# Judgments and their background

Wednesday, 06 July 2005 04:14PM

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The essential function of judges is to give decisions on matters in dispute or in question. How are their decisions arrived at? How are anyone's decisions arrived at?The question opens an illimitable field of philosophical and psychological enquiry and there can be no definitive answer to such a general question. It is impossible to assess all the factors, hereditary and environmental, which mould the human personality and produce a rational, civilised, valuable member of society or an unpredictable and antisocial psychopath. All of us, including those who would generally be regarded by society as rational and civilised, have our foibles, our prejudices and our preferences which we may or may not be aware of. As Pascal wrote: "The heart has its reasons which the reason does not know of". All of this adds greatly to the colour and variety of life and there may be no harm in it provided that our foibles are tempered by discretion, our preferences are not allowed to affect our responsibilities and our prejudices do not lead to bigotry or aggression or impinge on areas such as race or religion. It does however mean that strictly impartial judgment is rare.When we come to consider, not the ordinary man in the street but those of whom we demand the highest standards of impartiality, how are they to overcome the human failings which affect every one of us? Perfection is an ideal we must all strive for – why else are we here? – but, although by unremitting effort we can improve, we can never attain the goal. No man is or can be perfect.Yet, when a man assumes a function, he is influenced by the assumption of responsibility and, to some extent becomes a different person. Mr. Tan FRCS, when he dons his apparel as a surgeon and goes into the operating theatre is, in some ways, a different person from the Jack Tan who was playing tennis half an hour before. Encik Ali, when he goes into the classroom, to take Form V in Mathematics, is, in a way a different person, from the Ali who spent the previous evening amongst his orchids and pot plants. And when a man dons the judicial gown and takes his place on the Bench in Court, he knows or should know that a great deal is expected of him and he must try to live up to this.A judge's conduct on the Bench is of great importance. Fairness and courtesy to all, patience, forbearance, the capacity to listen with an open mind and, not unimportant when so many people are involved in the proceedings before him, punctuality in sitting and rising, all these are very necessary if the public, the litigants and counsel are to feel that proper consideration is being given and justice is being done. Most important of all is the responsibility to arrive at the right decision according to law. This, ultimately, is both the test and the justification of the judiciary.How then are judges to arrive at the right decisions? In some cases a written submission from Counsel is required in advance of the hearing. This has its merits but it does not detract from the importance and value of oral addresses. Lord McDermott of the House of Lords thought it was a mistake to study the written case too closely in advance of the hearing since it could lead to the premature formation of a line of thought. Malaysian Counsel sometimes complain that they are not given a proper hearing on appeal and that the Court seems to have made up its mind in advance of the hearing.. This would negate the point of the hearing. If a Court begins a hearing with a preconception this can lead to undue weight being given to all points which support the preconception and an undervaluation of all the points against it. A patient, open-minded hearing may lead to a complete change of the original view of the judge.. A distinguished Law Lord, Lord Guest, said: "I have known cases in which, when the case started, I was convinced that the appellant was either right or wrong and during the course of the case a point made by either counsel or one of my colleagues has completely changed one's view". The advantage of hearing argument over merely reading a case or appeal record is that in the interplay of ideas between Bench and Bar a point can emerge which upon consideration throws a completely different light either on the facts or the law or both. There was a Malaysian appeal before the Law Lords in the Privy Council where there was no dispute on the facts which were very simple. The case turned on a short point of law. The point was examined from all sides in argument for two full days. It was patent that the Law Lords were holding themselves back from personal commitment to a particular view point until there had been exhaustive examination of the point. The point was one which had been dismissed in a simple sentence by the presiding judge in the Federal Court and who was unwilling to entertain argument. The appeal was allowed. The debate in an appeal is usually thought of as a debate between counsel with the Court as referee. A Law Lord observed that "the debate is really much more between Counsel and Bench than between opposing Counsel. The dialectic between Bench and Bar which has been described as resembling " a conversation between gentlemen on a subject of mutual interest" is directed by Counsel more at persuading the Bench than attacking the other side. It is, of course, necessary to deal with strong points on the opposite side and the Bench itself will raise them with Counsel if they consider that they need a reply and are not getting it but the primary focus is on convincing the Court of the merits of Counsel's case ".It is particularly important in an appeal that the Bench should suspend judgment until after hearing Counsel for the Respondent. It is well known that a clear and attractive presentation by Counsel for the appellant may leave the Court convinced of the merits of his case and it is disheartening for Counsel for the Respondent if he rises to address the Court and finds that they have made up their minds on the strength of hearing his opponent and are unwilling to listen to the other side of the story.The influence of Counsel on judgments is demonstrated by the fact that their arguments are frequently the foundation of the judgments of the Court. Sometimes this is acknowledged in the judgments. More often it is not but this does not trouble Counsel since it is their function to present argument to the Court and argument should be framed in such a manner that the Court can, if it is accepted, incorporate it into the judgment.Two considerations have to be balanced. On the one hand, it is important that judicial time should not be wasted and that reasonable expedition should prevail in the disposal of appeals. On the other hand, it is important that the submissions of Counsel should have a patient and courteous hearing and that, particularly in a final court of appeal, any fundamental issues of law, should be given unhurried and patient examination. D.N. Pritt was once appearing in the House of Lords when Lord Buckmaster, after a constant series of interruptions said: "Mr. Pritt, their Lordships would like to how long this nonsense is going to continue". Pritt replied: "About ten days if interruptions continue on their present scale and several days less if they

