

# THE DISTRICT AND COUNTY COURT JUDGES' CONFERENCE

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## The Judicial Method: Essentials and Inessentials

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To someone of my vintage, this gathering of District and County Court Judges from around Australia, with its principal object of reflecting upon “the Court of the Future”, is itself a manifestation of change. Forty six years ago, when I entered legal practice, the District Courts (plural) of New South Wales, as their name implied, were decentralised. That decentralization was part of their reason for existence. It had benefits in terms of access to justice, especially for litigants in rural and regional areas. At the same time, it had its negative effects. Although the judges carried a heavy caseload of civil and criminal matters, their organisational framework was rudimentary. Judges, by comparison with their modern counterparts, had little in the way of institutional support. It was not unusual for them to be assigned for long periods, sometimes years, to areas distant from any central authority. There were no facilities for judicial formation or continuing professional education. Upon appointment to the bench, barristers were thrown in at the deep end. It was assumed that their experience as advocates would equip them to administer justice. There were some informal support networks, but most were left largely to their own devices. These judges enjoyed a high level of autonomy, but their professional lives must have been

lonely. They rarely, if ever, sat in panels. Such collegiality as they enjoyed depended largely upon their own informal arrangements. A regular conference such as this, embracing all judges of comparable jurisdiction from around Australia, would have been unknown.

Even today, it is necessary for some appellate judges to be reminded that the collegial life they enjoy, (or at least experience), is not shared by most trial judges. A member of a Court of Appeal rarely sits alone, and works in constant interaction with his or her colleagues, who are accessible for information and support. In civil law countries, cases at first instance are normally decided by panels of three judges. (I might add that, because of their methods of judicial formation and appointment, at least two of those judges are likely to be, by our standards, surprisingly young.) In the common law tradition, however, trial judges sit alone. That is one reason why civil law countries have a greater number of judges per head of population than, say, Australia or the United Kingdom.

The individual nature of the responsibilities of a trial judge in a common law system has not been sufficiently appreciated. It is partly relieved by the relationship between bench and bar, but that tends to weaken outside major city centres. The level of assistance that trial judges can expect from the profession is inconsistent, and the growth in size of the profession and the judiciary has created a greater distance between them. One essential form of compensation has been the development of facilities for judicial support. This Conference is an example. Meetings with their colleagues are especially important for judges who, in their ordinary daily business, work alone. Judges now regularly exchange ideas and information, and those exchanges are accepted as a necessary part of professional support and development. We have a National Judicial College, standing programs of formation in all jurisdictions, regular meetings of judges,

and constant communication, both personal and electronic. The isolation of trial judges has been diminished. No doubt there is more that can be done, but there has been a welcome break with the past in that respect.

There is now a single District Court of New South Wales. There have been major institutional developments in this and other jurisdictions. The Australian judiciary, from an institutional perspective, has been transformed. Formal programs of judicial orientation and development are well established. There is a reasonable level of material and technical support available to judges. Governments, the profession, the media, and the public have become more conscious of the resources necessary for the proper and efficient administration of justice.

Judges do not have to be isolated in order to be independent. Courts do not have to be management-free zones. The trajectory of change is clear. This change may be said to involve a form of bureaucratisation, but it has been necessary in order that courts could maintain their independence of the other branches of government. This change provides an illustration of the proposition I want to develop this morning. The institutional independence of courts, and the personal independence of judges, are essential. They are aspects of the rule of law. The undeveloped organisation of courts, and the relative isolation, or at least separateness, of judges were inessential. They may have contributed, in a negative sense, to some appearance of independence, but they were not necessary, and in some ways, if allowed to continue, they were a threat to independence. They inhibited the capacity of the judicial branch of government to assert itself, and to promote necessary change by speaking with a strong voice. They inhibited the capacity of judges to develop and refine their skills. Without such organizational change from within, the judiciary would have had change forced upon it, in ways that may not have respected independence. An

attempt to preserve what was inessential would have threatened what is essential.

