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Justice Shortchanged? Redrawing the Ethical Boundaries of Lifted Judgments Following *Crinion v IG Markets Ltd* [2013] EWCA Civ 587

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ABSTRACT

In the course of their work judges quite often expose themselves to criticisms. Implicit in these critiques is the expectation that responsible judicial writing should not only be encouraged but required as an ethical obligation. In composing their own legal analysis, judges are expected to have critically deliberated upon the issues in dispute from a neutral perspective. Where a judgment significantly replicates the prose of one litigant, regardless of whether the source is acknowledged, the other litigant would be justifiably indignant with the failure of the judge to devote sufficient thought to his position, notwithstanding the merits of said judgment. This paper will attempt to make the case for the imposition of a duty on the bench not to plagiarise the language of the victorious litigant and to advocate for a "functional approach" to deal with instances of unbridled judicial copying.

Keywords: judicial plagiarism; judgment writing; duty to provide reasons; judicial ethics; functional approach

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I. Introduction

We skim off the cream of other men's wits,
pick the choice flowers of their tilted gardens
to set out our own sterile pots.
Robert Burton[1]

From the annals of the seventeenth century, adjudication by impartial and independent judges has been recognized as one of the cornerstones of civil society.[2] Unlike the medieval epoch where the monarch could summon a judge to compel him to account for his actions,[3] judges of the present demonstrate their independent thought process through their judgments. A judgment goes beyond the performance of a bureaucratic function – the supply of judicial reasons is essential to "the establishment of fixed intelligible rules and for the development of law as a science".[4]

When a huge portion of partisan submission is "lifted" to form the crux of a judge's reasons, allegations of bias and partiality will inexorably surface. A lifted judgment is broadly understood as the incorporation of the submissions of one party in whole or in part as the judge's own reasoning without addressing the central arguments raised by the other party or explaining why those arguments were rejected.[5] The audience that a judgment serves needs to understand how the judge analysed the factual circumstances of the case and applied the law accordingly. A lifted judgment either defeats or diminishes these expectations.

Part II of this Article discusses the purpose of judgment writing and the judicial duty to provide reasons. This segment goes further to explore how the courts have dealt with judgments that divulge little to no judicial reasoning, otherwise known as non-speaking judgments.[6] Part III of this Article attempts to illustrate the paradox between lifted judgments and the ethics espoused in the Guide to Judicial Conduct[7] with extensive reference to the leading Court of Appeal decision in *Crinion v IG Markets*.[8] This segment points out the flaws in

1 Robert Burton, *The Anatomy of Melancholy* (Floyd Dell and Paul Jordan-Smith eds, Tudor 1948) 18.

2 John Locke, *Two Treatises of Government*, Book II (Black Swan, 1690) at para 4. On the discussion of Locke's theory, see Peter H. Russell, *The Third Branch of Government* (McGraw-Hill Ryerson, 1987) 20–21.

3 *O'Reilly v Mackman* [1983] 2 AC 237, 252.

4 Herbert Broom, *Constitutional Law Viewed in Relation to Common Law, and Exemplified by Cases* (2nd edn, Maxwell 1885) 147–148.

5 See generally, *Williams v Solicitors Regulation Authority* [2017] EWHC 2005; *Crinion v IG Markets Ltd* [2013] EWCA Civ 587; [2013] C. P. Rep. 41; *English v Royal Mail Group Ltd* (2008), UKEAT/0027/08.

6 *Joinery Plus Ltd (in administration) v Laing Ltd* (2003) 87 Con LR 87; *Soleimany v Soleimany* [1999] QB 785.

7 Courts and Tribunals Judiciary, 'Guide to Judicial Conduct' (March 2020) <https://www.judiciary.uk/wp-content/uploads/2020/03/Guide-to-Judicial-Conduct-Guide-Fourth-Amendment-2020-v3-1.pdf> accessed 20 June 2021.

8 [2013] EWCA Civ 587; [2013] CP Rep 41.

