Olla Podrida - Chapter 8

by Francis Bennion

Chapter 8

1

Philip Johnston complained in a *Daily Telegraph* Comment piece on 16 November 2009 that the Government tells us 'who to like and who not to'. I suggested in a letter on that day (not published until 23 November, no doubt while it was checked for accuracy) that Charles Dickens had it right in *The Life and Adventures of Martin Chuzzlewit*:

> ' "Every man", said Mr Pecksniff, "has a right, an undoubted right, (which I, for one, would not call in question for any earthly consideration: oh no!) to regulate his own proceedings by his own likings and dislikings, supposing they are not immoral and not irreligious."'

Under the heading 'Pecksniffian advice' the following letter from Linda Hepburn appeared on 24 November:

> 'Charles Dickens's Mr Peckniff has an impressive line in wise words; however he is actually a repellent hypocrite. William Shakespeare's famous "To thine own self be true" speech is spoken by Polonius, a man who spies on his children and hides behind an arras to listen to a private conversation.
>
> The best writers are complex.'[1]

2

Professor John Bell tells us of an important difference between the continental and the common law system. In the former, where the maxim *curia novit legem* (the court knows the law) applies, it is the judge, not the parties or their advocates, who will be expected to research the law:

> 'The judge never has to explain which materials he or she has looked at and in what order. The whole heuristic process of how the relevant law is discovered lies completely hidden from view.'

In the common law system, on the other hand, the process of law management is more transparent.

> 'With a traditional emphasis on the parties presenting their legal sources to the judge at a concentrated (and largely oral) hearing, a set of rules grew up about what sources parties could present in support of their claims, and under what circumstances.'[2]

The common law judge is nevertheless entitled to refresh his or her memory of the law by whatever means appear suitable. Furthermore it is accepted that such judges are liable to make mistakes in law.

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[1] See *www.francisbennion.com/2009/038.htm*.
[2] John Bell, *Law Studies* (September 2002), 473 at 477.

> 'As is well known, anybody, even a judge, can be capable of misconstruing a statute; and such misconstruction, when it occurs, can be severely criticised without attracting the epithet "negligent".'[3]

If a judge who misconstrues a statute is not necessarily negligent, this applies *a fortiori* to a legal or other adviser. Taking and acting on a wrong view of the law may however amount to maladministration.[4]

3

St Edmund Hall, founded in the thirteenth century, is now the sole survivor of the medieval academic halls which preceded the University of Oxford colleges. In 1951 I had the honour to be appointed by the Hall as its first official tutor and lecturer in law. I discovered that in 1699 the antiquary Thomas Hearne (1678-1735) graduated from the Hall as a Bachelor of Arts and remained in residence for many years. Under the title *Hearne's Collections*, his diaries were published in eleven volumes by the Oxford Historical Society between 1885 and 1918. They have some points of interest for present day lawyers and others, but they perhaps need to be taken in small doses. Here is one such dose, which might strike a chord with some hard drinkers of today.

22 August 1705 Yesterday Mr Gilby, Bachelor of Law, Fellow of All Souls College, and one of the Proctors in the vice-chancellor's court , died of a consumption, which he said a little before he died he thought verily to have proceeded from a piece of cherry stone which some time since went down his windpipe & caused a corruption in his lungs. Which though it might be one cause, yet 'tis said the chief was hard drinking. He is reported to have been a person of some parts, and some learning.

4

What is a judge? A professional with life experiences that qualify the judge to preside over disputes. Judges bring to the bench many existing sympathies, antipathies and attitudes. They are the product of every type of social experience, process of education, human contact with those with whom we share the planet. So say Justices L'Heureux-Dubé and McLachlin.[5] Lord Rodger of Earlsferry adds that judges have the advantage of years of relevant training and experience. They swear an oath to decide impartially and are expected to be able to put aside any prejudices they may have. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge was biased.[6]

So what are we to think regarding bias when Lady Cosgrove, a Jewish judge of the court of Session, makes a decision in a case where Miss Fatima Helow, a Palestinian asylum seeker, is a party? In the absence of any indication to the contrary, we are to expect that the above factors will lead Lady Cosgrove to decide impartially. Will it make any difference that she is a member of the International Association of Jewish Lawyers and Jurists ('the Association')? No, said the Appellate Committee.[7] This even applies if the Association's journal *Justice* contains some anti-Palestinian material, because *Justice* specifically says that the views of individuals and organisations published in it are their own and that inclusion in it does not

