The Politics of Judging
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Good evening. This is the third of my lectures concerning the politics of the courtroom. In my first two lectures I consider the political lawyer and the political jury. I now turn my attention to the politics of judging.

The photograph accompanying this lecture on Gresham College's website is by now a familiar one. I have it here on the screen. We see photographs – mugshots really - of the judges who in late 2016 decided in favour of Gina Miller in her challenge to the government's assertion that, following the referendum, it could serve notice to withdraw from the European Union without an act of parliament.[1] The accompanying headline is even more familiar: "*Enemies of the People*" thundered the *Daily Mail*. It is a headline which has launched a thousand dinner party conversations and, more recently, zoom discussions. It has even lent its name to an excellent book by the distinguished legal commentator, Joshua Rozenberg, published last year on the impact of judges on society.[2]

Of course, the choice of photograph was a careful one. The judges look remote and smug in their wigs and court dress. The message was clear. These men are not fighting your corner; they are members of a liberal elite who are seeking to promote their narrow metropolitan view of the world. Indeed one of these men, Sir Terence Etherton, the then Master of the Rolls, was described by the *Mail*, accurately but you might think irrelevantly, as a "an openly-gay ex-olympic fencer"; which led to J K Rowling's famous tweet: "If the worst they can say about you is you're an openly OPENLY GAY EX-OLYMPIC FENCER TOP JUDGE, you've basically won life."

The decision of these three men was upheld by a substantial majority in the Supreme Court a few months later in early 2017.[3] Ms Miller then returned to the courtroom in the equally famous case she brought concerning the prorogation of parliament in 2019. In that case all 11 justices of the Supreme Court sitting on the appeal agreed with Ms Miller that the decision to prorogue Parliament in August of that year was unlawful.[4]

Let me first say what this lecture is not about: I am not going to engage in a discussion of the legal merits or demerits of these court decisions. They have been endlessly debated by others far better qualified than me to offer an opinion. Instead, I am interested in the public response to what these judges decided and in wider questions about the politics of judging. There was, to me at least, a really surprising amount of outrage directed against these judges for the decisions they had reached, not just by journalists in certain parts of the press, not confined to *The Daily Mail*, but also from politicians and members of the government as well as from eminent academics.

Of course, criticism of the judiciary is by means a purely modern phenomenon. But traditionally the attacks have come from the left directed against a rather different form of elite to the current

[1] *Miller & Anor, R (On the Application Of) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).
[2] Joshua Rozenberg, *Enemies of the People: How Judges Shape Society* (Bristol UP, 2021).
[3] *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[4] *Miller, R (on the application of) v The Prime Minister* [2019] UKSC 41.

perception. Of course, if we go back into the past we find that the English judiciary was comprised almost uniformly of white, public-school educated men of a conservative disposition; distinguished by their belief in the salutary value of severe punishment and implacable opposition to the abolition of the death penalty.

Criticism of such judges required courage. When the most notorious of them all, the former Lord Chief Justice Lord Goddard died in the early 1970s, the journalist Bernard Levin wrote an excoriating article in *The Times* expressing his contempt for the principle that one should not speak ill of the dead and stating his view that Goddard had been a bigot and a bully. As Levin had himself predicted he was then met with an onslaught of outrage as the establishment closed ranks. But the only other tangible repercussion Levin suffered was being blackballed from the Garrick Club. In apartheid South Africa criticizing judges could lead to more serious consequences. The academic Professor Barend van Niekerk was held to be in contempt of court for publicly condemning judges for their failure to speak out against the introduction of particularly abhorrent legislation that permitted incommunicado detention without trial.

A few years later Professor John Griffith wrote his famous book *The Politics of the Judiciary*.[5] Griffith's argument was that the judiciary, drawn so he claimed from a narrow and privileged stratum of society, was making political decisions which reflected its predominantly conservative worldview and seeking to stymie the work of the Labour governments of the 1960s and 1970s. Griffith's thesis may be summed up as follows:

> "Behind these actions [i.e. particular decisions] lies a unifying attitude of mind, a political position, which is primarily concerned to protect and conserve certain values and institutions. This does not mean that the judiciary inevitably and invariably supports what governments do, or even what Conservative governments do, though this is the natural inclination…"[6]

Forty years on, the pendulum has swung decisively. The talk in the corridors of power is now of illegitimate activism by a liberal judicial cabal intent on stymieing 'the will of the people', reining in executive freedom of action and second-guessing governmental decisions.

