Impartiality in the Judiciary †

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Introduction

On the tenth day of March, 1951, the *Sydney Morning Herald* published the following: –

> Yesterday, seven justices of the High Court of Australia gave judgment on one of the most important constitutional cases in the history of the Commonwealth – the Communist Party [case] . . . who are the personalities responsible for the decision?[1]

Mr Justice Connolly of the Supreme Court of Queensland in a recent criticism of the 1983 Boyer Lectures observed: –

> . . . nothing would be more destructive of the confidence of any society in its judges than for the notion to gain ground that decisions are made to a standard of reasoning personal to the individual judge.[2]

What is particularly destructive about such unqualified allegations is that, like the above inference in the Sydney Morning Herald, they are essentially incorrect or lack concrete evidence to substantiate them. There is no reason to suggest that the Communist Party Case was anything but a legally rational decision.[3]

The objective of this paper is to examine some of the views advanced which tend to lessen society's faith in its judiciary, and to demonstrate that they are in the main unsustainable. My thesis is that judges are so tightly constrained that it is impossible to suggest as a general rule that they decide cases according to their individual biases or preferences.

Judges in England and Australia are educated and trained according to a rigid legal tradition which manifests itself in a methodology whereby the application of precedents leads to a logically rational decision. Such justices, whilst being faced with this task, are constantly under the vigilant scrutiny of the press, the parliament, the government, appeal courts and trained legal professionals all of whom make much ado about what appears to be the slightest quirk in the administration of justice. This is democracy at work. In this atmosphere, decisions characterised predominantly by bias, partiality or personal preference are few. Indeed, as Mr. Justice Kirby said in the introduction to the Boyer Lectures 1983 (The Judges): –

> . . . overwhelmingly they are people of integrity, maintaining the high standards of our judicial tradition and, by their rights, seeking to do

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1. Page 1.
2. Mr. Justice Connolly C.B.E., "The Judges Judged", *The Proctor*, (Q.), March 1984, p. 3.
3. (1950-51) 83 C.L.R. 1.

> justice according to law to all manner of people, without fear or favour, affection or ill will.[4]

It is pertinent before proceeding to allude to three commonly made, but erroneous assumptions. The first is that lack of judicial impartiality is necessarily related to, and thus proved by, judicial "creativity" and judicial "legislation". Bray C.J. illustrated well the notion of judicial creativity in *Davies v. Nyland*, a case concerning the law of the tort of conspiracy: –

> This case illustrates the remarkable vitality and capacity for proliferation of the common law. A principle evolved to deal with a theatre proprietor who enticed an opera singer to break her contract with another theatre proprietor and perform for him instead is now being used to deal with embargoes imposed by trade unions on recalcitrant employers . . . [5]

Indeed the fact that judges "legislate" may be seen as a consequence of the wide discretions imposed upon them such as "tests" relating to the public interest and inconvenience. However it does not follow from this that judges cannot be impartial. One commentator's whole case relies upon this assumption, yet he refrains from proving the one thing that needs proof: –

> Impartiality means not merely an absence of personal bias or prejudice in the judge but also the exclusion of 'irrelevant' considerations such as his political or religious views . . . *[T]his view rests on an assumption of judicial neutrality.*[6] (Emphasis added)

The learned author goes on to define neutrality as a wider notion encompassing the presupposition that judges should exclude external considerations, mainly political or economic consequences from their mind in reaching decisions. Thus he concludes, that for a judge to be impartial "he must act like a political, economic, and social eunuch, and have no interests in the world outside his court . . . ", and because this is not the case, impartiality is impossible. That neutrality (as defined by Griffith) is a myth is not the concern of this paper, but assuming that to be the case what is contested is that this necessarily indicates a lack of impartiality on the part of the judge. A judge may have regard to circumstances and consequences external to the legal questions in the case, and still come to a conclusion totally at odds with a particular bias he might hold. For instance a judge may refuse a civil claim, taking into account in his decision the "floodgates" argument, whilst still deciding contrary to a bias he might have, say, an emotional identification with the plight of the plaintiff.[7]

4. Mr. Justice M.D. Kirby C.M.G., *The Judges*, Australian Broadcasting Corporation, Sydney, 1983, Introduction (1983 Boyer Lectures).
5. (1974) 10 S.A.S.R. 76 at 101; see also on the judicial role of creativity, Neil McCormick, *Legal Reasoning and Legal Theory*, (Oxford University Press: 1978), p. 120.
6. Professor J.A.G. Griffith, *The Politics of the Judiciary*, (Manchester University Press: 1977) p. 209.
7. See also *Cormack v. Cope* (1974) 48 A.L.J.R. 319 where Barwick C.J. upheld Labor Government legislation notwithstanding the widely held view that there was no love lost between himself and Whitlam.

