# JUDICIAL DECISION MAKING IN THE HIGH COURT IN ORIGINAL JURISDICTION: THE EBB AND FLOW OF LEGAL REASONING IN AUSTRALIAN PERSPECTIVE

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## I Introduction

THE DOCTRINES of the rule of law and the separation of powers are the cornerstone of the Australian Constitution, establishing the federalist system in Australia. The Australian constitutional system is very much a hybrid system, incorporating many of the nuances of the British colonial system, as brought to the Australian shores upon colonization. It also embraces features of the American constitutional system, primarily due the existence of numerous states at the time of federation, analogous to the system of United States of America.

Whatever system of representative democracy the fathers of federation embraced, what was clearly retained was the application of the rule of law to the constitutional monarchy, with a separation of powers as outlined in the Constitution. This system of government has been preserved to this day, with the High Court playing an ever increasing role in the interpretation of the Constitution, particularly in the exercise of commonwealth and state power throughout the 20th century.

As the Court has gone about applying judicial reasoning and interpretation to delineate the boundaries of commonwealth and state powers, the Court itself has also embarked on a journey, delineating the boundaries of its own powers and processes. This delineation includes its role within the separation of powers, and the process by which the High Court arrives at a judicial decision, especially the judicial reasoning process.

This analysis considers judicial decision making within the constitutional framework of Australia, particularly focusing on High Court judicial decisions in the original jurisdiction (constitutional interpretation) in the last thirty years, since the appointment of Mason J to the bench.

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## II The judiciary, rule of law and separation of powers

> ..fundamental to the system is that the validity of all legislation and executive action is judged by the Courts, not legislature or executive.[1]

The separation of powers purports a distinct delineation of the judiciary from the other two arms of the government, where the role of the Court to determine the constitutional validity of the laws enacted and executed by the two arms of the government, in an independent manner, through chapter III of the Australian Constitution. The High Court was established under section 71 of the Constitution, as a Federal Supreme Court, similar to that of the US Supreme Court, having both original and appellate jurisdiction.[2]

> It is the role of the Judiciary, as embodied under section 76 of the Constitution, to interpret the Constitution in the original appellate function. The High Court has been given original jurisdiction in all matters arising under the Constitution or involving its interpretation[3] where a significant part of the High Court's work is hearing and determining constitutional questions, often in proceedings regarding Commonwealth enumerative powers and their validity or invalidity.[4]

This interpretation and decision making function has been embraced by the judicature since federation, and is the embodiment of the federalist system under which Australia operates, and particularly the separation of powers. Indeed, it is the judges of the High Court who, in developing the common law, give meaning to the Constitution in a society that has experienced immense political, social and economic change throughout the first century of federation.[5] These issues which face the justices were aptly articulated by Lord Porter in the *Bank Nationalisation* Case as under:[6]

> The problem to be solved will often not be so much legal as political, social or economic. Yet it must be solved in a Court of law.

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1. *Australian Capital Television* v. *Commonwealth,* (1992) 177 CLR 106.
2. D.F Jackson, 'The Australian Judicial System" 58 *University of NSW Law Journal* (2001) *available at* http://www.austlii.edu.au/au/journals/UNSWLJ, Australian Constitution, s. 71, s. 73 and ss. 75-6.
3. *Ibid*.
4. *Ibid*.
5. George Williams. "The High Court and the Mass Media" *UTSLR* 1 (1999) *available at :* www.austlii.edu.au/au/journals/UTSLR.
6. *Commonwealth* v. *Bank of NSW,* (1949) 79 CLR 497 at 639.

The evolvement of the High Court in the exercise of political power may appear to conflict with the notion of the separation of power espoused by Locke and Montesquieu.[7] This is especially questionable since there is an overlap between the judiciary and the executive branch of government. The judges are chosen by the Parliament, appointed by the executive, and may be dismissed by the Governor General on address from both the Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity, as defined in section 72 of the Constitution.

Since federalism, the High Court has interpreted the Constitution as providing a separation of powers, and in *Dignan's* case,[8] the Court considered and ruled on the nature of separation of powers between the legislature and the executive.[9] In this judgment, both Evatt and Dixon JJ supported the separation of powers, daring to provide substantive argument regarding the separation of powers, with Evatt J further venturing to discuss at length the issue.[10] Evatt accepted that there is separation of judicial powers, based on the High Court decisions, and opined:

> Judicial functionaries should be free from any interference from the legislative or the executive, the special nature of judicial power and the elaborate provisions of chapter III.[11]

Since *Dignan's* case, and beyond, the High Court has formally adhered to the separation of powers doctrine, reiterated by the Court in 1956 with the *Boilermakers* case[12] where the High Court ruled that the body established to exercise the commonwealths power to conciliate and arbitrate industrial disputes could not also operate as a Court of the kind the commonwealth Parliament may create under chapter III of the Constitution.[13]

## III Judicial decision making and legal reasoning in Australia

Sitting alongside the issue of separation of powers and the judiciary, is the fundamental, philosophical nature of judicial reasoning. The concept of

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7. David Soloman, *The Politics of the High Court* 7 (1992).

8. *Victoria Stevedoring & General Contracting Co. Pty Ltd* v. *Dignan,* (1931) 46 CLR 73.

9. Haig Patapan, *Judging Democracy: The New Politics of the High Court* 157 (2000).

10. *Id. at* 157-8.

11. *Supra* note 8, at 115-6.

12. *R.* v. *Kirby: Ex parte Boilermakers' Society of Australia,* (1956) 94 CLR 254.

13. *Supra* note 8.

judicial restraint is grounded in the idea that each branch of government will stick to its own defined function, and not step outside these responsibilities,[14] and dominated the thinking of most of the justices born in the first half of the 20th century. As noted previously, there were many philosophical influences on the development of the Constitution, particularly Locke, Hobbs, and Montesquieu, and their contribution to the rule of law and separation of powers in a federal Constitution. These social contractarian philosophies were 18th century in origin, arising in a time of the return of natural law and its influence on the judicial decision making process. Whilst these influences had a profound effect on the development and reasoning of the government of the USA, the British convict history and the time of the development of federation ensured that positivist law and its legal reasoning would have a profound influence on Australian High Court justices.

Throughout Australian judicial history since federation, justices of the High Court have applied judicial reasoning to the decision making process of the Court, as all judges do in arriving at a decision.

