BOOK REVIEW

Review of A MATTER OF CONSCIENCE: SIR RONALD WILSON, *Antonio Buti (2007)*

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This biography of Sir Ronald Wilson, Justice of the High Court of Australia between 1979 and 1989, presents the reader with two theories about the subject's life.

The first theory is expounded by the media columnist and speech writer, Christopher Pearson. He suggests that Wilson was basically a man of very angry passions. He kept them under wraps whilst serving as a judge and as President of the Assembly of the Uniting Church of Australia. But, other than that, he was given to unacceptable anger and zeal. Upon this theory, Wilson exhibited the latter emotions as a fearsome Crown Prosecutor, seeing himself as the 'avenging angel' of society, basically unconcerned with the innocence of those whom his forensic skills could persuade juries to find guilty as charged.

After resigning his judicial post, the same zeal was let loose again in his role as President of the Australian Human Rights and Equal Opportunity Commission (HREOC). For Pearson, it was most evident in the report of that Commission *Bringing Them Home*, tabled in Parliament in May 1997. As Pearson puts it:[1]

> What was keeping him going was afflatus and his regular fix of Old Testamental prophetic wrath. What routinely overwhelmed his judgment, in the HREOC years and afterwards, was seeing indigenous issues through a prism of rage.

The alternative estimate, cited by Dr Buti, is propounded in the book by the present reviewer. It suggests that, boringly enough, Wilson, as a professional lawyer, simply endeavoured to perform his legal duties with as much skill as he could muster and in fact portrayed to many colleagues a surprising but seemingly genuine lack of self-confidence, especially over the perceived defects of his early

* Justice of the High Court of Australia 1996–2009.

1 Christopher Pearson, quoted in Antonio Buti, *A Matter of Conscience: Sir Ronald Wilson* (2007) at 397.

formal education. As for the contrast between Wilson's perception of his available 'choices' as a judge, specifically a Justice of the High Court of Australia, and the 'choices' that he embraced after retirement in the HREOC and elsewhere, this simply demonstrated an evolution of his thinking:[2]

> … [H]e showed how a highly orthodox, conservative lawyer can grow up. How he can grow out of the cocoon, can expand his mind in harmony with his heart and with the sense of spirituality in which he was raised … Indeed, it is a life that Ingmar Bergman would have made a wonderful film out of. It would have been a film after the manner of *Wild Strawberries* (1957). It would be a man who had all the honours of the world, but looked into his soul, and found the need for something more. I believe that the desire to do this was planted by his early life and by his spiritualism and Christianity …

A strength of Buti's biography is that it leaves it to the reader to reach an opinion on which of these two classifications fits more comfortably as a description of the life's journey of Sir Ronald Wilson which he recounts. Buti does not hold back from recounting criticism of Wilson. Thus, he records quite fairly a trilogy of cases in which, it is suggested, Wilson took part as prosecutor and appellate advocate in securing, and maintaining, questionable convictions in criminal trials that led to the punishment of the accused John Button, Darryl Beamish and Eric Cooke. In quoted comments, expressed years later about these cases, Wilson remarked:[3]

> I have no sense of failure in having prosecuted John Button and Darryl Beamish and Eric Cooke because I was just doing my job. I didn't create the brief that was given to me. I took it and did my job in relation to it.

Under our system of criminal justice, however, a prosecutor in a criminal matter is not an ordinary advocate. He or she (increasingly in recent years, she) has special duties to the court, to the public and to the accused. They include duties of fair prosecutorial practice so that winning the case at all costs is not, as such, a permissible objective. There are also duties of disclosure to the accused's representatives of relevant evidence, including where such evidence will not be tendered by the prosecution at the trial but may throw light on the guilt of the accused person. The recent decision of the High Court in *Mallard v The Queen*[4] is a reaffirmation of this duty of disclosure. That case, also from Western Australia (but not involving Wilson), involved complaints of prosecutorial non-disclosure. It is now accepted that Mr Mallard was wrongly convicted and suffered more than

2 Michael Kirby quoted in Buti, above n 1 at 387, 388.

3 Sir Ronald Wilson quoted in Buti, above n 1 at 127.

4 (2005) 224 CLR 125.

a decade of imprisonment, in part because his trial miscarried through procedural irregularities.

