1922: AFTER RYAN, THE STORM[*]

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On 1 August 1921, Thomas Joseph Ryan died of influenza and exhaustion at the age of 45. Ryan was, at that time, assistant leader of the Federal Parliamentary Labor Party; but from mid-1915 until late 1919, he had been Premier of Queensland and the State's Chief Secretary and Attorney-General. The government that Ryan led was the first Labor government in Queensland to have a majority in the lower house of the State Parliament. In those eventful four years, Ryan's government proved itself to be the most radical reforming government to have been democratically elected anywhere in the world to that time.

That assertion will come as a surprise to those whose knowledge of Queensland's history commences with the Bjelke-Petersen years; but it is not empty hyperbole. Among the legislative achievements of the Ryan government were the partial socialisation of the Queensland sugar industry to break the monopoly control then exerted by the Colonial Sugar Refining Company over the manufacture and export of sugar from Australia. There was legislation to allow women to stand for election to a Parliament, which, with New Zealand and South Australia, already led the world in the introduction of universal adult suffrage. There was also the strengthening of the system of industrial conciliation and arbitration, and governmental support for the introduction through that system of the eight-hour working day, a landmark that was attained in Queensland decades before anywhere in Europe or the United States could match the achievement. There was the establishment of a State workers' compensation insurance as a responsibility of government; the establishment of the State Government Insurance Office, and other State-owned businesses to compete with private enterprise. There was the establishment of the offices of the Public Curator (now the Public Trustee) and the Public Defender over the opposition of the legal profession.

These innovations, radical for their era, were an inspiration to the rest of Australia and to the world at large as to the power of democratically elected governments to improve the lives of ordinary people. These innovations have stood the test of time. They shaped life in Queensland for the next hundred years, despite changes in the political colour of the State government. Most remarkably, perhaps, these legislative initiatives were prosecuted against the opposition of a conservative,

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Imperially-minded Establishment entrenched in the upper house of the Parliament, and while Australia was at war.

In addition, Ryan, together with Archbishop Daniel Mannix of Melbourne, led national campaigns in 1916 and 1917 against the two attempts by the federal government, of Prime Minister Billy Hughes, to introduce conscription to provide additional Australian soldiers for the Imperial war effort. The political heat generated by these campaigns, and by the prosecution of the Ryan government's legislative agenda was enormous. Prime Minister Hughes and other members of the Imperially-minded Establishment, including the Governor-General of the Commonwealth, were firmly of the view that Queensland was populated by Fenians and Bolsheviks[1].

Now these are my grandparents we are talking about here – and the grandparents of others here this evening. My grandparents, my father's parents, were the most respectable people I have ever known. They were gentle, kindly, silver-haired folk who looked after me at weekends when I was a little boy, and dutifully took me to Mass with them on Sundays. And yet, according to the then Prime Minister and Governor-General, these people, in their youth, made Maximilien Robespierre look like a lady in waiting to Marie Antoinette.

The early 1920's was a time of an extraordinarily bitter divide in politics as workers and small farmers, newly arrived in a new country and exercising a new-found economic strength that they did not have in the Old Country, were intent upon achieving a fairer share of the prosperity of the new province and the new federation than those who marshalled the forces of town and country capital were willing to allow. Actual violence by the parties to the struggle was not at all unthinkable. Sir Samuel Griffith, as Premier of Queensland, had given State troopers leave to fire on striking shearers during the 1891 shearers' strike. And the Great Strike of 1912, the first general strike in Australia (and possibly the world), led to attacks by mounted police wielding batons against about 15,000 people who had gathered in the public space that would become King George Square.

Just as few people now remember the political turbulence that at this time shaped life in this State for the next hundred years, so few now remember the attack by a democratically elected government upon the State's other institutions of government that followed Ryan's departure from State politics.

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[1] Murphy, *T.J. Ryan*, University of Queensland Press (1975) at 285.

In 1922, the government led by E.G. Theodore, Ryan's brilliant and ruthless successor, accomplished the abolition of the Legislative Council, and attacked the Supreme Court of Queensland. These attacks were without precedent in Australia's past and they would be without equal in its future. Tonight, I want to say something about these attacks upon the institutions of government after Ryan's departure from Queensland politics and early death, and, more particularly, about Ryan's part in the events that led up to them and the extent to which they should be regarded as part of Ryan's political legacy.

I suggest that, while it is fair to say that Ryan's successors in the Queensland government were carrying through on a policy Ryan championed in their attack upon the Legislative Council, their attacks on the Supreme Court were something else. In this latter regard, Ryan's successors were, I suggest, giving vent to what was distinctly their own class-conscious frustration with what they saw, rightly or wrongly, as unjustified opposition on the part of the judges as representatives of the political Establishment, to their reformist agenda. There is no real evidence that this was an animus that Ryan himself shared.

It was the policy of the Labor Party to abolish undemocratic upper houses in all the Australian States; but only in Queensland was this part of Labor's manifesto actually achieved. Queensland's Legislative Council certainly came with the terms of Labor's manifesto: it would be difficult to imagine a less democratic institution. In Queensland, the Legislative Council was not an elected body, even by election on a basis of property qualification for electors; rather, it was composed entirely of the Governor's appointees. It is noteworthy that, immediately after the abolition of the Legislative Council, Queensland became the first province in the British Empire to abolish capital punishment, a measure that the Legislative Council had consistently opposed. This was a peculiarly Queensland achievement. The sophisticated and progressive State of Victoria did not stop hanging its residents until after 1967.

