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A MIRROR TO THE MAN REFLECTING ON JUSTICE WILLIAM DEANE: A PRIVATE MAN IN PUBLIC OFFICE

ABSTRACT

Sir William Deane was a member of the High Court of Australia during one of its most creative periods, from 1982 to 1995. His decisions displayed a notable commitment to social justice and a willingness to extend the constitutional protection of human rights. These tendencies were particularly prominent during the Mason Court years (1987–1995), manifesting in decisions including *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Dietrich v The Queen* (1992) 177 CLR 292; *Leeth v Commonwealth* (1992) 174 CLR 455; and the political communication cases of 1992 and 1994. Although his judgments displayed a clear vision of his judicial responsibilities, Deane adopted a strict extra-judicial silence regarding the principles that informed his judicial philosophy. However, as Australia's 22nd Governor-General Deane was more open regarding his personal beliefs and their influence on his performance of those duties. This article utilises Deane's public statements as Governor-General to shed light on the foundations of his judicial philosophy. In particular, as Governor-General Deane drew on his Christian faith to support his commitment to highlight the cause of indigenous reconciliation and the plight of the disadvantaged in Australia. This article argues that Deane's spiritual convictions, as articulated in his vice-regal statements, can also be regarded as underpinning his understanding of his role as High Court Justice.

I INTRODUCTION

When Sir William Deane retired as Governor-General in 2001 he was regarded by many as one of Australia's most prominent public figures, an 'Australian living treasure'.[1] Deane's popularity, and critics, stemmed from his commitment to social

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1 Sir William Deane was nominated as a national treasure in 1997. See National Trust of Australia, *Australia's Living National Treasures* <http://www.nsw.nationaltrust.org.au/about/treasures.asp>.

justice issues while Governor-General (from 1996 to 2001), particularly the cause of Aboriginal reconciliation. For Deane, championing these issues was an essential part of the Governor-General's duty: to hold up a mirror to the nation.[2]

Deane's high public profile as Governor-General stood in sharp contrast to his publicity-shy reputation in 1995, when news of the appointment was announced. A member of the High Court since 1982, and author of many controversial decisions, including the famous joint judgment with Gaudron J in *Mabo v Queensland (No 2)*,[3] Deane had consistently and conscientiously remained out of the public eye.[4] Deane would later explain that his extra-judicial silence stemmed from his understanding and personal experience of the judicial role, that, 'for me, the best way of performing my judicial functions was to confine what I had to say in my judgments, and quite frankly I found writing the judgments quite often exhausting.'[5] However, when freed from the demands and confines of the judicial role, Deane became increasingly open regarding his vision for Australia. In particular, as Governor-General Deane would speak of the place of religious belief in his life, and how it underpinned the social justice ethos he brought to the vice-regal office.

This article argues that the spiritual beliefs Deane explicitly applied in his later life can also be regarded as underpinning his understanding of his role as a High Court judge. Part I of this article explores how Deane identified and applied the core principles of his faith as Governor-General. Part II then identifies how those beliefs can be seen in key elements of Deane's High Court decision-making, particularly his constitutional jurisprudence.[6] It is true that utilising Deane's own later speeches

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2 Deane borrowed this metaphor from Sir Zelman Cowen. See, eg, Sir William Deane, 'Launch of the Indigenous Health and Welfare Report, Darwin, 2 April 1997', quoted in Sir William Deane, *Directions: A Vision for Australia* (St Pauls Publications, 2002) 79. A documentary on the office of Governor-General produced during Deane's term picked up this metaphor as its title. See *A Mirror to the People — The Governor-General* (Directed by Daryl Dellora, Ronin Films, 1999).

3 (1992) 175 CLR 1 ('*Mabo*').

4 Deane's publicity-shy persona was noted in the press at the time his appointment was announced, and following his press conference in response to that announcement. See, eg, Mike Steketee, 'Deane: Sound, Male and Judicial', *The Australian* (Sydney), 22 August 1995, 1; Paul Chamberlin and Marion Frith, 'A Radical Traditional Choice', *The Age* (Melbourne), 22 August 1995, 11; Margo Kingston and Verge Blunden, 'The New GG — A Devout Catholic with a Quest to Put Big Brother in his Place', *Sydney Morning Herald* (Sydney), 22 August 1995, 6.

5 Sir William Deane, quoted in Peter Charlton, 'Clear Views from the Top', *Courier Mail* (Brisbane), 23 August 1995, 15.

6 As a consequence of this article's focus on Deane's constitutional law jurisprudence, the many instances in which Deane manifested his social justice principles by holding private citizens and businesses to account for their treatment of the vulnerable are not discussed. Illustrating these trends in Deane's jurisprudence, see, eg, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Jaensch v Coffey* (1984) 155 CLR 549; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Muschinski v Dodds* (1985) 160 CLR 583; and *Baumgartner v Baumgartner* (1987) 164 CLR 137.

and interviews to explore the principles that informed his earlier jurisprudence risks the contaminating influence of hindsight. However, Deane's extra-judicial silence compels the creative use of such public materials to search deeper within his judicial philosophy.[7] Although this article cannot provide a comprehensive picture of Deane, his faith, or the values that underpinned his reasoning, through this lateral perspective on his public life it hopes to shed further light on the legal reasoning of a key figure in Australian judicial history.

II Part 1: Governing in Faith — Deane's Christian Beliefs, Articulated and Applied as Governor-General

A *The 'Touchstone' of Deane's Christian Faith*

Deane brought an explicit spiritual commitment to his role as Governor-General. However, some of his most detailed reflections on his spiritual life were published a year after his retirement from that role, in an interview on the ABC Radio's *Encounter* program.[8] On *Encounter*, Deane reflected on his path to vice-regal office and the spiritual principles that he believed inspired his service in that role. There, Deane encapsulated the essence of his spirituality in the following statement:

> more and more the whole of Christianity … for me comes down to Chapter 25 of St Matthew's Gospel: I was hungry and he gave me food; I was thirsty, he gave me drink; I was without a home and he took me in … I was in prison and you came to me. That, if you think about the context of St Matthew's Gospel, is the whole touchstone by which according to Christian belief, one's life ultimately tends to be assessed, or stands to be assessed.[9]

This passage highlights three important aspects of Deane's spiritual beliefs. First, the essence of Deane's faith was non-sectarian. In part, Deane saw his personal transition towards what he identified as these 'universal Christian principles' as a response to his experiences of religious factionalism. Deane had been raised as a Catholic, and, as he explained on *Encounter*, had witnessed the religious tensions

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7 Contrast the extra-judicial materials available to illuminate the judicial philosophies of Deane's contemporaries on the Court. See, eg, Sir Gerard Brennan, 'Courts For The People: Not People's Courts' (1995) 2 *Deakin Law Review* 1; Sir Daryl Dawson, 'The Constitution – Major Overhaul or Simple Tune-up?' (1984) 14 *Melbourne University Law Review* 353; Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 5; and John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158. In respect of Sir Anthony Mason's speeches, see also Geoffrey Lindell (ed), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason* (Federation Press, 2007).

8 ABC Radio National, 'Sir William Deane', *Encounter*, 12 May 2002, <http://www.abc.net.au/rn/relig/enc/stories/s550825.htm> ('*Encounter*').

9 Ibid.

in the Australian community in his youth during the 1930s and 1940s.[10] Deane reflected that 'as one gets older' he was drawn to recognising the deep similarities between 'all the great religion[s] of the world'.[11]

Second, Deane's spirituality did not express itself in prescriptive codes of morality. Rather, the essence of Deane's faith lay in an ethos of care and compassion for the disadvantaged and vulnerable in the community. Finally, and vitally for his life in public office, Deane believed that one's faith was lived, tested and proved in action. As Deane explained:

> you can't draw a line between belief and action, you can't as it were, go to church on one day and then forget all about the background of belief and what belief requires in your ordinary life.[12]

Compassion for the disadvantaged was necessary but not sufficient in a good Christian life. Rather, for Deane, faith entailed a personal responsibility to act consistently with those beliefs in all aspects of one's 'ordinary life'. The balance of this Part demonstrates how Deane regarded these principles as underpinning his obligations and duties as Governor-General.

B *'To Play a Small Part' for the Disadvantaged and Reconciliation*

Prior to Deane's term, the office of Governor-General had historically been primarily a ceremonial and community role. As Professor Winterton observed, with the exception of the 1975 constitutional crisis, the Governor-General had served as a largely 'non-political, impartial and independent representative of the community

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10 Deane also referred to his experiences of racial and religious intolerance in the 1930s in Australia in his '1999 Australia Day Message' quoted in Deane, *Directions*, above n 2, 63. A searchable archive of Deane's Australia Day speeches can be found at <http://parlinfo.aph.gov.au>.

11 Deane, speaking on *Encounter*, above n 8. Deane's commitment to embracing diversity in religious belief was later manifest in his decision in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 ('*Scientology Case*'). Decided a year after Deane was appointed to the Court, this case saw Sir Ronald Wilson and Deane deliver a rare joint judgment. The question for the Court was whether Scientology constituted a religion for the purposes of Australian taxation law. As committed members of the Uniting and Catholic churches respectively, Wilson and Deane's personal religious beliefs were opposed to Scientology. However, their joint decision reflected a broad, non-Christian, definition of religion which could encompass unorthodox and unpopular beliefs, including Scientology. On Wilson's spiritual beliefs and the *Scientology Case,* see Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of Western Australia Press, 2007) 218–20.

