

Introduction: Not Enough Judges

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Abstract

This Introduction is attached to a Comment given as a paper at the seminar *Too Few Judges?*, which questions the assertion that judges are essential for justice and that not having enough judges available to carry out judicial duties therefore diminishes the availability of, or access to, justice. Playing devil's advocate the comment questions the cost and value of judicial law, whether judges do the job we imagine them to be doing, fulfill their role in ensuring justice, are always independent and fair, and are always capable of coming to fair conclusions. In doing so it is not intended to criticize in any way any former, intending or sitting judges but more to consider the nature and limits of the judicial decision making function. It is entirely accepted that some elements of the judicial function are essential for the progression of law, defence of the individual against the State, and certainty in law and human relations. Although examples used tend to arise out of UK law, the psychological research which is referred to is international and is carried out in a number of countries.

Key words

Judges; heuristics; cost of judging

Resumen

Esta introducción se adjunta a un comentario presentado en forma de artículo en el seminario *Too Few Judges?* Dicho artículo cuestionaba la afirmación de que los jueces son esenciales para la justicia, y que, por tanto, carecer de suficientes jueces disminuye la accesibilidad y el acceso a la justicia. El comentario cuestiona el coste y el valor del derecho judicial, si acaso los jueces hacen el trabajo que suponemos que hacen, cumplen con su obligación de garantizar la justicia, son siempre independientes y justos, y si son siempre capaces de llegar a conclusiones justas. Este cuestionamiento no pretende criticar a ningún juez, sino más bien considerar la naturaleza y limitaciones de la función decisoria de los jueces. Está enteramente aceptado que algunos elementos de la función judicial son esenciales para el progreso del derecho, la defensa del individuo frente al Estado, y la certeza del derecho y las relaciones humanas.

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Palabras clave

Jueces; heurística; coste judicial

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Introduction

This is an Introduction, and Comment on the series presented here as “Not Enough Judges”, arising out of a workshop in Oñati in 2016. The workshop intended to expose and begin to understand the general claims regarding the scarcity of judges and its consequences which appeared as an important issue in a number of jurisdictions. The concerns are that citizens and organizations may be denied access to justice; parties may suffer delays of justice; prosecutors may decline to prosecute more cases (Crystal S. Yang, *Justice Vacated? The Impact of Judicial Vacancies on Prosecutorial Behavior*); judges may become overworked etc. (Keren Weinshall-Margel *et al.*, *Case Weights for the Assessment of Judicial Workloads in Israel*).

This collection brings together the papers of the workshop which investigated whether there is substance to these claims and whether it is possible to assess the severity of the problem. The intention of the workshop was to seek out the sources of the problem; establish its social price; and propose solutions.

The phenomenon was approached by comparing different legal systems and the methods each has found to address the problem, and by exploring different perspectives: those of researchers, of the judiciary, and others.

The preliminary issue of data access, availability and comparativity was considered; as well as changing definitions of judges and tribunals (Matt Kleiman, *Case Weighting as a Common Yardstick* for the comparisons of cases in the USA; Marco Fabri, *Methodological Issues in the Comparative Analysis of the Number of Judges, Administrative Personnel, and Court Performance Collected by the Commission for the Efficiency of Justice of the Council of Europe*); judges' diversity (Avner Levin and Asher Alkoby, *Should the Bench be a Mirror? The Diversity of the Canadian Judiciary*; Livia Holden, *Women Judges and Women's Rights in Pakistan*; Eli Wald, *Judging Judges: a Study of U.S. Federal District Court Judges in the 10th Circuit*); the actual burden on judges (Brian Opeskin, *The Supply of Judicial Labour: Optimising a Scarce Resource in Australia*; Helena Whalen-Bridge, *Court Backlogs: Balancing Efficiency and Justice in Singapore*; Anne Wallace, Sharyn Roach Anleu and Kathy Mack, *Judicial Work and AV use: Perceptions from Australian Courts*) and its consequences (Limor Zer-Gutman, *The Effects of the Shortage of Judges in Israel*; Hugh Corder, *Judicial Capacity in a Transforming Legal System in South Africa*; Bruce Green, *The Price of Judicial Economy in the United States*), as well as the perceived burden (Eyal Katvan and Boaz Shnoor, *Court's Precious Time: Transparency, Honour and Judicial Scarce Resources in Israel*).

