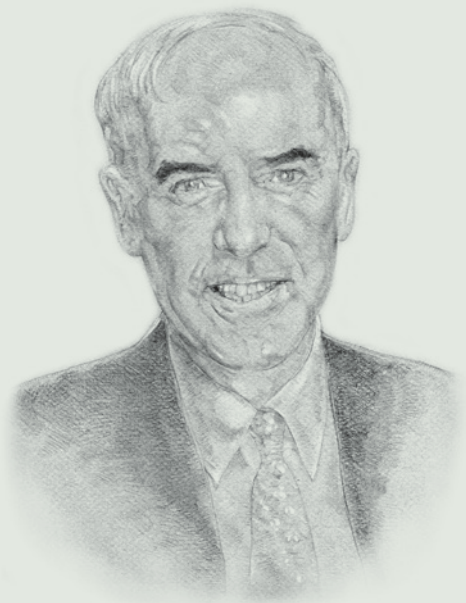
I have been discussing the need for judges to be, and to be seen to be, impartial. That is, quite simply, a basic requirement of any legal system which aspires to ensure the Rule of Law. Your Royal Highness put the position precisely in your 1984 lecture on the Supremacy of Law in Malaysia when you said:

"The existence of courts and judges in every ordered society proves nothing: it is their quality, their independence, and their powers which matter … The rules concerning the independence of the judiciary … are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the Rule of Law." *("Supremacy of Law in Malaysia" in Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches, 2004)*

Lord Rodger of Earlsferry
Bias and Conflicts of Interests
—Challenges for Today's Decision-Makers
24th Sultan Azlan Shah Law Lecture, 2010

The Right Honourable Lord Rodger of Earlsferry

Bias and Conflicts of Interests —Challenges for Today's Decision-Makers



Alan Ferguson Rodger
(18 September 1944 – 26 June 2011)

Lord Rodger was born in Glasgow in 1944. He read law at the University of Glasgow, where he obtained a double first in Scots and Civil Law, and pursued his doctorate in Roman Law at the University of Oxford. He remained at Oxford as a junior research fellow at Balliol College, and then as a fellow and tutor of New College from 1970 to 1972.

Lord Rodger was called to the Scottish Bar in 1974 and was appointed Queen's Counsel in 1985. In 1989 Lord Rodger was appointed Solicitor General for Scotland, and in 1992 he became Lord Advocate (the Scottish equivalent of the Attorney General), at which time he was made a life peer and Privy Councillor. He was said to be the only British law officer to have taken part in proceedings before the International Court of Justice, the European Court of Justice,

the European Court of Human Rights and the European Commission of Human Rights (*The Telegraph*).

Amongst the innovative changes Lord Rodger introduced during his time as Lord Advocate include allowing cameras in court to record court proceedings, the introduction of the right of Scottish prosecutors to appeal against sentences considered too lenient, as well as a wide-ranging review of the criminal justice system to look for cost savings (*The Telegraph*).

Lord Rodger was appointed a Court of Session judge in 1995, and was then one of the youngest appointees to the Scottish Bench. He was Lord Justice General of Scotland and Lord President of the Court of Session, the Head of the Scottish judiciary, from 1996 to 2001. (Interestingly, the post of Lord President of the Federal Court of Malaysia, which was created under the Federal Constitution just before the formation of Malaysia, had a Scottish origin, and was in fact first occupied by a Judge of Scottish origin, namely the Right Hon Tun Sir James Thompson who was Lord President from 1963 to 1966.) The Twenty-Fourth Sultan Azlan Shah Law Lecture was therefore an unprecedented occasion, featuring two distinguished jurists who have held the high post of Lord President of their respective judiciaries, namely His Royal Highness Sultan Azlan Shah and Lord Rodger of Earlsferry.

Lord Rodger became a Law Lord in 2001 and in 2009 became one of two Scottish Justices of the newly established Supreme Court of the United Kingdom. His judgments were marked by great learning, luminous clarity and human understanding. Lord Rodger applied his intellect with common sense, and was not alienated from the "real world". He was not to be mistaken for a conservative judge who viewed the world from the comfort of an Ivory Tower, or a high pedestal.

Indeed, Lord Rodger was more than aware of the trends and insights of the 21st century. This awareness was often reflected in his judgments. For example, in July 2010, Lord Rodger in the Supreme Court decision of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2011] 1 AC 596 highlighted the freedom

of all members of the British society to "enjoy themselves going to Kylie [Minogue] concerts" and "drinking exotically coloured cocktails" if they so wished.

Amongst Lord Rodger's well known judgments in the House of Lords and in the Supreme Court were *A and others v Secretary of State* [2005] 2 AC 68 (where a nine-man panel of Law Lords considered the right to liberty of a suspected terrorist under the Human Rights Act 1998) and *Regina (Gentle) v Prime Minister and others* [2008] AC 1356 (where a nine-man panel of Law Lords had to decide whether the British Government was obliged to hold an independent inquiry into the lawfulness of the invasion of Iraq). Lord Rodger also delivered judgment in the important cases of *Transfield Shipping Inc v Mercator Shipping Inc* [2009] 1 AC 61, a landmark case on the measure of damages for breach of contract; and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, an important decision on whether the common law rule excluding evidence of pre-contractual negotiations should be departed from.

Lord Rodger was regarded as one of the finest legal minds of his generation, an outstanding jurist who "combined a stellar professional career as advocate, law officer and judge with a global academic reputation as scholar and historian" (*The Guardian*). He was an Honorary Bencher of Lincoln's Inn and was appointed as the High Steward of Oxford University in 2008.

Apart from the law, Lord Rodger had a deep commitment in his professional and academic life to his colleagues, students and support staff. He never married, but he became a father figure and role model to many younger people, especially students (*The Guardian*).

Lord Rodger passed away on 26 June 2011 aged 66 after a short illness. Lord Phillips, President of the United Kingdom Supreme Court, in a tribute to Lord Rodger, remarked that "for 10 years [Lord Rodger] has been a mainstay of the Law Lords and of the Supreme Court. He was an outstanding jurist and a wonderful companion. His premature death is a tragic loss to the court and to the nation."

Where a judge will not be able to deal with the case impartially, or without giving the appearance of bias, he should not sit. This is a fundamental principle of the law and a system in which it is not observed is not fit for purpose.

The court always has to ensure that it maintains the confidence of the contemporary public in its independence and impartiality. So, if public attitudes change, the court must have regard to current thinking about what would be acceptable.

