

The Judges: Active or Passive

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IT IS A HIGH HONOUR to give the British Academy's Maccabaeian Lecture. It is an honour which should, this year, have fallen to the late Professor Peter Birks, whose tragic and untimely death has deprived the world of legal scholarship of one of its undoubted giants, a scholar who would have adorned any generation in any country. We are all the poorer for his passing, as the moving and eloquent addresses at his memorial service powerfully reminded us. What the subject of his lecture would have been, I do not know, but it would without doubt have been a work of originality and erudition, attributes to which my own lecture can, alas, lay scant claim. But perhaps I may introduce my theme with a quotation from Birks himself: 'Authority in interpretation of the law naturally derives from learning combined with good judgment and discretion in its deployment.'¹ He went on to add, perhaps rather generously, that 'the common law has always put its jurists on the bench'.²

In recent weeks the British judiciary have been charged, by a leading political figure, with 'aggressive judicial activism'.³ Similar charges, not always so politely expressed, have been made in other ages (for example, in ancient Athens) and in other countries also, notably the United States, Canada, Australia and New Zealand. They have also been made against

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¹ P. Birks, 'This Heap of Good Learning: The Jurist in the Common Law Tradition' in B. Markesinis (ed.), *Law Making, Law Finding, and Law Shaping: The Diverse Influences* (The Clifford Chance Lectures, vol. 2) (Oxford, 1997), p. 113.

² *Ibid.*, pp. 113–14.

³ M. Howard, 'Judges must bow to the will of Parliament', *Daily Telegraph*, 10 Aug. 2005, p. 22.

the Court of the European Communities.⁴ The widely admired Israeli Supreme Court has been described by an American critic as ‘the most activist, *antidemocratic* court in the world’.⁵ It is tempting to dismiss such accusations as mere political polemic. But the proper role of judges in the modern democratic world is a legitimate subject of public consideration and discussion, and the more significant one considers the judicial decision-making role to be, the more that is so. After all, as Lord Simon of Glaisdale observed in a reported case: ‘Law is too serious a matter to be left exclusively to judges.’⁶

I begin by describing what may, I hope fairly, be described as the traditionalist view of the judicial role. It rests essentially on three propositions. The first relates to the separation of powers. The function of the legislature is to enact laws for the good government of the country. It is for the executive to carry those laws into practical effect. It is for the judiciary, in case of doubt or dispute, to interpret and apply those laws. The task of the judges is, and is only, to give effect to the terms of what Parliament has enacted. They have no warrant to vary, add to or subtract from the effect of what Parliament has enacted, no warrant to supply omissions or give effect to what they may think Parliament would have intended.

The second proposition relates to the non-statutory areas of the law. Here the task of the judges is to declare what the common law is, and by implication has always been. Such law is derived, above all, from precedent, the accumulated wisdom of the past, applied with what Maitland called ‘strict logic and high technique’.⁷ Thus the judges are a neutral, colourless, undistorting medium through which the law is transmitted to those bound by it. They are not, save perhaps in a minimal sense, makers of the law, which must itself, to the highest degree possible, be certain, stable and predictable.

The third proposition is that the authority and standing of the judges depend on their strict adherence to these rules. They enjoy the tenure, the

⁴ See, for example, T. Hartley, ‘The European Court, Judicial Objectivity and the Constitution of the European Union’, LQR, 112 (1996), 95; P Neill, ‘The European Court of Justice: A case study in Judicial Activism’, evidence submitted to the House of Lords Select Committee on the European Communities, sub-committee on the 1996 Inter-Governmental Conference, 1996 Inter-Governmental Conference, *Minutes of Evidence, House of Lords Session, 1994–5, 18th report*, p. 18.

⁵ R. Bork, *Coercing Virtue: The World-wide Rule of Judges* (Washington DC, revised edn., 2003), p. 13.

⁶ *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, 481.

⁷ F. W. Maitland, Introduction, *Selden Society Year Book* (1983), Series I, p. xviii.

independence and the authority that they do precisely because of the essentially technocratic role which they fulfil, precisely because they are giving effect to the enacted intention of Parliament or the inherited corpus of the common law, and not to their own personal opinions, prejudices and predilections, which are wholly irrelevant. They are professional experts charged with a task of interpretation, ‘auditors of legality’ in the apt language of a leading Indian authority,⁸ but with no independent authority to rule on what would best serve the public interest. Not only do the judges lack the democratic credentials to perform such a task; they lack the resources and processes conducive to good law-making.⁹

There is an immense body of authority to support this view of the judicial role. As we learn from Lord Mackay of Clashfern’s Maccabaeian Lecture in 1987, the position of the early Scottish judges was quite clear: they had no power to make law.¹⁰ In Bacon’s opinion, ‘*Judges* ought to remember that their office is *jus dicere*, and not *jus dare: to interpret law*, and not to *make law* or *give law*’.¹¹ It was Hale’s opinion also that the decisions of English courts could not ‘make a law properly so called, for that only the King and Parliament can do . . . but though such decisions are less than a law, yet they are greater evidence thereof than the opinion of any private persons . . .’.¹² On the role of precedent, Parke B’s statement in *Mirehouse v Rennell* in 1833 has been repeatedly cited:

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.¹³

Similarly clear and compelling statements have been made on the proper approach to statutory interpretation. I take as an example the concluding paragraph of Channell B’s judgment in *Attorney-General v Sillem* in 1863:

⁸ S. P. Sathe, *Judicial Activism in India* (Oxford, 2002), p. 3.