The workshop wished to examine the relationships between the judicial burden and other characteristics of the judicial system. Is judicial burden associated with different perceptions of the judiciary as a public service the government is required to provide? Is the judicial burden different in civil and criminal law? Is it different in Civil Law and Common Law systems? The issue of the scarcity (or surplus) of judges must also be examined from the perspective of diversity in courts: Too few female judges? Too few minorities? Are differences in diversity associated with total scarcity of judges? In this context we examined the historical aspect – what does history teach about the abundance or scarcity of judges? Has this phenomenon always existed? How did it develop? Is it influenced by changes in society?

The workshop hoped to identify factors responsible for judges' scarcity. An initial, possible claim was that a surplus of lawyers could lead to extra litigation, (since the rate of growth in number of judges may be lower than the rates in growth of number of lawyers). But in many jurisdictions there has been a considerable reduction in the numbers of cases going through the courts, despite the perceived rapid growth in the number of lawyers /legal professionals (see, for example, for the USA: http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx; for Israel: <http://elyon1.court.gov.il/heb/haba/>

[dochot/doc/shnati2013.pdf](#); and for the UK: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf]. These phenomena need to be explained: perhaps more lawyers get involved in non-contentious work, and therefore do not need courts; or maybe lawyers advise their clients to turn to ADR because of the lack of judges.

Other factors might be the growing number of statutes and regulations that might be associated with more litigation; social/cultural issues such as the litigiousness of different societies (Marc Galanter, *Reading the Landscape of Disputes*); the multitude of sources of legal information; possible shortage of social or financial resources for appointing a sufficient number of judges; resource management failure, causing the allocated resources to be used inefficiently; inefficient behaviors of the judges themselves. Or maybe, the shortage has to do with political issues since politics usually governs many aspects of the judicial system, including the number of judges and their salaries.

In terms of the consequences of judges' undersupply: The workshop wished to investigate whether judges' scarcity leads to overload and delays (compare between Stephen Reinhardt, *Too Few Judges, Too Many Cases* and Gerald Bart Tjoflat, *More Judges, Less Justice*). Assuming the answer is in the affirmative, the effects of overload on judges themselves needed addressing (does judicial overload lead, for example, to decisions limiting access to courts? Marin K. Levy, *Judging the Flood of Litigation*), on lawyers (does judicial overload lead to behavioural problems in court?), on the parties to the proceedings (does judicial overload preclude fair and timely judgment?) on quality of judicial decisions (Bert I. Huang, *Lightened Scrutiny*). And on society in general (does undersupply of judges impair access to justice? and How is the public's perception of legal systems connected to the overload of the judicial system?).

In terms of solutions: Given that an undersupply of judges has negative consequences, various ideas must be examined to solve the problem (see e.g. Maria L. Marcus, *Judicial Overload: The Reasons and the Remedies*). Among the solutions the workshop hoped to examine the creation of external alternatives that will replace judges (e.g. mandatory reference to mediation or arbitration before approaching the courts); additional judges (which could lead to an increase in number of claims, and to possible devaluation of judges' status due to increasing numbers); procedural solutions (modifications of procedure) which will curb access to the courts or streamline the judicial process such that judicial time is used efficiently; improvement of the supporting system so as to improve the use of the judge's time; allowing non-professionals to carry some of the adjudication burden; educational/social solutions to reduce the incentive to litigate; etc.

The workshop took note of prior incidental discussion for example at the Oñati *Evaluating Judicial Performance workshop* held at the IISJ; the Oñati *Gender and Judging workshop*; The Oñati *Too Many Lawyers Workshop*; and the UCSIA workshop "*How objective can judges be*" (May 2014), as an issue requiring academic investigation and regulation.

The issue has been dealt with in various reports, including comparative reports, which provided the Workshop with considerable data. But these have been rather policy reports, not academic or socio-legal studies and indicate further the need for an in-depth examination of the topic (Klaus Decker, Christian Mohlen, David F. Varela, *Improving the Performance of Justice Institutions*; The EU Justice Scoreboard; CEPEJ Report http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf).

A methodical examination of judges' scarcity, from a comparative perspective, had the potential to enable productive dialogue, including examination of the ongoing dialogue between the judicial institutions and society; the role of the judge in society; as well as the effect of society on the litigation process. This discussion was

based on both theoretical and empirical examination, in an attempt to create the infrastructure needed for such dialogue.

