"CONCERNING JUDICIAL METHOD" – FIFTY YEARS ON

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FOURTEENTH LUCINDA LECTURE

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It is now more than 50 years since Sir Owen Dixon delivered his paper "Concerning Judicial Method". It was a paper delivered, in September 1955, on the occasion of his receiving the Henry E. Howland Memorial Prize at Yale. Dixon had then been a Justice of the High Court for 26 years and he had been Chief Justice of Australia for three years. The paper is one with which every Australian lawyer, I would go so far as to say every lawyer in the common law tradition, should be familiar.

I want to explore in this lecture one of the central propositions made in the paper, "Concerning Judicial Method", and to examine its present relevance. Dixon said, of courts "of ultimate resort without restriction of subject matter", that[1]:

> "Such courts do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision of the court will be 'correct' or 'incorrect', 'right' or 'wrong' as it conforms with ascertained legal principles and

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1 *Jesting Pilate and Other Papers and Addresses*, "Concerning Judicial Method", 2nd ed (1997) 152 at 155.

> applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness."

Is this statement, with its reference to "'correct' or 'incorrect', 'right' or 'wrong'" and its reference to "a standard of reasoning which is not personal to the judges themselves", an "external standard of legal correctness", still correct? Does it have any application to the constitutional work of the High Court of Australia? Have changes in the understanding of law and the judicial process made what Dixon said irrelevant or wrong?

It is necessary to consider not only what has changed since Dixon wrote these words but also to examine, with some care, exactly what he said.

"Concerning Judicial Method", like so much that Dixon wrote, repays repeated reading. Close study of what is said reveals layers of meaning which are not readily apparent to a reader whose only anxiety is to say that he or she has finished reading the paper.

There are several points to notice about the passage I have quoted. First, it is explicitly directed to the work of courts "of ultimate resort without restriction of subject-matter". Particular attention was being directed to the work of those courts from which there is no appeal and which, therefore, are not bound by precedent in the same way as courts lower in the hierarchy are bound.

Secondly, the reader's eyes inevitably light upon the words "the decision of the court will be 'correct' or 'incorrect', 'right' or 'wrong'" and the reader is tempted to assume that Dixon was propounding some mechanistic view of the law and of judicial method in which it is useful to focus only upon the result at which a court arrives. Or, the reader may be tempted to leap to the conclusion that Dixon denied that judges made the common law. Neither conclusion would do justice to what Dixon wrote.

We are all familiar with what my colleague Dyson Heydon has recently described[2] as "the witty and mocking passage in Lord Reid's address[3] to the Society of Public Teachers of Law in which he assured them that the declaratory theory of judicial decision was a fairytale". (Justice Heydon also pointed out[4], correctly, that to remind you of this evidently assumes that you "suffer from crippling and recurrent attacks of amnesia".) But Dixon was asserting no mechanistic view of the law and he did not deny that the judges make the common law. After all, the fundamental reason for publishing law reports is that the common law is to be found in what the judges of courts of record give as their reasons

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2 "Limits to the Powers of Ultimate Appellate Courts", (2006) 122 *Law Quarterly Review* 399 at 399-400.

3 "The Judge as Law Maker", (1972) 12 *Journal of the Society of Public Teachers of Law* 22.

4 (2006) 122 *Law Quarterly Review* 399.

for decision. There can be no doubt that the judges make and develop the common law. And the fundamental premise for Dixon's paper was that the work of a court of final appeal, like the High Court, requires more than the application of some mechanical process; it requires judgments to be made – judgments about contestable and contested questions.

What Dixon asserted to be the tacit and basal assumption for the work of a court of final appeal was that its decision in any particular case would be correct or incorrect, right or wrong, "as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves". "Right" or "wrong", "correct" or "incorrect" was to be determined not by looking only to the result at which the court arrived. It was to be determined according to the nature and quality of the reasoning deployed in support of the conclusion reached. And the reasoning to be applied was to be "external", "not personal to the judges themselves".

