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POLITICS AND THE LEGAL PROFESSION

PROFESSOR JO DELAHUNTY QC

A Introduction

Whilst the division of legal authority between Parliament (our primary law maker) and the courts (our interpreter of the legislation passed) and the sovereignty of Parliament is a concept familiar to the judiciary, respect for it in practice has been challenged by politicians, the press and the public who have, in recent times, asked whether judges have exceeded their powers when judicial decisions have been made which offend them. That challenge has made me question how and where the judiciary draws the line between what is in their remit and what is a matter for government.

In writing this lecture, I have had a number of overlapping 'voices' in mind: those of the judiciary, Parliament, the press and the public.

Consider press and public reaction to the successful Article 50 challenge mounted by Ms Miller and the resultant judgment of the High Court in *R. (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin)*. I have in mind the consequent Daily Mail headline identifying and naming the judges as 'Enemies of the People' and Nigel Farage's front-page article entitled 'Voters aren't going to let this incredible arrogance lie' beneath the Daily Telegraph's headline 'The Judge versus The People'.

What pressure does a vocal public and press bring to bear upon the decisions of our politicians and judges? Consider the Home Office letter sent to Shamima Begum informing her that an order was being made under the British Nationality Act 1918 stripping her of her citizenship; a letter sent *before* ascertaining whether she had dual nationality and then receiving legal advice upon the legitimacy of the order made. This attracted criticism of the Home Secretary that he was seeking to exploit a tide of hostile populist feeling without paying proper attention to the law.[1]

What of Lord Hain MP, under parliamentary privilege, naming Sir Philip Green as the subject of allegations of sexual harassment and in the process of doing so, riding a coach and horses through the "super injunction" granted by the court to Sir Green protecting his identity? [2]

What of serving judges, such as Hayden J, decrying the lack of legislative powers at his disposal in court, knowing and intending that his comments be made public? He called for powers to enable him to redress the institutionalised abuse he was obliged to preside over, when watching a victim being cross examined in person by her alleged abuser due to a lack of legal aid and legal representation.[3]

What do these examples say about the level of mutual respect between politicians and judges and about the understanding of their separate spheres of power and influence?
What do these illustrative headlines tell us about the interface between politics and law? This lecture aims to explore the conflict between the two, in practice rather than theory.

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[1] https://www.theguardian.com/world/2019/feb/19/isis-briton-shamima-begum-to-have-uk-citizenship-revoked
[2] https://www.theguardian.com/politics/2018/oct/26/naming-of-philip-green-will-reopen-issue-of-parliamentary-privilege
[3] Re A (a minor) (fact finding; unrepresented party) [2017] EWHC 1195 (Fam), para 60 and 63

it is a three-part analysis dealing with:

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 that the judiciary are transparent in their decision making about where their role ends and that of parliament begins
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: namely that it operates on the basis of mutual respect between parliament and the judiciary

This lecture thus covers a large expanse of material and cannot hope to give its readership more than an introduction to the subject. Having read and digested the many speeches given by academics, journalists, Law Lords and Ladies on the subject matter I have come to appreciate that there are as many differences as there are similarities in approach. This lecture comes with a health warning that the views I express are my own and what one lawyer argues, another may rebut with great coherence and force.

As is my practice, these notes are more comprehensive than the oral lecture and this document and my powerpoint/oral delivery are to be read as companion pieces rather than as substitutes for or duplicates of each other.

B General Principles that underpin the discussion to follow

Separation of powers: what does this mean ?

In the absence of a written constitution, a system of governance has developed in the UK on the basis that the powers of the executive, legislature and judiciary are separate[4]. In using these terms, I refer to the following: the executive is the Government (and all official and public authorities including local authorities that govern the UK), the legislative is Parliament[5], and both limbs of state are distinct from the judiciary.

Nolan LJ in **M v Home Office (1993) UKHL5 (1994)1AC377** described the situation thus

> *'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'*

Judicial autonomy: a framework for independence

By judicial independence, I mean that the judiciary is (or should be) politically independent and constitutionally secure from executive interference in the performance of their judicial roles and duties. In other words, politicians should not seek to interfere with, or undermine, the judiciary in the proper exercise of their judicial duties. If the separation of powers is to be seen as creating (or consisting of) mutual obligations, then by equal measure the judiciary has a duty not to make rulings or deliver judgments based on personal opinion rather than existing law.

Looking at the media's criticisms in recent years of judgements perceived to undermine political intent, the irony might be that judges of the Victorian and Edwardian era were very much seen as part of the establishment and not immune to being swayed by political sentiment[6]. Judicial independence has been entrenched in the UK's constitutional landscape for very long. The miscarriages of justice that occurred in the 1970s and 1980s arose at a time when the judiciary found itself unwilling or unable to challenge the authority of the State and security services such as the police force This was epitomised by Lord Denning's assertion, in his court judgment upon

[4] I would like to thank Freddie Sharma for all his help in researching this lecture

[5] Though for a government with a large majority it might be said that the distinction between executive and legislative powers is rather illusionary. Between 1979 and 2010 the government's safe majority made the scrutiny of the government more difficult though not impossible: the government could rely, in the main, on its legislation being passed.

[6] For example, the summing up by the original trial judge, Lord Chief Justice Goddard was described by Lord Bingham that in the Court of Appeal's judgment, the summing-up in the case by, "was such as to deny the appellant that fair trial which is the birth right of every British citizen".

their claim, that to allow the Birmingham Six to sue the police would open the "appalling vista" that the police had lied. As the presiding judge, Lord Denning made a comment that revealed exactly which personal and political (with a small 'p') beliefs had affected his judicial decision[7]. Such an unabashed link between those who created the law and those who administered it required modernisation and the later part of the twentieth century saw the concept of separation of powers being respected and further developed on UK soil.

The Constitutional Reform Act 2005 represented a fresh look at how the separation of powers between the executive, the legislature (Parliament) and the judiciary could be formalised and made transparent. It introduced changes as to how judges were recruited, who was in charge of them, the role of their leader in government and, symbolically as well as physically, where the respective seats of power of the legislative and judiciary sat to conduct their business.

Who heads up the judiciary?

