

BRITISH ACADEMY LAW LECTURE

# Judicial Independence: Who Cares?

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## I. Introduction

EPIMENIDES THE CRETAN, whom I briefly encountered in Princes Street last week, assured me that contemporary Cretans have the most scrupulous possible regard for truthfulness. He went on to explain that he was momentarily at an acute pecuniary disadvantage, having forgotten his PIN number, despite having a very substantial surplus in his Euro account with the Bank of Knossos. He asked if I could lend him £100 so as to let him catch a train to London where he had a prepaid onward connection to Crete. He assured me that he would instruct his bank to make an equivalent transfer to my account (if I would just kindly give him necessary IBAN number and other details). . . .

Well, there would be a nice inversion of the liar paradox. Hitherto Epimenides' line has been that all Cretans are liars—but, if so, could we believe what he said? Suppose he now starts assuring us that they all tell the truth always. What then? This is on its face as self-referential as the liar paradox, and it seems almost as fishy but in a different way. There is something pretty questionable about someone who assures us that all he says is true. It is the all-but-invariable opening gambit of every confidence trickster. It seeks to divert attention from obvious grounds for mistrust. Ordinary truthful people simply let their yea be yea and their nay be nay, say what they have to say, and let us take it at face value without further

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self-certification of its truthfulness. If it is true, self-certification adds nothing; if not, it is doubly worthless.

One may in similar vein remark that it is only when some value has become in some way problematic that people normally resort to making an explicit rule aimed at upholding it.<sup>1</sup> What goes without saying needs no rule. Moreover, what can be done by establishing a rule can be undone by repealing it. In that sense, making a rule may express a problem as much as a solution, showing that a principle or value hitherto taken-for-granted has somehow come into question.

Has this a message for us in relation to the subject of my lecture, the Independence of the Judiciary? Perhaps there are grounds for unease. Let us remember the grand flourish with which the Constitutional Reform Act 2005 commences:

1. This Act does not adversely affect—
  - (a) the existing constitutional principle of the rule of law, or
  - (b) the Lord Chancellor's existing constitutional role in relation to that principle. . . .
3. (1) 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.

Meanwhile in Scotland the Minister of Justice and the Lord Advocate, acting together on behalf of the Scottish Executive, earlier this year put in train a consultation about 'Strengthening Judicial Independence in a Modern Scotland'.<sup>2</sup> Their prefatory remarks to the consultation include this: 'We are strongly committed to the independence of the judiciary, and we propose to make a statutory statement of this commitment.' Following this, they sketch out quite firm general outlines of the statutory provisions they mean to bring forward, and they append many questions as elements of their public consultation. These invite comment on their own proposed scheme, rather than having a more open-ended character that would encourage broader reflection on the prerequisites of judicial independence in contemporary Scotland.

<sup>1</sup> I owe this insight to Professor Walter Weyrauch of the University of Florida. See 'The "Basic Law" or "Constitution of a Small Group"', *Journal of Social Issues*, 27 (1971), 49 and I gratefully acknowledge helpful correspondence with him about this paper and other related writings of his.

<sup>2</sup> *Strengthening Judicial Independence in a Modern Scotland* (Edinburgh, Consultation paper, Scottish Executive 2006) <<http://www.scotland.gov.uk/Publications/2006/01/30154152/0>>.

These Scottish proposals address among other things a perceived need to put Scotland on an equal footing with, or a footing similar to, that recently established in England and Wales, where a whole new order of judicial organisation has emerged through the aforementioned Constitutional Reform Act 2005.<sup>3</sup> It is worth remembering how that came about.

The office of Lord Chancellor was pronounced abolished in June 2003, following the dismissal from office of Lord Irvine of Lairg on 12 June.<sup>4</sup> This abolition proved premature, so many were the statutory and other functions exercisable only by the Lord Chancellor. Nevertheless, the abolition of the office was driven forward by the then Prime Minister's determination to reshape the three branches of government and sharpen the differentiation of the judicial function. There was to be a new United Kingdom Supreme Court<sup>5</sup> in place of the House of Lords (and the Privy Council, in those of its judicial functions pertaining to the United Kingdom). There was need for a new speakership of the House of Lords, and a new Department of Constitutional Affairs in place of the Lord Chancellor's Department of old. This all took some time to emerge clearly into view, but always it was being relentlessly pushed forward by the government, by the executive branch of the state.