The attack upon the Supreme Court was given its cutting edge by a militant egalitarianism that did not accept the legitimacy of judicial power, at least as exercised by the local judiciary, as a check upon the will of the people expressed, most unusually for the provinces of the Empire at that time, through universal adult suffrage and compulsory voting.

Ryan and the Labor Party

May I begin by saying something about Ryan and the Labor Party of which he was a leader.

In Canberra, in the park near Old Parliament House are statues of two men, John Curtin and Ben Chifley. They are not presented in heroic pose: they are presented simply walking to work dressed in the ordinary working men's suits of the kind that my grandfather used to wear on Sundays. The statues are, for those visitors to Canberra who recognise them, strangely moving. They are a reminder that in the most perilous period in the life of the Commonwealth, Australia was led by working class people of no wealth or family history, or social standing, and of very little formal education.

The principal qualification for the high office that both of these men discharged with such distinction during the dangerous years of World War II and the difficult years of Reconstruction was the confidence of the ordinary working people of the country that they had their interests at heart, and that they were sufficiently possessed of worldly wisdom to safeguard those interests. In this regard, it was of crucial importance that both Curtin and Chifley came from a trade union background. TJ Ryan did not share their background, or the basis for their claim on the confidence of the electorate.

Ryan was never a member of a trade union; and he was no middle-class socialist ideologue. Although Ryan would not have lost any sleep over being called a "socialist" by his political enemies, he was, in the sound judgment of his political biographer, Dr Denis Murphy, a bourgeois radical liberal[2]. Ryan began his political career as a supporter of Alfred Deakin's Liberal Party. He held degrees in arts and law from the University of Melbourne. He was a barrister by profession. Before going to the Bar, Ryan had been Classics Master at Rockhampton Grammar School.

As a barrister, Ryan was very proud both of his profession and of his membership of it to the extent that he bought a full-bottom wig for his appearance before the Privy Council. This wig, I might mention, has been passed down within the Queensland Bar. It is currently owned by the leader of the Australian Bar, Mr David Jackson QC.

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[2] Murphy, *T.J. Ryan*, University of Queensland Press (1975) at 517-518.

As a successful barrister, Ryan could afford to buy an expensive house in Clayfield. Later, he bought a large house in Auchenflower that had previously been owned by Sir Thomas McIlwraith, the former Conservative Premier of Queensland. Ryan and his wife employed a housekeeper[3]; and he often travelled with a valet.

Ryan took an understandable pride in his education and in his professional attainments. He identified himself very much with his profession as a barrister. Ryan's view of himself as a barrister first and a politician second is schooled by the description on his statue in Queen's Park in the city as a "scholar, jurist and statesman". Eminent commentators, such as Sir Robert Menzies and Sir Harry Gibbs, have challenged the accuracy of including the word "jurist" in that encomium; but those negative comments may tend to reflect a view from the conservative side of the political divide[4].

In any event, while there may be room for debate about Ryan's skills as an advocate, there can be no doubt that he was an astute legal strategist. It may fairly be said that Ryan's crowning success was in his lawyerly assessment of the prospects of the large constitutional arguments that were fought out in the pursuit of the reforms he championed. In this regard, his ability to judge these prospects so crucial to the success of his strategy, compares favourably with that of the much more illustrious Labor lawyer, Dr H.V. Evatt.

Here we can recall that it was Evatt's firm, but erroneous, advice to Chifley that the nationalisation of the private banks would be upheld by the High Court and then by the Privy Council, that encouraged Chifley's dogged pursuit of a measure which, as much as anything else, contributed to Labor's loss in the 1949 federal election. After the *Bank Nationalisation Case* had been lost in the High Court, Evatt advised Chifley that he was "convinced we can win" in the Privy Council[5], describing the decision of the High Court as "so bad as to be almost indefensible"[6]; Even without the benefit of hindsight one can say that Evatt's enthusiasm for pursuing his argument that the business of banking was not an integral aspect of trade and commerce was distinctly quixotic.

Chifley, typically, did not blame Evatt for what others might have regarded as an unreasonable stubbornness that belied his undoubted brilliance as a lawyer. Chifley

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[3] Murphy, *T.J. Ryan*, University of Queensland Press (1975) at xvii and 57.
[4] McPherson, *The Supreme Court of Queensland: 1859-1960*, Butterworths (1989) at 289-290.
[5] Day, *Chifley*, Harper Collins (2001) at 465.
[6] Day, *Chifley*, Harper Collins (2001) at 464.

was a great admirer of Evatt's erudition: he famously said that he would rather have had Bert Evatt's education than £10,000. And Chifley also had an abiding affection for Evatt. When Evatt took the brief for the Communist Party in its challenge to the validity of the *Communist Party Dissolution Act*, Chifley did not attempt to dissuade Evatt from honouring the Bar's great tradition of the cab rank. He did, however, take to referring to Evatt, affectionately no doubt, as "bloody old Ivan" after Ivan the Terrible[7].

As we will see from an examination of the leading cases in which the Ryan government became embroiled, Ryan proved to have a sound appreciation for the likely response of the courts, especially of the Imperial lawyer-statesmen of the Privy Council, to the issues that were brought before it from the provinces of the Empire.

