An independent and impartial judiciary is fundamental to the existence and operation of a liberal democracy. Focusing on Australia, Canada, New Zealand, South Africa, the United Kingdom and the United States, this comparative study explores four major issues affecting the judicial institution. These issues relate to the appointment and discipline of judges; judges and freedom of speech; the performance of non-judicial functions by judges; and judicial bias and recusal, and each is set within the context of the importance of maintaining public confidence in the judiciary. The chapters in this book highlight important episodes or controversies affecting members of the judiciary to illustrate relevant principles.

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FOREWORD

THE HONOURABLE CHIEF JUSTICE ROBERT FRENCH

The High Court of Australia

Comparative law and comparative constitutional law in particular challenge the scholar. This is so even when the scholar’s enquiry is confined to the search for useful comparative descriptions of aspects of legal systems. Meaningful exposition must be able to cross boundaries of difference in history, culture and political organisation. To do so successfully, the scholar must find descriptors of general application and relevance.

When focusing upon institutional arrangements, and particularly the judiciaries of different countries, that challenge is no less acute. There are many similarities between the judicial systems of liberal democracies. But even among liberal democracies similarity may mask diversity. When considering the constitutional position and function of judiciaries beyond those found in the democracies, the differences can be profound. Yet judges from many different countries and political systems engage with each other increasingly in international fora, conferences and bilateral meetings. There, many matters of genuinely common interest unite such judges and make engagement and dialogue mutually useful. These matters include court organisation and efficiency, information management, judicial education, case management, alternative dispute resolution and judicial specialisation. It is possible for judges from different legal systems to have a common interest in all of these things and yet to sit in courts which have different relationships with the legislature and the executive and different functions in relation to constitutional interpretation, judicial review and even statutory interpretation. At another level, statements of commitment to such ‘fundamentals’ as judicial independence may not always apply in one society in a way that is comprehensible to another. Comparative law, which offers too wide a focus across areas of great difference, may yield too diffuse a picture to be useful.

The editor of Judiciaries in Comparative Perspective has not tried to bridge unbridgeable gaps. He has nevertheless identified themes
illuminative of educative pluralism within mutually comprehensible frames of reference. The authors of the various chapters in this work have written about judiciaries in representative democracies with sufficient common elements in their legal heritage and constitutional arrangements to make comparative consideration useful. The countries about which the contributors to this book have written are Australia, Canada, New Zealand, South Africa, the United Kingdom and the United States.

The chapters are arranged thematically. They are framed by a discussion, by Shimon Shetreet, of judicial independence and accountability. There follow contributions from the six selected jurisdictions on the first theme which is the appointment, discipline and removal of judges. The second theme, relating to judges and free speech, deals both with criticism of the judiciary and with extra-curial speech by judges. Those two aspects of that topic raise different issues, but find their place under the one rubric of freedom of expression in a constitutional setting. Then follows consideration of judicial bias and recusal. The final theme relates to the mixing of judicial and non-judicial functions. Professor Lee draws these themes together in the concluding chapter entitled, ‘The judiciary: a comparative conspectus’.

In his discussion of judicial independence and accountability Shimon Shetreet acknowledges the ‘marked increase in the relative role of the judiciary in society’ in recent decades. That general trend, as he observes, is shared by countries with different legal traditions and various systems of government. It points to the need to re-examine conceptual framework and theoretical underpinning of the position of the judiciary in relation to the other branches of government.

Shimon Shetreet identifies what most readers of this book would accept as fundamental, albeit inter-related, values which lie at the foundations of many, if not most, judicial systems. They are procedural fairness, efficiency, accessibility, public confidence in the courts, judicial independence and constitutionality in the sense of the constitutional protection of the judiciary. Importantly, as the reader is reminded, these values are directed to the core function of the courts which is the hearing and determination of disputes.

