

‘Judge not, that ye be not judged’¹: judging judicial decision-making

F A Mann Lecture 2015²

Lord Neuberger

Introduction

1. In one of his many elegant and clever couplets, Alexander Pope identified the human aspect of judgement:

“’Tis with our Judgments as our Watches, none

Go just alike, yet each believes his own”³.

2. Every Judge, almost by definition, “believes his own”, at least when he gives his judgment. That does not mean that Judges do not have doubts while reaching their decisions. Inevitably, the level of doubt will vary with individual temperament. That is well illustrated by an email I received from a colleague (whom I shall not identify) after we had exchanged draft judgments, which came to the same conclusion, on an appeal. My colleague wrote “[My judgment is] an intensive review while yours is an anxious one. (I don’t really do anxiety - it is one of my many failings)”.

3. However, I suspect that few if any Judges (not even the writer of the email) believe themselves to be infallible; if anything, most of us are likely to look on some of our past decisions on issues of law, and experience doubt. This doubt is often prompted by arguments in subsequent cases, as our past decisions are analysed and their alleged failings exposed. Experience suggests that some Judges seem to enjoy having their earlier judgments

¹ *King James Version*, Matthew 7:1. The evangelist continues “For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again”

² I am most grateful to Hugh Cumber for his very considerable assistance in preparing this talk

³ Alexander Pope, *An Essay on Criticism*

read back to them in later cases, whereas others dislike it. I suppose a Judge's attitude in this connection reflects the extent to which he believes in his own infallibility.

4. More importantly, the work of Judges is subject to scrutiny by academics more than ever before. And our work is now being discussed far more by politicians, journalists, and indeed members of the public. This is partly attributable to the increased ease of communication. But it is also because Judges are being asked to determine more public policy issues, with the growth of judicial review, human rights, and EU jurisprudence. And all those developments are, I think, attributable to the ever-increasing power of the executive, and the consequent need for a judiciary which protects citizens from administrative abuses and maintains the rule of law.
5. The quality of the criticism of judicial reasoning was never more Olympian than when it came from the late and great Francis Mann, who did not hesitate to expose slack intellectual effort by Judges. In an obituary written for *The Guardian*, Mr Justice Hoffmann (as he then was) told of a Law Lord who had confessed to the fear he would experience whenever he saw Mann listening to argument in the Committee Room, anticipating that any shortcomings in his judgment would be remorselessly exposed in the next issue of the *Law Quarterly Review*.⁴
6. Such scrutiny of Judges is vital to our constitutional role, as well as being a necessary element of the important principle of open justice. Over four decades ago, Lord Reid wrote extrajudicially that “we must accept the fact that for better or for worse judges do make law, and tackle the question how do they approach their task and how should they approach it.”⁵
7. This evening, I would like to consider some pertinent questions in this connection. How do

⁴ Cited by Lawrence Collins in ‘F.A. Mann (1907-1991)’, in Beatson and Zimmermann eds. *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain* (Oxford: OUP, 2004)

⁵ Lord Reid ‘The judge as law maker’, republished (1997) *Arbitration* 180.

Judges reach their decisions? How do the qualities and experiences of particular Judges influence their thinking? What are the limits of the judicial function? These questions may be rather self-centred, but an understanding of Judges and their decision-making process is important in the light of the judiciary's interaction with the other two branches of government and the Judges' increasingly significant constitutional role of interpreting, developing and upholding the law.

How Judges think

8. Three baseball umpires were allegedly asked how they rule on a ball. The first said "I call it like it is"; the second said "I call it like I see it"; and the third said "It ain't nothin' till I call it"⁶. One might say that the first umpire was religious, a believer in absolute truth; the second was a classic rationalist or scientist, a follower of Isaac Newton or Rene Descartes; and the third was a student of Bishop George Berkley, a subjective idealist, or perhaps even a quantum physics student, thinking of Erwin Schrodinger and his wretched cat.
9. A somewhat similar difference of epistemological approach can be detected in the Judges' approach to their decisions. The French jurist Saleilles wrote: "one wills at the beginning the result; one find the principle afterwards; such is the genesis of all juridical construction"⁷ – an "I call it as I see it" approach. By contrast, his fellow countryman Montesquieu pictures judicial automatons, on the basis that "judges ... are only the mouths that pronounce the words of the law, inanimate beings, who can moderate neither its force nor its rigor"⁸ – a "call it as it is" approach. In my experience, judicial decision-making is ultimately an iterative process, which involves a combination of both approaches, although the proportions may vary from case to case. And, it must be admitted, from Judge to Judge - some of us are more

⁶ Cited in Peer and Gamliel *Heuristics and Biases in Judicial Decisions* (2013) 49 Court Review 114

⁷ Saleilles, *De la Personnalité Juridique*

⁸ Montesquieu, *Esprit des Lois*, LIV, XI, chap .VI

Salleillists and others more Montesquian.

