

The Role of Judges in a Representative Democracy

Lecture given during the Judicial Committee of the Privy Council's Fourth Sitting in The Bahamas

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1. The topic suggested to me reminds me of David Foster Wallace's fable of the fish:

Two young fish are swimming along and they happen to meet an older fish swimming the other way, who nods at them and says "Morning, boys. How's the water?" And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes "What the hell is water?"

2. As judges, we react intuitively to cases, though Daniel Kahnemann's book *Thinking fast and slow* warns us of the dangers of over-reliance on intuition. We also spend much time deliberating slowly about lawyers' submissions and past caselaw. But, consciously or unconsciously, we all have some form of judicial philosophy, some way in which we approach our role as *judges in a representative democracy*.
3. Representative democracy reminds us ineluctably of Edward Burke, the advocate of Parliamentary independence of thought. But, more than two hundred years after Burke and Wilberforce, the reality in Westminster model democracies is that the executive has a strong control over the legislature. Parliament in the 17th century prevailed over the Crown, but in modern times the Executive rules through Parliament. At the same time, we have seen increased state intervention in everyday life, greater awareness of individual rights and less deferential attitudes to authority. All this has affected judicial activity and public expectations of the judiciary.
4. The judiciary is the third pillar of the state. In identifying and applying the common law, it is a primary actor. In giving effect to legislation it is more than an agent of the legislature. Rather it is a junior partner, mediating by interpretation between the legislator and society.

5. More fundamentally, the judiciary stands as a counter-weight to the other two pillars, the legislature and the executive. Each needs the other, even if they are sometimes in healthy tension. The judiciary ensures that the pillars stay within their spheres and act in accordance with the law. Greater executive activity has given this role greater prominence. The judiciary also stands for certain values. In The Bahamas, many of these are prominently expressed in the constitution, with its fundamental rights Chapter III. Others have been established by constitutional case law of the Privy Council and local appeal courts.

6. Representative democracy contrasts with Athenian style direct democracy, or rule by referenda. Referenda can have unpredictable effects. Some have suggested that the UK's most recent experience, the third in fifty years, may even have contributed to the election of an American president! It also led to the UK Supreme Court's recent decision in *Miller v SoS for Exiting the EU* [2017] UKSC 5. We had to consider, among other points, whether the referendum vote to leave the EU confirmed that the Executive could, by use of the royal prerogative, give notice to leave the EU, without the prior sanction of a Parliamentary statute. The legislation providing for the referendum did not state the consequence of a Leave or a Remain vote. We held, by a majority of 8 to 3, that it remained for the UK Parliament to decide by statute whether the UK should leave the EU. We also held that the devolved legislatures (Scotland, Northern Ireland and Wales) had no legal right to a direct role in this decision.

7. I am concerned with the nature and exercise of the judicial role. But it is worth looking briefly at some essential pre-conditions to effective judicial activity: part institutional, part personal.

8. Institutionally, there must be a due separation of powers. The judiciary must be able to operate independently of the other two branches. That should be guaranteed at the highest constitutional or legal level: see Opinion No 1 (2001) of the Council of Europe's Consultative Council of European Judges ("CCJE"), para 14¹. This principle has been held to underlie Westminster model constitutions, in a series of remarkable cases from all over the Commonwealth: *Lijyanage v The Queen* [1967] 1 AC 259, *Hinds v The Queen* [1977] AC 196; *Abnee v DPP of Mauritius* [1999] 2 AC 294; *R (Anderson) v Secretary of State for the Home*

¹ The CCJE's Opinions are available on the Council of Europe's website, and examine many different aspects of the judicial role.

Department [2002] UKHL 46; [2003] 1 AC 837; *DPP of Jamaica v Mollinson* [2003] UKPC 6; [2003] 2 AC 411 and *The State v Khoratty* [2006] UKPC 13². It was described in them as “a characteristic feature of democracies”, “based on the rule of law”.

9. Separation of powers means security of tenure, normally until a defined retirement age³. Unlike the current English position, Westminster model constitutions still distinguish in this respect between a senior judiciary, who enjoy such security, and lower levels, such as magistrates, who do not, since they may enjoy only short-term engagements. Security also means freedom from significant disciplinary sanctions save after a judicial process for good cause, appropriate facilities, adequate guaranteed remuneration, and control over core judicial activities, such as listing and deployment. In some systems, judges also have their own budget and greater control over courts and their management, despite the administrative burden. Promotion at least should also be on objective, non-political grounds. Some countries operate politically based systems for initial, and some even for appellate, appointments, though I myself do not see that as a model to follow. Inevitably, some of these pre-conditions can only be fulfilled with the cooperation of the legislature and/or executive: where else, for example, is a budget to come from?
10. Individually, a judge must also be both honest and incorruptible and independent of the parties and issues before him.
11. A more basic pre-condition for the effective exercise of the judicial role is acceptance by society at large and mutual institutional understanding, indeed dialogue – even if sometimes rather tense - with the other pillars of the state. The common law only established itself by taking account of the needs, attitudes and values of the communities and individuals it serves. The other side of the coin is that all three pillars of the state need to be sensitive to and respect each other’s roles. In 1788, Alexander Hamilton predicted in Federalist paper No. 78, that the Judiciary would be the weakest of the three branches of the proposed US government, because it would have "no influence over either the sword or the purse, ...It

