DECISION-MAKING IN A VACUUM?

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Like everyone else, judges are the product of their social experience, background, education and heritage. These factors will underline at least some aspects of the decision-making process. To deny that judges have regard to social justice, the public good or other ideals is to deny a fundamental part of their role. Judges are commonly required to choose between several different and opposing legal principles that may be equally applicable. This inevitably involves a value judgment. Similarly, judges must strive to ensure that outdated principles and standards that no longer conform with current attitudes are not perpetuated. This is the surest way to secure judicial decisions that are consonant with generally accepted notions of social justice, as well as those ideals to which our legal system ought to aspire.

I INTRODUCTION

> Much harm is done by the myth that, merely by putting on a ... black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.[1]

At times it is necessary to explain what a judge does. The explanation can be easily understood, though some may choose not to understand. Laws confer rights and impose duties. A judge is required to investigate whether a claimed right is enforceable or an alleged breach of duty has occurred. This investigation requires the judge to determine the truth of any asserted facts, analyse the law applicable to those facts, and make an order in accordance with the law as interpreted and applied to the facts.

This simple statement of what a judge does, while accurate in so far as it goes, is not really complete. It ignores the underlying and exceedingly complex issue of how a judge carries out the investigation. What factors influence the judge when investigating the facts and determining the law? It is this issue that I wish to address.

First let me set the scene by quoting, not from a lawyer, but from a great author (and a French one at that):

> All those who deceive themselves into the belief that they put anything but their own personalities into their work are dupes of the most fallacious of

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1 *In Re J R Linahan* 138 F 2d 650, 652-3 (1943) (Frank J) (citing as inspiration Lord Macmillan, *Law and Other Things* (1937) 202).

illusions. The truth is that we can never get outside ourselves ... We are shut up in our own personality as if in a perpetual prison.[2]

II TRADITIONAL THEORY

The traditional theory of adjudication is that a judge must search for the relevant rule of law derived from settled legal principles found in precedents and then apply it to the facts of the case.[3] The approach basically assumes that the answer to any legal problem is to be found by searching in the reports and locating the relevant case. Benjamin Cardozo likens the process of identifying a precedent to matching 'the colors of the case at hand against the colors of many sample cases ... The sample nearest in shade supplies the applicable rule'.[4] Thus, the decision should be the same regardless of the identity of the judge. The traditional view is seen as 'the archetype of legal science in the practice of law'.[5] It places 'emphasis on uniformity, consistency and predictability, on the legal form of transactions and relationships' and, sometimes, on literal, rather than purposive interpretation.[6]

The principal rationale for the theory is the notion that people rely on certainty in the law in deciding how to settle their affairs.[7] It is said, with some justification, that the willingness of people to engage in commercial activities and transactions depends on the reliability of the rights and obligations assigned by the law. The less predictability and certainty there is, the less likely it is that parties will be able to settle disputes without litigation, and this is clearly contrary to public policy.[8] Following precedent and treating similar cases alike enhances certainty and enables formal equality to be achieved.

It must be accepted, however, that according formal justice (in the sense of following precedent) says nothing about substantive justice. Laws may at the same time be equally executed but unjust. So, while the importance of predictability in the law should not be underestimated, there is a good deal to be said for the view that it should not be pursued at the expense of justice and

2 Antole France, quoted in J Frank, *Law and the Modern Mind* (1949) 115.

3 Parke J in *Mirehouse v Rennell* (1833) 1 Cl & F 527; 6 ER 1015, 1023 gave a convenient statement of the doctrine of precedent:

> 'Our common-law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, nor merely for the determination of the particular case, but for the interests of law as a science.'

4 Cardozo, *The Nature of the Judicial Process* (1949) 20.

5 Davies, *Asking the Law Question* (1994) 115.

6 D McBarnet and C Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 *Modern Law Review* 848, 849.

7 Lord Reid, 'The Judge as Law Maker' (1972-73) 12 *Journal of the Society of Public Teachers of Law New Series* 22, 23.

8 S Evans, 'Defending Discretionary Remedialism' (2001) 23 *Sydney Law Review* 463, 494.

flexibility. The following of precedent also overlooks society's changing attitudes and evolving values. When viewed in the context of the standards of the day, many decisions that reflect the values of a bygone era are revealed as unjust.[9]

The requirement of fidelity to pre-existing norms is at the core of our understanding of law and is the institutional structure within which our legal system operates. Judges are trained to respect the law and the internal functioning of the legal system. On a practical level, following precedent makes a judge's workload manageable.[10] The doctrine of precedent clearly has a predominant role to play in judicial decision-making[11] - it is just not clear how substantial this role is, and perhaps more importantly, how substantial it ought to be.

While the institutional requirement to follow precedent is undoubtedly the most important limitation on a judge's decision-making process, there are numerous other institutional checks and balances. Legislation may mark out the bounds of a judge's discretion. The obligation to publicly provide cogent reasons for decision[12] necessitates the articulation of the decision in a coherent and supportable fashion. Judges may find their perceptions, premises, logic and values subjected to 'unremitting criticism'[13] from colleagues with whom they have consulted. The media, academics and appeal benches are all very quick to point out where they think a judge has gone wrong. Finally, and perhaps most importantly, there are the self-imposed constraints of commitment, professionalism and integrity.[14]

The fact that I have described the traditional theory as 'traditional' does not mean that all of its proponents are no longer with us. Perhaps the best known spokesman for legal formalism in this country was Sir Owen Dixon. On the occasion of his swearing in as Chief Justice of Australia, he said: 'There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.'[15] A contemporary proponent, Justice Hayne, believes that there are very few cases where precedent will not bind the judge to a particular outcome.[16] Perhaps the most famous adherent of this theory was Judge Learned Hand who claimed that 'a judge [can] avoid asserting his own predilections by practicing detachment, skepticism, and the virtues of institutional self-restraint'.[17] But, like

9 Mason CJ, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 94.

10 R Posner, 'Past Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship' (2000) 67 *University of Chicago Law Review* 573, 591; Cardozo, above n 4, 49; I Kaufman, 'The Anatomy of Decisionmaking' (1984) 53 *Fordham Law Review* 1, 11; see especially below n 58.

