LAW AND POLITICS

Professor Jo Delahunty Q.C.

1. A brief overview of how judicial independence is underpinned by our constitution and law;

2. Cases illustrating that the boundary between law and politics is permeable but there is a boundary;

3. Considers whether political responses (fuelled by reactions of the press and public) to judicial decisions in recent years undermines the unwritten rule that underpins the separation of powers

The Constitutional Reform Act 2005

Key underpinning principles

- **Separation of powers:** **Legislature** (Parliament), the **Judiciary , the Executive** (Government)
- **Judicial independence** ➢ appointments ➢ judgements free from political pressure ➢ location ➢ apolitical judges ➢ head of judiciary > no seat in Cabinet or the Lords

Nolan LJ in **M v Home Office (1993) UKHL5 (1994)1AC377**

'The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the court as to what its lawful province is'

HOW THE JUDICIARY RESPECTS THE BOUNDARY: THREE CASE STUDIES

Airedale NHS Trust v Bland [1993]

The permeability of the law vs politics boundary

- A novel question: in what circumstances, if any, could a doctor lawfully discontinue life-sustaining treatment (including nutrition and hydration) without which a patient in Tony Bland's condition would die?
- Dealt with through the legal distinction between acts and omissions
- But, per Lord Browne-Wilkinson: "**behind the questions of law lie moral, ethical, medical and practical issues of fundamental importance to society.** [...] the law regulating the termination of artificial life support being given to patients must, to be acceptable, reflect a moral attitude which society accepts. **This has led judges into the consideration of the ethical and other non-legal problems raised by the ability to sustain life artificially** which new medical technology has recently made possible"

ANTHONY (TONY) BLAND 21.9.70- 3.3.93. DIED AGED 22 R.I.P

R (Nicklinson) v Ministry of Justice [2014]

That permeability leads to different judgements by different judges confronted by the same facts

- N, L and M suffered from catastrophic physical disabilities but their mental processes were unimpaired. They wished to die but could not end their lives without a third party's assistance. The Suicide Act 1961 s.2 imposed criminal liability on those who assisted suicide.
- A nine-judge court disagreed about whether it would be appropriate to exercise their power to declare s2 incompatible with ECHR under s3 Human Rights Act 1998
- Four of the Justices through this was a moral question which should be left to Parliament.
- Five of the Supreme Court thought the court did have constitutional authority to declare the law incompatible with the Convention right to respect for private life: this includes the right to choose the time and manner of one’s passing.
- Only two of those five would have made such a declaration then and there (Lady Hale and Lord Kerr) .

Lord Dyson expressed the majority view:
“The courts have to concede a very wide margin of judgment to Parliament in a controversial area raising difficult moral and ethical issues such as assisted suicide, and the current law cannot conceivably be said to stray beyond it.

So whilst we accept the submission that the courts cannot refuse to carry out the proportionality exercise even where the case falls within the margin of appreciation, they must adopt a very light touch particularly when dealing with primary legislation. Applying the principles in that way, we have no doubt that as a matter of domestic law the current blanket prohibitions are compatible with article 8.” [my emphasis]

A and Others v Home Secretary [2004]

That variety in judgements is the result of an *excess* of care over policing the boundary (and the consequent variety in conceptualisations of it)

