WHAT 'CAPITAL-C'?

DAVID BENNETT AC QC*

Shortly after his recent retirement from the High Court, Ian Callinan gave a speech to the Institute of Arbitrators and Mediators Australia. In that speech he said (among other things):

> If a judge is bringing to a constitutional question his philosophical baggage – and he or she probably will have some sort of philosophical baggage – there is an obligation to make it clear what that philosophy is and to be absolutely candid about it.[1]

Yet, as a result of certain inopportune comments by a politician, regularly quoted out-of-context by the media, that declaration was effectively made for him: Callinan J was a 'capital-C conservative'. It seems that, to many people, and for many purposes, this beguilingly simple epithet constituted a meaningful and sufficient exposition of Callinan J's legal character.

This paper asserts that His Honour's record of service to the law, both while at the bar and on the bench, belies the epithet.

On 5 March 1997, *The Age* newspaper reported an interview with the then Deputy Prime Minister, Mr Tim Fischer.[2] At the time of the report, the High Court had recently given its decision in *Wik Peoples v Queensland*,[3] and the compulsory retirement age of Chief Justice Brennan was approaching.

According to the report, Mr Fischer wished Brennan CJ well in retirement and, in relation to the issue of the Chief Justice's replacement, noted:

> I'm attracted to the thought that it would be a capital-C conservative lawyer/judge.
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> That doesn't necessarily mean, by the way, someone who's had any direct contact with the Liberal or National Party. There are capital-C law persons … who may well have connections to both sides of politics. In other words someone who's somewhat conservative on the matter of judicial activism.

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* Solicitor-General of Australia.

1 See 'Some judges carrying philosophical baggage: Callinan' (2007) Australian Broadcasting Commission <www.abc.net.au/news/stories/2007/11/23/2099885.htm> at 7 June 2008.

2 Niki Savva, 'Fischer Seeks A More Conservative Court', *The Age* (Melbourne), 5 March 1997, 6.

3 (1996) 187 CLR 1.

> …
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> I'm looking, as one involved, to a capital-C conservative law person.

Mr Fischer's repeated use of the expression '*capital-C* conservative' was perhaps inapt. Taken out of its context, the phrase evokes a comparison with the distinction commonly drawn between a 'small-l liberal' and a 'capital-L liberal'. The former is, according to the *Macquarie Dictionary*, a person with progressive views; the latter is a supporter of the politically conservative policies of the Liberal Party of Australia (the Liberal Party). Despite the fact that the 'Conservative Party of Australia' was a registered political party at the time of Mr Fischer's remarks,[4] the phrase 'capital-C conservative' was clearly suggestive of a supporter of the Liberal Party or its coalition partner, the National Party of Australia. In fairness, the text of Mr Fischer's comment set out above shows that he was not using the phrase in this more common sense but rather in the specialised sense of a 'legal conservative'.

As it happened, the next High Court appointee immediately following Mr Fischer's comments was not Callinan J, but Hayne J; furthermore, Callinan J did not replace the retiring Brennan CJ; he actually replaced the retiring Toohey J.[5]

Nevertheless, Callinan J's curriculum vitae (including his prosecution of the ALP icon, Justice Lionel Murphy, for his alleged attempt to pervert the course of justice), and controversies during his early period on the High Court (including the ALP's call for a parliamentary inquiry into Callinan J's professional conduct following Goldberg J's judgment in *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)*[6]), allowed him to be more easily portrayed by the media as the supreme manifestation of a 'capital-C conservative'. For the media to have relied on either of these events specifically referred to would, of course, have been disingenuous. The effect of the 'cab-rank rule' is that it is always unfair to assume anything about the views or personality of a barrister from the fact that he appears for a particular client. Goldberg J's remarks were made without Callinan J (as he had by then become) having had an opportunity to be heard, and no professional body thought it appropriate to take the matter any further.

Unfortunately, the epithet was, and remains, suggestive of the notion that Callinan J was a political appointee in the most extreme sense: i.e., that he was 'in the Government's pocket'.[7] Some commentators have sought to

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4 The Conservative Party of Australia was registered on 23 October 1984 and deregistered on 21 October 1998.

5 Chief Justice Gleeson was appointed to the High Court on 22 May 1998 to replace the retiring Chief Justice Brennan.

6 (1998) 156 ALR 169. Regarding the ALP's call for a parliamentary inquiry, see, eg, Australian Broadcasting Corporation, 'His Honour', *Four Corners*, 14 September 1998.

