Judicial impartiality, New Forms of Legal Practice, and the Criminal Justice and Immigration Act 2008

by Gary Slapper, Professor of Law, and Director of the Centre for Law at The Open University

Judicial impartiality

Sentencing a young woman at the Magistrates' Court in Port Adelaide, Australia, in July, 2003, the magistrate Michael Frederick said:

> "You're a druggie and you'll die in the gutter. That's your choice…I don't believe in that social worker crap. You abuse your mother and cause her pain. You can choose to be who you are. You can go to work. Seven million of us do it whilst 14 million like you sit at home watching Days of Our Lives smoking your crack pipes and using needles and I'm sick of you sucking us dry".

The magistrate then extended his social analysis by condemning certain taxes, and concluded:

> "It's your choice to be a junkie and die in the gutter. No one gives a shit, but you're going to kill that woman who is your mother, damn you to death."

He then gave the woman a prison sentence, apparently unaware that that was unlawful in the particular type of case in question. The sentence was overturned on appeal, and the outburst of the magistrate was condemned by a senior judge.

Any apparent partisanship or prejudice from the Bench is an impediment to the achievement of justice.

The attitudes of some English judges have not inspired unalloyed public confidence. For example, in 1976, Judge Sutcliffe said to a jury "it is well known that women in particular and small boys are liable to be untruthful and invent stories".

In October 1990, addressing a female witness who said she wished to be addressed with the title "Ms", Mr Justice Harman said "I've always thought there were only three kinds of women, wives, whores, and mistresses. Which are you?"

Those are very unusual cases of judicial error but they raise the question of how neutral or disinterested in the matter before the court we can require a judge to be. Like many things in law, the answer involves an exquisite balance between conflicting demands. On the one hand, a justice system would not be publicly acceptable if judges were allowed to preside in cases in which close family members were litigants. Even if a judge were to remain clinically impartial in such a case it would look as if he or she might have been biased. On the other hand, a justice system would not be worthy of that title if it allowed a judge to be declared biased in a case simply by virtue of the fact that they came from the North or South of the country.

There are clear rules which oblige a judge to stand down from presiding in a case if he or she has a financial interest in the matter to be tried or if any party or witness is an acquaintance or relative. But the law also goes further than that and says a civil or criminal trial might be open to appeal if the judge is found to have an association or social interest in something indirectly connected with an issue before the court.

A good illustration of that rule being applied occurred this summer. In July, 2008, Mr Justice Cranston recused (the old term for refused) himself from presiding in a foxhunting case because he had previously condemned the sport's "barbarity" and voted for a ban on it when he was an MP. The judge was due to preside in case involving a dispute between huntsmen and animal welfare activists. He stood aside after some preliminary legal argument when lawyers representing an alliance of landowners in Sussex raised formal objections. The case concerns an attempt by the Crawley and Horsham Hunt (on behalf of 88 landowners) to ban animal welfare activists from almost 100,000 acres of open countryside in West Sussex.

The hunt wanted an injunction granted under the Protection from Harassment Act 1997 (which makes it unlawful to cause harassment, alarm or distress by a course of conduct) against the West Sussex Wildlife Protection Group. Sir Ross Cranston, a former Labour MP for Dudley North, accepted that it was inappropriate for him to continue as judge in the case after Tim Lawson-Cruttenden, the solicitor-advocate acting for the hunt, alerted the court to the judge's views on hunting.

Mr Lawson-Cruttenden referred the court to an article in a local newspaper from December 2000, in which Sir Ross was quoted as saying: "I am confident the vast majority of my constituents share my view foxhunting is not a sport but a barbaric and cruel activity." He said he welcomed the chance to vote in favour of legislation making hunting unlawful. Mr Lawson-Cruttenden argued that, while not suggesting that the judge would be biased, there might be "an appearance of bias" in the eyes of the public.

