# The Commonwealth Constitution: Canvas for Creative Decision-Making or Map of Directions?

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*Over the years the High Court has employed a range of interpretative devices. Legalism is the approach which the Court has generally espoused, however, the last decade has witnessed a change in the Court's attitude away from a strict legalism towards a "rights-driven" approach where implications have been made as to the values underlying specific constitutional provisions. This paper explores the trend towards an implied values approach in the context of the Court's interpretation of the external affairs power. The views of several commentators in this area will also be examined.*

## Introduction

An analysis of High Court decisions involving the interpretation of the Commonwealth Constitution reveals two broad streams of constitutional interpretation.[1] *Legalism* is the approach which the Court in *Engineers*[2]

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1 No attempt will be made in this paper to exhaustively outline the variety of theories of constitutional interpretation that have been put forward at various times by commentators in this field nor will there be a detailed examination of the range of decisions from which these theories derive. The aim of this paper is to examine two opposing streams of interpretation and the extent to which there has been a shift in emphasis from legalism towards a more "rights-driven" approach.

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

advocated.[3] Sir Owen Dixon, the supreme advocate of this method of interpretation, describes it as a method which deliberately excludes all subjective value criteria from judicial review.[4] The central feature of Dixonian legalism is the principle of *stare decisis* and the belief that the Court is not the appropriate forum within which to innovate change. The accepted interpretative techniques associated with legalism enable the Constitution to respond sufficiently to changes in society. "Hard cases" ought to be decided without abandoning principle or necessitating the infusion into their decisions of the subjective values of individual judges. Pure legalism is a guarantee against politically motivated decisions for the sake of justice or expediency providing an assurance of consistency and certainty in the expression and application of the law.

Despite its noble aims legalism has encouraged the infiltration of the subjective views of individual judges into their decisions. Strict legalism in the Dixonian sense of objective and certain decision-making has not always been the case. Inconsistent approaches to the construction of specific provisions, strong dissenting opinions, lack of clarity in and between individual majority judgements and recognisable phases of interpretation, all evidence the failure of legalism to guarantee objectivity in decision-making. The principle of *stare decisis* has always left it open to judges to imply their own policy preferences.[5] In reality the Court has moved away from "constitutionalism" towards a new criteria influenced by social theorists who favour a method of interpretation where the greatest benefit will yield to the greatest number of members of society. This may be termed the "rights-driven" approach[6] to interpretation motivated in part by the

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[3] The *Engineers Case* is also authority for "literalism", an approach which requires the meaning of the text to be derived from the words alone, in isolation from the spirit an intention of the drafters. As with "legalism" it denies the relevance of extra-legal considerations from constitutional interpretation. Associated with "literalism" and "legalism" is "textualism" which looks also at the words but does not deny the relevance of implications and underlying assumptions provided they can be supported by the text.

[4] The assumption is that the law "provides a body of doctrine" on which decisions are based; legal principles are applied quite apart from the personal reasonings of judges. As Dixon states: "The court would feel that the function it performed had lost its meaning and purpose, if there was no external standard of legal correctness." Dixon, "Concerning Judicial Method" in Woinarski (ed), *Jesting Pilate* (1965) at 155.

[5] Murphy and Mason JJ have both utilised approaches to interpretation which deny the original intentions of the framers of the Constitution but support popular social trends as they perceive them.

[6] It may also be termed "the right result" or "needs of society" approach.

recognition of the ineffectiveness of referenda to promote formal changes to the Constitution. The "rights-driven" approach enables the Court to look not only at the original purpose for the inclusion in the Constitution of specific provisions but changes in political, social and economic factors that may justify a more modern interpretation. As one commentator has argued the "right result" approach is a dynamic one that enables the document as originally conceived to more effectively fulfil the task of governing the Australian Commonwealth.[7]

The "rights-driven" approach to interpretation is one that has steadily gained in popularity, although it is not without its critics. As Lane points out: "The role of the High Court is changing these days from an emphasis on literalism and legalism to the pursuit of rights, to new values and perceptions."[8] Lane supports the textual approach to interpretation that emerged out of *Engineers* and seriously questions the legitimacy of the alternative approaches of "rights-driven social engineers operating, in their elitist way, outside Parliament House and outside the electorate."[9] Lane views the Constitution as a document that is an instrument of government on which a "raft" of rights has been built by repeated infractions into the notion of parliamentary sovereignty through "creative decision-making".[10] Lane's account of the move away from legalism towards an implied values approach to interpretation will be considered.

An alternative paradigm for the conceptualisation of judicial review within written constitutions is that provided by Claus.[11] The Commonwealth Constitution can be viewed as a "definitive-document", that is, an instrument of government clear enough in its textual expression and capable of amendment only through referendum. The judgements of the majority in *Engineers* reflect a "definitive-document" approach to interpretation. Within this conception subjective values, to be relevant, "had to be grounded in textual, not 'practical' necessity."[12] Lane's insistence upon a strict legalism conforms with Claus' "definitive-document"

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7 Detmold, *The Australian Commonwealth* (1985) at 262.

8 Lane, "The Changing Role of the High Court" (1996) 70 *ALJ* 246 at 247.

9 n 8.