10. The tension between these two approaches reflects in philosophical terms the familiar conflict between getting the fair result in the particular case and ensuring that the law is clear, certain and coherent. And just as there is nothing wrong with the notion of Judges, who have worked their way to an answer through a series of legal principles, then checking the answer against their notions of fairness and common sense, so there is nothing wrong with Judges starting off with the fair and common sense answer and seeing if they can get there – provided they are intellectually honest and legally principled.
11. Some of you may have childhood memories of a puzzle involving a maze with six different entrances, only one of which leads to the centre, and you have to find which it is. The natural and instinctive thing to do is to start with one entrance and then, if it doesn't work, to move onto the next and so until you find the right entrance. But many children gradually realise (or some horribly clever child tells them) that the quickest way to solve the problem is to start at the centre and work outwards till one gets to the right entrance. However, with a judgment, it is not necessarily quite so simple. Unlike the children's maze, there may be more than one arguably right answer, and, having got what you think is the most satisfactory result intellectually, you may then have to ask yourself whether it is the commercially sensible, practical and morally acceptable result – the iterative process at work.
12. It is almost inevitable that a Judge will form an initial view, either because of his opinion of the legal principles or because of his view of the fair and sensible outcome – or both. However, having formed that view, the Judge will then consider the various legal and policy arguments which have been raised, and often some of these arguments will cast doubt on his initial view. The reasons for departing from that initial view may be sufficiently telling to justify a change of mind, but it may well transpire that consideration of other arguments

causes a modification of that change or even a reversion to the initial view.

13. I would suggest that this ability to self-correct is one of the strongest characteristics Judges can possess and is likely to help to lead to a just result. The reality is that, in many cases, it is possible to reach more than one conclusion on the facts, which raises the question of what we even mean by the “right” answer. And the more difficult the case, the more true that is, and so it is scarcely surprising that one not infrequently sees sharp differences of opinion between Judges in appellate courts.

14. The concept of the “right” decision depends on what one views as the objective of the judicial process, and, as already mentioned, there may be a tension between the fair decision in the individual case and the right decision in terms of legal analysis, a tension which lies behind the observation of the great American jurist, Oliver Wendell Holmes that:

“The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned”.⁹

15. But, today at any rate, most Judges are quite open about such an approach. Thus, it is by no means uncommon for a judgment to analyse the arguments by reference to pure legal principles and, having reached a view, to inquire whether that view meets the practicalities and justice of the case. Whether such judgments always mirror the order (or indeed orderliness) of the anterior, intracranial judicial thought process is a matter of conjecture, but, at least in most cases, I doubt it. Some Judges are refreshingly frank. During argument in court, and even in some of his judgments, Sir Nicolas Browne-Wilkinson, when in the High Court and Court of Appeal, would say what outcome seemed to him to be just and

⁹ Oliver Wendell Holmes, *The Common Law* (Boston: Little Brown, 1881)

would then ask whether there was any reason in law why he should not come to that conclusion – a question he rarely answered yes¹⁰.

16. One of my colleagues, Lord Carnwath, in an extra-curial speech a year ago¹¹ spoke about the tension a between developing broad conceptual principles and doing justice in individual cases in these terms:

“Perhaps we as Judges should cut out the theorising and concentrate on doing justice in real cases. Where doing justice requires us to develop and refine new, more specific principles, we should be willing to do so. Generally we should look to the academics to do the theorising, and to put our efforts into a wider context. That way, we can decide the cases, and then they can tell us what we really meant, so that we can make it sound better next time.”

17. The response to this sentiment from academics was, perhaps predictably, less than enthusiastic. The authors of one leading textbook wrote, “if correct as a mode of analysis, this pragmatism renders doctrinal analysis otiose.”¹² Another academic commentator worried that this approach “places the doctrinal integrity of [in this instance] administrative law at risk”.¹³ I suppose Judges could go even further than Lord Carnwath’s suggestion, and give their decisions without any reasons, leaving it to the academics to explain what the reasons were or must have been, which is the approach of the French Cour de Cassation which seldom gives any reasons – perhaps an “it ain’t nothing till I call it” approach.

¹⁰ See *Kumar v Dunning* [1989] QB 193, para 21 (answer no) and *In re Collens, deceased* [1986] Ch 505,511C (answer yes).

¹¹ Lord Carnwath, *From judicial outrage to sliding scales—where next for Wednesbury?*, 12 November 2013, <<http://supremecourt.uk/docs/speech-131112-lord-carnwath.pdf>>.

¹² HWR Wade and CF Forsyth, *Administrative Law* (11th ed), 304.

