THE CONSTITUTIONAL JURISPRUDENCE OF THE HIGH COURT OF AUSTRALIA: LEGALISM, REALISM, PRAGMATISM, JUDICIAL POWER AND THE DIXON, MASON AND GLEESON ERAS

by

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Abstract

The discussion presented in this thesis will analyse the relationship between the judicial approach of members of the High Court and the wider sphere of theoretical assumptions that surround law generally and constitutional interpretation in particular. The theoretical perspectives that will be considered in this thesis are the ideas associated with liberalism, realism, natural law reasoning and pragmatism. The analysis presented will critically analyse the judicial approaches of the Dixon, Mason and Gleeson eras. The area of constitutional law that is examined in detail is the law relating to judicial power.

The central thesis of this work is that the Gleeson High Court is a largely a-theoretical Court, in that, decisions of the Court are characterised by a low-level of abstraction, and the Gleeson Court does not theorise at length about the reasons for adopting a particular judicial approach. It will be argued that the methodology of the current High Court is legalistic with a number of elements of pragmatic thought also being of relevance. In the context of decisions relating to judicial power it will be concluded that a central issue for the Court has been a concern to protect the integrity of the federal judiciary. The Gleeson Court's approach will be distinguished from the realist based jurisprudence of the Mason Court, which articulated the relevance of legal theory and tended to make broad statements of legal principle. It will be argued that the approach of the Gleeson Court also diverges from Dixonian liberalism, which the analysis presented in this thesis will establish is a theoretical form of liberalism. The thesis will present the view that more theorised forms of legal reasoning are to be preferred over largely a-theoretical approaches.
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