

BOOK REVIEW

OJL PIERCE *INSIDE THE MASON COURT REVOLUTION: THE HIGH COURT OF AUSTRALIA TRANSFORMED* (CAROLINA ACADEMIC PRESS, DURHAM 2006)

DAVID ROBERTSON *

This book is one of those one would read with fascination whatever one thought of the author's argument—just for the raw material. The book is based on more than eighty in-depth interviews with the senior judiciary in Australia in the late 1990s. These include (though we are not told which ones) four of the seven judges then sitting on the High Court, as well as six of the retired High Court judges at the time. Pierce quotes at length from the interviews, and it is extremely valuable to hear these judges in their own words—and often in very expressive words. My own favourite quotation comes towards the end, when a judge is reported as reacting to a decision of the post-Mason court thus:

'*Wakim* is a f***ing outrage' said a Federal Court judge. 'The real justification for *Wakim*—the one they will never articulate—is that the Federal Court pinched all the good work from the state courts and left the state supreme courts languishing'.¹

Apart from the sheer fun of imagining a senior judge getting so angry during an interview, this is actually a more important example than Pierce himself seems to realise. The case referred to, *Re Wakim; Ex Parte McNally*,² happened very shortly after Gleeson CJ replaced Brennan CJ. The Brennan court had already started to put the break on the innovations of Mason CJ's court, but had not forcefully reversed them. Chief Justice Gleeson and his colleagues quite intentionally reverted to the judicial orientation that had dominated the Australian High Court from its inception. In *Re Wakim*,³ a reform of the division of labour between state and federal courts by which each could handle business previously restricted to one or other branch of the judiciary was ruled unconstitutional. The reform had the support of the federal government, federal parliament, the governments of all the states and most of the courts. It had been hailed by an official review as having 'a profound and beneficial impact of the Australian judicial system'. However,

¹ JL Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, Durham 2006) 260.

² *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511.

³ *Re Wakim* (n 2).

the Gleeson court took a pure black letter approach - the constitution gave no power to the federal government to cross-vest state jurisdiction on federal courts. Dismissing all arguments including convenience and consent, Gleeson CJ wrote:

the cross-vesting legislation has been commended as an example of co-operation between the parliaments of the Federation. Approval of the legislative policy is irrelevant to a judgment of its constitutional validity... Its convenience has been determined by the Parliaments. The duty of the Court is to determine its legality.⁴

The Gleeson court has gone back to what was described by one of Pierce's interviewees as American-style 'originalists': 'It looks like you've got five Scalias there'.

This is in contrast to the Mason court's idea of 'implied rights', in contrast to its less precedent-bound and more purposive methodologies, in contrast to an approach more akin to what Americans used to call sociological jurisprudence. Pierce himself often describes the Mason court as consisting of 'judicial realists', though I am not sure this is a phrase ever used by American judges about themselves. The label Pierce most typically uses however is that the Mason court was 'politicised', which he contrasts with the 'orthodox' jurisprudence of the past, and presumably, the post-Mason court jurisprudence. This is where I have problems with his book, and this is why I have started, as it were, at the end of the story, with a post-Mason example. Not all the time, but much of the time, Pierce seems to accept the orthodox judges' self-characterisation as being non-political, as being neutral and purely dedicated to deriving logical deductions from the mere words of the Constitution. He approves, I think, of the Mason court more than of the orthodox courts of Australian history, but he far too readily accepts that the court was 'political' and had not always been so. Bluntly, I would see the decision in *Re Wakim*⁵ as 'political' as the decisions in *Mabo v Queensland (No 2)*⁶ on aboriginal land rights and *Australian Capital Television Pty Ltd v Commonwealth*,⁷ the famous implied right to free speech. But then, like those American academics who pioneered judicial realism as a description of judicial behaviour, I have never believed that there is such a thing as black letter law. One interesting part of his book actually addresses this. Pierce uses the interviews to show that what lay behind much of the opposition to the Mason court was not so much what they did, as the fact that they were open about it. If I learned anything new from Pierce's book it is that so many in Australia before the 1990s either believed, or paid lip service to, a 'bouche de loi' account of judging. As Pierce himself says:

it was striking that informants who welcomed judges making law spoke as if this admission was just recently accepted in the judicial culture and articulating it would place a judge on the vanguard of progressive legal thought in Australia.⁸

⁴ Pierce (n 1) 259.

⁵ *Re Wakim* (n 2).

⁶ (1992) 175 CLR 1.

⁷ (1992) 177 CLR 106.

⁸ Pierce (n 1) 110.