Buti lays out the strong criticism of Wilson's handling of 'the prosecutor's trilogy'. He pulls no punches. He cites criticisms especially of Wilson's conduct of the second Beamish appeal to the High Court in 1964. He quotes Professor Peter Brett's stinging critique of the handling of the Beamish case and the suggestion that Wilson had 'unwittingly led the Court into an error on a matter which two of its members regarded as of great importance',[5] which error was unrepaired on the special leave application.

One of the trio included in the Wilson trilogy, Eric Cooke, was sentenced and hanged in October 1964. He was the last person to be hanged at the gallows at Fremantle Prison. According to the book, Wilson gave little thought to the execution. So far as he was concerned he had prosecuted Cooke according to his legal duty. It was the judiciary that had ordered the hanging. Only later in life did Wilson become an outspoken opponent of capital punishment. On these cases the contract between a cool professional detachment and an excessive zeal for victory emerged quite clearly. Doubtless some critics of Wilson would remain of the Pearson persuasion. However, none of the detail recorded in Buti's life of Wilson persuades this reviewer to a view different than that earlier expressed.

Most Australians, most lawyers and probably most judges in the middle of the last century accepted capital punishment as a settled feature of 'the system' that they had not devised and could not alter. Most prosecutors, like Wilson, saw themselves as mere instruments of 'the system'. If Wilson showed more enthusiasm as an advocate than many prosecutors, this probably flowed from his upbringing and education and the temper of the times. He became a very fine advocate. Like most persuaders, he liked to win and to bring those whom he was addressing around to his point of view. There may also have been a grain of truth in Wilson's implicit criticism: that it is the ultimate duty of courts to safeguard convicted prisoners from wrongful miscarriages of justice. The advocate has a role to play; but the ultimate duty of vigilance cannot be removed from the judges.

Buti's book on Wilson traces his life through his inauspicious beginnings in childhood in Geraldton, Western Australia, where as a boy of four he suffered the calamity of his mother's death and three years later when he was told that his father had had a 'bad stroke'. The father, a solicitor, was left incapacitated. Raising the young Ron Wilson fell to a churchgoing Presbyterian, Mrs Clover, whom he described as a 'fantastic foster mother'.

Perhaps unsurprisingly, the father's legal business did not flourish. In an oft-repeated story, the family had to decide what to do with his father's leather-bound

5 Peter Brett, *The Beamish Case* (1966) at 52.

English law books. No one in Geraldton wanted to buy them. So the future High Court Justice took part in burying the books in the family's Geraldton backyard. The story was to become something of a symbol in Wilson's later life.

Wilson left school just short of his 14th birthday. His first work was as a casual messenger at the Geraldton courthouse. This led on to his recruitment as a junior clerk in the Crown Law Department of Western Australia. Wilson then became involved in Presbyterian church activities where he would later meet his wife, Leila. The outbreak of the Second World War led him to offer himself for military service. Eventually, he enlisted in the Royal Australian Air Force. This took him to England where he flew Hurricanes and then Spitfires in the Battle of Britain. The attrition of pilots in that activity was so great that Wilson was probably lucky, but disappointed, that he was assigned to non-combatant duties. In November 1945, after victory in the war, he returned to Perth and resumed work in the Crown Law Office.

One of the benefits provided to the returned serviceman was the Commonwealth Reconstruction Training Scheme. This secured for Wilson a place at the Law School of the University of Western Australia. There he would meet the future Prime Minister Bob Hawke and his future High Court colleague, John Toohey. Bob Hawke's father was a Congregational minister of religion. Hawke played a part in University Christian activities that threw him into contact with Wilson. The battle-hardened veterans and the young graduates mixed together, all happy that hostilities were over.

By 1951, Wilson was admitted a barrister and solicitor in the amalgamated legal profession of Western Australia. He had married Leila and started a family. His children were later to complain about his many absences as he prosecuted seemingly endless criminal cases. At one stage in 1953, in just five weeks, he fought nine successive major criminal trials, some including the capital offence of homicide. At first, Wilson did not have a good success rate in guilty verdicts. But the Crown Law Department knew they had an advocate of high intelligence on their hands, with the quality of persistence and seemingly endless capacity for work. Like many of the future judges of the Supreme Court of Western Australia before whom he appeared, Wilson's life was centred in the Crown Law Department. Buti's book contains many reminiscences of work colleagues of the 1950s and 1960s recounting Wilson's 'hard work ethic' — the first to arrive and the last to leave the office.

