

THE POLITICS OF JUDGING

Thomas Grant QC



GRESHAM
COLLEGE

Free **GIANT** map of Britain inside tomorrow



The fencer: Sir Terence Etherton

Worked with Tony Blair: Lord Justice Sales

The Europhile: Lord Chief Justice Thomas

Fury over 'out of touch' judges who defied 17.4m Brexit voters and could trigger constitutional crisis

ENEMIES OF THE PEOPLE

MPS last night tore into an unelected panel of 'out of touch' judges for ruling that embittered Remain supporters in Parliament should be allowed to frustrate the overwhelming verdict of the British public.

The Lord Chief Justice and two senior col-

By **James Slack** Political Editor

leagues were accused of putting Britain on course for a full-blown 'constitutional crisis' by saying Brexit could not be triggered without a Westminster vote.

The judgment by Lord Thomas - a founding member of the European Law Institute, a club of lawyers and academics aiming to 'improve' EU law - throws

into chaos Mrs May's timetable for invoking article 50 in March next year.

Senior MPs - led by an ex-justice minister - said it was an outrage that an 'unholy alliance' of judges and embittered Remain backers could thwart the wishes of 17.4million Leave voters. They warned that Mrs May could be forced to hold an election early next year if the courts did not back down. Leave

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**“If the worst they can say about you is you're an
OPENLY GAY EX-OLYMPIC FENCER TOP JUDGE,
you've basically won life.”**

J.K. Rowling on Sir Terence Etherton MR



“Judicial overreach increasingly threatens the rule of law and effective, democratic government. The project aims to address this problem – restoring balance to the Westminster constitution – by articulating the good sense of separating judicial and political authority. In other words, the project aims to understand and correct the undue rise in judicial power by restating, for modern times and in relation to modern problems, the nature and limits of the judicial power within our tradition and the related scope of sound legislative and executive authority.”

Judicial Power Project

(1) Being a judge is a political act

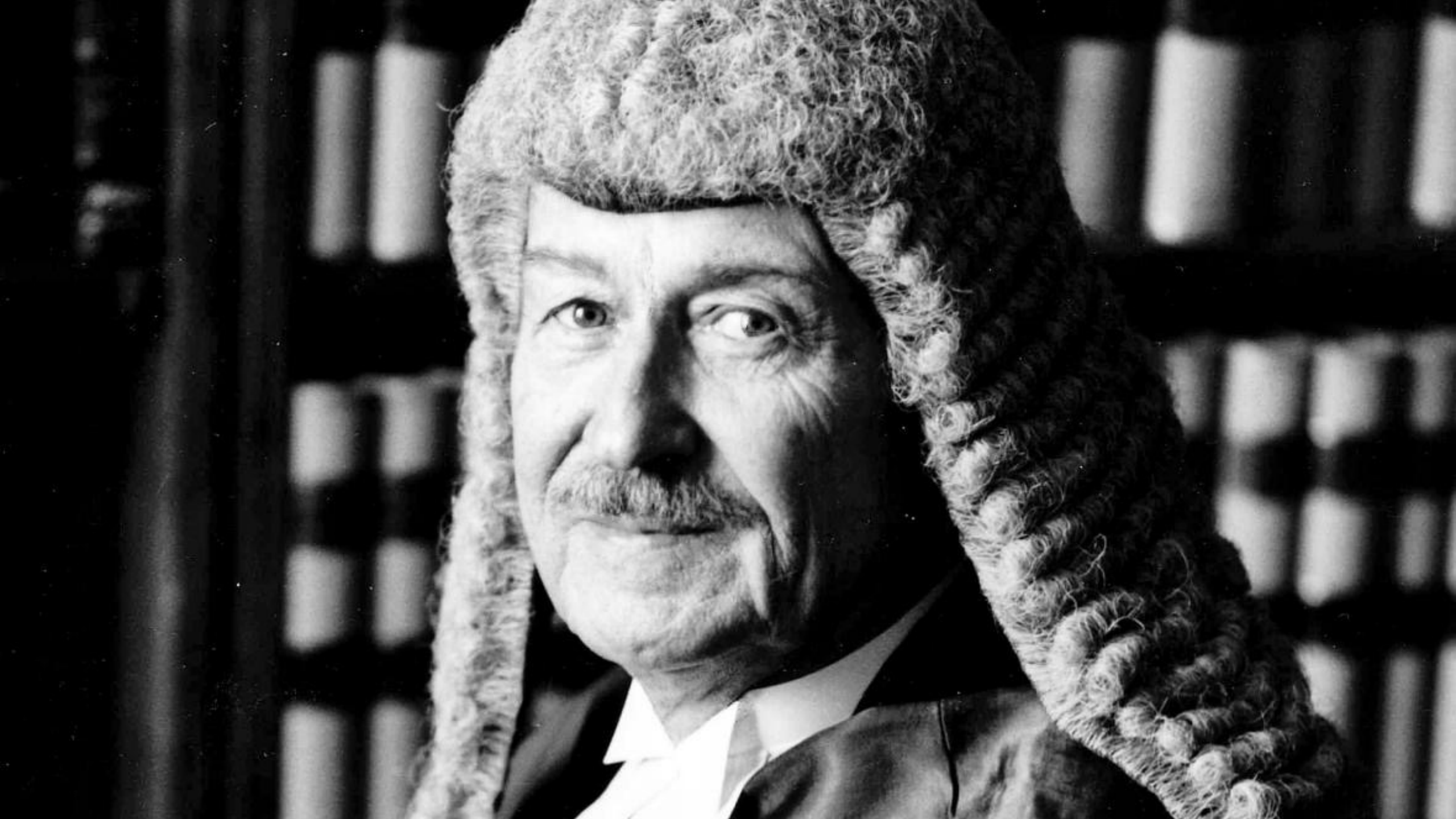
**(2) The politics of deciding whether
or not to be, or remain, a judge**

