THE ART OF JUDGING

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I INTRODUCTION

The image of the judge, an image which, in various guises, reaches far back into the history of mankind, has varied according to time and place. The image of the judge etched indelibly in my mind is of the judge who is 'wise, learned and objective'.[1] The words are those of Lord Radcliffe, one of the finest English judges of the 20th century, a lawyer who in Sir Garfield Barwick's opinion, was without peer in his day. To these words I would add the words 'fair' and 'humane', though the judge who is wise is almost certainly fair and humane.

Lord Radcliffe's idea of the judge differed radically from what we know of judges in much earlier times who were seen as stern, authoritarian figures representing the majesty and power of the law. In those times the law was at times associated with religion, very often an unforgiving version of religion with a strong emphasis on punishment and eternal damnation for offences committed against the laws of God and man. And religion endowed the law with added force, even more so in those jurisdictions in which the law was administered by judges who were members of a priestly class.

The image of the judge as a stern authoritarian figure persisted in various forms until recent times. There was more than a hint of it in Edmund Burke's reference in 1794 to 'the cold impartiality of the neutral judge'.[2] Over 200 years later a photograph of English judges in the 1920s or 1930s, processing in their judicial robes, depicted them as grim visaged guardians of the law.[3]

Even as late as the mid-20th century, Lord Chief Justice Goddard, notable for his knowledge of criminal law, loomed as a formidable,

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1 Lord Radcliffe, 'The Lawyer and his Times' in *Not in Feather Beds* (1968) 276.

2 Edmund Burke, Preface to the *Address of M Brissot* (1794).

3 See the cover photograph to Robert Stevens, *The Independence of the Judiciary – The View from the Lord Chancellor's Office* (1993).

forbidding judge. The picture of him which emerges from the judgment of Bingham LCJ (now Lord Bingham of Cornhill), in *R v Bentley*[4] is, to say the least of it, unflattering. Bentley was convicted of the murder of a police officer in 1952, after a trial before Lord Goddard and a jury, in circumstances where the critical evidence on which the prosecution relied was a statement made by Bentley, then aged 19. If made at all, the statement was ambiguous, though Lord Goddard did not so regard it and treated it as an instruction to the co-defendant to shoot the police officer. Despite a jury recommendation for mercy, Bentley was sentenced to death and executed. In 1998, 46 years later, the Court of Appeal quashed the conviction. Of Lord Goddard's unbalanced directions to the jury, Lord Bingham said:

> In our judgment, however, far from encouraging the jury to approach the case in a calm frame of mind, the trial judge's summing up, ... had exactly the opposite effect. We cannot read these passages as other than a highly rhetorical and strongly-worded denunciation of both defendants and of their defences. The language used was not that of a judge but of an advocate (and it contrasted strongly with the appropriately restrained language of counsel prosecuting). Such a direction by such a judge must in our view have driven the jury to conclude that they had little choice but to convict ...

Lord Goddard's directions reflected outdated judicial values when judges invited juries to accept the evidence of police officers in preference to that of the accused and defence witnesses. Police officers were then seen as protecting society from criminals, without having any motive other than to tell the truth and therefore as witnesses who were likely to be truthful and deserving of support in preference to defence witnesses who had a self-serving interest to secure the accused's acquittal.

Nowadays we think of the judge as a dispenser of justice rather than as an agent or representative of government in the role of law enforcer. Indeed, the emphasis given to judicial independence since the end of the 17th century recognised that the courts are not a branch

4 [1998] EWCA 2516 (30 July 1998).

of the executive government and that their function is to stand as an impartial and objective arbiter between the government and the citizen.

Many other illustrations could be given of changes in judicial values. These changes correspond to changes in the community's standards and values in much the same way as the substantive principles of law have changed in response to changes in society and the way in which it behaves. The important point is that the law and the way in which it is applied are constantly evolving, even if this evolution is at times imperceptible or almost so.