11 H Patapan notes in *Judging Democrary: The New Politics of the High Court of Australia* (2000) 188 that despite the High Court's willingness to overrule or distinguish earlier decisions, 'to the extent that the Court's decisions are cumulative, precedent forms a powerful and binding force on future discretion.'

12 *Pannizutti v Trask* (1987) 10 NSWLR 531, 535.

13 S Abrahamson, 'Judging in the Quiet of the Storm' (1993) 24 *St Mary's Law Journal* 965, 992.

14 Ibid.

15 O Dixon, (1952) 85 CLR xi, xiv.

16 Hayne J, 'Letting Justice be Done Without the Heavens Falling' (2001) 27(1) *Monash University Law Review* 12, 17.

17 W Rehnquist, 'Remarks on the Process of Judging' (1992) 49 *Washington and Lee Law Review* 263, 266.

all pronouncements by judges, however great, there is always room for different views, and regarding judicial decision-making, different views abound. A proper understanding of the judicial process requires an examination of at least some of these competing theories.

In reality, the traditional theory works only in easy cases. The true position is that few cases that come before superior courts can readily be disposed of by following well-established rules. Gaps and conflicts in legal rules are inevitable in a complex, modern system of law, particularly given the law's quest for comprehensiveness.[18] There will be many situations that are not provided for in strict legal rules. There will be many cases where several legal principles are equally applicable. The very nature of litigation means that there are two sides to every case. For each clear legal principle, there are an infinite number of issues that test the application of the principle at the margin.[19]

In these cases the lawbooks will often fail to provide the answer, or at least a satisfactory one. Indeed, it may sometimes be dangerous to attempt to extract a general legal principle from previous cases to apply to the present, as each may be very dependent on its facts. Lord Reid has cautioned that in dealing with general principles extracted from precedent, judges must not treat the words as though they were words of a statute. A rule taken from one case, when applied to another, may produce a result that offends against common sense and justice.[20] Each new factual matrix demands a dynamic examination of the static precedent.[21] As factual issues in cases become increasingly complex, it will correspondingly be more difficult to find cases in which the facts are sufficiently close to be governed by the same rule.[22]

In any event, the piecemeal development of the common law makes it inevitable that the law will not always provide an acceptable answer. The most significant institutional reaction to this position was the development of the body of rules now known as equity. The principal function of equity is to soften the rigours and fill the gaps left by the common law.[23] It is 'a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law'.[24] In more colourful language it has been described as a 'daring foe of rigid medieval structures and a still feudalistic common law'.[25] Equity's doctrines have been moulded to make available an appropriate remedy where equality and fairness demand relief. Equitable remedies were dispensed by the Courts of Chancery,

18 G Keating, 'Fidelity to Pre-existing Law and the Legitimacy of Legal Decision' (1993) 69 *Notre Dame Law Review* 1, 16-17.

19 R Clinton, 'Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society' (1981-82) 67 *Iowa Law Review* 711, 714.

20 Reid, above n 7, 26.

21 Kaufman, above n 10, 10-11.

22 P Atiyah, 'From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law' (1979-80) 65 *Iowa Law Review* 1249, 1259.

23 P Finn, 'Modern Equity' in P Rishworth (ed), *The Struggle for Simplicity in the Law* (1997) 75.

24 *Lord Dudley and Ward v Lady Dudley* (1705) Prec Ch 241, 244; 24 ER 118 (Sir John Trevor MR).

25 P Loughlan, 'The Historical Role of the Equitable Jurisdiction' in P Parkinson (ed), *The Principles of Equity* (1996) 6.

which were not bound by any doctrine of strict precedent. They assessed each case in light of its own particular circumstances and, in the words of Sir George Jessel MR, 'invented' rules to achieve a just result.[26] It therefore provided a vision of judge-made justice that was profoundly anti-formal.[27] That is, even when the formalist method of adjudication was at its peak of acceptance, judges recognised that it often produced unjust results and sought ways in which they could legitimately apply some notions of conscience, fairness and morality. Whether equitable relief is available is very largely a question of fact and value judgment.[28]

However, equity could not provide a complete answer to the strictures of the common law. Over time, equity itself has been reduced to a multitude of rules, leaving gaps in its wake and creating conflicts. Some equitable doctrines have become too inflexible to provide the justice they were developed to achieve.

So, if formalism does not provide a complete picture, what other views are there?

III OTHER THEORIES

One alternative is that a judge's background, unconscious motivations and prejudices have as much to do with the way he goes about deciding a case as legal education or precedent. According to this view, each judge brings to the bench a mind imprinted with previous experience, and that experience influences how the judge decides cases.[29] Because each case is new, and because the social context is continually changing, there will always be a degree of novelty or unpredictability: where the formal law cannot always determine the outcome. According to this so-called realist view, law is a social instrument which ought to be directed at achieving certain goals, not adoring rules and formal reasoning.[30] Some great American judges, including Benjamin Cardozo, Jerome Frank and Oliver Wendell Holmes, have subscribed to elements of legal realism.

