

# *The Constitutional Jurisprudence of the High Court: 1989–2004*

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## ***1. Introduction: The Contribution of Sir Anthony Mason to Australian Constitutional Law***

It is a great honour to be asked to give the inaugural Sir Anthony Mason Lecture. Sir Anthony is regarded by many as one of the greatest judges that the Australian legal profession has produced, as important and as influential in the modern era as Sir Owen Dixon was in an earlier period.

Sir Anthony was born in 1925 and grew up in Sydney where he attended Sydney Grammar School. After two years as a Flying Officer in the RAAF, he studied at the University of Sydney where he graduated with first class Honours in Arts and Law. After serving articles with Clayton Utz & Co, he became Associate to Justice Roper in the New South Wales Supreme Court. He went to the Bar in 1951. His practice was primarily in equity and commercial law but he appeared in a number of important constitutional and appellate cases in the High Court of Australia as junior counsel. They included *R v Davison*<sup>1</sup> and *R v Richards; Ex parte Fitzpatrick and Browne*.<sup>2</sup>

He was a forceful and dominant advocate who impressed the force of his personality on every court in which he appeared. Experienced Equity judges who said they needed no argument to decide where the balance of convenience lay in a motion for an interlocutory injunction soon found themselves listening to a forceful argument that it lay on the side of Mason's client. While at the Bar, he lectured for five years in Equity at the University of Sydney Law School. Among his students were the future Justice Gaudron and the future Justice Gummow. Sir Anthony was appointed a Queen's Counsel in 1964 and in the same year became the Solicitor-General for the Commonwealth. He was appointed to the Supreme Court of New South Wales in 1969 where he sat as a member of the Court of Appeal until 1972, when he was appointed to the High Court. In 1987, he was appointed Chief Justice of the High Court and remained in that office until he retired in 1995.

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\* Justice of the High Court of Australia, 1989-2005. This lecture was delivered as the Inaugural Sir Anthony Mason Lecture in Constitutional Law on 26 November 2004 in the Banco Court of the Supreme Court of NSW. I am indebted to my Associates, Mrs Jelita Gardner-Rush and Ms Anna Thwaites, for their assistance in its preparation.

1 (1954) 90 CLR 353.

2 (1955) 92 CLR 157.

During his tenure as Chief Justice, the High Court decided many important constitutional cases. Professor Zines thinks that *Cole v Whitfield*<sup>3</sup> was the most important constitutional case decided during Sir Anthony's period as Chief Justice.<sup>4</sup> My choice would be the trilogy of free speech cases: *Nationwide News Pty Ltd v Wills*,<sup>5</sup> *Australian Capital Television Pty Ltd v Commonwealth*<sup>6</sup> and *Cunliffe v Commonwealth*.<sup>7</sup>

No one reading the Commonwealth Law Reports for the period 1972 to 1995 could miss the change in Sir Anthony's approach to judging. In 1979 in *State Government Insurance Commission v Trigwell* he said:

The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities.<sup>8</sup>

Sixteen years later when he left the Court, he had been a party to more judgments making more dramatic changes in the common law than any judge in the history of Australia. As I later seek to show, it was the dramatic changes in Australian society that commenced shortly after *Trigwell* was decided that brought about the change in his approach to judging. It was the political, economic and societal changes that commenced in the 1980s that are the true explanation of what has been called Mason I and Mason II as a judge. I think that he regarded Australia's evolving status as an independent nation as inevitably requiring a change in the approach of High Court justices to judging.

As Chief Justice, his judgments provided the central point around which a majority of justices could coalesce. An empirical analysis of the voting patterns of the Mason Court has shown that Sir Anthony was the core member of the Court's decision-making process. He formed part of the successful majority more often than any other justice and he was joined more often by other justices than any other justice.<sup>9</sup>

Throughout the legal profession, Sir Anthony became associated with the movement away from Sir Owen Dixon's 'strict legalism'. He placed less emphasis in legal reasoning on the formal application of rules or formulae. He saw precedent — and he took a similar attitude in relation to constitutional interpretation — as 'an exercise in judicial policy which calls for an assessment of a variety of factors in which judges balance the need for continuity, consistency and predictability against the competing needs for justice, flexibility and rationality'.<sup>10</sup>

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3 *Cole v Whitfield* (1988) 165 CLR 360 ('*Cole*').

4 Leslie Zines, 'Most significant case of the Mason High Court' (1995) 30 *Australian Lawyer* 18 at 18.

5 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*').

6 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

7 (1994) 182 CLR 272.

8 (1979) 142 CLR 617 at 633 (Mason J).

9 Russell Smyth, "'Some Are More Equal than Others' – An Empirical Investigation into the Voting Behaviour of the Mason Court' (1999) 6 *Canberra Law Review* 193 at 207.

10 Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93 at 111.

I have known him for over 40 years and I had the honour of serving as the junior member of the High Court under Sir Anthony as Chief Justice for over six years. By any reckoning, he was a very great justice.

In this Lecture, I was asked to discuss the constitutional jurisprudence of the High Court over the six years I was on the Mason Court and during the subsequent periods of the Brennan and Gleeson Courts. Obviously, it is impossible in the course of a single lecture to discuss adequately the constitutional jurisprudence of the Court over such a lengthy period. I flirted with the idea of discussing four particular areas of the Court's jurisprudence: (1) federalism (2) the relationship of the individual to the State (3) the judicial power of the Commonwealth and (4) nationhood and sovereignty; and the effect of external influences on the Court's interpretative methods. But after looking at the cases again, I concluded that in a single lecture I could not do justice to those subjects. Instead, I propose to discuss in some detail the methods of constitutional interpretation that have prevailed during each of the Mason, Brennan and Gleeson Courts and the factors that led to the Mason Court's approach.

## ***2. Trends, Methodologies and Influences in Constitutional Law***

The search for trends in High Court jurisprudence is no easy task. A period in the Court's jurisprudence is often identified with the Chief Justice, irrespective of the continuity and change of membership of the Court, and often without close regard to the views of each justice, each of whom exercises an independent judgment. Justices may also change their views over time and they may approach constitutional questions differently according to the kind of issue that arises. In more recent times, the eschewing of an over-arching theory, or even theoretical discussion, by many justices makes trends even harder to discern.

### ***A. Radicalism and Changing Times***

#### ***(i) The Fall and Rise of Legalism***

When Mason CJ became Chief Justice, constitutional commentators generally agreed that the text of the Constitution and the accepted legal rules and principles of interpretation, in particular 'legalism', did not always determine constitutional questions. Commentators contended that, as long as the competing arguments were rational, two or more competing interpretations could be reasonably held<sup>11</sup> and decisions must turn on factors external to the Constitution. This consensus has been described as the 'demise of legalism'.<sup>12</sup>

Yet, by 2003, commentators were contending that the emphasis of the majority of the Gleeson Court was legalism.<sup>13</sup> In the view of these commentators, the Court

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11 Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5 *Constitutional Law and Policy Review* 21 at 23.

