JUDICIARIES IN COMPARATIVE PERSPECTIVE

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.

HOONG PHUN ('HP') LEE holds the Sir John Latham Chair of Law at Monash University and was the Vice-Chairman of the Australian Press Council from 1994 to 2010. He was appointed an Adjunct Professor of Law, City University of Hong Kong in 2009. His areas of teaching and research interests include the judiciary, comparative constitutional law, administrative law and the Malaysian and Singaporean constitutional systems.

JUDICIARIES IN COMPARATIVE PERSPECTIVE

Edited by

H. P. LEE

CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521190602

First published 2011

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging in Publication data
Judiciaries in comparative perspective / edited by H.P. Lee.
p. cm.
ISBN 978-0-521-19060-2 (hardback)
1. Judges. I. Lee, H. P., 1947–
K2146.J855 2011
347′.014–dc22
2011000635

ISBN 978-0-521-19060-2 Hardback

CONTENTS

CONTRIBUTORS

EDWIN CAMERON was educated at Stellenbosch University and won a Rhodes Scholarship to Oxford, where he was awarded the Vinerian Scholarship. He conducted a human rights practice in Johannesburg and was a professor at the University of the Witwatersrand's Centre for Applied Legal Studies before President Mandela appointed him to the High Court in 1995. From 2001 to 2008 he served as a Judge of Appeal in the Supreme Court of Appeal, and was appointed a Justice of the Constitutional Court in 2009. He is the author of *Witness to AIDS* (2005), which won the Alan Paton Award, South Africa's premier literary award for non-fiction.

COLIN CAMPBELL holds Masters degrees in law from the universities of Melbourne and Cambridge, and a PhD in law from the University of Cambridge. Formerly a solicitor and a judge's associate, Colin's main research interests lie in the areas of administrative law, regulatory law, especially the law relating to the regulation of privatised bodies, and anti-discrimination law. The topic of Colin's doctoral thesis was 'The Conception of Public Power in Judicial Review'. The thesis examined, among other things, the inter-relationship between the law of judicial review and competition law. Colin has published articles in the *Cambridge Law Journal* and the *Law Quarterly Review*.

HUGH CORDER has been Professor of Public Law at the University of Cape Town since 1987 and was formerly the Dean of the Faculty of Law. A graduate of the universities of Cape Town, Cambridge and Oxford, his main teaching and research interests fall within the field of constitutional and administrative law, particularly judicial appointment and accountability and mechanisms to further administrative accountability. He served as a technical adviser in the drafting of the transitional Bill of Rights for South Africa. He is the author of *Judges at Work* (1984) and *Empowerment and Accountability* (1991); co-author of *A Charter for Social Justice: A Contribution to the South African Bill of Rights Debate* (1992); and

Understanding South Africa's Transitional Bill of Rights (1994, with L. du Plessis); editor *of Essays on Law and Social Practice in South Africa* (1988); *Democracy and the Judiciary* (1989); *Controlling Public Power* (1995, with Fiona McLennan); *Administrative Justice in Southern Africa* (1997, with Tiyanjana Maluwa); *Realising Administrative Justice* (2002 with Linda van de Vivjer); and *Global Administrative Law: Development and Innovation* (2009).

IAIN CURRIE is a Professor of Law at the University of the Witwatersrand, Johannesburg. He has published mostly in the fields of constitutional and administrative law, and is a co-author of *The Bill of Rights Handbook* (2005) and of *The New Constitutional and Administrative Law* (2001) and books on access to information and administrative law. His current research interests include constitutional and administrative law, human rights, particularly the rights to freedom of expression and privacy, and law and new technologies.

PATRICK EMERTON was formerly a Research Officer, Federal–State Relations Committee, Parliament of Victoria. He was also a Sessional Lecturer with the University of Melbourne Philosophy Department and the Monash University Philosophy Department. He was appointed an Assistant Lecturer in 2004 and a Lecturer in 2006 in the Faculty of Law, Monash University. His publications are in the fields of Australian constitutional law, legal and moral philosophy and anti-terrorism laws. His research for this volume was supported under the Australian Research Council's Discovery funding scheme.

