

Conversation with Professor Leslie Ronald Zines¹

by

Lesley Dingle² and Daniel Bates³

Date: 7th October 2011

Professor Zines was interviewed at Lesley Dingle's home in Newnham on 7th October 2011, there being a power failure that day in the Law Faculty at Cambridge. The interview was recorded, and the audio version is available on this website along with this transcript.

Questions and topics are sequentially numbered for use in a database of citations made across the Eminent Scholars Archive to personalities mentioned therein.

Interviewer: Lesley Dingle, **her questions and topics are in bold type**

Professor Zines' answers are in normal type.

Comments added by LD, *in italics*.

All footnotes added by LD.

1. Professor Zines, you may be aware that over the past six years I have interviewed a series of eminent scholars with strong Cambridge associations. Most of these have been faculty members and there have been several visiting Arthur Goodhart professors. You have had a long and distinguished career with strong links to Cambridge. You were the Goodhart Professor here in 1992 to 1993. It is not possible to do justice to your illustrious career in one interview, so I am concentrating on aspects that have a Cambridge slant.

I wonder if we could begin with your memories of World War II. You would have been a boy of ten at the outbreak of the war.

Actually, I was not yet nine at the outbreak of war. I was born in December 1930. War broke out, of course, on 3rd September 1939. I have no memory of actually the war breaking out. I do have a memory of the war, but I think like a lot of schoolboys, the way of life became normal. You know, you did not have much to compare it with. You were too young, and there were things you could not buy that you remembered you could get, lots of lollies and chocolates that were no longer available or not available in the same quantity.

My mother died a year after the outbreak of war. Indeed exactly a year, 3rd September 1940. I was nine, nearly ten, and I was boarded with people. My father was thinking of joining up. He was quite a young man. He was only twenty-two when I was born, but he was a tailor and they wanted him to manage a factory making military uniforms under what were called the "Manpower Regulations" and so he worked in the city in a factory. Most of the time I was with my aunt and uncle and grandmother in one of the outer suburbs and I would see him at the weekend, but I remember my cousins older than me getting called up. One was in the air force, one was in the army and I recall we sent food parcels to England known as "Bundles for Britain" and I got irritated because we would send all this precious chocolate which we would only get once a month and our relatives would say they would like some dripping. So for a child that was a bit strange. We were sending them chocolate and they wanted dripping.

However, I do remember the end of the war, both VE Day in May and VP Day, as it was called in those days, with great joy. You know, at school we all had to assemble in the

¹ 1930-2014. Died 31st May 2014 in Canberra

² Foreign & International Law Librarian, Squire Law Library, Cambridge University

³ Freshfields Legal IT Teaching and Development Officer, Faculty of Law, Cambridge University



assembly hall with all the flags of the United Nations, as the allied powers were called then, and I remember going into town because our school, Sydney High, was quite close to the centre of Sydney and watching the milling throngs.

We did not suffer very much. There was rationing. I remember you could not buy rice because all the rice went to Asians. Once my cousin who was in the army came home with 2lb of rice and my aunt made a rice pudding and I thought it was the most delicious thing I had ever tasted. Anyway, I do not really have any significant memories of the war, I don't think.

2. Another question from which I receive a fascinating selection of answers, is why did you study law at university?

Well, you might well ask because it did not enter my head. I knew no lawyers. My parents knew no lawyers. In all the advice from people telling me what I should do, nobody mentioned law. Anyway, when I had finished school, I did not know what I wanted to do and, you know, I was thinking it might be nice to do philosophy. My father who was a very, shall we say, practical and pragmatic man said, "What do you do with philosophy?" and with all the arrogance of a seventeen-year old I said, "You do not do anything" and he did not think that was a very good idea.

Anyway, a friend of the family was a vocational psychologist and my father was going on about, "My son here goes down to the beach every morning" because we lived near the beach, "and does not know what he wants to do". Anyway this chap said, "Well, look, send him to me. I will give him some tests". I said, "Look, I have had these tests at school" and my father said, "You will go". I said, "All right. I will go".

He suggested law and I thought it would be treated as a bit of a joke when I came home and said he suggested law, but my father and stepmother said, "Oh, well, you will do it, will you?". So I had an agreement that, if I did not like it, then I could go onto something else and within a few weeks I thought it was lovely. I enjoyed it very much. I remember the first year in those days was Roman law, Contract law and Constitutional law and I liked them all and did quite well, not top notch, but close to it at that time.

3. My first eminent scholar for the archive was Professor Lipstein⁴ and so any reminiscences that you have of him, Professor Zines, will be very valuable.