The intellectual engine-room of this critique is the think-tank Policy Exchange which in 2015 created the Judicial Power Project (the JPP), headed by eminent academics. The JPP states its purpose on its website as follows: '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.'

Professor John Finnis QC, a very distinguished legal academic, in two papers available on the JPP's website, excoriated the unanimous decision of 11 Supreme Court judges in the prorogation judgment in *Miller (No 2)* as a constitutional heresy. His tone is not one of respectful disagreement. Lord Faulks QC, previously a Justice Minister in the Coalition government, wrote a commendatory preface to Finnis' second commentary, in which he added his view that the judgment was 'an assertion of judicial power that cannot be justified by constitutional law or principle.' Faulks went even further: he wrote that Finnis had shown 'just how badly the Supreme Court mishandled the law of our constitution which it was duty-bound to apply and thus the damage it has done to the integrity of the UK's political constitution.' These are strong words levelled against 11 of the 12 members of the United Kingdom's highest court. They are all the stronger when one considers that the

[5] (Fontana, 1977).
[6] Quoted in Rozenberg, op cit, at p.11.

philosopher-king of this school of thought, Lord Sumption, whose Reith lectures in 2019 were a sustained critique of judicial overreach, has himself described *Miller (No 2)* as doctrinally sound.

Government ministers also weighed in after the decisions in *Miller (No 2)*. Kwasi Kwarteng MP claimed that 'many people are saying that judges are biased. The judges are getting involved in politics'. Jacob Rees-Mogg denounced a 'constitutional coup'. Former Attorney General Geoffrey Cox QC said that he thought that there was 'a case for looking at how Supreme Court judges are appointed.'

A few weeks after the decision in *Miller (No 2)* the Conservative Party manifesto for the December 2019 election stated that a Conservative government would create a Commission on the Constitution, Rights & Democracy which would consider 'the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative…' Moreover, it would ensure that judicial review 'was not abused to conduct politics by another means or to create needless delays'. Judicial review, as many of you will know, is the legal process whereby the decisions of public bodies are subject to review for legality. In both Gina Miller's cases she had successfully applied for judicial review of a governmental decision.

In the immediate aftermath of the election many speculated what those words in the manifesto meant. The promise that the Commission would come up with proposals 'to restore trust in our institutions' seemed to suggest that the Conservative Party believed that trust in the judiciary had been lost. Lord Faulks himself suggested that the Commission would create an opportunity to reconsider the decision in *Miller (No 2)*. Then, in late July 2020 the government announced the formation of an Independent Review of Administrative Law, chaired by none other than Lord Faulks. Its remit was to 'consider whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government'.

Almost simultaneously with the announcement of the Review the JPP issued two papers which seemed to advocate the abolition of the Supreme Court. It was argued that the very title 'Supreme Court', and its physical separation from Parliament, might incite hubristic thoughts amongst the justices (by contrast the austere facilities of the Appellate Committee of the House of Lords, the previous apex court of the United Kingdom, may have 'encouraged a degree of humility'). Instead, was proposed a new 'Upper Court of Appeal' which would be made up of a revolving cadre of Court of Appeal judges from the Jurisdictions making up the United Kingdom.

The thread running through these papers was a desire to diminish the perceived self-importance of an overweening institution. The JPP said that it believed that the 'point is how to encourage that court to exercise its jurisdiction responsibly'. One proposed way to do this was to amend the Constitutional Reform Act 2005 by 'specifying in terms that [the Supreme Court's] responsibility is to adjudicate disputes according to law, not to guard the constitution'.

To some those sentiments will cause concern. Others will welcome them. But given the seeming influence of the views of the JPP in government circles these papers deserve attention, at least to detect which way the wind is blowing. There seems to be little doubt that reform of the Supreme Court, and retrenchment of the ambit of judicial review, are ideas which are gaining momentum.

The assumption implicit in the Conservative manifesto and the terms of the Independent Review is that the judges have overstepped proper boundaries and their power needs to be reined in. Is this a justified criticism? I will come back to that when considering the report produced by Lord Faulks and the members of his review, published less than two weeks ago.

Amidst all the din of these recent debates I want to take a step back and put forward a number of propositions and questions about the politics of judging.

Being A Judge Is A Political Act

In my first two lectures I deployed the word "political" in a particular way. I tried to explain how parts of the legal system were political in the sense that they involved a societal choice as to how we as a community organised the way law was administered. I now turn to judges. My first proposition is that the position of judges within the wider set of institutions which make up the way we have chosen to order our society is a political one.

