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The Judge, the Judiciary and the Court

The Individual, the Collective and the Institution

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I The Individual Judge

Judicial life is perhaps one of the most individual – and lonely – of professional callings. On appointment, a judge takes an oath to 'do right to all manner of people according to law without fear or favour, affection or ill-will.'[1] At that moment, she shoulders an individual responsibility to meet the highest expectations of the law.[2] This expectation, and concomitant scrutiny, will continue throughout the judge's career. Legal, political and public commentary may welcome her on appointment, examining the appropriateness of her credentials, experience and political neutrality. There may be ongoing critique of the quality of her judicial conduct in court, her decisions and reasoning, all of which must, subject to few exceptions, be performed in the public eye. Even upon her retirement, her conduct and any transgressions it reveals, may be the subject of critical public comment. In performing her institutional role, the judge is afforded no personal anonymity.

Individual judges and external commentators will bring different ideas and concepts of what 'doing right' with 'independence and impartiality' requires in the judicial role. Across the course of a judge's career, there will be ample opportunities for judicial 'choice': choice as to the legal method she brings to particular issues; choice as to how to undertake case management; choice as to how to exercise the many judicial discretions

[1] This form of the oath taken from the *High Court of Australia Act 1979* (Cth) s 11, Schedule.

[2] This chapter, and others in the book, have selected the female pronoun for the individual judge rather than the male pronoun, both pronouns, or the plural pronoun. In this introduction, our decision reflects our desire to emphasise the individual judge, without reinforcing the male gender bias of the judiciary, which continues to be reflected in the composition of judiciaries across the world.

conferred upon her across diverse areas of law; choice as to how to navigate the ethical dilemmas that may arise for her; choice about whether, and how, she engages in extra-curial activities, not just the acceptance of formal *persona designata* public appointments, but also speeches, publications, interviews and even online through social media; choice about whether she undertakes judicial education and well-being programs and, if so, which she prioritises. Legal, political and public scrutiny and criticism of the individual choices of the judge will be performed through innumerable different normative prisms, and undoubtedly one of the challenges for a judge is that there is no set of universally agreed-upon standards which she is expected to meet.

Exacerbating this challenge is the expectation that, when an individual judge is thought to have chosen a course that transgresses these standards, she will not respond publicly in her own defence. However, there is an increasing acceptance that there may be a collective judicial response, particularly if there is a perception that the criticism goes beyond individual judicial choices and threatens the institutional values of the court.

II The Judicial Collective

At the moment of appointment and acceptance of individual responsibility, the judge also joins a collective – 'the judiciary' – comprising other individuals who have taken the same oath, will be facing the same challenges in performing their role, and will be subject to the same targeted scrutiny in doing so. Even within a framework of ultimate individual responsibility, this professional community may bring with it some relational support, but also creates its own challenges.

The relational dynamics and cultures that develop between individual judges within and across courts has the capacity to substantially affect how judicial functions are performed. Judicial relationships encompass the peculiarities of the judicial administrative hierarchy. As explored by Gabrielle Appleby and Heather Roberts in their chapter in this volume, the head of jurisdiction has administrative and institutional responsibilities but relatively limited capacity to defend, support and also discipline individual judges. They consider how individual chief justices can use the status of the office with its constrained power within the judiciary as well as in its extra-judicial relationships to produce a substantive conception of judicial leadership.

Different judges join different institutional collectives. Depending on their court level, for some judges one of the most important aspects of

their relationships with other judges will occur through the appellate process, their individual judgments subject to review, affirmation or rejection by another judge or panel of judges, sometimes, although not always, in a different court. As is explored particularly in the chapters by Sarah Murray, Andrew Lynch and Rachel Cahill-O'Callaghan in this volume, within multi-member appellate courts, judges will exercise their constitutional functions alongside other individual judges. Their collective decision will determine the outcome of the cases that come before them. There is real scope for individual judges to approach and perform this relational dimension of their role differently. Doing so may affect not just the outcome of particular cases, but the manner in which the individual judge meets her personal responsibility and how she engages with colleagues to uphold and promote the institutional values of the Court.