⁹ J. Allison, ‘The Procedural Reason for Judicial Restraint’, [1999] PL 452–73.

¹⁰ Lord Mackay of Clashfern, ‘Can Judges Change the Law?’, *Proceedings of the British Academy*, 73 (1987), 285–308.

¹¹ F. Bacon, ‘Of Judicature’, *Essayes or Counsellis, Civill and Morall* (London, 1625), p. 222.

¹² M. Hale, *History of the Common Law* (London, 1713), p. 67.

¹³ *Mirehouse v Rennell* (1833) 1 Cl & F 527, 546; 6 ER 1015, 1023.

It may be said that the manner in which I have considered this case, by a minute scrutiny of the words of the Act, is a mere lawyer's method of viewing the matter—that in a case of this kind it is our duty to take a broader view—to take into our consideration the principles of international law, the duties of nation to nation, and even the opinions of great statesmen on those duties. I, for my part, have no ambition to decide cases in this Court in any other capacity than that of a lawyer. In days long past judges, I think, often invaded what we now consider the sole province of the legislature. They interpreted statutes to include cases which they assumed to think ought to have been included; thus not merely constituting themselves legislators, but generally also legislators *ex post facto*. That I think will never be done again. As long as acts of parliament are drawn as they are now, the office of construing them will be no sinecure, though we have but to interpret the law and not to make it. If it is for the interest of the nation that the law should be other than we interpret it,—if our construction of this act of parliament may endanger the peace of the nation,—then I say that it may be the duty of Parliament to enact a new law; but it is not our duty to look elsewhere than at the present statute for an interpretation of it.¹⁴

Such statements have their counterpart in this country in more recent times. One thinks, for example, of Lord Simonds' famous dismissal of Lord Justice Denning's plea for a purposive approach to statutory construction as 'a naked usurpation of the legislative function under the thin disguise of interpretation',¹⁵ and of his similarly unyielding response to Lord Denning's invitation to reconsider the English law on privity of contract:

... to me heterodoxy, or, as some might say, heresy, is not the more attractive because it is dignified by the name of reform. Nor will I easily be led by an undiscerning zeal for some abstract kind of justice to ignore our first duty, which is to administer justice according to law, the law which is established for us by Act of Parliament or the binding authority of precedent.¹⁶

It is not in this country alone that this traditionalist view of the judicial role has been taken. Oliver Wendell Holmes ended a dissenting opinion by observing that he was not at liberty to consider the justice of the Act under consideration;¹⁷ and in another case he dissented in favour of

¹⁴ *Attorney General v Sillem* (1863) 2 H&C 431, 566–7; 159 ER 178, 237.

¹⁵ *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189, 191.

¹⁶ *Midland Silicones v Scruttons Ltd* [1962] AC 446, 467–8. I touched on these matters in 'The Judge as Lawmaker: An English Perspective', published in P. Rishworth (ed.), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Wellington, 1997), pp. 3–12 and republished in T. Bingham, *The Business of Judging* (Oxford, 2000), pp. 25–34. My observations were severely criticised by P. Watts, 'The Judge as Casual Lawmaker', R. Bigwood (ed.), *Legal Method in New Zealand* (Wellington, 2001), pp. 175–213.

¹⁷ *Untermeyer v Anderson*, 276 US 440 (1928), at 446.

appellants whose views he characterised as ‘a creed that I believe to be the creed of ignorance and immaturity’.¹⁸ Cardozo J observed that ‘Judges are not commissioned to make and unmake rules at pleasure in accordance with changing views of expediency or wisdom.’¹⁹ But perhaps the traditionalist view has in recent times been most clearly and emphatically articulated by another greatly admired and respected common law judge, Sir Owen Dixon. Speaking of the High Court’s function of constitutional interpretation, he said in April 1952, on his appointment as Chief Justice of Australia:

Such a function has led us all I think to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.²⁰

In his address at Yale ‘Concerning Judicial Method’ in September 1955, Dixon cited Maitland’s judgment that the common law was not ‘common sense and the reflection of the layman’s unanalysed instincts; rather . . . strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books, rooted in the centuries’.²¹ The conclusion of the judge, Dixon said,

should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard. The standard is found in a body of positive knowledge which he regards himself as having acquired, more or less imperfectly, no doubt, but still as having acquired.

