

**THEMATIC:
THE INDIVIDUAL JUDGE**

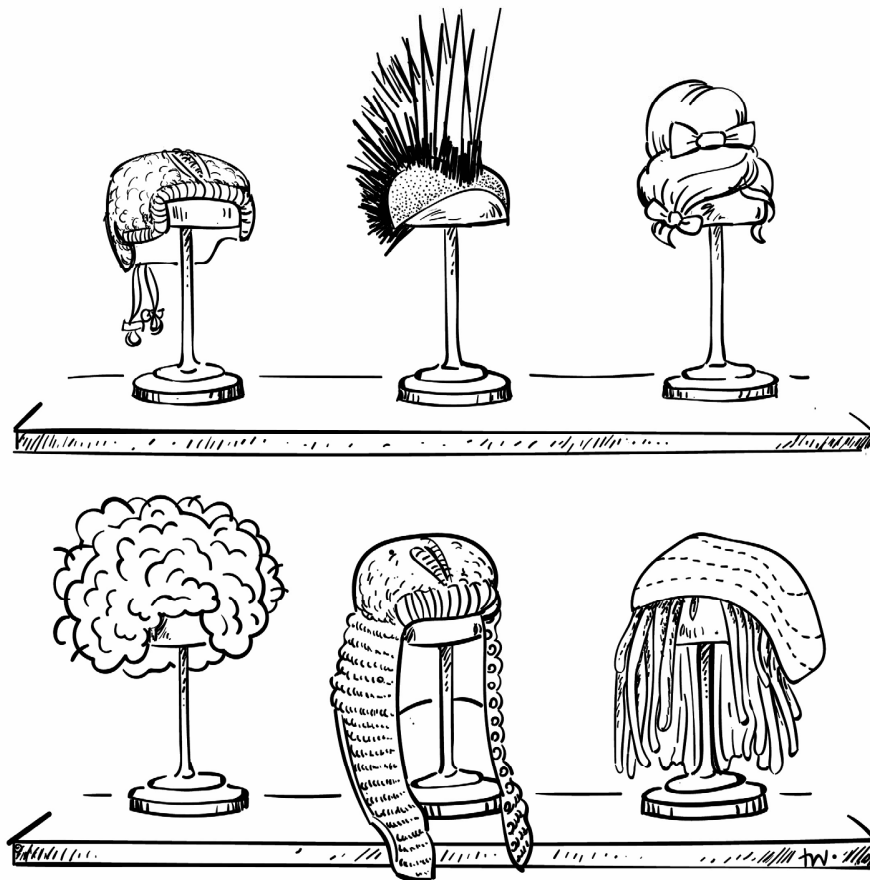


Illustration by Tilley Wood

FOREWORD

THE HON ROBERT FRENCH AC*

Judicial power is located in courts created under the constitutions of the Commonwealth and the states and the laws made under those constitutions. Its unique and essential function is ‘the quelling of such controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion’.¹

The judges who wield the power so critical to the operation of our representative democracy have been the subject of much generally depersonalised academic writing, offering analysis and critical reflection of the judicial product and consideration of its likely and its desirable future development. Occasionally, individual judges will be singled out for praise or criticism as evanescent heroes, disappointments, or villains according to the writer’s jurisprudential or political perspectives.

There is an extensive and ever-expanding body of literature on the nature, purposes, and techniques of the judicial process and the occupational sociology of judges. Australia, however, does not have a well-developed literature on the human dimension of individual judges as people who occupy a rather unique societal function. This issue of the *University of New South Wales Law Journal* focusses, as its thematic title indicates, on judges as individuals in the judicial institution. Eight articles comprise the thematic component. They offer a diversity of perspectives on the functions of judges, some with an historical perspective and others focussing on individual personalities.

The first article, by Andisheh Partovi, Russell Smyth, Ingrid Zukerman and Joseph Valente, picks up on a theme of recent public discussion by leading members of the judiciary about joint judgments in multi-member appeal courts. It focusses upon the High Court during the Chief Justiceship of Sir Anthony Mason and discusses the merits of joint judgments and, in particular, the attribution of their authorship. It demonstrates the use of what are called ‘computational linguistic methods’ for identifying the authors of judgments published by the Mason Court. A particular analytical tool, described as a ‘Support Vector Machine’ or ‘SVM’, is deployed to identify the authors with varying degrees of probability. The article makes for fascinating, if rather unsettling, reading. It

* Former Chief Justice of Australia, Adjunct Professor, Law School, University of Western Australia, Honorary Professor, College of Law, Australian National University.