The limits of legislative power and confrontations in the courts

With a view to side-stepping the inevitable opposition of the Legislative Council to aspects of his government's legislative agenda, Ryan adopted the expedient of law-making by Executive regulation. There are limits to the extent that a government can expect to legislate by regulation or proclamation, the most obvious being that regulations or proclamations can be valid only to the extent that they are held by the courts to have been authorised by enactments of the Parliament. Ryan used his skill and judgment as a lawyer to frame regulations that as it proved, skirted on just the right side of the legislation said to authorise them.

Ryan's strategy made a virtue of necessity in that, while his government came to power with a substantial majority in the Legislative Assembly, the Legislative Council, composed of men nominated by a Governor who was a British aristocrat, was steadfastly opposed to his legislative program.

Ryan fully appreciated, of course, that the conservative Establishment would react to the prosecution of his government's agenda by the expedient of making regulations where the upper house blocked or was likely to block its legislation. That reaction would inevitably take the form of challenges to those regulations in the courts. Ryan's strategy, which involved accepting this risk, was based on the assumption that the courts would give him a fair hearing[8]; and would determine the

[7] Murphy, *Evatt: A Life*, New South Publishing (2016) at 275, 276.
[8] Compare Lunney "*The Limits of Political Libel: Conscription and the Ryan v The Argus Libel Trial*" (2017) 41 Melbourne University Law Review 758 esp at 787.

issues on their legal merits without allowing personal or political antipathy to the policies of the government to affect their decisions.

While it may be said that Ryan had little practical alternative but to place his faith in the impartiality and competence of the courts, he did so with confidence and determination. He seemed genuinely to enjoy legal manoeuvring[9]. His strategy enjoyed considerable success, though, as we will see, less so in the Supreme Court of Queensland than in the Privy Council at Westminster.

With the benefit of hindsight we can now see that Ryan's legalist strategy anticipated, by many decades, the adoption by civil rights and other activists in the United States and Australia of the strategy of pursuing their claims in the courts where they are unable to succeed at the ballot box.

It is tempting to say that Ryan was the first political activist anywhere in the world to appreciate that the civility and openness and fairness and rationality that characterise the judicial process could, in some circumstances, make the courts a more attractive and effective forum for the advocacy of progressive causes than the more brutal processes of representative politics sometimes dominated, if not corrupted, by the power of the moneyed interests. Of course, what made Ryan's position special was that he had, in fact, been successful at the ballot box. He had the support of the community by way of a majority in the Legislative Assembly. But the institutional environment in which he found himself obliged him to "box cunning".

Ryan must have had a genuinely positive view of the courts as his chosen ground for his battles with the Establishment: if he didn't think that the courts would deal fairly with matters on their merits, his strategy would have been simply suicidal. In saying that, it must be recognised that he was a politician. He may well have been emboldened by the more politically hard-nosed calculation, adverted to by John McKenna QC in his history of the Supreme Court, that it would do his government's electoral prospects no harm for Queensland voters to witness the "radical young Premier" pitted in combat against the moneyed conservative interests before an "aging and hostile Supreme Court"[10].

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[9] McPherson, *The Supreme Court of Queensland*, (1989) Butterworths.
[10] McKenna, *Supreme Court of Queensland: a Concise History* (University of Queensland Press, 2012) at 111.

Early success

One of the first legislative initiatives of the newly elected Ryan government was a Bill to replace *The Workers' Compensation Act of 1905* with an Act that would make the provision of workers' compensation and insurance a State owned monopoly. Litigation was inevitable.

The first of the State Insurance cases was concerned with the State monopoly of workers' compensation. This monopoly was to be established by s 8 of the Bill which required every employer to obtain from the Insurance Commissioner a policy to the full extent of its liability for compensation. Section 7 of the Bill was amended by the Legislative Council so as to empower the Governor in Council to approve the carrying on of workers' compensation insurance business by private insurers "upon" the private insurer giving security. The Bill having been passed in this form, the Full Court of the Supreme Court of Queensland split on whether the Governor in Council was obliged to approve the carrying on of business by a private insurer if the required security were given, or whether the Governor in Council retained an uncontrolled discretion to grant or withhold approval under the Act.

The majority of the Full Court of the Supreme Court (Real, Chubb and Shand JJ) upheld the government's position that any grant of approval under s 7 was wholly discretionary[11]. The Privy Council upheld the majority view[12]. The Governor in Council then proceeded to refuse all applications for approval by private insurers to carry on workers' compensation insurance business. There was a serendipitous bonus for the government in the opportunity that sprang from the opposition of private insurers to the government's scheme.

While waiting for the decision of the Privy Council, the Insurance Commissioner, appointed by the government, proposed that fire and accident insurance business be carried on by the State. The government proclaimed the entry of the State into the business of fire and accident insurance. The Auditor-General refused to certify the regularity of outlays made for the purpose of this business on the basis that there was no statutory appropriation to support the payment out of consolidated revenue of public moneys. This led to the second State Insurance Case which concerned a claim by a private insurance company against the Commissioner to the effect that payment of the outlays was unlawful.

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[11] *Australian Alliance Assurance Co Ltd v AG (Qld)* [1916] St R Qd 135.
[12] *Australian Alliance Assurance Co Ltd v AG (Qld)* [1917] AC 537.

The Full Court of the Supreme Court held that payment of liabilities of the business of the Office out of consolidated revenue without an appropriation by the Parliament would indeed be unconstitutional[13]. Despite this unanimous view of the five member Full Court, a majority (Real, Chubb and Shand JJ) again refused an injunction to prevent the conduct of an unlawful business as a matter of discretion in relation to the grant of equitable relief. Neither side appealed this decision.

