ARTICLES

THE MASK AND THE JUDGE

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There are not many essays with the title, *The Charm of Judges.* I know only of one. It is not by a lawyer but by an author who was, at the time, theatre critic of the *Saturday Review*, Max Beerbohm. He was not particularly familiar with the law, although he drew that famous caricature of Mr Justice Darling in a jester's cap and bells.

In 1908 he published a collection of essays, *Yet Again*,[1] amongst which was 'Dulcedo Judicorum'. He wrote:

> In the courts I find satisfied in me, just those senses which in the theatre, nearly always are starved. No artificial light is needed, no scraping of fiddles, to excite or charm me as I pass from the echoing corridor through the swing doors into the well of this or that court. I never tire of the aspect of a court, the ways of the court. I love the mystery of those dark-green curtains behind the exalted Bench. One of them will anon be plucked aside, with a stentorian silence. Thereat we jump up, all of us as though worked by one spring; and in shuffles swiftly My Lord, in a robe well fashioned for sitting in, but not for walking in any where except to a bathroom. He bows and we bow; subsides and we subside; and up jumps some grizzled junior – 'My Lord, May I mention to Your Lordship the case of Brown v Robinson and Another'. It is music to me ever, the cadence of that formula. I watch the judge as he listens to the application, peering over his glasses with a lack lustre eyes that judges have, eyes that stare dimly out through the mask of wax or parchment that judges wear. My Lord might be the mummy of some high tyrant revitalised after centuries of death and resuming now his sway over men. Impassive he sits, aloof and

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1 Max Beerbohm, *Yet Again* (1928).

> aloft, ram parted by his desk, ensconced between his curtains to keep out the draft – for might not a puff of wind scatter the animated dust that he consists of? No creature of flesh and blood could impress us quite as he does, with a sense of puissance quite so dispassionately, so supernal. He crouches over us in such manner that we are all of us levelled one with another, shorn of aught that elsewhere differentiates us. He crouches over us, visible symbol of the majesty of the law, and we wilt to nothingness beneath him. And when I say (Him), I include the whole judicial bench. Judges vary, no doubt. Some are young, others old, by the calendar. But the old ones have an air of physical incorruptibility – are well preserved as by swathes and spices and the young ones are just as mummified as they. Some of them are pleased to crack jokes; jokes of the sarcophagus, that twist our lips to obsequious laughter, but send a chill through our souls. There are strong judges and weak ones (so barristers will tell you). Perhaps – who knows? Minos was a strong judge and Aeacus and Rhadamanthus were weak ones. But all three seem equally terrible to us. And so seen, in virtue of their position, and of the manner and aspect that invests them, with, all the judges of our own High Courts.

Of course nowadays, our judges are all youthful and assessed only according to their sympathy and humanity. The idea that they should inspire awe or seem terrible would strike us as preposterous. Certainly, those who exhibited any tendency to provoke such an emotion would be likely to drop the egg within the first few yards of the egg and spoon race to judicial office and thus be declared as lacking that asset most prized by the Judicial Appointments Commission, a safe pair of hands. But it is worth noting that to that observant theatre critic, the judge wore a mask.

I should start, if I am ever to start, with the objective identified by the professor of moral philosophy here in 1914 when he began his course of lectures with these words:

> But I would like to remind you of an important point. Some of you, when you go down from the University, will go into the Church, or to the Bar or to the House of Commons or to the home Civil Service or the Indian or Colonial services or into various professions. Some may go into the Army, some into industry and commerce; some may become country gentlemen. A few – I hope

> a very few – will become teachers or Dons. Let me make this clear to you. Except for those in the last category, nothing that you will learn in the course of your studies will be of the slightest possible use to you in afterlife – save only this – if you work hard and intelligently you should be able to detect when a man is talking rot, and that in my view, is the main, if not the sole purpose of education.[2]

And if I may say so, there is no shortage of rot when people talk about judges, not least from the judges themselves.

The Sienese understood the true image of justice. After all, they could see it in the Sala de la Pace, the frescoed chamber in the Palazzo Publico where Ambrogio Lorenzetti was commissioned in the 1330s to celebrate Sienna's system of government, the Ben Commune. The members of the council were instructed to look on the figure of justice:

> Turn your eyes to look on her, you who govern … *Guardate quanti ben venga da lei / E come e dolce vita e risposata Quella de la cita du e servata / Questa virtu ke piu d'altro risprendo* ... Look how many good things flow from her and how sweet and reposeful is life / In that city where she is served / that virtue who outshines any other.[3]

Timothy Hyman, in his wonderful book on Sienese painting describes the significance of Lorenzetti's depiction of the virtue, justice. It is the only virtue painted twice in the Allegory of Good Government. The nine members of the council entered the room beneath justice and sat below the allegory on a raised platform. Justice raises her eyes to wisdom and from each of her scales a cord leads down passing along the line of citizens.

Justice has no wig; her face serves as a mask and she has authority. I do not want to talk about costume, not about a wig of horsehair, but about authority beneath that horsehair. There is, I suggest, much for those of us in the law to learn from the use of mask in the theatre. I

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2 John Alexander Smith, Professor of Moral Philosophy, Oxford (1914).

