



Judicial biography: one plant but several varieties

By New South Wales Solicitor General M G Sexton SC*

There was at one time a considerable overlap between the subjects of political and judicial biography because of the number of prominent figures who had careers as both politicians and judges. This has, however, become a very unusual – if not extinct – species.

There have been very few examples in the last 30 years where a serving or recently retired politician in Australia, Britain or the United States has gone to the bench. This was once quite common, as illustrated by Australia’s first chief justice, Sir Samuel Griffith, who had been premier of Queensland, and Charles Evan Hughes, who went to the US Supreme Court after being governor of New York State. It was always rarer for judges to step down from the bench to enter the political arena, although Dr Evatt resigned from the High Court to stand for the House of Representatives in 1940 and Hughes left the Supreme Court in 1916 to run as the Republican candidate against president Woodrow Wilson in the election of that year. Although he lost that election very narrowly, Hughes capped off an extraordinary career by becoming secretary of state between 1921 and 1925 and then returning to the Supreme Court as chief justice in 1930¹. There are certainly no modern examples of judges moving to the political stage.

There are a number of reasons for these changes, although perhaps the most obvious is that over the last three decades, particularly in Australia but also in other western countries, persons taking up political life have done so at a much younger age and without really pursuing any other career – such as legal practice – beforehand. Many of these have, of course, left politics at a much earlier age than in the past but in most cases this has been to take up a career in business or the media rather than the law. This is a very different world from that portrayed by David Marr in his biography of Sir Garfield Barwick.² Barwick was in many ways the leader of the bar in Australia when he went into federal politics in 1958. Then, after serving as attorney general and minister for external affairs, he became chief justice of Australia in 1964 and remained in that position until 1981.

Bearing these changes in mind, it is possible to set out some traditional styles of judicial biography, although it will be noted that there is something of an arbitrary character to these categories and, quite a degree of overlap between them as well.

Famous cases at the bar followed by life on the bench

At one time, most particularly in Britain, judicial biography could commence with an account of its subject’s most famous cases while at the bar. A good example is the biography of



Edmund Barton and Alfred Deakin. Photo: National Library of Australia

Norman Birkett by H Montgomery Hyde.³ Birkett was called to the bar in 1913 and went to the bench in 1941. In the absence of the specialisation that is now the rule rather than the exception at the bar and also the multitude of competing celebrities, the most prominent trial lawyers were famous public figures. It might be noted that even Birkett had a brief period as a Liberal member of the House of Commons between 1923 and 1924 and then between 1929 and 1931, although this was at a time when parliamentary duties did not prevent a full practice at the bar.

Another example of this category is the biography of Rufus Isaacs by Derek Walker-Smith⁴. Isaacs was called to the bar in 1887 but he also had a significant public career before going to the bench. He was elected to the House of Commons in 1904, becoming solicitor general in 1910 and attorney general later the same year. In 1913 he became – as Lord Reading – Lord Chief Justice, only to return to public administration in 1921 as viceroy of India.

Judicial life combined with significant political careers

One of the best examples of this category is Geoffrey Bolton’s biography of Australia’s first prime minister, Edmund Barton⁵. Barton was elected to the NSW Legislative Assembly in 1879 and was appointed to the Legislative Council in 1887. He was attorney general in 1889 and 1891 and acting premier for six months in 1892. Although he left the NSW Parliament in 1893, he was heavily involved in the movement for federation in the 1890s and became the first Commonwealth prime minister in March 1901. In October 1903 he was appointed as one of the three members of the High Court.

One of his colleagues after 1906 was Henry Bournes Higgins who is the subject of a biography by John Rickard⁶. Higgins was a delegate to the 1897 – 1898 Federal Convention and was elected to the first Commonwealth Parliament. Although not himself a member of the Labor Party, he became attorney general in the brief Watson administration. He combined his time in the High Court with the presidency of the Federal Court of Conciliation and Arbitration from 1907 to 1921.

