The Zeitgeist and the Constitution

The 2017 Sir Harry Gibbs Memorial Oration

The Honourable P. A. Keane

Sir Harry Gibbs was one of the first, and remains the most distinguished, of the graduates of the Law School at the University of Queensland. He was the most brilliant barrister of his time at the Queensland Bar. And he was a very great Australian judge.

For junior barristers appearing before the High Court over which he presided there were some striking aspects to the experience. The first was the remarkable courtesy with which he conducted proceedings, remarkable because it was in such stark contrast to the experience of counsel when his immediate predecessor as Chief Justice, Sir Garfield Barwick, presided. The rancorous mood that then prevailed meant that barristers often could not give of their best, and it was unsettling for other members of the Court. Not for nothing was Sir Harry described, on the occasion of his appointment as Chief Justice of Australia, in the headline in the *Sydney Morning Herald* as "Sir Harry the Healer".[1]

His unfailing courtesy inspired great respect and, indeed,

affection. In this he was, as David Jackson, QC, has observed, "a very Queensland man; [and] also a great Australian".[2]

The second striking thing about appearing before Sir Harry was that he was a master of the professional skills which Sir Owen Dixon described as the "high technique of the common law". He knew and loved the law and the idea of the law as a coherent intellectual system. He put one in mind of the description of the soldiers of the Roundhead army in the English Civil War who were said to have known what they were fighting for, and to have loved what they knew. He was a legalist in the school of Sir Owen Dixon although he was distinctly more of a federalist in his outlook than Dixon. Integral to his legalist philosophy was a modest appreciation of the proper scope of judicial power in its relationship with the political branches of government.

When Sir Harry was sworn in as Chief Justice of Australia on 12 February 1981, he said of the courts that:

> if they are trusted [by society], it is because they are seen to apply the law. Individuals and governments are not prepared to entrust their destinies to the whim of a few persons who will determine their controversies in accordance with their individual beliefs and principles . . . . [I]t would eventually be destructive of the authority of the courts if they were to put social or political theories of their own in place of legal principle.[3]

Earlier this year [2017], in an article on judicial biography in Australia[4], Dr Tanya Josev of the Melbourne Law School noted the speculation that the paucity of biographies of legal figures in Australia may be due in part to an unwillingness to personalise legal issues by giving them a biographical context which is distinctly inconsistent with "the abstract neutrality

inherent in . . . legalism".[5] There is certainly some truth in this: Sir Harry would have been very content that his work on the Bench was not apt to generate interest in his private life or his personal views about politics or about anything else for that matter. In this respect, he contrasts sharply with, for example, his English contemporary, Lord Denning, who pursued the limelight with an enthusiasm matched only by his self-regard.

Today, I want to reflect upon the tenacity of Sir Harry's modest conception of the role of the judiciary as a branch of government. Some might regard this tenacity as no more than stubborn resistance to ideas whose time has come. But I propose to refer to a number of recent decisions which illustrate the persistence, if not perhaps the unalloyed success, in Australia of Sir Harry's modest view of judicial power. In these cases, arguments were presented by one or more of the parties that indicated an impatience on the part of litigants and their lawyers with the judicial self-restraint involved in some core aspects of the legalism of Dixon and Gibbs. This impatience with that view of the role of the judiciary has been manifest in attempts to wish out of existence the historical limits upon the role of the judiciary as an institution. By and large, those attempts were resisted by the judiciary.

These cases afford examples of litigants and their lawyers who instinctively frame issues of public law as a contest for the vindication of individual rights without regard for the historical development of our institutions of government and of their responsibilities inter se.[6] The zeitgeist[7] is so thoroughly entranced by the notion that the operation of our legal system is to be understood in terms of the enforcement of individual rights that fundamental propositions about our institutions of government – and their separate roles as part of the apparatus of creating and enforcing the law – can be lost from view, even by those whose business it is to advise or comment on those issues.

The fascination of the zeitgeist with rights analysis as the universal solvent of legal problems tends to exalt judicial power as the source of rights over the political branches of government in a way which is apt to distort the role of the judiciary in the Anglophone tradition and, indeed, in our Constitution. So, for example (and it is a very important example), as Brennan, J, explained in *Attorney-General (NSW) v Quin* by reference to the institutional responsibility peculiar to the judicial branch of government to declare what the law is: "The scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise."[8]

Lawyers, especially black letter lawyers, should never discount the zeitgeist. When, in 1937, the Supreme Court of the United States by a 5-4 majority upheld the *Wagner Act* [9], and signalled the end of that Court's hidebound opposition to the New Deal, Charles E. Wyzanski, one of Learned Hand's former law clerks, was a member of FDR's legal team. Learned Hand wrote Wyzanski a congratulatory letter praising his contribution to the government's success in the case. Wyzanski modestly, but accurately, replied to the judge: "[I]t was not really Mr Wyzanski who won the Wagner cases, but Mr Zeitgeist."[10]

And in the eight decades since that time, the US Supreme Court has, in response to the zeitgeist, developed a jurisprudence festooned with individual rights. And, in turn, the zeitgeist has fed upon this jurisprudence.