12 Ibid.

13 Brad Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234 at 250; Zines, above n11 at 26, 29.

appeared to be distancing itself from some of the methodologies of the Mason Court. They identified some level of retreat from an open consideration of values, a varying regard for consequentialist considerations and a renewed preoccupation with doctrinal scholarship.<sup>14</sup> Some have even argued that the Gleeson Court has articulated a return to legalism.<sup>15</sup> They contrast this with the ‘rejection of legalism and the adoption of a law-making role by a number of justices on the Mason, and to a lesser extent, the Brennan Courts’.<sup>16</sup> Thus, Justice Selway’s view in relation to the majority of the Gleeson Court is that:

The approach is fundamentally conservative and legalistic, based upon precedent and logical analysis. But the approach is not rigid or ‘tied to the past’. Where it is clear that the Constitution needs to develop then this has been achieved.

Given the perceived need for public confidence, the emphasis remains legalism. It may not be strict ‘legalism’, but it is legalism nonetheless.<sup>17</sup>

Does this suggest that over the past 15 years the Court’s constitutional jurisprudence has come full circle, from conservative orthodoxy to progressive activism under the Mason Court and back to a legalistic approach under the Gleeson Court? Does this indicate that there has been a revival of legalism under the Gleeson Court? Or have these apparent trends been more imagined than real?

Professor Zines thinks that there has been no discernible break in the judicial method applied by the majority in the Gleeson, Brennan and Mason Courts.<sup>18</sup> I think this is correct. The Mason Court’s approach to methods of constitutional interpretation was not as radical as some portray it. Despite the views of some individual judges, most notably Deane and Toohy JJ and to a lesser extent Gaudron J, the Mason Court generally adopted an approach that was consistent with the traditional common law constitutional method.

The tools of the common law constitutional method, like the tools of the general common law judicial method, are various. The common law constitutional method is a house of many rooms. It emphasises text and the drawing of constitutional implications from the text and structure of the Constitution. It relies heavily on previous authorities and the doctrines associated with those authorities. It uses history, particularly for ascertaining the purpose of particular constitutional provisions. But it recognises that none of these tools — including textual analysis — may be decisive. As a result, throughout the history of the Court, the common law method has permitted judges to consider the practical consequences of

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14 Zines, above n11 at 26, citing Paul Finn, ‘Australia Compared’ in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221 at 228-229.

15 Zines, above n11 at 29; Haig Patapan, ‘High Court Review 2001: Politics, Legalism and the Gleeson Court’ (2002) 37 *Australian Journal of Political Science* 241 at 241-242; Selway, above n13 at 250.

16 Patapan, above n15 at 242.

17 Selway, above n13 at 250.

18 Leslie Zines, ‘The Present State of Constitutional Interpretation’, in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 224 at 231.

competing interpretations. And since the beginning of the Mason Court, where the constitutional text is not compelling, as is often the case, it takes into account conflicting social interests, values and policies in seeking to give the Constitution a construction that accords with the needs of contemporary Australia.

Inherent in the common law constitutional approach is the recognition that many constitutional words and phrases derive from common law concepts and principles and pre-federation statutes and that most terms of the Constitution are inherently capable of evolving. Hence, the meaning of such words and phrases may be informed by developments in the common law and statute and elsewhere that are consistent with the text and structure of the Constitution.

The Brennan and Gleeson Courts have generally adhered to this approach and to the approach of Mason CJ with respect to ascertaining implications in the Constitution.<sup>19</sup> In *Australian Capital Television Pty Ltd v Commonwealth*,<sup>20</sup> Mason CJ said that where the implication is derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. But he went on to say that, ‘where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary to the preservation of the integrity of that structure’. In *Lange v Australian Broadcasting Corporation*,<sup>21</sup> the Brennan Court rejected the approach that Deane and Toohey JJ championed during the Mason Court period of deriving implications from ‘free-standing’ principles that the Constitution apparently embodied.

Drawing conclusions from the logic of the structure of the institutions and principles established by the Constitution has also become a relatively familiar technique in relation to federalism,<sup>22</sup> the separation of judicial power,<sup>23</sup> and in relation to the constitutional provisions that establish representative and responsible government.<sup>24</sup> Each of the Mason, Brennan and Gleeson Courts has used it.

How then has the perception arisen that the Mason Court was a far more radical court than the Brennan Court and the Gleeson Court? If the Mason Court used the traditional common law constitutional method, why have commentators perceived it as more radical than its predecessors or its successors? If the Mason Court was a radical court, what gave rise to its radicalism?

It does not follow that, because courts use broadly similar methods of constitutional interpretation, or judging generally, the result of applying those

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19 See, for example, *McGinty v Western Australia* (1996) 186 CLR 140; and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567 (‘Lange’).

20 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135 (Mason J).

21 *Lange* (1997) 189 CLR 520.

22 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410.

23 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

24 Cheryl Saunders, ‘Future Prospects for the Australian Constitution’, in Robert French, Geoffrey Lindell & Cheryl Saunders (eds), *Reflections on the Australian Constitution*, (2003) 212 at 222-223.

methods will be the same. Negligence lawyers are familiar with the phenomenon of judges, faced with the same body of evidence, coming to opposite conclusions as to whether that evidence was capable, as a matter of law, of establishing negligence. Similarly, justices in constitutional cases often reach diametrically opposed views on the meaning of constitutional provisions even though they all use the same method of constitutional interpretation. Two illustrations of the phenomenon from the pre-Mason Court era are the sharply divided High Courts in the *Territorial Senators Case*<sup>25</sup> and the *Tasmanian Dam Case*.<sup>26</sup>

(ii) *The Influence of an Attitude of Mind*

Just as significant — perhaps more so — than methods of constitutional interpretation are attitudes of mind. In my view, what distinguished the Mason Court from its predecessors, but not, I think, from the Brennan and Gleeson Courts, was a particular attitude of mind. I have no doubt that members of the Mason Court had a different view of the legal universe from their predecessors. I think that it was an attitude of mind, rather than the adoption of any particular method of judging, that brought about results in many cases, including constitutional cases, during the Mason Court and established its reputation as a radical Court.

The attitude of mind, to which I refer, was the belief that Australia was now an independent nation whose political, legal and economic underpinnings had recently and essentially changed. These developments outside the pages of the Commonwealth Law Reports required a different approach to the interpretation of the Constitution and a different approach to judging generally. Strict legalism was no longer an efficient tool for interpreting a Constitution or deciding private or public law cases — assuming strict legalism ever really applied in practice and was not simply a piece of judicial rhetoric. So, from 1987, the Mason Court as an entity rejected strict legalism as an interpretative tool. This approach of the Mason Court was neither surprising nor unique in the history of the Australian federation. In *Victoria v Commonwealth*,<sup>27</sup> Windeyer J pointed out that a similar change in interpretative approach had occurred in 1920 with the *Engineers' Case*<sup>28</sup> as the result of the new perception that, after 20 years of federation and World War I, Australia was largely a unified nation. His Honour said:

In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances. This does not mean that courts have transgressed lawful boundaries: or that they may do so.<sup>29</sup>

The attitude of mind of the Mason Court was influenced, in my view, by the dramatic changes in Australian society that began to appear in the early 1980s,

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25 *Western Australia v Commonwealth* (1975) 134 CLR 201.