An issue which attracts the interest and attention of judges, governments and court administrators across a number of national jurisdictions, is the tension between judicial independence and the public accountability of judges in a democracy. That accountability, like judicial independence, attaches to individual judges and to courts as institutions.
The individual judge is made accountable for his or her decisions by the duty to provide reasons for decisions. Scrutiny of those reasons may lead to the detection of error and the grant of appellate remedies. A second aspect of the accountability of individual judges relates to the judge’s efficiency and diligence in the hearing and disposition of cases. In some jurisdictions the judge may have case management responsibilities for a docket of cases and general time targets from filing to disposition. Accountability at the institutional level relates to the efficient use of public resources. The development of reliable and relevant measures of such efficiency is an ongoing project in a number of the countries considered in this book.

Judicial independence is an appropriate theme with which to frame the various issues explored in this book. It is asserted as a fundamental norm in many international instruments, declarations of principle and standards. It is reflected in Article 10 of the Universal Declaration of Human Rights and in Article 14 of the International Covenant on Civil and Political Rights. For the legal systems considered in the book, which are the heirs of a common heritage of constitutionalism, the differences in perspective on judicial independence are not as acute as they may be between those systems and some others with very different histories, cultural traditions and constitutional arrangements.

An interesting question which helps to sharpen consideration of the nature of judicial independence, is the phenomenon of the appointment of judges by popular election in many states of the United States. This is described and discussed by Mark Tushnet in his contribution. Appointment by popular election raises the question: how does an elected judge differ from an unelected judge in the discharge of the same judicial functions? The desirability of judicial elections has been the subject of public debate. Former Justice of the US Supreme Court, Sandra Day O’Connor, has written about their problems. The campaign process has given rise to litigation in the Supreme Court in relation to campaign finance donations from prospective litigants.1 Relevantly to another theme of this book, discussed by Charles Geyh in his chapter on judicial freedom of speech in the United States, a state law restricting campaign speech by candidates for judicial office was held by a majority in the Supreme Court in 2002 to violate the First Amendment guarantee of free speech.2

The appointment, discipline and removal of judges, which is the first specific theme in the book, are matters of ongoing discussion and development. There is today a general public and governmental interest in transparent and merit-based judicial appointment processes. There is also interest in ensuring that the full range of people potentially available for and worthy of appointment is encouraged to consider applying for appointment. Not that many years have passed, in Australia, since the idea of governments calling for applications or expressions of interest in appointment to a superior court would have been widely, although not universally, regarded as a rather tasteless departure from the practice of the Attorney-General quietly sounding out the senior judiciary and legal profession as to the suitability of prospective candidates for appointment.

Processes for the appointment of judges are generally concerned to ensure that the candidate selected is the most qualified and competent person available against criteria related to legal knowledge and skills, integrity, diligence and efficiency, sound judgement and communication. Case management, both before and during the trial of matters, requires its own skills set. A judge working with other judges in a permanent appeal court, for example, will need some level of skill in working within a collegial environment. For heads of jurisdiction, interpersonal skills and administrative competence are also vital.

Transparency in selection to avoid the perception of what Philip Joseph calls in his chapter ‘a self-perpetuating oligarchy, that is manifestly unrepresentative of society’ is a widely accepted contemporary goal of selection and appointment processes. The desirability of diversity in appointments is also a common theme. Hugh Corder, writes that in South Africa the Judicial Service Commission, chaired by the Chief Justice, has succeeded in a substantial transformation of the demographic profile of the superior court judiciary in relation to race, although it has been less successful in relation to sex. Martin Friedland, writing about Canada, points out that the enactment of the Charter of Rights and Freedoms, as part of the Constitution in 1982, coupled with public realisation that judges would play an increasingly important role in policy decisions, helped to create a positive climate for changing the system of judicial appointments. That may be seen as a particular application of the general observation by Shetreet, about the changing role of the judiciary in society in countries with different legal traditions and various systems of government.
Judicial independence intersects acutely with the protection of judicial tenure and procedures for the removal of judges for misbehaviour or incapacity. The utility of a procedure to enable allegations of circumstances which might warrant removal to be brought to the attention of the relevant authority is not particularly controversial. More contentious is the question of how to deal with complaints about judicial behaviour which would not, on any view, warrant removal. Quite apart from constitutional considerations which might attend the imposition of some statutory sanction, there is the practical question of the effect of such a sanction, publicly imposed, on the authority and standing and therefore on the effectiveness of the judicial officer concerned. The option of some form of ‘counselling’ by the head of jurisdiction or administration action, such as removal of a judge from involvement in a particular class of case, raises its own difficult issues.

