

The Playfulness of Constitutional Law

Nicole Rogers*

Introduction

I am about to perform a piece of political theatre. I have an audience, a script and a role. For some time, I have been reflecting on the intersection between political theatre and law. It is my perception that the High Court is engaged in political theatre and that as legal academics, in lecturing and giving papers, we are also engaged in political theatre.

This article developed from an unsuccessful attempt by a law student to persuade the High Court to judge the political deeds of our current Prime Minister, and from the idea of a Sydney playwright to turn this story into a play. The High Court chose not to hear the case the student tried to argue under s 44 of the *Constitution*. However, this case, or perhaps a fictitious case dealing with the same themes, may be heard by theatre audiences in a year or two with actors playing the roles of High Court judges, in a theatrical environment very different (or is it so different?) from that of the courtroom.

Lawyers are familiar with the depersonalising process by which courtrooms turn people's stories, their lives, into legal narratives. Writing this play requires a reversal of this process, a conversion of a dry impersonal constitutional law narrative into a dramatic event. Individual stories and characters must be teased out and developed from a somewhat unpromising beginning: a terse, patronising, two and a half page statement of reasons as to why the High Court refused, or was unwilling to, hear this case.

How it all began

In March 2004, after many months of frustrating procedural delays, Eric Bateman attempted to file a writ of summons and a statement of claim in the High Court Registry. He alleged that the Prime Minister, John Howard, was disqualified under s 44 of the *Constitution* from

* Lecturer, School of Law & Justice, Southern Cross University. This article was originally delivered as a conference paper at the Australian Law and Society Conference in December 2004.

continuing to sit as a member of parliament because of his acknowledgment of his allegiance to a foreign power. Questions of disqualification can be raised in the High Court by any person acting as a common informer under the *Common Informers (Parliamentary Disqualifications) Act 1975* (Cth), which was enacted pursuant to s 46 of the *Constitution*. I have already dealt with the constitutional issues in relation to s 44 elsewhere.¹ In short, Bateman was arguing that Howard's political deeds and misdeeds including, most importantly, his decision in March 2003 to follow United States President Bush's lead in declaring war on Iraq, amounted to an acknowledgment of allegiance to a foreign power.

The High Court Registry, as directed by Kirby J, refused to issue the writ of summons and the attached statement of claim without the leave of a justice. The view of the registry was that the writ on its face appeared to be frivolous, vexatious and/or an abuse of process. Bateman then sought leave to have the writ issued, and filed an affidavit in which he argued that the proceedings were not frivolous, vexatious, or an abuse of process. He argued that there was a genuine legal question to be heard. He pointed out that there was little clarity in the court's interpretation of the relevant limb of s 44(i), and that it was important that the High Court shed some light on the scope of this limb, and on the complex issues of loyalty and allegiance that it raises. The affidavit was filed and on 30 April 2004, Gummow J published his reasons for refusing the application.²

The statement of reasons was short and scathing in parts. For instance, Gummow J made the comment that "the proposed proceeding ... is drafted in a form which, in any event, is embarrassing in the technical sense so as to render the proposed proceeding frivolous or vexatious and an abuse of process."³ A lack of technical expertise is unsurprising given that Bateman was a law student with no practical experience in High Court litigation. However, the proposed proceeding was embarrassing not just in the technical sense, but also politically.

¹ Rogers N, "The Prime Minister as Puppet: Taking Howard to the High Court" (2004) 29 *Alternative Law Journal* 238.

² *In the Matter of an Application by Eric Bateman for Leave to Issue a Proceeding* (unreported, High Court of Australia, Gummow J, No C4 of 2004, 30 April 2004).

³ *In the Matter of an Application by Eric Bateman*, note 2, p 3.

The most revealing passage in the statement of reasons read as follows:⁴

The proposed statement of claim alleges statements and acts and omissions by the Prime Minister in the conduct of public affairs which, if proved, would, it is contended, found a conclusion that, whilst a member of the House of Representatives, the Prime Minister has acknowledged his allegiance, obedience and adherence to the United States of America. However, that conclusion would not necessarily enliven s 44(i) of the Constitution.

The question which the Constitution would present is not whether the Prime Minister has conducted himself in a particular way but whether, as a matter of law, he is “under” any acknowledgment of “allegiance, obedience or adherence to a foreign power” within the meaning of s 44(i).

Surely, here, the judge is saying that the Prime Minister can engage in a course of conduct which, as interpreted by a considerable number of people, suggests that his support of United States foreign policy is a more pressing imperative than the Australian national interest, and that *the court will not judge him for this*.

The outcome was, of course, predictable. It is unlikely that even a more progressive High Court would have heard this matter. Bateman’s target was the most powerful figure in the Australian Government, protected not only by virtue of his position but also as a consequence of his support for, and espousal of, widely held values. He was not a scapegoat. He was the prominent exponent of a dominant ideology. The court had no desire, and quite possibly no real power, to change his status from privileged insider to outsider.