Well, yes. There are two areas to my connections with Cambridge and with Lipstein because I decided to come to Cambridge just as a matter of curiosity. It was my second sabbatical. I had previously been at the London Institute for Advanced Legal Studies and I knew nothing about the colleges. I knew they had colleges but I had no idea it was the complex federal system that they have in Cambridge, so I just wrote to the faculty, said "I would like to come" and they said, "We will be happy to give you facilities. We cannot give you a room, but when you arrive, see the faculty secretary." They also directed me to the visiting scholars people. So I wrote to them about accommodation and I got a flat on the other side of Midsummer Common behind the boathouses there, Pentlands Court.

I went along, it was about 5th August. I had taken two months to get to Cambridge because I had travelled. When you come all the way from Australia and you have not been to Europe very much, you travel, so I did. It was a silly time to arrive because in early August there is nobody around. The only two people I thought I knew were Stanley de Smith⁵, who

⁴ Professor Kurt Lipstein (1909-2006), Professor of Comparative Law, University of Cambridge 1973-76

⁵ Stanley Alexander de Smith (1922-1974). Downing Professor of the Laws of England (1970-74).



had just come over to Cambridge from London, and Len Sealy⁶, who was professor of, I think, Commercial Law.

He was at Caius, but I had no connection with a college. It did not even occur to me. I went into the law library, which was then next to the Old Schools building. Nobody was there except one young man who was working away and whom I was not to know for about another couple of weeks and who happened to be Paul Finn⁷.

4. Goodness.

Later he said, “I was watching you, wondering who this chap is, always going to the *Australian Reports*.”

A chap I had been in correspondence with at Melbourne University was away taking a holiday. He was on sabbatical too and I got this because a man came downstairs to look at some of the library material and it was Kurt Lipstein. He of course needless to say was the only member of staff working in the law library and he was very charming. I said “do you know this fellow, ?Fagan Bowden “No, no. He’s on holiday, but he should be back soon”. That is the first glimpse that I had of Lipstein.

In time I got to know him more and his wife. One evening he said, you know, “Gwyneth would like to meet you. Come down and have a drink. She is at her council meeting”. Was it the Cambridgeshire or the Cambridge Council?

5. I believe it was Cambridge City Council.

Yes, I think it was Cambridge City Council. I did and she was top notch on what was happening in Australian politics - the election of the Whitlam Government and so forth. Of course, she was then in the Labour Party before she left later to join the Social Democrats, I think they were. That was 1972.

I came again in 1978 when I was at Clare Hall. I should say in 1972 Len Sealy was very disturbed that I did not have a college connection, so he arranged my dining rights at Caius College, which is what I did in 1972/73. I came back in 1978 to Clare Hall, this time in a more regular way. I had applied for a visiting fellowship and they gave me one and it was on that occasion that I wrote my first edition of, you might, say my *magnum opus*, “*The High Court and the Constitution*”⁸ and I saw Kurt quite a bit and I went to some classes. That might have been 1972. I am sorry to get a little bit confused. My first visit was 1972. I attended Kurt’s classes, the first classes on European law. He had had the manuscript of his book and I attended with Geoffrey Sawer⁹ who was a famous constitutional law professor in Australia, probably the most famous at the time. We both attended together, occasionally asking him questions. We later thought we should not ask too many. After all, there were students there and they were anxious to get on with the course.

Later, when I went to Wolfson... I will come to how I got there and everything....of course the Lipsteins were quite close [*LD: in Barton Close*] and Gwyneth would say to me, for example, “Well, we are going to judge the tidy towns. We have got to find the tidiest town in the region. Would you like to come with us?” That would be very nice. It was all

⁶ Leonard Sedgwick Sealy 1930- , Emeritus S J Berwin Professor of Corporate Law, University of Cambridge.

⁷ Professor Justice Paul Finn (b. 1946), Judge of the Federal Court of Australia, Goodhart Visiting Professor 2010-11. Interviewed for the Eminent Scholars Archive earlier this year.

⁸ Butterworths, Sydney. 1981, 1st Edition

⁹ Geoffrey Sawer, (1910-96). Professor of Law, the Australian National University. *Australian Federalism in the Courts*. Cambridge University Press. 1967, 247pp.



supposed to be a secret when you go in to these towns, but of course there was Kurt's huge car, a Bentley, was it? A 42 Bentley?

6. It was an Armstrong-Siddeley¹⁰.

Anyway, people would stop and gaze. We stopped to have a pub lunch and the publican said, "Are you here to judge the tidy towns." so some secret. Then they came to Australia – I was very pleased they did – to a conference about 1985 and they came to Canberra and we showed them around. Gwyneth was anxious to go to the botanical gardens and I recall showing her and Kurt around. Then, when we got to the war memorial, which is really a war museum; it is probably the best in the world I think. It is a magnificent institution and there was a big picture of a painting of Lloyd George signing the Treaty of Versailles and behind him were the four or five dominion prime ministers. There was Billy Hughes¹¹, who was the Australian; Smuts¹² from South Africa and... I can't remember Mackenzie King¹³? Not sure.