The discussion of freedom of speech in the six jurisdictions evidences a changing relationship between the judiciary and the society of which it is part. A statement made by Lord Chancellor Kilmuir in 1955 in response to a request from the Director-General of the BBC, that members of the judiciary take part in a radio series on ‘great judges of the past’, became known as ‘the Kilmuir rules’. They represented, and still represent, what John Williams, in his chapter, describes as ‘the high watermark for judicial reticence’. A much-quoted part of Lord Kilmuir’s statement, which can sometimes lend itself to parody, was his observation that, ‘So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable’. It goes without saying, of course, that judges, required as they are to give reasons for their decisions, cannot remain silent in the discharge of their functions. In that connection there is an ample supply of assailants, sceptical of judicial wisdom and impartiality, who have not been in the least discouraged by extra-curial silences.

The Kilmuir Rules cannot be dismissed as a relic of a bygone age. As Williams writes, they are ‘a readily recognised point for those who wish to debate the wisdom of judicial officers exercising their right as a citizen to speak out on matters of public debate’. Ongoing discussion can usefully be guided, as he points out, by constitutional principles and, in particular, the separation of powers and the maintenance of the rule of law. Both principles have been used to justify restraint and greater public involvement by judges.

The degree of public controversy engendered by extra-curial speech by judges is generally in proportion to the political or social sensitivity of the topic which is addressed. Criminal justice and sentencing laws and
the utility of imprisonment are generally high on the sensitivity register. The reaction to a speech by the Chief Justice of New Zealand on the last-mentioned topic, illustrates the point. It is described and discussed in Grant Hammond’s chapter on ‘Judges and free speech in New Zealand’.

There is no doubt that judges are much in demand as speakers, principally, although not only, at academic or professional conferences. The incidence of extra-curial judicial speech on a variety of legal topics has increased in recent decades, again underpinning the general point made by Shimon Shetreet in his opening chapter. Iain Currie makes the same point about South Africa since 1994. South African judges now routinely participate at academic conferences, give speeches to university students and address gatherings of the legal profession. Judges have also spoken out strongly on the administration of justice and law reform. Currie refers to informal ‘Guidelines for Judges’ which prohibit involvement by judges in ‘political controversy or activity’. An example of one judge who spoke at the boundaries of the rule was Justice Edwin Cameron. As an appeal court judge, he criticised what was referred to as AIDS denialism during the Mbeki administration. In a subsequent defence of his own actions, he referred to the conclusions of the South African Truth Commission that judges during the Apartheid era had failed in their duty not to collaborate in injustice ‘by omission, silence and inaction’. Like so many questions of comparative law, this question cannot be considered without reference to local conditions, including history, culture and constitutional arrangements.

The discussion of campaign speech in judicial elections in the United States by Charles Geyh is instructive. Notwithstanding the First Amendment, codes of conduct impose constraints on judicial speech and the authority of judges to respond to criticism. Some constraints would not be particularly controversial in any of the six jurisdictions. Model rule 2.10 of the American Bar Association’s Model Code of Judicial Conduct (2007), specifically constrains speech in relation to pending matters. It provides that:

A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court or make any non-public statement that might substantially interfere with a fair trial or hearing.