Mr Justice Cranston told the court that he could not remember the press release and that an MP's vote did not necessarily amount to an expression of a passionate personal belief. He also emphasised that he had had taken the judicial oath to "do right to all manner of people . . . without fear or favour, affection or ill will". (*The Times*, 29th July, 2008)

Similar cases have arisen before. In August 1999, a judge disqualified himself from presiding in a case because he was involved in pheasant shooting. When he found himself about to hear an appeal from an animal rights campaigner at Winchester Crown Court, Judge Patrick Hooton stood down. The case was an appeal against conviction for aggravated trespass on land where a pheasant shoot was taking place, and Judge Hooton admitted to the court "I am a member of the Countryside Alliance. I support shooting. I have taken part in shooting and beating [making noise and disturbance to get the pheasants to take flight]." (*The Times*, October 12th, 1999)

All judges, of course, have active and varied social interests. Many aspects of their lives and the lives of their families will inevitably overlap with matters related directly or indirectly to cases in which they are asked to preside. The old understanding of judicial duties involved a principle that, having been appointed as a person of balanced and independent thinking, a judge would be able to bring unbiased analysis to a case irrespective of any opinion he or she might have. As one American judge observed, if bias and impartiality were

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defined to include "the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will." (*per* Frank J., *In Re Linahan* (1943) F 2d 650 at 651)

The regulation of judicial impartiality has gone from early rules forbidding judges from presiding in cases where they have a financial interest or direct personal interest to more subtle rules extending to other sorts of possible bias. For centuries, the English legal system has operated a rule that no-one may be a judge in his or her own cause, i.e. they cannot judge a case in which they have an interest. This is sometimes known by the phrase *nemo judex in causa sua*. In a case in 1852, it was decided that a judge who was a shareholder in a company appearing before him as a litigant should have declined to hear the case. Even if a judge is unaffected by his or her interest in coming to a decision, it would still be wrong to preside in such a case because it might *look like* the judge was improperly swayed even if in fact there was no such sway. Thus, in the famous dictum of Lord Hewart in a case from 1924, it is of fundamental importance that: "justice must not only be done but should manifestly and undoubtedly be seen to be done". See chapter 6, *The English Legal System*, Slapper & Kelly, 2008.

This rule was given greater detail in the extraordinary case *In Re Pinochet Ugarte* (HL, 15th January, 1999). General Pinochet, was over in England on a visit when he was arrested for crimes of torture and mass killing allegedly orchestrated by him in Chile during the 1970s. His extradition had been requested by Spain. The legal question for the English courts was whether General Pinochet enjoyed a diplomatic immunity.

His case was eventually rejected by the House of Lords (by a 3:2 majority) in 1998. Pinochet's lawyers then alleged that the Lords' decision was invalid as one of the majority Law Lords, Lord Hoffmann, could not be seen to be impartial as he had a connection with the organisation Amnesty International which had been granted leave to intervene in the proceedings, and had made representations to the Lords through counsel. Lord Hoffmann at this time was an unpaid director of the Amnesty International Charitable Trust. Amnesty International was in favour of General Pinochet being brought to trial.

In January 1999, on an appeal brought by Pinochet, another panel of Law Lords set aside the decision of the earlier hearing on the basis that no-one should be a judge in his own cause. The House of Lords stated that if the absolute impartiality of the judiciary was to be maintained, there had to be a rule which automatically disqualified a judge who was involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as was a party to the suit.

Lord Browne-Wilkinson stated that although previous cases had all dealt with automatic disqualification of judges from hearing particular cases on the ground of pecuniary interest, there was no good reason in principle for limiting automatic disqualification to such financial interests. The rationale of the rule was that a person could not be a judge in his own cause.

In 1999, in *Locabail (UK) Ltd v Bayfield Properties Ltd*, EWCA 3004, the Court of Appeal, heard together five cases in which it had been alleged that the judge could be regarded as having a reason to be biased (note that this is a different allegation than one that says the judge *was* biased).

The court then explained the general principles that would govern such disputes. A judge who allowed his judicial decision to be influenced by partiality or prejudice deprived a litigant of the right to a fair trial by an impartial tribunal and violated a most fundamental principle on which the administration of justice rested.

The court held that the most effective protection of his right was, in practice, afforded by disqualification and setting aside a decision where real danger of bias was established. Every such case depended on its particular facts, real doubt being resolved in favour of disqualification of the judge from sitting in that case. It would, however, be as wrong for a judge to step down following a weak objection as it would be for him to ignore a strong objection.

While it would be dangerous and futile to attempt to define or list factors which might or might not give rise to a real danger of bias, since everything would depend on the particular facts, the Court of Appeal said it could not conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge.

