



SPECIAL ISSUE: CRITICAL PERSPECTIVES ON AUSTRALIAN CONSTITUTIONAL LAW

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THE HIGH COURT AND ITS CRITICS

THE papers in this collection present a critical perspective on some of the more recent developments in Australian constitutional law.¹ In these introductory remarks, I wish to reflect a little on the theme of critical perspectives - not, however, critical perspectives on those developments as such, but rather critical perspectives on the institution that is responsible for them, namely, the High Court of Australia. Some of these developments have attracted very sharp criticism, particularly in political circles but also in the academy and in the media. I want to raise, briefly, three questions:

- Is this a new phenomenon?
- Is the criticism appropriate?
- Who should respond, and in what manner?

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1 The papers were originally delivered at a conference entitled "Critical Perspectives on Australian Constitutional Law" held at the Australian National University on 7-8 November 1997. They have since been revised and rewritten for publication. This introduction was part of the the Dean's welcome to the conference.

IS THE RECENT CRITICISM A NEW PHENOMENON?

It is difficult to answer this question without the benefit of good quality empirical research, something that we have had very little of in Australia, at least in relation to public perceptions of the High Court over time. There is a feeling that some of the recent criticism is unprecedented, certainly in relation to personal attacks on the judges. This may be so, although one can find plenty of instances of strong comments in times gone by. The ephemeral Justice Piddington was described by *The Bulletin* on his appointment in 1913, quite unfairly, as an "obscure junior ... with a[n] ... insignificant practice" and an intellect "of the perverse and pedantic order".² This was of course a factor that led to his resignation before he had even sat, arguably a considerable blow to judicial independence. One could cite other examples of strong and perhaps unfair criticism, and we should not forget the long tradition of larrikinism in Australian public life, so the recent criticism has to be seen in context. But the impression is that the recent attacks on the Court have been more sustained, more extreme, more personal, more pragmatic and perhaps more ill-informed than ever before.

More work needs to be done to judge whether this is indeed so, but, if it is, it may not be surprising. The Court's role has changed in a number of ways, not least the way in which the introduction in 1984 of the filtering mechanism of special leave and the abolition in 1986 of residual Privy Council appeals have gradually combined to accentuate dramatically the creative and developmental aspects of the Court's work. We may also have a more questioning, more sceptical and perhaps even more cynical community today. We certainly have a greater mass of critics, with - to take just one group - a veritable explosion in the numbers of legal academics, and we also have more rapid, even instantaneous, communications. But the law-creative role of the High Court and its position as a coordinate institution of Australian government is such a subtle and fragile thing that the community needs and deserves a more careful and sympathetic explanation than the critics seem prepared to give, or even than many of them appear to understand. So I move to consider whether the spate of recent criticism is a matter for concern.

IS THE RECENT CRITICISM APPROPRIATE?

The first point to make is that robust criticism is the very lifeblood of the accountability of the High Court. The judges are not subject to democratic recall and can be called to book only by free and informed public discussion of the soundness and adequacy of their publicly stated reasons for decision. Some of the recent critics have made the absurd straw-claim, usually in a transparently weak self-justification for criticism that is over the top, that the current intellectual climate in Australia is hostile to criticism of High Court decisions. It has never been so. Criticism that is fair and informed is not only unarguably

2 "The Ghastly Error of W. M. Hughes", *The Bulletin*, 20 February 1913, p8, quoted in Fitzhardinge, *William Morris Hughes: A Political Biography* (Angus & Robertson, Sydney 1964) Vol 1 p279.

appropriate but is also more effective. The High Court's change of direction a decade ago in *Cole v Whitfield*³ on the interpretation of s92 of the Constitution is a nice example of the potential effect of sustained and reasoned criticism of earlier wrong turnings. One is gratified that reason and rationality have the power to trump the overblown rhetoric and attention-seeking cleverness of some recent utterances that make them a caricature of true criticism.

There is, by the way, much to criticise in some of the recent law-making by the High Court. I found it rather bemusing, for example, to advise clients on the meaning and effect of *Henderson's Case*,⁴ in which a bare majority adopted what is arguably a distinction without a difference and gave minimal examples of its alleged operation. The sheer volume and complexity of the raft of recent decisions may partially explain an apparent decline in the expected standards of crispness and clarity. There is a strong case, I think, for each judge to incorporate an executive summary of his or her decision, not as a short-cut to some mythical ratio decidendi, but as a healthy discipline that helps to crystallise the basis for decision and adds intellectual rigour to an otherwise unconstrained and sometimes self-indulgent narrative.

