The High Court, The Constitution and Australian Politics

Book Launch

Chief Justice Robert French AC
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The book, which it is my pleasure to launch tonight, takes its place in a body of significant scholarship about the relationship between the High Court and Australian federal politics. That scholarship, acknowledged by the editors in their introduction, includes Geoffrey Sawer's classic 'Australian Federal Politics and Law' published in 1956, Brian Galligan's 'Politics of the High Court: A Study of the Judicial Branch of Government in Australia' published in 1987, David Solomon's 'The Political High Court: How the High Court Shapes Politics' published in 1999 and Jason Pierce's book published in 2006 'Inside the Mason Court Revolution: The High Court of Australia Transformed'. The stated objectives of the authors, against that background, is a renewal and extension of Brian Galligan's original focus on broad trends in the relationship between politics and constitutional law in Australia. Professor Galligan, who has written a chapter on the Barwick Court, is a distinguished Australian political scientist and I congratulate the editors, Rosalind Dixon and George Williams, for having engaged both legal academics and political scientists as contributors.

There are some topics for discussion which have only to be stated to threaten the discussants with their apparent immensity and complexity. 'Life, the Universe and Everything' is one such topic. 'The High Court, the Constitution and Australian Politics' is another. The short answer to the first topic according to Douglas Adam's pan-dimensional supercomputer, 'Deep Thought' in the 'Hitchhikers Guide to the Galaxy' was 42. Several numerical answers to the second topic appear in Chapter 2 of the book written by Russell Smyth and Vinod Mishra under the title 'Judicial Review, Invalidation and Electoral Politics'. That chapter sets out rates of invalidation of Federal and State legislation by the Court during the periods in which each of its Chief Justices held office and during periods defined by the term of a particular Prime Minister's office. The authors also looked to rates of invalidation by reference to the time intervals between the enactment of the impugned legislation and the invalidating decision.

The last table in Chapter 2, which brings us closest to the simplicity of the '42' approach, combines several variables including one designated 'The Chief Justice Variable' to yield a number called a 'logit regression'. Its purpose is to measure whether the Court under its various Chief Justices was more likely to strike down legislation dependent upon the political colour of the government in power and the length of the time it was in power. Taking Sir Owen Dixon as a base of '0', the answer to The High Court, The Constitution and Australian Politics in the period since I took office is -0.107. This, I have to say, is a disappointing numeral. Putting disappointment to one side, it turns out, as one would hope, that the interaction terms between particular Chief Justices and the political colour of the government in power are not significant. The conclusion reached in this interesting chapter was that during the Court's history it has generally been pro-majoritarian with arguably illusory bouts of counter-majoritarianism. Those characterisations of course depend critically upon what majority you are talking about—a past legislative majority—a present legislative majority—whether it is a Federal, State or Territory parliament whose law is in question—or perhaps a present popular majority defined by recent polling and whether that popular majority is of the Australian people as a whole, or the people of a State or Territory. Northern Territorians for example, may differ in their collective attitudes from New South Welshpersons.

The important methodological question is raised by the editors in their 'Introduction' which gives a valuable overview of the whole book. It is also raised by a number of the distinguished contributors to the fifteen chapters that follow. By way of example, Professor Michael Coper in Chapter 3, discusses the decision of the High Court that the ACT Same Sex Marriage Law was invalid on the basis of its inconsistency with the *Commonwealth Marriage Act*. The decision to hold the ACT Act invalid, like any decision to hold an Act of a State or Territory Legislature invalid for inconsistency with a Commonwealth law, may be seen by some as thwarting the will of one popularly elected parliament in favour of the will of another.

Another methodological question thrown up by the statistical approach in Chapter 3 and by the general arrangement of the book, is the selection of periods in the history of the Court as bases for analysing its interaction with Australian politics. There are risks in dividing the periods of the Court's history by reference to the terms of its Chief Justices. Such selection may, as is acknowledged in the book, involve some implied assumptions

about the influence of particular Chief Justices during the whole of their tenures over the Court's decisions and the ways in which that influence relates to the interaction of the Court with the political process. Take the Court headed by Sir Adrian Knox. As Anne Twomey observes in her chapter on the Court during that time—while Knox nominally led the Court the primary force on it was Sir Isaac Isaacs:

> 'who drew together the legalists and the nationalists to produce outcomes profoundly different to those of the first High Court.'