² Lord Bingham of Cornhill observed in *Mollinson*, para 13: “Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as ‘a characteristic feature of democracies’: *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837, 890-891, para 50.” This was quoted by Lord Steyn in *Khoratty*, para 13.

³ Though ad hoc extension or re-engagement at a time when all judicial ambition is spent exemplifies why this is not an absolute rule.

may truly be said to have neither FORCE nor WILL, but merely judgment." That is true, but, if put into effect, the state would no longer function under the rule of law. The probably apocryphal statement of President Andrew Jackson about Chief Justice Marshall's decision in *Worcester v Georgia* 1832: "He has made his decision. Now let him enforce it!" is a recipe for the end of the judicial role and indeed of democracy. When alive, Jackson is reported as saying "I was born for the storm, and calm doesn't suit me". Recent photo shoots show that President Trump has moved a portrait of Andrew Jackson into the Oval Office.

12. However that may be, a better model for the co-existence of the three pillars is found in Lord Hope's attractive dictum in *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262 at [25];

"In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey at p 3 likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other. In *Pickin v British Railways Board* [1974] AC 765, 788A-B Lord Reid observed that for a century or more both Parliament and the courts have been careful to act so as not to cause conflict between them. This is as much a prescription for the future as it was for the past."

13. In *Vriend v Alberta* [1998 1 SCR 493, where the Canadian Supreme Court held refusal to employ a homosexual to be contrary to the Charter, Justice Iacobucci described the inter-relationship as a dialogue, with a positively democratic element:

"136 In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches.

139. To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the Charter). This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it."

14. How then is the judicial role to be defined? In *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837, 890-891, [50], Lord Steyn quoted from Windeyer J⁴. who had said:

“The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law.

Nevertheless it has long been settled in Australia that the power to determine responsibility for a crime, and punishment for its commission, is a function which belongs exclusively to the courts: ...”

15. Thus, in *Liyanaige*, the legislature usurped the judicial role, when it legislated ad hominem to change procedure and redefined criminal offences to assist the prosecution of individuals allegedly involved in an attempted coup d'état. In *Hinds*, it did so, when it transferred judicial power to a New Gun Court, the majority of whose members did not qualify as judges under the Constitution. In *Kboyratty* the JCPC upheld the Mauritius Court of Appeal's decision that, since the grant or refusal of bail is an essentially judicial function, a constitutional amendment removing any right to bail pending trial in terrorism or serious drugs cases (which could mean for years) was not merely contrary to the separation of powers, but so antithetical to the concept of democracy as to infringe the most deeply entrenched provision of the Constitution of Mauritius, section 1, providing that Mauritius shall be a sovereign democratic state.

16. If the legislature must not impinge on the judicial sphere, one may say that judges should avoid law-making and should stick to identifying and applying the law. And this is certainly an important general distinction. Law-making is essentially political, while identifying and applying the law is the role of the courts. Judicial decisions may have political implications, but that does not make them political. They are decided on legal argument and a legal basis. We were at pains to draw attention to this in *Miller*, and it is critical that it should be appreciated.

⁴ In *R v Trade Practices Tribunal, Ex p Tasmanian Breweries Pty Ltd* [1970] HCA 8; (1970) 123 CLR 361, 394.

17. But it will already be clear - from what I have already said about the judges' responsibility for the common law and for the interpretation of statute law – that applying the law is not an exercise in logic or mathematics. Indeed, pace Oliver Wendell Holmes, who said: “*The life of the law has not been logic; it has been experience*”, the life of the law is not just past experience, it is often closely related to an assessment of the future consequences of what will be decided.
18. For a long time, judges down-played the implications of their role. Indeed, in the interests of legal certainty or perhaps for fear of undermining their authority, they denied it. According to what is called the “declaratory” view of the common law, in its most traditional guise, the common law never changed. The judges merely revealed it from time to time. In the late 17th century, Sir William Blackstone, first Vinerian Professor of English law in Oxford, and later a colleague of Lord Mansfield on the bench, argued that the common law was rooted in Saxon law. Over 200 years later, Lord Esher MR, later Viscount Esher, subscribed to a similar view to Blackstone's, saying in *Willis & Co v Baddeley* [1892] 2 QB 324, 326:

“This is not a case, as has been suggested, of what is sometimes called judge-made law. There is, in fact, no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply existing law to circumstances as to which it has not been authoritatively laid down that such law is applicable”.