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[3] *Rowling v Takaro Properties Ltd* [1988] AC 473 at 502.
[4] See *Westminster City Council v Haywood* [1996] 2 All ER 467, *per* Robert Walker J at 482.
[5] *R v S(RD)* [1997] 3 SCR 484, cited in *Helow v Secretary of State For The Home Department and Another (Scotland)* [2008] UKHL 62 (hereinafter *Helow*) at [57]. This is stated more fully at the end of this note.
[6] *Helow* at [23].
[7] Unanimously held in *Helow*.

necessarily imply endorsement by the Association.[8] Counsel for Miss Helow suggested that the observer would think that, by reading *Justice*, Lady Cosgrove might by a process of osmosis have absorbed the more extreme views expressed in its pages. No said Lord Rodger, since *Justice* appears quarterly and anyone reading an article would be unlikely to retain any clear recollection of a similar article in an earlier issue. This would greatly reduce the chances of the articles having a cumulative effect on the reader.[9]

Who is this theoretical 'observer' who is to judge the question of judicial bias? The legal test to be applied in cases of apparent judicial bias is to be found in a speech of Lord Hope of Craighead, in an earlier case[10]:

> 'The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.

It is equally well established that the fair-minded observer is neither complacent nor unduly sensitive or suspicious.[11]

The theoretical observer is called on in all cases of suspected judicial bias except where the principle of automatic disqualification applies. It applied in the Pinochet case[12] where it was held that a judge was automatically disqualified not merely if they had a pecuniary interest in the outcome of the case, but also if their decision would lead to the promotion of a cause in which they were involved together with one of the parties. It applied in a Jersey case where Lord Brown emphasised that a party to litigation (above all one who had been convicted in it of an offence), must leave court feeling he or she has received a fair trial.[13]

In *Helow* Lord Mance cited the remarks of Justices L'Heureux-Dubé and McLachlin already mentioned.[14] They added that the requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes . . . the duty to be impartial does not mean that a judge does not, or cannot, bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

5

In a case turning on the complexities of the Transport Act 1981 s. 19, Lord Lane CJ said he sympathised with courts 'which have to grapple with this sort of legislation'. He added that it would be very surprising if judges did not make mistakes in this branch of their work.[15]

Judicial difficulties of this kind grow with the increasing complexity of statute law. A typical complaint by a senior judge was cited by Lord Walker of Gestingthorpe in a 2006 case.[16] He

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[8] See *Helow* at [19].
[9] *Helow* at [22].
[10] *Porter v Magill* [2002] 2 AC 357 at 494.
[11] *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, *per* Kirby J. See *Helow* at [14], [38].
[12] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119.
[13] *Michel v The Queen* (2009), *The Times*, 9 November: see 173 CL&J (21 November 2009), 750. A fair trial is of course required by the European Convention on Human Rights, art. 6
[14] *R v S(RD)* [1997] 3 SCR 484 at [119]. See *Helow* at [57].
[15] *R v Kent* [1983] 1 WLR 794 at 796.

said of a knotty question of construction on sex discrimination that it had become virtually impossible and almost unacceptable to decide points of this kind in short form.

> 'The legal materials on indirect discrimination and equal pay are increasingly voluminous and incredibly intractable. The available arguments have become more convoluted, while continuing to multiply. Separating the wheat from the chaff takes more and more time. The short snappy decisions of the early days of the industrial tribunals have long since disappeared. They have been replaced by what truly are "extended reasons" which have to grapple with factual situations of escalating complexity and with thicker seams of domestic and EC law, as interpreted in cascades of case law from the House of Lords and the European Court of Justice.'

