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What is wrong with top-down legal reasoning?

The Hon Justice Keith Mason AC

Introduction

The Hon Keith Mason AC was the President of the New South Wales Court of Appeal from 1997 to 2008 and before that the State's Solicitor-General. He has, as he noted in his lecture, the singular distinction of having been Sir Maurice Byers' unsuccessful opponent in *Kable v Director of Public Prosecutions*.[1] He is also the co-author of *Mason and Carter's Restitution Law in Australia*.

The subject matter of the lecture concerns a phrase originally coined by the American judge and polymath, Richard Posner, in an article entitled 'Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights'.[2] In it Posner described top-down reasoning as involving the extra-legal formulation of a theory which is then used as an organising principle in respect of pre-existing legal material. Bottom-up reasoning, on the other hand, was to be seen as reasoning which encompassed ordinary lawyers' tools such as the plain meaning approach to statutes and reasoning by analogy.

As Mason himself observed, Posner was very far from condemning either type of reasoning, seeing instead a role for both. This was a significant observation for it put in sharp relief the first reference to Posner's expression in Australian jurisprudence by McHugh J in *McGinty v Western Australia*.[3] There his Honour criticised an earlier judgment of Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills* in which they had suggested that constitutional implications could arise from doctrines which 'underlie the Constitution'.[4] In that case, the doctrine which was involved was that of responsible government and the implication which arose was a limitation on the extent of the legislative power to curb politi-

1 (1996) 189 CLR 51.
2 (1992) 59 *University of Chicago Law Review* 433.
3 (1996) 186 CLR 140 at 231-232.
4 (1992) 177 CLR 1 at 69-70.