Readers of Geyh’s chapter from other jurisdictions would be unlikely to cavil with the observation made by the Chief Judge of the Supreme Court of New York, that judges:
do not duel with public officials about the correctness of their decisions; they do not conduct press conferences about cases; and they have no call – in radio and television shows to explain their rulings. They rely on their decisions whether written or oral, to speak for themselves.

A difficult question is whether some forms of unfair criticism of judges and judicial decisions, falling short of contempt, justify a defence of the judge by the Attorney-General or by the head of jurisdiction. If the criticism emanates from government, it may be appropriate for the head of jurisdiction to respond. Sometimes a sufficient defence will be effected by a response from the relevant Judges’ Association, Law Society or Bar Association.

The limits of freedom of speech in criticism of judges must also be guided by constitutional principles. As Kent Roach reports in his chapter on ‘Judges and free speech in Canada’, the Charter has had the most decisive effect with respect to critical speech about the judiciary as it has invalidated the common law contempt offence of scandalising the court. Before the introduction of the Charter, that offence was used more frequently in Canada than other democracies with respect to criticisms of the judiciary.

The theme of judicial bias and recusal in each of the jurisdictions is comprehensively explored. Colin Campbell in his chapter focuses on the reasonable apprehension of bias test and the way in which it operates in Australia. The rules relating to judicial bias are an important aspect of procedural fairness, which as Shimon Shetreet points out, is one of the fundamental values which lie at the foundations of most judicial systems.

The last section of the book deals with the admixture of judicial and non-judicial functions in the various jurisdictions. This is a matter which has been the subject of litigation on more than one occasion in the High Court of Australia and is discussed in the Australian chapter on this topic written by Patrick Emerton and H. P. Lee. The phenomenon is reflective of a changing relationship between the judiciary and society. There is an increasing tendency for governments in some jurisdictions to seek to use judges to do non-judicial jobs. This is not least because of the reputation for independence and impartiality and detachment from partisan politics that attends the judicial function. In a sense, the use of judges to carry out non-judicial functions, such as the conduct of royal commissions or statutory inquiries or to head up administrative tribunals, may be seen as an appropriation to the executive branch of government of the reputation and attributes of the judicial branch. The trend is evident in Canada where, according to Patrick Monahan and
Byron Shaw, Canadian governments at both federal and provincial levels have increasingly looked to judges to carry out non-judicial tasks.

The use of judges in non-judicial roles raises the issue of the compatibility of such roles with the judicial function, both as a matter of constitutional principle and as a matter of practicality. The latter consideration arises where a judge is appointed to a non-judicial office, which renders the judge effectively unavailable for the discharge of judicial duties. Constitutional considerations arise if the performance of the non-judicial function may reflect upon the reality or appearance of independence and impartiality that is central to the judicial office.

The preceding observations are the merest sample skimmed from the text. It is no mere platitude to observe that the book provides a feast of food for thought. Within the framework provided by its selected themes, it focuses on the judiciary and legal systems similar enough to each other to make such discussion meaningful. At the same time it exposes a pluralism of approach that stimulates reflection and does so within the larger discourse about the fundamentals of the judicial role.
PREFACE

My interest in the judicial institution was heightened by a collaborative work with my late colleague, Emeritus Professor Enid Campbell OBE, AC. The project, funded by an Australian Research Council grant, culminated in *The Australian Judiciary*, published by Cambridge University Press in 2001. Later, I was privileged to have been invited by Professor Shimon Shetreet (Hebrew University of Jerusalem) and Professor Christopher Forsyth (Cambridge University) to participate in a series of conferences relating to their international project on judicial independence. That participation further kindled my interest in exploring comparative dimensions of the functioning of the judiciary in contemporary times. It became clear to me that valuable lessons can be learned from the experience of other liberal democracies on how to ensure that the judiciary can continue to play a pivotal role as an independent and impartial entity in a robust democracy.

