

THE CRITICAL JUDGMENTS PROJECT

A TEACHING GUIDE FOR PUBLIC LAW & CONSTITUTIONAL LAW COURSES

Dear colleagues/teachers

This short guide is designed to provide you with background information about how best to utilise Gabrielle Appleby and Rosalind Dixon (eds), *The Critical Judgments Project: Re-reading Monis v The Queen* (Federation Press, 2016) (The CJP) as a tool for teaching critical thinking in public and constitutional law. As we note in our introduction to The CJP, we envisage that it could be used as the basis for a standalone advanced course or seminar in constitutional law legal theory. It is also designed, however, to be used as the basis for a single class in a general public law/constitutional law class, so as to increase the theoretical depth and range of such a course, and introduce students to a broader range of critical perspectives as part of the core curriculum.

This guide is designed to assist in the preparation and running of such a class. It has two key components:

- (a) A guidance note for students, which instructors should distribute in advance of the relevant class; and
- (b) A guidance note for instructors, as to how best to structure the relevant class discussion.

Gabrielle Appleby & Rosalind Dixon

(A) Guide to Students

1. To prepare for this exercise, read the introduction to Gabrielle Appleby and Rosalind Dixon (eds), *The Critical Judgments Project: Re-reading Monis v The Queen* (The Federation Press, 2016) (CJP). This will give you an overview of what a 'critical judgment' is, and the different types of approaches that are taken in that book.
2. Read the case assigned by your teacher, with a view to noting (a) its basic factual matrix, (b) the result or decision in the case, and (c) the different reasoning or approach of various justices.
3. Pick one judgment, which could be either a majority or dissenting opinion, and rewrite the first paragraph of the judgment (or alternatively, the first paragraph as it appears in your casebook) from the perspective of 1 of the approaches outlined in The CJP ('your chosen critical approach').
 - a. Did your judgment noticeably differ in style from the actual judgment, or traditional formal legal methods of reasoning, and if so how? (compare CJP p 14, question 1)
 - b. Do these differences in style make a difference to how we perceive the facts or 'story' that lies behind the case? (compare CJP p 14, question 2)
 - c. What if anything does chapter 2 of The CJP on 'Law and Literature' have to say about these questions? Consider in particular the following quotes:

James Boyd White (CJP p 30):

[T]he lawyer is always saying not only here is how the case should be decided but also here in this language is the way this case in similar cases should be talked about. The language I'm speaking is the proper language of justice in our culture.

Robin West (CJP p 31):

Both law and literature and feminist legal studies ... see[k] to expand the contours of legal scholarship by bringing in heretofore excluded voices. Both are interested in the nature of legal and moral decision-making, and the role of narrativity, in that activity. Both have mounted challenges to the conception of decision-making, and the complex notion of rationality behind it, that dominates liberal and economic understanding of legal, moral, and practical reasoning.

4. Identify one aspect of the reasoning of the Court, or a dissenting justice, that might change under your chosen critical approach.

5. Would this difference in reasoning change the result?
 - a. If so, how and why? Do you think this result is better or worse from the perspective of your own conception of justice? (compare CJP p 15, question 3)
 - b. If not, does this different approach to reasoning still matter? Does it, for example:
 - i. lead to the likely development of precedent in the future?
 - ii. give greater voice to particular individuals or groups within the community (compare CJP p 15, question 1)?
 - iii. acknowledge certain historical wrongs or injustices in ways that might matter to particular individuals or groups within the community (compare CJP p 15, question 2)?
 - iv. make better sense of the existing result? (CJP p 15, question 5)
6. Are there reasons why the High Court should not endorse your chosen critical approach? (compare CJP p 15, question 4)
7. If you agree with these arguments, is there still value to the exercise you have undertaken? (CJP p 15, question 6) How does this relate to the understanding of 'critical thinking' outlined in chapter 1 of the CJP?
8. Are there perspectives in The CJP, other than your chosen approach, that are ill-suited to this particular case? If so, why or why not?
9. Are there any theoretical perspectives you have studied or read about elsewhere that are not included in The CJP but you think should be? Why or why not? (CJP p 15, question 7)

(B) Guide to Instructors

BEFORE CLASS:

1. Before this exercise, you will need to select a case. Here is a list that we suggest instructors could consider as the basis for a critical judgments exercise:
 - *Alqudsi v The Queen* [2016] HCA 24
 - *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1
 - *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490
 - *Thomas v Mowbray* (2007) 233 CLR 307
 - *Coleman v Power* (2004) 220 CLR 1
 - *Kartinyeri v Commonwealth* (1998) 195 CLR 337
 - *Kruger v Commonwealth* (1997) 190 CLR 1
 - *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1
 - *Polyukhovich v Commonwealth* (1991) 172 CLR 501
 - *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (*Communist Party Case*)
 - *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168
 - *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS case)* (1981) 146 CLR 559
 - *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237

Some of these cases, such as *Coleman v Power*, are closer to the original facts of *Monis v The Queen* (2013) 249 CLR 92, will thus be somewhat easier to approach for students or instructors less familiar with the relevant theoretical materials. Others, such as *Kartinyeri v Commonwealth* (1998) 195 CLR 337, involve more distinctive questions of federal power, and may thus be more appropriate for advanced undergraduate students.

