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Art or artifice: judging in troubled times

Greta Mary Bird
Southern Cross University

Nicole Rogers
Southern Cross University

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THE ART OF JUDGING

A special issue of the Southern Cross University Law Review



Editors: Greta Bird and Nicole Rogers

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ART OR ARTIFICE: JUDGING IN TROUBLED TIMES

GRETA BIRD AND NICOLE ROGERS

When we were in law school, we were both taught that judges were mystical figures, priests who channelled the common law and spoke with almost divine authority. The mask, as Lord Justice Moses has put it, was firmly in place: the mask which ‘evoked the magic by which they discovered and declared the law’.^{*} Since those long-ago days, we have abandoned fairytales¹ and judges have lost some of their mystique. Arguably, they have lost their mask. It is fascinating, therefore, to find out what judges themselves think about the art of judging.

This collection features contributions on the art of judging by a range of judges and retired judges. The contributors address topics and themes as diverse as the judge as consumer of legal services, therapeutic jurisprudence, judicial activism, judicial impartiality, the contribution of particular judges, the role of an intermediate appellate court, the role of the chief justice, the judge’s responsibility to the community, the importance of dissent, and the relevance of masks to the art of judging. Despite the diversity of such topics, a discussion of impartiality and independence as essential to the judicial function can be found in all contributions.

I THE IMPARTIAL AND INDEPENDENT JUDGE

The judge must be impartial and judge without bias. Justice Ruth McColl identifies, as one of the skills in judging, the requirement that judges must decide cases without being influenced by the ‘subconscious factors’ which would normally affect an individual’s decision-making process. The writers link impartiality to the concept

^{*} The reader should note that where we refer to articles in this collection, we have not referenced these articles. Page references were not available at the time of writing.

¹ Lord J Reid ‘The Judge as Lawmaker’ (1972) 12 *Journal of Public Teachers of Law* 22, 22; this has been reiterated by other judges (see, for instance, Justice Michael Kirby, ‘The Judges’, *Boyer Lecture Series*, 1983, Australian Broadcasting Corporation (Sydney)).

of an independent judiciary, immune from executive and governmental interference. The art of judging requires judges to perform their role as a bulwark between individual citizens and the state. Sir Anthony Mason writes that the judge's function is 'to stand as an impartial and objective arbiter between the government and the citizen.' Justice Kirby argues cogently that judicial independence is 'an institutional protection for the people.'

In Justice Kenny's article, she highlights Justice Gaudron's conviction that 'public confidence cannot be maintained in a judicial system which is not predicated on equal justice.' The decisions of judges are accepted by the public because judges are seen to be impartial and carrying out their functions in a fair manner. Thus, Professor David Malcolm describes the independence of the judiciary from the executive as 'indispensable if there is to be public confidence in the administration of justice'.

In Lord Justice Moses' article, the quality of judicial independence is represented by the mask. Managerial society requires transparency and accountability but how then, Lord Justice Moses asks, can judges retain their mask? Is the mask a necessary accessory to the judicial function, a means of elevating judges above the executive process or the political fray? Moses argues that without the mask, there is nothing to distinguish judges from the executive or government, and herein lies great danger.

Lord Bingham argues that 'the literature on [judicial independence] is meagre, and the concept itself has never been fully unpacked'.² According to David Brown, 'judicial independence is a shadowy and contradictory notion' and 'a far more precise debate is required, a debate that focuses on the specific work processes, routines and practices of the judiciary.'³ The independence of the judiciary may well be the foundation of a robust democracy; it can also be a 'smokescreen' for mystification. A detailed examination of the concept is thus useful.

² Lord Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (2000) 56.

³ David Brown, 'The Judicial Mystique: Looking Behind the Smokescreen of "Judicial Independence"' (1985) *Australian Society* 6, 9.

