put forward a view analogous to a more orthodox principle for reaching the same result.<sup>55</sup> He suggested that the rule of statutory interpretation in protection of common law rights could be extended to the interpretation and application of the Constitution, including constitutional powers, so that all Commonwealth (and possibly state) powers would be subject to whatever it was decided was a fundamental common law right in the absence of a clear contrary intention. It would amount, Toohey J said, to an implied bill of rights the content of which would emerge only in the course of time. As he put it: ‘the courts would over time articulate the content of the limits on power arising from fundamental common law liberties.’

While the basis of Toohey J’s exposition looks as if it is within the area of conventional legal methodology — extension by way of analogy from a rule of statutory interpretation — its results would have changed in a fundamental way the nature of our Constitution.

No other judges followed the approach of Deane and Toohey JJ, but it might possibly have been a factor in the recent revival of ‘strict and complete legalism’ in judicial rhetoric and, to some degree, in action. To that I now turn.

By 1998 Justices Brennan, Dawson and Toohey JJ had left the bench. Justices Hayne and Callinan had been appointed and Justice Murray Gleeson was appointed Chief Justice. It is commonly accepted that the judgments of the court in many areas of law have become more difficult, technical and complicated. There may have been a return by some judges to the view that changes to the law, in other than exceptional circumstances, have to be generated from existing doctrine.

Sir Anthony Mason in a chapter entitled ‘The evolving role of the High Court’ published in 2000<sup>56</sup> wrote of the court’s methodology following Dixonian legalism:

[I]n more recent times the court has been more willing to examine policy issues and expose its reasoning on such matters rather than bury the reasoning beneath an overburden of authority and doctrine. There are signs that this approach may be waning. The court may be returning to a methodology that places great store by doctrinal discussion ostensibly little influenced by discussion of policy considerations. Here, again, impressions

may be largely subjective and more time is needed in which a clear pattern may develop.

Justice Paul Finn, of the Federal Court, at a conference in New Zealand last year, referred to the High Court distancing itself from the methodologies and orientations of the Mason era. He said that there was some level of retreat from an open consideration of values, a varying regard for consequentialist considerations and a renewed preoccupation with doctrinal scholarship. He added that some reasons for judgment were often more akin to extended scholarly explorations of doctrinal issues.<sup>57</sup>

At the same conference the President of the Court of Appeal of New Zealand, Sir Ivor Richardson, pointed to the decrease of citation of Australian decisions in New Zealand from 12 per cent of total citations in 1990 to five per cent in 2000. He expressed surprise at this and said it was probably because of ‘the difficulty of dealing succinctly with High Court decisions’. However, he suggested that multiple judgments with judges taking different

approaches might be one reason for the difficulty.<sup>58</sup>

An obvious exception to the impression Sir Anthony Mason and Justice Paul Finn have of the present court is Kirby J, whose judgments display a prominent reliance on policy factors. If otherwise the impression is correct, it is reinforced by a number of public pronouncements of Chief Justice Gleeson in which the concept of ‘legalism’ has once again been given a eulogistic flavour, and Sir Owen Dixon’s remarks have been resurrected as a model to be followed. It may be that what the Chief Justice has said represents the underlying approach of the present court.

He gave an address to the Australian Bar Association in New York on 2 July 2000 entitled ‘Judicial legitimacy’. He emphasised that the court’s decisions will be accepted only if judges observed the limits of judicial legitimacy, and that was the reason behind what he called Sir Owen Dixon’s ‘famous observation’.

The Chief Justice then asked, rhetorically, if the court did not resolve federal conflicts by a legalistic method, what other method was there? While lawyers might differ as to ‘the techniques appropriate to strict and complete legalism’, who would care to suggest an alternative? Judges had no other relevant expertise, and in any case they had no right ‘to throw off the constraints of legal methodology’.

I find this speech puzzling in view of the fact that other High Court judges and chief justices did indeed ‘care to suggest an alternative’ to strict and complete legalism. They did not, in my view, regard themselves as throwing off ‘the constraints of legal methodology’. But they found that that methodology was not confined to strict and complete legalism.

In his Boyer Lectures<sup>59</sup> Gleeson CJ again stated his view that members of the court were expected to limit themselves to strict and complete legalism. This time he adverted to criticism of it. It is, he said, sometimes argued that courts should be guided by considerations of policy, give effect to their own or community values, and should be more explicit in acknowledging choices open to them. He dismissed the criticism by saying that policy and values here must refer to the policy and values of the law, which are to be discovered through legal precedents.