The head of the judiciary is no longer the Lord Chancellor. By virtue of s.7 (1) of the Constitutional Reform Act 2005, *"The Lord Chief Justice holds the office of President of the Courts of England and Wales and is the Head of the Judiciary of England and Wales."* This was intended to remove judicial office from direct political control. Formerly, the Lord Chancellor combined the roles of judge and Parliamentarian. The judges' leader was the Speaker of the House of Lords, a senior member of the Government and Head of the Judiciary. As such the Lord Chancellor was not simply head of the judiciary but also a member of the legislature and the executive. The House of Lords, through the Law Lords – or, more accurately, its Judicial Committee – exercised judicial authority as the *de facto* Supreme Court of the United Kingdom. The Law Lords were thus not only members of the judiciary but also the legislature. That link was severed by the 2005 Act. The Lord Chancellor is no longer a judge (nor do they need to have judicial or legal experience or qualifications). Their replacement as leader of the judiciary, the Lord Chief Justice, no longer has a seat in cabinet nor a place in the House of Lords.

Who appoints the judges and who upholds their independence?

The Lord Chancellor is no longer an integral party to the judicial appointment process. They have a clear, mandatory, duty to uphold the independence of the judiciary:

> *"The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary."*
>
> **Constitutional Reform Act 2005**, s3 (1)

The Lord Chancellor remains responsible for representing the judiciary to the executive and the legislature (s1 and 3). However, they now do this without the qualifications that were formerly part of the Lord Chancellor's role when they were the official head of the judiciary. Although the Lord Chief Justice does have a right to make representations to Parliament (s5), this is a right that has not yet been exercised.

The 2005 Act removed almost all of the Lord Chancellor's involvement in judicial appointments and set up a Judicial Appointments Commission for England and Wales (s6).

Before the Act, appointments were made on the recommendation of the Lord Chancellor and candidates for appointments were ascertained by consultation between the Lord Chancellor with the judiciary. The judiciary was (and still is) predominantly white, male, and drawn from the upper social class. It led to accusations that judges recommended their own kind for appointment, the likely candidate received a 'tap on the shoulder' to apply. The process had no transparency.

[7] As Master of the Rolls Lord Denning dismissed a civil action by the Birmingham Six against West Midlands Police in 1980 and remarked that to accept their case that police officers had lied about their confessions and beaten them would have opened up ``an appalling vista''. When the Birmingham Six convictions were eventually overturned in 1991, he admitted he had been wrong, apologised and condemned the West Midlands Police.

Since the Act passed, appointments have been made by the Judicial Appointments Commission (JAC)[8]. The JAC is an executive non-departmental public body sponsored by the Ministry of Justice[9]. The JAC recommends candidates[10] to the Lord Chancellor who has a limited power of veto[11]. The Act gives the JAC a statutory duty to encourage diversity in the range of persons available for selection for appointments. Judicial appointments are based on merit and good character (s63).

Judicial political neutrality

Judges are expected to be politically neutral in performing their judicial duties. Full-time judges are disqualified from sitting in the House of Lords by convention. There is an expectation they are (publicly) apolitical. The Bill of Rights 1689 means that judges cannot inquire into parliamentary proceedings. The departure of the judiciary from the House of Lords has led to a situation where senior judges are no longer able to amend or speak on Bills and Peers are no longer able to engage judges in office about judicial decision making or interpretation. Nor can advice be sought by the government from the judiciary about legislation the government in contemplating presenting to Parliament. The rationale for this is: how could a litigant in proceedings to which the executive is a party not conclude that there is bias and lack of independence on the part of the judiciary, where the issue at stake is one on which the senior judiciary had advised the executive? Judges also have immunity from suit in the performance of their judicial functions: they cannot be sued for actions in court, even if they act mistakenly, provided they act within their jurisdiction[12].

As important as political neutrality, is individual independence. As Lord Neuberger explained in his lecture 'Where *Angels fear to Tread*'[13]:

> *"Individual independence refers to each judge's ability to decide any particular case by applying the right law to the right facts. Judges must be independent of the parties, and must not be subject to any pressure or inducement from the parties. They must have no interest in the outcome and must be open-minded and impartial in their approach to the issues. A speech on a subject which may become the subject of judicial determination, and in which the judge's views on the subject are expressed in a particularly uncompromising or trenchant way, could be seen as compromising this aspect of judicial independence. That is because it could be said that, if the issue on which they had spoken came up in litigation, they could not approach it with an open mind. Entering into the controversies of the day can result in a judge being unable to determine those controversies judicially.*[14]"

The place of business of the most senior court in the land

The Supreme Court was created in July 2009 in accordance with the reforms enacted in the Constitutional Reform Act 2005. In place of the judicial committee of the House of Lords, there is the Supreme Court, which is quite separate from the legislature. Judges of the Supreme Court do not sit in the House of Lords. Until 2009 the judges appointed as Law Lords formed part of the House of Lords in Parliament. In addition, members of Parliament are no longer able to hold full time positions in the judiciary. This change further separated the legislature and the judiciary. It was a physical as well as a legislative separation. The last case heard in the House of Lords was 30th July 2009 and the new Supreme Court opened on 1st 0ct 2009. The Supreme Court is now housed in its own complex in Parliament Square opposite the Houses of Parliament

As Lady Hale has said,

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[8] See this web site for more information: https://www.judicialappointments.gov.uk/

[9] For the relationship between the JAC and MoJ see https://www.judicialappointments.gov.uk/sites/default/files/sync/about_the_jac/jac-moj-framework-2012.pdf

[10] https://www.judicialappointments.gov.uk/overview-selection-process

[11] These powers allow the Lord Chancellor to effectively ask the Commission to think again if they consider the candidate recommended is not appropriate. It is not known how frequently these powers are exercised.

[12] Subject to HRA 1998 s 7 and 9 which provide a mechanism in certain circumstances to bring proceedings in respect of a judicial act

[13] LORD NEUBERGER OF ABBOTSBURY MR WHERE ANGELS FEAR TO TREAD HOLDSWORTH CLUB 2012 PRESIDENTIAL ADDRESS 2 MARCH 2012

[14] Para 20

"The case for reform advanced by the senior Law Lord, Lord Bingham, was simple. The institutional structure should reflect the practical reality. We were a court and should be seen to be such. The public and people from overseas should not be misled into thinking that we are also legislators."

Political Pressure

Ministers should not seek to influence judicial decisions through any special access to judges. It is convention that Cabinet Members don't criticise judges (a point I explore in section three).

Per Lord Neuberger:

> *'Institutional independence goes wider than individual independence. It refers to the constitutional principle that the judiciary is independent of the other two branches of the State. It is the constitutional principle that the judiciary cannot properly be influenced by the executive, or the legislature, in carrying out the judicial function. Influence, whether overt or covert undermines the judiciary's ability to decide cases on their merits. Justice under the influence is no justice at all. It is inimical to the rule of law and our democratic system*[15]*.'*

How far members of Parliament in the House of Commons expect their public pronouncements (which politicians must reasonably know will come to the attention of the judiciary) to affect the climate in which the legislation is interpreted by the courts is a moot point. Senior politicians may hope to have an influence upon judgments that are a matter of political interest (and electoral value). However, given the revolving door of cabinet appointments in the House of Commons, how realistic would it be for any politician to expect a judge (appointed and in position until the age of 70) to take account of what might be an opportunistic political comment as part of a passing political trend (populist or otherwise)? Judges are a robust breed.