3 Quoted by Timothy Hyman, *Sienese Painting* (2003).

am not dealing with the hackneyed image of the baroque mask of tragedy and comedy, the goody and the baddy; but a mask such as made of soft leather, thin and ambiguous.[4] It may not even be beautiful; it could be merely of cloth with the holes cut for eyes.

The mask has not lost its power. But we may have forgotten its force and its importance in previous societies. The Church saw masks as pagan and tried to suppress them. Apparently there is in the Vatican a whole museum full of confiscated masks.[5] It was used as oracle, arbitrator and judge. Some were so sacred that an outsider who caught a glimpse of such a mask was executed.[6] Some masks were led on chains to keep them from attacking onlookers.[7] Masks were surrounded by rituals to reinforce their power.

But the great makers and teachers of mask, such as Roddy Maude-Roxby,[8] have not forgotten. They use the mask to enable, as one actor in the Bacchae described it, as a doorway to the metaphysical world. Imagine, and since this is the 50th anniversary of the English Theatre Company at the Royal Court, just imagine what happens when Maude-Roxby hands you the mask. He may not let you see it. But you put it on and suddenly to those around you, to the audience and fellow students, you are transformed. The mask drives you, you do not drive the mask; the mask dictates how you move and answer and react. The audience will see the mask which you cannot and will engage with and react to the mask. When the mask looks down the expression, in the minds of the audience, changes to one of sadness; when it looks up it is happy. And so you begin to understand that the emotions we perceive in others, are not so much communicated by the expression on your face as by the relationship of the head to the body and by all the movements of your body.

Garbo's face was a full tragic mask, but although the critics raved about her face, it was a mask into which her body transmitted the information. 'I have seen her change from love to hate and never

4 Peter Hall, *Exposed by the Mask* (2000).

5 Keith Johnstone, *Impro* (1979) 'Masks and Trance'.

6 Ibid.

7 Ibid.

8 To whom I am indebted for conversation and lesson with and loan of masks (May 2006).

alter her facial expression', said Clarence Brown. Of her stand-in it was said that she had

> everything which Garbo had, except whatever it is Garbo has. What Garbo had was a body that transmitted and received. She responded spontaneously with emotion and warmth and what she felt the audience felt, yet the information transmitted by the body was perceived as emanating from the face. You can watch a marvellous actor from the back of a big theatre, his face just a microdot on the retina, and have the illusion you've seen every tiny expression. Such an actor can make a wooden mask smile, its carved lips tremble, its painted brows narrow.[9]

You acquire a quality you did not have and use the imagination of the audience. And when you look for the first time in a mirror, you feel the shock when you first see the mask, the face of the persona you have become. It is, after all, worth recalling that the *persona* was the speaking tube through which the Roman actors spoke through their masks.

And so as an actor you achieve that abnegation of self, which the teacher is aiming for; the body can act automatically or be inhabited by the character the actor is playing. An actor may be possessed by the character, blush when embarrassed and white with fear, yet be unable to find the character until he dons the mask. Thorndike, in *Great Acting* published by the BBC in 1967 described it thus: 'When you are an actor, you are a person and you are a person with all the other persons inside you'.[10]

It is the mask which creates a belief, which creates authority. The actor accepts the mask, the form to achieve that essential objective in the theatre, truth.

In 2000, at Trinity Hall in Cambridge, Peter Hall gave four Clark lectures on Form and Language in drama. He called them 'Exposed by the Mask'. He describes the theatre as a place for scrutinising and magnifying the emotions. It creates a live contract; at each performance the audience agrees to imagine with the actor. It is, he

9 Johnstone, above n 5.

10 Cited in Johnstone, above n 5.

says, a sensitive and intricate contract and when it is broken there is acute disappointment. The contract is sealed by the form. The form is the style, be it the meter, the music, the metaphors. The form selects from human reality and gives it shape. Form communicates truth in the theatre. Hall exposes the paradox, that by hiding a feeling you express it. Drama deals with huge emotions, but if it displays them in an emotional way, overblown and indulgent, the audience is liable to reject such an exhibition. Those emotions must be, as he calls it, '*stage real*'.

To make those emotions real you must, as always, listen to the wisdom of the clown. He cites George Burns: 'The most important thing about acting is honesty. If you can fake that, you've got it made'.

Thus, says the director, if you wish to move an audience you must not cry. DO NOT CRY. If you cry, the audience will not; an audience is naturally repelled by grief. The child who comes towards you trying not to cry but who is filled with suppressed tears is incredibly moving. Hall quotes David Hare 'we need a slight touch of distance if we are going to be able to think and feel at the same time'.

The necessary distance between actor and audience, between a raw expression of grief and grief really felt in the theatre, can be more easily created and maintained if the form provides a mask. The mask may take the form of verse and Hall gives us examples of iambic pentameters of Shakespeare or the beat of Beckett's prose or the form of a mask itself. It releases rather than hides; it permits control while preventing indulgence.

