

Chapter 8

Out of Touch or Out of Reach?*

Different ages have different expectations of people entrusted with authority. This is the tactile epoch. Decision-makers are required, above all, to be “in touch”. To be described as elite is now a severe criticism, unless the description is applied to athletes. It is used as a term of condemnation when applied to the judiciary. Judges are expected to be conspicuously responsive to community values. That involves knowing those values; a task that is not always as easy as it sounds.

How should judges keep in touch? Should they employ experts to undertake regular surveys of public opinion? Should they develop techniques for obtaining feedback from lawyers or litigants? And what kind of opinion should be of concern to them? Any opinion, informed or uninformed? What level of knowledge and understanding of a problem qualifies people to have opinions that ought to influence judicial decision-making? Who exactly is it that judges ought to be in touch with? We live in a multicultural society that takes pride in its diversity. That includes diversity of values. Whose values should we know and reflect? If the values to which we respond are known common values, that is one thing. On the other hand, if different judges respond to different values, does that mean that the outcome of a case will depend upon which judge is appointed to hear it?

Judges live in the community. There is no empirical evidence that, as a group, their general experience of life is narrower than that of most other occupational groups. People who administer criminal justice probably see conduct that most members of the community never imagine. A Family Court judge would have a regular view of domestic relations that would throw many people into despair.

When you consider the parade of life that passes before a suburban or rural magistrate, it is difficult to understand why the judiciary, as a class, might be regarded as isolated from reality.

“Public opinion” is a deceptively simple concept. It is probably fair to say that, in respect of most of the day-to-day work of most judges, there is no generally shared public opinion. Most people never go to court. For those who do, it is a once-in-a-lifetime experience. In the days when juries participated regularly in the administration of civil justice, some members of the community saw civil courts at work and came away with an impression, perhaps favourable, perhaps unfavourable, about the justice system, or an individual judge. Most people now have very little exposure to the civil system in that way. People who are unfortunate enough to be involved in litigation see justice as a form of dispute resolution, and their views are probably influenced by outcomes. Winners are likely to have a more benign opinion of the system than losers.

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