What we have decided is that there will be a body of people, chosen in a particular way, who will decide disputes between private litigants or between the state and the citizen; and we have also decided that that body of people will be entirely independent of the parties to the litigation and will owe no duties to anybody or anything other than an abstract conception of justice which is sometimes described as the rule of law. The protection of that independence means that until they reach the statutory retirement age High Court judges can only be removed from office by a majority vote of both Houses of Parliament.[7] That has never been done in England or Wales.

And this ideal of judicial independence is perhaps the central plank of our legal system. Perhaps we don't think about very much; perhaps we take it for granted. But we shouldn't. When you have a dispute with somebody, whether that person is your neighbour, a company you are doing business with, or some emanation of the state, you will obtain the benefit of a judge to decide that dispute who is beholden to nobody and who you can have absolute confidence will try your case simply by reference to the law. That is a guarantee which is by no means universal in the world.

In the Soviet Union the conviction rate in criminal trials was 99.5%. The grim joke used to be that it was difficult to explain the 0.5% of acquittals. But don't think that is a statistic confined to the past. To this day apparently the average Russian judge renders a not guilty verdict once every 7 years.[8]

And judicial independence is in jeopardy within the borders of the EU. In Poland after the Law and Justice Party came to power in 2015 it instituted a number of measures to curtail judicial power over its executive action. For instance, it refused to recognise judges appointed by the previous government; it instituted the need for a super-majority within the judges making up a court; it created a system whereby judicial appointments were controlled by the state and then packed the courts with government appointees; and it created a system of sanctioning judges who in any way questioned the legitimacy of these appointees. This was the conclusion of two American commentators:

> "At its core, the [Law and Justice party's] rhetoric seeks to classify the judiciary as an impediment to democratic rule by the people, rather than a constitutionally mandated check on legislative and executive overreach. Of course, the end goal of the rhetoric is to justify the use of executive and legislative power unfettered by judicial review."[9]

These steps are concerning; and they are not happening in some distant land. They are happening on our doorstep. The rule of law is a fragile thing. There is nothing God-given that says that this country is immune from moving in that direction. And the undermining of the judiciary can be the first step towards its neutralisation.

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[7] Section 11(3) Senior Court Act 1981.

[8] *The problem with the Russian Judiciary*, Olga Romanova, 22 January 2018 https://carnegie.ru/commentary/75316

[9] https://judicature.duke.edu/articles/the-collapse-of-judicial-independence-in-poland-a-cautionary-tale/. Re the Hungarian situation see Uitz, Renáta: *An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts, VerfBlog,* 2019/1/02, https://verfassungsblog.de/an-advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/, DOI: 10.17176/20190211-223946-0

The Politics of Deciding Whether or Not to Be or Remain A Judge.
So, the idea – I should say ideal - of an independent judiciary is a political one.

But sometimes the question of actually whether to be a judge at all in a particular society engages political questions. Events in Hong Kong over the last few months have been much in the news after the introduction of the new national security law and the suppression of democratic representation. A question has arisen of the approach the judiciary should take to these events. Some people will know that there is what is known as the Hong Kong Court of Final Appeal, which comprises a significant number of senior United Kingdom, Australian and Canadian, judges who sit for a few weeks per year as so-called non-permanent members of that court.

In a leader column in *The Times* earlier this month it was stated that "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." Similarly, the shadow attorney-general Lord Falconer QC likewise called on British judges to cease sitting on this court because to "serves only to legitimise a compromised political and legal system."

Lord Sumption is himself a member of the Hong Kong Court of Final Appeal. Writing in response to *The Times* leader he gave a robust defence of his decision to remain a judge of that court. Sumption's view was that non-permanent Judges in fact absolutely should stay in post. He drew a distinction between Hong Kong's courts, which are independent and uphold the rule of law, and the legislation it applies, which is and has always been non-democratic. He wrote as follows:

> "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.
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> 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."

I should say that the question facing these judges is by no means unique. Even Sumption I think would acknowledge that there can come a time when, regardless of the integrity of the legal system administering the laws, the laws become simply too unpalatable to apply. Some of the finest advocates in apartheid South Africa during the apartheid years refused to become judges for that reason.

