

The Business of Judging

Selected Essays and Speeches

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*Judicial Ethics**

Judicial ethics, the subject I have been asked to address in this chapter, appears to have been largely neglected in this country in recent years—by the judiciary, by the practising profession, and, less surprisingly, by academics.

No doubt this relative neglect is, up to a point, reassuring. It reflects the fact that we have in this country been spared the scandals which have given life to the subject in the United States over many years and in Australia more recently. It is indeed a striking fact that in nearly three centuries since the Act of Settlement made the superior judges irremovable save on an address by both Houses of Parliament no English High Court judge has been so removed. The practice of appointing judges from a small pool of candidates, sharing a common professional background, and known personally or by professional repute to those making and advising on appointments, has enabled much to be taken for granted. Apart from the Kilmuir Rules, which were very limited in their scope and have now been to some extent relaxed, I know of no recent attempt to state the rules which govern, or should govern, the conduct of judges, and it is of interest that, in writing the letter to the Director-General of the BBC in which the Rules were set out, Lord Kilmuir referred to 'the important qualification that, as you are already aware, the Lord Chancellor has no sort of disciplinary jurisdiction over Her Majesty's Judges'.

A moderate degree of reassurance should not, however, spill over into complacency. Though the occasions are, I feel sure, infrequent, none of us knows how often, or on what grounds, judges of the higher courts have been informally nudged or encouraged into retirement. The Lord Chancellor is of course empowered to dismiss circuit judges, district judges, magistrates, and justices, but the principles upon which he acts may not be entirely clear. The enlargement of the pool from which judges are recruited, welcome though this is, must increase the possibility of error and may mean that less can be taken for granted. Above all, whether the judges like it or not—and of course they do not—we live in a time when the judicial role and judicial performance are the subject of increasingly critical public scrutiny. No reader even of the quality press would be tempted to think that the judges were beyond reproach. If, as I think most of us present would hold, the administration of justice is one of the cardinal functions of civil society, and if for that purpose the judges are entrusted, as they are, with wide and sometimes unreviewable powers, it is surely a matter of some moment to consider the

* First published in R. Cranston (ed.), *Legal Ethics and Professional Responsibility* (Oxford: Clarendon Press, 1995), 35–51.

principles of conduct by which judges are, or consider themselves to be, bound. I am accordingly grateful to the Society for causing me to think about this subject in a more coherent way than I have had occasion to do before.¹

Before venturing further, I should perhaps enter five caveats. First, the views I express are my own personal views, which I have not discussed with anyone. They do not carry the imprimatur of the Lord Chancellor who, as head of the judiciary, must be regarded as the ultimate, or at least the penultimate, arbiter of these matters. I do not doubt that some of my observations would provoke dissent from some of my professional colleagues. Secondly, I should make clear that my opinions have the inherent vulnerability of all opinions formed without discussion, argument, or application to specific instances. I could well imagine that situations would arise which would cause me to modify or depart from what I now think, and no doubt the passage of time and changing circumstances would anyway call at least for modification. Thirdly, it is obvious that any rules in a field of this kind must cover a wide spectrum of conduct. There are of course some acts—like acceptance of a gift from a current litigant, or conviction of conspiracy to pervert the course of justice—which would without question call for immediate removal or dismissal. There is other conduct—like using official writing paper to conduct an argument with one's insurers—which most judges would regard as 'a bit off' or 'not done' but which could not attract any sanction. Between these extremes would lie a wide range of conduct to which the appropriate response would depend on questions of degree. If it were shown, for instance, that a judge had on an isolated occasion behaved in court in an intemperate, overbearing, or unjust way, or fallen asleep, or neglected his duties, he might expect to be rebuked by any appellate court before which the case came or a senior judge would make an opportunity to have a quiet word. That would in all probability be that. But it might be different if a judge's unacceptable conduct in court, or somnolence, or neglect were shown to be habitual and of such an order as reasonably to undermine confidence in his ability to do justice. Fourthly, I have not attempted to cover all aspects of this subject. Despite the length of this address, there are significant areas of the subject which I shall not attempt to cover. And fifthly, I hope it will not be thought sexist if I refer to individual, hypothetical judges as 'he'. It is cumbersome to repeat 'he or she' and I am too pedantic to be happy using 'they' or 'their' after a singular noun. The alternative stratagem of saying 'she' seems inappropriate, since I know of no case where the conduct of a female judge has given serious ground for complaint.

I take as my starting point a passage in an address given by Sir Owen Dixon to law students in the University of Melbourne when professional conduct was first introduced into the curriculum of the university law school in 1953. He said:

¹ I am in particular grateful for being introduced to *Judicial Ethics in Australia* by the Hon Mr Justice Thomas of the Supreme Court of Queensland, a most interesting and informative work on which I have drawn heavily.