¹³ Mark Elliott, ‘Where next for the *Wednesbury* principle?’, *Public Law for Everyone*, 19 November 2013, <http://publiclawforeveryone.com/2013/11/19/where-next-for-the-wednesbury-principle-a-brief-response-to-lord-carnwath/>.

18. Of course, one advantage of not giving reasons was encapsulated in Lord Mansfield's famous advice to an army officer, who had no legal knowledge or experience, and had been ordered to resolve legal disputes in the West Indies - "Tut, man, decide promptly, but never give any reasons for your decisions. Your decisions may be right, but your reasons are sure to be wrong"¹⁴. As any judge who has had a decision reviewed in the Law Quarterly Review or the Cambridge Law Journal knows, it is undoubtedly the case that judicial reasoning can almost always be attacked, and there is much more academic enjoyment and fame to be gained by adversely criticising judicial reasoning than by praising it.
19. Judges are human (well, most of us are). So, few of us relish adverse criticism, and some really resent it. One judicial tactic to head off criticism is to hide behind the law. Thirty-five years ago, Professor Atiyah observed that English Judges "would prefer to seek shelter behind the declaratory theory of the judicial function in public, and to confine discussion of the nature and use of the creative judicial function among *cognoscenti*".¹⁵ In other words, we pretend to be pure Montesquians who are always bound by previous legal decisions to arrive at the conclusion which we reach. He suggested that Judges worried that if they were open about the extent of the scope for creativity available to the judiciary, their powers would somehow be curtailed by government.
20. Whether or not that was true then, it is not true now. Judges are generally ready to explain what they do and why they do it, and quite rightly so. That is due to a number of factors. I would suggest they include (i) the modern awareness of the need for open justice, (ii) the increased role of the judiciary in determining questions of public policy, (iii) the growth in public communication generally, and (iv) changes in social and political discourse. As I

¹⁴ John Cordy Jeaffreson, *A Book About Lawyers*, Volume 1 (1867)

¹⁵ P.S. Atiyah *Judges and Policy* (1980) 15 Isr. L. Rev. 346, 360.

suggested in a talk last year,¹⁶ “a world in which it is acknowledged that Judges do more than just reveal pre-existing law, is one in which they are rightly subject to greater scrutiny.” I might add that it is a world where Judges must be more open about what they are doing and why they are doing it.

21. The increase in judicial openness is right and proper, but it leads to a concomitant increase in the risk of inappropriate attacks on Judges. Public criticisms of Judges and judicial decisions are an inevitable consequence of open justice, and they are an essential ingredient of an open society and free speech. However, the judiciary is the weakest branch of the state (having “no influence over either the sword or the purse ... [and] neither FORCE nor WILL, but merely judgment”, as Alexander Hamilton put it¹⁷), and Judges cannot and should not be expected to defend their judgments, once they are delivered. Accordingly, attacks by ministers and MPs on the judiciary generally and on individual Judges in particular, are constitutionally inappropriate. And, it is only fair to add, in this country we are fortunate, as such overt attacks have been very rare, and, when they occurred, very short-lived.

22. Before I turn to another topic, let me give the last word on this part of my talk to Lord McCluskey, former Solicitor General for Scotland and Inner House Senator, who gave the 1986 Reith Lectures. In one lecture, he said “So Judges Do Think” (and I believe that there was no comma between “Judges” and “Do”). He then said that, when called on to decide a legal issue, Judges:

“study the results of earlier cases and the reasons given by the judges for reaching those results But Judges are not engaging in some *inexorable exercise in which every choice is determined by existing law*. Choice there is, but often not the choice between the right answer

¹⁶ ‘Sausages and the Judicial Process: the limits of transparency’ <https://www.supremecourt.uk/docs/speech-140801.pdf>

¹⁷ Federalist Paper No. 78, 28 May 1788

and the wrong answer. ... Between them, law, reason and discretion leave Judges free to declare results which derive at least in part from philosophies, attitudes and influences which are not themselves rules of law.”¹⁸

23. It is perhaps worth mentioning by way of a short detour that immediately after that passage, Lord McCluskey said this:

“It is unnecessary for me to assess the argument advanced by others that the judiciary is biased in its choices and prejudiced in its decisions because of the narrow social, educational and professional background which most judges share. It is enough to acknowledge that no one can be entirely free of the perspectives and assumptions that derive from his background.”

This observation highlights the benefit of a diverse judiciary. As I hope this talk has demonstrated, it is highly desirable to have a genuinely diverse judiciary, because it would result in a greater spectrum of judicial experiences and perspectives, which will enrich the law. Quite apart from the fact that increased judicial diversity is necessary to meet the demands of social justice, the need for highest quality Judges, and the requirement for as credible a judiciary as possible points ineluctably to real diversity on the bench. Having taken a short detour on diversity, let me return to my central theme. If Judges do think, then “how do they think”?, and if we are scrutinizing how judges think, what forms may this scrutiny take?