19. Put in these extreme terms, the declaratory theory, with its natural law overtones, was a useful protective device. It avoided questions about the legitimacy of judges to develop the law. The modern press encourages us to think about such questions. It asks who these unelected judges are, but does not always consider whether we might be worse off if judges were elected, or how the common law would have developed to meet modern needs without judicial activity⁵.
20. It is nearly 50 years ago since Lord Reid openly acknowledged extra-judicially that it was a fairy tale to suggest that judges do not make the common law. A notice in the exhibition

⁵ The declaratory theory was not confined to the common law. Montesquieu saw the judge as “La bouche de la loi” – the mouthpiece of the law. Article 5 of Napoleon's Code civil, enacted against a background of abusive misuse of power by pre-Revolutionary judges and still in force, went so far as to pronounce: « Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises ». It is perhaps responsible for the laconic reasoning of the Cour de cassation to this day.

space in the Privy Council's home in Parliament Square is, I think, appropriately open about the position:

“[Judges] will consider the implications of [a] decision, and will ensure that it is consistent with the general purpose and scheme of the law or principle concerned.....

Judging is thus not a science, but a discipline. The good judge is loyal to well-established approaches and methods of reasoning. But she or he may in the last analysis have to exercise an important judgment as to the relevant weight of different and sometimes competing considerations, in deciding in which sense to state or restate the legal position.”

21. This is not to say that the declaratory theory has no continuing use. It is a way in which we explain why a development in the law or an over-ruling of a prior authority affects the case in which it occurs *and* all other cases, past or present – rather than having purely prospective effect as a change for the future. In that respect, the theory amounts to a pragmatic acknowledgement of the possibility of judicial error or second thoughts. The law is occasionally prone to that risk, like any other human institution.

22. If judging is a discipline, not a science, what are the disciplinary controls? The exhibition notice mentions loyalty to well-established approaches and methods. These are epitomised by the common law use of precedent and analogy. They help ensure consistency, the hallmark of any system of law or equitable adjudication. But it can also have dangers. In the USA, when oil and gas started to attract litigation, courts initially invoked the rule of capture, which applied to wild animals. They soon found this an unhelpful analogy. David Hume in *‘An Enquiry concerning Human Understanding* accurately described experiences which many of us, I suspect, have had:

“If direct laws and precedents be wanting, imperfect and indirect ones are brought in aid; and the controverted case is ranged under them by analogical reasoning and comparisons, and similitudes, and correspondencies, which are often more fanciful than real.”

Judge Posner in *The Problems of Jurisprudence* (p.83) has noted that a proliferation of precedents may be a warning, rather than an encouragement. They may show that the rule to which the precedents relate has proved an irritant – producing a blister, rather than a pearl.

23. What then where there is no direct precedent and no helpful analogy? As even Lord Esher accepted, judges have often to consider what or whether a common law rule applies to a particular, perhaps novel situation. The common law tends to develop incrementally and cautiously, to that extent perhaps even experimentally in a scientific way. The process has been attractively compared by Professor Ronald Dworkin⁶ with the production of a chain novel by a series of different novelists, each adding a chapter, with the task of achieving as much overall coherence as possible and, one might add, with the final chapters perhaps providing some generalised key to all that preceded.
24. The process is particularly evident in the field of tort. *Hedley Byrne v Heller & Partners* [1964] AC - which upset university finalists by appearing on 28th May 1963 just before their final exams when I was at Oxford – drew on prior authority to identify a general principle of liability for negligent misrepresentation causing financial loss in contexts of proximity akin to contract, where one party had to the knowledge of the other justifiably relied on the other’s representation. But sometimes the law is too quick. *Anns v Merton LBC* [1978] AC 728 generalised the liability of local authorities towards owners of houses suffering from the effects of negligence by local authority building works inspectors performing their statutory duty. Within 13 years the principle was found to operate in an unsatisfactorily haphazard way, and was overruled in *Murphy v Brentwood DC* [1991] 1 AC 398. A recent attempt to resuscitate it by reliance on the state’s duty to respect and protect private life was rejected in *Gresty v Knowsley DC* [2012] EWHC 29 (Admin).
25. The exhibition notice also mentions the judicial role in assessing the weight of different considerations, when deciding how to state or restate the law. Two recent UK Supreme Court cases evidence this process. In *Patel v Mirza* [2016] UKSC 42, the Court restated the law of illegality, moving away from Lord Mansfield’s inflexible rule that no-one can rely on illegality, with the result that loss lies where it falls. In *Willers v Joyce* [2016] UKSC 33 & 34, the Supreme Court accepted a general right to claim damages for malicious pursuit of a civil action: In each, the Court might even be said to have trod boldly, rather than incrementally, but you can discount that, as I along with Lord Sumption, dissented in each!

