Sir Henry Brooke Lecture 2026: The Twenty-First Century Judge— Privileges, Pitfalls and Potential

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[A] INTRODUCTION

While I wasn't fortunate enough to meet Sir Henry Brooke during his lifetime, I have become quite well acquainted with him recently through what he called his "blogsite",[1] begun as an experiment to post his extra-judicial writings. Between its incipience in October 2015 and the last post in January 2018, the month of his death, the blog was an impressive repository for Sir Henry's views on many pressing justice issues, so much so that he was described by the then Chair of the Criminal Bar Association of England and Wales as "the doyen of legal bloggers". His farsighted commentaries on contemporary legal issues have inspired, at least in part, the topic of my lecture. Contributing to legal discourse in such a contemporary way could identify Sir Henry as the very paradigm of a twenty-first century judge.

We can, I hope, all concur with the view expressed by Lord Radcliffe, who in 1968 described the essential ingredients of the twentieth century judge as one who was "wise, learned and objective". One might regard those as prerequisites for holding judicial office, but are they sufficient in the twenty-first century and will any of those attributes still have value in the twenty-second century? Axiomatically, we live in an age of uncertainty. To what extent does the judiciary's role provide certainty and consistency in unstable times? Do threats to judicial security threaten democracy itself? What can the judges do to avoid such threats? Could judges do more to inspire the public's confidence about their decision making? What lessons can we learn from mistakes of the past?

It may now be regarded as mundane to note that privilege, or the exercise of power, necessarily imposes responsibility, but the adage has

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1 See 'Henry Brook: Musings, Memories and Miscellanea'.

never been more applicable to the role of a judge than currently. While the substantive duties of the twenty-first century judge are court and subject matter dependent, the pre-eminent requirements of independence and impartiality remain essential components of the judiciary's role in upholding the rule of law.

Independence in individual judicial decision making may now be regarded as a subset of the overriding doctrine of the separation of powers. Judicial independence from executive power has a long and proud history throughout the United Kingdom (UK) and its constituent (including former) parts. For Scots, an important early illustration is provided by the case of *Bruce v Hamilton* in 1599, when King James VI of Scotland intervened in person in the debate on behalf of one of the parties. George Nicolson, Elizabeth Tudor's agent in Scotland, reported the court's response to his master, Cecil, in London, in this way:

> The Lord of Newbottle then also stood up and said to the King that it was said in the town to His slander and theirs, that they durst not do justice but as the King commanded them; which he said should be seen to the contrary, for they would vote against Him in the right in his own presence.

The Lords then so voted:

> Whereat the King raged marvellously and is in great anger with the Lords of Session—The King swears he will have Mr Robert Bruce's case reversed, which the President understanding, says he will pen in Latin, French and Greek to be sent to all the judges of the world to be approved, and that by his vote it shall never be reversed (Smith 1961: 72).

Sir William Coke displayed the same fearless judicial independence for England and Wales in 1610, when as Chief Justice he declared the King to be subject to the law, famously stating in Dr Bonham's case that the laws of Parliament would be void if they violated "common right and reason" (*Thomas Bonham v College of Physician* 1610). Much debated as a possible early example of judicial overreach, of course, but for present purposes another powerful illustration of the strength of the judiciary's determination to decide cases without fear or favour.

Moving forward a few hundred years to the twentieth century, an intense political history set the scene for the Supreme Court of Ireland's historic declaration in 1950 that key provisions of an Act of the Oireachtas, the Sinn Féin Funds Act 1947, were unconstitutional. An engaging article by Gerard Hogan SC (now Justice of the Supreme Court of Ireland) marking half a century since its conclusion brings the controversy to life vividly (Hogan 1999). When Sinn Féin had split following the peace

treaty of 1922 the original organization resolved, on the motion of its Vice President Michael Collins, to vest a substantial "struggle fund" donated by supporters, in its President, Éamon de Valera, as trustee. The original trustees of the money, who were pro-Treaty, subsequently refused to hand over the funds to the anti-Treaty faction. For 25 years a dispute, albeit unlitigated, brewed about the identity of the true successor to the original party and so the rightful owner of the funds, which had meantime been lodged in court by the survivors of the original trustees. It wasn't until proceedings were pending before the High Court for their recovery, albeit making halting progress, that a Bill was introduced (by De Valera as Taoiseach but now antagonistic towards the reconstituted Sinn Féin) and passed, providing that a new body would hold and administer the money. Strikingly, the legislation provided that the High Court would require to dismiss the pending *Sinn Féin Funds* case on the application of the Attorney General.