For England and Wales, there also came sharply into focus the need for a new definition of the role of head of the judiciary and guarantor of its independence. The former role and a share of the latter was to be exercised thenceforward by the Lord Chief Justice, with consequential changes affecting other senior judicial posts. Inside government, the now purely executive office of Lord Chancellor would continue (as noted) to carry the duty of special vigilance for judicial independence.<sup>6</sup>

<sup>3</sup> Information that came my way under the 'Chatham House Rule' subsequently to my lecture leads me to believe that in fact the first moves in relation to the Scottish position and the need to consider possible parallels with new developments in England and Wales may have originated among the judiciary. It would be wrong to portray the Scottish Executive as having taken up the subject out of the blue, though it remains an open question how satisfactory the Executive approach has been.

<sup>4</sup> See K. Maleson 'Modernizing the Constitution; Completing the Unfinished Business' in G. Canivet, M. Andenas and D. Fairgrieve (eds.) *Independence, Accountability, and the Judiciary* (London: British Institute of International and Comparative Law, 2006), pp. 145–62 at pp. 148–50.

<sup>5</sup> This development was under discussion for several years before. See Lord Steyn, 'The Case for a Supreme Court', *Law Quarterly Review*, 118 (1999), 382.

<sup>6</sup> See Lord Bingham of Cornhill, 'The Old Order Changeth', *Law Quarterly Review*, 122 (2006), 211–23 at 222.

New arrangements by way of a Judicial Appointments Commission were to take effect in respect of appointing judges. In addition, there were to be elaborately balanced powers of appointment to, or recommendation for appointment to, the new United Kingdom Supreme Court. These reflect the asymmetrical constitutional schema of the United Kingdom, and respond to the historic guarantees of the independence and integrity of the Scottish Legal System.<sup>7</sup> The whole idea might however turn out still to be open to challenge. For it is not clear that any appeal to anything other than the Parliament (or one of its houses) is legitimate under the Articles of Union—the United Kingdom Supreme Court has a distinct look of a ‘Court in Westminster-hall’ or at least a ‘Court of like nature’.<sup>8</sup>

That gives in very brief summary the comparative background to the Scottish Executive’s proposal about judicial independence in Scotland. The main idea is that the Lord President of the Court of Session should, by a development parallel to that taking place under the Constitutional Reform Act, become the Head of the Scottish Judiciary. The Lord President should thus acquire responsibilities encompassing not only the Court of Session and the High Court of Justiciary as at present, but extending also to all sheriffs principal and sheriffs and district judges. It is not a proposal that has itself been rendered necessary because of the demise of the Lord Chancellor’s role as head of the judiciary and guardian of its independence. For the Lord Chancellor never had either of these roles in Scotland. Given the spectacularly variable constitutional geometry to which we are growing accustomed, the urgency of achieving symmetry in this respect between Scotland and the southern neighbours seems open to doubt.

<sup>7</sup> These are, of course, enshrined in the 1707 Treaty of Union, as that was put in force by the enabling legislation of the two parliaments that were predecessors to that of Great Britain. Scottish legal distinctiveness nowadays additionally falls to be considered in the light of the re-establishment of a Scottish Parliament under the devolutionary legislation. See N. MacCormick, ‘The English Constitution, the British State, and the Scottish Anomaly’, *Proceedings of the British Academy*, 101 (1998), 298–306.

<sup>8</sup> Article 19 of the Treaty of Union provides *inter alia* that ‘no Causes in Scotland be cognoscible by the Courts of Chancery, Queen’s Bench, Common Pleas, or any other Court in Westminster-hall; And that the said Courts, or any other of like nature after the Union, shall have no power to Cognosce, Review or Alter the Acts or Sentences of the Judicatures within Scotland, or stop the Execution of the same;’ (Cited from T. B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh, 1962) p. 878). For extended discussion of the question whether the Constitutional Reform Act violates this provision, see N. MacCormick ‘Doubts about “The Supreme Court” and Reflections on *MacCormick v Lord Advocate*’, *Juridical Review* (2004), 236–50 esp. at 242–50.