That Dixon was concerned with the reasons given for a decision, rather than the particular result of the decision, is emphasised by the example he took. In the paper, Dixon demonstrated that the result obtained by the creation and application, in *Central Property Trust Ltd v High Trees House Ltd*[5] of what was then a wholly new principle, of promissory estoppel, was a result that could be reached by the

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5 [1947] KB 130.

application of accepted and well-established principles. For Dixon, the path followed by what he called[6] "the conscious judicial innovator" was to be condemned. It was to be condemned, either because the reasoning employed was ultimately personal and idiosyncratic to the judge, or because the reasoning departed from established legal principles. Dixon demonstrated that the result reached in *High Trees House* could be obtained by the application of orthodox principles. But the point that Dixon was making was that the reasoning employed was important. The chain of reasoning which Dixon identified fulfilled what he described[7] as "the combined purposes of developing the law, maintaining its continuity and preserving its coherence" whereas the alternative form of reasoning did not.

Should the tacit and basal assumption of which Dixon spoke (that the decision of a court is right or wrong as it conforms with ascertained legal principles and applies them according to a standard external to the judges) now be put aside? Has the legal system, or our understanding of it, changed over these last 50 years in some way that would make us discard this view?

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6 *Jesting Pilate and Other Papers and Addresses*, "Concerning Judicial Method", 2nd ed (1997) 152 at 159.

7 *Jesting Pilate and Other Papers and Addresses*, "Concerning Judicial Method", 2nd ed (1997) 152 at 164.

There have been many changes to the legal system in Australia in the last 50 years. The High Court of Australia was not then, but is now, the final court of appeal. The common law of Australia had not then, but since *Parker v The Queen*[8] has, diverged from the common law as developed and applied by the House of Lords and the Privy Council. Particular constitutional doctrines, such as those associated with s 92, have undergone radical revision[9]. The work of Australian courts, and the way in which they set about their work, has changed. New courts have been established. Apart from actions in negligence, most litigation before the courts now either finds its root in statute or requires close attention to particular statutory provisions.

Of these various changes (and no doubt there are many others that could be noticed), the change which might be thought to bear most directly upon judicial method is the increasing prominence of statute. The essential nature of the common law work of the Court is fundamentally unchanged except for the increasing frequency with which it intersects with statute. Because this lecture is concerned primarily with the constitutional work of the Court, it is right to emphasise what might be called the "text-based work" of the Court.

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8 (1963) 111 CLR 610.

9 *Cole v Whitfield* (1988) 165 CLR 360.

In that regard, the High Court has gone out of its way in many recent cases to emphasise the need, when applying a statutory provision, to look to the language of the statute rather than secondary sources or materials[10]. But this emphasis on the primacy of the relevant text is hardly new. The *Boilermakers' Case*[11] was argued in Sydney in August 1955, the month before Dixon gave his paper "Concerning Judicial Method". The central step taken in the reasoning in the *Boilermakers' Case* was founded wholly in the text of the Constitution. Most of you will be familiar with the critical passage in the reasons[12]:

> "[T]o study Chap. III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested. It is true that it is expressed in the affirmative but its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chap. III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia. No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap. III. The fact that affirmative words appointing or limiting an order or form of things may have also a negative

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10 See, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9], 89 [46]; *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 526 [11], 545 [63]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[15], 111-112 [249]; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 6-7 [7]-[9]; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 79 ALJR 1850 at 1856 [30], 1877 [167]-[168]; 221 ALR 448 at 455, 484-485; *Weiss v The Queen* (2005) 80 ALJR 444 at 452 [31]; 223 ALR 662 at 671.

11 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

12 (1956) 94 CLR 254 at 270.

> force and forbid the doing of the thing otherwise was noted very early in the development of the principles of interpretation[13]. In Chap. III we have a notable but very evident example."

I would deny that there is anything about the nature of the work which now is to be done by the High Court of Australia which calls for any reconsideration of what Dixon wrote.