C The Permeable Nature of the Boundary between the Legislature/Executive and the Judiciary?

Three cases are discussed below, each of which illustrate that the boundary of law and politics is permeable; different judges reach different judgements on the same facts when this permeability comes to the fore; this variety in judgements is the result of excess, rather than too little, care by judges to police this boundary, as it arises from there being multiple well thought-out viewpoints on how best to conceptualise law and politics.

1 Airedale NHS Trust v Bland [1993]1 ALL ER1821[16]

Our most senior Law Lords and Ladies have often been in the forefront in making decisions on the interpretation of the law which impact profoundly on the way our society conducts itself. Their already delicate task is made incredibly hard where Parliament has not foreseen the particular circumstance presented to the court for determination.

A case in point: the ultimate end of Tony Bland's life having sustained devastating injuries as a result of the Hillsborough disaster. As the judgment of the Law Lords made clear, there is tension between where the role of Parliament ends and where that of the judiciary starts. This case raised for the first time in the English courts the question of in what circumstances, if any, a doctor could lawfully discontinue life-sustaining treatment (including nutrition and hydration) without which a patient in Tony Bland's condition would die. It raised serious moral, medical and ethical issues of the utmost importance, including whether causing a death is illegal when this is done by omitting to *continue* an action.

In reading this case I would ask anyone reflecting on the profound issues raised in it to have Tony Bland and his family in mind as individuals, not as a case name or a number. The 'pen portrait' about Tony given to the jury by his father during the Hillsborough Inquests gave powerful testimony about

[15] Para 24

[16] Decision here https://www.globalhealthrights.org/wp-content/uploads/2013/01/HL-1993-Airedale-NHS-Trust-v.-Bland.pdf : Curious students may find it interesting to read the submissions reproduced here: https://www.casemine.com/judgement/uk/5a8ff8c960d03e7f57ecd66d

how much had been lost to the family by Tony having been taken from them , first in spirit and then in body. The personal statement is here: https://www.bbc.co.uk/news/av/uk-27207111/hillsborough-inquest-tribute-to-tony-bland. Please read it as a mark of respect to Tony Bland, his family and friends and to the Hillsborough victims.

This case involved doctors treating Tony Bland, who had been in a persistent vegetative state (PVS) for more than 2 years following severe injury sustained in the Hillsborough disaster. His lungs were crushed and punctured in the incident and the supply of oxygen to his brain was interrupted. He sustained catastrophic and irreversible damage to the higher centres of his brain and there was no prospect of improvement to his condition from PVS. As Lord Hoffman eloquently put it in the Court of Appeal, whilst Tony's body was 'alive" in the sense that the heart continued to beat and his body was 'alive' with medical aid but,

> "*The parts of his brain which provided him with consciousness have turned to fluid. The darkness and oblivion which descended at Hillsborough will never depart. His body is alive, but he has no life in the Sense that even the most pitifully handicapped but conscious human being has a life. But The advances of modern medicine permit him to be kept in this state for years, even perhaps for decades.*"[17]

I found this case profoundly affecting not just at the time it was being determined but many years later in the context of the evidence given during the Hillsborough Inquests in 2014-2016 that explored, and gave verdicts upon, the circumstances that led to Tony Bland's PVS.[18] The case has not lost its power to this day. I have attached the link below not just to the decision of the House of Lords but also to that of the Court of Appeal as well as the submissions.

a) <u>The boundary between the law and politics is permeable</u>

The House of Lords recognised the intention by the withdrawal of treatment to cause death. To actively to bring a patient's life to an end is:

> *"to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia - actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law"* (per Lord Goff[19]).

Withdrawal of treatment was, however, properly to be characterised as an omission. An omission to act would nonetheless be illegal if there was a duty to act. There was no duty to treat if treatment was not in the best interests of the patient. Since there was no prospect of the treatment improving his condition, the treatment was futile. There was therefore held to be no interest for Tony Bland in continuing the process of artificially feeding him upon which the prolongation of his life depended.

The distinction between taking an active step to end life and withholding treatment which led to death may seem stark in its reductive simplicity; it was anything but that, as Lord Browne-Wilkinson made elegantly clear in his judgment.
Per Lord Browne-Wilkinson:

> *"My Lords, in this case the courts are asked to give the answer to two questions: whether the Airedale N.H.S. Trust and the physicians attending Anthony Bland may:*
>
> *"(1) lawfully discontinue all life-sustaining treatment and medical support measures designed to keep [Mr. Bland] alive in his existing persistent vegetative state including the termination of ventilation, nutrition and hydration by artificial means; and (2) lawfully discontinue and thereafter need not furnish medical treatment to [Mr. Bland] except for the sole purpose of enabling [Mr. Bland] to end his life and die peacefully with the greatest dignity and the least of pain, suffering and distress."*[20]

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[17] [1993]1 ALL ER 821 AT 850
[18] Declaration of interest. I acted, along with colleague lawyers on behalf of 77 families, in the Hillsborough Inquests (1.4.14-26.4.16).
[19] [1993] 1 ALL ER 850 at 865 F
[20] [1993 1 ALL ER 850 para. 877-878

Lord Browne-Wilkinson continued:

> *"Those are questions of law. But behind the questions of law lie moral, ethical, medical and practical issues of fundamental importance to society. As Hoffmann L.J. in the Court of Appeal emphasised, 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. But in my judgment in giving the legal answer to these questions judges are faced with a dilemma. The ability to sustain life artificially is of relatively recent origin. Existing law may not provide an acceptable answer to the new legal questions which it raises. Should judges seek to develop new law to meet a wholly new situation? Or is this a matter which lies outside the area of legitimate development of the law by judges and requires society, through the democratic expression of its views in Parliament, to reach its decisions on the underlying moral and practical problems and then reflect those decisions in legislation?*
>
> *I have no doubt it is for Parliament, not the courts, to decide the broader issues which this case raises […]"* [21][[my emphasis]

In Tony Bland's case Lord Browne-Wilkinson reflected on the balancing exercise he was performing between his role and that of Parliament :