Judicial cognitive bias

24. Lawyers generally, and Judges in particular, are expected to be particularly astute assessors

¹⁸ ‘Lecture 2: *The Clanking of Medieval Chains* 12 Nov 1986; Reith Lectures 1986: *Law, Justice and Democracy* Transcripts are available at <http://www.bbc.co.uk/radio4/features/the-reith-lectures/transcripts/1980/#y1986>

of human nature and human motivations. If, which I neither confirm nor deny, we have this special critical faculty, it is, I think, turned too seldom upon the Judges themselves. Perhaps we are rightly afraid of what we will see. But the reasons for the increased degree of public scrutiny, which I have been discussing, also justify a need for increased self-scrutiny. Like Alexander Pope (again), I would suggest that we follow the maxim famously inscribed on Apollo's temple at Delphi, "know then thyself"¹⁹. It is notorious that in the worst days of the court of equity, the quality of justice varied with the length of the Chancellor's foot.²⁰ A modern version of this sentiment is the concept that the outcome of a case will depend on what the Judge had for breakfast. This idea, legal realism at its most cynical, is scarcely new; Alexander Pope (yet again) put it thus in the *Rape of the Lock*:

"The hungry judges soon the sentence sign,

And wretches hang that jury-men may dine".²¹

25. Almost exactly three centuries after they were written, Pope's satirical couplet was rather alarmingly verified in a study of judicial decision making. Shai Danziger and his colleagues followed eight Israeli judges for ten months as they ruled on over 1,000 applications made by prisoners to parole boards. Their finding²² showed that, at the start of the day, the judges granted around two-thirds of the applications before them, but, as the hours passed, that number fell sharply, eventually reaching zero. But leniency returned after each of two daily breaks, during which the judges retired for food. Such food for justice leads to food for thought.

26. The scientific study of judicial behaviour is a growth area, explored variously by economists,

¹⁹ *An Essay on Man*, 1734

²⁰ *Gee v Pritchard* (1818) 2 Swanst. 414, per Lord Seldon

²¹ *The Rape of the Lock*, 1712/1714 Canto 3

²² Danziger et al, *Extraneous Factors in Judicial Decisions*, Proceedings of the National Academy of Sciences April 26, 2011 vol. 108 no. 17 6889-6892

legal academics, psychologists and political scientists.²³ Readers of Daniel Kahneman's *Thinking Fast and Slow* will not be surprised that the theories on cognitive heuristics and biases which he developed with Amos Tversky²⁴ have been applied to the reasoning of jurors, lawyers and, yes, Judges. To give just one example, their theory of anchoring and adjustment (that is, that decision makers start with a suggested "anchor" and then make adjustments to reach a result) has been experimentally demonstrated to apply to both novice and experienced Judges sentencing a hypothetical rape case.²⁵ Another study suggests that highly specialised Judges are as susceptible to such biases as their generalist counterparts.²⁶

27. Also relevant is a very recent study at Duke University which describes a phenomenon the authors term "Solution Aversion", which should be of particular interest to Judges.²⁷ The authors demonstrate that the instinctive, subjective attraction of a solution affects the degree of *belief* in the anterior problem. Participants were told of a scientific prediction about the projected level of global warming. Some participants were told the proposed policy solution was to be achieved through a free market. Others were told it was to be achieved by a greater level of regulation. Republican participants who were told of the free market solution were more than twice as likely to accept the scientific statement *itself* than those told of the regulation solution. These results were reflected by Democrat participants in relation to gun control. If our natural propensity to accept information as true depends in part on the desirability of the consequences, we must be careful. After all, the daily task of first-instance Judges involves evaluating such information in circumstances where they know all too well

²³ Numerous such examples are cited by Epstein and Knight 'Reconsidering Judicial Preferences' *Annu. Rev., Polit. Sci.* 2013. 16:11-31, 13.

²⁴ Tversky & Kahneman (1974) Judgment under uncertainty: heuristics and biases. *Science*, 185 (41570), 1124-1131.

²⁵ Enough & Mussweiler (2001) Sentencing under uncertainty: anchoring effects in the Courtroom *Journal of Applied Social Psychology*, 31(7), 1535-1551.

²⁶ Rachlinski et al, 'Heuristics and Biases in Bankruptcy Judges' *Journal of Institutional and Theoretical Economics*, Vol 163, No 1, March 2007, pp. 167-186(20)

²⁷ Findings published in Campbell et al, 'Solution aversion: On the relation between ideology and motivated disbelief.' *Journal of Personality and Social Psychology*, Vol 107(5), Nov 2014, 809-824.

what the consequences of a particular finding will be.

