BOOK REVIEWS

JUDGES by David Pannick, Oxford University Press, 1987.

Mr Pannick is an English barrister and a Fellow of All Souls. This book, however, is not remarkable either for the structure of its argument or the profundity of its scholarship. But then I would not think that it was intended to be a serious book, as the French might say. Rather it resembles a further collection of legal anecdotes, such as Megarry's *Miscellany-at-Law*, spiked with a dash of social purpose. The anecdotes are deployed to illustrate the judicial defects which Mr Pannick exposes and for which in some but not all cases he recommends a cure, thus executing his social purpose. In consequence, one encounters yet again Mr Justice McCardie's feud with Lord Justice Scrutton, Lord Atkin's dissent in *Liversidge* v. *Anderson*, the assorted horrors of Lord Hewart and Lord Braxfield (more than once), Darling's attempts at humour and even the most famous missile in legal history, namely the egg thrown at Vice-Chancellor Malins (intended of course for his brother Vice-Chancellor Bacon). The material tends to be repetitious, which is understandable, since parts of the book first appeared as articles in the Guardian newspaper from 1979 to 1987.

Any book is important which seeks to examine the judicial process, to criticise judicial method and encourage judicial self analysis. "Judges" attempts all of this, but I found it disappointing nonetheless. I think that the author's analysis of judicial failings is sometimes astray and his solutions superficial. Perhaps too I cannot contemplate with affection what appears to be Mr Pannick's preferred judicial model—brisk, cheerful, fortyish, neatly dressed, nothing gaudy, no wigs or robes of course, remorselessly courteous and relentlessly informal.

The learned author, as I may euphemistically describe him (I will explain the use of the adverb presently), presents his book as "an advocate's reflections on the judicial system", a subject whose discussion, he thinks, is generally inhibited because of the mysticism surrounding the law. That reluctance is regrettable "not least because the high quality of the English judiciary ensures that our legal system has nothing to fear from debate on this subject." A hundred pages later on, Mr Pannick confirms that "the overwhelming majority of our judges do a difficult job extremely well." I would respectfully seek to apply those *encomia* to the English judges' Australian brethren; that is to say, non-euphemistically, that I think that you can say the same about us.

As I have said, Mr Pannick describes himself as an advocate and I assume from this that he has spent some time in the courts, although

this is not a ready inference from the way in which he approaches the forensic routine. He addresses the judicial system under six separate heads—Expertise and Bias, Appointment and Training, Performance and Discipline, Criticism, Mysticism and Publicity. These are, it is suggested, the significant elements of the judicial system which require examination; as indeed they are. We must remember that Mr Pannick is writing about English judges whose eligibility for appointment depends upon tighter criteria than those current in Australia, since no one may become a judge of the English High Court or Court of Appeal unless a barrister of at least ten years' standing.

Although the book expresses no more than conventional regret at the homogeneity of the bench, Mr Pannick points out that the English judiciary still consists almost exclusively "of middle aged to elderly men who worked as barristers for twenty years or more prior to their appointment" and who are predominantly white and male with the same independent school and Oxbridge educational background. In essence, this description applies to the composition of the New South Wales Supreme Court. Of the twenty eight (out of thirty eight) judges whose names appear in WHO'S WHO, seventeen, or sixty per cent, were educated at private schools. Of the remaining eleven, or forty per cent, educated at State or Catholic high schools, five attended two selective high schools. The educational background of Australian and English judges may be similar. But in performance they are separated by the class-based attitudes and perceptions so much more pervasive and influential in England than in Australia; and largely responsible for the substantial lead which English judges enjoy in the volume of silly things said to juries and outrageous remarks made in the course of sentencing. At all events Mr Pannick has in mind his fifty year old, white, male judge, a "fallible human being" but one whose high performance and "unique virtues" would not be threatened if its members were brought out "of their self-imposed seclusion and into the sunlight where their performance could be more effectively assessed".

It might seem from this recital that Mr Pannick is engaged upon a monster exercise in irony, designed to mystify all but an inner circle who know the true state of affairs. It is hardly fashionable to press for greater exposure to public scrutiny as a means of confirming the virtues which the subtleties of judicial propaganda had asserted all along. I do not imagine that this is really the book's purpose, and I think that I might begin to try and convey its sharper flavour by dealing with some of the judicial characteristics which Mr Pannick particularly dislikes. This is not to say that he engages in anything which could be regarded as rabid denunciation of the judges of whom, as the passages quoted above show, he generally approves. Furthermore most of these unattractive features are not confined to the judiciary but shared with the profession, at least with the barristers.