1 *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ).

might encourage movement towards express attribution of authorship in judgments, particularly if the technique of computational linguistics creates a non-trivial probability of identifying the wrong person.

The second article adopts a historical perspective on the roles and leadership of Australian Chief Justices as evidenced by their extra-curial activities between 1964 and 2017. It is a comprehensive and interesting historical account of differing levels of extra-curial activity and accordingly different visions of judicial leadership. It does not demonstrate a smooth evolutionary trajectory, although it may be said that there has been a general increase in extra-curial engagements. Much depends upon the vision that a Chief Justice has of his or her function and the contingencies that arise during their term as Chief Justice. The authors, Katherine Lindsay and David Tomkins, acknowledge, as a distinctive contribution to the literature on judicial leadership, a paper presented by the former Chief Justice of South Australia, John Doyle, in 2009. He reported on eight key leadership qualities identified by Australasian Chief Justices three years earlier. They included development of a sense of the institution, a collective commitment to justice, communicating this throughout the court and to the public, developing a sense of collegiality, carrying out a pastoral role in relation to judges, jurisprudential capacity or skills, moral integrity, a commitment to all aspects of the work of the court, engendering mutual trust and respect within the court, and treating judges fairly.

The third article, by Margaret Thornton and Heather Roberts, concerns the intersection of public and private life for women judges. They refer to long-standing opinions associated with the Western intellectual tradition that women's natural association with the private sphere and the love and care of their families render them unable to develop the requisite sense of detachment and impartiality necessary for the universal act of judging. Against that background, they look at the question posed by Canadian Supreme Court Justice Bertha Wilson in 1990 – 'will women judges really make a difference?' They explore the question by reference to the swearing-in ceremony of a particular woman judge, Justice Sharon Johns of the Family Court of Australia, and the fictional picture of another in Ian McEwan's novel, *The Children Act*. They conclude that it is increasingly difficult to maintain the conventional line of demarcation between public and private life in formal adjudication and particularly in family law. The ubiquity of social media and its preoccupation with the private life of public figures has unsettled the notion of separate spheres. The authors conclude that the question posed by Justice Bertha Wilson still cannot be answered unequivocally. Empirical studies have yielded a finding that it is only in a very small component of cases – mainly those dealing with sex discrimination – that a gender difference is discernible. The authors end with the upbeat observation that the dramatic reimagining of the woman judge seen in *The Children Act* and by the real Justice Johns, particularly in the closing remarks of her swearing-in ceremony, augur well for the feminist future of adjudication. People may agree or disagree with that analysis but it certainly provides some rich food for thought.

The fourth article, by Rosemary Hunter and Danielle Tyson, focusses on a particular judge, Justice Betty King, formerly of the Supreme Court of Victoria.

The article is characterised in its title as ‘A Study of Feminist Judging in Action’. No doubt it is the perspective of an old white male retired judge that leads me to have some reservation about the characterisation of Justice King’s judgments that emerges from this article. The authors identify a number of indicia of feminist judging in the context of domestic homicide and domestic violence at the beginning of the article. They include empathy for the victim, taking domestic violence seriously, insisting on the need for men to control their anger and rage, challenging defendant’s self-serving claims and support for women’s rights to equality, autonomy and safety. After reviewing a number of Justice King’s sentencing judgments in domestic homicide and domestic violence cases, they characterise them as instances of feminist judging. They do not do this by way of an unalloyed endorsement of the approaches taken in the cases selected. Their analysis and their conclusions make for thought provoking reading. They are likely to enliven judicial reflection, not least about the extent to which the indicia of feminist judging which they identify are anything more than the indicia and approaches expected of any judge in the classes of case to which they refer.

The fifth article, by Tin Bunjevac, moves on to a quite different topic concerning court governance and the emergence of judicial councils and, with that, the changing nature of judicial accountability in court administration. It is a comprehensive and interesting piece. Its object is to critically analyse recent structural reforms of court governance and to identify factors tending to the emergence of judicial councils in many jurisdictions around the world. Judicial councils of administrators are said to be the key to any structural reform of the court system. The ideal model proposed is that of a small board of administrative judges and non-judicial experts appointed for a fixed term based on merit. The importance of this aspect of court governance to maintaining a robust institutional independence from executive government is emphasised and would, I think, command the assent of those who have experienced self-administering courts in Australia. There is no doubt that self-administration places an extra burden upon the judges who participate in the governance of their court, but it is a burden which is a small price to pay for maintaining the distinctive and distinct character of the judicial institution.