The distance which drama requires allows the audience to study something while experiencing it. Hence the importance of the mask. The bloodiest action, as the Greeks understood and Sam Peckinpah or Tarantino do not, takes place off stage. The violent action off stage is masked so the horror is unseen but imagined. But the discipline of form enables the audience to experience passions at intensity beyond repulsion. A screaming naked human face would repel. The face of the mask with a scream behind it, does not. The actor should become the mask, the sound of a scream makes the mask scream, the sound of laughter makes the mask laugh. Peter

Hall was not dealing with the hackneyed image of the baroque mask of comedy and tragedy, the goody and the baddie, but rather with the Greek mask. In Greek theatre, the mask was made of soft leather, thin and flexible and thus ambiguous, waiting to be printed with the emotion of the actor. The actors were masked, suggests Hall, so that the audience could know the unknowable, experience the unspeakable and so performance in drama requires the equivalent of a mask in order to transmit emotion to deal with primal passions, enigmatic and representing human confusion. It can laugh or cry but is more expressive than the human face because it is dealing with the quintessence of emotions; it enables a range of feeling to be expressed, an extremity of passion, often more difficult than the naked human face. It is an instrument of communication, a magnifying glass to enable the audience to scrutinise emotion. Hall concludes that without form there can be no credibility and no narrative and so no involvement and no drama.[11]

Twentieth century artists, Picasso, Gauguin, Derain, the Dadaists and Surrealists understood the power and authority of the mask.[12] Ozenfant wrote, in the *Foundations of Modern Art*,[13] in as troubled times as these, in 1931 in France. He too speaks of the importance of form and structure:

> Art would perish if it went on idiotically admiring its navel and repeating that it was free, free, free. Nothing is truly free if tested by our conceptions of liberty. The abuse of liberty can give nothing to art: art is structure and every construction has its laws.[14]

The greatest art is not imitation of that which evokes intense feeling. To imitate something is merely to stuff it. Ozenfant asks how fetish-worshipping tribes were able to carve sacred masks which evoke profound feeling in modern civilisations who know nothing of what the mask symbolises or the rituals to which they relate. The forms of

11 Hall, above n 4.

12 There are fine essays in 'Primitivism in 20th Century Art' in William Rubin (ed) *Museum of Modern Art (MOMA) Catalogue* (1984).

13 Amedee Ozenfant, *Foundations of Modern Art* (John Rodker trans, 1952 ed).

14 Ibid.

the mask affect us. The measure of quality is the degree of intensity of the feeling.[15] This is no different from the effect of form in theatre as described by Hall or Johnstone. In his essay, in the form of a dialogue, 'The Critic as Artist', Oscar Wilde writes:

> Shakespeare might have met Rosencrantz and Guildenstern in the white streets of London, or seen the serving men of rival houses bite their thumbs at each other in the open square; but Hamlet came out of his soul and Romeo out of his passion ... the objective form is the most subjective in matter.
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> Man is least himself when he talks in his own person. Give him a mask and he will tell you the truth.[16]

But I must move on I suppose from the Royal Court to the Royal Courts. Back to a time when judges were priests, prophets and oracles; when the mask evoked the magic by which they discovered and declared the law. In the medieval digests of Hindu law, the Book of Narada is quoted as of almost equal authority as the oldest legal treatise, the Code of Manu. Manu and Narada were mythical characters. The Code of Manu was a work which told of the creation of the world, the classification of beings in it and contained 100,000 slokas or legal texts prompting a somewhat rare joke in Maine's *Early Law and Custom*.[17] When Manu delivered the Code to Narada he remarked 'this book cannot easily be studied by human beings on account of its length'. I suppose judicial comity prevents me murmuring, when reading paragraph 113 of the judgment of Lord Justice X only to appreciate that he is still only clearing his throat, 'I share the sentiments of Manu'. The dominant notion present to the compiler of Narada is a court of justice. He places in front of everything the description of a court. All primitive codes, so Maine says, begin with the judicature. The Irish law, contained in the Brehon Tracts, never went further than initial steps of procedure … more Beowulf than Woolf. Maine suggests that the reason for this approach was that the authority of the court of justice overshadowed

15 Ibid.

16 Collected in Oscar Wilde, *Intentions* (1891).

17 Sir Henry Maine, *Early Law and Custom* (1891) (the same year as Wilde's essay).

all other ideas and considerations in the minds of the early code maker. 'The Courts of Justice have an immense ascendancy over men's minds and a singular attraction to their tastes, when they are first presented as a means of settling disputes hitherto only adjusted with violence.'[18]

Max Weber, in the last century, identified what the sociologist had to teach the lawyer about the nature of law in society, particularly by examining the origins of law.[19] The legitimacy of laws derived from the sacredness of certain practices, deviation from which would produce magical evil effects, the restlessness of spirits or the wrath of the gods. Laws were not created but had to be known and interpreted. The task of interpretation was that of those who had known such laws the longest … the Elders, often magicians and priests who had specialized knowledge of magical forces and could communicate with supernatural powers … rather like the libel Bar now.

But new laws could only emerge by what Weber describes as charismatic revelation, from those who were favoured by the gods or god. The revelation was often not a matter of mere inspiration; it required formality … magical devices used to proclaim new rules for new and unsolved problems. The men who adopted these formal methods to adapt old rules to new situations were magicians, prophets and oracles. Blackstone, after all, described judges as living oracles and Weber likens the role played by a judge's decision through which and only through which the common law is promulgated to the role of the oracle in ancient law. The existence of a particular common law principle only becomes known through the decision of the judge. And, so Weber says, the only distinction between the genuine oracle and English precedent is that the oracle does not state rational grounds,[20] … an optimistic and beneficent view, from Germany, of the English legal system.