The identification of the individual as a member of the judiciary extends beyond a particular court to encompass the judiciary as a whole. While this must always have been true to some degree, nowadays the benefits of cross-jurisdictional judicial engagement are explicitly fostered through the existence of collective institutions. In Australia, this has included the Judicial Conference of Australia (JCA), a representative body established in 1993 and comprising more than 750 serving and retired judicial officers across Australia. The JCA has a role in publicly defending the judiciary (including individual judges) and undertaking community education about the role of courts and judges, as well as working for legal institutional reforms relating to the judicial system. The Australian Institute of Judicial Administration brings together judicial officers with tribunal members, court administrators, legal practitioners, legal academics, librarians and others, for the predominant purpose of undertaking research into judicial administration and conducting judicial education programs. Education and professional development is the mission of the National Judicial Commission of Australia, established in 2002 and funded by Commonwealth, State and Territory governments. New South Wales and Victoria have their own dedicated, judge-led bodies for education, complaints and support. To facilitate communication about mutual interests and concerns among court leadership, there is the Council of Chief Justices of Australia. Internationally, organisations such as the International Association of Judges, the Commonwealth Magistrates' and Judges' Association and the International Association of Women Judges bring a cross-cultural dimension to the judicial collective. The existence of these bodies may be thought to alleviate, at least to some degree, the hallmark of judicial office as individual isolation.

III The Judicial Institution

On appointment, the judge assumes not just an individual role, nor membership of a collective, but acquires an institutional office: as a member of 'the court'. Indeed, this institutional office is the source of the judge's individual responsibilities; and a judge's understanding of her individual judicial role will be heavily influenced by her interpretation of the role of the court.

In Australia, the courts as institutions sit within a constitutionalised separation of powers, incorporating normative institutional requirements, including, for instance, minimum requirements and protections around appointment and removal.[3] At the federal level, there is a relatively formal separation of the judicial branch from those of the executive and legislature,[4] with strict rules maintaining the independence and impartiality of the judiciary and the exercise of judicial power. At the state and territory level, while there is no formal constitutional separation of powers, the role of the courts of those jurisdictions within the federal judicial structure effectively incorporates many of the same requirements established at the federal level.[5] At every level within the Australian judicial hierarchy, courts must be independent and impartial; they must exercise appropriate judicial discretion and cannot act under the dictate of the political branches of government; and they must exercise their power in accordance with fair judicial process. Additionally, the High Court and the State Supreme Courts must be able to exercise their supervisory jurisdictions over government power; this function cannot be denied to them.[6]

These constitutional imperatives give rise to normative frameworks that both protect and directly affect how individual judges perform their role and meet their commitments to independence and impartiality. As former Chief Justice Murray Gleeson said, the capacity of judges to honour their oath 'does not rest only upon their individual consciences.

[3] See s 72 of the *Australian Constitution* with respect to federal judges.
[4] The principle established in *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers Case*') (1956) 94 CLR 254.
[5] This originates from the principle established in the case of *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
[6] See discussion of the Chapter III constitutional principles that apply to federal and state courts in, for instance, James Stellios, *The Federal Judicature: Chapter III of the Constitution Commentary and Cases* (Federation Press, 2010); Gabrielle Appleby, Anna Olijnyk, James Stellios and John Williams, *Judicial Federalism in Australia: History, Theory, Doctrine and Practice* (Federation Press, 2021).

It is supported by institutional arrangements.'[7] However, those arrangements and norms rarely provide specific direction as to how an individual judge might best resolve the many choices that they confront in their role.