Such an application was duly made but refused by the President of the High Court. When Mr Aindrias Ó Caoimh[2] for the Attorney General claimed at the hearing to be at a loss as to the way in which the Act could be unconstitutional the President responded:

> Because judicial power is vested in the Courts. This is a judicial matter brought before the Courts for judicial determination. No other organ of the State, in my view, has the right to interfere pending that judicial determination … (quoted by Hogan 1999: 379).

The subsequent refusal of the Government's appeal to the Supreme Court was justifiably hailed in the Irish press as a triumph for the independence of the judiciary (*Buckley v Attorney General* 1950).

In the modern era, challenges to judicial independence are frequent and require appropriately robust responses. One current concern is the extent to which judges are pilloried by the media in relation to their decisions, most recently in what many regard as the extraordinary statement by Prince Harry and Baroness Lawrence about Nicklin J's judgment in their case (*Lawrence and Ors v Associated Newspapers Ltd* 2026). Strident criticism of any judicial decision is an acceptable aspect of the principle of open justice; public calls to discipline or remove judges for individual decisions is not. The recent sentencing decision referred to the Court of Appeal in relation to non-custodial sentences imposed on three 15-year-olds convicted of the rape of two girls illustrates the point. Putting to one side the merits of the decision, now of course partly overturned on Crown appeal (*R v X, Y, and Z* 2026), it is the signing by more than 200,000

[2] Later a judge of the Supreme Court of Ireland and of the CJEU.

people of a petition calling for mandatory sentencing reviews and powers to remove judges from office "that are actually used" which exemplifies the persistent level of public misunderstanding, marked by an increasing tendency to call for removal of a judge who may (or may not) have erred in making a judicial decision. The failure of the Crown Prosecution Service to correct errors in the colourful reporting of that case appears to have compounded the problem (ibid paragraphs 183-191).

Our Supreme Court has recently had occasion to reiterate that the constitutional principle of the judiciary's independence from government still rests on the separation of powers, enshrined now in statutes covering the constituent territorial jurisdictions of the UK. That crucial principle informed the apex court's decision that the relationship between a judge and government is fundamentally *not* akin to an employment relationship (*X v Lord Advocate* 2025: paragraphs 60-62).[3] In consequence, the individual concerned, found by a fitness for office tribunal to have been sexually harassed by the judicial office holder,[4] must now pursue her claim against him personally, risking his inability to satisfy an award. While understandably disappointing for that litigant, the consequences of treating judges as effectively employees of government would have been far more constitutionally unpalatable. The High Court of Australia reached a reassuringly similar conclusion when overturning the Federal Circuit Court's decision to allow a litigant to sue a judge for false imprisonment. Despite the lower court describing the judge's conduct giving rise to the proposed claim as "an affront to justice" in his reckless disregard for the litigant's rights, his behaviour could not expose him to a civil claim. As the High Court observed, judicial immunity does not exist for the benefit of individual judges; it serves the public interest in preserving the ability of an independent judiciary to act without fear or favour (*Commonwealth v Stradford* 2025).

[B] JUDICIAL APPOINTMENTS

In the realm of judicial appointments, independence from the executive is a relatively recent phenomenon in the UK. While each of the three territorial jurisdictions now has an established Judicial Appointments Board or Commission, their creation ended a long history of blurred lines. In Scotland, for example, the Lord Advocate, head of the prosecution service and a government law officer, customarily appointed himself to a

[3] The judge involved was a sheriff, a lower court judge in Scotland and the government was the Scottish Government.

[4] Sheriff John Brown fitness for judicial office: tribunal report.

senior judicial vacancy at the end of a term of office. As one judge, Lord Stott, is recorded as having quipped immodestly: "I appointed myself and a jolly good judge I turned out to be" (Paterson 2006: 33).