Lord Scott of Foscote joined in:

> 'This short point produced a judgment of some 14 pages by the Employment Tribunal (which held that the appellants' contention was right), a judgment of over 100 pages by the Employment Appeal Tribunal (which held it was not) and a judgment by Mummery LJ in the Court of Appeal . . . that, in a mere 14 pages, upheld the EAT. Mummery LJ commented on the lamentable state of complexity and obfuscation which appeared to attend this area of employment law.'[17]

The situation is exacerbated when coupled with the sort of constant legislative changes that I have christened law-churning, which grows worse by the day. There is an increasing tendency on the part of politicians to think that it will benefit them electorally if they promote frequent legislation. By this law-churning the Government of the day may do serious damage. A nation's legal system cannot perform its social function properly if it is constantly uprooted in this way. Lawyers cannot know the law. Law students cannot be taught the law. More unproductive lawyers are needed to work the system. Judges are thrown into confusion. Lord Radcliffe said:

> 'The respect for the law, without which it will certainly never be readily obeyed, cannot survive the spectacle of its continual making and remaking before our eyes. Human nature is not so constituted.'[18]

Law-churning has been particularly apparent in relation to criminal law. In 2005 Rose LJ, Vice-President of the Criminal Division of the Court of Appeal, said of the Criminal Justice Act 2003 that it was more than a decade since the late Lord Taylor of Gosforth CJ called for a reduction in the torrent of legislation affecting criminal justice. He added:

> 'Regrettably, that call has gone unheeded by successive governments. Indeed, the quantity of such legislation has increased and its quality has, if anything, diminished. The 2003 Act has 339 sections and 38 schedules and runs to 453 pages. It is, in pre-metric terms, an inch thick. The provisions which we have considered have been brought into force prematurely, before appropriate training could be given by the Judicial Studies Board or otherwise to approximately 2,000 Crown Court and Supreme Court judges and 30,000 magistrates. In the meantime, the judiciary and, no doubt, the many criminal justice agencies for which this court cannot speak, must, in the phrase familiar during the Second World War "make do and mend".'[19]

I have written more on this vexed topic elsewhere, but that will do for the moment.[20]

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[16] *Secretary of State for Trade and Industry v Rutherford and another* [2006] UKHL 19, [2006] 4 All ER 577, at [37].
[17] Ibid. at [7].
[18] Lord Radcliffe, 'Some reflections on law and lawyers' 10 CLJ 361 at 366.
[19] *R v Bradley* [2005] EWCA Crim 20 at [39], (2005) Times, 17 January.
[20] See the topic 'Law-Churning' on FB's website for his articles on this subject, www.francisbennion.com/topic/lawchurning.htm.

6

His Lordship, now that I have written to him about his title and emerged alive, has decided to become a regular correspondent. He sends me copies of some of his searing epistles. Here is one.

The Rt. Hon. Earl Forsooth K.G.

Montmorency Castle

Rutland

4 July 2009

Philip Hensher Esq.,
c/o *The Daily Telegraph*,
111 Buckingham Palace Road,
London SW1W 0DT.

Sir,

On being insulted

You had a great spread in the *Telegraph* on 3 July 2009, holding forth about literary punch-ups. Drolly you said that one of the things that had been drummed into you as a baby novelist (a what?) was Never Respond. When people are rude about you in print, Never Respond. If you meet them at a party, smile graciously, shake their hand if necessary (never employ kissing), and move on. Not a principle I've ever subscribed to myself, but then I'm not a handshaker anyway. (They say I'm more likely to shake people by the neck, that's by the way.)

In your piece you wrote about how Alain de Botton failed to keep up to your principle. He was stung by a review in the *New York Times*. So he wrote on the chap's blog (so you say):

> 'It's a review driven by an almost manic desire to bad-mouth and perversely depreciate anything of value. You have now killed my book in the United States . . . I will hate you till the day I die.'

Here you thought you saw your chance to plunge the knife into Mr de Botton yourself. So in your piece you wrote:

> 'It was unfortunate that De Botton, seeking to demonstrate his own value as a writer, wrote "depreciate" when he meant "deprecate", but still we get the point.'

Condescending or what? We graciously get your point even though you are such a thundering buffoon as to muddle up common words like deprecate and depreciate. And you call yourself a writer, sniff, sniff . . . Hardly the gracious smile, handshake and move on.

Unfortunately it was you who came unstuck. I felt suspicious and sent for little Miss Mousie who works as fourth stenographer in Dungeon 5b at the castle. She confirmed my suspicion by looking up our monster copy of the full OED. I had suspected that in fact De Botton wrote "depreciate" when he meant "depreciate", and I proved right. The OED says a meaning of this transitive verb is "To lower in estimation; to represent as of less value; to underrate, undervalue, belittle".

Spot on, I would say. Retire hurt, wretched Hensher. (I nearly wrote Hamster.)

Forsooth