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Abstract
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HERBERT VERE EVATT: JURIST, POLITICIAN, PERSON - THE PARADOX

SCOTT GUY*

Introduction

This paper will seek to document the life and political and legal writings of H V Evatt. As will, indeed, be shown Evatt certainly was an extraordinary personality with a significant intellect and a prodigious energy. His failings were not so much on an intellectual or academic front, but rather, ones that emanated from his interpersonal relationships with others. In this respect, his character presents somewhat of an enigma or paradox. Nevertheless, it is hoped that this review will highlight Evatt's extraordinary political and legal achievements and reinstate him in the pantheon of such great jurists as Sir Owen Dixon and (such) Labor politicians as John Curtin and Benedict Chifley.

Evatt's early academic writings and experience as a university student

Born in the nineteenth century, Evatt would live into the second half of the twentieth century. He was caught between two ages in culture as well as in time, for he was in part a conservative trapped in the culture of the earlier century. His love of nineteenth century life was ardent, as was his disdain for changes that were thrust upon his society; he wrote, for example, nostalgically in 1940 of life before the First World. For example, in his account of New South Wales Premier, W A Holman, Evatt stated:

> Holman belonged to the age which suddenly ended in August 1914. The smaller Sydney of those serene pre-war days knew and liked him well, just as the greater Sydney of to-day passes everyone by and hurries on. The old Sydney knew and was proud of Holman's splendid career. Ever the champion of the weak against the strong, his courageous speeches during the Boer War had toned down the more blatant jingoism of professional jingoism.[1]

In this respect, Evatt was very much imbued with the spirit of nineteenth century liberalism which pervaded Sydney University when he was an undergraduate and postgraduate student there. As Crockett argues, liberalism:

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1 H V Evatt *Australian Labour Leader: The Story of W.A. Holman*. Sydney: Angus and Robertson, 1945, p 571.

> … was well liked in Evatt's time, in part because certain of its permutations were stimulated by the need to accommodate change in England and Australia. Evatt was one of many at the University of Sydney to be drawn to its undogmatic promotion of reform through social and political fairness and encouragement of individual expression. [2]

In a 1917 paper titled 'Out of the Deep', Evatt argued that the introduction of the motor vehicle represented an undermining of the integrity and communal character of society.[3] Furthermore, he criticised, in part, the lack of political, cultural and social activity of the suburbs, as well as the essentially 'barrenness' of the suburbs. Moreover, he derided the comedic and uninspiring nature of Australian films and how this undermined the development of quality Australian drama.[4] Evatt further lamented how cinema demonstrated an intellectual disinclination and it neglected opportunities to educate the Australian public. He was also critical of (what he perceived to be) the low standard or quality of literature emanating from Australian writers.[5] More problematically, Evatt's early writings demonstrated somewhat of an elitist and condescending character, in effect criticising the Australian public for frequenting the racecourse, football stadium and the beach in preference to art exhibitions, literature discussions and orchestral concerts.[6]

Evatt's formative writings also reflected an unease about the emerging materialism in Australia and how this was engendering an obsession with material self-advancement, as well as dignifying ascendant greed to the detriment of other more praiseworthy ideals as altruism and selflessness as evident in those who participated in World War One. The decline in political and social idealism and the elevation of commercial values of materialism were particularly reflected (Evatt believed) in the growing influence of the Free Trade Party which espoused unfettered commercial trade and commerce with little government intervention or regulation to ensure a welfare safety-net for those who did not succeed in the commercial world.

As a consequence, 'In Liberalism in Australia' Evatt actively advocated the intervention of the state a mechanism by which to promote egalitarianism and social, as well as economic, justice and to ameliorate the worst excesses of liberal or laissez-faire capitalism .[7] Further, he insisted on a degree of economic equality (or equality of

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2 Peter Crockett *Evatt: A Life.* Oxford: Oxford University Press, 1993,

3 H V Evatt 'Out of the Deep', *St. Andrew's CollegeMagazine* 15 (October 1917), p.10.

4 Ibid.

5 H V Evatt 'The Possibility of a Standard of Merit in Literature' *St Andrew's College Magazine*, 11 (August 1914), p 1.

6 In this context, see Crockett, op cit, p 56.

7 H V Evatt *Liberalism in Australia: An Historical Sketch of Australian Politics Down to the Year 1917.* Sydney: Law Book Co, 1918.

outcomes) as the basis for socialism's (or social democracy's) demand for economic and social justice. It is important to note, in this respect, that Evatt repudiated a full-blown socialistic platform for the Australian Labor Party and this was particularly reflected in his support (in 'Liberalism in Australia') for the rejection of German theoretical socialism and its modification to accommodate a more reformist or essentially social democratic agenda by which social and economic reforms could be realised incrementally through the institutional forum of Parliament and the organisational bodies of the trade unions.

Evatt's essentially reformist tendencies are even more exemplified in his biography of W.A. Holman in *Australian Labour Leader: The Story of W.A. Holman* where his biography can generally be interpreted as a defence of pragmatic liberalism and rejection of trade union radicalism which sought to address the systemic and underpinning structural inequalities that was extant in Australia at that time. As Crockett perceptively observes, Evatt in this biography tended to 'understate' inequalities in Australia and:

> … planned state ownership of wealth and the means of distribution were not in accord with liberalism, and were rejected by Evatt.[8]

In this respect, Evatt placed significant faith and reliance in the existing political and legal order and was of the firm belief that social and economic reform could be achieved *within t*he existing legal and political apparatus. He, in no way, encouraged the undermining of Parliament or the law (although he did, as will be seen, advocate significant constitutional reform) since he conceived the political and legal process as the means by which to enhance the social and economic status of Australian citizens. As Crockett again observes:

> His [Evatt's] political optimism is based on belief in the strength of Australian institutions and a view of Australian political life that is essentially supportive despite the many weaknesses of politicians and the political process.[9]

In a sense, Evatt was concerned to safeguard individual liberty and this was to be achieved by responsible state intervention through realising a degree of social and economic equality. It is important to emphasise, however, that beyond this concern for liberty and (a limited degree of) equality, the reconstruction of society on socialist principles would not be countenanced by Evatt. This was firmly articulated in his early essay on 'Liberalism in Australia' and it is argued that the principles outlined in this piece formed the guiding philosophical tenets for the remainder of his life as a judge and politician:

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8 Crockett, op cit, 60

9 Crockett, op cit, 60.

> … it is only quite recently that Australian Liberalism has seen exactly where it is going, and that the process of State interference is supported on the principles of equality of opportunity and social freedom. The danger is, of course, a mere materialism. But as Australian Labour parties have their political maxims tempered by the responsibilities of office they will become more and more dissatisfied with any Marxian scheme of reconstruction with its failure to recognise individualism and its quite frank materialism. The new Liberalism sees that doctrinaire Socialism rests wholly on a realistic view of life, and it knows that, in philosophy, Realism has lost caste, and that a constructive Idealism is gradually taking place. The economic struggle is not everything, and it is satisfactory to note that the great question in Australian politics to-day concerns the form rather than the content of legislation.[10]

Here, Evatt emphasised the concept of 'New Liberalism' and his commitment certainly was one to promoting individual liberty and freedom. When referring to a 'form' of legislation in the final sentence Evatt is writing essentially as a lawyer and not a socialist – or social democrat – whose aim is to construct legislation that will have, as its overall priority, to promote individual freedoms. This discourse is by no means reflective of socialistic, or even social democratic, thinking and many commentators would argue that such a philosophy is, indeed, antithetical to social democracy and its marxian antecedents. In effect, the overriding focus on liberty and, to a lesser extent, equality, enabled Evatt to avoid confronting the fundamental questions that inhere in social democratic and socialist philosophy such as the inevitability of a (state) planned economy and (then) the eventual 'withering away' of the state. It also enabled Evatt to bypass the difficult question faced by social democrats as to how to reconcile government intervention – and by extension, a planned economy – with the facilitation of individual liberty. As Crockett argues, Evatt:

> … was attracted to a seeming coherence in this fashionable, but in Britain declining concept of state intervention that seemed to acknowledge the needs of individual liberty. It freed him from dealing with the problem of formulating a view of personal freedom within a planned economy. He understood but failed to confront the resistance in Australian society to formal socialism. Rather, he wrote as a lawyer with political aspirations who intended to use legal expertise to fashion legislation in the service of labour interests.[11]

Despite this lack of commitment to genuine socialist principles, Evatt was, however, was keenly sympathetic to the ideas and work of William Morris Hughes who was an artisan, craftsman, poet and idealistic socialist. In his biography of W.A. Holman,

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10 H V Evatt *Liberalism in Australia: An Historical Sketch of Australian Politics Down to the Year 1917.* Sydney: Law Book Co, 1918.

11 Crockett. Op cit, p 61

H V Evatt disclosed his admiration for Morris's *News From Nowhere*, which was essentially a prose romance of socialist propaganda.[12] Morris's antipathy to the depersonalisation of capitalism, industrialism and mass production, as well as his keen sense of aesthetic beauty and the creation of fine individual work were aspects that Evatt empathised with and relates back to the essential incongruence that was indicated earlier between Evatt's intellectual and emotional preoccupation with the nineteenth century (on the one hand) and the industrialised and liberal capitalist age of the mid-1900s within which he found himself (on the other hand). In this respect, Evatt could, in some respects, be regarded as idealistic in orientation – one who was repelled by the baseness of mass culture; the excesses of modern industrialism and materialism; and the consequent sense of alienation or remoteness which this was producing between workers. According to Hazani:

> Both esteemed a rather romantic past when life was slower and more reflective. Morris reinstated medieval practices while Evatt ruled the demise of the belle époque, with its composure and certitude, its inoffensive materialism, so different from the strident excesses that followed the First World War. Their shared aversions pointed to an unstructured, antiquated leftism in Evatt's political cast, their remoteness from ordinary life recalling the doomed communistic co-operation that was advocated by the Welsh social reformer, Robert Owen.[13]

What this commitment to a rather idealistic conception of the economy also reveals is that Evatt's economic knowledge and comprehension was rather limited and he lacked a truly sophisticated and nuanced understanding of the mechanics of the liberal market economy and the various theories or the models which underpinned it. His generalised antipathy to modernism and liberal capitalism with its underlying profit motive as the driving force behind its operation was particularly illustrated later in his parliamentary career when he evidenced a somewhat irrational hostility to the activities of private banking corporations. For example, during a parliamentary debate in 1958 on the relative balance that should be reached between the activities of the public (Commonwealth) and privative banking sectors Evatt exclaimed:

> What moral right have these organisations, which have now established savings banks, to use their general banking system as the organising centre for hire-purchase businesses, as was pointed out by the honourable member for Hindmarsh (Mr Clyde Cameron)? Is it right that these trading banks, which now have savings bank organisations, should have the unlimited right so to organise their affairs as to compel people to change their accounts from

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12 Evatt (1945) op.cit, ,p. 21.

13 M Hazani '"Behold the Victim?": Robert Owen and Sinner-Victim-Redeemer Syndrome', *Biography*, 15, 4 (Fall 1992) p 331.

> government savings banks to the savings bank departments of the trading banks? That is a contemptible practice… At the rate they are going, the time will come when all repossessed appliances such as television receivers and refrigerators will be returned not to the store, as was the practice, but to the offices of the private banks. This is a ridiculous situation.[14]

Evatt's early legal career

Evatt was admitted to the Sydney Bar on 31 October 1918[15] and became one of its leading lawyers during the 1920s. He commanded briefs from numerous solicitors in an extremely varied number of areas of the law. H V Evatt's areas of expertise included industrial law;[16] constitutional law; the law of negligence;[17] and, finally, conveyancing.[18] In terms of his expertise in the area of negligence, Evatt adduced predominantly international precedents and academic writings to justify wide conditions or circumstances that compelled a duty of care to prevent 'nervous shock' or nervous injury – a quite innovative and dynamic interpretation of law at the time.[19] Evatt's interpretation and development of the conception of this duty of care to avoid exposing plaintiffs to 'nervous shock' did not receive approval during his lifetime. However, his enlightened and advanced approach to this issue was subsequently confirmed and validated much later in the decision, *Jaensch v Coffey*,[20] where the discourse of 'nervous shock' became firmly accepted and entrenched into the mainstream law of negligence.

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14 Commonwealth Parliamentary Debates, (18 March 1958), p 399.

15 See *The Law List of Australia and New Zealand*, 1919, New South Wales Division, p 114.

16 Evatt was a forceful advocate before the Workers' Compensation Tribunal compelling many important changes in the interpretation of legislation that affected compensation For example, in *Whittingham v The Australian Commissioner for Railways (Western Australia*) (1931) 46 CLR 22 which concerned injuries received by an employee during a meal interval, was later to become the accepted line of reasoning for injury sustained under these circumstances.

17 In this respect, Evatt accorded a far-reaching interpretation in a case of alleged negligence in *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387 of a manufacturer's duty to avoid making a product that was harmful to a purchaser. In this case, a chemical not removed from underwear caused dermatitis in the wearer, Dr Richard Thorold Grant. Evatt's thought-provoking dissenting judgment decided that the manufacturer was negligent for not taking care to ensure that its products was safe; he quoted the opinions of numerous jurists to show that the manufacturer had breached a duty of care to the consumer, who justifiably believed in the soundness of the transaction, while a special relationship to the purchaser had been created by the manufacturer.

18 See H V Evatt J.G. Beckenham *Conveyancing Precedents and Forms*. Sydney: Law Book Co, 1923; J G Starke 'Evatt' *World Encyclopedia of National Biography*, pp 39-41.

19 *Chester v Waverley Corporation* (1939) 62 CLR 1 at 18-48.

20 (1984) 155 CLR 549.

As well as developing quite innovative and dynamic interpretations of the law – ones that only received acceptance much later after Evatt's death – his appearance as a lawyer also reflected a deep commitment to the principles of social justice. This was no better illustrated than in the so-called *Walsh and Johnson Case* (in 1923) where Evatt hoped to prevent the deportation of two Irishmen. Evatt argued that the deportation of two unionists, Thomas Walsh and Jacob Johnson, could not proceed because they were, in effect, Australians. Walsh was a president of the radical Seamen's Union but who was born in Ireland but had become a permanent resident of New South Wales since 1893. Similarly, Johnson was the general secretary and who had been born in the Netherlands, but who had become a naturalised Australian in 1913. Walsh and Johnson were subsequently arrested under the *Immigration Act* because of their involvement in strike action which hindered interstate trade and commerce and this provided a ground for deportation under the legislation. In a penetrating and ingenious submission, Evatt demonstrated that the relevant law under the *Immigration Act 1901 (Cth)* was not a law properly so-called since it possessed no accompanying sanction. Further, he demonstrated that the purported law could not be linked to, or grounded in, any of the constitutional heads of power and extended beyond the limits of the Commonwealth's executive power under the Constitution. Evatt's submissions were upheld and both Johnson and Walsh avoided deportation.

This decision, however, reveals an interesting trait in Evatt's personality insofar as he was more attracted and committed to abstract ideas and conceptualisations than to individual persons or their particular socio-economic plights or circumstances. In this respect, Evatt was less concerned with the identity of the people he was representing or the identity of the judges and jurors in whom he was appearing before then the offices they represented or socio-economic classes of the clients for whom he was advocating. This point is succinctly put by Crockett who argues that Evatt:

> … channelled empathy, or warmth, through ideas. Less concerned in the law with the identity of judges or members of the jury, he revered the concept that those offices evoked in him, just as concern for the downtrodden pointed to inner tensions rather than direct sympathy with certain individuals or organisations.[21]

Whilst a member of the High Court, Evatt demonstrated a fine constitutional mind and a capacity for logical and systematic reasoning that approached the type of 'strict and complete legalism' that was embraced by Sir Owen Dixon.[22] His judgments, in this respect, reflected a significant nationalism and wish to enhance the powers of the Commonwealth while, at the same time, also evincing a desire to ensure certain

21 Crockett, op cit, p 69.

22 Tennant, op cit, 81.

checks and balance were put in place to ensure political power was not subject to abuse by over-zealous Commonwealth Ministers. Kylie Tennant, for example, argued that Evatt's constitutional judgments in the 1930s represented:

> … a thoroughgoing nationalism in respect of Australia's status, but a rather suspicious attitude to the exercise of resulting powers by Commonwealth Ministers.[23]

In the case of *R v Burgess; Ex parte Henry*[24], for example, Evatt and McTiernan JJ in a joint judgement held that the external affairs power – found in s 51 (xxix) of the Constitution – could support legislation prescribing uniform aviation regulations since the Commonwealth was, in effect, implementing an international convention pertaining to the issue of safety in the aviation industry. This was in spite of the fact that the Commonwealth was essentially trenching on the rights of the States to legislate in this particular area.

