

## The Role of the Judge in the Evolution of the Common Law: A Legal Historian's Perspective

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The Common Law is buttressed by the involvement of Judges in its evolutionary process. Arguably, Judges make law through the creation of legal rules or by their interpretation of statute as the times change.<sup>1</sup> In the landmark English case of *R v R*<sup>2</sup>, this was evident where the UK Supreme Court (formerly the House of Lords) concluded that the traditional view that a husband could not be guilty of raping his wife was now unacceptable therefore resulting in Marital Rape as an offence. Interestingly, in some countries including the Bahamas the marital rape exemption still applies.

*“The role of a Judge is to serve the community in the pivotal role of administering justice.”*<sup>3</sup> This has certainly been a foundational view over the centuries and continues to exist. There is a view albeit from those on the receiving end of sentencing in criminal matters that the role of a Judge is simply to send persons to prison.<sup>4</sup> *“In a system of judge made law, judges are nominally bound to follow precedent whenever deciding cases, but in actual fact do depart from precedent from time to time.”*<sup>5</sup> At the commencement of legal studies we would have all discussed and/or debated the merits of *stare decisis*, however, without the departures from precedent through the formation of a new rule, the law could never evolve.

Judges are also guardians of judicial independence and particularly because they did not always have this inherent right. The UK Act of Settlement of 1701 provided that Judges were to be free of interference from the legislature and the king.<sup>6</sup> *However, Judges in some of the British Colonies were being used as tax collectors for the crown, expanding rather than reducing the crown's fiscal authority and ... were also judges in their own causes as tax collectors to pay themselves.*<sup>7</sup> Thus the role of Judges in the development of the Common law from a dependent to independent Judiciary encompassed conflict of interests at times. In the context of present day, it is expected that Judges are independent and objective.<sup>8</sup> The Bahamian case of *R v Jones*<sup>9</sup> supports this as Allen SJ said, *“judges are accountable to the Constitution and the law which they must apply honestly, independently and with integrity...and judicial independence has two dimensions, an individual dimension, which embodies the independence of a particular judge and an institutional dimension, which is the relationship of the judiciary to other branches of government.”*<sup>10</sup>

The role of the Judge within the context of perception can be interpreted in many ways. Indeed, it is the subjective views of individuals that inform the expectation which emanates from the role of the Judge. However, throughout the Commonwealth there is a commonality in realisation of the role that Judges play in the perfection of justice and more precisely the adjudication process through which the independence of the Judiciary is affirmed.

## Past

*“The English legal system, and that of the United States and many other countries, largely developed in Westminster Hall. For almost seven centuries, the Hall was at the very centre of that system. Of the four main courts, the Common Pleas, King's Bench, and Chancery sat in the Hall itself. Until the reign of Henry II (1154-89), royal justice was administered wherever the King happened to be, but under Henry, a royal ordinance decreed that five judges should sit in a certain place rather than travel with the King for the convenience of litigants. Thus by 1178, there were judges sitting in the Hall during the King's absence. In 1215, the Magna Carta stipulated that common pleas should be held in a fixed place which was usually Westminster Hall. Two separate courts - Common Pleas for civil litigation and the King's Bench for cases of interest to the King (effectively the Supreme court for criminal cases) were formed during the 13th century. The Chancery gradually became a distinct court in the 15th century, where the Lord Chancellor provided redress for those unable to obtain it under the strict rules of common law.”<sup>11</sup>*