The realists argue that legal rules alone could not predict judicial decisions. At least three reasons have been given. First, as many legal rules are ambiguous or contestable, reasonable people may disagree about their meaning (for example, the concept of 'reasonableness'). Second, decided cases can always be read in a number of ways – at the very least, a broad interpretation and a narrow interpretation will be possible. Third, because of the manipulability of precedent, it is not uncommon to find authority to support both sides of a case. The realists accept that, while precedent may constrain judges in decision-making, the social

26 In *Re Hallett's Estate* (1880) 13 Ch D 696, 710. In the same case, Jessel MR (at 710) reminded us that 'the rules of Courts of Equity are not, like the rules of the Common Law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time - altered, improved and refined from time to time.'

27 Loughlan, above n 25, 4.

28 A Mason, 'The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: An Australian Perspective' in D Waters (ed), *Equity, Fiduciaries and Trusts* (1993) 14.

29 Reihnquist, above n 17, 264.

30 Davies, above n 5, 123-8.

context, judge's ideologies, and professional consensus significantly influence judgments.[31]

Let me quote from the lectures of Judge Cardozo, delivered at Yale University in 1921, which should be compulsory reading for every judge. He said: '[There is an] inescapable relation between the truth without us and the truth within. The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties'.[32]

In recent times, a more radical view of decision-making has emerged, which has been given the label 'critical legal studies'. It is described as the intellectual successor of realism,[33] though it appears to go further than realism.[34] Perhaps unsurprisingly, the critical legal scholars (who are called 'Crits' by those who have sympathy for their views) seem to be exclusively academics. They have been described, variously, as self-consciously leftist,[35] nihilist[36] and as people who 'sincerely want to be radicals'.[37] The central tenet of this movement is that the act of adjudication is a political function. These theorists suggest that legal thought is necessarily incoherent and indeterminate and legal doctrine can be manipulated to justify an almost infinite spectrum of possible outcomes. It is nothing more than a sophisticated vocabulary and repertoire of manipulative techniques for categorising, describing, organising and comparing.[38] Law is viewed as being political, and legal reasoning as a technique used to rationalise, in legal jargon, the political decisions that are actually made.[39] The Crits attack free market liberalism on the grounds that this approach tends to rationalise oppression rather than cure it because the degree of social conflict is underestimated and because the privileged classes can manipulate 'neutral' governmental processes to their own advantage.[40]

Feminist Legal Theory also has a substantial following. Although it has several branches, in essence, it is based on the claim that the common law is 'patriarchal' or supported by a 'masculine ideology'. That is to say, the law and its resulting jurisprudence reflect male values because it is largely men who have written the law and theories about law.[41] Liberal feminism, one of the branches of the theory, 'challenges the male dominance of the public sphere, attempting to remove the

31 J Singer, 'Review Essay: Legal Realism Now' (1988) 76 *California Law Review* 465, 470.
32 Cardozo, above n 4, 174-5.
33 Cf Dworkin's statement in *Law's Empire* (1986) 272 that 'it is too early to decide whether (critical legal studies) is more than an anachronistic attempt to make that dated movement (ie Legal realism) reflower'.
34 Davies, above n 5, 147.
35 Dworkin above n 33, 272.
36 Davies, above n 5, 146.
37 P Johnson, 'Critical Legal Studies Symposium: Do You Sincerely Want to be Radical?' (1984) 36 *Stanford Law Review* 247, 249.
38 A Hutchinson and P Monahan, 'Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36 *Stanford Law Review* 199, 206.
39 Davies, above n 5, 147.
40 Johnson, above n 37, 256.
41 Davies, above n 5, 167-8.

legal and social impediments to women exercising the same rights, and enjoying the same opportunities, as men'.[42]

There are many other groups who have developed theories seeking to explain decision-making. They include the economic analysts, social scientists of law, gay legal scholars, law and literature theorists and critical race theorists, to name a few. Apart from the economic analysts, who are centred around the University of Chicago, and some of whose influential members have been appointed to the United States Circuit Courts of Appeal (for example, Judges Bork, Posner and Easterbrook), their influence is not great and so far they have achieved few practical ends.

IV THE ACTUALITY

Putting to one side the theories of others, I propose to declare where I stand. I believe that the reality lies somewhere along the continuum between formalism and realism. I doubt whether anyone who is actually involved in the process of litigating cases in the common law system (lawyer or judge) would support the view that literal language and rules should be followed religiously no matter how absurd, unjust or unintended the result.[43] However, formalist notions do live on in our common law system, in the methodology by which judges formulate their decisions and the style of judgment writing that legitimates those decisions.[44]

Every human being is the product of their social experience, background, education and heritage. A judge is no different. Judges views of morality as well as their background and beliefs, sympathies and antipathies cannot help but underline at least some aspects of the decision-making process and, in some cases, all aspects. This is so whether or not the particular judge acknowledges it. There are some self-proclaimed formalists who believe it is possible to divorce their personal views and values from their decisions. Although they may genuinely believe this, I doubt its truth. No theory of decision-making can approximate what judges actually do without taking into account the subjective elements of the decision-making process. Although formal rules may constitute the 'bedrock'[45] of our legal system, the creative input of the decision-maker cannot be denied.

Some judges explicitly recognise a duty to consider what they believe to be the public good. Holmes said: 'I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious'.[46]

42 Ibid 189.
43 C Sunstein, 'Must Formalism be Defended Empirically?' (1999) 66 *University of Chicago Law Review* 636.
44 E Rubin, 'The Practice and Discourse of Legal Scholarship' (1987-88) 86 *Michigan Law Review* 1835, 1861.
45 Kaufman, above n 10, 11.
46 O W Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 467.