To be a good lawyer is difficult. To master the law is impossible. But I should have thought that the first rule of conduct for counsel, the first and paramount ethical rule, was to do his best to acquire such a knowledge of the law that he really knows what he is doing when he stands between his client and the court and advises for or against entering the temple of justice.²

If applied to judges, the passage plainly calls for some modification, but the essential point seems to me apposite: it is a judge's professional duty to do what he reasonably can to equip himself to discharge his judicial duties with a high degree of competence. Sir Owen went on to say that acquiring such knowledge of the law meant hard work for a long time, and he added: 'It is harder work than in London because counsel here do not specialise. In England it is otherwise and a man may pass his life very comfortably as an expert in an extremely narrow field.'³

There is a relevance to judges in this passage also, and for them there are twin dangers. Some judges, particularly circuit judges, may pass their lives very comfortably as experts trying criminal cases. The temptation for them, after a time and in run of the mill cases, is that of over-familiarity, leading to ill-prepared, impromptu, ill-organised, diffuse, and unnecessarily lengthy jury directions. The Crown Court Study, recently made for the Runciman Royal Commission, suggests that to a remarkable and very creditable extent this temptation is resisted. Appellate judges are subject to a different temptation. Almost all of them spend much of their time dealing with areas of the law with which they have no close familiarity. The temptation then is in effect to cede decision of the appeal to the member of the court who is so familiar. This, plainly, is a dereliction of judicial duty. The litigant is entitled to the considered judgment, if not the considered judgments, of all members of the court, not just one. So Sir Owen's observations, suitably adapted, seem to me the right place to start. It is also perhaps appropriate to bear in mind Professor Dworkin's recent observations on judicial integrity and the need to give, so far as possible, adequately reasoned decisions.⁴ It must be possible to improve on the performance of a High Court judge to whom I once addressed submissions which he gave no reason for rejecting beyond saying 'Well, I'm sorry, but I don't agree.'

Just as the Ten Commandments of the Old Testament were subsumed in the New by 'the first and great commandment . . . and the second . . . like unto it, namely this', so (as it seems to me) much of what would go into a detailed code of judicial conduct if we had one is embraced by the judicial oath to 'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will'. This is language not only noble in its simplicity but also rich in content, and I think some phrases may usefully be highlighted.

The judge's obligation is to do justice 'after the laws and usages of this realm'.

² *Jesting Pilate*, 131.

³ *Ibid.*

⁴ *Life's Dominion* (1993), 144-7.

In other words, he must apply the law, not his own personal predilection, reflecting the wisdom of Samuel Johnson's observation: 'To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies of private understanding are to be supplied.'⁵

This obligation does not, in the field of non-statutory law, deprive the judge of all power to innovate, and to develop the law, an almost inevitable activity when he faces a situation to which existing authority does not apply. But it does in my view restrict the judges' authority to engage in what might be called wholesale judicial legislation. I will give an example. In an unreported decision on very strong facts, the Court of Appeal recently held that there was no enforceable right to privacy in English law.⁶ In so holding the Court had regard not only to authority, judicial and academic, but also to the public concern directed to this subject over thirty years, reflected in reports by the Younger Committee and JUSTICE, in a series of unsuccessful Private Members' Bills, and in the deliberations (not then concluded) of the Calcutt Committee. The Court has been criticised for excessive timidity, in failing to grasp a nettle which other organs of government appeared strikingly unwilling to handle, and for failing to lay down the foundations of a law of privacy. I do not myself accept the validity of this criticism, unsurprisingly since I was a party to the decision. It seems to me a very good example of the sort of task judges may not properly take it upon themselves to discharge.

When one turns to statute law and subordinate legislation, the judge's duty to apply the law by seeking conscientiously to give fair and full effect to the intention of the legislation is obvious. This is not simply a rule of construction but a constitutional duty, a duty which judges assume as part of the price of their independence. It is also in my opinion an ethical duty, in the sense that a judge who knowingly and deliberately neglected to give effect to the plain effect of a statute would be acting improperly. Having said that I must, no doubt surprisingly, confess to having done so, in one context. Perhaps I may elaborate, since I hope the example will show that ethical duties, even constitutional duties, are not always as straightforward as might be thought.

The context I have in mind is the Bail Act 1976. That Act was founded on the praiseworthy premise that prospective defendants who may be innocent and whom it is unnecessary to keep in prison should not be imprisoned during what may be a lengthy period until they are tried. Thus the general rule in section 4 of the Act is that a person shall be granted bail unless certain conditions apply, and in the case of imprisonable offences those conditions relate to the risk that the defendant will fail to surrender to custody, commit an offence while on bail, or interfere with witnesses, or that his own safety or welfare may be damaged by the

grant of bail. So far so good. It is the wording of paragraph 2 of the relevant schedule⁷ which causes trouble:

The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—

fail to surrender to custody, commit an offence, and so on. The difficulty arises because the court must do more than form an opinion that one or other consequence will or may follow if bail is refused; the court must be satisfied, an obviously more exacting state of intellectual conviction. Moreover, the court must be satisfied on substantial grounds, so hunch or personal apprehension is not enough if (as not infrequently happens) no ground of substance is presented to the court. The court's right to refuse bail is not, however, conditional on its being satisfied that there are substantial grounds for believing that the defendant may, if released on bail, do one or other of the proscribed things; the court must be satisfied that there are substantial grounds for believing that if granted bail the defendant would do one or other of the proscribed things, a very difficult test to satisfy in relation to anything as unpredictable as the future conduct of an unknown human being over a shortish time period. The dilemma presented by this provision was not in my view cured by paragraph 9 of the schedule, which required the court in taking these decisions to have regard so far as appeared to it to be relevant to the nature and seriousness of the offence charged, the probable penalty, the defendant's character, antecedents and community ties, the defendant's previous behaviour on bail, and the strength of the evidence against him. It is not very easy to relate this paragraph to paragraph 2, which I have quoted: the rigorous conditions of paragraph 2 are either satisfied or they are not, and if they are not it will only be in a minority of cases that paragraph 9 will make good the deficiency. The fact that a defendant has a long criminal record does not of itself enable the court to be satisfied that there are substantial grounds for believing that he will commit an offence if granted bail, and the fact that a defendant has a house and assets abroad, in Northern Cyprus or elsewhere, does not of itself enable the court to be satisfied that there are substantial grounds for believing that he will fail to surrender to custody if granted bail, although in each case the court will recognize a risk. An amendment to the Act has eased but not in my view cured this problem. In cases where I could not conscientiously say (to myself) that the conditions of paragraph 2 were satisfied, but in which I have felt grave apprehension that a defendant's release involved a real danger to the public, I have on occasion refused bail. I suspect other judges have done the same. It is highly regrettable that courts should be subject to this dilemma. On the repeated occasions when judges or justices have been vilified and hounded for releasing on bail a defendant who commits other offences or absconds, I have never been aware of any acknowledgement, in parliament or the press, of the stringent duty which this Act has imposed upon the courts.

⁵ Boswell, *Life of Johnson* (1976), 496.

⁶ *Kaye v Robertson*, 23 Feb. 1990; see App. 1 to the Calcutt Report.

⁷ Para. 2 of Part 1 of Schedule 1 of the Act.

The judge's duty to administer justice 'without fear or favour, affection or ill will' plainly covers a very wide range of ethical duties. If one were to attempt a modern paraphrase, it might perhaps be that a judge must free himself of prejudice and partiality and so conduct himself, in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent, and impartial judgment. This again calls for some elaboration.

Perhaps the most obvious reflection of this principle is the clear rule that a judge must have no pecuniary interest in the outcome of any litigation before him and should not be financially beholden to any litigant appearing before him. In *Dimes v Grand Junction Canal Company*⁸ an order of the Lord Chancellor was set aside because he had a substantial interest in the company, even though he was only affirming a decision of the Vice-Chancellor and was not in any way influenced by his interest. This was, as it seems to me, a very strong decision, but I have no doubt that it would be followed today on similar facts although I do not think a judge would stand down on account of a share-holding in a litigant company, or perhaps even disclose it,⁹ unless the share-holding and the action were such that the outcome could have a more than negligible effect on his fortune. That accords with an occasion in the Court of Appeal when, at the outset of a very lengthy and obviously tedious patent appeal, one member of the court disclosed that he held shares in one of the litigant companies. 'If my Brother thinks,' said (Charles) Russell LJ, presiding, 'that he can escape from this case on a ground as tenuous as that, he is in error.'

The rule against acceptance of gifts from litigants or potential litigants is clear and obvious. But it is not quite absolute. Both the Lord Chief Justice and the Master of the Rolls receive annual gifts of a quarter of roebuck from the Royal Parks (on payment of a nominal delivery charge) and until recently, received a shirt-length of cloth from the Corporation of London. If not sanctioned by immemorial custom, these gifts would no doubt be questionable. It is of interest that Lord Chief Justice Hale, in the much more venal age of Charles II, 'not only refused the customary perquisites like the venison for the justices on circuit, but insisted on paying more than the regular price for his domestic supplies'.¹⁰

No attempt has ever been made in this country, so far as I know, to define the

⁸ (1852) 3 HLC 758; 10 ER 301.

⁹ On reading this passage a very senior retired judge observed that he would personally disclose any share-holding of which he was aware. He had found himself severely criticised in the press for hearing a case without disclosing that he held shares in a part-owner of a litigant company. The share-holding had in fact been very small, and the judge had been unaware of it since his investments were managed on a discretionary basis by brokers. He then took steps, however, to put all his shares into the name of his brokers' nominee company. This would be effective to avert unfair criticism of this kind, but would not displace the need to disclose any significant share-holding, however held, of which the judge was aware.

