

## Commentary on Chapter 5

### *The Hon Justice Stephen Gageler AC*

United States Supreme Court Justice Stephen Breyer has published several books on constitutional theory. The first, *Active Liberty*, was published in 2005. The second, *Making Our Democracy Work*, was published in 2010. In 2008, Richard Posner critiqued the first of Breyer's two books. The critique was in one of Posner's own many books, *How Judges Think*. It was in a chapter entitled – not in a nice way – 'Comprehensive Constitutional Theories'. Posner started off with this:

A Supreme Court Justice writing about constitutional theory is like a dog walking on his hind legs; the wonder is not that it is done well but that it is done at all. The dog's walking is inhibited by anatomical limitations, the Justice's writing by political ones. Supreme Court Justices ... cannot write with the freedom and candor of [others, presumably including Posner himself].<sup>1</sup>

Justices of the High Court, by convention and disposition, tend to be more circumspect than Supreme Court Justices when it comes to commenting on contemporary constitutional issues. They observe particular restraint in commenting on cases that they, and their colleagues, have decided. Murray Gleeson captured the prevailing ethos with characteristic succinctness when he said, 'Judges ... give their reasons for their decisions – once'.<sup>2</sup>

That is a long preamble to me explaining that I find my assigned task of commenting on Rosalind Dixon's excellent chapter anatomically challenging. I am a little too self-conscious of my position and a little too close to her subject matter to be confident of maintaining balance.

The ambition of Rosalind's chapter is to take the large canvass that was the final chapter of Leslie Zines' *The High Court and the Constitution* – identifying and critiquing the methods, techniques and attitudes of the High Court as constituted up to and during his time – and to compare that large canvass with a snapshot of two recent decisions of the High Court as currently constituted. Where are we now, she asks, along a spectrum that has legal formalism shading into legalism at one end and legal realism shading into functionalism at the other end? The answer, she says, is that the High Court has maintained its distinctively legalist character, to which it had pretty much adhered from the 1920s, from which it had departed for a time in the 1980s and 1990s, and

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1 Richard Posner, *How Judges Think* (Harvard University Press, 2008) 324.

2 Murray Gleeson, 'Current Issues for the Australian Judiciary' (Speech, Supreme Court of Japan, Tokyo, 17 January 2000).

to which it had returned by about 2000. But mixed in with the legalism, supporting legalist positions to some extent and moderating legalist outcomes just a little, she sees elements of functionalism.

I will return to the terminology. But I will start with the chosen points of reference.

The choice to single out two of the recent citizenship cases as emblematic of the methodology of the contemporary High Court is interesting. *Re Gallagher*<sup>3</sup> is little more than a footnote to *Re Canavan*.<sup>4</sup> So the choice is, in effect, to focus on just one case. Despite the risk of selection bias which the chapter acknowledges, the choice is well made.

For one thing, *Re Canavan* was a case in which the political stakes were high. The outcome was dramatic. In the language of the Attorney-General of the day, it was 'brutal'.<sup>5</sup> It was not what the Prime Minister of the day had confidentially predicted and it was not what many commentators had speculated. Yet it was accepted with the most transient of grumblings by insiders and outsiders across the political spectrum, and the ship of state sailed on. In that respect it illustrates the continuing validity of Leslie Zines' observation that, despite the impediment that the High Court has repeatedly been to the realisation of the ambitions of governments of the right almost as much as governments of the left, the role of the High Court as the final constitutional arbiter has a remarkably high level of acceptance within the Australian community. Noteworthy is that the iconic and laconic Australian film, *The Castle*,<sup>6</sup> has the High Court's role in upholding the Constitution as a defining theme of its distinctive Australianness. It is telling to contrast the reception of *Re Canavan* in Australia in 2017 with the populist outcry that followed the decision of the Supreme Court of the United Kingdom in *R (Miller) v Secretary of State for Exiting the European Union*<sup>7</sup> (the first Brexit case) earlier the same year. We have in Australia an embedded culture of constitutionalism.