The judges in *Brown v Board of Education* 347 US 483 (1954) showed no such aversion. The case, which outlawed segregation in public schools, is widely regarded as being one of the most important decisions in American legal history. As a matter of constitutional interpretation and the application of strict legal precedent, the case cannot be shown to be correct. The entire opinion, written by Earl Warren CJ for the Court, consisted of 13 short paragraphs. The decision, though not long on explanation, can nonetheless be understood in terms of ethical and moral considerations, including improving the position of African Americans, vindicating the ideals for which WWII had recently been fought and promoting social peace through racial harmony. Because such considerations are not strictly admissible, as on pure formalist accounts they are not, the decision in *Brown* is questionable.[47] Indeed, it may be said that the decision went beyond implementing the will of the general public, as the majority of people in America at the time were opposed to desegregation.[48] However, history has vindicated *Brown* and its implied acceptance of moral and ethical considerations.[49]

So, to say that a judge should blindly follow established precedent without regard to social justice, the public good or ideals is to deny a fundamental part of a judge's role. Consider the commonplace situation where the judge is faced with several different and opposing established legal principles. No process of simple logical deduction will always determine the choice between them.[50] In such a situation, judges must make a value judgment. Their decisions will be directly related to their conceptions of the most appropriate, and the most just, outcome. And that will be influenced by their particular traits, disposition, biases and habits.[51]

The explosion at the Esso gas plant at Longford, which interrupted gas supply to Victoria for two weeks in 1998, is a current example of a case that presents difficult issues and competing principles. As a result of the explosion, many groups in the community suffered damage to property and pecuniary loss. Factories that were reliant on gas to operate their machines closed down. Some suffered damage to their equipment. Employees at the closed factories were stood down and lost wages. Esso has been found negligent in litigation,[52] which is currently wending its way through the Supreme Court of Victoria. One question at issue in this litigation is which of these groups, if any, ought to receive compensation? There are authorities to the effect that only those who have suffered physical damage should be entitled to recover. There are other cases

47 R Posner, *The Problems of Jurisprudence* (1990) 304.

48 According to statistics in J Patterson, *Brown v Board of Education; A Civil Rights Milestone and its Troubled Legacy* (2001) 227, Table 1, Appendix II, in 1942 only 30 per cent of whites supported the view that white students and African American students should go to the same schools.

49 An illustration of the fact that this watershed decision was ahead of its time is the fact that ten years after the decision, less than one per cent of schools in the South were desegregated and the notion of desegregation only became widely accepted several decades after the decision. The case was an instance of the court setting the standards in terms of morality and equality.

50 B Cardozo, in M Hall (ed) *Selected Writings of Benjamin Nathan Cardozo*, 229 (1947) (from *Growth of the Law* 100).

51 Frank, above n 2, 111.

52 *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2003) VSC 27.

which suggest that, in special circumstances, a plaintiff who suffers 'pure economic loss' can claim. No case, as yet, would give a remedy to the workers. But there is no authoritative Australian decision against them. The trial judge adopted a conservative approach and found against the workers. How will the Court of Appeal decide the case? Is it not inevitable that the judges of that court will give consideration to issues of policy and the common good in reaching a decision? Is it not also likely that in resolving policy questions and deciding what is the common good, the judge will be influenced by personal factors?

What goes on in judges' minds as they prepare themselves to make a decision in a particular case? The process begins even before the parties arrive at court. When reviewing the papers, the judge may have a 'hunch' as to the correct outcome of the case. This hunch may or may not be retained to become the final decision. According to psychologists, during the course of a trial, a judge will give consideration to several propositions in a variety of combinations to construct models for the decision. Each model is tested for coherence and, if coherent, is retained and revised in subsequent cycles. A judge will focus on propositions and inferences that are expected to advance the model towards the successful completion of the task, and may focus on those that will steer the outcome the way of the judge's hunch. As the process progresses, a number of models may evolve. The extent to which they evolve can depend on external factors such as the judge's workload. A judge may also consider the consequences of deciding a case in a particular way such as whether the defensive behaviour that may be caused by a particular decision will be detrimental to the community as a whole. For example, a judge will be aware that imposing liability for negligence in a new class of case may cause insurance premiums to rise.

The final decision is strongly influenced by the judge's state of mind at the instant of making the decision. At this point the judge will perceive that the arguments favour one side and will feel compelled to decide a particular way. This sense of unequivocal support for one view creates a sense of inevitability and of confidence on the part of the judge. The mental state of coherence then colours the written judgment.[53]

In the course of preparing reasons, the decision is then augmented by a process of *ex post facto* rationalisation, which not only consolidates the judge's own view but is also designed to enhance its public acceptance. Sometimes this is referred to as 'padding'.[54] This is not a reference to the adding of irrelevant information, but rather to the inclusion of additional information that will support the decision and result in decisions appearing more coherent and correct. Rationalisation may be particularly pronounced when the judge feels the decision is not sufficiently sound or where the judge may need to convince the audience, including the appellate court. Similarly, judges will omit from their reasons any reference to

53 D Simon, 'A Psychological Model of Judicial Decision-making' (1998) 30 *Rutgers Law Journal* 1, 84.

54 Ibid.

factors which have influenced them, but which they realise may not be regarded as a legitimate part of the reasoning process.[55]