Nonetheless, the constitutional requirements and institutional context often correlate with a set of judicial 'values' that provide principled guidance to the individual judge. 'Independence and impartiality' are the most recognisable judicial values, and indeed, these are constitutionalised. But the legal, societal and political expectations of the court will give rise to other values that may not be formal, let alone constitutional, that can also influence the performance of the roles of judge and judiciary. But many more are now readily accepted and emerging. In this volume, Appleby and Roberts, Felicity Bell and Monika Zalnieriute, and Murray, for instance, employ in their analysis a normative framework of six judicial values identified by Canadian academics Richard Devlin and Adam Dodek: independence, impartiality, accountability, representativeness, transparency and efficiency.[8] Of course, this list of institutional values is not the only one, and no list will be uncontested nor stagnant. To Dodek and Devlin's catalogue might be added, for instance, values that emerge from contemporary debates around the importance of access to justice, the judicial responsibility to protect individual liberty, the importance of maintaining judicial wellbeing, or, as Murray posits in her chapter, judicial 'collegiality' could be emerging as a value particularly on multi-member courts.

How judicial values are understood and prioritised will, obviously, influence the performance of the judicial role. This can itself occur at an institutional level. For instance, growing societal expectations not only of independence but also accountability has led many jurisdictions to establish new institutional mechanisms for dealing with complaints pertaining to the misconduct of individual judges. Additionally, how judges personally identify and prioritise the values that are attendant on their office can have a profound effect. For instance, an individual judge might adopt a particular approach to case management, conduct of

[7] Murray Gleeson, 'The Right to an Independent Judiciary' (Speech delivered at 14th Commonwealth Law Conference, London, September 2005) <www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_sept05.html>.

[8] Richard Devlin and Adam Dodek, 'Regulating Judges: Challenges, Controversies and Choices' in Richard Devlin and Adam Dodek (eds) *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 1, 9.

the courtroom and delivery of judgments that prioritises efficiency as a judicial value. Depending upon the relational position of the individual judge, particularly if holding a leadership role as head of jurisdiction, it may be that these personal decisions produce changes in the collective practices of a particular section of the judiciary.

IV The Individual, the Collective and the Institution in Judicial Scholarship

The individual, collective and institutional dimensions of the judicial role have emerged clearly in scholarship on the judiciary. In Australia, scholarship has been focussed around a number of key areas, each associated with one of these dimensions and often the dynamics between them.[9] There has been of course, much commentary on the performance of the curial role by individual judges, that is, an analysis of their substantive decisions, which includes doctrinal analysis of the development of the law through these decisions, as well as commentary and critique of the judicial method of the judge in coming to those decisions. In Australia, the latter has been dominated by debates around the appropriateness of the orthodox Australian commitment to a formalistic approach, often referred to as 'legalism', particularly in constitutional interpretation; and the challenges posed to this by other more value-explicit forms of reasoning, pejoratively, and as Tanya Josev argues in her chapter, problematically, referred to by conservative commentators under the label of 'activism',[10] closely associated with the legal realist movement in the United States.

The constitutional status of a strong separation of judicial power at the federal level, and with that having consequences also for the State and Territory courts, has ensured an understandably significant scholarship

[9] For those who have looked more broadly and deeply at the judicial role across a number of dimensions, although these are increasingly dated with emerging challenges and trends in the judicial role, including the contemporary debates around collegiality, activism, diversity, transparency, and the relationship with the media, see Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (OUP, 2001); Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2003); and Enid Campbell and H P Lee, *The Australian Judiciary* (CUP, 2nd ed, 2013).

[10] And see also Tanya Josev, *The Campaign against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017).

on the institutional requirements and limitations of the courts in which judges serve.[11] There is also steady interest in the broader institutional frameworks within which individual judges are appointed and perform their role.[12]

There is further scholarship that looks at other aspects of the judicial role: there are also socio-legal studies of the individual experience of performing the judicial role in a contemporary setting;[13] life-writing studies of individual and groups of judges, including histories and biographies;[14] and, although still relatively rare, politico-legal studies of particular 'courts', that is, attempts to understand the political motivations and power of individual and collective members of the judiciary during particular eras.[15]

This edited collection contributes to the existing Australian judicial scholarship in two ways. It does so, first, by engaging more directly with the interrelationship between the three dimensions of the judicial role. This commitment to exploring the dynamic effect that arises at the

[11] This includes the extensive scholarship on the constitutional requirements of Chapter III at both federal and state level, and the judicial interpretation and evolution of these requirements. For an introduction to some of this extensive work, see, for instance, Stellios, n 6; Appleby et al., n 6; Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016).