In the view of Gibbs, as of Dixon, Australian constitutional law does not proceed from a basal assumption that individual citizens enjoy rights against the state, much less that such rights may not be diminished by an elected legislature. The closest that any English-speaking people came to adopting that view of the relationship between the state and the citizen was, of course, in the United States Constitution. And, while the lawyers

who framed our Constitution closely followed the American model in many important respects, they did not follow the American model in this respect. That was, as Sir Harry Gibbs recognised, a matter of deliberate choice.[11]

For those who like their constitutions to articulate an inspirational vision of national unity or to shower rights upon the citizenry, our Constitution is bound to disappoint. It began life as a section of an Act of the Imperial Parliament at Westminster, the *Commonwealth of Australia Constitution Act* 1900 (Imp).

In this Imperial Act, the Australian people do not get a mention. The Act recites that:

> the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

And section 5 of the Imperial Act makes the Constitution binding on the "people of every State and of every part of the Commonwealth". It should be noted that this people rate only a lower-case "p" in contrast to the "People" with the capital "P" in the Constitution of the United States. In contrast to the United States Constitution, our Constitution does not postulate the anterior existence of "the People" who have resolved among themselves to secure their natural rights under it. One might suggest that, in this, it was no more than an accurate and sensible acknowledgment of the historical fact that an Australian people did not exist at the time of Federation. It might also have reflected a reluctance to assert an Australian national identity separate from the "British" identity of all of the other subjects of Queen Victoria within the British Empire.

As to the absence of a bill of rights, Sir Owen Dixon said of our framers' decision not "to place fetters upon legislative action": "The history of their country had not taught them the need of provisions directed to control of the legislature itself."[12] More positively perhaps, Professor Harrison Moore wrote, in 1901, of our Constitution: "The great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power."[13]

Individual rights and the institutions of government

Can I illustrate in a general way what I mean about the zeitgeist, and its pervasive fascination with rights, with a simple example from the United States. The *Atlanta Journal Constitution* of 1 December 2016 reported an ongoing controversy in the State of Georgia in the USA as to the circumstances in which sitting courts may be closed to the public. The report quoted an attorney for the Southern Center for Human Rights, who expressed dismay that what she described as "the constitutional right to observe our courts" was an "unsettled question".

If one approaches the question whether proceedings in court may be closed in terms of a supposed individual "right to observe", one should not be surprised that the assertion of this right might be thrown into question because it is apt, in the nature of things, to conflict with the asserted rights of one or more of the parties to, for example, a right to privacy.

If, however, the problem is viewed in the light of the history of the development of our legal institutions, the issue can be seen to be essentially concerned with the proper discharge of the judicial function rather than the vindication of the rights of individuals, whether they be parties to the litigation or interested

observers. The issue is readily, and satisfactorily, I think, resolved by recognising that it is of the essence of the performance of the judicial function that it take place in, and be justified in, public.[14]

Exceptions to that requirement as to the due performance of judicial power can be supported only by considerations which themselves bear upon the integrity and efficacy of the exercise of judicial power.[15] In this way, our law avoids the problem of the competition between rights as a battle between incommensurables; the right to individual privacy versus the right to know. For example, in prosecutions for blackmail, the name of the complainant may be suppressed, but only so that the purposes of the proceeding will not be defeated.[16] In *Australian Broadcasting Commission v Parish*,[17] Deane, J, in a passage cited with approval by a majority of the High Court in *Gypsy Jokers Inc v Commissioner of Police*,[18] explained the exception as an aspect of the institutional imperative:

> In some cases, where publicity would destroy the subject matter of the litigation, the avoidance of prejudice to the administration of justice may make it imperative that the ordinary prima facie rule of open justice in the courtroom gives way to the overriding need for confidentiality.

Alqudsi

Section 80 of our Constitution provides relevantly that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury."

Trial by jury, under Article III, Section 2 of the Constitution of the United States, has been considered by their courts to be a matter of individual right, so that an accused person may waive his or her right to trial by jury.[19] Last year [2016], in *Alqudsi v The Queen*,[20] both the accused, and the Commonwealth Government (which intervened in the case), argued that offences under the *Crimes (Foreign Incursions and*

Recruitment) Act 1978 (Cth) charged on an indictment presented in the Supreme Court of New South Wales should be tried by a judge sitting alone pursuant to section 132 of the *Criminal Procedure Act* 1986 (NSW). It was urged that the accused was entitled to waive the entitlement to trial by jury conferred by section 80 of the Commonwealth Constitution in respect of indictable offences under Commonwealth law. That was said to be because section 80 conferred a personal right on the accused, and that right might be waived by him or her. In order to accept that argument, it would have been necessary to overrule the decision of the High Court in *Brown v The Queen* [21] which had stood as an authority for three decades.

By a majority of six to one, the Court in *Alqudsi* declined to overrule *Brown* and, in so doing, rejected the notion that the case was to be resolved by the rights analysis propounded by the accused person and the Commonwealth. In a joint judgment, Kiefel and Bell, JJ, and me accepted the proposition supported by the majority in *Brown* [22] that section 80 is "integral to the structure of government and to the distribution of judicial power and not as a right or privilege personal to the accused."[23]

Viewed as an essential element of the apparatus of judicial power established by Chapter III of the Constitution for the determination of charges of serious crimes, section 80 assures the "benefit to the community of having the determination of guilt in serious cases made by a representative body of ordinary and anonymous citizens."[24] To "emphasise trial by jury as a protection of the liberty of the individual is apt to overlook the importance of the institution of the jury to the administration of criminal justice more generally."[25]