Further, change in the composition of the Court during the term of any one Chief Justice itself makes generalisations about the Court in that term difficult.

While it is flattering to have a chapter entitled 'The French Court', since I was appointed Chief Justice in 2008 there have been four departures and corresponding new appointments. The fifth will occur in June this year. After Justice Hayne retires the only Justice of the High Court remaining on the Court from the date of my appointment will be Justice Susan Kiefel. Every new appointment means the withdrawal of one person and the introduction of another. That is not just one change, it is two and as one might expect these changes can lead to the development of a new dynamic within the Court. In a sense there will have been five different High Courts between my appointment and retirement between 2008 and 2017. The editors recognise what they call the 'obvious difficulties' with periodisation by reference to Chief Justices. If I may quote from their introduction, reflecting Sir Anthony Mason's observation in his 'Foreword' to the book:

> '...it takes the Court, rather than the government or political institutions, as the relevant focus of periodisation or analysis. ... it ignores important sources of continuity between different eras on the Court, many of which are driven by the tenures of influential members of the Court other than the Chief Justice'.

The editors quite reasonably, however, invoke necessity, observing that some form of periodisation is necessary in a multi-authored project. In some periods the Chief Justice may be a reliable indicator of the current of High Court decision-making. In other eras the Chief Justice may only have spoken for himself and not for a majority. The editors say:

> 'Each of the chapters on specific Courts addresses this issue directly by identifying whether the relevant period is being studied in a 'weak' or 'strong' sense—as merely a nominal denomination of a particular time-period or as an era in which the Chief Justice was either influential on, or broadly in sync with, the decisions of other Justices'.

Another important issue recognised by the editors is that the High Court is not to be viewed for the purposes of their work as a kind of institutional black box with inputs and outputs which can then be studied for their interaction with political eddies and currents. As is suggested by some of the authors there are some periods in which there is little discernible relationship between the High Court's constitutional jurisprudence and broader political currents. In those periods it is the internal dynamics of the High Court that are significant. The change in the composition of the High Court from the end of the Griffith era to the beginning of the Knox era meant that the Court was no longer composed of people who had been centrally involved in the drafting of the Constitution. Anne Twomey points out, in her Chapter on the Knox Court, that while Isaacs and Higgins had been involved in the Conventions they had not been as central to the drafting of the Constitution as the members of the first Court. Gavan Duffy and Rich did not have a political background and had not been involved in the Conventions at all.

It is a truism to say that in a very broad sense, the High Court at the apex of the judicial branch of government and the other two branches, the legislature and the executive, are not ships passing in the night. They interact in ways which can be described and, with more difficulty, analysed. The federal public law cases which come before the Court, whether by way of appeal or in its original jurisdiction, are frequently responses to Commonwealth legislative or executive action. They may be the responses of a State or Territory or a private entity or individual. They may be outgrowths of particular debates involving political parties or interested lobby groups or other participants in the public square. It does not follow that the terms of such debates are reflected in the determination of the cases to which they give rise. Let us take the recent *Williams* cases concerning the spending power of the Commonwealth executive. That policy debate was about the use of public money for the provision of Chaplains by religious organisations in public schools. The scope of that debate is a good deal broader than contentions about the scope of s 116 of the Constitution which was raised in *Williams (No 1).* It is also a policy debate which can be carried on without reference at all to the spending power of the Commonwealth which was central to the decisions in both *Williams (No 1*) and *Williams (No 2).* It is not unusual, therefore, for legal issues to be agitated in the Court which do not themselves involve political questions but whose resolution may have a public policy consequence sought by one or other of the parties.

We can speak, therefore, in a descriptive way, of the political process giving rise to decisions by the Court which may have immediate consequences for public policy. Such decisions may be said by one political actor to reflect favourably on its own credibility and public policy position or adversely on the credibility and public policy position of another. Those forensic gibes or invocations are often based upon the result rather than any consideration of the reasoning which supports it.

In their chapter on the Court during the period Sir Anthony Mason was Chief Justice, from 1987 to 1995, Paul Kildea and George Williams refer to political responses to the Court's decisions observing that relations between the Court and politicians were defined by a small number of controversial decisions namely *Mabo, ACTV, Nationwide News* and *Dietrich*. The authors focus on the political reactions to those decisions and the degree to which they support a counter-majoritarian analysis. The decisions in *ACTV* and *Nationwide News* led to accusations of activism and the misuse of the Bench to make 'political statements' about rights protection. Some parliamentarians argued it was simply not legitimate for a Court to create new Constitutional freedoms by implication. There were calls for changes to the appointment process. The Shadow Attorney-General at the time, Peter Costello, said it was time for Judges to become public figures and to be 'outed—by the press, academics and the Parliament' and that governments needed to consult more widely before making appointments.