There are, at times, pressures from the executive arm of government to direct judges in how to interpret statutes or how to sentence. Justice David Ipp, recounting the experiences of a Chinese judge in relation to intervention by the executive arm of government in the exercise of her judicial functions, thus reminds us that judicial independence is undermined in regimes in which the rule of law is devalued. Western nations are not immune to this. The judges in Nazi Germany, despite the ‘fine reputation’ of the German judiciary prior to 1930, lost this quality of independence during the Nazi regime. Political theorist Giorgio Agamben describes the Nazi regime as a state of exception, in which the violence of the state was no longer administered through the rule of law; it had become, instead, absolute, arbitrary and unconditional.⁴

It is worth remembering that Agamben has also put forward the hypothesis that contemporary Western democracies, particularly in light of the war on terror and the corresponding attack on human liberties by the executive, can be designated as states of exception in which the rule of law is increasingly irrelevant.⁵ In a recent decision, Justice Kirby cautioned the Court against ignoring historical examples of ‘unacceptable intrusions by other sources of power into the independence of the judiciary’ and referred to Germany in the early 1930s.⁶ In *Kartinyeri v Commonwealth*⁷ he used the same historical example in order to interpret the race head of power, and to point out that a ‘manifest abuse’ test cannot offer adequate protection against racially discriminatory laws. He warned that ‘by the time a state of “manifest abuse” and “outrage” is reached, courts have generally lost the capacity to influence or check such laws’.⁸

Indeed, the public outcry in 2006⁹ against so-called ‘civil libertarians’ who believe that ‘the rule of law trumps all’,¹⁰ after the

⁴ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen trans, 1998).

⁵ Giorgio Agamben, *State of Exception* (Kevin Attell trans, 2005) 2.

⁶ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 645 (Kirby J).

⁷ (1998) 195 CLR 337.

⁸ *Ibid* 416 (Kirby J).

⁹ See Andrew Lynch, ‘Maximising the Drama: “Jihad Jack”, the Court of Appeal and the Australian Media’ (2006) 27 *Adelaide Law Review* 311.

Victorian Court of Appeal decided to quash the convictions of accused terrorist Jack Thomas, illuminated the potentially precarious position of an independent judiciary during what has been designated by one commentator as a war on an abstract noun.¹¹ The emphasis on the importance of an independent judiciary and the accompanying emphasis on the importance of the rule of law in this collection of essays are timely reminders. When governments pass legislation based on populist calls for 'law and order' or on a fear of difference, the judges must not only retain their independence from the executive but must also, when developing the common law and interpreting statutes, look to fundamental, rather than transient values. They refer to 'justice' as the ideal they are seeking.

In the view of Mauro Capelletti, a strong judiciary is needed to balance the power of the executive. He has argued that:

we are faced with two parallel developments of major dimensions, both of which reveal the clear symptoms of a deep crisis On the one hand there is the gigantism of legislatures which are called upon to interfere with larger and longer spheres of activities; on the other hand, there is the resulting gigantism of a pervasive, possibly oppressive, administrative branch Since the 'third branch' cannot ignore the great transformation of the real world, new responsibilities have come to weigh upon the courts.¹²

Capelletti wrote this passage in 1981. Since then, the advent of the war on terror and the consequent expansion of the powers of the executive arm of government in every Western nation have made his words even more relevant.

10 Gerard Henderson, 'Unanimous Verdict in Democracy Divided', *The Sydney Morning Herald* (Sydney), 22 August 2006, 11.

11 Rodney Allan, 'Terrorism and Truth' (2002) 27 *Alternative Law Journal* 157, 157.

12 Mauro Cappelletti, 'The Law-Making Power of the Judge and its Limits: A Comparative Analysis' (1981) 8 *Monash University Law Review* 15, 29.

A The Dissenting Judge

The dissenting judge plays a critical role in an independent judiciary. It is interesting to look at judicial dissent at a time when other forms of dissent are not welcomed by government. During the Howard years, a number of prominent Australian commentators documented an atmosphere of oppression and proliferating examples of censorship.¹³ The reactivation of the sedition laws¹⁴ has made certain forms of dissent more difficult. Yet the tradition of judicial dissent continues, with Justice Kirby as the High Court's most consistent dissenter in recent years.¹⁵ It is fitting, therefore, that Justice Kirby should discuss the importance of the dissenting judge in his article in this collection.