For the first half of the century there is no doubt that the Court was influenced by the judicial reasoning process related to rule based reasoning and its connection with Bentham,[15] and later Hart. In this positivist view of legal reasoning, public decision making authorities need to give guidance to lower Courts, future legislators, and citizens through clear, abstract rules laid down in advance of actual applications.[16] Derived from this Bentham-like form of legal reasoning is the epitome of positivist judicial reasoning from Hart, where the principal of formal justice is that all cases should be treated alike, and different cases should be treated differently, fitting into the principle of formal justice.[17] Formal justice requires that, given the criteria of likeness and difference which are established in the law, these criteria are applied by the determining element in the judicial and official decisions when applying the law.[18] This positivist view treats the law as a body of rules, where judicial decisions are concerned with the application of rules, the value of formal justice, and factual, non-moral criteria.[19] Hence, to Hart, a legal system is characterised by the existence of a rule of recognition and a body of primary rules which are, for whatever

14. Michael Kirby, *Through the World's Eye* 101 (2000).

15. Cass R Sunstein, *Legal Reasoning and Political Conflict* 10 (1996).

16. *Id.* at 10-11.

17. N. E Simonds, *Central Issues in Jurisprudence – Justice, Law and Rights* 88-9 (1986).

18. *Id*. at 89.

19. *Id.* at 90.

reason, generally complied with,[20] and the judicial obligation is to prescribe conduct, not describe it.[21]

This rule based legal system appeared to serve Australia well for the first half of the 20th century, and was applied by a body of men well versed in classical positivist legal reasoning theory. However, Hart himself admits that there are difficult or 'penumbral' cases that defy formal justice and the rules or recognition in interpreting the law. These 'penumbral' cases, as Hart described them, sat outside of the rule based system of formal-justice, defying the ability to classify and catalogue.[22] Murphy J in his analysis of the rule of law, noted that hard cases (when referring to entrenched statutory or precedent law), make 'bad law',[23] and hard cases reveal that new law, statutory or decisional (precedent) is required. Such was Murphy's commitment to the issue of hard cases, and he uttered his famous interpretation of the doctrine of precedent as follows:

> Then there is the Doctrine of Precedent, one of my favourite doctrines. I have managed to apply it at least once a year since I have been on the bench. The doctrine is that whenever you are faced with a decision, you always follow what the last person who was faced with the same decision did. It is a doctrine eminently suitable for a nation overwhelmingly populated by sheep. As the distinguished chemist, Cornford, said, 'the doctrine is based on the theory that nothing should ever be done for the first time.[24]

Furthermore, Murphy noted that when both judiciary and the legislature are out of step with the deeper moral conscience of the community they serve, it is the duty of the judges, as much as the legislature, to be radical.[25] Murphy's view came at a time when Australia's judicial thinking was beginning to shift away from the positivist, rule dominated formal law that arose in the 19th century and maintained throughout the first half of the 20th century.

The second world war and the horrors of the Nazi regime and its 'formal-rules' devoid of morality encouraged legal academics, and later judicial decision makers, to consider the place of rule based justice within the community, and its lack of consideration of morality, society and policy. This post war era was characterised by the consideration of principles based legal reasoning, where legal principles are seen to be deeper and

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20. *Id.* at 90.
21. *Id.* at 91.
22. *Supra* note 16 at 26.
23. Richard and Jean Ely, *Lionel Murphy: The Rule of Law* 114 (1986).
24. Lionel Murphy, "The Responsibility of Judges" in G. Evans, (ed) *Law, Politics and the Labor Movement* 6 (1980).
25. *Supra* note 24 at 114.

more general than legal rules.

This new principles based on natural law developed predominantly in the USA, with the likes of Finnis, Rawls and Fuller considering morality and law together seriously for the first time in over 150 years. However, the definitive work of this era was that of Dworkin, [26] who defined the important roles of principles, policies and rules in judicial reasoning. In developing his *rights thesis* where rights are 'trumps', Dworkin considered Harts penumbral cases, and approached these cases by the application of legal principles.[27] Furthermore, Dworkin urged that the idealistic application of the principle theory is the development of a justice who is an infinitely resourceful and patient judge who approaches the application of the law as one of integrity, judgments of fit and political morality – in essence justice Hercules![28]

Bringing morality into judicial judgments and considering principal and policy in judicial decision making are considered to be the qualities of judge Hercules. This consideration raises fundamental questions. Should justices engage in this form of reasoning? Have Australian High Court Justices begun to embark on this form of judicial super-heroism, or have Australian justices merely applied natural law to judicial decisions, to create the "evolving chain novel"?[29]

## IV The High Court and judicial reasoning in Australia

There are many opinions regarding the role of the judge in judicial decisions, both from commentators, and from the justices themselves. Perhaps the most modern opinion comes from Australia's greatest dissenting judge, Michael Kirby J. In a formative address, he assessed the judicial reasoning foundations of Australia, changes in judicial reasoning, and the current backdrop of judicial reasoning within which the High Court sits.[30] He identified a desperate need for judicial activism, considering policy, principle and rules in judicial decision-making to ensure that judges interpret laws to meet the needs of the community they serve.

Whether this modern judicial reasoning upholds the doctrines of rule of law and separation of powers has been a contentious issue, debated by judges and commentators alike. What can be substantiated is that judicial

26. Ronald Dworkin, *Taking Rights Seriously* (1994).

27. *Id*. at ch. 3.

28. *Supra* note 15 at 48-50.

29. As defined by Dworkin, Supra note 27.

30. Michael Kirby, *Judicial Activism: Authority, Principle, and Policy in the Judicial Method*, The Hamlyn Lectures, Fifty-Fifth Series, (2003) Lectures 1-4.

reasoning in Australia over the last 100 years has altered, as a consequence of both intrinsic and extrinsic factors.

There have been a number of judicial 'periods' in the High Court, marked by judicial decisions, with a number of influences on these decisions, internal and external to the Court. The history of judicial decision making has been characterised by approximately four periods in the last one hundred years, with the period of the last thirty years perhaps the most influential on constitutional law in Australia. Each of these periods coincides with a constitutionally important event, which has changed the Court forever. The early decisions of the Court cannot be ignored, for they govern the decisions that are made today - that doctrine of precedent that Murphy J so eloquently described and applied.

**1903 - 1920**

The justices of the High Court in this period, and the decisions themselves, were the result of the legal reasoning theories they were influenced by, and their role in the federation of Australia. Indeed, the first three justices Griffith CJ, Barton and O'Connor JJ had been Constitution convention delegates, assisting in the drafting of the Constitution. Consequently, the foundation justices had the knowledge of the aims of the Constitution, which were manifested in the Court in two ways.