Although the word bureaucracy is often used in a pejorative sense, to denote certain failings we associate with large institutions, public or private, I intend to use it neutrally. I use it to describe a state of organisation without implying that, in itself, it is good or bad. If judicial organisation had not been provided by the judiciary itself, it would have been provided by the executive branch of government. For example, in times of increasing workload, and pressure upon limited resources, if judges themselves had not embraced arrangements for the more efficient administration of civil and criminal justice, then this would have been done for them by officers of government departments answerable to Ministers. If the judiciary itself had not taken the initiative in developing programs of professional development, then such programs would have been implemented by external authorities, including universities. The independence of the judiciary could not have been maintained simply by relying upon the individualistic spirit of the judges. Independence is institutional as well as personal, and its preservation requires actively, and on occasion aggressively, involving the judiciary in identifying challenges and responding to them in a fashion that respects the constitutional imperative. Many people have useful ideas for better organising the court of the future, but those ideas raise certain issues. What are the characteristics to be preserved if a body is to be identified as a court? What is the nature of the judicial function? How does it differ from other decision-making functions? What forms or levels of bureaucratisation would compromise its character?

Judges themselves require skilled assistance in their own organisation. An example has been the growth of expertise in court administration as a specialised field. Judicial independence demands that certain kinds of decision,

such as allocation of judges to cases, or organisation of court lists, ultimately be made by the judiciary itself, but in practice that may mean that specialist administrators deal with such matters, reporting to a chief judge or judicial council, and working as part of the court structure. Judicial resources are scarce, and efficiency may require that as far as possible judges concentrate on what they do best, which is judging.

The development of necessary institutional structures within the judicial branch is, from one point of view, a form of bureaucracy. Provided it is consistent with the underlying principles of administration of criminal and civil justice, including judicial independence and the rule of law, this should be a source of strength. The challenge is to avoid consequences commonly associated with bureaucracies, that would be antithetical to the character of a court. The challenge is to become efficient and effective in the exercise of power without abandoning the judicial nature of the power.

Managing court lists is a specific example of the difference between the essential and the inessential. It involves efficient deployment of resources, which includes deciding priorities as between cases awaiting hearing, and assigning judges to particular cases. Judges do not choose the cases they hear, and litigants do not choose their judges. In many courts, including District and County courts, the government itself is a major litigant. Almost all criminal cases are conducted as contests between a public prosecutor, who is an agency of government, and a citizen. Governments, or entities controlled by governments, are major civil litigants. Hence, the listing of cases and the assignment of judges must be controlled by the court itself, not by the executive government. Yet, in the interests of efficiency, these functions are often better performed by skilled administrators. It is not essential, and may be undesirable, that they be

undertaken by judges. At the same time, it is essential that they be under the control of the judiciary.

The different models of court funding that apply in various Australian jurisdictions also illustrate the scope for change without detracting from basic values. The federal courts, including the High Court, operate on one-line budgets and, within the limits set by the total funding, and by the necessities of certain irreducible items of expenditure, enjoy a measure of autonomy in establishing their own internal priorities. In most State jurisdictions, on the other hand, courts are administered as a cost centre within a Ministerial area of financial responsibility, and have limited capacity to alter internal expenditure priorities. The South Australian model is different again. The federal scheme may be less the result of any decision of principle than of the historical fact that, until recently, the federal court system was small and court administration was not a major part of the business of a government department.

There is no danger that people will lose sight of the need for institutional renewal and development within the judicial branch. This is so for at least three reasons. First, within the judiciary itself, there is now a high level of interest in issues of administration and efficiency. Secondly, outside the judiciary, in government, the legal profession, and the media, the performance of courts is subject to constant scrutiny. Thirdly, there is international interest in, and cooperation about, issues of judicial management. The danger is not that the need for organisational development will be overlooked, or that ideas for change will be lacking. The problem is to ensure that judicial structures remain consistent with the essential aspects of the judicial function as we understand that in our society. To put it in another way, the court of the future will need to embrace, and respond appropriately to, the demands of the future, while remaining a court. For that purpose, judges themselves, and especially judicial leaders, need a clear idea of

what being a court involves. This means understanding the characteristics of the judicial function and discriminating between the essential and the inessential.