It has to be said, moreover, that the proposals themselves, and the manner of pressing forward with them—legislation was originally promised during the present Parliament, with an election due in May 2007—have given rise to some disquiet in legal and, notably, high judicial circles in Scotland, as well as among serious newspaper columnists.<sup>9</sup> The ancient office of Lord President may find itself yet more radically reconfigured than that of the Lord Chief Justice. Without other visible gains, this could wreak severe detriment to the established working usages of the Court of Session and High Court of Justiciary. In the absence of a radical re-think of responsibility for the Scottish Court Service, and its relation to the Scottish Courts Administration, which is a department of the Scottish Executive under the Justice Minister, the authority of the Lord President will be somewhat confined and his or her capability actively to champion judicial independence may be cramped and confined.

The establishment of a very substantial purely Court-dedicated civil service, with strong senior management responsible to the Lord President in consultation with other senior judges, could make a real difference.<sup>10</sup> In its absence, the proposed new model for the Lord Presidency will fail to achieve the purpose for which it is designed. To the extent that it would be workable, it would be a poor guarantee of real continuing judicial independence. For without some radical redesign, achieved after careful comparative study in the European Union and with similar sized jurisdictions elsewhere,<sup>11</sup> the pre-eminence of the Lord President as a judge rather than as a kind of CEO of the whole judiciary of Scotland would become a thing of the past. What is more, the independence of the judiciary conceived as the independence of every judge may be compromised if ‘independence’ is defined primarily as a quality of the whole corps of judges under direction of a new-model Lord President.

<sup>9</sup> See *Copies of responses received for the consultation paper entitled ‘Strengthening Judicial Independence in a Modern Scotland’* web publication, 13 June 2006, <<http://www.scotland.gov.uk/Publications/2006/06/13143517/0>>. The website includes twenty submissions from representative bodies, including one from the Scottish judges collectively, and seventeen from individuals, including the present Lord President, Lord Hamilton, and two of his predecessors, Lords Hope and Cullen.

<sup>10</sup> Compare the statement by Lord Hamilton, cited above, n. 9.

<sup>11</sup> The Scottish Judges, in their submission cited above, n. 5, and also Sir David Edward in his submission, cite Ireland as a relevant comparator in the light of recent reforms to the Irish Courts system.

On the other hand various aspects of accountability,<sup>12</sup> so far as this is a proper counterbalance to independence, and a safeguard against its abuse, might indeed be more easily worked into a new statutory framework than into present structures. The risk of Executive over-dominance of the bench might also be further warded off under a statutory version of the current Scottish Judicial Appointments Board, with special arrangements concerning appointment to the offices of Lord President and Lord Justice Clerk. The proposals of the Executive point in this direction, hence in these respects deserve more than a merely tepid response.

It would not be appropriate to the present occasion to go into much greater detail about the Scottish proposals and responses to them. Suffice it to say that we cannot wholly assure ourselves of a clean difference between Epimenides the truth-teller and the Scottish Executive. 'We are strongly committed to the independence of the judiciary, and we propose to make a statutory statement of this commitment.' Is there a rat here to be smelled?

In the same suspicious frame of mind, I am bound to ask: Does section 3 of the Constitutional Reform Act quell all possible concerns about judicial independence in England and Wales? '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.' Well, that's all right then—or is it really?

These may seem mean-minded doubts, but there is ground for them. If judicial independence matters, it matters most highly in respect of the interface between the executive and the judicial branch of government. In the present circumstance of party government, tough-minded political leaders in executive office can very frequently have their will done by means of the legislation a parliamentary majority can be persuaded to enact. In deep constitutional questions, this approach to law-making can be very disturbing. For the executive takes upon itself the task of deciding the lines of change to be pushed through, and only then does consultation in parliament and outside it commence. Sometimes, very often, perhaps, this consultation process does result in valuable modification of what was originally proposed. But the process and the upshot do not much

<sup>12</sup> See Andrew Le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK', in Canivet, Andenas and Fairgrieve (eds.), *Independence, Accountability, and the Judiciary*, pp. 49–76.

resemble the kind of calm reflection that a constitutional convention or even a royal commission might produce.