The thought process involved will in some cases be conscious and in many instances will be quite unconscious. Although self-awareness is not equally developed in all people, most judges are conscious of at least some of the subjective factors that influence their decisions. These include background knowledge of particular areas of community or business life, as well as some personal biases. In determining the facts of the case a judge's 'personal biases are operating constantly'.[56] When listening to the testimony of witnesses, judges will be affected by sympathies and antipathies created by their temperament and experiences. We no longer regard judges as being possessed of an inherent ability to discern from a witness's demeanour whether he is telling the truth.[57] It is natural for judges to approach the evidence against a background of their own experiences. Interestingly, the Supreme Court of Canada explicitly recognised this in a recent case in which it held that a comment by a black trial judge that white police officers have been known to lie when dealing with black suspects did not evidence an impermissible partiality but, rather, demonstrated that the judge had properly taken into account the reality of the inequitable social context in which the alleged offence was committed and her own experience of this social context.[58]

When judges are aware of biases that may impact on their determination of the facts, they may attempt to compensate for them and, in doing so, may lean too far the other way to avoid the actuality or the appearance of prejudice.[59] Compensatory bias stems from a conscious reaction against known bias, but it operates in an unintended, or unconscious way. In *Pinochet's case*[60] it was not alleged that Lord Hoffman's association with Amnesty International meant that he was actually biased but Pinochet did argue that there was a real chance that he might be. Lord Hoffman had not recognised the difficult position he was in, for if he did he would have excused himself from the case. Perhaps his failure to appreciate the conflict is itself a product of compensatory bias, or something like it. In any event the case demonstrates that even the best judges can be blind to their own prejudices, or the appearance of them.

55 R Leflar, 'Some Observations Concerning Judicial Opinions' (1961) 61 *Columbia Law Review* 810, 817-18.

56 Frank, above n 2, 106.

57 In *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588, 617, Kirby J said: 'There is a growing understanding, both by trial judges and appellate courts, of the fallibility of judicial evaluation of credibility from the appearance and demeanour of witnesses in the somewhat artificial and sometimes stressful circumstances of the courtroom.'

58 *R v S (RD)* (1997) 3 SCR 484, 505. L'Heureux-Daube and McLachlin JJ stated that 'triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function'.

59 K Mason, 'Unconscious Judicial Prejudice' (2001) 75 *Australian Law Journal* 676, 685.

60 *R v Bow Street Metropolitan Stipendiary Magistrates; Ex parte Pinochet Ugarte (No 2)* (2000) 1 AC 119.

Once the facts have been found, the judge must then decide what is the applicable law. Although a judge is required to abide by the doctrine of precedent,[61] at times he may only pay lip service to it. Lord Reid has pointed out that if a judge does not like an existing decision because it will produce an unjust or an unreasonable result, he will try to distinguish it. Or he may create an exception to the rule established in the previous case. This allows the doctrine of precedent to remain intact, but may result in an 'impenetrable maze of distinctions and qualifications which destroy certainty'.[62] In addition, judges are adept at manipulating the language of former decisions. As I have said, a judge can usually find earlier decisions to justify almost any conclusion. So, although a judge may appear to be deferring to the doctrine of precedent, in reality the deference is often illusory.[63]

Masking decisions that were actually influenced by ethical, social justice or other policy considerations in a pretence of fidelity to precedent in no way enhances the legal system. It makes debate about the appropriateness of those policy considerations virtually impossible and may mean that future reliance on the case as a precedent could perpetuate the policy considerations without the later decision-maker being aware of their existence and without any assessment of their current relevance. Perhaps we should heed Cardozo's formula: '[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.'[64]

In some cases, the outcome of a judgment can be moulded or crafted by the manner in which the legal question before the court is framed or the factual circumstances described. In *Bowers v Hardwick*,[65] for example, Justice Bryon White (writing for the majority) left the reader in no doubt from the outset about the issue to be decided and the result. He described the issue presented as:

> whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

Needless to say the majority held the State statute to be constitutional.

Justice Blackmun, dissenting, understood the importance of describing the issue presented, beginning his opinion in these terms:

> This case is no more about a fundamental right to engage in homosexual sodomy, ... than *Stanley v Georgia* ... was about a fundamental right to watch

61 It has been said that '[since] judges are supposed to decide cases by following legal doctrine, the inclination to do so is part of their more general desire to act in the proper fashion': E Rubin and M Feeley, 'Creating Legal Doctrine' (1995-96) 69 *Southern California Law Review* 1989, 1996.

62 Reid, above n 7, 24.

63 Frank, above n 2, 148-152.

64 Cardozo, above n 4, 150.

65 478 US 186 (1986).

> obscene movies, or *Katz v United States* ... was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about 'the most comprehensive of rights and the right most valued by civilised men,', namely, 'the right to be let alone'.

On other occasions, a self confident judge may sometimes describe the facts before the court in such a way that only one result is possible. My favourite example is Lord Macnaghten's speech in *Lloyd v Grace, Smith & Co,*[66] a case concerning solicitors' liability for the acts of their servants. He begins this way:

> My Lords, in the office of Grace Smith & Co, a firm of solicitors in Liverpool of long standing and good repute, the appellant, Emily Lloyd, a widow woman in humble circumstances, was robbed of her property. It was not much, just a mortgage for £450 bequeathed to her by her late husband, and two freehold cottages at Ellesmere Port which she had bought herself without legal assistance for £540 after her husband's death. But it was all she had; and after the order of the Court of Appeal, reversing a decision of Scrutton J who tried the case with a special jury, she was compelled to appear to this House as a pauper ...