Under the rubric "Mysticism" he asserts that what irritates and annoys litigants "beyond endurance is the ridiculous habit of lawyers

of dressing up for the occasion in wigs and gowns and using language that laymen cannot understand." The proposition is overstated and the attributed response exaggerated. Despite the testimony of Trollope and Dickens to the contrary (and, after all, Sam Weller in *Bardell* v. *Pickwick* did well enough) I never heard a complaint in 23 years of practice that judicial dress made witnesses "strained and hesitant when giving evidence." The transcripts I have looked at in the last 14 years or so have encouraged my scepticism. It is more often a case of staunching a torrent than of encouraging a trickle. Hesitancy when it occurs is usually the product of our curious evidentiary laws and practices which tend to envelop the witness in an unaccustomed straitjacket.

Equally, the average litigant is unlikely to encounter much in the way of legal language. Since the great volume of civil work in the courts consists of actions for damages for personal injury a medical glossary is likely to be of greater value than a legal dictionary. The plaintiff in an ordinary negligence action should have no difficulty in following his or her counsel's address. It is not uncommon these days for litigants to attend the hearing of their appeals in the Court of Appeal. They appear to understand the argument pretty well, rejoicing at judicial blows delivered at their adversary's submissions and hastening to offer their solicitor the means of repelling any apparent criticism of their own contentions. It is true that I did once overhear a barrister in conference inquiring of a client (the putative beneficiary of what was to be advanced as a *donatio mortis causa*) whether the deceased had indicated that he entertained a settled hopeless expectation of speedy death. But this represents difficulty of doctrine rather than language.

All in all I think that Mr Pannick's strictures merely reproduce conventional cavils of dubious substance. Let me take language first. He is pretty hard on legal jargon, assembling in his support an impressive variety of authorities ranging from Jesus to the Marx Brothers. (I might interpolate that the book contains 785 footnotes to about 208 pages of text, or 3.77 footnotes to a page.) I concede that lawyers have indulged themselves in jargon to an extent which falls only marginally short of that adopted by social scientists as their sole medium of communication. The difference is that while it is not of critical importance to understand what social scientists say, it is essential that the people understand what the judges say and, even more important, what their own contracts say. One must accept the role of technical language in facilitating certainty of meaning and necessary communication between lawyers. But until the vogue of "plain English", legal drafting had travelled further into obscurantism and complexity than any benefit could justify.

But while acknowledging all this, I would except the judges from most of the criticisms. The general run of judgments are not so crammed with latinisms or other legal jargon as to be unintelligible to a reasonably literate lay person. I would be quite happy to tender in support of this proposition the majority of the judgments of both the Supreme Court of New South Wales and the English Supreme Court.

Even if judgments were written in a far more indigestible style, and were lumpier with bits of jargon than they are, the display of caution and the invocation of familiar technical terms would be defensible as an indispensable means to their end. Judgments are intended primarily to solve the specific case. But, as John Austin said, the grounds of the decision may serve as grounds of decision in future and similar cases. The judges, particularly appellate judges, are aware of this consequential argument, and of the danger of leaving loose statements which may skew the future direction of the law on the topic in question. Hence the necessity for caution and precision and recourse, in some cases, to phrases and propositions which may be of a technical kind but have a well established legal meaning.

I am not convinced that judges ought to write their judgments for ordinary members of the public. In most cases they are written plainly enough and can be absorbed by anyone with a reasonable degree of education. Sir Ninian Stephen once suggested (see [1982] 56 A.L.J. 4) that when a court issues an important judgment it could at the same time publish "a detailed press release which does explain, in layman's language, what were the issues, who won and why." With great respect (a euphemism which particularly galls Mr Pannick) judgments are written mostly in lay language. They are written in English (or Australian); the problem is that so many Australians do not write or understand their own language with any skill or certainty. The contemplated press release would not serve as a mode of interpretation; but it might be explored as a means of diminishing the understandable reluctance of the curious (including other judges) to wade through judgments whose length often tends to be inordinate. Ludwig Wittgenstein said "Everything that can be said can be said clearly." That may be so, granted that "clearly" does not necessarily mean "simply". But at least everything that can be said can be said shortly.