Justice Kirby expresses surprise that he is often the lone dissenting voice on the High Court bench; he also expresses hope that his dissenting opinions may one day prevail, observing that his predecessor Lionel Murphy paved the way for later decisions protecting human and democratic rights through his dissenting judgments. The significance of Justice Kirby's own role as a dissenting judge cannot be overstated. In many cases, Justice Kirby's dissenting judgments provide a contextualised critique of the often legalistic judgments of his fellow judges. Justice Kirby's judgments allow us to deconstruct the legalistic reasoning of the majority judges. While their judgments may exclusively refer to black letter law, Justice Kirby painstakingly unmasks the political bedrock of judicial reasoning. We find, in his judgments, an overwhelming concern for social justice and human rights. As teachers in a law school, we can attest to the impact of Justice Kirby's dissenting judgments on a generation of idealistic law students struggling to reconcile justice and law.

¹³ See, for instance, Frank Moorhouse, 'The Writer in a Time of Terror' (2006) 14 *Griffith Review* 13; Clive Hamilton and Sarah Maddison (eds), *Silencing Dissent* (2007); David Marr, 'His Master's Voice: The Corruption of Public Debate under Howard' (2007) 26 *Quarterly Essay*.

¹⁴ In Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth).

¹⁵ Jonathon Pearlman, 'Ball Lands in Rudd's Court', *The Sydney Morning Herald* (Sydney), 8 February 2008, 2.

B The Activist Judge

For Justice Kirby, the art of judging and the pursuit of justice have placed him in a dissenting role, frequently in disagreement with the majority judges. Sometimes, however, Justice Kirby points out that it can be the majority of judges in a court who '[break] the spell of an existing consensus', as occurred during the years in which Sir Anthony Mason was Chief Justice of the High Court. Sir Anthony Mason concludes his article with the observation that the judge is, truly, 'a manifestation of the people'. It is, no doubt, his dedication to that democratic principle which inspired the long line of remarkable decisions from the Mason High Court: decisions which made Australia, in Justice Kirby's words, 'a more equal, freer place'.

The Mason High Court has frequently been accused of judicial activism. In particular, the *Mabo* decision¹⁶ attracted criticism from commentators concerned about the political impact of the case. Nonetheless, a different decision in line with earlier precedents, in which the rights of Aboriginal people had not been recognised, would have seen the common law 'frozen in an age of racial discrimination'.¹⁷ As Justice Brennan wrote in his judgment:

The expectations of the international community accord in this respect with the contemporary values of the Australian people A common law doctrine based on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.¹⁸

When does judicial independence become activism? The current Chief Justice of the High Court, Justice Robert French, investigates the concept of the activist judge in his article and concludes that it is difficult to attach a meaning to the term 'judicial activism'. In his view, the label 'activist' is not helpful and he refers to the 'almost meaningless rubric of "judicial activism"'. Activist judges are often accused of straying outside the acceptable parameters of the judicial function and, in fact, seeking to usurp the role of the legislature in

¹⁶ *Mabo v Queensland No 2* (1992) 175 CLR 1.

¹⁷ *Ibid* 42 (Brennan J).

¹⁸ *Ibid*.

law-making. He sees some value in asking questions about whether a judge has ‘exceeded his or her proper function’ but points out that ‘judges are the least powerful of the three branches of government.’

Furthermore, as Chief Justice French acknowledges, common law precedents or the words of a statute always carry within them ambiguity. This is the nature of language, as French philosopher Saussure has explained.¹⁹ Chief Justice French alerts us to the fact that we do not need ‘a descent into the depths of deconstruction,’ a term developed by Jacques Derrida in his work on the instability of language,²⁰ in order to realise that a ‘precision of expression is illusory.’

Consequently, judges must look to context and thus bring social and political and economic factors to bear in the art of judging. Sir Anthony Mason puts it thus: ‘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.’ Justice Tony North, for instance, has explained that judging native title issues required sitting down with Aboriginal people and learning about their culture. He has been privileged to have done this: without this experience it would not be possible for him to judge the issues properly. In his view, the complex language of the *Native Title Act 1993* (Cth) cannot be understood except in a cultural context.²¹

C The Sustainable Judge

It is worth contemplating whether the democratic principles which underline the independence of the judiciary and its adherence to the rule of law have any relevance in the context of sustainability. Increasingly, the first decade of the 21st century has been characterised by a heightened awareness of rapid and seemingly

¹⁹ Ferdinand de Saussure, *Course in General Linguistics* (Roy Harris trans, 1986).