The joint judgment also referred[26] to the history of trial by jury discussed in the unanimous judgment of the Court in *Cheatle v The Queen*.[27] There it was noted that, by the time of Federation, the common law institution of trial by jury had been adopted in

all the Australian colonies as the mode of trial in cases of serious criminal offences, and so the reference in section 80 to "trial by jury" was inevitably to that institution of the common law. And, as Sir Samuel Griffith had said in *R v Snow*, the requirement in section 80 that the trial on indictment of any offence against any law of the Commonwealth shall be by jury represents a "fundamental law of the Commonwealth", which "ought prima facie to be construed as an adoption of the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England."[28]

It may also be worth noting here that, while the stance taken by the accused is understandable in terms of a calculation that his prospects of acquittal would be better if he were to be tried by a judge sitting alone, the Commonwealth justified its stance on the basis that the complexity of much modern legislation meant that some cases are ill-suited to trial by jury. That suggestion was met with the response that, if a case cannot be made comprehensible to a jury, then it is unlikely to be "comprehensible to the accused and to the public, who must ultimately support the criminal process."[29] That response might be thought to have the virtue of common sense.

McCloy

A further recent example of an overly enthusiastic individual rights analysis is afforded by *McCloy v State of New South Wales*.[30] In that case, it was argued on behalf of McCloy that the implied freedom of political speech established in *Lange v Australian Broadcasting Corporation* created a right in an individual to make political donations in disregard of legislative attempts to limit such expenditure. The argument for Mr McCloy was that, under the implied freedom, he was entitled to spend as much as he liked in order to acquire and exercise as much political influence as he could garner.

The High Court rejected that argument on the same basis that it had consistently rejected attempts to invoke the implied freedom recognised in *Lange v Australian Broadcasting Corporation* as an individual right[32] to communicate about political matters free from all legal constraint.

Sections 7 and 24 of the Constitution, along with section 128, are the foundation for this principle of judge-made law which has been invoked to strike down laws made by the parliaments of the States and the Commonwealth. Section 24 provides that the House of Representatives shall be composed of "members directly chosen by the people of the Commonwealth". Section 7 provides that the Senate shall be composed of senators for each State, "directly chosen by the people of the State". In our Constitution, as has already been noted, the people rate only a small "p". Section 128, which provides for the amendment of the Constitution by referendum, does not even refer to the people; rather, it refers to "the electors qualified to vote for the election of members of the House of Representatives".

From the sparse textual basis of sections 7, 24 and 128 of the Constitution has grown, not without controversy, a body of case law which protects against legislative, executive or judicial action by a State or the Commonwealth, that curtails "freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors".[33] The protection thus afforded has been characterised as necessary to ensure that political sovereignty in this country is exercised by the people of the Commonwealth.[34]

How the people of the Commonwealth and States should go about making their choice of Members of the House of Representatives and the Senate was left to the Parliament to determine; but the seemingly modest provisions of sections 7

and 24 have been held by our judges to establish that the people of the Commonwealth are the sovereign power within the Commonwealth because of their enfranchisement by the Constitution.

As the ties of Empire became entirely tenuous after the passage of the Australia Acts in 1986, an expansive reading of sections 7, 24 and 128 of the Constitution met the felt need to relocate Australian sovereignty. As Mason, CJ, observed six years later in *Australian Capital Television Pty Ltd v The Commonwealth*,[35] the Australia Acts "marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people."

The point for present purposes is that the implied freedom of political communication is rooted in the institutional framework of our government. It protects the "[e]quality of opportunity to participate in the exercise of political sovereignty [which] is an aspect of the representative democracy guaranteed by our *Constitution*."[36]

The freedom of political communication protected by *Lange* is not a personal right of the kind guaranteed by the First Amendment to the United States Constitution; rather, it is a consequence of a perceived limitation on the role of government *vis-à-vis* the people of the Commonwealth. The implied freedom is about the institutions of government. It operates to restrict the power of the legislative, executive and judicial branches of government to curtail or skew communication about governmental or political matters amongst the people of the Commonwealth.[37]

Because the implied freedom is the other side of the coin of a limitation upon the power of government through whichever branch it may be exercised, it is essentially negative in its operation. In *Levy v Victoria*, McHugh, J, said:

Unlike the Constitution of the United States, our

> Constitution does not create rights of communication. It gives immunity from the operation of laws that inhibit a right or privilege to communicate on political and government matters.[38]

Similarly, in *McClure v Australian Electoral Commission*,[39] Hayne, J, said: "The freedom is a freedom from governmental action; it is not a right to require others to provide a means of communication."[40] On this view of the juridical nature of the implied freedom, it would not be curtailed by my neighbour's refusal to permit me to enter upon his or her land in order to make a political speech from his or her veranda. That is because the implied freedom confers on me no right to be on my neighbour's land without his or her consent. The point is that the operation of the implied freedom does not give rise to a contest of individual rights.

Positive rights and judicial power

By the late 18th century the English judges had demonstrated their firm resolve in the defence of the common law rights to liberty and property.[41] That a judiciary drawn from the aristocracy and the gentry should have been zealous to defend such common law rights against the executive government is hardly surprising: they were usually enforcing rules which they themselves had made concerning rights which they themselves enjoyed.