The metamorphic shift in attitudes to what is fair in judicial appointments since then is perhaps best illustrated by the Court of Appeal's decision last year supporting greater transparency in the information given to candidates for judicial office about those who will be consulted on their application (*R (on the Application of Katie Thomas) v Judicial Appointments Commission* 2025). A system that failed to make such candidates aware that consultees would be permitted to include comments (in that case adverse comments) they had received from "sub consultees" offended the statutory requirement to conduct the selection process fairly, albeit that the candidate had not established substantive unfairness in the rejection of her application. Judicial appointments, at least in the UK jurisdictions, are currently transparently free of the secret soundings and taps on the shoulder that the statutory regimes aim to consign to the sphere of historic interest. Complacency in this regard could yet be misplaced, however, as at least one political party in the UK appears to support the abolition of the Judicial Appointments Commission for England and Wales (Cross 2025).[5] Whether the consequence of that being enacted would be a return to direct political involvement in such appointments is unclear.

A marked increase in challenges to judicial independence from political interference in the judicial appointments arena has been experienced quite dramatically a little further from home. Since 1989 Poland has benefited from a National Council of the Judiciary (NCJ) tasked with safeguarding the independence of courts and judges. One of its functions is to assess and propose candidates for judicial office. Following parliamentary elections, a so-called "reform of the judiciary" was initiated in 2017 and implemented by successive amending laws. The key change involved the process of recruitment to the NCJ, previously through election of the candidates by their peers but under the amending law by parliamentary appointment, thus allowing Parliament to influence judicial appointments. Even prior to the changes, there had been an absence of protection against arbitrariness in the appointments system, with no provision for judicial review. One challenge exposed that the President of Poland had refused to appoint applicants to vacant judicial posts, despite their

[5] Such views were also expressed by Robert Jenrick while still a member of the Conservative Party (*Law Society Gazette* 2025).

having succeeded in a competitive selection process conducted by the NCJ (*Sobczynska v Poland* 2026).[6]

An early analysis of the proposed reforms by the Council of Europe's advisory body, the Venice Commission, concluded that they would:

> enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat … to … judicial independence as a key element of the rule of law (Venice Commission 2017: paragraph 129).

There followed a series of challenges to the new system, including to the European Court of Human Rights (ECtHR)[7] and the Court of Justice of the European Union (CJEU) *(European Commission v Poland (Independence of the Supreme Court)* 2019). The ECtHR concluded that the participation in judicial decision making of judges whose appointment was affected by the procedural deficiencies may violate the right to a fair trial under Article 6 European Convention on Human Rights (ECHR). In its new composition the NCJ was deemed to be no longer an independent and impartial body. Likewise, the CJEU found such regression to be in violation of EU law.

Efforts have been made to resolve some of the difficulties since the election of a new Polish Government in December 2023. It sought an urgent joint opinion from the Venice Commission the following year on a number of issues about the status of the judges appointed by the deficient appointment procedure and the validity of their decisions. The Commission expressed the view that, balancing the principle of legal certainty and the need to avoid jeopardizing the good functioning of the Polish judicial system, any right to reconsider such cases should be time limited and considered forfeited thereafter (Venice Commission 2024: 11). I suggest that the Polish example represents a stark reminder of the extreme disruption to the operation of the rule of law if judicial appointments cannot withstand scrutiny.

Whether to unpick (or not) the decisions of invalidly appointed judges has also arisen in the UK where a nuanced distinction has been drawn by the Court of Appeal between those in good faith or not about the invalidity of their appointment (*Baldock v Webster* 2004). Even the most sophisticated of statutory schemes can go awry. I conclude on this point that the aspiration of independence from government in judicial appointments deserves to be closely guarded.

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6 While the events were of some vintage, the decision of the First Section was pronounced only recently, on 21 May 2026.

7 See *inter alia*: *Grzęda v Poland* (2022); *Advance Pharma SP Z OO v Poland* (2022); *Dolińska-Ficek and Ozimek v Poland* (2021); *Reczkowicz v Poland* (2021).