By contrast, one can look at the role of the courts and the role of informers in the Salem witchcraft trials, immortalised by Arthur Miller in his play *The Crucible*.⁵ This successful piece of political theatre was inspired by the original court transcripts of the Salem witchcraft trials. Miller used this material to highlight aspects of the political climate in the United States in the early 1950s. In certain political conditions, courts will provide a mechanism by which scapegoats are

⁴ *In the Matter of an Application by Eric Bateman*, note 2, pp 2-3.

⁵ Miller A, *The Crucible*, Penguin Books, London, 1952.

punished, informants empowered, and a dominant ideology reinforced. This was the case in Salem in 1692. In the Salem witchcraft trials, outsiders were targeted, people who were perceived as presenting a threat to the cohesiveness of a tightly knit agrarian community and to a dominant ideology.⁶ Hence the informants, whose behaviour would today be dismissed as teenage hysteria, were singularly successful in using the power of the courts against selected outsiders. Informers like Bateman, who seek to use the power of the court against powerful insiders, will always fail. One can, however, envisage a successful common informer suit, which draws on current hysteria about terrorism and targets a member of parliament who fits within the modern, culturally specific profile of the scapegoat.

Another explanation can be found for the High Court's refusal to hear Bateman's arguments and this is relevant to the main theme of this article, which is the playfulness of constitutional law. Bateman's action can be seen as a playful use of constitutional arguments. I have found that most people laugh when I discuss the concept of a common informer suit against Howard. However, judges view the law as a serious and weighty matter, and constitutional law, which concerns the interpretation of the fundamental text in the Australian legal system, seems to be the most serious and weighty part of it. This view is apparently shared by textbook writers in this field, who talk about "the body of rules according to which a state is constituted or governed",⁷ and the concept of "public power".⁸ Only Michael Coper takes a light-hearted approach to constitutional law, in *Encounters with the Australian Constitution*,⁹ and his analysis of constitutional law and of the High Court continues to be light-hearted, almost irreverent.¹⁰

⁶ See Boyer P and Nissenbaum S, *Salem Possessed: The Social Origins of Witchcraft*, Harvard University Press, Cambridge, 1974, ch 8: Witchcraft and Social Identity.

⁷ Blackshield T and Williams G, *Australian Constitutional Law and Theory. Commentary and Materials* (3rd ed), Federation Press, Sydney, 2002, p 6.

⁸ See, for instance, Joseph S and Castan M, *Federal Constitutional Law. A Contemporary View*, Lawbook Co, Sydney, 2001, p 2; Hanks P and Cass D, *Australian Constitutional Law. Materials and Commentary* (6th ed), Butterworths, North Ryde, 1999, p 9.

⁹ Coper M, *Encounters with the Australian Constitution*, CCH Australia Limited, North Ryde, 1987.

¹⁰ He has recently suggested that the High Court, as "Australia's number one legal family", is "almost entirely dysfunctional", in Coper M, "The seven habits of a highly effective High Court" (2003) 28 *Alternative Law Journal* 59, p 62.

However, as Greta Bird has pointed out,¹¹ the *Constitution*, the body of judgments interpreting the *Constitution*, and constitutional law textbooks can, in fact, be seen as three levels of sacred texts within the Australian legal system.

Bateman was meddling with a sacred text in using available constitutional avenues to compel the High Court to sit in judgment on the Prime Minister. The court decided that this was frivolous, vexatious, and an abuse of process. One is forced to conclude that it was Bateman's political, playful, even subversive motives which condemned his action. The court appears to find nothing wrong with litigants using any available legal weaponry to achieve a particular desirable outcome, if that outcome is associated with personal gain.¹² Bateman's motives could not be construed in such a favourable light. He did not stand to gain from a successful outcome to his action. He was trying to use available constitutional law weaponry to relocate an energetic public debate about the loyalty and allegiance of our Prime Minister from 'appropriate' public forums to the 'inappropriate' forum of the High Court. He was attempting to use a sacred text, the very document which vests authority to govern in the privileged few, to challenge the suitability of the leader to govern. From the High Court's perspective, it is acceptable for litigants to be creative with constitutional law for personal gain. It is not, apparently, acceptable for litigants to be creative with constitutional law for subversive political purposes.

Creating political theatre from constitutional law

There are no further available legal avenues once the High Court refuses to hear a matter. However, there are many ways of telling a story and the story of loyalty, allegiance, a politician and a common informer can be told in other ways and in other places. A Sydney playwright, Susan Rogers, was intrigued by the playfulness of the common informer suit. Her decision to turn this story into a play is in line with a contemporary trend in modern theatre, which involves the

¹¹ In an unpublished conference paper which was presented at the 1996 Australian Law and Society Conference.

¹² In contrast, litigants motivated only by a sense of social justice find it difficult to gain access to the courts; consider the common law rules of standing, as enshrined in *Australian Conservation Foundation Inc v Commonwealth of Australia* (1980) 146 CLR 493.

creation of political theatre from ‘real’ political dramas, politicians’ speeches, and even the legalistic language of inquiries and courtrooms. One reason put forward by playwright Steve Waters for the development of verbatim theatre, or theatre of fact, is that “modern life in its complexity seems to defy invention itself.”¹³ There is a considerable amount of commentary on this development in modern theatre, and I will examine this phenomenon in more detail later in this article.