H V Evatt also had a distinctive approach to the interpretation of the constitutional separation of powers doctrine — one that recognised the realities that modern political governance required some degree of flexibility in relation to the separation of the legislative and the executive branches.[25] In a paper titled 'The Judiciary and Administrative Law in Australia' Evatt sought to argue that A.V. Dicey's[26] original conception of the separation of powers principle was no longer an accurate description of contemporary governance and that greater latitude or discretion needed to be given to administrative/executive boards to regulate and organise society.[27] According to Evatt, Dicey's conception:

> … only describes the legal and constitutional position as it exists under the common law unaffected by statute…[28]

As a result, Evatt argued that:

> It is not accurate, therefore, to assert that in Australia today there is anything like complete and universal subjection of all persons in the community to one general rule of law. Administrative boards and officials are frequently given

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23 Ibid, p 72.

24 (1936) 55 CLR 608.

25 In this context, see H V Evatt 'The Judiciary and Administrative Law in Australia' (1937) XV *Canadian Bar Review*, 247.

26 See A V Dicey *An Introduction to the Study of the Law of the Constitution*. London: Macmillan, 1959.

27 In this respect, Evatt was a keen admirer of the English legal (social democratic) theorists W A Robson and William Ivor Jennings.

28 Ibid, p 249.

> special rights, privileges and immunities which private citizens in the same relative position do not possess at all.[29]

Furthermore, Evatt was at pains to emphasise the 'enormous increase in output of legislation' and that:

> Increasingly, from year to year, such legislation deals with the complex affairs of the modern state and, of necessity, enters into and affects many of the relationships and so the life of the ordinary citizen.[30]

This flexible (and dynamic) approach to the separation of powers doctrine and the (regulatory) latitude that Evatt was willing to accord to executive and administrative agencies permeated many of his constitutional law judgements and separated him from his fellow justices on the High Court. For example, in *Victorian Stevedoring and General Contracting and Meakes v Dignan*[31] the High Court upheld s 39 of the *Transport Workers Act 1928* (Cth) which provided the executive (or Governor-General in Council) with wide powers to make regulations which affected all aspects of the employment of transport workers. The Court emphasised that while the constitutional separation of powers required a division between judicial and non-judicial power, it did not demand an associated division between the legislative and executive branches. The principal philosophical reason or justification for this was, in effect, provided by Evatt J who (apart from outlining that the Australian system of government was based on the British Westminster model) sought to emphasise that the pragmatic realities of governance required the executive to be vested with certain legislative and executive powers. According to Justice Evatt, denying the legislature the capacity to vest (administrative) authorities with such powers would impair the efficacy of government and diminish the regulatory potential of the social democratic welfare state. As Evatt perceptively declared:

> It is very difficult to maintain the view that the Commonwealth Parliament has no power, in the exercise of its legislative power, to vest executive or other authorities with some power to pass regulations, statutory rules and by-laws which, when passed, shall have full force and effect. Unless the legislative power of the Parliament extends this far effective government would be impossible.[32]

The constitutional significance of this reasoning should not be under-estimated by social democrats and it has had the effect of the upholding by the High Court of delegated law-making power on executive bodies and the (consequent) promotion of

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29 Ibid.

30 Ibid.

31 (1931) 46 CLR 73.

32 (1931) 46 CLR 43 at 117 per Evatt J.

a significant new body of discretionary administrative law — one that has provided the constitutional foundation for the (social democratic) welfare state in Australia.[33] In *Dignan*, for example, Evatt J declared:

> The true nature and quality of the legislative power of the Commonwealth invokes as part of its content, power to confer law-making powers upon authorities other than Parliament itself.[34]

Evatt's invocation of a more flexible separation of powers doctrine and the need to accord some degree of constitutional latitude or discretion to executive/administrative agencies was further evident in other High Court judgments.[35]

Evatt's judgments also displayed a keen desire to uphold civil liberties and to ensure that individuals were only convicted of civil or criminal offence where the evidence was compelling (in relation to the relevant offences) and identifiable. In this respect, Evatt was committed to the ideal of procedural fairness and to ensure that the accused was accorded the right to fair hearing/trial. This was particularly demonstrated in one case where an accused was charged with offences in relation to his employment in the public sector.[36]

In addition, Evatt's judgments also demonstrate a keen concern to take account of the social/sociological context in which the matter occurred — which was entirely antithetical to Dixon's commitment to a 'strict and complete legalism' — and this led him to empathise frequently with the position and the circumstances of the under-privileged and the disempowered. For example, Evatt's empathy to the plight and circumstance of a lessee in the decision of *Carson v Humphrys*[37] are evident and this clearly influenced the outcome of his decision. Similarly, in those cases involving the winding up of estates and distribution of property in the context of contested wills, Evatt's judgments again reflected a keen desire to explore all the social aspects of the

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33 Much to hostility and ire of classical liberal scholars: see, for example, the simplistic criticisms levelled at Evatt's reasoning in *Dignan* by Suri Ratnapala *Constitutional State or Welfare State?* Sydney: Centre for Independent Studies, 1990.

34 (1931) 46 CLR 73 at 119 per Evatt J.

35 See, for example, *Huddart Parker v Commonwealth* (1931) 44 CLR 492; *Orient Steam Navigation v Gleeson* (1931) 44 CLR 254.

36 *O'Keefe v Country Roads Board* (1931) 45 CLR 27.

37 (1931) 44 CLR 480.

case and to reach a fair and, indeed, equitable decision taking account of all the relevant circumstances.[38]

Evatt's commitment to an equitable and fair outcome were also evident, indeed, in his decisions regarding breach of contract matters, as well as his decisions pertaining to matters relating to the assessment of income tax. In relation to breach of contract cases, he often resorted to equitable (as opposed to legal) principles and sought to reach a decision that secured justice to both parties. In this respect, he often resorted to principles of equity to ameliorate the harsh application of the common law and this was again consistent with his commitment to examining *all* of the facts of the case and to judge each case according to its own particular circumstances.[39] Evatt's adjudication of taxation law cases was similar insofar as he sought to examine all of the facts of the case and to apply the provisions of the (then) *Income Tax Assessment Act 1927 (Cth)* in a manner that was equitable and fair.

In *Douglas v Federal Commissioner of Taxation*[40] his interpretation of the provisions of the *Income Tax Assessment Act 1927* (Cth) appeared to be lenient or generous insofar as they enabled the taxpayer concerned to claim significant (tax) rebates. Similarly, in *Federal Commissioner of Taxation v Victorian Hardware Club*[41] his interpretation of the case sought to go beyond the mere formalities of the facts of the matter and to penetrate to the actual substance of what was supposed to be the subject of taxation — a methodology which was entirely antithetical, indeed, to the formalism which typified Sir Garfield Barwick's approach to taxation cases in much later years.

As already outlined above, Evatt's interpretation of the provisions of the Australian Constitution also demonstrated a keen concern for individual or civil liberties. This was particularly illustrated in his interpretation of s 92 — the constitutional provision guaranteeing freedom of interstate trade and commerce. In his High Court decisions, Evatt was keen to emphasise that this provision not only bound the States, but also bound the Commonwealth.[42] The rationale for this interpretation was undoubtedly that the individual should be free from both State *and* federal regulation when engaging in interstate commercial activity.

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38 See *Personal Executors and Trustees Association of Australia v Russell* (1931) 45 CLR 146;*Tomkins v Simmons* (1931) 44 CLR 546; *Saywell v Permanent Trustee Commissioner of New South Wales* (1931) 44 CLR 564; *R v Weaver* (1931) 45 CLR 321.

39 In this context, see *Wendt v Bruce* (1931) 45 CLR 245.

40 (1931) 45 CLR 95.

41 (1931) 45 CLR 406. See also *Drysdale v Federal Commissioner of Land Tax* (1931) 46 CLR 308; *Deputy Federal Commissioner of Taxation v W R Moran* (1939) 61 CLR 735.

42 See, for example, *James v Commonwealth* (1936) 55 CLR 1.

Nevertheless, despite Evatt's fine constitutional mind, Leslie Zines has highlighted shortcomings in his constitutional judgements.[43] As Zines argues, Evatt's concern to focus on the substantive issues of the case at hand meant that he, in effect, neglected to develop a guiding approach to the Commonwealth Constitution, as well as to constitutional interpretation. Zines also points out that Evatt never reached a settled view on precisely *what* should be the appropriate constitutional balance between the Commonwealth and the States and *how*, indeed, power should, in fact, be shared between the two tiers of government. Evatt's reluctance, in this respect, to embrace 'cover the field'[44] tests in the context of those situations where there was conflict between federal and State law often produced inconsistency in his judgments (such as in the case of jurisdiction over territorial waters[45] as well as in the case of air travel and aviation regulations).[46] As an extension of Evatt's keen concern to focus on the particular substantive issues of the case, Zines further argues that Evatt placed too much faith in the capacity of judges to analyse the sociological (or social) features of the case, as well as to implement the overall political and administrative objectives of the Constitution.

In addition to being critical of Evatt's teleological approach to constitutional interpretation Zines also criticises Evatt's preparedness to utilise non-judicial documents as well as (comparative) constitutional opinions in overseas jurisdictions, such as North America, where the differences between the Australian and British North American Constitutions were considerable. Yet as Crockett argues:

> Evatt regarded the federal Constitution as a solemn instrument that was charged with a duty to respond to the national interest. He saw it as a technical although flexible statute at once bound and released by its language; it was a "human" and humane document which represented the aspirations and needs of society; and it was an organiser and dispenser of power. It was to him the spiritual keeper of the people. For the Constitution was invested with the soul of the nation, a manifestation of the people's identity; it was "of" of the people, while as a benevolent "God-figure" it was also "above" them. His advocacy of its widespread application even contained a preaching quality, as if his "reverence" and zealousness were fuelled by an assurance that this branch of the law was moral and would be a means to cure the world's ills.[47]

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43 Leslie Zines 'Mr Justice Evatt and the Constitution' 3 (1968-9) *Federal Law Review*, 153.

44 'The "cover the field" test has been the dominant approach to inconsistency between State and Commonwealth laws: see, for example, *University of Wollongong v Metwally* (1984) 158 CLR 447; *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1977) 137 CLR 545.

45 *Victoria v Commonwealth (the Shipwrecks Case)* (1937) 58 CLR 618.

46 *Australian National Airways v Commonwealth* (1945) 71 CLR 29.

47 Crockett, op cit, pp 72-3.

As previously indicated, Evatt's conception of the Federal-State constitutional balance was problematic and this shortcoming was particularly identified by Zines. Generally, Zines perceives Evatt as upholding both Commonwealth and State constitutional power and ensuring that each realm did not, indeed, intrude into the other realm. The rationale or justification for this – according to Zines – was to protect individual rights. According to Zines, Evatt's reasoning was that the Commonwealth did not have the power to make its officers immune from State laws, nor did the States have the power to make its officers immune from federal laws. As can be seen, this was generally reflective of the early 'implied immunity of instrumentalities' doctrine and represented a somewhat idiosyncratic conception of the federal constitutional balance. As Crockett argues:

> Evatt wanted the best of both worlds: he sought increased and centralised power, and he claimed to protect state power and function by promoting devolution. He argued for the enhancement of state power through decentralisation while effectively undercutting it as federal authority grew, although perhaps he did believe that through greater state activity the power of both constitutional units increased.[48]

It is important to note that Evatt came to the High Court at the commencement of the 1930s — an era in which the interpretation of federal powers was to receive its widest or most expansive exercise at the hands of Isaac Isaacs who was a High Court judge firmly committed to nation-building and federal political institutions.[49] In this respect, Isaacs, who wrote the judgement in the *Engineers' Case*, firmly eschewed the initial 'reserved powers' or 'implied immunity of instrumentalities' doctrine (as articulated by Griffith CJ, Barton and O'Connor JJ) and established the proposition that no law could be invalidated on the basis that it burdened or hindered the States.

A natural corollary of this doctrine was that the States could apply its laws to the Commonwealth and that it (in consequence) could not claim that the relevant State laws were invalid merely on the basis they burdened Commonwealth governmental functions. As outlined by Zines, H V Evatt, however, was critical of this proposition in *Engineers* that so long as the Commonwealth legislation fell within the ambit or scope of one of the 39 *placita* specified in s 51 of the Constitution the fact that State legislative or executive powers may be affected — and perhaps nullified — would not render the relevant federal legislation invalid. As Zines argues:

> Insofar as they acted to destroy or threaten the effectiveness of State this was anathema to Evatt…He disapproved of the *Engineers' Case* that the Court could not, in interpreting Commonwealth power, have regard to implications

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48 Ibid, p 73.

49 See Zelman Cowan *Isaac Isaacs.* Melbourne: Oxford University Press, 1967.

> the Constitution presupposed the preservation of the existence and vitality of the States.[50]

Evatt was critical, in this respect, of the interpretation accorded by the majority in *Engineers* to the early cases adjudicated on by the Court in *D'Emden v Pedder*[51] and *Deakin v Webb*.[52] The majority in *Engineers* conceptualised the initial High Court decision in *D'Emden v Pedder* in terms of privileging federal power in preference to State power and referred, in this respect, to the doctrine of the 'mutual supremacy between the Commonwealth and State realms' as a 'contradiction in terms'.[53] According to Evatt, this was a misreading of the decision which emphasised (rather) a constitutional approach of one of *mutual non-interference* between the federal and the State realms. Evatt's construction of *D'Emden v Pedder* was thus one which approximated the early High Court doctrine of the 'implied immunity of instrumentalities' whereby Commonwealth and State public (or governmental) bodies were immune from each other's respective legislative regulation.

The facts of *D'Emden v Pedder* involved a Commonwealth official who signed a receipt for salary but failed to stamp the receipt in accordance with Tasmanian *Stamp Duties* legislation. The issue in the case turned upon whether the federal Constitution enabled the Commonwealth official to refuse to comply with the command of the Tasmanian legislature. The majority — Griffith CJ, Barton and O'Connor — held that the reserved powers (or implied prohibitions) doctrine prevented the State from interfering with 'the conduct of the departmental affairs of the Commonwealth Government'.[54] The High Court found that the legislation governing salary receipts for employees/officials of federal departments — then contained within the *Audit Act 1901* (Cth) — was clearly to do with 'the conduct of the departmental affairs of the Commonwealth Government'[55] and this was an area over which (under section 52 of the Constitution) was within the exclusive authority of the federal government, and thus was immune from state authority. The Court expressed the principle in this way:

> In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied... a right of sovereignty subject to extrinsic control is a contradiction in terms. It must, therefore, be taken to be of the essence of the

50 Zines, op cit, 155.
51 (1904) 1 CLR 91.
52 (1904) 1 CLR 585.
53 (1920) 28 CLR 129 at 149.
54 (1904) 1 CLR 91 at 141.
55 Ibid.

