

CONFLICT and JUDGMENT

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EJTN Human and Fundamental Rights Project and Max Planck Institute for Social Anthropology

Utrecht, 6 November, 2019

1. It has been said of Abraham Lincoln, in the context of his determination to abolish slavery, that he demonstrated a moral standard by the use of practical experience¹. His experience was, of course, in politics. The success of his arguments was not defined by a belief in any faith or an abstract ethical construct but rather by a self belief born out of experience. He transposed practical experience into principle by his leadership, that is by the power of his advocacy on the perceptions of his people.
2. The relationship of practice and experience to principle is important both in politics and the law. Democratic legitimacy is essential to parliamentary sovereignty just as trust, respect and confidence are essential to the legitimacy of the rule of law. While we must not confuse the role of the politician in either the legislature or the executive with that of a judge, the need for respect and understanding of the people they serve in upholding the rule of law is key to trust and confidence in the justice system.
3. The law is a profession necessarily pragmatic in its pursuit of justice, hence it articulates neither absolute moral standards nor a reflection of belief in any one faith or none but rather experience: an external frame of reference that shapes interests and actions rather than an internal theory that derives them, to that extent it is neutral or secular². In philosophical terms, it tends to be inductive rather than deductive albeit that in striving to describe rules out of practices and institutions which are defined by those rules, one could be forgiven for forgetting the essentially practical nature of its purpose. That purpose is the resolution of disputes and the solution of problems for people who have a need to obtain redress from a decision maker who is independent (including of the State), impartial, and who has integrity.
4. Although many and sometimes great jurists have attempted to define that which in law is the standard or virtue by which people must live if the rule of law is to be our touchstone, I shall suggest to you that it is more likely to be profitable for the judiciary to study the internal equilibrium within which competitive beliefs and values can be governed by checks and balances. I am concerned here not with whether there is a jurisprudential norm out of which the plurality of our diverging values flow but rather, whether we understand the strategy of the rule of law which involves the creation and governance of power³ by a delicate balance of components.
5. That equilibrium is the defining character of the rule of law. It requires loyalty which in turn demands understanding and respect of people's experiences and practices, whether cultural, religious or realised, ie their perceptions. The outcome, the attainment of order out of conflict and difference, is achieved not by the imposition of uniformity on difference but by the balancing of irreconcilable opposites or at least incommensurable values in a way

¹ Gopnik, Adam, *A Thousand Small Sanities*, Basic Books, 2019, pp 208-210

² Gaddis, John Lewis, *On Grand Strategy*, Yale University, Penguin, 2018, p 232

³ *Ibid* and see, for example: *The Art of Creating Power: Freedman on Strategy*, Wilkinson and Gow (Ed), Oxford University Press, 2017

that is predictable. The practice of the common law has always recognised that balance and its dynamic nature permits interpretation which facilitates among other things adaptation and organisation. These practices are fundamental to the equilibrium that we recognise as a justice system. Our method of working, 'reason', is not consonant with an absolute truth, it is an imperfect tool that is, among other things, a blend of logic, evidence, experience, judgment, subtlety of thought and sensitivity to ambiguity⁴.

6. Modern justice systems are of necessity defined by our understanding of proportionality. That is the concept that prevents the price rationing of access to justice in times of resource austerity. The balance of opposites is its outcome. As Clausewitz had it: 'the simultaneous comprehension of contradictions'⁵. Both at the systemic level and that of the individual dispute, the strategic resolution of conflict requires governance from first principles and that requires an understanding of the practices from which the principles are intuitively derived. In other words, a justice system needs to understand the aspirations of people that stem from their perceptions and emotions just as much as they do from their rational conclusions. The ideas, beliefs, values and stories that are our cultural norms, practices and language inform those aspirations.
7. In order to bring its limited capabilities to bear to create order, a justice system must understand the cultural issues that are engaged and, in balancing the irreconcilable, respect them. Furthermore, our respective justice systems have to acknowledge that the language, patterns and rituals of communal life include and are influenced by the language and rituals of the law⁶. The legitimacy of the rule of law involves people understanding the law just as much as it involves the law understanding people.
8. We trade in and live by our senses and experiences: our perceptions are the consequence. We should provide a means to locate the perceptions of our communities in the language we use about rights and wrongs, about you, us and them. Isaiah Berlin, a sometime Oxford philosopher and commentator, said of this:

"There are many different ends that men may seek and still be fully rational....inter communication between cultures in time and space is possible only because what makes men human is common to them and acts as a bridge between them. But our values are ours, and theirs are theirs"
9. In Wiesbaden last year I identified the social context of judging as a constitutional function based in principle⁸. I described some of those principles. I also questioned whether we are sufficiently conscious of the effect that the rituals, traditions and language of our legal process has on those who must use our justice systems to obtain redress. For a justice system to be effective it must be true to its principles but it must also have the means to understand the social attitudes and perspectives of the communities that use it. It has to be inclusive not exclusive. There are civic obligations of accountability that form part of the judiciary's function as well as a recognition that the judiciary must safeguard access to justice in a transparent environment including for those who are vulnerable and/or excluded by others, including sometimes the majority.