From our earliest recorded history of the English Legal System which was exported throughout the Commonwealth there were specific attributes assigned to Judges. There has always been the issue of Judicial Activism particularly when we look at the United States of America (US) in which it is argued that some judicial rulings are based on personal opinion rather than on existing law. In *Lochner v New York*<sup>12</sup>, the New York labor law was described as being “unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual contract”. Another case which continues to have significance in the US on abortion rights is *Roe v Wade*<sup>13</sup> in which the US Supreme Court affirmed a woman's right to abortion until fetal viability with viability meaning being able to live outside of the mother's womb. The former Lord Chief Justice Woolf of the United Kingdom responded to criticism of judicial activism.<sup>14</sup> He said, “judges are only doing what they have to swear to do on appointment and that is to give a judgment according to law....the courts are not interfering with the will of Parliament. On the contrary, when they interfere, the judges are protecting the public by ensuring the Government complies with the laws made by Parliament. The courts are therefore acting in support of Parliament and not otherwise.”<sup>15</sup> This speech was given within the context of the Courts interpretation of UK legislation in tandem with the implementation of the Human Rights Act and the controversial issues associated at the time.

Judges often times have to deal with matters of controversy. This is not a new concept in the development of the Common law. In *Vrienda v Alberta*<sup>16</sup> the learned Judge Iacobucci stated, “...a great value of judicial review is...The work of the legislature is reviewed by the courts and the work of the court in its decision can be reacted to by the legislature in the passing of a new legislation.

The Common law judge's role has been defined historically as a passive moderator who hears arguments between parties.<sup>17</sup> To the extent one believes this to be the case it may be so in part

but does not capture the full responsibilities associated with the Judge historically which significantly includes decision making.

US First Circuit Judge LeBaron Colt stated in 1903, that judges use the “*doctrine of reasonableness*” and interpret constitutional and statutory provisions thus modifying the law to accommodate social changes.<sup>18</sup> Professor Brian Tamanaha of the Washington University School of Law further supports this view when he says, “*law would be obsolete if judges did not adjust to keep up with social change.*”<sup>19</sup>

Referring to the 1855 UK case of *Eagleton*<sup>20</sup>, Lord Diplock in the 1978 case of *Stonehouse*<sup>21</sup> discussed the test of proximity at common law where only acts immediately connected with the offence can be attempted. In *Gullefer*<sup>22</sup>, which rejected the Rubicon test “*Lord Lane recognized the unhelpful nature of this test.*”<sup>23</sup> Lord Scarman in *Whitehouse v Gay News Ltd*<sup>24</sup> endorsed the view that publishing blasphemous materials was a misdemeanour. The UK Law changed with the Criminal Justice and Immigration Act 2008 and it abolished the offence of blasphemy and blasphemous libel. These are further examples of the importance of Judges in the development of the Common law as matters were adjudicated.

The UK Supreme Court in *Shaw v DPP*<sup>25</sup>, held that there was an offence with the conspiracy to corrupt public morals. In this case, the accused published a directory of ladies who were prostitutes with their names and addresses, and in some cases some of the types of activities that they were willing to perform. This was a case where the Judges held that there was a common law offence. Further, in *Knuller (Publishing, Printing and Promotions) Ltd v DPP*<sup>26</sup>, Judges decided that outraging public decency was a common law offence.

In two old English cases of 1815 and 1852 respectively, *Vantandillo*<sup>27</sup> and *Henson*<sup>28</sup> regarding public nuisance, the court found exposing in a public highway a person infected with a contagious disease and taking a horse into a public place knowing that the horse has an infectious disease were offences at common law. Here again we see the significance of Judges making decisions which impacted the common law. Public nuisance is still an offence at common law in the UK.

The presumption of paternity in marriage under common law continues in which a child born to a married woman is presumed to be the child of her husband.<sup>29</sup> It was a judicial decision that informed the law that in this particular instance has remained as many other such decisions. However, “*Section 26 of the Family Law Reform Act 1969 in the UK was subsequently enacted in the UK which provides that legal presumptions can be rebutted on the balance of probabilities.*”<sup>30</sup> It was interesting to note that in 1999 the Lord Chancellor’s Department recommended that presumption of paternity derived in common law should be given statutory equivalence. One may reasonably suggest that where Judges through the common law have filled the gaps it is desirable, certainly if it is good law, for the legislature to cement the law through statutory enactment.