> *"……if the judges seek to develop new law to regulate the new circumstances, the law so laid down will of necessity reflect judges' views on the underlying ethical questions, questions on which there is a legitimate division of opinion. By way of example, although the Court of Appeal in this case, in reaching the conclusion that the withdrawal of food and Anthony Bland's subsequent death would be for his benefit, attaches importance to impalpable factors such as personal dignity and the way Anthony Bland would wish to be remembered but [it] does not take into account spiritual values which, for example, a member of the Roman Catholic church would regard as relevant in assessing such benefit. Where a case raises wholly new moral and social issues, in my judgment it is not for the judges to seek to develop new, all embracing, principles of law in a way which reflects the individual judges' moral stance when society as a whole is substantially divided on the relevant moral issues. Moreover, it is not legitimate for a judge in reaching a view as to what is for the benefit of the one individual whose life is in issue to take into account the wider practical issues as to allocation of limited financial resources or the impact on third parties of altering the time at which death occurs.*
>
> *For these reasons, it seems to me imperative that the moral, social and legal issues raised by this case should be considered by Parliament. The judges' function in this area of the law should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society. If Parliament fails to act, then judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises. But in my judgment that is not the best way to proceed.*
>
> *The function of the court in these circumstances is to determine this particular case in accordance with the existing law, and not seek to develop new law laying down a new regimen. The result of this limited approach may be unsatisfactory, both in moral and practical terms, but it is for Parliament to address the wider problems which the case raises and law down principles of law generally applicable to the withdrawal of life support systems."* [22] [my emphasis]

b) 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

I argue that when matters of legal and ethical importance require determination by the court in circumstances where the issue has not been prefigured by the legislature the application and interpretation of existing legal principles to a unique case will be a matter of judicial art (with its elements of subjectivity and individuality) rather than science.

[21] 1993 1 ALL ER 850 para. 877-878]
[22] [1993] 1 ALL ER 850 AT 879-880

That is why different judges in the same court can and do reach different conclusions on the same law applied to the same facts. That is an important matter for professional acknowledgement not just because it is patently true, but because in deciding whether to make a decision that will effect a change in the common law different judges may draw the line between their autonomy and the sovereignty of Parliament. Judges of equal standing and calibre may take different courses. Where one judge may step back and refer the matter to Parliament, another may make deliver a judgment which will move the law on.

2 *R (Nicklinson) v Ministry of Justice [2014] UKSC 38; [2015] AC 657*[23]

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) The boundary between the law and politics is permeable

Lady Hale was unafraid to confront the morality and ethics of the decision she and her fellow Law Lords were placed in by the application before them.

She asked:

> *'Is it then reasonably necessary to prohibit helping everyone who might want to end their own lives in order to protect those whom we regard as vulnerable to undue pressures to do so? "On what basis is it possible to distinguish some of those pressures from others?* [24] As she acknowledges *' no-one who has read the claimants' accounts of their lives and their feelings can doubt that they experience the law's insistence that they stay alive for the sake of others as a form of cruelty.'*[25]*).*

She answered:

> *'It would not be beyond the wit of a legal system to devise a process for identifying those people, those few people, who should be allowed help to end their own lives. There would be four essential requirements. They would firstly have to have the capacity to make the decision for themselves. They would secondly have to have reached the decision freely without undue influence from any quarter. They would thirdly have had to reach it with full knowledge of their situation, the options available to them, and the consequences of their decision: that is not the same, as Dame Elizabeth pointed out in in re B (Adult: Refusal of Medical Treatment) [2002] 2 All ER 449, as having first-hand experience of those options. And they would fourthly have to be unable, because of physical incapacity or frailty, to put that decision into effect without some help from others.'* [26]

How far does this judicial formulation advance itself as a strong legal admonishment, or encouragement' to the government to act? Lady Hale is justifiably robust in saying that decisions of life and death are not out width the experience of the courts[27]. She lays down the challenge for the government to consider incompatibility, leaving an executive decision to be made: whether to act to correct that incompatibility, or to continue as is.

b) 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

In *Nicklinson* The nine-judge court had to determine whether or not assisted suicide in the way the claimants wanted to exercise brought the UK law into conflict with the European Convention of Human Rights. 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

[23] https://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0235_Judgment.pdf
[24] page 117 para 312
[25] page 118 para 313
[26] page 118 para 314
[27] *'I do not pretend that such cases would always be easy to decide, but the nature of the judgments involved would be no more difficult than those regularly required in the Court of Protection or the Family Division when cases such as Aintree University Hospitals NHS Foundation Trust v James [2014] AC 591 or in re B (Adult: Refusal of Medical Treatment) [2002] 2 All ER 449 come before them."* [314]

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)[28].

The composition of the court can affect a case's outcome. The division of the court makes this plain. However, the quality of the judges' analysis in this case is uniformly exceptional: it is intellectually robust, it is transparently laid out. One knows who has decided what and why. The judgements have a clarity and eloquence that is often missing in parliamentary debate. What is missing here is accountability to the electorate for the decision.

Lord Dyson expressed the majority view:

> *"112 In our judgment, it would be inappropriate for the courts to fashion domestic article 8.1 rights exceeding the protection afforded by the requirements of Strasbourg in direct opposition to the will of Parliament as reflected in section 2 of the 1961 Act. 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.*
>
> *113 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]*

Lord Dyson, expressing the majority view, thus defers to the Secretary of State as he (they) consider this to be a matter of political not legal judgment. This deference is what leads to the application of a 'very light touch' when dealing with primary legislation, even though there is room for argument over its interpretation as a matter of law. He concluded that the question of whether relaxing the absolute prohibition would involve unacceptable risks to vulnerable people should be decided by Parliament. The issue involved a choice between mutually inconsistent moral values, about which there is no clear consensus in the public consciousness; such choices are paradigmatically legislative in nature. Parliament had made the relevant choice in enacting the 1961 Act. The parliamentary process was considered a better way of resolving issues involving controversial questions of fact arising from moral and social dilemmas (paras 230-232).