The on-the-hoof or off-the-sofa approach to redrafting the basic elements of a constitution, especially but not only affecting England and Wales, that followed the announced abolition of the Chancellorship (old style) was an instructive example of how not to do it. One cannot quite equiparate this with the Red King's 'verdict first, evidence afterwards', but it went a bit down that line. Save for long and arduous debates and committee work in Parliament's upper house, the result would have been greatly worse than it turned out. The constitution does not belong to the executive of the moment. Although governments have indeed the right to legislative initiative, and are entitled to achieve programmes of reform for which they have a reasonable electoral mandate, there should be considerable caution and a wider view when it comes to revising constitutional fundamentals. A mature and wide-ranging exchange of views ought to be included in, and perhaps to precede, any strong taking of position by the executive. Parliaments have a much larger part to play in deliberation upon possibilities than current practice seems to allow them.

In Scotland, the single-chamber character of our Parliament makes the more urgent a highly prudent and discursive approach to projects for reform of constitutional fundamentals. This was not initially conspicuous in respect of the 'judicial independence' proposals and consultation, though the responses received and the public controversy surrounding them have led to the adoption of wiser counsels. In both England and Wales and Scotland, the executive branch of government, in the act of proclaiming unshakable adherence to the principle of judicial independence, has acted in ways that suggest it is itself entitled to a privileged part in re-shaping that other branch of government whose independence it proclaims. Surely, that will not do.

## II. Judicial independence: why valued?

A lecture such as the biennial Law Lecture of the British Academy affords an opportunity to underline the importance of things that in fortunate times are simply taken-for-granted features of our civil and constitutional scenery. We live, by contrast, in interesting times. Lurid organs of the tabloid press frequently pillory judges on the basis of very partial reporting of decisions in individual cases. Two Home Secretaries have apparently added their voices to the virulent critique of particular judicial

decisions, and a third has sought a private audience with the law lords to discuss the sound balancing of priorities among human rights, and been rebuffed.<sup>13</sup> The Prime Minister, Mr Blair, was sufficiently discontented with the response of the judiciary to anti-terrorist measures that he sought parliamentary authority for detention of terrorist suspects up to ninety days. ‘The rules have changed’, he proleptically announced, while making preparation to have them changed.<sup>14</sup> There is a tension in the air between executive and judiciary. On each side, the one is considered insufficiently sensitive to the proper, legitimate, and deep concerns of the other during dangerous times.

Judicial Independence—Who Cares? Indeed, why should anyone care? We must at least nod in passing to first principles. Judicial independence is one essential corollary of the yet more fundamental principle of separation of powers. That itself, however, is by no means undisputed as to its meaning or its value. Admittedly, since at least the writings of John Locke, and all the more those of Montesquieu, it has been a kind of byword that free government—free government as distinct from despotism or tyranny—requires such things as the following. Those who make the laws should themselves be subject to governance under the laws they make, along with fellow citizens and other subjects of the law. Hence holders of the highest executive power should not themselves be able to determine the content of the legislation whose execution it falls to them to progress—their task is pursuit of the common good under the law, not to exercise domination over it. The administration and application of the law in individual cases, whether in its criminal aspects, in respect of private citizens in controversy with public authorities, or in respect of private persons litigating among themselves, must be entrusted to a quite separate corps of judges. These must be outside the executive and the legislature, and must not be exposed to undue or improper influence by these institutions or any of their individual members. This absence of improper influence is quite as important as both the actuality, and the clear appearance, of absence of any undue friendship or favouritism towards or financial dependency on, persons outside government. Judicial independence and impartiality so understood are indeed cornerstones of

<sup>13</sup> See <<http://www.downingstreetsays.org/archives/002913.html>>. *The Times*, 14 June 2006 (Rt. Hon. John Reid); <<http://www.irr.org.uk/2003/march/ak000010.html>> (Rt. Hon. David Blunkett); *New Statesman*, 26 Sept. 2005 (Mary Riddell, Interview with Charles Clarke).