It is one thing to look to courts to stand between individuals and the executive government to ensure that individual liberties are protected from the arbitrary exercise of state power. The enforcement by the courts of a human right of a negative kind, that is the right to be left alone by governments, costs the community nothing in upholding those rights – at least directly. It is another thing to see the courts as guarantors of

positive rights, for example, to an education, to health care, to support for those affected by disability, adversity and old age. To vindicate these positive rights as a matter of justice, money must be raised by taxation and then allocated between competing priorities. In our legal tradition, these responsibilities became exclusively the province of the legislature. This was not inevitably the case. Wars were fought about it.

Our present constitutional arrangements are the outcome of a thousand years of political, economic and social conflict from shortly after the Norman Conquest, manifest in the wars between Simon de Montfort and Henry III and Edward I, the political struggles to finance the Hundred Years War, and the Revolution in England which convulsed the British Isles for most of the 17th century. The success of the Revolution settlement over the succeeding three hundred years has meant that, for us, government evolved from the armed and violent kleptocracy of William the Conqueror and his descendants to liberal democracy and the rise of the welfare state.

The central element in the constitutional settlement following the Revolution of the 17th century was that the raising and expenditure of public moneys became the exclusive province of the legislature which represented the political nation. Neither the executive nor, for that matter, the judicial branch of government may insist on the extraction of money from the citizenry or the expenditure of public money, however worthwhile the objects of that expenditure may be, without legislative authority for that exaction and appropriation.

The most famous statement of the relationship between the three branches of government which developed at Westminster in the six hundred years to the end of the 18th century is contained in Federalist No 78, written by Alexander Hamilton. In that essay, Hamilton wrote:

The executive not only dispenses the honors, but holds the

> sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

It may be noted that Hamilton's statement is not theoretical or prescriptive: he is not saying what ought to be the proper role of each department of government in an ideal world. His statement is an elegant summary of historical experience of English-speaking people of the Revolution settlement of the 17th century.

It is the legacy of this historical experience of the broadly characteristic activities of the three branches of government that was enshrined in our Constitution. It seems that this legacy does not now strongly resonate within the zeitgeist. Sir Harry Gibbs would, no doubt, have thought that it would be to indulge in platitudes to insist that parliamentary supremacy over the power of the purse is constitutional bedrock. But what Sir Harry regarded as the settled understanding of the relationship between the branches of our government has been called into question in arguments advanced in cases before the High Court.

Dietrich v The Queen

One of the first of these was *Dietrich v The Queen*.[42] In that case, the argument put for Mr Dietrich was that "an accused person charged with a serious crime punishable by imprisonment, who cannot afford counsel, has a right to be

provided with counsel at public expense".[43] The High Court held that no such right existed.

The position here is, of course, to be contrasted with that in the United States where the Sixth Amendment to the US Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." And so, in *Johnson v Zerbst*,[44] the US Supreme Court held that in all federal cases, a court must appoint counsel to represent defendants who are unable to afford their own. The Court said:

> Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.[45]

If one thing is clear in this field of discourse, it is that neither our federal Constitution nor any of our State constitutions contains a provision even remotely resembling the Sixth Amendment. One might have thought that this is a fairly clear indication that they cannot be made to operate as if they did.

In *Dietrich*, the majority of the judges held that the power of the courts to ensure a fair trial of a criminal charge extended to granting a stay or adjournment of the trial where representation of the accused is essential to a fair trial, as it is in most cases where an accused is charged with a serious offence. That view was based on the proposition that the judicial power should not permit itself to be deployed unjustly.

The argument that the individual enjoys a right to be provided with Counsel at state expense could never stand with the settled view of the constitutional role of the judiciary. As Brennan, J, explained:

> The courts can point out that the administration of justice is an inalienable function of the State and that the very security of the State depends on the fair and efficient administration of justice, but the courts cannot compel the legislature and the executive government to provide legal representation. Nor can this Court declare the existence of a common law entitlement to legal aid when the satisfaction of that entitlement depends on the actions of the political branches of government. In my opinion, to declare such an entitlement without power to compel its satisfaction amounts to an unwarranted intrusion into legislative and executive functions.[46]

Pape v Commissioner of Taxation

In *Pape v Commissioner of Taxation*, the plaintiff was entitled to receive a payment of $250 under the *Tax Bonus for Working Australians Act (No 2)* 2009 (Cth).[47] The plaintiff challenged the validity of payments made under that Act. The High Court, by majority, held that the Tax Bonus Act was valid.

Section 81 of the Constitution directs that all revenues or moneys received by the Executive Government be paid into the Consolidated Revenue Fund. Such moneys are only to be appropriated from that Fund for "the purposes of the Commonwealth". By virtue of section 83 no money can be drawn from the Fund absent such an appropriation by law, that is to say, by statute. In *Pape*, the Court rejected the Commonwealth's contention that section 81 of the Constitution was itself a source of power which, when read with the incidental power in section 51(xxxix), supported the enactment of the Tax Bonus Act. The Court held unanimously that sections 81 and 83 of the Constitution are not to be understood as the source of a general power to spend moneys lawfully appropriated by

Parliament.[48]

Rather, in the view of the majority, the source of power was section 61 of the Constitution, read with section 51(xxxix), conditioned, as well, upon compliance with sections 81 and 83.[49] Of interest for present purposes is the circumstance that the reasons given by the members of the Court for rejecting the broad view of the operation of sections 81 and 83 of the Constitution were shaped by deference to the historic settlement in favour of Parliament's control over public moneys.