[C] JUDICIAL CONDUCT

The twin natural justice maxims of *audi alteram partem* and *nemo iudex in causa sua* ought to underline everything judges do. But notwithstanding these ageless imperatives, the twenty-first century judge may find that notions of propriety have evolved over time. In particular, an arguably more stringent approach to judicial misconduct threatening impartiality is now taken. A Scottish authority from the turn of the millennium illustrates the pitfalls that can face even very experienced judges. The late Lord McCluskey attempted admirably (though bravely) to demystify the judiciary by writing a regular newspaper column. In one such contribution, he referred to the ECHR as "a field day for crackpots and … a gold mine for lawyers". Regrettably the publication came shortly after he had refused the appeal of some Dutch drug smugglers on ECHR grounds. An embarrassing second appeal followed, although the court emphasized that it was the judge's journalistic language rather than his substantive opinion that was problematic (*Hoekstra v HM Advocate (No 2)* 2000: 401).

In one of the most infamous twentieth century cases involving alleged bias on the part of the judiciary, a trial judge in England referred in his summing-up to a principal prosecution witness as "a fraud, a sponger, a whiner and a parasite", while describing the defendant politician as "a national figure with a very distinguished public record" (Waugh 1980: 217).[8] It seems unlikely that in the twenty-first century such remarks could be cured by the traditional reminder to the jury that it is their recollection alone of the evidence and on witnesses' credibility that matters. But regardless of the nature of perceived judicial misconduct, methods of addressing it are problematic.

Removals from judicial office through misconduct have been extremely rare. In 1992 a Scottish sheriff was so removed on the basis of inability not characterized as misbehaviour. The conclusion was that he suffered from an underlying defect in character, which manifested itself in various ways to the severe prejudice of his function as a judge. The fitness for office panel found that he was:

> completely unable … to confine his attention to the evidence which the parties to the case wish to lead. He carries with him on to the Bench a wealth of private knowledge culled from various sources, which he employs with no sense of self restraint whenever he likes to decide cases in his own way irrespective of issues which he has been asked to decide. His belief that his own expertise is superior to

[8] Quoting Cantley J in the trial of Jeremy Thorpe.

> that of the parties and their witnesses … makes it impossible for him to bring an open mind to bear on cases where he thinks he has a contribution to make (*Stewart v Secretary of State for Scotland* 1995: 899).

Most recent cases involving judicial misconduct thankfully fall far short in terms of remedy from the last resort of removal from office. Insofar as there is a trend, these have tended to involve alleged unreasonable or bullying behaviour that offends or at least may give the perception of offending against the requirement of impartiality. Judges who have failed to listen carefully to both sides, who interrupt so frequently or so inappropriately that their impartiality can be called into question damage the public perception of the judiciary and may even find their decisions vitiated through such conduct. The balance is a difficult one. It has been recognized that modern judges take a more interventionist approach than previously. As Baker LJ put it in one recent case, "No advocate enjoys addressing a judicial Sphinx" (*Re K and L (Children: Fairness of Hearing)* 2023: paragraph 64), albeit that the judge under scrutiny in that judgment was ultimately found to have "descended into the arena" in an unacceptable way. It seems to me that the type of hearing makes a difference; when evidence is being led judges should be far more circumspect in their interventions than during submissions by counsel (*CD v ND* 2025: paragraph 49).

So what is the remedy for a litigant where unfair judicial conduct has occurred? It is now established that the correctness of a subsequent judgment is insufficient to remedy such behaviour and render fair an unfair hearing; such a decision has been described as "written in water" (*Serafin v Malkiewicz* 2020: paragraph 49). The practice in England and Wales, if unfair conduct by the judge has so tainted the proceedings that the decision cannot stand, is to order a rehearing. Conversely in Scotland, where authority suggests that (in any context) the court has no such power, the practice is for the appellate court to decide the case of new itself (*MacLeod's Legal Representatives v Highland Health Board* 2016: paragraphs 158-160). Either way, judicial misconduct has the potential to damage not just the reputation of the judiciary but the delivery of effective justice. When judges exceed the limit of reasonable conduct such that an unfair process has ensued, there is no choice but to undertake the consequential unravelling of that process.

