
Book Reviews

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THE CRITICAL JUDGMENTS PROJECT – RE-READING MONIS V THE QUEEN

The Critical Judgments Project – Re-reading Monis v The Queen, by Gabrielle Appleby and Rosalind Dixon (eds), Federation Press, 2016, 272 pages: ISBN 9781760020750. Softcover \$79.95.

Ten years ago Man Haron Monis (who later died in the Lindt Café siege) and his partner Amirah Droudis began sending letters to the families of Australian soldiers who died in Afghanistan. The letters accused the soldiers of engaging in terrorist activity by killing innocent civilians. Monis and Droudis were charged with Commonwealth offences, which alleged that they had used the postal service to convey communications that reasonable persons would regard as being highly offensive. They challenged the indictment on the basis that the law was invalid, because inconsistent with the implied freedom of political communication guaranteed by the Commonwealth *Constitution*. That argument was rejected by the trial judge (Judge Tupman) in the District Court and by the NSW Court of Criminal Appeal. The argument also failed in the High Court, but it did so in unusual circumstances; the Court, having sat six justices, split 3:3: *Monis v The Queen* (2013) 249 CLR 92. The division was seen as noteworthy because it was on gender lines, the three male justices having voted to uphold the appeal and the three female justices having voted to dismiss the appeal. (In the equally divided Court, the appeal was dismissed.)

These features of the case led the editors of this book of essays, both eminent constitutional lawyers at the University of NSW, to invite a number of Australian academic colleagues to write a seventh “judgment”, each from a different and specific perspective. The book was partly inspired by the “feminist judgment project” in which feminist scholars “rewrote” selected cases from a particular (feminist) perspective. By contrast, this book contains 12 additional “judgments” for the one case, designed to offer critical insights into Australian constitutional law and, in particular, the implied freedom of political communication. It is true, as Margaret Davies notes in the final chapter, that “critical thinking”, which seeks to analyse and identify values underlying legal principles, does not “sit comfortably with the notion of deciding a case”. Nevertheless, as Davies also recognises, the device provides a variety of interesting insights into both the underlying values at stake and methods of judicial reasoning.

Each chapter commences with brief extracts from established scholars outlining the chosen theoretical perspective; a brief, admirably succinct, “judgment” follows, adopting and applying the relevant perspective. It is clear that the spirit of the project engaged the writers, most chapters being well written and knowledgeable. However, some approaches offered more opportunity for insight than did others.

By far the most productive were those dealing with the intrusion of political speech into private life. For example, Margaret Thornton questions whether the fact that the appellants may have had a political motive in sending the letters engaged the freedom of political communication at all. The receipt of the letters occurred within the privacy of the home, not an environment conducive to political debate, whether “robust” or otherwise. Yet, if the conclusion that the constitutional freedom was not engaged flowed from a feminist analysis, it is curious that two other chapters adopting feminist approaches did not find it necessary even to address that issue. Furthermore, it is intriguing that no justice (or judge) sitting on the case reasoned in that way, even to reject the conclusion reached by Thornton. On the other hand, while the conclusion has much to commend it, the essay does not engage with the question whether party-political material attracts the implied freedom when sent by post, and if so, why. If the freedom is engaged in relation to such material, it must have been the personal nature of the communications sent by Monis and Droudis which took them outside the category of protected political speech.

Katherine Gelber reaches the same conclusion, namely that highly offensive communications of this kind do not burden political speech, drawing on the treatment of racial hate speech under an approach labelled as “critical race theory”. She reasons that prohibiting hate speech (which is closely analogous to the material the subject of the charges) promotes public discourse by allowing all persons to participate, rather than by alienating some by demeaning abuse.

One might not expect the application of a “restorative justice” approach to yield fruit. However, by extracting, somewhat awkwardly, the complaint that “the legal system” is blind to emotional harm, Melanie Schwartz and Anna Olijnik accept the legitimate role of government in protecting people, not merely from physical harm, but also from emotional harm. They engage directly and explicitly with the reasoning of Hayne J in *Monis*, which they see as adopting an overly restrictive and dismissive approach to protection from emotional harm.

However, even a flexible approach to the assigned framework cannot always produce useful insights. Neither the implied freedom nor the statute engages with principles of “preventative justice”. The result is an unpersuasive attempt to apply the proportionality principle (proposed as a basic principle of the criminal law by Andrew Ashworth and Lucia Zedner) to the *Lange* test, on the basis that both areas engage proportionality reasoning. Although the authors seek support in the joint reasons in *Monis* itself, that judgment explicitly recognised the variable forms which proportionality reasoning can take in different contexts.

Andrew Byrnes’ chapter, written as a decision of the UN Human Rights Committee in response to a putative complaint under the First Optional Protocol to the International Covenant on Civil and Political Rights, nicely illustrates the limitations (to a common law reader) of the declaratory style of reasoning as a subject of critical analysis.

Putting that approach to one side, of the other 12 “seventh judgments” of the High Court, nine uphold the law and three find it invalid. That discrepancy is itself worthy of analysis, but the final chapter abandons the constitutional law student to his or her own insights, by summarising what the diligent reader has just read (for a second time actually, because the first chapter also contains a summary of the succeeding chapters). An intriguing insight for a constitutional lawyer is that those who would uphold the law were clearly influenced by the content of the communications the subject of the charges. Should they have been? The conventional answer is, no; rather, it is the scope and potential operation of the statutory prohibition, as it applies to political speech, which should be assessed. Indeed, it might not matter if the conduct involved in the case (the sending of the offensive letters) had no political element; if the offence-creating statute infringed the implied freedom and could not be read down, as the High Court unanimously held it could not, so as not to apply to political communications, the statute would be invalid.

There is much to be said for the view that the engagement of the implied freedom in this case was bizarre, not, as Heydon J thought, because that would cast doubt on the justification for the implied freedom (and thus its existence), but because the Court did not need to go so far by way of abstract analysis. To impose a justifiable constraint on legislative power only required the application of the statute to the facts of the case. That point is made by Rosalind Dixon, who states that even if the offence-creating section “might be found unconstitutional in certain future cases, it is clearly constitutional as applied to the facts of this case” (pp 145-146). She notes that the US Supreme Court considers all constitutional challenges to legislation on an “as applied” basis, rather than a “facial” basis; a free speech challenge will only be considered on the latter broader basis if the statute substantially overreaches and is “thus likely to have a significant ‘chilling effect’ on the exercise of protected rights” (p 147). There is, arguably, an even stronger case for such an approach in assessing legislative competence, as we do in Australia.

It could be said that the book fails to pull together the consequences of the differing approaches in a way that reveals flaws in conventional constitutional reasoning; however, that may invite the querulous response of a frustrated academic: “I don’t mind spoon-feeding students, but I do draw the line at working their jaws.” There are some minor editorial infelicities in the book: each of Chs 11 and 12 has two authors who adopt a single judicial persona, but fail to resolve whether to use the singular or plural first person pronoun. (The first person pronoun is a trap for judges on collegiate courts too.)

But these are minor complaints; the book is an imaginative treatment of an important constitutional law principle. It should provoke and stimulate students; it can also reveal new insights to experienced lawyers. The editors, the authors and Federation Press are to be congratulated on its publication.

Justice John Basten
Judge of Appeal, New South Wales Court of Appeal