But what about the very considerable amount of work that has been done in the intervening 50 years in studying the law and legal systems? Does that require some reconsideration of what Dixon said?

It is necessary to take account of two distinct streams of academic thought and study. First, remember how much work there has been, over the last 50 years, in the general field of jurisprudence. HLA Hart published "The Concept of Law" in 1961, six years after Dixon had written "Concerning Judicial Method". Remember how much debate the work of HLA Hart has provoked. Consider if you will the exchanges between Hart and Devlin[14], between Hart and Fuller[15], and between Hart

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13 1 Plow 113 [75 ER 176].

14 HLA Hart, *Law Liberty and Morality*, (1963); Devlin, *The Enforcement of Morals*, (1965); HLA Hart, *The Morality of the Criminal Law: Two Lectures*, (1964).

15 HLA Hart, "Positivism and the Separation of Law and Morals", (1958) 71 *Harvard Law Review* 593; Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart", (1958) 71 *Harvard Law Review* 630.

and Dworkin[16]. Of course there had been important jurisprudential contributions before those I have just mentioned. The realist school of jurisprudence had long since emerged in the United States[17]. In Australia, Julius Stone had published *Province and Function of Law* in 1946 and George Paton had published his *Textbook of Jurisprudence* in the same year. But it is not unfair to say that the last 50 years have seen a great deal of work done in the general field of jurisprudence and the theory of the law.

But there is a second strand of academic development which may be thought to be of particular relevance to the present questions. I refer to the academic work that has been done in the United States about the judicial methods and philosophies reflected in the work of the Supreme Court of the United States.

Does any of this work, whether the general jurisprudential work or the particular work done in respect of the Supreme Court of the United States, suggest that the time has come to modify or discard Dixon's tacit, but basal, assumption that "the decision of the court will be 'correct' or 'incorrect', 'right' or 'wrong' as it conforms with ascertained legal

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16 Dworkin, *Taking Rights Seriously*, (1977); HLA Hart, "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream", (1977) 11 *Georgia Law Review* 969.

17 For example, Llewellyn, "Some Realism about Realism – Responding to Dean Pound", (1930) 44 *Harvard Law Review* 1222. See generally Llewellyn, *Jurisprudence: Realism in Theory and Practice*, (1962).

principles and applies them according to a standard of reasoning which is not personal to the judges themselves"?

It is neither possible nor useful to attempt some comprehensive summary of theoretical developments over the last 50 years. All that can be done is to point to a few of the developments that might be said to be relevant to the question under consideration.

One school of thought that has come to the fore in recent years, often associated with the work of Professor Rorty, asserts that "we must give up the idea that legal or moral or even scientific inquiry is an attempt to discover what is really so, what the law really is, what texts really mean, which institutions are really just, or what the universe is really like"[18]. This approach, often called a "pragmatist" view, is a much more radical view than the realist school of jurisprudence well known and recognised by the 1950s. But both the views of the pragmatists, and the views of the realists, may be compared with Dixon's statement in "Concerning Judicial Method"[19] that "[t]he possession of fixed concepts is now seldom conceded to the law. Rather its principles are held to be provisional; its categories, however convenient or comforting in forensic or judicial life, are viewed as unreal." Dixon was alive to developments of the kind that had by then been reflected in realist schools of

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18 Dworkin, *Justice in Robes*, (2006) at 37.

19 at 154.

jurisprudence and were later to be reflected, at a more radical level, by the pragmatists.

For my own part, I think that closer examination of what are described as "pragmatic" or "realist" analyses of judicial method reveals that those analyses fail to take account of the observable fact that judges, especially judges in a court of final appeal, feel constrained to record their processes of reasoning, and to do so in ways which take as their tacit assumption that the reasoning must accord to a standard external to the judge. The realist may suggest that the judge is unaware of important influences. The pragmatist may assert that there is no external standard. But the fact is that judges do not consider that their decision-making is unconstrained. Their reasons are directed to demonstrating that the decision reached is one which satisfies the constraints of an external standard; reasons are not directed to demonstrating only that the judge has reached a conclusion informed by nothing more than an intuitive sense of what is "fair" or "just".