He was there referring to the policies and values of the common law. As far as some aspects of constitutional law are concerned those policies and values may be important, particularly in areas related to judicial power, the relationship of the executive to parliament, trial by jury and so on. But it is difficult to see how the values and policies of the law would have been sufficient to determine the three constitutional cases argued by Sir Maurice Byers to which I have referred. Also, how do they help, for example, in determining the scope of the marriage power or the arbitration power, the existence and extent of the accrued jurisdiction of a federal court or whether, and when, the statutory destruction of a chose in action amounts to a law with respect to the acquisition of property?

I am in any case not sure that the distinction between values of the law and values external to the law is very helpful, although the distinction has often been made.<sup>60</sup> The values of the law presumably came from the society that it governs and reflects. Also the law takes on new values and sheds old ones as society changes, as is reflected in *Mabo (No 2)*,<sup>61</sup> *The Queen v L* (the rape in marriage case),<sup>62</sup> and *Cheatle v R*,<sup>63</sup> which held that jury qualifications in 1900, excluding unpropertied persons and women, would not comply with the requirement of trial by jury in sec 80 of the Constitution today.

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In launching the *Oxford Companion to the High Court of Australia* in February this year the Chief Justice persisted with his advocacy of legalism. This time he claimed the authority of Alfred Deakin in his great speech introducing the Judiciary Bill in 1902. Gleeson CJ said:

Deakin's speech contains one aphorism that deserves particular emphasis in the light of some of the entries in the *Oxford Companion*. He said: 'federation is legalism'. There is a tendency to refer to legalism as if it were invented by Sir Owen Dixon in the middle of the twentieth century. Doubts have been expressed about its meaning. There is not much doubt about what Deakin meant by legalism; and there is no doubt at all that he saw it as the key to the integrity of the court and the stability of the federal union.

I do not have any doubt about what Deakin meant by his aphorism; but, with respect, I do not believe that he was referring to a method of constitutional interpretation. In fact I doubt whether the word was used in 1902 in that sense.

It was Dicey (to whom Deakin refers from time to time in his speech) who in 1885 said that federalism meant 'weak government, conservatism and legalism'. However, he described legalism as the predominance of the judiciary in the Constitution and the prevalence of a spirit of legality among the people.<sup>64</sup> That, in my opinion, is what Deakin was referring to in his speech.

He had explained the past and recent extensions of law into new areas, including most recently, industrial conflict, and he indicated that otherwise purely political issues came within the province of law, and judicial determination, in a federal system. Federal government, he said, therefore demanded a law-abiding people. Then came the statement 'federation is legalism'. In the light of the context he was clearly using it in Dicey's sense. He was not there telling the future court how to go about interpreting the Constitution.<sup>65</sup>

In fact much of the speech was addressed to the function of a national court in adapting the Constitution to 'the changeful necessities and circumstances of generation after generation'.<sup>66</sup> The Constitution, he said, would be interpreted in accordance with the needs of the time. Reading the speech as a whole I believe it gives no support to legalistic interpretation.

How, if at all, is this rhetoric reflected in the decisions? That is a more difficult question.

*Re Wakim* (the *Cross-Vesting Case*)<sup>67</sup> might be seen as a monument to legalism, even though Dennis Rose<sup>68</sup> has purported to show that it is a monumental legalistic error. However that may be, the only references to social effects or to the value of co-operative federalism in the majority judgments are made in the course of castigating counsel for mentioning them. Gummow and Hayne JJ drew a sharp distinction between social convenience on the one hand and 'legal analysis and the application of accepted constitutional doctrine' on the other.<sup>69</sup>

Co-operative federalism was referred to as a slogan,<sup>70</sup> as was the avoidance of arid jurisdictional disputes<sup>71</sup> and those who resorted to these concepts were described as doing so unthinkingly or as guilty of 'loose thinking'. The inconvenient

consequences of the result in that case were described by McHugh J as saying nothing from a constitutional point of view. The agreement of all governments and legislatures in Australia was referred to by the Chief Justice as irrelevant.<sup>72</sup>

All that might have been accepted by everyone if the Constitution had plainly and clearly prohibited such schemes or if the cross-vesting scheme had conflicted with other important constitutional and legal values, such as those embodied in the separation of powers, the rule of law, basic common law rights or state rights and independence.

The decision and that of its successor, *Re Hughes*,<sup>73</sup> have thrown into doubt schemes, not involving judicial power, of the sort that have been created and applied throughout the life of the Commonwealth such as the Snowy Mountains Scheme, the marketing schemes of the mid-twentieth century, and co-operative schemes of the 1980s and 1990s relating to commercial matters, competition policy and national crime.