What happens when there is a revolution in a country and the judicial oath you have given become invalid? Do you as a judge simply shift your allegiance to the new head of state or constitution? These are not of course merely moral questions, to be debated in an academic way. Judges have to live and may have to feed their family. Resignation may have financial consequences for them. A now largely forgotten episode occurred in the 1960s in what was then Southern Rhodesia. At the time this country was a Crown Colony. The Prime Minister, a man once very famous (or rather infamous) called Ian Smith, fell out with the British government and he and his ministers in Rhodesia issued a so-called Unilateral Declaration of independence (UDI). Under the colonial constitution of Rhodesia this was totally illegal. Moreover, the reasons for the UDI were particularly odious: Smith wished to ensure that the franchise remained white only so as to retain white supremacy whereas

the British government wished to ensure the steady transition to universal suffrage where the majority of the population were black. A new constitution was purportedly brought into effect by Mr Smith and the British Government responded by declaring that it was of no effect and all laws made by the southern Rhodesian legislature were of no effect. The existing judges of South Rhodesia had all given an oath of allegiance to the Queen as the head of state. What should they do in the face of a revolution, albeit a peaceful one? Should they convert their oath from the Queen to the new constitution? Should they apply laws which were necessarily entirely unlawful? A case was argued before them under which the wife of a man who was detained by the state sought his release. The case went to the Privy Council in London. The Privy Council held that the law under which the man was detained was invalid and ordered his release. The new de facto government in Southern Rhodesia said it would not recognise the judgment. What should these judges, who had been appointed under the old colonial constitution, which recognised the Privy Council as the final court of appeal, do? Two brave men resigned as judges.

Sydney Kentridge, who argued the case for the detained man's wife in the Privy Council, later wrote that the honour of the South Rhodesian judiciary was maintained by those two judges.[10] One of them, Mr Justice Fieldsend, would later be appointed the Chief Justice of the new Zimbabwe. In his obituary Kentridge described him as "a man of conscience, the epitome of real judicial probity."

These examples I think show a fundamental truth about the business of judging. Judges are not simply passive creatures who adjudicate on the laws that are presented to them, irrespective of the contents of those laws. There is a conception of justice which can trump barbarous laws. That trumping may not permit a judge sitting on the bench to simply disregard them: but it may morally require him or her to refuse to participate in them. That may require resignation. Whether you call that an ethical or a political decision I don't think matters.

Are Our Judges Over-Politicized?

At the beginning of this lecture, I referred to the very serious disquiet which has been voiced by certain academics and politicians about the supposed encroachment of the judiciary into matters which are the preserve of the executive. My own view is that it is one thing to criticize particular judgments of the court and quite another to suggest that the judiciary is engaged on some form of concerted project to expand the reach of judicial power.

A recent decision of the Supreme Court which has received intense scrutiny is a case decided last year concerning Gerry Adams, the former leader of Sinn Fein. Adams had been interned in Northern Ireland in the early 1970s under a procedure which allowed the Secretary of State to detain a person without trial where, and I quote, "it appears to the Secretary of State that a person is suspected of having been concerned in commission or attempted commission of any act of terrorism…". Adams subsequently tried to escape from his detention and was convicted of the crime of attempting to escape from lawful custody. Over 40 years later he appealed against his conviction on the grounds that the original detention was itself unlawful because the relevant legislation required the Secretary of State personally to have considered Adams to be a terrorist, rather some junior minister. It was common ground that the Minister for Northern Ireland at the time, William Whitelaw, had not himself personally considered the matter. The Supreme Court unanimously decided that the statute required the Secretary of State to personally come to the conclusion about a person's involvement in terrorism. The consequence was that Adams had been wrongly detained and convicted and therefore might have a claim to damages; as might hundreds of other people who were also detained at that period in similar circumstances.[11]

[10] The case was *Madzimbamutu v Lardner-Burke* [1969] 1 AC 645. See S Kentridge, *A Judge's Duty in a Revolution*, printed in *Free Country: Selected Lectures and Talks* (Hart Publishing, 2013).
[11] *R. v Adams (Northern Ireland)* [2020] UKSC 19.

Now this decision has received a lot of criticism on the grounds that it simply misunderstands the practical reality of how government works as well as misapplying a doctrine of law knows as the *Carltona* principle, which in summary decides that where legislation requires a minister to do or come to a view on something that thing can be delegated. For what it's worth I have a good deal of sympathy with that criticism. But I simply don't accept that the Court's error, if error it was, is a symptom of some wider project. Courts sometimes get things wrong.