diminish". After further interruptions by Lord Buckmaster, Pritt could endure it no longer and slamming a book on the lectern in front of him said:" Your Lordships are going to hear this case". They did. Pritt won. It is to be noted that they did accept that he was entitled to a hearing and did not try to stop him.Lord Radcliffe considered that judges must be considerate and show humane manners. Lord Simonds was said to be "a model in his conduct of a hearing, concise, courteously patient and resignedly fair". Lord Gardiner said that it is the business of a judge not to let the case take longer than it need. The Court could be too courteous and let Counsel talk too much but this was better than the other extreme. Surely Lord Gardiner is right. The very essence of justice is to give each party a fair hearing. Someone has to lose and it is important that he should leave the Court knowing that his case has been fairly and patiently heard and not dismissed without any proper consideration on the basis of a misconception or an over-hasty preconception.I was once in the Court of the Master of the Rolls (Lord Donaldson) in London. A litigant appeared in person to appeal against the award of an arbitrator. Lord Donaldson explained that no appeal lay against the award. The litigant persisted in his address. Lord Donaldson gave him some time and then again pointed out that no appeal was possible. Still the litigant went on. Lord Donaldson gave him a little more time and then intervened and said gently but firmly: "I'm sorry we cannot listen to you any more. We see your point and we quite understand that you have a feeling of grievance but there is nothing we can do in the matter and there is nothing to be gained in continuing with your address".The late Tun Suffian was a model of patience and courtesy on the bench, whether in the High Court hearing trials or in the Federal Court hearing appeals. Counsel could be certain of being given every opportunity to present their cases properly and full consideration being given to them. The way to discourage Counsel if he is talking too much is for the Bench to remain completely silent. If the Bench interrupts it merely encourages Counsel to repeat or enlarge on his arguments. Tan Sri H.T. Ong, when he was Chief Justice, once stopped Counsel who had just begun to open an appeal (an indication that he required no argument for the appellant) and called on Counsel for the Respondent. Counsel for the Respondent began belligerently by saying "Do I understand that my Lord has already made up his mind without hearing the case for the Respondent?" "Oh, no!" said H.T. aimiably "please say anything you wish Mr. X". He then sat back and said not another word. Counsel for the Respondent soon dried up. Counsel for the appellant was not called on to reply. It is only fair to H.T. who had a brilliant mind, quick to grasp a point but who always gave Counsel his say and listened intently, to say that the Privy Council upheld his judgment in the subsequent appeal.A Court may inform Counsel that no argument is required on a particular point or even, as in the case just mentioned, in the whole appeal. This should only be done if the Bench is in favour of Counsel on that point or on the whole appeal. To decide a point against Counsel without hearing him on it would be the negation of justice.Lord Reid was one of the greatest of the judges in the House of Lords. One of his colleagues, Lord Pearce gives a fascinating glimpse of his approach to an appeal: "When he speaks he always takes the argument a stage further. He says "Well, what you are arguing really amounts to this" Then he puts the proposition very fairly and clearly. Counsel is doubtful and Lord Reid continues: "Well I think you have got to put it as high as that, haven't you, in order to make your point that so-and so?" Usually Lord Reid is right but sometimes Counsel can get out of that situation. Lord Reid is not demolishing the argument of Counsel, not at all. He just wants to see where it is leading and taking the argument a further stage. Well, none of that can ever get into any written submission because if you start re-writing the submission in the alternative, with about a hundred different alternatives taking in all possible points that might or might not be raised, you get nowhere". This description of Lord Reid's method shows very clearly the great importance of oral argument.Lord Reid never interrupted in order to display his erudition or mental superiority. As Lord Radcliffe said: "It is very wrong to use interruptions in order to indulge the range and intelligence of your mind. This is a terrible weakness which grows on some judges. Interruptions should be used only for the purpose of trying to explain to Counsel some difficulty in the argument which he has not met".Too early commitment to a point of view is always a dangerous trap lying in wait for a judge or a lawyer in a hurry to arrive at a decision. This danger is also mentioned by Lord Radcliffe: "If properly conducted the legal debate is uniquely effective in enabling the appeal judges to arrive at a mature committee decision. The presence and participation of Counsel serve as a valuable catalyst. They enable members of the Court to advance conflicting views for consideration without direct confrontation with each other or early commitment to a point of view and have them tested in argument. The debate is a great help in making progress to a mature and well-considered conclusion."I recall appearing before the late Tun Azmi, a fine judge, down-to-earth, patient, invariably courteous and personally modest. A debateable question of law arose in the case. Tun intervened and set out his view on the answer to the question. He concluded by saying: "Well, that is just my view. I may be wrong. Let me hear what you have to say." This was typical of him. He was open-minded, he did not cling to his own opinions but was ready to listen to reasons why he should change them. It was always a pleasure to appear before him. He and Tun Suffian added lustre to the Bench in their various roles as puisne judge, Court of appeal judge and Chief Justice.The House of Lords and the Privy Council make a point of preparing the judgments while the appeal is still fresh in their minds and not leaving the task until their recollection is dulled. We have had examples of in our Courts of judgments delivered many months or even years after the hearing. No judgment delivered after such long delays can be respected.Humility is a rare virtue. It is particularly becoming in a judge. Judges are not supermen and are not infallible. They have the same failings as the rest of mankind. The best judges are well aware of this at all times. They are also aware at all times that they have the very heavy responsibility, in matters in dispute brought before them, of giving decisions which can have far-reaching effects on the lives of the parties. They cannot always be right – no one can - but it is in their power to ensure that being fair, patient and good mannered is just as important on the Bench as anywhere else, that a courteous hearing is given to all sides and a careful and reasoned decision is given without delay.