Weber develops his focus on the charismatic role of the judge by reference to the distinction in North European systems between the

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18 Ibid and referred to by Sir Jack Jacob in his published Hamlyn Lecture, 'Trial' in *The Fabric of English Civil Justice* (1987).

19 Max Rheinstein (ed), *Max Weber on Law in Economy and Society* (1954).

20 Ibid.

lord of the court who would occupy the chair and keep order in court and the charismatic declarers of the law who actually reached a decision. The decision was reached by charismatically qualified sages, called upon in individual cases, such as the priests or Brehons in Ireland or the druids in Gaul … only they could deploy their magical qualifications to obtain the right decision from the deities … only they could reveal the law.... Such a system is not peculiar to the Germanic tribes or the Norse but found in Israel … Jeremiah was saved from death in the reign of Jehoiakim, king of Judah because the priests and the people said '*this man does not deserve the sentence of death for he has spoken to us in the name of the Lord;'*.[21] Jewish prudence not jurisprudence.

The oracles and charismatic declarers of the law had authority to reveal answers to new and unsolved problems because they delivered their decisions through the form of magic or the voice of god. It is worth considering the meaning of authority, when we speak of the authority of a judicial decision.

Atiyah teaches, in his *Law and Modern Society* in 1995, that 'the most perfect code of laws would be a mere abstract set of ideas if it had no actual relationship to the world of reality, if that code was never observed or followed.'[22]

So the law must compel or persuade people to behave in a desired fashion. As a last resort, obedience to the law can be achieved through force or compulsion … but that is a matter of last resort. Even the most powerful and monstrous of tyrannies, he points out, would find it hard to govern for any sustained period by force alone. Dictators do so by persuasion; hence the need to control the media without which no modern tyranny can survive.

In modern free society most of the law is observed without the threat of immediate force, but rather because obedience is taken for granted.

Atiyah tells us: 'The persuasive power of law derived much of its strength from its mystique and majesty …' and recalls how much greater that mystique was in earlier days when law was

21 *Jeremiah* 26 vv 12 and 16.

22 P S Atiyah, *Law and Modern Society* (1995).

indistinguishable from religion and magic, before the priestly class became transmuted into the professional lawyer class.[23]

Now the mystique and majesty of the law has disappeared. Observance to the law has been liberated from superstition, as Atiyah says. And yet and yet … Atiyah records 'the removal of the mystique and majesty from the law may lead [indeed surely has led] to a great weakening of the persuasive powers of the law'.[24]

It would be an impertinence to dwell, in this university of Rawls, Hart and Raz on the much debated paradox that there is no law that a law must be obeyed. But it is worth considering Friedman's essay, in Raz's collection of essays on authority, 'On the Concept of Authority in Political Philosophy'.[25]

Friedman makes two key distinctions. Firstly, he distinguishes authority from that which commands obedience by threat of force or punishment. Secondly, he distinguishes authority from that which gains acceptance by the weight of rational argument. He illustrates that second category by reference to the advice of a friend to stop smoking. You can choose to follow or not to follow that advice. If you follow that advice and cease to smoke it is because you accept your friend's argument that smoking damages your health. But when you obey the law that you must not smoke in a public place, obedience is not conditional on your own personal examination of why it is better not to smoke. It is a sufficient reason that your behaviour is prescribed by someone who is entitled to rule. You do not insist on reasons which can be grasped and appreciated as a condition of obedience. Justification is absent; it is not needed as a condition of obedience.

Thus the hallmark of authority is the surrender of private or individual judgment … obedience comes from recognition that the person whose command you obey has the right or status to give that command. He who obeys transfers his reason to another person's will or judgement. In the case of persuasion through rational

23 Ibid.

24 Ibid.

25 R B Friedman 'On the Concept of Authority in Political Philosophy' in Joseph Raz (ed), *Authority* (1990).

argument only the strength of the argument matters … in a relationship of authority it is the status of the speaker which is decisive. Friedman quotes Kierkegard: 'to ask whether the king is a genius with the implication that in such a case he is to be obeyed is really "lese majeste", for the question contains a doubt concerning subjection to authority.'[26]

You must follow a decision of Lord Justice Richards not because it is wise and rational or because he is a genius but because he sits in the Court of Appeal. Authority consists of recognition that the person to whom one defers is entitled to submission; you believe in the source not in the correctness of its utterance. Indeed the definitive feature of submission to authority is that it does not involve belief in the correctness of the ruling but rather in its disassociation from the correctness of the ruling. Thus authority is identified without scrutiny of the reasons for the command. This essential distinction between statement and speaker between ruling and ruler requires a means of identifying authority independent of scrutiny of the reasons for the command. But if there is no way to tell whether an utterance is authoritative other than by evaluating the rationality of its contents to see whether the argument should be accepted or not then the distinction between command and advice collapses. Obedience requires some public way of identifying authority. And that public way of identification must be independent of inspection or analysis of the proposals on their own merits. The merit or demerit of the actual decision is irrelevant to the obligation to obey.[27] You would have thought that you would not need to dwell on the question of identifying authority when it comes to the decision of a judge, but now we are subject to the Chinese curse: may you live in interesting times.