28. One study summaries its conclusions as follows:

“Judges, it seems, are human. They appear to fall prey to the same cognitive illusions that psychologists have identified among lay persons and other professionals... Even if judges are free from prejudice against either litigant, fully understand the relevant law, know all of the relevant facts, and can put their personal politics aside, they might still make systematically erroneous decisions because of the way they – like all humans – think.”²⁸

29. Such conclusions are entirely predictable, and they should give rise to concern, but not to alarm. As I have suggested, Judges are human, and therefore it is inevitable that they are susceptible to cognitive bias. We all, especially the Judges themselves, should be aware of it, as it is only by being aware of such potential for error that it can be avoided or mitigated.

30. Judicial education, both for judicial beginners and for experienced Judges, has been impressively developed over the past forty years or so in the UK. The Judicial Studies Board, now the Judicial College, was founded in 1979, and it has grown in influence and importance under a succession of inspiring judicial chairmen, and Northern Ireland has followed suit with its Judicial Studies Board (1994), as has Scotland with its Judicial Institute (2013).

31. I believe by far the most important aspect of its teaching is judge-craft, if I may call it that. Substantive and procedural law are obviously of central importance, but they will be part of all Judge’s experience in their previous careers, they are readily accessible in books and in on-line libraries and the like, and they will be the subject of specific arguments in each case. Understanding how to think and act as a first-class Judge, on the other hand, is not part of

²⁸ Guthrie et al ‘Judging by heuristic: cognitive illusions in judicial decision making’ (2002) 86 *Judicature* 1, 44, 50, itself abstracting the authors’ article *Inside the Judicial Mind*, 86 *Cornell L Rev* 777 (2001)

a lawyer's normal legal experience or education, except through watching Judges at work. The College has done excellent work on judge-craft, how to control a court, how to deal with difficult applications and litigants, how to compose a judgment and the like. I would suggest that the topic of subconscious bias, although in its infancy, should now achieve a more prominent position. As a result of the recent research and disclosures I have been discussing, it seems to me that the time has come to address that thorny issue as part of judicial education.

Apparent bias

32. If such scientific studies can offer such important insights into how Judges actually think, this doesn't alter how they are thought to think. This leads me from cognitive bias to apparent bias. It is perhaps appropriate to remind ourselves of the judicial oath itself, whereby each and every new Judge undertakes to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will."²⁹ Within the legal system itself, the law of bias represents an obvious source of judicial self-scrutiny, protecting litigants as it does from that very fear, favour affection or ill will.³⁰

33. Famously, justice must not just be done, but must be seen to be done. Accordingly, where a Judge has a financial interest in the outcome of the case, the law is relatively strict, as was confirmed by the Court of Appeal in 1999 in a case³¹ decided by Lord Bingham, Lord Woolf and Sir Richard Scott – Tom, Dick and Harry, you might say. In these days of capitalist democracy, unit trusts and so on, it is tedious and a little ridiculous in most circumstances to expect judges to declare that they own a few shares in a publicly quoted company, or that they are council tax payers of a council, which is party in the case. Having discussed the

²⁹ <http://www.judiciary.gov.uk/about-the-judiciary/oaths/>.

³⁰ Not least because judges typically consider their own recusal applications, on which, see below.

³¹ *Locabail(UK) Ltd v Bayfield Properties Ltd* [2000] QB 451

matter among ourselves, and with our court users group, the Supreme Court will shortly issue a statement saying that we will not routinely give out such information to the parties, but, in a particular case where the parties think such information is warranted, they would obviously be entitled to ask.

34. More generally, the modern law of apparent bias finds its source in the speech of Lord Hope in *Porter v Magill*³². The question to be answered is whether the circumstances are such as would lead a “fair-minded and informed observer” to conclude that there was a “real possibility” that the tribunal was biased. Of all of the menagerie of legal fictions with season tickets on the Clapham Omnibus (as entertainingly described by Lord Reed in his judgment in *Healthcare at Home*)³³ the fair minded and informed observer is perhaps the most fleshed out. She³⁴ has been attributed with an ever-growing catalogue of characteristics.³⁵ She is “neither complacent nor unduly sensitive or suspicious”,³⁶ she “always reserves judgment on every point until she has seen and fully understood both sides of the argument”³⁷, and “takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context.”³⁸
35. Significantly for present purposes, this character “knows that Judges, like anybody else, have their weaknesses”³⁹ but also that they “are trained to have an open mind”. She will “be aware of the traditions of judicial integrity and of the judicial oath”, and will “give it great weight”.⁴⁰

³² [2001] UKHL 67

³³ [2014] UKSC 49:

“The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society, familiar from the law of defamation, the officious bystander, the reasonable parent, the reasonable landlord, and the fair-minded and informed observer, all of whom have had season tickets for many years.”