This speech just eclipses the introduction penned by Lord Denning MR in *Lloyds Bank Ltd v Bundy*:[67]

> Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Getting out means ruin for him.[68]

Mr Bundy defeated the bank's claim although he had willingly mortgaged to it his only asset and did not dispute his default.

In the now famous case of *Mabo v Queensland (No 2)*[69] moral values were explicitly taken into account. For the first time the High Court recognised a form of native title, which reflects the entitlement of the indigenous inhabitants to their traditional lands. Brennan J said:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.[70]

66 [1912] AC 716.
67 [1975] QB 326.
68 [1975] QB 334.
69 (1992) 175 CLR 1.
70 (1992) 175 CLR 1, 42.

Deane and Gaudron JJ stated that the dispossession of indigenous Australians constitutes 'the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.'[71]

The unique knowledge, experience and perceptions of a judge are an integral part of the intellectual capital that is brought to the bench.[72] It is inevitable that these factors will play a part in decision-making albeit subconsciously. Holmes said that at the heart of the judicial process 'often lies an inarticulate and unconscious judgment'.[73] For my own part I suspect that judges are sometimes intuitively aware, in a general sense, that subjective factors may be exerting an influence over their decision-making. But intuitive awareness cannot override the subconscious.

One cannot discount the possibility that subconscious factors were at play in the recent decision of the High Court in *Garcia v National Australia Bank Ltd.*[74] A wife had given a guarantee for loans to businesses conducted by the husband. When the bank called in the loans, she sought to avoid liability, relying upon the principles in *Yerkey v Jones*[75] to the effect that married women are under a special disability and require special protection against improvident bargains. The bank countered this argument by contending that in today's society it is neither necessary nor appropriate to give special protection to married women. The High Court disagreed. The majority was bound to and did acknowledge that both Australian society and the role of women in it has changed in the last six decades. However, they went on to say that there are also things that remain unchanged. 'There is still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power between the parties.'[76] Their decision was clearly influenced by what they thought was right in light of what they termed 'the disparities between the parties'. Kirby J agreed in the orders but disagreed with the majority's underlying rationale. He said that:

> [w]hatever may have been the position in Australian society of 1939, it is offensive to the status of women today to suggest that all married women, as such, are needful of special protection supported by a legal presumption in their favour.[77]

What produced the difference in opinion about the position of a modern married woman? It was certainly not grounded in the evidence, as no sociologist, economist or psychologist was called. The result can only partly be explained by the application of strict legal principle. It is evident that the judges did attempt to discover in what respects the position and role of women had changed since

71 Ibid 42. Mason CJ and McHugh J agreed in the reasons for judgment of Brennan J.
72 P Wald, 'Thoughts on Decisionmaking' (1984-85) 87 *West Virginia Law Review* 1, 12.
73 Holmes, above n 46, 466.
74 (1988) 194 CLR 395.
75 (1939) 63 CLR 649.
76 (1988) 194 CLR 395, 403-4.
77 Ibid 424.

the 1930s, although they did this without the assistance of any evidence. This notwithstanding, it is likely that the judges were also influenced by their subjective views about whether or not women require 'special protection'. The extent of this influence is something we can never know, and perhaps the judges themselves will never know.

Although most judges strive diligently to avoid bias in making their decisions and firmly believe their rulings are free from extraneous influences,[78] subconscious factors may sometimes lead a judge to make a factual determination on unacceptable grounds. Judges are not 'dehumanized vehicles of faultless, logical truth'.[79] We are all prone to using subconscious simplifying strategies when processing significant amounts of information. One such strategy is to create mental categories so that when we are faced with a given set of facts, we approach them with these categories in mind. If we are not careful this may result in perceived or actual bias. Stereotypes may affect judgment through their impact on processing evidence (that is, in the finding of facts).[80]

Negative stereotypes about minorities may affect decision-making in a myriad of areas. Subconscious racial discrimination is one area that has been the subject of a substantial degree of analysis, particularly in America, but even in Australia it has received attention.[81] Subjective judgments about character, motivation and intellectual ability may be applied by the decision-maker to a race as a whole. These subjective judgments may be rationalised by the decision-maker to enable him to maintain an egalitarian self-image.[82]

Cognitive illusions enable decision-makers to process voluminous information efficiently, though they can produce systematic errors in judgment. Common cognitive illusions include making estimates based on irrelevant starting points ('anchoring'), and perceiving past events to have been more predictable than they actually were ('hindsight bias'). Psychologists have identified many other cognitive illusions that are said to infect decisions, but the two I have mentioned will serve as examples. Anchoring causes people making numerical estimates to rely on the initial value available to them, no matter how irrelevant it is. For example, claims for damages awards or proposals for levels of penalties to be imposed by the court may tend to anchor the final determination of the amount. Hindsight bias consists of using known outcomes to assess how predictable an event was at a previous point in time, for example, reconstructing how foreseeable a car accident was to the motorist involved before the event.

As judgments are not always particularly enlightening when it comes to explaining how decisions were reached, it is difficult to say with any certainty that cognitive illusions infect them. It is true that they are well accepted

78 Nugent J, 'Judicial Bias' (1994) 42 *Cleveland State Law Review* 1, 5.

79 Ibid.

80 Ibid 10.

81 For example, Kirby J in *State Rail Authority of New South Wales v Earthline Pty Ltd (in liq)* (1999) 160 ALR 588, 618.