26 *Commonwealth v Tasmania* (1983) 158 CLR 1.

27 *Victoria v Commonwealth* (1971) 122 CLR 353.

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

29 *Victoria v Commonwealth* 122 CLR 353 at 396-397 (Windeyer J).

chiefly as the result of globalisation. Those changes continued throughout the period of the Mason Court. They were the spark that set alight the opportunities for a new and distinctive Australian jurisprudence provided by the enactment of the *Privy Council (Limitation of Appeals) Act 1968* (Cth) and the *Privy Council (Appeals from the High Court) Act 1975* (Cth).

By the 1980s, in comparison with its 19th century position, Australia had been in economic decline for a century.<sup>30</sup> It had become obvious that, if Australia was to maintain even its declining prosperity, it had to become a more competitive society. Whatever else competition does for a society, it forces it to change. Competition is the agent of change. Stability is not a mark of a competitive society. As a result of the need for Australia to become a competitive society, in December 1983 the Australian dollar was floated and exchange controls lifted. Not long after, the financial system was deregulated. Increasingly, the Australian economy was deregulated. Many services that had formerly been provided by government passed into the hands of private enterprise.

The so-called ‘Industrial Relations Club’ establishment that, since Federation, had played a major part in regulating the Australian economy, was gradually stripped of much of its power. Employers driven by competitive pressures ruthlessly cut costs. Retrenchment of employees became a much-used cost cutting exercise. Only those who performed could expect to hold their employment. Management systems were streamlined and flattened out. The race of middle managers almost became extinct. In the universities, contracts were substituted for tenure. With the possible exceptions of federal judges, in no area of life was security of employment any longer guaranteed. For most of Australia’s history, it had been a given that children would have a better life than their parents. In the 1980s, Australians began to wonder whether that was true.

The passing of the *Australia Acts* in 1986 formally severed the constitutional ties with United Kingdom which had been weakening for decades. In addition, throughout the years of the Mason Court, the Hawke-Keating governments were in power. They saw the future of Australia as involved with Asia, not the United Kingdom or Europe. They floated the idea of a Republic. The thinking and many of the beliefs and values that permeated the Age of Menzies largely disappeared during this period. Globalisation did more than open up the Australian economy; it opened up Australian society to new ideas, to a new way of seeing the world. And by the commencement of the period of the Mason Court, human rights had become part of the political and social agenda, and international law and agreements were becoming a source of common law and domestic statute law.

Consciously or unconsciously, the need for change became widely accepted in most areas of Australian life. In his book, *The End of Certainty*, Paul Kelly wrote:

The 1980s was a time of both exhilaration and pessimism, but the central message shining through its convulsions was the obsolescence of the old order and the promotion of new political ideas as the basis for a new Australia.<sup>31</sup>

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<sup>30</sup> Paul Kelly, *The End Of Certainty: The Story of the 1980s* (1st ed, 1992) at 13.

<sup>31</sup> *Id* at 1.

It would be surprising if the judiciary had missed this message. Long ago, Judge Cardozo pointed out that judges cannot escape the currents of their times. ‘All their lives’, he said,

forces which they do not recognize and cannot name, have been tugging at them — inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James’s phrase of ‘the total push and pressure of the cosmos,’ which, when reasons are nicely balanced, must determine where choice shall fall.<sup>32</sup>

My belief is that, consciously or unconsciously, the idea of a new Australia influenced the approach of the Mason Court to judging. It made it a far more radical — and in terms of approach — a far different Court from its predecessors. Yet, surprisingly, when the constitutional cases are examined, I doubt if the Mason Court was any more radical in that area than the Brennan Court and Gleeson Court. I use ‘radical’ in the sense of fundamental change.

(iii) *A Radical Mason Court?*

On a rough count, the Mason Court decided about 70 constitutional cases. But only a handful of them can be regarded as radical. *Cole v Whitfield*<sup>33</sup> was certainly a radical decision. There the Court effectively overruled about 127 cases decided on s 92, including cases such as the *Bank Nationalisation Case*<sup>34</sup> and held that s 92 applied only to measures that discriminate against interstate trade and commerce in a protectionist sense. Yet paradoxically the reasoning in *Cole* was conservative. It is perhaps as close as you can get to a High Court decision decided on the original intent of the framers of the Constitution. Other decisions that were generally regarded as radical were:

- *Australian Capital Television Pty Ltd v Commonwealth*<sup>35</sup> where the Court declared that the Constitution contained an implied freedom to communicate on political and governmental matters.
- *Theophanous v Herald and Weekly Times Ltd*<sup>36</sup> and *Stephens v West Australian Newspapers Ltd*<sup>37</sup> where the Court constitutionalised the law of defamation.
- *Cheatle v The Queen*<sup>38</sup> where the Court held that, on a trial on indictment for an offence against the Commonwealth, s 80 of the Constitution required a unanimous verdict of the jury.
- *Street v Queensland Bar Association*<sup>39</sup> where the Court held that s 117 of the Constitution required a liberal interpretation and that a legal

32 Benjamin Cardozo, *The Nature Of the Judicial Process* (1921) at 12 (Lecture I).

33 *Cole* (1988) 165 CLR 360.

34 *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.

35 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

36 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 (*‘Theophanous’*).

37 (1994) 182 CLR 211.

38 *Cheatle v The Queen* (1993) 177 CLR 541 (*‘Cheatle’*).

39 *Street v Queensland Bar Association* (1989) 168 CLR 461 (*‘Street’*).

requirement as to residence applying to all persons may still have a discriminatory effect on an out-of-State resident because it might apply unequally to that person by subjecting him or her to a greater burden or disadvantage than that imposed on a resident of the legislating State. The Court overruled *Henry v Boehm*<sup>40</sup> which had interpreted and applied s 117 narrowly.

- *Health Insurance Commission v Peverill*<sup>41</sup> where the Court held that a retrospective legislative reduction in the amount of benefits payable to a medical practitioner was not an acquisition of property within s 51 (xxxii) of the Constitution.
- *Australian Tape Manufacturers Association Ltd v Commonwealth*<sup>42</sup> where the Court held that it was not essential to the concept of a tax that the imposition should be paid to a public authority. Accordingly, the Court held that a legislatively imposed royalty on vendors payable to the owners of copyright in sound recordings was a tax.
- *Harris v Caladine*<sup>43</sup> where the Court held that Ch III of the Constitution was not infringed by a law that empowered the registrars of the Family Court to decide certain matrimonial causes issues even though they were not appointed in accordance with s 72 of the Constitution.

Apart from these cases and *Cole*, I do not think that any of the other constitutional decisions of the Court could fairly be regarded as radical. In fact, a number of the Mason Court's decisions were cautious, indeed conservative.