The second assumption frequently made is that judges are by nature conservative individuals and that therefore this quality is reflected in their decisions. Mr. Justice Kirby for instance in his 1983 Boyer Lectures (The Judges) said that judges are habitually male, white, protestant, come from the "upper-middle class", are habitually characterised by distinguished legal careers and generally lead very boring and unadventurous lives. Thus he concludes that they are conservative and illiberal and that this is reflected in their decisions.[8] Several points arise out of this conclusion.

Firstly this seems an oversimplification of the situation as many judges have been raised and educated in a "non-compromising" family background, yet when appointed to the bench have shown themselves to be rather reform orientated to say the least:—

> . . . history has proven that such an objection [that judges are conservative] is, at best, an incomplete truth. Judges, like all other people, can be either progressive and activist or conservative, and even 'reactionary', depending on many circumstances. . . [9]

Secondly, basically the only authority Mr. Justice Kirby provided for his conclusion was Eddy Neumann's 1972 thesis on the background of Australian High Court Justices.[10] Mr. Justice Kirby drew from the study the conclusion that judges necessarily make conservative decisions because of their background, yet Mr. Neumann himself admitted that "only sociological variables are analysed, no linkage between these variables and judicial decisions has been attempted".[11] Professor Emy also concluded that studies such as Neumann's do not show that there is any "positive correlation between evidence as to age, previous political opinions or social background and an individual judge's pattern of decisions".[12] Thus Mr. Justice Kirby's conclusion is, with the greatest respect, an extrapolation beyond the metes and bounds of Neumann's thesis.

Professor Griffith has also suggested that cases are decided according to what kind of people the judges are, which is determined by their background and the position which they hold in society. This is, so the argument runs, "necessarily conservative and illiberal".[13] This conclusion is reached by reference to so-called judicial attitudes such as, inter alia, a dislike of trade unions.[14]

With the greatest respect it may be queried whether the evidence tendered by Professor Griffith is sufficient to establish this proposition. He attempts to prove his argument by referring to particular cases where decisions were given against trade unions. It is clear that the proposition advanced cannot be proven by reference to such examples alone.

8. Mr. Justice M.D. Kirby C.M.G. *op. cit.* pp. 16–17.
9. Maher, Waller and Durham, *Cases and Materials on the Legal Process*, 4th ed., (Law Book Company Limited, Sydney: 1984) p. 597.
10. E. Neumann, *The High Court of Australia: A Collective Portrait 1903–1972*, 2nd ed., (Department of Government, University of Sydney: 1972).
11. *Ibid.*, p. (i).
12. Hugh V. Emy, *The Politics of Australian Democracy*, 2nd ed., (MacMillan Company, Melbourne: 1978), p. 24.
13. J.A.G. Griffith, *op. cit.*, p. 230.
14. *Ibid*

To analyse a number of cases where decisions adverse to unionists' interests were given and to thus conclude that judges are biased against them is not only a failure in logical reasoning, but also overlooks the fact that other legally established rights are capable of being inundated: –

> It would be regrettable if . . . the trade unions should see the recent development of the law of tort of inducement of breach of contract as one more demonstration that the courts are ranged against them. They are not so ranged, but they have to take the law as they find it. The truth is that here two important values come into collision. The first is the principle that terms and conditions of employment should be fair and just and properly safeguarded . . . The other is that contracts should be honoured . . . All the courts can do is to resolve that conflict in particular cases by the application of principles laid down by statute or authoritative precedent. If those principles are to be altered, Parliament must do it.[15]

In any case, with respect to the torts of conspiracy and intimidation, one might refer to several cases which, if the judges were applying a standard of reasoning personal to themselves, may well have been (but were not) decided against the unions. The famous case of *Mogul Steamship Co. v. McGregor Gow & Co.*[16] is one such example. See also the *Crofter Case*[17] and *McKernan v. Fraser*.[18] The list is endless.[19]

The third common but incorrect assumption is that because political appointments are the order of the day, judges make decisions according to their individual political and other preferences. This assumption is fallacious in so far as one can rarely be sure about what type of judge an appointee will be when he assumes office.[20] President Eisenhower only ever admitted the making of two mistakes: "both of them", he said, "were sitting on the Supreme Court".[21]

Mr. Justice Evatt, further, was often labelled a socialist, yet when appointed to the High Court he made on many occasions decisions favouring the States and thus did not fulfil the role expected of him.[22] Alternatively, when Sir John Latham was appointed Chief Justice in 1935 he was expected to become part of a conservative wing of the High Court; however, on many occasions, he made decisions having the effect of expanding the Commonwealth heads