¹⁰ Bond, 'The Growth of Judicial Ethics', (1925) 10 Mass. Law Quarterly 1 at p.13.

sources from which a judge may properly receive money in addition to his judicial salary. There can, plainly, be no objection to his receiving the proceeds of ordinary investments, or the rents of any property the judge may own, or the earnings of any estate the judge may be fortunate enough to have. It has not been thought inconsistent with judicial office to be a member of Lloyd's, although it is now (I think) some years since judges sitting in the Commercial Court thought it proper to maintain their membership, an exemption for which they are, no doubt, grateful. I do not think it would be generally regarded as improper for a judge to accept a modest honorarium for a lecture or address which he had given, although most would perhaps decline or ask that the sum be paid to charity; a gift of wine or a book a judge might, properly in my view, accept, but the identity of the donor and the value of the gift would plainly affect his decision.

In his letter to the Director-General, Lord Kilmer (ironically perhaps, in view of the furore later caused by his acceptance of company directorships while drawing the not ungenerous pension of a former Lord Chancellor) observed that 'in no circumstances, of course, should a Judge take a fee in connection with a broadcast'. This is a rule which I think most, if not all, judges would observe in relation to any radio or television broadcast or any newspaper article. This seems to be a good rule. But there is to my knowledge no similar rule or practice in relation to the proceeds of any legal treatise, novel, play, or other literary work which a judge may publish. It is possible to see a distinction between the two situations, but it is not very obvious. Probably, however, this is an area better left to judges' recognition that they must do nothing which could or could appear to compromise their judicial integrity than to any attempt at formulation of detailed rules.

All the major common law jurisdictions would, I am sure, regard it as unacceptable for a serving judge to engage in any capacity in any commercial enterprise (save for the very limited, and now unusual, exception of managing his own estate). Happily perhaps, most of us would not be tempted to emulate the Illinois judge who moonlighted as a construction worker.¹¹ But beyond that rule there is a surprising diversity of view. The Canons of Judicial Conduct promulgated by the American Bar Association bluntly provide that 'A judge should not act as an arbitrator or mediator.' Here, section 3 of the Administration of Justice Act 1970 expressly provides for Commercial Judges to act as arbitrators. They do not of course receive any personal benefit, since the fees payable (shortly to be increased) are prescribed and are payable to the Treasury. It may be the lack of any similar mechanism which explains the American rule. In Australia and, I think, the United States, it would be questionable whether a serving judge should serve as chairman of a sporting body. Here, judges have certainly served in such capacities, and I do not think this would be regarded as in any way objectionable unless the appointment were likely to involve the judge in controversy or the body were likely to be involved in litigation. The American Canons provide that

¹¹ *Re Daley* 2 Ill. Cts. Com 38 (1983).

A judge should not solicit funds for any educational, religious, charitable, fraternal or civic organisation, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organisation.

In this country, a judge would undoubtedly be expected to exercise considerable discretion about the bodies with which he allowed himself to be associated, avoiding involvement in any campaigning organization of even a non-political kind, and would be scrupulous not to exploit his judicial office for the purpose of attracting funds. But subject to those caveats, English judges would not feel themselves precluded from soliciting funds for charitable causes, and I can think of a number who have done so. Again, the American Canons provide that

A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy or matters other than the improvement of the law, the legal system, or the administration of justice.

In Australia, the desirability of such a rule has been the subject of active debate. In Victoria, there has been long standing disapproval of judges serving on royal commissions. In Queensland the judges have held that they should not do so.¹² Strong and well-argued opinions have been expressed on both sides.¹³ The contrast with this country, where very many judges at all levels have served as royal commissioners or conducted inquiries and investigations, is very marked. One need only instance Lord Scarman, who perhaps holds the record, with his inquiries into disturbances in Red Lion Square, Northern Ireland, and Brixton, and into the Grunwick labour dispute. It is scarcely an exaggeration to say that among senior judges 'my inquiry' is the equivalent, in other circles, of 'my operation'. But we do well to recognize that those in the United States and Australia who take the contrary view have a serious point. It is in my opinion consistent with judicial office for a judge to serve in these capacities if the reason for his appointment is the need to harness to the task in question the special skills which a judge should possess: characteristically, the ability to dissect and analyse evidence, appraise witnesses, exercise a fair and balanced judgment, write a clear and coherent report, and so on. If, however, that is not the reason for his appointment—if, more particularly, it were sought to lend the respectability of his office or reputation to some political end not otherwise acceptable to the public—it would in my opinion be the clear duty of the judge to decline to serve. In general, we seem in this country to have been able to operate within more liberal constraints than have been found to be appropriate elsewhere. So long as this liberality can be maintained, it is in my view desirable that it should be: justice is not a cloistered virtue, and it is in general desirable that judges should have acquaintances and experience outside the monastery.

It is now regarded in this country as a cardinal feature of judicial impartiality

¹² Thomas, *op. cit.*, 54-5.