10 n 8.

11 Claus, "Implication and the Concept of a Constitution" (1995) 69 *ALJ* 887.

12 n 11 at 894.

conception. Alternatively, an "illustrative-document" conception of the Constitution in which values underlying specific constitutional provisions are elicited in the process of judicial review, has enabled the High Court to keep its decisions in line with prevailing values and perceptions. This method of interpretation equivocates the "rights-driven" approach criticised by Lane and will be considered in the light of the changing role of the High Court.

Some of the more recent decisions of the High Court involving the interpretation of the external affairs power[13] have been selected to illustrate the two broad streams of interpretation that Lane and Claus have identified. Nowhere is the shift away from legalism to a "rights-driven" approach more apparent than in the area of international law. One of the aims of this paper is to account for the infusion into Australia's domestic law some of the customary principles of international law, especially in the area of human rights. Sir Anthony Mason views this trend as appropriate for Australia as a member of the community of nations.[14] The "rights-driven" approach has enabled the High Court to develop "a common law for Australia, best suited to its conditions and circumstances."[15] Mason strongly advocates an "illustrative-document" conception of the Constitution where fundamental human rights are regarded as values to be protected even without the enactment of statutes giving effect to them.[16] Mason's views will be discussed in the context of the two methods of review under consideration.

In conclusion, it is necessary to consider the broader issue, namely, whether an approach such as legalism, which outwardly denies the relevance of social and political criteria to the resolution of disputes, is the most appropriate method of interpretation of a political document which forms the basis of our system and ought, therefore, to endure change and maintain its relevance in an international context. The "illustrative-document" conception or "rights-driven" approach to judicial review has steadily gained ascendancy over legalism as a method of constitutional interpretation. International standards, especially in the area of human rights, will continue to influence the content of Australia's statutory and common law. The trend is apparent in the area of industrial relations where a range of international

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[13] *The Commonwealth of Australia Constitution Act*, s 51 (xxix) External affairs.

[14] Mason, "An Australian Common Law?", (1995) ALTA Conference, La Trobe University.

[15] n 14 at 2.

[16] n 15.

conventions are listed in the Schedules to the *Industrial Relations Act 1988* (Cth) demonstrating the extent of Australia's concern to bring its domestic law in line with international standards, especially through its membership and participation in the International Labour Organisation.[17]

## The Changing Role of the High Court - From Legalism to a "Rights-Driven" Approach

The Commonwealth Constitution has no "equality provisions" equivalent to the American Constitution's Fourteenth Amendment, although, as Lane points out, there are several scattered provisions which deal with matters of "non-discrimination", such as ss 51(ii), (iii), 88, 99 and 117.[18] Nevertheless, a "doctrine of equality", as Lane describes it, has emerged as a consequence of the High Court's willingness to extract from the constitutional text certain basic underlying values.[19] Lane provides numerous examples of decisions where various "forms of equality" have been implied without reference to any particular constitutional provision.[20] Numerous decisions, based on specific constitutional provisions and in conjunction with the Preamble and covering clauses, have resulted in the creation of what is described as a "raft of personal freedoms" where the High Court has on each occasion uncovered "constitutionally entrenched

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[17] *Industrial Relations Act 1988* - Sch 5: Convention concerning minimum wage fixing, with special reference to developing countries; Sch 6: Convention concerning equal remuneration for men and women workers for work of equal value; Sch 8: Preamble, and Parts II and III, of the International Covenant on Economic, Social and Cultural Rights; Sch 9: Recommendation Concerning Discrimination in Respect of Employment and Occupation; Sch 10: Convention concerning termination of employment at the initiative of employer; Sch 12: Convention concerning equal opportunities and equal treatment for men and women workers: workers with family responsibilities; Sch 14: Parental leave; Sch 15: Preamble, and Parts I and II, of the convention concerning freedom of association and protection of the right to organise.

[18] Lane, n 8 at 247.

[19] n 18.

[20] The equality of the citizen as an implied guarantee under the Constitution (*Street v Queensland Bar Assoc* (1989) 168 CLR 461 at 521-522); equality under the law (*Secretary, Dept of Health and Community Services v JWB & SMB (Marion's Case)* (1992) 175 CLR 218 at 277); equality in the enjoyment of human rights (*Davis v The Commonwealth* (1988) 166 CLR 79 at 116); equality of the people under the Constitution (*Queensland Electricity Commission v Commonwealth* (1985) 158 CLR 192 at 247 and *Hammond v Commonwealth* (1982) 152 CLR 188 at 202-203); and the doctrine of legal equality (*Leeth v Commonwealth* (1992) 174 CLR 455 at 485-490). See Lane, n 8 at 247.