⁴ Baggini, Julian, *A Short History of Truth*, Quercus, 2017, p 47

⁵ Clausewitz, Carl von, *On War*, Howard and Peret (Ed), Princeton University Press, 1976, p 523

⁶ See for example MacGregor, Neil, *Living with the Gods : On Beliefs and Peoples*, 2018, Allen Lane

⁷ Berlin, Isaiah, *The Pursuit of the Ideal* (1949), *The Proper Study of Mankind, An Anthology of Essays*, Hardy and Hausheer (Ed), Pimlico, 1998, p 9

⁸ Ryder SPT, *Diversity and Judgecraft*, EJTN and MPISA, Wiesbaden, 2008 (12 November)

10. We discussed, as you will today, the approach of our courts and tribunals to the provision of reasonable adjustments to procedure in order to establish fairness, by the removal of barriers to comprehension and inclusivity, whether rational or perceived, so that the integrity and autonomy of the individual is protected without unfair advantage over other parties. We also discussed good practice including reliance on empirically validated research to achieve that aim.
11. I suggested that the United Kingdom's jurisprudence may offer guidance that assists in the determination of such questions in individual cases. It requires us to ask: "does the measure further the principles of open, accessible justice; are the proposed means of implementation rationally connected with the principle; are the means no more than is necessary to achieve the principle; and do the means strike a fair balance between the rights of the individual and the interests of the community?".
12. I hope I can take the concept of reasonable adjustments to procedure as one that is sufficiently established or recognised so that we can debate the merits of different examples of good practice. In that context I want to move on to identify examples of irreconcilable conflict and ask you to consider the approach of our different jurisdictions. Let me provide some examples from United Kingdom caselaw.
13. In *R (E) v Governing Body of JFS* [2009] UKSC 15, the claimant argued that an Orthodox Jewish school was guilty of direct discrimination on racial grounds by their refusal to admit a pupil because that child's asserted membership of the religion was not recognised having regard to the tenets of Orthodox Judaism, in particular, matrilineal descent or conversion. There was an irreconcilable conflict between the religion's approach to the definition of its own membership and the UK's discrimination legislation. The judgments of the UK Supreme Court provide an interesting contextual analysis. The justices were at pains to avoid criticising the school or the religion especially on moral grounds and they were equally clear that the issue of discrimination had to be separated from any generally understood accusation of racism.
14. The Supreme Court ruled against the admissions policy but dealt with the irreconcilable conflict between primary legislation and religious belief sensitively, graciously (that is, with understanding and respect) and without inappropriate inference or judgment, for example, as to motive. By the manner in which the court disagreed without disrespect it underlined the legitimacy of its own conclusions without alienating the community involved while making a clear decision that could be acted upon by other communities who might face similar irreconcilable issues.
15. In *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, the Court of Appeal in England and Wales (Munby LJ) had to decide how to make a welfare decision that was dominated by incompatible religious visions for the future upbringing of a child. In doing so, the court recognised the English orthodoxy that welfare is an all-encompassing concept, involving all aspects of a child's life and the centrality of relationships to a child's wellbeing. The judge's welfare assessment demonstrated considerable sensitivity to the religious differences involved and the court's neutrality on the questions of belief and irreconcilable values. Wherever possible, he identified shared community values, aspirations and opportunities that arose out of the conflicting plans to facilitate the promotion of the welfare of the child. These pragmatic realities did not reconcile opposing values but they did

tend to balance the irreconcilable by finding the positives without undertaking a value judgement about different religious concepts of good.

16. In *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 the House of Lords had to balance religious practice (in a faith school) with State policy and the rights and interests of different people, for example, children of different cultural heritage, parents and teachers. The balance was fact specific but the principle expressed by Lady Hale (now President of the UK Supreme Court) (at [72]) has wider value:

“...the child is not the child of the state and it is important in a free society that parents should be allowed a large measure of autonomy in the way in which they discharge their parental responsibilities. A free society is premised on the fact that people are different from one another. A free society respects individual differences.”