## Present

*“The considerable growth of judicial review in recent years has inevitably brought the judges more into the political eye.”<sup>31</sup> Certainly with the advancement of technology and access to information the wider public can better see and hear decisions being made by Judges and its impact in society. Having full assurance that such decisions are not perceived as politically motivated are a cornerstone for demonstrating impartiality. Throughout the Commonwealth Judicial reforms are touted and promulgated for all and sundry. The importance of judicial reform to advancing an orderly society cannot be underestimated and the Judge in the Common law system that we embrace is a natural champion of judicial reform insofar as it improves the efficacy of justice.*

In the UK case of *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No.2)*<sup>32</sup>, Lord Hoffman who was on the bench in the House of Lords was later revealed to have had involvement with Amnesty International who were following the case. This was a well-known international case involving extradition proceedings against former dictator of Chile, Senator Pinochet. As a result a further appeal was allowed. This further supports the position that Judges must be independent and the appearance of being independent should also be seen.<sup>33</sup>

*Prima facie* the norms of conduct of a Judge affects legal reliability. The public expect and anticipate that there is reliability with regard to how matters of dispute are disposed of by Judges. The Common law process produces results for which Judges are the focal point in developing. In the matter of the Articles 15, 20, 21, 23 & 28 of the Constitution of the Commonwealth of Bahamas<sup>34</sup>, Charles J., ruled that the Rule of Law and the Constitution supersedes Parliamentary privilege. This is an example of where the Common law is evolving as a result of the Judge and its impact in the development of Bahamian Constitutional jurisprudence. Arguably it is a precedent setting judgment in Constitutional law in the Bahamas and in practical terms it is persuasive for the Commonwealth. This case like many others in the British Commonwealth had a significant following by the political class in the Bahamas.

Most, if not all Judges would say that their decisions are solely governed by the law. According to political scientists, “an individual’s political views subtly affects their legal decision either knowingly or through cognitive biases.”<sup>35</sup> Are Judges able to check their ideology at the courtroom door? Author Mark Smith in his book *Disrobed: The New Battle Plan to Break the Left’s Stranglehold in the Courts*, contends that in the US system, “Judges are political actors who deal with complex politically charged cases and are sometimes required to make law rather than merely interpret it.”<sup>36</sup> Professor Brian Tamanaha posits that “Smith cannot be dismissed as an uninformed extremist.”<sup>37</sup> Judicial Politics Scholar Martin Shapiro has stated that, “constitutional law was a part of politics” and in Aristotelian terms when political scientists say judges are political<sup>38</sup>, “they mean it in the sense of law being a subspecies of politics and an instrument of the pursuit of a moral community.”

In this paper we do not examine the veracity of that claim, however, we bring attention to a view that persists in the US System which similar to the rest of the Commonwealth Countries has a Common law jurisdiction which continually evolves and for which Judges are the center of that evolutionary process. Moreover, from an ideological perspective of separation of powers and independence of the judiciary such academic discourse may cause unease particularly when connected to judges.

*“In any given area of the common law, one can often find more than one rule competing for the attention of judges.”*<sup>39</sup> Therefore the role of a judge in trying to decipher and make the appropriate determination impacts the changes or lack thereof in the common law. Moreover, following precedent rather than risk having decisions repudiated by subsequent judges plays a role in the rate at which the common law changes.

In the US, *“Judge –made law is dominant in commercial areas of law, such as contract, property, and tort law.”*<sup>40</sup> Contrasting that with jurisdictions in which financial services heavily dominate the courts such as the Cayman Islands, there has been a more conservative approach in the way that Judges make decisions. This is primarily connected to the fact that such jurisdictions are driven by commercial awareness and a sophistication for which the court users expect certainty with limited deviation in the common law.