⁶ In *Law’s Empire*.

26. In a series of cases, the UK Supreme Court has reminded counsel not to forget the common law or to treat it as beyond the age of child-bearing: *R (Guardian Newspapers) v City of Westminster Magistrates Court* [2012] EWCA Civ 420; [2013] QB 68, [88]; *Osborn v Parole Board* [2013] UKSC 61; *HS2* [2014] UKSC 3; and *Kennedy v The Charity Commission* [2014] UKSC 20. With the domestication of fundamental rights under the Human Rights Act, we found that issues or supposed issues were being pursued under the ECHR, which were or could have been covered by the common law. In the same vein, the Privy Council has emphasised that, where there are common law remedies, e.g. in contract or tort, it is inappropriate, and unhelpful, to try to dress the claims up as constitutional issues.
27. Let me say a word about contract. The judge's role is to give effect to the parties' intentions, derived from the words used in the light of the terms of the contract as a whole and the surrounding circumstances known or taken to have been known by the parties when they made the contract – excluding evidence of contractual negotiations. Some academics think that recent Supreme Court and Privy Council case law shows a continuing tension between literalist or textualist and purposive or consequentialist interpretation of contractual language. Since judges on both sides of this case law insist that there is nothing between them in principle, it is a matter of impression whether any difference exists in the actual decisions they reach. All I add, having recently attended as conference with German lawyers, is that the common law is probably still at the textualist end of the range compared with other European laws.
28. If judges have a certain freedom in relation to the common law, since it is after all their creation, what of the judicial role in relation to written or statute law? It is here that the judicial role is most sensitive. The common law legislator often speaks in very detailed terms, but still there are situations overlooked or ambiguity. The courts have inevitably to decide whether and if so how the gap can be filled or how to resolve any ambiguity.
29. Traditionally, courts relied on technical rules of textual construction, some still useful. But today our approach parallels in an elevated way that of contractual interpretation. We examine the words used in the context of the scheme as a whole and against the background of whatever is identified as the "mischief" which the statute set out to address. A purposive construction is increasingly supported by reference to general principles which it is assumed that the legislature will have intended to observe. There is a presumption against any

intention to legislate with extra-territorial effect; a presumption against penalisation of any activity by doubtful words; and, most importantly, a conception of fundamental common law rights – e.g. the right to liberty, the right to free speech, the right not to incriminate oneself and the right to legal professional privilege in respect of one’s communications with a legal adviser. In *R v. Secretary of State for the Home Department ex Parte Simms (A.P.)* Lord Hoffmann said

“Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”

The majority in the *Miller* case relied on this principle when concluding that Parliament, when it signed the UK up to EU law and law-making processes by the European Communities Act 1972, cannot have intended to leave it to the executive to sign the UK out at any stage without Parliamentary blessing.

30. *Ex p Simms* was decided in the UK context, where Parliament is sovereign. Since October 2000, this principle has a statutory homologue, since UK courts are obliged to interpret legislation as far as possible consistently with the ECHR. In The Bahamas, the Constitution with its fundamental rights Chapter III prevails over any contrary provision (article 2) and enables the courts to make such orders as it considers appropriate to enforce or secure such rights. But the principle in *ex p Simms* still represents a first port of call, often enabling the courts to avoid inconsistency with fundamental principles, whether or not located in a constitution.

31. This brings me to a fourth, core and sometimes controversial role of judges in a representative democracy: that is, in relation to public and constitutional law issues. In *Matadeen v Pointu* [1998] UKPC 9, the JCPC noted that

“... constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The

context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge A.J. said in giving the judgment of the South African Constitutional Court in *State v. Zuma* [1995] (4) B.C.L.R. 401, 412:-

"If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

32. In a constitution, society expresses its commitment to enduring principles of which judges are to be the future guardians, whatever may from time to time be the vicissitudes of majoritarian or political opinion. It is easy to protect the interests of the majority or the popular. But, as Justice Iacobucci observed in *Vriend v Alberta*, "The concept of democracy is broader than the notion of majority rule, fundamental as that may be". Where the law matters is when it protects the legitimate interests of unpopular minorities, including those strongly suspected of committing or intending very serious misdeeds. Those interests include due process and freedom from punishment without a finding of guilt. Thus, when it comes to the fight against terrorism, as the former Chief Justice of Israel, Aron Barak, said: "Sometimes, democracy fights with one hand tied behind its back. Nonetheless, it has the upper hand⁷".