Anyway, Kurt said "Oh, I remember that day". I said, "Oh". He said, "Yes, I was attending either my grandmother or my great grandmother's eightieth birthday. I was ten", he said, "and somebody came in and said, 'The peace treaty has been signed' and we were all joyful". But he said, "We did not know what was to follow, of course" and that is why I always remembered he was born in 1909 because the peace treaty was 1919.

As we kept coming back we would always see the Lipsteins but, of course after a while Gwyneth was not well and we would just go round with a bottle of wine or something of an afternoon and have a chat with them. Then of course, died - I can't remember the year she died, but.....

7. Was it about 1998, I think?

Right. Of course, we came in 1997. That was the last time. We stayed in 1997 for about six months. Then we came in 2000, mainly to escape the Olympic Games, and by then Kurt had somewhat adjusted to being alone. We used to go down and see him and I remember he invited me to a feast at Clare College one night and I was just amazed that he was still getting around. Except on one occasion he said, "I fell off my bicycle. I don't know why" and I thought, "Well, you are ninety-four or something". Actually, in 1997 I remember he said, "Oh, look, do not leave it until 2000 because I will be ninety" and I said, "Well, yes, it troubles me that I am about to become seventy" and he said, "Ah, when I was seventy, I could do anything". I did not like to tell him I couldn't. Anyway, that was my association with Kurt and I have always had a very great affection for him, as indeed I think most people did and he became a very revered figure, I think, in Cambridge.

8. He did, yes, greatly missed as well. Professor Zines, did you get to know Sir David Williams¹⁴?

¹⁰ Famously called "Nottebohm" by Lipstein to commemorate his role in the 1955 ICJ case. See a photo of it at: http://www.images.law.cam.ac.uk/gallery_viewer.php?gallery=acbeeb7c47a7acf9393e46a5fe75b341&image=d490d7b4576290fa60eb31b5fc917ad1&process=pop

¹¹ Hughes, William Morris (Billy) (1862–1952). 7th Prime Minister of Australia (1915-23)

¹² Jan Christiaan Smuts (1870-1950) Prime Minister, Union of South Africa (1919-24) and (1939-48). He served in the First World War and as a British field marshal in the Second World War.

¹³ William Lyon Mackenzie King, (1874-1950). 10th Prime Minister of Canada (1921-26, 1926-30, 1935-48).

¹⁴ Sir David Glyndwr Tudor Williams, (1930-2009), Rouse Ball Professor of English Law (1983-92), President of Wolfson College (1980-92), Vice-Chancellor, Cambridge University (1989-96).



David Williams was in fact my very closest friend in Cambridge. To go back to when I arrived, I said to you I knew Sealy and I knew de Smith, but David Williams I had met just briefly in Canberra. He had taken a sabbatical for one term in Adelaide and it was the period when he was leaving Oxford to go to Cambridge. He was at Keeble College and he came to Emmanuel College in Cambridge. He was brought up to Canberra while in Adelaide, as they do in Australia. They come up for two days, give a lecture sort of thing, and I was briefly introduced to him at morning tea. I remember him saying, and I have never forgotten – never forgotten – he said to us, “On coming over, the only thing I didn’t like was that people would think we were £10 migrants”, you see, because in those days the British could come over to Australia for £10 paid by the British and Australian Governments provided they agreed to stay for two years. If they left before two years, they had to pay the full fare back, you see. Anyway, I said, “And when they see you going back, they will think you are a whingeing pom”. “Whingeing pom” was used for people who came as migrants, decided they did not like it and went home, you see.

So in 1972, as I was sitting in the law library. Sealy [*with whom I*] had made contact and Paul [Finn] then saw a figure coming in and I thought, “That is that chap in Cambridge, David” and I remembered his name, David Williams. So I went to him and I said, “Hello, my name is Leslie Zines. I am just here for a year” and he said, “Oh, you called me a whingeing pom”. I said, “Oh, I do not think I quite did”. Anyway, he said, “Come out and have a cigarette” so we did, and then he invited me to his. He said, “I just want to ring Sally. Come out and have lunch on Sunday”, which I did. He had another academic there, a French fellow, Bailley, I think his name was, and from then on a friendship blossomed and he went out of his way to make me feel at home in Cambridge. I was very grateful to him and I returned the favour. When he came to Australia, as he did on a number of occasions, I tried to do the same for him.