Firstly, limitations were imposed on state and federal powers, with the state and federal governments prevented from intruding in each others affairs, reinforced with the doctrine of immunity with the decision of *D'Emden* v. *Pedder*.[31] Whilst this doctrine was not spelled out in the Constitution, the members of the Court established this as precedent through judicial decision early into their tenure, to give common law support to the goal of 'coordinated federalism'[32] that the participants had contemplated. Secondly, early decisions were less concerned with legalistic decision making, than with the establishment of the relative roles of the state and federal governments in the new federation of states.

The later appointment of two more justices Isaacs and Higgins JJ saw the Court focus on its development of a strategy suitable to the conditions of the Australian public and political arena. Consequently, the High Court adopted the techniques and public rhetoric of 'strict and complete legalism' for constitutional cases.[33]

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31. *D'Emden* v. *Pedder* (1904) 1 CLR 91.

32. Gwenyth Singleton, *et. al., Australian Political Institutions* 45 (7th ed. 2003).

33. Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of the Government of Australia* 71 (1987).

**1920 – 1942**

A larger, altered composition of the High Court and the recovery of the nation from its first war as a federation with allegiance to the Empire, saw changes in the decision making of the High Court. Rather than the narrow interpretations of the original Court appointees, the altered Court composition, with the newly ensconced Knox CJ and Starke J, allowed a wider view on issues of constitutional interpretation. This was typified by the Courts' interpretation of the doctrines of implied immunity and implied prohibition, as challenged in the *Engineer's* case. In this decision, the Court ruled that federal arbitration power could be extended to awards of state governments, effectively removing the two doctrines in a single swoop. In this judgment, the federal legislative powers were substantially broadened, with the balance of state on federal power considerably tipped in the favour of the commonwealth.[34]

More importantly, this liberal approach to decision making left a profound and lasting effect on constitutional interpretation that survives today, where the words of the Constitution were construed to be given their wide and literal effect rather than the narrow, substantive effect construed by the original appointees of the Court. Such was the effect of the judgment of the case that a leading newspaper of the time reported:[35]

> (T)his is a judgment of momentous importance, providing new principles of interpretation… the judgment of D'Emden v. Pedder is overthrown, and all decisions based on it. People must wonder how long this new interpretation will last.

This prophetic question can now be answered. The principles of the *Engineers* case still stands in constitutional law today, providing valuable guidance in the interpretation of Constitution, and ensuring the words and meaning are constructed literally.

The relative liberalism of the Court in this era was eroded by a number of factors, one internal and one external. New appointments to the Court, including the appointment of McTiernan J in 1930, Latham J in 1935, Dixon J in 1929, and Evatt J in 1930, significantly altered the Court composition. By 1935, the only justices from the *Engineers* decision still on the bench were Starke and Rich JJ. Alone, this may not have placed the Court on the course of strict liberalism that it was to maintain for the next forty years. What sealed the fate of the Court, ensuring the eschewing of strict liberalism reasoning was the commencement of world war II, and the

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

35. *Supra* note 34 at 98.

corresponding expansion of the purposive commonwealth defence power (section 51vi of the Constitution), culminating in the transfer of tax powers from states to the commonwealth.

**1942 – 1972**

It is the decision of the *Uniform Tax* case[36] that denotes the change in the commonwealth power in the early 1940's, and a new era in judicial decision making. The new era is characterised by strict legal reasoning as epitomized by Dixon CJ, in his swearing in speech in 1952:

> Close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safer guide to judicial decisions in great conflict than strict and complete legalism.[37]

By strict and complete legalism, Dixon is referring to the utilisation of formal legal argument, and reliance upon technical legal solutions rather than the considerations of principle, policy, or other issues and factors.[38] This marked the Court of Dixon, from 1952 to 1964, where a healthy dose of judicial restraint was the norm within the High Court. In this Court, his view of the role of law permeated, as a system of law which they administered 'as both the foundation and the steel framework of the community which they served'.[39]

Whether the application of strict legalism was practical and useful in judicial interpretation of constitutional issues appeared to be secondary to the strict and total adherence to legal reasoning in the Dixon Court? If the decision was narrowing and impractical, then so be it. It was better to adhere to strict legalism than the alternative, since the concept of judicial restraint is grounded in the idea that each branch of government will stick to its own proper function,[40] rather that defy the confines of the position of the Court to attain practical judicial decisions.

Even after Dixon's exit from the Court, the legalist view of the role of the High Court prevailed, as expressed by Kitto J in *Rootes* v. *Shelton:*[41]

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36. *South Australia* v. *Commonwealth (The First Uniform Tax* case*),* (1942) 65 CLR 373.

37. Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi at xiv.

38. George Williams 'The High Court and the Mass Media' *UTSLR* (1999) *available at* www.austlii.edu.au/au/journals/UTSLR.

39. Ninian Stephen, *Sir Owen Dixon: A Celebration* 29 (1986).

40. Michael Kirby, *Through the World's Eye* 101 (2000).

41. Kitto, in comment to a remark by Jacobs J in *Rootes* v. *Shelton,* (1966) 86 WN (NSW pt 1) at 101 – 102 in Kirby, n60, 103.

> I think it is a mistake to suppose that the case is concerned with 'changing social needs' or with 'a proposed new field of liability in negligence [negligence in sport] or that it is to be decided by 'designing' a rule. And if I may be pardoned for saying so, to discuss the case in terms of judicial policy and social expediency is to introduce deleterious foreign matter into the water of common law – in which, after all, we have no more than riparian rights."

An illustration of this adherence to 'technical law', and its subsequent overturning, is in the area of section 92 of the Constitution. In this area of constitutional interpretation, the High Court firmly entrenched the individual rights theory in the 1949 decision of the *Bank Nationalisation* case.[42]

This view of section 92 was firmly held by the Courts in the 1976 decision of *Buck* v. *Bavone,*[43] although Murphy J in dissent noted the doctrine of individual rights was highly artificial.[44] Murphy J's dissenting view was accepted by the Court in 1988 in the pendulum decision view of the section 92 case of *Cole* v. *Whitfield.*[45] In the judicial version of a double back-flip with a twist, the High Court reversed eighty years of individual rights theory, embracing the early section 92 interpretation found in *Fox* v. *Robbins,*[46] and turned its back on the previous *criterion of operation* formula:

> In truth the history of the doctrine is an indication of the hazards of seeking certainty of operation of constitutional guarantee through the medium of an artificial formula. Either the formula is consistently applied and subverts the substance of the guarantee, or an attempt is made to achieve uniformly satisfactory outcomes and the formula becomes uncertain in its application.[47]

In essence this decision was to come to epitomize a new era of the Court.