³⁴ “She” may be the more correct gender-neutral pronoun: *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, per Lord Hope at [1]

³⁵ As ably catalogued by Olowofoyeku in ‘Bias and the informed observer’ (2009) CLJ 338, 393-396.

³⁶ Comments approved by Lord Steyn in *Lawal*

³⁷ *Helow*, [2]

³⁸ *Helow*, [3].

³⁹ *Helow*, [2].

⁴⁰ *Robertson v HM Advocate* 2007 SLT 1153 per Lord Justice-Clerk (Gill) at [63]

She is imputed with the knowledge that the undoubtedly close relationships between the judiciary and the legal profession (not least in the Inns of Court) “promote an atmosphere which is *totally inimical* to the existence of bias”,⁴¹ while not being “wholly uncritical” of legal culture.⁴² So she is sceptical about the notion that a Judge may be biased.

36. The idea that English legal culture itself could not give rise to bias may appear to some to be admirably self-confident and to others rather self-congratulatory. However, the current stance is as much pragmatic as it is principled. It is all too easy for a litigant who does not want his case heard by the assigned Judge, or wishes to postpone a hearing, to conjure up reasons for objecting to a particular judge. It is contrary to justice for one party to be able to pick the judge who will hear the case. In small jurisdictions or in specialised areas of work, it is not always easy to find an appropriate judge, and if the objection is taken, as it often is, at the last minute, it will often lead to delay and extra cost for the parties and the court.

37. Whatever the correct approach, one question relating to bias is the wisdom of the English approach whereby judges assess their own recusal applications. This is one form of judicial self-scrutiny that poses real practical problems. Some Judges are too reluctant to recuse themselves, as they find it hard to believe that they could be seen as biased, because they are rightly of the view that they are not biased. Other Judges tend to be too ready to “play safe” and recuse themselves, because they do not want to risk presiding over a case where one party feels that the proceedings are unfair.

38. In a persuasive article written in 2011, Lord Justice Sedley⁴³ explained, in characteristically elegant terms, why it should not be the judge in question who decides the issue:

⁴¹ *Taylor v Lawrence* [2002] EWCA Civ 90, emphasis added

⁴² *Lawal*, [22].

⁴³ Lord Justice Sedley, ‘When should a judge not be a judge?: Recuse yourself’ LRB Vol. 33 No. 1 (6 January 2011)

“[T]he important thing is that the system should not compound one paradox – a judge who is unbiased but might reasonably be thought not to be – with a further paradox: a judge who, in order to decide whether he will be sitting as judge in his own cause, has to sit as judge in his cause.”

39. There may be much to be said for recusal applications being made to a different Judge, particularly when one considers that the purpose behind the stringent approach to apparent bias taken in this country is about preserving public confidence in the quality of justice and the quality of Judges.⁴⁴

40. So much, then, for how judges think. I turn to the issue of what they do.

Judges as lawmakers

41. In 1980, Lord Diplock said that “Parliament makes the laws, the judiciary interpret them”.⁴⁵ By that he meant that, where Parliament has legislated, it is for the courts to interpret the legislation, not to rewrite it. But the statement is sometimes invoked to support the view that Judges have no business in making law. That view fails to understand the nature of the task that a common law Judge in developing the law. Judges are and always have been lawmakers; this is inherent in their constitutional role in a common law system. Indeed, even 150 years ago, and maybe more recently, more English laws were made by judges than by legislators. The balance of the functions, a practical matter, may have changed, but the nature of the functions, a matter of fundamental principle, has not.

42. The notion that Parliament is the only body engaged in law-making in the wider sense is demonstrably untrue and it does not involve so-called “judicial supremacism” to suggest

⁴⁴ as Lord Steyn made clear in his speech in *Lawal v Northern Spirit* [2003] UKHL 35

⁴⁵ *Dupont Ltd v Sirs* [1980] 1 WLR 142, 157 per Lord Diplock. See also Lord Mustill in *Ex p Fire Bridges Union* [1995] 2 AC 513 at 597.

otherwise. An article last year identified “tiers of relative invisibility” as the law-making function is diffused across a spectrum of “intermediate law-makers”, such as lobbyists, regulatory bodies and Judges.⁴⁶ A Judge is often called upon to make new law, whether by developing existing principles to address novel situations or lacunae, by interpreting and reinterpreting legislation and statutory instruments, or, more controversially, by revisiting established principles in light of social change.