By the end of 1916, the fight had gone out of the private insurers and the Legislative Council. The Insurance Act of 1916 had established the State Government Insurance Office. Ryan was entitled to feel well pleased with the success of his initiatives.

Duncan v Theodore

This strategy of by-passing the political obstacle of the Legislative Council continued in *Duncan v Theodore*[14], commonly known as the *Mooraberrie Case.*

At the outbreak of the First World War, *The Meat Supply for Imperial Uses Act of 1914* sought to ensure adequate supplies of meat for the Imperial armed forces by providing for the acquisition of stock by the Imperial government. The formidable Mrs Duncan, the owner of Mooraberrie Station, sought, but failed to obtain, permission to move her cattle from the Station in south-west Queensland to Adelaide for sale[15]. Mrs Duncan then sought an injunction under s 92 of the *Constitution* to enforce her constitutional right to freedom of interstate trade. The State responded with a proclamation under *The Sugar Acquisition Act of 1915* by which Mrs Duncan's whole herd was appropriated by the State government. Her herd was seized by officers of the Queensland police acting under the instruction of E.G. Theodore, then the State Treasurer.

Mrs Duncan sued, claiming damages for trespass against the government. She succeeded at trial before a jury. The jury found as a fact that the government was acting unlawfully for an ulterior purpose when it invoked the powers of requisition conferred by the *Sugar Act* to effect an acquisition of the property in Mrs Duncan's cattle.

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[13] *Australian Alliance Assurance Co v Goodwyn* [1916] St R Qd 225.
[14] [1917] St R Qd 250.
[15] *Duncan v Theodore* (1916) 22 CLR 556.

The Full Court of the Supreme Court held unanimously that the proclamation was invalid, but then a majority considered that the general exemptions from liability afforded to the State by s 7 of the *Sugar Act* protected the State from liability in damages. The High Court reversed that decision[16]. The Privy Council restored the decision of the Full Court[17].

The Privy Council, in an opinion prepared by Viscount Haldane, held that the good faith of His Majesty's Executive government could not be questioned in His Majesty's Courts. In addition, his Lordship also reasoned that in acquiring the cattle for Imperial purposes, the Queensland government was acting as an emanation of a single indivisible Imperial Crown.

Ryan benefited greatly from the circumstance that the Privy Council viewed the issues in the case through the lens of its concern for the interests of the Empire in wartime. Given the finding of bad faith made by the jury, Ryan was both astute in his assessment of the spirit of the times, and particularly fortunate in that Viscount Haldane shared his appreciation of the issues.

At trial, the plaintiff's case that Theodore had acted under the *Sugar Act*, rather than *The Meat Supply for Imperial Uses Act*, because the government intended to sell the cattle itself so as to take the profit that might otherwise have accrued to pastoralists like Mrs Duncan. Under the latter Act, the cattle would have been acquired by the Imperial government at Westminster from the pastoralist at a price fixed by an independent board, whereas under the *Sugar Act* the price of acquisition by the Queensland government was fixed by the Governor in Council. In these circumstances, it is hardly surprising that the jury concluded that Theodore had acted under the *Sugar Act* "with an indirect object and for some ulterior purpose"[18] other than assuring the supply of meat to the armed forces of the Empire.

Viscount Haldane's conclusion that the jury's finding of bad faith in the invocation of the powers conferred by the *Sugar Act* was irrelevant was based on the notion that the good faith of the Executive government in the exercise of its discretion could not be questioned in the courts[19]. That reasoning involved a view of the separation of powers that diminished the role of the courts in the supervision of the lawful exercise by the Executive of powers conferred by the legislature. With the

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[16] *Duncan v Theodore* (1917) 23 CLR 510.
[17] *Theodore v Duncan* [1919] AC 696.
[18] *Duncan v Theodore* (1917) 23 CLR 510 at 525.
[19] *Theodore v Duncan* [1919] AC 696 at 706.

benefit of hindsight, we can see that this view proved to be not sustainable. It was given its final quietus by the High Court in *R v Toohey, ex parte Northern Land Council*[20]. And of Viscount Haldane's reliance on the notion of the indivisibility of the Crown which supported his conclusion that an acquisition by the State of Queensland under the *Sugar Act* was, in truth, an acquisition by the Imperial Crown under "*The Meat Supply for Imperial Uses Act*", the less said the better.

McCawley's Case

The next notable piece of litigation centred around Thomas William McCawley. Born in humble circumstances, McCawley left school at 14 years of age to help support his family. His ability and diligence as a clerk in the Department of Justice was noticed by his superiors, and at 28 years of age, he was appointed Queensland's Crown Solicitor. In 1915, Ryan made him Under-Secretary for Justice in addition to Crown Solicitor. The rapid advancement of a person who had been admitted to the Bar only eight years before aroused the public hostility of the private legal profession[21].

McCawley was appointed President of the Court of Industrial Arbitration on 6 January 1917. In October 1917, he was appointed a Justice of the Supreme Court under the power conferred by s 6(6) of the *Industrial Arbitration Act of 1916* (Qld). Section 15 of the *Constitution Act of 1867* (Qld) provided that judges of the Supreme Court should hold office for life during good behaviour. The question arose whether the appointment under s 6(6) of the *Industrial Arbitration Act*, which was for a term of seven years, conflicted with s 15 of the *Constitution Act* which had not been expressly repealed and was, therefore, invalid.

