SOCIETY OF CONSERVATIVE LAWYERS DINNER 2018

THE ROLE OF THE JUDICIARY IN THE UNITED KINGDOM

1. The role of the judiciary in the UK's government is not much talked about outside the world of lawyers and judges, and even many lawyers understandably feel that they have better things to do than to think about the judiciary. But the judges have been playing an increasingly important role in our constitution over the past fifty years.
2. In principle, of course, as we all know, there are three branches of government: parliament - the House of Commons and House of Lords - which makes and changes the law - the executive - ministers, the civil service, local government and other public bodies - who administer and enforce the law, and the judiciary – the judges - who interpret, uphold and develop the law. The UK is of course a monarchy and the monarch has a role in relation to each branch, but the UK is almost unique in having no coherent written constitution (like only Israel and New Zealand among democracies); we have a number of constitutional statutes and conventions, the most important of which is Parliamentary supremacy – ie Parliament has the last word.
3. The judges uphold the rule of law, by enabling people to settle their disputes in court, ensuring that suspected criminals are properly tried and sentenced, and dealing with complaints that the executive has wrongly interfered with citizens' rights. It is obviously vital that the judges are independent, competent and trusted and that the courts are accessible and their workings open to public scrutiny.
4. In the 19th century and the first six or seven decades of the 20th century, however, the judiciary enjoyed a period of profound constitutional slumber. Readers of Bagehot's famous work on The English Constitution, published 150 years ago, would come away with the view that there were only two branches of State, the executive and the legislature. For instance, in 1947, when a ministerial decision to demolish a large area of Plymouth was challenged, the Court of Appeal said

that he need not explain what material he relied on because "it is not for the court to decide whether he had sufficient material to justify his decision".

5. As the late Anthony King put it, "[f]or … the first six decades of the twentieth century, the judges were dogs that seldom barked or even growled … and showed no disposition to play any sort of constitutional role". But things started to change in the late 1960s. Thus, in 1984, the Law Lords were saying that the Government could not simply hide behind national security as a reason for refusing to let GCHQ workers join a trade union: ministers had to persuade the courts that the refusal was reasonable.
6. This change of judicial approach was partly attributable to the difference between the respectful attitude in the restrained 1940s and the more irreverent atmosphere engendered by the exuberant 1960s. Also, during the 1950s, society became more regulated, government agencies proliferated and the peace-time powers of the executive increased, and these tendencies all accelerated in the ensuing decades. As a result, judges became more aware of their constitutional function to protect citizens against the increasingly mighty state, and citizens were becoming more conscious of their rights: we were entering what the author Robert Hughes called the era of the Culture of Complaint. And, as Anthony King suggested, "the judges" were impelled further in the direction of self-assertion by the politics of the 1980s". The increasing use of judges to chair public inquiries also induced a feeling that the judiciary has a legitimate role to play in relation to policy issues.
7. So, it should be no surprise that the volume of cases in which judges were called on to decide whether the executive had acted properly increased from a mere 185 in 1969 to around 4,600 in 1999. A year later, in 2000, the Human Rights Act 1998 (HRA) came into force, and this gave the judges an enhanced duty to protect citizens against executive interference in their lives, as it statutorily enshrines fundamental rights such as the right to liberty, access to courts, respect for privacy and family life, freedom of expression and freedom from discrimination. Although most of these rights can have long been reflected in the common law, the HRA has given rise to some new rights (eg privacy), spelled

out some assumed rights (eg freedom of expression) and expanded some previously existing rights (eg the right not to be imprisoned arbitrarily). The effect of the HRA is such that it is no surprise that the current (August 2016) edition of the guide for civil servants, *The Judge Over Your Shoulder* (with its somewhat ironic acronym – JOYS) runs to 100 pages, and that by 2011 there were around 11,000 claims against the executive, well in excess of double the number ten years earlier.