7 See Gay Alcorn, 'A Law Unto Himself', *The Age* (Melbourne), 2 May 1998.

justify the epithet by referring to His Honour's relationships with certain members of the National Party and the Liberal Party.[8] It is not my intention to speculate as to his political views, nor as to how such political views might have influenced his deliberations as a judge. Callinan J's judgments themselves emphatically refute the proposition that he was a political appointee in the relevant sense.

In early 2006 I reviewed the constitutional cases decided by the High Court in the previous year by reference to Richard Posner's thesis that the Supreme Court of United States, when it decides constitutional cases, is a political animal because 'the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms'.[9] Although I concluded from my review of these cases that Posner's extreme 'realism' needed to be significantly qualified when describing the High Court,[10] I also concluded that discretion and choice are very much a part of constitutional law.[11]

Later in 2006 the High Court ruled on the validity of the 'Work Choices' laws promoted by the Howard Government in *New South Wales v Commonwealth*.[12] In a powerful dissenting judgment, Callinan J held that the laws were not supported by the corporations power in s 51(xx) of the Constitution. In doing so, Callinan J seemed to rely not only on textual, historical, structural and doctrinal modes of reasoning, but also on what Kenny J of the Federal Court might describe as a 'prudential-ethical' mode of reasoning.[13] That is, his Honour's decision seemed to rely partly on economic, social and political considerations attending the legal issue in dispute.[14] Callinan J begins a discussion entitled 'Constitutional Imperative of the Federal Balance' with the observation that it 'may … be argued that despite their faults, federations are the least undemocratic of all forms of government'.[15] His Honour went on to say that there is nothing in the

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8 See, eg, Peter Rees, *The Boy from Boree Creek: The Tim Fischer Story* (2001) 204; Paul Donegan, 'The Role of the Commonwealth Attorney-General in appointing Judges to the High Court of Australia' (2003) 29 *Melbourne Journal of Politics* 40; Australian Broadcasting Corporation, 'His Honour', *Four Corners*, 14 September 1998.

9 David Bennett QC, 'Dammit, Let 'Em Do It! The High Court and Constitutional Law: The 2005 Term' (2006) 29(2) *University of New South Wales Law Journal* 167. See also Richard A Posner, 'Foreword: A Political Court: The Supreme Court 2004 Term' (2005) 119(1) *Harvard Law Review* 31, 40-1.

10 Bennett, above n 9,179.

11 Ibid 171, 177.

12 (2006) 229 CLR 1.

13 See Justice Susan Kenny, 'The High Court on Constitutional Law: The 2002 Term' (2003) 26(1) *University of New South Wales Law Journal* 210, 219, where her Honour describes the 'prudential-ethical' mode of judicial reasoning.

14 Justice Sackville recently made a similar observation. See Ronald Sackville, 'Techniques of constitutional interpretation: five recent cases' (2008) 10(2) *Constitutional Law and Policy Review* 22, 27-8.

15 (2006) 229 CLR 1, 1082.

Constitution 'to suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society'.[16] His Honour also stated that the High Court should 'ensure that the functions of the States are not reduced to trivial or subservient ones'[17] and that the view of the corporations power taken by the majority 'has the capacity to obliterate the powers of the States'.[18]

Although these views might accord with traditional Liberal Party values, they certainly did not sit comfortably with the Howard Government's industrial relations reform agenda, or with former Prime Minister Howard's contemplation of a broad takeover of responsibilities from the States,[19] or with former Deputy Prime Minister Tim Fischer's recently suggested desire to abolish the States altogether.[20]

Thus, to the extent that Posner's thesis was applicable to the *Work Choices Case*, and the States' constitutional challenge to the laws thus represented an opportunity for Callinan J and the other judges effectively to exercise discretion and choice over political matters, Callinan J certainly did not toe the party line.

Just as an independent judiciary is vital to our legal system, so is an independent bar. The independence of the bar is supported in large part by the 'cab rank rule', which, in 1999, Lord Irvine (then Lord Chancellor) described as 'one of the glories of the Bar. It underscores that every member of the Bar is obliged, without fear or favour, to represent clients who offer themselves, regardless of how unpopular they may be in the community or elsewhere.'

Of course, the cab rank rule is subject to exceptions and, therefore, may be circumvented, perhaps too easily. There appears to me to be an unhealthy trend towards barristers 'specialising' in appearances not only in one area of practice, but also on one side of the record, especially in politically sensitive areas such as criminal law, native title law and industrial law. This latter development should be arrested.[21]

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16 Ibid 1085.