Given the history of parliamentary control of the exercise of executive power to spend public moneys, it is hardly surprising that the safeguards in sections 81 and 83 of the Constitution have been held to be an express statement of that control rather than substantive sources of power to pursue purposes other than those expressly conferred on the Parliament of the Commonwealth by section 51 of the Constitution.[50] Hayne and Kiefel, JJ, said:

> Section 81 does not provide for spending; it regulates the relationship between the Executive and the Parliament. Section 81 provides for control by the Parliament over the *purposes* to which the Consolidated Revenue Fund may be applied and s 83 regulates withdrawal of money from the Treasury of the Commonwealth. The power to spend lies elsewhere.[51]

Williams v The Commonwealth

In *Williams v The Commonwealth*,[52] the plaintiff challenged the validity of an agreement, and the lawfulness of payments by the Commonwealth pursuant to that agreement, between the Commonwealth and Scripture Union Queensland for the provision of chaplaincy services to schools. The Commonwealth made a broad submission that its capacity to contract and to spend was unlimited. In the alternative, the Commonwealth

submitted that the executive power of the Commonwealth supported the making of payments in relation to those activities in respect of which Parliament was empowered to make a law.

The High Court held, by a majority of six to one, that the agreement was beyond the executive power of the Commonwealth described in section 61 and that the payments were not supported by section 61. French, CJ,[53] Gummow and Bell, JJ,[54] and Crennan, J,[55] rejected both the "broad" and "narrow" bases for the validity of the payments advanced by the Commonwealth. In separate judgments, Hayne, J,[56] and Kiefel, J,[57] rejected the Commonwealth's broad submission, but did not decide whether the Executive's expenditure of money under contracts needed to be authorised by statute, because their Honours held that none of the heads of power in section 51 of the Constitution would have supported a hypothetical piece of legislation enacted to support the validity of the payments. Heydon, J, dissented, accepting that the executive power included what could be authorised by valid legislation.[58]

The majority held that no provision of the Constitution empowered the Commonwealth to make laws for the funding of the Scripture Union Queensland as part of the National School Chaplaincy Program.[59]

In *Williams v The Commonwealth [No 2]*, the High Court was unanimous in affirming:

> [F]irst, that the appropriation of moneys in accordance with the requirements of ss 81 and 83 of the Constitution does not itself confer a substantive spending power and, second, that the power to spend appropriated moneys must be found elsewhere in the Constitution or in statutes made under it.[60]

One might have thought it hardly surprising that this should be so. To see the power of the executive government of

the Commonwealth to enter into contracts as a free-standing power to create the occasion for the expenditure of public money is to make the great leap forward to the 16th century. But some learned commentators were surprised.

Appleby and Webster noted that the decision has been criticised "because it overturned an assumption on which the federal government had relied for almost a century, and that the newly required procedure will be difficult for the government to work with in future."[61] Professor Geoffrey Lindell observed:

> From a democratic point of view, the case has the undoubted and powerful attraction of ensuring that the *Parliament*, and *not the Executive*, should decide what the government does, especially in the way of new activities and policies not previously approved by Parliament.
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> But I believe this may have come at a high practical cost in terms of governmental efficiency and the hardships created for those who contract with governments. This is because it raises many questions about the uncertain boundary which will separate whether contracts entered into by the Commonwealth will or will not need additional legislative approval. One does not have to be more than a casual observer of political affairs to know . . . how difficult it is to obtain parliamentary approval for government policies even without minority governments. Democratic considerations need to be counterbalanced by the additional need for governments not to be hamstrung and prevented from acting decisively and promptly in the face of pressing popular demands.[62]

With great respect, there is something of the spirit of Charles I in the notion that the executive government may say to

the taxpayers of the Commonwealth that its need to spend our money upon projects which seem good to it is, in its judgment, so urgent and overwhelming that it cannot stay to seek authority to spend it from our elected representatives or to justify the occasion for the expenditure as within the authority conferred by them.

We should be wary of any suggestion that the claims upon the public funds of the Commonwealth are so urgent that it is no longer realistic to insist upon parliamentary authority for the expenditure of those funds or that such expenditure be demonstrably confined to the purposes that the Parliament authorises. The work of Carl Schmitt reminds us that there is good reason to be wary of an emergency as an exception to the application of the ordinary rules. His most insightful, and famous, aphorism was: "Sovereign is he who decides on the exception."[63] Schmitt's point was that in times of economic or political crisis, when there are calls for the application of extraordinary measures which depart from the usual constitutional order, it is the person who has the power to implement the extraordinary measures who exercises real sovereign power. As Schmitt went on to explain: "It will soon become clear that the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege."[64]

Murphy v Electoral Commissioner

Last year [2016], the High Court heard a challenge to the provisions of the *Commonwealth Electoral Act* 1918 (Cth) which suspend the enrolment of persons who seek to enrol to vote in federal elections, and the transfer of enrolment of persons already enrolled, during the period from 8 pm on the day of the close of the rolls for the election until the completion of polling.

The plaintiffs' contention was that these provisions were contrary to sections 7 and 24 of the Constitution which were to be understood as guaranteeing a right to vote to every individual, including those who did not trouble to register to vote as the Electoral Act required. The Court unanimously rejected the challenge.

