

**ADDRESS GIVEN TO THE SINGAPORE ACADEMY OF LAW,
Padang/Collyer Room, Raffles City Convention Centre.
3 November 2004**

Impartiality in Judging and the Passions of Mankind

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*The law has so watchful an eye to the pure and unbiased administration of justice, that it will never trust the passions of mankind in the decision of any matter of right.*²

Impartiality in judging is the essential attribute of the judge. It is the burden of the judicial oath common to my jurisdiction and to yours. Its observance ensures that, when judging, the only allegiance of the judge is to do right according to law to the parties.

Why impartiality is fundamental was explained by Lord Denning:

Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased".³

The demonstration of impartiality in judging serves a more important function than to assure the parties that the judge has no personal interest in the outcome. It is the condition on which a democratic society accepts the exercise of authority by judges who are not elected and not directly responsible to the elected branches of government. Since the assurance of constitutional government requires access to independent courts, the maintenance of public confidence in the impartiality of the judiciary is critical to our modern democracies.

Perhaps because of the need to ensure public confidence, it has long been appreciated that the appearance of partiality is destructive in itself. Demonstrating that a judge was actually biased may be difficult. But if the circumstances leave "right-minded people" suspicious, such suspicions may be dangerously corrosive. It is considerations such as these that led Lord Devlin to say that:

...within the context of service to the community, it is the *appearance* of impartiality, rather than the reality of impartiality, that is the more important: The judge who gives the right

¹ The Rt. Hon. Dame Sian Elias, GNZM, Chief Justice of New Zealand.

² Lord Mansfield in *Hesketh v Braddock* (1766) 3 Burr 1847 at 1856; 97 ER 1130 at 1135.

³ *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599 per Lord Denning MR.

judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all.⁴

So, appearances matter. But they are not everything. Everyone seems to know Lord Hewart's famous declamation that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".⁵ It seems seldom to be off the lips of those critical of particular court decisions. It sounds very fine. But such vehemence does not greatly assist in determining a workable test for partiality. The heightened vigilance and indignation it encourages may itself be destructive of public confidence.

The risk is heightened if judicial function is not well understood and if the judiciary is called upon to decide controversial questions on which community opinions are divided. Those are the conditions in a number of common law jurisdictions today, including mine. This is not a new phenomenon. Modern human rights legislation carries particular risks and opens up what Carol Harlow has called "campaigning litigation".⁶ But in reality the revitalisation of administrative law and open-textured legislation which confers wide discretion on judges have brought the judiciary increasingly into areas of public controversy over the past twenty years.

What the background of controversy means is that the background, attitudes, and opinions of judges are now under public scrutiny, perhaps as never before. At the same time, understanding of the role of the judge seems to have diminished. The fact that "[we] must rely on our conduct itself to be its own vindication"⁷ makes it difficult for the public to gain a proper understanding of controversial judicial decisions through a modern news media dominated by sound bites and flamboyant headlines. One result has been a proliferation in claims of presumptive bias against judges.

It is time to take stock of where all this is going. Some of the more absolutist statements about community perceptions of impartiality being more important than the reality, were made in a simpler time. Perhaps sensitivity to popular clamour based on the standards expected of Caesar's wife needs to be tempered. It may be that greater attention to institutional safeguards to promote impartiality in decision-making is a sounder response than recusals and overrulings because of assessment of appearances.

Shifting expectations

The judges who declared that appearances were so important, lived in much less squeamish times than ours. They had no thought that those taking up

⁴ Patrick Devlin, "The Judge as Lawmaker", *The Judge* (OUP, 2nd ed, 1981) at 3.

⁵ *R v Sussex Justices, Ex parte McCarthy*[1924] 1 KB 256 at 259.

⁶ Carol Harlow, 'Public Law and Popular Justice' [2002] 65 MLR 1.