And if, as the pragmatist school would have it, we should give up any reference to an external standard, because external standards are a mirage, we must recognise what that implies about the rule of law. If judges are not applying a standard external to the judges, and are doing no more than applying an intuitive and idiosyncratic assessment of what to that judge seems to be fair or just, basic considerations of the rule of

law require fundamental adjustment. That is why Dixon concluded his paper, as he did[20], by saying that:

> "[I]f the alternative to the judicial administration of the law according to a received technique and by the use of the logical faculties is the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk. The better judges would be set adrift with neither moorings nor chart. The courts would come to exercise an unregulated authority over the fate of men and their affairs which would leave our system undistinguishable from the systems which we least admire."

Professor Dworkin has recently written[21], and to my mind has convincingly demonstrated, that it is both possible and useful to ask, even in a hard case, whether the law, properly interpreted, is for one side or the other. Dworkin describes this[22] as "a very weak and commonsensical legal claim". But it is a claim that is founded in observation. For whenever a court of final appeal decides a hard case, one which is contestable and contested, it is both possible and useful to conduct a debate about the reasons that are given for that decision. And it is both possible and useful to express an opinion about which reasons are better than others. A debate about reasons given for a decision has, as its unstated premises, first, that the reasons deployed in

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20 at 165.

21 Dworkin, *Justice in Robes*, (2006) at 36-43.

22 *Justice in Robes* at 41.

support of a conclusion are necessarily more complex than the bare assertion that the result is fair or just and, secondly, that the reasoning itself can be assessed against some external or objective standard: a standard that is not personal to the judges themselves.

As I have said, it is right to observe that judges make the common law, as distinct from discovering and declaring it. In performing that function, judges make choices. There is not "always ... a single correct answer awaiting discovery"[23]. And of course it is right to say of the High Court of Australia, as Justice Jackson said of the Supreme Court of the United States, that "[w]e are not final because we are infallible, but we are infallible only because we are final"[24]. Of course it is right to observe that the High Court makes and develops the common law of Australia; its pronouncements are to be followed by all other courts in the Australian legal system. But it is a serious error to take these observations and to conclude from them that the High Court, or any other court of final appeal, is unconstrained in its decision making. And once it is accepted that the Court is not unconstrained, it follows inexorably that it is useful and necessary to examine the validity of the reasoning deployed in support of any decision and to consider the degree to which that reasoning conforms with the restraints upon it.

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23 HLA Hart, "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream", (1977) 11 *Georgia Law Review* 969 at 984-985.

24 *Brown v Allen* 344 US 443 (1953) at 540.

What are those restraints?

In those cases in which a text must be construed, attention must focus upon that text. It matters not whether the text is the Constitution, a statute, a contract, or some other written instrument. The text must be both the starting point and the finishing point for the application of that standard of reasoning which is not personal to the judges themselves and which must be applied in deciding the question that is presented in the case. The text itself is the most obvious form of restraint upon decision-making. But, except in the clearest of cases, the text cannot be the only point of reference.

Let me first make a simple but obvious point. Any seriously contested issue about the legal meaning of a particular text (constitutional, statutory, contractual or other) presents a task that is not accomplished by sitting with the text in one hand and a dictionary of the English language in the other[25]. As Professor Leslie Zines said[26] more than 30 years ago:

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25 *Cunard Steamship Co v Mellon* 284 F 890 (1922) at 894 per Judge Learned Hand.

26 Zines, "The Australian Constitution 1951-1976", (1976) 7 *Federal Law Review* 89 at 144.

> "'[L]egal reasoning' is a highly complex notion in which problems of meaning, history, social values, intuitive understandings and judicial tradition all play a part."