Crinion and argues that it is irreconcilable with the key principles enumerated in the Guide. It concludes with the assertion that a lifted judgment is unethical and poses serious detriment to public confidence in the judiciary. Part IV of this Article calls for a "functional approach" to be preferred over the minimalist prose endorsed in *Crinion* when dealing with instances of extensive judicial copying and proposes an addition to the Guide to clarify the permissible boundaries of judicial copying.

II. Why Write Judgments

To a great extent, the common law has evolved out of swashbuckling advocacy and at the expense of litigants, rankling courtroom dramas.[9] As the stage is set for a contest of averments, the advocates representing their respective clients inject every available strand of learning, suave, persuasion and sometimes emotion in their painstaking attempts to weave an ironclad case. All of these unfold before the bench – justices who are bestowed with the mandate to resolve the dispute by seeking for answers necessary to justify and achieve a fair outcome. Upon hearing arguments from both sides and admitting all relevant evidence, a decision is eventually rendered in the form of a written judgment that encapsulates much of the legal discourse and signifies the culmination of judicial deliberation.[10]

An authoritative judgment can only be rendered if its author is mindful of the purposes of writing.[11] The judgment that entails after a usually protracted dispute is etched into the institutional memory of the court and becomes the law. At the heart of the English legal system is the adversarial nature of proceedings that has existed since time immemorial, and judgments are written to apprise the litigants of "who has won and why".[12] In addition to being a healthy discipline for those who exercise powers that are capable of causing vast harm to others,[13] a written judgment is a vehicle by which the judiciary elucidates, expounds upon and creates rights for the citizenry.[14]

Many arguments can be advanced in support of judgment writing, the most obvious reason being the practice of law is traditionally grounded in literary works. "Most law professors, judges and practicing lawyers devote considerable effort to researching the law and composing a variety of legal writings, including law

9 John D. Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 LQR 205, 213.

10 *Re B (A Minor)* [1990] 1 FLR 344, 347.

11 James Wilson and Alexander Horne, 'Judgment Matters' (2010) 160 (7446) New Law Journal <https://www.newlawjournal.co.uk/content/judgment-matters> accessed 11 June 2021.

12 ibid. Also see *Meek v City of Birmingham District Council* [1987] IRLR 250; *R v Knightsbridge Crown Court Ex p International Sporting Club (London) Ltd* [1982] QB 304; *R v Harrow Crown Court Ex p. Dave* [1994] 1 WLR 98.

13 ibid 9, at 211.

14 Gerald Lebovits, Alifya V Curtin and Lisa Solomon, 'Ethical Judicial Opinion Writing' (2008) 21 Georgetown Journal of Legal Ethics 237, 244.

journal articles, client memoranda, appellate briefs and legal opinions".[15] The legal significance of judgment writing lies in the coalescence of a variety of sources ranging from knowledge of various factual and legal issues to the proper application of primary and secondary legislation, precedents, evidential matters and other pertinent sources of authority.[16] One only has to take a cursory glance at the contents of a judgment to realise that these are indispensable literatures in the academy of legal writing.

Written judgments have been described as necessary to "constrain judges and promote accountability in the resolution of real world disputes".[17] Writing a judgment impels the judge to exert intellectual discipline on themselves, which in turn reinforces judicial deliberation to the effect that the ultimate decision is derived from reasoned judgment and thoughtful analysis over an arbitrary exercise of judicial authority.[18] For those aggrieved by the trial court's decision and seek to contest those findings before an appellate court, a meaningful appellate review can only be established if the first instance judgment discloses salient grounds of appeal to enable the higher courts to clarify certain issues of law which may yet remain unclear.[19] Although no one savours the prospect of being shown to have erred,[20] the "disinterested application of known law"[21] necessitates the removal of injustice alleged by the contender.[22]

Interwoven with the crafting of judgments is the judicial duty to give reasons for such duty forms the "building blocks of the reasoned judicial process".[23] As the apothegm goes, a judge should not speak but his judgment should.[24] While a judgment is primarily written for the litigants, it does not follow

15 Carol M. Bast and Linda B. Samuels, 'Plagiarism and Legal scholarship in the Age of Information Sharing: The Need for Intellectual Honesty' (2008) 57 Cath. U. L. Rev. 777, 793.