The coming into force of the *Constitutional Reform Act 2005* (UK), notwithstanding its 119 sections and 18 schedules, required a concordat or agreement of a further 47 paragraphs setting out an agreement between the Lord Chancellor (LC) and Lord Chief Justice (LCJ), the status of which recalled those Solomon binding accords reached by Harold Wilson with members of Trade Unions prepared

26 Ibid.

27 Ibid.

to share a beer and sandwich. Section 1 observes that the Act does not affect the existing constitutional principle of the rule of law which sensibly it does not define. Section 3 guarantees the independence of the judiciary which sensibly it does not define. Section 7 makes the Lord Chief Justice head of the judiciary and president of the courts of England and Wales. There are lots of presidents now … and you must not call them 'Prezza' since that title was adopted by the Daily Mirror. There are, as we shall see, even more vice-presidents; like so many US corporations everyone save the tea-boy is a vice-president now.

And the concordat requires clarity and transparency in the relationship between LC and LCJ so that the roles and responsibilities of the most senior judiciary are clear …. The Secretary of State is responsible for pay and the efficiency and effectiveness of the administration of the courts, the LCJ for deployment and for those who will provide leadership not involving formal promotion. And like all kitchens where the broth is liable to become over boiled, both LCJ and LC are together responsible for considering and determining complaints against the judiciary and sanctions. It is frustrating but understandable that the senior law lord is unwilling to pronounce whether the mountains having laboured mightily have brought forth a mouse or a valuable measure of overdue reform or a monster.[28] The LCJ gave an interview on the <judiciary.org> website which the sophistication of the judicial IT system does not permit to be played out loud. You can, if you are a judge, watch the silent images of the LCJ and Marcel Berlins. The LCJ regarded the reforms as unnecessary. He took the view that he would stay out of political activity, which he did not, sensibly, attempt to define, and that the transition should be seamless.

The constitutional pregnancy, when first announced, was greeted with surprise and unsuppressed expressions of horror, as if it was the fruit of a one-night stand. I can only say that I cannot understand why. Reading now those triumphant levellers, Kate Malleson, Robert Stevens, Joshua Rozenburg, it is only surprising anybody was surprised that Judicial Office or <www.judiciary.gov.uk> should be created.

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28 Lord Bingham *Law Quarterly Review* (April 2006).

Rozenberg, Malleson and Professor Robert Stevens, in *The Independence of the Judiciary* in 1993,[29] and more recently in *The English Judges*,[30] all provide the most obvious explanation for the creation of the Judicial Office. All three have charted the march from years of judicial restraint, to the *Human Rights Act 1998* (UK) in 1998, and to the present when, as Stevens puts it, '…if the public feels there is a growth in what he calls judgeocracy the feeling is understandable'.[31] Joshua Rozenberg in 1997,[32] in response to governmental complaints of judicial supremacism, suggested the creation of an independent judicial media officer and a change in structure. And so, ever obedient to Joshua's commands to march blow trumpets and to shout, the walls of Jericho fell down flat and the Judicial Communications Office was created in April 2005.

Fundamental to the changes advocated in 1999, by Kate Malleson,[33] was the need for greater engagement with the public to remove the dangers of reinforcing the popular image of the judiciary as committed to archaic practices and displays of tradition in matters of ritual and form. In the light of their increasing intervention in issues regarded as the province of the executive and legislature, their independence could only be sustained by public confidence. That public confidence could only be achieved and maintained by change, change in systems for appointment, training and scrutiny.

Scrutiny required not only the Judicial Conduct Commission, which she recommends, but what she describes as an on-going public relations exercise. Her essential argument was that such methods for creating a 21st century judiciary, comprehensible and responsive to the public, would not undermine their independence. Accountability and independence were not incompatible.

To make good that crucial thesis she distinguished between the individual independence of the judge and the collective independence of the judiciary viewed as a whole. The individual independence of the judge is concerned with approaching each

29 Robert Stevens, *The Independence of the Judiciary* (1993).

30 Robert Stevens, *The English Judges* (2005).

31 Ibid.

32 Joshua Rozenberg, *The Trial of Strength* (1997).

33 Kate Malleson, *The New Judiciary* (1999).

individual case with an impartial state of mind. Such individual independence is not damaged by greater accountability, and greater active engagement with the community. Nor, she argues, is a judge's individual independence diminished unless his impartiality in making a particular decision is directly or indirectly eroded. It is a judge's impartiality in the particular decisions he takes which must be protected.

The judiciary as a whole, collectively, must maintain a structural and constitutional independence from other branches of government. That collective independence, once properly distinguished from individual independence, would not be damaged by greater accountability and greater active engagement with the community. The need for engagement with the public was the key to modernisation.

It is not my purpose, it really is NOT my purpose to assume the role of critic. I acknowledge, like Marshall McLuhan that innumerable confusions and a profound feeling of despair invariably emerge in periods of great technological and cultural transition … we must not attempt to do a new job with the tools of the old.[34] But I do wish to strike a warning note, ever conscious that the sound of the curfew bell might all too easily be confused with the rattle of the bolt in the stable door.

In the bustle to shed the cloaks and wigs of archaic practice of tradition and ritual, and don the mantle of constitutional progress, I fear we may have discarded one item of costume too many. We may have even lost the cloak-room ticket. It is the mask, the form through which the judges deliver their decisions.