33. A major achievement of common law courts over the last forty years has been the modernisation and formulation of judicial review principles. Generally expressed statutory

⁷ *Public Committee against Torture v Israel*, 26 May 1999, HC 5100/94.53(4) PD 817, 845.

powers must be exercised only for the purposes for which they were created. Decision-makers must observe due process, acting fairly and reasonably. Expectations about procedural steps such as consultation, and, more controversially, expectations about substantive rights may have to be respected: see most recently *United Policyholders Group v Attorney General of T+T* [2016] UKPC 17. All these are judicially led developments.

34. Courts also review decision-making for its substantive reasonableness. Traditionally this has been only in the diluted *Wednesbury* sense, that censures decision-making which no reasonable decision-maker could have reached. But increasingly it has been recognised that the intensity of review may increase, depending on the nature of the interests at stake, and their suitability for judicial review. The emergence of fundamental rights chapters, charters or conventions has also introduced the concept of proportionality, which the common law has started to pick up in allied areas: see e.g. *Kennedy v The Charity Commission* [2014] UKSC 20. On the other hand, courts have recognised that they are not and should not act as primary decision-makers. To repeat Justice Jacobucci's words: "In carrying out their duties, courts are not to second-guess legislatures and the executives." Judicial activity depends on the context. On issues of liberty, freedom of movement, speech or religion, courts can claim a special expertise. On issues about the use of public resources or economic judgment, the elected legislature or executive is better placed.
35. But in none of these cases, is it legitimate for the executive to submit that it is undemocratic for the courts to become involved. In *A (FC) v Secretary of State* [2004] UKHL 56, a case about the potentially indefinite detention of aliens suspected of terrorism, the Attorney General submitted that, just as it was for Parliament and the executive to assess the threat facing the nation, so it was for those bodies and not the courts to judge the response necessary to protect the security of the public, since this called for an exercise of political and not judicial judgment.
36. Rejecting this submission, Lord Bingham said:

"I do not in particular accept the distinction which he [the Attorney General] drew between democratic institutions and the courts. It is of course true that the judges in this country are not elected and are not answerable to Parliament. It is also of course true that Parliament, the executive and the courts have different functions. But

the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.”

37. History often repeats itself. A similar battle recently unfolded before the 9th Circuit Court of Appeals in *Washington and Minnesota v Trump* (No. 17-35105), decided February 9, 2017. The judgment recites that

“The Government contends that the district court lacked authority to enjoin enforcement of the Executive Order because the President has “unreviewable authority to suspend the admission of any class of aliens.” The Government does not merely argue that courts owe substantial deference to the immigration and national security policy determinations of the political branches—an uncontroversial principle that is well-grounded in our jurisprudence Instead, the Government has taken the position that the President’s decisions about immigration policy, particularly when motivated by national security concerns, are unreviewable, even if those actions potentially contravene constitutional rights and protections. The Government indeed asserts that it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this one. There is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy.

Within our system, it is the role of the judiciary to interpret the law, a duty that will sometimes require the “[r]esolution of litigation challenging the constitutional authority of one of the three branches.” We are mindful that deference to the political branches is particularly appropriate with respect to national security and foreign affairs, given the relative institutional capacity, informational access, and expertise of the courts.”

38. There are a few issues, mostly involving the royal prerogative, usually in the field of armed conflict or treaty making, which current authority identifies as non-justiciable, that is as requiring judicial abstention. The UK Supreme Court examined them recently in *Rahmatullah (No 2) v Ministry of Defence* [2017] UKSC 1 (Crown act of state) and *Belhaj v Straw* [2017]

UKSC 3 (foreign act of state). But they are rare indeed, and can be put aside in the present discussion.

39. Judges in a representational democracy are not therefore ciphers or agents of past history or of the current legislature. Even in states like the UK without a written constitution, they have a significant role in defining the practical impact of what the legislator decides. A fortiori in a state like The Bahamas, where the role is fortified by a written constitution.
40. Against the background, it is natural that attention should focus on the judges: who they are, with what attitudes and values they approach their work, and whether and, if so, how they are accountable to those they serve and whose interests are affected by their decisions.
41. As to who we are, a judicial appointments system needs to have the confidence of society generally, as well as ensuring a judiciary of appropriate quality and with an appropriate cross-section of skills. This is one of the pre-conditions to the effective exercise of the judicial role, into which I am not going. Various approaches exist, all with pros and cons.
42. The attitudes and values with which judges approach their work is, on the other hand, central to the judicial role. I have already mentioned some controls on judicial excess or exuberance: loyalty, precedent and methodology. Judiciaries usually also develop an internal collegiality. This aids cohesive jurisprudence, but should never degenerate into cliqueness or arrogance.
43. Our Victorian forebears do not seem to have been immune to the latter failing. On Queen Victoria's Diamond Jubilee, the judges of the Royal Courts of Justice gathered to consider their loyal address. The draft began: "Your Majesty, Conscious as we are of our manifold failings" To which one elderly response was: "Well, for my part, I am not quite sure about that". To which that great lawyer, Bowen LJ, quick as a flash proposed the final version: "Your Majesty, Conscious as we are of each other's failings".
44. I am afraid that even a Bahamian Chief Justice of the distant past also succumbed the judicial vice of taking himself too seriously, and reaching inappropriately for the nuclear weapon of contempt. Receiving an offer of a present of pine-apples from a satisfied litigant, the expatriate Chief Justice Yelverton in 1892 issued a stuffy statement of its renunciation from the Bench. The Chief Justice was evidently unpopular as this attracted a sardonic press article, written under the pseudonym "Colonist" from a Bahamian, mocking not only the