16 Naida Haxton, 'Editing Judgments: Lessons Learned in Law Reporting' (2007) 57 Clarity <https://minio2.123dok.com/dt02original/123dok_es/original/2019/01_24/vrqr1m1579237240.pdf> accessed 11 June 2021.

17 Jeffrey L. Dunoff and Mark A. Pollack, 'Experimenting with International Law' (2017) 28(4) EJIL 1317, 1338. Similarly, see Roman N Komar, *Reasons for Judgment* (Butterworths 1980) 9. Cf Alfred Denning, *Freedom Under the Law* (Stevens & Sons 1949) 91–92.

18 See generally Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co 1960) 13, 26, 56.

19 Andrew Bainham, 'Judgment: Whose Responsibility is it?' (2019) Fam Law 849, 851 (note).

20 ibid. Also see *Re L-B (Reversal of Judgment)* [2013] UKSC 8, [2013] 2 FLR 859 at [46] where Baroness Hale commented on the situation where a judge recognises that an error has been made: "it takes courage and intellectual honesty to admit one's mistakes".

21 A phrase coined by Louis L. Jaffe, *English and American Judges as Lawmakers* (Oxford University Press 1969) 13 when describing the function of a judge.

22 Lord Devlin, 'Judges and Lawmakers' (1976) 39 MLR 1, 3.

23 *Glicksman v Redbridge Healthcare NHS Trust* [2001] EWCA Civ 1097, (2001) 63 BMLR 109 at [11]. It is only a general rule that reasons need to be given. For exceptions to the general rule, see, for example, *Capital and Suburban Properties Ltd v Swycher* (1976) Ch. 319; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] 1 AC 191 and *R v Harrow Crown Court Ex p. Dave* [1994] 1 WLR 98.

24 Judges Matter, 'Judges Speak Through Their Judgments' (23 September 2019) <https://www.judgesmatter.co.za/opinions/judges-speak-through-their-judgments/> accessed 13 August 2021. In a 2012 lecture, Lord Neuberger stated that: "Without judgement there would be no justice." See Lord Neuberger, No Judgment – No Justice (First annual BAILII Lecture, 20 November 2012) <https://www.bailii.org/bailii/lecture/01.pdf> accessed 13 August 2021.

that the litigants are the sole consumers of the judgment. Judges also write for the public and for professionals including other judges, lawyers, academic scholars and law students.[25] At the broadest level of public accountability, a requirement that judges give reasons for their decisions – grounds that can be debated, attacked and defended – is fundamental to the legitimacy of the judicial institution in the eyes of the public.[26] As Lord Denning explained:

> [I]n order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen, if the judge himself states his reasons.[27]

Recent authorities from the Court of Appeal have equated a non-speaking judgment as an error of law that warrants appellate intervention.[28] Illustrating the sanctity of the judicial duty to provide reasons, Neill LJ in *Re L (Minors)* went as far as holding that a non-speaking judgment was "defective" and ordered a retrial of the matter before another judge,[29] as did Males LJ in *Simetra Global Assets v Ikon Finance*.[30] The exigency that the modern courts have placed on the expression of intellectual substrate and the disdain for reticence mark a tectonic shift from the stance of their predecessors especially if one recalls that Lord Mansfield, at one time was audacious enough to advise: "[N]ever give your reasons; – for your judgment will probably be right, but your reasons will certainly be wrong."[31]

III. Lifted Judgments—A Stain on Judicial Ethics

Most judges strive to be fair and appear to be fair so that the litigants walk away satisfied that they were fully heard, their positions were fully considered, and the pertinent rules were applied properly throughout the proceedings.[32] These considerations run like a golden thread throughout the legal system and is

25 Mary Kate Kearney, 'The Proprietary of Poetry in Judicial Opinions' (2003) 12 Widener Journal of Public Law 597, 601.

26 David L. Shapiro, 'In Defense of Judicial Candor' (1987) 100(4) Harvard Law Review 731, 737.

27 Alfred Denning, *The Road to Justice* (Stevens & Sons 1955) 29.

28 *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] 4 WLR 112 at [39]; *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at [19]; *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377, 381–382.