It was a very sad thing... One of my strongest reasons for coming to Cambridge was because he was here. I told you I was at Clare Hall in 1978. I was coming in 1982 and he was the one who persuaded me to come to Wolfson. He was the President. He had become President in 1980, I think. He had up to then been at Emmanuel College and I said, “Okay, I will” and then I never went anywhere else. When I became Goodhart, he was, I think, quite responsible. I think he put me up as Goodhart Professor, which I got in 92/93, as you have mentioned, but when I arrived of course he was ceasing to be President of Wolfson to become the first executive vice-chancellor of Cambridge. He had been vice-chancellor. You know they used to rotate the heads of colleges, but they weren’t executive or anything like that. They stayed at their college. But they decided to go on to an executive vice-chancellor freed of all college responsibilities and they built a house in Latham Road just off Trumpington Road.

Nevertheless, I stayed at Wolfson and a couple of years later I was made an Honorary Fellow of Wolfson in 1995, I think. Then I came in 1997. By then Sir Anthony Mason¹⁵ was the second Australian Goodhart Professor. Then I came 2000, 2004 and this was the longest period away from Cambridge, seven years, but then Judith was not well. She had a bad hip and had to have an operation. Then I had this cancer operation, so that held us all up. But I do miss the absence of David Williams.

9. I can imagine, yes. He is someone else who is greatly missed. He did a huge amount, as you can imagine, for the Faculty.

¹⁵ Sir Anthony Frank Mason, (1925-1995), ninth Chief Justice of the High Court of Australia, on the bench of the High Court from 1972 to 1995.



Yes. He went out of his way to make you feel at home.

10. Professor Zines, you have recounted the circumstances of your appointment to the Goodhart Professor in 1992. Did you teach that year?

Yes, I did. In fact, it was usual in those days – I do not know what the position is now – for the Goodhart Professor to teach in the LLM programme, although I used to hear mutterings about some people who came, usually very old people, they said who did not do anything. However, I taught a course in Comparative Federalism. I took as the basis for the course the United States, Canada, Australia and, when it came to interstate trade, the European Community.

I had about 13 or 14 students. For the first term you get more because they are encouraged to go and sit in on other classes, so I would have had about 22, but about 14 sat the exam and it was quite a nice little class. I quite enjoyed it.

11. Did you find in that time the Cambridge collegiate system to your liking?

Well, I don't know. I have divided views on that. In some ways, from the point of view of the academic, I think the best part of it is that you are forced into a position of mixing with people in other disciplines. I think that is the great pleasure: to get to know something about what is going on instead of just talking, as is the tendency to do in other universities, just to people in your own faculty or in your own discipline. On the other hand, I think it weakens the central aspects of the matter. You see, when they were building the new law building, the faculty was asked, "Do you want a room in the building?", when they were designing it, and most people said "No", they would rather be working in their college. I think that is a bit unfortunate. So it has its advantages and its disadvantages.

12. I think you are right. Actually, one of the previous Goodhart incumbents remarked upon that as well - how it draws the life force away from the faculty.

Yes.

13. Your time here in Cambridge at the moment: what are you working on, Professor Zines?

Well, it is not all that clear. I start doing something and then I get diverted to something else. I was thinking of looking at the interpretation clauses in the Human Rights legislation of Britain and a couple of jurisdictions in Australia and Hong Kong and Canada, but I was diverted away from that as some new cases came out in the High Court and I have really been bringing myself up-to-date with a view perhaps to writing something and giving a paper on judicial method in Constitutional Law. I may be proceeding with that. Well, that is what I am looking at at the moment.

14. That brings me to an article in your eightieth birthday volume.

Ah, yes. You got hold of that, did you?

15. Yes. Professor Lindell¹⁶ and Sir Anthony Mason refer in their article here to your "strong and long held views of the way the High Court should interpret the constitution". I wondered if it would be possible for you today to distill the essence of your views on this which has been the main focus of your life.

¹⁶ Geoffrey Lindell, Professor. Barrister and Solicitor, Supreme Court of South Australia; Professorial Fellow (Melbourne University).



Well, I think in the past there has been too much of a tendency... Australia had a reputation in the High Court in the 1950s, 1960s and 1970s of being what you might call “legalistic”. Sir Owen Dixon¹⁷, who was seen at the time as perhaps our greatest Chief Justice and highly regarded by English and other Commonwealth judges who would refer to him with some veneration, said that it’s the only way for a court to behave - the only way you could trust a court is if it was concentrated in looking only at legal considerations, but, of course, he did not do that. I believe he pretended to do that. Indeed, you can’t because a constitution is loosely worded, intended to endure for ages to come. The language is broad and general, unlike an ordinary Act, but some try to read it as if it were the Water, Sewerage and Drainage Act, instead of a constitution. Therefore, I felt judges should be more... there is nothing original about this..... Roscoe Pound¹⁸ and the American realists all pointed to this: that you should be aware of the choices that judges have. Once you are in the High Court or the House of Lords or the Supreme Court of South Africa or the United States, you can come to several different conclusions, all of which are rationale and, therefore, you should ask, “Why am I going this way rather than that way?” and the law itself will not be the deciding factor. You will have to look at questions of social desirability or justice. In other words, policy and values it seems to me are inevitable.