The Full Court of the Supreme Court determined the issue against the validity of McCawley's appointment on the basis that later legislation was not effective to repeal prior inconsistent constitutional legislation without first expressly amending the constitutional provision[22]. Real J dissented. The Full Court's view was affirmed in the High Court by a four-three majority[23]. The High Court was, in turn, reversed by the Privy Council[24] on the footing that Queensland's *Constitution Act*, not being in any way entrenched, was amenable to amendment simply by subsequent inconsistent legislation[25].

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[20] (1981) 151 CLR 170 at 192-3, 202-204, 221-224, 265, 283-4.
[21] (1910) 107 QPD, 2428-2429.
[22] *In re McCawley* [1918] St R Qd 62.
[23] *McCawley v The King* (1918) 26 CLR 9.
[24] *McCawley v The King* [1920] AC 691.
[25] [1920] AC 691 at 703.

In this regard, the Privy Council took the opportunity to make one of the most powerful endorsements of A. V. Dicey's conception of parliamentary sovereignty to be found in the Law Reports. The decision of the Privy Council in *McCawley v The King*[26] established that the provisions of the *Constitution Act of 1867* (Qld) were not infused with some special dignity that prevented them from alteration in the same way as more mundane statutes. The Queensland legislature was thereby empowered to reshape the institutions of government. The Privy Council overruled the High Court, specifically rejecting the opinion of the majority led by Griffith CJ, that "the Parliament of Queensland could not, by merely enacting a law inconsistent with the *Constitution Act of 1867*, overrule its provisions, although it might with proper formality pass an Act which expressly altered or repealed it."[27]

Sir Samuel Griffith had championed the view that the *Constitution Act of 1867* was "a fundamental or organic law, which can only be repealed or modified with special formality."[28] The Privy Council rejected that view and endorsed the dissenting opinion of Isaacs and Rich JJ that "the Act of 1867, though it deals with very important topics, possesses in law no such special constitutional quality as to preclude its amendment by the methods which are appropriate in the case of any other statute."[29]

The advice of the Privy Council (constituted by Lord Birkenhead LC, Viscount Haldane, Lord Buckmaster, Lord Dunedin and Lord Atkinson) was delivered by Lord Birkenhead LC. Three passages stand out. The first passage states some of the philosophical considerations underlying the difference between "controlled constitutions" and "uncontrolled constitutions", and dismisses the views of those who did not recognise the difference in a mocking tone that is rare in judicial pronouncements[30].

> "Some communities, and notably Great Britain, have not in the framing of Constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors, in spite of the fact that those successors will possess more experience of the circumstances and

[26] (1920) 28 CLR 106 esp at 114-116.
[27] *McCawley v The King* (1920) 28 CLR 106 at 112.
[28] *McCawley v The King* (1920) 28 CLR 106 at 112; cf *Cooper v Commissioner for Income Tax (Qld)* (1907) 4 CLR 1304 at 1312-1314.
[29] *McCawley v The King* (1920) 28 CLR 106 at 113.
[30] *McCawley v The King* (1920) 28 CLR 106 at 114-115.

> necessities amid which their lives are lived. Those constitution framers who have adopted the other view must be supposed to have believed that certainty and stability were in such a matter the supreme desiderata. Giving effect to this belief, they have created obstacles of varying difficulty in the path of those who would lay rash hands upon the ark of the Constitution."

The second passage that I want to refer to gives an explanation, in emphatic terms, that the unfettered law-making power of a parliament under an uncontrolled constitution must extend to the making of amendments to the constitution itself[31]:

> "It is of the greatest importance to notice that where the Constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned Judges in the Court below said that, according to the appellant, the Constitution could be ignored as if it were a *Dog Act*, he was in effect merely expressing his opinion that the Constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a *Dog Act* or any other Act, however humble its subject matter."

The third passage contains an interesting insight into the then policy of Westminster towards the devolution of responsibility for colonial development[32]:

> "Their Lordships are clearly of opinion that no warrant whatever exists for the views insisted upon by the respondents, and affirmed by a majority of the Judges in the Courts below. It was not the policy of the Imperial Legislature, at any relevant period, to shackle or control in the manner suggested the legislative powers of the nascent Australian Legislatures. Consistently with the genius of the British people, what was given was given completely, and unequivocally, in the belief, fully justified by the event, that these young communities would successfully work out their own constitutional salvation."

The Indigenous inhabitants of Queensland would not have been so sanguine. Nevertheless, this landmark decision cleared the ground for the bold social and

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[31] *McCawley v The King* (1920) 28 CLR 106 at 115-116.
[32] *McCawley v The King* (1920) 28 CLR 106 at 117.

economic innovation which followed without constantly embroiling the judiciary in the resolution of the political conflicts that innovation generated.

Ryan's strategy of reliance upon the courts was not as successful in relation to his attempts to abolish the Legislative Council.

Abolition of the Legislative Council

As we have seen, just as Queensland differs from other States in its unicameral Parliament, so it differs from the other States in that it abolished capital punishment nearly half a century before other States would do so.

As the Honourable Roslyn Atkinson AO noted[33],

> "The two Queensland innovations are related. The first legislative attempt to abolish capital punishment in Queensland came in 1916. It was defeated in the Legislative Council. The first session of Parliament held under the unicameral system began on 4 July 1922. The first Bill which had been formally rejected by the Legislative Council and which was reintroduced into the unicameral Parliament was the Bill to abolish capital punishment. ... On 20 July 1922 the Bill passed the second reading debate and the Governor's assent was received on 31 July 1922."

Roslyn Atkinson concluded[34]:

> "Without one reform it is unlikely that we would have seen the other as early as we did".