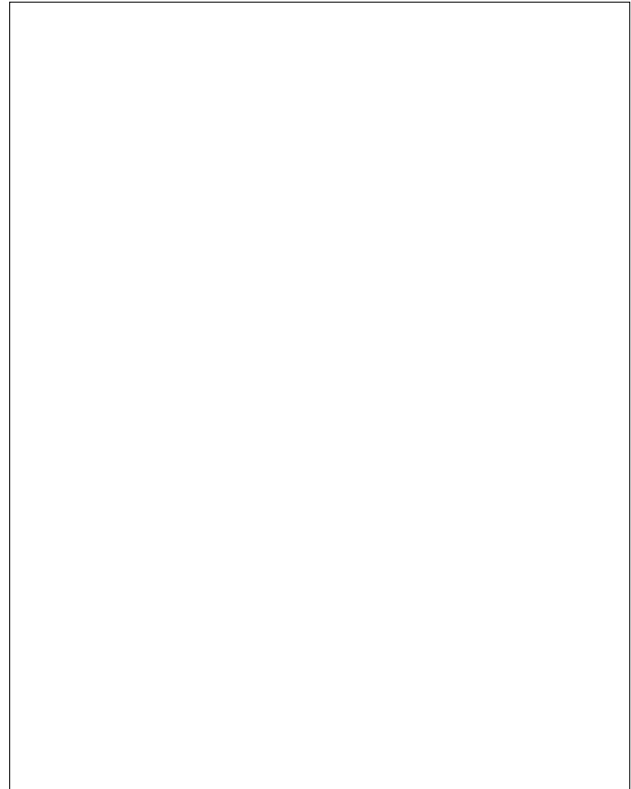
Perhaps the most controversial combiner of judicial and political careers in Australian history was Herbert Vere Evatt. Evatt has been the subject of three detailed biographies, although none really deal adequately with the complexities of his character.⁷ Evatt was a member of the NSW Legislative Assembly from 1925 until 1930. He was appointed to the High Court in 1930 but stepped down in 1940 to enter the House of Representatives. He was attorney general and minister for external affairs in the Curtin and Chifley administrations and president of the UN General Assembly in 1948-1949. Evatt was leader of the Opposition in the federal parliament from 1951 to 1960. He returned briefly to the bench as chief justice of NSW in 1960 but resigned in 1962.

An English example of this mixture of roles is John Campbell's life of F E Smith.⁸ After a dashing early career at the bar, Frederick Edwin Smith became solicitor general in 1915 and later that year attorney general until 1919. He then became lord chancellor over the period 1919-1922 and sat in this role on many cases in the House of Lords. He returned to politics in 1924 – now earl of Birkenhead – a secretary of state for India in the Baldwin government until 1928.

Judicial life simpliciter but in a social setting

On the face of it this category presents the biographer with the most difficult task. There are examples of long periods of judicial life that are not combined with a political career or a series of famous cases as a trial lawyer. In many ways this was the model for Professor Ayres' biography of Owen Dixon.⁹ It is true that Dixon went to Washington in 1942 for two years in the role of what was effectively Australian ambassador to the United States and acted as United Nations mediator in 1950 in the Kashmir dispute but otherwise he spent 35 years on the High Court between 1929 and 1964. During this time, therefore, his only public profile was his record of judgments. Nevertheless, the book does very well in placing Dixon in his social milieu. He was essentially a product of the late-Victorian and Edwardian eras in Melbourne and remained so all his life.

Another recent example of this style of biography is that of Roma Mitchell by Susan Magarey and Kerrie Round.¹⁰ Mitchell spent 18 years on the South Australian Supreme Court. She



Herbert Vere Evatt preparing to call first meeting of General Committee to order. (Photo by Yale Joel//Time Life Pictures/Getty Images)

was the first woman appointed – in 1965 – to any state Supreme Court in the country. She was born in 1913 and brought up in Adelaide in comfortable but not ostentatious circumstances. In many ways the book is not only a biography of Mitchell but a social history of Adelaide – particularly of its bourgeoisie – over much of the last century. Although Mitchell did not come from one of the old families that dominated its close-knit world, she moved on their fringes and had access to corners of their domain.