fundamental common law rights and civil liberties."[21] Two decisions that epitomise this phase of "judicial activism" are *Australian Capital Television Pty Ltd v. Commonwealth (No 2) (Political Advertising Ban)*[22] and *Nationwide News P/L v. Wills.*[23] From these two decisions spring "two remarkable freedoms" within the Constitution, namely, "freedom of political discourse" and "freedom of criticism of government institutions."[24] The justification for these implied freedoms rests on the Court's view in each instance of the underlying premises of representative and democratic government.[25] This places the judiciary in the tenuous position of having to define certain emotive terms such as "equality", "representative democracy" and "political". Frequently the Court has relied on "the contemporary values of the Australian people" to avoid strict adherence to the text of the Constitution.[26] As Lane points out *Mabo*[27] is an example of the Court taking as its reference point the contemporary values to overturn the common law doctrine of *terra nullius.*[28] In *Dietrich v. The Queen* contemporary values and community conceptions were called in to adapt the content of a right to a fair trial.[29] Similarly, in *Theophanous v. Herald & Weekly Times Ltd* contemporary social and political circumstances enabled the Court to rethink State laws on defamation and create an implied freedom of political discourse.[30] The problem with this, states Lane, is that it offends the notion of parliamentary sovereignty. The voting public looks to parliament and not the courts "as the general regulator of the public interest or the general facilitator of communal values and perceptions."[31]

Lane views the Constitution as essentially "an instrument of government" that distributes powers between the various organs of

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21 n 20.

22 (1992) 177 CLR 106.

23 (1992) 177 CLR 1.

24 Lane, n 8 at 247.

25 n 24.

26 n 8 at 248.

27 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 40-42.

28 Lane, n 8 at 248.

29 (1992) 177 CLR 292 at 321.

30 (1994) 182 CLR 104 at 174.

31 Lane, n 8 at 249.

government which it creates.[32] The correct approach to judicial interpretation is therefore the one espoused by the Court in *Engineers*[33] "which taught an adherence to the contours of the constitutional document, a legal document, not a manifesto."[34] Implications which are based on contemporary social values "float in clouds of the unknown" serving as "allusions to an overarching natural law."[35] The Court ought to adopt a non-interventionist approach through adherence to the text; an approach supported by the notion of parliamentary supremacy.

Perhaps the greatest area of concern for Lane is international law. Lane is critical of the High Court's support of the use of the external affairs power to justify the infusion into domestic law of principles derived from consideration of international documents and the decisions of international tribunals. In his view: "When the court pursues international law for domestic purposes, the Court sells out local parliamentary sovereignty to a law 'enacted' outside the community."[36] *Teoh's* case[37] demonstrates the extremes to which the Court will go in giving effect to contemporary values enshrined in international conventions that have yet to be implemented.

## The High Court and the External Affairs Power

Over the last ten years the High Court has broadened the scope of the external affairs through a series of decisions on Australian statute laws which have sought to implement convention provisions. *Koowarta v. Bjelke Peterson*[38] and *Commonwealth v. Tasmania (Tasmanian Dams Case)*[39] were significant in establishing the Commonwealth's power to implement its treaty obligations even though the subject areas over which the Commonwealth had legislated fell within State residual powers and not

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[32] n 8 at 247.

[33] (1920) 28 CLR 129.

[34] Lane, n 8 at 248.

[35] n 34.

[36] n 8 at 250.

[37] *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995) 183 CLR 273.

[38] (1982) 153 CLR 168.

[39] *Commonwealth of Australia & Anor v. State of Tasmania & Ors (Tasmanian Dams Case)* (1983) 153 CLR 1.

directly within Commonwealth power. Initially, however, the High Court was careful to invoke certain limitations on the use of the external affairs power. In *Koowarta* Stephen J pronounced the test of "international concern", namely, that only treaties which covered matters of international concern fell within the ambit of s 51(xxix).[40] The invocation of an international concern about racial discrimination denotes the implication by the Court of contemporary political and social values which, in Lane's paradigm, is an instance of creative decision-making. Stephen J went further than the other members of the Court when he suggested that "the Convention apart" legislative justification for outlawing of racial discrimination possibly rests on Australia's membership of the international community. He stated that "the subject of racial discrimination should be regarded as an important aspect of Australia's external affairs...As with slavery and genocide, the failure of a nation to suppress racial discrimination has become of immediate relevance to its relations with the international community."[41] From this decision it seems that general principles of international law and customary international law can be cited in justification of laws passed by the Commonwealth under s 51(xxix) even in the absence of a convention on the subject matter.

Stephen J's "international concern" test was rejected by the majority of the Court in the *Tasmanian Dams* case in favour of the more expansive view, namely, that the mere entry by Australia into an international treaty is sufficient justification for the Commonwealth's legislative endeavours. Mason J took an even wider view, namely, that the mere entry into an international treaty by the Australian government demonstrated Australia's acceptance of it as a matter of international concern to be subsequently incorporated into domestic law.[42] Deane J suggested that s 51(xxix) may support legislation based on international obligations which are not necessarily found in treaties. He stated that "obligations under both treaties and customary international law lie at the centre of a nation's external affairs." [43]

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[40] n 38 at 216.

[41] n 38 at 220.

[42] Mason J stated that "the Court should accept and act upon the decision of the executive government and upon the expression of the will of Parliament in giving legislative ratification to the treaty or convention." (1983) 158 CLR 1 at 125-126.

[43] n 39 at 258.

