The Byers Lectures 2000 – 2012

Nye Perram and Rachel Pepper (eds)

Australia: Federation Press 2013, pp 288, ISBN: 9781862878518, $125.00

The Byers Lectures is a collection of the first 12 annual essays delivered in honour of Sir Maurice Byers QC, a former Commonwealth Solicitor-General, the majority of which concern public law and jurisprudence. The collection gives an insight into legal and jurisprudential thought of the past decade, as well as areas ripe for future reform. Editorial comment by Justice Nye Perram and Justice Rachel Pepper, judges of the Federal Court and New South Wales Land and Environment Court respectively, gives important context to the lectures and provides an indication of how prophetic – or myopic – each lecture was. While the collection is aimed at a very informed audience, the editorial comment increases its accessibility by placing the lectures within the current context of the law.

The lectures cover topics such as constitutional law, evidence, international law and the legal profession. Fittingly, considering the innovation that Sir Maurice displayed during his career, the idea that the law is dynamic and must reflect and create social change underlies the collection. Described in the collection as a 'great leader of the bar' and 'the consummate barrister's barrister,'[1] Sir Maurice demonstrated this innovation while serving as Solicitor-General from 1973 to 1983 and later while arguing landmark constitutional cases such as *Wik*[2] and *Kable*.[3]

Sir Maurice himself noted that an 'independent bar has become an essential feature of the administration of justice in every court...'.[4] Sir Gerard Brennan, who writes of the strengths and perils of the bar at the turn of the century, expands on this idea. While the editors rightly note that some of Sir Gerard's predictions – particularly with regard to technological developments and 'Multi Disciplinary Practices' – have failed to eventuate, in other areas Sir Gerard's speech has been more prophetic.

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[1] By Murray Gleeson and James Spigelman, former Chief Justices of the High Court and Supreme Court of New South Wales respectively.

[2] *Wik Peoples v Queensland* (1996) 187 CLR 1.

[3] *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

[4] Sir Maurice Byers, 'A "Living National Treasury" – Sir Maurice Byers' (1994) (Spring/Summer) *Bar News* 17, 24.

Recently, and somewhat controversially, New South Wales Chief Justice Tom Bathurst has warned against the commercialisation of law.[5] This in some ways fulfils Sir Gerard's prediction that the bar may abandon a large proportion of its public representation in favour of increasing service to corporate and government sectors, and demonstrates the prescience of his essay. One function of an independent bar is to prevent this corporatisation and, in a sentiment shared with Sir Gerard's lecture, the Chief Justice of the Supreme Court of Tasmania recently praised the functioning of an independent bar in his swearing in.[6]

Sir Gerard's comments also relate to another underlying theme of the collection – the rule of law – since in an increasingly profit-centric profession, access to law by all citizens is necessarily compromised. This has been recognised by both governments and non-governmental organisations, and the editors note the growing prevalence of legislation such as the regulation of legal charges.[7]

The Hon Jim Spigelman, a former Chief Justice of the Supreme Court of New South Wales, once said that the adversarial system, which is fostered by an independent bar, is 'one of the greatest mechanisms for the identification of truth… that has ever been devised.'[8] In an exploration of the law and truth coloured by the evolution his own views, Spigelman identifies two main areas where the adversarial system does not necessarily align with a search for truth: evidentiary restrictions and perception and memory. Both issues are relevant in the current legal landscape and are likely to remain relevant in the future.

Spigelman's essay is perhaps the most interesting of the collection. Lucidly written, it engages the reader by referring to specific examples. As an illustration, he laments a failure to examine anachronistic evidence rules, such as the exclusion of hearsay evidence and involuntary confessions, as he believes that these rules can restrict truth finding in law. The editors argue that there has been a recent trend to 'to promote the concept of justice… over a more austere pursuit of the truth.' Very recently, however, the re-examination that Spigelman spoke of is in some

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[5] Chief Justice Tom Bathurst, 'Commercialisation of Legal Practice' (Speech delivered at the Commonwealth Lawyers Association Regional Law Conference, Sydney, 12 April 2012). For the Law Council of Australia's response, see Chris Merritt, 'Tom Bathurst Rethinks "Drone" Attack', *The Australian* (online), 11 May 2012.