In an oblique (and, it seems, unrecognised)²² reference to Lord Denning, he added: ‘. . . in our Australian High Court we have had as yet no deliberate innovators bent on express change of acknowledged doctrine’.²³ Dixon was gloomy about what he saw as current trends:

The possession of fixed concepts is now seldom conceded to the law. Rather its principles are held to be provisional, its categories, however convenient or

¹⁸ *Abrams v United States*, 250 US 616 (1919), at 629. See, generally, T. Sowell, ‘Judicial Activism Reconsidered’ (2005), <http://www.tsowell.com/judicial.htm>

¹⁹ B. N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), p. 68.

²⁰ ‘Swearing in of Sir Owen Dixon as Chief Justice’ *CLR*, 85 (1952), xiv. And see P. Ayres, *Owen Dixon* (Melbourne, 2003), p. 233.

²¹ O. Dixon, *Jesting Pilate* (Melbourne, 1965), p. 153.

²² Ayres, *Owen Dixon*, p. 251.

²³ Dixon, *Jesting Pilate*, p. 157.

comforting in forensic or judicial life, are viewed as unreal . . . illusory guides formerly treated with undue respect.²⁴

That these opinions continue to command the support of judges at the highest levels is apparent from the address of Heydon J, a more recent recruit to the bench of the High Court of Australia, given in 2002 and entitled ‘Judicial Activism and the Death of the Rule of Law’.²⁵ In it the author concludes: ‘Our present state is much less bad than that of the United States, Canada and New Zealand. But the former condition of things needs to be restored.’

Seeing that we are compassed about with so great a cloud of authorities, one might well conclude that there is no room for any alternative view. The principles I have attempted to summarise do indeed express important, fundamental and indispensable truths. In the absence in this country of an entrenched and codified constitution, the Queen in Parliament is the supreme lawmaking authority, having no rival. If every judge were free in each case to do whatsoever is right in his own eyes, an approach criticised in the religious sphere by the author of Deuteronomy,²⁶ it would not only violate the judge’s oath to do right to all manner of people ‘after the laws and usages of this Realm’ but would also violate the principles on which the rule of law is founded. As Lord Hailsham of St Marylebone very pertinently observed in his 1983 Hamlyn Lectures, Thomas Fuller’s famous warning—‘Be you never so high, the law is above you’—lays down the rule for judges no less than ministers.²⁷ No case can be made for what has been called judicial popularism, judicial adventurism or, perhaps less happily, judicial excessivism.²⁸ A more difficult question is whether the traditionalist model as I have characterised it provides a comprehensive and convincing description of what judges have done in the past and still do or an adequate prescription for what they should do, applicable in all countries at all times. With genuine respect for those who think otherwise, I suggest that it does not: it captures very important elements of the truth but does not express the whole truth.

It does not, in the first place, seem to me that the traditionalist model squares with the historical record. It is, after all, the cardinal feature of

²⁴ Dixon, *Jesting Pilate*, p. 154.

²⁵ *Quadrant Magazine*, Jan.–Feb. 2003, p. 9.

²⁶ 12: 8.

²⁷ *Hamlyn Revised: The British Legal System Today* (London, 1983), p. 49. Lord Hailsham no doubt had in mind the citation of this warning by Lord Denning MR in *Gouriet v Union of Post Office Workers* [1977] QB 729, 761–2.

²⁸ Sathé, *Judicial Activism*, pp. 27, 100, 118–20.

the common law (in which, for this purpose, I include equity) that the decisions of the judges, made one by one in case after case, are themselves a source of law. Faced with an apparently new problem a judge will, like an administrator, a doctor, a surveyor or an accountant, apply his mind to how rather similar cases have been treated in the past. He will tend, as Lord Wright graphically put it, ‘to proceed from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point, and avoiding the dangers of the open sea of system or science’.²⁹ But the gradual, piecemeal, incremental nature of the process should not blind us to the fact that over the centuries the judges have created important bodies of law, largely untouched by statute, in fields such as, for example, contract, tort, equity, unjust enrichment and the principles governing judicial review. This was not done in a fit of absence of mind. Sir George Jessel MR pointed out

. . . 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 . . . In many cases we know the names of the Chancellors who invented them.³⁰

This conscious lawmaking role was not confined to equity judges. During his thirty-two years as Chief Justice of the King’s Bench, Lord Mansfield heard and decided, it would seem, well over a hundred cases dealing with insurance, mostly marine insurance, and over 450 concerned with bills of exchange and promissory notes.³¹ Those were cases which, it seems plain, Mansfield deliberately reserved to himself because he wanted to fashion, as in the result he did, a coherent, principled body of law fit to serve the needs of an ambitious and expanding commercial nation. This was not a body of law rooted in the Inns of Court and the Year Books. Nor was it the product of strict logic and high technique. It was rooted in important principles of openness and fair dealing, and in the practice and expectations of the market place. It was, Mansfield recognised, ‘of more consequence that a rule should be certain than whether the rule is established one way or the other’,³² but that he was establishing rules he can have had

²⁹ Lord Wright, ‘The Study of Law’, LQR, 54 (1938), 185, 186.

³⁰ *Re Hallett’s Estate* (1880) 13 Ch D 696, 710.