Almost any case, however, could be used as the basis for a critical constitutional inking exercise. The aim of such an exercise is simply to encourage students to apply the perspectives they have read, and see the extent to which they do or do not have application to a range of concrete cases.

2. Give students the instruction guide, and ask them to submit their answer to Question 2 (in the Student Guide, i.e. their sample re-written paragraph) in advance of the relevant class.

We suggest that you invite students to undertake this exercise individually, and then group their responses based on the approach they take (see step 3). You could, however, also choose to ask students to work in groups in responding to these questions, and either allow students to choose their preferred approach once in a particular group, or to write down a preferred approach, and then allocate groups based on the relevant choice of approach.
3. Create a list of different approaches canvassed by the students, and group them by approach.

IN CLASS:

4. Begin the class by displaying on a slide or other audio-visual tool, a sample of the different rewritten paragraphs, grouped by approach, and contrast them with the original opening paragraph of the actual decision - either in the original judgment, or if you prefer, as it is reported and extracted in the casebook you teach from. Guide students through the answers to Question 3 (in the Student Guide) by reference to this audio-visual display.
5. Invite individual students or groups to answer Question 4 (in the Student Guide), and then engage in a broader class discussion of the answers to Question 5 (Student Guide), based on their approach.
 - a. Generally the easiest way to do this will be to ask particular students to offer their own answers to Question 5, and then ask others who have taken a similar approach whether they agree, or if answers are by group, different groups to comment on the answers of other groups. Finally you might invite more general responses from individual students, who may have read The CJP and all relevant theoretical perspectives, in greater detail.
 - b. Depending on the size of the class, it may be easiest to approach this by dividing the discussion into distinct perspectives – i.e. completing Questions 4 and 5 for each chosen approach, before moving onto the next approach. You might, however, also choose to adopt more fluid approach to the relationship between Questions 4 and 5.
6. Invite students as a class to respond to question 6 (Student Guide), based on their own chosen approach or that of other students. Seek to generate a conversation about whether some or all chosen perspectives are in tension with established legal norms in Australia, or whether there are differences between them. It is also potentially useful in this context to discuss with students the degree to which some modes of reasoning might increase support for the Court and its jurisprudence from some sections of the community, while reducing it among others, and the relative importance of support for the Court from political and legal elites versus ordinary citizens or disadvantaged members of the community.
7. Transition the conversation to a discussion of Question 7 (Student Guide), and in particular the value of exploring different perspectives, from the perspective of understanding the contingency to legal decision-making and judicial choice. You may also find it useful to connect this to the discussion on pp 1-2 of The CJP of the value of critical thinking in law school, and constitutional law study. See e.g.

Students of law must learn the craft of positivist-based legal method... But a legal education must provide more than this.... It must teach students to identify and assess the influence of personal social political and economic factors in the development of legal doctrine. Law students must also develop capacities to interrogate assumptions that inhere in legal rules, institutions and processes as they exist, that is, to think critically about the law as a political, social and economic phenomenon that is shaped by its historical context.

Critical thinking is foundational to a functional liberal democracy... Law graduates – whether they practice as lawyers or not – go on to play important roles in the intellectual leadership of the community. A developed ability to employ critical thinking informs their engagement with legal and political institutions and the development and reform of law and its practice.

Every nation is in ongoing dialogue with itself about whether it's constitutional law provides a frame at the reflected community's public law values, whether it of facilitates the appropriate assessment of those values when they might come into conflict, or when they collide with state interests such as community protection and national security. Fostering the capacity for critical thought in constitutional law empowers law graduates to become active contributors and leaders in these debates.

8. Invite students to address the answer to Question 7 (Student Guide). In doing so, we suggest that you canvas three broad themes:
 - (i) The importance of the particular legal or constitutional context to the relevance of different approaches - e.g. federalism or separation of powers cases, as opposed to cases involving the application of independent constitutional guarantees such as the implied freedom of political communication, may lend themselves less naturally or easily to the application of a variety of approaches. Similarly, statutory or small 'c' constitutional cases may be more or less amenable to a given critical approach than a big 'C' constitutional decision. Clearly the answer to this also depends on one's ingoing theory of constitutional and statutory interpretation.
 - (ii) The degree to which particular approaches find existing support within Australian legal and political culture, and the degree to which this, in turn, is shaped by the degree to which the various approaches are taught in Australian law schools (note the potential circularity of what counts as a legitimate legal argument - we often only teach the approach that we think is relevant to the Court's jurisprudence).
 - (iii) The extent to which various approaches are more or less internal or external to the liberal legal project, or seek to provide insights that can be absorbed by and integrated into existing formal liberal legal models, versus insights that seek to challenge the very foundation and premise: see e.g. CJP pp 16-17. The most notable example of an 'external' approach of this kind in the US is the 'critical legal studies' (CLS) or 'crit' movement. In chapter 15 of The CJP, Margaret Davies also surveys a number of other radical external critiques, including those offering their origins to Marx.