15. Bray C.J. in *Davies v. Nyland* (1974) 10 S.A.S.R. 76 at p. 102.
16. [1892] A.C. 25.
17. [1942] A.C. 435.
18. (1931) 46 C.L.R. 343.
19. See also *Morgan v. Fry* [1968] 2 Q.B. 710; *Reynolds v. Shipping Federation Limited* [1924] 1 Ch. 28; *Allen v. Flood* [1898] A.C. 1; *Stratford v. Lindley* [1965] A.C. 269; *Davies v. Thomas* [1920] 2 Ch. 189.
20. Sir Robert Megarry's 1984 Leon Lader Lecture, 1984, *University of British Columbia Law Review*, Vol. 19: 1, at p. 113.
21. J.C. Howard, "Judicial Appointments in America", (1982) 9 *J. Bar Cl. India*, 521 at 524.
22. However it has been suggested that this is because Mr. Justice Evatt realised that the A.L.P. was more powerful in the sphere of State Government: see *Current Affairs Bulletin*, (1967) Vol. 42:6, p. 93 (anonymous article).

of power.[23] Sir Owen Dixon similarly was on several occasions found to be in the minority upholding radical legislation.[24]

The Doctrine of Precedent

Sir Owen Dixon said on one occasion: –

> It is taken for granted that the decision of the Court will be 'correct' or 'incorrect' . . . as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The Court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness.[25]

Indeed, the whole concept of the doctrine of precedent would be an empty shell if judges habitually made decisions according to standards of reasoning personal to themselves. Thus the view that judges decide according to their biases is a paradox because how could one otherwise explain the logical development of the law from case to case, where such development has been allowed to take place?[26] Indeed even in the progressive era of the Sir Owen Dixon High Court, the development of the law took place "with the complete confidence of the Australian people, because each decision was seen to flow logically and inevitably from the decisions of the past".[27]

Thus there is no doubt that the doctrine of precedent is a major check on "judicial licence". It provides that intellectual frame of reference within which judges must work, and as fundamental as this concept is, it is easily overlooked when suggestions of partiality are made: –

> The system is designed to prevent judges imposing their individual policy preferences on the community in the blatant and ad hoc way open to politicians. Lawyers not only expect judges to supply reasons when handing down a decision but they expect that those reasons will conform to accepted standards . . . As you move higher up the hierarchy the discipline of collegiate courts is substituted for single judges to further limit the scope for capricious decision making.[28]

Practical Checks on Judges

(i) Self esteem and expectation of brethren

The camaraderie which develops within the legal profession is an age-old occurrence. This camaraderie is transmitted individually and collectively to the Bench. This is so much the case with respect

23. *Ibid.*
24. Emy, *op. cit.*, p. 25.
25. Sir Owen Dixon, "Concerning Judicial Method" in *Jesting Pilate*, Woinarski (ed.), (Law Book Co., Melbourne: 1965) p. 155.
26. "Logical" here is used in the sense of "as a result of rational processes", not in the normative sense of the word.
27. Mr. Justice Connolly C.B.E., *op. cit.*, p. 3.
28. Maher, Waller and Durham, *op. cit.*, p. 110.

to the English Law Lords that one would be extremely "wary of flouting the expectations which his colleagues hold for him".[29] Indeed it is even suggested that because the same group is such a small, tightly-knit body of individuals, it would not be surprising if one Law Lord took cognizance of the expectations of his colleagues although he did not agree with them.[30]

The reason for the conclusion advanced is simply that even Law Lords are human and accordingly nurture a desire for acceptance and recognition from their peers. There is no reason that this rationale would not apply more or less on all levels in England and Australia.

A further factor in this context which may have some bearing on judicial decisions is a possibility of "sanction" by one's colleagues for deviating from accepted standards of behaviour. An illustration of this point is Lord Atkin's famous dissent in *Liversidge v. Anderson*. On the interpretation of wartime legislation empowering the Secretary of State to detain "hostile" persons, Lord Atkin strongly disagreed with the majority of the House of Lords. His judgment is characterised by a tone of cynicism and scorn directed towards his brethren: –

> It has always been one of the pillars of freedom . . . that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.[31]

Lord Atkin concluded that the only authority for the construction adopted by the majority was: –

> "When I use a word", Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean, neither more nor less".[32]

Putting aside for the moment the merits of this suggestion, it is clear that such observations of Lord Atkin were not taken in good humour. Indeed the Lord Chancellor (Viscount Simon) who had not sat on the appeal put Lord Atkin under pressure to alter his speech before it was delivered. However Lord Atkin refused to accede to the request. As a consequence: –

> Maugham . . . made a bizarre attack on him in a legislative session, and the Law Lords refused to eat with Atkin in the House of Lords or, at one point, even to speak with him. Many felt he never really recovered from this treatment before his death in 1944.[33]

Three points require mention. Firstly there is no doubt that Lord Atkin was an extremely strong-willed and bold judge. So much so that it has been suggested that "everybody now knows that in

29. Alan Paterson, *The Law Lords*, (MacMillan Press, London: 1982) p. 33.
30. *Ibid.*
31. [1942] A.C. 206 at p. 244.
32. *Alice in Wonderland*; see [1942] A.C. 206 at 245.
33. Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976*, (Weidenfeld and Nicolson, London: 1979) p. 287.