It is characteristic of the judicial process that it seeks to be fair. Some people would say another characteristic is that the process is slow and expensive. How do you reverse the second and preserve the first? Both aspects of the system involve questions of degree. Some elements of fairness involve compromise. Standards of fairness are not immutable. The High Court of Australia strictly limits the time allowed for oral argument in applications for special leave to appeal. In some cases it permits no oral argument at all. The Court does not have the resources to allow all special leave applications to be presented with unlimited oral argument. It rations its time. What if a trial court were to limit, either generally or by ad hoc decision, the time available for evidence in chief, or cross-examination, or argument? At least as it seems to me, giving unlimited time for those procedures is not an essential part of the system. Giving a fair hearing, however, is essential. What constitutes a fair hearing will vary with circumstances. I do not doubt that courts will continue to look more closely at the need to reconcile efficient deployment of scarce judicial time with the requirements of a fair hearing. It is unlikely that the balance struck in the past will remain unaltered.

In recent years there has been an interest, across the entire judiciary, in pursuing methods of dispute resolution in addition to adversarial litigation in order to enhance the accessibility and efficiencies of justice. There is still a lot to be done in this area. Regrettably, it is still the case that the costs and delays of the ordinary civil trial process make that process prohibitively expensive for many people. In practice, this denial of access to the courts is uneven. Certain kinds of litigant are able to take advantage of availability of legal services on terms that assist, or even encourage, claims. Others are not. Within some

courts, mediation and other dispute resolution procedures are fostered, but again developments have been uneven. The adversarial process, with a climactic trial as its final stage, is not the only procedure by which courts can resolve disputes fairly and efficiently. It is likely that, in the future, courts will continue to seek ways, consistently with the interests of justice, to modify their dependence on the trial process as a form of dispute resolution.

The way courts go about their business is to some extent influenced by factors over which they have no control. The volume of civil litigation, or the amount of criminal work that courts have to handle, is the consequence of a combination of factors largely outside judicial control or even influence. The resources available to courts to deal with the business that comes to them are the product of decisions made by the executive government. The number of judges depends on external governmental decision, although the judiciary has the capacity to draw the attention of government to its needs. Similarly, the physical facilities available to the court system are decided outside the system. At the same time, however, there are features of the ways in which a court goes about the conduct of its affairs that are the product of principles of law, ultimately with a constitutional foundation, commonly declared by courts themselves.

As a process of decision making, the judicial method has some characteristics that are capable of modification, and others that are not. The characteristic features of the judicial method of decision making do not mean that it is inherently superior to any other method; simply that it is the manner in which the judicial power of government is exercised.

The primary characteristics of the judicial method are not necessarily peculiar to judging, but in combination they form minimum requirements necessary to describe a process as a judicial process. They include, subject to certain closely

defined qualifications, a requirement to conduct trials in public, to hear both sides of an argument, and to give reasons for a decision. Of course, the very reference to hearing both sides of an argument implies a certain assumption about the adversarial nature of the process, but as I have already said, the modern court embraces other methods of resolving disputes that are brought to it.

Depending upon the nature of the question to be decided, a trial is not necessarily the best, or the fairest, or the most efficient, and it is usually not the most economical, way of making a decision. Most decisions, whether of government, or in business, or in personal life, are not the outcome of a public process. Most decision-making is not reached after an adversarial procedure, and most decision-makers do not give reasons for their decisions.

The requirement that the judicial process should take place in public, not in secret, and be open to observation and comment, is not the same as a requirement that the process be conducted so as to maximise its entertainment value. I dislike the use of the criminal justice system as a form of public amusement, but there are legitimate differences of opinion about the desirability of certain forms of publicity, and I am happy to leave those issues to others. Times and opinions change. I can remember when colourful details of matrimonial disputes were enthusiastically reported, and widely read. That form of entertainment, at least in its application to the private lives of most ordinary people, is no longer fashionable. Proceedings in the Family Court are conducted in public, but restrictions on the information about them that may be reported mean that, in practice, they are rarely a source of news. This illustrates the difference between a court that is open and a court that conducts its business with maximum publicity. There will always be pressures for change on some aspects of the publicity that may be given to court cases. Of more concern,

however, would be pressures to conduct some proceedings so that they are not open to the public. The policy of the law has been to limit carefully the permissible exceptions to the basic principle of open justice, and to scrutinise strictly legislative attempts to require or permit closed proceedings.