8. The HRA requires judges to decide issues involving national security, counter-terrorism, and even military activities on the battlefield, areas which have traditionally been regarded as "no go" areas for the judiciary. Further, the traditional approach of a judge in the UK is to ask whether the decision was one which a reasonable public body could have reached: ie the judge has a purely reviewing function. By contrast, when it comes to human rights, the court has to consider the justification for the policy or legislation in question on its merits.
9. But the HRA has not only rebalanced the relationship between the judiciary and the executive; it has also rebalanced the judiciary's relationship with the legislature, which is of particular constitutional significance as Parliamentary statutes have been regarded as unreviewable by the courts. The HRA requires the court to rewrite a statute so that it complies with the Convention, and, where that is not possible, to indicate to Parliament that the statute should be amended; Parliament can of course refuse, but it has only done so once, and even there (prisoners' votes) Ministers are now considering the issue.
10. The1998 devolution legislation gives UK judges a further novel constitutional role: it is for the judges to decide what powers have been devolved or retained by the Westminster parliament. A number of other statutes have given the judiciary novel powers. Thus, the Freedom of Information legislation bestows on the judges a considerable degree of control over the confidentiality of government records – and even over some Royal records. And the data protection legislation similarly gave judges considerable powers over data in public and private hands.

11. Quite apart from these developments, the judiciary has seen very significant changes in its organisation and structure, and indeed to its very identity. The Constitutional Reform Act 2005 created a new free-standing UK Supreme Court in place of the Law Lords, statutorily enshrined the independence of the judiciary and the rule of law, abolished the judicial role of the Lord Chancellor, gave the Lord Chief Justice much greater responsibility for the courts and judges of England and Wales, emasculated the Lord Chancellor's powers of judicial preferment, and introduced a new system for appointing and promoting judges. And the Tribunals, Courts and Enforcement Act 2007 unified a number of different and disparate ad hoc tribunals and integrated them within the judicial system.
12. All the changes I have been discussing contributed to the judiciary's sense of constitutional responsibility and its sense of institutional self-confidence – as well, it must be said, as contributing to a significant increase in the judicial work-load, and media interest in the judges and their work.
13. And the change that has occurred in judicial activity outside court since the 1960s has been as marked as the change inside court. Many of the reasons are the same, but in addition there is the advent of the electronic age, and the consequent mushrooming of communications. Judges have a vital role in defending and upholding the rule of law generally and the independence of the judiciary in particular. In the past an old-style Lord Chancellor, abolished by the 2005 Act, could have been relied on to defend the judiciary from unjustified attacks, by speaking out both in public and in the Cabinet. Since then, despite the Act's pious support for the rule of law and independence of the judiciary and tokenistic requirement for a properly qualified Lord Chancellor, there is an understandable feeling that neither the Lord Chancellor nor any other Government Minister can be confidently relied on to do the job of protecting the rule of law and the independence of the judiciary. If there was any doubt about that, it was proved by the woeful experience last year following the media reaction to the High Court decision in the *Miller* case. It is only fair to record that there are no grounds for criticising the present Lord Chancellor or his immediate predecessor on this

count. Nonetheless, it will take a long time before we can be confident that there will always be a government minister of stature who can be relied on to stand up for the judiciary unequivocally when it is not politically expedient to do so. It is not a question of the judges individually feeling upset by unjustified and personal attacks: that is part of modern life. It is the fact that such attacks undermine public confidence in the judiciary and therefore in the rule of law. So, if no one else can be relied on to do so, the judges have to be ready to speak out on that issue, but they have to do so in a measured, non-political way.

14. Of course, to concentrate on defending the rule of law against unjustified media attacks is only the high-profile tip of the iceberg. There is a much wider canvas for the judges to paint on - speaking up for, and explaining to the public which is not very well educated about our constitution and government, about the rule of law, access to justice, the role of judges and the functioning of the courts; and also explaining and discussing more specific issues which are almost always more complex and more nuanced than will appear to the average newspaper-reader, television-watcher, or radio-listener.

15. And judicial communication with the public is by no means only out of court. Steaming Supreme Court hearings and publishing judgments and judgment summaries enables every member of the public see and understand what goes on in court. Indeed, I believe that it was one of the reasons why the media reception of the Supreme Court decision in the *Miller* case was so much more appropriate than the reception of the High Court decision.

16. The marked increase in the judges' role when it comes to policy issues inevitably means that judges and their decisions are getting more media coverage than they ever got, and the effect of this change is exacerbated by the fact that it is occurring at a time of fast moving social and technological change and increasingly strident and pervasive mass media, and, at least for the moment, in a highly charged political atmosphere. It means that the pressure on the judges is considerable and that their responsibility to maintain and uphold the rule of law is particularly crucial. Judicial steadfastness is crucial both for the public interest and for the judges' peace of mind. Parliament has given the judges new powers,

which they should exercise cautiously. For instance, while it is for the judiciary, not the executive, to decide whether a particular decision of the executive justifies curtailing a human right, the Supreme Court has said that "the making of government and legislative policy cannot be turned into a judicial process", and so in cases involving decisions and actions on issues such as national security, economic assessments, and foreign relations, it requires a particularly clear case before the judges will interfere, as such cases involve questions which the executive, "with the experience and sources of information available to [it] internally and externally, is, almost literally, infinitely more qualified to form an authoritative opinion … than a domestic judge".