We forget symbols to our peril. The Supreme Court will be moving to the Middlesex Guildhall. Designed by J G S Gibson & Partners, with details by Shipworth in 1912–13, it is described with no great affection by the authors of Pevsner as an Art Nouveau version of Gothic. Its claim to house our new Supreme Court is fortified at least by the inscription on the back wall, formerly entrance to the Bridewell prison, 'for such as will beg and lie idle'. Successive governments chose the Dome as a monument. They forgot the words

34 M McLuhan and Q Fiore, *The Medium is the Massage* (1967).

of Mayor John Shaw when opening a court house and city hall in Toronto in 1899 which had exceeded the budget by some 2.2 million dollars …

> Great buildings symbolize a people's deeds and aspirations. It has been said that whenever a nation had a conscience and a mind, it recorded the evidence of its being in the highest products of this greatest of all arts. Where no such monuments are to be found, the mental and moral natures of the people have not been above the faculties of the beast.

You might have thought that a building for the Supreme Court might too represent the conscience of the nation and that that conscience should, to adapt Ken Tynan's words, represent more than the conscience of a shrivelled appendix. But it was different in the 19th century. On 9 December 1882, Queen Victoria opened the Royal Courts of Justice in the Great Hall. Selbourne LC said: 'justice will in the future be as much better administered as she will henceforth more commodiously housed.'

He lacked the gift of prophesy. Good administration and the commodious housing of justice are often not on speaking terms, if I may bowdlerise Lord Atkin in *GMC v Spackman*. Come to The Thomas More Building of the 70s and up the lift marked Staff Rest. There with a view as fine as that of the London Eye, although you should be confident, without its tendency to go round and round in stately circles, is not the Staff Rest, but now the Judicial Communications Office, designed to enhance public office holders in England and Wales. From that eyrie the Director,[35] with a staff of eight, and a budget of £940,000, can look down on all the other offices and sections contained within Street's Royal Courts. Where there were once the judges, those lilies of the field who toiled not neither did they reap, though Solomon in all his glory was not arrayed as one of these, now between the idle pipe caps of the London Vacuum Company, designed to suck the dust and ashes of the disappointed litigant to some hidden waste disposal tank, there are offices and officials of the new Judicial Office. They support the

35 I am indebted to Mike Wicksteed, for talking to me and inviting me to his office and providing invaluable and impressive information, in April 2006.

LCJ and what are called the senior judiciary in their new roles and responsibilities under the *Constitutional Reform Act 2005* (UK) and the concordat. The senior judiciary is not the same, statutorily speaking, as those who used to be called High Court Judges and above. The Judicial Office has private offices, offices for planning and governance and a staff of 61 with a budget of £3.4 million. Elsewhere to demonstrate their independence, the work of the Judicial Studies Board, reporting to the LCJ, continues with a staff of 61 and, no surprise, a budget of £3.4 million to retain parity, you will recall, with the Judicial Office; and the Judicial Appointments Commission to select candidates for judicial office on merit, using what are described as the principles of openness, supported by a staff of 100 with a budget of £5.33 million; the Office for Judicial Complaints to handle, disappointingly despite encouragement of its title, complaints against and not complaints from judges, with a staff of 18 and a budget of £1.2 million; and a Judicial Appointments and Conduct Ombudsman with a staff of eight, and more limited budget of £750,000. I have been privileged to see the Director of Judicial Office organogram; this is a family tree of private office officials which would make the Reverend Quiverfull[36] blush that his offspring were limited to 12.

Hopes might be raised by observing that almost the largest group of officials provide support for what is known as Judicial HR. But those hopes are in vain in 2006, eight years have passed since the dizzy raptures of the incorporation of the *European Convention on Human Rights*. 'HR' to the new Judicial Office is not 'Human Rights' but 'Human Resources'. There is a temptation to cheap mockery … it is irresistible: the Name of the Lord Chancellor:

> Courts may find they need to use the name of the new Lord Chancellor in two ways.
>
> 1) While on a few High Court and Probate forms, there is still the need to insert the name of the Lord Chancellor. The forms themselves already contain the phrase 'The Lord High Chancellor' and the Court should therefore ensure that the testate inserted reads 'Charles Lesley Lord Faulkner of Thoroton', it SHOULD NOT include the term Right

36 Anthony Trollope, *The Warden* (1902).

> Honourable. If for any reason the incorrect name or title has been used on Court documents since the appointment of the new Lord Chancellor, it is up to the parties to challenge the validity of the process. If the issuing party subsequently does so, it can be referred to a District Judge for amendment under the slip rule.
>
> 2) In other documents and correspondence, his correct name and title is The Lord Chancellor and Secretary of State for Constitutional Affairs, The Right Honourable, The Lord Faulkner of Thoroton. This is, for instance, the title that should be given to court users who wish to write to the Lord Chancellor.

How pleasing that a fresh dawn will see an end to tradition and flummery, whilst at the same time ensuring that correspondence from court users is limited.