**1975 to the mid 1990's - the activist era**

The previous legalistic approach of the High Court was affirmed with the appointment of Garfield Barwick CJ to the Court in April 1964. Barwick CJ had been Attorney General of Australia during 1961-4, and was well versed in the strict legalist approach of the Court. His attitude to legal

42. *Commonwealth* v. *Bank of New South Wales, (*1949) 79 CLR 497.
43. *Buck* v. *Bavone,* (1976) 135 CLR 110.
44. *Id. at* 132.
45. *Cole* v. *Whitfield,* (1988) 165 CLR 360.
46. *Fox* v. *Robbins,* (1909) 8 CLR 115.
47. *Supra* note 45 at 402, per Mason J.

restraint was linked to a lack of a Bill of Rights to interpret,[48] justifying the Courts "legalistic attitude to the Constitution and other matters."[49] It appeared that the judicial attitude of the previous era was to continue into the last quarter of the 20th century, with no relief. Whilst there had been many changes in approaches to judicial reasoning in the academic realm,[50] it would appear that it was not to reach the shores of the antipodes in the near future. Barwick reasoning, whilst simplistic, conveyed the message that strict legalism remained the Courts official doctrine on constitutional adjudication.[51]

**Factors influencing judicial activism**

The decade from the late 1970's was perhaps one of the most judicially active since federation, an era unlikely to be seen again for some time. This rise in judicial activism can be attributed to many factors, some interrelated, some isolated, which together coalesce to form a force capable of altering the reasoning process of the High Court of Australia, and influencing the reasoning process of justices at the same time.

On the occasion of the opening of the Court in 1903, Sir Samuel Griffith said:

> We know that some cases will come to us of necessity; in others it will be optional with the citizens to say whether they will trust us with the decision of their cases, or whether they will prefer to have recourse to the great tribunal that sits in the very centre of the Empire.[52]

How prophetic this statement was. Many fundamental constitutional issues have been decided in the last three decades, encompassing many areas of constitutional law, and interpreted in new ways. Perhaps the greatest illustration of this is the *Tasmanian Dams* case.[53] This decision epitomized the 'new thinking' of the Court, establishing commonwealth powers in the areas of external affairs (section 51 xxix), customs and excise (section 90), acquisition of property on just terms (section 51 xxxi), and the limits of the commonwealth corporations power. Quite simply, it was a remarkable

48. *Supra* note 34 at 32.

49. *Id.* at 3.

50. Eg., Rawl, Finnis, Fuller and Dworkin, as previously noted.

51. *Supra* note 34 at 31.

52. As noted in Gleeson CJ., *"Ceremonial Sitting – Swearing in of the Chief of Justice the Hon. Anthony Murray Gleeson CJ Ac COO/1998" available at* http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/hca/transcripts/1998/C00/3.html?query=%7e+swearing+in+gleeson 25 March 2004.

53. *Tasmania* v. *Commonwealth* (The *Tasmanian Dam* case), (1983) 158 CLR 1.

decision by a Court that a decade ago had been influenced by judicial restraint.

Another landmark decision, this time in the Mason Court era, was that of *Mabo*.[54] Whilst it did not challenge or alter the course of any enumerated federal constitutional power, it accomplished something even more fundamental, rewriting 200 years of Australian history by altering the Australian postion on *terra nullius*[55] thereby establishing native title rights to indigenous Australians. This decision was a reversal for the Court, given that only twenty years previously in *Milirrpum* v. *Nabalco Pty Ltd.,*[56] where the Court was reluctant to consider the land rights issue, and certainly conceded no legal gains to the indigenous applicant.

As noted earlier, the decision in *Cole* v. *Whitfield*[57] was the judicial pendulum swing of the century. Rather than the Court deciding for the first time on some area of law, this case reversed well established and theoretically grounded precedent and reasoning that had prevailed in the highest Court of the land for over 80 years. The burning question relating to the change judicial reasoning and decision is simple… why?

A survey of commentaries regarding this era of judicial activism[58] notes a global common law paradigm shift toward judicial creativity and away from the strict legalism that had dominated the Court since world war II. A number of prominent judiciaries point to events in the fifties and sixties, which shifted the judicial goalposts, particularly decisions from the 'Warren Court' of the United States.[59] These decisions enabled the Warren Court and its judicial activism to permeate into the Australian High Court, ultimately influencing fundamental decisions in the original jurisdiction.

In his swearing in speech, Gleeson CJ noted two particular issues in the 1980's which have affected the Court's role forever:[60]

> The first was the abolition of appeals to the Privy Council. In the beginning, and for the greater part of the time since then, the Court's role in hearing appeals from the various Australian jurisdictions

54. *Queensland* v. *Commonwealth [No. 21],* (1992) 175 CLR 1.

55. *Ibid.*

56. *Milirrpum* v. *Nabalco Pty Ltd*., (1971) 17 FLR 141.

57. *Cole* v. *Whitfield,* (1988) 165 CLR 360.

58. As defined by Michael Kirby in "Judicial Activision", *Through the Worlds Eye* 96 (2002).

59. Such decisions included *Brown* v. *Board of Education of Topeka,* (1954) 347 US 483; and *Miranda* v. *Arizona*, (1966) 384 US 436.

60. *Supra* note 52.