⁷ *R v Metropolitan Police Commissioner, Ex parte Blackburn (No 2)* [1968] 2 All ER 319 at 320 per Lord Denning MR.

judicial office had to be “ideological virgins”⁸ - and they were not. Lord Hewart, described in *The Oxford Companion to English Law* as “perhaps the worst Chief Justice since the 17th century”, was “an uninhibited political figure, who thrived on controversy”, writing on all subjects ranging from electoral reform and capital punishment to democratic theory and licensing laws.⁹

In England it was not until the beginning of the 20th century that appointments to the High Court bench were generally drawn from the leading members of the practising bar. Before then, appointment was explicitly the reward for political service. Lord Salisbury, as premier, was quite candid about the process:

It is . . . the unwritten law of our party system; and there is no clearer statute in that unwritten law than the rule that party claims should always weigh very heavily in the disposal of the highest legal appointments. In dealing with them you cannot ignore the party system as you do in the choice of a general or archbishop. It would be a breach of the tacit convention in which politicians and lawyers have worked the British constitution together for the last 200 years. Perhaps it was not an ideal system – some day no doubt the Master of the Rolls will be appointed by a competitive examination in the Law Reports, but it is our system for the present; and we should give our party arrangements a wrench if we threw it aside.¹⁰

It was not until the 1930s that promotion from the Court of Appeal to the House of Lords became usual. Before then, the view was taken that the appointment of those who had held political office was preferable because the disputes handled in the House of Lords while legal in form, were political in fact.¹¹ Chief Justices in England were appointed from Attorneys-General until 1940.

In appointing judges from such backgrounds, it is clear that presumptive bias was not thought to attach to a judge because of his activities before appointment. At times when political service before judicial office was usual, judges were not expected to be colourless technocrats who had stood aloof from the currents of the times.

Moreover, a conceptual separation between judicial conduct and conduct off the bench seems to have continued after appointment. Until comparatively recently English judges seemed to have no qualms about corresponding with newspaper editors about current issues of the day. Until very recently, participation in legislation or the parliamentary debates in the House of Lords

⁸ Justice Cameron of the South African Supreme Court, quoted by Robert Stevens “Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and *Brave New World*”, (2004) 24 *Legal Studies* 1 at 32.

⁹ David M Walker (ed), *The Oxford Companion to English Law* (OUP, 1980) at 565-566.

¹⁰ Quoted by Stevens, supra, n.8, at 11.

¹¹ See Stevens, supra, n.8, at 12.

was not thought to disqualify a judge from later sitting in a case arising from the legislation or touching on matters raised in the debate.

The extent to which judges felt uninhibited by their legislative activity is illustrated by the war-time case of *Continental Tyre and Rubber Company v Daimler Company*.¹² There was a public outcry when the Court of Appeal refused to lift the corporate veil to show that Continental was controlled by a German parent company. Judges wrote letters to the editor of the *Times* in favour of the judgment and against it. Lord Halsbury introduced a Bill in the House of Lords to reverse the decision. It was supported by Lord Wrenbury, who had dissented in the Court of Appeal. It was also supported by Lord Mersey. Daimler then appealed to the House of Lords. Lord Halsbury, aged 93, presided. Lord Mersey sat. The Court of Appeal was overturned.

What are we to take of this apparent dissonance between the near-contemporary statements of the need to ensure that justice is “manifestly and undoubtedly” seen to be done and the personal views indicated by the legislative activity of Lord Halsbury and Lord Mersey? It is not an answer that this was war-time aberration. It is our perception of what constitutes the appearance of partiality that has changed.

Engagement in politically partisan activities, even in relation to the controversy in issue, was not formerly thought to overcome the expectation that, in judging, the judge would be dispassionate and would adhere to the judicial oath. Only direct pecuniary interest in the outcome automatically disqualified a judge, because it infringes the basic rule that no man can be a judge in his own cause.¹³ No other automatic category in which bias would be presumed was recognised. Short of pecuniary interest, circumstances raising a real danger of bias were required.