All this was apparently a compelling result of the text of the Constitution. It contrasted with the court's view in 1983 that Commonwealth-state co-operative schemes, providing for a pooling of powers, was an inevitable by-product of the federal system, requiring only that there be Commonwealth legislative authority for federal officers to exercise powers conferred by the states and vice versa.<sup>74</sup> In *R v Hughes* it was suggested that if the state law imposes a duty the Commonwealth cannot authorise its officers to carry it out unless the Commonwealth itself has power to impose the duty, which of course effectively denies a pooling of powers, unless the executive and incidental powers are regarded as sufficient, which seems doubtful.

The tendency in these cases is, therefore, to treat social and political practices and consequences as irrelevant, for the purpose of deciding whether the language of the Constitution is unambiguous, and how it should be interpreted.

Although this might be thought to epitomise the return to legalism of the Gleeson court there are other cases where the majority have adopted approaches which differ markedly from that in *Re Wakim*. For example, in *Abebe v Commonwealth*<sup>75</sup> the majority upheld legislation which limited the grounds on which certain migration decisions could be reviewed by the Federal Court but not by the High Court. The dissenting judges (Gaudron, Gummow and Hayne JJ) regarded the legislation as invalid because there was no final determination of all the legal rights and duties of the parties. It was not, therefore, in their view, an exercise of judicial power. In any case they thought the court was given jurisdiction in respect of only part of the 'matter' contrary to Chapter III.

The joint judgment of Gleeson CJ and McHugh J showed great concern for the consequences of invalidating the provisions. They said it would create immense practical problems which the makers of the Constitution could hardly have intended. It would mean, for example, that the Commonwealth could not create specialist courts. Unlike the attitude in *Wakim*, here undesirable social effects were taken to throw light on the meaning of the Constitution. They said that 'only the clearest constitutional language' could result in giving parliament such limited and impractical choices. They found nothing in the language that forced such choices.<sup>76</sup> Ironically, Kirby J relied in part on much of this language in his dissenting judgment in *Re Wakim*.

Similarly in *Sue v Hill*<sup>77</sup> it was held that a citizen of the United Kingdom owed allegiance to a foreign power and so was

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disqualified under sec 44 of the Constitution from being chosen or of sitting as a member of the Commonwealth Parliament. The text of the Constitution contains much that could lead to the opposite conclusion (as one would expect having regard to the state of affairs in 1900). The court instead looked to the evolution of Australia's relations with the United Kingdom and the development of its sovereignty in international affairs since 1900. In other words the terms of the Constitution were downgraded in favour of modern political perceptions.

The reasoning in the latter two cases could be easily seen as representative of a policy oriented court of which Sir Anthony spoke. It is in contrast to *Wakim and Hughes*.

At the end of 1999 I expressed the view that the constitutional cases decided in the previous two years indicated no general pattern or direction. Varying approaches were taken to different cases, as indicated by the four cases to which I have referred. There have not been many significant cases since then.

The greatest source of litigation and speculation in constitutional law is at present Chapter III, part of which was the subject of last year's Byers Lecture given by McHugh J. He indicated that it was a potential mine of individual rights and of restrictions on legislative power.

As was the case with Sir Owen Dixon, legalism has not prevented judges making large inferences, once again from Chapter III. McHugh and Gummow JJ, for example, have declared that because sec 73 gives the High Court appellate jurisdiction in respect of the judgments of state supreme courts, the states cannot abolish those courts and so impair the national character of the High Court. McHugh J has gone further and said that the states cannot deprive the supreme courts of their jurisdiction to hear appeals or to review the orders of lower courts, because that would also impair the position of the High

Court in the national system.<sup>78</sup>

If Chapter III is the source of constitutional implications it is also the subject of much doctrinal basket-weaving as illustrated by the *Cross-Vesting Case* and other cases. There are many long and technical decisions in areas at the intersection of constitutional and administrative law, particularly in relation to sec 75(v) of the Constitution<sup>79</sup> or involving federal jurisdiction.<sup>80</sup>

It is difficult to know clearly what effect the modern return to legalism will have in the area of constitutional law. The fact is that the terms of the Constitution remain largely of a broad and general nature. They continue to open up situations where judges must choose between equally rational conclusions that cannot be settled by doctrine or precedent alone. In an age of open government it is important that, whatever the new legalism means, judicial conclusions should not be seen as simply resting on different perceptions or impressions, but examined in the light of consequences and appropriate policies. This may come down to regarding law as a means of fulfilling social ends rather than as an end in itself.