By contrast, Lady Hale was satisfied that a declaration of incompatibility should be made (albeit in the minority):

> *"Like everyone else, I consider that Parliament is much the preferable forum in which the issue should be decided. Indeed, under our constitutional arrangements, it is the only forum in which a solution can be found which will render our law compatible with the Convention rights. None of us considers that section 2 can be read and given effect, under section 3(1) of the Human Rights Act 1998, in such a way as to remove any incompatibility with the rights of those who seek the assistance of others in order to commit suicide. However, in common with Lord Kerr JSC, I have reached the firm conclusion that our law is not compatible with the Convention rights. Having reached that conclusion, I see little to be gained, and much to be lost, by refraining from making a declaration of incompatibility. Parliament is then free to cure that incompatibility, either by a remedial order under section 10 of the Act or (more probably in a case of this importance and sensitivity) by Act of Parliament, or to do nothing. It may do nothing, either because it does not share our view that the present law is incompatible, or because, as a sovereign Parliament, it considers an incompatible law preferable to any alternative."* (para. 300) [my emphasis]

The Nicklinson case demonstrates different judges come to different legal decisions as the result of differing views on how the boundary between law and politics should be policed, and how exactly it can – and may – be crossed. Anyone who takes the time to read the judgments delivered could not fail to accept that when judges come to differing views on when they can or can't make declarations about the compatibility of UK law those differing opinions demonstrate a clear engagement with the limits of their role. Divergence in opinions over how the permeability of that boundary should be dealt with result from a different balancing exercise about

[28] Lady Hale, *"The Supreme Court: Guardian of the Constitution?",* Sultan Azlan Shah Lecture 2016, Kuala Lumpur (9 November 2016) [https://www.supremecourt.uk/docs/speech-161109.pdf]

where their role and that of Parliament begins and ends not from disagreement over whether it should be respected at all

3. *A and Others v Secretary of State for the Home Department* [2004] UKHL 56.

This case came about following 9/11 when the UK had derogated from its obligations under Article 5(1) (right to liberty and security) using the powers available under Article 15. This case again illustrates the point about equally eminent judges coming to different decision on the same facts, applying the same law about what can or cannot be the subject of judicial review and resolution.

Article 15(1) ECHR says: *"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."*

X were all foreign nationals who had been certified by the Secretary of State as suspected international terrorists under s.21 of the 2001 Act. They could not be deported since that would in the circumstances have involved a breach of the Human Rights Act 1998 Sch.1 Part I Art.3. They had been detained under s.23 of the 2001 Act without charge or trial in accordance with the derogation from Art.5(1)(f) of Sch.1 Part I of the 1998 Act permitted by the Human Rights Act 1998 Order 2001. That Order had been enacted to deal with the perceived terrorist threat from Al-Qaeda after the terrorist attacks in the US on September 11, 2001.

The Supreme court declared, under the Human Rights Act 1998 s.4, that the Anti-Terrorism, Crime and Security Act 2001 s.23 was incompatible with the Human Rights Act 1998 Sch.1 Part I Art.5 and Art.14 in so far as it was disproportionate and permitted detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status, and the Human Rights Act 1998 (Designated Derogation) Order 2001 was quashed. A derogation order was made. Parliament then passed the Anti-Terrorism Crime and Security Act 2001. Under s.23 of this Act it enabled the detention of non-nationals who the Home Secretary suspected of being international terrorists but who could not be deported.

The point of interest to me is that this was not a unanimous decision. I make the point again about equally competent judges coming to differing interpretations of the same law on the same facts. Lord Hoffmann dissented on the public emergency issue and Lord Walker dissented on the proportionality and discrimination issues. There is a range of equally astute, intellectually robust decision makers in the Supreme Court: one should not (nor can one I believe) take the personality (with all its power of individual thought, experience, reflection and analysis) out of the equation when considering the way in which judges can develop (and challenge), by interpretation of the law, what might have been the intent of the government. That would be artificial, in my view.

a) The boundary between the law and politics is permeable

Does the approach the court takes depend on its composition and the permeable nature of the boundary between the remits of the legislature, executive and judiciary? Does the balance between judicial activism or judicial deference come down to the personality and persuasion of the judge(s) and the case in question? This case appears to answer both questions in the affirmative.

b) 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

This case shows the court wrestling with the boundaries of their role and what was to be considered to be political (and therefore out of their remit), in the context of the government having declared a state of emergency that threatened the life of the nation.

As Lord Bingham of Cornhill explained:

"I would accept that great weight should be given to the judgment of the Home Secretary, his colleagues and Parliament on this question, because they were called on to exercise pre-eminently political judgment […]

None the less that was not the end of the matter because

'*As will become apparent, I do not accept the full breadth of the Attorney General's argument on what is generally called the deference owed by the courts to the political authorities. It is perhaps preferable to approach this question as one of demarcation of functions or what Liberty in its written case called "relative institutional competence.")(My emphasis).*

What did this mean? Lord Bingham explains

'The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions.

He concluded

'The present question [i.e. regarding whether there was a *"public emergency threatening the life of the nation."*] *seems to me to be very much at the political end of the spectrum."* [para. 29]

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.

The point of interest to me is that this was not a unanimous decision. I make the point again about equally competent judges coming to differing interpretations of the same law on the same facts.

There is a range of equally astute, intellectually robust decision makers in the Supreme Court: one cannot (nor can one I believe) take the personality (with all its power of individual thought, experience, reflection and analysis) out of the equation when considering the way in which judges can develop (and challenge), by interpretation of the law, what might have been the intent of the government. That would be artificial in my view
Contrast and compare the approaches of Lord Hope of Craighead:

"[…] 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]

And then consider the power of Lord Hoffman's dissenting judgment as he directly engages with the proportionality of the government decision that there was a state of national emergency: He suggests there is no evidence a threat existed which "*threatened the life of the nation."*

"I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. 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] [my emphasis]

Lord Hoffman suggests there is no evidence a threat existed which "*threatened the life of the nation.",* whereas Lord Hope seems to assert that any evidence or lack thereof is the executive's to consider, not the court's. It can clearly be seen in the passage quoted above however, that Lord Hoffman's readiness to adjudicate on the matter arose not out of a disregard for the boundary between law and politics, but out of a concern that political decisions did not trample on legal, constitutional rights.

This case was resolved by a majority .It emphasises my point that diversity in judgements is the result of an *excess* of care over policing the boundary, and a variety of conceptualisations of how best to do so. The important point is that the court is unanimous in acknowledging that there is a boundary to be observed : where to draw it is where they differ. Space precludes a discussion of what these conceptualisations are and the comparative merits of them; it suffices for our purposes that a variety has been shown to exist, and all are concerned with *respecting* the boundary between law and politics.