> was shared with, and was, to an extent, subject to the Judicial Committee of the Privy Council in London. The abolition of appeals from the High Court, and then from all Australian Courts, resulted from legislation enacted in the 1970s and 1980s, but only took final practical effect as pending cases worked their way through the system….
>
> The second relatively recent change affecting the appellate work of the Court is that appeals can no longer be brought as of right. Until amendments to the Judiciary Act in 1984, civil appeals could be brought to this Court, without the need for leave, provided the cases involved a specified, relatively modest, amount of money, or involved disputes about property of a certain value. In practice, an appeal could be brought if the appellant considered that what was at stake in the case justified the legal expense. Most such appeals were capable of being decided by the application of settled precedent. For most of this century, work of that kind occupied a large part of the time of the Court. Now, special leave to appeal is required in all civil cases. Leave is granted or refused according to such considerations as whether the case involves a question of law of public importance, or whether the High Court is required to resolve differences between other Courts as to the state of the law.[61]

This opinion is held by Kirby J, in his analysis of the Mason Court.[62]

**Mason 1972 - 1995**

Mason commenced his judicial service on the High Court espousing the judicial reasoning so prevalent of the day…*change, especially major change, should be left to the Parliament*.[63]

Yet his decision in *Teoh*[64] encompassed a healthy dose of judicial activism, with the incorporation of international human rights developments, and a willingness to see these rights reflected in Australia's legal and constitutional principles.[65] His early decisions such as that in *Trigwell* were entirely orthodox reflections of Sir Owen Dixon's 'strict and complete legalism'. In later decisions, and their reasoning, Mason chose a different

61. *Id*. at 4.
62. Michael Kirby, *Supra* note 40 at 111.
63. *State Government Insurance Commission* v. *Trigwell,* (1979) CLR 617, at 633, per Mason J.
64. *Minister for Ethnic Affairs* v. *Teoh,* (1995) 183 CLR 273.
65. *Id.* at 288 per Mason CJ and Deane J.

path, instituting irreversible changes in a time in law that was ripe for change.[66]

The remarkable transformation of Mason's judicial making in the Court, both as justice and chief justice, are seen by Kirby J as attributable to a number of important changes which occurred in the 1970's and 1880's.[67]

Firstly, was the physical location of the High Court. The lasting legacy that Barwick CJ created was the relocation of the High Court to a permanent location within the parliamentary triangle.[68] Whilst the Barwick years were dominated by strict legalism in the tradition of judges who had gone before him, the relocation of the Court to the parliamentary triangle in Canberra, and the granting of a permanent home established a close physical proximity to the other seats of power, namely, the executive and the legislature. This reinforced the role of the judiciary in the consitutional trinity[69] and its role in the decision-making process.

Secondly, there was an end to Privy Council appeals. Like Gleeson CJ, Kirby sees the influence of the abolishment of the Privy Council appeal[70] with the Australia Act, 1986 as the unshackling of the hands of the judiciary forever more. Mason came to the Court with a legal reasoning borne from the knowledge that whatever decision the Court made, it could still be overturned. Like so many of his peers, Mason CJ came from a judicial realm where superintendence to the Privy Council was an everyday reality.[71] Whilst the Privy Council may have been representative of the British Judicial Policy, it certainly did not reflect that of Australia, rather being, in the mind of Lionel Murphy J, an "eminent relic of Colonialism….[which] no longer has a useful role in maintaining uniformity even where it is desirable."[72]

The end to Privy Council appeals instilled in the minds of the judicature that the High Court of Australia was the final Court in Australia, and could not be overturned. This unleashed a hitherto restrained judicial attitude, since no longer could it ever be shackled by the mother country, or bound in chains like the convicts of our origins so long ago. Finally, the judiciary was free to establish precedent that was suited to Australian legal and constitutional conditions. Deane J has frankly acknowledged that deriving the authority of the Constitution from a compact between the Australian people, rather than the past authority of the United Kingdom Parliament

66 *Supra* note 63 at 123-4.
67. *Id.* at 112.
68. *Id.* at 114.
69. *Ibid.*
70. *Id*. at 116.
71. *Ibid*.
72. Ely, *Supra* note 24 at 175.

under the common law …[offers] "a more acceptable contemporary explanation of the basic law of the Constitution".[73]

Thirdly, growing nationhood and independence was a catalyst for changing Australian High Court attitudes. Kirby J noted that during the tenure of Mason in the High Court, both as justice and chief justice, there was a perceptible but distinct growth of Australian nationhood and independence that could be linked to the Australia Acts of 1986, and the severing of all ties with the United Kingdom.[74] This independence established a legal nationhood, with a brotherhood of justices to find the essence of the new nation with growing independence. This is exhibited in some landmark judicial decisions, from the Court at this time, including *Cole* v. *Whitfield,* which overturned 80 years of constitutional history on its head, and arguably marked the beginning of open judicial activism in the Court. Closely related to this was the introduction of time limits on submissions.[75] This encouraged the identification of the issues of legal principles and legal policy attracting interest which applicant seeks special leave,[76] thus clarifying in the mind of the judiciary the legal principles involved (a return to a Dworkin-like approach to the consideration of application, utilising principle rather than rules approaches.)

The close confines of the High Court to Parliament and the executive allowed Mason to observe that parliament cannot be relied upon to make all of the necessary amendments to the laws, so the judiciary must be relied upon to take a more active role. [77] This view is questionable that the separation of powers delineates the role of the judiciary as interpreting the law, not making the law. Mason CJ noted the role of increased knowledge and heightened expectations of justice in the community, placing High Court decisions firmly within the arena of the community,[78] especially since decisions such as *Tasmanian Dams*. No longer would strict legalism hold up to the community, as they needed logical, principled reasoning they could identify with. Many were uneasy with the concept the Court was involved in decision making, preferring such decisions be made to the Parliament. Consequently, the decisions made by the Court needed to make logical sense to the community.

Mason's period of tenure also coincided with the decline and fall of the declaratory theory of the judicial function in Australia.[79] Many justices

73. *Breavington* v. *Godleman,* (1988) 169 CLR 41 at 123 per Deane J.
74. Kirby, *Supra* note 58 at 116.
75. *Id.* at 119.
76. *Id.* at 119.
77. *Id.* at 121.
78. *Ibid.*
79. *Id.* at 120.

of the Court at the time of judicial creativity had been students of Julius Stone, and therefore exposed to his exposition of appellate decision-making at a time when judicial legalism was the order of the day. In this form of judicial decision making, "the judge remains a judge, working within the constraints of the law, but the task is better and more honestly done if the leeways are acknowledged."[80] Stone's form of judicial reasoning was heresy when Mason joined the Court in 1972, but close to accepted reality in 1995 when he left.[81]

In the 1970's the Courts were occasionally citing substantive articles of Stone's, (none more keen to do so than Murphy J), although the judiciary noted: "*Stones views must be taken not to have obtained acceptance"*.[82] By 1996 there was a frank acknowledgment of Stone's views on the leeway for choice, and policy problems that face the Courts, as declared by Deane J:

> Where past authority does not provide the solution, the appellate Court, particularly a final Court of appeal, is bound to derive solutions by analogous reasons from past legal authority, and considerations of relevant matters of legal principle and legal policy.[83]

Several judicial appointments in this period had a profound impact on the judicial reasoning of the High Court during this period.[84] In particular was the appointment of Lionel Murphy J, whose writing had a great influence on Mason CJ. The judicial reasoning styles of the two justices were very different. Murphy's techniques of opinion writing were distinct, espousing legal nationalism that questioned English authority,[85] at a time when the shackles were being shrugged off Courtesy of the Australia acts. This fascination with the text and implications of the Constitution came to influence other members of the Court. Also, the appointment of Deane J, in 1982 from Sydney bar, brought to the High Court bench his interest in intellectual property, unjust enrichment and equitable principles which generally stimulated intellectual perceptions and encouraged the Court to consider principles in addition to judicial legalism.[86]

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80. Michael Kirby, *Julius Stone and the High Court of Australia* (1997). The University of NSW, speech marking the Fiftieth Anniversary of the Publication of *Province and Function of Law*.