Susan Rogers’ play, however, does not fit neatly within the genre of verbatim theatre. Rogers wanted to create a play which was a metaphor. She felt that a play that explored a common informer suit against Howard would be too obvious and too polemical. She decided to relocate the common informer suit in a different historical period, the early 1950s, when the nation was gripped by a hysteria about communism, and Australian communists were seen as part of “the communist’s grand plan for global conquest.”¹⁴ There are obvious parallels between the Howard government’s rhetoric about terrorism and the Menzies government’s rhetoric about communism. Arthur Miller saw the same parallels between Puritan and McCarthyist America. He explained in his Introduction to *The Crucible* that:¹⁵

It was not only the rise of ‘McCarthyism’ that moved me, but something which seemed much more weird and mysterious. It was the fact that a political, objective, knowledgeable campaign from the far Right was capable of creating not only a terror, but a new subjective reality, a veritable mystique which was gradually assuming even a holy resonance ... It was as though the whole country had been born anew, without a memory even of certain elemental decencies which a year or two earlier no one would have imagined would be altered, let alone forgotten.

-
- 13 Waters S, “The Truth Behind the Facts”, *The Guardian*, 11 February 2004; available at <http://www.guardian.co.uk/arts/news/story/0,11711,1145501,00.html> (17th November 2004).
- 14 Lowe D, *Menzies and the ‘Great World Struggle.’ Australia’s Cold War 1948-1954*, University of New South Wales Press, Sydney, 1999, p 9.
- 15 Quoted in Budick E Miller, “History and Other Spectres in Arthur Miller’s *The Crucible*” (1985) 28 *Modern Drama* 535, p 536.

We have witnessed the creation of a climate of terror by conservative western governments in recent years. Since 11 September 2001, we in the western nations have been told that the world is no longer safe. This, of course, is old news for significant sections of the global community. In the west, in recent years, we have also witnessed the disappearance of “certain elemental decencies”, including some fundamental human rights.¹⁶ Courts can play a significant role at such times, not only in reinforcing this “new subjective reality”, as they did in Salem in 1692, but also, on occasion, standing firm against it.¹⁷ In 1991, Kirby J commented that:¹⁸

It will be seen how readily the politics of Australia became debased in 1951 by fear of a foreign enemy ... We should take heed from this feature of our political life and be alert to its symptoms in contemporary Australian society to engage in witch-hunts and to search for scapegoats for the perceived ills of society.

To modern ears, the phrase “be alert” sits uneasily as part of this warning. Justice Kirby’s words resonate powerfully at a time when State and Federal Governments are constructing draconian responses to the perceived threat of terrorism. A play set in Australia in the early 1950s, in which a common informer suit was launched against a politician with apparent communist sympathies, allows the exploration of all of these important themes.

Yet how effective is political theatre that draws parallels between different historical periods? This question raises in turn other interesting questions about the possibility of universal themes transcending particular historical epochs, and about the enduring nature of political theatre. Arthur Miller has observed that when *The Crucible* was first produced in 1953, it was “generally dismissed as a

¹⁶ There is much commentary on the impact on human rights of the Commonwealth’s counter-terrorism laws. See, for example, Head M, “Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights” (2002) 26 *Melbourne University Law Review* 666.

¹⁷ A good example of this is the High Court’s decision in 1951 to invalidate the legislation which outlawed the Australian Communist Party in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

¹⁸ Kirby M, “H V Evatt, the anti-communist referendum and liberty in Australia” (1991) 7(2) *Australian Bar Review* 93, p 118.

cold, anti-McCarthy tract, more an outburst than a play.”¹⁹ Critics commented that the analogy between the Salem witchcraft trials and McCarthyism was inappropriate, “or at worst a specious and even sinister attempt to whitewash the guilt of the Communists with the noble heroism of those in 1692 who had rather be hanged than confess to nonexistent crimes.”²⁰ However, *The Crucible* has continued to carry a significant message that is relevant in other political and cultural settings.²¹ According to Miller, the play is about the politics of paranoia,²² a phenomenon certainly not restricted to Puritan or McCarthyist America. In his autobiography, he wrote that he “can almost tell what the political situation in a country is when the play is suddenly a hit there – it is either a warning of tyranny on the way or a reminder of tyranny just past.”²³ A Chinese writer who spent six and a half years in solitary confinement during the Cultural Revolution told Miller that the events described in *The Crucible*, including the role played by the teenagers, mirrored the events of the Cultural Revolution. She “could not believe that a non-Chinese had written the play.”²⁴ Such statements certainly suggest that political theatre can embrace themes which reverberate throughout human history.

The different faces of political theatre

Political theatre is not a new phenomenon. We can find examples of this genre in the plays of the ancient Greeks and in Shakespeare’s plays. Sometimes, modern productions of these plays can provide a telling commentary on current political situations.²⁵ Kustow writes that “theatre has consistently used the surfaces of contemporary life to

19 Miller A, “It Could Happen Here – And Did”, in Martin, Robert A (ed), *The Theatre Essays of Arthur Miller*, The Viking Press, New York, 1978, p 294.