Now, I am not suggesting from that that you do not begin with the text. I do not approve of judges taking it upon themselves to say “Well, I am going to work out what is the best solution for this country based on my own political and moral views and then try and stretch the language to fit in”, but the language itself will not usually decide a matter because it will not get to that highest court unless there are at least two arguments, one side and the other side. That I suppose is it in a nutshell. In other words, I am saying that doctrine and principles together with policy and values are all part of the fabric of the law and, of course, we know that, that in Common Law judges quite openly in torts or equity will decide, “Well, is this desirable that we should extend this notion or should we limit something?” and, of course, they do so on the basis of policy. They might talk about the law and, indeed, as I say, the law itself does set some limits, but within those limits you have to go to social or value considerations because we do not have a Bill of Rights, so that makes it easier for judges to pretend they are legalistic. It is hard to do, if you have a Bill of Rights.

16. Very interesting, Professor Zines. You mentioned earlier that when you came to Cambridge you encountered a young man in the Squire Library who turned out to be Justice Finn. He was recently interviewed, in fact about a year ago, in his role. One of the things he spoke about was the Australianisation of the Common Law. In your opinion, Professor Zines, do you think this is proceeding far and fast enough?

Well, yes, I think it is. You see, up until the 1960s, no High Court judge would think of not following the House of Lords’ decision, even if it was contrary to an earlier High Court decision. They would follow the House of Lords. The policy behind that, so far as Sir Owen Dixon was concerned, was the desirability of one Common Law for the whole British Commonwealth. You did not expect the British courts to be following the dominions, so the High Court should follow the House of Lords. Well, that ended. Indeed, it almost broke Dixon’s heart, I think, when in a judgment in 1963 or 1964... I do not remember the details now, it was a criminal law matter, he said he and the other members of the court could not in all conscience follow the House of Lords’ decision. That was the first time that had happened from the beginning of the High Court in 1903. From then on English law became

¹⁷ Sir Owen Dixon (1886–1972), 6th Chief Justice of Australia.

¹⁸ Nathan Roscoe Pound (1870-1964), Dean of Harvard Law School (1916-36.)



treated more and more as a foreign law that you can compare with, look at, might learn from, but in the same way as Canadian law or New Zealand law and so forth. It was not treated as special like it was before.

Now that has proceeded. Whether, of course, the results have been good is something which I do not know I can comment on because I am not a great Common Law lawyer, but we have departed a lot from Britain. It would have happened anyway because of the Europeanisation of English law. You see, we do not have that influence. The courts [*in England*] will often say, “Oh, well, perhaps we should change this Common Law rule because in certain circumstances we have to follow the European rule and we should not have two different rules in this area,” or something like that, whereas we do not have that problem, and similarly, with administrative law. In fact, in a very recent case, the interpretation of the Charter of Rights and Responsibilities of Victoria, Justice Gummow said “Well, look, it is no good looking at the English decisions and the Human Rights Act because they are affected by Brussels” and, indeed, Lord so and so said, “We have to obey Brussels”. Well, we are not in that ball game really.

17. Really interesting.

So we have got further apart. Although, as I say, if you have got a good English decision based purely on English law, the High Court is very happy to look at it.

18. So really Britain’s constitutional relationship with Europe has had quite a profound effect upon its relationship with Australia.

That is so and I think that has probably been true of New Zealand and Canada and, I presume, South Africa. Although South Africa, of course, is partly Common Law and partly Roman-Dutch, is it not?

19. That’s right, yes. I also wanted to ask you one more thing in relation to Justice Finn. This is about a comment that you had made to the effect that in a 1995 paper that he wrote called “The Forgotten ‘Trust’: The People and the State”¹⁹ he “had been misguidedly lured into a heresy about trust and fiduciary ideas in relation to the people in the state” and I

I do not recall saying that, but I believe I did.

20. I asked him what this heresy was supposed to have been last year, and he said I should ask you because he knew that you were in Cambridge.

Well, actually, if you look at his article there, he has a reference to it early in the piece.

21. Here it is actually, yes. I have just made a photocopy of it here. “I have reconsidered the heresy into which he believes I was misguidedly lured.”

Well, yes, he was.