In *New South Wales v Commonwealth* (the *Incorporation* case),<sup>44</sup> the Court, with Deane J alone dissenting, held that the corporations power did not empower the Federal Parliament to legislate for the incorporation of trading and financial corporations, thereby dashing the hopes for a uniform federal company law.

In *Re Dingjan; Ex parte Wagner*,<sup>45</sup> a majority of the Court held that the corporations power did not extend to making a law that regulated contracts entered into by natural persons where the contracts had a relationship with the business of a trading corporation. In *Philip Morris Ltd v Commissioner of Business Franchises (Vic)*<sup>46</sup> and in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*,<sup>47</sup> the Mason Court refused to overrule a series of unsatisfactory cases concerned with the meaning of the term 'excise' in s 90 of the Constitution. The Brennan Court subsequently effectively overruled those cases in *Ha v New South Wales*.<sup>48</sup>

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40 (1973) 128 CLR 482.

41 (1994) 179 CLR 226.

42 (1993) 176 CLR 480.

43 (1991) 172 CLR 84.

44 (1990) 169 CLR 482.

45 (1995) 183 CLR 323.

46 (1989) 167 CLR 399.

47 (1993) 178 CLR 561.

48 (1997) 189 CLR 465.

In a series of cases,<sup>49</sup> the Mason Court, over powerful dissents by Deane and Gaudron JJ, refused to hold that courts martial could not try service personnel for serious offences that were substantially the same as offences under the *Crimes Acts* of the Commonwealth and New South Wales even though persons who were not appointed in accordance with Ch III of the Constitution presided over the courts martial. The Mason Court held that courts martial had jurisdiction as long as the offences had a service connection or the accused had a service status.

In *Mickelberg v The Queen*,<sup>50</sup> the Mason Court affirmed the narrow meaning of 'appeal' in s 73 of the Constitution and refused to admit fresh evidence in High Court appeals.

The Brennan Court existed for only three years. But at least four constitutional decisions of the Brennan Court were as radical as any constitutional decision of the Mason Court. They were:

- *Ha v New South Wales*<sup>51</sup> where the Court accepted a wide interpretation of the Commonwealth's exclusive power to impose excises and overruled previous decisions of the Court that had upheld the validity of a number of State statutes which were the source of considerable revenue to the States.
- *Kable v Director of Public Prosecutions (NSW)*<sup>52</sup> where the Court held invalid a State law that detained a named individual in prison after the expiration of his sentence. The Court held that it was incompatible with the integrity, independence and impartiality of the Supreme Court of New South Wales, a Court in which federal jurisdiction had been vested under Ch III of the Constitution.
- *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*<sup>53</sup> where the Court held invalid a law of the Federal Parliament that authorized a Federal Court judge to prepare a report for a Minister so that the Minister could make a declaration in respect of a certain area of land. The Court held that the performance of such a function was not compatible with holding the office of a judge appointed under Ch III of the Constitution.
- *Lange v Australian Broadcasting Corporation*<sup>54</sup> where the Court unanimously held that the Constitution contained an implication of freedom of communication on political and government matters and that the law of defamation could not be inconsistent with that freedom.

The Gleeson Court too has made radical constitutional decisions. The decision in *Sue v Hill*<sup>55</sup> holding that the United Kingdom was now a 'foreign power' for the purpose of the Constitution was a radical decision by any measure. So, in my view,

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49 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

50 (1989) 167 CLR 259.

51 *Ha v New South Wales* (1997) 189 CLR 465.

52 (1996) 189 CLR 51.

53 (1996) 189 CLR 1.

54 *Lange* (1997) 189 CLR 520.

55 (1999) 199 CLR 462.

was the recent decision in *Singh v Commonwealth*<sup>56</sup> where the Court did not apply the definition of ‘alien’ formulated by the Gibbs and Mason Courts. The Gleeson Court held that a person born in Australia of foreign parents who had not lived here for 10 years was an ‘alien’ for the purposes of the Constitution.

Many would also regard as radical the decision of the Gleeson Court in *Re Wakim; Ex parte McNally*<sup>57</sup> striking down the cross-vesting legislation that had operated for over a decade and had been held valid by a statutory majority of the Brennan Court in 1998 in *Gould v Brown*.<sup>58</sup>

This analysis of the Mason, Brennan and Gleeson Courts suggests that the Mason Court was no more radical in the result in constitutional cases than the Brennan Court and perhaps no more radical than the Gleeson Court.

The reputation of the radicalism of the Mason Court stems, in my opinion, from two sources. First was its radicalism in non-constitutional cases. Second was the effect caused by the abandonment of any pretence to strict legalism and the open discussion of the values and policies that influenced its decisions. Looked at as independent bodies of work, however, the constitutional jurisprudence of the Mason Court cannot match in radicalism the jurisprudence of that Court in non-constitutional cases.

At the head of the list of radical decisions in the non-constitutional sphere of the Mason Court is, of course, *Mabo v Queensland (No 2)*<sup>59</sup> which held that native title to land survived the Crown’s acquisition of the sovereignty of Australia and the Crown’s radical title to the land. But consider in no particular order other far-reaching non-constitutional decisions of the Mason Court.

- In *Burnie Port Authority v General Jones Pty Ltd*<sup>60</sup>, the Court declared that the venerable rule in *Rylands v Fletcher*<sup>61</sup> was no longer part of the common law of Australia.
- In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*<sup>62</sup> the Court held, as an exception to the long-established rule that only the parties to a contract can sue on it at common law, that a person who is not a party to an insurance policy but for whose benefit the policy had been made could sue on the policy at common law.
- In *Minister for Immigration and Ethnic Affairs v Teoh*,<sup>63</sup> the Court affirmed the rule that an international Convention ratified by Australia does not become part of Australian law unless its provisions have been incorporated into municipal law by statute. However, the Court held that the ratification is an adequate foundation for a legitimate expectation, absent statutory or

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56 (2004) 222 CLR 322.

57 (1999) 198 CLR 511.

58 (1998) 193 CLR 346.

59 (1992) 175 CLR 1.

60 (1994) 179 CLR 520.

61 (1868) LR 3 HL 330.

62 (1988) 165 CLR 107.

63 (1995) 183 CLR 273.

executive indications to the contrary, that administrative decision-makers would act in accordance with the Convention. The Court said that it was immaterial that the person relying on the legitimate expectation was unaware of the Convention or did not personally entertain the expectation.

- In *Bropho v Western Australia*,<sup>64</sup> the Court abolished the longstanding rule that the Crown was not bound by a statute unless the intention to do so was manifest from the terms of the statute or its purpose would be wholly frustrated if the Crown were not bound.

In the area of criminal law, the Mason Court affirmed protections for the accused person. In *McKinney and Judge*,<sup>65</sup> the Court held that, as a rule of practice, a trial judge should warn the jury that it was dangerous to convict an accused person solely on the basis of a confession allegedly made while in police custody when its making was disputed and not reliably corroborated. In *Dietrich v the Queen*,<sup>66</sup> the Court held that a criminal court had power to stay a trial on indictment where there was a risk of an unfair trial because the accused was impecunious through no fault of his own and could not get legal representation. And in *Ridgeway v The Queen*,<sup>67</sup> the Court held that the courts have power to stay a criminal prosecution where the accused has been induced to commit the crime by police officers.