24 Bias and Conflicts of Interests —Challenges for Today's Decision-Makers

Lord Rodger of Earlsferry
Justice of the Supreme Court of the United Kingdom

Text of the Twenty-Fourth Sultan Azlan Shah Law Lecture delivered on 6 October 2010 in the presence of His Royal Highness Sultan Azlan Shah

Your Royal Highness, I must begin by expressing my gratitude for the invitation to come to Malaysia to give this lecture. I am only too well aware of the roll of distinguished judges who have preceded me and am conscious of the honour of having the opportunity to add my contribution. In thanking everyone for the care that has gone into arranging my trip, I can only say how sorry I am that the start of the new Supreme Court term prevents me from staying longer and seeing more of the country.

I have chosen to speak this evening about bias and conflicts of interest or—to describe the same thing in another way—the requirement that a tribunal making a decision should not only be impartial but should be seen to be impartial. The same principle is applied in many common law and allied jurisdictions. So I have felt free to take quite a lot of my examples from Scottish cases which

“A judge cannot refuse to sit because, say, the case concerns a matter of great public controversy in which any decision is likely to bring down criticism on the judge, or because one of the parties is powerful and popular and a finding against him would make the judge unpopular.”

may not be so well known to you, but which happen to illustrate points which are not covered in the more familiar English authorities.

The paradigm decision-maker is the judge. And most of the examples which I shall be discussing this evening concern judges. But there are plenty of other decision-makers in respect of whom similar issues arise. Here in Malaysia you do not use juries, but in Britain we do. And allegations have quite frequently been made that a jury was not impartial—for example, because a juror went out on a date with one of the accused after he was acquitted at the half-way stage of the trial, when the jury still had to consider the case against his brother. But questions may also arise about the impartiality of members of an employment or other specialist tribunal, or of a planning or licensing board. Questions may even arise about the impartiality of an arbitrator—despite the fact that the parties will usually choose somebody whom they consider to be impartial between them. If he turns out not to be, his decision will be set aside.

To sit, or not to sit

Where a judge will not be able to deal with the case impartially, or without giving the appearance of bias, he should not sit. This is a fundamental principle of the law and a system in which it is not observed is not fit for purpose. Nonetheless, the duty *not* to sit in these circumstances is an

> The duty to sit also prevents counsel from trying to shop around for their preferred judge by advancing some reason why it might be better for some other judge to hear their case. The question is not whether their preferred judge might be more appropriate in some respect but whether the judge to whom the case has been assigned has a valid ground for recusing himself.

exception to the judge's general duty to sit in any case that is validly placed before him. The rationale of that general rule is to ensure that even the least worthy or most unpopular litigants are entitled to have a fair trial of their dispute. Therefore a judge cannot refuse to sit because, say, the case concerns a matter of great public controversy in which any decision is likely to bring down criticism on the judge, or because one of the parties is powerful and popular and a finding against him would make the judge unpopular. If the Rule of Law is to prevail, the judge must sit in all such cases, unless he has a valid reason for not doing so. At a slightly less exalted level, the duty to sit also ensures that the work of the court is properly shared among the judges and that a lazy judge—strange to tell, such creatures do exist—cannot avoid a long and difficult case. The duty to sit also prevents counsel from trying to shop around for their preferred judge by advancing some reason why it might be better for some other judge to hear their case. The question is not whether their preferred judge might be more appropriate in some respect but whether the judge to whom the case has been assigned has a valid ground for recusing himself. Like any other exception to an important general duty, the judge's duty not to sit when he is conflicted must be kept within appropriate bounds.

Varieties of bias

Allegations of bias can arise in a variety of ways. At one extreme a judge or tribunal could be biased because one of

> Allegations of bias can arise in a variety of ways. At one extreme a judge or tribunal could be biased because one of the parties had actually given a financial bribe. Unfortunately, corruption of that blatant kind has by no means been unknown in recent years in Malaysia.

[1] 4 October 2010, page 2. The magistrate was sentenced to three years' imprisonment and fined RM15,000 on the first charge of accepting a bribe of RM3,000 to reduce a sentence for a drugs offence to a two-year good behaviour bond of RM1,000. He was sentenced to three years' imprisonment and fined RM25,000 on the second charge of asking for a bribe of RM5,000 for a similar purpose. The periods of imprisonment were to run concurrently.

the parties had actually given a financial bribe. In Britain such a case would be virtually unheard of nowadays but, even in the short time I have been here, I have become aware that, unfortunately, corruption of that blatant kind has by no means been unknown in recent years in Malaysia. Indeed Monday's *New Straits Times*[1] contained a report of a magistrate being convicted of accepting and soliciting a bribe to pronounce a more lenient sentence in a drugs case.

If I do not dwell on these shocking cases, it is simply because they are much better known to you than to me and, in any event, the legal position is clear: any decision by the corrupt judge must be set aside.

The same would apply if a judge were blackmailed by one of the parties.

Although a slightly different principle is involved, the position is equally clear if a judge has a financial interest in the outcome of the case—by reason, say, of being a shareholder in one of the parties. Sometimes the judge may be influenced by fear of some powerful and ruthless authority. More commonly, the risk will be that the judge may have been influenced in more subtle ways—by friendship, or out of gratitude for some appointment or other favour, either for himself or for a member of his family, or, even more insidiously, by a prospect of future promotion.

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[2] *Barrs v British Wool Marketing Board* 1957 SC 72 at 82.

Many modern legal systems try to reduce these risks by providing that, even if the executive appoints the judges, it must act on the advice of an independent commission. This kind of commission has now been introduced in Malaysia. Such commissions tend to work slowly and not all their appointments are wise. But they do at least provide some assurance that the public will not see those who are appointed as being beholden to the executive which appointed them.

Right to a fair trial

Not so long ago, if the subject of bias came up at all, it tended not to be in connexion with the courts as such, but in connexion with some lesser administrative body which was said to have offended the principles of natural justice. Then, to use the words of Lord President Clyde:

> It is not a question of whether the tribunal has arrived at a fair result; for in most cases that would involve an examination into the merits of the case, upon which the tribunal is final. The question is whether the tribunal has dealt fairly and equally with the parties before it in arriving at that result. The test is not "Has an unjust result been reached?" But "Was there an opportunity afforded for injustice to be done?" If there was such an opportunity, the decision cannot stand.[2]

Many modern legal systems try to reduce these risks by providing that, even if the executive appoints the judges, it must act on the advice of an independent commission.

