The High Court and Free Speech: Visions of Democracy or Delusions of Grandeur?†

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1. The High Court: Pissant or Puissant?

On 25 November 1992, the High Court decided that Phil Cleary, who had been elected as the independent member for Wills at a by-election earlier in that year, was not duly elected after all and that the election was void.[1] This was said to be the inevitable result of subsection 44(iv) of the Australian Constitution, which precludes any person who holds an office of profit under the Crown from being chosen or from sitting as a member of the Federal Parliament.

The decision was met by politicians with howls of outrage, although what seems to have been even more unsettling was the further holding that the two candidates at the by-election who polled the next highest number of votes were also found to be incapable of being chosen because of subsection 44(i) of the Constitution, which disqualifies any person who is "under any acknowledgment of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power". Scores of politicians were seen scurrying up and down the corridors of power that night, checking their own citizenship status and speculating on the raft of exotic questions that followed in the wake of the decision. Did Phil Cleary have to repay his salary? Was the petitioner in the case entitled to it? Did there have to be another by-election? Were the laws passed by the invalidly constituted Parliament also invalid? And so on.

Graeme Campbell, the outspoken member for Kalgoorlie, was particularly upset and announced that he would move in the Parliament for the impeachment of the High Court. He was reported to have referred to the judges as "those pissants on the High Court".[2] This was a fascinating description, but its precise meaning was not entirely clear. There is evidently a species of Australian ant which is small, aggressive and smells like urine when crushed. On this basis, it would seem that a pissant is a person who is small and unimportant but noisy and aggressive. In the hot-bed of emotion that is Parliament

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1 *Sykes v Cleary (No 2)* (1992) 109 ALR 577.

2 *The Australian*, 27 November 1992, at 2. According to later reports, however, Campbell said that he had actually called the judges "popinjays — in the Gilbertian sense": *The Sydney Morning Herald*, 7 December 1992, at 20.

House, Canberra, "pissant" has often been a favourite word, especially in Labor circles, and in that context is said to mean that you have no influence, that you do not have the ear of the powerful.[3] But perhaps Mr Campbell really meant "puissant". Puissant means having great power or influence, the exact opposite of pissant. It would certainly be more accurate to think of the High Court as great and powerful in a quiet and low-key kind of way rather than as noisily uninfluential.

2. *The Cleary Case and the Free Speech Cases*

In fact, the low-key environment in which the High Court generally operates is underscored by the fact that every time the Court hands down a major constitutional decision that frustrates the will of the Parliament, or some other outcome of the democratic process, there is a predictable flurry of questions from politicians and journalists: "Who are these people?", "Where do they get this power?", "Has this ever happened before?" Because the High Court is not in the public eye in any sustained way, and because its role is neither well understood nor well explained in the community, amnesia sets in and each new decision seems to come as a surprise. But what seems to have provoked much of the reaction to the *Cleary* decision was the perceived contrast with two decisions that had preceded *Cleary* by a couple of months: the decisions in *Australian Capital Television Pty Ltd v Commonwealth* [No 2],[4] ("the political advertising case") and in the case involving restrictions on criticism of Industrial Relations Commissioners, *Nationwide News Pty Ltd v Wills* ("the industrial relations case").[5]

In simple terms, the contrast was said to be that, on the one hand, the High Court, in the name of democracy, invented a Bill of Rights that cannot be seen anywhere in the words of the Constitution, but, on the other, took a strict or rigid view of what section 44 of the Constitution requires, notwithstanding the immediate undemocratic consequence that the electors of Wills were then deprived of representation in the Federal Parliament. The perception was of a failure to carry through the robustness of approach of the earlier decisions, perhaps exacerbated by a dislike, at least in some political circles, of the results of all of the decisions.

In the political advertising case, the High Court invalidated Part IIID of the *Broadcasting Act* 1942 (Cth). That Part prohibited the broadcasting by radio or television of political advertisements during an election period (covering Commonwealth, State, Territory and local government elections). News items and news commentary were not prohibited, and there was provision for "free time", 90 per cent of which was to go to parties already represented in the Parliament in proportion to the extent of their current representation. But the essence of the law was the prohibition of political advertising on radio or television for the ostensible reason of inhibiting the corruption that could be encouraged by the need to raise large amounts of money to pay for that advertising.