statement, but also the Chief Justice's recent increase in salary, which appears to have been accompanied by a summer period away from The Bahamas for fear of fever in excess of his stipulated six weeks' leave of absence. The article can be read with enjoyment in the report: *In the Matter of a Special Reference from The Bahama Islands* [1893] AC 138. It included these passages:

“Some cynic has said, ‘Every man has his price’. It is assuring to this community to know that the ‘fount of justice’ in this colony is above the price of even a dozen pine-apples. Mr Yelverton’s noble words of scornful renunciation should be graven in letters of gold upon the walls of every magisterial office in this colony; then, and not till then, will sweet potatoes, pigeon pies, &, cease to exert their baneful influence on the administration of justice in this colony.

But I must not confine myself to words of heartfelt commendation. Duty and esteem call upon me to speak words of warning; and it is well that Mr Yelverton should know that a great many people of this city are man enough to say that ‘He should risk his valuable life and attend to the duties of his office in summer as well as in winter. They contend that the day of non-resident officialdom is over, and that a man should reside in the colony that pays him his salary. The *law* allows six weeks’ leave of absence, and Mr Yelverton should be subservient to that law, if no other.’ I say to these fellows of the baser sort, ‘Now just suppose we had a fool for Chief Justice, would ten months and two weeks’ sticking to his office make him worth a thousand a year?’”

45. The Chief Justice's response to the letter was to summons the editor to disclose the identity of its author, and, upon the editor refusing disclosure, to commit him for contempt during the Chief Justice's pleasure and to fine him. The Governor on advice ordered the release, which was effected despite the Chief Justice's warning to the keeper of the prison that this would be without court authority. The JCPC was asked to advise. Unsurprisingly, it upheld the Governor's power, concluding also that neither the letter (though it might be libellous) nor the editor's refusal to disclose its authorship involved any contempt.
46. But what gives the judiciary the right to apply any particular set of attitudes or values, especially if they can be said to conflict with what a majority might think or wish? In countries like The Bahamas, the written constitution is a social contract, deliberately and

democratically introduced to entrench values immune from ephemeral or insensitive majoritarian opinion⁸.

47. But that is only a complete answer if the Constitution leaves no room for doubt, choice or change. The originalist approach to interpretation adopted by the late Justice Scalia might have it so. One may be sceptical however whether the originalists really avoid value-free judgments. Was the US Supreme Court value-free in *District of Columbia v Heller* 554 US 57 (2007), when it held that the possession of handguns, but not it seems machine guns, was within the Second Amendment provisions that: “A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed”? However that may be, originalism is not I think a prominent feature of constitutional interpretation outside the USA.
48. What then are the values to which we should aim to give effect in interpreting and applying a Constitution or any other law? The matter was well put by Dickson C.J. in *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136:

“The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”

49. The former Chief Justice of Israel, Aaron Barak, spoke to similar effect in *The Judge in a Democracy* (2006). He underlined the importance of the judicial role not just in relation to the other pillars of the state, but also in embedding the concept of the rule of law in society generally, in ensuring what the CCJE has called “social peace”. The book engages closely with the judicial role, faced with issues of violence and national security. Barak is at pains to

⁸ Justice Iacobucci put it powerfully in *Vriend v Alberta*:

“ 134 our Charter’s introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design. 135. So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen.”

answer concerns that his approach confers on the judge too prominent a status or that “democracy is too important to be left to the protection of judges who are not elected or otherwise accountable to the people” (p.88)⁹.

50. None of this of course fully answers the question how judges identify “the values and principles essential to a free and democratic society” to which Dickson CJ referred, if these do not appear in a written constitution, or, still more pertinently, how judges decide what weight to give to such values and principles as do appear or as they do identify. Loyal though we are by inclination and training to the law, we are each of us different in our make-up and individual personalities, and in difficult cases this may evidence itself. Not long ago, Professor Rachel Cahill-O’Callaghan of Cardiff University won the Society of Legal Scholars Best Paper Prize for a paper entitled “Reframing the judicial diversity debate: personal values and tacit diversity”, analysing the position at the highest United Kingdom level and concluding that “despite the lack of explicit diversity, there is an element of tacit diversity in the Supreme Court, which is reflected in judicial decisions”. The interesting thing here is that diversity was being examined implicitly on the basis that it may be a good thing, as it is generally and rightly accepted to be in the outward composition of courts and other bodies in a diverse society. A degree of diversity at the stage when an appellate court is discussing a decision internally can clearly help to ensure that all viewpoints are taken into account. Diversity to the point where different constitutions of the same appellate court may reach different decisions is more problematic¹⁰.

