Book Review

Judicial Reasoning and The Doctrine of Precedent in Australia by ALASTAIR MACADAM and JOHN PYKE (Sydney, Butterworths, 1998), pp. i–xxvi, 1–381 plus index.

'This is a book about the ... reasoning that judges engage in, and are expected to explain publicly, when they make rulings as to what rules of law apply to issues that arise in court cases.' The quotation is taken from the beginning of Part A, a sixty-page Introduction, which is followed by Parts B and C — 'The Following of Precedent' and 'The Making of Precedent'. John Pyke has primary responsibility for Parts A and C; Alastair MacAdam for Part B. It is an important book and, though the authors deal with matters that have been written about before, they restate and expand them, particularly from an Australian viewpoint, with a great many authoritative or illustrative cases and a good many sensible speculations of their own.

The legal scholar C.K. Allen[1] was born in Melbourne in 1887 and graduated in Arts at the University of Sydney before going to Oxford, where he remained for the rest of his life. But his *Law in the Making*,[2] which in its seventh and last edition contains 220 pages on the nature, history, authority and operation of precedent, makes little or no reference to the Australian experience.

No doubt this is a reflection of the limited nature of that experience until relatively recent times. As Pyke says at page 324,

> until the mid-1980s the High Court [of Australia] played relatively little part in developing the common law .... In those days nearly all of the development occurred in English courts and Australian courts — even the High Court — simply followed those developments.

This may be illustrated by the role asserted for itself by the High Court from its establishment in 1903 and briefly sketched by J.M. Bennett:[3] bringing into line the divergences of the State Supreme Courts. The Melbourne barrister Philip A. Jacobs put forward a theory to account for these divergences:[4]

> Before the establishment of the High Court, appeals to the Privy Council were rare, owing to the expense and delay involved. Hence, the likelihood of appeal being small, the Full Courts [of the State Supreme Courts] tended to give decisions on broad, equitable lines ... the same tendency to decide on what may be called liberal lines has characterised decisions of the House of Lords, the ultimate English Court of Appeal.

Appeals from Australian courts to the Privy Council were finally abolished by the *Australia Act* 1986 (UK & Cth). As Pyke goes on to say, since then the High Court 'has taken up the law-developing function with enthusiasm'. That function may

1 B Nairn and G Serle (eds) *Australian Dictionary of Biography* (1979), Vol VII, 44.
2 (1st ed 1927, 7th ed 1964).
3 *Keystone of the Federal Arch*, AGPS, Canberra, 1980, 25–9.
4 *Judges of Yesterday*, Robertson & Mullens Ltd, Melbourne, 1924, 8.

therefore be seen as something exercised by different courts at different times, according to whichever is, in effect, the final court of appeal.

The very abolition of those appeals has led to a body of law as to the authority nowadays of decisions of the Privy Council which were reached before the abolition. Some problems in the area are still unresolved. Twenty pages of the book are devoted to examining these matters and they may provide some surprises for the reader who has not kept up with the output of decided cases.

The High Court has always regarded itself as free to overrule its prior decisions, though the judges have not always agreed as to when it is proper to do so. In the *Australian Agricultural Co.* case, Isaacs J said: 'It is not, in my opinion, better that the Court should be persistently wrong than that it should be ultimately right.'[5] As is well known, Isaacs and Higgins JJ regularly dissented before 1920 in certain kinds of constitutional cases.

More recently, McHugh J has said that 'The doctrine of precedent is not as rigid in relation to decisions on the Constitution as it is in relation to decisions under the general law'.[6] But after quoting the statement of Isaacs J set out above, he refers with approval to an observation of Gibbs J that, despite that statement, no judge of the High Court 'is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court'.

Then again, Alastair MacAdam says at page 166 (giving an example, but only one) that Murphy J 'was never faced with any need for justification because it was his practice to simply follow his own previous judgments whether dissenting or otherwise'.

Amendments to the *Judiciary Act* 1903 (Cth) and the *Federal Court of Australia Act* 1976 (Cth), culminating in those of 1984, prevent appeals being taken to the High Court from other Federal courts and from State and Territory courts, except with special leave of the High Court. Leave is only given sparingly and therefore the High Court came to recognise in *Nguyen* v *Nguyen*[7] that 'the appeal courts of the Supreme Courts of the States and of the Federal Court are in many instances courts of last resort for all practical purposes'. The Court went on to say that, as a consequence, it was inappropriate that those appeal courts 'should regard themselves as strictly bound by their own previous decisions'.

So, in some respects, the wheel has turned full circle. But the High Court retains its correcting power; and the authors draw attention on page 74 to the criticism in that Court,[8] on an appeal from the Court of Appeal in New South Wales, of the innovative decision below.