An obligation to hear both sides of a case is related to the common law idea of a judicial process as a contest. There is a level of public impatience with the law's fondness for this as a method of arriving at a just result. Courts themselves have been conscious of this impatience, and are likely to continue to modify their procedures accordingly. Even so, they have insisted, and will continue to insist, on what used to be called natural justice (an expression that is well worth preserving) and is now more often described as procedural fairness.

Conducting hearings in public, and giving reasons for decisions, serve a number of important purposes. These include helping the courts avoid two of the major reasons for dissatisfaction with much bureaucratic decision-making, whether in the public sector or the private sector. The first is the difficulty – sometimes the impossibility – of identifying the decision-maker. The second, which is often the corollary of the first, is the invisibility to the decision-maker of the people affected by the decision. A sense of injustice arises where people affected by decisions cannot find out who made them. Unfair decisions often result from a decision-maker's inability to understand the consequences of a decision, or to appreciate its effect on people. The judicial method obliges individual judges to take responsibility for their judgments. A man who is sent to prison knows who decided to send him there. A defendant who has been required to pay damages to a plaintiff knows who made the award of damages. Judges come face to face with litigants. It is often said that an accused person is entitled to see his or her accuser. I would add that an accused person is also entitled to see, and to be seen by, his or her judge. The physical immediacy of this aspect of the judicial

process should not be overlooked. No doubt the technology now exists to enable most judges, most of the time, to work from home. Theoretically, judges could work anonymously, and cases could be processed, on the papers, without open hearings. But that is not the judicial method. Decisions by anonymous decision-makers would not be judicial decisions.

The third essential is giving reasons for a decision. Reasons serve a number of purposes. They promote good decision-making by requiring a decision-maker to explain and justify an outcome. They inform a losing party of the reason for failure. They allow an appellate court to identify possible error and correct possible injustice. They inform the public of the way judicial power is exercised. The adequacy of a statement of reasons for a decision is judged by reference to these purposes. There are some notable differences between common law and civil law techniques in this area also. Decisions of civil law courts at all levels are almost always collective decisions of a group of judges. Often, there is no provision for dissent. Indeed, the individual judges may be sworn to secrecy as to their private opinions. It is the decision of the group that matters, like the decision of a jury in our system. Reasons for the collective decision are, by our standards, quite brief, partly because they reflect the lowest common denominator of agreement. And, in the civil law system, the judges normally are applying (and in theory, doing so automatically) the provisions of a written legislative code. No doubt there are people who wish common law judges had less to say, and in some cases their wishes may be shared by other judges. Yet common law courts have certain minimum standards which reasons are required to satisfy, and these will always have to be respected.

We adhere to these necessities, not because they are essential to all decision-making, but because they are essential for a decision to be of a judicial character.

Many government decisions that are made by an exercise of judicial power could also be made by an exercise of legislative power, or of executive power. Even so, to resolve an issue judicially carries with it certain public consequences. It involves, among other things, a representation to the community about process as well as outcome.

In countries with a common law background there is now a good deal of judicial authority upon the question what constitutes a court, the minimum requirements for judicial independence, and the essential characteristics of the judicial function. For example, in Australia, Canada, and South Africa there are cases on the minimum requirements for judicial independence. Because of the structure of the Australian constitution, issues as to what constitutes an exercise of judicial power, which might arise because of a legislative attempt to confer judicial power upon a non-judicial authority, or because of an attempt to confer non-judicial power upon a court, have a long history.

