

Peter Allen: I still call Australia home

- **Principles of interpretation**
- **Some specific powers**
 - **Corporations power**
 - **Aborigines**

The importance of the judiciary

“The chief lawmakers in our country may be and often are the judges because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all lawmaking. The decisions of the courts on economic and social questions depends on their economic and social philosophy; and for the peaceful progress of our people during the 20th century we shall owe most to those judges who hold a 20th century economic and social perspective and not to a long outgrown philosophy, which was itself the product of primitive economic conditions.” (Teddy Roosevelt)

Interpretation

- **To what extent is judging subjective:**
 - Literalism or formalism v realism
- **The extent that policy factors are identified and discussed**

Interpretation: literalism

- **“...the court’s sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of the line consequentially drawn or on the other and that it has nothing whatever to do with the merits or demerits of the measure. ... (Sir Owen Dixon CJ)**
- **“Now, it cannot be too clearly understood that this court is not in the smallest degree concerned to consider whether such a project is politically, economically, or socially desirable or undesirable.” (Rich J)**

Problems with literalism

- The words of 1900 are not sufficient for the 21st Century
- “The practice of legal interpretation is mired in a deep and persistent crisis ... the crisis reflects a loss of faith concerning the availability of objective criteria permitting the ascription of transparent meanings to legal texts. ... (The judges) bring to the dispute the historical perspective, precedent and intellectual rigour in interpreting the Constitution in the context of that current pressure” (Rosenfeld)
- E.g. *Rowe v Wade* has not been repealed

Realism: reasonable proportionality

- “... (I)t is material to ascertain whether, and to what extent, the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in so doing, causes adverse consequences unrelated to the achievement of that object. In particular, it is material to ascertain whether those adverse consequences result in any infringement of fundamental values traditionally protected by the common-law, such as freedom of expression.” (*Nationwide News Pty Ltd v Wills* (1992) 177 CLR at p. 30, per Mason CJ)
- the test of reasonable proportionality has an important role to play when the validity of a law hinges upon the proposition that it seeks to protect or enhance a subject matter or legitimate end within power. There is a need to ensure that such a law does not unnecessarily or disproportionately regulate matters beyond power under the guise of protecting the enhancing the legitimate end in view.” (ibid. Mason CJ)

Literalists are sometimes realists

Rich J in the context of WW II said a country with a federal form of government “cannot hope to survive unless it submits itself for the time being to what is in effect a dictatorship with power to do anything which can contribute to its defence.” *Dawson v Commonwealth* (1946) 73 CLR 157 at p. 177, compared to:

- “Now, it cannot be too clearly understood that this court is not in the smallest degree concerned to consider whether such a project is politically, economically, or socially desirable or undesirable.” (see above)

Underlying reasons

- **“The reasons for judgment in the higher appellate courts increasingly look behind the legal rule to discover the informing legal principle and behind the informing legal principle to discover the basic value”**

(G. Brennan, ‘A critique of criticisms’, *Monash University Law Review* 19 (1993), pp 213-6)

- **“Natural Law provides ... a philosophical basis for seeing such things as human rights as going deeper than any particular Act of Parliament.”**

(*Sir William Deane: The Things that Matter*, (Sydney 2002), p. 100.)

Different attitudes to judging

- **“The judges of the nation are only the mouths that pronounce the words of the law. Inanimate beings who can moderate neither its force nor its rigour.”**

Montesquieu

- **“One wills at the beginning the result; one finds the principle afterwards; such is the genesis of all juridical construction.”**

Saleilles

Benjamin Cardozo

“The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has constancy and uniformity and average value greater than its component elements. ... The pebble on the beach talking loudly to its neighbour does not define the shoreline.”

John Bray CJ

- "... the law exists to serve ... [the people] ... , to provide a just settlement of their disputes and to protect them against violence and dishonesty. Amongst other things, it represents the elements of stability and permanence in the community. It should be neither in advance of the times nor too far behind them. ... The judge is the minister and not the master of the law. He must deal fairly by it. As Aristotle said, 'To seek to be wiser than the laws is the very thing which is by good laws forbidden'. But within the ambit of judicial discretion and judicial creativity, confined and delimited as it rightly is, the judge should be mindful of the needs and the opinions of the age in which he lives."

Judicial balance

- **Balancing competing interests and evolving community standards**
- **Avoid populism but remain relevant**
- **Literalism is a fiction to hide subjectivity:**
 - **Wartime**
 - **Protect property not religious freedom**
 - **Tear up the State/Federal balance**
 - ***Mabo* change the land law of the nation**

Specific powers

Specific powers: s. 51

- Corporations power**
- Aborigines**

Some specific powers

- **Corporations power: s. 51(xx)**
“foreign corporations, and trading and or financial corporations formed within the limits of the Commonwealth;”
 - *Huddart Parker v Moorehead* [1909] 8 CLR 330- narrow view
 - *Concrete Pipes Case* [1971] 124 CLR 468- overturned *Huddart Parker*
 - *Incorporation Case* [1990] 169 CLR 482- referral s. 51(xxxvii)
 - *The Industrial Relations Case (Work Choices)* 2006

The Industrial Relations Case (Work Choices)

- **S. 51(xxxv):** power with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”
- **The court turned the intention of enumerated powers on its head**
- **Ignored the limitation in (xxxv)**
- **Kirby J: “Truly this reveals the apogee of federal constitutional power and a profound weakness in the legal checks and balances which the founders sought to the Australian Commonwealth.”**

“s.51(xxvi) ...power to make laws with respect to people of any race...”

**A people
dispossessed:
different approaches to
Aboriginals**

A greater concern

- **1962 Aborigines clearly entitled to vote**
- **1967 Constitution amended to include them in the census and to give the Commonwealth power to assist their welfare**
- **Land Rights by some States**

Australian land law 1991

Australia was *terra nullius* - vacant land taken by the Crown and granted by:

- An estate in fee simple (freehold title)
- Crown leasehold- pastoral leases
- Torrens title system provided certainty
- Land law underpins economic activity

***Mabo (no.2)* [1992] 175 CLR 1**

- **Court ignored problems with Mabo's adoption and differences to Aborigines**
- **Historical conclusions without evidence**
- **Terra nullius did not apply: the Aborigines had native title recognised in our law**
- **Freehold title is a superior title that extinguishes native title**
- **Where Aborigines can show a continuing connection to their land their native title continues except where freehold title applies**
- **What happens with Pastoral Leases and mining titles?**

***Mabo* aftermath**

- High Court attacked
- ***Wik People v QLD* [1996] 187 CLR 1: pastoral leases**
- ***Yorta Yorta* [2002] 77 ALJR 356**
- **Competing native title claims**
- **Native Title tribunal**
- **Indigenous Land Use Agreements**

<video>