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This had to be the model, of course, for G Edward White's biography of Oliver Wendell Holmes.¹¹ Although Holmes's youth can hardly be described as uneventful – he fought and was badly wounded in the Civil War – he then became a legal scholar, even when he was practising law, and he joined

the faculty of Harvard Law School in 1882. That same year, however, he was appointed as a justice of the Massachusetts Supreme Court. Holmes spent 20 years as a judge of this court, ultimately becoming chief justice, before leaving in 1902 to join the US Supreme Court. He then spent almost 30 years on that body before retiring in 1932. The book paints an interesting picture of Holmes's world in Boston and London – where he spent considerable periods of time over the years – although this world was a very rarefied environment and said little about society generally. The book is, however, a dramatic example of the judicial biographers' difficult task of translating judgments – and in this case legal text as well – into an account that can engage the general reader.

A similar exercise can be found in Gerald Gunther's biography of Learned Hand.¹² After a relatively brief period in private practice, Hand was appointed to the US District Court in 1909 at the age of 35. He then spent 52 years as a federal judge. In 1924 he was promoted to the US Court of Appeals for the 2nd Circuit and was the chief judge of that court between 1939 and 1951. Hand was, in fact, particularly interested in politics, both in the broad and narrow senses, but he was, of course, unable to indulge that interest publicly after his appointment to the bench.

In many ways judicial biography shares the particular problem of literary biography – the fact that the subject is essentially a writer, albeit, usually of a different kind, and is not a man or woman whose life is filled with action in the way that is sometimes true for a politician, a soldier or a public administrator.

Judicial autobiography: a rare species

The notion of judicial autobiography is certainly uncommon. One example is the two volumes by William O Douglas who was a member of the US Supreme Court between 1939 and 1975.¹³ It should be noted, however, that one of Justice Douglas' biographers has argued that there is a considerable amount of fiction in the two volumes of autobiography.¹⁴ There are other cases of this kind of conflict between biographer and subject but this is a particularly serious dispute.

Problems of judicial biography

In many ways judicial biography shares the particular problem of literary biography – the fact that the subject is essentially a writer, albeit, usually of a different kind, and is not a man or woman whose life is filled with action in the way that is sometimes true for a politician, a soldier or a public administrator. As already noted, this does not mean that the judge's private life should be neglected and it will often be a source of considerable interest to readers. And it has already been suggested that putting the judge in his or her social setting is likely to provide valuable background and add real colour to the story.

It is also true that, in the case of multi-member courts, like the High Court of Australia, the interaction between the various members of the court may provide useful background material. It will not always, of course, show some of the judges in a good light. As Justice Barton said of Justice Isaacs in 1913 – writing to Chief Justice Griffith who was overseas – 'his judgments... are very weighty – in respect of paper, and he has assumed an oracular air in Court that is quite laughable'.¹⁵ Justice Higgins was coupled with Isaacs in another of Barton's letters to Griffith when he said: 'You will see how little decency there is about these two men'.

The biggest problem about judicial biography is obviously how to describe litigation and the legal doctrines that govern its resolution in a way that avoids over-simplification but allows the general reader to understand this process. This statement of the problem assumes, of course, that the author is aiming at a readership beyond lawyers. That would seem to be a reasonable assumption in most cases. In addition, there are many lawyers who would need assistance in decoding the judgments of, for example, the High Court of Australia. This is, of course, not a skill that is confined to judicial biography but one that is required whenever writing about the legal system and decisions of courts.