20 Miller, note 19, p 295.

21 Miller, note 19, pp 295-296.

22 Miller, note 19, p 296.

23 Miller A, *Timebends. A Life*, Methuen, London, 1987, p 348.

24 Miller, note 23.

25 See Coveney M, “Stuff happens as political theatre joins the mainstream”, *Australian Financial Review*, 24 September 2004; available at <<http://afr.com/articles/2004/09/23/1095651460090.html>> (27th October 2004).

illuminate the timelessness of political conflicts.”²⁶ Critics nevertheless argue that some forms of political theatre are neither enduring nor timeless: they draw a distinction between theatre and propaganda. In 1966, a play about the Vietnam War, *US*, used “a public stage to examine our own attitudes to Vietnam.”²⁷ The production compelled its audiences to confront the horror of war.²⁸ However, it provoked an angry reaction from some critics. Jean-Paul Sartre described it as a “crisis of the imaginary” (and refused to see it), and American director Charles Marowitz commented that “productions like *US* produce superficial flurries on incendiary subjects that can be justified neither on artistic nor ideological grounds.”²⁹

Similar concerns have been expressed about the recent spate of political plays in England that have been inspired by the invasion of Iraq. These include *The Madness of George Dubya*, which incorporated satire, jokes and song,³⁰ *Embedded*, a satire highlighting the sanitisation of war for media purposes,³¹ and *Follow My Leader*, a musical satire which focused on the Bush-Blair relationship. Most recently, David Hare’s *Stuff Happens* has been showing at the National Theatre in London. *Stuff Happens* is mostly (but not completely) based on the recorded speeches and comments of Bush, his advisers, and Blair. It is therefore, at least in part, an example of verbatim theatre; it has also been described as a docu-play.³² Even its title is a quotation, taken from Donald Rumsfeld’s infamous response to the looting of Baghdad. Hare states in his program notes that it is a

26 Kustow M, “An epic piece of storytelling”, *Red Pepper*, October 2004; available at <<http://www.redpepper.org.uk/Oct2004/x-Oct2004-Kustow.html>> (27th October 2004).

27 Billington M, “Goodbye to all that”, *The Guardian*, 9 January 2003; available at <<http://www.guardian.co.uk/print/0,3858,4579570-111466,00.html>> (11th November 2004).

28 Billington, note 27.

29 Quoted in Coveney, note 25.

30 Coveney, note 25.

31 Billington M, “Embedded”, *The Guardian*, 10 September 2004; available at <<http://www.guardian.co.uk/arts/politicaltheatre/story/0,13298,1301703,00.html>> (27th October 2004).

32 Meek J, “All the world’s leaders crowd the stage”, *The Guardian*, 2 September 2004; available at <<http://www.guardian.co.uk/arts/politicaltheatre/story/0,13298,1295794,00.html>> (27th October 2004).

play (as opposed to a documentary) but, also, that nothing is “unknowingly untrue”.³³ One critic has written: “Hare holds up the agents of our recent and continuing history like an entomologist.”³⁴ Comparisons with Michael Moore’s *Fahrenheit 9/11* are inevitable.³⁵

These productions, in particular, *Stuff Happens*, have met with mostly favourable reactions. One exception is the response of the Conservative Member of Parliament, Ann Widdecombe, who wrote that:³⁶

I might have said that *Stuff Happens* is the most blatant subverting of art for the purposes of crude propaganda since that of Leni Riefenstahl, but there is no art involved, no characterisation, no coherent plot, no empathy.

However, critics have also queried whether these productions will have a continuing relevance and, most importantly, whether they have made “the imaginative leap into art.”³⁷ One playwright has commented that:³⁸

While plays often waddle clumsily in the wake of events, at their best they achieve the status of “news that stays news” to borrow Ezra Pound’s phrase: fiction taking a longer view.

Similar issues arise in the context of Australian theatre. The war on Iraq prompted playwright Stephen Sewell to write *Myth, Propaganda*

33 “The Hare’s form. Agitprop or art?”, *The Economist*, 16 September 2004; available at <<http://economist.com/books/displayStory.cfm?story-id=3195685>>.

34 Kustow, note 26.

35 See comments of Tim Collins and Max Hastings in “For or Against?”, *The Guardian*, 3 September 2004; available at <<http://www.guardian.co.uk/arts/politicaltheatre/story/0,13298,1296666,00.html>> (27th October 2004). Also Frankel G, “David Hare sees how War Plays on World Stage”, *The Washington Post*, 5 October 2004, p C01; available at <<http://www.washingtonpost.com/wp-dyn/articles/A7372-2004Oct4.html>> (27th October 2004).

36 In “For or Against?”, *The Guardian*, note 35.

37 See “The Hare’s form. Agitprop or art?”, note 33. See also Polly Toynbee’s comments in “For or Against?”, *The Guardian*, note 35.