This expansive trend of interpretation continued in *Richardson*[44] where the Court supported the Commonwealth's attempts to grant interim protection to an area in Tasmania that was being considered for suitability for World Heritage listing as a legitimate exercise of the Commonwealth's power to implement the World Heritage Convention. The dissenting judgements of Deane and Gaudron JJ suggested some limitations on the ability of the Commonwealth to implement its treaty obligations, namely, that there must be "a 'reasonable proportionality' between that purpose and object and the means by which the law adopts to pursue it."[45] It is interesting to note that the doctrine of "reasonable proportionality" is itself an imported concept having originated in German law and applied as a test for statutory validity by the European Court of Human Rights.[46]

By the end of the eighties it seemed to have become settled law that the Commonwealth could implement its treaty obligations. This still left room for argument in individual cases as to whether the Commonwealth's legislative measures did in fact implement its treaty obligations or were they indirect attempts to regulate matters over which the Commonwealth had no direct control. In each of the cases considered various members of the Court had expressed concern about the *bona fides* of the Commonwealth's actions. In the *Tasmanian Dams* case members of the majority of the Court cautioned that the Commonwealth could not automatically acquire plenary power over a subject matter merely by entering into a treaty[47] and from the minority in *Richardson* it might be concluded that the extent to which the legislation actually implements treaty obligations is relevant in determining its validity.[48] However, this is separate from the issue whether the High Court can use ratified conventions that have not yet been implemented as a source of rights and obligations within domestic law, an issue that was later tested in *Teoh*.

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[44] *Richardson v. Forestry Commission of Tasmania (Richardson)* (1988) 164 CLR 261.

[45] n 44 at 311-312.

[46] *Handyside v. United Kingdom* (1976) 1 EHRR 737 at 754; *Sunday Times v. United Kingdom* (1977) 2 EHRR 245 at 277-8; *Barford v. Denmark* (1989) 13 EHRR 493 at 499 and 502; and *Sunday Times v. United Kingdom (No 2)* (1991) 14 EHRR 229 at 242. Mentioned by Mason, n 14 at 20.

[47] (1983) 158 CLR 1 at 131 per Mason J; at 172 per Murphy J.

[48] (1988) 164 CLR 261 at 317-318 per Deane J; at 346 per Gaudron J.

The potential for the use by the Commonwealth of the external affairs power was reconsidered in *Polyukhovich*[49]. The significance of this decision is the extent to which the High Court was prepared to acknowledge the Commonwealth's attempts to regulate matters or events which occurred outside Australia many years before. The issue before the Court was whether the *War Crimes Act* 1945 (Cth) and its 1988 amendments which conferred jurisdiction upon Australian courts to try Australian citizens and residents for war crimes was a valid exercise of the external affairs power. By a 4-3 majority the Court upheld the validity of the legislation on the basis of the Commonwealth's ability under s 51 (xxix) to regulate matters physically external to Australia.[50] In his dissenting judgement Brennan J found no current and necessary connexion between Australia and the "affairs" sought to be legislated upon to justify its validity.[51] Of the majority Toohey J justified the connexion where there exists "a national interest in some person, thing or matter that enables one to say that the subject of legislation concerns Australia."[52] Of significance is the fact that some members of the Court were prepared to concede the Commonwealth authority under s 51 (xxix) to implement general principles of international law as an aspect of Australia's nationhood and membership of the international community. In supporting the jurisdiction of Australian courts to try war crimes Brennan J stated: "Australia's international personality would be incomplete if it were unable to exercise jurisdiction to try and punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order."[53] He further stated that under principles of international law a State has "universal jurisdiction" to prosecute war crimes irrespective of the fact that it may be "under an obligation to do so and whether or not there is an international concern that the State should do so."[54] Invocations of Australia's sovereignty and its status as a member of the international community to justify the inculcation by the High Court into Australia's common law of principles of international law could be viewed in Lane's terms as the "selling out" of local law to a body of laws

[49] *Polyukhovich v. Commonwealth* (1991) 172 CLR 501.

[50] Mason CJ, Dawson, Toohey, McHugh JJ; Deane, Brennan, Gaudron dissenting.

[51] n 49 at 554-555.

[52] n 49 at 653.

[53] n 49 at 562-563.

[54] n 49 at 563.

enacted outside the community.[55] If general principles of international and customary law can form the basis of laws under s 51 (xxix) the decision in *Polyukhovich* seems to have paved the way.

On the one hand, Lane would view the legislative implementation of international obligations as an appropriate exercise of parliamentary sovereignty in accordance with the principle laid down in *Walker v Baird*[56], namely, that Parliament "is supposed to be the body that translates international law into the local community." On the other hand, this approach could be seen to have eroded the principle of "federalism" insofar as many of the subject areas over which the Commonwealth has legislated to implement conventions impinge upon State residual powers, including the environment and equal opportunity. Lane is in favour of an approach to interpretation that takes into account the federal structure and with it the ability of the electorate to amend the terms of the written document through referendum.[57] He would probably agree with the narrower construction of s 51 (xxix) expressed by Stephen J in *Koowarta* that only treaties which dealt with matters on international concern, ought to come under that head of power.[58] Within Lane's "textualist" frameworks 51(xxix) should not to be regarded as a power to implement into domestic law all international treaties to which the Commonwealth is a party, especially, where there is "no necessary connexion" between Australia and the "affairs" to be legislated, the point made by Brennan J in *Polyukhovich*.[59]

*Teoh's* case is probably the most significant decision to date on the extent to which s 51 (xxix) can be used to justify a range of legislative and executive actions. It is illustrative of Lane's concerns, namely, that notions of parliamentary sovereignty have been bypassed in deference to principles of international law. *Teoh's* case concerned an appeal by the Minister for Immigration and Ethnic Affairs against a decision of the Full Court of the Federal Court that the Minister's delegate had failed to give proper consideration to certain provisions of the United Nations Convention on

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55 Lane n 8 at p 250.