C **Tying the threads together: the role of the court, the duty of the court and where the division of power lies between the judiciary and Parliament**

No lecture on this subject would be complete without looking to Lady Hale: her efforts to explain, to those who wish to engage, the work she and the Supreme Court (SC) does are exemplary. If you have been left confused by the how the walks the tightrope between holding the Government and executive within the powers Parliament has given them and seeming to challenge the legality of the powers they have should read this explanation given in a speech in November 2016 in Kuala Lumpur[29]

Lady Hale explains the powers given to Judges under the Human Rights Act 1998 very succinctly, including the consequences of a declaration of incompatibility and the examples of the Government amending legislation.[30] The Human Rights Act 1998 has made 3 important changes:

> *"First, it has made the rights set out in the Convention into rights in UK law – no longer are we relying solely on the common law and what we can make of it, we have a clear statement in the Convention of what the rights entail and the circumstances in which they may be qualified or taken away. This has the benefit that we can explain our decisions in terms which the European Court of Human Rights in Strasbourg will understand, because we are all using the same concepts. This is, I believe, the main reason why the UK has lost fewer cases in Strasbourg in recent years.*
>
> *Second, the Act requires that, so far as it is possible to do so, both primary and secondary legislation should be read and given effect compatibly with the Convention rights[1][31] We are no longer searching only for the intention of the legislature but for a way of reading its words which is compatible with the Convention rights if at all possible. Thus, for example, the words 'living with each other as husband and wife' could be read as including a same sex couple whose relationship was as marriage-like as an unmarried opposite sex couple's relationship.[32]*
>
> *Third, while the Act does not allow us to 'strike down' provisions in Acts of the UK Parliament which cannot be read compatibly with the Convention rights, we can declare that they are incompatible.[33]This is a neat way of reconciling the protection of fundamental rights with the sovereignty of the UK Parliament. The law remains unchanged but Government and Parliament are given a clear message that we think it to be in breach of the UK's international obligations under the Convention. A recent example is the declaration that it is unjustifiably discriminatory to impose a good character requirement before people born of unmarried parents can acquire British citizenship while children born of married parents get it automatically, no matter how badly behaved they are."* [34]
>
> *"If a declaration is made, there are three choices: for a relatively simple case, the Government can promote a 'fast track' remedial Order in Parliament to put it right (another sort of Henry VIII clause); for a more complicated case requiring a*

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29 *Lady Hale's Sultan Azlan Shah Lecture, Kuala Lampur – "The Supreme Court: Guardian of the Constitution?" (9 November 2016)*

30 https://www.supremecourt.uk/docs/speech-161109.pdf

31 s 3(1)

32 https://www.supremecourt.uk/docs/speech-161109.pdf

33 s 4

34 p 8 pf the lecture

new legislative scheme, they can promote an Act of Parliament; but if they so choose, they are free to do nothing and accept whatever the international consequences this brings. An example of the first was the Order giving people on the sex offenders' register a very limited right to challenge their continued inclusion if they could demonstrate that they were no longer a risk. An example of the second was the Gender Recognition Act 2004, which introduced a scheme for recognising changes of sex in certain circumstances. An example, and so far the only example, of the third is the so-called 'blanket ban' on any sentenced prisoner voting in elections. Both the Strasbourg and a UK court have declared this incompatible with the Convention right to vote, and various possibilities have been canvassed, but none has yet been enacted. That apart, however, the record of curing the incompatibilities found has been exemplary."

"This does, of course, illustrate the gaping hole in the power of the Supreme Court of the United Kingdom to act as guardian of the UK Constitution in the same way that other Supreme and Constitutional courts do the world over. We cannot strike down Acts of the UK Parliament. But please do not think that I – or any of my brethren – want us to be able to do that. We are, I think, very comfortable with the role that we do have. This includes the various rules of statutory interpretation which govern the way in which we read legislation and enable us to safeguard fundamental rights and the rule of law." [35] (my emphasis)

D The Politicians, Press and public: what do they make of the concept of Judicial Independence?

We are onto the final stage of my three-part analysis. You now have a brief overview of how judicial independence is underpinned by our constitution and law. I have invited you to participate in the lively judicial debate about how best to respect the distinction between law and politics. Now I turn to the third aspect and consider 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: namely that it operates on the basis of mutual respect between Parliament, the government and the judiciary.

The unwritten rules: are they 'rules' anymore?

Frankly, no: certainly not absolute ones.

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

The Telegraph headline on 4th March 2013 announced that, "Lord Neuberger has launched an attack on Theresa May for criticising judges over their failure to deport foreign criminals." May, then the Home secretary, had said the failure of judges to take new rules into account meant she would bring in new laws to stop them allowing foreign rapists and violent criminals to stay in Britain by claiming a right to a family life. Lord Neuberger, then President of the Supreme Court, had labelled May's strongly-worded criticism of immigration judges as "inappropriate, unhelpful and wrong". He continued, "*I'm concerned about it because I think it's inappropriate and unhelpful for ministers to attack individual judges or groups of judges."* The Home Office declined to comment on Lord Neuberger's remarks.

Was either piece of criticism justified? Lord Neuberger was criticising May for her own criticism of the judiciary. He was doing so as part of a defence of the role and independence of the judiciary. The real issue here is why Lord Neuberger was taking that step when it is the mandatory duty of the Lord Chancellor (i.e. May's fellow cabinet member, Chris Grayling MP) to protect and uphold the independence of the judiciary[36]. I think this exchange reveals Lord Neuberger trying to remind the legislative about how it and the judiciary best operate ie) with mutual respect for the roles and responsibilities of each limb of the State. The Rules he espoused in 2011 show every sign of having been whittled away by the conduct of parliamentarians in both Houses and at all level of seniority.

What of political respect for judicial independence? By the press, politicians and the Lord Chancellor?

[35] page 9-10 of the lecture

[36] The word' must' is used in Constitutional Reform Act 2005

R. (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin) The High Court ruled Parliament should vote on when the government can trigger Article 50, beginning the formal process of the UK leaving the EU. The High Court decision that triggered these extreme personal criticisms of the judges involved was, as we know, later upheld by the Supreme Court R. (Miller) v Secretary of State for Exiting the European Union [2017] UKSC5 [37]

The Lord Chief Justice Lord Thomas put it in this way: "The sole question in this case is whether, as a matter of the constitutional law of the United Kingdom, the Crown - acting through the executive government of the day - is entitled to use its prerogative powers to give notice under Article 50 for the United Kingdom to cease to be a member of the European Union." He stressed that it was a "pure question of law" with "no bearing" on the merits of the UK withdrawing from the EU. Many of today's papers took issue with that. The clear assertion by Lord Thomas reaffirming the critical importance in our law of the sovereignty of Parliament: *"The most fundamental rule of UK constitutional law is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme"* did not satisfy the disgruntled press.