It started really when he came here to Cambridge to do a PhD and what he wanted to do was to see if he could find general principles which would govern the duties of fiduciaries in relation to their beneficiaries or principles and the duties and obligations of officials and Governments in relation to the people. Just like Einstein’s “unified field notion”, he thought he could find some general principles to govern all. Paul has had some tendencies towards

¹⁹ Justice Finn’s paper “The Forgotten Trust: The People and the State” in Cope (ed) *Equity Issues and Trends*, Federation Press (1994)



natural law. Whether that was due to his Catholic upbringing, I do not know, but he found it sort of vaguely appealing. Anyway, he was discouraged from doing such an ambitious thing for his PhD and he did his PhD purely on fiduciary obligations and his thesis became a book²⁰.

Nevertheless, it carried over with him that he would come up with all sorts of equitable notions. He got interested in public law, but he remained influenced heavily by these equitable notions. To give you one idea, under our system, if the Commonwealth has power over, say, interstate and overseas trade, the courts say, “Well, it is enough that the law controls the trade. We are not concerned with why the Parliament is doing it, what its policy is”. So it might have a policy of protecting morals by banning pornographic material going into the country or whatever, even though the Commonwealth has no power over morals. Nevertheless, it has power over trade and it can control the trade for whatever reason and pursue its own policies.

Well, Paul said “No”. He would think that, as in the case of a trust or a power, it would amount to abuse of power. I said, “But that is ridiculous. You are not talking about a trustee looking after a benefit. You are talking about a democratically elected Parliament”. Then he had notions that Parliament could only legislate for the good of the people, so that a court would have to see whether in fact Parliament was acting in its sort of vague trustee role for the people. Well, as time went on, he did realise it just would not work. I mean, you are just giving incredible power to the courts to decide what is good and evil. But he did retain some of those notions and I was always mocking his views and he would come back and I think that is what the reference was about.

22. Very interesting. I think that it is also mentioned by...

Gummow²¹?

23. Yes, in his contribution to your eightieth volume²². I was just rather intrigued to see that because I obviously have been looking at this recently. I had asked Justice Finn the same question a year ago.

Professor Zines, one of your research specialities has been on constitutional law for the Commonwealth of Australia and I would be fascinated to hear your views on what you think the constitutional trajectory of Australia should and will be.

I should perhaps say there that, well, a constitution of Australia, I suppose I have written most about, but I have been interested in federalism generally. As I mentioned, I gave a course as the Goodhart Professor and, in fact, in 1988 I was the Smuts Lecturer in Cambridge giving the Commonwealth lectures. You know, common lectures are given under the auspices of the Smuts Memorial Fund. Smuts, as you know, was Chancellor of Cambridge when he retired from politics in 1950 or something like that.

I called the lectures “Constitutional change: the original members of the present Commonwealth”, which excluded South Africa because it wasn’t in 1988 a member of the Commonwealth. I concentrated on Britain, Canada, Australia and New Zealand and the lectures came out in a book published by CUP, a small book, called “Constitutional Change in the Commonwealth”²³, which was a bit too broad for what it covered. I covered the

²⁰ 1977 *Fiduciary Obligations*, Sydney, The Law Book Co. Ltd, 229 pp

²¹ William Montague Charles Gummow AC (b. 1942), Justice of the High Court of Australia (1995-).

²² Page 313, in his Foreword to *Federal Law Review*, 2010, 38, Special Issue in Honour of Professor Leslie Zines on his 80th Birthday.

²³ 2003, 128pp. Deals with important changes in the United Kingdom, Canada, Australia and New Zealand, the original members of the present Commonwealth of Nations. The first lecture discusses the development in



notion of how the dominions came to be independent without any break. You know, the dominions like Canada, Australia and New Zealand all think they have not changed their law. It just sort of happened in a seamless way. We did not have any moment, as I put it, at midnight where one flag was raised and another lowered amid nostalgia and joy and so forth. I mean, it just happened and it is often very difficult to say, “Well, when did you become independent?” and you can say, “Well, we were almost independent here. We are now. I am not sure what moment it happened”.

Anyway, as far as the Commonwealth of Australia is concerned, the aspects which first interested me were the federal aspects and, when I went to Harvard [LD: 1955], I was mainly interested in American constitutional and federal aspects. It has become less interesting partly because the High Court has proved to be very centralist. It has interpreted Commonwealth powers broadly and the states aren't guaranteed any specific powers. They are just given the residue. So there is nothing to interpret, unlike Canada, where you have federal powers and you have provincial powers and the court has to reconcile the two. But our court says, “No, we do not have to reconcile anything. The only powers we look at are the federal powers and anything left over belongs to the states”.