KEITH D. EWING is Professor of Public Law at King's College London. Formerly, he was Lecturer, Edinburgh, 1978–83, University Assistant Lecturer, University Lecturer, Fellow of Trinity Hall, Cambridge, 1983–9, Visiting Fellow, University of Melbourne and Monash University 1988, Visiting Professor, Osgoode Hall Law School 1982, University of Alberta 1987–8 and the University of Western Australia 1992. His many publications include: *Constitutional and Administrative Law* (2007, with A. W. Bradley); *Party Funding And Campaign Financing in International Perspective* (2006, with Samuel Issacharoff); *Labour Law, Text, Cases and Materials* (2005, with Hugh Collins and Aileen McColgan); *Skeptical Essays in Human Rights* (2002, with Tom Campbell); *The Struggle for Civil Liberties* (2000); *Freedom under Thatcher: Civil Liberties in Modern Britain* (1990, with Conor Gearty); *Britain and the ILO* (1989); *The Funding of Political Parties in Britain* (2010); and *The Bonfire of the Liberties* (2010).

CHRISTOPHER FORSYTH is Professor of Public and Private International Law as well as Director of the Centre for Public Law in the University of Cambridge and Extraordinary Professor of Law in the University of Stellenbosch. He is the author with the late Sir William Wade QC of *Administrative Law* (2004), as well as several other books including *Judicial Review and the Constitution* (2000); *The Golden Metwand and the Crooked Cord; Public Law Essays in Honour of Sir William Wade* (1998, with Ivan Hare); and *Private International Law – the Modern Roman–Dutch Law including the Jurisdiction of the High Courts* (2003), which is an authoritative work on the subject in Roman–Dutch jurisdictions. He is the author of many articles in learned journals on all aspects of public law and private international law. He has advised several governments on thorny issues of administrative and constitutional law. He is a practising barrister, a Bencher of the Inner Temple and sits as a Recorder in the Crown Court in England.

ROBERT FRENCH was sworn in as the Chief Justice of the High Court of Australia, the highest court in Australia, on 1 September 2008. From 1986 to October 2008, he was a judge of the Federal Court of Australia. He has served as part-time Commissioner of the Australian Law Reform Commission (2006–8), Additional Judge of the Supreme Court of the Australian Capital Territory (2004–8), a Judge of the Supreme Court of Fiji (2003–8) and as President of the National Native Title Tribunal (1994–8).

MARTIN L. FRIEDLAND CC, QC, is University Professor and James M. Tory Professor of Law Emeritus at the Faculty of Law, University of Toronto. He holds a BComm, LLB and honorary LLD from the University of Toronto, and a PhD and LLD from Cambridge University. After teaching at Osgoode Hall Law School, he joined the University of Toronto. He was promoted to professor in 1968 and served as dean (1972–9). He was a full-time member of the Law Reform Commission of Canada in Ottawa (1971–2). As well as many other awards, he was appointed a fellow of the Royal Society of Canada in 1983, an Officer of the Order of Canada in 1990 and made a Companion of the Order of Canada in 2003. In 1995 he was awarded the Canada Council Molson Prize in the Humanities and Social Sciences and in 2003 received the Royal Society of Canada's John William Dawson Medal. He is currently a Fellow of Massey College. His extensive publications include *Detention Before Trial*, *Double Jeopardy*, *Access to the Law*, *A Place Apart: Judicial Independence and Accountability in Canada*, *The Trials of Israel Lipski*, *The Case of Valentine Shortis* and *The Death of Old Man Rice*.