Many other illustrations of radical decisions by the Mason Court in non-constitutional cases could be given. But, in the history of the High Court before 1987, no decisions comparable to the illustrations that I have given can be found. Little wonder, then, that the Mason Court achieved a reputation for radicalism. It is, I think, the non-constitutional cases that are the true basis of the Mason Court's reputation for radicalism. Its radicalism lay in its recognition of new common law and equitable rights (whether or not strictly so-called) and strengthening of existing rights. They included:

- title to land for indigenous people;
- protections from unfair prosecution for accused persons, flowing from the right to liberty;
- causes of action for those seeking redress for moral wrongs; and
- a higher level of protection for those whose rights and interests are affected by administrative decision-making.

Freedom of political communication was the only implied constitutional right successfully upheld in the Mason Court. No substantive wider rights jurisprudence in constitutional law was articulated or accepted by the Court. In fact, for all the concern about the legitimacy of the Mason Court's jurisprudence, the decisions that most affected the rights of Australian citizens were developed in the common law arena, which is both the legitimate context for judicial law-making, and the development of the law consistently with changing social values, and the context

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64 (1990) 171 CLR 1.

65 (1991) 171 CLR 468.

66 (1992) 177 CLR 292.

67 (1995) 184 CLR 19.

in which Parliament always has the capacity to reverse judicial results for the future.

A number of controversial new propositions seeking to constitutionalise individual rights were propounded by counsel in the Mason Court, but none, other than the freedom of political communication, succeeded. For example, in the Ch III cases, the majority of the Court refused to invalidate the legislation in *Polyukhovich*<sup>68</sup> and *Chu Kheng Lim*<sup>69</sup> on the basis of a right to freedom from, respectively, retrospective criminal law or executive detention. Nor would it accept the submission that rights to equality before the law or legal representation could be derived from the Constitution in, respectively, *Leeth*<sup>70</sup> and *Dietrich*.<sup>71</sup>

### ***B. The Common Law Method of Constitutional Interpretation***

Let me now turn to the way each of the Mason, Brennan and Gleeson Courts have used the tools of the common law constitutional method.

A majority of justices in the Mason, Brennan and Gleeson Courts have favoured a textual approach to constitutional interpretation and generally have adhered to the common law constitutional method. In this context, the significance of the circumstances surrounding the text varies according to the nature of the problem.<sup>72</sup> Where precedent dictates the application of a particular method of construction, that approach is generally followed unless there are persuasive grounds for departing from it. Moreover, the Mason, Brennan and Gleeson Courts in various cases have each applied different interpretive methodologies to different constitutional provisions, albeit within the confines of the common law constitutional method.

The Mason, Brennan and Gleeson Courts have also generally used history, including the Convention Debates, as a tool in constitutional interpretation. However, its use has typically been confined to the identification of a specialised meaning of certain terms: in *Cole v Whitfield*<sup>73</sup> in relation to the meaning of the word ‘free’; in *Ha*<sup>74</sup> to identify the purpose of the relevant concept ‘excise’; in *Cheatle*<sup>75</sup> to understand the essentials of the term ‘jury’ in s 80 of the Constitution.

#### *(i) The Mason Court*

Professor Saunders has said that all High Court justices have wavered between interpreting the Constitution as an ordinary statute with unusual characteristics and developing a methodology that attaches significance to constitutional status in

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68 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

69 *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1.

70 *Leeth v Commonwealth* (1992) 174 CLR 455 (‘*Leeth*’).

71 *Dietrich v the Queen* (1992) 177 CLR 292 (‘*Dietrich*’).

72 See *Brownlee v The Queen* (2001) 207 CLR 278 at 285 (Gleeson CJ & McHugh J).

73 *Cole* (1988) 165 CLR 360.

74 *Ha v New South Wales* (1997) 189 CLR 465.

75 *Cheatle* (1993) 177 CLR 541.

order to develop the potential of the Constitution as the framework for government.<sup>76</sup> That is, I think, true of members of the Mason Court.

Professor Zines has argued that, during the Mason Court there was ‘a rejection of formal criteria’ — the Court’s approach to s 90 and s 92 are examples — ‘a more open application of policy considerations, and, where appropriate, a deliberate balancing of conflicting social interests or values’.<sup>77</sup> The Mason Court also recognised that ‘it may be necessary to resort to other factors if a reasoned conclusion was to be reached’, such as policy considerations and value judgments.<sup>78</sup> Mason J acknowledged in 1986 (the year before he became Chief Justice) that the Court was moving away from the doctrine of legalism ‘toward a more policy oriented constitutional interpretation’.<sup>79</sup>

From the beginning of the Mason Court, it was apparent that the Court’s interpretive approach had shifted from that of its predecessors. The Court became concerned with substance instead of form. It looked at what the law *did*, rather than the form it took. In *Street v Queensland Bar Association*,<sup>80</sup> for example, the Court articulated a test for whether a law violated s 117 that focused on the *effect* of that law on the person claiming discrimination.<sup>81</sup> The Court also rejected the ‘criterion of operation’ test in relation to s 92 and the ‘criterion of liability’ test in relation to the excise cases.

The Mason Court also used an interpretive approach that combined the finding of constitutional implications with a focus on individual rights. The result was the ‘free speech cases’ where the Court identified and gave effect to an implied constitutional freedom of political communication as a limitation on legislative and executive power and constitutionalised the law of defamation. The Court derived an implication of representative government from the text and structure of the Constitution, a necessary incident of which was a freedom of communication between the people on government and political matters. However, as I have indicated, the Mason Court did not develop an extensive rights jurisprudence. Indeed, in the free speech cases, most members of the Court stressed the relationship between the implied freedom of political communication and the text of the Constitution and voiced scepticism about the possibility of comprehensive rights protection.<sup>82</sup>

In matters of constitutional interpretation, there was a discernible trend in the Mason Court to accord less weight to precedent<sup>83</sup> and to engage in a more open discussion of competing constitutional policy and value considerations than its

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76 Saunders, above n24 at 221.

77 Zines, above n11 at 24.

78 *Id* at 23.

79 Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience’ (1986) 16 *Federal Law Review* 1 at 5.

80 *Street* (1989) 168 CLR 461.

81 Adrienne Stone, ‘Constitutional interpretation’ in Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 137 at 138.

82 *Id* at 139.