The decision in the Miller case was significant not just for constitutional reasons, but for the response it prompted in some sectors of the news media. The judges of the divisional High Court were labelled "Enemies of the People" by the Daily Mail in its banner headline and the Daily Telegraph described the effect of the judgment, as *"[t]he day democracy died*".[38] Attacks were personal as well as professional: one judge's sexuality being cited[39] (on what basis that might be relevant is inconceivable: it was an appalling and unjustifiable editorial decision in my view).The judges also faced some strong criticism from prominent politicians, for example from the Business Secretary, Sajid Jived, who commented that "*This was an attempt to frustrate the will of the British people and it is unacceptable."*[40]

This led to a defence of the judges. See for example the Bar Council statement of 4 November 2016, "*Judiciary must ensure rule of law underpins our democracy*"[41]. Noticeable by her silence was the then Lord Chancellor Liz Truss. Attention turned to her absence. Criticism of her was not silenced by a three-line press release issued somewhat tardily after the judgment that backed the independence of the judiciary but stopped short of condemning the professional (and personal) attacks on senior judges over the Brexit ruling**.**[42]

Liz Truss when asked about this by the House of Lords Constitution Committee on 1 March 2017 said

> *"……I am a huge believer in the independence of the judiciary; I am also a very strong believer in a free press and the value it has in our society. In defending the judiciary, it is very important that I speak out about the valuable work it does. I want to work with the judiciary so that we have more from the judiciary explaining to the public the work that it does and the process of appointment, but I draw the line in saying what is acceptable for the press to print or not. For me, that goes too far."*[43]

Lord Thomas of Cwmgiedd's comments before the House of Lords Constitution Committee on 22 March 2017 should be looked at. It provides an unusual example of a senior Judge criticising a senior Minister.

> *"In short, I believe that the Lord Chancellor is completely and utterly wrong in her view […] First, it seemed to me inappropriate to say anything during the time of the decision. Secondly, it was inappropriate to say anything until the*

[37] https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf
[38] Daily Mail and the Daily Telegraph, 4 November 2016.
[39] The Mail Online infamously introduced the Judges to its readers under the following headline: *"The judges who blocked Brexit: One founded a EUROPEAN law group, another charged the taxpayer millions for advice and the third is an openly gay ex-Olympic fencer" https://www.huffingtonpost.co.uk/entry/mailonline-online-attacks-brexit-judge-for-being-openly-gay_uk_581b344ee4b0ab6e4c1ba5ff?guccounter=1&guce_referrer=aHR0cHM6*
[40] Sajid Javid MP, speaking on Question Time, BBC 1, 3 November 2016.
[41]http://www.barcouncil.org.uk/media-centre/news-and-pressreleases/2016/november/bar-council-judiciary-must-ensure-rule-of-law-underpins-ourdemocracy/
[42] "Brexit ruling: Lord Chancellor backs judiciary amid row", BBC News, 5 November 2016: http://www.bbc.co.uk/news/uk-politics-37883576
[43]http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/lord-chancellor/oral/48223.pdf

legislation had been passed. Thirdly, 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.

It is clear, in my view, that we must maintain a free press, and I have said this in a number of cases that I have dealt with personally, most of which probably arose out of the prosecution of a number of journalists for printing stories that they knew they had acquired in breach of people's public duties. In that and a number of other cases, 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 clear in relation to the first part of the Article 50 case that the claimant had been subjected to quite a considerable number of threats, and 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."[44]

That comment, on record, points out the very real impact of press 'abuse' upon the judiciary. Implicit in it is a feeling they had been 'hung out to dry' by a Lord chancellor who failed to defend them when they were unable to do so themselves. What then of mutual respect for roles and responsibilities?

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

On 25th October 2018 Lord Hain used parliamentary privilege to name Sir Philip Green despite (or rather in flagrant breach of) the court injunction that banned the Telegraph (and media) from reporting the billionaire's name in an on-going case. Lord Hain told the Lords *"I'm not disputing judges' responsibilities - that's a matter for the judiciary. I'm discharging my function as a parliamentarian*."[45]

In March 2011, Liberal Democrat MP John Hemming used parliamentary privilege to reveal the existence of an injunction that banned a man from talking about court proceedings in which he was involved, including to his MP. Hemming also revealed that former RBS chief Sir Fred Goodwin had obtained an injunction banning the media from calling him a banker.

This led to a rebuke from the Lord Chief Justice, Lord Judge: "*But 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. It's a very serious issue in my view."*[46]

This is not a phenomenon of recent years. Ryan Giggs' identity was revealed in the House of Commons in 2009 via a parliamentary question asked by Paul Farrelly MP despite him having the benefit of a 'super injunction' granted by the court.

From just these few sample cases (there are many more) it is clear that both the Lords and the Commons have failed in the tradition to respect the province of the law and the judiciary if super injunctions are taken as an example . Moreover, the trampling of that boundary wall has not been confined to junior ministers. On 24th April 2009, the then Prime Minister David Cameron expressed concern about the use of 'gagging orders', saying that Parliament should determine privacy law and not judges. He spoke after Mr. Justice Eady granted a worldwide permanent ban on publication of photos of a television presenter.

[44]http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/lord-chief-justice/oral/49312.pdf
[45]https://www.independent.co.uk/news/uk/politics/philip-green-peter-hain-lord-wealth-knighted-sexual-harassment-metoo-parliamentary-privilege-a8602271.html
[46] https://www.bbc.co.uk/news/uk-politics-13475703

In a well-argued article by Patrick O'Brien entitled *'Enemies of the People": Judges, the media, and the mythic Lord Chancellor'* [47], the author rightly says that there is a long history of robust criticism of judges in the UK and then proceeds to give this sample list. This history led to Lord Dyson, in a speech in 2014, to conclude that the convention precluding criticism of judges by government ministers no longer existed[48]. Considering the history Mr O Brien sets out and which I have summarised above, I agree.

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

Consider the judgment of Wood J in *H v L (2006) EWHC 3099 (Fam)* setting out the appalling consequences of there being no legal aid for legal representation; in particular someone being cross-examined by their alleged abuser, acting as a litigant in person. Wood J was robust in his conclusions and ended his judgment with a bold invitation to the legislature:

> *"I would invite urgent attention to creating a new statutory provision which provides for representation in such circumstances analogous to the existing statutory framework governing criminal proceedings as set out in the 1999 Act. Such a statutory provision should also provide that the costs of making available to the court an advocate should fall on public funds. I can see no distinction in policy terms between the criminal and the civil process. Logic strongly suggests that such a service should be made available to the family jurisdiction. If it is inappropriate for a litigant in person to cross-examine such a witness in the criminal jurisdiction, why not in the family jurisdiction?"*[49]

Consider the comments of Baroness Hale in her lecture *'Equal Access to Justice in the Big Society'*[50]. In her opening address to the Law Centres Federation Annual Conference, she described some aspects of the Government's proposed legal aid reforms as '*fundamentally misconceived*'[44], and went on to describe other aspects of it as a '*false economy'.*[45] Such comments enter the territory of government policy and, indeed, a particularly controversial aspect of policy. As such it might be said that, notwithstanding the caveat at the opening of her address, which was to the effect that it is not for judges to criticise government policy[46], such comment was inappropriate. Lord Neuberger defended her in his article '*Where Angels fear to tread'* [51] thusly:

> *"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."*

E Where does this lead us?