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3 Murray-Smith, S, *Right Words* (1987) at 250.
4 (1992) 66 ALJR 695.
5 (1992) 66 ALJR 658.

In the *Nationwide News* case, the High Court invalidated subparagraph 299(1)(d)(ii) of the *Industrial Relations Act* 1988 (Cth), which provided that a person shall not use words calculated to bring the Industrial Relations Commission into disrepute. In an article published in *The Australian* in November 1989, the late Maxwell Newton had described the Commission as "corrupt" and "compliant". The High Court handed down its decisions in late 1992.

The judgments occupy around 200 pages of the law reports and it is not proposed to analyse them here; that is done in detail in other contributions to this volume. But it is important to remind those, politicians and others, prone to knee-jerk reactions that the judgments clearly deserve analysis. The persuasiveness of the Court's reasons is central to the Court's accountability, and those who criticise the Court should at the very least read carefully what the judges have to say.

3. *The Reasoning in the Free Speech Cases*

It is sufficient for present purposes to state briefly that the essence of the Court's reasoning in the political advertising case was that there is implicit in the Constitution a guarantee of freedom of communication in relation to political matters. This freedom was said to be essential to the proper functioning of our system of democratic, representative government. The freedom is not absolute, but the restrictions imposed in the political advertising case were said, with one dissent,[6] to go further than was reasonably necessary.

The reasoning in the industrial relations case was similarly based, with emphasis on the principle of freedom to criticise the institutions of government, but a majority of the judges preferred to take the more conservative route of saying that the power of the Federal Parliament to legislate in the area of industrial relations simply did not extend as far as the Parliament purported to go in section 299 of the *Industrial Relations Act*. By contrast, the Court had no doubt in the political advertising case that the law in question otherwise fell within the power of the Parliament to legislate in the area of radio and television broadcasting. Notwithstanding this, the broadcasting ban was invalid because it infringed the implied constitutional guarantee of freedom of communication.

Without pursuing the subtleties of this contrast, it is worth noting that the route by which a law is held to be outside a head of power is the Court's more traditional way, and may show some sensitivity to the advantages of a minimalist solution, rather than a radical, interventionist one, in a context in which intellectual persuasion is the Court's only real weapon. Having said that, however, I wonder whether, at least in the circumstances of these two controversial cases, there is really any material difference between the two approaches (and also whether, at least in the minds of those particularly affected, it is really the outcomes of the cases that are of greater significance). In any event, from here on I refer, without refinement, to the two decisions as standing for the discovery of an implied guarantee of freedom of communication.

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6 Above n4 at 713 per Brennan J. Dawson J dissented, however, from the main holding that such a freedom could be implied: above n4 at 722 and 723.

4. *How Far do the Free Speech Cases Go?*

With that background, it is proposed to comment on two aspects of the decisions. First, how far do the decisions go? Is there a question mark over, for example, our defamation laws, over the legislative banning of, say, tobacco advertising, and over our range of censorship laws, Commonwealth and State, including those, for example, dealing with pornography? Secondly, can the High Court's approach in the free speech cases be justified?

The first point to make is that the High Court has not said that there is a general right to free speech in the Constitution akin to the First Amendment of the United States Constitution. The discovered freedom was embedded firmly in the context of politics and government. It was a right to communicate political ideas in the interest of the proper working of representative democracy. In this context, neither the ban on political advertising nor the very wide restriction on criticism of Industrial Relations Commissioners could be sustained. But let me make three brief observations about any possible extension.

First, there are some comments scattered throughout the various judgments which can be read as support for a wider freedom of speech and perhaps for other freedoms also. But the Court has often warned, and rightly so, against reading throwaway lines in judgments as if they were the words of a statute to be applied at face value in the next case.[7] The next case — and litigation in relation to defamation is underway[8] — will involve considerably more cooking of issues that are at present only half-baked (and possibly the addition of new ingredients as well). The High Court will also have to decide, for example, whether the discovered and yet to be discovered freedoms apply not only to Commonwealth laws but also to State and Territory laws.