Because our law is deeply rooted in the past, the lawyer and the judge need to cultivate a strong sense of history. That was Lord Radcliffe's view[5] and it was based on the proposition that our jurisprudence is a rationalization of attitudes, moral or social, which make up the history of our society. As a broad commentary on our jurisprudence that statement may well be right, even if it underplays the element of reason that contributed to the development of the common law. On the other hand, the statement has nothing to say about our statute law, which forms an ever-expanding proportion of our laws.

To say that the judge needs to cultivate a strong sense of history does not mean that the judge automatically is expected to find an answer to today's legal problem in a past decision. To say that a judge should cultivate a sense of history is not to say that a judge should become a legal antiquarian. Indeed, it is to state the very opposite. It is to assert that, in order to understand any rule or principle of law, one must understand what were the circumstances that brought it into existence and its purpose. This means ascertaining the reasons, values and policies on which it was founded. Given that understanding, the judge is in a position to evaluate the rule or principle and its reach as well as its suitability for application to changed conditions and circumstances.

The sense of history of which I speak is, of course, centred on the law itself and its relationship with society. Neither the law nor its relationship with society can be understood unless the judge

5 Lord Radcliffe, 'How a Lawyer Thinks' in *Not in Feather Beds* (1968) 71.

appreciates the variety of cultural influences, political, economic and social which impact upon the law. In other words, the judge should be well-read and knowledgeable. It is one aspect of being learned in the law.

II JUDICIAL DECISION-MAKING

Some of the greatest common law judges have regarded the nature of the judicial process as a mystery. Justice Cardozo, in his acclaimed account *The Nature of the Judicial Process*,[6] went to great lengths to explain the elements of the process. His account, like the writings of Lord Radcliffe, is of little assistance to the judge who is to decide issues of fact at first instance in the typical cases that come before the courts. To such a judge Lord Bingham's discussion of 'The Judge as Juror'[7] would be of more assistance. Both Lord Radcliffe and Justice Cardozo wrote with the ideal judge in mind, the judge who is confronted with difficult and challenging questions of law, more particularly questions which are novel and not covered by precedent or, if covered by precedent, raise the question whether precedent should be followed, overruled or distinguished.

On questions of this kind there is no magic formula which the judge can apply. On the contrary, various considerations are to be taken into account, some of them conflicting, with no settled weight to be given to each of the relevant considerations. Not infrequently the judge is confronted with a tension between competing values. There is the tension that troubled Sir Owen Dixon between the force of precedent (with its virtues of certainty and predictability) and the natural desire of the judge to reach the correct or just result, whether it be based on principle, logic or public welfare,[8] and there is the tension between the argument from philosophical concept and the argument based on history or custom, illustrated by the tension between the separation of powers under the Australian Constitution

6 Benjamin Cardozo, *The Nature of the Judicial Process* (1921).

7 In Sir Thomas Bingham, *The Business of Judging* (2000) 1.

8 Sir Owen Dixon would almost certainly take issue with the suggestion that public or social welfare should, as such, be taken into account.

and the history of delegated legislation by the executive government under the Westminster system.[9] And there are other imponderables. How does the judge fill in gaps in the law? Should the response of another system of law, even international law, be adopted? Or should a new principle be fashioned that best reflects the needs and values of our own community.

Underlying these and other questions are competing theories or philosophies of law. The judge may be, and probably is, a stranger to all of them in the sense that he does not subscribe to any of them. This statement might not be accepted in the United States where it has been said that '[t]he juristic philosophy of the common law is at bottom the philosophy of pragmatism'.[10]

In any event, as Cardozo remarked, '[t]here are vogues and fashions in jurisprudence as in literature and art and dress'.[11]

And, in so far as judges develop a philosophy of judicial decision-making, they generally do so in the light of their experiences as judges. Few judges come to the Bench with an already developed judicial philosophy.

By endeavouring to identify a number of the ingredients that have a potential to inform or influence the decision-making process, I have made the process appear much more complex and onerous than it is in practice. Even in the highest reaches of the law, the issues in the particular case are confined and the factors actually taken into consideration by the judge in a given case fall short of all those I have mentioned.