Judicial reflections upon the judicial function, and the nature of judicial power, have never attempted to deny to Parliament appropriate choice as to whether a certain kind of question, or decision, will be committed to judicial authority or to some other authority. In New South Wales, land use, and questions of town planning and environmental protection, may be decided in a variety of ways. Some such questions are resolved judicially by the Land and Environment Court. Some are resolved administratively by local government authorities. Some are resolved by the direct exercise of legislative authority. The courts have insisted that certain decisions, such as the adjudication of criminal guilt and the imposition of criminal punishment, are ultimately matters exclusively for the exercise of judicial power, but we are all familiar with systems of administrative penalty. The dividing line between serious crime and forms of

misconduct that are appropriate to be dealt with otherwise than by the judicial process is difficult to draw, and some forms of administrative penalty can be more serious than those commonly imposed by courts.

While acknowledging that the judicial method is only one of a number of possible methods by which questions may be decided, or disputes resolved, and while not claiming that it is in all cases, or even in most cases, the best method, courts have insisted that if the government represents to the public that a problem will be solved by the judicial method, or represents to the public that a tribunal is a court, then certain requirements must be fulfilled. The description of a process as a judicial process, or of a tribunal as a court, may carry powerful political consequences. There may be political purposes to be served by describing an inquiry as a judicial inquiry, or a tribunal as a court, or a decision-maker as a judge. Sometimes it may be expedient to suggest, for example, that an activity undertaken by someone who once was a judge is a judicial process. The term “judicial enquiry” is sometimes used rather loosely. There is a reason for this. The public distinguishes between judicial action, which is understood to be politically neutral, and legislative or executive action which, in a democracy, belongs to the realm of politics. Each has its own kind of legitimacy. To describe a decision-maker as a judge, or a tribunal as a court, is to imply independence, impartiality, certain standards of fairness and openness in the process, and apolitical decision-making. Depending on what is at stake, this is not necessarily a superior kind of decision-making, but it is distinctive. It has a reputation that is sometimes borrowed, in circumstances that may be innocent, or that may involve a political purpose. We should be conscious of when this is happening. From one point of view, the prestige that is attracted to a process by describing it as judicial may be welcomed by Judges as an indication of public confidence. Even so, we need to take care not to blur the distinctive characteristics of judicial action.

Many people, both inside and outside government, are puzzled, and sometimes irritated, by the insistence of judges that they are not public servants. Of course they are servants of the public, and in exercising the judicial power of government, courts are public instrumentalities. Yet, within the limits set by the law and considerations of personal and institutional integrity, the characteristic role of a public servant is to help form, or give effect to, government policy, which is subject to the operation of the political process. The characteristic role of a court, on the other hand, is to apply the law, regardless of the political consequences of that application. A public servant may be responsible to a Minister; a judge has no responsibility except to the law. Again, this does not mean that one activity is inherently superior to the other. It simply means that they exist to serve different ends.

There is another aspect of the difference between the bureaucratic function (using the term bureaucratic in a neutral sense) and the judicial function. The bureaucratic function typically involves the application of policy, or general standards, across a large number of cases, without becoming closely involved in the facts or circumstances of particular cases. Whether the bureaucracy in question is in government or in private enterprise, there is commonly an assumption, (sometimes a correct assumption), that for good decision-making one should avoid being caught up in the facts and circumstances of particular cases. The judicial process, on the other hand, is strongly weighted towards an investigation of facts and circumstances, followed by a search for a general principle appropriate to those facts and circumstances. In other words, the bureaucratic tendency is to look first for a policy or standard, and apply it across as many cases as possible, whereas the judicial tendency is to investigate the individual case and then look for a principle or rule that covers it. By bureaucratic standards, the judicial process may seem inefficient. By judicial

standards, the bureaucratic process may seem unjust. The difference in approach is not absolute. I refer to tendencies rather than strict constraints, but they are real and important.