12 Deane, speaking on *Encounter*, above n 8. Deane made this observation in the course of explaining what the broader Christian community should learn from Indigenous Christian communities in Australia.

on significant national occasions'.[13] During the period following the constitutional crisis of 1975, Governors-General had largely focused their attention on avoiding partisan issues and fulfilling the unifying role of the office.[14] Media coverage in August 1995 of the news of Deane's appointment as Governor-General designate intimated that he would follow that model. Some commentators cast Deane as a 'safe and non-controversial choice'[15] for the post, emphasising also that he brought broad support from both sides of the political aisle.[16]

The years of Deane's term of office, 1996 to 2001, required the national representative and unifying symbol provided by the Governor-General. This was the era of national tragedies such as the Port Arthur massacre in 1996; the Thredbo landslide in 1997; and the loss of national icons such as Sir Donald Bradman in 2001. It was also the time of Pauline Hanson's politics; the High Court's decision in *Wik Peoples v Queensland*;[17] and the Stolen Generation report[18] and the political furore each created. When, as national mourner, Deane had taken sprigs of wattle to leave in memory of the young Australians killed in the canyoning accident at Interlaken, Switzerland, Deane's simple yet profound gesture had warmed the hearts of many Australians. However, in other contexts, Deane's actions took the office of Governor-General into the quagmire of Australian politics.

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13 George Winterton, 'The Evolving Role of the Australian Governor-General' in M Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 44, 54.

14 Geoffrey Lindell, 'Governor-General' in T L H McCormack and C Saunders (eds), *Sir Ninian Stephen: A Tribute* (Melbourne University Press, 2007) 54.

15 Geoff Kitney, 'How the PM Sprang a Safe Surprise: Private Talks Led from the High Court to Yarralumla', *Sydney Morning Herald* (Sydney), 22 August 1995, 6. However, there was some controversy that the post was filled by (another) man: see, eg, Marion Frith, 'Women not the Model of a Modern G-G', *The Age* (Melbourne), 21 August 1995, 1, and Alan Ramsey, 'Yarralumla Needs a Woman's touch', *Sydney Morning Herald* (Sydney), 9 August 1995, 15.

16 One commentator observed that '[u]nlike his predecessor, Bill Hayden, whose appointment in 1988 was attacked by the Opposition, Sir William starts with goodwill and applause from both sides.' Steketee, above n 4. See also comments from former Prime Ministers Fraser and Hawke cited in John Ellicott and Michelle Coffey, 'Blacks See Republic Role for G-G', *The Australian* (Sydney), 23 August 1995, 2.

17 (1996) 187 CLR 1. This decision determined that pastoral leases did not necessarily extinguish native title and attracted fierce criticism from a number of politicians. For example, Tim Fischer famously remarked in response to *Wik* that future Court appointments should be filled by 'capital C conservatives'. See, eg, Nikki Savva, 'Fischer seeks a More Conservative Court', *The Age* (Melbourne), 5 March 1997, 1, 2.

18 Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997). The 'Stolen Generation Report' revealed that Aboriginal children had been subject to a systematic program across the nation of forcible removal from their families, beginning in 1869 and concluding in the 1970s. The report concluded that these children and their families, although in some cases overcoming the impact of their removal, had suffered extreme trauma as a result of the removal policies.

Deane's tenure as Governor-General became controversial because of his understanding of his role as the 'mirror' to the nation. In particular, he expressed the desire to play a 'small part' in helping the disadvantaged in the Australian community and in the cause of reconciliation between Indigenous and non-Indigenous Australians.[19] Consequently, Deane consistently drew the eyes of the nation towards the underprivileged, marginalised and unrecognised in Australia. It was on this basis, for example, that Deane's speeches as Governor-General repeatedly raised the issues of homelessness; drug and alcohol abuse; youth unemployment; and mental illness and health.[20] Further, in a final symbolic gesture, Deane used his last official event as Governor-General to underline the issue of homelessness in Australia, by hosting a lunch for youth from the charity Youth Off the Streets.[21] Throughout his term Deane's message was simple and persistent: 'the collective plight of the disadvantaged in this country [was] a national problem of overwhelming dimensions.'[22]

Deane frequently tied this message of care and compassion for the vulnerable in the Australian community to iconic Australian values and civic identity. For example, Deane explained that assistance to the disadvantaged reflected the core 'Aussie' commitment to 'a fair go'. This principle was evinced, Deane argued, by the generosity of ordinary Australians in reaching out to others to ensure that all people in Australia received an equal opportunity to share in the riches, peace and vibrancy of the nation.[23] At other times, Deane appealed to the legal foundations of the Australian nation, 'the people' and their decision to unite to form the Australian Commonwealth in 1901.[24] At the joint parliamentary sitting commemorating the

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19 Deane identified these causes as his vision for his term at his press conference in August 1995. See, eg, Sir William Deane, quoted in Mike Steketee, 'Bill Deane: Rebel with a Cause', *Weekend Australian* (Sydney), 22–23 November 1997, 25.

20 See, eg, Sir William Deane's '1999 Australia Day Message', above n 10.

21 See Governor-General's Program, 28 June 2001. At Deane's request, the customary gift from the Australian Government to a departing Governor-General was also made to a homeless shelter in Sydney (Charles O'Neill House). See John Howard, 'Farewell Address' (Speech delivered at the Farewell Reception for Sir William Deane, Great Hall, Parliament House, Canberra, 28 June 2001). See also the anecdote related by Cullen that: 'Each year, the Deanes host a series of Christmas and New Year parties for sick and disadvantaged children at Yarralumla and Admiralty House. As the tired children left one such party, Sir William handed each $40, with the strict proviso that they spend $20 on themselves but use the other $20 to buy presents for their Mums.' Jenny Cullen, 'National Treasures', *The Australian Women's Weekly* (2001) January 55, 56.

22 See, eg, Sir William Deane, 'Opening Address' (Speech delivered at the National Conference of the Council to Homeless Persons, Melbourne, 4 September 1996); and Sir William Deane, 'Opening Address' (Speech delivered at View Clubs of Australia National Convention, Canberra, 17 September 1996). See also, Sir William Deane, '1997 Australia Day Address' available at <http://parlinfo.aph.gov.au>.

23 See, eg, Sir William Deane, '2000 Australia Day Address' quoted in Deane, *Directions*, above n 2, 13.

24 See, eg, Sir William Deane, 'Toast to Australia on the occasion of the Australia Day Luncheon' (Speech delivered at the Australia Day Luncheon, Melbourne, 24 January 1997). Deane also changed the official toast to reflect his understanding

centenary of the Australian federation, Deane explained the nature of his vision of Australian democracy in this way:

> All of us who are privileged to hold public office, be it elected or appointed, owe a duty of trust to the present and future generations of Australians to put the pursuit of the common good above personal gain or ambition. Let us be conscious of that duty, and of the basic fact of our democracy, namely, that the ultimate source of all government power and authority in this land, is the people — all the people — of our Commonwealth.[25]

Only by ensuring that all Australians experienced equal citizenship could the Australian nation be true to its ultimate foundation. What diminished one, diminished all. Deane thus relied on Australia's democratic foundations, and distinctive national ethos of a 'fair go', to reinforce his message that public officials had an obligation to act to improve the plight of the disadvantaged in Australia.

On other occasions, Deane linked his advocacy for the disadvantaged to what he would later describe as the core principles of his faith. For example, in his Australia Day Address in 1999, Deane reflected:

> The ultimate test of our worth as a truly democratic nation must surely be how we treat our most vulnerable.[26]

It was on this basis that Deane believed the status of Australia as a nation, and the conduct of governments in the nation, should be assessed. Deane applied his 'test' to both communities and individuals, remarking in 1998:

> It is my firm belief that the ultimate test of our worth as a democratic nation is how we treat our most disadvantaged. And by 'we' I refer to all of us, as members of the community.[27]

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of sovereignty residing in the Australian people, to 'To the Queen of Australia *and the people of Australia*': Tony Stephens, *Sir William Deane: The Things that Matter* (Hodder, 2002) 6. Former Prime Minister Howard soon followed Deane's example, see Richard McGregor, 'Deane's Changes in Place on Roasted Toast to Queen', *The Australian* (Sydney)*,* 5 November 1999, 6.

25 Sir William Deane, Joint Commemorative Meeting of the Parliament of the Commonwealth of Australia and the Centenary Commemoration Ceremony, Melbourne, 9 May 2001 in Deane, *Directions*, above n 2, 72. See also an earlier explanation by Deane that: '[i]t is the very essence of a great and compassionate democracy such as ours that, when the views and aspirations of the majority ultimately prevail, there is respect, tolerance and understanding of the views and aspirations of the minority. Otherwise the unbearable cost of our development as a nation will be our disunity.': Deane quoted in Marion Frith 'A G-G's Mission' *The Age* (Melbourne), 17 May 1996, 27.

26 See, eg, Sir William Deane, '1999 Australia Day Address'; above n 10.

27 Sir William Deane, Opening of the Mission Australia National Conference, Newcastle, 2 February 1998 quoted in Deane, *Directions*, above n 2, 80.

Deane's vision was therefore one encompassing personal responsibility, and a commitment by all in Australia to alleviate suffering. Speaking to a Mission Australia event, Deane turned to Christian imagery to illustrate his philosophy of providing a hand of assistance to the disadvantaged:

> [There] must also be the creation or encouragement of an awareness on the part of individual Australians that, while the assistance provided by Government and Government instrumentalities to the disadvantaged is absolutely vital, Government assistance can do only so much and must be supplemented by individual contributions of work, skill, dedication and, in many cases, companionship. In that regard, it is well to remember that the abiding wisdom of the patristic maxim that he who has failed to feed the man dying from hunger has truly killed him is directed to the individual and transcends mere notions of government welfare payments or services even when they are available.[28]

Within Deane's vision, Australians, particularly Christian Australians, were left little room for complacency in their daily life. Each individual was morally charged to act, while public officials owed greater obligations because of the nature of the 'public trust' of their office.