Donoghue v. Stevenson Lord Atkin talked the majority round".[34] Accordingly it is clear that few would attempt any similar course of action, especially with the advantage of hindsight, simply through fear of being subjected to such vindictiveness. The frequent manufacturing of biased decisions would, it is submitted, lead to a similar response from one's colleagues, which is enough to prevent the ordinary judge from deciding in this way.

Secondly, Lord Atkin's observations in *Liversidge* suggest that his colleagues lacked impartiality. It has been suggested that Lord Atkin's construction of the regulations was a narrow one, and as Lord Atkin said extra-judicially that he felt very strongly about the matter, perhaps it is not pertinent to regard his observations in the case as authority for the proposition that his colleagues were biased in coming to their decision.

These and other considerations in the case provide additional bases for suggesting that, if anyone did make a biased decision, it may have been him.[35] If one accepted this as the case, then that would not detract from my thesis in general because Lord Atkin was a staunchly independent judge, and one could not ignore what might be regarded as a reality, albeit insignificant to the overall picture. But I am not to be considered here as casting aspersions on the impartiality of any particular judge in the case. As Paton once said, the question is not worthy of serious consideration because: –

> . . . if we wish to emphasise the influence of the individual characteristics of the judge, we are confined to a blind guess as to what really affected his decision . . .[36]

Thirdly, Humpty Dumpty's suggestion is nothing less than a paradox. If words were inherently capable of giving rise to ambiguities, then we would never be able to understand each other in everyday conversations. Whilst some phrases can be at times equivocal, this fact does not justify the conclusion that human beings are unable to communicate with one another. So it is with the bland suggestion of a habitual lack of judicial impartiality. Somewhere along the line someone forgot about the common law.

Accordingly one would expect that the desire for acceptance and the fear of criticism might often deter judges from making biased decisions.

(ii) Opinion of the Profession

Mr. Justice Blackburn once suggested that the major practical check on judges is the "habitual respect which they all pay to what is called the opinion of the profession".[37] In particular this respect is a result of the informal social and professional pressures exercised by the Bar: –

34. K.W. Wedderburn, "Law as a Social Science", (1967) 9 *J.S.P.T.L.* 335 at p. 341.
35. Stevens, *op. cit.*, pp. 286–7.
36. Paton, cited in Jerome Frank, *Courts on Trial*, (Princeton, New Jersey, 1973) p. 157.
37. 1872 Judicature Commission, cited in Shimon Shetreet, *Judges on Trial*, (North-Holland Publishing Company, Amsterdam: 1976) p. 225.

> Judges and barristers in London normally lunch at the Inn, where the judges mingle with Q.C.s, and at the lunch table and in the Inn's corridors the talk is free and informal. Like all human beings, judges and barristers begin with comments about general matters but almost invariably the discussion goes on to the daily gossip. It may consist of details about the intemperate behaviour of Mr. Justice Pimple that morning, or of rumours that Mr. Justice Blank was under pressure to resign . . .[38]

In addition other informal gatherings take place at the Inns and elsewhere thus insuring that one is rarely sheltered from the climate of professional opinion.[39] Since judicial misconduct is unlikely to go unnoticed in this close-knit community, the natural consequence therefore is that:—

> The opinion of the profession about particular judges and particular incidents is made known to the Bench, and to the judges, who normally are concerned about their reputations, and cannot help but take note of it.[40]

Accordingly this factor is an important consideration in the mind of the judge and may well prevent him giving a prejudiced decision.