Before 1999, the cases in which such danger was found to exist generally concerned justices or their clerks with conflicts of interest in the outcome of the proceedings. The holding of opinions, friendships, political partisanship, and previous professional connections were insufficient to overcome the presumption of judicial impartiality described by Blackstone:¹⁴

By the laws of England also, in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged. For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. And should the fact at any time prove flagrantly such, as the delicacy of the law will not presume beforehand, there is no doubt but such misbehaviour would

¹² [1915] 1 KB 893; [1916] 2 AC 307.

¹³ *Dimes v Proprietors of Grand Junction Canal* [1852] HL Cas 758; 10 ER 301. *R v Rand* [1866] LR 1 QB 230 at 232 per Blackburn J.

¹⁴ Sir William Blackstone, *Commentaries on the Laws of England: Book the Third* (15th ed, 1809) at 361.

draw down a heavy censure from those to whom the judge is accountable for his conduct.

“No room for fine distinctions”

In *R v Gough* Lord Woolf expressed reservations about the Hewart maxim, echoing the comment in another case that it might lead to the erroneous assumption “that it is more important that justice should appear to be done than that it should, in fact, be done”¹⁵. He affirmed that the only category of automatic disqualification was where the tribunal had a pecuniary or proprietary interest in the subject matter of the proceedings:¹⁶

The courts should hesitate long before creating any other special category since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category. The real danger test is quite capable of producing the right answer and ensure that the purity of justice is maintained across the range of situations where bias may exist.

In *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)*,¹⁷ the House of Lords took a different approach. It held that the principle that a judge was automatically disqualified from sitting in any case in which he was interested was not confined to a pecuniary interest in the outcome. Lord Hoffman was disqualified because he was a director of a charity closely allied to a party to the litigation. The decision was explicitly grounded on Lord Hewart. Lord Browne-Wilkinson observed:¹⁸

If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart CJ’s famous dictum is to be observed: it is ‘of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done’.

It may be that this basis for the decision was accepted more readily because it made it unnecessary for the alternative ground of reasonable apprehension of bias (or, on the *R v Gough* approach, real danger that the judge was biased) to be considered. That avoided questions of the extent of Lord Hoffman’s involvement in the fundraising charitable body and the involvement of Lady Hoffman in Amnesty itself.

¹⁵ [1993] AC 646 at 673.

¹⁶ *Ibid.*

¹⁷ [1999] 1 All ER 577.

¹⁸ [1999] 1 All ER 577 at 588.

Although based on the automatic disqualification that attends a judge in his own cause,¹⁹ the case has also been seen to herald closer scrutiny of judicial sympathies such that could give rise to a reasonable apprehension of bias. It was followed by an increase in the number of cases in which presumptive bias was raised. At times there have been indications that parties may allege bias in order to secure the removal of judges thought to be potentially unfavourable.²⁰

The Courts in all jurisdictions have grappled with identifying when “right-minded people” might reasonably think the judge to be biased. The tests adopted for bias have swung around a little since the *Pinochet* decision. An objective standard, reflecting the reaction of “the ordinary reasonable member of the public” seems to be where we have come to rest.²¹

The English Court of Appeal has attempted to categorise factors which may – or may not – give rise to a successful claim of apparent bias.²² Presumptive bias was thought by the Court to be inconceivable in relation to such factors as “religion, ethnic or national origin, gender, age, class, means or sexual orientation”.²³ Those not “ordinarily” objectionable included:

“.....the judge’s social or educational or service or employment background or history.....previous political associations; membership of social or sporting or charitable bodies;.....previous judicial decisions; or extra-judicial utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or.....membership of the same chambers.....”²⁴

That would leave close family relationships, friendships, animosities and financial interest (though not those too minor to be a risk to impartiality) as raising connections where apparent bias will be inferred.²⁵

Kate Maleson has pointed out that although *Locabail* has removed the spectre of large numbers of unfounded claims of bias clogging up the court system and exposing the judges to intrusive public scrutiny of their personal lives and values, there is no empirical or theoretical basis for the blanket categories described.²⁶

¹⁹ A point on which *Pinochet* has been critically reviewed. See, for example, Kate Maleson, ‘Safeguarding Judicial Impartiality’ 22 *Legal Studies* 53 (2002); A Olowofoyeku, ‘The *Nemo Judex* Rule: The Case Against Automatic Disqualification’ [2000] *PL* 456.

