

Justice Hill and justice: beyond the black letter of the law

*Colin Fong**

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Abstract:

Is it possible to extract from Justice Hill's writings something about his view of Justice? This paper in contrast with other papers assessing Justice Hill's contribution, particularly on tax matters, looks at Justice Hill's contributions, off the bench, via some of his many writings mainly via journal literature, convention papers and speeches. Why did a former Minister for Immigration, take exception with Justice Hill's remarks, he made off the bench? What policy matters interested Justice Hill? Falling short of a judicial biography, this essay aims to draw out some of those views of Justice Hill often neglected when assessing his contribution to legal and tax literature.

* Lecturer, School of Law, The University of Notre Dame Australia, Sydney

- 6 "With what shall I come before the LORD,
and bow myself before God on high?
Shall I come before him with burnt offerings,
with calves a year old?
- 7 Will the LORD be pleased with thousands of rams,
with ten thousands of rivers of oil?
Shall I give my firstborn for my transgression,
the fruit of my body for the sin of my soul?"
- 8 He has told you, O mortal, what is good;
and what does the LORD require of you
but to do justice, and to love kindness,
and to walk humbly with your God?¹

"When I became a Judge I took an oath that I would do justice. Yet the result of the any (sic) Court to have judicial review of decisions of the Minister or the Refugee or Migration Review Tribunals is that I can not do justice at all."²

Introduction:

The following is an extract from Woody Allen's *Annie Hall*, which was made in 1977.

MAN IN LINE (*Even louder now*) It's the influence of television. Yeah, now Marshall McLuhan deals with it in terms of it being a – a high, uh, high intensity, you understand? A hot medium ... as opposed to a ...

ALVY (*More and more aggravated*) What I wouldn't give for a large sock o' horse manure.

MAN IN LINE ... as opposed to a print ...
Alvy steps forward, waving his hands in frustration, and stands facing the camera.

ALVY (*Sighing and addressing the audience*) What do you do when you get stuck in a movie line with a guy like this behind you? I mean, it's' just maddening!
The man in line moves towards Alvy. Both address the audience now.

MAN IN LINE Wait a minute, why can't I give my opinion? It's a free country!

ALVY I mean, d- He can give you- Do you hafta give it so loud? I mean, aren't you ashamed to pontificate like that? And – and the funny part of it is, M-Marshall McLuhan, you don't know anything about Marshall McLuhan's ... work!

¹ *The Bible* New Revised Standard Version via http://www.anova.org/sev/htm/hb/33_micah.htm

² Hill, DG 'Sydney University conferring of honorary degree of Doctor of Laws (LLD)' (2002) 11 *The Sydney Law School Reports* 6 at 8-9
http://www.law.usyd.edu.au/alumni/slr/Report/2002/SchoolReport_Vol2_2002.pdf

MAN IN LINE (*Overlapping*) Wait a minute! Really? Really? I happen to teach a class at Columbia called "TV Media and Culture"! So I think that my insights into Mr McLuhan - well, have a great deal of validity.

ALVY Oh, do yuh?

MAN IN LINE Yes

ALVY Well, that's funny, because I happen to have Mr McLuhan right here. So ... so, here, just let me - I mean, all right. Come over here ... a second.

Alvy gestures to the camera, which follows him and the man in line to the back of the crowded lobby. He moves over to a large stand-up movie poster and pulls Marshall McLuhan from behind the poster.

MAN IN LINE Oh

ALVY (*To McLuhan*) Tell him

MCLUHAN (*To the man in line*) I hear - I heard what you were saying. You - you know nothing of my work. You mean, my whole fallacy is wrong. How you ever got to teach a course in anything is totally amazing.

ALVY (*To the camera*) Boy, if life were only like this!³

From the above, I am conscious of trying to not misrepresent Hill's⁴ views, as evidenced from the extract. Interesting as the above extract is, it seems to mirror Hill's view, when he made the following comment:

"It is only a few weeks ago that a politician (I shall not name him, but you will know who I mean) was reported in the SMH as having given an address in London in which he referred to the: unelected and irresponsible (sic) officials of the Court who apparently were at the heart of the problems with refugees. The same politician had sometime earlier, singled me out for personal attack (oddly the newspaper report of that attack, suggested that the Minister had in support of his argument referred to a case where I found for the Minister, but I suppose he had not read it)."⁵

Hill made many non-judicial pronouncements via his numerous books, journal articles, convention, conference and seminar papers, speeches etc⁶. In a Letter to the Editor, and published in (2003) 77 *Australian Law Journal* 278, Hill claimed:

"In the interests of fairness I would ask that you print the address I gave to graduating students at the University of Sydney at the ceremony in May 2002 at which the degree of

³ Allen, W *Four films of Woody Allen*, London, Faber and Faber, 1983, pp 15-16

⁴ For purposes of this paper, I will be referring to Hill without his judicial title of Justice or J as I am referring to his writings, off the bench when he was not writing in his capacity as a judge.