Secondly, even if the Court holds the line at freedom of communication of political ideas in order to sustain representative government, it will not be an easy matter to say what falls within the concept and what falls outside it. Defamation is a good example. Freedom to speak freely about and to criticise public figures, especially political leaders, may be thought to be essential to the proper workings of democratic government. And some would make the wider point that all speech is political, that freedom of expression, freedom from censorship and the right of adults to see and read whatever they choose, are essential to the healthy working of a democratic system of government.

Thirdly, anyone making a prediction has to bear steadily in mind that the discovered freedom of communication, and any associated freedom, is not absolute. The public interest in these freedoms has to be balanced against the public interest in certain restrictions. Even in the political advertising case itself, one judge (Brennan J) thought that the ban was a reasonable and proportionate restriction on the guaranteed freedom of communication.[9] When it comes to restrictions in the interests of reputation (such as those presently authorised by

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7 See, for example, Mason, A, Book Review (1983) 6 *UNSWLJ* at 234–235.

8 Two cases were pending in the High Court at the time of publication: *Theophanous v Herald & Weekly Times* and *Stephens v Western Australian Newspapers Ltd* (both argued September 1993).

9 Above n4 at 713.

the law of defamation), physical health (such as restrictions on product advertising) and social health (such as restrictions on pornography), the position is far from clear-cut. It may be that the High Court would be reluctant to second-guess the present balance struck by the law of defamation between allowing free speech on the one hand and protecting reputation on the other, and the present mechanisms, including jury decisions in some jurisdictions, for achieving the balance. The more there is room for argument about the right balance, the more the Court is likely to defer to the decisions of the various legislatures.

This is not to say that the more extreme restrictions may not be vulnerable; it is merely to caution that even if the High Court were to hold that there is a general right to free speech in the Constitution, it would not follow automatically that journalists could be completely scurrilous or that the sale or display of pornography could not be legislatively controlled. The experience of other countries with explicit constitutional guarantees of free speech, including the United States and more recently Canada, is and would be instructive in indicating how the balance might be struck.[10]

5. *Can the Free Speech Decisions Be Justified?*

Having flirted with the intriguing question of how far these recent High Court decisions go, I turn to the even more intriguing question of whether the decisions can be justified.

For the purpose of evaluation, it should be kept in mind that the central point is this: the High Court struck down two laws of a democratically elected Parliament, one prohibiting political advertising on radio or television in an election period and the other prohibiting criticism of Industrial Relations Commissioners, and did so not by reference to any express provision in the Constitution capable of being seen and read by others but by reference to a guarantee of freedom of communication said to be implicit in the very fabric of the Constitution. The question is whether the Court was justified in finding this implied guarantee.

The initial public and media reaction to the decision in the political advertising case seemed to be positive, as if there were almost a consensus that the ban had been a bad thing. Even some of its Labor sponsors seemed relieved. But attention soon turned to the overarching institutional question: by what right does the High Court overturn the judgment of the nation's elected representatives? It is proposed here simply to lay out some of the arguments for and against. The immediate public debate was not particularly well-informed. The following are some of the relevant considerations.[11]

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10 See esp *Hustler Magazine v Falwell* 485 US 46 (1988); *Milkovich v Lorain Journal Company* 497 US 1 (1990) (defamation); *Posadas de Puerto Rico Association v Tourism Co* 478 US 328 (1986) (product advertising); *Osborne v Ohio* 495 US 103 (1990) (pornography). See also Fleming, J, "Libel and Constitutional Free Speech" (1991) in Cane, P and Stapleton, J (eds), *Essays for Patrick Atiyah* at 333.

11 These remarks were originally directed mainly to journalists, politicians and the general public, but it is never a bad thing, even for lawyers, to go back to basics. For more detailed analysis, see, in addition to the other contributions to this volume, Cass, D, "Through the

I start with the arguments against, the criticisms of the High Court, because it was the criticisms which grabbed the limelight as soon as the politicians turned their minds from the immediate result of the case to the cold, hard fact that their law had been overturned by a higher power.