17 Ibid 1111.

18 Ibid 1127.

19 In this regard, in *ACCC v Baxter* (2007) 237 ALR 512, 552-3, Callinan J said, 'Nowhere in the Constitution is it suggested that the provision of hospitals and related health services is other than the responsibility of and an essential role of the states. This has always been the position. From the earliest colonial times, administrations interested themselves in health and established public hospitals. … Section 51 of the Constitution nowhere suggests that the Commonwealth has any particular role in the provision of hospitals or medical or health services. That the Commonwealth has chosen to do so, indeed has in recent times done so extensively, does not diminish the importance and essentiality of the states' role and primary function in this field.' (Citations omitted.)

20 Laurie Oakes, 'Knives out for states', *Herald Sun* (Melbourne), 26 April 2008.

21 See David Bennett QC, 'Editorial' (1997) 46 *Stop Press* 1-2.

It is well known that Callinan J's practice at the bar was unusually broad, and extended to the diverse fields of commercial law, criminal law and industrial law, at both trial and appellate level. It is perhaps less well-known or acknowledged that his practice extended to both 'sides'. For instance, for some time he held a retainer for a waterside workers' union, yet he also appeared for insurers in personal injury cases; he defended Alan Bond, but pursued Christopher Skase.

Thus, it is clear that he was neither party-political as judge, nor partisan as an advocate. But what scope did he afford *policy* in his judicial technique? Is it accurate to say of him that he was a 'conservative on the matter of judicial activism', a strict 'legalist',[22] dare one say a 'small-c conservative'?

Prior to his appointment to the High Court, Callinan articulated his position on judicial activism in two papers. The earlier paper, entitled 'An Over-Mighty Court', was published in 1995.[23] The later paper, entitled 'Judicial Activism', was presented at the Bar Association of Queensland Conference in May 1997.

In 'Judicial Activism', Callinan defined judicial activism as 'any tendency by judges to intrude into political matters and go beyond what is required to decide the cases before them'. He argued that the common law has generally developed in a 'conservative, incremental way' and that, often, when courts have appeared to have acted in a more adventurous way, on closer sight, their judgments were supported to a significant extent by precedent, if overlooked or discarded precedent. He rejected 'slavish adherence' to authority and eschewed considering whether judicial activism is, or could be said to be, 'a good or a bad thing'. However he did outline a number of risks attending to judicial activism, including public criticism of the court, the destruction of rights and expectations retrospectively, demands being made for public participation in judicial appointments, legal uncertainty and instability, irreversibility by the Parliament of the court's constitutional decisions, and the unsuitability of court processes for the development of policy.

The earlier paper rehearsed some of these concerns, emphasising, in particular, the limited capacity of the court to accurately inform itself of contemporary community values.[24]

Callinan J's papers certainly contained the expression of a wariness of judicial excess. However, to my mind, the papers could not be accurately described as advocating a strict legalism: they do not deny the scope for judicial discretion in making difficult interpretive choices, nor do they deny that a judge can, or should, make law in appropriate circumstances. In my view, Callinan J's identification of the 'constitutional imperative' of the 'federal balance' in his judgment in the *Work Choices Case* is evidence of

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22 For a definition and discussion of 'legalism' in the sense that I use that term, see Tony Blackshield et al, *The Oxford Companion to the High Court of Australia* (2001) 429-30.

23 Ian Callinan, 'An Over-Mighty Court' (1995) 51 *Refresher* 34-4.

24 Ibid 39-40.

his participation in the former activity, while his apparent support for the development of a new tort of privacy or some other 'remedy to protect the rights of "owners" of a spectacle' in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[25] is evidence of his participation in the latter activity.

There are, undoubtedly, characteristics of Callinan J's judicial technique that distinguish him from his former colleagues on the High Court. Furthermore, it must be conceded that it may at times be helpful for legal commentators, particularly those who speak primarily to the public at large, to distil their description of such characteristics into simple and economical language. Somewhat cynically, one might also speculate that by adopting and propagating epithets such as 'capital-C conservative', commentators may choose to see legal issues through the political lens with which they may be more accustomed and comfortable, and thereby avoid poring over complex judgments.

However, as Lord Mansfield observed well over 200 years ago, '[m]ost of the disputes in the world arise from words'.[26] As a barrister and a judge, Callinan J has made an impressive contribution to the resolution of such disputes. It is therefore an unfortunate irony that his contribution is too often mischaracterised by reference to such an infelicitous expression.

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[25] (2001) 208 CLR 199, 320-30, especially at 322 and 326-7.

[26] *Morgan v Jones* (1773) 98 ER 587, 596.