Nor, ordinarily, the court decided, could an objection be soundly based on his social or educational or service or employment background or history, nor that of any member of his family; nor previous political associations, membership of social, sporting or charitable bodies; nor Masonic associations; nor previous judicial decisions; nor extra-curricular utterances, whether in textbooks, lectures, speeches, articles, interviews (so Mr Justice Cranston *could* arguably have resisted standing down in the fox hunting case above); nor previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; nor membership of the same Inn, circuit, local Law Society or chambers.

By contrast, the court ruled, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any such member of the public, particularly if that individual's credibility could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected that person's evidence in such outspoken terms as to throw doubt on his ability to approach such a person's evidence with an open mind on any later occasion.

In *Morrison v AWG Group Ltd* and another (2006) EWCA Civ 6, the legal issue was whether a High Court judge should have recused himself from presiding because he knew someone in a case he was about to try. The Court of Appeal ruled that he should have recused himself. It stated that if there was evidence of an apparent bias, then inconvenience, costs and delay in finding a substitute judge were not acceptable reasons for the original judge proceeding to preside. In this company case, the judge had said he had known a witness for the claimants for 30 years.

The judge, Mr Justice Evans-Lombe, said in his judgment that when he discovered that one of the witnesses to be called in the case by the claimants was well known to him, the claimants said they would solve that problem by not calling this man but calling someone else from the same company who could equally well testify on the same issues. That way, this complex case would not have to be postponed until another judge could read all the voluminous papers and take on the case. Mr Justice Evans-Lombe then said:

> … At the outset of the hearing of the defendants' application I described my connection with AWG and with Mr Jewson in the following terms: AWG is a company whose primary business is supplying water to industry and the public in East Anglia and in particular in Norfolk. My family are farmers/landowners in Norfolk and so in the area of operation of AWG. I have had dealings with AWG, not always harmonious, over the years on such subjects as access for the purpose of sinking boreholes and running pipelines. Mr Jewson lives in the next village to the village where I and my family live being approximately 1 mile distant. Our families have known each other for at least 30 years. Our children are friends and we have dined with each other on a number of occasions. Mr Jewson and I in the past were tennis players. Mr Jewson has recently been appointed Lord Lieutenant of Norfolk. I would have the greatest difficulty in dealing with a case in which Mr Jewson was a witness where a challenge was to be made as to the truthfulness of his evidence.

That witness was therefore replaced and the judge resolved to continue hearing the case. On appeal, however, Lord Justice Mummery stated that the safest course of action was for the trial judge in such a situation to stand down to avoid any possible perception of bias. Even without the witness appearing, the case had still involved him. So, had the case gone ahead, it might have looked to the public (however unjustified such a perception) that the judge

had handled the case in a way that favoured the commercial interests of his friend because even if the friend had stood down and let someone else take his place as a witness, the case was one that obviously had involved him. Walking away as a witness did not cut his connection with the case.

In operating strict rules to keep judges' personal experiences and lives out of the justice system, we are now a long way from the times of Mr Justice Buller (who became a judge in 1777). It was said of him that that he invariably and automatically sentenced to be hanged anyone found guilty of sheep stealing, giving as a reason that he had had several sheep stolen from his own flock.

New Forms of Legal Practice

Between 1950 and 2000, the scenery of the legal professions changed dramatically. In 1950 there were 17,000 solicitors whereas by 2000 there were 100,000. During the same time, the number of barristers rose from 2,000 to 11,000. During the same fifty years, though, the general population grew by only 20 per cent from 50 million to 60 million.

During this time, moreover, the shape and style of legal practice changed in many ways. The top 20 English firms, for example, became global operators and became as economically powerful as small countries. Legal practice developed a great many new specialist fields.

One recent change to the structure of legal services is set to carry significant consequences into the next 50 years. The Solicitors Regulation Authority (SRA) has agreed a set of changes to its Code of Conduct which pave the way for the regulation of new forms of legal practice including Legal Disciplinary Practices (LDPs). These changes have been made possible by the Legal Services Act 2007.