81. Kirby, *Supra* note 58 at 120.

82. Kirby, *Supra* note 80 at 4.

83. *Oceanic Shipping Line* v. *Fay,* (1988) 168 CLR 197.

84. Kirby, *supra* note 58 at114.

85. *Id.* at 114.

86. *Ibid.*

It is the combination of all these factors that has allowed the genesis of Julius Stone's judicial activism influence to take hold and flourish within the Court, however, it was Stone that had planted the seed of judicial activism within the minds of many of the justices of the High Court of Australia.

Some decisions by individual judges in the last thirty years illustrate this shift from strict legalism to a more literalist judiciary, with a penchance for considering the law alongside other issues such as policy and morality. This analysis looks at some of the judicial giants of the last thirty years, examining their contribution to the shifting reasoning paradigm in this period.

The Mason Court was marked by an judicial about face, relinquishing the obedience to strict legalism that had dominated the Court and the justices for over forty years, in favour of the rising judicial activism which considered Dworkin's principles, policies and rules in judicial decision-making. Mason CJ was taught and, therefore, somewhat influenced by Julius Stone's ideals of judicial activism within the legal profession,[87] yet confined by the 'strict and complete legalism" of the Dixon era. The influence of the judicial activism concept became apparent on the Mason Court, where the strict legalism that is reflected in one of Mason's early judgments[88] is replaced by a Court where concepts of Human rights and freedoms pervade many aspects of law,[89] as illustrated in the *Teoh*[90] judgment.

Mason's decision in *Cole* v. *Whitfield* was praised by Gerrard Brennan, noting: "...this judgment might rightly be considered as testimony to the multiple judicial qualities of Chief Justice Mason".[91] The influence of judicial activism on Mason during his tenure in the High Court is apparent, and during his term as Chief Justice, the Court "constituted by Justices of robust independence of mind, willing and able to give cogent expression to their own views."[92] The judicial activism era had begun.

**Murphy 1975 - 1986**

Murphy was creative and unconventional judge, appointed by the Whitlam government from the Senate in February 1975, just a few short months before the dismissal of the Whitlam government.

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87. *Id.* at 111.

88. *State Government Insurance Commission* v. *Trigwell and Ors.,* (1978) 142 CLR 617.

89. Lesley Zines, "Sir Anthony Mason" 28 2 *Federal Law Review* (2000) *available at* http://law anu.edu.au/publications/flr/vol28no2/Zines-on-Mason.htm.

90. *Minister for Immigration and Ethnic Affairs* v.*Teoh,*(1995) 183 CLR 273.

91. Gerrard Brennan in Zines, above n. 86, 2.

92. Gerrard Brennan, *A Tribute to the Hon. Sir Anthony Mason* (1995).

Murphy had a desire to 'bring about a more democratic and equal society – something he carried over into his judgments' as noted by Gibbs CJ.[93] Many of Murphy's judicial opinions (often in dissent) are today accepted as legal orthodoxy.[94] During his eleven years on the bench Murphy wrote 638 judgments, of which 137 in dissent (22%).[95] There are a number of issues in this development of acceptance of Murphy's legal theories.

Murphy demonstrated how powerful ideas, simply expressed, even in dissent, can work away within the legal system to plant seeds of doubt, until, in due time, the once dissenting views become accepted.[96] This is clearly illustrated in Murphy's minority view in *Buck* v. *Bavone*[97] regarding section 92 of the Constitution. This dissenting view was later accepted as law in *Cole* v. *Whitfield,*[98] which declared that the old doctrine of interstate trade and commerce was highly artificial.[99]

Throughout his appointment on the bench, Murphy implied constitutional rights as a recurring judicial theme, asserting them as '*not absolute, but nearly so*.'[100] He was criticised by Mason J in *Miller* v. *TCN Channel Nine*[101] for these views, yet vindicated in *ACTV* and *Nationwide News*. In both of these decisions the majority of the High Court upheld the argument that the federal legislation impugned was invalid by reference to the freedoms embodied in constitutional implications which amounted to guarantees of public and political discussion and criticism.[102] The Court then went on to take this premise as the basic proposition on which the implied freedom is built on in *Lange*.[103]

In *Mabo*[104] Brennan referred to *International Convention on Civil and Political Rights,* noting that international law is a legitimate and important influence on the development of common law, especially when international law declares the existence of universal human rights.[105] A decade earlier, Murphy had referred to this international convention, particularly in constitutional cases (for example, *Koowarta* v. *Bjelke-*

93. *Late Mr Justice Murphy* (1986) 160 CLR v at vii.
94. Kirby, *Supra* note 58 at 128.
95. *Ibid*.
96. *Ibid*.
97. *Buck* v. *Bavone,* (1976) 135 CLR 110 at 132 – 138.
98. *Cole* v. *Whitfield,* (1988) 165 CLR 360.
99. Kirby, *Supra* note 58 at 133-4.
100. *Id.,* at 135.
101. *Miller* v. *TCN Channel Nine,* (1986) 161 CLR 556.
102. Kirby, Supra note 58 at 136.
103. *Lange* v. *Australian Broadcasting Commission,* (1997) 189 CLR 520.
104. *Supra* note 54.
105. Kirby *supra* note 58 at 137.

*Peterson*,[106]) and was prominent in rejecting the narrow construction of the external affairs power in the *Tasmanian Dams* case.[107] Murphy perceived many legal issues from a human rights angle, with an open mindedness about the need to throw over the old doctrine when it no longer accorded to the social conditions and community attitudes of justice and fairness in modern Australia.[108]

Perhaps the ultimate legacy of Murphy on the High Court bench was that he broke the spell of unquestioning acceptance of the old rules.[109] Modern social circumstances and community attitudes have changed, rendering many rules inappropriate or inapplicable, and our identity as a nation and an English dominion have inextricably altered forever, leaving a new Australia in search of an identity. Many of Murphy's judgments, often in dissent, provided the genesis of these ideas, assisting Australia and Australians to define the nation they live in, and the constitutional guarantees that can be enjoyed.