> Constitution that the Commonwealth is entitled, within the ambit of its authority, to exercise its legislative and executive powers in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself... It follows that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative.[56]

As Evatt perceptively observed in 'Constitutional Interpretation in Australia'[57] the majority wrongly imputed to Griffith CJ, Barton and O'Connor JJ in *D'Emden v Pedder* a one-sided doctrine in favour of Commonwealth supremacy when, in actual fact, the judges concerned were seeking to articulate a conception in which the Commonwealth and the States each had autonomy over their respective jurisdictions. As Evatt remarked in his paper published in the *University of Toronto Law Journal*:

> The *Engineers' Case* also said that "mutual supremacy is a contradiction of terms". The comment was made upon a supposed interpretation of *D'Emden v Pedder* which imputed to Sir Samuel Griffith a one-sided doctrine in favour of Commonwealth supremacy. But Griffith regarded the rule in *D'Emden v Pedder* as one of mutual non-interference and certainly not as perpetrating the absurdity of mutual non-interference. While the *Engineers' Case* still remains a landmark in constitutional history of Australia, the analysis and criticism to which it has been and is being subjected are all to the good.[58]

To further reinforce his fundamental support for the 'reserved powers' doctrine and his basic critique of the proposition articulated in *Engineers* Evatt quoted with favour the comment made by Gavan Duffy J in *Engineers* when his Honour expressed the view that:

> The existence of the State as a polity is as essential to the Constitution as the existence of the Commonwealth.[59]

While conceding in 'Constitutional Interpretation in Australia' that there was nothing explicitly prohibiting federal governmental interference on State instrumentalities or State (governmental) interference on federal instrumentalities Evatt, nevertheless, insisted that such a conception of mutual non-interference could be implied into the federal constitutional framework on the simple grounds of efficacy — or the effective functioning of the federal system. As he argued in 'Constitutional Interpretation in

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56 Ibid.

57 H V Evatt 'Constitutional Interpretation in Australia' 39 (11) *University of Toronto Law Journal*, 1

58 Ibid, p 10

59 Ibid, p 11.

Australia' when couching the federal regulation of State instrumentalities and State regulation of federal instrumentalities in terms of the discourse of 'discrimination':

> Would not the presence of discrimination against State and Commonwealth officials respectively reveal the true nature of each enactment? In each case, would there not be a deliberate attempt by one Parliament to injure or sabotage the constitutional instrument of the other? Yet there is no express provision which forbids discrimination of the character illustrated? It is almost unthinkable that such enactments would pass muster in any court of law, even if a Parliament were mad enough to elect them. If that is so, they would have to be declared ultra vires by reference to some such doctrine of mutual non-interference as Griffith suggested; a doctrine to be implied from co-existence, side by side in the same territories, of Commonwealth and State legislatures, executives and judiciaries…[60]

In 'Constitutional Interpretation in Australia' Evatt was particularly critical of the decision in *Queensland v Commonwealth*.[61] In this decision the High Court upheld the validity of Commonwealth legislation which provided that interest from certain Commonwealth securities should not be liable to State income tax. In this respect, the Commonwealth had legislative power with respect to 'borrowing money on public credit of the Commonwealth'.[62] Hence, the Commonwealth could issue securities or debentures which provided for the payment of interest and the eventual repayment of the loan — as well as exemption from Commonwealth taxation. However, according to Evatt, this should not have precluded, at the same time, the prerogative of the States to levy (State) income tax on the interest derived from the securities. As he remarked in his paper in the *University of Toronto Law Journal*:

> But the legislation actually passed forbade the States to exercise their ordinary constitutional power of taxation in relation to income received by their citizens from Commonwealth securities…[63]

In this respect, the Commonwealth legislation in effect *infringed or trenched on State constitutional powers to legislate* and essentially circumscribed the operation of State legislative autonomy — a key fact that had underpinned the early constitutional jurisprudence in such cases as *D'Emden v Pedder* and *Deakin v Webb* with which Evatt fundamentally agreed.

Similarly, Evatt was critical of the decision in *Huddart Parker v Commonwealth*[64] where the High Court held that the Commonwealth Parliament could use the trade and

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60 Ibid, p 12.

61 (1920) 29 CLR 1.

62 (1920) 29 CLR 1 at 10.

63 Evatt, op cit,p 11

commerce power in order to give preference to union members for employment in the loading and unloading ships involved in interstate and international trade. In the words of Dixon J, the legislation was valid because:

> … it directly regulates the choice of persons to perform the work which forms part of or is an incident in interstate and external commerce. It does so in spite of the fact that it affects employers in the selection of their servants and in spite of the industrial aspect which the provision undeniably presents.[65]

This view was applied in *R v Wright; Ex parte Waterside Workers Federation of Australia*[66] where the High Court confirmed the validity of parts of the *Stevedoring Industry Act 1949* (Cth) giving the Court of Conciliation and Arbitration authority to prescribe conditions of employment in the stevedoring industry. It was held that the trade and commerce power could support this legislation.[67] But, as H V Evatt perceptively commented, the legislation that was actually passed in *Huddart Parker v Commonwealth* was 'undoubtedly labour and industry and this particular subject matter is not specifically assigned to the Commonwealth under s 51 [of the Constitution]'.[68] Similarly, it is arguable that in *R v Wright; Ex parte Waterside Workers Federation of Australia* the topic of legislation was also one pertaining to labour and industry — areas that were fundamentally of constitutional concern to the States as opposed to the Commonwealth.

Evatt also sought to correct what he perceived as the erroneous interpretation of the Privy Council decision in 1907 in *Webb v Outrim*.[69] In an appeal directly from the Supreme Court of Victoria to the Privy Council the case raised a question concerning the capacity of the Commonwealth and State Governments respectively to legislate in such a way as to impose a burden on other government instrumentalities — that is, an issue that was raised that was strikingly similarly to the one that was implicated in *Deakin v Webb*. Again, like the High Court decision in *Deakin v Webb*, the Privy Council accepted the doctrine of immunity of instrumentalities, but as Evatt correctly observes, 'it now applied it for the benefit of the States'.[70] As Evatt perceptively noted, no reference was made to s 109 (the 'inconsistency' provision) in the judgement and:

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64 (1931) 44 CLR 492.

65 (1931)44 CLR 492 at 515-6.

66 (1955) 93 CLR 528.

67 See also *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256.

68 Evatt, op cit, p 12.

69 (1907) AC 81.

70 Evatt, op cit, p 5.

> … in spite of all this [references to United jurisprudence], the actual decision in *Webb v Outrim* has come to be recognised as sound. It is to be regarded as finally rejecting the contention that income tax legislation of a State, which applies to all its residents, is prevented by the Commonwealth Constitution from applying to a Commonwealth salaried official who is also resident of the state concerned.[71]

Similarly, as Evatt pointed out, in *Federated Amalgamated Government Railway and Association v New South Wales Traffic Employees' Association* (Railway Servants' Case),[72] the Court accepted the doctrine of the implied immunity of instrumentalities but it (again) applied it for the benefit of the States and not for the Commonwealth. Under s 51 (xxxv) of the Constitution, the Commonwealth has power to pass laws providing for a system of conciliation and arbitration in relation to industrial disputes extending beyond the limits of one State. As Evatt highlighted, the High Court held in substance that the *Commonwealth Conciliation and Arbitration Act 1904* was ultra vires insofar as it purported to affect the railways of a State, and that an organisation consisting of employees by a State could not be registered for the purposes of federal conciliation and arbitration. Such an interpretation was supported by the Court's declaration that:

> The rule laid down in *D'Emden v Pedder* viz. that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised by the Constitution, is to that extent invalid and inoperative, is reciprocal. It is equally true of attempted interference by the Commonwealth to its State instrumentalities. The application of the rule is not limited to taxation.[73]

Nevertheless, Evatt recognised the peculiarities of s 51 (xxxv) which had the effect of authorising the Federal Government (or the Conciliation and Arbitration Commission) to settle interstate industrial disputes. Insofar as it comprised this function, State instrumentalities *were bound,* indeed, by federal awards and the doctrine of immunity of instrumentalities doctrine, to some extent, was undermined. As Evatt observed:

> Now the *Railway Servants' Case* had asserted that, because of the doctrine of immunity of instrumentalities, it was impossible to apply the Commonwealth's industrial arbitration system to the employees of a state. Yet in some industries the leading employers of labour were State government authorities which frequently became parties to industrial disputes of the kind

71 Ibid, p 5.

72 (1906) 4 CLR 488.

73 (1906) 4 CLR 488 at 543.

> mentioned in s 51 (xxxv) of the Constitution. The main purpose of this constitutional power was to authorise the Commonwealth arbitrator to prevent or settle all industrial disputes extending beyond the limits of one State. But, if the chief employer in many industries, and the sole employer in some, i.e. the States, could not be bound, the disputes could never be settled. The decision of the Court, which now seems obviously right, was that under s 51 (xxxv), state governments, if otherwise parties to disputes, could be bound by the awards of Commonwealth arbitrators made in settlement of such disputes.

In fundamentally supporting this doctrine of mutual non-interference between the Commonwealth and State realms and in seeking to qualify or modify the literalist interpretation articulated in the *Engineers' Case* Evatt also sought in 'Constitutional Interpretation in Australia' to reinterpret the High Court jurisprudence on s 109. Central to this jurisprudence was the High Court decision in *Pirrie v McFarlane*[74] which repudiated the 'immunity of instrumentalities' on the basis that the Commonwealth could grant itself protection from State laws via the instrument of s 109 of the Constitution — the so-called 'inconsistency' provision. By the 1930s, s 109 was being accorded a wide and expansive operation — through the mechanism of the 'cover the field' test — developed by Isaacs J in *Clyde Engineering v Cowburn*[75] and *Ex parte Mclean*.[76] As Zines argues:

> By the time Dr Evatt came to the bench this doctrine was not developed, but its potential as a means of destroying concurrent State power was clear.[77]

In this respect, Evatt was critical of how subsequent decisions have been re-interpreted to accommodate an expansive interpretation of s 109 when, in actual fact, these decisions were not at all really predicated or based on the inconsistency power and the so-called 'cover the field' test.

An example of this was the decision in *Deakin v Webb*.[78] There, a Commonwealth minister of the Crown and a member of the Commonwealth Parliament, whose income was subjected to tax in common with all other residents of Victoria, claimed to be immune by virtue of the immunity of instrumentalities doctrine and that the Commonwealth's free exercise of its legislative and executive power was being interfered with by Victoria's attempt to tax Commonwealth ministers. In essence, the

74 (1925) 36 CLR 170.

75 (1926) 37 CLR 466.

76 (1930) 43 CLR 472.

77 Leslie Zines 'Mr Justice Evatt and the Constitution' (1965) 3 *Federal Law Review*, 153.

78 (1904) 1 CLR 585.

High Court regarded the claim as sound because it was essentially predicated on the 'principle of *D'Emden v Pedder*'.[79] As Evatt commented with obvious approval:

> Both in *D'Emden v Pedder* and *Deakin v Webb*, Griffith CJ sought to attach to the Australian constitutional portion of the doctrine of immunity of instrumentalities with which the great name of Marshall CJ is connected. Again, *Deakin v Webb* nowhere suggested that s 109 of the Constitution had anything to do with the matter in hand.[80]

To further de-emphasise the operation and influence of s 109 on constitutional jurisprudence, Evatt also made reference to the High Court decision in *Baxter v Commissioner of Taxation*.[81] In that case the conception of intergovernmental immunity had been justified, or predicated on, the federal form of government as established by the Commonwealth Constitution. As Griffith CJ, Barton and O'Connor JJ declared, intergovernmental immunity was 'essential to the attribute of sovereignty of any government that it shall not be interfered with by any external power',[82] so that the elements in the Australian federation had the 'right to disregard and treat as inoperative any attempt' by the other elements to control the exercise of their powers.[83]

In his dissenting judgement, Isaacs discussed s 109 and the question of inconsistency but, as Evatt observed, his Honour also focused attention on the more general rule of immunity of instrumentalities and strongly dissented from the suggestion that:

> …. because the Constitution does not expressly say so, a State is not prohibited from interfering with the operations of the Federal Government or with the means it employs to effectuate its powers.[84]

In this respect, (as Evatt keenly notes) Justice Isaacs was not unprepared to apply the doctrine in *D'Emden v Pedder* in favour of the Commonwealth and, in agreeing with the majority of the High Court, submitted that the Commonwealth Government 'is by necessary implication to be free from any impediment to the full and perfect performance of the National functions assigned to it', and that 'the mere admission

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79 (1904) 1 CLR 585 at 615.

80 Evatt, op cit, p 4.

81 (1907) 4 CLR 1078.

82 (1907) 4 CLR 1078 at 1121.

83 (1907) 4 CLR 1078 at 1121. It should be noted that Griffith CJ declared that this 'implication of mutual non-interference' in *Attorney-General (Qld) v Attorney-General (Cth)* arose 'prima facie from necessity': (1915) 20 CLR 148 at 163.

84 (1907) 4 CLR 1087 at 1156.

that the effect of any specified State Act is to impede or impair the public operation of a Federal Officer is sufficient to stamp it as unlawful'.[85] As Evatt further observes:

> The basis of Isaacs J's dissent was that it was not an improper interference with Commonwealth functions for the state to collect taxation upon the income of Commonwealth officials in common with that of all other citizens.[86]

Evatt's emphasis on the continuing relevance of the immunity of instrumentalities doctrine and his (concomitant) de-emphasis of s 109 (and the wide operation of the inconsistency provision) was supported by the prior enactment of the *Commonwealth Salaries Act 1907* (Cth) in 1907 which, in effect, declared that State taxation of salaries earned by Commonwealth officers were not, if the quantum of the tax was not discriminatory, be deemed to be an interference with the exercise of any power of the Commonwealth.

This enactment was reinforced in *Chaplin v Commissioner of Taxation*[87] wherein it was (conversely) held that the *Salaries Act 1907* (Cth) was deemed to have effectively subjected the salaries of *State* officials to *Commonwealth* taxation. It should be noted that Isaacs and Higgins JJ did not adjudicate on this case and (again) no reference was made to the operation of the inconsistency provision in s 109 — thereby supporting Evatt's interpretation of the continuing relevance and efficacy of the immunity of instrumentalities doctrine. In this respect, Griffith CJ, as well as Barton and O'Connor JJ perceived, in effect, the doctrine of immunity of instrumentalities as a right of the particular government concerned and not of any individual; 'so that the government could waive the right by appropriately worded legislation'.[88]

In short, Herbert Vere Evatt was critical of the broad and the expansive operation accorded to s 109 by Isaac Isaacs in such cases as *Ex parte Mclean*.[89] For example, in *West v Federal Commissioner of Taxation*,[90] Evatt declared:

> "Supremacy" was the new euphemism for the less ambiguous words employed in sec. 109 itself in order to resolve actual conflicts between valid Commonwealth and valid State legislation.[91]

This raises the obvious concern as to how to reconcile Evatt's labourist and social democratic political and philosophical orientation with his somewhat critical attitude

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85 (1907) 4 CLR 1087 at 1158-9.

86 Evatt, op cit, p 6.

87 (1911) 12 CLR 375.

88 Evatt, op cit, p 7.

89 (1930) 43 CLR 472.

90 (1937) 56 CLR 657 at 699.

91 *West v Federal Commissioner of Taxation* (1937) 56 CLR 657 at 699.

to the *Engineers' Case*, as well as the operation of s 109, and the associated explicit policy preference to widen the powers of the Commonwealth (at the obvious expense of the States). During the 1930s and 1940s, the Australian Labor Party had an explicit policy platform of one that advocated national unification and the abolition of the States.[92] Hence, it is somewhat ironic or paradoxical that at this time in the legal and constitutional arena, H V Evatt was advocating that equal status be accorded to both the States and the Commonwealth and that a policy of 'mutual non-interference' — similar to the doctrine of the immunity of instrumentalities — be embraced.