⁹ Barak’s book was welcomed by distinguished commentators, including Lord Pannick, noting in the *The Times* that “Barak points out that tension between the courts and other branches of government is natural and it is desirable. If the courts’ decisions were always welcomed by the executive, judges would not be doing their job properly. Barak’s thesis is . . . of fundamental importance.”

Barak’s moderation did not however prevent his thesis being panned by the United States Judge Robert Bork. His highly polemical review under the title “Barak’s Rule” is worth reading for the light it throws on United States originalist thinking, which Bork sees - I would suggest, fallaciously - as the vade mecum to “preserving a democratic order - the rule of law rather than the rule of judges”.

¹⁰ Two recent cases illustrate how the differing weight placed on different considerations may lead to overt differences in judicial conclusions: (i) In *Arorangi Timberland Ltd v Minister of the Cook Island* [2016] UKPC 32, where the issue was whether the JCPC should hold that a particular state pension fund provision was unduly discriminatory against immigrant workers, and there was a difference of opinion about the weight to be given to the local jurisdiction’s choice of scheme. (ii) In *Nicklinson v Ministry of Justice* [2012] UKSC 39, where the Supreme Court had to consider whether the blanket criminalisation of assisting suicide was justifiable under the ECHR, in a case of locked in syndrome. We all agreed that under the Strasbourg court’s jurisprudence the question fell within the United Kingdom’s margin of appreciation, and was for the United Kingdom to decide. Five Justices (Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, and Lord Wilson) held that the Court had constitutional authority to make a declaration that the general prohibition on assisted suicide in section 2 was incompatible with Article 8. Of those five, Lord Neuberger, Lord Mance and Lord Wilson would not grant a declaration of incompatibility in these proceedings, but Lady Hale and Lord Kerr would have done so. Four Justices, Lord Clarke, Lord Sumption, Lord Reed and Lord Hughes, concluded that the question whether the current law on assisting suicide is compatible with Article 8 involved a consideration of issues which Parliament was inherently

51. There is probably no complete answer to the questions I have been discussing. We live in an imperfect world, in a universe which we can never fully comprehend. None of us will ever be, or meet, Ronald Dworkin's Judge Hercules, whose intellectual muscles enabled him to identify the true weight that any particular factor merited and so to discern the best of all conceivable solutions to any problem that came before him (or her). But without judges there would be no administration of justice or rule of law at all. And this brings me to the final aspect of the judicial role which I wish to underline, our duty to account, so far as we can, for our stewardship of the law.
52. Independence and accountability are, as one Canadian commentator put it, "rather testy friends"¹¹. Judges cannot be directly or personally accountable like agents or contractors for mistakes or faults in the judicial decision-making. But ensuring as much accountability as possible is an important part of the judicial role. This in turn links with Chief Justice Barak's theme about inculcating law into society, and ensures that, despite any unanswered conundra, all elements of society will continue to coexist under the rule of law.
53. First, the primary remedy for erroneous decisions is that there should be an appropriately accessible and speedy appeal process, unless, of course, one finds oneself in the unfortunate position of thinking that a final court of appeal, like the Privy Council, has got something wrong.
54. Second, in order to account to the parties, and to enable them to assess whether to appeal where appropriate, our judgments must address the issues, they must explain the parties why we have come to the conclusions we have on fact and law. They must cut to the chase, focusing on and analysing the points that matter, and not engaging in wide-ranging and unnecessary recitation or discourse, whether of fact or law.
55. At the appellate level, the common law has a freedom which not all systems enjoy, by permitting both concurring and dissenting judgments. They can contribute not only to the clarity of the analysis, but also to the law's future development as well as to its acceptability in the eyes of the parties and wider society. In courts which insist on single style judgments,

better qualified than the courts to assess, and that under present circumstances the courts should respect Parliament's assessment.

¹¹ P. Hughes, (2001) 80 Can Bar Rev 181, 184.

fruitful internal discussions may well take place in private and lead to changes of position and compromises. Common law judges should also encourage such discussions, one should not dissent on every little point. There is an aphorism that a dissent should only to be written when one's natural indolence is outweighed by one's indignation at the folly that one's colleagues are about to perpetrate. Be that as it may be, the freedom to speak out, when really necessary, seems to me an additional and immensely beneficial bonus enjoyed by common law courts.