¹³ 'Judges as Royal Commissioners and Chairman of Non-Judicial Tribunals', Australian Institute of Judicial Administration Incorporated (1986).

that the judge should be a political eunuch. If he was ever a member of any political party or organization, he must sever all ties on appointment. Thereafter he must do nothing which could give rise to any suggestion of political partisanship. A colleague once told me that he had never, since appointment, even cast his vote, although he did somewhat undermine the effect of this by adding that since he lived in Chelsea there was anyway no need.

It is perhaps worth pausing briefly to reflect how recent this tradition is. Well after the Act of Settlement, Lord Chief Justices as well as Lord Chancellors were known to sit in the cabinet.¹⁴ Lord Stowell combined his judicial role in the Admiralty Court with a very active parliamentary role, concerned with the same measures on which he thereafter ruled as a judge.¹⁵ Lord Romilly, the last member of my Inn to hold my office, held it while a member of the House of Commons. Sir James Stephen, while serving as a Queen's Bench puisne, contributed very lengthy letters to *The Times* attacking the government's policy on Ireland.¹⁶ Lord Hewart, plainly, did not regard the office of Lord Chief Justice as any bar to participation in the political controversies of the day. Only in what, legally speaking, must be regarded as very recent times have the senior judicial offices ceased to be the preserve of the law officers of the day who wanted them. If my memory serves, Lord Hailsham on his first appointment as Lord Chancellor in 1970 announced an intention to increase the number of appointments to the bench from the ranks of serving members of parliament, an intention he did not, happily, implement to any significant extent.

It is also perhaps worth pausing briefly to reflect how different is the position here from that in the United States, with whose legal system we tend to think our own has so much in common. A rule of total and universal political neutrality would of course be inconceivable in a country where many members of the state judiciaries are elected and accordingly campaign for election on a platform. It is furthermore accepted that appointments to the higher, especially the highest, federal judiciary are made with what are essentially political considerations in mind, even though presidential hopes are often confounded. And there is a long tradition of active political activity by members of the Supreme Court. Brandeis was a major architect of Woodrow Wilson's legislative programme. During the Second World War Frankfurter conferred almost daily with Roosevelt about strategies and policies, and assisted in drafting some of the president's speeches. Fortas advised Lyndon Johnson on topics including the Vietnam War, steel price increases, and strategy for averting transport strikes. But this gave rise to criticism, as did some of Warren Burger's activity as chief justice.¹⁷ So it may be that even in the United States there is some movement in our direction.

¹⁴ e.g. Lord Mansfield, who was also Chancellor of the Exchequer, and Lord Ellenborough.

¹⁵ H. J. Bourguignon, *Sir William Scott Lord Stowell* (1987), 271.

¹⁶ K. J. M. Smith, *James Fitzjames Stephen* (1988), 153.

¹⁷ Edwards, 'Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act' (1987) 75 Calif.L.R.

Here, the rule is clear and (subject to the anomalous position of the Lord Chancellor) absolute. The Law Lords sit on the cross-benches and do not, by tradition, become involved in political controversy unrelated to the administration of justice. Perhaps the only remaining problem, and that a minor one, concerns the position of judges' spouses. When almost all judges were men and wives were expected to subordinate their personal interests to their husbands', the unwritten rule was that judges' wives should adopt the same position of strict neutrality as their husbands. But the unwillingness of wives to be treated as appendages of their husbands, recognition that there need be no identity of view between husband and wife on political any more than other issues, and—I fear it must be admitted—the increasing appointment of women to the bench, with the result that it is the husband not the wife who is expected to give up office as member of parliament or county councillor, will, I feel sure, lead to acceptance that conventional political activities of the spouse will not taint the judge provided the judge remains resolutely aloof.

The Kilmuir Rules undoubtedly had the effect of discouraging almost to the point of prohibiting contacts between judges and the media. The reason which he gave—that 'So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable'—was not entirely flattering but contained a hard nugget of truth. As is well known, this rule (if one can call it such) has been relaxed somewhat by the present Lord Chancellor, for reasons which are in my opinion sound. If judges are fit to judge they should be able to exercise a reasonable judgment on whether to speak to the media and what to say if they do. Issues do, perhaps increasingly, arise on which it is desirable that the voice of the professional judiciary should be heard and it is unfortunate if the only audible voice is that of those retired judges most forward in offering their opinions. There is also, I suppose, a faint hope that the more grotesque caricatures of the modern judiciary will lose credibility if the public generally has a better idea of what judges are actually like. But there has now been enough experience of the new and more liberal regime to indicate the very real damage which would be done if judges did not exercise their new freedom with the greatest circumspection. It is vital that the occasions on which and the conditions under which judges contribute to public discussion are closely considered. I would whole-heartedly endorse the view more than once advanced by Mr Bernard Levin that judges should not be tempted to pontificate or offer opinions on subjects outside their professional field.¹⁸ Nor should they, save on issues directly related to the administration of justice, and then with considerable discretion, be drawn into criticising government policy. When such issues do arise—one thinks recently of cutbacks in legal aid, the Administration of Justice Act 1992, and the number of judges—it is probably desirable that public comment should be left to the Lord Chief Justice, who by tradition enjoys a seat in the House of Lords, presumably to give him an appropriate public forum in which to discuss such matters.