Yet, as Zines argues, Evatt's approach from a distinctively social democratic or labourist perspective can be justified or rationalised on the basis of his commitment to civil liberties and individual rights and his antipathy to any form of government oppression or the trenching on, or infringing of, individual liberty. In this respect, his commitment to States' rights and the mutual non-interference of the State and federal governmental realms appears quite progressive and subtle — a position that was firmly predicated on an underlying commitment to civil liberties and the freedom of the individual. As Zines remarks:

> From the point of view of both the constitutional lawyer and the political scientist, Mr Justice Evatt's general outlook may indeed seem obscure, inconsistent and "enigmatic". For the constitutional lawyer, however, this is so only if we adopt the approach, long accepted by teachers of, and commentators on, the Constitution, of viewing the development of constitutional interpretation as a struggle between or balance of, centripetal and centrifugal forces. Evatt J himself expressed disapproval of this way of looking at things. To the political scientist it is suggested that his Honour's stand on many constitutional issues shows that it is possible to support "States' rights" for reasons that are anything but conservative in the social, economic or political sense.[93]

In 1944 Evatt quoted from his judgment in the first *Garnishee Case of 1932*; this is a fair summary of Evatt's public view of the proper, somewhat modest, role of a State's duty to its citizens – an essentially commonsense approach that leaves higher matters of state to the federal government:

> For all purposes of self-government in Australia, sovereignty is distributed between the Commonwealth and the States. The States have exclusive authority over all matters affecting peace, order and good government so far as such matters have not been made the subject of specific grant to the Commonwealth. And the authority of the State covers most things which tough the ordinary life and well being of their citizens- the maintenance of

92 See L F Crisp *Australian National Government*. Sydney: Longman, 1971.

93 Zines, op cit, p 156.

> order, the administration of justice, the police system, the education of the people, employment, poverty, and distress, the general control of liberty. Speaking generally, all these subjects are no lawful concern of the Commonwealth.[94]

Zines suggests that Evatt did advocate extensions to Commonwealth power in relation to postal and broadcasting services, as well as arbitration, but did not provide any justification for extensions to these federal powers and not others – such as interstate trade and commerce and reforms to s 92 (guaranteeing freedom of interstate trade and commerce) which had been the subject of hostility among Labor supporters in the 1940s.

It is also somewhat perplexing that in his academic writings and constitutional law judgements that Evatt did not seek to understand or conceptualise the Crown in Australia in more innovative or different (reformist) perspectives. It would obviously be too optimistic or hopeful for Evatt to consider the potential for Australia to become a republic but, nevertheless, it might have been expected that Evatt would have directed critical attention as to why, for example, Australia persisted so long with (outdated) discursive notions such as 'the Crown in right of the Commonwealth' and the 'Crown in right of the States'.

In other dominion states, for example, critical attention was being directed to the source of the power of government and whether this derived from the Crown or, in a popular democratic sense, from the people themselves. In particular, in 1972, the prominent Irish judge, Brian Walsh J, for example, in *Bryan v Ireland*[95] emphasised that whilst the basis of the Crown prerogative in English law was that of the King, under the Constitution of Irish Free State — *Saorstat Eireamin* — the executive, legislative and the judicial powers of government derived from the people. It was therefore erroneous, according to the judge, to speak of the 'Crown in right of the State' since the government was constitutionally predicated or based on the people themselves:

> [The Crown in Great Britain] had the prerogative right to make treaties and alliances with foreign states and the power to declare war and to make peace and he was regarded as the fountain-head of justice and the general conservator of peace of the kingdom….Article 2 of the Constitution of the Irish Free State expressly rejected the concept that any of the powers of

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94 H V Evatt 'Reconstruction and the Constitution' in D.A.S. Campbell (ed.) *Post-War Reconstruction in Australia*. Sydney: Australasian Publishing, 1944, p 239; see also *New South Wales v Commonwealth (No.1)* (1932) 46 CLR 220. It should be recalled that in 1928 he claimed he had always been a centralist, but had argued that Sate rights and constitutional propriety be respected.

95 (1972) IR 241.

> government, legislative, executive or judicial derived from the Crown. Article 12 of the Constitution makes him part of the *Oireachtas* and Article 51 vested the executive of the Irish Free State in him "to be exercised in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Ireland by the Representative of the Crown." Article 51 of the Constitution by its very terms circumscribed the exercise by the King of the executive authority vested in him by the Article. …The overlooked basis of the Crown prerogative in English law was that the King was the personification of the state. Article of the Constitution of the Irish Free State declared that all the powers of Government and all authority, legislative executive and judicial in Ireland were derived from the people of Ireland and that the same should be exercised in the Irish Free State through the organisation established by or under and in accord with that Constitution. The basis of the prerogative of the English Crown was quite inconsistent with the declaration contained in the Article.[96]

It is, therefore, interesting to conjecture why Evatt, who devoted an entire doctoral thesis to the issue of imperial relations with the United Kingdom did not turn his attention to this obvious issue regarding the precise and appropriate discourse to be used when referring to the Crown and the Commonwealth of Australia. Perhaps it was because of the different cultural and political contexts of Ireland and Australia — in Ireland there was a more overt and deep-seated antipathy towards Great Britain whereas in Australia Great Britain was still regarded with affection and high regard. Nevertheless, for Evatt, who sought to advocate a more independent Australian nation, the issue of discourse and, in particular, how precisely to refer to the Commonwealth and the Crown was one that might have been expected to be raised and confronted either in his academic writings or in his constitutional law judgments.

Evatt's personality

Much academic commentary has been written about Evatt's character and personality with some commentators seeking to 'pathologise' Evatt as a paranoid, neurotic and insecure person who interpreted individual actions and events conspiratorially against himself.[97] Others, however, have presented Evatt as an

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96 (1972) IR 241 at 272-3.

97 In this context, most recently see Andrew A. Campbell 'Part One: Dr H V Evatt: A Question of Sanity' 73 (2007) *National Observer*, 25; Andrew Crockett 'Part Two: Dr H V Evatt: The Question of Loyalty' 76 (2007) *National Observer*, 33; To a lesser extent Peter Crockett also portrays Evatt's character in a less than positive light: Peter Crockett *Evatt: A Life*. Melbourne: Oxford University Press, 1993. More positive conceptions of Evatt are presented by Kylie Tennant *Evatt: Politics and Justice*. Sydney: Angus and Robertson, 1970; Fred Daly *From Curtin to Hawke.* Melbourne: Sun Books, 1984; J.B. Paul 'Labor's Petrov

essentially principled jurist and politician – one who was truly an internationalist in political orientation and legal orientation and one who advocated strongly for the rights of the underprivileged and disempowered and who actively facilitated the rights of the smaller nations in the United Nations.[98] There is little doubt that Evatt's psychiatric condition deteriorated in the 1960s when he was installed as the new Chief Justice of the New South Wales Supreme Court but it is interesting to conjecture whether this mental deterioration was simply a consequence of an ambitious political and legal figure who was chaotically unpredictable or whether, indeed, it was the result of a more deep-seated pathological condition — such as the onset of dementia or the result of childhood experiences that were to inhere in him throughout the rest of his life.

What is certain, however, is that Evatt had an enormous capacity for hard work with Bolton, in particular, describing Evatt as 'prodigiously energetic'.[99] This enormous energy and talent is particularly illustrated by the fact that, in 1930, at the age of 36, Evatt was made a judge of the High Court. His prodigious ability to handle, simultaneously, political and legal briefs was further reflected in the fact that during the years of 1948-9 he represented the Commonwealth in the *Bank Nationalisation Case* for 39 days between 14 May and June 1 1949.[100] He somehow managed the Privy Council appeal in the *Bank Nationalisation Case* whilst he was (simultaneously) president of the United Nations General Assembly. Similarly, whilst leader of the Australian Labour Party in 1951, he represented the Australian Communist Party in the High Court[101] resulting in the invalidation of the *Communist Party Dissolution Act 1950* (Cth) and thereby contributing to the resultant victory in the Communist Party Dissolution referendum on 22 September 1951.[102] In this respect, H.C. Coombs claims that Evatt's 'major contribution to Australian history was his resistance to the McCarthyist hysteria about the threat of Communism'.[103]

Legend: A Suitable Case for Internment' in Robert Manne (ed.) *The New Conservatism in Australia*. Melbourne: Oxford University Press, 1982.

98 Kylie Tennant *Evatt: Politics and Justice*. Sydney: Angus and Robertson, 1970; Gareth Evans 'Herbert Vere Evatt: Australia's First Internationalist', Transcript of 1995 Daniel Mannix Memorial Lecture, Melbourne, 31 August 1995; The Hon. Justice Michael Kirby, AC CMG, 'Speaking to the Heart', Speech on 18 July 2003 at the opening of the Mary Alice Evatt Exhibition; H.C. Coombs, *The Whitlam Phenomenon.* Melbourne: McPhee Gribble, 1986, p 56.

99 Christopher Bolton 'Herbert Vere Evatt' 14 *Australian Dictionary of Biography*, 108.

100 Commonwealth v Bank of New South Wales (1949) 79 CLR 497.

101 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

102 H C Coombs *The Whitlam Phenomenon*. Melbourne: McPhee, 1986, p 56.

103 Ibid.

Yet, it should be noted that there was more pragmatic and opportunistic motivations on which Evatt's opposition to the 1951 Communist Party Dissolution Referendum was based. As Bill Hayden has perceptively noted, 'his [Evatt's] first instinct…was to pass the Bill uncontested as he feared a forthcoming national election'.[104] The Labor Party parliamentary executive, however, actually *compelled* Evatt actively to oppose the Bill. Although it should be recognised that the former Labor Prime Minister (then Opposition Leader) Ben Chifley was opposed to Evatt representing the Communist-led Waterside Workers. Evatt, however, did not see any impropriety and claimed he had Chifley's approval to appear in the High Court challenging the constitutional validity of the *Communist Party Dissolution Act 1950* (Cth).[105]

This raises the issue that certain academic commentators view Evatt as an essentially political and devious manipulator of people who was power-driven and too prone to conspiracy theories and who, in turn, believed he was constantly being undermined and politically out-manoeuvred. Andrew Campbell, in particular, pathologises Evatt and argues that he consistently perceived himself as a victim of political conspiracies and one who was consistently being undermined. In highly critical terms, Campbell argues that Evatt had a 'grandiose, narcissistic self-image and paranoid interpretation of events'[106] and this interpretation has been perpetuated by academic commentaries sympathetic to Evatt.[107] Campbell justifies his interpretation on the basis that at the time when Evatt was judge of the High Court and then subsequently Leader of the Australian Labor Party medical knowledge and understanding of mental illness was under-developed and little understood. By implication, Campbell argues that had Evatt been living in contemporary society with its modern advances in psychology and psychiatry he would have been regarded as suffering a pathological psychiatric condition that would have required medical treatment, if not confinement. In this respect, Campbell argues that:

> Evatt lived in a period in which the nostalgias of mental illness were ill-defined and many complex disorders had not been identified. Evatt's polymorbidity was dismissed by his supporters as a function of the "Doc's genius" or "his legendary scholarship". His complex symptoms were dismissed as "eccentricities" and his academic achievements taken as proof of

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104 Bill Hayden, *An Autobiography*. Sydney: Angus and Robertson, 1996, p 83.

105 According to Fred Daly, Evatt's claim that he had Chifley's approval to represent the Waterside Workers' Federation was blatantly a lie: Fred Daly *From Curtin to Hawke*. Melbourne: Oxford University Press, 1003.

106 Andrew Campbell 'Dr H V Evatt – Part One: A Question of Sanity' No. 73 (Winter) *National Observer*, 25 at 27.

107 Campbell does not, indeed, explicitly refer to Kylie Tennant's biography of H V Evatt but it is implicit in his paper.

> his "genius". Since the release of his documents concerning his the Petrov affair and the publication of books basing the study of Evatt on archival research, a new picture is emerging in which he was not the victim of his circumstances so much as his mental states.[108]

Burton, in this respect, has referred to Evatt's 'almost split personality' and, more specifically, to his rapid mood swings and general unpredictability of behaviour.[109] John Burton was a key figure in Evatt's life holding the position of Secretary of the Department of External Affairs. It would be expected, then, that he would have experienced Evatt's mood changes on a daily basis. Kylie Tenant quotes Burton in *Politics and Justice*, as expressing the opinion that: 'He was a beaming idealist or the hatchet man'.[110] In this context, Burton declared (in an interview with Nicholas Whitlam and John Stubbs) that H V Evatt could be:

> … the most charming person and he was a delight to be with on occasions. Yet he was about the rudest person you could come across. There would be a quick switch: one never knew what to expect…This duality, these extremes, and the quick switch from one to another, is….the secret to understanding his whole personality, and indeed his political career.[111]

In their account, *Nest of Traitors*, Whitlam and Stubbs also document that Evatt's wife, Mary Alice Evatt, also saw in Evatt:

> … this kind of duality…In later days this duality became accentuated. It was almost a split personality; you had to remember which Evatt you spoke to last time…[112]

After extensively reviewing the primary source material on Evatt, Justice Kirby in his address 'Speaking to the Heart' concedes that:

> … it would not have been easy to live with a man…rude to others yet infatuated with human rights. There is more than a hint of bi-polar disorder in Evatt's make-up.[113]

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108 Andrew Campbell 'Dr H V Evatt – Part One: A Question of Sanity' No. 73 (Winter) *National Observer*, 25 at 27.

109 See Nicholas Whitlam and John Stubbs (eds.) (Interview with John Burton) *Nest of Traitors: The Petrov Affair*. Brisbane: Jacaranda Press, 1974, p 35.

110 Cited in Kylie Tennant *Evatt: Politics and Justice*. Sydney: Angus and Robertson, 1970, p 212.

111 Nicholas Whitlam and John Stubbs (eds.) *Nest of Traitors: The Petrov Affair* (Interview with John Burton). Brisbane: Jacaranda Press, 1974, p 35.

112 Ibid, 39.

113 The Hon. Justice Michael Kirby, AC CMG, 'Speaking to the Heart', Speech on 18 July 2003 at the opening of the Mary Alice Evatt exhibition. Evatt's confidante, Sam Atyeo noted that: 'He could…; for the most trivial things, be thrust into the blackest moods with constant aggressive manner' cited in Crockett, op cit, p 148.

According to Justice Kirby, Evatt wrote loving letters and even poems to his wife, Mary Alice, yet at the same time, could be combative to her and extremely difficult to live with. Michael Kirby further suggests (in outlining other academic opinions of Evatt) that his love for Mary Alice was so absorbing and all-consuming that it left little room for affection and empathy towards others. In this respect, one has to sympathise with the plight of Mary Alice who had to confront and essentially put up with these extreme mood swings on the part of Evatt and this (in turn) led her to consume alcohol as a psychological 'prop'. As Justice Kirby documents:

> It cannot be said that repeated unpleasant storms of this kind passed Mary Alice by without having their impact on her. This sensitive artistic woman was subjected not only to his unruly, awkward, eccentric behaviour over many years but also to an extended vilification of him by many Australians, often urged on by a hostile media. At one stage in the 1940s, it led to a period when Mary Alice came to drink heavily - as a way of coping with the stresses of her life with Bert at the centre of seemingly endless political monsoons.[114]

In a similar vein, Evatt's close friend and confidante at the time, Sam Atyeo, further noted that Evatt 'could, for the most trivial things, be thrust into the blackest moods with a constant aggressive manner'.[115]

Put simply, bipolar disorder — or manic-depressive illness — is characterised by extreme mood swings where the individual experiences abnormally elevated moods (known clinically as 'mania') and, conversely, significant depressive episodes. These manic-depressive episodes can also be frequently interspersed with periods of normal mood (swings) where the individual evinces no features of significant mania or depression. Justice Kirby's suggestion that Evatt was, in fact bipolar is somewhat persuasive given the history of Evatt and his intense (even obsessional) work ethic — such as representing the Australian Communist Party in the High Court and his subsequent efforts in the referendum on the *Communist Party Dissolution Act* — as well as his extremely intense interpersonal relationships with others. As already documented, throughout Evatt's life his interpersonal relationships were never characterised by 'normality' but rather evidenced an extreme personal affection and loyalty (such as to his wife) or an extreme hostility and (as was shown) suspicion, bordering on paranoia.

Given these extreme emotional reactions, Justice Kirby's observation that there was more than a hint of bipolar disorder in Evatt's personal makeup becomes all the more convincing and cogent. It must be conceded, however, that this bipolar disorder (if that was in fact what Evatt was suffering from) did enable him to perform quite

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114 Ibid.

115 Cited in Crockett, op cit, 148.

significant intellectual and political achievements and allowed him to undertake a workload that was beyond the limits and capabilities of most people. It should also be cautioned against too easily 'pathologising' Evatt and applying contemporary medical and psychiatric constructs to a man who lived in a different age and cultural, as well as socio-economic, setting.