³¹ J. Oldham (ed.), *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, 2 vols, (Chapel Hill, 1992), 1. 479, 610; Jane D. Samson, ‘Lord Mansfield and Negotiable Instruments’, *Dalhousie Law Jo.*, 11 (1988), no. 3. 944.

³² *Vallejo v Wheeler* (1774) 1 Cowper 143, 153; Lofft 631, 643; 98 ER 1012, 1017, 843.

no doubt whatever. Nor can he have doubted that the rules he was establishing, if they were to be effective, had to commend themselves as reasonable and fair to those who were to be bound by them.

We must be grateful to Lord Reid in 1972 for rejecting the declaratory theory of the common law more explicitly than anyone had done up to then,³³ but in truth it scarcely needed him to expose that theory as a fairy tale. For it could not be reconciled with the announcement by the Lord Chancellor on behalf of himself and the Lords of Appeal in Ordinary in 1966 that the House would modify its existing practice and ‘depart from a previous decision when it appears right to do so’.³⁴ That *Practice Statement* recognised precedent as ‘an indispensable foundation upon which to decide what is the law and its application to individual cases’ and as providing ‘at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules’. The role of precedent in the lower reaches of the judicial hierarchy was preserved, and reference was made to ‘the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law’. But it was accepted that ‘too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law’. In other words, the House could reject a bad rule in favour of a better, a power it has exercised, although very infrequently, where the interests of justice or the coherent development of principle appeared to demand revision of an earlier decision.³⁵ The 1966 statement was, I think, seen at the time as a radical (if cautious) departure from settled practice. But, as Lord Rodger of Earlsferry has pointed out,³⁶ the rule that the House was bound by its own decisions was not finally laid down until 1898, and then by four Law Lords in a case in which counsel for the respondent was not called on and Lord Halsbury’s extempore speech occupied less than three pages of the

³³ Lord Reid, ‘The Judge as Lawmaker’, *Jnl. Soc. Public Teachers of Law*, 12 (1972), 22.

³⁴ *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

³⁵ Examples which spring to mind are *R v Inland Revenue Commissioners, Ex p Rossminster Ltd* [1980] AC 952, departing from *Liversidge v Anderson* [1942] AC 206, *R v Shivpuri* [1987] AC 1, overruling *Anderton v Ryan* [1985] AC 560, and *R v G* [2004] 1 AC 1034, departing from *R v Caldwell* [1982] AC 341.

³⁶ Lord Rodger of Earlsferry, ‘What Are Appeal Courts For?’ *Otago Law Review*, 10 (2004), no. 4. 517, 529.

law report.³⁷ Lord Rodger remarks that the doctrine of papal infallibility had been proclaimed some three decades earlier.

The judges are respectful of principle and vividly alive to the value of precedent as a source of certainty, stability and continuity. They recognise, as the Court of Appeal recently put it, that the law is best developed ‘on a case by case basis and not with one large leap’.³⁸ But the inescapable fact is that they do have to make choices, and unless superseded by Act of Parliament their choice determines what the law shall be. Should a taxpayer be entitled to recover payments of tax made to the Inland Revenue under a mistake of law and not of fact? Three Law Lords concluded that the taxpayer should, two that it should not.³⁹ There were competing arguments and the House had to choose between them. One of the arguments urged against recovery was that to recognise such a right would ‘overstep the boundary . . . separating the legitimate development of the law by the judges from legislation’,⁴⁰ prompting Lord Goff of Chieveley (himself a wisely creative judge) to observe:

. . . although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case. Indeed, if it were to be as firmly and clearly drawn as some of our mentors would wish, I cannot help feeling that a number of leading cases in your Lordships’ House would never have been decided the way they were.⁴¹

Should a firm of solicitors whose dilatoriness in drawing up a will deprived an intended beneficiary of her bequest be held to owe a duty of care towards that person? There were powerful arguments both ways, as evidenced by the fact that three Law Lords were of opinion that the firm should owe such a duty and two that it should not.⁴² Should an employer owe a duty of care towards a former employee on whom he writes a reference for a prospective new employer? Four Law Lords ruled that he should, one that he should not.⁴³ Should the ordinary rules of causation apply where a workman has contracted a fatal illness, possibly through a single exposure to unlawful levels of asbestos dust, but cannot show as against a series of employers, all of whom exposed him in that way, which

³⁷ *London Street Tramways Co Ltd v London County Council* [1898] AC 375.

³⁸ *R. v Clark (Mark)* [2003] EWCA Crim 991, [2003] 2 Cr App R 363, para 13.

³⁹ *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

⁴⁰ *Ibid.*, 173.

⁴¹ *Ibid.*, 173.

⁴² *White v Jones* [1995] 2 AC 207.