For another thing, *Re Canavan* was a unanimous decision of the High Court, the reasons for which were expressed in a joint judgment which was produced quite rapidly. The nature of a joint judgment is that it is like a chorus sung from a hymn sheet selected by a committee to accommodate a variety of musical tastes on the part of the various choristers and to offend none. Not every chorister can be expected to be happy with every note, but all can be treated as content at least to hum along with the tune. If you want to assess the methodology of the High Court as an institution, then looking at a joint judgment will allow you to identify those judicial techniques that are broadly acceptable to all members of the institution. It would be too harsh to say that you are getting the lowest common denominator. You are getting a sort of line-of-best-fit, in which approaches attractive to individual justices that can be regarded as statistical outliers have been eliminated.

Finally, the subject matter of *Re Canavan* presented the High Court with a novel interpretative challenge. Section 44 of the Constitution had been glimpsed briefly in the case law in the 1990s, but it had remained since federation very much a sleeper.

3 (2018) 263 CLR 460.

4 (2017) 263 CLR 284.

5 'Interview with Peter van Onselen and Paul Kelly and George Brandis', *Sunday Agenda* (Sky News, 2017).

6 Directed by Rob Sitch, Working Dog Productions, 1997.

7 [2018] AC 61.

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When woken, it gave rise to surprising difficulties. The subject matter of the section simply did not intersect with what had hitherto been seen as the mainstream issues of Australian constitutional law. The section appeared to combine, in the words of Tony Blackshield quoted in the chapter, 'substantive concerns that are nowadays wholly or partly anachronistic, with language that is either bafflingly obscure or frustratingly intractable'.<sup>8</sup> The techniques employed in coming to grips with its meaning and operation in a contemporary setting were therefore techniques of a primal kind. They were unrefined by the accumulation of precedent and unassisted by many of the usual guideposts to constitutional decision-making. In *Re Canavan* we can see the contemporary High Court navigating largely uncharted terrain relying on the most basic of its modern institutional instincts.

Having introduced the contemporary snapshot, let me go back to say something of Leslie Zines' broad canvass. Leslie was afforded in his career a luxury denied modern academics. He was given time to reflect deeply on his chosen field before he was expected to publish. He used the time well. The first edition of *The High Court and the Constitution* was published in 1981. By that time Leslie had been teaching constitutional law for a good 20 years. In that year, I was fortunate to be in his class. As a student, I was not then aware of its publication. It was not, and never was to become, a prescribed text.

When I looked at the structure of the book some years later, I saw in it the structure of the course which Leslie took an entire year to teach to his students. The first chapter, 'The struggle for standards', was the first month or so, just getting to the *Engineers' case*.<sup>9</sup> The three chapters on s 92 were the term or so spent on the topic of what until *Cole v Whitfield*<sup>10</sup> came to be decided had been the most socially and economically significant and doctrinally intractable problem in Australian constitutional law. The other chapters on characterisation, intergovernmental relations, separation of powers, the *Communist Party*<sup>11</sup> doctrine and the rise of Australian nationhood were all recognisably discreet elements of the course. The final important chapter on the methods, techniques and attitudes of the High Court was not. Ideas at that level of abstraction were not taught or even spoken about by Leslie directly in his lectures. They were something that students came to understand inferentially from an intense analysis of the case law arranged thematically and unfolded in the sweep of Australian history.

The ideas we see in Leslie's last chapter need to be understood in the context of all of the preceding chapters. They are ideas that were anchored in the concerns of Australian constitutional doctrine that had until then been thrown up by Australian history. The pre-occupation of Australian constitutional law had long been, and then very much remained, Commonwealth-State relations. Leslie's main concern in critiquing legalism and in advocating a more realist approach to constitutional adjudication lay mainly with addressing what he saw as the tendency for hard-edged constitutional rules to hold back national social and economic development. The tendency of the black-letter of the Constitution as interpreted by the High Court to hold back social and economic development appears much less to us now than it appeared to Leslie in

8 Tony Blackshield, 'The Unfortunate Section Forty-Four' (2018) 29 *Public Law Review* 3, 9-10.

9 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

10 (1988) 165 CLR 360.

11 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

the 1980s. The preoccupations of Australian constitutional law moved on in the 1990s to focus on a range of structural implications about which Leslie was never particularly happy. He often told the story of how, as junior legal officers in the Attorney-General's Department, he, Pat Brazil and Bill Deane had talked about producing an annotated version of the Constitution. He would add: 'Well, of course you could not do that now because of all of those bits you cannot see!' In looking now at Leslie's later chapter, we need to recognise that times have changed – that his concerns were not exactly the same as our current concerns.