43. In 1970, Lord Reid elegantly identified the quandary which faces Judges in this context:

“People want two inconsistent things; that the law shall be certain, and that it shall be just and move with the times. It is our business to keep both objectives in view. Rigid adherence to precedent will not do. And paying lip service to precedent while admitting fine distinctions gives us the worst of both worlds. On the other hand too much flexibility leads to intolerable uncertainty.”⁴⁷

44. And, around the same time, but in a judgment, he said that “it is now widely recognised that it is proper for the courts ... to develop or adapt existing rules of the common law to meet new conditions.”⁴⁸ However, he went on to suggest that “issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers”, “it is not for the courts to proceed on their view of public policy for that would be to encroach on the province of Parliament.”⁴⁹

45. The most frequently quoted judicial observation about the Judge’s law-making role is probably in Lord Browne-Wilkinson’s judgment in 1993 in the well-known *Bland* case, which concerned the withdrawal of treatment from a patient in a persistent vegetative state

⁴⁶ Jonathan Montgomery et al, *Hidden Law-Making in the Province of Medical Jurisprudence* (2014) 77(3) MLR 343

⁴⁷ *op cit.*, 183.

⁴⁸ *Pettitt v Pettitt* [1970] AC 777, 794

⁴⁹ *Ibid.* 794-5.

following the Hillsborough disaster:⁵⁰

“Where a case raises wholly new moral and social issues, in my judgment it is not for the judges to seek to develop new, all embracing, principles of law in a way which reflects the individual judge’s moral stance when society as a whole is substantially divided on the relevant moral issues. ... The judges’ function in [such an] area ... should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society. If Parliament fails to act, then judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises. But in my judgment that is not the best way to proceed.”

46. But, as Lady Hale has pointed out extra-curially, Parliament, unlike the courts, has the option of not acting. By contrast, “If [Judges] are presented with a case within their jurisdiction they cannot refuse to decide it, however much they might like Parliament to tell them what to do.”⁵¹ Further, Lord Reid and Lord Browne-Wilkinson made the observations just quoted before the passing of the Human Rights Act 1998, whose effect has inevitably been to heighten these tensions in judicial decision-making. The 1998 Act is not merely an authorisation, but an invitation, even a stipulation, by Parliament to the judiciary to “make law” in areas into which the judiciary has traditionally been reluctant to step or even conventionally prohibited from stepping.

47. The revolutionary effect of the 1998 Act is, in summary terms, threefold. First, Judges are now called upon more frequently to rule on moral and political issues, given that is what human rights involve. This means that we have to engage on a review of the merits of any decision or action which impinges on an individual’s fundamental rights. Before the 1998

⁵⁰ [1993] A.C. 789, 879.

⁵¹ Lady Hale, ‘Law maker or law reformer: what is a law lady for?’ (2005) *Irish Jurist* 1, 14.

Act, our role in relation to government acts was more circumscribed. Secondly, Judges must perform a quasi-statute-writing function as section 3 of the 1998 Act requires Judges to read and give effect to legislation “[s]o far as it is possible to do so ... in a way which is compatible with the Convention rights”. If legislation does not appear to comply, we must, if we can, recast it so that it does comply. Thirdly, under section 4 of that Act, Judges must tell Parliament when legislation cannot be made to comply and, with one exception (prisoners’ votes), it has done so.

48. While these judicial powers are new in the United Kingdom, three points must be made. First, they were conferred by Parliament not grabbed by the Judges. Secondly, in a country with a written constitution (ie in almost every other democratic country in the world) these powers would be unsurprising. Thirdly, at least in the view of many legal and political thinkers, these powers are necessary if the rule of law is to prevail, particularly considering the ever-greater powers of the executive branch of government

49. The reasoning in the judgments of the Supreme Court in the *Nicklinson* case in 2014⁵² on the lawfulness of the blanket criminalisation of assisting a suicide, provide a contrast with the judicial self-denial expressed by Lord Browne Wilkinson in the life-support case of *Bland* in 1993. Comparison of the judicial approach in the two case provides some sort of indication as to how things have moved on over the past twenty years or so. In *Nicklinson*, two members of the nine-Justice panel were prepared to go so far as to hold the blanket ban incompatible with the Convention; three were open-minded on the possibility of doing so, if Parliament did not grapple fully and properly with the issue; and four were more restrained, but did not wholly rule out the possibility of holding the blanket ban incompatible. Lord Reed who was one of the more restrained four, put the point very well:

⁵² R (*Nicklinson*) v Ministry of Justice [2014] UKSC 38

“[T]he Human Rights Act introduces a new element into our constitutional law, and entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature. It does not however eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their procedures, their accountability and their legitimacy.”