CHARLES GARDNER GEYH is the Associate Dean of Research and the John F. Kimberling Chair at the Indiana University Maurer School of Law. He received his BA in political science from the University of Wisconsin and graduated from the University of Wisconsin law school, after which he clerked for the Honorable Thomas A. Clark on the US Court of Appeals for the Eleventh Circuit, was an associate at the Washington, DC law firm of Covington & Burling, and served as counsel to the US House of Representatives Committee on the Judiciary before beginning his teaching career in 1991. His extensive publications include *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (2006) and *Judicial Conduct and Ethics* (2007, with Lubet and Shaman Alfini). He has served as a reporter to American Bar Association commissions on the Separation of Powers and Judicial Independence, Public Financing of Judicial Campaigns, the 21st Century Judiciary and Revising the Model Code of Judicial Conduct. He has likewise served as director of the American Judicature Society's Center for Judicial Independence, and director and consultant to the ABA's Judicial Disqualification Project.

GRANT HAMMOND, a graduate of the University of Auckland and the University of Illinois, was appointed to the High Court of New Zealand in 1992 and was elevated to the Court of Appeal of New Zealand in 2004. He was seconded as President of the New Zealand Law Commission from 1 December 2010. He was for some years a senior partner in the Hamilton law firm Tompkins Wake & Co. He was a Professor of Law in Canada before taking up appointment as the Director of the Alberta Law Reform Commission and as a Uniformity Commissioner on the Uniform Law Conference of Canada. He returned to New Zealand to take up appointment as Professor of Commercial Law in the Faculty of Law at the University of Auckland. He subsequently became Dean of Law at the University of Auckland. He has been a Visiting Professor at Cornell University and the Law Foundation Professor at the University of Saskatchewan. He was recently elected a Robert S. Campbell Fellow in Law at Magdalen College, Oxford University. His extensive publications include *Personal Property: Cases and Materials* (1990) and *Judicial Recusal – Principles, Process and Problems* (2009).

W. WILLIAM HODES graduated with honours from Harvard College in 1966 and from Rutgers Law School in 1969. In 1979, Hodes served as a Bigelow Teaching Fellow at the University of Chicago Law School, and then joined the faculty at the Indiana University School of Law in

Indianapolis. In 1989, he was a Visiting Scholar and Lecturer at the China University of Politics and Law, teaching a course in American Civil Procedure and conducting research into Chinese People's Mediation. During the October 1996 term of the US Supreme Court, while on sabbatical leave from Indiana University, Professor Hodes served as a law clerk to Justice Ruth Bader Ginsburg. In 1999, he became Professor Emeritus of Law at Indiana University, and established the William Hodes Professional Corporation, a solo consulting practice. He is the co-author, with Professor Geoffrey C. Hazard Jr and Peter R. Jarvis, of *The Law of Lawyering*, a nationally recognised treatise on legal ethics that is updated annually. From 2004 to 2007, Professor Hodes was Co-Reporter to the American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct, which developed the most recent iteration of the Model Code of Judicial Conduct.

CORA HOEXTER lectured in law at her alma mater, the University of Natal (Pietermaritzburg), for several years before joining the University of the Witwatersrand, Johannesburg in 1994. She was appointed to a Chair in the School of Law in 2000. Cora has taught subjects including constitutional law and legal philosophy, but her first love and main research interest is administrative law. Her most recent book on the subject is *Administrative Law in South Africa* (2007). A former member of the South African Law Reform Commission, Cora was Editor-in-Chief of the *Annual Survey of South African Law* for four years and served for ten years on the editorial team of the *South African Law Journal*.

PHILIP A. JOSEPH is Professor of Law at the University of Canterbury, New Zealand and a barrister and solicitor of the High Court. He is author of *Essays on the Constitution* (1995) (now in its third edition), *Constitutional and Administrative Law in New Zealand* (2007), the 'Administrative Law' and 'Constitutional Law' titles for *The Laws of New Zealand*, and many articles and book chapters dealing with pubic law issues. In 2004, he was conferred the degree of Doctor of Laws in recognition of his research contributions. He also consults as a barrister advising in public law matters and acts as adviser to sundry government organisations. He is a member of the Editorial Advisory Boards of *Public Law Review* (Sydney) and *New Zealand Journal of Public and International Law* (Wellington), and is a Contributing Editor to *New Zealand Law Review* (Auckland).