⁵ 'Sydney University conferring of honorary degree of Doctor of Laws (LLD)' (2002) 11 *The Sydney Law School Reports* 6 at 8 http://www.law.usyd.edu.au/alumni/slr/Report/2002/SchoolReport_Vol2_2002.pdf

⁶ For a reasonably comprehensive list, see Fong, C 'Publications of Justice Graham Hill' (2006) 21 *Australian Tax Forum* (forthcoming)

Doctor of Laws (*honoris causa*) was conferred upon me. This is the only public speech I have given in recent years that has not been on a technical legal issue. Those who criticise me would do well to read it, for the subject was the rule of law, a subject about which I feel deeply.⁷”

I would beg to differ on Hill’s claim that this speech is the only public speech not on a technical legal issue. Others at this ATTA Conference will tackle Hill’s expertise at technical legal issues via his judgments. My purpose is to cover those non judicial writings which tell us something about Hill’s views about justice.

2002 and all that jazz!

In his graduation address of 2002, Hill spoke of the rule of law and judicial review particularly in the context of anti terrorism legislation and immigration decisions affecting refugees. What irked Hill was:

“Legislation to take away rights in a time when there may be a fear of a terrorist attack, introduced with good intentions which takes away the rights of persons who are arrested to consult a lawyer, initially for 48 hours but theoretically, with multiple applications, indefinitely, might later be used by a government not so well intentioned, to subvert freedom where no risk of a terrorist attack exists⁸ .

I would not be surprised, if Hill was alive today, we would have some trenchant remarks about the present debate involving anti-terrorism legislation.⁹ Less than three years later, Hill repeated aspects of his graduation address, at last year’s ATTA Conference, where he spoke about ‘Relations between the Judiciary and the Executive in Australia and New Zealand.’¹⁰

Earlier days

Back in 1995, when Hill was profiled for *Taxation in Australia*,¹¹ the following comments were made.

“Would he agree with those who regard him as a somewhat controversial judge? “I try not to be. It depends what you mean by controversy. I try to stay out of public controversy ...

“One of the things one learns very quickly about being a judge is that there are always two parties to every dispute. And 50 per cent of the people will think you’re wrong.”

In the article which followed ‘Great expectations - What do we expect from judges in tax cases,’¹² Hill discussed the nature of the judicial process. He went on to say.

⁷ See Footnote 2, pp 6; 8-9

⁸ Footnote 3 at 6

⁹ *Anti-Terrorism Act 2005 (Cth); Anti-Terrorism Act (No 2) 2005 (Cth)*. Bill as at 30 November, check again

¹⁰ Handed out at the conference, 25 p at p 7

¹¹ Evans, D ‘Profile: Hill J’ (1995) 30 *Taxation in Australia* 19 at 20

¹² (1995) 30 *Taxation in Australia* 21-29

“It is a debate about the ability of the Court to find legal principles, not in the language of a statute, not in the language of a constitution, not in the common law as commonly understood, but in the conscience of the judge to reach a result that is controversial and which, to some sections of the community critical of the new judicial process, is not seen as a just result at all.

It is hard to avoid the conclusion that the adoption by the Court of a more activist role is, in part, a consequence of inactivity on the part of the legislature to protect civil rights and, in part, and far more importantly, an insidious erosion of those rights.”¹³

“The independence of the judiciary from executive control is of central importance, yet it is a concept little understood. Judges often get in the way of bureaucrats and Ministers of the Crown by setting aside decisions, regulations or even Acts of Parliament made, promulgated or enacted contrary to law.

There is little wonder that bureaucrats and politicians do not fall over themselves to enthusiastically support judges.”¹⁴

These comments appeared to be prophetic in the light of the controversies which later appeared in 2002.

In 2001, something of Hill’s view on justice may be gleaned from the following:

“And while the rules of interpretation may not be contentious as such, their application to the statute and then the application of that statute as interpreted to the given facts will give the judge much judicial discretion to reach a conclusion which he or she perceives to be just. And the possible width of that discretion will operate to make an adviser’s task even more difficult in predicting an outcome.”¹⁵

Commenting on the above, Mark Burton reveals:

“Justice Hill suggests that the judge must seek a ‘just’ result. Although many argue that justice is a subjective concept, many others argue that justice has an objective meaning (formal justice, utilitarian justice, justice according to finite moral norms {universal or specific to a particular culture}). It is possible that Justice Hill is adopting the latter understanding of ‘justice’, in which case his statement would be consistent with the determinacy thesis.”¹⁶

In a public lecture, given at Flinders University in October 1999, ‘Which way to Damascus? A bill of rights or Chapter III of the Constitution’, Hill remarked:

¹³ Footnote 9 at 27

¹⁴ Footnote 9 at 29. See also Heraghty, B ‘Defender of the faith? The role of the Attorney-General in defending the High Court’ (2002) 28 *Monash University Law Review* 206-238

¹⁵ Hill, DG ‘How is tax to be understood by courts’ (2001) 4 *The Tax Specialist* 226 at 233

¹⁶ Burton, M ‘The rhetoric of tax interpretation – where talking the talk is not walking the walk’ in: Australasian Tax Teachers Association Conference Papers, Victoria University of Wellington, Wellington, 2006 <http://pandora.nla.gov.au/pan/23524/20050225/MarkBurton.pdf>

“There have been decisions where the courts, apparently oblivious of the consequences, have assisted the legislature in restricting access to the courts, decisions which while impeccable in legal reasoning were not necessarily inevitable as can be seen from the fact that many were decided by only a bare majority.”¹⁷

This remark was based on previous decisions of courts, but was also prophetic of the High Court decision in *Al-Kateb v Godwin*¹⁸, where by a majority of one, the court held that detention would continue until either removal, deportation or grant of a visa happened. Hill lamenting this decision, expressed his disappointment with McHugh J who he thought might have decided differently¹⁹. Ten months later, and after Hill’s death, McHugh was reported in the *Sydney Morning Herald*, with the following comments regarding the *Al-Kateb* decision.

“McHugh was part of a 4-3 majority, but in his judgement and after it he has almost gone out of his way to express regrets.

He told Sydney University students he was “afraid [the majority] included myself” and supported a bill of rights that would save judges from being “called on to reach legal conclusions which have tragic consequences”.²⁰

‘We can ensure

Critics of Hill’s views – attacking the person and not the views

As mentioned previously, Phillip Ruddock was a trenchant critic of Hill judicial pronouncements regarding immigration. Yet in a different capacity, he lamented the passing of Hill, with the following comments:

“Attorney-General Philip Ruddock today extended his deepest sympathy on behalf of the Australian Government to the family, friends and colleagues of Justice Graham Hill of the Federal Court of Australia in Sydney.

“I was deeply saddened by the news of his passing,” Mr Ruddock said.

“He will be greatly missed by his colleagues and the wider legal community.”

“Justice Hill made a very fine contribution to the Federal Court and the development of the law in Australia. His death is a great loss,” Mr Ruddock said.²¹

¹⁷ (2003) 5 *Flinders Journal of Law Reform* 103-27 at 103

¹⁸ (2004) 78 ALJR 1099; [2004] HCA 37

¹⁹ ‘Relations between the Judiciary and the Executive in Australia and New Zealand,’ in: Australasian Tax Teachers Conference 2005, Victoria University of Wellington, Wellington at p 6.

²⁰ Pelly, M ‘A higher justice’ *Sydney Morning Herald* 29 October 2005 p 3

Other critics included JB Thomas, who wrote 'Judges who play politics: two current judicial issues',²² where he wrote:

"Strong feelings about refugees and the manner in which the Australian government attempts to deal with the problem led to ongoing problems between the judiciary and executive government. Some time after the series of cases that led to the above comments, federal Parliament (with bi-partisan support) passed a law containing a privative clause that seems to have been aimed at making review of any decision of the refugee tribunal impossible. Some members of the Federal Court made public statements showing hostility to that measure, followed by a statement by the Minister for Immigration (Mr Ruddock) that the courts were "finding a variety of ways and means of dealing themselves back into the review game". This provoked cries of interference with judicial independence. Counsel expressed regret that any such implication might be so construed. In my view Mr Ruddock, as a Minister of the Crown, was perfectly entitled to make such comments *if he had reasonable ground for thinking they were correct*. The history of litigation involving at least some members of that courts and further public statements by Justice Graham Hill seems to provide some basis for a reasonable suspicion to that effect."²³

ICF Spry in an essay 'Should Chief Justice Black resign' noted:

"In regard to immigration matters (where the Federal Court has often over-turned decisions rejecting applications by assylum-seekers and other would-be immigrants) Mr Ruddock considered somewhat inappropriate and foolish comments by justice Graham Hill, who was reported to have "warned that Australians' human rights and freedoms were at grave risk from a government contemptuous of judges". Justice Hill's remarks were absurd, and the fact that they were made at all reflects very badly on the Federal Court. If that Court continues to make decisions not in accordance with the law, it is indeed the duty of the Government to point out that fact."²⁴

Further along in the essay, Spry makes the following observation:

"Judges are not chosen in order to advance their personal political views. If they were, it would be appropriate that they be elected so that some legitimacy might be obtained. But in Australia they are not elected, and moreover commonly their personal political views, in so far as they are evident from incautious judgments, are unpopular and contrary to the wishes of the great majority of Australians. For example, opinion polls show invariably that Australians are concerned to retain border protection and are opposed to the politically-correct who, often for inadequate reasons and invariably to the detriment of their country, are happy to undermine traditional Australian society. The Federal Court is a second tier court, and its members are not generally of the first rank in ability, but it appears that what they lack in ability they more than make up for in political inputs."