50. But the 1998 Act is not a substitute for the common law, and it should not have the effect of marginalising the common law, which should be reinforced not undermined by the introduction of human rights. This point was emphasised in two recent Supreme Court appeals, namely *Osborn v Parole Board*⁵³ and in *Kennedy v Charity Commissioners*⁵⁴. In each appeal, the appellants had based their case on human rights, but they succeeded in common law, and in *Kennedy*, in circumstances where the human rights claim failed. In that case, echoing what Lord Reed had said in the earlier case, Lord Toulson observed that:

“The growth of the state has presented the courts with new challenges to which they have responded by a process of gradual adaption and development of the common law to meet current needs. This has always been the way of the common law and it has not ceased on the enactment of the Human Rights Act 1998, although since then there has sometimes been a baleful and unnecessary tendency to overlook the common law. It needs to be emphasised that it was not the purpose of the Human Rights Act that the common law should become an ossuary.”

And, as Lady Hale has colourfully put it “there may be new toys in the nursery but the judges play with them in much the same way as they played with the old ones”.⁵⁵

⁵³ *Osborn v Parole Board* [2013] UKSC 61

⁵⁴ *Kennedy v The Charity Commission* [2014] UKSC 20

⁵⁵ Lady Hale ‘Law make or law reformer: what is a law lady for?’ (2005) *Irish Jurist* 1, 14.

51. Whether the Judges are developing the law under their traditional common law powers or under their newly accorded human rights powers, it has been cogently suggested that this constitutional role of the judiciary is not to be feared but embraced:

“The courts share in the task of policing the boundaries of a rights-based democracy with the legislature and executive; their role is complementary to that of Parliament, and of the executive. To decry the quasi-constitutional functions of the courts as a step towards judicial supremacy is to deny the distinctive functions of the legislative and judicial branches. It also denies the crucial constitutional role of the courts in their habitual recognition of Parliament as sovereign. The constitutional functions and authority of the courts, therefore, form the embodiment of the balanced constitution in its modern incarnation.”⁵⁶

52. The question of the judiciary’s relationship with Parliament and the executive most clearly comes to a head when the question of what is usually, inelegantly, termed ‘deference’ is raised.⁵⁷ As Lord Sumption has recently explained, “deference” represents two distinct but overlapping principles, namely what might be termed “constitutional deference”, based on the constitutional principle of separation of powers and “institutional deference”, which represents a pragmatic recognition of the evidential value of certain judgments of the executive or Parliament on the basis of the specialist institutional competence.

53. The difficulty with applying a principle with its basis in the separation of powers and functions is that one must first express a clear understanding of precisely where these lines are drawn in our unwritten constitution. In the recent *Carlile* case⁵⁸ there is a marked distinction of view. The case concerned a decision of the Home Secretary to prevent a dissident Iranian politician from entering the country following an invitation from a number

⁵⁶ J Murkens & R. Masterman ‘The New Constitutional Role of the Judiciary’ (2014) LSE Policy Briefing 2

⁵⁷ *R (Prolife Alliance) v BBC* [2003] UKHL 23 at [75] per Lord Hoffmann. Lord Sumption also criticises the term in a recent decision of the Supreme Court in *Carlile*, on which more below.

⁵⁸ *R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60

of members of the House of Lords. Lord Sumption (in the majority upholding the Home Secretary's decision) considered that "the Human Rights Act 1998 did not abrogate the constitutional distribution of powers between the organs of the state which the courts had recognised for many years before it was passed"⁵⁹, whereas Lord Kerr, dissenting, appears to consider that this distribution of power *was* so altered.⁶⁰ The reason I draw attention to this difference is that the precise constitutional role of the judge may itself be determinative of questions judges have to decide, as it was in *Carlile*.

Conclusion

54. Francis Mann was at heart a legal realist; he recognised that "in general, irrespective of legal niceties, meritorious litigants won cases and unmeritorious litigants lost them."⁶¹ The more we understand and recognise the way judges as decision-makers work, the greater our ability to avoid errors and biases. Platonic ideals of judicial decision-making which do not acknowledge the reality of Judges as human beings are doomed to fail. Judicial automatons are not just an unattractive option; they cannot exist. Instead we must approach the task of judging in a manner which embraces, rather than eschews, our humanity. We should do so more openly and more honestly.

55. Alongside better understanding Judges we must endeavour properly to understand their constitutional role; only by recognising that Judges are law-makers and being transparent about their relationship with the other branches of government.

56. Judges currently have to shoulder the dual task of acting within their constitutional role while also policing the boundaries of what that role is. This is an unavoidable consequence of our

⁵⁹ Ibid, [28].

⁶⁰ Ibid, esp [159] and [175].

⁶¹ Lawrence Collins, op. cit. p.436.

current constitutional position. I have referred more than once this evening to the recent increase in judicial powers. With that increase in judicial power comes not merely an increase in judicial responsibility, but an increase in the need for judicial self-awareness and self-restraint. I started with a couplet from the 18th century Augustan poet, Alexander Pope, but in what some may regard as a rather pathetic attempt at illustrating how judges try to keep in touch, I shall end with a motto from the Spiderman films “with great power comes great responsibility”.

David Neuberger

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