The existence in Australia of a number of different hierarchies of courts, one in each State or Territory, leads to other difficulties. The authors (page 83 et seq) use the convenient term 'common apex' to refer to a court such as the Privy Council or the High Court which straddles different hierarchies. All courts below the apex, irrespective of hierarchy, will be bound by a decision of the court at the apex —

5 (1913) 17 CLR 261, 278.
6 *Re Tyler* (1994) 181 CLR 18, 38: the case is discussed by MacAdam 170.
7 (1990) 169 CLR 245, at 269: the case is discussed by MacAdam 174–7.
8 *Trident General Insurance Co Ltd* v *McNiece Bros Pty Ltd* (1988) 165 CLR 107.

assuming of course that the relevant statute law of the jurisdiction in question is to the same effect as that of the jurisdiction in which the decision arose. Students often forget that a decision of the High Court on appeal from the Supreme Court of Queensland, for example, may well be inapplicable in Victoria because relevant provisions in the Queensland legislation have no counterpart in Victoria — or vice versa.

Is a single judge of the Supreme Court of Victoria bound by a decision of the Court of Appeal of the Supreme Court of New South Wales? Is the Court of Appeal in Victoria bound by a decision of the Court of Appeal in New South Wales? The authorities collected at page 123 and the following pages suggest that the answer to both questions is technically no, but that in practice it may be yes, at least in cases involving the construction of Commonwealth legislation. But to say that does not do full justice to the intricacies of the authors' answers.

Nor, in the space available here, is it possible to give an adequate indication of their discussion of such familiar concepts as 'cases of first impression', 'ratio decidendi', 'obiter', 'binding', 'persuasive', 'distinguishing', 'extending by analogy', 'explaining' or 'reinterpreting', 'finding an underlying principle' and 'policy arguments'.

MacAdam says at page 214 that the doctrine of precedent is 'full of complexities and, in some areas, uncertainty' but that it 'provides a basis by which the judges can receive wisdom and guidance from their predecessors and contemporaries and by which they are able to develop the law on an incremental basis'. This is well put.

He goes on to say that the doctrine 'supports a system of courts within which there is a recognition that those who preside in lower courts are most often of lesser ability than those in higher courts'. In saying that, he is echoing his reference on page 66 to the 'learning, wisdom and general greater judicial ability of higher courts'. Some appellate judges may agree with that, but one may take leave to doubt it as a statement of general applicability. Dixon CJ is reported[9] to have said in club that appellate judges are no better lawyers than trial judges but exist to make the trial judges more careful about what they say and do. He of course could say that without losing any face. Dixon may, incidentally, look 'desiccated' (page 25) in photographs taken in his later years but no one who heard him laugh could think of him in that way.[10]

Also incidentally, the German warship *Bismarck* (page 281) was no 'pocket battleship'. In at least one place (page 41), the word 'his' in a quoted passage is replaced by the expression 'his/her', on that occasion with a justificatory footnote. The plaintiff in *Carlill* v *Carbolic Smoke Ball Company*[11] appears anachronistically on pages 35–36 as 'Ms Carlill', with a justificatory sentence on page 36, but as 'Miss Carlill' on pages 39 and 41. Reference is made on page 38 to 'the diabolical Smoke Ball', though there is no suggestion in the report that it actually caused the lady's influenza and indeed the advertisement relied on contained many testimonials as to its efficacy. Perhaps the authors were seduced by the rhyme.

9 Hon. Sir John Norris QC pers. comm.
10 J Richie (ed) *Australian Dictionary of Biography* (1996), Vol XIV, 9–10.
11 [1893] 1 QB 256.

The Table of Contents on page v sets out no more than the titles of the three Parts already referred to and the page on which each is supposed to begin. To find the whereabouts of individual chapters, it is necessary to consult the list given at the beginning of each Part: on pages 1, 61 and 217–8 (not 218 as stated on page v). This is inconvenient. There is no bibliography and consequently one can only obtain an idea of the previous literature by wading through the footnotes or, in the case of a few authors, by consulting the excellent index. There are very few misprints.

Pyke states on page 4 that this book 'is written both for those beginning their law studies and for more experienced lawyers'. Undoubtedly it will be useful for both, though law teachers may be deterred by its elaboration of detail from recommending it to first year students — and, now that so few students take a course in jurisprudence, find little opportunity for recommending it to those in later years.