8 months later the Supreme Court heard the appeal in the Shamima Begum case. You will recall that as a girl of 15 Ms Begum left England to join ISIS. A few years later, while she was detained in a camp in Syria, the Home Secretary sought to deprive her of her British citizenship and then refused to allow Ms Begum to return to the United Kingdom so that she could effectively contest that deprivation. The Secretary of State justified that refusal on the grounds that Ms Begum's return to this country would be contrary to the national interest on national security grounds. The Supreme Court refused to question or go behind the Home Secretary's reasons deciding that it was "the Home Secretary who has been charged by Parliament with responsibility for making such assessments, and who is democratically accountable to Parliament for the discharge of that responsibility."[12]

Two of the judges who decided the *Begum* case were also on the panel which decided the *Adams* case. They did not have some Damascene conversion in that 8-month period to the path of judicial self-restraint.

I have appeared in front of hundreds of judges in my time as a practising member of the Bar. I know personally a lot of judges. Almost to a man and woman they are intensely hard-working, conscientious people, who have usually given up lucrative careers in private practice to take on a job which involves long hours and is mentally wearing. They don't become judges in order to pursue some nefarious agenda; they generally do so out of a sense of public-spiritedness: after all for a society to function efficiently and fairly we have to high calibre lawyers willing to perform judicial tasks. And although these people no doubt have political views in the party sense – just like everyone else they vote Conservative or Labour or Liberal Democrat – perhaps some of them even voted for UKIP - when they enter the courtroom my own perception is that they put aside those views.

The judiciary has come a long way since the days of hanging judges like Lord Goddard. It is drawn from a much wider pool of society, both in terms of gender, ethnicity and social background. Moreover, appointments to the bench are now in the hands of a specially appointed commission. I have read legal judgments from around the world and the decisions of the English judiciary stand out for their lucidity and intellectual rigour. My own view is that the Supreme Court, and before it the House of Lords, is one of, if not the most, respected courts in the world. It sits at the apex of a court system which attracts business from across the world. Foreign companies chose to have their disputes decided by English judges because they know they will get independent justice dispensed by high quality legal minds. And so when one reads about proposals to rename the Supreme Court the Upper Court of Appeal, or to convert its membership so that it includes a rolling list of Court of Appeal judges, one does wonder why such an act of national self-harm could even be contemplated.

I mentioned earlier that the Government had instituted an Independent Review of Administrative Law. Well Lord Faulks' report was not the blistering critique that some people may have been hoping for. In fact, it was a measured document that found very little about the current system and the judge's role requiring change. I quote from its conclusion.

> "10. 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.

[12] *Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor* [2021] UKSC 7.

11. 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.

12. However, the government is undoubtedly entitled to legislate in relation to judicial review, and may well be justified in doing so in certain circumstances. None of the judges who provided submissions to us called this into question. Although there could be said to be an element of conventional law reform about some of our proposals, any decision to legislate more widely will essentially be a political one.

13. One theme which we would like to emerge from our review is that there is a continuing need for respect by judges for Parliament. This is rendered easier where there is evidence of real parliamentary scrutiny. In this context, we welcome the fact that the Fixed-term Parliaments Act 2011 (Repeal) Bill 2021 132 is to be the subject of pre-legislative scrutiny by an all-party Joint Committee of the Houses of Lords and Commons. ….

15. Respect should be based on an understanding of institutional competence. 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."

The Lord Chancellor responded to this Report by saying that it had found that there was "a growing willingness to accept an expansion of the remit of judicial review", which he described as "worrying". When interviewed last week by Joshua Rozenberg in Radio 4's *Law in Action* Lord Faulks himself disagreed with that analysis.

Activist or Asleep?

That said I think it is right there we can discern in judges broadly speaking two casts of mind: the interventionist and the non-interventionist. Strangely, they are not correlated to political leaning in the party sense. Those two casts of minds were most sharply delineated in one of the most famous decisions of the twentieth century. In 1941, in the depths of the War, a man called Robert Liversidge was arrested and detained by order of the Home Secretary under the notorious regulation 18B of the Defence (General) Regulations which had been hastily brought into force in late 1939. This Regulation allowed the Home Secretary to intern people if had "reasonable cause" to believe that they were of "hostile association". So Liversidge – who I should say was Jewish - was incarcerated and he brought legal proceedings to challenge the Home Secretary's order.