¹⁸ *The Times*, 28 Feb. 1986 and 17 Aug. 1993.

In his most interesting book on 'Judicial Ethics in Australia', Mr Justice Thomas of the Queensland Supreme Court addresses a topic never to my knowledge expressly addressed here, the social constraints to which a judge is subject. He suggests¹⁹ that 'a judge should not have particularly close contact with anyone who regularly appears in his court' and also says²⁰ 'I should be very surprised if there is still any general expectation that judges should never go into a public bar.' On the first point, any English rule would have to take account of the Inns of Court, which inevitably bring judges and senior practitioners at the Bar into close contact. This is, no doubt, a source of strength, but there are potential dangers, to which judges should be alert. I can certainly think of one judge whose continuing contact with members of his old chambers was so close and frequent as to raise disquieting questions in the minds of those appearing against them before him. On the second point, as a very general proposition, I think most judges would be inclined to agree. But I would be very surprised if any judge were to be seen in a public house within about a mile of the Law Courts in the Strand or, perhaps, any court in which the judge was sitting. On a third point I have no doubt that there would be general agreement: that while a judge need not necessarily conduct his private life in accordance with the highest standards of morality he must at least do so in such a way as to avert the possibility of scandal and to demonstrate respect for the law he is appointed to serve; one could well imagine that infractions of the law which were in the past regarded as relatively venial—driving when over the prescribed limit of alcohol is the most obvious example—might in future cause much more acute concern.

If, as happens from time to time, proceedings are issued against a judge as a result of something done or not done in his judicial capacity, the standard practice is to hand any papers to the Treasury Solicitor who will take the necessary steps to have the action dismissed. If it were necessary for a judge to issue proceedings to defend his judicial reputation (an almost unheard of event), I think it would again be appropriate to invoke the help and follow the advice of the Treasury Solicitor. A judge who did not follow this course would not, I think, expect to be reimbursed out of the public purse for any expenditure he incurred. Only in the most extreme or unusual circumstances does any judge go to law in relation to a private matter: this is no doubt in part because of the somewhat invidious spectacle this would present to the public, but it is also in part because judges know, better than anyone, how uncertain the outcome of litigation is liable to be.

I fear I have occupied much of your time without having, as yet, even got the judge into court. It is perhaps difficult to improve on rules for his own personal guidance which Chief Justice Hale devised for himself in the 1660s:²¹

4. That in the execution of justice, I carefully lay aside my own passions, and not give way to them however provoked.

¹⁹ At 44.

²⁰ At 42.

²¹ Thomas, *op. cit.* App B, 203.

5. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions.
6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business and both parties be heard.
7. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.

This is, literally, a counsel of perfection. It is a truism that all human beings, judges included, are to some extent creatures of their upbringing, education and experience. They inevitably hold views, entertain preferences and are subject to prejudices. But it is plainly their duty to lay these aside and approach cases in an impartial and objective way so far as possible, and to give the appearance of doing so.

There can, I think, be no doubt that much judicial behaviour was tolerated in the past which would be regarded as simply unacceptable today. Connoisseurs will doubtless savour, as I do, the account of 'The Origin of the Commercial Court' contributed by Lord Justice MacKinnon to the *Law Quarterly Review* in 1944:²²

Mr Justice J. C. Lawrance was a stupid man, a very ill-equipped lawyer and a bad judge. He was not the worst judge I have appeared before: that distinction I would assign to Mr Justice Ridley. Ridley had much better brains than Lawrance, but he had a perverse instinct for unfairness that Lawrance could never approach.

Examples of past judicial misbehaviour spring readily to mind. There was the occasion when Norman Birkett, appearing as a young man for a plaintiff who he thought had won, rose after his opponent's closing speech and said 'I don't know if your Lordship wishes to hear me?' 'No,' said the judge, so Birkett sat down and listened with horror while the judge delivered judgment against his client. At the end he rose and protested: 'But your Lordship said you didn't wish to hear me.' 'I didn't,' replied the judge, 'and I still don't.' One recalls the notorious partisanship of Lord Hewart.²³ One recalls the judge who, on receiving the assurance of a witness wishing to affirm that he had no religious belief, observed 'And no morals either.' One recalls the appeal which succeeded against Hallett J because the judge's interruptions had been such as to make the conduct of both parties' cases impossible.²⁴ One recalls, much more recently, the criminal case in which a chairman of quarter sessions (unobjectionably, as was held on appeal) on repeated occasions during a defendant's case observed in a loud voice 'Oh, God' and laid his head across his arm and made groaning and sighing noises.²⁵ It cannot, unfortunately, be said that such aberrations never recur, and of course they were always exceptional. But I have no doubt that the modern judiciary would, as it should, regard itself as the servant of the public, not its master; would

²² 60 LQR 324.

