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JUDGES AND THE COURT SYSTEM

Comment on the paper by
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COMMENT

INTRODUCTION : LIMITS ON THIS COMMENT

1. I face an impossible task. My comment upon Associate Professor Blackshield's interesting paper must be at once relevant, useful, stimulating and above all thoroughly innocuous. How can I deal with the "big themes" of this paper? How can I comment upon High Court or other appointments? You will forgive me if I confine my political comments here to an occasional raising of the eyebrows. It is simply not possible for me to deal with party political issues that are at the heart of the paper. The strength of the judiciary in the British tradition rests, in part at least, upon its plain remove from ephemeral political controversies.

2. I retreat to less heady stuff, leaving it to Mr. Merrills and other controversialists who are under no disabilities, to lead the real debate. This is not to say that I necessarily agree with everything in the Blackshield paper. My reservations illustrate his major conclusion. A distinction of some sort must be drawn between judicial attitude and predilections, on the one hand and what judges actually do as judges, on the other. Forgive us, but as citizens and mortal creatures judges obviously have attitudes. These include political attitudes. Indeed in our democracy, the compulsory vote forbids judges the luxury of a total retreat from party politica evaluation. Clearly, such attitudes and predispositions will affect, in a general way, some judicial decisions. It does not say very much, I am afraid, to reveal that judges have their biases. It would be curious, indeed a case for scientific wonderment, if they did not.

The real issue for governments and for the community is how judges handle their attitudes.

JUDGES AND PREJUDICES

3. Because the Common Law system reposes such unique importance in its judges, debate and speculation about judicial attitudes will inevitably agitate the community. It will especially fire the legal community because it feeds extensively on its own myths. When two or more lawyers are gathered together in this country, we all know that only a short interval expires before discussion turns from the qualities and attributes of the participants, to the biases and defects of the judges. The Blackshield paper has tried to reduce this timeless, fascinating exercise in gossip to the dignity of a science. It is an interesting yet unsatisfying effort. We may live under a government of laws not of men. But the laws are stated, interpreted and enforced by men. Indeed, by a few, identifiable men. Scrutiny of these few should flourish and be informed.

4. Has it never struck you as strange that the legal fraternity which asserts most vehemently, the absolute removal of judges from political issues, nevertheless spends so much time and mental energy examining the prejudices and attitudes of judges? Therein lies the germ of confusion. But, when quantitative analysis is finished and the scalograms are before us, what precisely does the voting pattern that emerges tell us that we did not know from common gossip or our own intuition? A scientific demonstration that Mr. Justice X is, on his "votes" at the extreme left of a scalogram and that Mr. Justice Y is at the extreme right is all very interesting. But which of us in this room learns anything really new from the scalogram appearing on page 48 of the paper? Unless it is the bizarre appearance of Menzies J at the extreme left of the scale, the only thing this scalogram does is to organize knowledge which most of us who have been reading the cases had anyway. Perhaps no more should be claimed for quantitativ analysis than this.

THE DANGERS OF QUANTITATIVE ANALYSIS

5. But if we are to indulge ourselves in this fascinating American[1] import, we should be aware of the need for caution:

(1) In the United States, it is usual to find all(or almost all) judges of the Supreme Court participating in every decision. The number of cases where judges do not sit is rare. This

is not the case in the High Court, even in matters involving issues under the Constitution.

(2) Although there has been an increase in individual opion-writing, to the point indeed of provoking criticism,[2] analysis of this kind is prone to display a bias in favour of individualists and against those who concur in opinions.

(3) The analysis inevitably concentrates on how judges "vote". It makes no allowance for the reasons expressed by them. Quite different reasons may bring one judge to the same conclusion as another. The analysis has a tendency to reduce the intellectual processes of reasoned judgment to the banality of an opinion poll.