Despite this, subsequent (modern) academic commentaries have, indeed, tended to agree with this assessment of Evatt as somewhat of an egocentric individual who was prone to fits of paranoia and distrust. Graham Fricke, for example, after reviewing the activities of Evatt as a judge on the High Court in the later 1930s described him unfavourably:

> …. as an ambitious petulant, driven, querulous and mistrustful; and as very jealous, unscrupulous, and frantically disorganised and confused in his work methods; and, as a bully, lacking in depth of knowledge of international affairs; occasionally childish, and suspicious of anyone over the age of four…[116]

Fricke proceeds to assert that Evatt was, indeed, 'poorly organised, yet arrogant, he employed erratic work methods, was unpunctual and not constrained by obligations to colleagues'.[117] Yet, the portrayal of Evatt which Fricke presents is not one that is unequivocally negative and disparaging. In this context, Fricke suggests that Evatt was somewhat of a paradox or enigma since he also displayed the admirable qualities of altruism, selflessness and empathy with his dealings with others. He was concerned, in particular, to remedy injustice and intervene and promote the rights of the under-privileged and disempowered. This keen concern to redress inequality and injustice was not only displayed at an interpersonal level but also at an international level where he was prepared to defend and promote the right of the dominion and Third World nations against countries, such as the United States of America and the United Kingdom. Fricke's conclusion is that Evatt was essentially a paradox – someone who was:

> … capable of misperception and laudable depth; bathos subverted grandeur, selflessness coalesced with indifference, affability with withering brusqueness, and unaffected confidence and belief with sinister mistrust and scepticism…[118]

In this respect, Evatt certainly demonstrated principled and altruistic qualities. His defence of the Australian Communist Party and his 'resistance to the McCarthyist

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116 Graham Fricke 'A Decade in the Life of the High Court: 1930-40,' (2006) 9 *Canberra Law Review*, 1 at 10.

117 Ibid.

118 Ibid.

hysteria about the threat of Communism'[119] despite the unpopularity of this position was one aspect of his principled philosophical stance and his concern to assist the more marginalised in society. Furthermore, as Coombs argues, Evatt produced a more 'independent pro-Australian policy, as well as United States and anti-British orientation'.[120] Moreover, whilst Evatt was undoubtedly difficult to deal with, his prodigious energy and unrivalled work habits allowed items on political and legal agendas to be expedited quickly and for political, legal and constitutional reforms to be realised in circumstances where, had there been any other individual superintending such matters, such reforms would never have been achieved. This is particularly illustrated in the work he did when involved in the United Nations. In June 1945 Australia sent a delegation (led by Evatt) to represent Australia's interests. At the Conference, Evatt insisted on personally undertaking as much work as was humanly possible so as to maximise his influence and broaden his control of the Australian delegation. Frederic Eggleston was a seasoned diplomat who accompanied Evatt to the San Francisco Conference and observed that:

> Everything was done by Evatt, or under his instructions, by the team which he had brought with him and the work consisted partly of preparing speeches to be made by Evatt, or drafting amendments to be moved by him, partly of very close negotiations with various other delegations.[121]

According to Crockett, Evatt negotiated during the day – standing up to Great Britain and the United States of America in order to secure concessions for Australia – whilst undertaking other work between the hours of 10 pm and 2am. In this context, as documented by Plant in his doctoral dissertation, Sir Paul Hasluck remarked that:

> … the almost frantic activity that surrounded Evatt once the business sessions of the conference had started. The physical and mental energy he applied night and day over a period of ten weeks of constant and changing arguments and frequent controversy, both inside and outside the conference rooms, urged on by a daemonic will, and inspired by the growing attention being given to him on his first entrance on a world forum, were beyond human experience.[122]

In this respect, Evatt's personality may have demonstrated obsessional characteristics but this undoubtedly contributed to his considerable achievements both as a jurist

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119 Tennant, op cit, p 120.

120 H C Coombs *The Whitlam Phenomenon*. Melbourne: McPhee, 1986, p 56.

121 Cited in J D E Plant 'The Origins and Development of Australia's Policy and Posture at the United Nations Conference on International Organisation, San Francisco, Unpublished PhD Thesis, Australian National University, 1967, p 206.

122 Cited in Plant, op cit, p 206.

and a politician representing Australia's interests on the world stage. As Coombs observes, there is no doubt that Evatt promoted a more independent Australian foreign policy and an international framework that was more sensitive to the rights of Third World nations.[123] This somewhat paradoxical nature of Evatt's character is best expressed by Crockett when he observes that:

> Evatt's concern for the underprivileged moderated his offensiveness and coloured his pursuit of unfashionable causes as he sought to eliminate disadvantage by representing individuals and bodies he identified with the political left. Evatt promoted a distinct Australian identity as a matter of fundamental liberty and facilitated an active [Australian] nationalism within its Imperial structures…[124]

Furthermore, while Evatt had an abrasive and abrupt personality, it is arguable that a Minister for Foreign Affairs with a more equable and accommodating character would not have secured such positive outcomes given the realities of the Cold War situation and the emerging polarisation between the super powers, on the one hand, and the smaller states, on the other hand. Indeed, it is arguable that Evatt's strong willed and assertive character was precisely what *was* needed in the emerging Cold War context in order to represent Australian interests and stand up to the interests of the United States and Great Britain. This point is particularly made by Laurence Maher when he observes that:

> Evatt was not liked. He alienated people. But it needs to be said that in the immediate postwar context this only made an existing external situation worse. Even if Evatt had possessed an equable personality, the climate of emerging polarisation of Cold War global politics was such that any small state or group of small states was forced to deal with the realities of big power bossiness and mutual hostility. It is little wonder then that Evatt excited particular hostility by the big powers.[125]

Maher continues that Evatt was undeterred by the power and influence exercised by the United States and that he, in effect, represented (effectively) the interests of the smaller nations ensuring that the United Nations was left in little doubt as to their contribution to the war effort in the immediate post-war years. One is left with the implication that Evatt, indeed, was precisely *the right person at the right time* to uphold and promote the interests of Australia (and the Third World nations) in the immediate succeeding years of post-war reconstruction:

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123 Coombs, op cit, p 56.

124 Crockett, op cit, p 2.

125 Laurence Maher 'Half Light Between War and Peace: Herbert Vere Evatt, the Rule of International Law and the Corfu Channel Case' (2005) 9 *Australian Journal of Legal History*, 47 at 62.

> In the *Realpolitik* of the immediate postwar years, Australia's power and influence in the international community were marginal. Evatt was, however, completely undeterred by what he perceived as the domineering exclusiveness and bullying of big-power politics. He thrust himself forward as a self-appointed leader of the smaller nations in the emerging post-colonial world. He was determined to remind the world of the unmatched extent of Australia's "total" war effort. As pleaded by Evatt, Australia's claim to a decisive role was self-evident.[126]

Moreover, there is evidence to support some of Evatt's more conspiratorial attitudes and beliefs and his attitudes that certain individuals were deliberately undermining him were not entirely without foundation. As Laurence Maher indeed documents, Sir Owen Dixon distrusted Evatt to the point of hostility. Moreover, Phillip Ayres argues that Justice Starke had to persuade Dixon not to resign when he heard of Evatt's appointment.[127] Fricke, however, has suggested that this antagonism mainly manifested itself in the 1940s and that during the 1930s Evatt and Dixon were colleagues with, at one point, Dixon writing an encouraging note to Evatt to the effect that: 'it appears to me the course you took [in the matter relating to the left wing writer Egon Kisch] is calculated to enhance the Court's reputation in a substantial degree.'[128] Moreover, in at least 18 cases, notably including *R v Federal Court of Bankruptcy; ex parte Lowenstein*,[129] Dixon and Evatt collaborated[130] and Geoffrey Sawer has suggested that there was, in essence, an underlying synthesis or convergence in the matter of the interpretation of that most controversial of provisions of the Constitution – section 92.[131] Maher has suggested, in this respect, that by 1940, Evatt's achievements as an appellate judge and public law intellectual were matching those of Sir Owen Dixon[132] and it may, indeed, be that Dixon perceived Evatt as potential competition – particularly in view of the fact that Evatt adopted a more sociological approach to the law which tended to contrast with Dixon's more logical, classical and syllogistic style.

The picture that emerges, then, is that Evatt was certainly capable of collaboration, despite his disorganised and often abrasive style and that he was able to undertake the writing of joint judgements with Sir Owen Dixon – a judge whose political philosophy and legal methodology stood in stark contrast to that of Evatt's. It is not

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126 Ibid, p 64.

127 Phillip Ayres *Owen Dixon*. Carlton: Meigunyah Press, 2003.

128 Evatt Papers. Also cited in Ayres, op cit, p 58.

129 (1938) 59 CLR 556.

130 Fricke, op cit, p 5.

131 Geoffrey Sawer *Australian Federal Politics and Law 1929-49*. Melbourne: Melbourne University Press, 1963, p 222.

132 Maher, op cit, p 35.

beyond argument that with Evatt's rising reputation and increasing prominence as a jurist on the High Court, as well as his distinctive sociological style, that Dixon perceived Evatt as a potential competitor and this may explain the increasing discordant relationship between the two personalities in the 1940s. The fact that Evatt cooperated with Dixon in the 1930s in the writing of joint judgements tends to undermine the interpretation that Evatt was inherently difficult to work with, paranoid and consistently suspicious of the motives of others.

It is suggested, then that a more balanced appraisal of Evatt needs to be adopted – he was certainly abrasive, controlling and obsessional in his work habits, but this should not detract from the fact that he did work in a collegiate manner with Dixon on the High Court and by the late 1930s he was achieving a prominence that equalled Dixon's in terms of his judgments and legal style of reasoning. Once again, Evatt's personality presents something of a paradox with both positive and negative qualities being evinced in his work and interpersonal relations.

Evatt's doctoral dissertation and *the King and his dominion governors*

Evatt's intellectual powers were considerable, indeed receiving triple first class Honours' degrees and a Master of Arts degree, as well as a Doctor of Laws in Constitutional Law from the University of Sydney Law School. H V Evatt's Master of Arts thesis was titled 'Social and Political Tendencies in Australia' and the thesis examined imperial power relations and, in particular, disputes between the United Kingdom with the 'dominion' – or what would now be termed the colonial – powers of Australia. In this dissertation, Evatt noted an accelerated Australian nationalism as well as, in particular, the decision on the part of the Australian Government to establish an Australian navy in 1909.

What was distinctive about this thesis – and which later emphasis recurred in his doctoral dissertation – was that Evatt opposed formalising Australia's imperial relations with Great Britain. In this context, Evatt examined the views of proponents of Federation and implied that Australia's fledgling nationalism was vital to establishing its own distinctive political identity which was (also) assisted by an independent foreign policy. In his thesis H V Evatt quoted two authorities, Professors Lowell and Curtis, to emphasise that Australia's uncertain status within the Empire required the development of a separate national foreign policy. In this context, Evatt accepted the ultimate supremacy of the Crown over the Dominion states, but he argued that Australia (at the same time) enjoyed effective self-government. This was to be a central contention of his thesis – that is, that while imperial power was indivisible, Australia still enjoyed a separate and independent political status and exercised its own national political power independent of Great Britain. Hence, Evatt's contention was subtle and nuanced arguing that the prerogative powers of

the Crown could be conceptualised as being both divisible *and* (at the same time) indivisible.

Evatt's Doctorate of Laws thesis titled 'Certain Aspects of the Royal Prerogative: A Study in Constitutional Law' continued, and elaborated on, the themes which he explored in his Master of Arts thesis. It is this later dissertation that formed the basis of the publication in 1936 titled *The King and His Dominion Governors: A Study of the Reserve Power*.[133] It is somewhat perplexing that Evatt — a professed social democrat and one who had obvious political and philosophical sympathies with the Australian Labor Party — should select the British Empire and its relations with its 'Dominion' nations as a topic for his doctoral dissertation. Indeed, it raises the question as to why should an outstanding academic scholar with social democratic orientations be so fascinated and preoccupied by this ostensibly conservative and somewhat 'traditional' or 'conventional' topics of study?

Part of the explanation for his continued preoccupation with the British Empire and its relationship with its 'Dominions' was his concern for championing the rights of the small and middle powers in the maintenance of the world order and his undoubtedly internationalist ideal to advance the protection of human rights and the ideal of full employment in *all* countries. As already indicated, Evatt conceptualised the issue of the indivisibility and divisibility of Crown power as vital to Australia's emerging nationhood and national independence. In this manner, while the topic of his doctoral dissertation was seemingly a conservative and somewhat traditional one, the interpretation which he was placing on the relationship between the United Kingdom and its 'Dominions' was very much a radical and transformative one.

Indeed, it is arguable that Evatt's concern with the status and rights of small and middle national powers was a consistent thread which underpinned and motivated his political and legal career throughout his life. As Attorney-General and later President of the United Nations, he championed the rights of the smaller nations and was never reluctant, indeed, to confront the United States and United Kingdom in advocating the interests of Australia and other smaller (Pacific) nations.[134]

Furthermore, given the obvious loyalty and support for Great Britain — and the maintenance of a strong relationship between Australia and the United Kingdom — during the 1930s and 1940s within Australia it, perhaps, makes Evatt's resistance to

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133 H V Evatt *The King and His Dominion Governors*: *A Study of the Reserve Powers of the Crown in Great Britain and the Dominions*. London: Cass, 1967.

134 Crockett, op cit, p 138 ff.

Australia's 'dominion' status that is emphasised in his doctoral dissertation more controversial and radical than what first superficially appears.[135]

In his doctoral dissertation, Evatt referred with approval to the view of the constitutional authority, H. Duncan Hall, who criticised Curtis (whom he referred to in his Master of Arts thesis) for failing to predict changes in Imperial relations during the First World War, as the dominion states assumed, indeed, a major role in its prosecution, and for underestimating the expansive capacity of Imperial cooperation. Evatt criticised Curtis's failure to understand that the dominion states as nations inherently resisted imperial governance and control.

In his thesis, Evatt sought to specify with sufficient clarity the legal and constitutional rules – or 'reserve powers' – governing the relations between the United Kingdom and its dominion (or provincial) states. These 'reserve' powers could include the power to dismiss a ministry; to grant or refuse a dissolution of a legislative chamber; to designate a Prime Minister or refuse to appoint a Prime Minister; or, finally, appoint peers in the House of Lords or in a comparable Upper House. In short, as Sir Zelman Cowen comments, Evatt sought:

> … to re-examine some of the constitutional rules and practices whereby both in Britain and in the self-governing Dominions, doctrines of overwhelming importance are treated as being too vague to be defined at all, or, if defined, defined in an unsatisfactory manner and never regarded as enforceable by the courts of the land. These rules and practices relates, in general, to what may be called as the "Reserve Powers" of the Crown.[136]

In effect, the reserve powers existed to protect the people and the Constitution against the possibility that a government may pursue an unlawful course of conduct, or refuse to enforce court orders or to ensure that that the elements of parliamentary democracy perform their intended function. Their operation and function is best summarised in the High Court decision in *FAI Insurance v Winneke*[137] where Brennan J held that:

> Reserve powers exist to protect the people and the Constitution against the possibility that a government may pursue an unlawful course of conduct, or refuse to enforce court orders or to ensure that the elements of our

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135 For an interest interpretation, in this respect, see F. Bongiorno 'Commonwealthmen and Republicans: Dr H V Evatt: The Monarchy and India' (2000) 46 *Australian Journal of Politics and History*, 33.

136 Zelman Cowen 'Introduction' in H V Evatt *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions*. London: Cass, 1967, p xviii.

137 (1982) 151 CLR 342.

> parliamentary democracy perform their intended function; especially if they show they are unwilling or unable to do so…The Constitution would be destroyed if an executive government were to act illegally or were to refuse to observe or enforce court orders.[138]

In this account, Evatt accepted the ultimate supremacy of the Crown over the dominions states but argued that Australia, nevertheless, enjoyed effective self-government. In this respect, Evatt maintained that political, legal and constitutional power shifts were constant, ever-present and changing within the Empire and this was particularly the case in those situations where the dominion nations sought to assert their independence and to challenge the power of the Crown. In essence, then, Evatt was concerned at the lack of detailed specification and clarification regarding the relationship between the United Kingdom – or the Crown – and its Dominions and how the Crown's deceptive 'ambience of disinterested passivity'[139] contributed to uncertainty regarding the dealings between it and the dominion states.