As Professor Graham Gee pointed out in her through provoking article *'A Tale of Two Constitutional Duties: Liz Truss, Lady Hale, and Miller'*[52], one consequence of the 2005 reforms is that the judiciary today has a much greater responsibility to defend their own independence. As Professor Gee robustly points out judges have ample means to do so, including:

(a) an intervention by a senior judge (for example, a head of division or the very able Senior President of Tribunals, given that the Lord Chief Justice and Master of the Rolls both sat in the High Court in *Miller*);

(b) a 'media panel' of judges who are trained to speak publicly on controversial issues of public salience;

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[47] https://radar.brookes.ac.uk/radar/file/a7666467-7a26-4600-89b5-da16ecda5055/1/fulltext.pdf . Please take the time to read this in full. It covers much ground I could not deal with here: it is well researched and well argued

[48] Lord Dyson, "Criticising Judges: fair game or off limits?' Third Annual BAILII Lecture, 27 November 2014.

[49] https://www.bailii.org/ew/cases/EWHC/Fam/2006/3099.html

[50] The Law Society, 27 June 2011.

[51] *Lord Neuberger's Holdsworth Club 2012 Presidential Address – "Where Angels Fear to Tread" (2 March 2012)*

[52] https://policyexchange.org.uk/a-tale-of-two-constitutional-duties-liz-truss-lady-hale-and-miller/

(c) the Judicial Office's Press Office can pro-actively engage with the media in ways akin to the Supreme Court's Communication Team;

(d) a retired senior judge such as Lord Judge or Lord Woolf could be a 'proxy' available to the media on both the day the judgment was released and the few days after; and

(e) the Lord Chief Justice can raise the press coverage in the occasional meetings that he has with newspaper editors.

Lord Neuberger addresses what scope the post-2005 changes give the judiciary in his Holdsworth Club 2012 Presidential Address[53]:

> *'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 –.'*

He suggested some principles that might apply that might guide a judge entering what might be perceived as the political arena[54]:

> *'First, it seems to me only proper that judges, with their wisdom and experience, should be free to comment extra-judicially on a wide range of issues. In doing so they play an educative role. In areas such as constitutional principles, the role and independence of the judiciary, the functioning of the legal system, and access to justice, and even important issues of law, this role cannot be underestimated.*
>
> *Secondly, any comment should be made following careful consideration of the impact which it might have on both aspects of judicial independence. The Scalia situation should be avoided as should the Harlan Stone situation.*
>
> *Thirdly, a judge should consider the effect on the judiciary generally of any view expressed. The judiciary's claim to institutional independence depends in part on its institutional reputation and standing. An individual judge may regard a particular statement as justified and be prepared to take any consequent criticism, but the effect on the judiciary generally may render it inappropriate to make the statement.*
>
> *Fourthly and more specifically, a judge should think carefully about how any statement about politically controversial issues, or matters of public policy, might affect, or be affected by, the separation of powers, and comity between the three branches of the state*
> *Fifthly, judges should think carefully of their audience, and the impact their comments might have upon it, and upon any wider audience, including the media. Might that impact, or potential impact, call into question their independence, their ability to carry out their fundamental role of doing justice according to law? Could it call into question judicial independence? In particular, if a judge is proposing to discuss a point which may subsequently come to court, care should normally be taken to make it clear that the judicial mind is not closed.*
>
> *Sixthly, judges should not seek publicity for its own sake, or use their 'office as a springboard for causes (however worth'*
> *Seventhly, there are rather a lot of judicial speeches being made at the moment. I wonder whether we are not devaluing the coinage, or letting the judicial mask slip.'*

Lord Neuberger was seeking to give guidance on the balance a judge has to strike between maintaining the distance from the public and politicians that enables them to maintain authority through detachment and independence whilst also engaging with the society it is appointed to serve.

He intervened to 'hold the balance' between the judiciary and the legislative. He sought to reaffirm the principal of respectful debate between the judiciary and executive/ legislature.

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[53] Para 34-44
[54] Para 44-50

I can find no such measured guidance of expression of good intent from the legislature and executive; rather the reverse, in fact. Given that actions speak louder than words, it is difficult to avoid the conclusion that the judicial restraint and reason exemplified by Lord Neuberger on behalf of the judiciary is not mirrored by Parliament or the government. If the mutual respect for each other's roles and duties still exists, it appears to be valued by the one side of the partnership more than the others. Is this a consequence of the judges exercising their power (given by Parliament) to hold government to account and to apply the law with the independence that is part of their judicial oath?

> *'I, (name), do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth in the office of (office), and I will do right to all manner of people after the laws and usages of this realm (or colony), without fear or favour, affection or ill will'* [55]

As Sumption QC (as he was then was) openly acknowledged in his lecture[56]

> "*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*[57].

The premise of separation of powers is an important statement of principle but its absoluteness in practice is questionable. The degree to which a judge or a politician decides to address the duties and responsibilities of the other and where to draw the line between about their powers is as individual as the judges and politicians are.

The judicial decision to intervene or not in the exercise of the government of its powers, and how that is justified, is a matter for the judge concerned to resolve carrying out that duty with intense focus , integrity with intellectual rigour. I consider that they do so fully cognisant of the point at which their power ends and that of Parliament (re)starts. Some senior judges are prepared to go further than others in making themselves accessible to the wider professional and public to explain what they do. Again, that is more a matter of personality than professional rule.

Given the paralysed state of our government whilst it struggles with Brexit and the business of daily government is left as a poor relation, the courts continue their daily work, addressing matters big and small. The decisions of our senior law lords and ladies are intellectually rigorous, articulate and transparent. I would rather place a decision of importance in their hands given the current state of political debate than a politician's, to be frank. I for one am grateful for their robustness, boldness and independence.

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[55] Promissory Oaths Act 1868:
[56] "Judicial and Political Decision-Making: The Uncertain Boundary The F.A. Mann Lecture, 2011
[57] Para 29