A. The High Court and Democracy

The decision was said to be undemocratic. There is some irony in this criticism, as democracy was the very consideration to which the Court turned to justify its decision that the legislative restriction on free speech was obnoxious. But the essence of the criticism was the fundamental point that the Court is not an elected body, accountable to the people, but is appointed, virtually for life, and, except in extreme cases, beyond recall.[12] Is it not, then, fundamentally undemocratic for such a body to overturn the wishes of a democratically elected body whose very purpose in life is to make the country's laws?

This is an age-old question in any country with provision for judicial review under a written Constitution and has been long debated, to a high degree of sophistication, in the United States. And because there is a hard core of truth in the criticism, the issue continues to be debated, and that debate has a direct impact on the methods and principles of constitutional interpretation adopted by the courts from time to time.

However, the fact of judicial review has been an accepted feature of our Constitution from the beginning, and in that respect there is nothing remarkable about the political advertising case. Contemporary reports suggest that there was at least as much shock and horror when the High Court invalidated Labor's bank nationalisation legislation in 1948, and also (in a nice display of even handedness), the Menzies Government's Communist Party ban three years later in 1951. And the upholding of legislation can be just as controversial, as the *Franklin Dam* case demonstrated in 1983.[13]

So I do not want to dwell on this point, as it is much larger than the present controversy, even though central to it. But in the interests of balance, let me very briefly make two points in answer to the claim that judicial review is undemocratic.

First, it is quite simplistic to think that democracy means no more and no less than the will of a legislative majority. In the first place, a federal system is itself a dilution of simple majority rule. A federal system is a complex system,

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Looking Glass: The High Court and the Right to Speech" (1993) 4 *Public LR* 229; Douglas, N, "Freedom of Expression under the Australian Constitution" (1993) 16 *UNSWLJ* 315; Smallbone, D, "Recent Suggestions of an Implied 'Bill of Rights' in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation" (1993) 21 *Fed LR* 254; and three as yet unpublished papers given at *Future Directions in Australian Constitutional Law*, conference in honour of Professor Leslie Zines, 3–4 December 1993, Canberra: Blackshield, A, "The Implied Freedom of Communication"; Goldsworthy, J, "Implications in Language, Law and the Constitution"; and Lindell, G, "Recent Developments in the Judicial Interpretation of the Australian Constitution".

12 Australian Constitution s72. The judges are appointed until the retiring age of 70 and can be removed only by the Governor-General on an address of both Houses of the Parliament for proved misbehaviour or incapacity.

13 *Commonwealth v Tasmania* (1983) 158 CLR 1.

in which we have organised ourselves into different communities for different purposes, and with differently weighted voting strengths, as a moment's thought about the Senate, or even about the people at a referendum (given the need for a majority in a majority of States), will demonstrate. And we do not organise ourselves only in geographical communities; democracy is as much about the protection of minorities as it is about majority rule, a consideration which leads directly to the concept of a Bill of Rights.

But most importantly, democracy is about the separation and sharing of power between different institutions and the blunting of absolutism in any form. The High Court's role as independent arbiter of the Constitution is one ingredient of this power sharing, or of what the Americans prefer to describe as a system of checks and balances. The trick here is to ensure that the right institutions are doing the right jobs. Functions that are appropriate to an elected body are not necessarily appropriate to a body intended to be independent of political pressures, and vice versa. This is really more an empirical question than a theoretical one, which is why, in the debate about whether the High Court should second-guess the Parliament, attention often focuses on the very practical question of just how well the Parliament is actually doing the job of, say, protecting free speech (this is the so-called "filling the void" argument).