⁴³ *Spring v Guardian Assurance plc* [1995] 2 AC 296.

particular exposure triggered the illness? The Court of Appeal unanimously held that the workman could not recover.⁴⁴ The House of Lords unanimously held that he could.⁴⁵ Should the ordinary rules of causation apply where a patient is not warned of a risk inherent in an operation, however skilfully performed, when the risk unhappily eventuates but she cannot establish that she would probably not have undergone the operation if she had been duly warned? Three Law Lords held that the ordinary rules should not apply; two dissented.⁴⁶

It is possible, but not very meaningful, to typecast decisions of this kind as ‘activist’. And it is true that the result in each of the cases I have mentioned was to establish liability where it was argued there should be none. In that sense all the decisions made over the centuries establishing the major grounds of, for instance, tortious, contractual, equitable and criminal liability may be so described. Further examples may be found in revocation of the immunity previously enjoyed by a husband who rapes his wife⁴⁷ and of barristers guilty of negligently conducting proceedings in court.⁴⁸ But the expression ‘activist’, if used at all, must surely be applied also to cases where, on the ordinary application of familiar principles, it might be thought that a claim would lie but it is held not to do so. One example might be the negligent preparation of company accounts to be circulated to shareholders;⁴⁹ another the failure of a social services department to respond to clear evidence of the maltreatment of children;⁵⁰ another the making of false and negligent diagnosis that a parent has abused her child.⁵¹ But perhaps the most striking recent example is *McFarlane v Tayside Health Board*,⁵² in which the House of Lords held that the parents of a healthy and normal child, born to a mother following allegedly negligent advice on the effect of a vasectomy performed on her husband, could not recover as damages the cost of bringing up the child. That is a decision with which I have myself expressed agreement.⁵³ But it would seem to me that an orthodox application of familiar and conventional principles of the law of tort would have pointed towards

⁴⁴ *Fairchild v Glenhaven Funeral Services Ltd* [2001] EWCA Civ 1881, [2002] 1 WLR 1052.

⁴⁵ [2002] UKHL 22, [2003] 1 AC 32.

⁴⁶ *Chester v Afshar* [2004] UKHL 41, [2005] 1 AC 134.

⁴⁷ *R. v R.* [1992] 1 AC 599.

⁴⁸ *Arthur J. S. Hall & Co. (a firm) v Simons* [2002] 1 AC 615.

⁴⁹ *Caparo Industries PLC v Dickman* [1990] 2 AC 605.

⁵⁰ *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

⁵¹ *D. v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 WLR 993.

⁵² [2002] 2 AC 59.

⁵³ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309, para 7.

recovery.⁵⁴ There was a duty owed. There was an assumption of responsibility, reliance and proximity. Negligence was assumed. The ingredients of a successful claim were there, and on analogous facts a claim was upheld by a majority of the High Court of Australia.⁵⁵ In my opinion, the House had good reasons for declining to regard a human life as no more than a financial liability but, although the result was negative, it was an exercise in creative decision-making. I am not aware that this decision, which had the incidental effect of protecting the National Health Service against very considerable claims, has been the subject of political criticism.

In the countries which I mentioned at the outset—the United States, Canada, Australia, New Zealand and the UK—the adjective ‘activist’ has on the whole been used pejoratively. It has been applied to decisions such as *Roe v Wade*,⁵⁶ *Lawrence v Texas*,⁵⁷ *Mabo v Queensland (No. 2)*,⁵⁸ *Wik Peoples v Queensland*,⁵⁹ and *A v Secretary of State for the Home Department*,⁶⁰ and tends to be used by those who oppose the outcome of the decision in question, quite often on political grounds. But judicial activism is not everywhere regarded as something to be deprecated. In Ireland, the judges have been thought over the last thirty years or so to have been ‘notably activist’⁶¹ but much of their work has been judged to be beneficial.⁶² The same is true of South Africa.⁶³ In India, the activism of the Supreme Court has been said, with reason, to make it the most powerful apex court in the world.⁶⁴ In his interesting and detailed work, *Judicial Activism in India*,⁶⁵ Professor Sathe has explained how it has achieved this position: by a creative interpretation of the constitution;⁶⁶

⁵⁴ *Ibid.*, para 4.

⁵⁵ *Cattanach v Melchior* [2003] HCA 38 (2003) 215 CLR 1.

⁵⁶ 410 US 113 (1973).

⁵⁷ 123 S Ct 2472 (2003).

⁵⁸ (1992) 175 CLR 1.

⁵⁹ (1996) 187 CLR 1.

⁶⁰ (2004) UKHL 56, [2005] 2 AC 68.

⁶¹ D. Gwynn Morgan, *A Judgment Too Far? Judicial Activism & The Constitution* (Cork, 2001), p. 104.

⁶² *Ibid.*, pp. 105, 106.

⁶³ D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (Oxford, 1991).

⁶⁴ Sathe, *Judicial Activism*, p. 249.

⁶⁵ See above, n. 8.

