Judges, by DAVID PANNICK. (Oxford University Press, London, 1987), pp.255. Cloth recommended retail price $50.00 (ISBN 0L9215956 – 9).

The author of this work has made a close examination of the conventions affecting the English judiciary. Although full of praise for the quality of their judicial performance, he concludes that the interests of society would be better served if most of these conventions were abrogated. He seeks to make his point by providing an extensive and often amusing catalogue of the oddities of judicial behaviour encouraged by the conventions. Illustrations are drawn not only from England but from the United States and other common law countries. He expresses his conclusions as follows:

> [w]e need judges who are not appointed by the unassisted efforts of the Lord Chancellor and solely from the ranks of middle-aged barristers. We need judges who are trained for the job, whose conduct can be freely criticised and is subject to investigation by a Judicial Performance Commission; judges who abandon wigs, gowns and unnecessary linguistic legalisms; judges who welcome rather than shun publicity for their activities.

The questions which he raises under various headings such as appointment and training, performance and discipline, criticism, mysticism and publicity are all important aspects of judicial administration. But there are countervailing considerations which could militate against some of the reforms he advocates and there are significant differences between the position in England and Australia.

The first difference concerns the status of solicitors. In England there is considerable dissatisfaction on the part of solicitors that they have no right of audience in superior courts and are ineligible for appointment to them. In Australia they can appear and are eligible, although so far only a handful have been appointed. The author considers that the exclusion of solicitors and academic lawyers from the Bench is only explicable as a restrictive practice favouring barristers and works against the public interest. One can agree that both should be eligible for appointment to the Bench if otherwise qualified. Many solicitors are acquainted with the trial process from experience in working up cases and witnessing their presentation. This would, in my view, be a necessary and sufficient qualification. Academic lawyers, who would normally lack such experience, could make a valuable contribution as members of an appellate bench.

The discrimination in England against solicitors is due to a well known proneness to dwell upon differences of rank which applies even among barristers. In Australia, lawyers exercising their right of audience, whether they be senior barristers, junior barristers or solicitors, stand at a bar table. In England, where bar tables are unknown, senior barristers address the Court from the front row of benches, their juniors sitting in the row behind them. If, however, a junior appears without a leader he is not permitted to advance into the front row. The opposing silk enjoys an advantage with the judge which is both psychological and spatial.

The author also argues that the Bench should be made more representative of the community at large by making more appointments from the ranks of

women lawyers and lawyers drawn from minority groups. At the same time by insisting that a more representative bench should not be a less able bench he rejects favourable discrimination. One cannot but agree with both propositions while recognising how the operation of the former has hitherto been qualified by the latter. There is no reason to believe that in Australia unfavourable discrimination has excluded otherwise well qualified members of either group. Moreover the future composition of benches in this country will, without affirmative action, be radically changed in favour of women by developments now current. Women constitute approximately fifty percent of the enrolment in Australian law schools and are assuming growing prominence in both branches of the profession. As they ascend in course of time to upper professional levels (particularly at the Bar), it is inevitable that the proportion of women judges will increase *pari passu.* Length of experience is all that they lack since their aptitude for legal practice is demonstrably equal to that of men.

The author contends that the offence of scandalising the judiciary should be abolished and that judges should be subject to unrestricted criticism in the performance of their duties. Under Australian law the right of criticism is already untrammelled except in one respect, namely the imputation that the Court has bowed to outside pressure in reaching its decision. The question is whether criticism which charges the most disreputable of all forms of judicial misconduct should or should not remain punishable as contempt of court. An arguable case for the retention of this single head of liability for criticism could be made along the following lines. It is a criminal offence, illustrated by certain recent trials, to subject a judge to external pressure whether he reacts favourably or unfavourably to it or is uninfluenced. Should commentators be at liberty to suggest with impunity that the integrity of the judicial process has been exposed to alien influences of a criminal kind? Those favouring a negative answer would argue that public confidence in the impartiality and independence of the courts still exists notwithstanding a few recent blots on the record. In a democratically governed society the acceptance by the loser of an adverse judicial result is just as important as the loser's acceptance of an adverse electoral result. One wonders how long that confidence and acceptance would last if the integrity of the Courts were placed at the mercy of journalistic attack. Given the present condition of the fourth estate one cannot exclude the possibility of a sustained campaign to establish the sensational proposition that courts are nests of corruption with alleged support in distorted or invented "facts".

Similar misgivings prevent acceptance of a recommendation that the U.S. system of open hearings on the suitability of judicial appointments could with advantage be adopted. Many U.S. observers believe that the standing of the Supreme Court was damaged by the wrangle over the nomination of Justice Bork. The American Bar Association by a majority of ten out of fifteen had found him to be well qualified. The challenge to his credentials had little to do with professional competence. It was formulated by Senator Edward Kennedy in terms which excited raw political passion by equating a Bork

appointment with a return to backyard abortions and Jim Crow discrimination. The televised hearings and incessant commentary provided a field day for irrational prejudice. A better system, I believe, could be based upon a convention that the appointing government, Federal or State, would not appoint anyone whose name did not appear on a list of acceptable persons compiled by the professional associations. Nor do I see any harm in allowing those willing to accept appointment to the Bench so to inform the Attorney-General in question. Once it was extremely rare for an offer of judicial preferment to be declared but this is no longer the case.

The recommendation that judges should avoid mysticism by shedding wigs and gowns and avoiding euphemisms and legalisms has an obvious appeal. In any event it does appear that in Australia the days of the judicial wig, wing collar and bands are now numbered although some kind of gown is likely to be retained. On the other hand many judges who preside over criminal trials will be loath to "abandon the priestly garments that separate them from ordinary men and women". Remembering the grim experience of judges of the Family Court, they believe that priestly garments, by placing them at a remove from ordinary men and women, discourage vengeful attacks by disappointed litigants. There is no doubt that resort to legalese could be lessened and plain language substituted. But a distinction is to be drawn between pompous jargon which is dispensable and terms of art which have acquired a precise professional meaning and are irreplaceable semantic tools.

The book contains many examples of the misbehaviour of judges, mainly in times past, which can be traced to their insulated and overprotected position. Judges who eat and write letters on the Bench, habitually fall asleep after lunch and ostentatiously parade their inattention to the proceedings before them, do not represent a current problem. One would hope also that the judge who spends a lot of time and effort wringing appreciation of his humorous sallies from a conscript audience is now mercifully extinct. Finally there can be no cavil that the convention that judges should shun publicity ought not inhibit them from giving explanations to the public of how the judicial process works or from making contributions to public debate on issues affecting the courts. In 1980 the present Governor-General Sir Ninian Stephen, then a member of the High Court of Australia, suggested that any judgment of general interest should be accompanied by "a detailed press release which does explain in layman's language what were the issues, who won and why".

As a miscellany of judicial behaviour and misbehaviour the book is a source of instruction and entertainment. On the level of discussing what reforms to a major social institution are requisite in the public interest, it provides a valuable and provocative stimulus.

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