56 [1892] AC 491.

57 Lane refers to Kitto J's remarks in *Airlines of New South Wales Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 115: "The Australian union is one of dual federalism...until the Parliament and the people [under s 128 of the Constitution] see fit to change it." Lane n 8 at 246.

58 (1982) 153 CLR 168 at 216.

59 (1991) 172 CLR 501 at 555.

the Rights of the Child in determining the respondent's application for resident status. The respondent, Mr Teoh, a Malaysian citizen, had married an Australian citizen. Mrs Teoh had four children, one from her first marriage and three from a de facto relationship with Mr Teoh's deceased brother. There were in addition three children of the marriage. Mr Teoh applied for resident status, however, while his application was pending, he was convicted for possession and importation of heroin and sentenced to six years imprisonment. The sentencing judge accepted that Mrs Teoh's addiction to heroin played a part in Mr Teoh's actions. Upon Mr Teoh's conviction an officer authorised under the *Migration Act* 1958 (Cth) notified Mr Teoh that his application for the grant of resident status had been refused on the ground that he was not a person of good character. Mr Teoh applied for a review of the decision refusing his application for resident status. The Immigration Review Panel recommended that Mr Teoh's application for reconsideration be rejected despite claims on compassionate grounds that his deportation would cause considerable hardship to his wife and children. The matter was subsequently appealed to the Full Court of the Federal Court which ordered that that the delegate's decision to refuse Mr Teoh's application for resident status be set aside and the matter referred to the Minister for reconsideration according to law. The Court was of the view that ratification of the Convention placed an obligation on the delegate to initiate appropriate inquiries and obtain appropriate reports as to the future welfare of the children in the event that the respondent was deported. The mere fact of ratification without implementation was sufficient, in the Court's view, to impose on Commonwealth decision-makers an obligation to treat as a primary consideration the best interests of the children. The Minister appealed to the High Court. One of the grounds of appeal was that the Federal Court had erred in holding that Australia's ratification of the Convention created a legitimate expectation in parents and children that any decision by the Commonwealth would be conducted or made in accordance with the principles of the Convention. The High Court dismissed the appeal on the ground that, although ratification of an international treaty does not automatically incorporate it into municipal law, it does constitute a positive statement by the Australian Executive Government that its agencies will act according to the Convention and created a legitimate expectation in those concerned that decision-makers would act in conformity with the Convention and treat the best interests of the child as a primary consideration.

The Court referred to the well known principle that ratification of a convention does not automatically make it part of Australia's municipal law: "legislation, not executive act, is required."[60] However, it may be assumed that parliament, *prima facie*, intends to give effect to the obligations created under it, especially where the convention "evidences internationally accepted standards to be applied by the courts and administrative authorities in dealing with basic human rights affecting the children and family."[61] The Court stated that the mere fact of ratification "is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention."[62] The Court found that the provisions of the ratified Convention were relevant to the exercise of the Minister's statutory discretion and gave rise to a legitimate expectation that the decision-maker would exercise that discretion in conformity with the terms of the Convention.

Mason CJ and Deane J supported the use of unincorporated conventions as aids to statutory interpretation: "If the language of the legislation is susceptible of a construction which is consistent with the terms of an international instrument and the obligations which it imposes on Australia, then that construction should prevail."[63] They did not, however, view the case before them as concerned with the resolution of an ambiguity in a statute or the "development of some existing principle of the common law".[64] Having accepted the view that an unincorporated convention may impose obligations on administrative decision-makers in certain areas the issue was to be decided upon the relevance of the Convention to the decision-makers statutory discretion.

Despite the Court's claim that the decision was not concerned with the development of some existing principle of the common law *Teoh's* case does demonstrate the willingness of the High Court to import into the body of Australian common law international standards directed towards the achievement of humanitarian goals. Citing *Mabo's* case in support of their

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60 (1995) 183 CLR 273 at 373.

61 n 60 at 365.

62 n 61.

63 n 60 at 362.