It is not uncommon for those who emphasise precedent and doctrine as conclusive determinative factors to set up their opponents as persons desiring to replace legal principles by idiosyncratic decisions based on what the judge thinks is just and desirable. On this view the danger is that judges are seen as free-wheeling policy makers rather than as interpreters of the Constitution. No one doubts that certainty, consistency and coherence of the law and the legal system are important social and legal values. They are not achieved by ignoring the factors which the law (and particularly the Constitution, by reason of its indeterminacy and its longevity) invites, or rather compels, the courts to consider. This is not to argue that judicial policy-making is desirable; it is merely at times necessary.

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| <p>1 I was informed of this by Father Frank Brennan.</p> <p>2 Commonwealth v Tasmania (1983) 158 CLR 1.</p> <p>3 (1992) 177 CLR 106.</p> <p>4 (1996) 187 CLR 1.</p> <p>5 (1997) 189 CLR 51.</p> <p>6 Gibbs, 'The threat to federalism' in Samuel Griffith Society, <i>Upholding the Australian Constitution</i>, vol 2, 1993, pp 183-194.</p> <p>7 (1988) 165 CLR 360.</p> <p>8 Barwick, 'Parliamentary democracy in Australia' in <i>Upholding the Australian Constitution</i>, vol 5, 1995, 205-220.</p> <p>9 <i>Milirrup v Nabalco Pty Ltd</i> (1971) 17 FLR 141.</p> <p>10 (1952) 85 CLR xi at xv.</p> <p>11 <i>Melbourne Corporation v Commonwealth</i> (1947) 74 CLR 31 at 83.</p> <p>12 <i>R v Kirby; ex parte Boilermakers' Society of Australia</i> (1956) 94 CLR 254.</p> <p>13 <i>Parton v Milk Board</i> (1949) 80 CLR 229 at 260.</p> <p>14 <i>Australian Communist Party v Commonwealth</i> (1951) 83 CLR at 193.</p> <p>15 At p429.</p> <p>16 Dixon, 'Concerning judicial method' in <i>Jesting Pilate</i>, pp 152-165.</p> <p>17 <i>Attorney-General (Cth); ex parte McKinley v Commonwealth</i> (1975) 135 CLR 1 at 17.</p> <p>18 <i>Uebergang v Australian Whate Board</i> (1980) 145 CLR 266.</p> <p>19 <i>Ibid</i> at 294, 295.</p> <p>20 <i>Western Australia v Commonwealth</i> (1975) 134 CLR 201.</p> <p>21 <i>Queensland v Commonwealth</i> (1977) 139 CLR 585 at 603, 606.</p> <p>22 Zines, <i>The High Court and the Constitution</i>, 4th edn, 1997, pp 467-469.</p> <p>23 Mason, 'The role of a constitutional court in a federation: A comparison of the Australian and the United States experience' (1986) 16 FLRev 1 at 5.</p> <p>24 Mason, 'The role of the courts at the turn of the century' (1993) 3 <i>Journal of Judicial Administration</i> 156 at 164.</p> <p>25 (1986) 16 FLRev 1 at 5.</p> <p>26 <i>Dietrich v The Queen</i> (1992) 177 CLR 292 at 329.</p> <p>27 McHugh, 'The law-making function of the judicial process' (1988) 16 ALJ 15-31, 116-127; 'The judicial method' (1999)</p> | <p>73 ALJ 37</p> <p>28 Brennan, 'A critique of criticism' 19 Mon L R 213.</p> <p>29 Saunders (ed), <i>Courts of Final Jurisdiction</i>, 1996, p10 at 13.</p> <p>30 (1995) 183 CLR at xi.</p> <p>31 (1994) 182 CLR 104 at 143.</p> <p>32 At p 696.</p> <p>33 <i>Bolton v Madsen</i> (1963) 110 CLR 264.</p> <p>34 <i>Hughes and Vale Pty Ltd v NSW (No 1)</i> (1953) 87 CLR49 (HC), (1954) 93 CLR 1 (PC); <i>Hospital Provident Fund Pty Ltd v Victoria</i> (1953) 87 CLR 1.</p> <p>35 <i>Wragg v New South Wales</i> (1953) 88 CLR 353.</p> <p>36 <i>Henry v Boehm</i> (1973) 128 CLR 482.