



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

Haig Patapan
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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 Australia's continuing lack of a Bill of Rights, have 'compelled' the Court to 'reconsider the adequacy of Australia's political institutions' (20, 179). This, Patapan suggests, has been expressed in a new approach to interpretation, in the implication of rights and freedoms, in the redefinition of citizenship and the structure of the representative system, in the development of indigenous rights such as native title, and in the protection of the integrity of the judicial process through the separation of powers (5-7).

In chapters dealing with each of these topics, Patapan seeks to discuss the nature,

problems and limits of the new politics of the High Court. As a political scientist, he attempts to describe the cases, rather than analyse and critique. He seeks to identify important themes, tensions and contradictions, rather than provide solutions. While none of his specific observations are particularly novel, the chief value of the book lies in the convenient manner in which it gathers the material. However, it is for this reason a difficult book to review: there is little to disagree with in its particular observations.

Patapan's fundamental question throughout is whether in judging democracy in these ways the Court has adopted a 'coherent and comprehensive democratic vision of the Australian polity' (6, 179). This is a crucial question because the Court has been exposed to the criticism that its new politics has been *improperly* political. Against such charges, one of its defences might lie in the consistency and attractiveness of its democratic vision. But what if no such vision emerges? And if no such vision has emerged, why is this so? Have institutional, practical and political constraints hampered the Court's efforts? These are the questions that Patapan seeks to answer.

For Patapan, the old politics of the High Court, derived from the *Engineers* case, positioned the Court as arbiter of disputes between the Commonwealth and the States. To do this effectively, it was important that the Court appear to be politically neutral. It achieved this through the use of literalistic and legalistic methods of interpretation. Such methods suggested that the role of the Court was merely to apply the text of the Constitution to each case at hand. Fundamental, therefore, to this judicial philosophy was an acceptance of the sovereignty of Parliament. Occasionally, the Court might find legislation to be unconstitutional, but when doing so, the Court was merely giving effect to the plain language of the Constitution; it was certainly not substituting its own political judgments for those of the legislature.

But in the new politics, Patapan maintains, the High Court has 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 is to admit to a role which is apparently legislative, provoking the criticism that the Court is engaging in judicial politics.

Moreover, Patapan argues, the sociological jurisprudence which the 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 McHugh, 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 unelected, 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 observations' (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.

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Reviewed by Nicholas Aroney

**Greenspan:
The Man Behind Money**

Justin Martin

Perseus Publishing 2000

284 pp, USD 28.00

ISBN 0-7382-0275-4

**Maestro: Greenspan's Fed
and the American Boom**

Bob Woodward

Simon & Schuster 2000

270 pp, USD 25.00

ISBN 0-7432-0412-3

Alan Greenspan is an interesting figure from a classical liberal perspective. A strong advocate of free markets, Greenspan has at the same time successfully negotiated the pragmatic world of Washington to head one of its most powerful institutions, the US Federal Reserve. That Greenspan should be the subject of two books targeted at a general audience is testimony to his success in this role. As a central banker, Greenspan has assumed an unparalleled degree of national and international prominence. One could also argue that this makes him the world's most prominent market liberal.

Justin Martin provides the more detailed account of Greenspan's early years and the importance of his association with Ayn Rand. Greenspan was introduced to Rand's inner-circle by his first wife, Joan Mitchell, a childhood friend of Barbara Branden, who later wrote the kiss-and-tell *Passion of Ayn Rand* (1986). While Greenspan had already been strongly influenced as a student by economists with free market leanings such as Arthur Burns, Rand is credited with rounding out his commitment to liberalism with her moral