Or, to put the matter another way, the Lord President said that the test was not "Has injustice been committed?" but "Has fair play been exercised?"

I have chosen to discuss the matter under the separate heading of bias. But, as the Lord President's formulation suggests, the right to the decision of an independent and impartial judge or tribunal is simply one aspect of everyone's wider right to a fair trial, whether of a civil dispute or of a criminal charge, which has long been recognised by the common law and which is now recognised as one of the key components of a democratic society.

In the passage which I quoted, Lord President Clyde adopts an objective approach. This is essential, not least because, where a judge or tribunal *is* actually biased, this will often not be immediately apparent from the decision. After all, if a judge has taken a bribe to decide in your favour, he will not want to be caught and so—usually, at least—risk losing his job and going to prison. He will therefore take pains to formulate his judgment in such a way that he will appear to have considered all the issues with due care before finally—and perhaps with a false display of reluctance—coming down in your favour. In this way, the judge will not only conceal what is actually going on, but he will go a long way towards making his decision immune to appeal on the legal or factual analysis.

In a legal system which allows for appeals, influencing the first instance judge is not going to do much good if his

> The test was not "Has injustice been committed?" but "Has fair play been exercised?"

[3] See D Daube, "Recht aus Unrecht", in HC Ficker, D König et al, eds, *Festschrift für Ernst Von Caemmerer* (1978), pages 13–19, and also in C Carmichael, ed, *Collected Works of David Daube vol 1, Talmudic Law* (1992), pages 15–21.

[4] D.12.4.3.5, Ulpian 26 *ad edictum*.

[5] D Daube, "A Corrupt Judge Sets the Pace", in D Nörr and D Simon, eds, *Gedächtnisschrift für Wolfgang Kunkel* (1984), pages 37–52, and also in David Daube, *Collected Studies in Roman Law* (edited by D Cohen and D Simon, 1991), pages 1379–1394.

judgment will inevitably be overturned on appeal. So, by dint of careful drafting, the judgment of a judge who is actually biased may appear entirely convincing.

Indeed, one can go further. The decision of a partial judge may not only be "correct" as a matter of substance: it may even introduce a sound and desirable development in the law. This is not as surprising as it may seem at first sight. One ancient authority is recorded as pondering an ingenious solution to a particular legal problem—and adding, "How many more such ingenious suggestions would have come into the mind of someone who had been bribed to think them up?"[3]

In other words, bribery may be the mother of invention. In Justinian's Digest,[4] we find mention of a judge who corruptly decided a case of unjust enrichment to the benefit of a favourite of the Emperor Nero. Even though the decision was corrupt, it successfully established a legal principle which was then adopted by all the leading Roman jurists.[5]

For present purposes that ancient case serves as a further reminder that in a modern legal system which upholds the Rule of Law, the decision of a judge or tribunal which is not seen to have been impartial must be set aside—even if, as a matter of substance, the decision is perfectly defensible, or indeed commendable, on both the facts and the law.

> The right to the decision of an independent and impartial judge or tribunal is simply one aspect of everyone's wider right to a fair trial, which is now recognised as one of the key components of a democratic society.

[6] [2002] 2 Crim App R 267.

[7] Ibid, at 284.

In the criminal law, in particular, this means that, if the judge has appeared to be biased against the defendant, the verdict convicting him must be quashed. Quite simply, the accused has not had the fair trial which is the necessary preliminary to any valid verdict and sentence.

In *Randall v The Queen*,[6] in the slightly different context of a trial in which the prosecutor had behaved outrageously, Lord Bingham—whose recent death has cast a shadow over the entire legal world–put the point with characteristic clarity:

> But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.[7]

So where an appeal court concludes that the trial court was actually biased, or that an observer would conclude that there was a real possibility that it was biased, the conviction must be quashed. There is no room for the appeal court to go on—in the jargon—to "apply the proviso" and to consider whether, on the evidence, an impartial lower court would have convicted him anyway.

> Where a judge or tribunal *is* actually biased, this will often not be immediately apparent from the decision. After all, if a judge has taken a bribe to decide in your favour, he will not want to be caught and so risk losing his job and going to prison. He will therefore take pains to formulate his judgment in such a way that he will appear to have considered all the issues with due care before finally—and perhaps with a false display of reluctance—coming down in your favour.

[8] [2010] 1 WLR 879.

[9] Ibid, at 889, paragraph 34.

The Privy Council recently adopted that approach in *Michel v The Queen*[8] which arose out of a major prosecution for money laundering in Jersey. The evidence against the appellant looked very strong. But the Board quashed his conviction because, in its view, when the defendant gave evidence at his trial, the interventions of the presiding judge were so frequent and so hostile as to give every impression that the judge had made up his mind against the defendant. Lord Brown described the proper role for a judge during the course of a trial in this way:

> Of course he can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence-in-chief. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced.[9]

The very open way in which the judge intervened and expressed himself in that case indicates that he himself was quite unaware of the impression that he was making or that he was doing anything wrong. He would certainly not have seen himself as acting in a biased or partial manner. But the law does not intervene to punish knowing misconduct on the part of the judge. It intervenes to protect the defendant's

> In a modern legal system which upholds the Rule of Law, the decision of a judge or tribunal which is not seen to have been impartial must be set aside.

[10] *Metramac Corporation v Fawziah Holdings* [2007] 5 MLJ 501.

right to a fair trial. So, even though the judge acts in all good faith, if his conduct makes it appear that there was a real possibility that he was biased against the defendant, the verdict must be quashed. It is then up to the appeal court to decide whether there should be a fresh trial.

A court of appeal can also appear to be biased, although that is likely to happen even more rarely. But the decision of the Malaysian Federal Court in the *Metramac* case illustrates the point. Although the Federal Court rightly stressed that the threshold for intervening was high, it concluded on the basis of a careful analysis of the Court of Appeal's judgment that the lower court had indeed proceeded on a mistaken preconception which vitiated its impartiality and required that its judgment should be set aside.[10]

In the last few years there appears to have been an explosion in the Commonwealth case law on the subject of bias on the part of judges or tribunals. I do not believe that this indicates that all over the Commonwealth there are actually more judges or tribunals who are biased. Rather, a variety of factors may account for the increase in cases. I have time to mention only two—the emergence and elaboration of the doctrine of apparent bias and the advent of the Internet.