(4) These points assume greater importance where the sample is small. Inevitably the U.S. Supreme Court must dispatch a great deal more business than the High Court. But where, as here, we are not dealing in hundreds but only eleven issues in eight cases, the chances of really worthwhile conclusions are diminished. I say this even bearing in mind the limitations that are inherent in the endeavour to analyse a stable group of judges when time inevitably and unhappily erodes the stability of the group.

6. The point of this is that in constitutional as in other cases we must be alive to the unpredictable, as well as to the predictable. Governments, which appoint judges must temper the comfort and self-assurance that arises from quantum analysis with a healthy regard for the eccentricities of judicial independence. When you compare the scalogram in this paper with those appeari in Professor Blackshield's Lawasia essay,[3] the lessons that emerge are, I would suggest, three -

(1) The ranking of judges varies according to fairly specific subject matters. To lump "constitutional" cases together may be quite unhelpful. Attitudes focus much more specifically, (as does the law).

(2) The ranking of judges varies. The composite picture emerging from all votes varies signficantly from the votes on particular issues.[4]

(c) The picture varies with the passage of time.[5]

JUDICIAL PATRONAGE - UNITED STATES

7. There is absolutely no doubt that governments everywhere recognize the importance of judicial patronage. This is a sensitive issue. I am happy to say it is an international one. The latest part of the Congressional Quarterly to cross my desk discloses that the United States Senate has now passed a Bill which creates forty-five additional federal judgeships in twenty-eight States.[6] This Bill was delayed by the Senate leadership for six months. The United States Chief Justice blamed the Senate inaction on "the political considerations of a presidential year".[7] The Chief Justice and a subsequent editorial in the Washington Post put thesemanoeuvres into an historical perspective worthy of the Bicentennial -

> "[this is] the old political tradition of delaying judgeships when the Party controlling Congress hopes to win the White House and the right to appoint any new judges...since 1801 new judgeships have been political footballs...[statistics show] that none of the major additions to the Federal Bench since World War II came later than midway in a Presidential term".[8]

It should perhaps be noted that the Bill has now passed. Perhaps agreements we reached that removed the impediment.

JUDICIAL PATRONAGE IN BRITAIN

8. Lord Hailsham, the former Conservative Lord Chancellor, recently publishe his autobiography. One Chapter is titled "Judges and Judge Making".[9] It deals with the question of judicial patronage in England. After lamenting the fact that none of his appointments had been made from the House of Commons,[10] Lord Hailsham said this about one of the themes before us today -

> "It is a great mistake to suppose that the possession of definite political ideas or the experience of having contested elections constitutes a slur on a judge's impartiality. Indeed, it is arguable that the opposite may be the case. Simonds, Maugham and Goddard were far to the right of the most Conservative Members of Parliament and unless I have misjudged him, Lord Gardiner is politically far to the left of Roy Jenkins, Lord Elwyn Jones or the late Mr. Justice Donovan. Impartiality does not consist in having no controversial opinions or even

> prejudices. The Bench is not made up of political, religious or social neuters. Impartiality consists in the capacity to be aware of one's subjective opinions and to place them on one side when one enters the professional field, and the ability to listen patiently to and to weigh evidence and argument and to withhold concluded judgement until the case is over."[11]

GOVERNMENTS CAN ONLY APPOINT AND HOPE

9. I stop short of applying these themes in Australia. However, the point must be made that governments, of whatever political complexion, should not be lulled by scalograms into a false confidence in the predictability of their appointees. As Mr.Byers pointed out constraints are imposed on the predilections even of a maverick by the traditions of the Bench, the training of the profession and the frequent absence of room to indulge personal prejudices, however strong. Cardozo J put it well -

> "In countless litigations, the law is so clear the judges have no discretion. They have the right to legislate within gaps. But often there are no gaps".[12]

I do not seek to restore the myth of complete and absolute legalism". But in throwing this myth overboard, we should not fall victim to an equal heresy. Party hopes and academic expectations are bound to founder uncomfortably often on the judicial rock of impartiality and independence. All that governments can do, once an appointment is made, is to hold their breath and hope for the best.