While in statements such as these Deane alluded to the spiritual source of his 'test', it was after his retirement as Governor-General that Deane tied his vision more openly to his personal Christian beliefs. For example, shortly after his retirement as Governor-General, in 2002, Deane defined the obligations of those in public office in terms of his understanding of the touchstone of his Christian faith while launching an ecumenical religious centre:

> In such times, when we are as a nation in danger of losing our way, it is particularly important that here in our national capital there should be at least one great ecumenical centre where there is no ambiguity about the constant relevance of the Christian message that the ultimate test of the worth of each of us as individuals and of all of us as a nation is how we have treated and treat the most disadvantaged and vulnerable of our fellow human beings. The parable of the Good Samaritan makes plain that, however convenient it might be to do so, one simply cannot confine one's definition of neighbour to including only our fellow Australians.[29]

Speaking to an ecumenical gathering, it is perhaps not surprising that Deane chose to refer openly to his understanding of the Christian message. However, this speech clearly reflected the interlocking components of Deane's vision as Governor-General, that is, the obligations of public officials to serve 'the people' of Australia — 'all the people' — and that it was through their acts of service towards

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28 Sir William Deane, 'Opening Address' (4 September 1996) above n 22.

29 Sir William Deane, Launch of 'Visions of Rottenberry Hill' at the Australian Centre for Christianity and Culture, Canberra, 31 January 2002 in Deane, *Directions*, above n 2, 87.

the disadvantaged that the nation would be judged. Not surprisingly, this repeated advocacy of the disadvantaged, and the moral overtones of his message, elicited controversy as overstepping the neutral role of the Governor-General.[30]

The passion of Deane's speeches regarding Australia's moral obligation to alleviate disadvantage was matched only by his remarks on the topic of Aboriginal reconciliation. On this issue, Deane again turned to his understanding of his role as 'mirror' to the nation. This mirror must reflect both the glory and the errors in the Australian past, and openly acknowledge those faults: 'where there is no room for national pride, or national shame, about the past, there can be no national *soul*.'[31] In particular, Deane saw Australia's shame as a nation in its present and past treatment of Indigenous Australians. In his famous lecture, 'Some Signposts from Daguragu' Deane explained:

> It should, I think, be apparent to all well-meaning people, that true reconciliation between the Australian nation and its indigenous peoples, is not achievable in the absence of *acknowledgment* by the nation of the wrongfulness of the past dispossession, oppression and degradation of the Aboriginal peoples. That is not to say that individual Australians, who had no part in what was done in the past, should feel or acknowledge personal guilt. It is simply to assert our identity as a nation, and the basic fact that *national shame, as well as national pride*, can and should exist in relation to past acts and omissions, at least when done or made in the name of the community, or with the authority of government.[32]

Through the metaphor of healing the Australian soul, Deane conveyed his sense of the paramount importance that *action* was required: first to acknowledge (confess) past acts, and then to redress the consequences of those actions. Only by such acts could the nation be healed. Without such healing, how could the nation move forward in peace towards prosperity for all Australians? Again, for Deane, all 'well-meaning' Australians, including the Governor-General, must take part in that healing process. It was for this reason that Deane issued personal apologies to Indigenous communities, including the Stolen Generations, for the tragedies of the past.[33] Robbed of their land, their history, their children and often their lives,

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30 See, eg, Cheryl Critchley, 'Deane defends Church Opinions', *Herald Sun* (Melbourne), 19 November 1997, 11; Rachel Hawes and Chip le Grand, 'G-G plays risky politics: Kennett', *The Australian* (Sydney), 19 November 1997, 1.

31 See, eg, Sir William Deane, 'Some Signposts from Daguragu' (1997) 8 *Public Law Review* 15, 21 (emphasis added). Daguragu is the Gurindji name for 'Wattie Creek', the site of the famous 1967 'Wave-Hill Walk Off' protest camp, where Aboriginal stockmen and their families rallied to force action on unequal wage provisions and Aboriginal land rights over the Victoria River area.

32 Ibid (emphasis added).

33 See, eg, the response to Deane's personal 'profound' apology to the Stolen Generations, and the 'long applause' it received at the Australian Reconciliation Conference, held in Melbourne in May 1997 in Buti, above n 11, xix. See also Deane's controversial personal apology to the peoples of Mistake Creek at his speech

Deane saw full and frank acknowledgement of these past acts against Indigenous Australians as essential to the healing of the national spirit.

However, Deane's message was not simply one of spiritual and emotional healing of the country. His vision focused also on the need for governments and individuals to work together to alleviate the effects of past injustice. Thus, Deane envisioned reconciliation as necessarily encompassing measures to rectify the systemic and crushing disadvantage suffered by Indigenous peoples. For example, from his earliest speeches Deane emphasised the striking differences in quality of life that faced Indigenous communities. In his 1997 Australia Day Address Deane chose to showcase the importance of health reform as a component of reconciliation in the following way:

> Let me take the example of a new-born Aboriginal baby girl and give you some plain facts about her future, if things don't change. On average, she can expect to live almost 20 years less than other Australians. She is three times more likely not to survive infancy. If she does survive until she is 15, she will be three-and-a-half times more likely to die before she reaches 25. If she reaches 25, she will be six times more likely to die before the age of 34. Her prospects are even worse if we look at particular illnesses. For example, if she does become a woman, her chances of dying from a diabetes-related illness are 17 times greater than those of a non-Aboriginal woman.[34]

Without action to effect substantive equality between the indigenous and non-Indigenous communities in Australia, Deane argued, real reconciliation could not be achieved: 'How can we hope to go forward as friends and *equals* while our children's hands cannot touch?'[35]

For many, statements such as these confirmed Deane's status as a part of the national conscience, offering a profound message of compassion and generosity.[36] For others, Deane's message was divisive, 'bleeding heart' rhetoric that politicised the ceremonial role of the Governor-General.[37] On this view, Deane could no longer claim to be a mirror to the people. Rather, he acted as a lens, focusing public attention on those issues vital in *his* world-view, distorting his commentary on the nature of Australia through his moralistic tone. Deane's statements on reconciliation gave particular momentum to this style of critique. In the so-

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at the Ceremony of Reconciliation with the Kija People, Mistake Creek, Western Australia, 7 June 2001 in Deane, *Directions*, above n 2, 31.

34 Sir William Deane, '1997 Australia Day Address', above n 22.

35 Sir William Deane, 'Some Signposts from Daguragu', above n 31, 24 (emphasis added).

36 See, eg, the comparison of Sir Ronald Wilson and Sir William Deane in Tony Stephens 'The Turbulent Knight', *Sydney Morning Herald* (Sydney), 4 September 1997, 13. This quote is also considered by Buti, above n 11, 340–1.

37 Stephens titled Chapter 3 of his work exploring Deane's role as Governor-General 'The Work of a Bleeding Heart': Stephens, above n 24.

called history wars of the 1990s,[38] Deane's view of history was rejected by some as projecting Australia's past as a 'disgraceful story of imperialism, exploitation, racism, sexism and other forms of discrimination',[39] a history of ignominy and infamy. By referring to 'national shame', and past injustice and wrongs, Deane was regarded as projecting a politicised 'black-armband' vision of Australia's past. Deane's critics saw such remarks as embodying political activism and so usurping the democratic role of the people's representatives in Parliament.[40] For example, then Victorian Premier, Jeff Kennett, publicly criticised Deane, warning that he

> should, like all predecessors before him, be careful to make sure that he doesn't become party-aligned, which I suspect he is in the sense that his views are all of one side.[41]

As a High Court Justice, Deane's decisions had also elicited criticism as usurping the democratic role of Parliament. As he had as Governor-General, Deane saw his role as a judge as encompassing an obligation to ensure that public officials acted in accordance with the public trust they held on behalf of 'all the people', and particularly, the disadvantaged and vulnerable in Australia. However, as a High Court judge, Deane did not explicitly connect this understanding of his role to his Christian principles.

III Part 2: Deane, Faith and the High Court

When Deane's appointment as the next Governor-General was announced in August 1995, the media offered a brief commentary on his most notable High Court decisions.[42] They had much to discuss. Deane was appointed to the High Court in 1982 and his early years on the Court had included high profile disputes such as the *Tasmanian Dam Case*, the 'Murphy Affair' and the *Chamberlain* litigation.[43]

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38 For an overview of the 'black-armband' debate and the 'history wars', see Mark McKenna, 'Different Perspectives on Black Armband History' (Research Paper No 5, Commonwealth Parliamentary Library, 1997). Recent changes to the Australian education system have resurrected discussion of 'black armband history': see, eg, Justine Ferrari, ' "Black Armband" History Dumped', *The Australian* (Sydney), 26 February 2010, 3.

39 John Howard, 'The Liberal Tradition: The Beliefs and Values which guide the Federal Government' (Speech delivered at the Sir Robert Menzies Lecture, Melbourne, 18 November 1996) <http://www.menzieslecture.org/1996.html>.

40 Professor Lindell alluded to the risks to the office of appearing to be in conflict with the government of the day in Lindell, 'Governor-General', above n 14, 54–5.

41 Jeff Kennett quoted in John Short and Michael Magazanik, 'Kennett calls G-G for Playing Party Games', *The Australian* (Sydney), 21 November 1997, 5. See also Tony Stephens, 'Hackles Rise as Queen's Man has his Say', *Sydney Morning Herald* (Sydney), 20 November 1997, 1.