Lord Bingham put the point with characteristic clarity: "The right of a criminal defendant to a fair trial is absolute."

[11] W Blackstone, *Commentaries on the Laws of England* (1768) vol 3, page 361. Blackstone went on to point out that, if a judge did actually behave in the flagrantly biased way which the law would assume was impossible unless and until it actually occurred, he would suffer a heavy censure at the hands of those to whom he was accountable for his conduct. The exact nature of the process is not clear. But, at all events, it would not be of much comfort to the litigant who had suffered from the judge's prejudice.

Apparent bias

In Britain, on the whole, the courts are still respected. But today it is recognised that they have to earn that respect: it does not come automatically. By contrast, there is a telling passage in *Blackstone's Commentaries* where he says that, in his time—the late eighteenth century—English law held "that judges or justices cannot be challenged. For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."[11]

This statement by Blackstone speaks volumes for the authority which he saw as automatically attaching to the office of an English judge at that time. Plainly, English law no longer sees judges in quite the same way. But, so long as it did, there was no need to consider how things might look to a litigant or to any outsider. Since, *ex hypothesi*, there was no possibility of an English judge being biased, the judge could take a decision even in circumstances where someone not versed in the law might think that there was, at the very least, a risk that he would be biased. In other words, not only was there no possibility of *actual* bias, but there was equally no possibility of an *appearance* of bias. It was, supremely, the insider's view of judges and of the legal world.

Blackstone's motto was really that we should trust the judges. Scots Law was never quite so trusting about its judges. And, of course, for many years now, English law has

> Where an appeal court concludes that the trial court was actually biased, or that an observer would conclude that there was a real possibility that it was biased, the conviction must be quashed. There is no room for the appeal court to go on—in the jargon—to "apply the proviso" and to consider whether, on the evidence, an impartial lower court would have convicted him anyway.

[12] *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259.

[13] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119.

[14] [2002] 2 AC 357 at 494, paragraph 103.

departed from Blackstone's view and has accepted that a judge may be partial.

It follows that in certain circumstances you may reasonably infer, from something that the judge has said or done or from the surrounding circumstances, that the judge *may* have been biased. But, for all the reasons I have given, proving it would often be difficult. So the law takes a further, critical, step. It decides that there is no need to prove that the judge *was* biased: a judgment cannot stand if it appears that the judge *may have been* biased. Hence the famous aphorism of Lord Chief Justice Hewart—not himself a paragon of impartiality—that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[12]

Where the judge has a financial interest in the outcome, disqualification is automatic. In *Pinochet No 2*[13] the House of Lords held that automatic disqualification may apply in some other exceptional cases—in particular, where the organisation with which Lord Hoffmann was associated had a very real, though non-financial, interest in the outcome of the case which he was hearing. For the most part, however, the effect of the particular relationship or other circumstances must be considered and tested. After some shilly-shallying, the accepted test in Britain is now to be found in the oft-cited words of Lord Hope in *Porter v Magill*: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[14]

> The law does not intervene to punish knowing misconduct on the part of the judge. It intervenes to protect the defendant's right to a fair trial.

[15] *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321 at 325, paragraph 12. See also *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293.

I doubt whether, in practice, there is any material difference between this test and the "real danger of bias" test which was adopted by the Federal Court in the *Mohamed Ezam* case.[15]

I shall come back to the fair-minded observer in a moment. At present, we just need to note that nowadays few litigants ever suggest that the judge or tribunal in their case was actually biased. All they say is that, for some particular reason, the judge gave an appearance of bias. In a society which does not defer unduly to judges or assume that they are immune to factors which would influence other men and women, that is enough. So the rise in the number of Commonwealth cases where issues of bias are raised is not, in itself, a reliable pointer to a corresponding increase in the number of judges or tribunals who are actually biased.

Advent of the Internet

The other factor which I must mention is the arrival of the internet. It used to be difficult to investigate a judge's background. Now it is comparatively simple. Googling his name may immediately produce various cases in which the judge was involved or connexions which he may have had with individuals or companies. It may reveal her passion for a particular football team or his involvement with his old university or school.

> Even though the judge acts in all good faith, if his conduct makes it appear that there was a real possibility that he was biased against the defendant, the verdict must be quashed.

[16] [2008] 1 WLR 2416; 2009 SC (HL) 1.

[17] *Pembangunan Cahaya Tulin v Citibank* [2008] 5 MLJ 206.

It used to be rare for judges to give interviews or speak at conferences, but it is relatively common today. A casual remark in such an interview or talk may easily reach the Internet and, if it does, it is liable to stay there—ready to be found and exploited by anyone researching the judge's background.

A litigant or lawyer who does not want the judge to sit may use the results of such investigations to try to build a case for the judge standing down. Equally, a defeated litigant may use the technique to build a case for saying that the decision should be set aside because the judge was partial.

The House of Lords case *Helow v Secretary of State for the Home Department*[16] is instructive. It involved a Palestinian woman who claimed refugee status in Britain. Her case was rejected by the Home Office and by the relevant tribunal. She applied for leave to appeal to the court. Her application was dealt with on paper and was refused by the judge, Lady Cosgrove, who is Jewish.

The applicant then brought a petition asking for the judge's decision to be set aside on the ground of her apparent bias against the applicant. The applicant did not suggest that the judge would be biased, or would be regarded as biased, merely because of her religion. In Britain any such suggestion would have been dismissed—and in Malaysia the Court of Appeal has also roundly rejected any attempt to hold that a judge should be disqualified from sitting on the supposed basis of bias by reason of his or her religion.[17]

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In *Helow*, however, the applicant's legal advisers spotted that the judge was a member of the International Association of Jewish Lawyers and Jurist. Again, the aims of that organisation were unobjectionable. But, as Lord Mance pointed out, the applicant's lawyers used the Internet to investigate the contents of the quarterly journal of the association, some of which were very hostile to the Palestinian cause.

The lawyers then deployed these to mount a double-headed challenge to Lady Cosgrove. They argued, first, that there was a real possibility that a judge who read a journal containing such articles would herself be biased against a Palestinian activist applicant. Secondly, they argued that there was a real possibility that she would be subconsciously biased as a result of reading these articles.

Despite some doubts on Lord Walker's part, the House of Lords rejected both arguments and the applicant's appeal failed. But the significant fact is that, up until just a few years ago, it would have been virtually impossible for lawyers to mount a challenge of this kind without quite disproportionate effort and expense. Today, the material comes at the click of a mouse. Doubtless, in future we can expect other challenges based on such internet searches.