But it is possible to see within these reforms the seeds of their own destruction, or at least the possibility of spreading weeds which might stifle vigorous growth. In 2000 the LCJ Lord Bingham wrote,[37] in his lecture on Judicial Independence, of the resentment of judges being treated as pawns on a bureaucratic chess board. Decisions bearing on important judicial functions had been made without consultation … 'management concepts quite inappropriate to the unique function of administering justice have been wrongly allowed to intrude. There has been', he wrote, 'difficulty and dispute on the frontier, not alleviated by doubt about where the frontier should be.'[38]

But the solution was to remove the frontier; to create a new bureaucracy for the judges themselves to govern. No longer consultees, they are in charge of their own officials. And does Parkinson's Law lie in what we must learn to call the senior judiciary's shelves alongside the Law of Contract or the Hague-Antwerp rules? 'The first and most elementary of the science of what Parkinson calls comitology is that a committee is organic

37 Published in Sir Thomas Bingham, *The Business of Judging* (2000).

38 Ibid.

rather than mechanical in nature; it is not a structure but a plant … it takes root and grows, it flowers wilts and dies.'[39] He writes in his chapter on Plans and Plants,

> examples abound of new institutions coming into existence with a full establishment of deputy directors, consultants and executives … and experience proves that such an institution will die ... it is choked by its own perfection. It cannot grow naturally for it is already grown. Fruitless by its very nature it cannot even flower …. When we see an example of such planning the experts among us shake their head sadly, draw a sheet over the corpse and tiptoe quietly into the open air.[40]

It is now the task of the judges to preserve the life of the young plant and it is no *ad hominem* criticism to question the greenness of their fingers. Judges have no training in administration; the Judicial Appointments Commission does not ask whether alongside the qualities of decisiveness, fair-mindedness and such other qualities as they seek to see demonstrated, they also look for management skills. But the higher a judge ascends the judicial ladder the greater the need for skill and subtlety of the mandarin. And the dangers of so obvious a necessity lie not so much in the possibility that unlike the presidents and vice-presidents today, some judges reaching the top may be good at judging and bad at administration but rather in blurring the very boundary which the new constitutional changes sought to clarify and preserve. The danger lies in the elision of administration and the process of judging.

The issue of the use of judges in public enquiries provides a useful warning. Beatson examined the question in his article in the *Law Quarterly Review*,[41] 'Should Judges Conduct Public Enquiries?', following the Hutton Enquiry, the publication by the Government of its consultation document *Effective Enquiries*. Beatson records that in 1988 a Department for Constitutional Affairs (DCA) report on the deployment of High Court judges estimated that the time of three

39 C N Parkinson, *Parkinson's Law* (1957).

40 Ibid.

41 Jack Beatson, 'Should Judges Conduct Public Inquiries?' (2005) 121 *Law Quarterly Review* 221. I am indebted to him for helping me with thoughts on this lecture.

High Court judges was taken up in extra-judicial work at any one time. The measure of time known as 'a High Court Judge's time' is satisfactorily elastic, but what of the time of those who now are in charge of their new offices? What the Israelites, Egyptians, Babylonians, Gauls and the Irish understood, we have forgotten; the lords of the court, the rulers, administered the courts but left the charismatic priests to discover and declare the law. Our judges are no longer priests and oracles but must increasingly devote their time to administration. Will a new report from a fresh committee of the DCA on deployment of the senior judiciary tell us, within a year or two, how much time is spent away from the court fulfilling the unfamiliar task of running a department? Relieved of administrative obligation, the Supreme Court has time to be of that right judgment in all things, for which the Whitsuntide prayer beseeches. Not so the Court of Appeal, whose shortness of judicial time leads to ever longer judgments.

But it is not just the damage done by deploying judges to administer; graver risk is that of confusion caused by requiring judges to administer and to judge. The form has been forgotten: the mask through which a judicial decision can be recognised and by which a judicial decision has authority. Public enquiries provide a warning.

Beatson cites Harold Wilson's criticism of Denning's appointment to enquire into what was so unkindly called the 'Profumo Affair' … it blurred the edge which marks the sharp 'definitions of the functions of the judiciary on the one hand and the executive and legislature on the other'.[42] One of the essential arguments against the use of judges on inquiries is that it undermines the authority of the judge; although the government and executive take advantage of that authority to cloak the inquiry with respectability, the conclusions do not have the authority of a judge. If the conclusions are undermined, so is that authority.

But if smudging the line between the function of a judge and the function of the executive undermines the authority of a judge when he conducts an inquiry, what happens when he is compelled to adopt the role of administrator? As administrator, transparent, responsive

42 Ibid.

communicator as he must be, in fulfilment of Malleson's wish to engage with the public, how is the public to recognise the judge, how will the public distinguish between the decisions of the judge spoken as judge and his words as administrator? The decisions as judge are authoritative; the judge's communication with the public is not. Without the ability to recognise the distinction, as Friedman and Atiyah teach, authority is lost. What provides the mark of recognition is the mask. Speaking without the mask, without form in the judicial process removes the distinction between judge and administrator, between the voice of authority and the advice of counsellor.

I do not think that the fear is merely fanciful. The problems are already to be seen. Judges, when they pass sentence have the assistance of the Sentencing Advisory Panel and the Sentencing Guidance Council. Neither have authority, one gives advice, the other guidance which statute requires the sentencing judge to take into account. Yet when either publish what is never more than a recommendation, for example as to sentences for sex offences or for burglary, it merely fills the vials of the wrath of every newspaper at yet another example of judicial leniency. The newspapers and the public have lost the ability to distinguish between a bureaucratic recommendation and the sentence of the court. In short they have lost the ability to recognise the judgement of the judge, when judges fail to speak through the mask.

