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Cold War Justice? Judicial Responses to Communists and Communism, 1945-1955

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Abstract

In times of crisis, how much can courts do constrain the other branches of government? On the whole, the answer would seem to be 'not much'. Courts are, after all, presided over by people who are likely to share many of the values and assumptions of the 'political' branches of government. Moreover they are responsible for enforcing law, and law is largely determined by the political branches. There are, however, circumstances in which courts may constrain the other branches. Judicial careers are not the same as those of bureaucrats and politicians and judges' world-views are likely to reflect their distinctive antecedents and roles. The inherent ambiguity of law means that courts are – within limits – able to place their own meanings on it. Moreover even when laws are unambiguous, their interpretation and application may impose constraints on the political branches. Laws may reflect what governments think they can get away with rather than what they would like to be able to get away with, and, faithfully interpreted, can therefore serve to constrain government. And the application of law is dependent on findings of fact. So courts' insistence on evidence may constrain governments which would otherwise be content to act on the basis of assumptions.

This article examines how courts reacted to cases involving communism during the early cold-war years. In Part I I provide a brief description of the political and legal climate within which the courts were operating. In part II I discuss the higher and lower court cases in which courts responded to cases involving communists and communism. In part III, I explore the implications of these decisions, for an understanding of the role of courts in times of intense political emotion. My analysis is complicated by conceptual and evidentiary problems, but I argue that judicial reactions to communism reflected a complex mixture of judicial politics and law, with law tending to prevail insofar as its content was relatively clear and politics becoming more important when 'law' was relatively ambiguous. During that period courts occasionally created opportunities for political repression. Sometimes they enforced repressive laws in a relatively repressive manner. Usually they enforced mildly repressive laws in a relatively mild manner, and occasionally' albeit spectacularly, they sometimes struck down harsh laws, upheld communists' legal claims, and acquitted communist defendants. On balance their role was to restrain official anti-communism and this seems to have been partly a response to judicial politics, partly a result of insistence on the rule of (positivistically-defined) law, and partly a result on their concern for evidence.

Queensland: Where Imprisonment is Not Punishment

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Abstract

Queensland law now authorizes a court to imprison a citizen on the basis that he or she has presents an “unacceptable risk to the community”. This is not done as part of the sentencing process, but y consequence of a procedure tacked onto the end of a person’s sentence that bears no real relationship to a criminal trial. The imprisonment of a citizen not for what they have done but for what they *might* do represents a radical departure from traditional judicial functions. The author, a barrister who represented a man incarcerated under this law in a constitutional challenge to the legislation in the High Court, argues that the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Q) significantly undermines the safeguards provided by traditional judicial processes, inflicts double punishment and is unconstitutional. This paper outlines and considers the constitutional arguments presented to the High Court.

Challenging Nations’ Treatment of Children

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Abstract

‘The child’s sob in the silence curses deeper
Than the strong man in his wrath”

Elizabeth Barret Browning

The detention of refugee children is one where the national policy should be challenged because of its failure to properly implement international conventions. The focus of this paper is on the is urgent contemporary issue and how it is being addressed in Australia.

The paper will examine the treatment of refugee children coming into Australia in the context of Article 37 of the Convention on the Rights of the Child which provides that detention of children should only be used as a measure of last resort. It questions whether due recognition is being accorded to that Article in the practices and policies adopted by Australia in regard to refugee children.

The legislative background to refugee detention centres will be discussed with reference to the numbers, location and conditions under which refugee children are detained. In particular this paper will look at published research on potential mental health problems which can arise in this population.