The fair-minded and informed observer

Picking up what I said earlier, the accepted test is now whether "the fair-minded and informed observer", having

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[18] [2008] 1 WLR 2416, 2417-2418, paragraph 1;
2009 SC (HL) 1, 3, paragraph 1.

considered the facts, would conclude that there was a real possibility that the judge or tribunal was biased. As Lord Hope noted in *Helow*, "the fair-minded observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively."[18]

He went on to point out that this observer has attributes which many of us might struggle to attain. He or she is not unduly sensitive or suspicious and is not to be confused with the person who complains that the judge is biased. Above all, the fair-minded observer is "informed".

Should we welcome this newcomer to our legal village? Not *particularly* warmly, perhaps. The whole point of inventing this fictional character is that he or she does not share the viewpoint of a judge. Yet, in the end, it is a judge or judges who decide what the observer would think about any given situation.

Moreover, the informed observer is supposed to know quite a lot about judges—about their training, about their professional experience, about their social interaction with other members of the legal profession, about the judicial oath and its significance for them, etc. Endowing the informed observer with these pieces of knowledge is designed to ensure that any supposed appearance of bias is assessed on the basis of a proper appreciation of how judges and tribunals actually operate. The risk is that, if

> Blackstone's motto was really that we should trust the judges. Scots Law was never quite so trusting about its judges. And, of course, for many years now, English law has departed from Blackstone's view and has accepted that a judge may be partial.

[19] *R v Secretary of State for the Environment and another, ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 at 316.

[20] *Regina v Abdroikof; Regina v Green; Regina v Williamson* [2007] 1 WLR 2679.

[21] [2003] ICR 856 at 861, paragraph 14.

this process is taken too far, as Sedley LJ observed, the judge will be holding up a mirror to himself.[19]

To put the matter another way, the same process will tend to distance the notional observer from the ordinary man in the street who does not know these things. And yet the whole point of the exercise is to ensure that judges do not sit if to do so would risk bringing the legal system into disrepute with ordinary members of the public.

The fair-minded observer seems to have come into existence in cases involving possible bias in judges or tribunals. From there he has recently moved into cases involving juries.[20] Yet, for many years, the courts were perfectly capable of dealing with cases involving juries simply by asking whether, for example, the safeguards in the system are such that the accused could be seen to get a fair trial from a jury who had read or seen prejudicial reports about him in the press or on television.

Similarly, we might ask whether the safeguards in the system are such that the party complaining could be seen to get a fair trial in the circumstances from the particular judge. Once it is accepted—as obviously it must be accepted—that the test is an objective one, it is perhaps questionable whether it is really helpful to concentrate on the fictional bystander and on what he is supposed to know or not to know. Indeed in *Lawal v Northern Spirit*[21] Lord Steyn suggested that it was unnecessary to delve into the characteristics to be attributed to that fictional character.

> The law takes a further, critical, step. It decides that there is no need to prove that the judge *was* biased: a judgment cannot stand if it appears that the judge *may have been* biased.

[22] CF Shand, *Practice of the Court of Session* (1848) vol 1, page 61.

[23] [2003] 1CR 856, at 865, paragraph 22, per Lord Steyn.

What the court actually has to consider is whether the system is such that the public would have confidence in the impartiality of the decision reached by the judge in the particular circumstances.

Standards of independence and impartiality

When called upon to decide the point, the court must apply current standards. These may fluctuate. One writer in the middle of the nineteenth century was conscious that earlier Scottish cases "carried jealousy of judges much farther than we do at present."[22] Clearly, he was aware of a change in approach by the court—towards narrowing the circumstances in which a judge should be obliged to stand down.

In 2003 in *Lawal v Northern Spirit* the House of Lords acknowledged that standards may have changed in recent years–in the opposite direction:

> What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago.[23]

While older cases provide interesting illustrations of the kinds of problems that may arise, and show how they were handled by the courts at the time, they may not

> Nowadays few litigants ever suggest that the judge or tribunal in their case was actually biased. All they say is that, for some particular reason, the judge gave an appearance of bias.

[24] *Smits v Roach* (2006) 227 CLR 423 at 457, paragraph 97.

[25] For the background, see Lord Rodger of Earlsferry, *The Courts, the Church and the Constitution* (2008), Chapter 3.

necessarily furnish appropriate guidance as to the solution that should be adopted in a similar situation today.

The court always has to ensure that it maintains the confidence of the contemporary public in its independence and impartiality. So, if public attitudes change, the court must have regard to current thinking about what would be acceptable. This, I think, is part, at least, of what Kirby J had in mind when he said in the High Court of Australia[24] that the cases show that different judges can reflect different assessments and reach different conclusions, and then added:

> The fact that this is so should make contemporary judges aware that, ultimately, they themselves have to shoulder the responsibility of reaching conclusions on the point and giving effect to them. They cannot ultimately hide behind a fiction and pretend that it provides an entirely objective standard by which to measure the individual case.

So, for instance, at one time it was regarded as quite acceptable for a judge to sit in a case where he had previously acted as counsel or in relation to a matter on which he had given legal advice to a party.

To take a specific example,[25] in 1873, 1897 and 1899 a counsel, Mr Blair Balfour, gave advice—actually conflicting advice—on what would happen to the property of the Free Church of Scotland if it entered into a union with another church.

> It used to be difficult to investigate a judge's background. Now it is comparatively simple. Googling his name may immediately produce various cases in which the judge was involved or connexions which he may have had with individuals or companies.

[26] Letter from the Rev John Sinclair, dated 24 May 1904, *The Times*, 2 June 1904, page 4, reprinted in (1904) 12 Scots Law Times (News) 31–32.

Very shortly after giving the last of these opinions, Mr Blair Balfour was appointed Lord President of the Court of Session and, two years later, he was raised to the peerage as Lord Kinross.

Meanwhile, in 1900 the union of the two churches had gone ahead and, a few weeks later, a tiny minority of the old Free Church ministers began an action, claiming that all the Free Church property belonged to those few members who had not entered the union.

When the case was eventually appealed to the House of Lords, it had to be heard twice because Lord Shand died after the first hearing. The Lord Chancellor, Lord Halsbury, asked Lord Kinross to sit in the second hearing—in which, incidentally, the tiny minority went on to win. The week before the second hearing, however, the writer of a letter to *The Times* pointed out that Lord Kinross had actually given opinions to the parties on the very point at issue.[26] The writer therefore questioned whether Lord Kinross should sit.