For present purposes, the important part of the argument advanced for the plaintiff was that it was technically possible for the Commonwealth now to make arrangements which would allow for a person's entitlement to vote to be assessed at the time of polling. It was said that, in light of this possibility, the closure of the rolls in advance of polling day burdened the constitutionally mandated choice by the people. In my reasons, I responded to that argument thus:[65]

> To require the assessment of qualification to enrol at the polling booth can also be expected to require the provision of resources in addition to those currently necessary if delays to voting and consequent inconvenience to those already enrolled and waiting to vote are to be avoided. While this Court's power and responsibility to declare what the law is requires this Court to declare the invalidity of laws which exceed the legislative power of the Parliament,[66] it is not a recognised part of the role of the judiciary within our system of separated powers to require the executive government or the legislature to raise and spend public funds in order to effect what might be thought to be desirable improvements in the public life of the community.[67]

Kiefel, J, as her Honour then was, held that the legislation was not invalid on the basis that it could not be said that the closure of the rolls was a "disproportionate" exercise of

legislative power. In explaining proportionality testing of the limits of legislative power in this context, her Honour said:[68]

> Proportionality analysis does not involve determining policy or fiscal choices, which are the province of the Parliament. Thus the test of whether there are alternative, less restrictive means available for achieving a statutory object, which assumes some importance in this case, requires that the alternative measure be otherwise identical in its effects to the legislative measures which have been chosen. It will not be equal in every respect if it requires not insignificant government funding.[69]

Gageler, J, concluded his judgment with this observation:[70]

> [T]he plaintiffs would have had the Court engage in a process of electoral reform. Through the application of an abstracted top-down analysis, they would have had the Court compel the Parliament to maximise the franchise by redesigning the legislative scheme to adopt what the plaintiffs put forward currently to be best electoral practice.
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> To seek to compel such a result by those means might be all well and good in a constitutional system in which a function of the judiciary is understood to be the enhancement of political outcomes in order to achieve some notion of Pareto-optimality.[71] That is not our system. The plaintiffs' efforts to expand the franchise would be better directed to the Parliament than to the Court.

Lyons v Queensland

Last year [2016], in *Lyons v Queensland*,[72] the High Court

considered whether a profoundly deaf person was unlawfully discriminated against when she was excluded from serving on a jury. Ms Lyons asserted her right to do jury service, but required the services of an Australian Sign Language ("Auslan") interpreter. The Court decided that Ms Lyons was "incapable of effectively performing the functions of a juror"[73] by reason of her disability.

The Court unanimously held[74] that Ms Lyons' exclusion from jury service was not unlawful discrimination under the *Anti-Discrimination Act* 1991 (Q) ("the Anti-Discrimination Act"), because Queensland law did not permit an Auslan interpreter to be present in the jury room during jury deliberations.

There was another reason for concluding that it was not unlawful discrimination to exclude Ms Lyons from jury service which was not adverted to by the Court. Section 106(1)(a) of the Anti-Discrimination Act exempts from its operation "an act necessary to comply with . . . an existing provision of another Act."

The *Jury Act* 1995 (Q) ("the Jury Act") provides by section 63 that a person who attends, when instructed by the sheriff to attend under a summons, to perform jury service is entitled to remuneration and allowances on the scale prescribed under a regulation. Section 64 provides for special payments for financial loss arising out of the person's jury service where the Governor in Council authorises such a payment by way of compensation.

The Jury Regulation 2007 (Q) provides for remuneration and allowances to jurors,[75] but these do not include reimbursement of expenses incurred for assistance necessary to enable a juror to discharge his or her duties.

Thus, neither the Jury Act nor the Regulation contains authorisation for the provision of an interpreter to enable a person to be eligible for jury service.

What makes *Lyons* noteworthy for present purposes is that the officer of the executive government who made the decision to exclude Ms Lyons from serving as a juror was obliged to observe the requirement of the Queensland Constitution of statutory authority for any expenditure by the executive government.[76] That the provisions of the Anti-Discrimination Act operate within this constitutional constraint was explained by the earlier decision of the Queensland Court of Appeal in *Hashish v The Minister for Education*.[77] There, it was held by majority that if a statute does not provide for expenditure for a particular purpose, then a refusal to make the expenditure is necessary to comply with the State Constitution, as an existing Act within the meaning of section 106(1)(a) of the Anti-Discrimination Act. The decision in *Hashish* has stood for nearly 20 years. It might have been thought that the approach taken in *Hashish* by the Court of Appeal would have been applied by officers of the executive government in the administration of the State's anti-discrimination legislation. But that was not to be.

Given the provisions of the Jury Act and Regulations to which I have referred, it was abundantly clear that they did not authorise such expenditure.

When, in the course of the hearing before the High Court, the limited statutory provision for payment of expenses of jurors was raised as a potential difficulty for Ms Lyons, Senior Counsel for Ms Lyons observed, correctly, that the Registrar had not raised this difficulty in response to Ms Lyons' demand, so that it could not be known what course Ms Lyons might have taken had it been made clear to her that her requirement that the State fund the availability of two Auslan interpreters was an obstacle to acceptance of her request. In the circumstances, the State, rightly, did not seek to rely upon this point. And so this point did not form any part of this Court's decision.

I mention the case now, both as a reminder that officers of the executive government operate within the zeitgeist, and as an illustration that the time-honoured discomfort of executive governments with parliamentary control of public moneys is not confined to politicians. That the decision of the Queensland Court of Appeal in *Hashish* had passed out of the corporate memory of the public service is explicable as a triumph of the zeitgeist over the authority of the Court of Appeal. No doubt bureaucrats, too, find their life easier when they can be generous with public money. No-one wants to be accused of being mean-spirited. And that is especially so when the charge of being mean-spirited can be avoided by the use of other people's money.