64 n 63.

view, Mason CJ and Deane J stated: "The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law."[65] The judgement of Gaudron J, in particular, supports the implementation of a convention that "gives expression to a fundamental human right which is valued and respected here as in other civilised countries". In her view the Court will automatically give effect to the Convention as ratification would tend to "confirm the significance of the right within our society".[66] International conventions are the principal means by which humanitarian advances have been made, however, as Gaudron J points out "in the case of a treaty or convention that is not in harmony with community values and expectations" it would not be reasonable to expect that it would be given effect.[67] This places the Court in the critical position of actively identifying the contemporary values of civilised societies which, to return to Lane's view, is a role more appropriately exercised by our elected representatives. Gaudron J went further than the other members of the Court in positively identifying "a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by government agencies which directly affect that child's individual welfare...".[68] The implication of a common law right to have the best interest's of the child taken into account was predicated on the concept of "citizenship"and notions of the patriarchal State expressed as follows:

> Citizenship involves more than obligations on the part of the individual to the community constituting the body politic of which he or she is a member. It involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability....No less is required of the government and the courts of a civilised democratic society.[69]

This series of High Court decisions on the external affairs power illustrates Lane's view of the changing role of the High Court "from an

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[65] n 60 at 362.

[66] n 60 at 376.

[67] n 66.

[68] n 60 at 375.

[69] n 68.

emphasis on literalism and legalism to the pursuit of rights, to new values and perceptions...".[70] In the area of international law "the Court sells out local parliamentary sovereignty to a law 'enacted' outside the community and, at times, interpreted by tribunals outside the community." [71]. Although Lane accepts that his view might be regarded as "parochial" he uses democratic principles as justification for his conservative approach to judicial review where he states: "Parochial ? Democracy *is* parochial."[72]

## An Australian Common Law

Where other commentators might see the Court as appropriately shaping the common law to achieve social justice in conformity with prevailing values Lane is all too quick to label them judicial activists and condemn the process as one of creative decision-making. Sir Anthony Mason accepts the Court's role in the development of the common law where he states: "the common law is shaped by the judges with a view to achieving, amongst other things, social justice for the community which they serve."[73] The "shape and content of the common law" depends, states Mason, "on the scope of the role conceded to the judges or perceived by the judges themselves." The courts achieve justice through the formulation of rules and principles that are appropriate in the case "and adapted to the conditions and circumstances of the society which it serves."[74]

As Mason explains Australia is developing its own unique brand of common law that is a blend of rules and principles derived originally from English case law and subsequently modified to suit the country's conditions and circumstances. Australia's growing presence on the international stage has been accompanied by an increasing acceptance into its jurisprudence of doctrines derived from international bodies and other jurisdictions which in the long run will "tend to make Australian law less distinctive."[75] That the Court must exist in a vacuum is unrealistic. The Australian legal systems

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[70] Lane, n 8 at 246.

[71] n 8 at 250.

[72] n 71.

[73] Mason, n 14 at 5.

[74] n 73.

[75] n 14 at 11.

have always been influenced by overseas developments and the trend is growing with the "ease of communication and growing familiarity with other countries and their culture, as well as the internationalisation of commerce and politics."[76] The process of judicial review gives the High Court the opportunity to give the various provisions of the Constitution a meaning that enables it to provide a relevant framework for the distribution of powers in the nineties and in so doing facilitate the evolution of Australia's common law.

## The Constitution - An Illustrative or Definitive Document?

An alternative framework for the rationalisation of what Lane describes as "creative decision-making" in which implications based on contemporary social values are made in constitutional interpretation is that offered by Claus.[77] Judicial review, states Claus, accepts the conception of a written constitution as an "illustrative document" where the text merely illustrates the "broader, unwritten principles which ultimately set the scope of governmental powers."[78]

This is to be contrasted with the textual or "definitive-document" approach which views the constitutional text as defining governmental powers and the limits to their exercise. Illustrative reasoning is a common law method which treats the constitutional text as a relevant decision, rather than a statute, "as illustrating principles rather than defining them."[79] Judicial review is a matter of "making" the law rather than "finding" it, of *selecting* the concept rather than *expressing* it and "the concept so selected may animate specific sections of constitutional text."[80] Some of the cases decided under the external affairs power can be justified as exercises in illustrative-document reasoning. Given that Australia is able to negotiate treaties with other countries it is implied within the simple description "external affairs" that the government may implement those obligations into domestic law. So much was decided in *Walker v. Baird.* However, can

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[76] n 14 at 2.

[77] Claus, n 11 at 887.

[78] n 11 at 887.

[79] n 11 at 888.

[80] n 79.

the description "external affairs" justify the High Court's use of this power to give effect to the range of contemporary social and political values brought to the surface in some of its more recent decisions? For example, in *Koowarta*[81] international concern for racial discrimination was cited in support of the *Racial Discrimination Act* 1975 (Cth). In *Polyukhovich* it was "Australia's international personality" that was used to support jurisdiction to try and punish offenders for crimes committed in other jurisdictions many years before. Brennan J justified the War Crimes legislation as a reasonable measure intended to subject war crimes offenders to "universal jurisdiction" in the cause of "international peace and order."[82] In *Teoh* it was the implied right of parents and children to have a child's best interests taken into account in discretionary decision-making by government agencies as a right shared in common with civilised societies that formed the basis of the Court's decision to order reconsideration of the decision to deport Mr Teoh.