The second reply to the claim that judicial review is undemocratic is that it is misleading to say that the High Court is totally non-accountable. Its accountability comes about through professional and public scrutiny of its decisions. The courts are atypical in the extent to which they expose themselves to scrutiny by publishing at some length the reasoning in support of their decisions. Certainly, that reasoning is sometimes inscrutable, inelegant, incomplete or simply unpersuasive, but it does provide the starting point for debate. There are many examples of the High Court responding, over time, to sustained and compelling criticism and doing so without compromising its independence of any political or sectional interest. The High Court does not operate in a vacuum, or even only in the cloistered atmosphere of lawyers' law. (Obviously, in order to sustain the argument that the Court is accountable in this way it is important that the Court's decisions and reasoning be widely accessible; in this respect a lot of work remains to be done.)

B. The Idea of Implications

However, reference to the persuasiveness of the Court's reasoning leads directly to a further criticism of the Court's decision in the political advertising case, and one of more particular relevance than the general point that judicial review is undemocratic. I foreshadowed this criticism in my earlier description of the decision: it is that the Court based its decision not on any express guarantee of freedom of communication in the Constitution but on the notion that such a guarantee may be implied.

This notion is deservedly controversial. If the guaranteed freedom cannot be seen in black and white, how do we know whether it is really there? Is not the idea of implied guarantees unacceptably subjective?

This is an important point that links directly back into the discussion of democracy. As the judges are not elected, the legitimacy of their power to overturn the Parliament depends very much on their ability to justify their exercise

of that power by reference to objective touchstones in the Constitution: by reference, for example, to a clear, written mandate that this is what the authors of the Constitution intended.

However, two points should be made in defence of implied guarantees.

First, the idea is not new; it would not be correct to think of the idea of implied personal freedoms as merely the invention of today's radical and activist High Court. Certainly today's Court is activist, for a variety of reasons, but two judges of the High Court used similar reasoning to invalidate a State restriction on freedom of movement between the States as long ago as 1912.[14] From 1920 onwards, this kind of approach fell into disfavour as it was supplanted by a more literal approach to constitutional interpretation generally.[15] The late Justice Lionel Murphy revived the idea in a number of cases,[16] to which, surprisingly, there is scant reference in the political advertising case. It is rather interesting, and a little puzzling, that prior to the political advertising case, the idea of implied guarantees seemed to be widely regarded as nothing more than an idiosyncratic Murphy aberration, yet now we seem to have gone to the other extreme of not even acknowledging his contribution.

The more general idea of implied constitutional principles is certainly not new. Indeed, for a long time the High Court has recognised an implied constitutional principle that prevents the Commonwealth from legislating in a way that singles out or puts a special burden on the States.[17] This and other like principles[18] have been drawn from implications about federalism rather than from implications about representative government, but the underlying process is the same. The federalism implications are really no less controversial, but if the process of drawing implications is accepted, the argument can only be about the content.

The second point to make in defence of implied constitutional guarantees, and of implied constitutional principles in general, is that it is impossible to properly and fully interpret any legal document without making implications of some kind. And there is a pretty fine line between identifying a principle that is said to have some textual support, and implying a principle that stands wholly outside the text. Some constitutional provisions are so general that interpreting them is not significantly different from extracting implications from the "federal nature" or "democratic theme" of the Constitution.

6. *Judicial Intervention in the Interests of Democracy*

In the end, the question is whether an implied principle adopted by the Court, and the application of that principle in a particular case, is persuasive.

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14 *R v Smithers; ex parte Benson* (1912) 16 CLR 99 (Griffith CJ; Barton J), building on the United States Supreme Court decision in *Crandall v State of Nevada* 18 L Ed 745 (1868), 73 US (6 Wall) 35 (1867).

15 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

16 See Coper, M, *Encounters with the Australian Constitution* (1988) at 324–331.

17 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192.

18 Cf *Leeth v Commonwealth* (1992) 107 ALR 672; Coper, M, "Lawyers, Political Scientists and the High Court" (1993) in Fletcher, C (ed), *Encounters with Federalism* at 17–23.

This deceptively simple proposition begins to take us around in circles, but I would have thought, to return to the political advertising case and express a personal view, that the Court's intervention to second-guess a legislative decision is most justified where that intervention is precisely in order to strengthen the integrity of the political process. In other words, the Court should be very cautious in overturning the will of the Parliament without a clear and explicit mandate in the Constitution, and should generally defer, on democratic grounds, to the expression of that will, but the case for such deference is weaker as the political and Parliamentary process is less democratic. If the Court's intervention can, although somewhat paradoxically, make the political process more democratic, then there is, in my view, much to be said for it.