Nothing daunted, Lord Kinross set off for London to sit in the appeal. But, having discussed the matter with the Lord Chancellor, he must have had second thoughts, because, at the start of the proceedings, the Lord Chancellor indicated that Lord Kinross had decided not to sit, because he felt that he had given so many opinions on the questions that it might be considered that his mind was prejudiced.

> In Malaysia the Court of Appeal has roundly rejected any attempt to hold that a judge should be disqualified from sitting on the supposed basis of bias by reason of his or her religion.

[27] 10 June 1904, page 4.

[28] (1904) 12 Scots Law Times (News) 30.

[29] "Scottish Notes" (1904) 89 The Law Times 122–123.

[30] Editorial Review: Disqualification of Judges by Previous Connection with Cases, (1904) 24 Canadian Law Times 210–213.

The *Scotsman* Newspaper[27] thought that Lord Kinross had been wise to step down. But the Scottish legal press was indignant: "in legal circles", the *Scots Law Times* thundered, "the suggestion that Lord Kinross should not sit would meet with no support".[28]

The English *Law Times* agreed that lawyers would recognise at once that the objection was entirely ill-founded, but added that "the public find it difficult to believe in the intellectual detachment of the legal mind", before asserting that to accept any such objection to a judge would paralyse the administration of justice.[29]

The *Canadian Law Times* was having none of it: "We are not surprised" it said, "to learn that the public find it difficult to believe in the intellectual detachment of the legal mind, and we cannot understand why the administration of justice should be paralysed because a judge coming from the Bar declines to sit in cases in which he has been counsel".[30]

Surely, we would take the Canadian view today. In part, the prevailing legal analysis has changed—the English and Scottish legal journals were taking a legal insider's view of the situation. So, while they were conscious of the likely perception of the general public that a judge should not sit in those circumstances, they thought that it was wrong to allow that public perception to prevail over the view of the professionals.

“Up until just
a few years ago,
it would have
been virtually
impossible for lawyers
to mount a challenge
of this kind
without quite
disproportionate
effort and expense.
Today, the material
comes at the click
of a mouse.”

By contrast, the Canadian journal realised—as we do today—that what really matters in such situations is not that the legal community should be content, but that the court should adopt a course that can be expected to command the assent and respect of the general public, whose attitudes will often find expression in the wider press and other media. And, if there had been any room for doubt about the attitude of the public on this matter at the beginning of the twentieth century, there could surely be no doubt about their attitude today: nowadays the public would regard it as quite unacceptable for a judge to sit in a case involving a matter on which he had advised one of the parties. And it is the current public perception that matters.

Similarly, while decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters.

In addition, what may be acceptable, or at least tolerable, in a small jurisdiction where substitute judges cannot readily be found, may be unacceptable in a larger jurisdiction where that problem does not arise.

Nevertheless, the fact remains that judges work within a particular professional environment which can spill over into their social lives. Most lawyers count fellow lawyers and judges amongst their friends. So, when lawyers

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[31] (1881) 8 R 1006.

[32] *Shotts Iron Co v Inglis* (1882) 9 R (HL) 78; (1881-1882) LR 7 App Cas 518.

are appointed as judges, or as members of tribunals, in their new capacity they will inevitably come into contact with lawyers with whom they are friendly. Obviously, so far as possible, a judge will try to avoid having to sit on a case where one of his legal friends or colleagues is a party. But sometimes it just cannot be avoided. So questions of possible bias may arise, even where the judge has been reluctant to sit but has concluded that he really must.

To take a striking example. In 1877 John Inglis, the extraordinarily influential Lord President of the Court of Session, raised proceedings in his own court for the Scottish equivalent of a *quia timet* injunction against a company whose works were producing fumes that were damaging the trees on his country estate.

The Lord President even gave oral evidence on his own behalf in front of one of the junior judges in the court. On the facts, the case was not straightforward, but the Lord President won at first instance. The other side appealed, even though there was no real dispute on the law.[31] The Lord President won the appeal in the Court of Session. The other side appealed to the House of Lords and the Lord President triumphed there too.[32]

So far as I know, it has never been suggested that the decision of any of the three courts was other than entirely justifiable. As I have observed already, however, this is no guarantee that the judges were not influenced in favour of the distinguished litigant.

> While older cases provide interesting illustrations of the kinds of problems that may arise, and show how they were handled by the courts at the time, they may not necessarily furnish appropriate guidance as to the solution that should be adopted in a similar situation today.

Plainly, today, an outsider might wonder whether the judges in the Court of Session, in particular, would not have been influenced by having their boss as one of the parties. Probably, much the same thought would have struck an ordinary member of the public in Queen Victoria's time. Perhaps, indeed, only another judge can be confident that, far from wanting to help out the Lord President, the judges would have been most reluctant to sit. But they would have realised that it was their duty to do so, since otherwise the Lord President would be denied his right to protect his property by taking legal proceedings in the most appropriate court.

Almost certainly, however, the judges would have bent over backwards to make sure that they could not be accused of favouring the Lord President. Indeed the real risk would be that they might over-compensate and treat his side of the case with an unmerited degree of caution.

This is an example of a situation where necessity dictated that the judges had to deal with the case, even if there was a risk that they would give the appearance of bias.

In some systems such problems can be overcome by bringing in temporary judges from another system. In the Lord President's case, the availability of an appeal to the more remote House of Lords helped to defuse any risk of apparent bias in the system. The availability of an appeal to the Privy Council has served that function in some systems. But, if none of these remedies is available, the judges just have to do their best.

> While decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters.

[33] [2009] NZSC 72.

[34] [2007] NZCA 349.

Sometimes, of course, a lawyer will be a party in a litigation before the court where he practises and where he is on friendly terms with one or more of the judges. Again, for the same kinds of reasons, such cases can cause potential difficulties. But, as a rule, the position is quite different where, as often happens, a judge finds himself sitting on a case in which the lawyer for one of the parties is a friend, even a close friend.

At first sight nothing more was involved in the New Zealand saga of *Saxmere v The Wool Board Disestablishment Company Ltd*.[33] Wilson J was one of the three members of the Court of Appeal who allowed the Disestablishment Company's appeal in August 2007. Senior counsel for the successful appellants was a Mr Alan Galbraith QC.[34] In November of the same year it was announced that Wilson J was to be appointed to the New Zealand Supreme Court with effect from 1 February 2008.