These are of course more methodological than substantive criticisms. The major substantive battlefield for recent debate has been the permissibility of implications, particularly the implied freedom of political communication. There is a real issue about the persuasiveness of these developments, with reasonable and respectable arguments on both sides. To depict the Court's strenuous and honest efforts to develop a more persuasive justification for the implied freedom of political communication as a naked grab for power is to belittle the institution and to trivialise the debate about the proper role of the Court in the protection and enhancement of our particular brand of representative democracy. As is the tendency of all reckless exaggeration, this depiction masks a core of legitimate criticism of potential overreach by the unelected arm of government, but it so distorts the point that it must foster misunderstanding in the uninitiated.

Is this recent criticism, or at least some of the more extreme criticism that appears to be driven by the short-term agendas of opportunistic politicians or the inflated egos of attention-seeking commentators, appropriate? Is it acceptable or is it a cause for concern?

Depending on how one frames the question, I have to admit to some ambivalence here. On the one hand, my unashamed attachment to the classical concept of freedom of speech tells me that all views are entitled to compete for attention in the marketplace of ideas, and that the good will ultimately prevail over the bad. On the other hand, we know that some voices are louder and more insistent and have greater access to the marketplace than others, and that unfair criticism distorts the debate.

3 (1988) 165 CLR 360.

4 *Re Residential Tenancies Tribunal of New South Wales; Ex parte Defence Housing Authority* (1997) 146 ALR 495.

I do not think that it involves any kind of censorship or attempted censorship to say that the critics, especially the expert critics, have certain responsibilities, particularly a responsibility to be fair. Some of the recent attacks, especially by those in positions of power, have done a disservice to the Court, the community and to the critics themselves. However, we have a free and vigorous democracy, and any voice has a right to be heard, no matter how strident or intemperate and no matter how far the right is detached from its corresponding responsibility. What is necessary, obviously, is for other voices to be raised in reply. So let me, finally, comment briefly on who should respond.

WHO SHOULD RESPOND, AND IN WHAT MANNER?

It is the right of any of us of course, and perhaps our responsibility as well. But there is a case also for institutional responses. The Court itself is in a difficult position; it speaks through its judgments, and further response to criticism is all but impossible to disentangle from self-justification. That is not to say that the Court cannot take considerable steps to make its work better understood and its decisions and processes more widely accessible, but it should not be expected to do this in the context of responses to particular criticisms. The latter burden, I think, must lie elsewhere.

Some of the recent debate has been about the proper role of the Attorney-General. I have no time to go into the rich history of this unique office, and can only state here the bare essence of my view that it is proper for the Attorney to be sensitive to the need to protect the Court from unfair and ill-informed attack, particularly from other members of the government, and to explain and defend the integrity of the Court and its members. This in no way precludes criticism of particular decisions or of the Court's methodology or procedures or even of the quality of the work of the Court or of individual judges from time to time. It merely requires the Attorney to assist in the education of his or her colleagues and the community at large by acknowledging and explaining that, in the upper reaches of the law, the final court of appeal has endemically difficult choices to make, that the difficulty is not lessened by the existence of intellectually respectable arguments on both sides in most cases, that the choices made and the reasons for them are open to public scrutiny, and that, in the absence of any evidence to the contrary, there is no reason to doubt that those difficult choices are made conscientiously and with integrity. Against that background, let vigorous debate flourish!

Other institutions also have a role to play here. The Law Societies and the Bar Associations share the responsibility to respond to inappropriate or misguided attacks on the Court, as do the law faculties, individual lawyers and any others with expertise and standing in the community. Can I say to all interested parties - academics, government lawyers, and private practitioners - let us not quietly acquiesce in some of the recent departures from fairness and decency in criticism of the High Court but let us raise the standard of public debate by taking appropriate opportunities to inject our own knowledge and understanding into the public arena and providing an antidote to political opportunism, ignorance, self-aggrandisement or any other motive or explanation for attacks that we

believe are misguided or unwarranted. In that spirit, I welcome the following critical perspectives on recent developments in Australian constitutional law.