17. These are but snapshots of the court respecting cultural differences, engendering loyalty from different communities and balancing differences in the resolution of disputes. A former Archbishop of Canterbury, the leader of the Anglican Christian tradition, Lord (Rowan) Williams, said in 2008⁹ (in what was then reported as a controversial commentary) that the law should take contextual account of religion and people’s motivations for acting in order to avoid conflict and reconcile obligations. Although I would respectfully differ with him in the manner of balancing rather than reconciling the irreconcilable, I would agree with his conclusion that if the law takes no account of a person’s reasons for behaviour, “it fails in a significant way to communicate with someone involved in the legal process ...(and thereby) fails in one of its purposes”.
18. He went on to comment that “secular government assumes a monopoly in terms of defining public and political identity. There is a position – not at all unfamiliar in contemporary discussion – which says that to be a citizen is essentially and simply to be under the rule of the uniform law of a sovereign state, in such a way that any other relations, commitments or protocols of behaviour belong exclusively to the realm of the private and of individual choice....this is a very unsatisfactory account of political reality in modern societies...”. Cultural differences should not deprive a person of the safeguards of the rule of law and the law should acknowledge that society must “work to overcome the ultimatum of ‘either your culture or your rights’¹⁰”
19. May I then return to the principles that should guide us? Those principles include:
- a. The obligation to secure open and effective access to justice, independently of the executive and the legislature
 - b. The integrity of an independent, impartial judiciary in their approach to differences of belief, custom and culture where those differences are not proscribed by law
 - c. The governance of justice so that we, the judiciary, provide leadership and good practice in the way we deliver and administer it.
20. How we govern justice systems is a question for another lecture. I have already argued in the United Kingdom for a more informed, strategic approach from first principles so that the

⁹ Williams, (Lord) Rowan, *Civil and Religious Law in England: a Religious Perspective*, 2008
<http://aoc2013.brix.fatbeehive.com/articles.php/1137/archbishops-lecture-civil-and-religious-law-in-england-a-religious-perspective>

¹⁰ Shachar, Ayelet, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights*, University of Cambridge, Cambridge University Press, 2001, p 113

judicial voice is heard. The quality of our individual decisions and their content is the judiciary's most powerful voice but that alone does not satisfy our obligations. We have executive functions that demand principled governance if we are to deliver quality outcomes and prevent the unintentional or unguarded adverse impacts, for example, of incomprehensibility, delay, austerity, the unavailability of proportionate forms of redress or the failure to lead or manage people or work so that the system becomes ineffective or inefficient. That governance has many aspects and must consider the opportunities that we each have for the prevention, consensual resolution and corrective or remedial resolution of disputes¹¹.

21. One aspect of our governance is the provision of guidance and training. We are not the only students of the law considering these issues today. There are some very interesting ideas that you may wish to consider. For example, there is a developing commentary around Europe, previously discussed and implemented in parts of North America, about the need for a threshold test for judges to help them answer questions relating to culture in the individual case, before attempting to balance rights, by reference to reliable, cogent knowledge¹².
22. That dialogue between law and anthropology is of course the special interest of the scholars who are with us today from the Max Planck Institute for Social Anthropology. They will challenge us to answer the question: how are we as judges to evaluate behaviours without transgressing rights? There is no common model. We will all have experience of what works in our own jurisdictions and our case studies are themselves worthy of study to identify common themes, solutions to problems and good practice. We can all learn from each other. The MPISA is curating one very important example of that in its Cultural and Religious Diversity Database (CURED) project¹³. What this has already started to reveal is fascinating. How we might use the data and analysis that it produces is one of the questions to consider during our plenary discussion. Some of our jurisdictions have already identified the need for cultural expertise for the judiciary. Can we and should we provide assistance for judges about the heterogeneity of ways in which anthropological knowledge may be relevant? And if so, how? These questions will be at the forefront of our minds.
23. There is an Observatory on Justice, Transcultural Dialogues and International Protection in Italy led by the judiciary. That will not be the only such endeavour across our various teaching institutes and colleges as they face requests for assistance from judges on cultural questions. In the process, we are moving towards a better understanding of each other: the crux of dispute resolution itself. These strategies have important civic implications. If we have the practical tools to make decisions about or involving cultural questions, we may also be able to develop the principles that are necessary to create a new justice strategy of community engagement to assist dispute resolution.
24. In an editorial in the Vatican Press on the canonization of Saint John Henry (Newman) entitled, 'The Harmony of Difference' the Prince of Wales said¹⁴:

¹¹ Ryder SPT, *Implementation and Application of the Law: the Governance of Justice*, Society of Legal Scholars, Preston, 2019 (4 September)

¹² Ruggiu, Ilenia, *The 'Cultural Test' as Cultural Expertise: Evolution of a Legal-Anthropological Tool for Judges*, University of Cagliari, MDPI Laws, 2019, 8, 15

¹³ CURED, Max Planck Institute for Social Anthropology, Department of Law and Social Anthropology, Halle

¹⁴ Wales, HRH The Prince of, *John Henry Newman: The Harmony of Difference*, L'Osservatore Romano, 2019 (12 October)

“He could advocate without accusation, could disagree without disrespect and perhaps most of all could see differences as places of encounter rather than exclusion.”

You may think that this is a model for the liberal profession of the law albeit in a secular context.

Thank You.