29 (CA, 30 January 1991).

30 ibid 28 at [8]. It must however be stated that a retrial is an expensive step in the judicial process and is rarely granted, see *Lai Wee Lian v Singapore Bus Ltd* [1984] 1 AC 729 at 741: "Thus, if the only conclusion open on the evidence trial was the conclusion reached by the trial judge, then, notwithstanding an inadequate statement of reasons, the matter need not go to a new trial."

31 John Campbell, *The Lives of the Chief Justices*, vol 3 (James Cockcroft & Co 1873) 481.

32 This point was more eloquently stated by Sir Robert Megarry: "One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process. See Robert Megarry, 'Temptations of the Bench' (1998) 16 Alta. L. Rev. 406, 410.

especially discernible in the first instance courts where interaction between judges and litigants occur more readily. [33] It is easy to overlook them when a judge becomes unduly immersed in the proceedings before them or have made up their mind prior to full argument from counsel,[34] for why else an author would deem judicial neutrality as a myth?[35] The scale of such anxiety, though unlikely to be widespread, wields considerable persuasion especially when a judgment is 'lifted' verbatim from a partisan submission while neglecting the core arguments of the other. Understandably, such instance would engender apprehensions that the judge was an unreliable agent of justice who could not be trusted to carry out their constitutional obligation *erga omnes*.

A lifted judgment can be aptly described as judicial plagiarism.[36] Bereft of the judge's independent analysis and contribution, a judgment may appear to be skewed in favour of the party whose submissions were adopted or may at the very least suggest that the judge's mind was shut to the arguments of the losing party.[37] Even if the lifted judgment represents the judge's true thinking, it reflects poorly on the administration of justice.[38] The Guide to Judicial Conduct underscores three distilled principles from the Bangalore Principles of Judicial Conduct[39] that form the essence of judicial ethics – judicial independence, impartiality and integrity.[40] In particular, a judge is expected to display "intellectual honesty"[41] and to "avoid situations which might reasonably reduce respect for judicial office or might cast doubt upon their judicial impartiality".[42] It is difficult to see how a judge who plagiarises the winning submission without any independent thought can be said to have upheld their "Hippocratic" oath of ethics. To argue otherwise would be tantamount to blowing hot and cold.

However, the Court of Appeal in *Crinion v IG Markets Ltd* was reluctant to accept that plagiarism and judicial ethics are mutually exclusive.[43] The gist of the dispute is one of enforceability of debt, yet it is unlikely to be overly significant from a commercial vantage. In a nutshell, *Crinion* is one of the few ironies in

33 Simon Stern, 'Copyright Originality and Judicial Originality' (2013) 63 UTLJ 385, 386.

34 Lord Diplock, for example, was characterised as someone who prepared for oral hearings very thoroughly to the extent that it was not unusual for him to have made up his mind before a hearing. See Alan Paterson 'Does Advocacy Matter in the Lords?' in James Lee (ed), *From House of Lords to Supreme Court Judges, Jurists and the Process of Judging* (Hart Publishing 2011) 257. At p.258, Lord Hope, recalling his days as a barrister appearing before Lord Diplock, said: "He didn't allow arguments to develop that he thought had nothing in them … and really cut you short."

35 Kathleen E. Mahoney, 'The Myth of Judicial Neutrality' (1996) 32 Willamette L. Rev. 785, 788.

36 *Williams* (n 5); *Re S* [2015] EWCA Civ 1015; [2016] 2 FLR 965; *Crinion* (n 5); *English* (n 5).

37 ibid 33, at 393.

38 Per Sir Stephen Sedley in *Crinion* (n 5) at [39].

39 United Nations, 'The Bangalore Principles of Judicial Conduct' (2002) <https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf> accessed 20 June 2021.

40 ibid 7.

41 ibid.

42 ibid.

43 *Crinion* (n 5).