The Legislative Council was, as it had been established at the foundation of Queensland as a separate colony by the Separation Order in Council of 1859. Given the absence of any claim of this body to democratic legitimacy, and its fixed opposition to improvement in the condition of small farmers and industrial workers[35], it is hardly surprising that its abolition was part of the platform on which Ryan's government had been elected in 1915.

In 1915 and again in 1916, the Legislative Council rejected a Bill for that purpose passed by the Legislative Assembly pursuant to the *Parliamentary Bills*

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[33] White and Rahemtula, (eds) *Queensland's Constitution, Past Present and Future*, Supreme Court Library of Queensland (2010) at 266.
[34] ibid.
[35] McPherson, *Supreme Court of Queensland*, (1989) Butterworths at 262-263, 282.

Referendum Act 1908 (Qld), which provided for the overruling of the Legislative Council by a referendum of the people of the State. The government proposed a referendum for that purpose to be held on 5 May 1917. Members of the Legislative Council brought proceedings in the Supreme Court to restrain the holding of the referendum on the ground that it was beyond the constitutional competence of the State's legislature to abolish part of itself.

The Imperial Statute, the *Colonial Laws Validity Act 1865* (Imp), provided by s 5 that a representative legislature had full power to make laws "respecting the constitution, powers and procedures of such legislature". Section 5 also conferred power to "abolish" courts and to "alter" their constitution.

In *Taylor v A-G (Qld)*[36], the Full Court held that the power to make laws respecting the constitution of the legislature was limited to laws with respect to the composition of the constituent parts of the legislature and did not extend to the abolition of any of these constituent parts. In taking this view, Cooper CJ and Lukin J were influenced by the consideration that s 5 of the *Colonial Laws Validity Act* expressly conferred a power of abolition in relation to "courts"[37]. In contrast, the suggestion that the power to make laws respecting the constitution of the legislature could be used to abolish the Legislative Assembly was an outcome that was not to be countenanced[38]. In the view of Real and Chubb JJ, para 22 of the original Separation Order was a sufficient source of power to abolish the Legislative Council, but their Honours held that it was necessary first to alter the State Constitution to incorporate an express power in that regard before it could be exercised. That not having occurred, there was no legislative authority to enact the Bill for the abolition of the Legislative Council[39]. Accordingly, the Full Court granted an injunction to restrain the holding of the referendum.

The High Court, acting with remarkable alacrity, on 4 May 1917, allowed an appeal and dissolved the injunction allowing the referendum to proceed on the following day[40]. In the event, the referendum was defeated by a majority of 179,105 votes to 116,195[41].

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[36] [1917] St R Qd 208.
[37] *Taylor v A-G* [1917] St R Qd 208 at 236-237.
[38] *Taylor v A-G (Qld)* [1917] St R Qd 208 at 238. See also *Cooper v Commissioner of Income Tax* (1907) 4 CLR 1304 at 1328.
[39] *Taylor v A-G (Qld)* [1917] St R Qd 208 at 239-241. See also *Cooper v Commissioner of Income Tax* (1907) 4 CLR 1304 at 1314.
[40] *Taylor v A-G* (1917) 23 CLR 457.
[41] McPherson, *Supreme Court of Queensland*, 1989 Butterworths at 283.

In the High Court, Barton J held that the *Referendum Act* was authorised by s 5 of the *Colonial Laws Validity Act*[42]. The Privy Council refused to entertain a further appeal on the footing that the result of the referendum meant that resolution of the constitutional questions had become "theoretical" only[43]. As would become apparent in the decision of the Privy Council in *McCawley v The King*[44], the narrow approach to which the Supreme Court adhered was without foundation, and as we have seen from the reasons of the Earl of Birkenhead LC, risibly so.

After the rejection of the 1917 referendum, the Legislative Council twice again rejected bills to abolish it in 1918 and 1919.

In 1920, Theodore took the reins from Ryan to lead the Labor Party to victory in the general election with a reduced majority of four seats. The first institutional target of the new government was the Legislative Council. The Governor of Queensland, Sir Hamilton Goold-Adams, had accepted Ryan's advice to appoint 13 new members nominated by Ryan to the Council. He appointed three more in 1919, but the government could still not command a majority in the Council. Thereafter, Goold-Adams, rejecting the government's advice, refused to make any further appointments, and retired in 1920.

During the 1920 election, the abolition of the Legislative Council had been a significant issue[45]; but rather than risk another referendum, and taking advantage of the delay in the arrival of the new Governor from Great Britain, the Theodore government then appointed William Lennon, who had been Speaker of the Legislative Assembly, Lieutenant-Governor. On 19 February 1920, Lennon appointed 14 more Labor nominees to enable Labor to dominate the Legislative Council. In 1921, both Houses of Parliament finally passed a Bill for the Council's abolition. The measure was passed by 28 votes to 10 in the Council.

While the measure was reserved for the signification of the King's pleasure under the *Australian States Constitution Act 1907* (Imp), aggrieved members of the Legislative Council presented a petition to the Imperial government at Westminster that no further action be taken on the measure itself until a referendum had been held, or until the Privy Council had determined that the legislation was valid. Winston Churchill, Colonial Secretary, evidently accepting the Privy Council's

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[42] *Taylor v A-G (Qld)* (1917) 23 CLR 457 at 467-470.
[43] *Taylor v A-G (Qld)* [1918] St R Qd 194.
[44] (1920) 28 CLR 106.
[45] Carney, "Constitutional Milestones From 1867-2009" in *Queensland's Constitution Past, Present and Future* White and Rahemtula eds (2010) at 105.

reasoning in *McCawley v the King*, concluded that the issue was a matter "for determination locally" and declined to accede to the petition[46]. And so, on 23 March 1922, the *Constitution Act Amendment Act 1922* (Qld) received Royal Assent.