Conclusion

Each of the cases I have discussed advanced an argument blind to a crucial aspect of the institutional context in which rights are created within the Anglophone legal tradition and, indeed, under our Constitution. In each case, that argument failed to carry the day. Common to each unsuccessful argument was an exalted understanding of the nature and extent of judicial power within our institutions of government.

In the context of the Australian experience of the separation of powers, the judiciary has proved to be a steadfast protector of negative rights such as personal liberty, but it has never been thought to have a role in actively advancing the values of fraternity. In light of the historical development of our institutions of government, no-one could sensibly expect that it would.

And yet the grip of that historical perspective on the minds of our young lawyers may be slipping. Each year the best and brightest of our young law graduates emerge from our Universities, almost all of them fired by the noble ambition to

work in the field of human rights; which they understand as involving working within the judicial system to bring positive improvements to other people's lives. Almost without exception, none of them ever expresses an ambition to enter politics.

Given the brutality of the political process and the eye-crossing banality of so much of what passes for political debate, one can understand the consequent disillusionment with the political processes of government, and the attraction, especially for our best and brightest young lawyers, of arguing for rights in the open, polite and reasonable atmosphere of a court whose decisions must be justified in public by comprehensive reasons. But the attractions of the openness, fairness and rationality offered by the judicial process cannot trump the stubborn truths that the grant of positive rights necessarily depends on the exercise of the sovereign prerogative of choice, and that positive rights are possible in a democracy only if taxpayers are willing and able to pay for them.

Within our legal tradition generally, and under our Constitution in particular, it is only the institution of Parliament that can create the positive rights that give practical meaning to the great political virtue of fraternity without injustice to those of the citizenry who must pay for them. To declare and enforce such rights against a community which has not agreed to pay the price of doing so puts one in mind of St Augustine's description of the state as nothing more than a great band of robbers.[78]

In Australia the great political principle of fraternity has, as a matter of historical fact, thrived to an extent that is the envy of the world. That success has been dependent upon an engaged citizenry rather than upon the wisdom or generosity of judges. Those of us who know something of our history have ample reason to have faith in our parliaments to create positive rights for our citizens. As the Honourable E. G. Whitlam said:

> Parliament has been our great liberating force . . . . There is no freedom without equality. To redistribute and equalise liberty has been one of the principal functions of Parliament. Parliament alone can give equality of opportunity and thereby increase liberty for all. If we are to have economic equality of opportunity, which is the next stage in the advance of liberty, we must have effective parliamentary government and, accordingly, dispense with fetters on Parliament rather than contrive them.[79]

I am reasonably confident that Sir Harry Gibbs agreed with very little that Gough Whitlam ever said. In particular, of course, Sir Harry disagreed strongly with Whitlam's centralising ambitions and his promotion of an expanded role for government in the life of the community. But as to the notion that it is no part of the judicial function to search in the constitutional silences to contrive fetters on the legislative branch of government – I think that he would have agreed with that.

Endnotes

1. *Sydney Morning Herald*, cited in Joan Priest, *Sir Harry Gibbs: Without Fear or Favour*, (1995) at 86.

2. D. F. Jackson, "The Sir Harry Gibbs Oration: Sir Harry Gibbs and The Constitution", (2006) 24 *University of Queensland Law Journal* 65 at 76.

3. (1981) 148 CLR xi at xiii.

4. T. Josev, "Judicial Biography in Australia: Current Obstacles and Opportunities", (2017) 40 *UNSW Law Journal* 842 at 846-848.

5. John Waugh, "Cowen as Life-Writer: Sidelights from the Archives", (2015) 38 *Melbourne University Law Review* 1081 at 1081.

6. Cf *Victorian Stevedoring & General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 101-102 per Dixon J.

7. The expression, "zeitgeist", "the spirit of the age", was coined in the early 19th century by Georg F. W. Hegel in *The Philosophy of History*, New York, Cosimo, 2007 (German Edition 1899).

8. (1990) 170 CLR 1 at 36.

9. *NLRB v Jones & Laughlin Steel Corp.*

10. Gerald Gunther, "Learned Hand: The Man and the Judge", at 393-394.

11. "The Separation of Powers: A Comparison", (1987) 17 *Federal Law Review* 151 at 152.

12. Owen Dixon, "Two Constitutions Compared", *Jesting Pilate*, (1965) at 102.

13. Harrison Moore, *The Constitution of the Commonwealth of Australia*, 1st ed. (1902) at 329.

14. *Scott v Scott* [1913] AC 417 at 441; *Russell v Russell* (1976)

134 CLR 495 at 507, 520-521, 532.

15. *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 450, 457, 464, 471-472, 473.

16. *Scott v Scott* [1913] AC 417 at 445; *Reg v Socialist Worker; Ex parte Attorney-General* [1975] 1 QB 637 at 651-652.

17. (1980) 43 FLR 129 at 157.

18. (2008) 234 CLR 532 at 560-561 [41].

19. *Patton v United States* (1980) 9 Am L R (4d) 689.

20. (2016) 90 ALJR 711; [2016] HCA 24.

21. (1986) 160 CLR 171.

22. (1986) 160 CLR 171 at 197, 202 and 214.