83 Zines, above n18 at 226.

predecessors. A former Chief Justice and some commentators described the Mason Court as engaging in ‘judicial activism’. Some, such as Sir Garfield Barwick, criticised the Court’s decisions in *ACTV*, *Nationwide News* and *Theophanous* as threatening democracy and parliamentary government.<sup>84</sup>

However, two members of the Mason Court — Deane and Toohey JJ — challenged traditional modes of constitutional interpretation. Their Honours propounded an approach to constitutional interpretation during the Mason Court that the rest of the Court did not accept — even those members who expressly rejected the earlier legalism. Deane and Toohey JJ articulated a radical approach that relied on sources external to the Constitution, such as the supposed assumptions of the founders and fundamental common law principles, in order to derive restraints on legislative and executive power. They also used the principle of popular sovereignty — the sovereignty of the people — as the source of the authority of the Constitution to create constitutional rights.<sup>85</sup> Their Honours identified certain rights from ‘the conceptual basis of the Constitution’ such as a right to equality.<sup>86</sup>

From fundamental rights and principles recognised by the common law at the time the Constitution was adopted, they also identified an implication of freedom of political communication.<sup>87</sup> Their approach was based on the imputed intention of the voters who adopted the Constitution in the referenda of 1899 and 1900. Deane and Toohey JJ advocated the principle that fundamental rights and freedoms recognised by the common law in 1900 limited federal power.<sup>88</sup> This was based on the view that the framers and the people assumed that common law rights would be preserved and that it was therefore unnecessary to include them in the Constitution. The other members of the Mason Court did not accept this approach.

In *Theophanous*, Deane J held that, as the authority of the Constitution derived from the sovereignty of the people and the people’s continuing acquiescence to it, the intention of the framers was irrelevant. He said that ‘the Constitution must be construed as ‘a living force’ representing the will and intentions of all contemporary Australians, both women and men, and not as a lifeless ‘declaration of the will and intentions of men long since dead’.<sup>89</sup> Only Kirby J in the Brennan and Gleeson Courts has consistently upheld this view.<sup>90</sup>

However, applying their different interpretive methodology led Deane and Toohey JJ to a different result from the rest of the Court only in *Leeth v*

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84 Garfield Barwick, ‘Parliamentary Democracy in Australia’ (1995) 5 *Upholding the Australian Constitution* 205 at 216-217.

85 Zines, above n18 at 226.

86 *Leeth* (1992) 174 CLR 455 at 486 (Deane & Toohey JJ).

87 *Nationwide News* (1992) 177 CLR 1 at 69 (Deane & Toohey JJ)..

88 See *Nationwide News* (1992) 177 CLR 1 at 69 (Deane & Toohey JJ); *Leeth* (1992) 174 CLR 455 at 485-487 (Deane & Toohey JJ)..

89 *Theophanous* (1994) 182 CLR 104 at 173 (Deane J)..

90 See, for example, *Eastman v The Queen* (2000) 203 CLR 1 at 79-80 (Kirby J).

*Commonwealth*<sup>91</sup> where their Honours found an implied right to equality in the Constitution.<sup>92</sup>

(ii) *The Brennan Court*

Some have seen the approach of the Brennan Court towards constitutional interpretation as a retreat from the more policy oriented ‘adventurousness’ of the Mason Court. But although some members of the Brennan Court were highly critical<sup>93</sup> of the interpretive methodologies favoured by various members of the Mason Court, as I have already said, the results of the Brennan Court in constitutional cases were no less radical than those of the Mason Court.

The Brennan Court advocated an interpretive approach based on the text and structure of the Constitution. Thus, while the Brennan Court accepted that the Constitution embraced a system of representative government that required freedom of political communication between the people, the Court emphasised that the source of the system of representative government and the implied freedom was the text and structure of the Constitution. Each concept was confined by reference to what the specific provisions of the Constitution necessarily required.

In *Lange v Australian Broadcasting Corporation*,<sup>94</sup> the Brennan Court, including Toohey and Gaudron JJ, reiterated a strong commitment to the common law constitutional method of interpretation. Under this approach, the process of drawing implications was to be ‘tightly controlled’ by the text and structure of the Constitution. Implications could be drawn only where logically or practically necessary to give effect to the structure of the Constitution as revealed in its text, not simply from the vague notions of representative and responsible government that permeate and inform the text. In declining to apply non-textual interpretative approaches, the Brennan Court also explicitly rejected Deane and Toohey JJ’s approach of drawing implications from the assumptions of the Founders and fundamental common law principles. I doubt if Sir Anthony Mason would have disagreed with the approach of the Brennan Court in *Lange* to finding implications in the Constitution.

In *Lange*, the Brennan Court upheld the existence of an implied freedom of communication on political and government matters but stressed that it was a freedom *from* laws, not a constitutional freedom *to* communicate. As a result, unlike the Mason Court, it refused to constitutionalise defamation law. Instead, it said that defamation law must be developed to conform to the freedom. Perhaps the tone of the judgment suggested a more legalistic approach towards constitutional interpretation than the Mason Court’s. The Court emphasised that

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91 *Leeth* (1992) 174 CLR 455.

92 Zines, above n18 at 226.

93 *Theophanous* (1994) 182 CLR 104 at 143 (Brennan J); *McGinty v Western Australia* (1996) 186 CLR 140 at 229-235 (McHugh J); *Kruger v Commonwealth* (1997) 190 CLR 1 at 66-68 (Dawson J). See also George Williams, ‘Globalisation of the Constitution – The Impact of International Norms’, in French, Lindell & Saunders, above n24, 192 at 209.

94 *Lange* (1997) 189 CLR 520.

the concept of representative government was not a ‘free-standing principle’, but existed only as provided for in the Constitution. Nevertheless, in the result the Brennan Court accepted the concept of the implied freedom of political communication in respect of government and political matters and held that it was not confined to elections periods.

(iii) *The Gleeson Court*

Justice Selway has argued that there has been a consensus in the Gleeson Court that the Constitution is to be interpreted as an Imperial statute enacted in 1900, albeit a special kind of statute. Justice Selway contends that all members of the Gleeson Court are fundamentally ‘textualists’.<sup>95</sup> On this approach, the text is the starting point for any interpretation issue, and if the constitutional text is sufficiently clear, then the meaning of that text will be ‘controlling’.<sup>96</sup>

In general, the Gleeson Court has not embraced a single theory of interpretation. Rather, the individual members of the Court have ‘employed a number of different interpretive modes in resolving constitutional issues, and ... have differed in their approaches to interpretation’.<sup>97</sup> Gummow and Kirby JJ and I, in particular, have articulated our preferred but somewhat different approaches. Nevertheless, it is possible to identify several broad methodologies favoured by the present Court.

The first of these is the textual approach, which focuses on the text of the Constitution and gives constitutional words and phrases their natural or ordinary meaning. There is general agreement among all members of the Court that each constitutional inquiry commences with an examination of the constitutional text. However, as the natural meaning of the text rarely resolves the issue in question, it is necessary to apply other interpretive approaches.<sup>98</sup>

The Gleeson Court also favours a structural approach, which requires justices to consider the Constitution as a whole and enables the Court to draw inferences from a combination of provisions. For example, a structural analysis of the Constitution is helpful for ascertaining general principles about the structure of government and the relationships created by the constitutional text. Nevertheless, while a useful interpretive tool, structural analysis does not usually provide a complete answer to an inquiry.<sup>99</sup> The Court has therefore turned to other methodologies. It is at this point that divergence among the members of the Court emerges.