²⁰ See Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak trans, 1998); Jacques Derrida, *Writing and Difference* (Alan Bass trans, 1978).

²¹ Justice Tony North, ‘Disconnection – The Gulf between Law and Justice’ (Paper presented at the National Indigenous Legal Conference, 12–13 September 2008, Melbourne).

irreversible environmental degradation, which includes climate change. Justice Brian Preston anchors his discussion of the three critical steps involved in the art of judging in the context of the judicial adoption and application of the principles of sustainable development. Justice Preston's contribution suggests that the art of judging can indeed provide viable solutions to the catastrophic occurrences of climate change and associated environmental degradation. Justice Kirby reminds us that 'law does not belong to the few but to all the people; not only to the past but also to the present and future.' We find, in the examples discussed by Preston, judicial decision-making directed towards the needs of future generations.

II REFLECTIONS ON A MORE REPRESENTATIVE JUDICIARY

Advertisements, interviews and judicial commissions spell the death knell of the judge as oracle or priest, as masked avenger, seeking justice unsullied by the tawdry practicalities of power and political process. Such is the zeal for democracy that 'the people' are calling for a representative judiciary which reflects the make up of contemporary Western society. Yet if judges can and indeed are truly impartial, perhaps those who advocate a more representative judiciary are misguided. Certainly Justice Ipp is concerned about the possibility of standards being lowered in the search for a more representative judiciary.

Justice Ipp asserts that he is against 'discrimination, reverse discrimination or affirmative action' in judicial appointments. He argues that if we seek to appoint judges who are, for example, compassionate then we may end up, as has happened in the past, with judges whose compassion is exercised in favour of large investors or employers of labour.

Justice McColl agrees that merit is a starting point but that 'merit may come differently packaged'. As Joan Brockman writes of Canada,

the history of the legal profession in Canada, as elsewhere, is one of the exclusion of women, Aboriginal peoples, ethnic and racialized groups, and those from the less privileged classes. The

beneficiaries of these exclusionary tactics were usually upper-or-middle class [white] men.²²

There is a temptation for all of us in seeing neutrality as lying in what Professor Margaret Thornton has termed the body of the ‘benchmark’ man.²³ This person, who shares the class, race and gender positions of the leaders in every area of the economy, appears impartial because their viewpoints support, rather than challenge, the status quo.

Justice Ipp is of the opinion that it is ‘important that judges continue to be drawn largely from the ranks of successful practising barristers’ although he also acknowledges that judges appointed from other fields have proved to be excellent appointments. He argues that a successful practice at the Bar is the best indicator of judicial capacity. Justice Pagone, however, points out that a different set of skills is needed for judging, and that the adversarial system encourages barristers to prolong legal hearings unnecessarily. At present, with most senior judges chosen from the ranks of the Bar, we have what Weisbrot has termed ‘an Australian judiciary marked by a high degree of technical competence ... but also with a narrow political and intellectual approach and a relatively homogeneous social background’.²⁴

Senior Magistrate David Heilpern points out that it is a sobering experience as a privileged, white, middle class man to judge the conduct of an Aboriginal youth who represents the third generation in his family to be incarcerated; for whom, in fact, incarceration is an unpalatable but inevitable fact of life.

Heilpern uses narrative to critically reflect on his role as a judge. He interrogates his race and class position and speaks of his sense of privilege arising from his whiteness and his professional position. In contrast, the defendants who appear before the court are often marginalised in some way. Many of them are Aboriginal; Aboriginal

²² Joan Brockman, *Gender in the Legal Profession* (2001) 3.

²³ See Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 7, 22.

²⁴ David Weisbrot, *Australian Lawyers* (1990) 179.

people are vastly over represented in the criminal justice system. Others are poor or mentally ill. He writes powerfully, bringing the very body of the defendants before our eyes and clearly demonstrating that the so-called 'people's court' is divided along lines of class and race. Heilpern eschews theory in his contribution. However his narratives provide data for Indigenous critical race theorists, such as Irene Watson and Aileen Moreton-Robinson, because the stories he recounts reflect on the valuable property flowing from his 'whiteness' and demonstrate his professional struggle to achieve justice.