The Court's decision in *Mabo* attracted strong responses from State and Territory governments and, in particular, mining and pastoral interests. It was not only politicians and industry groups that reacted to the judgment. I remember being present at a conference in New Zealand in 1993 in which a leading Australian law academic described the decision as a 'monstrous presumptuous obiter dictum' and 'another usurpation by the Court of the Constitutional power of the Australian parliaments and people'[1].

The question arises whether strong political and sectoral reactions are suggestive of a counter-majoritarian Court or a counter-majoritarian decision. That may depend upon where you look for your majority. Kildea and Williams note that national surveys conducted in the twelve months after the *Mabo* decision showed that public opinion on the question of

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[1] G de Q Walker, 'Some Democratic Principles for Constitutional Reform in the 1990s' in B D Gray and R B McClintock (eds), *Courts and Policy Checking the Balance* (Brookers, 1995) 183, 189-190.

Aboriginal native title was and remained, divided. There was neither solid majority support for it nor broad public opposition against it. The apparent lack of community consensus resisted conclusions about counter-majoritarianism on the part of the Court. However, as the authors observe in considering such data, it is important to keep in mind the low levels of awareness and knowledge that exist in relation to complex High Court decisions. I would add that low level of awareness may reflect a broader issue about the extent of societal awareness of our constitutional and governmental arrangements generally.

A distinct question which can be raised is the extent to which decisions of the High Court actually have significant consequences for public policy and/or the position of political actors. Plainly there are some decisions with long term significance and others which, like a comet, blaze brightly for a short time, generate much excitement, and then fade into relative obscurity. Some of the most significant decisions for long-term policy may be received with very little fanfare. The interactions I have mentioned are obvious and relatively easily discussed and examples selected. The editors of the book and the contributors have undertaken a more ambitious task. They have done so not lightly but in recognition of the challenges which that task poses.

The book is divided into sixteen chapters. It begins with an introduction by Rosalind Dixon and George Williams incorporating an overview of what is to follow. Chapter 2, by Russell Smyth and Vinod Mishra entitled 'Judicial Review, Invalidation and Electoral Politics: A Quantitative Survey' I have already mentioned. In Chapter 3 Michael Coper discusses judicial review and the politics of Constitutional amendment under a series of entertaining headings:

- The People Trump the Court
- The People Fail to Trump the Court
- The Court Says What The People Really Meant
- The Court Trumps the People
- The Court (allegedly) Bypasses the People

He concludes with the observation that the debate of substance is not a debate about counter-majoritarianism but a debate about judicial method. That is—how effective are the principles

and precepts of constitutional interpretation in providing touchstones of genuine guidance in divining Constitutional meaning?—are they applied consistently or deployed pragmatically for justification rather than guidance. Those and other questions like them are described as 'timeless'.

Andrew Lynch in Chapter 4 discusses judicial dissent and the politics of the High Court. In the course of that discussion he makes reference to the effect of the change in composition of the Court from time to time. As he observes:

> 'It is important to acknowledge the subtle internal dynamic of the Court—the individuals appointed to it necessarily engage with and are influenced by those serving alongside them. What is created with any new appointment is nothing less than a fresh institution'.

Judicial dissent, as he says, makes plain the broad parallels that exist between difficult legal questions and the contest of ideas underpinning challenges in public policy. I'm not sure that I agree that it inevitably 'politicises' the way in which the community and government regards the composition of the Courts particularly in the context of judicial appointments. Every now and again counsel will read something from a judgment helpful to their case without observing that the judge was in dissent. Typically the dissenting judge will make the point himself or herself, the non-dissenting colleagues being too polite to do so. Mostly counsel will say his or her Honour was in dissent but not on the point for which judgment is quoted. In the event, as Andrew Lynch says, dissents are not the law the Court pronounces. Some may subsequently be vindicated by a differently composed Bench but that is rare.