[12] This includes, for instance, the growing scholarship that looks at judicial appointments, discipline and ethics. For a small selection of more recent work in these particular areas, see, for instance, Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008–2013' (2015) 37 *Sydney Law Review* 187; Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System that Enhances Institutional Integrity' (2014) 38 *Melbourne University Law Review* 1; Gabrielle Appleby and Suzanne Le Mire, 'Ethical Infrastructure for a Modern Judiciary' (2019) 47 *Federal Law Review* 335.

[13] See, for instance, the extensive scholarship of Sharyn Roach Anleu and Kathy Mack in this area, for instance, Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (2017, Palgrave).

[14] See further Sarah Burnside, 'Australian Judicial Biography: Past, Present and Future' (2011) 57 *Australian Journal of Politics and History* 221 and Tanya Josev, 'Judicial Biography in Australia: Current Obstacles and Opportunities' (2017) 40 *University of New South Wales Law Journal* 842.

[15] See the major works of Brian Galligan, *Politics of the High Court : A Study of the Judicial Branch of Government in Australia* (1987) (University of Queensland Press); Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000); Jason Pierce, *Inside the Mason Court Revolution The High Court of Australia Transformed* (Carolina Academic Press, 2006); Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015).

intersection of the individual, collective and institutional identities of the judge is central to the way in which the chapters have been conceived of and developed by their authors. Second, it undertakes this analysis by reference to recent events and contemporary challenges which provide both an impetus for academic attention and a lens through which to direct that gaze.

V Contemporary Debates and Challenges

In Australia, the need for a moment of critical scholarly engagement with the tripartite dimensions of the judicial role has been made more acute following several recent incidents and events that have sparked considerable and varied debate. The shock of judicial officers taking their own lives and subsequent reporting on the emotional toll of judging on the individual judges themselves has placed the previously under-discussed issue of judicial emotions and well-being on the judicial, government and scholarly agenda.[16] At the same time, continuing revelations of judicial misconduct in jurisdictions that lack an independent system to deal with complaints against judges has extended the conversation to the need to reconsider the desirability of more robust institutional arrangements.[17] And inexorably, the rise of technological innovation in the practice of government and law has placed demands on the courts to embrace its potential with an appropriate degree of caution.[18] In short, the Australian judicial landscape is one in which pressure is acute – whether this is of individual performance and stress, of ensuring there are sufficient means

[16] See, for instance, some recent reporting: Peter Wilmoth, 'Loneliness, panic attacks, insomnia: Life for some on the judicial bench' *Good Weekend, Sydney Morning Herald* (4 August 2018) and Alexandria Utting, 'Potts pans the 'bully' bench', *Courier-Mail* (27 December 2019). See Carly Schrever, Carol Hulbert and Tania Sourdin, "The psychological impact of judicial work: Australia's first empirical research measuring judicial stress and wellbeing" (2019) 28 *JJA* 141.

[17] See further on this Hagar Cohen, 'Who watches over our judges', *Background Briefing* (8 September 2019) <www.abc.net.au/radionational/programs/backgroundbriefing/judge-street-under-scrutiny-again-v2/11480818>'; Damian Carrick, 'Who judges the Judges' *The Law Report* (30 July 2019) <www.abc.net.au/radionational/programs/lawreport/who-judges-the-judges/11339280>.

[18] See discussion of the general challenges of the embrace of technology within government and its implications for the rule of law and the courts in Monika Zalnieriute, Lyria Bennett-Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82 *Modern Law Review* 425.