The influence of Murphy on other justices of the bench cannot be overlooked. In *Trigwell,* Mason advocated judicial restraint, whilst Murphy in dissent noted the need for judicial change. How times have changed in those few short years on the Court! Many of the recent decisions discussed above demonstrate how the High Court of Australia has shaken off the judicial restraints, instead considering issues such as principle, judicial policy and international conventions within the judicial framework of the High Court. Until Murphy J came to the Court, asking searching questions, it was rare for a justice to expound such a challenging view in the highest Court of the land. Now, thankfully, this is not so rare.

**Deanne**

Deane J, whilst a student of Julius Stone, straddled the middle ground in the judicial road to activism. He expressed the function of a judge in an ultimate Court as one of reserve, not held back by the strict legalism that had previously pervaded, nor judicially active to the point of compromising the rule of law:

> The primary duty of any judge in a society governed by the rule of law is the application of legal authority. But often legal authority is unclear. The constitution of statute may be ambiguous. The presented cases may not be readily stretched by the tools of

106. *Koowarta* v. *Bjelke-Peterson,* (1982) 153 CLR 168.
107. Kirby, *Supra* note 58 at 137.
108. *Id.* at 139.
109. *Id.* at 141.

> analogical reasoning to afford a solution to the case in hand. Then, the judge in the tradition of the English Legal system may call in aid legal policy and legal principle.[110]

Deane's J just and guiding hand in judicial decision making provided a rudder for the High Court in time of change, being neither reactive nor judicially active. It was this steady, reserved attitude that saw him universally succeed as governor general when appointed in 1995.

**Brennan 1981- 1998**

Brennan's J approach to the law was defined for the world to see in his highly respected leading judgment of *Mabo*,[111] and was the embodiment of his approach to judicial decision making he articulated amidst his peers at the occasion of his swearing in ceremony as chief justice on 21 April, 1995:

> This Court is not a parliament of policy; it is a Court of law. Judicial method is not concerned with the ephemeral opinions of the community. The law is most needed when it stands against popular attitudes, sometimes engendered by those with power, and when it protects the unpopular against the clamour of the multitude. But judicial method is concerned with the equal dignity of every person, his or her capacity to participate in the life of the community, to contribute to society and to share in its benefits; it is concerned with the powers entrusted to governments and the manner in which those powers are exercised. Judicial method starts with an understanding of the existing rules; it seeks to perceive the principle that underlies them and, at a deeper level, the values that underlie the principle. At the appellate level, analogy and experience, as well as logic, have a part to play. Judgments must be principled, reasoned and objective, as Sir Anthony Mason said yesterday. And, most significantly, each step in the reasoning must be exposed for public examination and criticism.[112]

During his period on the bench, Brennan did not waver from his conviction to judicial decision making, ensuring all of his judgments were available for public examination and criticism, such as that of *Mabo.*

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110. *Fay* v. *Ocean Sun Line Special Shipping Company,* (1988) 165 CLR 195 at 252 per Deane J.

111. *Supra* note 54.

112. Brennan CJ*'Ceremonial Sitting – Swearing in of Brennan CJ Coo/1995" available at* http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/hca/transcripts/1995/C00/2.html?query=%7e+brennan+swearing+in.

**Gleeson**

With dignity indicative of his role as the chief justice, Gleeson speaks of the need to exhibit fidelity to legal discipline and warns of the dangers of judicial creativity.[113] Not as judicially active as some of his peers, he nonetheless sees the changing role of the High Court in a changing age:

> Some of the things that need to be done to improve the [government] system and to assist it to cope with the demands now made upon it can only be done by the judiciary. Trial judges have extensive powers available for the control of litigation, and are now much less inclined to act as spectators, while the lawyers and the parties decide the manner in which a case will proceed. Courts as institutions are active in developing systems for the management of their lists. Most of the law concerning legal procedure was originally judge made. If judges could make it, to suit former circumstances, then they can change it to suit changed circumstances.[114]

**Kirby**

It was at his swearing in speech in 1996 that Kirby J, a former student and ardent supporter of Julius Stone, set the scene for what would become a judicially creative and open Court in the history of the federation thus far. Publicly criticising and rejecting Dixon CJ's strict reasoning, Kirby charted a creative path for the law to follow:

> There will be no returning to the social values of 1952 when Sir Owen Dixon spoke, still less those of 1903 when this Court was established. It falls to each generation of Australian lawyers, led by this Court, to fashion new principles of the Constitution, common law, and of equity, which will contribute wisely to the good governance of the Australian people. There is now a greater public understanding of the limited, but still very real, scope for judicial creativity and legal development. Judges are now more candid about this aspect of their function. Without a measure of creativity how else would the common law have survived seven centuries, from feudalism to the space-age? How else would it

113. Kirby, *Supra* note 80 at 127.
114. *Supra* note 52.

> have endured in so many lands after the sun had set on the British Empire?[115]

Since this public declaration of judicial creativity, Kirby J has embarked on a path of judicial 'modernisation', incorporating judicial activism in his decisions. In addition, he has incorporated the Bangalore Principles of international law into judgments where ever possible. Part of Kirby's justification of this path comes from an unusual source:

> In my own way I have been endeavouring to carry on this important legacy.… "I confess that, at first, I regarded his [Justice Murphy's] attitude of internationalism in the law as unorthodox, and even heretical…..I now acknowledge that I was wrong. Lionel Murphy merely saw a great truth before most others did.[116]

This notion has been woven into many of Kirby's judgments, for example *Kartinyeri* v. *Commonwealth (Hindmarsh Bridge).*[117]

Kirby J has bought to the High Court bench an open proclamation to support judicial activism,[118] backed up by some of the most controversial and policy oriented judicial commentaries in Australia, such as his dissent in *Henderson's* case.[119]

Does this judicial activism proclaim Kirby as the Australian Justice Hercules? May be. Dispel the illusion of Kirby J in a yellow cape and red tights, and consider both his leading judgments, and dissent in many areas of the law, as well as extra-curial remarks in speeches such as the Hamlyn lecture series.[120] In all of these arenas, Kirby is quick to promote judicial activism, noting that it can only benefit, imbuing many judgments with statements of human rights, and in doing so continuing the legacy of Lionel Murphy.