Meanwhile, Saxmere appealed to the Supreme Court—eventually, on the ground that Wilson J should not have sat in the Court of Appeal in their case because of an appearance of bias arising from his relationship with the Company's counsel, Mr Galbraith.

In short, the allegation was that, because of his friendship and business relationship with Mr Galbraith, the independent observer would conclude that there was a real possibility that Wilson J would have been affected by an unconscious bias in favour of Mr Galbraith's clients. The

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[35] [2009] NZSC 72; [2010] 1 NZLR 35.

[36] [2009] NZSC 72, paragraph 25; [2010] 1 NZLR 35, 49, lines 33–36.

judge and counsel were not only close friends: they also shared an association in a horse stud and some broodmare partnerships.

In March 2009 the New Zealand Supreme Court—which was having to deal with an allegation involving one of its six members—dismissed Saxmere's appeal.[35]

So far as the friendship of the judge and counsel was concerned, the court pointed out that any impartial observer would note that this friendship had survived many a battle when the men appeared against one another as counsel. Indeed, the court commented that such relationships are a positive feature of our legal systems.

The court also rejected the idea that the position was different because the two men were business partners. It was difficult, they said, to see why, by itself, this would influence the judge to find in favour of his partner's clients.

But two of the judges noted that the position might be different if, as part of their business relationship, the judge was somehow financially obliged to counsel and so might fear some adverse effect on his own financial position if counsel lost the case. "Such a situation might theoretically exist," said Blanchard J, "if, for example, the judge had been lent money by counsel or was dependent on counsel in order to meet some liability."[36] But there was nothing of that kind in the materials before the court.

> In some systems such problems can be overcome by bringing in temporary judges from another system. In the Lord President's case, the availability of an appeal to the more remote House of Lords helped to defuse any risk of apparent bias in the system. The availability of an appeal to the Privy Council has served that function in some systems. But, if none of these remedies is available, the judges just have to do their best.

[37] *Saxmere v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122; [2010] 1 NZLR 76.

[38] *Cf Wilson v Attorney General* [2010] NZHC 1678.

[39] Speaker's postscript: On 21 October 2010 the resignation of Wilson J, with effect from 5.00 pm on 5 November 2010, was announced.

That was by no means the end of the story. Taking the hint from these remarks in the judgments, Saxmere set about inquiring further into the business relationship between Wilson J and counsel. The judge made two further statements to the Supreme Court about that relationship. It now emerged that, contrary to what the Supreme Court had previously supposed, there was reason to think that the business relationship between the two men was not on an equal basis and that the judge was, in effect, indebted to counsel to the tune of at least NZ$74,249—and arguably to about three times that amount.

In November 2009 the Supreme Court allowed Saxmere to reopen their appeal and, in the circumstances as now revealed, quickly concluded that the case on apparent bias was made out. The court therefore recalled their previous decision dismissing the appeal, allowed Saxmere's appeal and sent the case back for a hearing before a new panel of judges.[37] Since then, a complaint has been made to the Judicial Conduct Commissioner with a view to having Wilson J removed from office on the ground of misconduct.[38]

It would obviously be wrong to comment in detail on the circumstances of this very sensitive affair affecting the New Zealand Supreme Court, while the matter is still under investigation.[39]

The case does, however, highlight just how fact-specific issues of impartiality can be. The Supreme Court accepted that in New Zealand society the business relationship in

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[40] 2005 SC (HL) 7.

question between a judge and one of the counsel in a case would not be regarded as affecting the public's perception of the judge's impartiality. That is surely a matter which turned on the New Zealand judges' appreciation of the attitude of people in New Zealand to that situation.

But the Supreme Court thought that the indebtedness of the judge to counsel made all the difference. They did not explain exactly why. But their instinct—and it can only be a matter of instinct—was that, even if the judge could not be said to have any direct financial interest in his partner's clients, the public would feel that there was a real possibility that a judge, who was indebted in some way to counsel as a result of their business relationship, might be biased towards holding in favour of his clients. My hunch is that—especially given the way that the facts emerged—even without any close analysis of the exact position, a court in Britain might well have taken the same view as the New Zealand Supreme Court. It is the broad picture which would count with the press and other media and with the public.

Cases involving financial interests are relatively easy to deal with. Altogether more difficult are cases where the supposed conflict of interest arises out of the judges' previous involvement with the issue which they have to decide.

In *Davidson v Scottish Ministers No 2*[40] the Court of Session was concerned with the interpretation of a particular section in the Scotland Act 1998. One of the

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[41] That view did indeed turn out to be wrong: *Davidson v Scottish Ministers* 2006 SC (HL) 42.

[42] *Cf Regina (Al Hasan) v Secretary of State for the Home Department; Regina (Carroll) v Secretary of State for the Home Department* [2005] 1 WLR 688 at 690–692, paras 7–11.

judges sitting in the case was Lord Hardie who had formerly been a Government law officer. In that capacity he had spoken for the Government when the Scotland Bill was before the House of Lords in its legislative capacity. In the course of debate on the Bill, Lord Hardie had expressed a view on the interpretation of the provision in question in the *Davidson* case.[41]

After the court had given its decision against Mr Davidson, he challenged that decision on the ground that Lord Hardie should not have sat. The contention was that he could not be seen to be impartial because, in judging the case, he had adopted the same interpretation of the section as he had advanced during the debate in the House of Lords. Both the Court of Session and the House of Lords agreed and quashed the court's decision.

You may see this decision as setting a commendably high standard for judicial conduct. And that may be the appropriate response in the light of political and legal history of Malaysia. But I confess that, within a British context, I have some doubts[42] about it—perhaps because I, too, have been Lord Advocate and have spoken on Bills on behalf of the Government. Presumably, it was because of that history that I was not assigned to sit on the appeal.

The simple fact, however, is that in Britain, for the most part, ministers speak to briefs written by civil servants in support of the Government line. Of course, it can be assumed that the minister thought that the view which he expressed was the accepted view or that it was at least

> Judges regularly hear appeals in which one side contends that a previous decision of the judge was incorrect.

> Judges are quite capable of accepting that they were wrong and that their previous decision should be overruled.