It is possible that the image of the judge in the mind of the public is that of a stereotype. But what type of stereotype? The community's experience of the judiciary is varied, depending upon the particular court and the class of case with which the individual was involved. Most people are more familiar with Magistrates' Courts and the Family Court than with the District or County Court and higher

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9 See *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73.

10 Cardozo, above n 6, 102; see also R Posner, *Law, Pragmatism and Democracy* (2003) 10–13, 24 et seq.

11 Cardozo, above n 6, 102.

courts. It is also likely that the individual's impression of a Family Court judge will be very different from the individual's impression of an appellate judge or a judge presiding in a criminal trial or the judge who sits in a specialist court such as the NSW Land and Environment Court. And there is the distinct possibility, alarming though it may be, that the public image of the judge is not of an upstanding Australian judicial officer but of a televised American judge culled from a program such as Boston Legal, LA Law or even Judge Judy.

Putting aside this alarming possibility, the point is that what a judge does covers a broad spectrum of activities, varying according to the particular jurisdiction and whether the judge is sitting at first instance, with or without a jury, or on appeal, when the judge may be sitting alone or as a member of an appellate bench.

The legal community knows that judges vary in many ways. The legal academic community shares this view, even to the extent of suggesting, in the United States, that a judge's outlook may depend on what he had for breakfast.

For my part, having sat with many judges over the years, I have not encountered any two who shared an entirely identical outlook. Two judges who came close to sharing a common outlook were Sir Harry Gibbs (who became Chief Justice) and Sir Cyril Walsh of the High Court. There are judges who have a rigid view of precedent and others who have a more relaxed view. There are judges who tend to be conservative in some areas of the law, notably property, commercial and taxation, and less so in relation to matters where social issues are involved. There are other judges who interpret statutes in the light of the pre-existing common law and others who are more disposed to give the words of the statute full value, uninfluenced by what was the common law. Then there are literalists and others who are more inclined to draw meaning from context or purpose. And there have been judges who were known to give generous awards to plaintiffs in personal injury cases and others who were reputed to be niggardly. The list of potential points of difference does not stop at this point.

Perhaps more disconcerting than any of these differences, viewed in isolation, is disagreement about the role of the court. Disagreements

of this kind generally occur in the higher courts and relate to how far the court can or should go in changing the law, to the relationship between the court and the other arms of government and to the appropriate method of constitutional interpretation. Disagreement about the role of the court has been a prominent feature in the history of the Supreme Court of the United States as Justice Scalia's powerfully expressed opinions make clear. Disagreement of this kind has also been an element in the jurisprudence of the High Court of Australia over the past 25 years.

Despite these differences in outlook, common to all the judges with whom I have been associated has been a keen sense of the common law tradition of judicial decision-making and a dedication to that tradition and to judicial integrity. I have sat with judges and retired judges from many other jurisdictions in courts and arbitral tribunals and they all exhibit these characteristics. I have felt as much at home sitting with the judges of the Hong Kong Court of Final Appeal and of other Pacific courts as I did in the High Court of Australia and the NSW Court of Appeal.

III JUDGMENT WRITING

The judgment which decides the case and deals with the arguments is a critically important element of the judicial responsibility. It contains the reasons for the decision; it explains to the losing party why he lost and it informs the legal community what the case decided and why. The judgment is written to persuade the reader that the conclusion reached is correct.

Particularly for later generations, the reputation of a judge rests on the quality of his judgments. Lord Macnaghten was an outstanding judgment writer. His speech in *The Great Western Railway Co v Bunch*[12] has been justly regarded as a masterpiece. Mrs Bunch came to Paddington station to catch the 5 pm train to Bath. She entrusted a Gladstone bag to a porter, employed by the company, to be taken to the platform, whence the train was to depart, to be deposited on the train. The bag, last seen on the platform, was never to be seen again. The House of Lords held, with Lord Bramwell dissenting, that the

12 (1888) 13 AC 31.

bag was delivered into the custody of the company and its loss was due to the company's negligence. Lord Macnaghten's speech, in its ordering and arrangements of the facts and its disposition of the arguments creates such an impression in the mind of the reader that the conclusion ultimately reached seems inevitable. Lord Macnaghten, like many English judges had an economical yet elegant writing style, sometimes coupled with a gentle mocking sense of humour, seen to great advantage in *Attorney-General v Duke of Richmond*[13] which was what we would call a tax avoidance case.