[D] THREATS TO JUDICIAL SECURITY

On 3 March 2023 two Scottish men were convicted of the assault and abduction of a sheriff, Robert McDonald, in Banff as part of a so-called "citizen's arrest", although it was death threats sent to former First Minister Nicola Sturgeon by one of them which grabbed the headlines (Barker 2023). In that and subsequent cases, such as the assault on a family judge in Milton Keynes, where individual criminal acts have been perpetrated against a judicial office holder, it is uncontroversial that they should be provided with the same legal protections as any other citizen. Less frequently articulated, but widely understood by lawyers, is the principle that an attack on a judge is an attack on the rule of law. But what if those attacks are to the life of the nation itself?

The war in Ukraine illustrates most poignantly that the judiciary can be directly affected by security threats to their jurisdiction. Having heard first hand from a Ukrainian judge who described working in a court where several of her judicial colleagues and officials left to fight for their country, became casualties of war and did not return, I approach this subject recognizing that such experiences are incomparable to those faced in the UK. The unimaginable daily challenges posed were eloquently summarized by Professor Dmitriy Kamensky, who wrote this early in the conflict:

> It is really a challenge to do any kind of legal writing when law itself, just like any other aspect of normal life that we take for granted, disappears. When a group of heavily armed troops comes out of the blue to search your car and the house you have fled to escape shelling in your home city (forget about any type of due process or basic rights protection). When a cruise missile strikes about a mile from your house one night with a loud banging sound. When your law school disappears, and most of your colleagues, students, and friends have escaped to other parts of the country or abroad, while your academic career track, with strong, over decade-long ties to American jurisprudence and the legal community, becomes more of a personal safety threat than a hard-earned achievement (2022: 541).

I imagine that few if any of us present have been required to consider just how much we would sacrifice to keep the justice system operative in such extreme circumstances.

In the twentieth century, judges faced the supreme challenges of world war and revolution. It is striking that the judges who are best remembered are those who refused to yield to wartime temptations of expediency or vengeance. Two examples merit consideration. The first is Atkin LJ's majestic, solitary dissent in *Liversidge v Anderson* refusing to accept

that the Secretary of State could deprive those considered to have hostile associations of their liberty without disclosing the reasons, declaring:

> In this country, amid the clash of arms, the laws are not silent … they speak the same language in war as in peace. … the judges … stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law (1942: 244).

The second is the principled stance of the French judge Léon Lyon Caen. As a Jew, he had been dismissed from the Cour de Cassation under Vichy's antisemitic laws and had lost three sons during the occupation. Nonetheless, when approached to preside over the treason trials of the Vichy leadership, Lyon Caen refused on the basis that he could not approach the task without bias, a decision demonstrating an almost unimaginable level of integrity (Jackson 2023: 114-115).

This legacy was reflected more recently in Wilkie J's sentencing remarks following the conviction of Jo Cox MP's murderer, who was described as having betrayed "the quintessence of our country".[9] That the judiciary charged with imposing punishment on those who threaten democracy may on occasions be victims of such conduct themselves has presented itself as one of the most acute dangers for the twenty-first judiciary.

[E] POTENTIAL—WHITHER THE ROLE OF JUDGES IN A WORLD OF AI?

Moving from the troubled past to, one hopes, a brighter future, it is hard to keep pace with the volume of contributions on the subject of artificial intelligence (AI) and the law. As recently as this morning a Franco-British Lawyers Society seminar entitled "Artificial Intelligence; Friend or Foe" took place in Edinburgh with contributions from distinguished French and English judges, one of countless though necessary discussions about the extent to which AI is transforming the way we work. There is no time this evening for more than a brief foray into one of the many pertinent questions in the ongoing AI debate, namely whether the distinctly human aspects of judging will survive this revolution. As one member of the Australian judiciary has observed, judges "are not reasoning machines" (*Hendry v State of Western Australia (No 3)* 2025). But for how much longer?

9 'R v Thomas Mair, Sentencing Remarks of Mr Justice Wilkie'. 23 November 2016.

Judge Richard Posner, formerly of the United States Court of Appeals for the Seventh Circuit, drilled down somewhat controversially into the *je ne sais quoi* of judging, albeit not in the context of AI, saying:

> I pay very little attention to legal rules, statutes, constitutional provisions. A case is just a dispute. The first thing you ask yourself – forget about the law – what is a sensible resolution of this dispute … When you have a Supreme Court case or something similar, they're often extremely easy to get around (Liptak 2017).