What was significant about Evatt's doctoral dissertation was that he perceived the problem of seeking to clarify the status of the dominion nations and their relationship to the Empire as being crucial to the realisation of Australian political and constitutional independence. In this respect, Evatt thus conceptualised imperial power in quite innovative terms insofar that (on the one hand) it was indivisible in that it facilitated cohesion in the Empire, as well as, (on the other hand), it promoted *divisibility* by enabling the dominion states to achieve a degree of independence. As Crockett argues:

> So the diverse capacities and agencies of the Crown compelled the gradual accommodation of divisibility, although Evatt came to the innovative view that both were valid: the essence of indivisibility preserved Imperial cohesion through the prerogative, while divisibility facilitated governmental identities to assure a theoretical independence of dominion power, as conferred by constitutions.[140]

In terms of judicial power, Evatt conceptualised the application of the prerogative power as being relatively straightforward and unproblematic since the Privy Council in England was conceived as being the ultimate authority of the Crown in judicial matters. However, in terms of legislative (or parliamentary) matters the application of imperial power was less straightforward and Evatt argued (quite innovatively) that the Crown employed what could essentially be called an *enlightened paternalism* to both oversee and, indeed, superintend the interests of the Dominion states, as well

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138 (1982) 151 CLR 342 at 365.

139 Evatt (1967), op cit, p 16.

140 Crockett, op cit, p 63.

as to foster or facilitate dominion independence. As Evatt argued in *The King and His Dominion Governors*:

> It conferred self-governance chiefly through the enactment of constitutions: its retention of legal supremacy encouraging growth to maturity.[141]

The main political and constitutional authority that was enjoyed by the sovereign representatives (such as the Prime Minister and Minsters) of the dominion states lay in the so-called 'reserve powers' which they could utilise in times of political and constitutional crises. According to Crockett, the prerogative powers that inhered in imperial government and its associated vagueness and lack of specification assisted in the centralisation of political and constitutional power and undermined any move to facilitating the independence of the various dominion states. However, as Crockett concedes, the lack of amenability of these prerogative powers to detailed specification and identification 'was unhelpful in solving constitutional crises'.[142]

In consequence, then, Evatt's overriding objective in *The King and His Dominion Governors* was to reduce the reserve powers to legislation – that is, to place them on a new and rigid basis – so that its consequent application, analysis, and its definition could be subject to interpretation by judicial and arbitral tribunals. This urge to specify explicitly, as well as to systematise, the various reserve powers was consistent with Evatt's logical and technical approach to, and conception of, the law which closely approximated Sir Owen Dixon's highly methodological jurisprudential approach. Evatt perceived the ill-defined constitutional conventions and the lack of specificity in relation to the reserve power as impeding the move to dominion self-government and genuine Australian political independence, as well as one that denied 'dominion governors a distinct pattern by which disputes could be settled'.[143] Yet the difficulty in explicitly articulating or specifying the various prerogative powers was that, at the same time, it did indeed *diminish* their capacity to adjust and accommodate as new situations arose. In effect, then, to prescribe the existing conventions, as well as prerogative rules, as the governing norms would freeze those conventions and preclude the development of constitutional custom, and the gradual

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141 Evatt (1967), op cit, 32.

142 Crockett, op cit, 67.

143 Evatt (1967) op cit, p 69. As Jenks argues: 'Until the reserve powers are adequately defined, there is a special difficulty facing students in that much of the learning and many of the leading precedents are contained in documents which do not at once become public and in some instances never do so': H. Jenks 'The King and His Dominions: A Commentary' (1972) *Cambridge Law Journal* 21 at 21. Similarly, as Crockett argues: 'With the innovatory urge of the law reformer, he perceived that Australia's growth to inclusiveness facilitated an "exclusiveness" which was characterized by full self-government': Crockett, op cit, p 68.

evolution of the reserve or prerogative powers in the future. As Crockett again argues:

> His principal motive was concealed for the transformation of the reserve powers to statutory law would strip it of those characteristics that give it strength, it would be emasculated by legislative entrapment for measured regulation was designed to situate a pre-polent force under dominion control.[144]

In this respect, Crockett argues that:

> In effect, he [Evatt} wanted the Crown's supremacy to be divested and passed to an Australian tribunal that was empowered and directed by local legislation….He refused to accept the irreconcilability between legislative containment and an abstract concept that was widely regarded as valuable for its imprecision and adaptability to diverse political circumstances.[145]

In essence, then, Evatt advocated the codification of the reserve powers so that they could be judicially enforced or made, in essence, *justiciable*. Ivor Jennings also perceived merit in having the reserve powers subject to legislative codification and specification.[146]

As already noted, Evatt's commitment to legalism led him to believe that the law could operate as an instrument of social and economic progress and one that could promote the rights of the under-privileged and, more generally, the interests of the dominion states. For example, Evatt believed that the Australian Government's post-war objective of stability through worldwide full employment could be realised by the established administrative agencies conducted according to legal forms and more expansive constitutional powers,[147] while the courts and associated arbitral bodies would intervene where negotiations failed.[148] In an international context, Evatt accorded, indeed, an excessive respect and reliance to international agreements and

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144 Crockett, op cit, p 78.

145 Ibid.

146 Ivor Jennings 'Book Review' (1937) *Law Quarterly Review*, 53.

147 Evatt, for example, was a driving force behind the various referenda conducted in 1946 to expand the nation's economic and social welfare powers. The only referenda to be passed by the Australian public was that which accorded the Commonwealth with legislative power to enact laws in relation to the topic of social welfare: see s 51(xxiiiA). See R Sackville 'Social Welfare in Australia: The Constitutional Framework' (1973) 5 *Federal Law Review*, 248. As a member of State and the Federal Parliament, Evatt succeeded in the distribution of a family endowment scheme. He was also instrumental in having industry fund the family endowment reforms.

148 H V Evatt *Post-War Reconstruction: A Case for Greater Commonwealth Powers*. Canberra: Commonwealth Government Printer Service, 1942.

international law to foster the rights and independence of the various dominion states and to promote the self-governing rights of Third World nations.[149] This is precisely why he adopted an innovative and far-reaching interpretation of the reserve powers in *The King and His Dominion Governors* since he perceived, in effect, their codification as facilitating dominion independent and assisting in Australia's growth to national independence.

Critique of the King and his dominion governors

As previously indicated, there were several aspects to Evatt's doctoral dissertation. The first was that if the existing constitutional conventions regarding the exercise of the reserve powers were to be codified, then they would be justiciable and subject to High Court challenge. Second, Evatt recognised that by codifying these conventions he would effectively be freezing them and this would, of course, preclude their future development and evolution.

This raises the obvious concern that judicial adjudication and enforcement of the reserve powers could produce delay and uncertainty regarding their interpretation and any litigation in relation to the exercise of a reserve power may be prolonged and contentious. In this respect, the delay and the uncertainty of litigation surrounding the reserve powers might thereby frustrate the very purpose of their existence and their use in cases of constitutional crises. Such a criticism was particularly expressed by K C Wheare in *The Statute of Westminster and Dominion Status* in which he emphasised that the:

> … existence of a variety of usages without any single obligatory convention must lead to vagueness, confusion and misunderstanding…[150]

In this respect, Wheare strongly condemned:

> … the paramount conclusion of Mr Justice Evatt. His remedy would be not to commit agreed conventions to writing in a non-legal forms but to enact the appropriate rules, to translate them into strictly legal form.[151]

However, whilst there is some validity is this criticism, this does not mean that there is no merit in having the reserve powers codified and subject to some mechanism of enforcement. For example, if litigation is too prolonged and facilitates unnecessary delay and expense, then some other institutional form of enforcement could be

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149 See, for example, H V Evatt *The United Nations*. Melbourne: Oxford University Press, 1948; H V Evatt *Task of Nations*. New York: Sloan and Pearce, 1949.

150 K C Wheare *The Statute of Westminster and Dominion Status*. Oxford: Oxford University Press, 1953, p 12.

151 Ibid.

developed. In this context, Professor George Winterton suggests that a so-called 'Council of State' could be developed to act as a consultative body, which would, in turn, advise a popularly elected (executive) President in relation to matters involving the exercise of the prerogative or royal powers.[152] According to Winterton, it would be for a President to form an opinion that an exercise of any reserve power is necessary, but a Council of State (that would be immediately available to the President) could be empowered to certify it (and if it sees fit) and ensure that the President intended exercise of the (relevant) reserve power is valid. According to Winterton, the Council of State should be small enough to expedite consultation. Ideally, he suggests a Council of Three- comprising a Governor-General; a Chief Justice and another justice of the High Court.

Winterton's proposed reforms are far-reaching and involve the appointment of a popularly elected President (along the lines of the United States model) and a new institutional body being the Council of the State. It is difficult to envisage such a framework being implemented in the near future but they do indicate how Evatt's original idea to have the reserve powers codified and essentially justiciable still has merit in contemporary society and is being revisited – albeit in different terms.

The litigious and uncertain nature of the reserve powers should not, however, be overstated. For example, there are certain powers, indeed, which can be exercised without ministerial advice and where there would be little contention or dispute in relation to their exercise – such as the power to dismiss a Prime Minister after the government has been defeated at an election, as well as the prerogative power to prorogue Parliament; to dissolve both Houses of Parliament after the Senate has failed to twice pass a Bill; as well, finally, to appoint and dismiss a Minister. All of these powers could be easily reduced to legislative codification or specification and there would seem to be little legal dispute or contention in relation to their application and enforcement. In short, their exercise by an executive President would appear to be straightforward without even the need to consult (as Winterton suggests) a Council of the State.

The most controversial reserve or prerogative power is undoubtedly that pertaining to the right or prerogative to dismiss a government. Evatt was adamant that a power both to refuse a dissolution, as well as to dismiss a government did, indeed, exist.[153] In Chapter Seven of *The King and His Dominion Governors* Evatt devotes an extended discussion to the Governor-General of Canada, Lord Byng, who refused a dissolution

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[152] George Winterton 'Who Is Our Head of State?' (2004) 3 *Constitutional Law and Policy Review*, 65.

[153] Evatt (1967), op cit, Chapter Seven.

to the then Prime Minister, Mr Mackenzie King, who thereupon resigned.[154] Evatt, in fact, was critical of the Governor-General's actions and suggested that he should have granted a double dissolution in the circumstances. By extension, Evatt suggests that the Governor-General also possessed a prerogative power to dismiss a government and, in this respect, he focused considerable attention on the constitutional problems that did, indeed, beset Pakistan in 1953, where the then Governor-General dismissed the Nazimuddin Government because, in the words of Evatt, 'the constitutional machinery had broken down'.[155]

Evatt adduces these case examples as strong evidence 'for the case for setting and stating as clearly as possible the principles upon which the reserve powers should be settled'.[156] However, he is still somewhat vague on *when* precisely a Governor-General would be entitled to dismiss a popularly-elected government. The closest he comes to articulating the circumstances where it would, in fact, be legitimate for the reserve powers to be exercised to dismiss a government are when he declares that:

> There may be occasions, however remote their conception may be, where the Governor-General would be entitled to withdraw his consent from a particular legislature. In the United Kingdom, if the House of Commons passes a law which strikes at the very foundations of the Constitution, as for instance where Parliament prolongs its life or trifles with the right of electors to vote, the Sovereign may and perhaps would, whether the Ministry advises it or not,

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154 According to Evatt: 'The Governor-General of Canada, Lord Byng, refused a dissolution to Mr Mackenzie King, who thereupon resigned. Mr Meighen, the Conservative Leader, was commissioned to form a government but found that he could not command a stable majority in the House and within a few days requested and was granted a dissolution': Evatt, (1967), p 98. Evatt's view was that the Governor-General was wrong in granting a dissolution to Meighen, having refused it a few days earlier to Mr King. In these circumstances, Evatt argues that the Governor-General should have recommissioned King and granted him a dissolution.

155 Evatt, (1967) op cit, p 264-5. Evatt argued that the then Governor-General of Pakistan acted correctly and was constitutionally obliged to dismiss the (then) Prime Minister: 'The Proclamation of 24 October 1954 which is relied upon as the order dissolving the Assembly stated that the constitutional machinery had broken down; that a state of emergency had been declared throughout Pakistan; that the Constitutional Assembly as then constituted, having lost the confidence of the people, could no longer function; and that the Prime Minister had accepted the invitation to reform the Cabinet with a view to giving the country a vigorous and stable administration…The question whether acting in the manner that he did the Governor-General acted in his discretion does not arise because the acceptance of the invitation by the Prime minister must, on the strength of several constitutional precedents in the Commonwealth, be taken as assumption by him of the responsibility for dissolution': Evatt, (1967), 264-5.

156 Evatt (1967), op cit, p xx.

> exercise his powers of withholding assent or dissolution. The same is the position of the Governor-General in the Dominion States.[157]

Eugene Forsey, in his introduction to Evatt's first edition *The King and His Royal Governor*s in 'The Present Position of the Reserve Powers of the Crown' was in partial agreement with Evatt's conclusion that the Governor-General could, in fact dismiss a government but his position on this matter was not as unequivocal as that of Evatt's and suggested that while, legally and technically, such a power did exist, *as a constitutional convention*, it would rarely, if ever, be utilised. As Forsey documented:

> The Crown and its representatives, then, can certainly, in rare and extraordinary circumstances, variously defined, refuse a dissolution, can they insist on one? The answer, I think, depends on the answer to a further question: can they dismiss a government? The legal power is, of course, undoubted: can it be exercised within the limits of constitutional convention? In the United Kingdom, it has not in fact been exercised since Lord Melbourne in 1834.[158]

Geoffrey Marshall in *Constitutional Conventions* was more emphatic in his acceptance of a prerogative power to dismiss a government when he argued that:

> If a government with a majority in the Commons were to take steps that in Sir Ivor Jennings' words "subverted the democratic basis of the Constitution" and prevented the electorate from exercising its electoral choice by interfering with the electoral process in some fundamental way the Queen would be justified in dismissing the Government.[159]

S A de Smith in *Constitutional and Administrative Law* argues that:

> If a government having lost its majority in the House of Commons were to insist on remaining in office instead of offering its resignation or advising a dissolution, the Queen would be justified after the lapse of a reasonable period of time, in requesting the Prime Minister to advise her to dissolve Parliament and, if he were to refuse, in dismissing him and his ministers.[160]

It should be noted, in this respect, that Sir John Kerr did expressly rely on the views of Evatt and Forsey to rationalise or justify his dismissal of the Whitlam Government in 1975 and that the Governor-General did possess reserve powers to dismiss a popularly-elected government where the democratic process was being subverted.[161]

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157 Evatt (1967) op cit, p 146.

158 Eugene Forsey 'The Present Position of the Reserve Powers of the Corwn' in H V Evatt (1967) op cit, p xxix.

159 Geoffrey Marshall *Constitutional Conventions*. Oxford: Oxford University Press, 1984, p 124,

160 S A de Smith *Constitutional and Administrative Law.* London: Penguin, 1971, pp 103-4.

161 In this context, see John Kerr *Matter of Judgement*. Sydney: Penguin, 1979.

Much academic commentary has already been written on the propriety of Sir John Kerr's actions and it is not the intention of this paper to devote significant attention to Whitlam's dismissal. Nevertheless, it should be pointed out that Eugene Forsey in an introduction to third edition (1977) to *The King and His Dominion Governors* emphasised the point that 'a United Kingdom Government which could not obtain supply would have to resign or secure a dissolution'.[162] Forsey continues:

> Now the situation could arise only if the House of Commons refused supply. Mr Whitlam could not obtain Supply. He had not lost his majority in the House of Representatives; but he had lost his ability to obtain supply. Yet he insisted on remaining in office instead of resigning or asking for a dissolution. The Governor-General had already waited for a considerable period of time: the Senate had first denied supply almost a month before. The deadlock had gone on and attempts to compromise had failed. He could not in the circumstances wait longer than he did. If nothing were done in the week ending November 16, no election would then be practically possible until the following February. Sir John Kerr did his duty.[163]

Of course, the critical and contentious issue here is that Whitlam had secured approval for his appropriation of monies from the Lower House and he argued that it was contrary to constitutional convention to also obtain approval for the appropriation of monies from the Senate. As Joss Malloy argues, Kerr can be criticised:

> … because he appeared to introduce a novel and hitherto unheard of convention in the Australian Constitution, namely that responsible government involves a government having to have the confidence of both Houses of Parliament.[164]

Further, he argued that Sir John Kerr had not acted properly by advising him of his intention to dismiss the Whitlam Government, thereby engaging in deliberately deceptive or misleading conduct.[165]

For reasons of space this issue cannot be canvassed further. However, what it does illustrate is that certain reserve or prerogative powers are still subject to significant contention and debate and could not easily be reduced to legislative codification or specification as envisaged by Evatt. The power to dismiss a government, for example, would by necessity have to be couched in general terms, such as those suggested by

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162 Eugene Forsey 'Introduction' in H V Evatt *The King and His Dominion Governors* (3rd ed) London: Cass, 1977, iii.