²⁴ *Jones v National Coal Board* [1957] 2 QB 55.

²⁵ *R v Hircock, Farmer, Leggett* [1970] 1 QB 67.

²³ C. P. Harvey, *The Advocate's Devil* (1958), 32.

recognize that the dignity of judicial office is enhanced and not reduced by the display of ordinary good manners; and would recognize that the appearance of justice is almost as important as its substance, if indeed the two are separable. There is much force in Sir Robert Megarry's observation that the most important person in court is not the judge or the advocate or the witness but the litigant who is going to lose.²⁶

The judge's duty to be, and appear to be, completely impartial during the conduct of a case is so fundamental, so pervasive and—I must admit—so obvious that I would not be justified in wearying you with examples. But there are a number of situations which perhaps deserve mention.

First, disqualification. It is the judge's duty to disqualify himself if, pecuniary interest altogether apart, he is for any reason unable to try a case on its objective merits or might reasonably appear to be so. This can give rise to very difficult questions.²⁷ In the ordinary way English practice would not require a judge to stand down because he had previously decided cases against a particular party, or even because he had previously rejected the evidence of a particular material witness. But the consistency of the previous adverse decisions or the terms in which the evidence had been rejected, might be such as to raise a question, however wrongly, about the judge's ability to approach a case with the necessary objectivity. In such a case the judge may prefer to stand down. The Court of Appeal has, however, emphasised very recently that a charge of bias or apparent bias is not to be lightly made.²⁸

Secondly, it is quite clear that a judge should not make disparaging comments about the parties in any case he is currently trying. An extreme example of such conduct came before the Criminal Division of the Court of Appeal in the recent and notorious case of *R v Barth*.²⁹ In that case the then Recorder of London, while presiding over a trial in which a Sikh defendant was accused of murder, was reported in a daily newspaper to have made an after-dinner speech at the Mansion House in which, referring to the case he was hearing at the time, he made mention of 'murderous Sikhs'. It was found, not surprisingly, that in the absence of any convincing contradiction of the report, it raised an appearance of bias and the court commented on 'the extreme unwisdom of any Judge making remarks outside the court in public about a case which he is currently trying'. In an even more recent civil case,³⁰ the Civil Division of the Court of Appeal held that 'total abstinence from comment on a current case, in public or in private, should be the rule'.

Thirdly, while it is inherent in the appellate system that judges will disagree, and it is on occasion necessary for an appellate court to express criticism, sometimes

²⁶ 'Judges and Judging', Child & Co Lecture, 3 Mar. 1977, 5.

²⁷ See, e.g., *Australian National Industries Ltd v Spedley Securities Ltd* (1992) 26 NSW LR 411.

²⁸ *Arab Monetary Fund v Hashim*, unreported.

²⁹ Unreported, 9 Apr. 1990.

³⁰ *Arab Monetary Fund v Hashim*, unreported.

very strong criticism, of a judge's conduct, the language used on such occasions should be measured, temperate, dignified, and so far as possible polite. Such situations should never degenerate into personal vendetta. Happily, I can think of recent parallel to the occasion on which Scrutton LJ gratuitously criticized knowledge claimed by McCardie J, a bachelor, of women's underwear, an attack to which McCardie J responded by refusing to make his notes of judgment available to any Court of Appeal of which Scrutton LJ was a member.³¹ When Lord Maugham wrote to *The Times* criticizing Lord Atkin's dissenting judgment *Liversidge v Anderson*³² Atkin rightly forbore to reply. I cannot think any judge would now feel justified in writing to a periodical to criticize a judgment of Lord Chief Justice, as Sir James Stephen did in 1884 fiercely attacking Lord Coleridge's judgment in a blasphemy case.³³ The convention is now settled: differences of this kind are not aired in the press.

Fourthly, it is plainly improper for a judge to court publicity or seek public acclaim or newspaper headlines. There is still much force in the old aphorism that the best judge is he whose name is unknown to average readers of the *Daily Mirror*. Chief Justice Hale three centuries ago was fully alive to this point. His 'This necessary to be continually had in remembrance' included

11. That popular or court applause or distaste, have no influence into any thing I do in way of distribution of justice.

12. Not to be solicitous what men say or think, so long as I keep myself exactly accord to the rule of justice.

Modern practice would, I think, endorse that approach fully, subject to two qualifications. In passing sentence in a difficult case, a criminal judge is often wise to take account, among many other considerations, of how a proposed sentence will be perceived by the public at large, or the community to which the defendant belongs, or the victim. This is not a surrender to the clamour of the mob; it is realistic recognition that a sentence widely seen as unjustifiably lenient may ultimately be damaging to the defendant himself and even, unless and until corrected, to the administration of criminal justice. In the civil field also, cases arise which are of public concern: it may then not be enough for the court to reach the right decision; it may be necessary also to give reasons for the decision in terms which the public can understand.