42 See, eg, newspaper commentary listed below nn 46 and 47.

43 *Commonwealth v Tasmania* (1983) 158 CLR 1 *('Tasmanian Dam Case')*; *R v Murphy* (1985) 158 CLR 596; *Chamberlain v The Queen* (1984) 153 CLR 521. For an overview of the controversy surrounding these decisions and the issues raised, see respectively Tony Blackshield, '*Tasmanian Dam Case*' and 'Murphy Affair', and

In addition, Deane had contributed to, and often initiated, a re-conceptualisation of principles of tort, equity and contract.[44] In the field of constitutional law, particularly during the Mason Court era (1987–1996), Deane also consistently advocated the extension of constitutional rights, express and implied.[45] Some members of the press in 1995 noted the significance of Deane's role in these contexts.[46] However, most focused extensively, or exclusively, on *one* of Deane's decisions: *Mabo*.[47]

The media's focus on Deane's role in *Mabo* was to be expected. The case had captured public attention at the time, its impact 'likened to the imposition of a peace treaty on the winning side in a war that had lasted more than two centuries.'[48] By highlighting Deane's involvement in this decision, the media both associated Deane with a well-known legal event and tapped into the controversy regarding the High Court's role in that context.[49] Further, the fact that Deane and Gaudron's joint judgment had elicited particular controversy opened the door for the commentators in 1995 to ask a number of questions: what was the motivation behind the Keating Government's appointment of Deane as Governor-General? Did the Government want Deane off the bench? Was there a tension between Deane's apparently shy public persona and his intellectual radicalism? Would he be a radical Governor-General or a lawyer's lawyer in that role? What values and principles would he bring to his new role?[50] Thus by highlighting Deane's *Mabo* decision, the media

Russell Hogg, 'Chamberlain Case' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 658, 486, 85.

44 See, eg, the cases discussed in the entries by Rosalind Atherton et al 'Deane, William Patrick' and Michelle Dillon and John Doyle 'Mason Court' in Blackshield, Coper and Williams, above n 43, 195 and 461 respectively.

45 Deane's rights jurisprudence is discussed below at Part II Section (b).

46 See, eg, Farah Farouque, 'High Court Loses an Individual Thinker on Rights', *The Age* (Melbourne), 22 August 1995, 11 and Bernard Lane, 'Shy, Radical Judge Heads for Yarralumla', *The Australian* (Sydney), 22 August 1995, 13. Most of the press attention on Deane focused on his constitutional jurisprudence. As noted above, this article shares this emphasis.

47 (1992) 175 CLR 1. See, eg, Steketee, above n 4.

48 David Solomon, *The Political High Court* (Allen & Unwin, 1999) 27.

49 At his press conference, Deane had dismissed criticism of the Court as 'making' law, and stated that in his view the *Mabo* decision had been misrepresented. It is unclear from the media coverage whether these remarks were unsolicited or in response to a media inquiry. Certainly Deane's reference to *Mabo* would have further encouraged the press to mention this decision in their commentary. On Deane's response to criticism of *Mabo* see, eg, Verge Blunden, 'New Man Judges his Words', *Sydney Morning Herald* (Sydney), 23 August 1995, 5.

50 See, eg, Blunden, above n 49, 5; Don Greenlees, 'Deane Rules out a Repeat of Kerr's Dismissal', *The Australian* (Sydney) 23 August 1995, 1; Selva Kumar, 'Australia losing its most Libertarian Judge', *Business Times Singapore,* (Singapore), 31 August 1995; Chris Merritt, 'Judgement Day', *Australian Financial Review* (Sydney), 25 August 1995, 29; Innes Willox, 'Deane stays open to Ministerial Advice', *The Age* (Melbourne), 23 August 1995, 3. On the suggestion that the Government's intention was to remove Deane from the High Court because of his controversial decisions,

introduced colour and controversy to what might otherwise have been regarded as a conservative appointment: a(nother) white male lawyer to the post of Governor-General.[51]

However, in hindsight, the media's attention on Deane's role in *Mabo* was prescient. In *Mabo* Deane voiced opinions that would define his conduct as Governor-General, and exhibited a bold understanding of his role as a public official, at this time, as a High Court judge.

A *Deane and the* Mabo Case

In *Mabo* members of the Meriam people brought an action against Queensland claiming traditional native title over the Murray Islands.[52] A majority of the Court (Dawson J dissenting) held that the common law recognised native title and that the title survived the acquisition of sovereignty by the Crown.[53] Under the so-called enlarged concept of the *terra nullius* doctrine, it had been long accepted that Australia lacked settled inhabitants or settled law.[54] However, after exploring the history of the contact between white settlers and the Indigenous peoples of Australia, Brennan J, author of the leading judgment in *Mabo*, recounted that this doctrine was 'false in fact and unacceptable in our society', resting on the 'discriminatory denigration of indigenous inhabitants, their social organization and customs.'[55] In finding for the claimants, the Court re-framed long-established principles regarding the legal consequences of white settlement and the foundations of Australian land law.

Within that controversial decision, Deane and Gaudron's reasoning attracted particular attention for the way in which they chose to recount the treatment of Indigenous peoples in Australia's history.[56] While a discussion of history was necessary in the majority's reasoning, Deane and Gaudron went beyond an account of that interaction between the cultures at settlement. Instead, their Honours

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see Robert McCorquodale, 'Teoh's Case' in Blackshield, Coper and Williams, above n 43, 665.

51 Cf coverage of the need to appoint a female Governor-General, eg, Frith, above n 15. Of the four Governors-General preceding Deane (Hayden, Stephen, Cowen and Kerr), all had been legally trained.

52 The historical, political and personal context of the *Mabo* decision is outlined in the four entries on the case, and the further references listed therein, in Blackshield, Coper and Williams, above n 43, 446–52.

53 A differently constituted Court had earlier decided *Mabo v Queensland (No 1)* (1988) 166 CLR 186. Deane was a member of the majority in that case holding that Queensland legislation designed to extinguish native title in that state, and so derail the litigation, was inconsistent with the Commonwealth's *Racial Discrimination Act 1975* (Cth).

54 See *Mabo* (1992) 175 CLR 1, 32–3 (Brennan J).

55 Ibid 40.

56 As evinced by the continued interest in Deane's decision in 1995. See, eg, references above n 46.

characterised that history as a blot on Australia's identity, and reconciliation as a precondition to Australia's future.[57]

As outlined in Part I above, the proposition that Australia as a nation and a people must own its history, both good and bad, was a key component of Deane's advocacy of reconciliation as Governor-General. Four years earlier, these views had entered Deane and Gaudron's reasoning in *Mabo*. In a noted passage from their *Mabo* decision, Deane and Gaudron reflected:

> The nation as a whole *must remain diminished* unless and until there is an acknowledgement of, and retreat from, those *past injustices*.[58]

Thus, as he would later express as Governor-General, Deane (and Gaudron) in *Mabo* characterised the interaction between white settlers and Indigenous Australians in moral terms, as 'injustice'. In statements that were later echoed by Deane in his vice-regal speeches, Deane and Gaudron also characterised these 'past injustices' of the history of dispossession of Indigenous Australian as '*the darkest aspect of the history of this nation*.'[59] This, they observed, was a history of

> the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and *leave a national legacy of unutterable shame*.[60]

Deane and Gaudron recognised this language was 'unusually emotive' for use in a High Court decision, and asserted that it was *not* designed to attribute moral guilt. However, as Professor Berns has observed, the alliterative elements of this passage were 'intended to reach not the mind but the *heart*, to evoke not reasoned acknowledgment but *empathy*, evocative of a national holocaust which had gone for too long unremarked.'[61] The very use of language of this kind ensured the ideas (and values) underpinning this aspect of Deane and Gaudron's reasoning were long remembered.[62]

Language of this sort gave dramatic voice to Deane and Gaudron's distinctive understanding of their duties as High Court judges. In *Mabo*, in his leading judgment, Brennan J was influenced by the contemporary social context as one basis for rejecting the long-accepted principle of *terra nullius*. Thus, his perception of the community's response to a principle informed by discriminatory,

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57 See, eg, the detailed examination of the significance of the narrative employed by each of the judges in *Mabo* in Sandra S Berns, 'Constituting a Nation: Adjudication as Constitutive Rhetoric' in C Sampford and K Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 84.

58 *Mabo* (1992) 175 CLR 1, 109 (emphasis added).

59 Ibid (emphasis added).

60 Ibid 104 (emphasis added).

61 Berns, above n 57, 107 (emphasis added).

62 Deane's repeated use of these phrases from the *Mabo* decision also ensured their continued place in public debate between 1996 and 2001.

racist assumptions, was one basis for enabling the Court to depart from the principle. While this too was the effect of Deane and Gaudron's decision, their 'acknowledgement' passage embraced a significantly broader role for the Court. Their decision offered historical and political commentary on Australia's past, and its future, in uncompromising terms. In their view, their role thus encompassed calling for Australia to *take action* to rectify injustice done to the Indigenous peoples, and, as a first step in that process, for the highest court in the land to admit to Australia's shameful past.

As these aspects of Deane's reasoning in *Mabo* were part of a joint judgment, how much can we attribute to Deane personally? Certainly there is always a tension when attributing the language, style, tone and values of a joint judgment to a single judge. By joining in the judgment, at the very least Deane can clearly be taken to have endorsed the decision's core features; its recognition of native title and the violent history of conflict between white settlers and Indigenous communities. However, two factors suggest that Deane was significantly invested in the language and sentiments of these passages in *Mabo*. First, as discussed above, his endorsement of the message of acknowledgment and action as essential for healing the Australian nation as Governor-General testifies to his continued and personal commitment to these views.[63] Second, for the reasons outlined below, Deane's earlier decision in the *Tasmanian Dam Case* suggests that Deane in fact authored these key passages in *Mabo*.