²⁰ See Michael Taggart, ‘Administrative Law’ [2003] *NZ Law Rev* 99 at 101.

²¹ *R v Webb* (1994) 181 *CLR* 41; *Porter v Magill* [2002] 2 *AC* 357; *Collier v Attorney-General* [2002] *NZAR* 257.

²² *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] *QB* 451.

²³ *Ibid.*, at 480, para 25.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Kate Maleson, *supra*, n.19, at 62.

[The guidelines] are an essentially pragmatic attempt to protect the efficient operation of the court system over a purist application of the Hewart principle of justice. The fact that the construction of the categories has very little theoretical or empirical grounding is therefore not accidental nor the result of an inexplicable intellectual failure on the part of three of the most capable judges in the country. The construction of this list should be seen as a statement of policy rather than fact. In excluding background and personal origins, the court was seeking to limit to a bare minimum the damage which would arise to the running of the courts and the confidence in their fairness from frequent challenges. The gaps and inconsistencies of the *Locabail* guidelines suggest that they should be read as a signal to close the floodgates rather than an attempt to provide an internally or externally consistent framework for identifying the circumstances in which bias might arise.

I am not sure that Malleson's conclusion that the result is that the disqualification of a judge for apparent bias will be "a very rare event".²⁷ Certainly, in my jurisdiction there seem to be no shortage of litigants raising apparent bias points, particularly when disappointed in result.

Expressing the major premise

It remains to be seen whether the essentially pragmatic approach of the courts will suffice against the popularity of the Hewart emphasis. The maxim taps into a deep and popular spring. It may be that we need to be careful in our assumptions that the community share the views of the higher judiciary that the judge's background is unlikely to disqualify him. After all, Chief Justice Holt accused Chief Justice Coke of having been biased in the case of *Dr Bonham* because both Coke and Bonham were graduates of Cambridge.²⁸ And in a recent English case against Oxford University, cited by Malleson, the plaintiff was reported to express concern that the case could not be fairly tried because so many of the judges had attended Oxford. Such matters of background are widely felt to be highly influential.

This is the risk of the "unexpressed major premise" described by Oliver Wendell Holmes. Such premise is often based on values and attitudes which have been absorbed by the judge through his own experiences in life. Felix Frankfurter identified a critical quality of a judge as the "power to discover and to suppress his prejudices."²⁹ It is easier said than done, particularly if judges come from narrow sections of society. Lord Devlin pointed to the English

²⁷ Ibid at 63.

²⁸ *Dr Grenville v College of Physicians* 88 ER 1398 at 1400.

²⁹ Felix Frankfurter "The Appointment of a Justice" in P Kurland *Felix Frankfurter on the Supreme Court* (1970) at 211, 216-217.

judges who, in looking for the philosophy behind an Act, found “a Victorian Bill of Rights”:³⁰

favouring (subject to the observance of the accepted standards of morality) the liberty of the individual, the freedom of contract, and the sacredness of property, and which was highly suspicious of taxation. If the Act interfered with these notions, the judges tended either to assume that it could not mean what it said or to minimize the interference by giving the intrusive words the narrowest possible construction, even to the point of pedantry.

Within my time in legal practice in New Zealand, I can point to similar hostility by the then exclusively male judiciary to the policies of early matrimonial property legislation. These were judges who prided in their mastery of legalism. They would have been horrified to think that they were pushing any sort of ideological barrow. I suspect the same is true of the English judges who were hostile to tax and other legislation impacting on property rights. They simply did not see that their construction of the legislation was heavily influenced by their own personal values. And they did not appreciate the extent to which those values were out of touch with the values of the times.