Although the Bar and Bench in Australia may not be seen to be steeped in such "quasi-monastic serenity" and tradition, it is still apparent that the Bench is responsive to the opinions of the Bar and the profession.[41]

An illustration of this responsiveness is provided by the sudden change in temperament of Mr. Justice Scrutton. During his early days on the Bench he was bad-mannered, impatient and showed anything but due appreciation towards arguments advanced before him. Alfred Chayter, a leading Junior of the time, in a representative capacity aired the grievances of the profession before the judge in open court. Mr. Justice Scrutton it is said "listened without comment, but his subsequent conduct showed that he had taken the hint."[42]

It has also been suggested that judges are not likely to make decisions which will probably be reversed on appeal, because of not only the effect it may have on their self-esteem and career prospects, but also because of the jokes which are handed around the profession. One such anecdote is as follows:—

> Counsel was opening an appeal —
> "This case, Your Lordships, was heard by Mr. Justice Pimple . . ."
> "Yes, yes", interrupted one of the presiding judges, "we know that, is there any other ground of appeal?"[43]

Thus unless one is concerned with a particularly strong minded individual, the judge in coming to a decision will certainly take the

38. Shetreet, *op. cit.*, p. 230.
39. Even the Circuit Inns in England adopt a similar pattern.
40. Shetreet, *op. cit.*, p. 231.
41. See Ross Johnston, *History of the Queensland Bar*, (Bar Association of Queensland, Brisbane: 1978) p. 42; Phrase "quasi-monastic serenity" borrowed from Leon Uris, *Q.B. VII* (Corgi Books: 1970) p. 184.
42. Shetreet, *op. cit.*, p. 233.
43. *Ibid.*, p. 235.

climate of professional opinion into account and may well be deterred from making a prejudiced decision because of it. If no such "climate" exists, he may so refrain because of the bad weather which might result.

The argument has been advanced that because barristers are always concerned about factors such as getting Chambers, getting silk and eventually being appointed to the Bench, they will very rarely be seen to criticise.[44] However it is apparent that whilst this view is not altogether untrue, one will always find individuals who are willing to criticise as well as those who are not. Criticism on the part of the Bar is infrequent, but so is judicial misconduct.[45] In any case it seems that fear of criticism, although important, is not the essence. The crux of the matter is a respect for the institution to which the judge once belonged.

(iii) The Appellate Court

The Appellate Court has a major role in securing high judicial standards. Indeed its duty extends to taking: –

> . . . disciplinary action, ranging from mere censure of criticism of the judge's misconduct to a reversal of his judgment or setting aside a conviction. Such discipline does not directly affect the tenure or position of the judge, but it must have an effect on the judge to whom the criticism is addressed as well as on other judges.[46]

This disciplinary power of Courts of Appeal has undoubtedly a restraining effect on inferior court judicial officers. The reasons are obvious. Firstly if a judge is frequently reversed on appeal it may reduce his chances of promotion.[47] Secondly, and perhaps more importantly, frequent reversal would affect the pride and self-esteem of all but the boldest of judges and would undoubtedly affect his standing from the point of view of the profession at large as well as of his colleagues. Therefore generally speaking, judges of inferior courts are vigilant in ensuring that their decisions are strictly justifiable in accordance with established precedents.

It is pertinent to point out here that most allegations of judicial partiality are made in respect of superior court judges and a general rule is propagated without reference to the myriad of inferior court judicial decisions which are characterised by nothing but impartiality. Indeed the bona fides allegations are perhaps explicable on the basis that certain appellate court judges who cannot have their chances of promotion prostituted or who cannot be appealed from, are unperturbed by the other checks imposed by the system and carry on regardless. If it be assumed for argument's sake that the allegations frequently made in respect of Mr. Justice Murphy and

44. Michael Zander, *Lawyers and the Public Interest*, (Weidenfeld and Nicolson, London: 1968) p. 266.
45. Shetreet, *op. cit.*, p. 261.
46. *Ibid.*, p. 201.
47. Where the reversal is on a matter of substantive law only it is conceded that the situation is unclear. However displayed partiality would undoubtedly lessen chances of promotion.

Lord Denning were valid, then when considered in the context of their respective positions in the judicial hierarchy and in the light of their respective personalities, the whole picture becomes nowhere near as black as some would paint it.

One commentator also noticed the "aloofness from the trial courts" displayed by the deponents of such allegations of judicial prejudice, in particular the "sociological jurisprudes":

> They ignore, however, that vast majority of decisions of cases in which social, economic, political and professional considerations are entirely or almost entirely, absent, and where the rules are clear, the facts alone being in dispute.[48]

Furthermore allegations of lack of impartiality in Australia are habitually made in respect of constitutional cases dealt with by the most superior court of law in this country. Whilst there appears to be little real evidence to support such allegations, it should in any case be pointed out that between the years 1903 and 1965 approximately 650 cases concerning constitutional questions were dealt with by the high court, whereas in total approximately 9000 cases on all matters were considered by the High Court in the same period.[49] This is a ratio of about 1 to 14. The vast bulk of the High Court's business is on matters of private and civil law which allow even less scope for freedom of movement.