163 Ibid, p iv.

164 Joss Malloy *The Structure of Canadian Government*. Toronto: Gage, 1984, 58.

165 Gough Whitlam *The Truth of the Matter*. London: Penguin, 1979.

Marshall when he quotes the words of Ivor Jennings that the government must first 'subvert the democratic process' before it can be removed by the Crown. Nevertheless, Marshall does point out that:

> There is perhaps only one breach of convention whose existence would be sufficiently clear and undisputed to raise the question of possible sanction by the Crown. That is a breach of the convention of collective responsibility which requires that a government defeated on a specific motion of confidence moved by it, or on a motion of no confidence moved by the opposition, should resign on advice of a dissolution by Parliament… Ministers who clearly ignored a loss of confidence by the House of Commons and defied the conventional rules might properly be dismissed…[166]

In this context, Ivor Jennings has sought to outline those situations where, in fact, the Crown would be entitled to dismiss a government, such as where there is 'unnecessary and indefinite prolongations of the life of Parliament' and where there is a 'a gerrymandering of the constitutions in the interests of one party'.[167] This does demonstrate the potential to codify the reserve powers – however, as has been shown, such a process would be subject to bitter legal controversial debate and contention.

There have been other criticisms of Evatt's proposal to codify the reserve powers. One prominent criticism was that levelled by Berriedale Keith who argued that issues pertaining (for example) to the dismissal of government were essentially *political* (and not judicial) matters and they therefore required essentially *political* resolutions. This was reinforced, according to Keith, by the lack of judicial precedent or cases on the dismissal of popularly elected government by the Crown. To make such matters, therefore, *justiciable* was inappropriate and better resolved in a *political forum*. As Keith argues:

> …from Dr Evatt's insensitiveness to constitutional developments one may deduce a further argument against entrusting to judicial hands the delicate work of adjusting political action to emergent circumstances for which precedent is lacking.[168]

Another associated criticism proposed by Keith is to the effect that there is indeed little room or latitude for the exercise of reserve powers by the Crown and that a Governor must, in effect, for all executive acts, be clothed with minister responsibility

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166 Marshall, op cit, 125.

167 Ivor Jennings 'Book Review' (1937) *Law Quarterly Review*, 53 at 53.

168 Berriedale *Keith Letters and Essays on Current Imperial and International Problems*. London: Stevens, 1952, p 90.

or approval.[169] In 'Responsible Government in the Dominions' Keith argues that a Governor must be clothed with ministerial responsibility for all acts of which he is a party in relation to acts of the executive.[170] This innovative contention doubting the actual existence of the prerogative powers is never really considered by Evatt and one, perhaps, he needed to address in his doctoral dissertation.

A final criticism and one that applies more generally to Evatt's conception of the law and legal, as well as constitutional, instruments is that he placed *too* much reliance on their efficacy and their potential to effectuate progressive social and economic reform. Evatt's excessive faith in legalism and constitutionalism as a mechanism for initiating change was not only illustrated in his dissertation exploring the prerogative powers and how they could facilitate a more independent Australian national identity, but also, more generally, in his reliance on international agreements/conventions, as well as the United Nations, as mechanisms for promoting the rights and interests of the Third World nations. This excessive faith and reliance on international law, in particular, grew more pronounced as he becoming increasingly involved in the United Nations as Minister for Foreign Affairs under the Curtin and then Chifley Labor Governments. As Crockett perceptively points out:

> Evatt's constitutionalism gave continuity and principle to his foreign policy, although an excessive respect for legalism led to his over-reliance on international agreements and international law. Before 1944-45 he favoured established sovereignty but then generally responded to the challenging location and nature of sovereignty as his respect grew for the self-governing rights of Third World States.[171]

Constitutional amendment

Evatt's faith in the law and the Constitution as a means of fostering progressive social and economic reform was, however, admirable and there is little doubt that he was ahead of his time in advocating constitutional amendment to enhance the economic and social powers of the nation. Had these amendment proposals been passed by the Australian public there is little doubt that Australia would be economically and socially better placed than it is currently. Evatt, in particular was a prime motivator in the Curtin Government for the enactment of the *Constitution Alteration (Post-War Reconstruction and Democratic Rights) Act 1944* (Cth) which sought to overcome the deficiencies in Australia's economic constitutional powers by incorporating

169 A B Keith 'Responsible Government in the Dominions' (1936) 18 *Journal of Comparative Legislation and International Law*, 65.

170 Ibid.

171 Crockett, op cit, 147.

generalised powers relating to industrial relations, unemployment, price controls and marketing.[172] Unfortunately, the various referenda associated with this enactment all failed to gain the required public approval as required by s 128 of the Constitution. Similarly, Evatt was also instrumental in proposing further constitutional amendments to enhance the nation's economic and social powers in 1946 with, indeed, only one referendum succeeding – that being the *Constitution Alteration (Social Services) Act 1946* (Cth) with the resultant inclusion of the 'social welfare' power in s 51 (xxiiiA) of the Australian Constitution.

There is no doubt that Evatt was ahead of his time in recognising the deficiencies of the Constitution and the relative absence of economic constitutional powers allowing the Commonwealth little room to manoeuvre in managing the economy and dealing with endemic problems such as unemployment and inflation. His advocacy of enhanced constitutional powers for the Commonwealth was later acknowledged with significance emphasis by the 1959 Joint Committee of Constitutional Review which concluded in forceful terms that:

> The Joint Committee's Summary of post-war Federal Economic Action demonstrated that the Commonwealth has had to grapple with the broad problem of maintaining economic stability and promoting national development from a position of constitutional weakness.[173]

Similarly, much later in 1988, the (second) Joint Committee of Constitutional Review reiterated this point and confirmed what Evatt had, indeed, been advocating as early as in the 1940s by arguing for the inclusion of a general provision in the Constitution relating to 'matters affecting the national economy'.[174]

Evatt has been criticised, in this respect, by Peter Crockett for being too abstract and focusing on (political and legal) ideas, offices and institutions. Yet, the converse side to this argument is that Evatt recognised the *possibilities* which inhered in political and legal institutions and the potential for politics and the law to make a significant difference to society, in general, and to individuals, in particular. He was, no doubt, ahead of his time in acknowledging the power of the Constitution and politics to act as agents for reform – both at a national, as well as an international, level. This fact is neglected by academics such as Fricke and Campbell (as outlined above) who focus too much on the failings of Evatt's somewhat paradoxical personality at the expense

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172 See L F Crisp *Australian National Government*. Sydney, Longman, 1971, 45.

173 Joint Committee of Constitutional Review *Final Report of the Constitutional Committee.* Canberrra: AGPS, 1959, p 133.

174 Joint Committee of Constitutional Review *Final Report of the Constitutional Committee.* Canberrra: AGPS, 1988, p 140.

of his undoubted political and legal genius and how he used this for the betterment of society.

Evatt and the United Nations

Evatt's contribution to the development and evolution of the United Nations and his consistent advocacy for the rights and interests of the smaller nations should not be downplayed. In 1945, as Attorney-General under the Curtin Labor Government, he was a member of the *San Francisco Conference* which drew up the *Charter* of the United Nations. As Kylie Tennant documents, during the Charter negotiations, Evatt consistently fought for the rights of the smaller nations and, in doing so, argued for the inclusion of a constitutional power on the part of the United Nations to effectuate social and economic reform and to protect human rights.[175] In this respect, Article 56, which called on member states to work toward 'higher standards of living, full employment, and conditions of economic and social progress' became known as 'the Australian pledge' and were a direct consequence of Evatt's significant efforts and powerful advocacy at the Conference.[176] Subsequently, as Attorney-General, Evatt led Australian delegations to the Paris Peace Conference and to the United Nations Conferences in 1946, 1947 and 1948 where he performed a significant institutional role as an architect in preparing the United Nations for the interventionist role it was to play in securing peace, justice and equality in the post-War international order.

In 1948 Evatt was elected President of the United Nations General Assembly and, to this day, he remains the only Australian to have, indeed, held this post. Significantly, as President, Evatt presided over the United Nations's adoption and proclamation of the *Universal Declaration of Human Rights* on 10 December, followed by the later enactment of the Geneva and Genocide Conventions.

In advocating for the development of a *Universal Declaration of Human Rights* Evatt's social democratic philosophical orientation was clearly apparent as he argued not only for the inclusion of civil and political rights, but also (significantly) social and economic rights. In his account, *Australia and the New World Order: Evatt at San Francisco, 1945* W.J. Hudson commented that:

> Evatt was no pacifist. For him, as for his leaders, Curtin and Chifley, the main and immediate point of the United Nations and the world in general and Australia in particular was that it comprised a collective security system, and collective security is a military concept.[177]

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175 Tennant, op cit, p 56.

176 Ibid.

177 W J Hudson *Australia and the New World Order: Evatt at San Francisco, 1945.* Canberra: ANU Press, 1993, p 52.

Indeed, Evatt, on his return to Australia after attending the San Francisco Conference, stated that 'there is a direct obligation on all member states to place forces at the disposal of the security council'.[178] In his passionate advocacy for the specific recognition of fundamental human rights, Evatt, along with other Australian delegates to the United Nations, saw the fundamental correlation between rights and security. Speaking before the General Assembly on the occasion of the adoption of the *Universal Declaration of Human Rights*, the Australian delegate, Alan Watt spoke of this interconnectedness in the following terms:

> I should have liked to express satisfaction with the inclusion of economic and social rights and also the unanimous agreement that such rights should be included. Modern economic and industrial arrangements have bought with them terrible social risks. I mention only mass unemployment and other loss of livelihood, whether through old age or other causes. My government has continually urged, in international conferences, that full employment, or in the language of the declaration 'the right to work' and social security must be guaranteed for world prosperity and world peace. We know what economic insecurity can breed. The civil and legal rights of the Weimar Republic were destroyed in the collapse of the German economy and the rise of Nazism.
>
> In speaking of the economic and social rights I do not underestimate the longer established rights. If we needed any conviction, the events of Nazism and the war have illuminated that traditional human liberties must be cherished. We know that economic rights are realised through the exercise of political liberties and that the surrender of these liberties can bring helplessness and insecurity.
>
> It is the task of social democracy to maintain and develop to the full the simultaneous enjoyment of political and civil liberties and economic rights. The comprehensive nature of the declaration makes it a historic document in the progress of social democracy.[179]

There is little doubt that Evatt sympathised with, and advocated for, this view of the primacy of social and economic rights in the post-War world order. It fitted in with his emphasis on the need for (for example) full employment in the smaller nations and the institutional role that the United Nations could perform in securing these social and economic ideals. In this context, Evatt's social democratic credentials were clearly evident and he was, in many respects, ahead of his time in recognising the intricate connection between the meaningful exercise of civil and political rights (in

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178 Cited in Robert McLelland 'How is a Bill of Rights Relevant Today?' Paper Delivered to the Evatt Foundation, Sydney, 27 June 2002.

179 Ibid.

the post-War world order) and the need, at the same time, to secure some degree of social and economic equality in the smaller nations.

Writing in 1957, Geoffrey Sawer, indeed, argued that Evatt 'hoped for and believed in the UN' whereas his conservative successors as Minister for External Affairs, P C Spender (1949-51) and R G Casey (1951-60) had only hoped for the UN.[180] In this context, Evatt passionately and repeatedly pressed for the inter-related claims for the United Nation in securing justice in the post-War world order for:

- systematic and objective fact-finding (by the United Nations) based on proven evidence including, where appropriate, the utilisation of 'on-the-spot' investigations;
- formal due process (in the United Nations' judicial role) of the type that lawyers in the Anglo-American tradition conceived as a constitutive character of courts and quasi-judicial agency;
- the use of power (especially the Security Council veto) *only* for proper purposes. The Security Council was only to take military action to suppress aggression;
- the use of conciliation and mediation in preference to imposed adjudication and, especially, as an alternative to the imposition of the Security Council veto;
- the application of even-handedness and impartiality and judging every case on its individual merits free of extraneous and irrelevant considerations;
- the desirability in appropriate cases of last resort of referring questions to the International Court of Justice (ICJ) for binding determination. There was to be maximum employment of the ICJ in determining the legal aspects of international disputes; and
- as with the need to protect the dignity of the courts and administrative agencies in the domestic setting, it was of central importance to maintain public confidence in the integrity of the UN and its agencies; and, especially, the integrity and effectiveness of the Security Council.[181]

In many respects, Evatt's significant contribution to the United Nations and his role in securing a more socially just and equitable post-War world order have been overshadowed by his subsequent mental decline whilst sitting as a Chief Justice on the New South Wales Supreme Court Bench. This is unfortunate, indeed, given the

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[180] Geoffrey Sawer 'The United Nations' in Gordon Greenwood and Neil Harper (eds) *Australia in World Affairs 1950-1955.* London: Penguin, 1957, 93.

[181] In this context, see Laurence Maher 'Half-Light Between War and Peace: Herbert Vere Evatt, the Rule of International Law and the Corfu Channel Case' (2005) 9 *Australian Journal of Legal History*, 47 at 65.

important role he played in the United Nations and his strong advocacy for the rights of the smaller nations. It is hoped, therefore, that this brief summary of Evatt's achievements in the international diplomatic sphere reinstates Evatt's reputation as an important political and legal figure in international affairs in the 1940s and provides a corrective to the more contemporary, and generally negative, accounts which have tended to focus on Evatt's later psychological disintegration. It is to Evatt's later career and his subsequent personal and professional decline on which attention is now focused.

Evatt's decline

Evatt's decline in his political and legal standing can, in part, be linked to his association with leading pro-Soviet communists.[182] Ball and Horner, for example, cite a longstanding confidante of Evatt's, Katharine Susannah Prichard, who was a foundation member of the Australian Communist Party[183] and (who according to John McNair) was a major participator in Soviet intelligence networks in Australia.[184] According to Campbell, Prichard 'was a lifelong and committed Soviet propagandist and agent of influence. She was a talent-spotter and courier for Soviet intelligence officers'.[185] Ball and Horner assert, quite contentiously, that Evatt's disclosures to Pritchard assisted her to avoid or overcome detection whilst living in Sydney.[186] This is a questionable assertion and no evidence is provided to support the argument.

Evatt's general decline can also undoubtedly be attributed to the Petrov Affair and Petrov's defection to Australia in 1954. Again, much has been written on this and reasons of space preclude an exhaustive canvassing of this event. However, it is interesting to note that one of Evatt's key personnel staff members, Allan Dalziel,[187] undertook contacts with Petrov and after his 1954 defection to Australia, Vladimir Petrov recalled that Dalziel:

> … as secretary to Dr Evatt..had access to a lot of interesting information. Further, he was sympathetic to the Soviet Union.[188]

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182 Desmond Ball and David Horner *Breaking the Codes: Australia's KGB Network*, 1944-50. Sydney: Allen and Unwin, 1998, 233-240.

183 Ibid, p 235.

184 John McNair 'Visiting the Future: Australian (fellow)-Travellers in Soviet Russia' 46 (4) (2000) *Australian Journal of Politics and History*, 468.