English common law that starts off being about one thing only to end up being about quite another – the fashion in which the trial judge opted to draft his reasons. While much displeasure was expressed against the etiquette of "cut-and-paste",[44] the court ultimately affirmed that a minimalist judgment was neither defective nor capable of giving rise to injustice that justifies appellate intervention.[45] The test formulated by Underhill LJ was "whether the judge properly addressed" the contentions of the losing side,[46] without further explanation or illustration on judicial propriety. The judgment rendered by His Lordship, read in entirety, suggests that so long as the judge provides a brief analysis to show that the conclusions derived were not the product of a purely mechanical act, the judge would have discharged his or her judicial duty to provide reasons, notwithstanding that the said judgment was premised unilaterally on one side.

It is certainly regrettable and unfortunate that the court in *Crinion* did not attempt to make any reference whatsoever to the Guide to Judicial Conduct in its decision. The Guide is the closest paraphernalia that judges have to a code of conduct without it actually being one.[47] It is not every day that an opportunity presents itself to the court which begets adjudication on judicial ethics. When the court does get such opportunity, one can almost expect the main non-jurisprudential source on the topic of judicial ethics in the United Kingdom would be cited. Hence, the omission in *Crinion* is patently disappointing because reference to the Guide would have prompted the court to further explicate the ethical principles at play and perhaps even encourage future courts to steer clear of certain prose and terminology.[48]

By contrast, Pauffley J of the Family Court in *Re L (A Child)* drew explicit attention to two out of the three principles ventilated in the Guide – independence and impartiality.[49] "It is difficult to view the justices as having been independent and impartial if, as happened here, [the court] simply adopted the local authority's analysis of what their findings and reasons might comprise."[50] Although Her Ladyship made no mention of the Guide *per se*, the relevant passages are nevertheless *in pari materia* with those principles enumerated in the non-

44 ibid, per Underhill LJ at [16] and Sir Stephen Sedley at [40].

45 ibid, at [17].

46 ibid, at [36].

47 ibid 7, at 4. The opening remarks sets out the purpose of the Guide, that is "to offer assistance to judges, coroners and magistrates about their conduct. It is based on the principle that responsibility for deciding whether or not a particular activity or course of conduct is appropriate rests with each individual judge." The remarks further stipulate that the Guide is "not a code, nor does it contain rules other than where stated. Instead, it contains a set of core principles which will help judges reach their own decisions."

48 Nothing more than a general remark was made by Sir Stephen Sedley, who stated at para 46: "I hope that a judgment like the one now before us will not be encountered again."

49 [2014] 1 WLR 2795.

50 ibid, at [68].

jurisprudential text. Furthermore, Her Ladyship thought that "it is fundamental that nothing is sent to the judge by one party unless it is copied simultaneously to every other party" in order to secure fairness to the parties.[51] A quick glimpse at the Guide reveals that exercising equality and fairness of treatment are part of the ethical principle of integrity.[52]

Turning back to *Crinion*, the message that the Court of Appeal is sending to judges is something along the lines of: "lifted judgments will be tolerated so long as you have properly addressed the case, the issues and the evidence bearing on the losing party.[53] Avoid extensive plagiarism though, as recriminations of bias and misconduct may arise more readily." Ultimately, the line that demarcates acceptable copying from inexcusable copying is extremely opaque.[54] There seems to be a tacit acceptance that judges may copy when counsel's submissions are of such quality that rewriting the reasoning and conclusions in the judge's own words would be such a waste of time.[55] In deciding as it did, the court in *Crinion* essentially preferred a lackadaisical approach to intellectual honesty – that judges, when delivering their judgments, are permitted to "fill up the empty vessel" first before deciding whether to engage in an elaborated disquisition of empirical analysis.[56]

Intellectual honesty, along with coherence and critical rigour, is a normative heritage of judicial ethics and discipline.[57] It is on this point that the court in *Crinion* left much to be desired. While lifted judgments may convey the extent of confidence that a judge holds in counsel's submissions,[58] this argument is fundamentally flawed and untenable because its inquiry is too limited. Suppose a judge is neither partial towards the winner or biased against the losing party, but instead lacked the requisite sophistication or conscientiousness to fully comprehend a particularly complex and protracted dispute. The matters arising from the dispute have never been adjudicated before and there are no established precedents. After hearing submissions from both sides, the judge delivers a judgment that reproduces a significant portion of counsel's submissions, making only inconsequential changes that afford little to no insight into the judge's own

51 ibid, at [67].