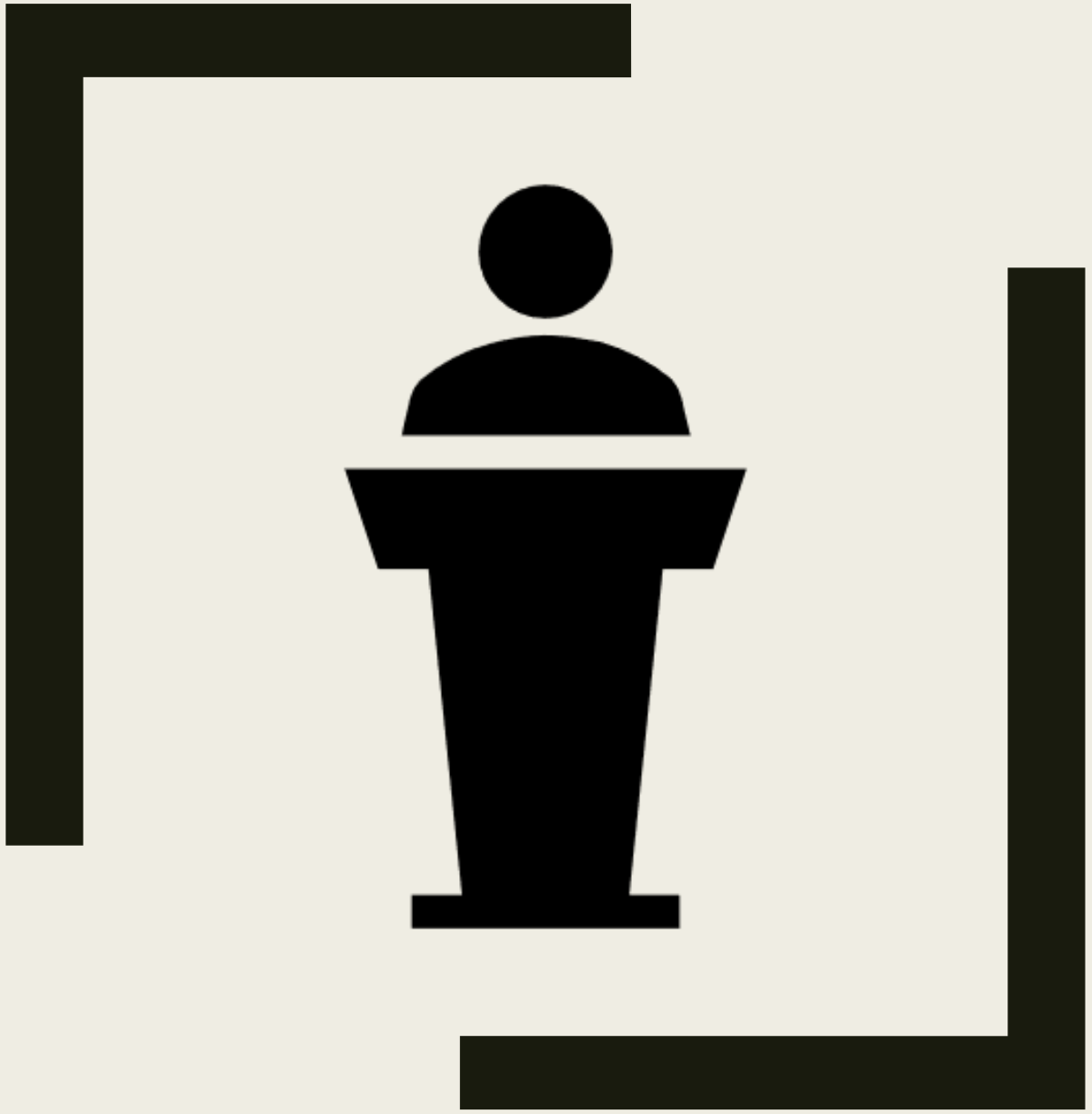
- Following 9/11, the UK had derogated from its obligations under Article 5(1) ECHR (right to liberty and security) by detaining, with neither charge nor trial, foreign nationals for whom deportation was not a possibility, using the powers available under Article 15 ECHR (which is conditional upon war or other public emergency threatening the life of the nation)
- The court held, **as a majority** that it had not been shown that the Commission had misdirected itself in law on the issue whether there was an emergency and its decision was open to it on the evidence. Great weight should be given to the judgment of the Government and Parliament on that issue, because they were called on to exercise a pre- eminently political judgment.
    - The Government had been entitled to conclude that there was a public emergency.
    - BUT that the prisoners' detention was incompatible with HRA 1998 s 4
    - Declaration of incompatability made
    - Govn passed Prevention of Terrorism Act 2005

8 LAW LORDS : 1 LADY : MAJORITY OF 7

Lord Hope: ***"whether there is an emergency and whether it threatens the life of the nation are pre-eminently for the executive and for Parliament."*** [para. 116]

Lord Hoffman, dissenting: the test that **'there was a threat to the life of the nation" was not made out**

*"**Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community** [...] in my opinion, such a power in any form is not compatible with our constitution. **The real threat to the life of the nation**, in the sense of a people living in accordance with its traditional laws and political values, **comes not from terrorism but from laws such as these**. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give terrorists such a victory."* [Para. 96-97]



HOW DO POLITICIANS (FUELED BY THE PRESS AND PUBLIC) RESPECT THE BOUNDARY ?

The unwritten rules: made to be broken?

Judges won't criticise ministers? Ministers won't criticise judges?
The Lord Chancellor will protect the independence of the judiciary?

The Telegraph

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Britain's top judge attacks Theresa May's criticism of judiciary

Lord Neuberger has launched an attack on Theresa May for criticising judges over their failure to deport foreign criminals.

https://www.telegraph.co.uk/news/uknews/law-and-order/9908528/Britains-top-judge-attacks-Theresa-Mays-criticism-of-judiciary.html

Political respect for judicial independence?