Jelena Popovic tells us in her article that Indigenous people feel quite differently about justice when it is administered by their own Elders, in the Koori courts of Victoria. Yet these Elders sit only at the magistrates' level and play only an advisory role. Furthermore, since the death of Judge Bob Bellear, there are no Aboriginal judges in Australia, and a paucity of Aboriginal magistrates in comparison to the disproportionate numbers of Aboriginal defendants who appear before them.

Justice Ipp and Lord Justice Moses both allude to the symbolic representation of justice in a female form. Despite this depiction, women also remain under-represented in the judiciary, in the magistracy, and at the senior levels of the legal profession.

Does gender matter, in the art of judging? Justice Ruth McColl reminds us of the 'subconscious factors', the 'underlying philosophies' which can affect decision-making, even whilst judges strive for impartiality, and points out that these may indeed 'differ between genders and racial groups'. Professor David Malcolm has written in another context of 'the hidden or unconscious gender bias in the law and the administration of justice'.²⁵

The legacy of the first woman to sit on the Australian High Court, Justice Mary Gaudron, is acknowledged by Justice Susan Kenny in her article. In discussing Justice Gaudron's contribution, Justice Kenny highlights her concern for judicial process and her commitment to the ideal of justice. Justice Gaudron saw justice as,

²⁵ Chief Justice David Malcolm, 'Women and the Law – Proposed Judicial Education Programme on Gender Equality and Task Force on Gender Bias in Western Australia' (1993) 1 *Australian Feminist Law Journal* 139, 144.

in part, residing in the judicial process. She spoke of the ‘open, just and free society’²⁶ and called for a ‘requirement for the critical evaluation of conventional judicial method.’²⁷ For us, the editors, the significance of the first woman and mother to sit on the High Court bench is apparent in a small but telling example.

The *Kruger* case²⁸ is the case in which the High Court held that the *Aboriginals Ordinance 1918* (NT), an Act which enabled the Northern Territory Chief Protector to remove Indigenous children from their families and communities, was constitutionally valid. It is truly a case in which, as Professor Margaret Thornton has pointed out, the process of ‘constitutionalisation’ involved ‘the treatment of issues at a very high level of abstraction so that distinctive private or subjective features [we]re sloughed off.’²⁹ She has argued that ‘the sorrow of the Aboriginal “Stolen Children” evaporates in the face of a legalistic excursus on the legislative scope of the Territories power.’³⁰

Both of us have two daughters. Both of us can imagine, only too vividly, the agony of the Aboriginal mothers whose children were taken away against their will. One of us, appalled by the dry legalism of the High Court reasoning, could not finish reading the case. The other, reading the almost identical opening paragraphs of each judgment in which the judges quickly explained the identity of the plaintiffs, felt there was some small, almost imperceptible difference in Justice Gaudron’s explanation. She re-read the opening paragraph and found it.

Justice Gaudron, herself a mother, was the only High Court judge to name the child who had been taken away from one of the plaintiffs so many years ago. The child’s name was Queenie Rose.

²⁶ *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 (Gaudron J).

²⁷ Justice Mary Gaudron, ‘Speech at the Swearing in of the Honourable Justice Gaudron’ (1987) 68 *Australian Law Review* xxxiii, xxxviii.

²⁸ *Kruger v Commonwealth* (1997) 190 CLR 1.

²⁹ Margaret Thornton, ‘Towards Embodied Justice: Wrestling with Legal Ethics in the Age of the “New Corporatism”’ (1999) 23 *Melbourne University Law Review* 749, 754.

³⁰ *Ibid* 756.

III CONCLUSION

Justice Susan Kenny writes that ‘the entire community needs to take a genuine and constructive interest in its judges.’³¹ The contributors in this volume have generously provided insights into the role that judges perform in an increasingly complex society. They have provided a basis for a continuing debate on the important topic: the art of judging.

31 Justice Susan Kenny, ‘Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium’ (1999) 25 *Monash University Law Review* 210, 224.