²¹ Australia Attorney-General, 'Tribute to Justice Graham Hill', *Media release 156/2005*
http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2005_Third_Quarter_25_August_2005_-_Tribute_to_Justice_Graham_Hill_-_1562005

²² (2003) 77 *Australian Law Journal* 173

²³ Note 21 at 174

²⁴ (Winter 2002) No 53 *National Observer* <http://www.adelaideinstitute.org/Legal/spry.htm>

And:

“In fact, the quality of justice in the Federal Court has proved to be much lower than that in the State courts. The Federal Court has been perceived, especially in recent times, to be intransigently political, in the sense that commonly its judges temper their decisions with political correctness and lack rigour in their reasoning. Indeed, out of the scores of judges who comprise the expensive machinery of the Federal Court it is hard to identify anyone of special distinction. But it is unfortunately all too easy to identify judges whose decisions are not of high quality. Many of them have been appointed for political reasons.

Indeed, especially since Mr Michael Black QC became Chief Justice it is difficult to find any compelling reason for the existence of the Federal Court. It has been perceived to diminish the legal standards of the country. And it provides a forum for judges who are sometimes of unduly leftish political views or who are often merely mediocre proponents of political correctness.”

With workloads which are heavy enough, if you were a Federal Court judge, how would you feel about the above criticism? Basically I would query Spy’s errant criticisms as being way off the mark. Many Federal Court appointments represent the elite of the legal profession. Hill himself scored the university medal at the University of Sydney ahead of his fellow high school students who went on to become High Court appointees, Murray Gleeson and Michael Kirby.

Judging just a robotic process?

Many critics of judges often pillory them for being unelected. This criticism seems sanctimonious. Notice the following which appears to be typical.

“The fact is, however, that what the bill of rights sirens are really selling is an instrument that transfers some of the line-drawing powers that are presently exercised by elected legislators to unelected judges. (Let’s be honest, to committees of former lawyers). It’s a tool that would (and in Canada and elsewhere does) give judges vastly more say than they have at present.”²⁵

All law students in their first years are informed about sources of law. As you know those sources of law include the primary materials of legislation and case law. Some teachers may suggest that legislation is paramount. What this fails to tell us is that sometimes legislation is struck down and sometimes judgments are usurped by legislation.

In Australian legal history it may irk the politicians when the legislation they have introduced is struck down, but the reality is that this is one of the purposes of judicial review. Note the striking down of the bank nationalisation legislation in 1948 and 1949.²⁶

²⁵ Allan, J ‘Sounding the alarm about a bill of rights’ *The Australian* 22 December 2005 p 10

²⁶ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 (HC); (1949) 79 CLR 497 (PC)

Then there was the anti Communist Party legislation, which was also struck down in 1951.²⁷ The Tasmanian Dam legislation was ruled invalid in *Commonwealth v Tasmania*.²⁸ The federal corporations legislation was struck down in *New South Wales v Commonwealth*²⁹ and later in *Wakim, Re; Ex parte McNally*³⁰ which dealt with the cross vesting provisions.

By way of contrast are the number of instances whereby cases have been overturned by subsequent legislation. Examples include the *Parramatta Stadium Trust Act 1988* (NSW) which overcame the effects of a decision of the Land and Environment Court.

Black and white or shades of grey

There are traditionalists who see the world as black and white, whilst others see issues with shades of grey.

A small call for reform

Earlier I mentioned I would not refer to Hill as Justice Hill in most of my paper as I am referring to his non judicial comments. Most law review, newspaper articles, convention or seminar papers written by judges, often have their judicial appellation but I think it would be wiser to just have the name of the author with a * indicating their position. Once you indicate Justice in front of a person's name you are in a sense usurping their role on the bench.

I understand at a recent meeting of the Sydney Synod of the Anglican Church, a member or delegate addressed another member as Justice. This "Justice" announced in this forum, he did not need to be called "Justice" but just plain Robert³¹.

Likewise when citing non judicial writings by a judge, I have seen writers cite the article as follows: Bambi, J 'Taxing taxis in Tanzania' (2005) 4 *Journal of African Taxation* 23, where you get the impression the person's initials are J, whereas the person is suggesting the J stands for Justice.

²⁷ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1

²⁸ (1983) 158 CLR 1

²⁹ (1990) 169 CLR 482

³⁰ (1999) 198 CLR 511

³¹ Not the real person's name, just made up for this example.