Future courts will be, or continue to be, subject to pressure to make their procedures conform to the bureaucratic norm. Without doubt, the judicial approach to problem solving is labour intensive, costly, and time consuming. Within the area of civil justice, there are ways in which the judicial paradigm could usefully become more flexible, without sacrifice of justice. The bureaucratic and the judicial processes each have their own strengths and weaknesses. So long as they understand what is essential for the judicial process, judges can learn from other kinds of decision-making. Already it is possible to point to instances in which courts base their decisions upon general standards without a need to investigate fully the circumstances of the specific case. Assessments of compensation are an example. There are, however, limits to the extent to which courts can be deflected from their traditional concern with the particular case, and those limits operate most powerfully in the area of criminal justice. One of the reasons mandatory sentencing is so controversial, and so much resisted by the legal profession and the judiciary, is that it represents a departure from the typical judicial concern, especially in areas of discretionary decision making, with the circumstances of the particular case. This is not to say that the departure may not sometimes be justified. In relation to crimes of certain kinds, especially the most serious crimes, the law has for a long time been familiar with mandatory sentences. Transportation to the colonies owed its existence to a system of mandatory sentencing, for which it provided a compassionate alternative. In most parts of Australia, for most of the twentieth century, various forms of mandatory sentencing existed in the case of murder. Judicial discretion in relation to sentences to be imposed for the most serious crimes in the criminal calendar was often absent or limited.

Sentencing, and the assessment of damages for personal injuries, are two areas of discretionary decision making (using the concept of discretion in its widest sense) where, as a matter of public policy, there has been pressure for modification of the traditional judicial function. In such cases, a common cause of complaint against the judicial function is the existence, or alleged existence, of inconsistent decision-making. Consistency is regarded as one of the virtues of the bureaucratic process, and inconsistency is regarded as an ever present danger in the judicial process.

This criticism is not lightly to be dismissed. It is a corollary of the rule of law that, in the administration of civil or criminal justice, the outcome of a case should depend as little as reasonably possible upon the random factor of the identity of the judicial decision maker. Any legal practitioner knows the sense of embarrassment, and unfairness, involved in having to advise a client that the outcome of a case will depend on the identity of the judge who is allocated to hear it. The Judicial Commission of New South Wales was established in the late 1980s in consequence of complaints about sentencing which became a political issue. The complaints were not that sentences were either generally harsh or generally lenient. The complaint was that they were inconsistent. The possibility of complaint of that kind is almost inevitable when you have a process of discretionary decision making that concentrates heavily on the facts of particular cases. The same facts might be appreciated differently by different decision makers.

The judicial concentration on particular cases is not necessarily more virtuous than the bureaucratic disinclination to do so. Either approach may be capable of producing injustice. And each kind of decision maker may have lessons to learn from the other. In some kinds of decision making, bureaucrats, without

sacrificing consistency and efficiency, might improve the fairness of their process if they were more willing to attend to the circumstances of particular cases. In some circumstances judges, without sacrificing justice, might improve their consistency and efficiency if they elevated their sights above the details of the particular matter before them.

Judges can learn, not only from one another, but also from people who make decisions in other areas. Provided judges have the understanding and the confidence to discriminate between what is essential and what is inessential to their *métier*, they ought to be interested in finding out how others approach problem-solving. This has already been done, to an extent, in relation to exchange of information. In New South Wales, the response to the perceived problem of inconsistency in sentencing was the establishment of a Judicial Commission which set up a Sentencing Information System. In essence, this was to make it easier for judicial officers to find out what other judicial officers were doing. This is not the occasion to go into utility of sentencing guidelines. That subject would warrant a paper of its own. The point is that, underlying a sentencing information system, or sentencing guidelines, is an attempt to improve the judicial method by giving judicial officers access to information that may be legally relevant and practically useful. It is a response to the problem of the isolation that can burden the common law judicial officer.

The court of the future will be seeking to improve its own standards of efficiency, accuracy and fairness in decision-making, and it will also be under external pressure to do so. Judges have a lot to learn from one another, from their judicial counterparts in other places and other legal systems, and from successful decision-makers in other non-judicial fields. The better they understand the difference between what is essential and inessential to their

judicial function, the more easily and confidently they can learn lessons from others.