Obviously, the government's motivation in abolishing the Legislative Council was deeply partisan. There is a comforting irony, though, in the circumstance that the Legislative Council was undone by its vulnerability to the Executive government inherent in the gross departure from the separation of powers involved in its creation. It was a legislative institution wholly dependent on the will of the Executive for its membership. And for supporters of the Theodore government, the circumstances of the Council's abolition, which the government's opponents thought scandalous, provided confirmation that politicians can rise above venal cynicism.

The attack upon the Court by the Theodore government

On 16 September 1921, the *Judges' Retirement Bill* was introduced into the then still bicameral Parliament. There was also a Bill to abolish District Courts in Queensland. The *Judges' Retirement Bill* proposed the imposition of compulsory retirement at the age of 70 years. The adoption of the Bill would force the immediate retirement of a number of serving Justices of the Supreme Court. Compulsory retirement for judges at age 70 had been adopted in New Zealand in 1903, but the New Zealand measure applied only to subsequent appointments.

The Queensland measure was different in that it applied so as to remove from office existing judges who were over the age of 70. Half of the existing Supreme Court bench of six would thus be terminated: Cooper CJ was 75 years old, Real J was 74 and Chubb J was 76 years old. The forced retirement of Cooper CJ would clear the way for the government to appoint Thomas McCawley as the new Chief Justice, the next stage of his political advancement.

Theodore, not surprisingly, issued public denials that the government was motivated by a "desire to wreak vengeance on" the judges of the Supreme Court[47]; he protested too much. It was undeniably the case that judges appointed during life and good behaviour were being removed without any suggestion of bad behaviour. Indeed, as we have seen, Real and Chubb JJ had consistently supported the

[46] (1922) (1) QPD at 44.
[47] 137 QPD 1019.

government in the constitutional turmoils of Ryan's premiership. The Queensland Bar Association and the Queensland Law Association protested against the legislation[48]. The Bill was passed in October 1921 and received assent on 5 November. It was proclaimed to take effect on 31 March 1922. On the following day, McCawley received his commission as Chief Justice[49]. He died only two months after his appointment.

The *Judges' Retirement Act of 1921* (Qld) preserved the pension rights of existing judges, including those removed from office by reason of age, but by s 4, it abolished pensions in respect of all future judicial appointments, (including that of the new Chief Justice McCawley). It also reduced the salary of the new Chief Justice by 10 per cent. This measure was justified as an exercise in fiscal responsibility by the government, but there can be little doubt that the abolition of judicial pensions was motivated by a not entirely surprising resentment at the enjoyment of a privilege not shared by other, less well-off members of the community. It was also tinged with a vindictive perception that the Queensland judiciary had sided with the political establishment against the reforming initiatives of the Ryan government[50].

It is difficult for us today – especially for those of us who are members of the legal profession, and even more so for those of us who have reason to look with fondness on judicial pensions, for some of us a fondness that increases daily – not to feel sympathy with the judges. They were shabbily treated. But at that time, there was among those who supported the Theodore government a strong perception that the local Establishment was distinctly not in sympathy with the ordinary men and women of Queensland.

The judiciary, in particular, were perceived to be part of that Establishment that was overwhelmingly conservative, British and Empire-minded. And that perception was not confined to those Queenslanders who identified themselves as supporters of the fledgling Labor Party. It should also be said that perception was not entirely unjustified. From the very beginning of the life of the new colony, the pro-British Establishment exhibited aristocratic pretensions that were at odds with the egalitarianism that informed the zeitgeist but was not at all understood by the Imperial establishment.

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[48] Cope, *A Study of Labor Government and the Law in Queensland 1915-1922* at 133-136.
[49] McPherson, *Supreme Court of Queensland* (1989), Butterworths at 306.
[50] McPherson, op cit at 299-302.

When Queensland was separated from New South Wales in 1859, the new Governor, Sir George Bowen, decided that the colony's then-resident Supreme Court Justice, Alfred Lutwyche, was not of sufficient social standing to fill the role. Bowen wrote to the Colonial Secretary, the Earl of Selborne[51]:

> "What we want is a gentleman rather than a mere lawyer. The principal officials in the colony form a sort of social aristocracy."

Lutwyche, though a graduate of Oxford, was the son of a leather merchant. And Sir Alfred Stephen, then Chief Justice of New South Wales, said that Lutwyche's wife was "unfit for the circle into which her husband's rank must place her."[52] The zeitgeist in Queensland was out of sympathy with the Bunyip aristocracy.

Ryan and the storm

By and large, Ryan's legalist strategy of governing by regulation in areas of great controversy was vindicated. Importantly, however, as we have seen, his success came largely in the Privy Council, and rarely in the Supreme Court of Queensland and the High Court. It would hardly be surprising that many of Ryan's supporters, who did not share his appreciation of the scope for an honest difference of views amongst the ablest and most disinterested of lawyers in relation to the difficult legal issues, came to the view that the members of the Supreme Court who consistently found against the government in its most important cases only to be corrected by the Privy Council, were predisposed against the newly emergent political force.