38 Waters, Note 13.

and Disaster in Nazi Germany and Contemporary America.³⁹ The play focuses on the plight of a New York academic prepared to expose the propaganda underpinning the War against Terror, and faces the personal, political and professional consequences of doing so. Sewell feels that, at present, writers and playwrights have a critical role to play in protecting democracy and challenging “ideological compliance and complicity”.⁴⁰ His agenda is unashamedly political. According to the *Green Left Weekly*, Sewell wants “to use theatre, like mass demonstrations, to validate and strengthen people’s reaction to the war.”⁴¹

A 2004 Australian production, *A Certain Maritime Incident* by Version 1.0, highlighted the possibilities for creating compelling drama from the legalistic, impersonal, acronym-riddled proceedings of a Senate Select Committee (here, the committee which investigated the “children overboard” affair.) It is an unusual idea to create a play from Hansard. One reviewer described the play as an exploration of “an emotive topic through ... potentially soporific material.”⁴² However, verbatim theatre, or theatre which draws on materials in interviews, speeches, and the transcripts of legal and parliamentary proceedings, has ‘galvanised’ political theatre in recent years.⁴³ In Australia, a number of recent plays⁴⁴ have drawn directly on the words of asylum seekers because, in Linda Jaivin’s words:⁴⁵

39 Sewell S, *Myth, Propaganda and Disaster in Nazi Germany and Contemporary America. A Drama in 30 Scenes*, Currency Press, Sydney, 2003.

40 O’Casey A and Fletcher K, “Just a book”, *Green Left Weekly*, 25 June 2003: available at <<http://www.greenleft.org.au/back/2003/543/543p22.htm>> (30 November 2004).

41 O’Casey A and Fletcher K, note 40.

42 Hopkins M, “A CMI: A Certain Maritime Incident, Version 1.0”, *Sydney Morning Herald*, 29 March 2004.

43 Kellaway K, “Theatre of War”, *The Observer*, 29 August 2004: available at <<http://www.guardian.co.uk/print/0,3858,5003951-110428,00.html>> (27th October 2004).

44 *In Our Name, Citizen X, Club Refuge, Kan Yama Kan, Something to Declare: Stories of Refugees and Asylum Seekers in Australia and Through the Wire*.

45 Jaivin L, “Theatre of the Displaced”, *The Bulletin*, 14th April 2004: available at <<http://bulletin.ninemsn.com.au/bulletin/eddesk.nsf/0/637962f5e461bc14ca256de90081dfb>> (27th October 2004).

The enormity of the human tragedy being written in blood and tears behind the razor wire in this country almost defies the playwright or author to do it justice.

In other plays, such as Alana Valentine's *Run Rabbit Run*, about the ousting of the South Sydney Rabbitohs from the National Rugby League competition in 1999, the technique of verbatim theatre has been used with powerful effect. In London's Tricycle Theatre, recent productions⁴⁶ have focused on the inquiry into the arms-to-Iraq affair,⁴⁷ the inquiry into the death of a black teenager,⁴⁸ the inquiry into the death of weapons expert David Kelly,⁴⁹ the United Nations war crimes tribunal hearing into the massacre at Srebrenica,⁵⁰ and the testimony of detainees at Guantanamo Bay.⁵¹

One commentator has written that "this kind of theatre depends on a compact with the audience: you can absolutely trust that every word you hear has actually been spoken."⁵² It is factual theatre: theatre which, according to playwright Richard Norton-Taylor, "can lead to a greater understanding of how we are governed and what is being said and done on our behalf."⁵³

In *A Certain Maritime Incident*, transforming Hansard into a play required not only substantial editing (without altering the language) but also the use of many dramatic devices: a spinning boardroom table, the constant movement of the actors themselves who, at one point, join in an aerobics routine, a line of naked, seemingly dead bodies over which the audience has to step on its way into the theatre, a child reading the words of Peter Reith (reminding us, according to Jaivin, of "the innocence of all children at the centre of this story"),⁵⁴ images

46 See Coveney, note 25.

47 *Half the Picture*.

48 *The Colour of Justice*.

49 *Justifying War*.

50 *Srebrenica*.

51 *Guantanamo*.

52 Kustow, note 26.

53 Norton-Taylor R, "Courtroom drama", *The Guardian*, 4 November 2003: available at <<http://www.guardian.co.uk/print/0,3858,4789019-111466,00.html>> (11th November 2004).

54 Jaivin, note 45.

of Parliament House, constantly moving water on screens, and an on-stage lie detector. After listening to the depersonalised language and political wrangling of the inquiry process, the audience is finally exposed to the authentic words of the *SIEV X* survivors, with these words being read by a machine. The script is derived almost exclusively from Hansard but the purpose of the production is to highlight what was *not* said. One reviewer described the performance as a “deconstruction of politicians at work.”⁵⁵ The producer, David Williams, has said that:⁵⁶

In *CMI* we seek exposure: to read between the lines, to air the thoughts left in the dark, to seek the faces behind the masks, to hear the questions never said aloud. We ask where is the place for truth in this inquiry? What are the stories we tell ourselves through this inquiry? This inquiry talks the talk that numbs the intellect and paralyses the body’s capacity for outrage. *CMI* is a public act of outrage.