52 ibid 8, at 7.

53 *Crinion* (n 5).

54 See *English v Royal Mail Group Ltd* (2008), UKEAT/0027/08 where a verbatim reproduction of the respondents' submissions that completely ignored the appellant's submissions rendered the judgment of the Employment Tribunal fatal.

55 *Crinion* (n 5). For example, in para 5, Underhill LJ described the submissions of the counsel for the winning party as "thorough and carefully structured" and commended those submissions as "an excellent piece of work".

56 ibid. At para 16, Underhill LJ admitted that: "a judge will often derive great assistance from counsel's written submissions, and there is nothing inherently wrong in making extensive use of them, with proper acknowledgement, whether in setting out the facts or in analysing issues or the applicable legal principles or indeed in the actual dispositive reasoning."

57 ibid 25. In his article, Shapiro argues that all cooperative undertakings would be difficult or impossible in the absence of truthfulness.

58 ibid 55.

reasoning process. Surely, the lack of competence that the judge had ostensibly demonstrated cannot be said to be an exemplar of intellectual honesty. The courts frequently peddle the notion that justice must not only be done but must be seen to be done,[59] yet it is difficult to see how justice can be seen to be done in the scenario envisioned in light of the minimalist approach laid down in *Crinion*.[60]

Lurking beneath the rationale for minimalism is perhaps the apprehension of imposing more burden on judges who have very little control over their workload and that limited judicial resources would be further strained by meritless appeals based on make-weight allegations.[61] However, this burden must not be overstated for judicial accountability and the ethics of judgment writing seek "basic fairness, not perfection, and does not justify an undue shift in focus from the correctness of the result to an esoteric dissection of the words used to express the reasoning process behind it."[62] The pressure upon modern judges at both first instance and on appeal cannot be said to be greater than that of their forebears, even more so if one considers that judges of today are all accorded with the latest research apparatuses. An ethical judgment – one that encompasses independence, impartiality and integrity – need not be a lengthy judgment.[63] In fact, brevity is key to an authoritative and trenchant legal reasoning,[64] and at the same time allows judges to dispose their cases promptly.

In the end, practical realities support the conclusion that judicial plagiarism and ethical judgment writing simply cannot coexist. Whether the courts attract public support or criticism hinges on the quality of their reasons. The judicial duty to provide reasons can only be said to have been genuinely discharged if the reasons given truly reflect the views of the judge. Where the duty is largely circumvented as was the case in *Crinion*, the inequity that entails will prove difficult to be righted. In consonance with the right to fair trial[65] where decisions on litigated cases are neither submitted to nor blessed at the ballot box,[66] a plagiarised judgment bears the hallmark of a poisoned judgment, and a judge that projects such obvious moral turpitude inevitably drags the reputation of the bench into declension.

59 *R v Sussex Justices Ex p. McCarthy* [1924] 1 KB 256, 259. See also, *Cape Intermediate Holdings Ltd v Dring* [2020] AC 629; *Bank Mellat v HM Treasury* [2014] AC 700; *R v Abdroikov* [2007] 1 WLR 2679; *Porter v Magill* [2002] 2 AC 357; *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.2)* [2000] 1 AC 119.

60 Like Megarry once said: "To be condemned without being understood is as bad as being condemned unheard." See Robert Megarry, *Lawyer and Litigant in England* (Stevens & Sons 1962) 135.

61 ibid 33, at 390.

62 *R v Sheppard* [2002] 1 SCR 869, at [60].

63 Ward LJ was instructive on this point in *Baird v Thurrock Borough Council* [2005] EWCA Civ 1499 and opined: "Short judgments are, of course, all fine and well and to be encouraged but only if they are careful judgments."