The participants were from a variety of jurisdictions. From the USA, the UK, Spain, Germany, Israel, Japan, Australia, Pakistan, South Africa, Canada, Italy, India, China, Singapore and Russia.

The Workshop produced some interesting findings and brought together some far ranging approaches and conceptualisations of the issue. The following is a list of the articles published in this series, as a result of the workshop. They are divided into three sections:

Judges, Cases, Numbers

Matt Kleiman suggests *Case Weighting as a Common Yardstick* for the comparisons of cases in the USA.

Marco Fabri promotes *Methodological Issues in the Comparative Analysis of the Number of Judges, Administrative Personnel, and Court Performance Collected by the Commission for the Efficiency of Justice of the Council of Europe*.

Brian Opeskin considers, *The Supply of Judicial Labour: Optimising a Scarce Resource in Australia*.

Helena Whalen-Bridge writes on *Court Backlogs: Balancing Efficiency and Justice in Singapore*.

Anne Wallace, Sharyn Roach Anleu and Kathy Mack write on *Judicial Work and AV use: Perceptions from Australian Courts*.

Effects

Limor Zer-Gutman looks at *The Effects of the Shortage of Judges in Israel*.

Hugh Corder considers *Judicial Capacity in a Transforming Legal System* in South Africa.

Bruce Green considers *The Price of Judicial Economy in the United States*.

Boaz Shnoor and Eyal Katvan consider *Court's Precious Time: Transparency, Honour and Judicial Scarce Resources* in Israel.

Judges, Diversity and Judging

Avner Levin and Asher Alkoby ask, *Should the Bench be a Mirror? The Diversity of the Canadian Judiciary*.

Livia Holden also looks at diversity in *Women Judges and Women's Rights in Pakistan*.

Eli Wald writes on *Judging judges: a study of U.S. federal district court judges in the 10th Circuit*.

As with *Too Many Lawyers?* the question itself began to expose the complexities beneath. *Too Few Judges?* was the perceived problematisation, but the real issues were far more complex showing changes in society, social contract, professional status, diversity of actors in the process, need for adjudication, alternative approaches to dispute resolution, the promise of technological change, judicial personality, efficiency and justice, the politics of law and limits of law and many more.

Are judges good decision makers? Are judges essential for justice?

In order to provide a different view on the value of judges and judicial work a further Comment was given at the Workshop and is repeated here by the author. This *Comment* arose out of a course taught to new "judges" and "assessors"

making judicial type decisions which was intended to warn neophytes about the possible limits of their own abilities to apply fairness and certainty to their judgements.

This comment is not written as a paper but as a balance to some of the views expressed in other papers in this collection. It questions the assertion that judges are essential for justice and that not having enough judges available to carry out judicial duties therefore diminishes the availability of, or access to, justice. It begins by considering briefly the relative costs associated with different legal systems and the need for lawyers on both sides of each argument in adversarial systems fought before judiciary. It goes on to consider research on how judges make their decisions and more general research on how judgments are made under conditions of uncertainty. It ends by suggesting a cultural change in the use of judge made law, law itself and its effectiveness.

Playing “devil’s advocate” the paper questions the cost and value of judicial law, whether judges do the job we imagine them to be doing, fulfill their role in ensuring justice, are always independent and fair, and are always capable of coming to fair conclusions. In doing so it is not intended to criticize in any way any former, intending or sitting judges (who undoubtedly carry out excellent work in difficult circumstances) but more to consider the nature and limits of the judicial decision making function. It is entirely accepted that some elements of the judicial function are essential for the progression of law, defence of the individual against the State, and certainty in law and human relations. Although examples used tend to arise out of UK law, the psychological research which is referred to is international and is carried out in a number of countries.

This Comment does not mention, but does take account of, important empirical work on Israeli and British judges taking remand decisions (Danziger *et al.* 2011); Roger Hood’s (1992) work on sentencing; Baldwin’s (1995) work on small claims; Cahill-O’Callaghan’s (2013) work on values; Thomas and Genn (2013) on judging in tribunals; the US political science work on liberal vs republican judges (see, e.g., Epstein and Martin 2012) (and realist work on judging more generally).¹

Can we afford “judicial law”? - Comparing legal systems

Recent changes in the system and use of the judiciary in many countries, as suggested in other papers in this series, often arise out of financial necessity or the desire to save the expense of judges and judicial decisions and judicial law. However, it is not easy to make comparisons between different judicial systems in relation to cost and differential use of judicial law.