What the analyst of judicial method must seek to achieve is a description of the elements that go to make up that "highly complex notion" and must attempt to identify how those elements do, or how those elements should, relate one to the other.

In constitutional cases, it is at this point that we begin to encounter particular difficulties. First, terms which are used in analysing the way in which courts set about the task of constitutional interpretation are sometimes used to make nothing more substantial than a rhetorical point in which the world is neatly divided as it was in the cinema serials of the 1950s, between those who wear white hats and those who wear black hats. Secondly, there is a tendency to attempt to apply systems of classification about constitutional reasoning which may not always reflect the complexity of the problem being analysed. It is assumed that all kinds of constitutional question will yield to the same kind of analysis and will always require consideration of the same issues. That is not so.

First, the difficulties of terminology in this field of discourse are well known. Judge Michael McConnell of the United States Court of Appeals for the Tenth Circuit has recently written[27] that "[t]he vocabulary

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27 "Active Liberty: A Progressive Alternative to Textualism and Originalism?", (2006) 119 *Harvard Law Review* 2387 at 2399.

of 'judicial activism' and 'judicial restraint' is notoriously contested." The same kind of contest can now be seen in Australia[28]. And the same point may be made about a number of other terms encountered in this area. That contest is not reduced, it is made much worse, by the appropriation of those terms for polemical and rhetorical purposes.

In that connection, words like "literalist", "originalist", "purposive", "flexible", "progressive" and metaphors like "living tree" and "dead hand of the past" can all be seen as having been given this rhetorical function in debates about constitutional construction. Each can always be seen, at least peeping around the curtain. What part are they to play? Each of these words, and even each of the (now tired) metaphors, may have a part to play in the scholarly analysis of judicial method in constitutional cases. Nothing that I am to say should be understood as denying the importance of that work, or as suggesting that these words, or even these metaphors, may never be used. And nothing that I am to say should be understood as denying the utility of the scholarly analysis of what judges have done, or the scholarly examination of how judges should go about their work. On the contrary, the work of scholarly description and prescription is of the very first importance to the proper development of an understanding of the judge's task, not only by those who observe judicial work but also by those who perform it. But it is important to recognise that terminology presents a particular difficulty in

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28 Kirby, "Judicial activism? A riposte to the counter-reformation", (2004) 24 *Australian Bar Review* 219.

analysing that "highly complex notion" of legal meaning, and attempting to identify how the elements that go to make it up relate one to the other.

Take the single word "originalism", a word much used in the United States in connection with questions of judicial method in constitutional cases, and a word which seems now to have entered Australian debates. Consider the baggage that comes with the word. Some would see the use of the word in the United States as emerging from the political and social controversies that engulfed the legal system and the whole of that society at about the time that the Supreme Court of United States held, in 1954, in *Brown v Board of Education*[29], that racial segregation violated the Fourteenth Amendment and that the then well-entrenched doctrine of "separate but equal" established in *Plessy v Ferguson*[30] should be overruled. How much, if any, of that overseas baggage travels with the word "originalism" if it is to be applied in Australia?

If we decide that none of that overseas baggage should be permitted to travel to this country, what exactly is meant by a reference to "originalism"? Is its meaning constant, or does it vary according to whether it is used as a term of approval or disapproval? That is, if it is used as a term of approval, does the user of the word "originalism"

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29 347 US 483 (1954).

30 153 US 537 (1896).

intend to convey that a judge embarks upon a task of construing the Constitution with no more than the text in one hand, and a particular edition of a dictionary (one published in 1900) in the other? Or if it is used as a term of disapproval, does the user mean that a judge should take no account of whatever may have been the problem that provoked the drafters to include particular words in the Constitution? Is history wholly irrelevant? Does it mean that no account may be taken of what was meant at the end of the nineteenth century by words like those found in s 51(xviii): "[c]opyrights, patents of inventions and designs, and trade marks", or words like those found in s 75(v): "a writ of Mandamus or prohibition or an injunction"? And is the use of the word "originalism" intended to convey some assertion about when that particular approach to constitutional interpretation is to be employed? Is this approach (whatever it encompasses) to be applied always, sometimes, never?