As far as limitations on government powers through judicial implication are concerned the issue is "whether a court can go beyond what those sections can reasonably be held to imply, ascend the tree of abstract principle and then climb out on other branches and declare that the government cannot pick fruit from them either."[83] The High Court went out on a limb in *Teoh* where it placed limitations on administrative decision-makers basing its reasoning on a subjective assessment of the rights of the child within contemporary civilised society. This could be viewed as a remarkable leap in interpretation given that s 51(xxix) doesn't illustrate any abstract principle such as liberty and equality which could open the way for value judgements as to what such human freedoms actually mean.

Claus believes that there is scope for the adoption of illustrative-document reasoning within the interpretation of certain provisions of the United States Constitution. The Republican Form Clause, the Ninth and Fourteenth Amendments express limits on government power with a level of generality which invites consideration of abstract principles in their interpretation.[84] As he so eloquently expresses it: "The presence of these ostensibly over-supplied arsenals of high-powered judicial weaponry makes

[81] (1982) 153 CLR 168.

[82] (1991) 172 CLR 501 at 562-563.

[83] Claus, n 11 at 888.

[84] n 11 at 902.

all the more remarkable the court's persistence with attempts to launch activist missiles via the popgun of due process."[85] Claus views the modern principles of substantive due process as having evolved out of illustrative-document reasoning through the Supreme Court's reference to the principles of liberty and equality.[86]

The Australian Constitution, unlike the United States Constitution, does not, states Claus, lend itself to the merging of both rationales for judicial review. A choice must be made by the judiciary as to whether it opts for an illustrative-document conception which involves selecting the concept to be relied upon or a definitive-document approach where the text itself expresses the concept which the Court then declares.[87] Since federation the High Court has nevertheless wavered between the two approaches. Early decisions reflecting the illustrative-document conception applying the principle of federalism could have been influenced by American case law. The case of *D'Emden v. Pedder*[88] is attributed with establishing a broad federal immunity from State taxation in direct application of *McCulloch v. Maryland*[89]. The immunity was made reciprocal and further extended by the *Railway Servants'* case[90] to operate as a limitation on federal powers generally.[91] Maintaining an illustrative-document method of review the High Court reasoned in a number of cases that the States must retain exclusive responsibility for the regulation of their internal commerce.[92] In the *Union Label* case [93] and *Huddart Parker*[94] s 51(i) was interpreted with the principle of federalism confining the Commonwealth's powers to interstate and foreign trade so that any interference with intra-State trade by the Commonwealth

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[85] n 11 at 903.

[86] n 11 at 899.

[87] n 11 at 903.

[88] (1904) 1 CLR 91.

[89] 17 US (4 Wheat) 316 (1819).

[90] *Federated Amalgamated Government Railway and Tramway Service Association v NSW Railway Traffic Employees Association* (1906) 4 CLR 488.

[91] Claus, n 11 at 892.

[92] n 11 fn 63 at 893.

[93] *Attorney-General for NSW v. Brewery Employees Union of NSW* (the *Union Label Case)* (1908) 6 CLR 460.

[94] *Huddart, Parker & Co Pty Ltd v. Moorehead* (1909) 8 CLR 465.

through its use of other heads of power was unconstitutional. It is interesting to note that the same principle was applied in several later American Supreme Court decisions.[95] In its early years the High Court supported the doctrine of inter-governmental immunity through the application of illustrative-document reasoning. It was finally departed from in the *Engineers* case where a definitive-document conception of the Constitution was expounded. The definitive-document approach takes into account the federal structure and the ability of the electorate to amend the terms of the written document through referendum. In contrast the illustrative-document approach is one which treats the text as embodying certain basic underlying values. The *Engineers* formula, states Lane, "taught an adherence to the contours of the constitutional document, a legal document, not a manifesto."[96]

Since *Engineers* there has been a gradual shift in interpretation towards the illustrative-document approach where the High Court has drawn upon its own understanding of the principles, doctrines and assumptions which lie beneath the express provisions of the Constitution. Where the *Railway Servants'* case gave birth to State immunity it was resurrected in *Melbourne Corporation v. Commonwealth*[97] and held applicable to most heads of power, not just taxation.[98] It was an implied limitation drawn from the Court's understanding of the nature of a "federation", namely, "that the Commonwealth will not in the exercise of its powers discriminate against or 'single out' the States so as to impose some special burden or disability upon them...".[99] From its earliest days some members of the Court have been more active in urging for an illustrative-document conception than others. Claus refers to the "right to travel" cases as limitations drawn on State powers from implications derived from "due process" considerations.[100] The opinion of Barton J in *R v. Smithers; Ex parte Benson*[101] that "the creation of a federal union with one government and one legislature in respect of

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[95] *Hammer v. Dagenhart* 247 US 251 (1918); *Bailey v. Drexel Furniture Co.* 259 US 20 (1922) and *States v. Butler* 297 US 1 at 68 (1936). See Claus, n 11 at 893.

[96] Lane, n 8 at 247.

[97] (1947) 74 CLR 31.

[98] Claus, n 11 at 894.

[99] *Victoria v Australian Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25 at 93.

[100] Claus, n 11 at 901.