In the Cayman Islands, Directors’ duties are those imposed by the common law. Certain aspects of those duties were examined in the 2011 case of *Weaving Fixed Income Macro Fund Ltd v Peterson and Ekstrom*<sup>41</sup>. This is a present day example of the importance of the role that judges play in the common law and in this particular matter the commercial implication was in the millions of US dollars. As an aside, in looking at the structure of the Grand Court it is interesting to note that there is a Financial Services Division of the Grand Court to handle the significant amounts of cases specifically related to Financial Services. Whilst there are statutory regimes for which most of the matters being adjudicated fall within, judges have the common law to provide insight as well as where there are interpretative nuances make decisions which at first instance have far reaching implications.

## **Future**

There has been legal analyses by academics who proffer legal realist models in projecting how judges will face opportunities to distinguish precedent cases before them and whether there will be bias to changing law or keeping the status quo.

According to Gennaioli and Shleifer (2007), *“the law better adapts to the underlying transactions (and to new circumstances) when activist judges distinguish cases.”* The evolution of the common law may not be beneficial depending on one’s perspective. No doubt judges are a remarkable conduit through which this takes place.

As a substantive point on democracy, even though throughout most Common law jurisdictions, judges are not elected, it does not make them undemocratic. This particular matter is raised

because judges are not accountable to the general population as are politicians. In *A v Home Secretary*<sup>42</sup>, Lord Bingham states,

“I do not...accept that there is a distinction...between democratic institutions and the courts. It is of course true that judges in this country are not elected and are not answerable to Parliament. It is also of course true...that Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision making as in some way undemocratic...”

Judges by their actions in decision making are also guardians of democracy in the evolution of the common law. It is anticipated that this position will continue in the future.

As the global financial services community grows and develop there will always be disputes which invariably end up in the courts. Derivative litigation is one type of dispute in which most jurisdictions have statutory or procedural provisions, however, Bermuda is an example of a jurisdiction which has none and thus a pure common law approach in bringing such action.

*“Offshore common law jurisdictions such as the British Virgin Islands, Bermuda and the Cayman Islands, generally reflects the common law of England and that is not necessarily the law of England as currently applied by English practitioners. When the law of England is varied by procedural or statutory reform, the current law of England does not represent the common law position. This point should be obvious, but very serious errors in analysis have occurred in cases involving offshore jurisdictions. Taking derivative actions as an example, the present procedural and statutory laws of England no longer reflect the common law as the Companies Act 2006 and the Civil Procedure rules both made specific provisions for derivative actions.”*<sup>43</sup>

Thus the importance of judges in the deliberations related.

The Greek philosopher Heraclitus stated that nothing endures but change.<sup>44</sup> *“The question remains whether there are new judicial functions as yet in the womb of time.”*<sup>45</sup> *“Courts are creatures of evolution, and of evolution there is no end”.*<sup>46</sup> *“Judges are important public officials whose authority reaches every corner of society. Judges resolve disputes between people, and interpret and apply the law by which we live.”*<sup>47</sup> The Common law will continue to develop as time goes on and Judges will be central to this reality.

## References

1. [1991] UKHL 12.
2. Ibid at pp. 3.
3. Brennan, Hon. Sir Gerard Brennan, Chief Justice of Australia, National Judicial Orientation Programme, October 13, 1996, Wollongong, Australia.
4. Carey, John GF., Political Discourses, Booksurge, 2006, at pp. 103.