Finally, in this very abbreviated tour of the way in which the word "originalism" is encountered in this field of discourse, does the person who uses the word intend to draw what Dworkin has described[31] as "the distinction between semantic intention (what the framers meant to say) and political or expectation intention (what they expected would be the consequence of their saying it)"?

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31 Dworkin, *Justice in Robes*, (2006) at 125.

There may be some value in staying a moment to explore this last-mentioned distinction. Its exploration may cast a little light upon that fundamental question of judicial method which lies at the centre of this paper – is the trite, but basal, assumption that the decision of the court will be "correct" or "incorrect", "right" or "wrong" as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves now to be discarded?

The point to be made about semantic originalism may be made by reference to an example taken from outside constitutional or legal discourse. If you look at a Shorter Oxford Dictionary published as recently as 1973 you will find the word "prestigious" defined as "[p]ractising juggling or legerdemain; cheating; deceptive; illusory". Yet if I said today that the Monash Law School is prestigious, I would be taken to offer a compliment, not some criticism of the honesty of its teachers. But what am I to make of a text written at the end of the nineteenth century if it uses the word "prestigious"? Am I to understand that text without regard to the way in which that word was used when the text was written? Most would agree that I should take account of the way in which the language was used when the document was written. But exactly what account should I take of that fact? In particular, are there not other and separate questions presented about whether I may look beyond what I find in answer to my inquiry about how the word was used when it was first incorporated in the relevant text?

Problems of this kind may not be wholly foreign to Australian constitutional interpretation. The examples may or may not be as stark as "prestigious", but there are expressions in the Constitution, some of them technical, some of them not, which may, I do not say must, present such questions. I have in mind expressions of the kind I mentioned earlier: "a writ of Mandamus or prohibition or an injunction" in s 75, and "[c]opyrights, patents of invention and designs, and trade marks" in s 51(xviii). But reference might also be made to words like "jury" in s 80, or "directly chosen by the people" in s 7 and s 24.

For those who are interested, debates about semantic intention and expectation intention loom very large in a colloquium recently published in the *Yale Law Journal*[32] between Professor Akhil Reed Amar (the author of "America's Constitution: A Biography") and Professor Jed Rubenfeld (the author of "Revolution by Judiciary: The Structure of American Constitutional Law").

Do not difficulties of the several kinds I have mentioned suggest the need to develop some single overarching explanation of the approach to constitutional interpretation? Would such an explanation not supply that "standard of reasoning which is not personal to the judges themselves", of which Sir Owen Dixon spoke? This leads to the second set of issues I mentioned earlier, and which I described as the

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32 (2006) 115 *Yale Law Journal* 1975.

tendency to attempt to apply systems of classification about constitutional reasoning which may not always reflect the complexity of the problems being analysed.

The central difficulty in framing any single overarching theory of constitutional construction is that it must seek to explain a process that is not mechanical. It is therefore not possible to take every consideration that may bear upon a disputed question of constitutional construction and assign some hierarchy of importance to those considerations that is apt to every kind of problem. Not every kind of constitutional question does provoke, or should provoke, the same analytical response. To assert that the task should always be approached according to a single theory of construction would not accurately reflect what the High Court has done in the past. Nor do I think that it could provide a tool that would usefully inform the judicial task. Rather, theories of constitutional construction intended to provide general descriptions, or universal prescriptions, of what has been or should be done, can only be cast at a very high level of abstraction. And the more abstract the expression of the relevant principle the harder it is to apply in practice.

What then of the trite but basal assumption? Do the difficulties I have identified mean that the assumption should now be discarded, or that it should be modified or discarded in relation to constitutional cases? At this point we must recall the emphasis given by Dixon to the reasoning advanced in support of the particular conclusion reached and

explore some of the consequences that follow from the emphasis given to it.