The UK spends relatively a higher amount on legal aid, per capita, than most other countries. This is still the case since the Legal Aid and Punishment of Offenders Act came into force in 2013. But whilst it is tempting to compare headline figures on legal aid expenditure and courts and judiciary expenditure between countries, the following table shows how those figures alone can be misleading. For example, whilst England and Wales used to spend over eight times as much as Germany per capita on legal aid, Germany spent far more on their court system and their judges. In an adversarial system the need for advocates on both sides may be greater than in an inquisitorial system where judges might spend more time in querying, investigating and assessing the issues in a case. In an adversarial system the judge may be more of an umpire watching and assessing the point scoring on each side. Whereas in a civilian jurisdiction judges may themselves be more actively involved in developing as well as weighing the arguments.

¹ For a recent exposition, see Posner 2008.

TABLE 1

Costing Justice systems *BEFORE* 2012

Country	Population millions	Public Expenditure (€ Million)	Court Budget (€ Million)	Legal Aid Budget (€ Million)	Legal Aid Criminal (€ Millions)	Legal Aid Civil (€ Millions)	Cases covered by legal aid (Million)	Court spend per head	Legal Aid Spend per head	Type of Legal System
England and Wales	53.7	822,040	1,504	3,020.1	1,558	809	2.65	€28.00	€56.24	Adversarial/ Common Law
Germany	82.4	697,211	8,731	557.0				€105.96	€6.75	Inquisitorial and Adversarial/ Civil Law
Netherlands	16.3	408,647	774	344.6	157	188	0.41	€47.50	€21.14	Inquisitorial/Civil Law
South Korea	48	144,930	584	30.8			1.32	€12.17	€0.62	

Table 1. Costing Justice Systems Before 2012²

The English Ministry of Justice is also currently trying to diminish its spend on Courts (see e.g. The Telegraph 2010). The type of legal system, including whether the system is common law or civil law, whether the procedure is adversarial or inquisitorial, and whether it is formal or less formal, plays an important part in determining the need and costs of courts and judges as well as publicly funded legal advice and representation.

Decision Making and Applying Judgement-Do Judges do a good job? Decisions, assumptions, heuristics and biases.

It is assumed that the purest and fairest form of justice is that provided by courts and judges, and it is therefore worth considering carefully the value of judicial decision making. Such value should not only be computed in terms of cost but also in terms of accuracy and fairness. Perhaps the most important judicial function is to make decisions in cases (Elias 2017). Such decisions may for example have the effect of sending defendants to prison, award or deny large sums of compensation, take children away from their parents, or make large organisations demerge. It is therefore useful to know how reliable are the decisions people make under such conditions of relative uncertainty. We do know that assumptions are different from decisions based on proof and evidence. Making decisions in professional life it is necessary to be more careful and more conscious of the difficulties of jumping to conclusions. In making decisions about other people's lives or livelihoods, reputation and allocation of blame, it is essential that decisions are made based only on absolute, clear and irrefutable proof. We are more likely to question the basis of our assumptions under these circumstances and only to come to a conclusion if it is proved, by a party who has the burden of proof, "beyond a shadow of doubt", or at a high level of balance of probabilities.³

The following conclusions arising from research into judgements made under conditions of uncertainty relate to all people and not only to judges. The concentration on judges in this Comment and the application of the research to judges is because of the importance of the decisions they often have to make. Some similar considerations would apply to juries, to arbitrators, and mediators all of whom would be likely to be similarly affected by human natural responses and

² See also Bowles and Perry 2009.

³ But see e.g. also Charupat *et al.* 2012 - there may be gender differences in balancing probabilities.

inabilities and weaknesses. In the case of juries additional issues involving group responses and a “shift to risk”⁴ might also apply.

Culture and “feel”

In order to function in a normal day we have to assume to a certain extent that things which some people tell us are correct. We need more than this in a courtroom or tribunal. We know from Kahneman *et al.* (1982) that some people or types of people simply appear more “believable” to us than others. Elizabeth Loftus⁵ showed that elements of memory and perception such as face recognition, memory of road lay out and perception of events (which might be imagined to be capable of practice and development) can be as poor among police officers as laypeople. Yet police officers giving testimony on such issues which will be more likely to be believed. That might not mean that their stories are more true and accurate and fully remembered than those who do not appear to be quite so competent in presenting the believability of their stories through their expression or demeanour.