64 ibid 8, at 215.

65 *English v Emery* (n 28) at [19]; *Anya v University of Oxford & another* [2001] IRLR 377 at [12]. For a broader overview of the jurisprudence of Article 6 of the European Convention of Human Rights, see *Garcia Ruiz v Spain* (2001) 31 EHRR 589; *Helle v Finland* (1997) 26 EHRR 159.

66 *Sheppard* (n 62), at [5].

IV. An Alternative to the Minimalist Prose

Judgment writing is said to be "public writing of the highest order".[67] The question that must be asked is what do we expect of a judge? An appropriate response would be that ethical judgment writing intertwines style and substance,[68] and it is impossible to prescribe a formula of rigid methodology for crafting the perfect judgment.[69] While our expectations on the depth and precision of the judge's independent analysis must be guided by pragmatism over quixotism, it would not be unreasonable to demand that the judge's own imprimatur on the law,[70] at the most rudimentary level, must have explored both sides to a dispute and be capable of explaining to its audience where justice lies.[71]

For clarity, this paper neither attempts to endorse nor extol the idea of judicial originality. The underlying principle of *stare decisis* makes it impractical and undesirable to impose an originality requirement on the enterprise of judgment writing.[72] As one author puts it – "it is only the arrogant fool or the truly gifted who will depart entirely from the established template and reformulate an existing idea in the belief that in doing so they will improve it."[73] Drawing on Canadian jurisprudence, what is required instead is a "functional mechanism" that can determine whether the alleged deficiencies in reasons that a judgment contains effectively deprive a party of meaningful appellate review.[74] If the conclusion is in the affirmative, it follows that an error of law has been committed which warrants appellate intervention, and *vice versa*.[75]

The starting point for consideration would take into account a list of comprehensive factors including (1) the complexity of the dispute; (2) did the judge fully understand the intricacies of the dispute; (3) did the judge derive any assistance in drafting his or her findings;[76] (4) the extent of the judge's copying and what was copied;[77] (5) any significant inconsistencies or conflicts in evidence

67 ibid 14, at 237.
68 ibid, at 238.
69 ibid.
70 ibid, at 249.
71 ibid, at 309.
72 Co Litt 97b.
73 Duncan Webb, 'Plagiarism: A Threat to Lawyers' Integrity?' (*International Bar Association*, 2009) <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=bc2ef7cd-3207-43d6-9e87-16c3bc2be595> accessed 26 June 2021.
74 *Sheppard* (n 62), at [25]
75 ibid.
76 *Virdi v Law Society (Solicitors Disciplinary Tribunal intervening)* [2010] 3 All ER 653. The Court of Appeal found that assistance rendered by the clerk to the tribunal in drafting their written findings was not *ultra vires* as the tribunal had no power to reconsider their decision.
77 *Re S* (n 36). 20% of the material in the judgment of first instance court which was taken verbatim or near verbatim from the skeleton arguments and written materials submitted by the parties was not serious enough to be appealed.

which are not addressed in the judgment;[78] (6) did the judge devote sufficient attention to the arguments of the complainant;[79] (7) whether the judge failed to take into account any material consideration or gave consideration to any immaterial circumstance;[80] (8) whether the judge clearly explained his preference for one case over the other;[81] (9) whether the copied text is supported by appropriate citations or up-to-date legal authority;[82] (10) did the judge deliberate or distinguish competing cases cited;[83] (11) any informal arrangement that might exist between the court and a litigant;[84] (12) any other intrinsic or extrinsic factor relevant to the determination of the exercise of independent analysis by the judge.

The multifactorial approach suggested above gives judges some leeway in preparing their judgments in that it is not a fine-tooth comb that sets an extremely lofty threshold of writing that reads as a work of art in itself. At the same time, the clemency granted to judges is not too lenient as to enable them to abdicate their core responsibility and to delegate the burden and cost of judgment writing to the parties. Where plagiarism is alleged, be it an unattributed inclusion of one paragraph or ten paragraphs dissipated sporadically throughout a 50-page long judgment or at a rate slightly below the 94% similarity level condemned in *Crinion*,[85] not all factors will be material and the weight assigned to the relevant factors may vary according to the facts of the dispute.