Apart from jargon, the other defect in legal communication which provokes Mr Pannick's displeasure is the legal euphemism; and I have offered some examples of the *genre* above. The euphemism is used, says Mr Pannick, "for a variety of purposes including ceremony, obfuscation and the avoidance of what might otherwise be distasteful"; and he instances of course the prime emollients "with respect", "with great respect" and so on. This sort of language has, to a large extent, been adopted in Australia, and has survived because it is an entirely harmless means of reducing the friction which is never far off in a hard fought forensic engagement, and of preserving the degree of decorous calm which best conduces to the examination of important issues. It seems however that some of the language to which Mr Pannick refers has not been transported. I have never heard the expression "through the usual channels" with reference to the fixing of a case in court, nor has any barrister said in my hearing that he resiles from a point, or that he will pray it in aid. The delightful grovelling exhibited by A. P. Herbert's counsel which evidently continues in England has never been fashionable in Australia, and certainly not

at the bar of New South Wales. I confess that I do myself indicate that the court does not wish to hear submissions from counsel for the respondent by saying "We don't need to trouble you, Mr X". Mr Pannick has pointed out that it is of course no trouble if counsel is being paid to be there. This suggests to me a useful substitute for future use. The perceptive wife of a former colleague once criticised the use of counsel's ordinary opening gambit "May it please the Court" and said that at least there should be added the rider "and my client".

Currently the preference is, I think, for informality rather than ritual, ceremony being seen perhaps as a deliberate barrier against the encroachment of reality or as a manifestation of heartless indifference to the affairs of ordinary people. Mr Pannick's heart is plainly in the right place since two earlier books of his are *Judicial Review of the Death Penalty* (he is not in favour of the death penalty) and *Sex Discrimination Law* (he opposes sex discrimination). Naturally, he is not in favour either of judicial wigs and robes, and I am rather inclined (euphemism, I think) to agree with much of his criticism of fancy dress. But I disagree with his formulation of the case in favour of it and I think that his criticisms tend to miss the point. I would have thought it clear that robes do not constitute a necessary element in maintaining "the formality and dignity of a grave occasion" despite judicial authority in favour of that view which Mr Pannick accepts as stating the case. Equally, the fact that the Law Lords, whether sitting in the House or as the Judicial Committee of the Privy Council, do not robe is not to the point for two reasons. The first is a technical one. In neither case do they sit as members of a court. Secondly, they deal in each case with questions of law and do not see witnesses or hear evidence. That really raises the critical point.

There is to my mind only one plausible argument in favour of court dress—although I doubt that it supports the retention of the wig. Robes confer a degree of anonymity upon the wearer and diminish individual personality to something more nearly approaching a featureless element in the administration of the law. No doubt along with this goes some emphasis upon the dignity and formality which is desirable in the procedures of any court which deals with the resolution of hard fought disputes of fact which engage the emotions and self respect of the litigants. Robes deflect the anger, frustration and despair of a loser. Without them the judge is all too evidently an ordinary mortal born to err. It is surely relevant that almost every country puts its judges into robes of some kind; and the European judicial *biretta* is no less foolish than the wig.

Mr Pannick says: "The protective clothing of the judge deters all but the most persistent critic." He intends this as a criticism, but in truth it is not. It contains the justification for judicial dress which is indeed protective clothing. Similarly he speaks of the priestly garments that separate judges from ordinary men and women. But the job that judges are required to do is one for extraordinary men and women. Their conduct and their judgments must be open to criticism. However to give them

the means of adding a dimension of detachment is a benefit not a detriment to the system. I do not accept that robes prevent judges from being properly respected and understood. Nor do I consider it an advantage to abolish an element of separation between the judges and those whom they must judge. I would retain robes for trial courts. There is, to my mind, a shade of argument in favour of retaining them in appellate courts too. The difference between those two situations has been recently underlined by the High Court's abandoning wigs and adopting the dress of an American academic from the Middle West, and by the Family Court returning to robes. That last decision was determined by tragic experience which may represent a powerful response to Mr Pannick's thesis.

The mysticism which is said to surround the activities of the judiciary, is equalled only by the tenacity with which many of the public and the media retain visions of the judges which, being totally erroneous, are not the product of any judicial act or omission. Mr Pannick aptly instances the survival in literature and in popular belief "if not often in the courts" of George Orwell's invocation of "that evil old man in scarlet robe and horse-hair wig, whom nothing short of dynamite will ever teach what century he is living in but who will at any rate interpret the law according to the books and will in no circumstances take a money bribe." On Australian television the judge, commonly depicted as satisfying most elements of this description, is also equipped with a gavel, an instrument unknown in our courts save possibly as an exhibit in a case of assault. The mote or mystique is often in the eye of the beholder.