56. Third, we must also aim at – and succeed in – avoiding delay. Delay, at any level of a court system, kills memory and destroys touch, it makes the ultimate task of deciding and writing judgments much more difficult: see *Tex Services Ltd v Shibani Knitting Co* [2016] UKPC 31¹².
57. Fourth, we must remember that there may be persons other than the parties who may be concerned in or affected by our decisions and reasons. They may be third parties. They may be society at large or the executive or legislature. Our decision may constitute an important precedent or guide. It must be framed accordingly to be clear, understandable and usable. We must also expect and accept that our judgments will occasionally arouse controversy. The Privy Council once famously remarked that “Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respect, even though outspoken, the comments of ordinary men”: *Ambard v Attorney General of Trinidad and Tobago* [1936] AC 322. We might choose different language today, judges must expect to put up with a great deal of vigorous criticism, not just from “ordinary men”, but hostile commentators or highly skilled legal

¹² In *Tex Services Ltd*, a Mauritian appeal, the judge had delivered his judgment three years after the trial, no doubt relying on the transcript and recording, but the Board said: “48 These facilities, commendable though they are, cannot and do not put a judge who is returning to a case after much if not all direct memory of it and its detailed course has inevitably faded, in the same position as a judge who thinks it through and analyses the issues when his or her direct memory is still fresh. The prospect of a judge having the time or patience to sit through large parts of an oral recording taken from his computer is probably also limited. Aural digestion of a course of events anyway differs from its visual appreciation. The transcript is in reality likely to be the judge's main support. The result can be the effective recitation, as in this case, of a summary of the evidence and submissions taken from the transcript in the order in which they took place.

49 The infinitely preferable position is for a judge to have the time and possibility, not long after the trial is concluded when the overall picture is fresh in his or her mind, to analyse the issues and the relevant evidence and to reflect the result of this analysis in a written judgment. Although it is not necessary for the Board to reach any positive conclusion on this, the Board cannot exclude the possibility that the time taken meant that the judge had to spend so much time and effort in reintegrating himself into the case that he missed some of the points to which the Board has now in its judgment drawn attention.

50 The Board well understands that delays feed on other delays, and that an inveterate problem of delay is difficult to address or eradicate. If there is an underlying problem of judicial resources, whether of manpower or otherwise, to manage the volume of litigation, the Board hopes that this judgment may promote its resolution, with the involvement of all concerned.”

experts. But courts should certainly be as cautious about deploying counter-measures such as supposed contempt of court as the Privy Council was warning in *Ambard*.

58. Fifth, court procedures should be transparent and accessible. The Supreme Court and the Privy Council have been at pains to make their procedures transparent and accessible – by welcoming visitors to our court-rooms (yearly attendance is now over 100,000), by web-casting hearings, so that they can be watched across the world, by press releases, by short oral explanations of our reasons on YouTube and by the services of an effective press office, which has developed the most excellent liaison with the media. In addition, we receive members of other judiciaries, as well as school and university groups, with whom a Justice will frequently meet or have lunch.
59. Sixth, judges nowadays regularly attend conferences and speak publicly on legal and sometimes other themes, without of course addressing current or in any controversial way past cases.
60. Finally, on the sad occasions when this is necessary, if judges misconduct themselves in connection with their judicial office, they may expect to be disciplined. We have in the UK formally established, judicially-based processes for this. Judges are of course no more immune than any ordinary citizen in the UK if they commit a criminal offence, such as speeding.
61. All this contributes to mutual understanding and “social peace”. But social peace is a two-sided affair. Ultimately our societies depend on shared bonds and mutual understanding. From time to time, voices do speak in terms which are not helpful to the rule of law. When Prime Minister, Mr Cameron reacted to a European Court of Human Rights’ decisions that at least some convicted prisoners should have the vote, by saying that they made him physically sick and that he would clip the wings of the court. The Daily Mail reacted to the High Court’s judgment in *Miller* (later upheld in the Supreme Court) by putting a picture of the three High Court judges on its front page with the caption *Enemies of the People*, and the Mail Online – at least initially, and deplorably – referred to the publicly acknowledged homosexuality of one of them. Happily, by 24 January 2017 when we gave our judgment, things had calmed down. The furthest the Daily Mail then went was a photo of the three dissentients captioned *Champions of the People*, which was even quite witty!

62. Recently, Judge Neil Gorsuch, nominated by President Trump to be an Associate Justice of the United States Supreme Court characterised language denigrating the judiciary as “disheartening and demoralising”. Judge Gorsuch is himself is a man of great politeness and considerateness. Whatever the fate of his nomination in the USA, I am confident that his view does and will prevail generally in The Bahamas with its proud legal tradition, as well as in other jurisdictions which the Privy Council has the privilege of serving.