1 *Deane and the* Tasmanian Dam Case*: Clues for the* Mabo Case

Decided in July 1983, the *Tasmanian Dam Case* was one of Deane's earliest decisions as a member of the High Court. The case concerned the Hawke Labor Government's attempts to prevent the construction of a hydro-electric dam on the Gordon River below the Franklin River, in Tasmania's south-west region.[64] As a result of lobbying by environmental groups, the construction of the dam had become a central issue in the 1983 national election campaign. The then Hawke-Labor federal opposition promised to utilise Commonwealth legislative power, in conjunction with s 109 of the *Constitution*, to prevent Tasmania constructing the dam. In contrast, the federal Liberal Party's 'new federalism'[65] policy committed the Commonwealth to respecting State autonomy, including the State's right to balance issues of power generation and environmental protection within the State. Following its success at the national polls,[66] the Hawke government quickly prepared the promised legislative package. The resulting scheme,

63 See, eg, above n 32.

64 The history of the dispute, and the Court's decision, is explored in detail in Leslie Zines, 'The *Tasmanian Dam* Case' in H P Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 262.

65 See further Patrick Weller, *Malcolm Fraser PM: A Study in Prime Ministerial Power* (Penguin, 1989) 307–11.

66 However, as Professor Zines observed, the acute federal issues were reflected in the electoral polls, as the Labor party failed to win a single Tasmanian seat in the House of Representatives in the 1983 election: Zines, above n 64, 265.

described by Deane as a complex 'entanglement of provisions',[67] relied on a suite of Commonwealth legislative powers to maximise the chance that at least one provision preventing the construction of the dam would survive the inevitable legal challenge. This technique ultimately proved effective as a majority of the Court upheld sufficient elements of the scheme to prevent the dam's construction.

Deane's reasoning contained important indicators of his judicial philosophy, particularly in his application of innovative interpretative approaches to strengthen the constitutional protection of individual liberty (such as proportionality reasoning).[68] However, for the purpose of pinpointing Deane's contribution to the key passages of the later *Mabo* joint judgment, it was his analysis of the validity of the legislation under s 51(xxvi) (the 'race power') that warrants close attention.

Section 51(xxvi) of the *Constitution* empowers the Commonwealth to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws.'[69] The Commonwealth's argument was that aspects of the legislation operated to protect a site of particular significance to the cultural and spiritual heritage of Indigenous Australians and so were supported by s 51(xxvi). Deane agreed. He commenced this aspect of his judgment with an outline of the presence of the two 'dismissive'[70] references to Indigenous Australians originally contained in the *Constitution*. Speaking of the motives behind the 1967 referendum, Deane observed,

> it became increasingly clear that Australia, *as a nation, must be diminished* until acceptable laws be enacted to mitigate the effects of *past barbarism*.[71]

The highlighted language in this passage is strikingly similar to that of nine years later in *Mabo*. However, considered in context, the passion and moral tone of Deane's remarks in the *Tasmanian Dam Case* were the more remarkable. In *Mabo* the rhetorical arc of Deane and Gaudron's reasons, culminating in cataloguing the 'barbarism' of past acts towards Indigenous Australians, was employed as part of

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67 *Tasmanian Dam Case* (1983) 158 CLR 1, 250.

68 The significance of this aspect of Deane's reasoning in the *Tasmanian Dam Case* is discussed later in this article. See below n 94 and accompanying text. Deane's discussion of the s 51(xxxi) issues in the case also extended the scope of that guarantee beyond that recognised by other judges in the case. His views on the meaning of an 'appropriation' in particular were influential in later cases in the 1990s. For further discussion of this aspect of Deane's constitutional jurisprudence, see H J Roberts, *'Fundamental Constitutional Truths': The Constitutional Jurisprudence of Justice Deane, 1982–1995* (PhD, ANU College of Law, 2008) 190–8.

69 On the framers' intentions in drafting the section, the effect of the 1967 referendum on its meaning, and the Court's interpretation of the race power generally, see Robert French, 'The Race Power: A Constitutional Chimera' in Lee and Winterton, above n 64, 180.

70 *Tasmanian Dam Case* (1983) 158 CLR 1, 272.

71 Ibid 272–3 (emphasis added). See also *Gerhady v Brown* (1985) 159 CLR 70, 149.

a decision exploring Indigenous land rights in Australia, and in particular their interpretation of the Court's duty to modify the common law to recognise native title. However in the *Tasmanian Dam Case* the subject matter of the case did not lend itself to such a narrative: the 1983 case was a traditional federalism dispute, with the protection of indigenous cultural heritage being only one (arguably small) part of the legal and political questions raised. Further, in an otherwise dispassionate discussion of the s 51(xxvi) issues, Deane did not rely on the need to rectify past 'barbarism' to support his understanding of the head of power. In a Court arguably more conservative in style and approach than its 1992 counterpart, Deane's reference in 1983 to 'past barbarism' towards Indigenous peoples in Australian history, and the cloud under which the nation must continue until adequate steps were taken to rectify these wrongs, possessed a dramatic moral tone. In this way, the tone and language of the extract from the *Tasmanian Dam Case* indicates that as early as 1983 Deane considered it appropriate for a member of the Court to express such views in his reasons for decision and also signals Deane's heavy hand in the later *Mabo* joint judgment.

Other examples from Deane's High Court career manifest his understanding of his duty as a High Court judge to protect 'the people'. In particular, it was when Deane perceived legislative or executive interference with individual liberty that the strength of his beliefs regarding social justice, and the Court's obligation to utilise its powers creatively for that purpose, were dramatically illustrated.

B *Championing the Vulnerable: Deane and the Court's Role in Protecting the 'Weak ... the Poor ... and the Bad'*

As is the custom for Australian High Court judges, Deane was sworn-in as a new Justice of the Court at a public ceremony in July 1982.[72] Deane thanked those present for their support and reinforced the personal significance of the judicial oath by explaining that '[a]s witness to [the judicial] oath, *I have called upon the God in whom I profoundly believe*'.[73] Statements of spiritual conviction of this nature were uncommon in swearing-in speeches. For Deane this reference to his personal spiritual beliefs was particularly notable given his later decision to restrict his public remarks exclusively to his reasons for decision. At his swearing-in Deane did not take the further step of overtly connecting his judicial philosophy to his spiritual beliefs. However, he did explain his concept of the 'oath of service to the people of this country' with the following significant statement:

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72 Despite the fame of Sir Owen Dixon's swearing-in speech as Chief Justice in 1952, these speeches remain largely unexplored. *Contra* H J Roberts, 'Fundamental *Constitutional Truths'*, above n 68 (on the role of Deane's swearing-in speech as an indicator of his judicial philosophy) and Heather Jan Roberts, 'Women Judges, "Maiden Speeches" and the High Court of Australia' in Beverley Baines, Barak Erez and Tsvi Kahana (eds) *Feminist Constitutionalism* (Cambridge University Press, forthcoming) (on the insights of swearing-in ceremonies into gender and the law in Australia).

73 Transcript of the Ceremonial Sitting of the Occasion of the Swearing-in of the Honourable Mr Justice Deane as a Justice of the High Court of Australia at Canberra, Tuesday 27 July 1982, 18 (emphasis added).

> The source of law and of judicial power in a true political democracy such as Australia is the people themselves; the governed: the strong and the weak, the rich and the poor, the good and the bad: 'all manner of people'. As the Australian Constitution itself makes clear, the Federation, in pursuance of which this Court was established, was not a federation between the States of the Commonwealth. It was a federation between the peoples of the States. Under that Federation, the grant of judicial power by the people was subject to what I see as fundamental constitutional guarantees, namely, that the power granted must primarily be exercised by an independent judiciary and that those exercising the power must act judicially.[74]

This statement revealed a judge who, in 1982, had a keen interest in equality for all Australians. His speech referenced the strong *and the weak*, rich *and poor*, good *and bad*; categories of disadvantage and vulnerability Deane would later invoke in his *Encounter* interview in 2002 when explaining the touchstone of his Christian faith. As in 2002, Deane also recognised at his swearing-in a duty of action: on *Encounter* Deane indicated that Christians must act to alleviate disadvantage; in his swearing-in speech, Deane explained the grant of power from 'all the people' carried with it 'guarantees' regarding how the federal judiciary must behave.

Deane's swearing-in speech encapsulated a powerful, innovative, vision of the authority of the *Constitution*, and the Court's role as its interpreter. Conventional theory held that the *Constitution* derived its authority from its status as an Act of Imperial Parliament. Further, the Australian *Constitution* was regarded primarily as an instrument designed for the division of power by government, not for the protection of individual liberties.[75] Should 'the people' need protection, it was thus to Parliament and the democratic process, not the Courts, that they should primarily turn. As his later jurisprudence would confirm, Deane recognised the importance of representative democracy as a fundamental commitment of the *Constitution*.[76] However, from his first moments on the bench, Deane clearly embraced a different concept of the relationship between the people and the *Constitution*.

For Deane, the Court and judicial processes were the most important guarantees of individual liberties. This was because Deane regarded the judicial oath as an oath of service to 'all the people', and particularly to the vulnerable minorities in the community whose interests may be opposed to the passing majorities of the day. Viewing the *Constitution* through this lens led Deane to favour rights-

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74 Ibid 17–8.

75 See, eg, Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 597. Deane's some-time contemporary on the High Court, Lionel Murphy, held a different view of the Constitution. See further discussion in George Williams, 'Lionel Murphy and Democracy and Rights' in M Coper and G Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient* (Federation Press, 1997) 50.

76 See, eg, Deane's reasoning in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*') and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

sensitive interpretations of the *Constitution's* text, including the development of a number of controversial implied constitutional rights to limit governmental power. The balance of this Part explores three illustrations of these features of Deane's High Court decision-making and how these trends were consistent with his understanding of the 'touchstone' of Christian faith.