Finally Mr Pannick finds it a matter of some regret and concern that, in many respects, judges continue to shun and avoid publicity, both in and out of court. I accept his sincerity, of course (euphemism ?), but I detect in this expression of disappointment a vibrant element of frustration. It resembles the advocate's prayer—"Oh that mine adversary's client would swear an affidavit."

Mr Pannick is very hard on "the legendary enthusiasm of judges to state opinions on all manner of topics indirectly connected with the legal proceedings." Judges are not appointed for their competence as moral philosophers or social commentators and make fools of themselves if they think they are. But they do sometimes feel the need to speak out "without fear or favour and occasionally without adequate information or common sense, on issues which nobody has asked them to decide." Nevertheless, Mr Pannick acknowledges the judges' right to speak out on matters of "public concern" (so long as they avoid the real or apparent display of bias or prejudice) and that they "may have something of value to say, particularly on matters relating to the legal system." The objection that statements of this kind made out of court may provoke criticism to which a judge cannot reply, or conventionally does not reply, is, he adds, without substance. A judge can answer back if he thinks it appropriate to do so.

I find this all rather muddled. It is difficult for a judge to speak out, beyond the case in hand, without running the risk of displaying apparent bias. The appearance of judicial bias means no more than the revelation of an opinion which suggests that the judge no longer has an open mind on the issue. There would be little for the judge to chew on if all issues which might come before the courts were excluded. Certainly any matter of social significance would be prohibited. This would be curious indeed for despite Mr Pannick's reservations about judicial competence to address moral or social questions he contends that litigants "are entitled to be heard by judges who understand and reflect the values and concerns of contemporary society." I do not know how a judge is to ascertain what those values and concerns are, since society is normally in a state of flux in which many different values and concerns vie for acceptance. However, if a judge were able to arrive at the state of understanding urged by Mr Pannick he would presumably appreciate the ingredients of his knowledge and be equipped to talk about them; and they would undoubtedly include moral and social questions. Indeed judges are urged on all hands to take at least an active if not a dynamic role in the development of the law, now that we (including Mr Pannick) no longer believe in fairy tales and accept the obligation of judicial choice. Since even activism, the milder kind of intervention, requires some notion of moral and social values, it seems impossible to deny the judges this hitherto forbidden knowledge, and the right to impart and discuss it, out of court as well as in. And if judges are little more than delegates of the ruling class, as Professor Griffith and Professor Unger would have it, equity demands their right to discuss the values which inform that stance.

I think that judges do better not to engage in debate about the wider questions of morality and social organisation, unless such discussion is validly connected to the specific case. It is difficult to do so without declaring, or appearing to declare, fixed opinions which may be regarded by reasonable people as entailing particular judgment of a justiciable issue. It is far easier to be impartial than many people realise, but the appearance is the thing in this area.

In matters which concern the administration of justice judges are well equipped to express informed views. Often their opinions are the most valuable because they lack most of the self interest which may, or may appear to, influence the attitudes of the profession, the bureaucrats or the politicians. In this area the courts should speak out, preferably with one voice. But if unanimity cannot be achieved, the judges individually have a duty to speak. The area of debate will again be a comparatively narrow one, but will include matters of staffing, organisation and funding of the court's administrative and ancillary services, such as library, research assistants and electronic and other aids and equipment. It is absurd that funding for these essentials is ordinarily discussed and established without any direct discussion with the judges who are the consumers, and who

will be criticised for delays which underfunding and archaic organisation compel.

Mr Pannick's book undoubtedly raises important issues. I do not much like what appears to me to be the image of the judge which his prescription will produce. More than once he calls the judges "public servants". So they are, but hitherto of a rather special species with responsibilities of an exceptional kind. It is the nature of their duties which has, in my opinion, made it necessary for them to receive the protection which a touch of mystique and a contrived detachment provides. They have been accorded high status for the same reasons, and have earned respect which I believe they still enjoy and certainly still deserve. Judging, said Sir Owen Dixon, is a hard and unrewarding task. Hard yes—but not unrewarding.

However, it is becoming more difficult to attract recruits to the bench. Three reasons are paramount. First, the enormous and increasing disparity between judicial incomes and those at the bar. Secondly, what is perceived to be a general depreciation of the standing and conditions of service of the judges. Thirdly, the volume of work.

Mr Pannick's judge of the new wave, whom I have already described, might be seen as the product of a most radical change in existing methods of judicial appointment. I do not suggest that members of the bar are likely to refuse appointment because they will be denied the chance to wear a Father Christmas outfit. But the author's youngish judicial public servants put me in mind of a career judiciary in the European mould. Perhaps that represents the future.

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