The sequence of the analysis contained in Leslie's last chapter on the methods, techniques and attitudes of the High Court is worth noting. It began with 'legalism'. It moved to 'precedent' – a hot topic in the wake of the territorial representation cases of the late 1970s. It went on to a discussion of 'judicial policies and values'. Then it moved to the important, and very much related, topic of 'facts that are relevant to validity'.

Legalism is an enigmatic concept. Those who are critical of it (and I have been one) too readily equate it with formalism and dismiss it as a local brand of mechanical jurisprudence. Those who support it stress that it is concerned with the distinctiveness of legal method. They tend to be less than unanimous when it comes to identifying precisely what it is that makes legal method distinctive.

Leslie's analysis of legalism was quite nuanced. He pointed out that the champion of legalism, Sir Owen Dixon, had never suggested that there existed a sharp distinction between the legal realm and the political realm. He pointed out that embedded within a legalistic approach were judicial values and a judicial sense of the polity and of the role of the judiciary within it. His main criticism of legalism was not that it excluded judicial policies and values but that it failed to articulate them. The root problem for him was the 'inarticulate major premise'<sup>12</sup> which obscured the significance of economic and social considerations that he saw as necessarily forming part of any constitutional reasoning.

When he got to the topic of 'facts that are relevant to validity', Leslie made a telling observation about the connection between legalism and constitutional facts. These are his words:

The criticism that the court engages in abstract or conceptual reasoning without regard to the social or economic factors surrounding the law may point to a tendency to prefer an interpretation of law that will exclude the relevance of social facts or else reduce their relevance.<sup>13</sup>

Although tentatively expressed, that is an extraordinarily perceptive observation.

I referred at the outset to two of Stephen Breyer's books on constitutional theory. The thesis of the second book (the one not critiqued by Richard Posner) basically comes down to this. Constitutional adjudication is pretty much all about recognising choices and weighing consequences. When I first read it, I thought that the thesis was trivial. Now, I am not sure that I disagree with it or have much to add.

Of course, the ambit of the choices that you think are available to you as a constitutional adjudicator depends on your view of how much you are constrained by the formal legal material: text, structure, history, precedent. And how far you think you can

12 Leslie Zines, *The High Court and the Constitution* (Butterworths, 1981) 303, citing *Lochner v New York* 198 US 45, 76 (1905) (Holmes J).

13 Zines (n 12) 314.

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go in weighing the consequences depends on your view of how much it is appropriate in formulating or administering a rule of constitutional law to inquire into issues of fact. In other words, just how formalist or realist you choose to be in the categorical rules you are prepared to propound in interpreting and applying the Constitution is very much related to your appetite for inquiring into issues of constitutional fact.

That brings me to *Re Canavan*. The text was strong. The history was equivocal. The precedents were not determinative. The High Court opted in the resolution of the case for a bright line – if you like, formalist – rule, which cleaved fairly closely to the literal meaning of the constitutional text, together with a relatively narrow, purposive – if you like, functionalist – exception: the so-called ‘constitutional imperative’.

The High Court did not arrive at that resolution in a vacuum. It did so in the context of the arguments that were put to it. Indeed, any understanding of the methodology of the High Court would be incomplete were it to focus only on conclusions. The methodology can only be completely understood in light of the range of arguments that are treated as arguable and how and why losing arguments are rejected.

In arriving at the result that it did, the High Court rejected alternative and arguably more functionalist rules that were put to it in argument. It did so for essentially functionalist reasons. None of the alternatives was rejected at a conceptual level or as wholly incapable of being reconciled with the constitutional text. Each, it was pointed out, had undesirable consequences, either in terms of introducing invidious distinctions between natural-born and naturalised citizens, or in terms of necessitating an inquiry into a politician’s state of mind and favouring the obtuse at the expense of the vigilant.

In doing all that, as Rosalind quite rightly points out, the High Court in *Re Canavan* was acting consistently with Leslie’s understanding that a policy-based analysis of a constitutional problem is not necessarily inconsistent with the choice of a formalist solution.