



Chapter 1

Some Reflections on the Role of Courts in Public Law

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A striking feature of public life in modern liberal democracies is that many of our citizens regard our courts as the most successful of the three branches of government. Judicial decisions are made by disinterested professionals after hearings in public for reasons which must be fully stated.

Usually these decisions are made with the assistance of argument from skilled counsel whose first duty is to the administration of justice, and whose second duty is to ensure that every argument that can fairly be put on behalf of the client is put and is put as well as it can be. The transparency and evident rationality of the proceedings of this arm of government is very attractive when compared with much of the decision-making of the executive arm of government.

And in Australia, in particular, the contrast with the sheer eye-crossing banality of parliamentary debate is striking.

The attraction of the courts as fora for the ventilation of issues of public importance is reflected in the growth of public interest litigation, the pressures to liberalise standing requirements and to reduce the availability of cost orders against unsuccessful claimants, and demands for access to justice manifest in the pathological growth in the number of self-represented litigants.

The courts and the judiciary are clearly successful in their essential role as the guarantors of fairness and rationality in governmental decision-making: as what Spigelman CJ called the “integrity branch of government”.

But I think that it would do us no harm to reflect upon the possibility that it may be unwise to oversell the claims of the judicial system. Judicial wisdom and judicial processes may not be fitted to ensure rationality in the resolution of broad political questions involving competition between values such as free speech and privacy. As David Hume said: “Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them”.

A truly political question, that is, the kind of issue as to competing values and interests which divides the major political parties, does not cease to be so because a court is required to decide it, and it may be to hold out a false hope to suggest that opposed political interests can be reconciled to the community’s satisfaction by the rational processes of judicial decision-making.



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