[43] *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2004] QB 702 at 755–756, paragraph 158.

sustainable. But often the minister will have had only a short time to master the brief or think about the point. It would, therefore, I think, be rash to conclude that, as an individual, the minister would be wedded to that view or embarrassed to have to admit later that it was wrong.

Indeed, if Lord Hardie was unable to deal with this question without the informed observer concluding that there was a real possibility that he would be biased, what would that observer say about judges who have been, for example, members of a Law Commission that produced a public report which then led to legislation? Since, as commissioners, they will almost certainly have spent far more time than any government minister in considering how the legislation was intended to be interpreted, one might think that they would be far more committed to that view than Lord Hardie would ever have been.

Yet, to hold, for example, that it was wrong for Lady Hale to sit in cases involving the English Children Act 1989, on which she was the lead Law Commissioner, would have a startling effect on the recent jurisprudence on the interpretation of that Act. Surely, no one would ever suggest such a thing. And indeed history shows that, as a judge, Peter Gibson LJ had no difficulty in deciding that the English Law Commission had got the law wrong in a report to which he had been a party.[43]

But the point is wider. I am aware of one case in which, in response to a request of one of the parties, it was decided that a particular judge should not sit in the Privy

> A previous judicial decision is a factor that is not likely to give rise to any need for a judge to disqualify himself. Our legal system really could not work properly if judges who had previous experience and expertise in a particular field were excluded from subsequently putting that experience and expertise into practice in a case where it might be most needed.

[44] *Regina v G; Regina v J* [2010] 1 AC 43, overruling *R v K* [2008] QB 827.

[45] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 QB 451 at 480, paragraph 25.

Council when a recent, and closely argued, decision of his was to be under challenge. But that is very exceptional and it is not a desirable precedent.

Indeed the practice is quite the other way: judges regularly hear appeals in which one side contends that a previous decision of the judge was incorrect. Yet the judge will often have done far more work on such a decision and, one might suppose, be more committed to his conclusion than any ministerial spokesman. Again, experience shows that in this situation judges are quite capable of accepting that they were wrong and that their previous decision should be overruled. To take a recent example, a couple of years ago, in *Regina v G*, Lord Phillips was Chairman of the Appellate Committee of the House of Lords which unanimously overruled an important decision that he had given not long before as Lord Chief Justice.[44]

Indeed, according to *Locabail*, a previous judicial decision is a factor that is not likely to give rise to any need for a judge to disqualify himself.[45] As a lawyer and as a judge, I have no doubt that this is correct, but I am less confident that even the best informed independent observer would necessarily agree.

The accepted practice may be better explained on the simple basis that our legal system really could not work properly if judges who had previous experience and expertise in a particular field were excluded from subsequently putting that experience and expertise into practice in a case where it might be most needed.

> The court always has to ensure that it maintains the confidence of the contemporary public in its independence and impartiality. So, if public attitudes change, the court must have regard to current thinking about what would be acceptable.

[46] "Supremacy of Law in Malaysia" in V Sinnadurai (ed), *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches by HRH Sultan Azlan Shah*, 2004, Professional Law Books and Sweet & Maxwell Asia, 13–33, at pages 14–15.

There I must bring this lecture to a close, even though there is much more that might be said. I have been discussing the need for judges to be, and to be seen to be, impartial. That is, quite simply, a basic requirement of any legal system which aspires to ensure the Rule of Law. Your Royal Highness put the position precisely in your 1984 lecture on the Supremacy of Law in Malaysia when you said:

> The existence of courts and judges in every ordered society proves nothing: it is their quality, their independence, and their powers which matter … The rules concerning the independence of the judiciary … are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the Rule of Law.[46]

The judge's duty of recusal helps to maintain the Rule of Law by sustaining public confidence that our legal systems will afford everyone a fair trial by an independent and impartial court. That and nothing less is ultimately what all judges have sworn a solemn oath to do.[47]

Editor's note

The Privy Council recently referred to this lecture with approval in *Belize Bank Ltd v Attorney General (Belize)* [2011] UKPC 36 (20 October 2011). Lord Brown, in paying tribute to Lord Rodger's "salutory" remarks in this lecture, observed (at [99]):

"In a characteristically thoughtful lecture … given by Lord Rodger of Earlsferry (The Sultan Azlan Shah Law Lecture 2010 entitled "Bias and

“The judge’s duty of recusal helps to maintain the Rule of Law by sustaining public confidence that our legal systems will afford everyone a fair trial by an independent and impartial court. That and nothing less is ultimately what all judges have sworn a solemn oath to do.”

[47] I am grateful to my former and present Judicial Assistants, Adil Mohamedbhai, solicitor, and Tetyana Nesterchuk, solicitor, for their assistance in the preparation of this lecture.

My friend, Professor Peter Skegg, of the University of Otago, generously took the time to supply me with updated information about the *Saxmere* case.

Conflicts of Interests—Challenges for Today's Decision-Makers") appears this, to my mind salutary, warning about the concept of the informed observer:

> Should we welcome this newcomer to our legal village? Not particularly warmly, perhaps. The whole point of inventing this fictional character is that he or she does not share the viewpoint of a judge. Yet, in the end, it is a judge or judges who decide what the observer would think about any given situation. Moreover, the informed observer is supposed to know quite a lot about judges—about their training, about their professional experience, about their social interaction with other members of the legal profession, about the judicial oath and its significance for them, etc. Endowing the informed observer with these pieces of knowledge is designed to ensure that any supposed appearance of bias is assessed on the basis of a proper appreciation of how judges and tribunals actually operate. The risk is that, if this process is taken too far, … the judge will be holding up a mirror to himself. To put the matter another way, the same process will tend to distance the notional observer from the ordinary man in the street who does not know these things. And yet the whole point of the exercise is to ensure that judges do not sit if to do so would risk bringing the legal system into disrepute with ordinary members of the public. [See pages 465–467, above.]"

Lord Dyson, echoing Lord Brown's sentiment, observed (at [75] and [76]):

"Lord Brown has quoted from the lecture given by Lord Rodger … Lord Rodger says … in relation to apparent bias that the court should 'adopt a course that can be expected to command the assent and respect of the general public'. A little later, he continues:

> Similarly, while decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way that the public view such matters. In addition, what may be acceptable, or at least tolerable, in a small jurisdiction where substitute judges cannot readily be found, may be unacceptable in a larger jurisdiction where that problem does not arise. [See page 477, above.]

I agree with Lord Rodger's salutary words."