“The judges’ involvement in the justice system provides a welcome gloss of legitimacy, which is critical to Hong Kong’s continued functioning as an international financial centre, particularly after the draconian national security law imposed by Beijing last year.... There can be no more quiet agreements for the judges to extend their lucrative visiting contracts. With the illusion that they can deliver change from within the new system exploded, they should instead adopt a common position and resign together. They should insist, with one voice, that they will no longer lend their authority to a compromised system, and demand that independent justice be restored to Hong Kong. That would be more than a gesture.”

Times Leader Column

“Calls for the withdrawal of British judges have nothing to do with judicial independence or the rule of law. In reality they are demands that British judges should participate in a political boycott designed to put pressure on the Chinese government to change its position on democracy. It is not a proper function of judges to participate in political boycotts. They will serve the cause of justice better by participating in the work of Hong Kong’s courts.”

Lord Sumption, in response



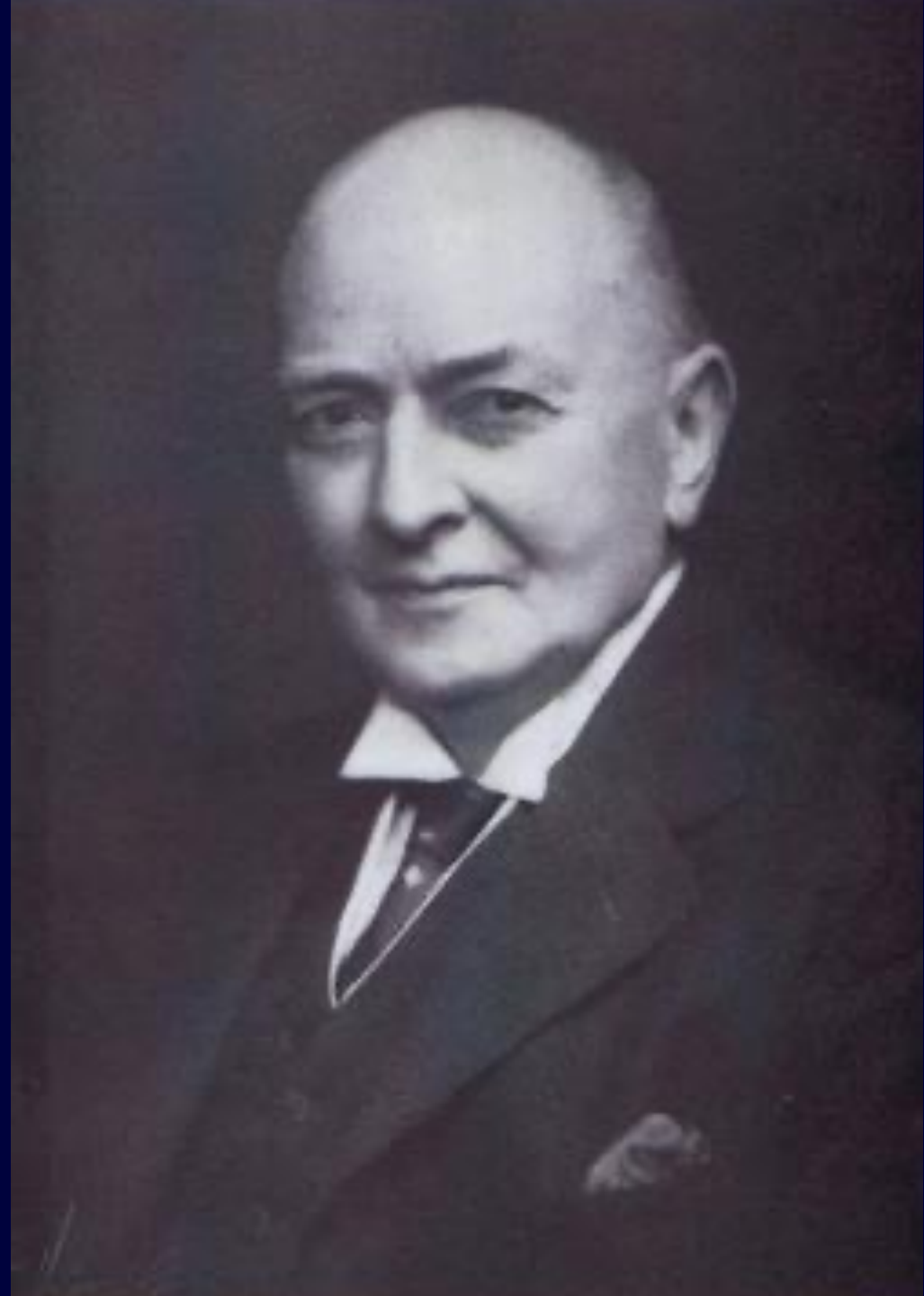
(3) Are our judges over-politicized?

“The Panel consider that the independence of our judiciary and the high reputation in which it is held internationally should cause the government to think long and hard before seeking to curtail its powers

It is inevitable that the relationship between the judiciary, the executive and Parliament will from time to time give rise to tensions. Recent decisions provide a clear illustration of this. On one view, a degree of conflict shows that the checks and balances in our constitution are working well.

Our view is that the government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action. Politicians should, in turn, afford the judiciary the respect which it is undoubtedly due when it exercises these powers.”

(4) Activist or Asleep?



By unknown - Lewis, G. (1983). Lord Atkin. London: Butterworths.

"I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps, in war time leaning towards liberty, but following the dictum of Pollock C.B. in *Bowditch v. Balchin*... : "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute." In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and 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. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I."

Lord Atkin in *Liversidge v Anderson*

“Our tradition has taken the view that the body that ought to have authority to decide what the law should be is Parliament, in part because it represents the community but in part also because it is best placed to change the law wisely and in a way that secures the rule of law.”

“While the courts have had a limited capacity to develop the common law, it is Parliament that has enjoyed the main responsibility for overseeing the content of the law and changing it when required.”

Judicial Power Project