1 *The* Dietrich Case: *Forcing the Executive's Hand to Protect Indigent Accused*

Five months after the Court's decision in *Mabo*, Deane's reasoning in *Dietrich v The Queen*[77] again reflected his understanding of the Court's responsibility and powers to protect the disadvantaged and vulnerable in the Australian community.[78] Dietrich had been found guilty of the federal offence of importing trafficable quantities of heroin.[79] He appealed his conviction to the High Court on the ground that his 40 day trial represented a miscarriage of justice because he had been unrepresented. In an earlier decision,[80] the High Court had recognised that at common law an accused had a right to a fair trial and that a court could utilise its inherent powers to stay proceedings to prevent an abuse of process and avoid an unfair trial. Could this principle be extended to permit a Court to stay proceedings until representation could be obtained? Such a conclusion would effectively compel the executive to reassess and reallocate legal aid resources. Should the Court intrude into the realms of policy and governmental expenditure in this way?

For Deane the Court's duty was clear and paramount. The decision to bring criminal proceedings against an individual was one of compulsion by the executive. As such, the executive bore corresponding obligations to ensure fairness in such circumstances, including, where necessary, to provide appropriate legal representation at public expense. Further, Deane regarded the Court's processes as an essential guarantee of fairness and justice; guarantees of particular significance to individuals when faced with the power of the government. It was from that platform that Deane commenced his decision in *Dietrich*, stating the underlying principles at issue in this case in the following terms:

> The fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial according to law. In so far as the exercise of the judicial power of the Commonwealth is concerned, that principle is entrenched by the Constitution's requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Ch III of the Constitution designates.[81]

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77 (1992) 177 CLR 292 ('*Dietrich*').

78 For an overview of the significance of the Court's decision in this case, see Declan Roche, 'Dietrich v The Queen' in Blackshield, Coper and Williams, above n 43, 207.

79 Dietrich was later convicted of more serious offences. See further Andrew Rule and John Silvester, 'Rich Man, Poor Man', *The Age* (Melbourne), 13 November 2009 <http://www.theage.com.au/national/rich-man-poor-man-20091112-ick8.html>.

80 *Jago v District Court (NSW)* (1989) 169 CLR 23.

81 (1992) 177 CLR 292, 326.

According to Deane the right not to be tried unfairly in the federal system was constitutionally protected.[82] *Dietrich* thus demonstrated his commitment to enforce the rights of the indigent — 'the poor … the weak … [and] the bad'[83] in the Australian community — even in the face of significant delays in the administration of criminal justice, and the reallocation of scarce public resources.

An earlier High Court case had confirmed Deane's heightened sensitivity to the relationship between the executive, the judiciary and the people, and the fair administration of justice in Australia. The incident occurred in 1988 in the context of an urgent application by the Commonwealth to prevent the publication by a reporter of a security agent's identity and location.[84] Because the application was scheduled outside ordinary Court hours, Deane required Court staff to display a notice that indicated that the matter was being heard in open court. Given the location of the High Court in Canberra, and the hour of the hearing, it seems unlikely that persons without prior knowledge of the application would have seen the notice and so elected to attend the hearing. Nevertheless, Deane's insistence that a notice be placed on the Court was an affirmation by the Judge of the principle of open justice and its importance in Australian society.

After the application was heard, Deane was informed that a member of the Commonwealth Attorney-General's Department had recorded the names of individuals seated in the public gallery. Deane considered that this incident was a cause for concern and, as in *Dietrich*, relied on the Court's inherent powers to take action in the matter. On this instance, Deane held a special sitting of the Court to interrogate the Commonwealth officials involved. Ultimately, Deane was satisfied by the Commonwealth's explanation of its conduct and he decided that no further action was required. Nevertheless, Deane issued a statement defending the principle of open justice, including an affirmation of:

> the importance of ensuring that *the right* of members of the public to attend the public sittings of the Court be not compromised and that *the independence of the court from the control of the Executive Government in the exercise of judicial power be vigilantly safeguarded and publicly proclaimed*.[85]

In tone, this statement conveyed Deane's outrage at the threat of executive overreach and its impact on individual liberty in Australia. Deane's sensitivity to such issues should not have come as a surprise, even in 1988. In 1984, for example, Deane had remarked in *A v Hayden* that the case 'illustrate[s] the abiding

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82 Deane's vision for the constitutional protection of this right was a minority view in *Dietrich*.

83 See above n 73, 17.

84 *Commonwealth v Brian Toohey* (Unreported, High Court of Australia, Deane J, 8 November 1988). An overview of the incident is provided in Rebecca Craske, 'Open Court' in Blackshield, Coper and Williams, above n 43, 511.

85 'Orders in ASIS Secrets case', (1988) 19 *Legal Reporter* 6, 7 (emphasis added).

wisdom of the biblical injunction against *putting one's 'trust in men in power'*.[86] From a serving judge, these were strong words regarding the conduct, character and motivations of the executive government. This strength of belief accompanied Deane's actions in 1988 too, as he fiercely asserted the principle of open justice and in *Dietrich* ensured the fairness of judicial proceedings for an indigent accused by invoking the Court's inherent power to protect 'the people' from the coercive effects of executive power.

A further notable feature of *Dietrich* was the difference in approach between Justices Deane and Brennan. Avid Court watchers would have observed many similarities between the reasoning of these two Catholic judges across their High Court careers. For example, looking only to cases decided in 1992, the year of *Dietrich*: both judges were in the majority in *Mabo*; both recognised the implied freedom of political communication as a constitutional guarantee (*ACTV*);[87] and, most controversially, both had sympathies for the implication of an implied constitutional guarantee of equality (*Leeth v Commonwealth*).[88] This one year confirmed a strong social justice commitment in the reasoning of both judges. However, in *Dietrich* Brennan's reasoning differed from Deane's in significant ways. Justice Brennan did not deny the fundamental importance of a fair trial in the Australian legal system, and the place of legal representation in achieving that end,[89] nor that the Australian community should bear the cost of legal representation in a 'civilized system of justice'.[90] Nevertheless, Brennan reasoned that it was for those who controlled 'the public purse strings', the federal executive and Parliament, to determine the allocation of funding from that limited resource.[91] Accordingly, Brennan concluded that for the Court to allow an indefinite stay in such circumstances would constitute both an 'unwarranted intrusion into legislative and executive functions'[92] and a failure for the Court to exercise its own constitutional duty.[93] In this way, *Dietrich* reflected Brennan and Deane's different visions of appropriate limits on the Court's power to protect the disadvantaged.

2 *Proportionality Reasoning: Balancing Minority Interests and Legislative Power*

Through the introduction of 'proportionality' reasoning in constitutional adjudication Deane created a further mechanism by which the Court could act to protect the interests of the vulnerable in Australian society. Deane's first use of the language of 'reasonable proportionality' was made in the *Tasmanian Dam Case*

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86 *A v Hayden* (1984) 156 CLR 532, 592 (emphasis added).

87 *ACTV* (1992) 177 CLR 106. The differences between Brennan and Deane JJ's application of proportionality reasoning in this case is discussed further below n 103 and accompanying text.

88 (1992) 174 CLR 455 ('*Leeth*'). See further discussion below n 120 and accompanying text.

89 *Dietrich* (1992) 177 CLR 292, 316.

90 Ibid 317.

91 Ibid 323. See also ibid 349–50 (Dawson J).

92 Ibid 323.

93 Ibid 324.

when assessing whether parts of the Commonwealth legislative scheme could be supported by the external affairs power. In that case, Deane explained that for a law implementing treaty obligations to be supported by s 51(xxix) it must evince 'a *reasonable proportionality* between the designated purpose or object and the means which the law embodies for achieving or procuring it'.[94]

Deane's test clearly required the Court to examine the relationship between the legislative means and ends.[95] He illustrated his test in the *Tasmanian Dam Case* with an 'extravagant example' of a Commonwealth law compelling the destruction of all sheep in Australia. Such a law would fulfil an objective to prevent the spread of disease amongst sheep but would fail the reasonable proportionality test as a draconian measure to achieve that end.[96] In the *Tasmanian Dam Case* Deane concluded that Parliament had assumed too great a degree of control over the designated area in the State (prohibiting all earthworks, from major excavations to small scale interference with native vegetation). Although the measures would ensure compliance with Australia's international obligations to protect natural heritage, in their breadth much of the scheme could not satisfy the reasonable proportionality requirement.[97]

Deane's reasoning in the later case of *Richardson v Forestry Commission*[98] illustrated how his proportionality test could operate to strengthen the judicial protection of minority interests from the exercise of majority power. *Richardson* concerned a challenge to a Commonwealth law freezing development of an area of Tasmanian wilderness until an inquiry could be conducted into its environmental value. In addition to prohibiting construction (whether for roads or fire breaks) the legislation made it unlawful for land-owners to fail to take 'reasonable steps' to prevent prohibited acts occurring on their property. A majority of the Court, with Deane and Gaudron dissenting in separate judgments, held that it was within Parliament's power to conclude that these measures were a reasonable mechanism to preserve the land until a determination of its status under the World Heritage Convention was made.[99] Thus, the majority judges considered that it was for Parliament to balance the adverse impact on land-owners against the fulfilment of the Commonwealth's treaty obligations and the ensuing environmental benefits. However, Deane focused on the impact of the legislation on the small number of private land-owners affected by the scheme.

In a passage reflecting, in both substance and tone, his vision of the Court's duty to stand *against* Parliament to protect the rights of 'the people', Deane remarked:

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94 *Tasmanian Dam Case* (1983) 158 CLR 1, 260 (emphasis added).

95 On the balancing inquiry involved in proportionality analysis, see generally Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1.

96 *Tasmanian Dam Case* (1983) 158 CLR 1, 260.

97 Ibid 266.

98 (1988) 164 CLR 261 ('*Richardson*').