The background culture of the judges and of the evidence might be very important in the circumstances of judgements made, in the courtroom, under conditions of uncertainty. It is well known, for example, that people from different cultures react to authority in very different ways (Huo and Tyler 2000). In the UK, a person who does not look you in the face whilst telling a story is sometimes thought to be hiding something. People from other cultures who do not look you directly in the face may be behaving in that way because looking you directly in the face is taken to be an impolite challenge to your authority. They may be being respectful rather than dishonest – but they might be thought of as appearing “shifty” and unreliable.

Learning and being English

Eva Hoffman in *Lost In Translation: A Life in a New Language* (1989) expressed the difficulty of fitting in to a different culture thus,

She learned to gesture less, to stand further away from the person she is speaking to, and to avoid grabbing the listener's arm in excitement, so as not to be considered too aggressive. She also learned to avoid speaking critical truth too directly, and to be careful about what she says, how loud she laughs, and whether to give vent to grief. (Hoffman 1989)

It is clear that different cultures and backgrounds make a considerable difference to behaviour and that it is not always possible to draw conclusions easily from the demeanour or behaviour of others in court in any multicultural society, even for this reason alone.

Judges and Judgements, The Orthodox view

Elizabeth I famously said we cannot make “windows into men’s souls” in order to know what they are really thinking or believing. Yet in deciding any questions of *mens rea* or *mala fides* in cases judges are attempting to do exactly that.

This is where it starts to become difficult. Is that feeling of “good common sense” and knowledge of human beings real in a particular case? Or is it a simple prejudice based perhaps on elements of truth but also on major levels of uncertainty? Prejudices, it should be noted, also can equally work in favour of some people as well as against others. So, what are the arguments in favour of the judicial function in relation to judgments made?

⁴ Wallach, Kogan and Bem 1964. Groups chose greater risk due to a diffusion of responsibility. See also Myers and Bishop 1970. Therefore known as *Shift to risk phenomenon*.

⁵ Elizabeth Loftus ran a welter of experiments in this area in the 1970s 1980s and 1990s, has published 19 books and some 200 articles. *Eyewitness Testimony* (1996) brings much of this together. Her work on “false memories” has been more controversial (*The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse*, 1994).

Louis Blom-Cooper, a judge, academic and author has written on the functions of judging, especially at the higher levels.⁶ He presents something of a different view. As it seems to be a view held by many judges who he has studied it is worth considering in full,

An 'open mind', in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being (...). More directly to the point, every human society has a multitude of established attitudes, unquestioned postulates. Cosmically, they may seem parochial prejudices, but many of them represent the community's most cherished values and ideals.

The judge in our society owes a duty to act in accordance with those basic predilections inhering in our legal system (although, of course, he had the right, at times, to urge that some of them be modified or abandoned). The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.

In addition to those acquired social value judgments, every judge, however, unavoidably has many idiosyncratic 'learnings of the mind', uniquely personal prejudices, which may interfere with his fairness at a trial. (Paper presented to Conference on Independence of the Judiciary, Vienna, 2011)

Blom-Cooper appears to be suggesting that judges are affected by and rightly contain the social values of the societies from which they come and that it will not be wrong to apply these values to the cases in front of them. If that is correct, it is difficult to see the judges simply applying the law- they are applying the law through the spectacles of the local culture and values as they (the judges, from their particular backgrounds) see them.

However, Blom-Cooper is more nuanced than this,

To recognise the existence of such prejudices is the part of wisdom. The conscientious judge will, as far as possible, make her/himself aware of this bias of his character, and, by that very self-knowledge, nullify their effect. Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine. The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices. Freely avowing that he is a human being, the judge can and should, through self-scrutiny, prevent the operation of this class of biases. The self-knowledge is needed in a judge because he is peculiarly exposed to emotional influences.

It is difficult to see how this might work, especially if one is considering the judicial function operated in a busy court room with numerous cases coming before the judge to be dealt with at some speed without the time for much reflection or self-correction.

Blom-Cooper continues,

Disinterestedness does not mean child-like innocence, if the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.

This forces us back to the human factor, the need to carry out the function, the need to make decisions and to make things happen in the court room. However it is an apologium rather than a corrective. It does not really provide a full and satisfactory answer to the questions of possible prejudice, or where assumptions might end and decisions begin.

⁶ See e.g. *The Court of Appeal* (2007) with Fullbrook and Blake.