HOONG PHUN ('HP') LEE has held the Sir John Latham Chair of Law at Monash University since 1995. He was Vice-Chairman of the Australian Press Council from 1994 to 2010. He was appointed an Adjunct Professor of Law, City University of Hong Kong in 2009. His many publications include *Constitutional Conflicts in Contemporary Malaysia* (1995) and *The Australian Judiciary* (Cambridge University Press, 2001) (co-author). He is the co-editor of *Australian Constitutional Landmarks* (Cambridge University Press, 2003), *The Constitution of Malaysia: Further Perspectives and Developments* (1986), *The Constitution of Malaysia: Its Development 1957–1977* (1978) and *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007). He recently co-edited *Constitutional Advancement in a Frozen Continent* (2009).

KATE MALLESON joined the School of Law at Queen Mary in 2005. She had previously taught at the London School of Economics. She acted as a specialist adviser to the House of Commons Constitutional Affairs Select Committee assisting it in its review of the provisions of the Constitutional Reform Bill. In 2006–7 she chaired a JUSTICE committee on 'A Bill of Rights for Britain'. In 2007 she acted as an adviser to the Northern Ireland Judicial Appointment Commission in relation to research it was undertaking on diversity in the judiciary in Northern Ireland. Before that she was a member of the Commission on Women in the Criminal Justice System established by the Fawcett Society which reported in March 2004. She also sat on the Joint Working Party on Equal Opportunities in Judicial Appointment and Silk set up by the Lord Chancellor's Department. Her many publications include *The New Judiciary: The Effects of Expansion and Activism* (1999) and *The Legal System* (2007), co-editor (with Peter Russell) of *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (2006).

GERARD MCCOY QC, SC, is a Barrister of the High Court of New Zealand, of the Supreme Court of New South Wales, the Supreme Court of Victoria, the High Court of Australia, the High Court of Hong Kong, the High Court of Fiji, the High Court of the Isle of Man and the English Bar (Middle Temple) practising in constitutional and public law. He is Professor of Law at City University of Hong Kong and Adjunct Professor at the University of Canterbury, New Zealand. He has been a Deputy Judge of the High Court of Hong Kong since 2001, exercising full civil and criminal law jurisdiction. He is a member of

the Hong Kong Law Reform Commission and Hearsay in Criminal Law Subcommittee. He is co-author of a number of books, including *The Most Fundamental Right: Habeas Corpus in the Commonwealth* (2000) and was awarded the Silver Bauhinia Star in the 2005 Hong Kong Honours List for services to law.

PATRICK MONAHAN, a member of Osgoode Hall Law School's faculty since 1982, was appointed the Vice-President Academic and Provost of York University, Ontario with effect from 1 July 2009. He was the Dean of York University's Osgoode Hall Law School from 2003 to 2009. Between 1986 and 1990, he was Senior Policy Adviser to the Attorney-General and Premier of Ontario, respectively, where he played a key role in the negotiation of the 1987 Meech Lake Accord. Professor Monahan has acted as adviser to the federal government as well as to a number of provincial governments with respect to economic, constitutional and international trade matters. He was the Director of the York University Centre for Public Law and Public Policy for most of the 1990s through to 2002. He is the author of several books, including *Constitutional Law* (2006) and *Liability of the Crown* (2000, with Peter Hogg). He is the recipient of the 2008 David W. Mundell Medal for Legal Writing awarded by the Attorney-General of Ontario.

ABIMBOLA A. OLOWOFOYEKU is currently a Professor of Law at Brunel Law School. He has previously held positions as Assistant Legal Adviser, Federal Inland Revenue Department, Lagos (1982–3); Barrister and Solicitor, Chief B. Olowofoyeku & Co., Lagos (1983–4); Lecturer, Liverpool Polytechnic (1987–8); Lecturer, Keele University (1988–95); Visiting Fellow, Centre for International and Public Law, Australian National University (March–August 1995); Senior Lecturer, Keele University (1995–9); Reader, Keele University (1999–2000); Visiting Fellow, Faculty of Law, Australian National University (July 1999–January 2000, December 2000–January 2001); Head of Department, Brunel University (2003–4); Head of the School of Social Sciences and Law (2004–6); Head of Brunel Law School (2006–9). He is the author of *Suing Judges* (1993) and *The Law of Judicial Immunities in Nigeria* (1993). He has published a number of articles in *Public Law*, the *Singapore Journal of Legal Studies* and the *Cambridge Law Journal* pertaining to judicial power, automatic disqualification, recusals, judicial accountability and judicial independence.