These are provocative questions. Can plays derived from constitutional law narratives also focus an audience’s attention on such questions?

The dramatic potential of constitutional law

High Court judgments in the area of constitutional law are dry and depersonalised. Margaret Thornton has described how “[the process of] ‘constitutionalisation’ typically involves the treatment of issues at a very high level of abstraction so that distinctive private or subjective features are sloughed off.”⁵⁷ Thornton has pointed out that:

[A]long with the body of the litigant, the materiality of discriminatory harm and knowledge of systemic injustice, constitutionalism also sloughs off affectivity – whether it be passion, pain, anger, desire or care – which is deemed to belong

⁵⁵ Hopkins, note 42.

⁵⁶ Quoted in Gallasch K, “Children Overboard: Outrage and Performance”, *Real Time* 59, February-March 2004.

⁵⁷ Thornton M, “Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the ‘New Corporatism’” (1999) 23 *Melbourne University Law Review* 749, 754.

more properly to the private sphere and to be of no interest to law.”⁵⁸

What is of no interest to law has, however, dramatic interest. It is difficult to envisage reworking a constitutional law narrative into effective drama. Somehow, the private, the emotive and the subjective have to be restored to this narrative. A playwright must find the original voices of the complainants and recover their individual stories from the “authoritative texts of constitutional jurisprudence.”⁵⁹

Every year I set my constitutional law students an (optional) task. I ask them to select a constitutional law case and to re-tell the story in a different voice. I ask them to reflect on the nature of High Court reasoning, and on whether it is possible, or even likely, that similar conclusions would be reached if a legal narrative were re-told in a different voice. Most of the students who choose to undertake this task select the *Hindmarsh Island Bridge Case*⁶⁰ or the *Stolen Generations Case*⁶¹ as the constitutional narrative they wish to re-tell. Perhaps this is because most of the High Court judges, in dealing with the indigenous plaintiffs in those cases, demonstrated such a remarkable lack of empathy. The High Court narratives in those cases are largely devoid of the sort of “ethical political understanding”⁶² which Anthony Uhlmann describes: an understanding “[which incorporates] the lived experiences of people and peoples.”⁶³ In Thornton’s words, “the sorrow of the Aboriginal ‘Stolen Children’ evaporates in the face of a legalistic excursus on the legislative scope of the territories power (s 122 of the Constitution).”⁶⁴

58 Thornton, note 57, pp 754-755.

59 Thornton, note 57, p 756.

60 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

61 *Kruger v Commonwealth* (1997) 190 CLR 1.

62 Uhlmann A, “Law Translating Life and Life Translating Law through Stories: *Bringing Them Home* and *Benang* by Kim Scott” (2001) 15 *Australian Feminist Law Journal* 41, 46.

63 Uhlmann, note 62, p 41.

64 Thornton, note 57, p 756.

After reading Mark Haddon's *The Curious Incident of the Dog in the Night-Time*,⁶⁵ in which the narrator is a child with Asperger's syndrome, it occurred to me that reading and trying to understand constitutional law judgments requires a similar mental adjustment to that required when reading this book. The narrator in *The Curious Incident* is a mathematical genius, but lacks emotional intelligence. He can reach conclusions about other people's behaviour based on logic but he has no empathy. The author has described his voice as "an incredible flat expressionless voice", and commented that "he is always missing stuff but, ironically, once you adopt that voice, it helps you avoid a number of the pitfalls that novels fall into."⁶⁶ Reading the book is an unsettling, disturbing experience, somewhat similar to my first reading of the *Stolen Generations Case*. In that case, as in other constitutional law narratives, the High Court judges deliberately distanced themselves from an emotional response to the story they were re-telling. This is a story about Aboriginal people who were taken from their families as young children by the government, and about an Aboriginal woman whose baby, Queenie Rose, was taken away from her. Only one judge, the only female judge who has sat on the High Court bench, named the baby in her judgment.

It is problematic for white law students to try to adopt Indigenous voices in re-telling the stories behind the *Hindmarsh Island Bridge Case* and the *Stolen Generations Case*, although most demonstrate a considerable degree of empathy in attempting to do so. Some students find other ways to tell these stories. One student structured her tale in the form of a play about a play reading of a play about the *Hindmarsh Island Bridge Case*. The six potential actors at the play reading represent the six High Court judges who heard the case, and adopt their viewpoints, more or less, as they discuss the case in this context. A seventh actor, 'Ian', has "called to say he won't be coming this week because he double-booked himself."⁶⁷ As this is a play, the actors say things that are not relevant to the process of legal reasoning (or perhaps they are). The one female actor says, "Hmm, I'd hoped

⁶⁵ Haddon M, *The Curious Incident of the Dog in the Night-Time*, Random House Children's Books, London, 2003.

⁶⁶ Kellaway K, "Autistic Differences", *The Observer*, 27 April 2003; available at <<http://books.guardian.co.uk/departments/generalfiction/story/0,6000,944097,00.html>> (17th November 2004).

