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DIXONIAN LEGALISM AND ITS ADHERENTS: ASSESSING THE PLACE FOR POLICY CHOICES UNDER "STRICT AND COMPLETE LEGALISM" IN THEORY AND PRACTICE

Ned Hirst

This article provides an account of the literalist paradigm that prevailed before Owen Dixon was appointed to the High Court and compares Dixon's legalism to the pre-existing norm. It uses a case study of Dixon's judgment in Melbourne Corporation v Commonwealth to illustrate the way in which his legalism operated in comparison to the literalism expounded by the Court in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd. I argue Dixon's legalism allowed for a more open acknowledgment of judicial choice than the literalist orthodoxy, and that the Mason Court's clearer articulation of policy choices owed much to Dixon's interpretative techniques. On this view, the perceived legitimacy of interpretative choices would appear to relate more to the political character of the decisions reached rather than the soundness of the judicial approach. 352

DISCRIMINATION AGAINST EMPLOYEES OF RELIGIOUS SCHOOLS IN AUSTRALIA, US AND THE EU – A COMPARISON IN LIGHT OF HUMAN RIGHTS AND DELIBERATIVE DEMOCRACY

Robert Mężyk

Should religious schools be allowed to discriminate against employees? While different legal systems offer varying answers to this question, the Australian federal regulation allows discrimination based on chosen attributes specified by the legislator. This solution has also been endorsed by the 2018 Religious Freedom Review. In the comparative context of the United States and the European Union, this article discusses three major options for regulating employment by religious schools: the solution in which the legislator foresees permissible grounds of discrimination (Australia), the model of broad exception for religious schools from discrimination laws (US) and the inherent requirements model (EU). I argue that both the theory of deliberative democracy and the requirements of human rights speak against the model of legislative specification of permissible discrimination grounds. Consecutively, I contend that international human rights support the preferability of the European inherent requirements model over the American model of general exception. 367

RESOLVING CONFLICTS AT THE INTERFACE OF PUBLIC AND PRIVATE LAW

Ellen Rock

Public and private law converge in cases where causes of action and remedies from both sides of the divide might be brought to bear, such as where the same conduct might amount to both a tort and crime, or where demonstrating invalidity of an administrative decision is an element of tortious liability. This article canvasses a range of procedural tools that can be utilised to shape the relationship between public and private law; moving between independent, staged, prioritised and collaborative relationships. The question of whether these tools ought to be utilised in a given case is influenced by a range of policy concerns tied to the interests of the parties, the institution of the courts, and the wider public. Accordingly, the relationship between public and private law, and the question of what principles and remedies ought to apply at the interface, requires a delicate balancing act between these interests. 381

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