KATE O'REGAN served as a judge of the South African Constitutional Court from its establishment in 1994 until 2009, when her fifteen-year term ended. Since 2008, she has chaired the Internal Justice Council of the United Nations whose task is to help ensure independence, professionalism and accountability in the new system of internal justice for the United Nations. She is a member of the International Monetary Fund Arbitration Tribunal and has been appointed an acting judge of the Namibian Supreme Court for 2010. She is also currently a Visiting Professor at the University of Cape Town and the University of Oxford.

GEOFFREY PALMER was President of the Law Commission from 2005 to 2010. Sir Geoffrey has had a long career in the law, as an academic lawyer, a politician and a law practitioner. In 1989–90 he was Prime Minister of New Zealand. Both before entering politics and after leaving it, he was a Professor of Law at the Victoria University of Wellington and at the University of Iowa in the United States. Geoffrey Palmer's extensive publications include *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (1984). Then co-authoring with Dr Matthew Palmer, the book was re-titled as *Bridled Power: New Zealand's Constitution on Government* (1997, 4th edn., 2004). Since 2002, Geoffrey Palmer has been the New Zealand Commissioner on the International Whaling Commission. He is a member of Her Majesty's Privy Council. He was awarded a KCMG in 1991 and made an Honorary Companion of the Order of Australia in the same year. In 1991 he was listed on the United Nations 'Global 500 Roll of Honour' for his work on environmental issues. Geoffrey Palmer has also sat as a Judge ad hoc on International Court of Justice in 1995.

KENT ROACH, a graduate of the universities of Toronto and Yale and a former law clerk to Justice Bertha Wilson of the Supreme Court of Canada, is Prichard-Wilson Chair of Law and Public Policy at the University of Toronto Faculty of Law, and a Fellow of the Royal Society of Canada. His extensive publications include *Constitutional Remedies in Canada* (winner of the 1997 Owen Prize for best law book), *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (short-listed for the 1999 Donner Prize for best public policy book), *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (short-listed for the 2001 Donner Prize), *September 11: Consequences for Canada* (named one of the five most significant books of 2003 by the *Literary Review of Canada*) and *Brian Dickson: A Judge's Journey* (with Robert J. Sharpe, winner of the 2004

J. W. Dafoe Prize for best contribution to the understanding of Canada). His other books include *Criminal Law* (2009), *The Charter of Rights and Freedoms* (2009, with Robert J. Sharpe) and *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (2005, with Ken Jull and Todd Archibald).

JEFFREY M. SHAMAN has concentrated much of his scholarship in the area of constitutional law and is a nationally recognised authority on judicial ethics. He served as Senior Fellow of the American Judicature Society and as President of the American Civil Liberties Union of Illinois. He is a member of the American Law Institute, the American Society of Legal History and the US Association of Constitutional Law. Professor Shaman has litigated a number of cases concerning constitutional rights and is the principal author of the Illinois Freedom of Information Act. He has won numerous awards for teaching, scholarship and service to the community, culminating in his appointment as Vincent de Paul Professor of Law. His many publications include *Equality and Liberty in the Golden Age of State Constitutional Law* (2008), *Judicial Conduct and Ethics* (2007, with Steven Lubet, James J. Alfini and Charles Gardner Geyh), *Constitutional Interpretation: Illusion and Reality* (2001), *Judicial Disqualification: An Empirical Study of Judicial Practices and Attitudes* (1995, with Jona Goldschmidt) and *Judicial Conduct & Ethics Curriculum* (1993, with Cynthia Gray).