⁶⁷ Justice Ian Callinan decided eventually (after much controversy) to disqualify himself from hearing the case, after it emerged that he had given legal advice to the Federal government on this matter before he joined the High Court bench.

there'd be more women, but never mind." The play finishes with the actors expressing frustration about the process of creating a play based on High Court judgments. They decide to ask local Indigenous people for help.

One conclusion which can be drawn from this is that verbatim theatre based exclusively on High Court judgments may not be the most effective way to tell a story. Despite the success of *A Certain Maritime Incident*, it is difficult to see how High Court judgments, or a High Court statement of reasons for rejecting an application, or even High Court transcripts, can provide sufficient material for a dramatic production without the infusion of other stories, other perspectives, other ways of 'seeing' than the strictly legalistic. Playwrights and dramaturges do not share the assumptions of the legal community and, in particular, may not believe that a constitutional law case is significant because of where it sits in an existing line of authority, and because of the legal principles that the court applies and perhaps creates. For a playwright, the focus must always be on the particular human story. Thus, a play about a constitutional law case which is more than a documentary must always involve a deconstruction of the judgment(s).

However, this is not the only conclusion which can be drawn from this exploration of alternative re-tellings. The student's construction of a case within a play within a play reading within a play hints at the circularity and layers of story-telling and performance, in which the High Court judgments comprise simply one more layer, and the courtroom itself simply another performance space. Just as constitutional law is not confined to the courtroom, so political theatre is not confined to the stage.

The ubiquity of political theatre

High Court proceedings may be an unpromising, unplayful starting point for a piece of political theatre. They can also be considered to be political theatre themselves. In the courtroom, there are rituals, role playing and costumes: David Marr has described the High Court judges as looking "like customers in a palatial barber's shop."⁶⁸ If

⁶⁸ Marr D, "Nazi race laws 'may well be' valid here", *Sydney Morning Herald*, 6 February 1998, p 6.

High Court proceedings do in fact constitute political theatre, it is political theatre which makes grandiose claims about the universalism of its themes. Hence, we have the doctrine of precedent. Of course, High Court judges do not perceive themselves as actors engaged in political theatre. In fact, increasingly, they prefer not to concede that their role is political.⁶⁹ It is interesting that the judges define political communication in terms which place it firmly *outside* the courtroom. In a recent case, Kirby J stated:⁷⁰

Political communication in Australia is often robust, exaggerated, angry, mixing fact and comment and commonly appealing to prejudice, fear and self-interest ... [with] emphasis upon brevity, hyperbole, entertainment, image and vivid expression.

One assumes that the judges would describe their own judgments, or even their contributions to the courtroom arguments, quite differently.

Political theatre is not confined to theatres and courtrooms. Political theatre encompasses, for instance, the memorable live performances of Simon Hunt as Pauline Pantsdown, which may well have contributed to the electoral defeat of One Nation candidate Pauline Hanson in the 1998 federal election. Pantsdown, inspired by the performers who satirised Hitler,⁷¹ “decided to answer [Hanson’s] racist nationalism with digital sampling, lip-synching, and satirical, gender-critical live performance.”⁷² One commentator has described this form of political theatre as “electoral guerilla theatre”.⁷³

Educators are also engaged in a form of political theatre. The parallels between lectures and political theatre were apparent in a Canadian dramatic performance called *The Noam Chomsky Lectures* in which two actors, who played themselves, engaged in a dialogue about the

⁶⁹ See Patapan H, “High Court Review 2001: Politics, Legalism and the Gleeson High Court” (2002) 37 *Australian Journal of Political Science* 241.

⁷⁰ *Roberts v Bass* (2002) 194 ALR 161, per Kirby J at 206.

⁷¹ Bogad LM, “Electoral Guerilla Theatre in Australia: Pauline Hanson vs Pauline Pantsdown” (2001) 45 *TDR: The Drama Review* 70, p 76.

⁷² Bogad, note 71, p 75.

⁷³ Bogad, note 71, p 71.

political concerns and ideas of Noam Chomsky.⁷⁴ The theatrical context allowed the actors to explain by demonstration. For example, the actors challenged the audience's "theatrical assumptions" (and hence highlighted Chomsky's point about the media's manipulation of the ideological assumptions of its readers) by throwing paper balls and squirting water at the audience when the lights went out.⁷⁵ The performance was described by one of the actors in the course of the play as a "perpetual workshop, an unfinished play, a fourth draft, a work in progress; hence, you are a workshop audience, an audience in progress; hence, this is not a real play, you are not a real audience."⁷⁶

The Noam Chomsky Lectures invited comparisons between lectures and theatre.⁷⁷ The play's content constantly changed, to incorporate audience comments and even the reviews of theatre critics.⁷⁸ The shifting content of the play and its particularity, the extent to which it was tied to the personalities of the two actors,⁷⁹ and the political context in which it was performed, made it seem more like a lecture than a play. However, one does not normally find in a lecture the dramatic devices introduced by the actors, such as the Artstick (to be used "whenever one of the performers crosses that fine line between art and demagoguery")⁸⁰ and the Whistle of Indignation, which dealt with "emotionally charged political opinion."⁸¹ The actors directly addressed the question of what theatre is and can be. One stated that:⁸²

Some of you may be thinking that what we have embarked on here is not theatre. Well, that's too bad. I would like to say this: if the theatre is to survive, it must become something other than an expensive alternative to television.

