

THE RULE OF LAW AND THE CONSTITUTION,

by The Hon Murray Gleeson AC, The Boyer Lectures 2000, ABC Books, Sydney, 2000, iv + 138, ISBN 0 7333 0975 5. RRP A\$19.95 (softcover).

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Traditionally, Australian judges are not heard on the airwaves. The conventions that govern judicial behaviour dictate that judges should generally avoid public comment on matters liable to excite political controversy. In our information-hungry world, the extent to which judges can — or should — make public addresses or speak to the media is hotly debated. However, even the more adventurous judicial spirits acknowledge that there are significant constraints on what judges can say extra-curially.¹

In this context, the current Chief Justice of the High Court — Murray Gleeson — was an interesting choice to deliver the Boyer Lectures 2000. Doubtless those responsible for his selection did so with an eye towards the centenary of federation and a desire to promote a better understanding of the Australian Constitution and the institutions of national government it established. The result — *The Rule of Law and the Constitution* — is a solid survey of this area with an emphasis upon the role of law as a ‘civilising influence’ enabling communities to grow and prosper.² The difficulty, however, is that Gleeson must steer clear of potentially controversial comment. As he acknowledges, ‘[j]udges are limited in their capacity to engage in political agitation’ a convention that forms ‘an important part of the fabric of our constitutional arrangements’.³ Thus, *The Rule of Law and the Constitution* lacks the critical edge one might otherwise expect from this sort of publication. It is a conventional account of the role of law in the Australian nation.

Chapter One (‘A Country Planted Thick with Laws’) introduces the reader to the Constitution and sketches the largely ‘unnoticed’ role that law plays in ensuring that Australians live in one of the most stable world democracies. Chapter Two (‘Becoming One People’) recounts the virtual ‘miracle’ of federation in 1901.⁴ In many ways, these are the two most interesting chapters in the book. Safe in the relatively uncontroversial realm of history, Gleeson allows his admiration for the achievement of federation full sway. He lauds the ‘imagination, courage and practical wisdom’ of the founders,⁵ emphasising the frequently neglected point that our Constitution ‘was not drafted by civil servants in London’, but was written and voted upon at colonial referenda by Australians.⁶

The remaining four chapters survey the founders’ handiwork in more detail. ‘Aspects of the Commonwealth Constitution — Part 1’ provides a general overview of the Constitution, whereas ‘Aspects of the Commonwealth Constitution — Part 2’ focuses upon the Constitution and the protection of individual rights. The High Court is discussed in ‘The Keystone of the Federal Arch’ and the common law and the courts form the subject of ‘The Judiciary’. Two recent speeches given by Gleeson complete the collection.

Despite Gleeson’s restrained tone, the book still provides an insight into his vision of the High Court and its relationship with the other branches of government and the Australian people. In particular, Gleeson’s theory of constitutional interpretation stresses fidelity to the text and the limits thereby placed on judicial creativity. He

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emphasises that judges cannot ordinarily fill the silences of the Constitution,⁷ a clear reference, among other things, to the Constitution's failure to incorporate a Bill of Rights. Of course, even Justice Kirby — the most adventurous interpreter of the Constitution on the High Court today — does not deny that the text is paramount.⁸ However, Gleeson lays bare his traditional approach when he maintains that members of the High Court 'are expected to approach their task by the application of what Sir Owen Dixon described as "a strict and complete legalism"'.⁹ For constitutional lawyers, 'Dixonian legalism' is a badge of orthodoxy.

At the same time, Gleeson is an advocate of constitutional 'vitality', claiming that '[m]aintaining the fitness of our Constitution is a challenge that faces each generation of Australians'.¹⁰ However, in Gleeson's opinion, it is the sovereign people,¹¹ rather than the unelected High Court, that has primary responsibility for this task. It hardly needs to be said that Australia's referendum record—only 8 out of 44 proposals put to the people under section 128 of the Constitution have been carried—is not a promising one for proponents of formal constitutional change. However, Gleeson's lectures offer three interesting reflections on this situation.

First, he emphasises that federation was only achieved because of the preparedness of the leaders of the federation movement to compromise.¹² Although Gleeson eschews comparison with today's leaders, one cannot help reflecting on the lack of compromise between certain 'yes' groups at the recent republic referendum. Second, Gleeson offers the astute observation that the colonial referenda that ultimately voted in favour of federation were not conducted under a system of compulsory voting. In other words '[p]erhaps compulsory voting is a force against change if people are not satisfied that they fully understand the need for and the implications of change'.¹³ This is highly political territory and Gleeson is quick to add that '[t]his is not an argument against compulsory voting, but it may mean that special care needs to be taken to inform the electorate fully of the implications of change'.¹⁴ Finally, Gleeson makes the point that under s 128 of the Constitution, the Commonwealth Parliament has a monopoly over the initiation of referenda to alter the Constitution. He suggests this too may inhibit change as people in a federation may resist change emanating from the centre.¹⁵ This particular issue has attracted attention on other occasions. For example, in 1988 the Constitutional Commission recommended that the Constitution be altered to allow State Parliaments to initiate constitutional referenda.¹⁶

The Rule of Law and the Constitution contains some other interesting comments. Notable is Gleeson's pithy defence of politics as a profession: 'To despise politics is to despise democracy.'¹⁷ At the same time, Gleeson counsels that those in politics must respect the role of judges, referring to 'parliamentary conventions' that 'restrict the ability to reflect adversely upon the integrity of individual judges'.¹⁸ Disregarding such conventions, says Gleeson, 'involves a cost to the community'.¹⁹

Certainly, Gleeson is mindful of the convention of judicial restraint in public speaking in these lectures. Nonetheless, his book reminds us that we often take the smooth functioning of our legal system for granted. It also challenges the Australian people, drawing on the spirit of those who achieved federation one hundred years ago, to take an active role in shaping their constitutional future. ▲

Endnotes

- ¹ See generally Hon Justice Thomas, *Judicial Ethics in Australia* (2nd ed, 1997) Ch 7.
- ² See p 75. See also p 1: 'The law restrains and civilises power'.
- ³ At p 107. See also pp 120–123.
- ⁴ See the quote from Alfred Deakin at p 38.
- ⁵ At p 12. See also pp 21, 36 and 51.
- ⁶ At p 37. See also pp 12 and 14.
- ⁷ At pp 16 and 56.
- ⁸ Graeme Hill, "'Originalist" vs "Progressive" Interpretations of the Constitution—Does it Matter?' (2000) 11 *Public Law Review* 159, 159 and Justice Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1, 11–14.
- ⁹ At p 85. See also p 134.
- ¹⁰ At p 58.
- ¹¹ At p 6.
- ¹² At pp 11–13, 31–33.
- ¹³ At p 17.
- ¹⁴ At p 17.
- ¹⁵ At pp 56–57.
- ¹⁶ Constitutional Commission, *Final Report of the Constitutional Commission* (1988) 851.
- ¹⁷ At p 48. See also his comments about the Commonwealth's 'external affairs' power in s 51(xxix) of the Constitution (pp 51–52) and his remarks on appointments to the High Court (pp 80–82).
- ¹⁸ At p 107.
- ¹⁹ At p 107.