⁶⁶ In decisions such as *Kesavananda Bharati v Kerala* AIR (60) 1973 SC 1461, *SR Bommai v India* AIR 1994 SC 1918, *SC Advocates-on-Record Association v India* AIR 1994 SC 268 and *In re Presidential Reference* AIR 1999 SC 1.

by relaxing the rules on *locus standi*;⁶⁷ by expanding the bounds of justiciability in relation to public interest litigation⁶⁸ so as to investigate a wide and diverse range of complaints into public issues,⁶⁹ by developing new and unique forms of procedure;⁷⁰ and by giving administrative directions having the effect of legislation on a wide range of matters.⁷¹ Professor Sathe considers

that the Court has clearly transcended the limits of the judicial function and has undertaken functions that really belonged to either the legislature or the executive. Its decisions clearly violated the limits that the doctrine of separation of powers had imposed on it.

But he continues:

Admitting all these aspects, it is acknowledged that judicial activism is welcomed not only by individuals and social activists who take recourse to it but also by governments, political parties, civil servants, constitutional authorities such as the President, the Election Commission, the national Human Rights Commission, statutory authorities including the tribunals, commissions or regulatory bodies, and other political players. None among the political players have protested against judicial intrusion into matters that essentially belonged to the executive.⁷²

Despite some undoubted excesses,⁷³ the blackest mark against the record of the Supreme Court is generally considered to be its passive acquiescence in measures taken during the 1975 emergency when, as Sathe puts it, ‘maximum care had been taken to ensure that no vestige of liberty survived’.⁷⁴ It may be, as Sathe suggests, that in India ‘the people have reposed greater faith in judges than in politicians,⁷⁵ and have come to regard judges as ‘better guardians of people’s rights than the representative legislature’.⁷⁶

⁶⁷ Sathe, *Judicial Activism*, pp. 17, 107, 201, 208.

⁶⁸ *Ibid.*, pp. 17, 209, 229, 246.

⁶⁹ *Ibid.*, p. 209.

⁷⁰ *Ibid.*, pp. 203, 208.

⁷¹ *Ibid.*, p. 251.

⁷² *Ibid.*, p. 251.

⁷³ e.g. R. R. Iyer, ‘Linking of Rivers: Judicial Activism or Error?’, *The Indian Advocate*, 31 (2003), 33–7.

⁷⁴ Sathe, *Judicial Activism*, p. 101. The Supreme Court’s decision in *ADM Jabalpur v S Shukla* AIR 1976 SC 1207, usually called the Fundamental Rights Case, is discussed by Sathe under the heading ‘Judicial Surrender’: *ibid.*, pp. 100–5.

⁷⁵ *Ibid.*, p. 247.

⁷⁶ *Ibid.*, p. 21.

Channell B's pronouncement on statutory construction which I quoted earlier makes a fundamental point, that the interpretation of any document, whether a will, a contract, a statute or a constitution, must begin with a very careful consideration of what the document actually says. Sometimes, if the document is clear and simple, the exercise may end there also. But a purely literal construction may pervert or defeat the true meaning of the document. Blackstone gives a good example: a law against shedding blood in the street should not apply to a surgeon treating an injured man.⁷⁷ Channell B's own judgment provides another example. The Court of Exchequer⁷⁸ was construing section 7 of the Foreign Enlistment Act 1819, which had been enacted to restrain British nationals from giving aid to either belligerent in a conflict in which Britain was neutral. The issue was whether the building of a ship designed and strengthened for warlike purposes but not armed within the jurisdiction violated the section. By the narrowest of margins it was held not to do so.⁷⁹ No doubt this was a tenable interpretation of the section, read literally, but it ignored the spirit and purpose of the enactment. Within a decade of the decision Parliament amended the section, but not in time to save this country from what is still, probably, its most expensive and certainly its most humiliating reverse in any international tribunal, the Alabama Claims Tribunal of 1871–2.⁸⁰ A much more recent example may be found in the Human Fertilisation and Embryology Act 1990, passed to regulate the creation of human embryos outside the body. When the Act was passed, this could only be done by using a fertilised egg, and the Act was expressed in terms reflecting that factual premise. But a technique was discovered to create a human embryo outside the body by a process of cell nuclear replacement, using no fertilised egg. The question then arose whether the Act, a regulatory measure, should be understood to cover this new process also. A literal reading would have suggested not, and at first instance the judge so held. But the Court of Appeal held otherwise,⁸¹ and the House of Lords agreed.⁸² A literal reading would have defeated Parliament's clear intention, since it could not rationally have

⁷⁷ *Commentaries on the Laws of England*, 4 vols. (Oxford, 1765), 1. 60.

⁷⁸ See above, n. 13.

⁷⁹ In the Court of Exchequer the judges were equally divided, and the junior judge withdrew his judgment.

⁸⁰ See T. Bingham, 'The Alabama Claims Arbitration', *ICLQ*, 54 (2005), 1–25.

⁸¹ [2002] EWCA Civ 29, [2002] QB 628.

⁸² *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687.

intended to regulate the creation of embryos by one means but not another.