By 1957, Wilson's skills as an advocate were becoming highly refined. They led to his deployment on behalf of Western Australia in important industrial cases before the Commonwealth Conciliation and Arbitration Commission. Most especially, he appeared in the annual Basic Wage Cases, pitted by now against his old University acquaintance, Bob Hawke. He was shocked by Hawke's 'truculent, abusive, intimidatory and effective' advocacy. Wilson persuaded his superiors to

re-classify him as Chief Crown Counsel so that he could present civil as well as criminal cases. When this promotion came through, Wilson regarded it as a 'job from heaven'.

In due course, Wilson began to receive briefs for the State in constitutional cases, including before the Judicial Committee of the Privy Council, still at that stage Australia's final court in most cases. This opportunity pitted him against many of Australia's leading advocates at the time. It was therefore natural enough that, in April 1969, he should be appointed Solicitor-General of Western Australia under new legislation which Mr (later Sir) Charles Court introduced into the State Parliament. Thus began countless peregrinations from Perth to the Eastern States to appear before the High Court. His skills as an vigorous proponent of States' rights during years of innovative Federal legislation is described with affection and respect by his future colleague, Sir Daryl Dawson, then Solicitor-General for Victoria. According to Dawson, Wilson was recognised as the natural leader of the State forces. They did not notch up many victories before the High Court. But Wilson's dedication quickly attracted attention from the conservative side of politics.

When in 1977, Justice McTiernan resigned, the Federal Attorney-General, Bob Ellicott, reportedly invited Wilson to accept appointment to the High Court. He had previously turned down an appointment to the Supreme Court of Western Australia, preferring to be Solicitor-General. Ellicott gave Wilson 24 hours to decide whether to accept the offer. In the result, according to Buti, Wilson declined the offer and the appointment went to Mr Keith Atkin QC of the Melbourne Bar. The given reason for his refusal was concern about his family. He was also annoyed about the pressure for an instant answer. As Ellicott explained it to Buti, the refusal was typical of Wilson, striving to 'do the right thing'.

When, in April 1979, Justice Kenneth Jacobs retired for reasons of ill health, Wilson's old Western Australian friend, by now Federal Attorney-General, Peter Durack, pressed the next vacancy upon him and this time he accepted. He was sworn into office during the Brisbane circuit of the High Court in May 1979.

The chapter on Wilson's High Court years is less satisfactory than the attention to that subject in other books on judicial lives. Buti picks a few cases to illustrate the public events and political themes that emerged during Wilson's judicial service. The events included the trials of Justice Lionel Murphy, the transitions from the Barwick to the Gibbs and the early Mason courts and the opening of the new building for the High Court in Canberra in May 1980 by the Queen. The cases with a political element, touched on by Buti, include many in which Wilson dissented, pursuing his view of legal positivism and his loyalty to the federal system as a constitutional arrangement for government specially suited to the continental country which he criss-crossed to attend the High Court sittings. If other Justices did not know and appreciate the size and remote

outriders of the communities of the Commonwealth, Wilson certainly did and his views about them were reinforced by the constant travel across the continent.

The signature theme which Buti adopts as the centrepiece of the biography is Wilson's response to the position of indigenous Australians, especially Aboriginals, under the law. Buti therefore takes some pains to examine Wilson's apparently unsupportive dissenting reasons on this issue in the successive High Court decisions in *Koowarta v Bjelke-Petersen*[6] and the first case of *Mabo v Queensland*.[7] These cases are examined in a chapter titled 'Mabo and More'. It illustrates Wilson's adherence to 'rigorous intellectual reasoning'. His decision in *Mabo* differed markedly from that of a majority of the Court.

An obvious question that is presented by this biography is how a man, who held office in the nation's highest court, and as such had the power to reflect large value judgments in constitutional and common law controversies, and who was later to become one of the most outspoken supporters of Aboriginal legal rights, could not bring himself to favour their causes although four of his colleagues found pathways to do so which he acknowledged as reflecting permissible but sincere differences of opinion.

Buti might have examined more closely in this section of the book whether Wilson was at an earlier stage of his own intellectual maturation. Whether the content of any instruction he had at Law School in jurisprudence was deficient and provided him with no real insight into the 'choices' that teachers like Julius Stone gave to contemporary students on the other side of post-war Australia at the Sydney Law School. Whether Wilson was too far gone by the 1980s, in terms of his reputation, as a 'black letter lawyer', to question old assumptions from the judicial seat? Why contemporary Justices, such as Justice Mason, evolved on the High Court Bench but Wilson did not?