If, for example, there is unfairness in the electoral system, it is somewhat hollow to say that democracy demands that the issue be left to be sorted out by the Parliament if that Parliament is the very product of the unfairness in the system. The Court can play an important role in identifying the minimum standards that are required of the political process before the sensible and necessary principle of judicial self-restraint and deference to that process takes over. And this need not be confined to electoral matters. There is an argument that, through principles such as freedom of speech, the Court may vindicate the rights of minorities who otherwise do not have a voice in the political process, thereby strengthening the democratic nature of that process.

Clearly, my suggested principle, that the Court can justify its intervention on the basis of an implied guarantee only where that intervention strengthens the democratic process, is elusive. It may be that the ultimate justification lies in the ability of the people to second-guess the High Court if necessary, by changing the Constitution at a referendum,[19] although the referendum possibility is also used by those who would say that there is no justification for implying Bill of Rights type provisions because the Constitution allows and envisages that such provisions should be adopted explicitly by amendment.[20] (On the other hand, are there instances in which the High Court could arguably imply guarantees to strengthen the referendum process?)

7. *The Constitution and Chance*

To return to the *Cleary* case, the door through which we entered upon this discussion, it will be recalled that that case required interpretation of an express provision of the Constitution. Six judges took the provision at face value, whereas one (Deane J) was a little more creative (I am referring here to subsection 44(iv)). It was a different exercise from the political advertising case, in which the elusive reasoning may have misled some of the Court's critics into thinking that the Court is purely result-oriented and unconstrained by the text of the Constitution. The truth is that constitutional interpretation is a complex thing,[21] and it deserves critical debate that is informed and is sensitive to those complexities.

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19 Cf Toohey J, "A Government of Laws and Not of Men?" (1993) 4 *Public LR* 158, esp at 170–174.

20 Coper, M, "The People and the Judges: Constitutional Referendums and Judicial Interpretation", paper given at the conference referred to above n11.

21 Coper, M, "Interpreting the Constitution: A Handbook for Judges and Commentators"

When I wrote *Encounters with the Australian Constitution* a few years ago, I rather mischievously entitled one chapter "Is there a Bill of Rights in the Constitution?"[22] Obviously there is no explicit and comprehensive Bill of Rights, and the critics of the recent voyages of discovery by the High Court would say that that reflects a conscious decision not to have provisions in the nature of a Bill of Rights. The voyagers and their defenders say that some rights were so important and fundamental that it was unnecessary to state them. Perhaps we should take into account that we might have had a Bill of Rights in the Constitution if the Tasmanian, Andrew Inglis Clark, the great proponent of a Bill of Rights, had not caught the flu on the Easter weekend of 1891 and missed most of the Hawkesbury River cruise on the SS Lucinda, where the drafting committee of the 1891 Convention wrote the essence of what became the present Constitution.[23] I have not yet seen a developed constitutional theory based on the chance events and mundane happenings surrounding the drafting of the Constitution, but it might provide a good, earthy counterbalance to some of the more abstract theories of constitutional interpretation.

With that brief excursion into the High Court and chaos theory, I conclude by recalling that the modest aim of this short essay was simply to lay out some of the considerations pertinent to appraising the High Court's recent activism in the area of implied guarantees. That appraisal, to which this volume is devoted, is important not only in retrospect but also in prospect. If the weather in New York can be affected by a butterfly flapping its wings in Beijing,[24] then it is not too much to expect that the ruminations of the critics in the *Sydney Law Review* will not be altogether irrelevant to the High Court's future approach to implied constitutional guarantees.

(1983) in Blackshield, A (ed), *Legal Change: Essays In Honour of Julius Stone* at 52; also above n16 at 366 ff.

22 Above n16 at 291.

23 La Nauze, J, *The Making of the Australian Constitution* (1972) at 64.

24 Gleick, J, *Chaos* (1987) at 8.