In this book distinguished scholars and eminent jurists from six countries, Australia, Canada, New Zealand, South Africa, the United Kingdom and the United States of America, have contributed chapters pertaining to four major themes of contemporary relevance to the judiciary. The various analyses by these authors are placed within an overarching analysis of the notions of judicial accountability and judicial independence. The first theme of the book deals with developments concerning the appointment, discipline and dismissal of judges in these countries. For the second theme, the authors evaluate the exercise of freedom of speech of judges and of the freedom to criticise judges. Particular attention is focused on the intrusion by judges into the arena of political debates and the ethical dimensions of that intrusion. The third theme deals with the legal principles and ethical guidelines which have been developed in relation to the enhancement of judicial neutrality and impartiality. The major focus is on rules regarding the disqualification and recusal of judges on the ground of bias. Chapters on the fourth theme critically evaluate the performance by judges of non-judicial
functions and, where relevant, the constitutional dimensions of the separation of powers which impact on the admixture of judicial and non-judicial functions. The appointment of judges to head royal commissions or public inquiries is a major area of focus in some of these chapters.

I am immensely indebted to all the contributors who honoured me by accepting the invitation to contribute to the book. In a book which straddles six jurisdictions and involves the participation of twenty-nine contributors from these six jurisdictions, my role as editor was facilitated by their kind cooperation, patience and understanding. I am extremely grateful to the Honourable Robert French, Chief Justice of the High Court of Australia, for writing the Foreword to the book, despite his many pressing commitments. I owe a special debt to Finola O’Sullivan of Cambridge University Press, who provided her unstinting support and encouragement when I first proffered my idea of the book to her. I thank her and her staff, in particular Richard Woodham, Lyn Flight and Christina Sarigiannidou for their patience and efficiency in the production of the book. I also thank Michael Adams for his efficient and meticulous research assistance.

Finally, I wish to pay tribute to Emeritus Professor Enid Campbell, an outstanding public law scholar, who was looking forward so keenly to writing a chapter for this book but who unexpectedly passed away on 20 January 2010.
TABLE OF CASES


APLA Ltd v. Legal Services Commission for New South Wales (2003) 224 CLR 322 172

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A v. Home Secretary (No. 2) [2005] UKHL 71 247

Abrams v. US (1919) 25 US 616 210


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Armstrong v. Kane [1964] NZLR 369 343

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Attorney-General for the Commonwealth v. R (1957) 95 CLR 529 404

Attorney-General v. Guardian Newspapers Ltd (No. 2) [1990] 1 AC 109 156

Attorney-General v. Mr Justice Edwards (1891) 9 NZLR 321, CA 324

Auckland Casino Ltd v. Casino Control Authority [1995] 1 NZLR 142, CA 325, 330

Auckland Education Board v. Haselden (1898) 17 NZLR 277 323

Aussie Airlines Pty Ltd v. Australian Airlines Pty Ltd (1996) 135 ALR 753 291, 331

Australian Capital Television Pty Ltd v. Commonwealth (1992) 177 CLR 106 156


Authorson v. Canada [2003] 2 SCR 40 320

BOC New Zealand Ltd v. Trans Tasman Properties Ltd [1997] NZAR 49 325

BTR Industries SA (Pty) Ltd v. MAWU 1992 (3) AA 673 346

Badger v. Whangarei Refinery Expansion Commission of Inquiry [1985] 2 NZLR 688, HC 467

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Barrette v. R 68 DLR (3d) (1977) 260 8
Belilos v. Switzerland (1988) 10 EHRR 466 367
Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia) [1997] 1 FC 911 444
Beno v. Canada [1997] 2 FC 527, CA 444
Berger v. United States, 255 US 22 (1921) 388
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Bodner v. Alberta 2003 ABCA 102, 327 AR 77, CA 309
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Buckley v. Edwards [1892] AC 387, PC 324
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Calvert & Co. v. Dunedin City Council [1993] 2 NZLR 460 323
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