The principles governing constitutional interpretation (in which I include the interpretation of human rights instruments) are both the same and different. They are the same inasmuch as one starts with a text, to which effect must be given. They are different inasmuch as constitutions tend to be expressed in broad and general terms, laying down (as Cardozo J put it) ‘not rules for the passing hour but principles for an expanding future’.⁸³ This is the doctrine of the ‘living tree capable of growth and expansion within its natural limits’,⁸⁴ of the ‘living instrument’.⁸⁵ While the meaning of a human right does not change over time, its content and application may.⁸⁶ It is for the appropriate court to interpret and apply the relevant provisions in the light of evolving values, standards, needs, social conditions and circumstances. As Simon Brown LJ observed,

... the court’s role under the 1998 Act is as the guardian of human rights. It cannot abdicate this responsibility ... judges nowadays have no alternative but to apply the Human Rights Act 1998. Constitutional dangers exist no less in too little activism as in too much. There are limits to the legitimacy of executive or legislative decision-making, just as there are to decision-making by the courts.⁸⁷

There is a further, important, dimension to this problem, which does not always feature in the discussion: the comparative. In 1831 Savigny famously expressed his regret that England ‘in all other branches of knowledge actively communicating with the rest of the world, should, in

⁸³ Cardozo, *Judicial Process*, p. 83. See also *Matadeen v Pointu* [1999] 1 AC 98, 108.

⁸⁴ Per Lord Sankey LC, *Edwards v Attorney-General for Canada* [1930] AC 124, 136.

⁸⁵ *Öcalan v Turkey* (2003) 37 EHRR 238, paras 193–4, *Brown v Stott* [2003] 1 AC 681, 727; *Dyer v Watson* [2002] UKPC D1, [2004] 1 AC, para 49; *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 1 WLR 856, para. 6.

⁸⁶ *R (Quintavalle) v Secretary of State for Health*, above, para. 9.

⁸⁷ *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728, paras 27, 54. While the judges have been accused of activism in interpreting and applying the Human Rights Act 1998, a different view has also been expressed. Reviewing the impact of the Act after a year of operation in ‘The Human Rights Act 1998—A Year On’, *Jersey Law Review* (2002), 10, 14, Michael Beloff QC described the courts’ decisions under the Act as ‘relatively conservative’. Professor Ewing has been more critical, suggesting that the judges have not used their powers under the Act very well, that the Act is a ‘weak palliative to address a terminal condition’ and that, although the record of the Strasbourg Court is much more impressive, ‘the experience of the Convention rights in the domestic courts is likely to be one of abject disappointment and growing disillusionment’: K. D. Ewing, ‘The Futility of Human Rights Act’, [2004] PL 829, pp. 840, 850, 852.

jurisprudence alone, have remained divided from the rest of the world, as if by a Chinese wall'. It is a reproach which, in our own time, may perhaps be most appropriately directed to the United States. 'American judges', it has been said,

are exceptionally resistant to using foreign human rights precedents to guide them in their domestic opinions. As Justice Antonin Scalia remarked, when rejecting a colleague's references to foreign jurisprudence in deciding *Printz v US*, 'We think such comparative analysis inappropriate to the task of interpreting a constitution'.⁸⁸ This judicial attitude is anchored in a broad popular sentiment that the land of Jefferson and Lincoln has nothing to learn about rights from any other country.⁸⁹

Justice Thomas has referred dismissively to 'foreign moods, fads or fashions'.⁹⁰ Savigny's reproach is one to which modern British judges have, to some extent at least, responded,⁹¹ and the same trend is observable elsewhere, sometimes overtly, sometimes less so.⁹² The Israeli Supreme Court has been described as 'The most important comparative law institute of the world'.⁹³ A national judge seeking to rely on a foreign law is well advised to proceed with great caution, since many pitfalls await the unlearned, the unguided and the superficial. It would be naïve to suppose that a better answer to difficult legal problems is always to be found elsewhere. That said, however, there is, as I would suggest, a real gain, even if only in a very small minority of cases, in drawing on the learning of other jurists grappling with very much the same problems in other jurisdictions. We cannot claim a monopoly of learning and wisdom. But to draw inspiration from the wisdom of others involves a conscious voyage beyond the bounds of the inherited common law. It is not compatible with a strict view of the traditionalist judicial role.

⁸⁸ *Printz v United States*, 521 US 898 (1997), 921, fn. 11.

⁸⁹ M. Ignatieff, 'Introduction: American Exceptionalism and Human Rights', in M. Ignatieff (ed.), *American Exceptionalism and Human Rights* (Princeton, 2005), p. 8.

⁹⁰ *Foster v Florida*, 123 S Ct 470 (2002), 470.

⁹¹ Among the examples which spring to mind are *White v Jones* [1995] 2 AC 207, *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235 and *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32.

⁹² In a work awaiting publication (B. Markesinis and J. Fedtke, *Judicial Recourse to Foreign Law: A New Source of Inspiration?*), generously made available to me by Professor Sir Basil Markesinis, the authors give Italy and France as examples of countries where foreign law exerts a largely unacknowledged influence and England, Germany, Canada and South Africa as examples of countries where the influence is more openly acknowledged.