But have I learned this? Can I rely on this as a fair assessment of Australian legal attitudes? This is the biggest problem with the book. It is, I suppose, an investigation of legal culture. We do not need the interviews with 82 judges and lawyers in order to understand what the Mason court did, or what its successors are doing. We can read the opinions. We might need the book to tell us how the Mason (temporary) revolution came about. But the answer to this, though it takes a very long chapter full of rather pointless charts to set out, is the familiar one of judicial appointments and political reaction leading to corrective further appointments. The value of all these interviews must be to tell us something about the context within which the Mason court, and indeed its predecessors and successors, work. Why else do we care about the views these other judges held about the court? Pierce has a marvellously rich data set, but he has the logic of his book the wrong way around. What he can tell us, that nothing else can, is about this legal culture. This would mean, however, that he had to be much more forthcoming than he is with details about the attitudes expressed. How common is each view he demonstrates? What types of respondents hold this view, and what types hold the opposite? Yet his use is purely anecdotal and, except in an *ad hoc* way, he never says anything to help us locate the attitudes of his interviews with any structural descriptions of them. Go back to my example at the beginning. It rather appears that *Re Wakim*⁹ may, in fact, have been more seriously criticised, indeed disparaged, than any of the shock, horror decisions of the Mason court. This might mean that Australian legal culture had been partly transformed by the Mason Court, and that the legal elite had come to welcome this. Even if the political elite still hated Mason's developments, the legal elite might wish to return to many Mason style legal positions. We have no way of knowing whether this is true or not, because of the anecdotal use Pierce makes of his information.

For that matter I am left unclear as to just how reactionary, and I use the word quite technically and non-pejoratively, the Gleeson court has been. This is partly because Pierce is determined to fit these courts into his preconceptions. When I was preparing to write this review, I had in mind to start by citing the 2004 decision in *Coleman v Power*.¹⁰ This is a freedom of speech case generally thought to show a further advance in the implied right to freedom of speech in Australia, in contrast with the last important case on the issue, *Lange v Australian Broadcasting Corporation*¹¹ in 1997 which is thought to have restricted the implied right. *Lange*¹² was decided by the Brennan court, which Pierce generally treats as a halfway house in the return to orthodoxy. One of Pierce's own informants, for example, says '[t]here is no doubt that *Lange* has limited the implied rights cases very, very severely'. In *Coleman*,¹³ the High Court had struck down a Queensland statute

⁹ *Re Wakim* (n 2).

¹⁰ (2004) 220 CLR 1.

¹¹ (1997) 189 CLR 520.

¹² *Lange* (n 11).

¹³ *Coleman* (n 10).

which made it an offence to utter ‘threatening, abusive, or insulting words to any person’ in a public place. Coleman was a political activist who had shouted some very nasty things at a policeman who approached him during a demonstration. The implied right to freedom of speech was held to trump any other value that the law may have sought to protect. I had intended to use it as an example of the continued richness and vitality of the implied rights approach. Pierce, however, uses it as evidence of the limitation of such an approach. What lies behind our disagreement is illustrative of the difficulty of his approach to categorising courts. The High Court was divided in *Coleman*¹⁴ because the minority objected to widening the range of protected speech. Chief Justice Gleeson was in the minority. Hence, apparently, the Gleeson court is orthodox and very limited in its approach to implied rights. Is that really the case? Chief Justice Gleeson maybe, but maybe there isn’t a Gleeson court at all. Maybe there wasn’t a Mason court either, because all the major cases then produced divided benches. There was Mason CJ and he was a towering figure, a massive judicial intellect who persuaded many other judges. He left his mark on many areas of law, many of them in a non-contested way. His court’s decision on section 92, the Australian equivalent of the US commerce clause, changed Australian constitutional law tremendously. As the High Court said in its unanimous opinion in *Cole v Whitfield*:

no provision of the Constitution has been the source of greater judicial concern or the subject of greater judicial effort than Section 92. That notwithstanding, judicial exegesis of the section has yielded neither clarity of meaning nor certainty of operation.¹⁵

Litigation under this section has virtually disappeared at the higher levels of the court hierarchy since that decision. How did they do this? They did it by an approach which in the US would have been seen as originalist and therefore conservative—they went back to the reports of the constitutional convention to see what the clause was meant to achieve. This is indeed a new technique in Australian constitutional jurisprudence, because it was not accepted by the ‘orthodox’. But why on earth not, and why does doing something that elsewhere would seem the very epitome of judicial conservatism qualify the Mason court as a politicised court?

We might know the answers to questions like these had Pierce actually treated his enormously rich interview material as the real focus of his work, rather than as evidence to justify his own categorizations of Australian courts. Pierce is a political scientist, and much of this review reads as though it was written by a lawyer intolerant of such discipline boundary crossing. As it happens, I am a political scientist. I just wish this book were a better example of what my discipline has to offer lawyers- but then, I believe in reading the cases, listening to the actors themselves, rather than paying much attention to the critics. Alternatively, I believe in doing elite culture studies properly. This book falls too solidly between the two stools.

¹⁴ *Coleman* (n 10).

¹⁵ (1988) 165 CLR 360, 383.

However, the quotes are enormous fun, and can be very thought provoking. My other favourite comes from a member of the High Court, explaining that the Mason court felt driven to develop principled arguments because of the failure of its once great model, the House of Lords. Lamenting what he saw as a decline in English judicial argument, he had this to say:

the English had not for many decades attempted a principled response to legal problems. In large measure their decisions were, 'Well a chap knows what a chap should do, and a chap shouldn't do this'. There had not been for many decades any serious attempt by the British to expose fundamental legal principles. The big change in the Mason court . . . was the recognition that if the Australian common law was to develop in a coherent way and adapted to Australian conditions then fundamental legal principles have to be exposed. You had to reason from the principle to the result, rather than this 'a chap knows what a chap should do' superior moral tone that the English had.¹⁶

Hardly colonial cringe, that.

¹⁶ Pierce (n 1) 88.