The sixth article, by Tanya Josev, focusses upon the rarity of judicial biography in Australia and the reasons for that rarity. Ms Josev notes that of 53 justices of the High Court, only 15 have been the subject of an extended biography or multiple biographies. Ten of those judges had public careers outside their life in the law which seem to have been of more interest to biographers than their judicial lives. One of the obstacles to judicial biography identified by the author is the relatively late arrival of legal realism to Australia and the associated academic interest in judicial ‘life’ in law faculties. Another is the separation of the disciplines of law, history, and politics in the Australian academy with the potential to stultify the development of multi-disciplinary scholarship of the kind involved in biography. A third factor is the unavailability of archival material on the workings of judge’s chambers. A fourth is the legal culture of discretion which promotes a degree of reticence in individuals, such as former associates, giving personal accounts of their interaction with the judges. An optimistic view

of the potential for more judicial biography is taken by reference, inter alia, to the way in which the obstacles are dealt with in the United States, a jurisdiction in which judicial biography is flourishing. It is encouraging for retired justices to hear that the author strongly cautions against a softening of the culture of discretion among Australian associates, regardless of what the American experience produces. She writes: 'The biographer's duty to provide an account of chambers life is important, but it is not a duty that should ever cut across the proper functioning of the court'.

The seventh article, written by James Lee, concerns the judicial individuality of Lord Sumption. As the author observes, Lord Sumption presents an interesting case study. His standing as an historian is undoubted. He was the first person to be appointed to the apex court directly from the bar since Lord Radcliffe was appointed to the House of Lords in 1949. His impact during his short tenure so far is described as 'considerable'. During the first four years of the Supreme Court he delivered the third highest percentage of lead and single judgments and his position was the same if dissents were included. He is ranked as 'one of the most prolific judgment writers on the Court'. When he has dissented he has done so with 'gusto'. His judgment style is described as involving 'short, punchy sentences and a strident tone'. An example quoted is his dissent in *R (Nicklinson) v Ministry of Justice* when he said:

English judges tend to avoid addressing the moral foundations of law. It is not their function to lay down principles of morality, and the attempt leads to large generalisations which are commonly thought to be unhelpful. In some cases, however, it is unavoidable. This is one of them.²

The article also focusses upon his extra-curial speeches and his caveat that his judgments should not be compared with those speeches. This is an interesting and illuminating essay on a judicial officer of considerable significance in the British pantheon.

The final article concerns the magistracy. It is co-authored by Sarah Murray, Tamara Tulich and Harry Blagg, all from the University of Western Australia. It considers, inter alia, innovative practices by magistrates including creative ways of engaging with defendants, partnering with support services and novel sentencing methods. There is a question whether such methods present a challenge to the legitimacy, expectations, and traditional practice of the wider court of which the magistrate forms a part. There is a tension between legitimacy and reform which is properly addressed by the authors. The concept of legitimacy is discussed and examples of vanguard reformers in remote and regional areas of Australia. The tools of innovative practice are considered and the possibility of specialist 'solution-focused' magistrates courts as creating opportunities for innovation. The crucial importance of personality, demeanour, and engagement are acknowledged in relation to the maintenance of legitimacy within the relevant community. So too, is the need for a realisation that the legal issues that bring a defendant to court are just the tip of an iceberg of other issues which require the engagement of a range of experts including case workers,

2 [2015] AC 657, 824 [207].

psychologists, mental health personnel, Aboriginal liaison officers, housing officers and rehabilitation workers.

The authors explore legitimacy lessons for what they call a mobile ‘solution-focused’ court model and argue that this innovation can create and re-create the court’s legitimacy by working with community, facilitating community-owned and culturally secure solutions, and augmenting procedural justice. The article is essential reading for anybody interested in court design and practice in challenging environments requiring departures from traditional institutional approaches.

Taken as a whole this collection offers a very rich resource indeed for those interested in the judicial function and its inescapably human dimension. It is, to put it colloquially, a ‘good read’ and I congratulate the editors on their production, and the contributors on their work.