(iv) Criticism by the media

Although it has been suggested that criticism issuing from the media is uncommon and in any case superficial[50], it seems on balance that the prospect of such criticism is a factor always prevalent in the mind of the Judge: –

> Justice has no place in darkness and secrecy. When a Judge sits on a case, he himself is on trial . . . if there is any misconduct on [his] part, any bias or prejudice, there is a reporter to keep an eye on him.[51]

Furthermore, subject to certain limitations for instance the law of contempt and proceedings conducted in camera, the right to criticise is well established. It is submitted that Judges do take account of this prospect and they will be influenced by it in their actual decisions. Indeed Lord Hailsham, Lord Chancellor said in 1972 that: –

> There was some danger that popular pressures might endanger the administration of justice. The press, television and radio were immensely powerful and represented a real challenge to . . . the judiciary.[52]

The Lord Chancellor further suggested that if the criticism went much further than it had gone in the past, "no human Judge, how-

48. Frank, *op. cit.*, p. 149.
49. Geoffrey Sawer, *Australian Federalism in the Courts*, (Melbourne University Press, Melbourne: 1967) pp. 53–4.
50. Paterson, *op. cit.*, p. 12.
51. Lord Denning, *The Times*, 3rd December, 1964.
52. *The Times*, 5th July, 1985.

ever independent or strong-minded, could avoid being influenced by emotional pressures".[53]

Accordingly the Lord Chancellor is suggesting that the power of the media is so influential that Judges are beginning to be adversely affected at the other extreme. If this is the case then surely the media must be a valuable checking force in the prevention of the en-masse production of prejudiced decisions.

Whilst the effectiveness of the press and the media has at times been criticised due primarily to the rules of contempt of court, there can be little doubt that the media plays an important role in checking judicial behaviour. There are many instances of this.[54] Furthermore, there can be little doubt that a Judge is responsive to the prospects of criticism by the media:

> The Judge will be careful to see that the trial is fairly and properly conducted if he realises that any unfairness or impropriety on his part will be noted by those in court and may be reported in the press. He will be more anxious to give a correct decision if he knows that his reasons must justify themselves at the bar of public opinion.[55]

Indeed from the earliest times, parliament has often acted on the assumption that public opinion, as expressed in the press and other media, serves as a sufficient check over judicial conduct, leaving only serious cases to be considered by parliament.[56] A graphic example occurred in 1891 when The Times emphatically called for the retirement of Mr. Justice Stephen (a well known authority on criminal law) who had been inflicted with mental illness but still remained in office. It was rumoured that his mental illness manifested itself in cases he tried and in the notes he took, and his conduct of the murder trial of Mrs. Maybrick in 1888 so aroused public resentment that he had to be given police protection. As a result of criticism in parliament and in the press, Mr. Justice Stephen resigned his office in April, 1891.[57] His Honour obviously did take note of public criticism of him. It has even been suggested that the numerous political attacks made upon Mr. Justice McCardie bore a direct relationship to his subsequent suicide in 1933.[58]

Whilst as a general rule Judges by virtue of their office do not reply to criticism or enter into public controversy, it is nevertheless clear from the many examples which appear in the books that Judges are responsive to and take note of public opinion and criticism expressed through the media and in parliament. There are also some examples in Queensland which illustrate this. Speaking of H.D. Macrossan (Chief Justice), Johnston wrote:

> His wit from the bench on one occasion had unfortunate consequences. During the course of a divorce suit, evidence was produced that two people although unmarried, were living together as a very loving couple.

53. *Ibid.*
54. Shetreet, *op. cit.*, pp. 192–3, 196, Chapter IX.
55. Lord Denning, *The Road to Justice*, (1955), 64, cited in Shetreet, *op. cit.*, p. 179.
56. *Ibid.*, pp. 179–180, 240.
57. *Ibid.*, pp. 174, 182, 240–41.
58. *Ibid.*, p. 240.

> Macrossan, by way of a casual aside, remarked "I suppose they will go and get married and spoil it all" (laughter). Two clergymen, Rev. Norman Millar and Rev. H.M. Weller, took distinct objection to such a flippant remark about the holy sacrament, and wrote a letter to the editor of the Courier-Mail protesting about the judge's comments. The matter was taken as contempt of court by the editor of the newspaper and the two clergymen. On appeal to the Full Court however, the contempt conviction was upset.[59]

A more recent example occurred on 4th, 5th March, 1985. Following an industrial dispute in the power industry, criticism attributed to the Premier of the role of the Queensland Industrial Conciliation and Arbitration Commission and its decisions appeared in the press and on television. The President of the Industrial Court, Mr. Justice Matthews of the Queensland Supreme Court responded to the reported criticism with a statement from the bench of the Industrial Court.[60]

A further illustration is the reported response by His Honour Judge Pratt District Court Judge in his capacity as Chairman of the Queensland Police Complaints Tribunal to criticism of the report of that tribunal following its investigation into allegations that a confession of murder had been wrongly obtained by the police. The tribunal cleared the police of any impropriety. The report received much publicity through the media and much exposure in parliament.[61]

No comment is made on the reported criticisms or responses as such. The sole point to be here made is that notwithstanding that judicial responses to media criticism are infrequent, Judges at all levels take cognizance of the vigilant eye of the media in their conduct of judicial proceedings of various kinds.[62] It may be reasonably concluded that the presence of the media provides a valuable check against the risk of biased or prejudiced judicial decisions at every level.