R. (Miller) v Secretary of State for Exiting the European Union [2017] UKSC

- In a joint judgment of the majority, the Supreme Court holds that an Act of Parliament is required to authorise ministers to give notice of the decision of the UK to withdraw from the European Union.
- The **2016 referendum is of great political significance**. However, its **legal significance is determined by what Parliament included in the statute authorising it**, and that statute simply provided for the referendum to be held without specifying the consequences. **The change in the law required to implement the referendum's outcome must be made in the only way permitted by the UK constitution**, namely by legislation.
- Withdrawal makes a fundamental change to the UK's constitutional arrangements, by cutting off the source of EU law, [78-80]. Such a fundamental change will be the inevitable effect of a notice being served [81]. The UK constitution requires such changes to be effected by Parliamentary legislation [82].

Supreme Court Press Summary

- Business Secretary, Sajid Javid: “This was an attempt to frustrate the will of the British people and it is unacceptable.”
- Noticeable by her silence was the then Lord Chancellor Liz Truss.
- Eventually a three-line press release was issued that backed the independence of the judiciary but stopped short of condemning the professional (and personal) attacks on senior judges over the Brexit ruling.

Lord Thomas of Cwmgiedd's comments before the House of Lords Constitution Committee on 22 March 2017

"In short, I believe that the Lord Chancellor is completely and utterly wrong in her view [...]

I am extremely reluctant to get into an argument that in any was compromises the position that the judiciary has taken on Brexit, which is to get on with the legal problems and leave the politics to the politicians. I do not want to be drawn into politics at all.
I have emphasised the vital importance of the freedom of the press [...]

I also believe that people ought to criticise us [...] ***Criticism is very healthy. If you have got something wrong, fine, but there is a difference between criticism and abuse****, which I do not think is understood.* ***It is not understood how absolutely essential it is that we are protected, because we have to act, as our oath requires us without fear or favour, affection or ill will.***

it is the only time in the whole of my judicial career that I have had to ask for the police to give us a measure of advice and protection in relation to the emotions that were being stirred up.

It is very wrong that judges should feel it. I have done a number of cases involving al-Qaida, I dealt with the airline bombers' plot and some other very serious cases, and I have never had that problem before."

What of a political act that directly undermines a legitimately arrived at court order?

- On 25.10.18 Lord Hain used parliamentary privilege to name Sir Philip Green despite (or rather in flagrant breach of) the court injunction banned the Telegraph (and media) from reporting the billionaire's name in an on –going case.
- In 2011 Lord Stoneham used parliamentary privilege to reveal details of an injunction brought by former Royal Bank of Scotland boss Sir Fred Goodwin.
- The then Lord Chief Justice, Lord Judge: “you do need to think, do you not, whether it's a very good idea for our law makers to be flouting a court order just because they disagree with a court order, or for that matter, because they disagree with the law of privacy which Parliament has created.”

inforrm.org/2018/10/30/case-law-abc-v-telegraph-media-

Does the convention precluding criticism of judges by government ministers still exist?

- NO
- NO
- NO

Lord Dyson in 2014 concluded that it does not

What of extra-judicial pronouncements that call into question the nature and impact government legislation, or the lack thereof?

- Baroness Hale's lecture 'Equal Access to Justice in the Big Society', she described some aspects of the **Government's proposed legal aid reforms as 'fundamentally misconceived'**, and went on to describe other aspects of it as a 'false economy.'

Lord Neuberger defended Lady Hale:

“It seems to me though that, while it may have been brave, it was not impermissible for Baroness Hale to make the points she did.