Fifthly, there has, particularly in the United States, been some debate about *ex parte* communications a judge may properly have when preparing his judgment.³⁴ The view there seems to be that a judge may consult with other judges but not with any law teacher. It is without doubt fundamental that a judge should not decide a case on a point which has not been raised in argument without giving

³¹ Thomas, *op. cit.* 18-19.

³² K. J. M. Smith, *James Fitzjames Stephen*, 171.

³⁴ ABA Canons of Judicial Conduct, Canon 3A(4): 'Judicial Ethics: The less-often asked questions'. Andrew L. Kaufman, (1989) *Washington Law Review*, vol. 64, 851.

notice to the parties and allowing them an opportunity to make submissions. That is a rule which arbitrators are expected to observe and so are judges. But subject to that, English practice would not in my view frown on a judge who sought to clear his mind or test his views by discussing the matter with a colleague or a law teacher. Difficulties could arise if the discussion were with an appellate judge who was thereafter called upon to decide an appeal against the decision, but in a case raising some issue of judicial or sentencing policy I do not think consultation with an appellate judge would be thought improper provided the trial judge did not cede the responsibility for decision which was properly his.

Sixthly, modern practice requires expeditious delivery of reserved judgments. The press of other commitments, the incidence of vacations, and the occasional unavailability (in multi-judge courts) of all members may lead to some delay between hearing and judgment but (save at the highest level) this should be measured at most in weeks and not in months. I do not think any delay beyond that is regarded as tolerable save perhaps in very special circumstances.

Seventhly, judges (being human) do not like being reversed on appeal, although some dislike it more than others. But it is the judge's clear duty to do nothing to obstruct any arguable appeal, whether by making findings of fact more conclusive than the evidence warrants in the expectation that the appellate court will be unable to interfere, by passing an unduly lenient sentence in the hope of deterring an appeal against conviction, by refusing leave or a certificate in any case where such is necessary and justified, or in any other way. Whatever the cost to his *amour propre* the judge must, so far as possible, remain detached and not seek to deprive a litigant of rights which the legal system confers.

In this context the question has arisen whether and to what extent it is permissible for a judge to edit a transcript of what he said. Authority makes plain that editing a transcript of a direction to a jury is not permitted.³⁵ This is in my view right, since in such cases much may turn on the precise terms in which the jury is directed; in civil cases more latitude is permitted, since that is generally not so. It is common practice to correct errors and infelicities of grammar and style in the transcript of an *extempore* judgment. But that latitude does not extend to alterations in the substance or sense of what was said, to the adding of new points or the rectifying of omissions not mentioned at the time. Still less does it sanction the wholesale rewriting of the judgment, using the transcript as little more than a draft.

Eighty and lastly under this head, the overwhelming consensus of judicial opinion would in my view discourage or condemn attempts by judges, whether from the bench or otherwise, to answer public criticism of their decisions. Lord Cockburn burned his fingers when he entered the lists in defence of his decision in *R v Bedingfield*³⁶ over a century ago. Other judges who have attempted to

³⁵ *R v Kilcznski* [1973] 1 WLR 1230.

³⁶ (1879) 14 Cox CC 341.

³² [1942] AC

answer criticisms, particularly of criminal sentences, from the bench have tended to cut sorry and rather unconvincing figures. Judges are almost always better advised to remain silent, leaving the wisdom or unwisdom of any decision to be judged by the appellate courts, by academic commentators, and by public opinion.

On the closing stages of the judge's official journey I have only three brief points to make. First, and whatever the position before the appointment of Fisher J in 1968, it is now in my view clear that a judge may not properly retire (save of course on grounds of ill health or incapacity) before serving a minimum period of 15 years. The Lord Chancellor makes plain to prospective appointees that elevation to the bench is a one-way street and judges are morally obliged to honour that commitment. Secondly, the judge may after retirement pursue any avocation, public or private, not inappropriate for a retired judge. This may certainly include acting as an arbitrator or giving expert opinions on the law in the capacity of a retired judge. But thirdly, and here the contrast with both the United States and Australia is stark, a retired judge may not return to the practice of law. There are in my opinion a number of sound practical reasons which strongly support that rule. There is also, I think, a formal reason: that on becoming a judge a practitioner ceases to be a barrister or a solicitor (whether he remains on the roll or not) and becomes solely a judge, with the result that on retirement he lacks any qualification to practise. I would for my part be very sorry to see that rule eroded.³⁷

³⁷ This is a slightly modified version of a lecture given at the SPTL Annual Conference on 8 Sept. 1993.