82 S Vargas, 'Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity' (1999) 58 *Maryland Law Review* 150, 170.

phenomena in other spheres of decision-making and there is some anecdotal evidence indicating that judges are affected by cognitive illusions. It is almost certain that hindsight bias was at play when, in 1931 the Prerogative Court of New Jersey stated that:

> [i]t was common knowledge, not only amongst bankers and trust companies, but the general public as well, that the stock market condition at the time of [the] testator's death was an unhealthy one, that values were very much inflated and that a crash was almost sure to occur.[83]

There are several tools a decision-maker can use in trying to minimise the effects of biases, prejudice and cognitive illusions. Perhaps the most important is a large dose of self-awareness. 'The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices'.[84] Thus, judges must strive to understand their own personal biases. '[T]he wisdom of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies'.[85] They should not be afraid to ask themselves whether any of their biases could affect a particular decision. They must accept that others may have a different perspective and must engage and address viewpoints other than their own.[86] Considering whether the reasons for deciding in a particular way, if articulated faithfully, would appear to be reasonably acceptable to a member of a minority group may act as a good sense check.

Amici curiae appearances by public interest groups may assist in providing the judge with an alternative viewpoint and have become an increasingly accepted part of litigation in recent years.[87] In the United States, in constitutional cases, non-legal evidence may be presented in a brief (known as a Brandeis Brief[88]) so as to inform the court of social, political and economic matters relevant to the case. This seems to be an effective means of ensuring that relevant background information is at the disposal of the judges, and consideration should be given to

83 *In Re Chamberlain* 156 A 42, 43 (NJ Prerog Ct 1931).

84 *In Re J R Linahan* 138 F 2d 650, 653 (1943) (Frank J). Cf Kentucky Railroad Tax Cases (Cinncinnati, NO & TPR Co v Commonwealth of Kentucky), 115 US 321, 334-5.

85 Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991) 12.

86 Vargas, above n 82, 210-11.

87 See eg, *Levy v Victoria* (1997) 189 CLR 579, in which media interests were represented; *Victorian Council for Civil Liberties Incorporated v Minister for Immigration and Multicultural Affairs* (2001) FCA 1297; on appeal (2001) FCA 1329 in which Amnesty International Ltd and the Human Rights and Equal Opportunity Commission (HREOC) were permitted to intervene and *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) FCAFC 194 in which HREOC intervened. For an interesting comparison of views about the value of amicus briefs in the United States compare *Ryan v Commodity Futures Trading Commission*, 125 F3d 1062, 1063 (7th Cir, 1997) (Posner CJ) (noting that an amicus curiae means 'friend of the court, not friend of the party') and a response to that decision by Luther T. Munford, 'When Does the Curiae Need an Amicus?') 1 *Journal of Appellate Practice and Process*, 279 (1999).

88 The Brandeis Brief is named after Mr Brandeis (who would later become a justice of the Supreme Court) who, in 1907, presented a brief to the Supreme Court containing two pages of legal information and over a hundred pages of evidence from committee reports, statistics and other non-legal material in a case concerning a ten hour maximum working day for women: referred to in *Muller v Oregon* 208 US 412, 419 (1908).

its greater use in Australia.[89] This would enable the members of the judiciary, who are generally drawn from a pool of people with relatively similar backgrounds, to consider whether the standards and common sense they apply to the decision-making process are as universal as they think.

V JUDGES AS LAWMAKERS

If I am right in my view that the traditional theory of adjudication (that the answer to any dispute is to be found in a precedent) does not often reflect the reality of judicial decision-making, and a myriad of factors, varying in their degree of influence, actually produce the resolution of a case, does this mean that judges are really unelected legislators? We are so far down the track now that no-one could seriously claim that judges do not make law.[90] Everyone who writes on this topic quotes Lord Reid and I see no reason to do otherwise. He said:

> Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame ... But we do not believe in fairy tales any more. So we must accept the fact that for better or for worse judges do make law.[91]

But should we be critical of this? I think not. In the first place, the criticism overlooks the basic, if not fundamental, proposition that the common law is nothing but judge made law. In substance, the criticism amounts to this. That for some unarticulated reason, the original function of common law judges came to an end a century or two ago. I venture to suggest that there is no logic in this approach. In any event I think that those who decry judges for acting as 'legislators' actually misunderstand the nature of a judge's function. Judges are required to develop the common law. The High Court has accepted this role although some members believe that the privilege should be confined to that court alone.[92] There is a different view.

89 S Brown, 'The Courts, Legal and Community Standards', in a collection of papers from a National Conference, The Australian Institute of Judicial Administration Inc, *Courts in a Representative Democracy* (1994) 98-9.

90 In the words of Judge Schaefer of the Supreme Court of Illinois in his article, 'Precedent and Policy' (1966-67) 34 *University of Chicago Law Review* 3, 4: 'It is generally agreed that judges make law and that it is inevitable that they should do so.'

91 Reid, above n 7, 22.

92 For example in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, a case in which the High Court by majority created an exception to the common law doctrine of privity of contract, Toohey J commented that although the law in this area is not so well entrenched as to be incapable of change, it 'is not ... a change to be made by an intermediate court of appeal': 165 CLR at 167. See also 165 CLR at 158 per Dawson J. But compare the comments of Kirby J in his speech to the Bar Council of India, 'Judicial Activism', 6 January 1997 in which he stated that it is not appropriate to limit judicial creativity to the High Court, referring to comments made in *Nguyen v Nguyen* (1990) 169 CLR 245, 269, where some of the very same judges noted that now appeals to the High Court are by special leave only, the appeal courts of the Supreme Courts and the Federal Court may be the courts of last resort in many cases for all practical purposes.