</p> <p>37 For example, in respect of sec 90 see <i>Hematite Petroleum Pty Ltd v Victoria</i> (1983) 151 CLR 599 at 616-618 per Gibbs CJ, Mason J, before <i>Cole v Whitfield</i>, moved the construction of sec 92 away from its laissez-faire origins while using the same formal concepts; see, for example, <i>North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW</i> (1975) 134 CLR 559 at 614-615.</p> <p>38 Section 92: <i>Cole v Whitfield</i> (1988) 165 CLR 360; sec 90: <i>Hematite Petroleum Pty Ltd v Victoria</i> (1983) CLR 599; sec 117: <i>Street v Queensland Bar Association</i> (1989) 168 CLR 461.</p> <p>39 At 402</p> <p>40 Saunders (ed) <i>Courts of final jurisdiction</i>, 1996.</p> <p>41 Zines, <i>The High Court and the Constitution</i>, 4th edn, 1997, pp 202-212, 377-399. Williams, <i>Human rights under the Australian Constitution</i>, 1999, chs 7 and 8.</p> <p>42 (2000) 24 MULR 645; (2001) 25 MULR 24.</p> <p>43 (1992) 175 CLR 1.</p> <p>44 (1996) 187 CLR 1.</p> <p>45 (1994) 182 CLR 104.</p> <p>46 <i>McGinty v Western Australia</i> (1996) 186 CLR 140 at 229-235.</p> <p>47 <i>Amalgamated Society of Engineers v Adelaide Steamship Co Ltd</i> (1920) 28 CLR 129.</p> <p>48 <i>Levy v Victoria</i> (1997) 189CLR 579.</p> <p>49 (1997) 189 CLR 520.</p> <p>50 Zines, 'The present state of constitutional interpretation' in Stone and Williams, <i>The High Court at the crossroads</i>, p 224 at 226-227.</p> <p>51 Despite the Privy Council's strange remark that the construction of the Constitution would have been the same 'had Locke and Montesquieu never lived nor the Constitution of the United States ever been framed':</p> | <p><i>Boilermakers' Case</i> (1957) 95 CLR 529 at 540.</p> <p>52 <i>Nationwide News Pty Ltd v Wills</i> (1992) 177 CLR 1 at 69.</p> <p>53 (1992) 174 CLR 455.</p> <p>54 (1610) 8 Co Rep 107a; 77 ER 646.</p> <p>55 Toohey, 'A government of laws and not of men' (1993) 4 Public L R 158 at 170.</p> <p>56 Opeskin and Wheeler (eds) <i>The Australian Federal Judicial System</i>, p 119.</p> <p>57 Bigwood (ed) <i>Legal Method in New Zealand</i>, pp 228-229.</p> <p>58 <i>Ibid</i> p 265.</p> <p>59 Gleeson, <i>The rule of law and the Constitution</i>, pp 85, 97-99.</p> <p>60 Mason, 'Rights, values and legal institutions' (1997) <i>Australian Journal of International Law</i>, pp 1-16; McHugh J, 'The judicial method' (1999) 73 ALJ 37.</p> <p>61 (1992) 175 CLR 1.</p> <p>62 (1991) 174 CLR 379.</p> <p>63 (1993) 177 CLR 541.</p> <p>64 Dicey, <i>The law of the Constitution</i>, 10th edn, p 175.</p> <p>65 <i>Commonwealth Parliamentary Debates</i>, Vol 8, 18 March 1902, p 10962 at pp 10989 et seq.</p> <p>66 <i>Ibid</i> p 10967.</p> <p>67 <i>Re Wakim; ex parte McNally</i> (1999) 198 CLR 511.</p> <p>68 Rose, 'The bizarre destruction of cross-vesting' in Stone and Williams (eds) <i>The High Court at the crossroads</i>, 2000, ch 6.</p> <p>69 At 582.</p> <p>70 At 580 per McHugh J.</p> <p>71 At 580 per Gummow and Hayne JJ.</p> <p>72 At 540.</p> <p>73 (2000) 202 CLR 535.</p> <p>74 <i>R v Duncan; ex parte Australian Iron and Steel Pty Ltd</i> (1983) 158 CLR 535.</p> <p>75 (1999) 197 CLR 510.</p> <p>76 See Hill (1999) 27 FL Rev 547 at 573.</p> <p>77 (1999) 199 CLR 462.</p> <p>78 <i>Kable v DPP</i> (1997) 189 CLR 51 at 109-110, 137-139.</p> <p>79 For example, <i>Re Refugee Review Tribunal; ex parte Aala</i> (2000) 204 CLR 82.</p> <p>80 <i>Australian Securities and Investments Commission v Edensor Nominees Pty Ltd</i> (2001) 204 CLR 559.</p> |
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