(v) Criticism in Parliament

Whilst criticism of Judges in parliament is not a frequent occurrence except in serious cases, it has been seen to affect Judges on

59. Johnston, *op. cit.*, p. 85, see also *R. v. Foster, Hardy, Millar & Wheeler* [1937] St.R.Qd. 368 and the reference by Blair C.J. at 378 to the remarks of Sir Samuel Griffith C.J. in *R. v. Nicholls* (1911) 12 C.L.R. 280 at 286 to the effect that he (Griffith C.J.) was not prepared to accede to the proposition that an imputation of impartiality to a Judge was necessarily a contempt of Court but to the contrary, "if a judge were to make a public utterance of such a character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the Court in any matter likely to be brought before it, any public comment on such an utterance, if it were a fair comment, would, so far from being a contempt of Court, be for the public benefit . . ."
60. *Courier-Mail* 6th March 1985, p. 1; See also Parl. Deb. [Hansard] Qld. No. 12 pp. 3753–4.
61. *Sunday Mail*, 20th April, 1986, p. 17 where His Honour was reported to have said:—

    > Judge Pratt said he was struck by the way certain critics rushed in. It would take a day to read the report properly, but the media and others rushed in immediately. "I invite people: read the report."

62. See also the circumstances surrounding the retirement of Mr. Justice Lilley: Ross Johnston, *op. cit.* pp. 43–44.

occasions.[63] Traditionally the rule is that judicial conduct cannot be enquired into other than by way of an address for removal but it is clear that in practice this rule is not adhered to.[64]

For example in Mr. Justice Grantham's case (1906) the British Prime Minister Sir Henry Campbell-Bannerman argued in favour of an ultimately successful resolution that the address for removal (on the ground of shown partiality) should be discontinued and that the government should be satisfied with "severe condemnation":—

> After all, have we not accomplished all that was required by the situation — namely that there should be this public and . . . almost universal condemnation or censure of Mr. Justice Grantham's language and action? . . . Have we not given him such a lesson that he is not likely to repeat these ill-considered actions?[65]

Thus the Prime Minister and his compatriots at least were confident that such criticism would prevent similar misconduct for the future. Several similar incidents can be found.[66]

Thus while parliamentary criticism is not an every day occurrence, it should not be discounted completely as a check on judicial misconduct.[67] Indeed several commentators give it great weight in the prevention of biased decisions and other forms of misconduct.[68]

(vi) Academic Criticism

Judges hold certain academics in high esteem. This respect it appears has been emphasised since the 1960's when the House of Lords relaxed its "non-citation of living academics" rule. For instance, Lord Denning, in accounting for the rejection of *Candler v. Crane* in the deciding of *Hedley Byrne & Co. Ltd. v. Heller* said:—

> The commentators helped a lot. They made several useful criticisms. Those things do influence the House of Lords.[69]

Thus as far as the more established critics at least are concerned, it is clear that a Judge would not want to be subjected to critical analysis by that man's hand. Indeed Lord Reid said:—

> If Professor Goodhart or someone like him is criticising you in the *Law Quarterly Review* then you sit up and take note, if it is somebody you've never heard of, perhaps you don't take so much notice.[70]

63. Paterson, *op. cit.*, p. 12.
64. Shetreet, *op. cit.*, p. 165.
65. *Ibid.*, p. 166.
66. 1906, 160 Parl. Deb., 4th ser., 392 at 411; See also 716 H.C. Deb., 675, Mr. Orme; 781 H.C. Deb., 432–54; and for a Queensland example: see Malcolm Cope, "The Political Appointment of T.W. McCawley", *U.Q.L.J.*, Vol. 9, No. 2, 224 at p. 238.
67. Shetreet, *op. cit.*, p. 178.
68. See Maher, Waller and Durham, *op. cit.*
69. "Law and Social Change: An Interview with Lord Denning", *Kings Counsel*, No. 22 (1969) 6 at p. 8.
70. Quoted in Paterson, *op. cit.* pp. 19–20.

Even if the observations are made by way of insinuation, in the best of humour and with the greatest respect, a Judge nevertheless may well cringe at the suggestion.[71]

Thus academic criticism can be at times a decisive force in checking judicial bias because it is clear that Judges in the main do not want to be seen as anything but fair and impartial.