Lord Reid denied the notion that judges do not make law with these words:-

> Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the common law in all its splendour and that on a judge's appointment, there descends on him, knowledge of the magic words 'open sesame' … we do not believe in fairy tales any more.[43]

But if you do not believe in fairy tales, you should pay some heed to the magic of the law. In writing about judges so long ago David

43 Lord Reid, 'The Judge as Lawmaker'(1972) 12 *Journal of the Society of Public Teachers of Law* 22, quoted by Kate Malleson in *The New Judiciary*, above n 33.

Pannick scorned in his chapter on mysticism the language and the fancy dress. But the mystique of the judge, the separation of judge from public is of significance in supporting the acceptability and authority of the decision.

The removal of the mask does matter. Most of the important decisions taken by the highest courts, as Laws J pointed out over 10 years ago, relate to questions on whose merits politicians are in rancorous disagreement. They involve social and ethical decisions as to which there is no right answer. Lord Browne-Wilkinson pointed out on the incorporation of the *European Convention on Human Rights* that the court will be required to give moral answers to moral questions. Moral attitudes which had previously been the actual but unarticulated reasoning laying behind judicial decisions would become the very stuff of the decision on *Convention* points. The silent true reason for decisions will become the stated ratio decidendi.[44]

It is surely convenient for any politician to leave such questions to the judges since any solution of an elected representative is likely to lead to loss of approval from opposition and supporters alike. Michael Beloff in a recent debate asked 'where is the democratic legitimacy for unelected judges to take on the power to have the last word?'[45] But he provides the answer to his own question; authority to give a decision lies in the very fact that the judges are unelected and do not account for their decisions, save in the reasoning they provide within their judgments. If there is a problem to be solved which has no correct solution, whether a baby should be allowed to die, whether evidence vital to protect life should be obtained through torture, whether detention may be in the interests of public safety, the one thing democracy requires is an answer recognised as authoritative. That requires the recognition of the authority of a judicial decision and that requires a mask.

The mask provides the distance between public and court; it enhances the authority of the communication. It distinguishes

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44 Quoted by Robert Stevens in *The English Judges*, above n 30.

45 Published in the *Justice* Annual Debate chaired by Lord Steyn on 18 October 2005. See also 'Changing the Rules: The Judiciary, Human Rights and the Constitution' (2005) 2(2) *Justice Journal* (December 2005).

between judge and administrator. The brave new world of constitutional reform exposes a paradox. The Act and concordat sought to protect and emphasise the independence of the judiciary by underlining the distinction between the judiciary and executive. But by providing a whole new bureaucracy to achieve that separation, with the judges in charge, they eroded the very distinction they sought to achieve. Judges must now devote their energies to run their own show. The essence of good administration, as it is perceived today is engagement with the public, to inspire confidence with transparency. But it is the judges administering the judiciary as a whole who must be accountable for the judiciary as a whole. At this time, discussions take place as to how the judiciary, as a whole, is to account to Parliament. And so it is that the distinction between the individual and group independence of the judiciary is eroded. How is the judge to communicate as administrator, engaging with the public in a way which is clearly to be perceived as distinct from his communication as judicial decision maker? Judges diminish the authority which a legal decision requires when they speak without a mask. Without the mask they can no longer be distinguished from any other member of the executive or government; they are deprived of authority. The judge is least himself when he talks in his own person. Give him a mask and he will tell you the truth.

Let us finish with Max. His *Happy Hypocrite*, a story and a play, was the mirror of the *Portrait of Dorian Grey*. Max thought there was a certain amount of sincerity in its sentimentality. Lord George Hell with a face wracked by his loose living sought to woo a beautiful young girl by donning the mask of saint. By the end of the tale, when a jealous former lover tears off the saint's mask he has bought from the mask-maker, his real face underneath has changed to that of a saint. By assuming virtue he had become virtuous. Here he is buying the saint's mask from the mask maker Mr Aeneas:

> At this moment Julius came in with the Ripsby mask. 'I must ask your lordship's pardon for having kept you so long', pleaded Mr Aeneas. 'But I have a large store of all masks and they are imperfectly catalogued.'
>
> It certainly was a beautiful mask with its smooth pink cheeks and devotional brows. It was made of the finest wax. Lord George took

> it gingerly in his hands and tried it on his face. It fitted a merveille. 'Is the expression exactly as your Lordship would wish?' asked Mr Aeneas. Lord George laid it on the table and studied it intently. 'I wish it were more as a perfect mirror of true love', he said at length. 'It is too calm, too contemplative'. 'Easily remedied' said Mr Aeneas. Selecting a fine pencil, he deftly drew the eye brows closer to each other. With a brush steeped in some scarlet pigment, he put a fuller curve upon the lips. And behold it was the mask of a saint who loves dearly. Lord George's heart throbbed with pleasure. 'And for how long does Your Lordship wish to wear it?' asked Mr Aeneas. 'I must wear it until I die', replied Lord George.[46]

46 Max Beerbohm, *The Happy Hypocrite* (1936, first published 1897).