That was intended to create a weak central Government. It confines the specific powers. Canada was intended to be a strong central Government because in the 1860s they believed that the American Civil War had occurred because there was insufficient power in the central Government. So they gave federal powers, provincial powers and you look at provincial powers and they look pretty narrow, like taverners' licences, although property and civil rights was the killer. They interpreted that very broadly. Then everything left over belonged to the central Government, not to the state. But as it has turned out, Canada is the most decentralised federation, I think, in the world. Australia is rather centralised and so is the United States legally. The United States politically is not so centralised, but that is not because of the law, anything interpreted by the courts, but because they do not have a party political system like ours with strong discipline as in Britain and Australia. So a member of congress or a senator, may think, “Well, if I am going to be re-elected, I have to be seen to be supporting my state”, in the case of the senator or “my district”, in the case of congress. So you find Democrats voting against things the President likes and Republicans who are tending towards more liberal views, so that politically you find federalism is still much more of a force in America. Whereas in Australia I think people aren't - except in the smaller and developing states like Western Australia with all its minerals and wealth, and Queensland, but somebody in New South Wales or Victoria does not go round saying, “We are interested in New South Wales' rights or Victorian rights”. They think of themselves primarily as Australians.

But the High Court, not having a Bill of Rights and pretending to be highly legalistic, certainly since Sir Anthony Mason ceased to be Chief Justice, has in fact become quite activist under a cover of legitimacy and it has implied rights that are not set out. For example, Section 24 says that the House of Representatives shall be directly chosen by the people and Section 7 says the Senate shall consist of persons directly chosen by people of each state. Now, they have taken those words “directly chosen” to say, “So we have

recent years of the constitutional autonomy of Canada, Australia and New Zealand, and its effect on the constitutions of those countries and on the concept of the 'crown'. The second lecture is concerned with methods to entrench, constitutionally, individual and democratic rights. The final lecture contrasts judicial attitudes to the interpretation of the constitutions of Canada and Australia. The conclusion is reached that although the EEC is not a federation, there is a structural similarity between the distribution of governmental power within the Community and its members, and the federal issues that arise in Canada, Australia and other federations.



representative Government. Representative Government means you have to have some freedom of speech to discuss political matters and Governmental matters”. So in 1992 they discovered freedom of political speech in the constitution, which for the previous ninety-two years we did not know we had.

Similarly, they have used the separation of judicial power (that is not expressly stated - it just says that the judicial power of the Commonwealth is vested in various courts) to say “Well, the Commonwealth cannot interfere with traditional judicial methods. Open courts are required, except in circumstances where we the High Court tell you closed courts are permitted. You have got to allow this, that and the other”. The States do not have any separation of powers, but they say, “Oh, nevertheless, the constitution protects the integrity of the courts”. So if a state Parliament wishes to get a state court to act as a sort of subsidiary of the executive government, it will fail. So all these freedoms are coming in, but purely by implication from institutions. Representative government and the separation of powers are two obvious ones. The Mason period... were you here during Mason’s reign²⁴?

24. Just missed, actually.

It was regarded as a remarkable period of freewheeling... well, I say “freewheeling”; that is perhaps a bit unfair but, having regard to policy considerations and value judgments, there was a bit of reaction against that. As I say from the examples that I have given, the court has been in some respects quite activist, but all the time emphasising the text and doctrine and so forth and I think it could be a bit more open.

25. Professor Zines, something that I was wondering about were your views on the 1975 sacking of Gough Whitlam²⁵. Do you think in retrospect this was justified?

No, I do not. In fact, I remember signing, me and three other constitutional lawyers, a thing against the Senate taking upon itself to refuse supply. I am not saying the Governor General should never have acted. It seems to me that that is the point of the Crown. You get to a stage where the country cannot carry on and the only thing to do is to go to the people to get them to decide. The only person who can do that is the Governor General by getting somebody to advise him to have an election, which is what he did, but I think he moved much too early. The political argy-bargy was still going on and the country had not come to a standstill. There were suggestions that some of the senators on the opposition side were getting very worried and thought that the Senate should pass the appropriation bills and you only needed about two of them to get it through. Moving when he did resulted in a great split in the community. Now, it was not long-lasting, as some thought it might have been, but it did last for many years. The Governor General²⁶ who stayed on for about two or three years was often booed. Instead of being a symbol of national unity, he was a symbol of division and the Labor members of Parliament would never attend any function at Government House or anything the Governor General might have put on, you know, lunch or dinner. They just would not come and would not even have anything to do with him and all this was pretty unfortunate.

²⁴ Goodhart Professor 1996-97

²⁵ Edward Gough Whitlam, (b. 1916-). Prime Minister of Australia (1972-75)

²⁶ Governor-General Sir John Kerr (1914-91), 18th Governor-General of Australia. Dismissed the Labor government of Gough Whitlam on 11 November 1975, marking the climax of the most significant constitutional crisis in Australian history.