So, we might ask, is the nebulous but precious common sense the irreplaceable judicial commodity?

Posner's approach was radical and contradicted the accepted norms of decision making through strict legal analysis. One eminent academic concluded a review of Posner's book *Overcoming Law* by observing:

> I, for one, would cheerfully surrender custody over my fundamental rights and liberties to the supremely reasonable Richard Posner, but I am less inclined to give similar discretion to many of his judicial colleagues (Rosen 1995: 584-596).

And what of compassion? Could *it* be the key trait that survives machine-led thinking? Although "compassion", while a universal value, is not one which is without dispute. The line of authorities relating to the withdrawal of life-support demonstrates that point well. "Compassion" in that context may look different to a utilitarian, a consequentialist, a Catholic, a Muslim or a parent or some combination of those. What "compassion" means to different people and so to different judges will vary.

So much has been written about AI that it is hard to distil succinct thoughts from the plethora of sources. However, recent contributions, such as those of the outgoing Master of the Rolls, have focused on the aspects of judging that may yet be left to human beings (Vos 2026). A view that is gathering support in this context is that judges working in fields involving human interest may find themselves more in demand than ever. One such example is family law, particularly child protection.

There can be no higher stakes in judicial decision making than when judges require to resolve live practical questions between individuals or between the state and individuals. The enormity of the task was articulated persuasively by Nicholas Mostyn J, in a lecture "The Craft of Judging and Legal Reasoning":

> I have tried in child protection proceedings … cases where the issue is whether a parent has deliberately killed a child. In effect in such cases I have sat as a Diplock Court trying a charge of murder. In the light of such findings I have been asked to order, and have ordered,

> forced adoption severing the parental bond. In the Court of Protection I try issues of mental capacity and in the light of the findings have been asked to order, and have ordered, forcible caesareans or amputations. I have been asked to make findings as to the life expectancy and quality of life of seriously ill and damaged babies and adults in support of an application that medical care should be made palliative only and that the person should be allowed to die (Mostyn 2014: paragraph 4).

Transposing that to the current discussion, I find it hard to conceive of such decisions being made by reasoning machines.

When Lady Hale said that judges can and should be human and not alien creatures (2014) the context was not any feared or anticipated destination for AI, it was rather about the need for a judiciary representative of the public it serves. And while the sentiment that judges should have human compassion is a respectable one, the received wisdom is that they must be alert to the dangers of allowing considerations beyond the law to influence their decisions.

In a fascinating book entitled *How Judges Judge*, Brian Barry, an Irish academic, examines several thought-provoking topics on judicial decision making (2021). These include cognitive biases, errors in numerical evaluation, motivated reasoning, emotion and group decision-making effects; uncomfortable concepts for judges even to contemplate, schooled as we are in the fundamental ethos of impartial decision making. But let me pick just one example, that of the role of emotion in judicial decisions. Barry cites examples of judges making statements that appear to go against what he terms the "persistent cultural script" of judicial dispassion. First, there is the statement of an English family court judge who stated "I couldn't read out the judgment; I just had to hand it down in writing" to describe his emotion in a case involving a child being taken away from her young mother. The written judgment itself expressed his sadness and regret at coming to the "wretched" conclusion (his words) that the child should be so removed and anger at the care system that appeared to have let the mother down. And there is a story of a Canadian judge who was seen to dab a tear from her eye when reading a victim impact statement in a sexual abuse case and who was then asked to recuse herself. Refusing to do so she declared that "there is nothing wrong with the court showing emotion" and that demonstrating human compassion was not the same as judicial bias. Academic writers have attacked these and other examples as inappropriate, arguing that to call a judge emotional is "a stinging insult, signifying a failure of discipline impartiality and reason". This single example demonstrates the minefield that is the psychology of judicial decision making, a subject on which I

claim no expertise. Its relevance to the issue of potential for future judicial decision making may be to consider whether, properly channelled, the human aspects of judging may yet be our "USP".