The value of experience

If assumptions may be based on prejudices or previous experiences would it be possible to say that one can be more certain when relying on the assumptions and decisions of more experienced performers? It is also not proven that longer experience actually enhances one's ability to make good judgements. Apparently it sometimes has the opposite effect (Loftus 1996). Those who are most experienced sometimes leap to the most obvious conclusions without a sufficient degree of checking and clarifying the level of evidence and proof; we have a tendency to believe that this case is similar to the last because it is easier for us to do so – at least until we see something materially different.

Professionals and judgement expertise

It is also tempting to believe that professionals are always in a better position to make adequate judgements than others, but this does not appear to be the case. There is much psychological literature, for example, showing that the police are no better at estimating distances, recognising people from other cultural backgrounds and remembering stop signs than other people who do not have to do these things quite as often as part of their professional lives (Loftus 1996).

In fact, as Moorhead (2007) notes, professionals often exhibit an unwarranted over confidence in their abilities to make good decisions,

Criticisms of premature diagnosis during professional interviews (Sherr 1986) may apply also to judges. There is a question mark over the ability of anyone, even skilled judges, to know, often from defective paperwork, what the litigant's case is. Psychological study of decision making has shown a link between high knowledge groups, over-confidence and poor decision making (Arkes *et al.* 1988) even in judicial contexts (Dhami 2005, looking at magistrates making bail decisions). [Moorhead 2007]

Moorhead continues,

Bail decisions are based on an assessment of risk, not unlike the assessment of risk involved in deciding whether somebody should continue to practice as a solicitor, a doctor or a veterinary surgeon. Apparently the magistrates making these decisions use both legal and non-legal factors to influence their decisions, but,

Typically, judges over-report the use of socially desirable factors such as offence and under-report the use of factors such as gender.

whereas the actual reason for their decision often depended on an earlier risk judgement that might not be fully reported later.

So it is useful to note that professionals are certainly no less prone than other people to making judgements under uncertainty which have a poor probative base even though they have a tendency to feel highly confident about those decisions. In fact, according to Sherr's 1998 work on solicitors,⁷ the major effect of experience is to provide an increasing overlay of certainty about decisions, but not necessarily any more expertise in making them. (Moorhead 2007)

Lon Fuller also noted the problems which Judges have in dealing with an unrepresented party in an adversarial system,

[T]he integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by an arbiter who attempts to decide a dispute without the aid of partisan advocacy. Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full. When he resumes his neutral position he must be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a

⁷ For the problems of, and benefits of, expertise see also Foer (2011).

man in his time must play many parts, it is scarcely given to him to play them all at once. (Fuller and Winston 1978).

Heuristics and Judgements under uncertainty.

Kahneman, Slovic and Tverski between them wrote many papers and an excellent book on this subject showing the multiple sources of error and misunderstanding under these conditions. Judgement under these circumstances is always difficult. There is no alternative but to base one's judgement on one's own experience and expertise, knowledge of life, knowledge of people and sense of fairness.

In more precise terms, heuristics stand for strategies using readily accessible, though loosely applicable, information to control problem-solving in human beings and machines. (Kahneman *et al.* 1982)

The work of Kahnemann *et al.* (1982) transcends the numerous types of decision making which judges need to perform in order to form a judgment. We are all guilty of common mistakes in understanding statistical information, of problems of perception in both two and three dimensions, of answering easier problems when we do not have answers for more difficult ones, of filling in blanks in our knowledge with assumptions, and many other faults associated with the "quick" rather than "slow" thinking processes (Kahneman 2011).

Fortunately, most of us do not have to make the serious, high impact decisions that judges make, with their enormous effect on others. But there is nothing to suggest that judges are any better than the rest of humanity in our restricted abilities of correct decision making. And our own certainties that we are good at doing this job of decision-making are likely to be reflected in the certainties that judges have of themselves.

Does this mean that nobody can ever carry out a good or perfect judgment? Kahneman's later work shows what might assist in ensuring more accurate and more rational judgments. However our assumptions that judges are able to this job well and with ease are sufficiently questioned to raise doubts about whether other approaches to making judicial decisions might equally be considered or even be thought of as preferable.

So, would not any decision making person or group be similarly affected by the problems of making judgements under uncertainty? And would not any system for handling disputes suffer from the difficulties expressed above?