Legal Disciplinary Practices (LDPs) are a new type of body which will enable solicitors to take into partnership other lawyers such as barristers and licensed conveyancers. The new legal businesses will also be able to have non-lawyers constituting up to 25 per cent of its partners. These LDPs are an interim development towards Alternative Business Structures (ABSs) also covered by the Legal Services Act and often referred to under the term, 'Tesco Law'.

Peter Williamson, chair of the SRA said: "These changes are the first step in encouraging innovation and competition in the legal services market through more flexible forms of practice and ones which will ultimately benefit consumers."

Certain rule changes will now need to go through various statutory approval processes by the Secretary of State for Justice's Consultation Panel before they are formally introduced in 2009.

The changes follow ten consultations with stakeholders earlier this year to amend the existing rules extending the SRA's remit to cover both individuals and the firms in which they work. In addition the 2007 Act changes the position of sole practitioners who will need to seek authorisation from the SRA to act as a 'recognised sole practitioner'.

Antony Townsend, SRA's chief executive, said (28th July, 2008):

> "We had to review both the firm-based and individual authorisation processes to ensure consumer and public protection while at the same time trying to create a more streamlined and efficient system without too much red tape. Although the fine detail has still to be established, we believe that firm-based regulation will prove more effective and efficient in terms of the necessary checks and fee collection."

The changes to the Code of Conduct follow the delegation of rulemaking to the SRA by the Law Society in July. The changes will mean:-

- solicitors will be able to join legal practices regulated by other approved regulators e.g. the Council for Licensed Conveyancers, as an owner/manager;
- unincorporated partnerships will need to become recognised bodies;
- sole practitioners will need to be authorised as 'recognised sole practitioners';
- existing sole practices and partnerships will be automatically 'passported' to become recognised without having to undergo any formalities.

Details on the consultations in relation to the Legal Services Act, including reports on responses, are available on the SRA website at www.sra.org.uk/LSA.

Criminal Justice and Immigration Act 2008

The Criminal Justice and Immigration Act 2008 advances the government's programme of reform of the criminal justice system. The government argues that these steps will help to protect the public, promote and improve access to justice, and increase public confidence in the justice system.

In particular, the Act:

- introduces a new criminal of offence of incitement to hatred on the grounds of sexual orientation
- restates the law on self defence, articulating the state's responsibility to stand by those acting in good faith when using force in self defence
- introduces new civil penalties for serious breaches of data protection principles
- abolishes the common law offences of blasphemy and blasphemous libel
- reinstates the statutory ban on industrial action by prison officers
- introduces a minimum tariff of two years for prisoners serving indeterminate public protection sentences
- gives powers for courts to make dangerous offenders given a discretionary life sentence serve a higher proportion of their tariff before being eligible for parole
- creates a presumption that trials in magistrates' courts will proceed in the event the accused fails to appear
- introduces a new offence of possession of extreme pornographic images
- extends existing crack house closure powers to tackle premises at the centre of serious and persistent disorder or nuisance, regardless of tenure
- creates a new offence of causing a nuisance or disturbance on NHS premises
- provides for special immigration status for terrorists and serious criminals who cannot currently be removed from the UK for legal reasons

The Act is long (154 sections), and is the latest in a series of 50 pieces of legislation affecting criminal justice in the last 20 years. It is a good example of how wide-ranging and socio-political are the things legislated by government in the context of a law ostensibly just about the way the law machine *processes* cases.

In fact, apart from making changes to the legal system itself, this Act creates new crimes, abolishes old ones, and makes some politically contentious changes. One such contentious change is that in bullet point 2 (above) legislated in s. 76. It is designed to clarify the law on self defence, by (in one governmental phrase) "articulating the state's responsibility to stand by those acting in good faith when using force in self defence". People were already allowed to use reasonable force to protect themselves and to prevent serious crimes, and the Act does not change that position in any way.

It is arguable that the only reason that the government wanted to make this new declaration of law about self-defence was to be seen to be siding with the victims of crime. The danger is that new law will be regarded by many citizens as a licence to use force more readily against criminals. Where that happens, as a number of horrifying cases have shown recently, the innocent intervener commonly gets brutally attacked and sometimes killed. So, the wisdom of emboldening citizens to make a stand against crime (as opposed to the government concentrating on improving the resources of the police) is open to question. The way the government has presented the law in s 76, in what is arguably a political gesture, will probably have an effect on citizen responses to crime.