For the majority of the Court, history plays a significant role in constitutional interpretation. Under the Gleeson Court, there has been a continued focus on

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95 Selway, above n13 at 239.

96 See *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 382 (Gummow and Hayne JJ).

97 Susan Kenny, ‘The High Court on Constitutional Law: The 2002 Term’ (2003) 26 *University of New South Wales Law Journal* 210 at 210; see also Dan Meagher, ‘Guided by Voices? – Constitutional Interpretation on the Gleeson Court’ (2002) 7 *Deakin Law Review* 261 at 273; Selway, above n13 at 243–244.

98 Kenny, above n97 at 214.

99 *Id* at 216–217.

ascertaining the purpose of constitutional provisions based on the objective intentions of the Constitution's framers. However, there is probably a consensus that questions of constitutional interpretation are not determined simply by linguistic considerations that pertained a century ago.<sup>100</sup> The Court also accepts that the historical context of a constitutional word or phrase is relevant.<sup>101</sup> As one commentator has said, the Gleeson Court has seen constitutional history as an ongoing narrative. On this view, the state of the law in 1900 provides context, but it is not an interpretative straitjacket.<sup>102</sup>

The principal mode of constitutional interpretation under the Gleeson Court has been a doctrinal approach. This methodology applies principles derived from the Court's previous authorities relevant to the resolution of the constitutional issues in question.<sup>103</sup> For example, the majority justices in the controversial decision in *Re Wakim; Ex parte McNally*<sup>104</sup> relied heavily on past authorities<sup>105</sup> in holding that the Commonwealth's attempt to confer State judicial power on federal courts pursuant to the national cross-vesting scheme contravened Ch III of the Constitution. However, this method accepts that the principles when applied must be informed by developments in the common law and statute and events outside the law courts that are consistent with the text and structure of the Constitution.<sup>106</sup> It therefore recognises that 'the Constitution is an extraordinary law, one that must endure indefinitely and adapt to a constantly changing world'.<sup>107</sup>

Subject to the limits of its text and structure, the Constitution must also be capable of responding to external developments. An example is the s 80 jury cases<sup>108</sup> where contemporary practice concerning juries was taken into account. A striking example is *Sue v Hill*<sup>109</sup> on whether the United Kingdom is now a 'foreign power'. Other examples are the 'aliens' power cases in which the emergence of Australia as a sovereign nation and its independence from the United Kingdom have been important factors.<sup>110</sup>

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100 Most members of the Court agree, I think, with the view expressed by Gummow J in *SGH Ltd v Federal Commissioner of Taxation Australia* (2002) 210 CLR 51 at 75 [44].

101 See, eg, *Brownlee v The Queen* (2001) 207 CLR 278 at 284-285 (Gleeson CJ and McHugh J), 299 (Gaudron, Gummow & Hayne JJ), 337-338 (Callinan J); Meagher, above n97 at 282.

102 Meagher, above n97 at 287.

103 Kenny, above n97 at 217.

104 (1999) 198 CLR 511.

105 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 579-580 (Brennan J).

106 Meagher, above n97 at 271-272, citing *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 629 (Gummow J); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 97 (Gaudron & Gummow JJ); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 500-501 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ); *Brownlee v The Queen* (2001) 207 CLR 278 at 291-292 (Gaudron, Gummow & Hayne JJ).

107 Meagher, above n97 at 287.

108 *Cheng v The Queen* (2000) 203 CLR 248 at 270; *Brownlee v The Queen* (2001) 207 CLR 278 at 284 (Gleeson CJ & McHugh J).

109 *Sue v Hill* (1999) 199 CLR 462.

In *Grain Pool of Western Australia v Commonwealth*,<sup>111</sup> the majority identified the ‘central’ conception of constitutional words as at 1900 and then had regard to history and other extrinsic materials to ascertain the extent of the ‘radius’ of those words. As a result, it saw nothing in the patents power to prevent Parliament legislating for the protection of plant variety rights even if those rights would not have been treated as patentable in 1900. Similarly, in *Brownlee v The Queen*<sup>112</sup> — a case concerned with trial by jury under s 80 of the Constitution — the Gleeson Court held that the essential aspects of trial by criminal jury in 1900 did not prevent legislation authorising a conviction by a 10 person jury if two members of the jury had to be discharged. In contrast, in *Cheatle v The Queen*,<sup>113</sup> the Mason Court had identified an essential aspect of the criminal jury trial as at 1900 as requiring a unanimous verdict and held that s 80 of the Constitution precluded majority verdicts.

The approach of the Gleeson Court also accepts that the Court is required to interpret and apply values inherent in the law. Individual justices may disagree about those values within the limits of the legal method, that is, legal reasoning that adheres to legal principle, derived from precedent.<sup>114</sup> Speaking extra-judicially, Gleeson CJ has said that this is not formal legalism: it is legalism consistent with judicial law-making.<sup>115</sup> Such an approach endorses judicial law making, the finding of constitutional implications and the need to accommodate social change.<sup>116</sup>

The Gleeson Court has also not hesitated in appropriate circumstances to take into account practical and political considerations attending the case. In *Abebe v Commonwealth*,<sup>117</sup> the majority justices treated the practical consequences of an adverse decision to the Commonwealth as important and upheld a law that limited the grounds upon which the Federal Court could entertain a dispute. The majority was influenced by the practical consideration that, if the legislation were found to be invalid, the Commonwealth could not establish specialist courts to deal with particular issues. Gleeson CJ and I said that such a result ‘would create immense practical problems for the administration of federal law which the makers of the Constitution can hardly have intended’.<sup>118</sup> In arguing against rigidity and impracticality, we also said that consequences may throw light on the meaning of the Constitution, although they could not alter its meaning.<sup>119</sup> We said that ‘only the clearest constitutional language’ could result in confining Parliament to the

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110 *Re Patterson, Ex parte Taylor* (2001) 207 CLR 391; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162; *Singh v Commonwealth* (2004) 222 CLR 322.

111 (2000) 202 CLR 479.

112 (2001) 207 CLR 278.

113 *Cheatle* (1993) 177 CLR 541.

114 Murray Gleeson, *The Rule of Law and the Constitution* (2000) at 134.

115 *Id* at 129.

116 Patapan, above n15 at 243.

117 (1999) 197 CLR 510.

118 *Abebe v Commonwealth* (1999) 197 CLR 510 at 531 [41] (Gleeson CJ & McHugh J).

