

Chief Justice Gleeson and the Constitution

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Strict and complete legalism

Murray Gleeson became Chief Justice of the High Court on 22 May 1998. As a barrister he had appeared before the High Court in constitutional cases on many occasions; but as Chief Justice of New South Wales for 10 years immediately preceding his High Court appointment he had little to do with such issues. During his first two or three years on the High Court he gave the impression of a judge who desired to swing the Court in a different direction, that is away from the methods and attitudes that characterised it in the previous 15 years or so.

Whereas during the earlier period, particularly under the Chief Justiceship of Sir Anthony Mason, a number of judges emphasised such matters as the interplay of policies, values, doctrine and principle, Gleeson CJ in several addresses to the Bar and the public spoke in favour of legalism, and not merely legalism, but ‘strict and complete legalism’ – the phrase made famous by Sir Owen Dixon when he used it during his swearing-in speech as Chief Justice in 1952.

This can be contrasted with the lecture by Sir Anthony Mason at the University of Virginia in 1986, a year before he became Chief Justice, when he declared that the Court was moving away from the doctrine of legalism ‘towards a more policy oriented constitutional interpretation’,¹ describing the new approach as ‘a species of legal realism’. He went on to say that the danger is that strict and complete legalism ‘will be a cloak for undisclosed and unidentified policy values’.

In an address to the Australian Bar Association in New York in 2000 Gleeson CJ stressed that the Court’s decisions will be accepted only if judges observed the limits of judicial legitimacy and that was the reason behind what he called Sir Owen Dixon’s ‘famous observation’.² He even

* This chapter is based on the Geoffrey Sawer Lecture delivered on 31 October 2008 at the Australian National University.

1 AF Mason, ‘The Role of a Constitutional Court in a Federation : A Comparison of the Australian and the United States Experience’ (1986) 16 *Federal Law Review* 1 at 5.

2 M Gleeson, ‘Judicial Legitimacy’ (2000) 20 *Australian Bar Review* 4.

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