74 Brousseau E, "Personalizing the Political in *The Noam Chomsky Lectures*", in Colleran J and Spencer JS (eds), *Staging Resistance. Essays on Political Theatre*, University of Michigan Press, Ann Arbor, 1998, p 248.

75 Brousseau, note 74, p 252.

76 Brousseau, note 74, p 258.

77 Brousseau, note 74, pp 153-154.

78 Brousseau, note 74, p 253.

79 Brousseau, note 74, p 261.

80 Brousseau, note 74, p 253.

81 Brousseau, note 74.

82 Brousseau, note 74.

Environmental direct action constitutes another form of political theatre. I have been involved in political theatre at North East Forest Alliance (NEFA) blockades. NEFA is an environmental group which was formed in 1989 with the objective of preventing logging in old growth forests in north-east New South Wales. Blockades have never been NEFA's only tactic, but they have often been very effective as a short-term strategy to gain time and generate publicity. Blockades can be highly theatrical, although perhaps the impact of a blockade is more profound for its participants than for its audience. One commentator has said that "regular doses [of environmental theatre] appear to allow suburbanites to continue normal producer-consumer lifestyles."⁸³

I doubt that I would have the same desire to be playful with constitutional law had I not experienced the individual empowerment and subversive quality of NEFA blockades. This is the group which took over the Forestry Commission's offices in Sydney for a morning in 1992, installed its own People's Commissioner for the Forests, and were labelled terrorists at a time when the word carried less powerful and sinister connotations.⁸⁴ A participant has said that:⁸⁵

The whole concept was that of a coup, where the old corrupt Forestry Commission was ousted by a popular uprising and we were the interim administration, the People's Commission for the Forest ... I had one woman ring and I reassured her that her husband was perfectly safe. There's just been a bloodless coup but it was all sorted out now and working under a new administration and she seemed quite happy saying, "Oh all right then, thank you."

My introduction to NEFA blockades was in the Chaelundi State Forest in 1991, and that blockade had more of the quality of a revolution. Aidan Ricketts has written that:⁸⁶

83 Notion H, "Greenpeace – getting a piece of the green action", *Chain Reaction*, No 63/64, April 1991, pp 32-34.

84 See Rogers N (ed), *Green Paradigms and the Law*, Southern Cross University Press, Lismore, 1998, pp 175-178.

85 Rogers, note 84, pp 176-177.

86 Rogers, note 84, pp 173-175.

The words Chaelundi Free State became a rallying point, an aspiration realised, the forest and the people were one ... To even experience for a moment that kind of total liberation would be illegal if only the legislators could define and describe it.

NEFA blockades are a form of political theatre which has a fluid and dynamic relationship with the law; they usually encompass both minor lawbreaking and law enforcement.⁸⁷ In fact, in consultation with the New South Wales police, NEFA created its own rules or laws about direct action, a Forest Protest Protocol.⁸⁸ NEFA activists have a playful relationship with the law. For them, unlike the High Court judges, it is not a serious and weighty matter.

My experiences with NEFA have taught me that political theatre is everywhere, but the best of it is profoundly subversive.

Conclusion

This is an appropriate point to draw some conclusions about the effectiveness of political theatre in the form of a play based on constitutional law. How subversive can such political theatre be, given the necessary limitations of its audience? It reaches only “the converted cognoscenti, rather than a popular audience.”⁸⁹ In relation to recent Australian plays focusing on the plight of asylum seekers, Linda Jaivin has commented that:⁹⁰

Those hostile to the asylum-seekers’ cause, those who still mistakenly believe it is ‘illegal’ to seek asylum by boat or who’ve convinced themselves that ‘border protection’ justifies the indefinite detention of innocent people are unlikely to see any of these plays.

⁸⁷ Frequently NEFA blockades have been staged while simultaneously legal proceedings were commenced in the Land and Environment Court over various statutory breaches by the NSW Forestry Commission (now State Forests).

⁸⁸ See Ricketts A, “The Forest Protests Protocol: an outbreak of participatory democracy” (2000) 25 *Alternative Law Journal* 68.

⁸⁹ Billington, quoted in Coveney, note 25.

⁹⁰ Jaivin, note 45.

And yet, is the impact of such political theatre restricted to its audience?

Perhaps, in the end, one of the most subversive things we can do with constitutional law is to play with it, to build a parallel universe alongside it, to emphasise its playfulness. To search for the 'play' in constitutional law is to seek to escape from the authority of the text. There are many structural obstacles standing in the path of the playful litigant who tries to use sacred texts to challenge the dominant assumptions of our legal system. On a stage, however, the only limitations arise from a failure of the imagination.