⁹³ A. Somek, 'The Deadweight of Formulae: What Might Have Been The Second Germanization of American Equal Protection Review', *U. Pa. J. Const. L.*, 1 (1998), 284, fn. 1.

If it be accepted that the traditionalist model, as I have endeavoured to characterise it, expresses the truth but not the whole truth, where then is one to find Lord Goff's elusive boundary between legitimate judicial development of the law on the one hand and impermissible judicial legislation on the other? It is not very helpful to answer, even though it is true, that the boundary may lie in a different place in different classes of case, or in different countries, or in the same country at different times. Nor, perhaps, is the problem resolved by asking whether an issue is one which a judge should be asked to decide since, unless it is held to be non-justiciable, the judge ordinarily has no choice but to decide it: he cannot choose the issues to be litigated.⁹⁴ But it may perhaps be helpful, in relation to any particular decision which is the subject of controversy, to ask whether it is a decision which it was proper for a judge, sitting as such, to make.

If the true reasons for the decision are given in the reasoned judgment, and if those reasons on analysis are found to be legally motivated, the answer to the question will ordinarily be affirmative. This will be so if the judge gives a reasonable (even if debatable) interpretation of a statute or constitution or applies or develops a common law rule in a way which, even if open to argument, seems to him justified on principle, or authority, or the particular facts. In such a case the judge is doing what a judge is employed to do, applying his legal expertise to resolution of the problem raised by the particular case. If his colleagues, or professional or academic opinion, consider that he has erred, that is a ground for questioning the correctness of the decision but it is not a ground for questioning the propriety of his reaching it at all. It is otherwise if, whether or not the true reasons for the decision are given, the decision is not in truth legally motivated. This will be so if the decision is motivated not by legal but by extraneous considerations, as by the prejudice or predilection of the judge or, worse, by any personal agenda of the judge, whether conservative, liberal, feminist, libertarian or whatever.

The contrast can perhaps be highlighted by reference to an American example. On 18 November 2003 in *Goodridge v Department of Public Health*,⁹⁵ the Supreme Judicial Court of Massachusetts, a highly regarded court, construing the state constitution, ruled that the state could not lawfully deny the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wished to marry. This

⁹⁴ *Cohens v Virginia*, 19 US (6 Wheat.) 264 (1821), 404 per Marshall CJ.

⁹⁵ 798 NE (2d) 941.

decision prompted President George W. Bush to promise to ‘defend the sanctity of marriage’ against judges who ‘insist on forcing their arbitrary will upon the people’, and on 17 May 2004, the day on which the first same-sex marriages were celebrated in Massachusetts, he issued a statement declaring that ‘the sacred institution of marriage should not be redefined by a few activist judges’.

I am not qualified to express any opinion on the legal correctness of this decision, and do not do so. A nation-wide opinion poll showed that the great majority of Americans believed that decisions on legalising gay marriages should be taken by legislatures and not by judges,⁹⁶ but this is not necessarily significant: decisions in favour of unpopular minorities tend to be unpopular, but are the essence of human rights protection. It was, nevertheless, a very significant social change to effect by judicial decision. In the European Community it has been held that:

in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of the opposite sex.⁹⁷

The European Court of Human Rights has not ruled that the right to marry protected by article 12 of the European Convention extends to couples of the same sex.⁹⁸ In this country it was thought to require a statute, the Civil Partnership Act 2004, to address the disadvantages to which couples of the same sex were subject, but the Act laid down a detailed regime which could not have been introduced by judicial decision. Whether or not the Massachusetts decision passes the test I have proposed—and it is supported by very detailed analysis of the state constitution, relying on recent Canadian authority—it is perhaps not hard to understand why it was seen, even if wrongly, as a usurpation by judges of authority that more properly belonged to the elected representatives of the people.

⁹⁶ A poll conducted by the University of New Hampshire Survey entry for the *Boston Globe* (*Boston Globe*, 15 May 2005) showed 52% thought the issue should be left to legislatures, 29% to courts, 2% thought that it ‘depended on the State’ and 11% did not know.

⁹⁷ *Grant v South-West Trains Ltd.* (Case C-249/96) [1998] ECR I-621, 648, para. 35.

⁹⁸ In cases brought by transsexuals, article 12 has been held to refer only to traditional marriage between persons of different sexes: *Rees v United Kingdom* (1986) 9 EHRR 56, para. 49; *Cossey v United Kingdom* (1990) 13 EHRR 622. In *Goodwin v United Kingdom* (2002) 35 EHRR 447 the Court held that English law related to transsexuals violated article 12, but it was not directed to marriage between couples currently of the same sex.

I must, in conclusion, confront the question raised in my title: should the judges be active or passive? I respond evasively by quoting again the texts I have borrowed from Peter Birks: ‘the common law has always put its jurists on the bench’ and ‘Authority in interpretation of the law naturally derives from learning combined with good judgment and discretion in its deployment’. Or, as Lord Devlin simply put it, ‘The first quality of a good judge is good judgment’.

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