Alternative Dispute Resolution

It is worth considering the relative value of alternative dispute resolution systems in this light. Though they may or may not provide "justice" and they may or may not provide resolution they may be no better or worse in coming to accurate, sensible judgements. It is said that they often operate as a "black box" and it is not possible to assess what is happening in the process. Genn (2012) has suggested that "mediation is not about just settlement, it is just about settlement". This is unlike an open trial where it is possible to see everything that happens. However, if it is correct that judgements made even in open trial may suffer from our innate abilities to decide accurately, there may not be much difference in the results of an alternative process- one which may be faster, less formal and less expensive to process.

The ADR approach has been developed most interestingly in the Rechtwijzer system currently in use in the Netherlands. A blend of On line Dispute Resolution, with the possibility of lawyer intervention, assistance in understanding the law and the process, and even some "after care" in relation to the decision, has proved popular with some divorcing couples and others (www.hiil.org/project/rechtwijzer). An important question is whether any process is acceptable, or even more desirable, because it satisfies the users and those who are affected by the decisions. Should a

process or system be judged only by the satisfaction of the users, or is the cost of the system more important, the accuracy of its decisions or the further needs of society?

ADR also tends not to provide reported cases and therefore does not develop the law. However, the regulation of human behavior needs clarity in the law in order to avoid litigation; and settlements negotiated between parties need reported cases to guide their own decisions. If lack of judicial time forces more cases into private resolution systems there will be less clarity in legal development and less ability to come to out of court agreement.

Making law more interactive and usable

Perhaps this is also an argument about the nature of the expression of law or laws. Statutes will usually aim to define a more general position than judge made law, which moves from the happenstance of law development on the basis of which cases come to court. Yet legislation will also often be queried because it is unclear or poorly expressed for situations which develop subsequently, or because legal representatives are stretching the approach to cover an argument. Different approaches to the expression of law might vitiate the need for some of these arguments, and for legal advice in interpretation of legislation. Algorithmic statements of legislation can assist lay people to work out for themselves whether the law applies to a particular situation and what that effect might be.

Any system which made the law itself more accessible and more understandable would prevent the need for translators of the law, lawyers, to become involved; and downstream this could obviate the need for judges also.

The changing landscape

Whilst the papers in this series consider whether there are too few judges this paper has shown how the costs of judicial systems are based on a number of choices and alternatives. It has considered the likely fallibility of judgments made under uncertainty, and the fallibility of memory and perception in providing proof in evidence. The paper has also suggested other approaches to deciding issues—algorithmic drafting and alternative dispute resolution.

However societal innovation is already moving away from previous cultural norms in which judicial intervention was essential. The iconic approach of Judge and Jury was fair trial by one's peers, backed up by a highly precedential, considered system. Western societies are now driven by trial by the media. Both print and visual media carry stories as soon as they are received. The views they take and the comments and decisions they make are short, sharp and unappealable. Once the item is reported, whether it is true or false, fair or unfair, there is little that can be done to reorganise perceptions.⁸

At the same time there are many less trials and what Galanter noticed in 2004 in the US has also proved true in the UK. There is a sense that the role of law is less important in the daily life and work of the Anglophone "west". The Rule of Law is still acknowledged but the certainties it provided seem less clear. The powerful adopt a stance which suggests that they can get away with whatever they want as law simply does not keep pace with the faster pace and rhythms of modern life (CBC News 2014).

⁸ See for example Blockley 2016. See also the Duke of York and Harvard lawyer Alan Dershowitz who have been the subject of what Dershowitz called "salacious and scurrilous" allegations and "absolutely outrageous claims". The BBC News (2015) report describes the straight denial of substance to the allegations by Buckingham Palace compared with the actions of the outraged Dershowitz who has filed defamation claims, applied to intervene in the action in which the allegations were made and has even indicated his intention to have the lawyers concerned disbarred; for his pains he is now also the subject of a defamation suit from the lawyers.

At the same time new approaches to the controls that law provided have evolved. These include digital systems which act as a “sheep dip” approach-putting everyone through the investigatory system, such as airport security. Until you have reached the search area you are not judged innocent, but feel very guilty, once through you can hobble along, feeling for your shoes, belt, watch, phone, coins etc. And you are released the other side as an innocent but uninteresting person.

It is clear that there are other ways to provide systems of justice which still depend on the rule of law. Each has relative benefits for the public in general, for lawyers, for clients, for judges and for society. It is necessary to work on adopting and adapting other forms of dispute resolution which can keep pace with social needs, or with less judicial positions and access to justice we may further loosen the grip of the rule of law.

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