There are limits to the insights to be expected of a judge who thinks that all the world thinks as he does and therefore that a factor goes without saying. That is why diversity in appointments matters. Had there been women on the bench, it is most unlikely that the unconscious hostility to the matrimonial property legislation would have continued unchallenged for so long. Or that I could have received a judgment in a case of persistent cruelty where the judge said “You only have to look at the photographs of the home to see that the respondent is a good husband and provider.” Again, however, there are limits to what can realistically be achieved with greater diversity on the bench, especially when we move beyond gender. Whatever their origins, most judges are appointed from well-educated, middle-class, economically comfortable backgrounds.

Justice Keith Mason, President of the New South Wales Court of Appeal, echoes Ronald Dworkin in advising judges that the best answer to unconscious judicial bias is for them to “come clean and get real.”³¹ Judges must identify the major premises at work in their reasoning and express them. Both the identification and the expression are hard work. Sometimes such expression may itself provoke controversy.

Controversy arose in that way in a 1997 decision of the Canadian Supreme Court, *R v RDS*.³² A black youth was acquitted by a black judge, who declined to accept the evidence of a police officer. What she said was:³³

³⁰ Patrick Devlin, *supra*, n.4, at 15.

³¹ Keith Mason, ‘Unconscious Judicial Prejudice’, Supreme and Federal Courts Judges’ Conference, January 2001, at 7.

³² [1997] 3 SCR 484.

³³ *Ibid* at 494 (emphasis added in judgment).

The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the court this morning. I am not saying *that the constable has misled the court, although police officers have been known to do that in the past*. I am not saying that the officer overreacted, *but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable*. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [RDS] that he was told to shut up or he would be under arrest. *It seems to be in keeping with the prevalent attitude of the day*.

At any rate, based on my comments and based on all the evidence before the court I have no choice but to acquit.

The Supreme Court of Canada was deeply divided on the acceptability of what L'Heureux-Dubé and McLauchlin JJ described as “contextualised judging.”³⁴ Four judges expressed the view that “judicial neutrality” is to be contrasted with “judicial impartiality”. The first is impossible to achieve. On this view judges should draw on knowledge of their communities. Relevantly, they would understand the racial dynamics of the community “including the existence . . . of a history of widespread and systematic discrimination against black and aboriginal people, and high profile clashes between police and the visible minority over policing issues.”³⁵ L'Heureux-Dubé and McLauchlin JJ found the judges' remarks:³⁶

reflected an entirely appropriate recognition of the facts in evidence in this case and of context within which this case arose – a context known to the judge and to any well-informed member of the community.

Cory and Iacobucci JJ, while concurring in the result to uphold the verdict, emphasised the dangers of reasoning from generalisations. They stressed that the life experience of a trial judge is no substitute for evidence. They thought the reasons given were sufficient, however, without the offending words. The dissenting judges (Lamer CJ, Sopinka and Major JJ) took the view that the reasoning was based on stereotyping and was impermissible propensity reasoning not based on evidence relating to the particular officer.

Sounding off and shooting ducks

In addition to the values and attitudes which may influence judicial decision-making unconsciously, questions of partiality and its appearance are raised

³⁴ Ibid, paragraph 59.

³⁵ Ibid, paragraph 47.

³⁶ Ibid, paragraph 30.

where judges have expressed views on topics which are relevant in litigation. In recent cases in a number of jurisdictions attempts have been made to get judges to recuse themselves where they have given an earlier judicial decision on a similar matter or at a different stage of the proceedings.³⁷ Friendships and associations with politicians and civil servants whose legislation or policies are in issue in litigation are increasingly under scrutiny.