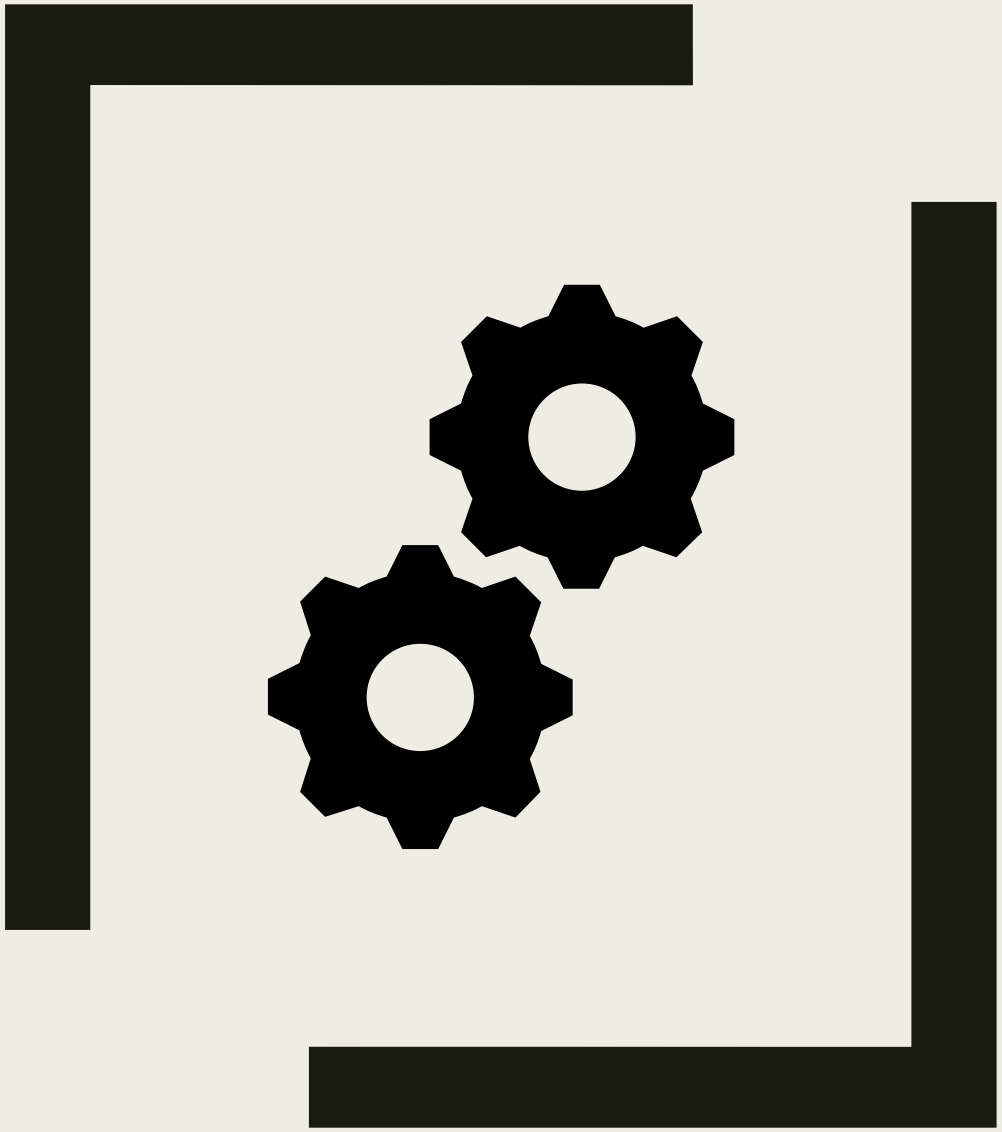
Judges can, I suggest, properly comment publicly on matters which go to the heart of the functioning of the judicial branch of the State. In some circumstances, it could be said to be their duty to do so.

In the past, it would have been easier for them to do so whilst donning their legislative hats in the House of Lords, or via the Lord Chancellor. But those days are now gone.”

Lord Neuberger addresses what scope the post-2005 changes give the judiciary in his Holdsworth Club 2012 Presidential Address:

'Against this changed background to what extent can and should the judiciary contribute to public debate? To what extent can they do so without damaging judicial independence?

Like any important right it should, of course, be exercised with due care while fully accepting that by entering into the policy debate with government, government can properly answer back, and in such a debate it is always Parliament which has the final word –.'



WHERE DOES THIS LEAVE JUDICIAL INDEPENDENCE AND THE SEPARATION OF POWERS?

Per Sumption QC (as he was then was)

"The last two decades in particular have seen major changes in the tone and principles of both major parties.
In this way, modern political parties have proved to be an effective means of mediating between those in power and the public from which they derive their legitimacy. ***They are essentially instruments of compromise between a sufficiently wide ranges of opinion to enable a programme to be laid before the electorate with some prospect of being accepted****.*

Political decision-making is often characterised by a measure of opacity, fudge, or even irrationality. This is not because politicians are intellectually dishonest, but because opacity, fudge, and irrationality are often valuable tools of compromise, enabling divergent views and interests to be accommodated. The result may be intellectually impure, but it is on the whole in the public interest.

By comparison law, with its transparency, its analytical consistency, and its absoluteness, is a poor instrument for achieving accommodation between the opposing interests and sentiments of the population at large.

"Judicial and Political Decision-Making: The Uncertain Boundary The F.A. Mann Lecture, 2011 Para 29

Respect for the division of powers?

The judiciary ?

The interpretation of law and balancing the autonomy of the judiciary and the sovereignty of Parliament is an art not a science: different judges police the boundary from different directions

But there is respect for A boundary

As for The Politicians and Press? The jury's out

Thank you for listening.

Professor Jo Delahunty Q.C.