5. Whitman, Douglas Glen, 'Evolution of the Common Law and The Emergence of Compromise', *Journal of Legal Studies*, vol. XXIX, June 20011 at pp. 753.
6. Smellie, Hon. Anthony, Chief Justice of the Cayman Islands, Lecture on The History, Meaning and Importance of Judicial Independence: A Commonwealth Caribbean Perspective, Stetson University Law School Winter Program delivered at Cayman Islands Law School, December 2012.
7. bid at pp. 2.
8. Slapper, G. & Kelly, D. *The English Legal System* (5th Edition, 2001), Cavendish Publishing Limited, London/Sydney at pp. 91.
9. [2008] 1 LRC 1.
10. Para. 10.
11. <http://www.parliament.uk/about/living-heritage/building/palace/westminsterhall/government-and-administration/early-law-courts/>
12. 198 U.S. 45 (1905).
13. 410 US 113 (1973).
14. Wadham, John, Mountfield, Helen, Gallagher, Caoilfhionn, Prochaska, Elizabeth, *Blackstone's Guide To The Human Rights Act 5<sup>th</sup> edition*, Oxford University Press, (1998), at pp. 9.
15. Lord Chief Justice Woolf-UK, 'The Impact of Human Rights', speech at Oxford Lyceum, 6 March 2003.
16. [1998] 1 SCR 495.
17. Hazard Jr., Geoffrey C, and Dondi, Angelo, 'Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits', (2006). Faculty Scholarship Series. Paper 2329 At pp.61.
18. Colt, LeBaron B., *Law and Reasonableness*, 37 *AML.REV.* 657, 674 (1903).
19. Tamanaha, Brian Z., Review Essay, *A Vision of Social-Legal Change: Rescuing Ehrlich from "Living Law,"* 36 *LAW & SOC. INQUIRY* 297, 316 (2011).
20. [1855] Dears CC 376, 515.
21. [1978] AC 55.
22. [1990] 3 All ER 882.
23. Ormerod, David, *Smith and Hogan Criminal Law 12<sup>th</sup> edition*, Oxford University Press (2008), at pp. 393.
24. [1979] 68 Cr App R 381.
25. [1962] AC 220, [1961] All ER 446.
26. [1973] AC 435, [1972] 2 All ER 898.
27. [1815] 4 M & S 73.
28. [1852] Dears CC 24.
29. *Banbury Peerage Case* [1811] 1 Sim & St 153 HL.
30. Herring, Jonathan, *Family Law 4<sup>th</sup> Edition*, Pearson Education Limited (2009), at pp. 331.
31. Elliott, Catherine, *English Legal System Sourcebook*, Pearson Education Limited (2006), at pp. 3.
32. [2000] 1 AC 119 65.

33. Elliott, Catherine, English Legal System Sourcebook, Pearson Education Limited (2006), at pp. 65.
34. 2016/PUB/con/0016.
35. Segal, Jeffrey A., Et Al., The Supreme Court in the American Legal System 33-35 (2005).
36. Smith, Mark W., Disrobed: The New Battle Plan to Break the Left's Stranglehold on the Courts, (2006).
37. Tamanaha, Brian Z., 'The Several Meanings of "Politics" In Judicial Politics Studies: Why "Ideological Influence" Is Not Partisanship', William Gardiner Hammond Professor of Law, Washington University School of Law.
38. Ibid at pp. 767.
39. Whitman, Douglas Glen, 'Evolution of the Common Law and The Emergence of Compromise', Journal of Legal Studies, vol. XXIX, June 20011 at pp. 780.
40. Gennaioli, Nicola and Shleifer, Andrei, 'The Evolution of Common law', Journal of Political Economy, 2007, vol. 115, no.1.
41. [2011] 2 CILR 203.
42. [2004] UKHL 56.
43. Halkertson, Graeme, 'Derivative litigation: Onshore litigation and offshore companies *ARC Capital*-A temporary blip?', Wilberforce Cayman Conference', September 23, 2014.
44. Plato in *Cratylus*, 402a.
45. Boudin, Michael, Chief Judge, U.S. Court of Appeals for the First Circuit. 'The Real Role of Judges', Boston University Law Review, Vol. 86., 2006.
46. Ibid, at pp.1099 - Revised text of remarks delivered on April 21, 2006, for a panel on "Changing Times, Changing Roles," at a symposium sponsored by the Boston University School of Law on "The Role of the Judge in the Twenty-First Century."
47. Shaman, Jeffrey M., "Judicial Ethics", (1988-89), 2 Georgetown Journal of Legal Ethics 1 at pp. 1.