[101] (1912) 16 CLR 99.

national affairs assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation" is an early example of illustrative reasoning. As Claus points out the opinions of Griffith CJ and Barton J in *Smithers* were cited with approval by the majority of the Court in *Australian Capital Television v. Commonwealth*[102] and *Nationwide News Pty Ltd v. Wills,*[103] two recent decisions in which the notion of freedom of political communication was based on the underlying premises of representative and democratic government.[104]

Further departures from the *Engineers* formula have unearthed a bed of fundamental common law rights and civil liberties which a literal reading of the text of the Constitution does not always sustain. As previously noted there are some provisions which deal directly with matters of "non-discrimination,"[105] however, there are no express provisions of the type found in the United States Constitution which invite an illustrative-document analysis in judicial review. Yet the Court has on numerous occasions read into the provisions of the Constitution rights and values which a literal reading of the text itself does not admit. In each instance the test "is to ask whether a decision explains the meaning of an existing section of the Constitution or whether it can only be expressed by adding a section."[106]

## Conclusion

An analysis of various landmark High Court decisions that span the years since federation reveals two conflicting approaches to judicial review. Where the Court in its early years favoured a literal reading of the text and paid regard to the federal balance argument there are early decisions which stand out as instances of illustrative reasoning as in *D'Emden v. Pedder* and *R v. Smithers; Ex parte Benson.* The doctrine of intergovernmental immunity evidences the trend of infusing into the text principles derived from the Court's understanding of the nature of federation. Where *Engineers* marked

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[102] (1992) 177 CLR 106.

[103] (1992) 177 CLR 1.

[104] Claus, n 11 at 901.

[105] See n 1.

[106] Sawer, "Implication and the Constitution" (1949-1950) 4 *Res Jud* 85 (Pt 2) at 90. Referred to by Claus, n 11 at 888.

the demise of the doctrine and pronounced a definitive-document conception of the Constitution it was resurrected in *Melbourne Corporation v. Commonwealth* where the Court implied limitations on federal power again reasoning from the nature of a federation. The range of cases considered under the external affairs power clearly evidences the trend towards an illustrative conception of the Constitution. The High Court has developed the law in this area in line with its own understanding of the values and assumptions underlying the external affairs power. In each instance the Court is, states Mason, seeking to achieve justice through the formulation of rules and principles that are appropriate in the case "and adapted to the conditions and circumstances of the society which it serves."[107] Mason agrees with Brennan J in *Mabo* that international law is a legitimate influence on the devlopment of Australia's common law, especially where it declares fundamental rights.[108] International conventions are, states Mason, the principal means by which humanitarian advances have been made.[109]

Lane refers to the series of cases on which the High Court has built its "raft of personal freedoms" as evidencing "a general stream of judicial activism" which detracts from the electorate's role in relation to s 128 and compromises the notion of parliamentary sovereignty.[110] Lane is critical of the High Court's changing role from "an emphasis on literalism and legalism to the pursuit of rights, to new values and perceptions."[111] Claus agrees with Lane that if the text of the Constitution becomes a vehicle for the inculcation by members of the judiciary of their personal predilections then written constitutions must be "inherently incapable of achieving the purpose of conferring and limiting powers by means of words."[112] Viewed in the extreme a "rights-driven" approach to judicial review detracts from the original function of the Constitution as the foundation for a system of government and becomes instead a textual facade behind which the judiciary can be seen to be "limiting government power by reference to judge-made rules."[113] Those who advocate legalism as an appropriate method of

[107] Mason, n 14 at 6.

[108] n 14 at 17.

[109] n 108.

[110] Lane, n 8 at 250.

[111] n 8 at 246.

[112] Claus, n 11 at 890.

[113] n 112.

interpretation would agree with the following rationale for written constitutions:

> It is the assumption that it is practically impossible for words in their application to particular circumstances to be unambiguous which gives written constitutions a meaningful mission. Constitutional scholars who do not accept the assumption are like bishops who do not believe in God.[114]

Legalism accords with the democratic majoritarian premise on which the Australian Constitition is based. Creative decision-making that departs from the use of traditional methods of review requires value choices to be made outside the political process and for this reason is condemned by strict legalists. Advocates of the "rights-driven" approach condemn legalism because of its denial of the relevance of social and political criteria in the resolution of constitutional disputes. In its efforts to do justice in the individual case the High Court has for the most part managed to avoid widespread condemnation. The decisions concerning the application of the external affairs power reflect in part the current concerns and prevailing attitudes of substantial sections of the Australian population and possibly serve to indicate the general public's expectations of the superior courts as the potential champions of civil liberties and custodians of many features of our heritage, natural and cultural. Lane even admits that in reality "there is no clear and present danger of parliamentary democracy or of the electorate in s 128 being subverted" through the implication of civil rights.[115] Each of the cases decided within the "rights-driven" paradigm can be justified because of the "massive research" which they involved.[116] Now that legalism has been exposed as unworkable the Court's decisions can be understood from a realistic perspective that takes into account social and political objectives. Nevertheless, if judges are to be guided by public expectations then a re-evaluation of the process of judicial review in a federal system established under the terms of a written constitution which defines and at the same time limits the powers of all three arms of government is necessary.

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[114] n 113.

[115] Lane, n 8 at 250.

[116] n 115.