In Scotland the presiding judge in the Appeal Court, Lord McCluskey, was held to have tainted a case where human rights were in issue because he had criticised the incorporation of the European Convention on Human Rights into the Scottish legal system as a “trojan horse” in extensive articles. A different panel of the Appeal Court concluded that the article, “published very shortly after the decision in the appeal”:

Would create in the mind of an informed observer an apprehension of bias on the part of Lord McCluskey against the Convention and against the rights deriving from it, even if in fact no bias existed in the way in which he and the other judges had actually determined the scope of those rights in disposing of the issues in the case.³⁸

I am not sure what signal this sends out. If the Judge had not given public expression to his views would it have been alright for him to have sat even though he in fact held the same opinion? Are we suggesting a reversion to something like Lord Kilmuir’s views: that a judge’s reputation for wisdom and impartiality can only be maintained if he keeps his opinions to himself? And how are we to treat the inevitable requests that will come to flush out opinions in advance so that litigants can know if the judge has views which may be adverse to one side? In New Zealand, we have had at least one attempt to administer a catechism to a Judges to determine potential conflicts. The questions proposed included whether any of the Judges was a member of any “secret society” or of something called the “Illuminati” as well as “Skull and Bones” and the Ku Klux Klan.³⁹ (I don’t think we have ever had a chapter of the Ku Klux Klan in New Zealand.)

Private contacts present similar difficulties if the judge is not a monk. In the public debate which preceded the setting up of the Supreme Court in New Zealand, fears were expressed that our society was too small to allow a final court to be sufficiently detached from local issues and personalities. I did think at the time that anyone who thought that Wellington was too small had never spent time at Westminster or Washington. But there is a very serious point here which we may be unwise to evade. I am not sure that the public appreciates the extent to which judges in most common law jurisdictions with which I am familiar have contact with other public figures, some of whom, in their official capacities, are frequently before the courts or interested in the outcome of court cases.

³⁷ See, for example, *Sengupta v Holmes and others* [2002] EWCA Civ 1104.

³⁸ *Hoekstra and Others v Her Majesty’s Advocate (No 2)* 2000 S.L.T. 605.

³⁹ *Collier v Attorney-General* [2002] NZAR 257 at [2] (CA).

It is not good enough to leave the impression that we subscribe to the Hewart emphasis on appearances, on the basis that those of us who are within the club are alive to the proper boundaries and can be relied on to observe them and the judicial oath. Some of the risks in that approach are indicated in the furore in the United States about Justice Scalia's duck shooting trip with the Vice President. In his spirited memorandum rejecting the Sierra Club request for him to recuse himself, Justice Scalia said:⁴⁰

A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials – and from the earliest days down to modern times Justices had had close personal relationships with the President and other officers of the Executive. John Quincy Adams hosted dinner parties featuring such luminaries as Chief Justice Marshall, Justices Johnson, Story, and Todd, Attorney General Wirt, and Daniel Webster . . . Justice Harlan and his wife often 'dropped in' at the White House to see the Hayes family and pass a Sunday evening in a small group, visiting and singing hymns. . . . Justice Stone tossed around a medicine ball with members of the Hoover administration mornings outside the White House. . . . Justice Douglas was a regular at President Franklin Roosevelt's poker parties; Chief Justice Vinson played poker with President Truman. . . . A no-friends rule would surely have required Justice Holmes's recusal in *Northern Securities Co v United States* . . . the case that challenged President Theodore Roosevelt's trust-busting initiative. . . .

I am not sure that the wider public finds such reasoning entirely convincing. Nor is it clear that non-lawyers would accept the result in a case like *Sengupta*, where Sir John Laws was not required to recuse himself from hearing an appeal after earlier declining leave to appeal. They may think the appearances more important.

Judging in context

If we do not want to keep our judges cloistered from the society they are appointed to serve, then it is necessary to gain acceptance for the view that such withdrawal is not necessary and is not in the interests of the administration of justice.