WOMEN APPOINTMENTS

10. There are a few points of a minor nature that I feel the paper may not have brought out sufficiently. I think it underestimates the forces now at work that redress the sexual balance of the Bench in Australia. Those forces, once set in train, have not been stopped or reversed.[13]

THE PRIVY COUNCIL IN DECLINE

11. The section on the Privy Council tends, I think, to the error that the government's moves to establish an entirely indigenous judicial

hierarchy were an Antipodean aberration. They were not. They were part of a more general, international trend. Within a year, Guyana[14] and Trinidad[15] have abolished appeals.[16] Malayasia has now removed constitutional and criminal appeals.[17] The debate has even begun in New Zealand! Absence of appeal to London has not, we are told, made the Canadian heart grown fonder.[18] If we must have a Privy Council for State appeals it is interesting to speculate whether the Whitlam Government endeavoured to find an indirect path around the legal problems outlined in the paper. Would it have been constitutionally possible to establish in this country on the advice of the Australian Government an Australian Judicial Committee of the Privy Council? The Queensland venture came unstuck.[19] But could not the Queen of Australia have constituted an entirely Australian Judicial Committee? We will be told, in due course, whether such an indirect means of modernizing the Australian Constitution was considered and if so the reactions of the Australian and United Kingdom Governments. If the monarchy, with the Queen's consent, can be made indigenous, can the Privy Council be repatriated too for State appeals?

JUDGES OUTSIDE THE COURT SYSTEM : INQUIRY

12. A major assignment to judges by the Whitlam Government is scarcely touched upon in this paper. It ought to be mentioned somewhere in the Conference. This opportunity will do. It is the use made of judges by the Government in a large number of inquiries. The facility[20] is not uncommon in New South Wales. Other States have different traditions. During 1974, it was said in Sydney that you could not get a matter tried in the Supreme Court of New South Wales because so many judges were involved in federal inquiries or investigations or had otherwise received a federal Commission. The list is a long one -

Kerr C.J: Governor-General
Hope J.A: Royal Commission on Intelligence and Security
Collins J: Royal Commission on Petroleum
Else-Mitchell J: Commission of Inquiry into Land Tenures
Meares J: Commission of Inquiry into Rehabilitation and Compensation
TooseJ: Royal Commission on Repatriation

The use of judges, including State judges, does not end there. When the Prices Justification Tribunal was set up, a Deputy President of the Arbitration Commission, WilliamsJ, was selected to head the Tribunal. Else-Mitchell J was appointed Chairman of the Grants Commission. W.B. Campbell J had been appointed by the previous government to be Chairman of the Remuneration Tribuna

and the Academic Salaries Tribunal. Nimmo J was commissioned to inquire into the constitutional future of Norfolk Island. Elizabeth Evatt J, whilst a member of the Arbitration Commission, received a further Commission to be Chairman of the Royal Commission on Human Relationships. J.B. Sweeney J, initially appointed to the Arbitration Commission and later to the Industrial Court, was then appointed Royal Commissioner on Certain Allegations of Payments to Maritime Unions. He also headed the Commission of Inquiry set up to report on Co-ordinated Industrial Organisations. Although the legislation was passed during the life of the present Parliament, it was the Whitlam Government wh ich announced the intention to appoint a judge, Woodward J, as Director-General of the Australian Security Intelligence Organisation. Franki J is Chairman of the Committee on Reprographic Reproduction and was sent by the Government to represent Australia at an International Conference on Copyright Law. The Law Reform Commission Act, the Administrative Appeals Tribunal Act and the Australia Police Bill all envisage a role for federal judges outside the purely curial. There are no doubt very many other examples. The tradition of using judges is not, of course, a new one in Australia. It certainly received a fillip from the Whitlam Government. It is a phenomenon that surprises overse lawyers. Indeed I am told it surprises Victorian lawyers. Its motivation can no doubt be traced to the desire of governments for advice of a somewhat different kind than could be expected from the more orthodox sources in the Public Service. Is it the independence of the judicial mind and tradition which motivated such a use of judges?