There have been many other fine judgment writers. Of modern judges, Lord Hoffmann is noted for his brilliant exposition of principles and arguments, while Gleeson CJ's judgments are highly regarded for their clarity of exposition of principle and doctrine, even in the virtually impenetrable gullies of the jungle of Australian constitutional law.

It is, I think, true to say that many Australian appellate judgments are 'dense', following a tradition thought to be set by Sir Owen Dixon. They are rather too encrusted by the citation of authority and the discussion of precedent seems at times to get in the way of the reasoning and to obscure it. Such a criticism could not be made of the opinions of Cardozo, Holmes or Learned Hand JJ. Nor can it be justly made of Sir Owen Dixon, though it must be said that his reasoning often required very careful attention. His propositions sometimes resembled a well-constructed mansion in which certain windows and doors were advisedly left open.

IV THE JUDGE AS REPRESENTING THE COMMUNITY

At least in a metaphorical sense the judge is seen as representing the community in the adjudication of disputes, whether they be civil or criminal. In earlier times, when juries were empanelled in civil and criminal cases, this aspect of the judicial role was obscured by the stronger emphasis given to the jury's role as representing the community. Now that the jury has been virtually banished in civil

13 [1909] AC 466.

cases, it is apparent that the courts and each of its constituents, the judge and jury, represent the community in the adjudication of disputes.

Moreover, in deciding issues of fact, the judge and the jury bring to bear their knowledge of the community and interpret community values and standards, whether it be the standard of a reasonable person or some other standard or in assessing the credibility of witnesses. And in sentencing offenders, judges impose a sentence that marks the community's sense of moral outrage at the offence which has been committed. The judge is, accordingly, the representative of the community and the interpreter of its standards and values.

In the United States, Judge Posner, recognising the representative role of the judiciary in this sense, advocates that the judiciary should become more representative in its composition. The more diverse it is, the more representative it will be with the likely consequence that its decisions will be more respected and accepted.[14] He contrasts such a diverse judiciary with a mandarin judiciary. On the other hand, he does not suggest that a judge, in hearing and deciding cases, should act as a representative of a particular section of the community. In fact, Judge Posner opposes any such notion.

Just how judges inform themselves about matters such as standards, values and sentencing, has been a matter of controversy. How does a judge measure the community's sense of outrage at the commission of a particular offence? Presumably by ranking it on a scale of seriousness relating to an offence of that kind.

From time to time, politicians criticise judges for being 'soft' on crime and embark on a 'law and order' campaign, demanding that judges impose harsher sentences. The climate of opinion generated by these campaigns present a dilemma for sentencing judges. Do the judges remain uninfluenced by these events or do they treat them, if endorsed by the electorate, as reflecting a shift in the community's sense of moral outrage? Although the evidence is not conclusive, it may suggest that the judges give effect to the second alternative.

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14 Posner, above n 10, 120, 353–4.

It is accepted that a judge must decide a case without regard to the popularity or unpopularity of the decision. On the other hand, when a judge has regard to community values and standards in arriving at a decision, the judge is looking to enduring values and standards, not matters of transient impression which may arise by way of reaction to particular and immediate events.

In the words of Aharon Barak, President of the Supreme Court of Israel,

> judging is not merely a job but a way of life; … it is a way of life that includes an impartial and objective search for truth. It is … not an attempt to please everyone but a firm insistence on values and principles; not surrender to or compromise with interest groups but an insistence on upholding the law; not making decisions according to temporary whims but progressing consistently on the basis of deeply held beliefs and fundamental values .... There should be no wall between the judge and the society in which the judge operates. *The judge is part of the people.*[15] (emphasis added)

This statement captures the essence of the judicial role and what the judge stands for. It explains why the judge is entitled to respect and has the confidence of the people. It is because he is a manifestation of the people.

15 Aharon Barak, *The Judge in a Democracy* (2006) 112.