(vii) Other Practical Restrictions

The first practical restriction is that a Judge is expected to disqualify himself if he has any "interest, partiality or bias, or even simply the appearance of bias, connected with the matter coming before him".[72] Mr. Justice Kirby in his Boyer Lectures notes that Judges are usually most careful to ensure that cases wherein there is a possibility of embarrassment are not listed before them.[73]

Indeed, Mr. Justice Dawson recently refused to sit on an important constitutional case because as a barrister he had given advice to the Crown on the question.[74] Mr. Justice Ludeke of the Australian Conciliation and Arbitration Commission also stood down recently because of a speech he had given extra-judicially on a similar issue.[75] Indeed, some years ago I personally witnessed a Queensland Supreme Court Judge ask whether counsel objected to his determining the matter because he declared that he was personally acquainted with a cousin of the witness!

In addition, if a Judge refuses to stand aside in such cases, the appellate Court is likely to intervene and set aside the order made.[76] Accordingly, if these are the demonstrated and daily standards which can be expected from the judiciary, then any fears relating to lack of judicial impartiality seem quite unfounded and remote.

Secondly, it has been suggested that counsel "have been and continue to be, able to impose considerable limitations on the creative performance of Law Lords in hard cases".[77] This restrictive power of counsel, which obviously is not limited in its effect on Law Lords, revolves around the notion that a Judge cannot be seen to be taking advice out of the courtroom. More simply, a Judge cannot raise arguments justifying his decision in respect of which counsel have not made submissions. The rule extends also to restrict the raising of arguments not considered by the court below it, if any.

The rule is admittedly on occasions ignored; however such occasions are few and far between but when they occur, are often

71. For instance, Kekewich J. may well have rolled over in his grave as a result of certain observations, albeit in good humour, footnoted to the main text in Ford and Lee, *Principles of the Law of Trusts* (Law Book Company, Sydney 1983) p. 891, in respect of Kekewich J.'s decision in *Re Nottage* [1895] 2 Ch. 649.
72. Mr. Justice M.D. Kirby C.M.G., *op. cit.*, p. 48.
73. *Ibid.*
74. See *The Age*, 19th January, 1983, p. 8.
75. See *Canberra Times*, 16th February, 1983, p. 3.
76. See *Livesey v. N.S.W. Bar Association* (1983) 57 A.L.J.R. 420; see also R. Cranston, "Disqualifications of Judges for Interest, Association or Opinion", [1979] *Public L.* 237.
77. Paterson, *op. cit.*, p. 43.

accompanied by the rebuke of one's brethren.[78] Although it has been suggested that this rule is not as inhibiting as first might appear, nevertheless it is clear that the Judge does not have the latitude to decide according to his will. He must decide according to the law as argued before him.[79]

Conclusion

The decisional style of Australian and English Courts has always rested on logical inference derived from precedents. As Mr. Micawber said in reply to David Copperfield's question about how he liked the law: –

> My dear Copperfield, to a man possessed of the higher imaginative powers, the objection to legal studies is the amount of detail which they involve . . . [T]he mind is not at liberty to soar to any exalted form of expression.

And indeed, within this limited framework, Judges are constantly under the scrutiny of the press, their colleagues, the Bar, academics and others. They realise that any slight quirk in the administration of justice will be reverberated down the corridors of history, and only the very bold will hazard this consequence. Further, their own self esteem and desire for success burns within them so that when they present themselves at the crossroads, only one path becomes available: the path of justice.

The legitimacy and authority of the Judiciary rest of necessity on the faith of the public at large. This faith is its corner-stone. Yet this great institution continues to be subjected to trenchant criticism reflecting upon its impartiality, the tendency of which is to reduce this public confidence. This paper has attempted to show that Judges are hemmed in from every angle so that they have remarkably little latitude for the expression of their individual whims. Hopefully this paper will assist lawyers and laymen in putting allegations of a lack of judicial impartiality into perspective. Whilst public faith in our Judges still is reasonably high, it would be most refreshing to see more of the kind of confidence illustrated by James Avery Joyce who thought that British justice was the admiration of all the world because therein: –

> . . . runs that application of practical logic and scientific method, that elimination of emotional prejudice, and clarity of expression and search for truth, which are the essence of all clear thinking and the hall-mark of true justice.[80]

78. See Lord Denning in *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379 at pp. 423–4, and see the remarks of Viscount Simonds with whom Lords Reid, Cohen and Sovervill agreed, at p. 398.
79. For a discussion on this issue, see Paterson, *op. cit.*, pp. 38–47.
80. James Avery Joyce, *Justice at Work: The Human Side of the Law*, 2nd ed., (Pan Books Ltd., London: 1955) p. 99.