23. (2016) 90 ALJR 711 at 735 [94].

24. (2016) 90 ALJR 711 at 740 [116]. See also 743 [128]-[131], 744-745 [137]-[140], 749 [174]-[175].

25. (2016) 90 ALJR 711 at 740 [116].

26. (2016) 90 ALJR 711 at 736-737 [100].

27. (1993) 177 CLR 541 at 549.

28. (1915) 20 CLR 315 at 323, cited in *Cheatle v The Queen* (1993) 177 CLR 541 at 549.

29. (2016) 90 ALJR at 740-741 [119].

30. (2015) 325 ALR 15; [2015] HCA 34.

31. (1997) 189 CLR 520.

32. (2015) 325 ALR 15 at 24-25 [25]-[30].

33. (1997) 189 CLR 520, 560.

34. *Unions NSW v New South Wales* (2013) 252 CLR 530, 583-584 [158].

35. (1992) 177 CLR 106 at 138 (footnote omitted).

36. *McCloy v New South Wales* (2015) 89 ALJR 857, 870 [45].

37. *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 150; *McGinty v Western Australia* (1996) 186 CLR 140 at 169-170, 232-235; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567; *Monis v the Queen* (2013) 252 CLR 530 at 554 [36], 571-572 [109]-[112]; *McCloy v New South Wales* (2015) 325 ALR 15; [2015] HCA 34 at [2].

38. (1997) 189 CLR 579 at 622.

39. (1999) 73 ALJR 1086 at 1090 [28].

40. See also *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 222 [109], 225 [112] , 245 [182], 298 [337], 303-304 [352]-[354].

41. *Entick v Carrington* (1765) 19 St Tr 1029 at 1066; *Southan v Smout* (1964) 1 QB 308 at 320. See also *Clough v Leahy* (1904) 2 CLR 139 at 155-156; *Coco v The Queen* (1994) 179 CLR 427 at 437; *Plenty v Dillon* (1991) 171 CLR 635 at 639-641.

42. (1992) 177 CLR 292.

43. (1992) 177 CLR 292 at 293.

44. 304 US 458 (1938).

45. 304 US 458, 467-468 (1938).

46. (1992) 177 CLR 292, 317-323.

47. (2009) 238 CLR 1.

48. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 36 [53], 55 [111] per French CJ, 73 [178], 75 [184]-[186] per Gummow, Crennan and Bell JJ, 113 [320] per Hayne and Kiefel JJ, 210 [600], 211-212 [603], 212-213 [606]-[607] per Heydon J.

49. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 55 [112].

50. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 55 [111], 73 [178], 210-211 [601].

51. *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 113 [320].

52. (2012) 248 CLR 156.

53. *Williams v The Commonwealth* (2012) 248 CLR 156 at 179-180 [4].

54. *Williams v The Commonwealth* (2012) 248 CLR 156 at 239 [161].

55. *Williams v The Commonwealth* (2012) 248 CLR 156 at 359 [548].

56. *Williams v The Commonwealth* (2012) 248 CLR 156 at 244-245 [183].

57. *Williams v The Commonwealth* (2012) 248 CLR 156 at 366 [569].

58. *Williams v The Commonwealth* (2012) 248 CLR 156 at 296 [344].

59. *Williams v The Commonwealth* (2012) 248 CLR 156 at 179 [2], 229 [128], 248 [191], 301 [356], 341 [478], 362 [559].

60. (2014) 252 CLR 416 at 455 [25], [99].

61. Appleby and Webster, "Executive Power under the Constitution: A Presidential and Parliamentary System Compared" (2016) 87 *University of Colorado Law Review* 1129 at 1173.

62. Lindell, "The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case" (2013) 39

Monash University Law Review 348 at 386.

63. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans George Schwab, The University of Chicago Press, (1985) at 5.

64. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, Trans George Schwab, The University of Chicago Press, (1985) at 5.

65. *Murphy v Electoral Commissioner* [2016] HCA 36 at [188]-[189].

66. *Marbury v Madison*, 5 US 137 at 177 (1803); *New South Wales v Kable* (2013) 252 CLR 118 at 138 [51]; [2013] HCA 26.

67. *Dietrich v The Queen* (1992) 177 CLR 292 at 323; [1992] HCA 57.

68. *Murphy v Electoral Commissioner* [2016] HCA 36 at [65].

69. Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 324-325.

70. *Murphy v Electoral Commissioner* [2016] HCA 36 at [109]-[110].

71. E.g., Alexy, *A Theory of Constitutional Rights*, (2002) at 105; Barak, *Proportionality: Constitutional Rights and their Limitations*, (2012) at 364-365.

72. [2016] HCA 38.

73. *Jury Act* 1995 (Q), s 4(3).

74. *Lyons v Queensland* [2016] HCA 38 at [38], [40]-[41].

75. Regulation 8, Sched 2.

76. See now ss 64-67 of the *Constitution of Queensland Act* 2001 (Qld).

77. [1998] 2 Qd R 18 esp at 27-29, 33.

78. Augustine, *The City of God Book IV*, ed. G. P. Goold. The Loeb Classical Library 1963, vol. II at 17. "Remota itaque iustitia quid sunt regna nisi magna latrocinio?".

79. Cited in Andrew Moore, "A mace to swat two blow-flies: interpreting the *Fitzpatrick and Browne* privilege case", (2009) 55 *Australian Journal of Politics and History* at 32, 33.