An inquiry about a particular decision, whether in a constitutional matter or in some other field of law, may begin by considering the internal logical coherence of the reasoning supporting the decision and the decision's consistency with other, substantially identical, cases decided earlier by that court. But the inquiry cannot stop there. It cannot stop there because the problem, especially the problem in a court of final appeal, is usually more complex than will allow the reasoning to be assessed by reference only to considerations of internal coherence and consistency with substantially identical cases. The contestable issue of law in a court of final appeal is usually an issue where decisions in earlier cases offer no clear guidance to its resolution. Some development or modification of existing statements of principle is sought, or is resisted. And it may be thought that this problem is present in most if not all constitutional cases. What does it mean to say of such a decision that the reasoning which supports it is right or wrong?

It is always possible to ask whether the reasons given by a judge for a decision reveal the application of accepted methods of reasoning from known and identified principles. That statement may be contrasted with the notion that the judge is free to, even should, determine the difficult question according to overriding considerations of what the judge

intuitively considers to be fair or just. As Judge Learned Hand rightly said[33], "a judge cannot 'enforce whatever he thinks best'".

Professor Dworkin has written[34] that "judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement" and "the rest of us must accept the deliverances of a majority of the justices". Professor Dworkin was speaking of the Supreme Court of the United States which must grapple with problems presented by the Bill of Rights.

There are particular difficulties that emerge when courts are asked to construe statements of fundamental rights. Not least is that so because statements of fundamental rights are typically cast at such a level of generality and abstraction that no rational person could disagree with what is said. I express no view about whether adopting statements of this kind is desirable or undesirable. That is a question for others to decide. The judiciary must deal with whatever justiciable question is properly presented to them. But it is useful for present purposes to notice some of the particular questions that are presented for judicial

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33 Learned Hand, "How Far is a Judge Free in Rendering a Decision", in Dilliard (ed), *The Spirit of Liberty*, *Papers and Addresses of Learned Hand*, (1953) 103 at 109.

34 Dworkin, "Unenumerated Rights: Whether and how *Roe* should be overruled", in Stone, Epstein and Sunstein (eds), *The Bill of Rights in the Modern State*, (1992) 381 at 383.

method by deciding questions of the kind presented by such instruments, or that emerge when resort is had to statements of standards of that kind.

Professor Dworkin would have it that, in the end, the decision in a particular case will depend upon the judge's own perception of justice, equality, or other similar moral or political views. Yet, as I noticed earlier, Professor Dworkin would also acknowledge that, even in hard cases, it is useful to ask whether the law, properly interpreted, is for one side rather than the other. Whether these two propositions can be reconciled is a large question upon which I will not venture. Rather, let me attack the problem from a different direction.

Even in cases in which the principle to be applied is stated at a level of abstraction like, "Congress shall make no law ... abridging the freedom of speech", it will never suffice to connect that principle with a conclusion in a particular case by no greater bridge than that "the impugned law is, or is not, of the prohibited kind because I say it is so". That will not suffice because it reveals no reasoning that is capable of external evaluation; it is bare assertion. And bare assertion is not compatible with the rule of law. Neither will it do to say only that, because others have reached one conclusion rather than the other in a generally similar case litigated in some other country by reference to some different statement of applicable principle, I too will reach the conclusion they have. The latter kind of proposition will not do because

it says no more than "me too". And "me too" is a conclusion, not a set of reasons.

More analysis is required. In the United States, where the courts have grappled with the Bill of Rights for as long as they have, the analysis will focus upon what has been held in the past. If there is not that developed body of authority, from which the analysis can proceed, it is necessary to state the principles which underpin the conclusion that is reached. And it is necessary to recognise (and to reconcile as far as one can) principles and considerations that will point in opposite directions.