Despite the many strengths and visions demonstrated here, there are some commentaries that see Kirby J's vision of law as inherently flawed:

> The accepts the notion of parliamentary sovereignty which regards parliament as able to make any laws it wishes, providing technical

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115. M Kirby, "*Speech on the Occasion of his swearing in and welcome as a Justice of the High Court of Australia" available at* http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/speeches/kirby%5fswear.html?query=%7e+swearing+in+kirby.

116. Kirby, *Supra* note 58 at 138.

117. *Kartinyeri* v. *Commonwealth,* (1998) 195 CLR 337.

118. Michael Kirby, *Judicial Activism: Authority, Principle, and Policy in the Judicial Method*. The Hamlyn Lectures , Fifty-Fifth Series, (2003) Lectures 1 – 4., Lecture 3, 1.

119. *Re Residential Tenancies Tribunal of NSW; Ex Parte Defence Housing Authority,* (1997) 190 CLR 410.

> (including constitutional) requirements are met. For justice Kirby there are no deeper human goods which transcends and ultimately controls the law.[121]

## V The High Court at 100, and judicial creativity

On turning one hundred, the High Court of Australia as divergent stances on judicial activism. Gleeson CJ and Michael Kirby J, whilst not singing the same judicial activist tune both in principle support the use of policy and procedure in judicial decision-making, however, one must remember that they are only two of seven sitting justices, with five other justices expressing opinions regarding the apparent wave of judicial activism (or at least a reprieve from strict legalism that gripped the Court in the first two thirds of the century).

To call the High Court judicially conservative on its one hundredth birthday is probably accurate, given the stance of the remaining justices in relation to judicial activism.

Hayne J supported traditional jurisprudence, with its roots embedded in rules and precedent.[122] Similarly, Callinan J on previous occasions openly criticised the judicial activism exhibited by the High Court,[123] advocating a return to strict legalism in the tome of Dixon in the 1940's and 50's. Particularly, Callinan J has been vocal on the Court's position on freedom of speech:

> I fear that an enlarged constitutional 'right' of freedom of speech has the potential simply to produce an oppressive, even more powerful media, unlikely to lead to the sort of better informed society that the High Court may be contemplating.[124]

Heydon J's views on judicial activism is a clear, leftover legacy of the 1950's: "Radical Legal Change is best effected by professional politicians who have a lifetime's experience of assessing the popular will. They might

120. *Ibid*.

121. Simon Travers, "Justice on trial in the High Court" *available at* http://pandora.nla.gov.au/pan/10449/19960630/member12/HCOURT1.HTM.

122. Kenneth Hayne J, "Letting Justice be done Without the Heavens Falling" 27 *Monash Law Review* 12-13(2001).

123. Ian Callinan, 'An Over-Mighty Court?" (Paper presented at the Fourth Conference of the Samuel Griffith Society, Brisbane, 29-31 July, 1994) *available at* http://www.samuelgriffith.org.au/papers/html/volume4/v4chap4.htm.

124. *Id.* at 3.

not be an ideal class, but they are fitted than the Courts to make radical legal changes." [125] He truly believes that judicial activism in any form is the death knell for the Rule of Law.. but is it?

## VI The judiciary and the preservation of the separation of powers

*"A stream must not rise above its source."*[126]

The concern and controversy regarding judicial activism centres on judicial activism, which encourages the judiciary to exceed their role in the separation of powers. This separation is grounded in the Constitution, which is said to assume the rule of law. The issue raised by judicial activism is simple. In the very nature of judicial activism, utilising principle, policy and rule to achieve judicial decisions, is the separation of powers compromised?

The foundation judicial activist, Lionel Murphy, undoubtedly made some sound judicial decisions. Yet many of his judgments were questioned, seen by some commentators:

> Even those sympathetic to his views, that Murphy failed to clothe his judgments in a legally appropriate manner - from his judgments it was all too clear that his 'reasoning' was a thin veneer to give some legal respectability to his political aims in particular cases.[127]

A specific issue of the manifestation of Hercules J is that of an attitude to constitutional law that enhances the role of the government.[128] Gava argues that the 'heroic' style of judging is a catastrophic development, signaling the reversal of time honoured beliefs about the roles of judges.[129] But one must question this attitude. It is conceded that the role of the judge has changed. But had not also the nature and structure of the society we live in? If the judiciary is to remain static, reveling in the strict legalism of the 1950's and 1960's, then shouldn't society stay in that era also?

Today we have a society that is exceedingly complex, participating in the global arena, forging external relationships and ties reflecting these

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125. Dyson Heydon, "Judicial Activism and the Death of the Rule of Law" 47(1) *Quadrant* 9 (2003).

126. *Australian Communist Party* v. *Commonwealth,* (1951) 83 CLR 1.

127. M J Demtold "Impartiality: Judicial Power and Constitutional Integration" (2001) 61 *University of NSW Law Journal available at* http://www.austlii.edu.au/au/journals/UNSWLJ/> 21 February 2004.

128. John Gava "The Rise of the Hero Judge" 60 *University of NSW Law Journal* 2-3 (2001).

129. *Id.* at 1.

changes. Constitutional laws need to reflect these complexities of societal relationships, with the decision in *Cole* v. *Whitfield* reflecting this increasingly complicated interpretation of section 92 and its implications for states. The Court openly admits that strict legalism in constitutional interpretation created predicament in the first place. Do we want to return to this predicament again – surely not.

Even the most active of judicial decision-makers, Michael Kirby, advocates control on judicial activism:[130]

> We need a middle ground that reflects the pragmatic character of the Common law in contemporary times. The extremes of unbound judicial creativity and invention will be tamed. But so too will be the extreme of mechanical application of old law without considering the context in which it must operate and its justice and conformity to basic principle.[131]

The question is simple – has the judicial stream risen above its source, exceeding its power in *interpreting* the law in the separation of powers, or has the judicial decision stream merely changed course, as it meanders its way across the Australian political landscape. Does judicial change mean alteration in judicial power?

Only time will determine the answer to this question, but indications based on precedent suggest that High Court decisions in the original jurisdiction have attempted to embody the original meaning of the Constitution within a modern context, rather than a Court in a desperate grasp for political power.

130 Michael Kirby, *Judicial Activism: Authority, Principle, and Policy in the Judicial Method* . The Hamlyn Lectures, Fifty-Fifth Series (2003) Lectures 1-4., Lecture 3, 1.

131. *Ibid*.