Fraser²⁷, who in some ways is a very good man, became Prime Minister. He was very much tainted with what looked like naked ambition and he did not care what happened to the institution. Up until then... I thought there was a convention, but some said no, it was not a convention, but there certainly had been a practice of the Senate not throwing out holus-bolus an appropriation or supply bill. Now, the Senate would always say it is not like the House of Lords because it is an elected body, which is true, but the House of Representatives is the one that decides who is going to be the government and it is the Prime Minister who decides, with the approval of the Queen or the Governor General, when an election is to be. It seemed to me right from the beginning that you cannot have a situation where the Senate can decide to throw out a government because at that moment it looks like, if there is an election, the people might be in favour of the opposition because that is what it amounts to. I was against it and I am still against it, but fortunately in all those years it has not arisen since.

One thing I am sure of is that no Governor General in future would act so precipitately as did Sir John Kerr, and John Kerr unfortunately got a very bad reputation because of that. In other respects he did good things as a judge and was reasonably popular up to that stage. He had been Chief Justice in New South Wales before he was Governor General. He said he was trying to protect the Queen and all that sort of thing, but it was an awkward position because it could have... you see, the point was the Governor General can dismiss the Prime Minister; the Prime Minister can get to the Queen to dismiss the Governor General, so that this creates a rather unholy situation. After Kerr dismissed Whitlam and called on Fraser to form a caretaker government until the election and also to advise the Governor General to have an election, straight after that there had been a resolution in the House of Representatives of no confidence in Fraser, you see. Now, the Speaker then went to Government House with this resolution of no confidence, but he was told to wait in the sitting room and in the meantime the Governor General dissolved the House of Representatives. He then went to the Queen and said, you know, this was not a good thing for the Governor General to do. The reply was, as we understand it here from the official secretary, that all these powers are in the hands of the Governor General.

So the Queen in effect separated herself further from Australian affairs by saying that, although the Governor General is her representative, the understanding is the constitution gives these powers to the Governor General and she cannot interfere or override them. So the Queen now only has, as far as the federal Government is concerned, one power, it seems to me, and that is to appoint the Governor General on the advice of the Prime Minister or dismiss the Governor General on the advice of the Prime Minister and all the powers belong to the Governor General. The same thing is true now of the states by virtue of the Australia Act of 1986²⁸.

²⁷ John Malcolm Fraser (b. 1930), 22nd Prime Minister of Australia.

²⁸ Act No. 142 of 1985. An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation.

The Australia Act 1986 is a pair of separate but related pieces of legislation: one an Act of the Commonwealth (i.e. federal) Parliament of Australia, the other an Act of the Parliament of the United Kingdom. In Australia they are referred to, respectively, as the Australia Act 1986 (Cth) and the Australia Act 1986 (UK). They were passed by the two parliaments, to come into effect simultaneously, because of uncertainty as to which of the two parliaments had the ultimate authority to do so. They eliminated the possibility for the UK to legislate with effect in Australia, for the UK to be involved in Australian government, and for an appeal from any Australian court to a British court.



But I do not know what is going to happen in the future. There are moves towards a republic. I think Australia will become a republic, but nobody is terribly excited about it. I am what you might call an unenthusiastic republican. If we had a referendum on whether to become a republic, as we did in 1998, I would probably vote “yes”, but I do not really care very much. The country is not going to be affected one way or the other and I am very anxious that the President of a Republic of Australia not feel he has so much popular appeal that he can override the Prime Minister. Now, of course, with an unelected head of state, there are limits to what a head of state can do. Anyway, that remains in the future.

26. Well, all that remains for me is to thank you so much for a fascinating account. I am extremely grateful to you and looking forward very much to incorporating this valuable material into our archive. Thank you, Professor Zines.

Thank you.

There were two short sections of recording prior to, and after, the main interview. These have been included for completeness.

27. Apropos Professor Zines’ health.

I’ve got chronic bronchitis in my left lung - had it for 20 years and then I had lung cancer in my good lung and they had to cut off about a top third – three years ago. So a good time. I’ve survived reasonably well. I can’t walk up lots of steps and I find hills - have to go very slowly, but the topography of Cambridge is very suitable.

28. Apropos photographs of Professor Zines.

You’ve met Judith Wilson? Judith is my partner.

I’ll look through my old photographs. I have met a lot of relatives, family I never knew existed this time. A man who is a first cousin of mine once removed emailed me about two years ago from Ipswich saying he was a professional genealogist and he was sending me photographs saying did I know who this was etc and I met him recently on this trip in Ipswich and he showed us round. He said of course my uncle wants to see you and it turned out to be a chap called Tony Franklin who is my first cousin because his father and my mother were brother and sister So that involved us going out to Norwich. We met him and his wife who’s a couple of years older than me and his daughter and her husband who interestingly is a detective who specialises in cold cases. That involved photographs.