That task is not easy. Of course ideas can usefully be gathered from how other courts in other countries have grappled with similar problems. But in the end the judge must articulate the reasoning which leads that judge to the particular conclusion reached. If that is not done, we pass from notions of the rule of law to the view that the judge is enforcing whatever he or she thinks best. If the judge is left to enforce whatever he or she thinks best, we are confronted with a serious constitutional question – at least according to present understandings of separation of powers. For have we passed from the performance of a judicial function in exercise of judicial power, to the performance of some legislative function?

But these are issues that do not yet arise in Australia. The issues that are presented by constitutional litigation in the High Court of

Australia or are presented in the general appellate work of the Court are not of the kind I have just been considering.

Those who observe the work of the courts, particularly the work of the High Court, must examine that work with due regard to some fundamental underpinning principles. The primary, sometimes exclusive focus of litigants is the outcome of their particular litigation. Their concern is to know whether they won or lost. The concern of those who observe the work of the courts, however, especially the work of the High Court, must be to look beyond what result was obtained and to ask why that result was reached. Of course the result is important. But the result does not stand apart from the reasons that are given for reaching it. And in the end, what Sir Owen Dixon identified as the trite but basal assumption for the work of a court of final appeal was that the reasons given by the Court were of critical importance. It was the reasons that revealed the worth of the decision that was reached.

That remains the case today. Judges, lawyers who practise in the courts, and the academy would all accept, at least if pressed, that it is useful to debate not only whether the reasons advanced in support of the conclusion reached in any case are compelling but also whether they are right. All would agree that it is necessary to strip away whatever rhetorical, even polemical, devices appear in the reasons to reveal the process of reasoning that the judge deploys in support of the conclusion reached. All would, I think, accept Dworkin's weak and commonsensical claim that even in a hard case it is both possible and useful to ask

whether the law, properly interpreted, is for one side or the other. Yet it may be that this task of stripping away the rhetorical devices to reveal the reasoning that supports the conclusion is being undertaken less often than it should.

Dixon's emphasis on the importance of judicial reasoning can be re-expressed as a reminder that intellectual rigour is essential to the rule of law. Those who write reasons for judgment must be intellectually rigorous in their analysis and application of principle. But so too, those who read reasons for judgment, those who research the work of the courts, and those who report upon that work must all apply the same standards of intellectual rigour. All four of those processes, writing, reading, researching, reporting, require analytical rigour, not the glib or facile reliance upon slogans devoid of content.

What may have changed, since Dixon wrote "Concerning Judicial Method", is that, now, when the media, or the public, focus upon any particular decision of a court, they will focus upon the result to the exclusion of the reasons given for reaching it, and will then proffer an opinion about the desirability of that result when measured against some unstated standard that is thought to be self-evident. And if reference is ever made, in such public debates about the work of the Court, to the process of reasoning that has been stated in the reasons for judgment, it is thought sufficient to encapsulate it in the opacity of a slogan like "literalist", "black letter", "progressive" or "liberal".

There is no point to be served by doing more than noting that this is what now occurs in much of the (limited) popular discussion of the Court's work. But when there is to be any serious legal debate about the decisions of any "court of ultimate resort without restriction of subject-matter", like the High Court, this approach simply will not do. It may be an approach to the Court's work that can be encapsulated in a six second sound bite, but the work of the Court cannot usefully be reduced to such a compass. It is for the academy to lead the way in both pointing out the limits of such an approach and eschewing it in every form of serious legal commentary.

Of course the result at which the Court arrives is important. But that result cannot be and must not be divorced from the reasons given for it. If there is to be serious debate about the work of the Court it is necessary to identify what reasons are given for the result that is reached and to engage with those reasons.

That exercise has value if and only if Sir Owen Dixon was right when he said that "the decision of the court will be 'correct' or 'incorrect', 'right' or 'wrong' as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves". There is no point in the court giving reasons for decision, and there is no point in there being any debate about those reasons for decision, unless the trite but basal assumption is made that the reasons may be assessed according to an external standard – a standard that is not personal to the judges themselves. Discard the

assumption and you discard a fundamental basis for the legal system itself.