Not infrequently a court will be faced with a new issue that has not been considered previously, for example those raised by the advent of new technology. In such a case the court has no alternative but to decide the case in the best way it can, having regard not only to analogous cases, but also to principles of justice and the potential consequences of its decision. In that situation it would be unthinkable for a judge, whether at first instance or on intermediate appeal, to say to the litigants:

> I'm sorry, this is a new issue. There is no formal law to guide me so I won't be able to help you. Come back when you have a more straightforward matter, one that does not require me to make new law which may entail a consideration of social, political and ethical issues.

Similarly, the application of principles and standards that no longer conform with current attitudes cannot be justified and will often require change. Take *R v L,*[93] a case about marital rape. The question was whether a wife was under an obligation to render conjugal rights. The High Court held she was not. The majority said that 'this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between parties to a marriage.'[94] Imagine the public outcry if the High Court had decided that the common law entitled a husband to have sexual intercourse with his wife against her will. As Sir Anthony Mason said in an address to the Sydney Institute: 'Nothing is more likely to bring about an erosion of public confidence in the administration of justice than the continued adherence by the courts to rules and doctrines which are unsound and lead to unjust outcomes.'[95]

Of course, there will be occasions in which a court should defer to the legislature for law reform. But if the Parliament does not act, the court may be forced to intervene. In *Beswick v Beswick,*[96] which concerned contractual benefits conferred on a stranger, Lord Reid warned that 'if one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter'.[97] For a variety of reasons, the legislature may not intervene. This may be because Parliament has too many other things on its agenda, or because a particular problem has simply not come to its attention. In the increasingly complex world in which we live, it will become more and more difficult for Parliament to keep abreast of desirable changes in the law. Correspondingly, there will be an increasing onus on the court to supply the answers, many of which may be completely novel and founded on new principles. The point cannot be better made than by Cardozo who, as long ago as 1923, said:

> There are those who, dismayed by the difficulties of the judicial process when it becomes a creative agency, would keep it to the sphere of imitative

93 (1991) 174 CLR 379.
94 (1991) 174 CLR 379, 390.
95 Sir Anthony Mason, 'The Australian Judiciary in the 1990's', *The Sydney Papers*, (Autumn 1994) 111, 114.
96 [1968] AC 58.
97 [1968] AC 58, 72.

> reproduction, and leave creation to the statutes. I am not sure but that I should be prepared to join them if statutes had proved adequate in the past to the bearing of such a burden, or gave promise of being adequate within any future now in sight.[98]

It should not be surprising that certain decisions which introduce notions of equity and justice are roundly criticised by politicians, the public, and the press, while others are overlooked or ignored by all but the legal profession. The *Mabo* cases caused an enormous outpouring of criticism for being decided on policy grounds. It has been suggested that in the aftermath of the *Mabo* decisions the media were enlisted by powerful pressure groups with vested interests – graziers, pastoralists, mining companies and conservative politicians. On the other side of the coin are decisions such as *Cole v Whitfield,*[99] where the High Court dramatically re-interpreted the freedom of interstate trade and commerce provision of the Constitution.[100] The case was just as much based on policy ideals as were the *Mabo* cases, but has been singularly free of controversy. If it is considered acceptable for a court to make decisions such as *Cole v Whitfield*, then what is wrong with the court taking a similar role in other cases? Perhaps the explanation for the difference in the treatment of these cases lies in the media's perception of the views of their audience and the fact that some decisions are seen as impacting more immediately on people's lives than others.[101] Or perhaps there is a genuine lack of understanding about what courts really do. As Professor Brian Galligan pointed out in the Weekend Australian of 17-18 July 1993:

> Much of the criticism of Mabo and recent Constitutional decisions has mixed distaste for particular outcomes with mistaken beliefs about the illegitimacy of the High Court's basic law making role.
>
> If the High Court's essential role has not changed, much else has. Most significantly, leading judges have dropped the disguise of legalism and are boldly making and changing constitutional and common law in decisions of enormous public consequence. Unfortunately, they have not prepared the public for the switch.[102]

98 Cardozo, above n 50, 244.
99 (1988) 165 CLR 361.
100 *Australian Constitution* s 92.
101 This is generally only a matter of perception, rather than reality. For example, virtually all Australians were affected in an immediate and practical way by the decision in *Cole v Whitfield*, whereas *Mabo* only really impacted on a small number of resources companies and farmers.
102 Quoted in J Doyle, 'Implications of Judicial Law-Making' in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 85.

VI CONCLUSION

Frank tells us that:

> [t]he honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices is the best guaranty of justice. Efforts to eliminate the personality of the judge are doomed to failure. The correct course is to recognize the existence of this personal element and to act accordingly.[103]

The application of judges' human qualities to a decision should be welcomed because it prevents the worst error of all: creating a schism between a formalistic legal order and commonly held notions of social justice.[104]

Nothing I have said should be interpreted as indicating that a judge should act as an 'ad hoc legislator'.[105] At all times a judge must work within the framework of the common law system. Sometimes this means that a judge will be obliged to follow precedent regardless of personal views. However, I hope I have been able to highlight the importance of both judges and the wider community acknowledging the inescapable fact that many aspects of the judicial function, from determining facts to granting a remedy, will be coloured by subjective factors, whether conscious or subconscious. Accepting that this is the case is the surest way to secure judicial decisions that are consonant with generally accepted notions of social justice, as well as those notions to which our legal system ought to aspire.

[103] Frank, above n 2, 138.
[104] Kaufman, above n 10, 16.
[105] A M Gleeson, 'Individualised Justice: The Holy Grail' (1995) 69 *Australian Law Journal* 421.