Judging Democracy: The New Politics of the High Court of Australia

Haig Patapan
Cambridge University Press, 2000, $39.95 pb.
ISBN 0 521 77428 4 (paperback)
ISBN 0 521 77345 8 (hardback).

In this ambitious book Patapan seeks to undertake a general assessment of the 'politics' of the High Court's recent constitutional jurisprudence. While others such as Brian Galligan and David Solomon have exposed the 'old' politics of the Court as arbiter of the federal division of powers, Patapan is concerned with a 'new' politics in which the Court is consciously attempting to reshape and strengthen Australian democracy; to 'judge democracy', so to speak.

Developments such as executive control of Parliament and Australian constitutional jurisprudence. While others have abandoned the legalistic view that its role is merely to declare or discover the law. The Court now admits that it must make law, which implies admitting to a role which is apparently legislative, provoking the criticism that the Court is engaging in judicial politics.

Moreover, Patapan argues, the new politics of the High Court has adopted is 'predicated on the need to accommodate change', to keep the Constitution 'up to date'. And while the Court is to be guided by 'community values', these emerge from informed debate conducted within the 'deliberative community'; they are not the results of surveys and opinion polls (25). But to rely on informed opinion is to rely on elite opinion, and this explains much of the popular and political discontent with the new politics of the High Court.

The problem, however, is that Patapan overstates the case. As Sir Anthony Mason cautioned in the Foreword to the book, the High Court is not a 'monolithic institution', but consists at any time of a group of seven justices, each having 'individual judgment' and 'conflicting views'. These conflicting views have extended to different conceptions of the judicial function.

Thus while Patapan is correct to draw attention to statements (such as those of Sir Anthony himself) adopting the 'realist' view that judges 'make' law, the Chief Justice did not speak for the Court as a whole. For example, Sir Gerard Brennan very clearly insisted that implied rights are only to be 'uncovered', not 'made', and later explained that in constitutional law there is no 'leeway for judgment'—apparently distancing himself from Julius Stone's sociological jurisprudence in this respect. Even Justice Gaudron, who admitted the legislative function of the judiciary, likewise insisted that the Court must restrict itself to 'political principles or theories' that are 'anchored' in the text or structure of the Constitution.

The central weakness of Patapan's book, therefore, is that the questions he asks presuppose that 'the Court' (as a whole) has adopted a sociological jurisprudence and a reformist agenda.
Time and again, Patapan imputes intentions and goals to the Court as an entire institution. But on the contrary, individual justices have their own approaches to these issues.

Patapan rightly draws attention to 'divergent and . . . irreconcilable positions' held by different judges (32) and his analysis of the cases accurately identifies many nuances and divergences. However, he interprets these as problems with sociological jurisprudence, rather than different conceptions of the judicial function.

Patapan is correct to point out that ideas like 'common law', 'implied rights', 'the separation of powers' and 'the sovereignty of the people' are capable of very different interpretations. He is also correct to point to the tensions inherent in so many of the Court's decisions. But more than showing that the Court has failed to construct a coherent democratic vision, the evidence casts doubt on the proposition that 'the Court' ever set out to achieve such an objective.

Patapan does well to demonstrate the tension between the idea that the Constitution guarantees certain fundamental political rights and that the Constitution is to be interpreted in terms of 'current democratic standards'. Patapan identifies similar tensions in the way in which the Court incorporates native title into Australian property law.

Another tension consists in the admission that the Court 'makes' law and the Court's own insistence on the proposition that it must consist of undated, tenured judges who are fully independent of the 'political' branches of government. But in canvassing the detail, Patapan's analysis serves to undermine the assumption that the Court has set for itself an ambition to judge democracy.

Towards the end of the book, Patapan says as much. He recognises that members of the Court continue to adhere to versions of the declaratory theory in particular contexts (123, 140, 182). This, and the tensions inherent in many of the decisions, show that the Court does not hold a 'comprehensive view'; its decisions are 'a palimpsest of different constitutive ambitions' (184).

But most revealingly, Patapan concludes that 'perhaps' he was 'too ambitious' in searching for a 'comprehensive and consistent' vision of Australian democracy. He accepts that there were problems with postulating 'a single unified Court'. He points out that the Court's decisions are actually 'determined by the individual wills and desires of the justices and the coalitions they can muster to secure a particular outcome'. Thus while Patapan had sought to examine the 'mind, reasoning and opinion' of 'the Court', the evidence presents 'an accidental collage of thoughts and opinions' (184-5, 189).

Nevertheless, Patapan resists this conclusion. He continues, to the end, to insist that the 'extra-curial claims of the justices themselves' and the Court's occasionally radical departures from precedent 'indicated and promised a much more ambitious plan' (189).

The Court really did intend to set forth an overarching and comprehensive vision by which to evaluate and strengthen Australian democracy.

And what is this vision? Patapan briefly sketches a model of democracy which, he says, the Court has adopted—a broad-brush model in which republican ideals of popular sovereignty and fundamental rights are central.

But this is all, as he concedes, very general; too general, we might add. What is needed, in Patapan's words, is a 'more subtle evaluation'. Patapan has written a useful prolegomenon to such a task; but his book promised more.

Reviewed by Nicholas Aroney