In the House of Lords four of the Law Lords meekly agreed that they could not go behind the Home Secretary's assertion that he did indeed have "reasonable cause". The Home Secretary's simple assertion that he did was good enough. One judge took a different view. Lord Atkin was then 72 years old and no radical. But he was moved to say this:

> "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."

For those who rail against judicial activism I know of no better argument against them than the fact that in the darkest days of Apartheid South Africa the decision of the majority in *Liversidge v Anderson* was regularly cited to justify judicial abstentionism in the face of executive abuse. Let me give you one notorious example. In *Rossouw v Sachs* the well-known anti-apartheid activist Albie Sachs had been detained in prison for interrogation and was deprived of reading and writing material. This was a detention that last weeks and months, not days. Sachs sought an order from the court requiring the police to allow him books, and pen and paper. In denying Sachs's claim the Court drew support from *Liversidge*. The regulations under which Sachs was being held were designed to preserve public order and the safety of the state and therefore they should be interpreted in a way which allowed the police to hold detainees for week after to week without any form of distraction. Why? The reasons given are chilling: "to induce the detainee to speak".

Albie Sachs went on to become a member of the Constitutional Court of South Africa. And in fact, in courts across the world it is the Atkin viewpoint which has generally prevailed. If it was a toss-up between the four judges who agreed with the Home Secretary and Lord Atkin, I know who I would rather have on the bench deciding my case. There is in existence a telegram sent to Atkin by his daughter Nancy after he had delivered his judgment in the *Liversidge* case. It reads as follows: "Many congratulations on superb judgment. Am prouder than ever to be your daughter." Not words, one suspects, a judge often receives from their children for a judgment they have handed down.

Sir Stephen Sedley, a recent retired court of appeal judge, once wrote that a judge is either an activist or asleep. And in fact, the English common law has been built on judicial activism. Yet one of the criticisms recently levelled at the judges by the Judicial Power Project is that **'**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.'

It is difficult to connect these sentiments to the actuality of law-creation in Britain over many centuries. The reality is that much of the law that regulates our lives has been created by judges in a body of authority which dates back to the Middle Ages and which fills law libraries. The common law, in all its complexity, subtlety and flexibility, ranks as a great intellectual project. As a famous Law Lord, Lord Reid, said in a speech given in the early 1970s and pointedly titled 'The judge as law maker', it is a fairy tale to believe in some Aladdin's Cave where there 'is hidden the common law in all its splendour and [that] on a judge's appointment there descends on him knowledge of the magic words "open sesame".' In fact, the common law is created and developed by judges in a never-ending process of refinement and cross-generational conversation.

Parliament has been perfectly content to allow this to happen. Of course, Parliament can and does legislate to change the common law; but there remain large expanses where it has chosen not to go near or where it has made only limited interventions. It is in those territories – the law of negligence, the law of private remedies, the law of contract and indeed the law of judicial review to take just a few obvious examples – where the common law holds dominion.

The JPP also tells us that '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.' Again, to my mind this statement is at odds with historical reality. The common law is nothing more than the accumulation of judicial learning over many centuries. It changes with the times; otherwise, our law would be ossified in the fourteenth century except to the extent Parliament intervened.

Let me take three well-known examples of judicial law-making.

(1) In the 1770s Lord Mansfield declared that the concept of slavery was not recognised in Britain. When James Somersett, the enslaved person in question, sought his liberty from the courts should Mansfield have said "it is a matter for parliament?" This was judicial activism at work.

(2) In 1932 the modern law of negligence was created not by legislative intervention but by the House of Lords and in particular by the judgment of the same Lord Atkin who I mentioned earlier. Lord Atkin did not say, "it is a matter for parliament."

(3) For centuries the law of England was understood to hold that a man could not be guilty of the rape of his wife, notwithstanding that she had not given informed consent. Parliament had shown no interest in intervening to change the law. Then, in 1991 the House of Lords in *R v R* held that the law should reflect modern mores and decided that the marital rape exception no longer applied. Again, was this a piece of objectionable judicial activism? Should the judges have deferred to a passive Parliament and allowed Mr R to go free?

I mentioned earlier in this lecture Joshua Rozenberg's most recent book *Enemies of the People*. Rozenberg is of course one of our most respected legal commentators, careful in his opinions and no apostle of judicial radicalism. I suspect that most lawyers, whether they veer to the right or the left, would agree with his ultimate conclusion: 'Far from being enemies of the people, judges are just about the only friends we have.'