17. If I may, I would like to get across to you this evening several basic points, which may seem obvious to most lawyers, but which are plainly not well understood outside the legal world. First, judges should and do decide cases according to their understanding of the law, not their personal views or their moral or religious beliefs. Secondly, because the law is not always easy, views as to the law may differ: that is why we have appellate courts – and indeed why there are dissenting judgments. Thirdly, judges decide cases according to the evidence put before them in court: they do not choose what witnesses and documents to produce. Fourthly, most of the powers a judge has have been given by Parliament, and the remainder of the powers have been developed over the centuries. Fifthly, any judicial decision or any judicial powers which politicians or ministers do not like can be reversed or overridden by Parliament if it thinks it right to do so, because the UK enjoys Parliamentary supremacy.

18. Sixthly, "unelected" judges decide on the law: that is their job; and sometimes the politicians are happy to leave it to the judges to do so; given that judges do not need to be re-elected, it is often easier for them to make the difficult, but right, decisions. I should like to look at that point a bit more closely. The argument against "unelected" judges is based on the implicit assumption that nobody should make a decision unless he or she has been elected. I think that that is not only contrary to common sense, but it is positively dangerous. Plenty of unelected officials need to have powers and cannot be expected to stand for

election. The notion of people who seek to be judges having to seek popular election is plainly undesirable and people having to seek re-election as judges, thereby making decisions for reasons of popularity rather than the rule of law, is plainly even worse. I know that there is an occasional cry for politicians to be involved in selecting senior judges, but I am strongly against that. It would risk turning senior judicial appointments into a party-political game, as in the US. And the risks if politicians were involved in judicial promotions would be even greater: it would be almost inevitable that there would at least be a perception that some judgments were given by judges who were seeking favour with politicians.

19. The truth is that our society rests on two principle pillars - a democratically elected government and the rule of law. The rule of law is based on an independent judiciary which applies the law, including fundamental rights, independently and disinterestedly. Democratically elected government is embodied in the former is established by a democratically accountable legislature, namely the House of Commons. And any concerns about judges not being elected is neatly met by the existence of Parliamentary sovereignty – the House of Commons can overrule any judgment it does not like.

20. Let me revert to the *Miller* case, because it provides an excellent illustration of what I have been saying about how the constitution works. Government Ministers, the executive, wanted to give notice terminating the UK's membership of the EU. Ms Miller, as a citizen of this country, went to court because she considered that this would not be lawful without formal authorisation by Parliament, the legislature. Although the issue arose in an EU context, it was a classic domestic constitutional case: the judiciary was being asked to identify the relative constitutional responsibilities of the executive and the legislature. And we decided that, because it is only Parliament that can change, or authorise a change in, the law of the land, and the giving of the notice would result in a significant change in our laws, ministers could not give the notice without the formal authorisation of Parliament. That was an example of our constitution and the rule of law at work: a citizen getting access to the courts

to hold the executive to account, and the courts deciding who was entitled to change the law, and upholding Parliamentary supremacy.

21. A respected judiciary is vital to the rule of law, but it is also very important for the financial health of the nation. The international respect for our courts, our common law and lawyers means that the UK boxes way above its weight when it comes to international legal services and dispute resolution (litigation, arbitration, mediation). This is highly beneficial for this country's finances, both directly, in terms of a very large amount of international legal work coming to London, and indirectly, in terms of supporting financial and other service industries so vital to this country. It is essential to maintain a nationally and internationally respected judiciary, because it is a vital ingredient of the rule of law at home, and a vital underpinning to our legal standing on the international stage.
22. I regret to have to tell you that the judiciary may be coming under pressure from a different quarter. It is a melancholy fact that in three successive High Court competitions the selection panel, rightly adhering to the need for the highest quality, was unable to recommend sufficient candidates to fill vacancies on the bench. The problem has extended to two successive Circuit Judge competitions. It is to be hoped that the Government will take the opportunity presented by the Senior Salaries Review Board fundamental review of judicial remuneration, expected to report in September this year, to remedy what is generally regarded as the primary impediment to recruitment.
23. Thank you very much.

David Neuberger

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