Chapter 5 begins a sequence of chapters on the Court in the periods of its successive Chief Justices. The chapter on the Griffith Court is written by John Williams who observes that that Court arguably extended the life of the Constitutional Conventions for nearly another two decades as its framers on the Bench debated the true nature of the compact in a new venue. It is not surprising, as Professor Williams observes, that the Griffith Court stands in some ways apart from its successors. Its work was foundational and was shaped more by the unfinished Constitutional debates of the 1890s than the interplay between the governments of the day.

Anne Twomey has written Chapter 6 on the Knox Court which decided the *Engineers Case* and thereby, as she observes, reshaped the federal system of government conferring greater power on the Commonwealth at the expenses of the States. However, it was not particularly deferential to the wishes of the Commonwealth government where the

independence of the Court was in question. In that vein the Court decided the *Advisory Opinions Case*[2]. At the level of administrative interaction, the Chief Justice, Sir Adrian Knox, refused a number of Commonwealth requests that he provide Justices to hold Royal Commissions as he did not want the Court embroiled in political controversies. The chapter ends with a satirical poem in the form of an imaginary ode from Knox to Prime Minister Stanley Bruce which included the following lines:

> 'Could I make clear, for just your ear,
> Some point of law that's muddy
> But when you bid me raise the lid
> of some soiled linen basket
> And plunge its duds into the suds—
> O Stan, how can you ask it?'

Chapter 7 on the Isaacs Court is written by Professor Tony Blackshield. That is a Court that lasted for just 42 weeks—from Isaacs' appointment as Chief Justice on 2 April 1930 to his appointment as Governor-General. It was not the peak of his judicial career. He found himself increasingly in sole dissent and suffered ill health early in his term. Dixon, almost from the moment of his appointment, became the new intellectual leader of the Court. Rich tended to join Dixon rather than his previous voting partner, Isaacs. Dixon developed qualifications on *Engineers* which ultimately bore fruit in *Melbourne Corporation v The Commonwealth*[3]. The period of this Court coincided with that of the Great Depression. Professor Blackshield observes that the period of the Isaacs Court was far too brief and its political context far too turbulent to permit any meaningful analysis.

Gabrielle Appleby contributes Chapter 8 on the Gavan Duffy Court. Gavan Duffy was appointed at age 78 as a stopgap leader and a safe pair of hands against the background of fading political faith in the Labor Party. He is described bluntly as 'largely ineffectual as a judge let alone as Chief Justice'. He sat in less than half of the cases decided by a Full Court, wrote his own judgments only very infrequently and then very briefly. The Court is described as having been a 'famously divided Court, at least insofar as the personal relationships between the judges were concerned'. Starke and Rich did not take the appointments of McTiernan and Evatt well. Gabrielle Appleby describes the High Court's jurisprudence under the Gavan Duffy Court as concerned to protect the integrity of the Court

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2 *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

3 (1947) 74 CLR 31.

and its independence from politics. The Court was reluctant to intervene in the course of disputes over economic and labour policy. It reflected Dixon's emphasis on the importance of confidence and legitimacy to the Court's function.

Fiona Wheeler has written Chapter 9 concerning the Latham Court — Latham being a figure on whom she has conducted much research. When I read of the fractious Justices over whom Latham presided, at least in the earlier part of his Chief Justiceship, I feel a degree of sympathy for him and relief when I consider the Court as composed during my term. Latham was a politician before his appointment. The period of his Chief Justiceship is described by Professor Wheeler as providing a 'compelling study of the interplay between law and politics in the context of the Australian *Constitution*'. She characterises the Latham Court during World War II as part of the national project to defeat the enemy explicitly interpreting the Constitution to support the government's carriage of the war. Its contrasting activism post war was not necessarily counter-majoritarian in all respects. She refers teasingly to the wider story of the Latham Court including the actions of certain Justices which provides a cautionary note for those who suppose that in earlier times the High Court occupied a realm where law and politics did not collide.

The Dixon Court is discussed by Helen Irving in Chapter 10. On the question—how political was the Dixon Court, Professor Irving accepts the proposition that its constitutional judgments had a political effect as all constitutional judgments do. However, Dixon's record was of resistance to the notion of constitutional interpretation as creative and inescapably political. She quotes an interesting observation by David Solomon:

> 'The Court cannot and does not make decisions based on the current state of public opinion or parliamentary opinion but it does need to be sensitive to its role in the political process, just as all those involved in the political process need to be conscious of the Court's proper role.'