99 Ibid 291–2 (Mason CJ and Brennan J); 303–4 (Wilson J); 328 (Dawson J); 336–7 (Toohey J).

> Insignificant though those areas may be in the overall perspective from Canberra, their owners, few though they may be, are citizens whose lives and property are beyond the reach of the Parliament except to the extent authorized by a relevant grant of Commonwealth legislative power. Yet there was no effort by the Commonwealth to justify the application of the protective regime, with all its stringency, to those privately owned areas of freehold land.[100]

According to Deane the interests of the vulnerable 'few' Tasmanian land-owners had been improperly sacrificed to the Commonwealth Parliament's pursuit of policy objectives. Parliament had, in his view, given insufficient weight to the individual rights affected by the law.[101] This was confirmed for Deane by the fact that the Commonwealth could not demonstrate that it had investigated how these 'few' land-owners would be affected by the regime: Parliament had sacrificed the interests of the vulnerable 'few' for the many.[102] Deane therefore found that much of the legislative scheme in *Richardson* was not reasonably proportionate to the implementation of the Commonwealth's treaty obligations, and so was invalid.

In *ACTV* Deane and Toohey, in joint judgment, also utilised proportionality reasoning to scrutinise the impact of Commonwealth legislation on individual rights, specifically, free speech.[103] In that case, the Commonwealth had imposed a prohibition on political advertising in the mainstream media. The Commonwealth then allocated free media time to those persons and parties already represented in Parliament. A majority of the Court in this case recognised that the *Constitution* contained an implied guarantee of political speech. As this freedom was not absolute, the Court then assessed whether the Commonwealth legislation could reasonably be regarded as proportionate to the pursuit of a legitimate end. Deane and Toohey concluded that the legislation was a disproportionate means of achieving its objective.[104] They reasoned that the implied freedom protected the ability of parliamentarians and all candidates for political office (not simply members of established political parties) to communicate with the electorate as well as the ability of 'the people' to communicate with each other about governmental and political matters. When assessing the effect of the legislation, Deane and Toohey were particularly influenced by the fact that the scheme reinforced the

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100 Ibid 316.

101 Compare Deane's analysis with the reasoning of Mason CJ, Deane and Gaudron JJ in *Davis v Commonwealth*, also decided in 1988, where the concept of reasonable proportionality was utilised in the context of the incidental power of the Commonwealth. There, the impact of the Commonwealth's measures on traditional common law rights was significant for their Honours' assessment of the validity of the measures. These measures were found to be 'grossly disproportionate to the need to protect the commemoration' of the bicentenary of European settlement in Australia. See *Davis v Commonwealth* (1988) 166 CLR 79, 100.

102 *Richardson* (1988) 164 CLR 261, 316.

103 This case has been subject to extensive commentary and critique. For an overview of its historical and doctrinal significance, see, eg, H P Lee, 'The Implied Freedom of Political Communication' in Lee and Winterton, above n 64, 383.

104 *ACTV* (1992) 177 CLR 106, 174 (Deane and Toohey JJ).

status of those already in positions of political strength. How could groups previously unable to obtain representation in Parliament express their views and protect their interests if 'free time' depended on prior success at elections? In this way, the legislation reinforced the strength of the dominant political parties, and compounded the disadvantage of the minority voice in the Australian community.

In this conclusion in *ACTV*, Deane's approach again stood in contrast to Brennan's analysis. Justice Brennan reasoned that the Court must apply proportionality reasoning through the filter of an express 'margin of appreciation' to Parliament.[105] On Brennan's approach, it was reasonable for Parliament to have come to the conclusion that in order to protect political processes from the corrupting influence of expensive media buys it was necessary to regulate and restrict political advertising in Australia. In particular, he emphasised that 'the Parliament chosen by the people — not the Courts, not the Executive Government — bears the chief responsibility for maintaining representative democracy in the Australian Commonwealth'.[106] Brennan's reasoning thus deferred to the motivations of the people's current representatives while Deane and Toohey's reasoning reflected Deane's scepticism of majoritarian democracy as an adequate guarantee of the rights of 'all the people' in Australia.

3 *No 'Bill of Rights'? No Problem*

In *Dietrich* and in his application of the proportionality test, Deane's reasoning had exhibited a tendency to enlarge the ability of the Court to take action to protect individuals against governmental power in order to protect the 'weak' from the 'strong'. These decisions stemmed from Deane's vision of the Court's duty to interpret the *Constitution* consistently with the principle that all power stemmed from 'the people'. A dramatic statement by Deane of the breadth of his rights-vision came in 1989. In *Street v Queensland Bar Association*[107] Deane commenced his reasons with a rights 'manifesto',[108] in which he declared:

> It is often said that the Australian Constitution contains no bill of rights. Statements to that effect, while literally true, are superficial and potentially misleading. The Constitution contains *a significant number of express or implied guarantees of rights and immunities*. The most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the 'courts' designated by Ch III (s 71). Others include: the guarantee that the trial on indictment of any offence against any law of the Commonwealth shall be by jury (s 80); the

105 Ibid 159.

106 Ibid 156. However, in its application to State elections, Brennan J held that the provisions were invalid on the basis that they imposed a burden on the capacity of the State to function. His conclusion relied largely on the same factors considered in his proportionality analysis.

107 (1989) 168 CLR 461 ('*Street*').

108 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 3rd ed, 2002) 1100.

> guarantees against discrimination between persons in different parts of the country in relation to custom and excise duties, and other Commonwealth taxes and bounties (ss 51(ii), 51(iii), 86, 88 and 90); the guarantee of freedom of interstate trade, commerce and intercourse (s 92); the guarantee of direct suffrage and of equality of voting rights among those qualified to vote (ss 24 and 25); the guarantees of the free exercise of religion (s 116); and the guarantee against being subject to inconsistent demands of contemporaneously valid laws (ss 109 and 118).
>
> All of those guarantees of rights or immunities are of fundamental importance in that they serve the function of advancing or protecting the liberty, the dignity of the equality of the citizen under the Constitution.[109]

Deane's decision in *Street* was delivered a year after the failure of a referendum designed to increase the guarantees of individual liberty in the *Constitution*. However, in *Street* Deane affirmed his vision that, even in its unamended form, the *Constitution* was a significant source of individual rights.[110]

To date, no member of the High Court has endorsed Deane's list of constitutional guarantees in its entirety.[111] As foreshadowed earlier in this article, this vision of the Australian *Constitution* sat at odds with the conventional understanding of the fundamental nature and purpose of the text. Sir Owen Dixon, for example, had famously remarked extra-curially that the lack of a Bill of Rights in the Australian context went 'deep in legal thinking.'[112] This understanding of the nature of the *Constitution* had also infused the reasoning of members of the Court in the key cases of Deane's era. For example, Mason CJ in *ACTV* reflected on the importance of the framers' decision not to include a Bill of Rights in the Australian *Constitution* in the following way:

> In light of this well recognised background, it is difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and

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109 *Street* (1989) 168 CLR 461, 521–2 (emphasis added).

110 Deane had already implemented these guarantees in a number of decisions prior to 1989. For example, in *Kingswell v The Queen* (1985) 159 CLR 264 and *Brown v The Queen* (1986) 160 CLR 171 Deane had affirmed s 80 as a fundamental guarantee of trial by jury of serious federal offences.

111 Justice Michael Kirby had perhaps gone furthest on this path. On Kirby's constitutional vision see Heather Roberts and John Williams, 'Constitutional Law' in I Freckelton and H Selby (eds), *Appealing to the Future: Michael Kirby and His Legacy* (Lawbook, 2009) 179.

112 Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 469.

> freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.[113]

It was against this philosophy that in 1989 Deane dared to proclaim the centrality of rights in the Australian *Constitution*.

In his rights' manifesto in *Street*, Deane referred to a vast and eclectic mix of constitutional provisions. Amongst these, ss 80, 116 and 117 had been traditionally regarded as constitutional rights, albeit of somewhat limited operation.[114] However, Deane extended his catalogue to incorporate ss 90, 109 and 118 as guarantees of equality and the rule of law.[115] As he explained in 1984 in *University of Wollongong v Metwally*:

> the Australian federation was and is a union of people and … whatever may be their immediate operation, the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called the Commonwealth and States derive their authority.[116]

Consistent with this understanding of the *Constitution's* purpose, Deane held that its text must be interpreted for the benefit of the people, and so restrictions on power conferred corresponding privileges and immunities on 'the people'.[117] In *Metwally*, Deane's vision of the *Constitution* through the lens of its inherent benefit to 'the people' meant that s 109 was not to be interpreted solely as a provision designed to resolve disputes between Commonwealth and State laws. Rather, it was a guarantee, 'protecting the individual from the injustice of being subjected to the requirements of valid and inconsistent laws of Commonwealth and State Parliaments on the same subject'.[118] It was by virtue of this understanding of the nature of the Australian *Constitution* that Deane could conclude in *Street* that it was 'misleading' to draw adverse comparisons between the Australian and American

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113 *ACTV* (1992) 177 CLR 106, 136. See also in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 720 (McHugh J), decided two years after *Street*, in which McHugh J drew on the framers' failure to incorporate a guarantee against retrospective criminal laws as a factor precluding the implication of such a guarantee from Ch III.

114 *Street* (1989) 168 CLR 461, 521–2. It is surprising in this context that Deane did not include s 51(xxxi) in this catalogue, particularly as in 1983 in the *Tasmanian Dam Case* Deane had extended the definition of an 'acquisition of property' to expand significantly the scope of the 'just terms' guarantee. On the traditionally narrow interpretation of ss 80, 116 and 117, see generally Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 569–78.

115 Deane applied this vision of s 90, 109 and 118 prior to *Street* in *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599; *University of Wollongong v Metwally* (1984) 158 CLR 447 ('*Metwally*'); and *Breavington v Godleman* (1988) 169 CLR 41 respectively.