In a later chapter, after the closely divided *Wik* decision was handed down in 1996,[8] Wilson is portrayed defending the majority opinion in the High Court, favourable to the Aboriginal claimants, against the very public attacks on the Justices that burst forth after the decision in *Wik*. If Wilson could do this, largely in the course of defending his *Bringing Them Home* report for the HREOC, it suggests a development in his thinking which, had it happened earlier, might have shown him pathways to decisions in *Koowarta* and the first *Mabo* case that could have brought him to different conclusions.

A comparison between Wilson's judicial and post-judicial remarks on the rights of Aboriginal Australians under Australian law is most striking. Upon one view, it requires acceptance of a 'value-free' process of judicial decision-making

6 (1982) 153 CLR 168 ('*Koowarta*').

7 (1988) 166 CLR 186 ('*Mabo*').

8 *Wik Peoples v Queensland* (1996) 187 CLR 1 ('*Wik*').

to reconcile the two lines of argument. This is a central quandary in explaining the values that Wilson espoused in his various public offices. It suggests a kind of intellectual schizophrenia and a perceived fidelity to duty that caused him no internal conflict that probably deserved more space than the Buti gives it. Nonetheless, the paradox is certainly laid bare for the reader to appreciate and speculate about.

In the nature of the work of the High Court, it is concerned all the time with constitutional, criminal and other cases that challenge the decision-makers to disclose the values that influence their reasons and conclusions. If they adhere to a completely linguistic view of cases or mechanical view of the judicial function, so that they are merely giving effect to the 'clear intent' of a text or the perceived state of the pre-existing law, it is possible to accept Wilson's plaintive excuse that he had 'no real choice' and was obliged to decide *Koowarta* and *Mabo* and other cases as he did. If he had secured a good grounding at university or elsewhere in theories of justice and a sound appreciation of the inescapable 'leeways for choice' that judges of our tradition must face, it is likely that his reasoning in the High Court would have been more subtle and insightful in the cases mentioned and in other cases. These deep undercurrents affecting the judicial method during Wilson's time on the High Court are not really explored, certainly at sufficient in length, in Buti's biography. They may not be all that interesting to a lay reader of his life. But, in so far as many readers of Buti's work will be lawyers, they will feel a little short-changed by the section on the High Court years and the failure of the biographer to come to grips with the arguable weaknesses in Wilson's reasoning as a High Court Justice. That was an important matter because, after all, that office was the most significant and influential that Wilson held in his lifetime.

I suspect that there would have been a rich minefield in Wilson's High Court decisions which, a little digging, would have proved as fruitful, revealing decision-making patterns and themes in Wilson's judicial opinions. This is not an approach that has proved congenial in most judicial biographies in Australia, although (doubtless encouraged by the language of the Bill of Rights) it is a constant focus of writings on the lives of the Justices of the Supreme Court of the United States. Necessarily, the Australian judicial biographer has to quarry a little more deeply. But, especially in more recent years, with greater candour about operating values, and more transparency in judicial reasoning, the role that principle and policy plays in decision-making, especially in a final court, is there for all who search long enough to find and to reveal. No judge, however much he or she might try, can ever entirely escape those basic values.

Instead of exploring the High Court cases, Buti bookends his biography with an examination of the *Bringing Them Home* report of HREOC, written during Wilson's time as President of the Commission. The work opens, dramatically enough, with a prologue describing the anger of Aboriginal Australians to the

response of the then Prime Minister, Mr John Howard, in May 1997, on the presentation of the HREOC report and the act of discourtesy, the like of which we have never seen before or since in Australia, when Aboriginal leaders and other delegates at a conference in Melbourne stood and slowly turned their backs on the nation's highest elected political leader.

The book closes with Wilson's appointment as President of the HREOC and his important work in that body for various minorities (including homosexuals and other sexual groups). However, the principal focus of the closing chapters is the story of the report on the 'Stolen Generation' of Aboriginals (a phrase Wilson did not invent and rarely used). It is this report and its demand for an acknowledgment of a great wrong done by Australia, and proper reparation for that wrong, that made Wilson many enemies. A large number of them were people who would originally have counted themselves as his admirers. They were churchgoing, somewhat conservative citizens who liked being proud of their nation's history and institutions. Here was a much decorated pillar of the law and of the Christian community, ex-judge and decorated knight, who was moved to the strongest criticism of the way the nation had removed large numbers of Aboriginal children from their birth parents and transferred them to be raised by 'white' families.