SUMMARY

13. To sum up, I would say this about the Blackshield paper -

(1) The last few years have demonstrated that judges in the future are likely to have increasingly important functions outside court rooms.

(2) Within court rooms, important social and political issues must be resolved, sometimes without the benefit of "pure legal" principle.

(3) In these circumstances, it is inevitable and healthy that the governments who appoint them and the community served should be aware of the attitudes and predilections of judges.

(4) Associate Professor Blackshield's fascinating techniques assist in this knowledge. But, given our traditions, the watch word for governments is and should be "Put not your faith in scalograms".

FOOTNOTES

1. For a recent American analysis see W.B. Schultz and P.K.Howard "The Myth of Swing Voting: An Analysis of Voting Patterns on the Supreme Court" (1975) 50 *New York University Law Review* 798.

2. For example (1975) 49 *Australian Law Journal* 157.

3. A.R.Blackshield "Quantitative Analysis: the High Court of Australia, 1964-1969" (1972) 3 *Lawasia* 1 at pp.14,24.

4. *loc cit.*

5. *loc cit.*

6. Vol. XXXIV, No. 15 *Congressional Quarterly Weekly Report* (10 April 1976) p.841.

7. *loc cit.*

8. *loc cit.*

9. Lord Hailsham *The Door Wherein I Went*, Collins, London 1975, p.254.

0. *ibid* p.256.

1. *ibid* pp.256-7.

2. B. Cardozo, *The Nature of the Judicial Process*, 1921, pp.113-15.

3. The paper fails to mention the appointment of Mrs. Judith Cohen as a Commissioner of the Australian Conciliation and Arbitration Commission. This appointment took place during the life of the Labor Government. Since then another such appointment has been made, in the person of Pauline Griffin. The N.S.W. non Labor Government appointed Miss Leone Glynn as a Conciliation Commissioner under the N.S.W. *Industrial Arbitration Act*. A number of women have been appointed to other Benches. These include Judge Kemeri Murray, appointed to the Family Court of Australia on 5 February 1976, Mrs. Margaret Lusink appointed to the same Court on 25 February and Mrs. Josephine Maxwell, whose appointment was announced on 11 June to the Family Court. The N.S.W. Government had appointed Mrs. Helen Larcombe as the first woman Stipendiary Magistrate in New South Wales. She has now been joined by Miss Sue Schreiner.

14. *Constitution (Amendment) Act 1973* (Guyana) (1975) 2 *Commonwealth Law Bulletin* 9.

15. Constitutional Commission Report (Trinidad) (1975) 2 *Commonwealth Law Bulletin* 57

16. *Courts of Judicature (Amendment) Act 1976* (Malaysia) (1976) 2 *Commonwealth Law Bulletin* 85.

17. See (1975) 49 *Australian Law Journal 449. Cf.* F.M. Brookfield "New Zealand (Appeals to the Privy Council)(Amendment) Order 1972: Another View" (1975) 6 *New Zealand Universities Law Review* 408.

18. D.H. Clark "The Supreme Court of Canada, the House of Lords, the Judicial Committee of the Privy Council and Administrative Law" (1976) 14 *Alberta Law Review* 5.

19. *Commonwealth of Australia v. Queensland* (1975) 7 *A.L.R.* 351.

20. M.V. McInerney "The Appointment of Judges to Commissions of Enquiry and Other Extra-Judicial activities" in *Judicial Essays*, 1974, p.35; *Cf.* P.B. Toose, *ibid* p.55.

21. *Cf.* Enid Campbell "Ministers, Public Servants and the Executive Branch", *supra* p. (footnote 1 of Dr.Campbell's paper).