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Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium

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INTRODUCTION

Judges in Australia go about their daily work in the belief that they have the confidence of the public. Having the confidence of the public is of fundamental importance. In consequence, the stated purpose of more than one branch of the law in Australia is to maintain that confidence.[1] Moreover, in some circumstances, the Commonwealth Constitution may operate to render invalid legislation which, by virtue of the power it would confer, would tend to diminish public confidence in the integrity of the judiciary as an institution.[2]

But, one may ask, who are the public and why is their confidence so important? Does that public confidence remain, and how is to be maintained? Is it really under threat? These are the matters I wish to discuss today.

THE PUBLIC AND THE JUDICIAL TASK

Who are the public? The question is more easily asked than answered. It cannot be the electorate, for judges are not, under the system of government which prevails in this country, held accountable to the electorate. Nor is it a sector of the community, such as, for example, the media viewing (or reading or listening) public. In the present context, the public cannot be said to be represented by either Parliament or the Executive, for the judiciary is answerable to neither. Less still can the public be taken to be the major institutions, such as the banks, representatives of the major religious faiths, the political parties or sporting clubs. The question, who are the public, must, I think, fall to be answered by reference to the primary task of the judiciary, which is to administer the law by making binding resolutions of disputes according to law. As trustees of the rule of law, the judiciary administers the law not for its own benefit, but for the benefit of each and every member of the community. The public, then, is the whole community — which at times may not be represented by the majority or the media.

The philosophical basis for this in many ways unremarkable task is, I think, best explained by Sir Isaiah Berlin in his book entitled *The Crooked Timber of Humanity*. Sir Isaiah said:

* Judge of the Federal Court of Australia. The paper is a revised version of the Sixth Lucinda Lecture, delivered at Monash University, 24 March 1998, when the author was a judge of the Court of Appeal, Supreme Court of Victoria. The author thanks her then associate, Dr Steven Tudor, for his help in the revision of the paper.

1 Eg *Gallagher* v *Durack* (1983) 152 CLR 238, discussed below.

2 *Kable* v *Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

> The first public obligation is to avoid extremes of suffering. Revolutions, wars, assassinations, extreme measures may in desperate situations be required. But history teaches us that their consequences are seldom what is anticipated; there is no guarantee, not even, at times, a high enough probability, that such acts will lead to improvement. We may take the risk of drastic action, in personal life or in public policy, but we must always be aware, never forget, that we may be mistaken, that certainty about the effect of such measures invariably leads to avoidable suffering of the innocent. So we must engage in what are call trade-offs — rules, values, principles must yield to each other in varying degrees in specific situations. Utilitarian solutions are sometimes wrong, but, I suspect, more often beneficent. The best that can be done, as a general rule, is to maintain a precarious equilibrium that will prevent the occurrence of desperate situations, of intolerable choices — that is the first requirement for a decent society; one that we can always strive for, in the light of the limited range of our knowledge, and even of our imperfect understanding of individuals and society. A certain humility in these matters is very necessary.[3]

Sir Isaiah elsewhere points out that conflict between values, even within the one-world view, is basic and inescapable, and that in any complex and reasonable society a final resolution of all conflicts and disputes (or even the establishment of arrangements to prevent them) is neither possible nor conceivable. What matters is how a society deals with the myriad disputes that will arise, large and small. The best way to do that is, so Sir Isaiah says, to try to maintain a 'precarious equilibrium' that avoids extremes of suffering.

The courts play an important role in that task, for they are pre-eminently the places where the people bring their disputes to be settled. In many cases before the courts the precarious equilibrium is in danger of being, or already has been, lost, sometimes only for the individuals involved, at other times for a wider circle of the public. The task of the courts is to do what they can, according to law, to shore up or restore the equilibrium. In consequence, public confidence in the judiciary largely depends on how the courts are perceived to succeed in that task. The converse, however, also holds, at least to the extent that in order to succeed in the task, the courts need the confidence of the public. This is because the courts cannot act with effective authority (as opposed to brute force) if those with whom they deal do not take them seriously.

This is, I think, part of what lies behind the constitutional preoccupation with the maintenance of public confidence in the judiciary as an institution. The Commonwealth Constitution, in Chapter III, confers and controls the exercise of judicial authority by the High Court of Australia and other courts created by the Commonwealth Parliament pursuant to s 71. It is accepted that the Constitution prevents the Commonwealth Parliament from conferring power that is not judicial power or a power incidental thereto on those courts.[4] In particular, the Constitution prevents the Parliament from conferring a function on a judge in his or her individual capacity if that function is inconsistent with the exercise of judicial power. Such inconsistency will arise when the

[3] Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (H Hardy ed, 1991) 17-18.

[4] *R* v *Kirby; Ex Parte Boilermakers' Society of Australia* (1956) 94 CLR 254.