I do not think that Ryan himself was disposed to regard all the judges as class enemies who were bad beyond redemption. His legalist strategy was predicated upon a view to the contrary. And I do not doubt that he would have strongly empathised with Justice Real who shared his experience of a poverty stricken upbringing as the child of Irish immigrants. More broadly, Ryan's actions suggest a much milder view of the Supreme Court than that of his political colleagues. As a barrister, Ryan understood that honest minds may differ over difficult legal issues, and that the heat of legal argument did not mean personal antipathy on the part of judges and counsel towards each other. As a barrister, he knew what it was, in Shakespeare's words, "[to] do as adversaries do in law, [s]trive mightily, but eat and drink as friends."

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[51] Whittington, "The rise and fall of 'common' Lutwyche". Sunday Mail, 15 August 2021 at 54.

[52] Whittington,"Way we Were: How Alfred Lutwyche became Queensland's first Supreme Court judge" The Sunday Mail (Qld), 15 August 2021.

The most reliable evidence of Ryan's attitude to the judges of the Supreme Court of Queensland was that he had not pursued the passage of the Supreme Court Bill while he was still Premier. Malcolm Cope has suggested[53] that Ryan was actually opposed to the extreme measures ultimately adopted to resolve the crisis.

Apart perhaps from his particular "bête noire", Sir Pope Cooper CJ, I suspect that Ryan's attitude to the Queensland judges was very much the same as the attitude of most barristers towards a judge who gives them a hard time in court. This was the attitude expressed at a later time by US President Harry Truman of Tom Clark, his former Attorney-General, whom he appointed to the Supreme Court of the United States. Once on the Court, Clark proceeded to make a number of important decisions against the Truman administration. Truman said:

> "It isn't so much that he's a **bad** man ... It's just that he's a dumb son of a bitch."

Ryan, we can be sure, would not have used such salty language.

As to Cooper CJ, Ryan was certainly party to some acerbic exchanges with Cooper CJ in Court, and in Parliament, Ryan accused Cooper CJ of bias against the government in the first of the *State Insurance* cases and in *Taylor v A-G (Qld)* on the basis of "a want of integrity rather than an imperfect knowledge of the law"[54]. The immediate occasion for Ryan's criticism of Cooper CJ was the Chief Justice's public criticism of a jury who had acquitted an accused represented by the Public Defender.

Ryan's difficulties with Cooper CJ were not peculiar to Ryan. Many years before, Sir Samuel Griffith, when Premier, had publicly attacked Cooper for the latter's willingness to comment publicly on matters beyond his judicial office. It is also possible that Griffith, when he lost office, may have been contemplating the removal of Cooper CJ by address to the Parliament on the ground that he was not fit for office as a judge[55]. Cooper CJ's great historical contribution may well have been to provide future generations with an example of what a judge should strive not to be.

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[53] M. Cope "The Political Appointment of TW McCawley as President of the Court of Industrial Arbitration, Justice of the Supreme Court and Chief Justice of Queensland" *The University of Queensland Law Journal*, Vol 9, No 2, 224 at 239.
[54] (1917) 127 QPD 1515.
[55] McPherson, *Supreme Court of Queensland*, (1989) Butterworths at 226.

Ryan's legacy

Ryan's successors, like Theodore and McCormick, were willing and able to exploit the advantage that the demographics of early 20th century Queensland gave them. This new demographic was fiercely egalitarian. That should not be all that surprising given that they had come here from cruelly oppressive and rigidly class conscious societies in Europe to make a new life in their new country. But, just as it is very hard for us now to comprehend the almost absolute indifference of these people to the cruel plight of the indigenous people whose displacement from their traditional lands was underwriting the prosperity that was being forged for the grandchildren of these people, so it is very hard for us now to appreciate just how fierce and uncompromising their egalitarianism was.

It's not surprising that Ryan's successors could see no reason to show mercy to the Legislative Council that had shown itself to be so intransigent to their reformist agenda. In removing the Legislative Council, they were indisputably following his lead.

As to the Supreme Court, the more ideological and class-conscious of Ryan's successors did not share the barrister's tolerant view of the ordinary human foibles of the judiciary. That less tolerant attitude may well have been aggravated by the view that the circumstance that Ryan's legalist strategy had worked so well in the Privy Council necessarily reflected badly on the Supreme Court of Queensland.

There is a further irony in that the success that the Queensland government enjoyed in the Privy Council was due in large part to English judges whom Ryan's successors in government in Queensland would have regarded as bad men. The Earl of Birkenhead was a Conservative grandee, and Viscount Haldane was a Liberal aristocrat. For the working class members of Theodore's government and their supporters, these men were their natural enemies.

In summary then as to Ryan's responsibility for the attack on the Court, I think that it is unlikely that Ryan promoted, or was disposed to pursue, the attack on the Supreme Court judges. Whether, had he stayed as Premier, he would have been willing to spend the political capital required to stem the tide of his colleagues' anger towards the judges or able to do so, is, I think, unlikely.

Conclusion

May I conclude with a tribute to the people who were, in a most important sense, heroes of the political storms of 1922. These were the people, many of them also ordinary working folk, who supported the Imperial Establishment against the radical changes being made to their lives by Queensland's radical government. Their support for the conservative side of politics remained peaceful. At a time when political passions were running high, and violence was never unthinkable, these people remained committed to the peaceful settlement of political differences by the democratic process. That was truly remarkable given the sudden and, for them, deeply disturbing change in the balance of political advantage. No doubt some of their grandchildren are here this evening too.