185 Andrew Campbell 'Dr H V Evatt – Part II: The Question of Loyalty' 76 (2008) *National Observer*, 33 at 37.

186 Ball and Horner, op cit, p 237.

187 In this context, see Allan Dalziel *Evatt the Enigma*. Melbourne: Lansdowne Press, 1967, p ix.

188 Cited in Cambpell (2008), p 41.

Paul Hasluck has also, in attending UN Conferences from 1941-7, remarked that Evatt was, at times, more sympathetic to the Soviet Union than Great Britain and reflected a naïve optimism in their system of government.[189] Similarly, Alan Renouf points out that Evatt certainly approved of aspects of the USSR and the possibilities which inhered in it supporting anti-colonialism and the rights of Third World nations. In this respect, Renouf suggests that Evatt maintained hopes of developing some relationship with the Soviet Union during the Cold War Years.[190] Crockett also notes that Evatt's 'hostility to conservatives was obsessive' with the author noting that Evatt was particularly 'critical of Churchill and the powerful Canadian conservative press baron Lord Beaverbrook'.[191]

Yet, it is incorrect (as Campbell seems to imply) that Evatt was an overt communist sympathesiser who was essentially subversive and sought to undermine the Australian liberal democratic political system. Evatt was more concerned with seeking to balance the demands of liberty with the equally important requirements of security during wartime and the immediate postwar years. He condemned, for example, the illiberal wartime Menzies-Fadden government's extensive media censorship which offended his inherent orientation to upholding civil liberties and the right to free and open expression. This is no way implicated him as a communist sympathasiser; rather it reflected on the importance he attached to a freedom of political expression and the maintenance of fundamental civil liberties – as illustrated in his speech to the effect that:

> … censorship has been employed by Government servants in a way that prevents fair and constructive criticism of the war effort. This seems to me a very dangerous policy indeed. I believe that Parliament will agree that the right of honest and legitimate criticism by the public and by the Press is essential to victory.[192]

Furthermore, to illustrate his inherent nationalism and loyalty to Australia, documentary evidence suggests that during wartime and the immediate postwar years his relationship with the Australian Broadcasting Commission was frequently strained as he was concerned that the ABC wartime press were not sufficient pro-Australian and were having a worrying affect on the morale of the Australian troops.

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189 Paul Hasluck *Diplomatic Witnesses: Australian Foreign Affairs 1941-47.* Melbourne: Melbourne University Press, 1980, p 196. He remarks that Evatt considered Russia 'more enlightened than the British on questions affecting human welfare': Hasluck, 1980, 196.

190 Alan Renouf *Let Justice Be Done: The Foreign Policy of Dr H V Evatt*. Brisbane: University of Queensland Press, 1983, p 111.

191 Crockett, op cit, p 170.

192 Commonwealth Parliamentary Debates, 172 (2 October 1942), p 1383.

His participation in the defection of Vladimir Petrov – though politically naïve – in this respect, can be seen through the prism of his strong commitment to civil liberties and freedom of political beliefs and political expression. Similarly, his decision to represent the Australian Communist Party after Menzies's enactment of the *Communist Party Dissolution Act 1950* (Cth) – again while politically naïve – can be interpreted as further reflection of a strong commitment to civil liberties and freedom of political expression.

Nevertheless, the criticism that Evatt was exposed to following these events produced in him a sense of mistrust and an almost obsessional need to control all activities pertaining to his departmental work as Minister for External Affairs. According to one member of his Department at the time, Peter Heydon:

> When Evatt was Minister for External Affairs officers' safes were opened, private diaries extracted and copied (in 1946 and 1947 he did this to Alan Watt and in a moment of anger admitted it to me as evidence of a point he was making).Drawers were gone though with Evatt's authority or on his direction by Sam Atyeo in London and Paris (and presumably elsewhere).
>
> … he obtained from Curtin in 1942 authority under the National Security Act to dismiss any public servant permanent or temporary, in Australia or overseas, notwithstanding the provision of the Public Service Act or any other Act. He told Geoffrey Bridgland that he must look after this carefully, that he expected to have to use it against several officers…
>
> I have never worked for an Australian Minister who used the methods of the police State at all substantially – except Evatt. In this matter he was in my experience quite unique.[193]

This need to control and constantly monitor and superintend the activities of others is somewhat ironic and paradoxical given Evatt's sincere and genuine commitment to upholding (as outlined above) civil liberties and freedom of political thought and expression. It appeared that he was strongly committed to civil liberties, as well as political freedom on a more abstract national (and international) level, but could not, indeed, translate this commitment to a purely interpersonal level where his close personal relations with others was characterised by a sense of mistrust and an almost obsessional need to control the activities and behaviours of others. Crockett adduces psychological evidence to indicate that Evatt experiences a troubled infancy – one that may explain his subsequent inability to trust others in his later mature years.[194]

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193 Cited in Crockett (1993) op cit, p 162.

194 Ibid.

Whether this interpretation is valid or not, it is beyond dispute that Evatt's general psycho-pathology degenerated significantly following the ALP split of 1954-55 and the subsequent formation of the Democratic Labor Party (DLP). A product of this split was undoubtedly Evatt's resistance to Menzies's *Communist Party Dissolution Act 1950*. In a powerful speech on 10 July 1951 – during the debate on the *Constitution Alteration (Powers to Deal With Communists and Communism) Bill* Evatt spoke movingly that this was 'a direct frontal attack on all the established principles of British justice'.[195] Following this, as Crockett comments, Evatt 'devoted himself without stint to defeating the referendum and spoke during the campaign against the audacity of the three referendum proposals which sought power to enable Parliament to pass the unconstitutional *Communist Party Dissolution Act*'.[196] According to Crockett:

> He resented the failure to circumscribe a period of emergency and warned against the unwarranted inclusion of various Australian groups within the undefined terms "communist" and "communism." He travelled extensively to reach as many Australians as possible, his endeavour contrasting with the restrict campaigning of the prime minister. No country town or individual was too insignificant to escape Evatt's message. The later High Court judge, Mary Gaudron, heard him speak from the back of a utility in the New South Wales town of Moree when she was just eight years old. In response to her baffled query concerning the word "Constitution", he sent the child a copy of this august document.
>
> The defeat of the referendum was a success for which Evatt was largely responsible. The modest campaign backing he received was in the beginning almost non-existent; party fears of identification with communism ensured the effective maintenance of his political isolation…[197]

This was a time when Evatt was at the peak of his career – upholding civil liberties and the right to freedom of political expression. Yet, in representing the communist cause, the perception of Evatt himself became too closely aligned with the communist cause thus producing the Australian Labor Party split and the subsequent formation of the Democratic Labor Party.[198]

Doubts have not only been cast in relation to Evatt's mental deterioration following the period subsequent to the ALP split, but doubt has also been cast over Evatt's loyalty and, in particular, loyalty to his (then) leader Prime Minister Ben Chifley. Burton reports that during the great Coal Strike of 1949 – a period of protracted industrial conflict from 27 June until 15 August – a group of Communist party

195 Ibid, p 165.

196 Ibid, p 165.

197 Crockett, op cit, p 167.

198 See Paul Reynolds *The Democratic Labor Party*. Milton, Jacaranda, 1974.

members sought to bring train travel in New South Wales to a stand-still and essentially destroy or 'blow up' the Hawkesbury railway tunnel to prevent so-called 'scab coal' from reaching Sydney.[199] The Australian Security Intelligence Organisation (ASIO) had its own agents within the Communist Party who were reporting directly to Prime Minister Chifley. John Burton reports that by this time he was undertaking secret meetings and negotiations with Evatt and facilitated a meeting between him and the General-Secretary of the Communist Party, Ernie Thornton, despite the absence of Chifley's knowledge.[200] According to Campbell, ASIO's official historian, Mr Robert Swan, revealed many damning features of Evatt's career and Chifley's 'off-the-record' distrust of Evatt to ASIO that could not be included in the official history and that were sanitised for publication.[201] Ball and Horner similarly argue that the statement 'I don't trust Evatt' succinctly summarised Chifley's attitude to Evatt and after suffering a severe heart attack, Chifley was asked to retire and replied: 'Bert [Evatt] is my Deputy, but I honestly don't think he could do it'.[202]

According to Campbell, Evatt also demonstrated misleading, if not outright deceptive, qualities. After, indeed, the defection of Soviet diplomat-spy, Vladimir Petrov, Evatt continuously claimed for the following two years that ASIO had not briefed him on the security risk of his key staffers. According to Campbell, in his interview with the leader of the ASIO surveillance team, Ray Whitrod, this was, in fact, a blatant lie and from 1950 until 1953, ASIO had indeed briefed him on a succession of leaks to communist sympathisers.[203] According to Campbell:

> As early as 5 June 1950, ASIO discussed with Evatt his private secretary Allan Dalziel's relationship with Soviet KGB agent Nosov (codename "Technician"). In that meeting, Evatt vouched for Dalziel's loyalty. Senior ASIO officer Bernard Tuck interviewed Evatt who assured him that Dalziel had legitimate reasons for his contacts with Soviet agent Nosov.
>
> On 5 August 1953, ASIO Director-General, Brigadier Charles Spry, briefed Evatt at his office in Parliament House, at Evatt's own instigation, on his staff member Albert Grundeman's drinking habits and indiscretion, and on his press secretary Ferguson O'Sullivan's drinking and close relationship with

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199 Burton cited in Whitlam and Stubbs, op cit, pp 36-7.

200 Ibid.

201 Cambpell, (2008) op cit, p 49.

202 Clyde Cameron *The Confessions of Clyde Cameron*, 1913-90. Sydney: Australian Broadcasting Corporation, 1990, p 82.

203 Transcript of Interview between Andrew Campbell and Ray Whitrod, Timeframe, ABC, 1997 season, episode 8: 'The Door Never Closes'. URL: http://wwww.abc.net.au/time/epsidoes/ep8.htm

> Communist Party journalist Rex Chipin (codename Charlie), and its security implications.[204]

As documented by Gavan Duffy, by 1953 even ALP parliamentarians were becoming increasingly concerned at the lack of security and confidentiality in Evatt's office and that Evatt should be confronted at the leaks and confidential information being passed onto high level communist sympathisers.

More generally, Hasluck has noted that in the 1940s and 1950s Evatt (in an external affairs context) had an unusual and unconventional manner of operating and, if not deceptive, his behaviour was certainly secretive and went unrecorded and this made Evatt a difficult person to work with and predict – both in terms of his work methods and interpersonal relationships:

> When the archivists and the editors of Australian documents on foreign policy are working on this period they will be handicapped by the fact that some of the activities of Evatt when overseas were not reported in any formal way… Furthermore, he worked through so many roundabout channels and used so many roundabout methods of communication his instructions that much of his conduct of foreign affairs was probably never recorded in any form.[205]

Nevertheless, in spite of these deficiencies Evatt vigorously sought to modernise Australia's constitutional, legal and political structure and to ensure that it would be responsive to the new postwar international economy. As outlined earlier, in 1944 and 1946 he emphasised the 'dynamic potential of the Constitution' and the need for it (in his opinion) to be the subject of 'constant review' by advocating the inclusion of additional extensive social and economic powers.[206] He was concerned (as most Labor Party members were at the time) about the High Court's interpretation of s 92 and thus sought revision or amendment of the provision. Furthermore, by the late 1940s and early 1950s Evatt envisaged the development of a quasi-constitutional convention which would have the overall objective of radically overhauling the Constitution and modernising it to facilitate Australia's independence and emerging nationhood – a feature that inhered throughout his life and writings (originating in his doctoral dissertation). As Crockett argues, his leadership, in this context was truly inspirational and notable thus undermining those interpretations proposed by Campbell that Evatt was seriously undermined by his paranoia and insecurity:

> …Evatt's freshness, determination and inspired leadership were notable. He wished to overhaul the entire Constitution at a new convention towards the

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204 Campbell, op cit, p 51.

205 Paul Halsuck *Diplomatic Witness: Australian Foreign Affairs 1941-47*. Melbourne: Melbourne University Press, 1980, p 31.

206 Crockett, op cit, p 136.

> end of the five-year period. The purpose of this gathering would be to modernise the Constitution in the light of contemporary circumstances and the outcome of the new powers, and a radically altered Constitution was then to be presented to the people for approval. Evatt hoped to accelerate the nation's maturation and bring it into line with international developments while he attempted to tailor international reform to local conditions.[207]

This again highlights the paradoxical nature of Evatt's character – in national and international affairs he could play, indeed, a highly constructive, dynamic and innovative role, yet in his own interpersonal relations he was susceptible to suspicion, mistrust thus resulting in secretive and, indeed, deceptive conduct on his part.

After successive defeats as Federal Parliamentary Leader of the Australian Labor Party during the 1950s Evatt retired from federal politics in 1960, taking up the position of Chief Justice of the New South Wales Supreme Court. Ill-health forced him to retire from this position in 1962. Herbert Vere Evatt died in Canberra on 2 November 1965 at the age of 71.

Conclusion

This paper has sought to document the life and political and legal writings of H V Evatt. Its overall aim has been to restore the reputation of Herbert Vere Evatt and to remind readers of the very significant — indeed, overwhelming — political, legal, diplomatic and constitutional achievements that he secured. It is only in enumerating and highlighting Evatt's achievements that one can obtain a truly balanced and objective view of the professional career and personal life of this great Australian. It is important to keep in mind that Evatt became a justice of the High Court at the age of 36; that he has been the only Australian to reach the distinguished position of President of the United Nations; that he single-handedly defeated that most regressive of legislative enactments which was motivated by the political expediency of his personal nemesis, Robert Menzies, in both the political and the legal spheres — the *Communist Party Dissolution Act.* The threat to civil liberties and individual rights of this legislation cannot be underestimated and the role that Evatt played in securing its constitutional invalidation and eventual political failure should also not be downplayed. His contribution to Australian society in this context alone has been to ensure that never again will the state seek to trench on, and infringe, individual freedoms in the manner in which the *Communist Party Dissolution Act* sought so regressively to do.

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[207] Crockett, op cit, p 139.

Yet, Evatt's achievements were both more subtle and extensive than simply becoming a Justice of the High Court and President of the General Assembly of the United Nations. As has been shown, his intellectual achievements were equally significant and his academic writings indeed demonstrated a coherent thread — that being a focus on Australia's emerging nationhood, in particular, and the upholding the rights of smaller nations more generally — which has contributed significantly to social democratic constitutional, legal and political thought in this country. His academic thinking also, no doubt, influenced and motivated his later political and diplomatic actions. For example, there is little doubt that his advocacy of the rights of smaller nations in the United Nations and his passionate desire to enact a code of civil, political and socio-economic rights that would provide constitutional protections and guarantees in the post-War world order can be traced back to his early academic dissertations. Equally, Evatt's commitment to civil liberties and individual rights cannot be doubted. As was shown, his academic analysis of the early High Court constitutional jurisprudence and his critique of the *Engineers' Case* were extremely subtle and nuanced and motivated by a keen interest to uphold civil liberties and individual freedoms and to ensure that the state would not trench on these freedoms. Superficially, his analysis of the High Court's early constitutional jurisprudence — and his advocacy for the mutual non-interference of the federal and the State realms — would seem to make little sense from a distinctively social democratic perspective, but when seen through the prism of his commitment to individual freedom and liberty his analysis becomes coherent and in fact highly persuasive. As further outlined, his judgments on the High Court also reflected a similarly keen interest and desire to promote civil liberties, social justice and equality.

It is unfortunate, then, that these considerable achievements have tended to be overshadowed by his subsequent psychological decline ◎ particularly when he was Chief Justice of the New South Wales Supreme Court. Nevertheless, it has to be conceded that Evatt's interpersonal style was often abrasive; that he was frequently difficult to work with; that he was profoundly suspicious of the motives and actions of others; and that his manner of working was unpredictable to the point of being almost chaotic. This may or may not have been the outcome of a significant psychiatric disorder ◎ that being bi-polar disorder. Certainly, his actions were sometimes inconsistent and unpredictable with Evatt, on the one hand, being capable of managing enormous workloads and realising achievements that were little short of unbelievable ◎ such as his defeat of the referendum on the Communist Party Dissolution Act ◎ but, on the other hand, being prone to fits of self-destruction and what can only be described as irrational behaviour in his interpersonal dealings with others. These more personal failings, however, need to be placed in the context of his considerable political and legal achievements and it is important that academics do not indeed 'pathologise' Evatt and interpret his personality in terms of contemporary

psychological and psychiatric constructs when he lived in a fundamentally different era to the twenty-first century. In short, Herbert Vere Evatt was, indeed, a remarkable individual and it is hoped that this paper has contributed, at least in a small way, to reinstating him in the pantheon of great political and legal figures of the twentieth century.