Benjamin Cardozo in 1921 expressed the view that we do not help the cause of truth by pretending that judges "stand aloof on the chill and distant heights"

⁴⁰ *Cheney v United States District Court for the District of Columbia* 124 S Ct 1391 (2004) at 1394-5.

of “pure reason”: The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.⁴¹ That is wholly beneficial for the administration of justice. John Buchan, who had been a barrister before turning to writing, said that a great judge must be a great man. He illustrated his point by reference to two undoubtedly great judges of the common law tradition, Chief Justice Marshall and Lord Mansfield.⁴²

While Chief Justice Marshall could not compare for book-learning with his contemporary on the Supreme Court, Justice Story, he has proved the greater. Buchan attributed that to the fact that “he never lost touch with the realities of our common life”.⁴³

The great Chief Justice, jogging in a gig along the sandy roads of North Carolina, and after the day in court was done playing quoits with the townsfolk behind the tavern, was in a better way of judicial education than if he had burned the midnight oil over his law books. And how much did not his years as a soldier and a politician contribute to his success?

And as for Lord Mansfield, Buchan cited Dr Johnson. Johnson was angry when Mansfield was dismissed as a “mere lawyer”.⁴⁴

Mansfield, he said, was not a mere lawyer. When he came to town he drank champagne with the wits; he was the friend of Pope.

We do not always live up to such giants. We do not always get to drink champagne with the wits, but judges serve their societies better if they know them.

Chief Justice Barak of Israel in discussing the role of objectivity in judging is firm that the goal of objectivity “is not to ‘liberate’ the judge from his past, his education, his experience, his faith and his values”.⁴⁵

On the contrary, its purpose is to stimulate him to make use of all of these in order to reflect as purely as possible the fundamental values of the nation.

Or, as Justice Rehnquist put it in *Tatum v Laird* “proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* . . . would be evidence of lack of qualification, not lack of bias”.⁴⁶

⁴¹ Benjamin Cardozo, *The Nature of the Judicial Process* (1921) at 168.

⁴² John Buchan, ‘The Judicial Temperament’, [1999] 73 ALR 260.

⁴³ *Ibid.*, at 269.

⁴⁴ *Ibid.*

⁴⁵ Aharon Barak, ‘The Role of a Supreme Court in a Democracy’, [2002] 53 *Hastings Law Journal* 1205 at 1211.

⁴⁶ 409 US 842 at 835 (1972).

Putting on the Gown

It is important to acknowledge that the appearance of impartiality matters. But it is equally important to be very clear that it is concerned with real danger, realistically assessed. If we acknowledge that good judges will not be “ideological virgins” when appointed, we must be willing to rely on the professional obligation of impartiality they take on with office.

At a time when judges are frequently the targets of public campaigns (most frequently in relation to sentencing or child custody decisions), there are often more direct pressures on the judge than his upbringing or extra-judicial opinions. Judicial administration and the expectations of colleagues add other pressures. The obligation to identify all such influences, to confront them and to exercise independent judgment is the judicial responsibility.

Judges themselves should take care to demonstrate the full reasons for their decisions, so that suspicions of unexpressed major premises can be laid to rest. Frankness is preferable even where it may be controversial, as the Canadian case of *RDS* shows it will be at times. The appointment of judges from diverse backgrounds within the community helps the judiciary to stay in touch and is to be welcomed. Institutional safeguards such as transparent systems for allocating cases among judges also assist in assuring the community that the appearance of impartiality is taken seriously.

Ultimately, however, the obligation to bring an open mind to judging is the individual responsibility of the judge. The oath to do right without fear or favour is a solemn obligation. Felix Frankfurter was impatient of the often-asked question “Does a man become any different when he puts on the gown of judicial office?” “If he’s any good, he does”, was his retort.⁴⁷

It is right not to be complacent when right-minded people might see a predisposition to a particular result. But it is also right to remember that the law reports are full of the decisions of judges who have confronted their personal views and set them aside to do what is right according to law. That is why the presumption of impartiality propounded by Blackstone remains valid today. It should not be set aside lightly.

⁴⁷ Felix Frankfurter, ‘Chief Justices I Have Known’ [1953] 39 Virginia Law Review 883 at 901.