It is easier, of course, to achieve this goal in relation to some kinds of cases than others. The subject matter of criminal trials, for example, is often more interesting to general readers than civil litigation and questions of guilt and innocence are more readily dramatised than many of the issues that arise in commercial causes. Sometimes, however, the underlying facts in a civil case may make it easier to bring the legal principles to life if, for example, a public figure is suing in libel or a well-known sporting figure is challenging a restraint of trade. Complex corporate litigation obviously presents a considerable

challenge to the writer but often arises out of fact situations that are of considerable interest to many members of the community. A recent example is the civil proceedings against the directors of James Hardie in relation to the provision made by the company for the compensation of victims of exposure to asbestos.

Judicial biography has some particular problems but, like biography generally, it requires portraying the subject's life and work in the context of his or her immediate environment and against the currents of the surrounding society. How these various elements are woven together and dramatised will reflect the skill of the biographer. In the case of judicial officers, the task is often especially challenging but the rewards for the author – and for the reader – can still be handsome ones.

Endnotes

1. See generally Merlo J Pusey, *Charles Evan Hughes* (MacMillan, 1951).
2. David Marr, *Barwick* (George Allen & Unwin, 1980).
3. H Montgomery Hyde, *Norman Birkett: The Life of Lord Birkett of Ulverston* (Hamish Hamilton, 1964).
4. Derek Walker-Smith, *Lord Reading and His Cases: The Study of a Great Career* (Chapman & Hall, 1934).
5. Geoffrey Bolton, *Edmund Barton* (Allen & Unwin, 2000).
6. John Rickard, *H B Higgins: The Rebel as Judge* (George Allen & Unwin, 1984).

7. Kylie Tennant, *Evatt: Politics and Justice* (Angus & Robertson, 1970); Peter Crockett, *Evatt: A Life* (Oxford University Press, 1993); Ken Buckley, Barbara Dale and Wayne Reynolds: *Doc Evatt: Patriot, Internationalist, Fighter and Scholar* (Longmann Cheshire, 1994). See also the memoir by Allan Dalziel, *Evatt the Enigma* (Lansdowne, 1967).
8. John Campbell, *F E Smith: First Earl of Birkenhead* (Jonathan Cape, 1983). See also Ephesian, *Lord Birkenhead* (Mills & Boon Limited, 1926).
9. Phillip Ayres, *Owen Dixon* (The Miegunwah Press, 2003).
10. Susan Magarey and Kerrie Round, *Roma the First: A Biography of Dame Roma Mitchell* (Wakefield Press, 2008).
11. G Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, 1993).
12. Gerald Gunther, *Learned Hand: the Man and the Judge* (Knopf, 1994).
13. William O Douglas, *Go East, Young Man: the Early Years* (Delta, 1974); *The Court Years 1939-1975* (Random House, 1980).
14. Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O Douglas* (Random House, 2003).
15. Zelman Cowen, *Isaac Isaacs* (Oxford University Press, 1967) at 116.

* This article is based on a paper presented in December 2009 at a seminar on judicial and political biography organised by the University of Adelaide Law School and the Australian Association of Constitutional Law.

Verbatim

'The English common law is now proceeding within the confines of European canals, in which most of the locks have been constructed by civil lawyers. Traditionally, the common law finds the constraints of barge life too restrictive.'

Spigelman CJ in launching the 8th edition of *Nygh's Conflict of Laws in Australia*

'In September 2008 I spent Lehman Brothers weekend in Shanghai attending an international conference of insolvency practitioners. A highlight of the conference was the sudden

departure of a significant number of American insolvency practitioners who were scheduled to speak. ... It is fair to say that the insolvency practitioners from all over the world who were left behind in Shanghai were not engulfed by any sense of gloom about their immediate prospects in the practice of the black arts of a commercial undertaker.'

Spigelman CJ, beginning his lecture on 'The Global Financial Crisis and Australian Courts' at the Inter-Pacific Bar Association Conference, Singapore, 4 May 2010