119 *Abebe v Commonwealth* (1999) 197 CLR 510 at 532 [43] (Gleeson CJ & McHugh J).

limited and impractical choices that were proposed in that case and that nothing in the language of the Constitution forced such choices on the Parliament.<sup>120</sup>

The Gleeson Court also accorded substantial weight to practical consequences in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*.<sup>121</sup> There, the Court upheld earlier decisions holding that s 72 (which deals with the appointment and tenure of federal judges) did not apply to a court created under the Territories power. Gleeson CJ, Callinan J and I took into account the need to accommodate ‘the realities of government and administration with which the Constitution must deal’<sup>122</sup> and the fact that the case raised the lawfulness of convictions and court decisions in many past cases.<sup>123</sup> The question for the Court in *Re Governor, Goulburn Correctional Centre* was whether a Territory judge, not having been appointed in accordance with s 72 of the Constitution, had been validly appointed. The practical effect of holding the appointment invalid would have been that all Territory judges would have been invalidly appointed, with the result that all decisions of Territory judges would have been voidable. Gleeson CJ, Callinan J and I held that the conclusion that the Territory judge had been validly appointed was a construction of the Constitution that ‘is open on the language, and produces a sensible result, which pays due regard to the practical considerations arising from the varied nature and circumstances of the territories’.<sup>124</sup>

Some commentators have suggested an inconsistency between the Court’s approach in *Abebe* and its approach in *Re Wakim; Ex parte McNally*.<sup>125</sup> However, the majority justices in *Re Wakim* took the view that the force of the negative implication to be drawn from Ch III, as expounded in *In Re Judiciary and Navigation Acts*, could not be overcome by the practical consequences of the decision. It is wrong to infer from *Wakim* that, for the Gleeson Court, social and political practices and consequences are irrelevant in deciding constitutional issues.<sup>126</sup> As Professor Zines has said, the outcome of the case resulted from ‘a combination of implications from the text, inferences from past decisions and a general view that doctrinal and structural considerations led inevitably to the conclusion’.<sup>127</sup>

In *Sue v Hill*,<sup>128</sup> the Court examined external factors such as the evolution of Australia’s relations with the United Kingdom and the development of its sovereignty in international affairs since 1900. Nothing in the Court’s decision in

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120 *Abebe v Commonwealth* (1999) 197 CLR 510 at 532 [44] (Gleeson CJ & McHugh J)..

121 (1999) 200 CLR 322.

122 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 331 [7] (Gleeson CJ, McHugh J & Callinan JJ).

123 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 330 [5] (Gleeson CJ, McHugh J & Callinan JJ).

124 *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 at 332 [9] (Gleeson CJ, McHugh J & Callinan JJ).

125 (1999) 198 CLR 511. Eg, Zines, above n11 at 28; Zines, above n18 at 235-236; Graeme Hill, ‘The Demise of Cross-Vesting’ (1999) 27 *Federal Law Review* 547 at 573.

126 Zines, above n11 at 28.

127 Zines, above n18 at 235.

128 *Sue v Hill* (1999) 199 CLR 462.

that case can be described as legalistic, textual or narrowly doctrinal.<sup>129</sup> In the teeth of much textual material that suggested the opposite conclusion, the Court found that the United Kingdom was a ‘foreign power’ for the purpose of s 44(i) of the Constitution. The Court interpreted the Constitution in light of the history of the constitutional and diplomatic evolution of Australia’s relationship with the United Kingdom in order to reach a conclusion that was consistent with modern political conceptions. Gleeson CJ, Gummow and Hayne JJ held that the practical consequence of Australia’s independence meant that the words of the Constitution should be interpreted in light of the changed constitutional circumstances. Modern political perceptions were given precedence over the literal meaning of the terms of the Constitution. In this case, social consequences and historical-political developments were used to illuminate the meaning of the Constitution.

As Professor Zines wrote in *The Oxford Companion to the High Court of Australia*, the impression that the Gleeson Court was endeavouring to distinguish itself ‘from the policy-oriented and value-based judgments of the Mason Court’ is ‘more a matter of tone and style than of substance’.<sup>130</sup>

### 3. Conclusion

There has been a tendency to assume that the constitutional decisions of the Mason Court were more expansive than they were and that constitutionally it was a far more progressive and radical court than the Brennan and Gleeson Courts. But, as I have indicated, some of the constitutional decisions of the Mason Court were conservative and even legalistic. Those who point to *Re Wakim* as indicating a legalistic approach by the Gleeson Court and assert that a different result would have been reached by the Mason Court, as it was by a statutory majority of the Brennan Court in *Gould v Brown*,<sup>131</sup> should remember the *Incorporation Case*.<sup>132</sup> There, six members of the Mason Court held that the Federal Parliament’s power to make laws with respect to ‘corporations formed within the ... Commonwealth’ only authorised laws with respect to corporations already incorporated.

No doubt the style and tone of judgments in the Brennan and Gleeson Courts may make them seem more legalistic than those of the Mason Court. But, in terms of results, there does not seem to be an appreciable difference in the constitutional jurisprudence of the three Courts. Effectively, the Brennan Court overruled *Theophanous* and *Stephens* — two decisions of the Mason Court — in *Lange*. It may be that the Brennan Court would also have come to a different decision in the *Phillip Morris* excise case. But apart from these cases, I doubt that the Brennan Court would have decided any constitutional case differently from the Mason Court. The Gleeson Court would also certainly have followed the *Lange* approach and not decided *Theophanous* and *Stephens* as the Mason Court did. It may be that the Gleeson Court would also not have decided *Cole v Whitfield* as the Mason

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129 Zines, above n18 at 229.

130 Zines, ‘Gleeson Court’, in Blackshield, Coper & Williams, above n81, 307 at 308.

131 (1998) 193 CLR 346.

132 *New South Wales v Commonwealth* (1990) 169 CLR 482.

Court did. On the other hand, I think that there is a good chance that a majority of the Gleeson Court would have found for the Commonwealth in the *Incorporation Case*, thereby permitting a uniform federal company law. The Gleeson Court may also have reached a different conclusion in *Cheatle*, thereby permitting majority verdicts in jury trials for federal offences. But apart from these cases, I doubt whether any of the roughly 70 constitutional cases decided by the Mason Court would be decided differently by the Gleeson Court.

It is not really surprising that, after the demise of strict legalism, there should be such unanimity of result in the decisions of the three Courts in constitutional cases. Despite the differences in the style and tone of the judgments, ultimately the text of the Constitution is controlling. Moreover, it may be that the differences between legalism and a purposive or policy based constitutional jurisprudence have been overstated. As this is the inaugural Sir Anthony Mason Lecture, it is fitting that Sir Anthony should have the last word on that subject. Three weeks after his retirement, he said:

Too much should not be made of the movement away from legalism towards a more purposive or policy oriented form of jurisprudence. The text of the Constitution must always remain the principal foundation of constitutional interpretation. The treatment in the *Tasmanian Dams* case<sup>133</sup> of s 100 of the Constitution and the acceptance of the authority of the earlier decision in *Morgan v Commonwealth*<sup>134</sup> show that legalism is still alive, as did *New South Wales v Commonwealth* (the *Incorporation Case*).<sup>135</sup> That is not surprising. In the final analysis, the Constitution is our paramount law, and interpretation requires that we give effect to its language and heed what it says.<sup>136</sup>

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133 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 154 (Mason J), 182 (Murphy J), 249 (Brennan J), 251 (Brennan J).

134 (1947) 74 CLR 421.

135 *New South Wales v Commonwealth* (1990) 169 CLR 482.

136 Anthony Mason, 'Trends in Constitutional Interpretation' (1995) 18 *University of New South Wales Law Journal* 237 at 245.