Professor Irving describes the conservative values of the Court during the period that Sir Owen Dixon was Chief Justice as aligned with the majority conservative culture of the time. In an interesting comment on the *Communist Party Case* which was decided shortly before Dixon's elevation to Chief Justice, she suggests that Menzies who appointed Dixon as Chief Justice, was himself persuaded by the Court's reasoning in the case although Dixonian legalism dictated a conclusion that neither Dixon nor the Prime Minister personally desired. Legalism for Dixon is characterised as a shield against political evils. Professor Irving

describes that as the irony and perhaps also the beauty of the claim of legalism to strict political impartiality.

Professor Brian Galligan contributes Chapter 11 on the Barwick Court, a period which stretches from April 1964 until February 1981. He argues that Barwick, despite his longevity in office, was not an influential Chief Justice as Sir Owen Dixon had been and that he was increasingly out of step with new Judges appointed throughout the 1970s. Like other authors Professor Galligan addresses the methodological problem of selecting the period of Sir Garfield Barwick's office as Chief Justice but suggests that segmenting the High Court according to its Chief Justices sets manageable periods for review.

Sir Garfield's move from the Sydney Bar to politics and high ministerial office and thence to Chief Justice of the High Court indicates what Professor Galligan calls 'the smooth interconnection between law and politics in the Menzies era'. His appointment was not criticised on the basis of his political affiliation. Arthur Calwell described Barwick as 'better fitted for his new duties for having been a politician and for the better understanding of the popular opinion and public needs that only a parliamentarian can attain'. Whitlam described Barwick as 'the greatest lawyer to enter this chamber since the Leader of the Opposition, and the greatest advocate to enter it since the Prime Minister'—an opinion he no doubt later revised. Barwick of course, left behind him the monumental building that is the home of the High Court in Canberra and that itself was a significant achievement. He did not achieve a number of other goals such as having the administration of the Court vested in the Chief Justice alone. His colleagues saw to that. Nor did he achieve the object of having all the Justices of the Court reside in Canberra. His attempt to secure a permanent residence for the Chief Justice also failed. He had in mind Lanyon—a very pretty heritage homestead which I have enjoyed visiting but would not necessarily want to live in.

Nicholas Aroney and Haig Patapan write about the Gibbs Court, a period which they describe as showing the Court as a political institution in transition, consolidating—and defending—its political power and legitimacy in the larger context of a new Australia with international hopes and ambitions. It also showed the High Court as a legal institution interacting with contending jurisprudential perspectives while shifting its focus from questions about federalism to liberal rights and freedoms.

Chapter 13 which follows on the Mason Court is written by Paul Kildea and George Williams. They characterise the Court in that period as an outlier in the history of the Court:

> 'There has not before or since been a Bench of the Court that has been so consistently willing to push the frontiers of Australian law. The Court was a product of the times and of the particular set of judges on the Bench and the collective vision they shared about the role of the High Court in making and shaping Australian law'.

While accepting that the Court was innovative they do not classify it as counter-majoritarian.

The Brennan Court is discussed by Patrick Emerton and Jeffery Goldsworthy. It covers the period of Sir Gerard Brennan's appointment in April 1995 to his retirement in May 1998. As the authors point out the decisions of the Brennan Court in *Wik* and *Kable* were at least as significant as those in *Mabo* and *ACTV*. The Court's Chapter III jurisprudence was part of a broader tendency to affirm a judicalised conception of the rule of law. Emphasising the protection of rights asserted through technical legal reasoning rather than of expectations based on the prior conduct of political decision-makers.

The Gleeson Court is discussed by Rosalind Dixon and Sean Lau in Chapter 15. It is described, in a temporal sense, as a Court of the Howard era. The authors characterised Chief Justice Gleeson as a small 'c' legal conservative. Such characterisations are always contestable both as to their meaning and their accuracy but they undoubtedly stimulate reflection upon the Court's jurisprudence in that period which, on a longer view, will be seen as one of considerable importance in the history of the Court.

I will pass briefly over Chapter 16 by Anika Gouja and Katharine Gelber entitled 'The French Court'. A first quick reading left me with the impression that I was being 'progressively institutionalised'. On a closer study, however, I found that I was described as an 'institutionalist' but one with 'progressive' tendencies. Enough said about that, nobody should be a judge about his or her own Court.

This book is full of history and personalities and their interaction with the political events of 115 years of the Australian Federation. I congratulate the editors and the contributors. It is a good read.