[6] Chief Justice Alan Blow, 'Swearing in as Chief Justice' (Speech delivered at the Supreme Court of Tasmania, Hobart, 8 April 2013).

[7] See, eg, *Legal Profession Act 2007* (Tas) part 3.3. See generally, Access to Justice Taskforce 'A Strategic Framework for Access to Justice in the Federal Civil Justice System' (Final Report, Attorney General's Department, 2009).

[8] Chief Justice James Spigelman, 'Swearing in as Chief Justice' (Speech delivered at the Supreme Court of New South Wales, Sydney, 19 May 1998).

ways occurring, perhaps suggesting a shift from 'justice' to pursuit of truth. The right to silence was recently abolished in New South Wales, allowing adverse inferences to be drawn from an accused's silence in indictable offences.[9] Following a similar trend, the Chief Justice of the Supreme Court of Queensland has called for juries to be privy to an accused's prior convictions.[10]

Spigelman's second identified barrier to truth finding is the legal profession's understanding and appreciation of psychological factors that affect memory and perception, and hence the credibility and reliability of eyewitness evidence. While rules of evidence strictly limit the use of leading questions, there is no such limit in police investigations or lawyers' preparation of affidavits. Recent cases of wrongful convictions – such as Andrew Mallard's, partly on the basis of leading interview questions by the police[11] – suggest that this is an area ripe for development.

Appropriately, given that Sir Maurice's expertise lay in public law, there is also much discussion of constitutional law, statutory interpretation and jurisprudence. Constitutional law is dynamic, and implied constitutional rights, such as the freedom of political communication and the right to vote, have occupied much of the High Court's recent time.

The editors observe that constitutional law, and the assumptions that underpin the *Constitution*, affect increasingly wide areas of law. The court in *Aid/Watch*,[12] for example, noted that the *Constitution's* protection of electoral participation must be included in the definition of 'charitable institution'.[13] This context is particularly important as Jackson foreshadows future constitutional development. He notes that the rule of law as a constitutional doctrine may be a 'fertile source for future implications' and, to this extent, he applies Gleeson CJ's endorsement of

[9] *Evidence Act 1995* (NSW) s 89A, as amended by the *Evidence Amendment (Evidence of Silence) Act 2013* (NSW).

[10] Chief Justice Paul de Jersey, 'Address' (Speech delivered at the Queensland Law Society Symposium, Brisbane, 15 March 2013). The Chief Justice's proposal found the approval of the Queensland Attorney-General, Jarrod Bleijie but opposition from lawyer groups.

[11] *Mallard v The Queen* (2005) 224 CLR 125. See generally, Colleen Egan, *Murderer No More* (Allen & Unwin, 2010).

[12] *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539.

[13] Ibid 555-556 [44] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

Dixon J's statement in the *Communist Party Case*, that the *Constitution* assumes and relies on the rule of law.[14]

Although the lectures cover a wide range of topics each is grounded in a tribute to Sir Maurice, ensuring that the lectures come together well as a collection. The diversity of subject matter introduces the reader to the many facets of Sir Maurice's career, and the frequent use of personal anecdotes in introducing lectures gives the reader a familiarity with Sir Maurice's life and influence on the law. Each lecture is strong as a stand-alone piece but it is perhaps the dominance of constitutional law as a theme that gives the collection its colour.

If one theme could be distilled from the collection, it is that the law must constantly develop to both reflect and create change, as it did in *Aid/Watch* and *Kable*. That is the beauty of the common law, of which Sir Maurice was so influential in shaping. *The Byers Lectures* provides a fascinating, if occasionally inaccessible due to the level of presumed knowledge, exploration of the thoughts and evolution of some of the common law world's leading minds.

Claire Jago[*]

[14] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193, cited in *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351-352 [30] (Gleeson CJ and Heydon J).

[*] Fourth year BEc-LLB student at the University of Tasmania, and Board Member of the University of Tasmania Law Review for 2013.