Returning to *Crinion*, the prospect of the impugned judgment being set aside is highly plausible had it been appraised against the list of factors detailed above. Of the 14 issues disputed, the trial judge did either one of these – made zero reference to the arguments ventilated by the defendant's counsel,[86] gave no reason as to why those arguments were rejected,[87] or substantially lifted passages from the claimant's submissions with extreme paucity of his own reasoning.[88] More egregiously, the "properties" segment of the electronic copy of the judgment readily revealed the author as counsel for the claimant.[89] Where the Court of Appeal was willing to overlook this mischief and to accept the minimalist prose of the first instance judge, this would not be palatable under the functional approach.

78 *Sheppard* (n 62) at [28].

79 *English* (n 5). A verbatim reproduction of the respondents' submissions that completely ignored the appellant's submissions rendered the judgment of the Employment Tribunal fatal.

80 *Re B* (n 10) at 347.

81 *Flannery* (n 28) at 382.

82 *Cojocaru v British Columbia Women's Hospital and Health Centre* [2013] 2 SCR 357 at [36]. The Canadian Supreme Court agreed with the view that a failure to attribute outside sources should be discouraged.

83 *Crinion* (n 5) at [17].

84 *Re L* (n 49). Pauffley J observed that in order to secure fairness to the parties and the perception that justice will be done, it is fundamental that nothing is sent to the judge by one party unless it is also circulated to the other party.

85 *Crinion* (n 5), at [11].

86 See generally, *IG Markets Ltd v Crinion* [2012] EWHC B4 (Mercantile).

87 ibid.

88 *Crinion* (n 5).

89 *Crinion* (n 5), at [11].

The ten cardinal factors call for a contextual and holistic consideration of all the circumstances which may have a bearing on the suggestion that the judge had indeed copied a partisan submission blindly and whether a fair-minded and informed observer would conclude that the judge had effectively abdicated his or her responsibility as a result of the copying.

In addition to the functional mechanism, this paper proposes that the following paragraph be inserted into the Guiding Principles of the Guide to Judicial Conduct that forms the wider notion of integrity:

> Judges are the official bearers of public trust and confidence in the courts. Therefore, the judgments that they write are held to high ethical standards. Judges must undertake intensive finding of fact and conclusion of law before arriving at a decision. A judge must not engage in extensive copying of partisan submissions and must ensure that no important evidence or argument from the other side is overlooked. Where a judge decides to borrow language from sources other than his own, the judge must do it in a way that does not foreclose a party of meaningful appellate review and must ensure that proper attribution is given. A judgment that fails to acknowledge borrowed language is a judgment lacking in integrity and reflects adversely on the ethics of the judiciary.

The inclusion of this proposed paragraph is not expected to be a silver bullet to every instance of judicial plagiarism, but it will provide a much-needed clarification to judges on the ethical boundaries of "cut-and-paste" judgments. It is not unrealistic to anticipate that a comment addressing plagiarism in the Guide will serve as a salutary deterrent against chameleon writing that adopts the winning litigant's prose and exhibits no distinctive thought or reasoning from the judge.[90] In doing so, this paragraph could pave the way for broaching the subject of lifted language that is often downplayed or goes unnoticed along the corridors of justice.

V. Conclusion

Judges are not rubber stamps that assent to the work of another as a substitute for their own. A superficial observation of the judicial process under the pretence of discharging judicial responsibility does not live up to the ethics and virtues envisioned in the Guide to Judicial Conduct. Construed narrowly, one side of a dispute which has not been given the closest personal attention by the judge

[90] ibid 14, at 249.

renders the judicial process perfunctory.[91] In a cosmos where plagiarism is portrayed as *malum in se*, judges as the guardians of the rule of law are certainly not impervious to the stigma of disregarding this social imperative.

[91] ibid 2, at 211.