116 (1984) 158 CLR 447, 476–7.

117 Deane articulated this view of constitutional rights most clearly in his 1994 decision in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 168.

118 *Metwally* (1984) 158 CLR 447, 477.

Constitutions. Under Deane's list of constitutional guarantees, in number — if not in substance — Australia's *Constitution* surpassed its American counterpart.

In *Street*, Deane's catalogue of rights included reference to a number of implied protections. Although a proponent of implied constitutional rights throughout his High Court years, 1992 saw Deane at his most adventurous in this area. In *ACTV*, as discussed, Deane was part of a majority of the Court recognising the implied freedom of political communication. In *Dietrich* and *Chu Kheng Lim v Minister for Immigration*[119] Deane confirmed the implication of guarantees protecting elements of judicial power from executive interference. However, in breadth, level of criticism, and connection to the core elements of Deane's constitutional philosophy, Deane and Toohey's recognition of an implied guarantee of legal equality in *Leeth* stood alone.[120]

Leeth concerned a challenge to Commonwealth legislation requiring a court, when sentencing a federal offender, to have regard to the non-parole periods prescribed by the laws of the State or Territory where the offender was convicted. The provision was enacted in recognition of the fact that Commonwealth offenders were tried in State Courts and housed in State prisons. Although designed to reduce the administrative load on State prison facilities, a consequence of the Commonwealth's legislation was that offenders convicted of the same federal offence could serve different minimum terms depending upon the State in which they were convicted. In dissent, Deane and Toohey found the Commonwealth provision invalid.

Deane and Toohey's recognition of a legal equality guarantee in *Leeth* manifested Deane's willingness to adopt innovative interpretations of the *Constitution*.[121] Their guarantee was premised on an interpretation of the *Constitution* as adopting, by implication, fundamental common law guarantees found to exist at the time of the federation. Amongst such guarantees, they concluded, was a guarantee that all persons would be equal under the law and before the courts. This guarantee was manifested by the incorporation of a number of constitutional provisions and fundamental doctrines in the *Constitution*. For example, they reasoned that the *Constitution*'s separation of powers at the federal level manifested the equality guarantee because the Court's duty to act 'judicially' included the obligation to provide 'equal justice'.[122] Significantly, in terms echoing Deane's swearing-in speech, Deane and Toohey also relied heavily on the nature of the *Constitution* as a 'compact of the people' to endorse the existence of the guarantee. Deane and Toohey thus observed that the preamble made 'plain'[123] that the *Constitution*'s

119 (1992) 176 CLR 1.

120 (1992) 174 CLR 455.

121 See also Toohey's extra-judicial remarks suggesting the breadth of his vision for implied constitutional rights in Toohey, above n 7.

122 *Leeth* (1992) 174 CLR 455, 486–7.

123 Ibid 486.

> conceptual basis was the free agreement of 'the people' — *all the people* — of the federating Colonies to unite in the Commonwealth under the Constitution. Implicit in that free agreement was the notion of the *inherent equality of the people as the parties to the compact.*[124]

In this passage, Deane and Toohey appeared to rely on the extent of public participation in the constitutional referenda of the 1890s to support their understanding of the *Constitution*'s 'conceptual basis'. However, three weeks before the decision in *Leeth* was handed down, Deane and Gaudron's remarks in *Mabo* had underlined the limits of this interpretation of Australian history and constitutional meaning. In *Mabo* Deane and Gaudron stated that,

> the Australian Aborigines were, *at least as a matter of legal theory*, included among the people who, 'relying on the blessing of Almighty God', agreed to unite in an indissoluble Commonwealth of Australia.[125]

On its face, this statement in *Mabo* was not inconsistent with Deane and Toohey's suggestion in *Leeth* that 'all the people' agreed, equally, to the terms of the Australian *Constitution*. However, in a judgment that was replete with allusion to the dichotomy between legal theory and practice,[126] Deane and Gaudron's reasoning that the 'Australian Aborigines' united to form the Commonwealth '*at least as a matter of legal theory*'[127] invited the question of whether such a statement was true as a matter of practice.[128] By implication, Deane's *Mabo* decision thus drew into question the accuracy of his claim in *Leeth* that in 1900 the *Constitution* effected the free agreement of 'all the people'. Deane and Toohey's failure, in *Leeth,* to acknowledge the historical inequalities in participation in the movement towards federation thus suggested a selective reliance on the historical record.[129] However, for Deane and Toohey this selectivity was consistent with their commitment to expanding the range of judicially protected rights, and to viewing the *Constitution* through a rights-protective lens.

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124 Ibid (emphasis added).

125 *Mabo* (1992) 175 CLR 1, 106 (Deane and Gaudron JJ) (emphasis added).

126 See further discussion in Berns, above n 57, 105–9.

127 *Mabo* (1992) 175 CLR 1, 106 (Deane and Gaudron JJ) (emphasis added).

128 See also Deane's acknowledgment, while Governor-General, of the restrictions on qualification to be a delegate at a Constitutional Convention, and the significance of those qualifications on a sense of 'belonging' to the new nation; Sir William Deane 'Opening of the Exhibition, "Belonging: A Century Celebrated" State Library of New South Wales' Sydney, 3 January 2001, quoted in Deane, *Directions*, above n 2, 16.

129 In the words of one commentator, other components of Deane and Toohey JJ's reliance on history in *Leeth* had exhibited significant 'judicial athleticism, if not a certain degree of gymnastic ability'. John Doyle 'Courts Unmaking the Laws' in Australian Institute of Judicial Administration (ed), *Courts in a Representative Democracy*, quoted in George Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions* (Federation Press, 1996) 121, 132.

Deane and Toohey's conclusion on the facts of *Leeth* also demonstrated the degree to which their equality guarantee would enable the Court to scrutinise parliamentary action. In *Leeth*, Deane and Toohey recognised that 'almost all laws discriminate'. Accordingly, Commonwealth laws which could be regarded as reasonably capable of 'providing a rational and relevant basis for the discriminatory treatment' would be valid.[130] However, Deane and Toohey were heavily influenced by the fact that the executive could choose the venue of a prosecution, and so concluded that the provision breached the equality guarantee.[131] In contrast, Brennan, who had displayed sympathy for the scope for the implication of an equality guarantee,[132] concluded that the administrative complexity of housing offenders could reasonably be regarded as a 'rational and relevant basis' for the differential treatment between federal prisoners. In this way, *Leeth*, like *Dietrich* and *ACTV*, saw Brennan and Deane again display different visions of the role of the Court in protecting the individual against the coercive power of government in Australia. In these cases, both Catholic judges could be seen as supporting the judicial implementation of social justice principles. However, Brennan's understanding of deference to Parliament and the limits of judicial power stood in contrast to Deane's strong convictions regarding the purpose of the Australian *Constitution* to protect the Australian people and the role of the judiciary in implementing that purpose.

As commentators such as Zines observed in the 1990s, by drawing on 'fundamental' common law doctrines in their analysis in *Leeth,* Deane and Toohey's decision suggested the influence of natural law principles.[133] Certainly the doctrine of legal equality crafted by Deane and Toohey would have been sufficiently fluid to enable the Court to scrutinise a broad range of legislation for potential breaches of the fundamental rights and privileges of Australian citizens. Further, when searching for a 'rational and relevant' basis for discrimination, a judge's personal philosophy would inevitably influence their reasoning. As a consequence, by scrutinising the legislation against the principle of legal equality, the Court could 'censor' legislation by reference to those personal standards.[134] As *Leeth* demonstrated, for Deane those standards included a scepticism of Parliament's ability to, or interest in, protecting the vulnerable. That commitment was matched for Deane by his heightened sense of the Court's obligation to intercede on behalf of 'the people', in *Leeth*, through a novel interpretation of the *Constitution*'s text and its fundamental principles.

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130 *Leeth* (1992) 174 CLR 455, 488–9.

131 Justice Gaudron also found the provision invalid, on the basis that it infringed the Constitution's guarantee of the separation of federal judicial power.

132 *Leeth* (1992) 174 CLR 455, 475.

133 Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 183. See also Rachael Gray, *The Constitutional Jurisprudence and Judicial Method of the High Court of Australia: The Dixon, Mason and Gleeson Eras* (Presidian Legal Publications, 2008) 84–9.

134 See further Zines, above n 133, 192–4.

IV Conclusion: Deane, Faith and Public Office

A study of Deane's public remarks from 1982 to 2002 tells of a man with a coherent vision for his roles in public office. For Deane, his oath to 'serve the people of Australia', first as High Court Judge, and then as Governor-General, was a sacred trust sworn before the God in whom he profoundly believed. Although the nature of his duties in those roles differed, Deane was consistent in his vision that his duty was underpinned by social justice principles and that he was required both to articulate and implement those principles in those roles. As Governor-General, he was outspoken on the topics of disadvantage in Australia and particularly the cause of Aboriginal reconciliation. As a High Court judge, Deane interpreted the *Constitution* so as to strengthen the power of the judiciary to protect minorities, and the most vulnerable of the Australian people, from the exercise of power by the executive or legislature. In both roles, although unelected to his position, Deane's scrutiny of governmental action was intense.

That Deane brought his vision of the role of a High Court judge with him, fully formed, to the Court in 1982 was reflected in his swearing-in speech and his many early decisions manifesting his social justice principles. However, only when he assumed office as Governor-General did Deane articulate a link between this understanding of his public office and his personal religious convictions. An ethos of Christian compassion meant that his duty was owed not to passing majorities but to 'all the people', and particularly the vulnerable and disadvantaged. For Deane, it was in his actions towards such people that the value of a Christian's life, a democratic nation, and his conduct as Governor-General and High Court Judge, would stand to be assessed.