Some of the attacks on the HREOC report centred on terms that were used in its text. The word 'stolen', for example, is highly criticised and the point is made that many children were 'transferred' with the consent of their birth family. Even more criticism, recounted by Buti, is directed at the use of the expression 'genocide'. Wilson ultimately agreed that 'we should never have used it'. But earlier he had pointed out that, as a matter of strict legality, there were supporting opinions in the international discourse on 'genocide' as an international crime, that viewed the deprivation of indigenous peoples of their children as a kind of termination or diminution of their race and culture and its capacity to flourish. The word and its baggage caused a bad reaction in the government, some sections of the media and the public.

Much debate followed the HREOC demand for a national apology to the Aboriginal people. To the end of his extended term of office, Prime Minister Howard resisted giving a governmental apology. He expressed, as many others did, reservations concerning inter-generational responsibility for alleged injustices done by others, mostly dead, in earlier times. Mr Howard also voiced concern about the legal and financial implications of such an apology. But he expressed personal sorrow and, during his last election campaign, confessed to a type of epiphany which his predecessor, Mr Paul Keating, described as a 'death-bed confession'.

Wilson made it clear that he did not favour individual entitlements to compensation but rather a collective or group reparation.[9] The Rudd government

was committed to a change of direction on these issues. This was made clear by the National Apology of 2008 in which the Prime Minister and the then Leader of the Opposition (Dr Brendan Nelson) joined. Buti's biography, coinciding with the change of Federal government in Australia was well-timed to remind the nation of very painful stories. The equivalent accounts in Canada led ultimately to a large 'healing fund' designed to support communities in redressing especially 'the legacy of physical and sexual abuse' suffered by indigenous people in Canada, particularly in residential schools.[10]

Woven through the very busy public life which Wilson led in the law, the courts and national and State institutions, were contributions as a university chancellor and as a church moderator and President. Wilson denied that his Christian beliefs played any part in his decision-making as a judge. However, this too may have reflected a blind-spot in his appreciation of the ambit of the choices that fell to him as a final court judge and of the factors that were influencing his decision-making in a system of law such as ours. Certainly, when Wilson left the High Court, he acted and wrote very differently than he had as a judge. He saw bolder choices before him and did not hesitate to make them. Then, with his considerable skills as an advocate to the fore, he set out to convince people of the rightness of his causes. If he had not earlier been such a hero of conservatism, he would not have upset so many in politics, the media and the law. But he did.

Sir Ronald Wilson died in July 2005, nearly three years after his 80th birthday. He had suffered a series of ischemic attacks. When he turned 80, he declared that he was content to 'leave this life'. He said that 'perhaps wrongly' he had a sense that 'I've done my bit'. In a rich life, that far exceeded in variety the normal experience of an advocate and judge, Wilson displayed apparent inconsistencies that invite different explanations. The broad contours of his life, and its motive forces, are well displayed in Buti's biography. So are elements of his personal and family life, as well as of his spiritual beliefs. There are one or two minor slips. The focus of criminal trials is not to find whether the accused is guilty or innocent[11] but whether the prosecution can prove guilt beyond reasonable doubt. Justice Hal Wootten, likewise a champion of Aboriginal causes, was not a judge of the Federal Court but of the Supreme Court of New South Wales.[12] Justice Brennan before his appointment to the High Court had moved to live in the Capital Territory, not New South Wales.[13]

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9 Buti, above n 1 at 365.

10 See various reports of the Canadian Royal Commission on Aboriginal Peoples, established in 1991, and the report of the Canadian federal government, *Gathering Strength: Canada's Aboriginal Action Plan* (1998), cited in Buti, above n 1 at 356.

11 Buti, above n 1 at 47.

12 Id at 148.

13 Id at 192.

These are trifles and the work, without ever descending into hagiography, covers Wilson's life admirably. There is an excellent index and a good bibliography. The notes are consigned to the back of the book, although some of them at least should have been formatted as footnotes, to be read with the text. The cover is an arresting photograph of a smiling Ron Wilson wearing a 'Walking Together' T-shirt. Other photographs included in an insert provide images evocative of his life and times.

For a country with few judicial biographies, Buti has chosen his subject well and presented a most readable text. The only real defect that I could see was the lack of sustained analysis of the values given effect during the subject's crucial years as a judge of the nation's highest court. Until we find biographers willing to do this, the myths of completely value-free judicial decision-making will persist in Australia. Sometimes, as possibly in Wilson's own case, they will be myths that the judges themselves are all too happy to express and even perhaps to believe in.