BYRON SHAW is an associate with the firm McCarthy Tetrault LLP in the firm's Toronto office. Mr Shaw clerked for the Court of Appeal for Ontario prior to being called to the Ontario bar in 2009. He received his BA (Hons) in Economics from the University of British Columbia in 2005 and his LLB from the University of British Columbia in 2008. Mr. Shaw is a member of the Law Society of Upper Canada and the Canadian Bar Association.

SHIMON SHETREET holds the Greenblatt Chair of Public and International Law at the Hebrew University of Jerusalem and is the head of the Sacher Institute of Legislative Research and Comparative Law. He was a member of the Chief Justice Landau Commission on the Israeli Court System (1980), and a judge on the Standard Contract Court (1981–8). He has served as the general coordinator of the International Project of Judicial Independence which drafted the Mt Scopus International Standards of Judicial Independence in 2008 and has organised five international conferences (in Jerusalem Vaduz, Krakow

and Cambridge). He served as General Coordinator, International Bar Association Project for Minimum Standards of Judicial Independence (1980–2), as a Member of the Knesset, the Israeli Parliament (1988–96) and also as a cabinet minister in the Rabin Government. His extensive publications include *Judges on Trial* (1976), *Judicial Independence: The Contemporary Debate* (1985), *The Role of Courts in Society* (1988), *National Security and Free Speech* (1991), *Pioneers in Tears: Anthology on North African Jewry* (1991), *Justice in Israel* (1994), *Women in Law* (1998), *The Good Land between Power and Religion* (1998), *Law and Social Pluralism* (2002) and *On Adjudication* (2004).

LORNE SOSSIN is the Dean of the Osgoode Hall Law School of York University. He was formerly a Professor and Associate Dean at the Faculty of Law, University of Toronto. He previously taught at Osgoode and Columbia Law School. He was a litigation lawyer with Borden & Elliot (now Borden Ladner Gervais), a law clerk to the Chief Justice of the Supreme Court of Canada and has served as the city of Toronto's Integrity Commissioner. His extensive publications include *Boundaries of Judicial Review*: *The Law of Justiciability in Canada* (1999), *Public Law* (2002, with Michael J. Bryant), *Access to Care, Access to Justice: The Legal Debate on Private Health Insurance in Canada* (2005, co-editor with Colleen Flood and Kent Roach) and *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (2006, co-editor with Sujit Choudhry and Jean-Francois Gaudreault-Desbien). Dean Sossin also serves on the boards of the National Judicial Institute and the Law Commission of Ontario.

MARK TUSHNET, who graduated from Harvard College and Yale Law School and served as a law clerk to Justice Thurgood Marshall, specialises in constitutional law and theory, including comparative constitutional law. His research includes studies examining (sceptically) the practice of judicial review in the United States and around the world. His extensive publications include *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008), *The New Constitutional Order* (2003), *Taking the Constitution Away From the Courts* (1999), *Red, White, and Blue: A Critical Analysis of Constitutional Law* (1988), *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (2005), *The Oxford Handbook of Legal Studies* (2003, co-editor with Peter Cane) and *Defining the Field of Comparative Constitutional Law* (2002, co-editor with Vicki C. Jackson).

JOHN M. WILLIAMS is Dean and Professor of Law at the University of Adelaide. His research is in the areas of constitutional law and Australian legal history. He is the author of *The Australian Constitution: A Documentary History* (2005) and co-editor of *Peace, Order and Good Government: State Constitutional and Parliamentary Reform* (2003) and *Makers of Miracles: The Cast of the Federation Story* (2000). He co-edited *The New Federalist: The Journal of Australian Federation History* for its entire (and pre-ordained) life: 1998–2001.

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

illustrative 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]

[1] *Caperton* v. *A. T. Massey Coal Co., Inc.* 173 L.Ed. 2d 1208 (2009).
[2] *Republican Party of Minnesota* v. *White*, 536 US 765 (2002).

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