It seems to me that taking care to discount personal bias should not deprive judges of empathy where appropriate, even at the highest level of decision making. In a short but impressive biography of the late Lord Rodger, the point is neatly articulated. Remarking on the sensitivity Lord Rodger displayed in his searching remarks about whether and how a tribunal could measure the suffering which a gay man would find reasonably tolerable in the case of *HJ (Iran) v Secretary of State for the Home Department* (2010), David Johnston KC records that this was a judge who brought innate human sympathy to his judicial work in addition to meticulous legal analysis (2015).

So, how will the twenty-second century judge navigate this quagmire? If reasoning by deduction, induction and analogy can all be performed perfectly well by AI, will it be the peculiarly human elements that will continue to justify our existence as decision makers? Discussions about these elements within judicial decision making are hardly novel; they pre-date the current explosion of contributions on judging and AI. In 1999, Michael Kirby the esteemed Australian jurist and academic, put it this way;

> Decision-making in any circumstance is a complex function combining logic and emotion, rational application of intelligence and reason, intuitive responses to experience, as well as physiological and psychological forces of which the decision-maker may only be partly aware (Kirby 1999: 21).

The discussions about replacing judges with AI bots are redolent in some ways of the debate that took place during the Covid-19 pandemic. The courts quickly adapted to online hearings, so that the business of judicial decision making could continue. In some quarters, Scotland being one, this was considered so successful that questions arose about whether the need for in-person hearings could be dispensed with in the longer term. Many of us felt that ignored the importance of the sense of place that courts and human judges provide when dispensing justice. In his ongoing work about courtroom movement, James Campbell at Oxford draws on legal architecture scholarship in describing the space that we call a courtroom as "the setting for a ballet previously choreographed but yet to be performed". Using Court 1 in the Court of Session in Edinburgh as the paradigm, Campbell examines the court's innovations such as the embracing of livestreaming its hearings. He comments that:

> this push for transparency through technology is admirable and may go some way towards demystifying the arcane. Alternatively, it may simply disseminate the arcane to a wider audience (2027 forthcoming).

Either way, it seems to me that if we jettison those publicly recognizable and well understood aspects of the art of judging we do so at our own peril and that of the as yet unborn twenty-second century judge.

Human impact hearings within public inquiries such as the Post Office and Infected Blood Inquiries are good examples of the aspects of judicial work that investigate much more than the rights and wrongs of a system or incident. They require a human face.

So, having made significant progress towards blending technology into the important physical space of the courtroom, just how looming is the threat that human judges won't be occupying it? We must be live to the extent to which AI might supplant judicial decision making as opposed to providing assistance with it. Returning to Barry, in concluding his work by examining the case for and against AI judges replacing the human kind in future, he acknowledges that such judges will be able to produce good quality judgments, more efficiently and accessibly than their current human counterparts. But this is balanced by the view that justice is not just a product, it is also a process. He states:

> Many litigants crave the sense that they have been listened to, that they have had their day in court and that they have participated in a civic exercise under the watchful eye of the public (Barry 2021: chapter 8).

That reflects, I suspect, the experience of most of those of us who have spent their professional lives in the courts.

There are recurring themes in considering the privileges, pitfalls and potential of and for the judiciary; as in so many walks of life we can learn from past mistakes. I want to conclude this survey of twenty-first century judging with an optimistic word directly to those of the century to come. To paraphrase the enduring words of Mark Twain, I am confident that rumours of your anticipated demise are being greatly exaggerated.[10]

Thank you for listening.[11]

[10] "Reports of my death have been greatly exaggerated", attributed to Mark Twain in the *New York Journal*, 2 June 1897.

[11] And my thanks to Andrew Ratter, Law Clerk to the Inner House of the Court of Session, for his assistance with some of the background research for this paper.

About the author

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Lady Wise served as one of the two Family Court judges in the Court of Session prior to her appointment to the Inner House in January 2022. She continues to chair the Family Law Committee of the Scottish Civil Justice Council and has been an International Hague Network Judge since 2017. Lady Wise has been President of the Scottish Tribunals since 1 May 2023. In 2025 she was appointed as an ad hoc judge of the European Court of Human Rights in Strasbourg. See also her profile page.

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