<sup>14</sup> Prime Minister’s press conference 5 Aug. 2005 <<http://www.number10.gov.uk/output/Page8041.asp>>.



liberty under the rule of law,<sup>15</sup> and essential to free government in a free society. This is part of the rule of law and the separation of powers as we know them.<sup>16</sup>

Not everyone agrees about the separation of powers. Some think that Montesquieu simply misunderstood the British Constitution, with mischievous effects for those in America, France and other places who tried to guarantee liberty by making constitutional provisions for strict separation of powers—though doing so in decidedly different ways in their different countries.<sup>17</sup> All along there was never a clean separation of powers in any of England, Great Britain, the United Kingdom, each in succession to its predecessor. Still, one should surely acknowledge that differentiation of constitutional functions, and especially a jealous regard for judicial independence has long been a standing feature of our constitutional practice. Much has depended on convention and usage and the self-policing of elite institutions (the conduct of the Court of Session and Faculty of Advocates, and the special position of the Lord Advocate, hitherto afforded one telling example, pertinent to the opening section of this lecture).

Everything is now changing. Adjudication is to be moved out of the House of Lords and re-established in a Supreme Court elsewhere in Westminster. The dismemberment of the Lord Chancellor's office, though happily not of either the former or the current holder of the office, and other current developments, represent a cleaner separation than heretofore of executive power both from judicial and from legislative power. If the theory of separation of powers was a mistake, the United Kingdom is now committing that very mistake two centuries after everyone else.

It was not a mistake, however, as I argue elsewhere.<sup>18</sup> Any person of generous spirit ought to welcome this as an attempt to catch up and to put the constitutional house in order. Mr Blair's government showed due mindfulness of the imperatives of the Human Rights Convention. It showed a proper willingness to amend the curious example the United

<sup>15</sup> Compare Lord Irvine of Lairg, *Human Rights, Constitutional Law, and the Development of the English Legal System* (Oxford, 2003), pp. 201–8 (chap. on 'Judicial Independence and the British Constitution').

<sup>16</sup> This paragraph summarises points argued at greater length in N. MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford, 2007), pp. 43–8, to which I refer the reader in preference to overloading the text of this lecture with excess of footnotes.

<sup>17</sup> See, e.g., I. Claus, 'Montesquieu's Mistakes and the True Idea of Separation', *Oxford Journal of Legal Studies*, 25 (2005), 419–52.

<sup>18</sup> *Institutions of Law*, see above, n. 16.

Kingdom has hitherto presented to the former Communist states that the European Council, United Kingdom included, exhorted to get their constitutions in better shape as regards the separation of powers and the rule of law. Having been somewhat critical of the methods adopted by governments in the opening section of this lecture, surely I must in concluding this section acknowledge that Mr Blair's was the government that 'brought rights home'.<sup>19</sup> This was the government that worked into the tapestry<sup>20</sup> of our law the Convention Rights—the rights asserted by ourselves and most other Europeans in the European Human Rights Convention. Faced with the question 'Judicial Independence: Who Cares?' one can properly answer: 'Everyone who takes seriously human rights as these have been codified in the post-1945 period does and must take seriously the issue of judicial independence.' The right to a fair trial before an independent tribunal<sup>21</sup> is one of the foundational rights of the human condition as the international community now conceives this.

Certainly, in the light of intellectual and political commitments formed over many years, I for one am bound to salute the wisdom and courage of a government that did 'bring rights back home'. In time to come, this will surely be seen as one of the greater politico-legal achievements of the closing years of the twentieth century in this country. This will be so long after momentary conflicts and frustrations between ministers and judges over the correct interpretation and balancing of rights in difficult cases has passed out of public memory. So the doubts I expressed in my opening section about the approach of the United Kingdom Government and the Scottish Executive to the issue of judicial independence need to be put more fairly in context. The situation is one in which the greatest obstacles to hasty and perhaps ill-considered ministerial action under pressure of emergency situations are constituted by legislation originally promoted by the self-same government. If ministers have fallen into a trap, it is one they set and baited themselves. It should be seen, however, not as a trap, but as a safety net, situated very fortunately well in place when it was needed at a difficult time.

<sup>19</sup> The White Paper *Rights Brought Home: the Human Rights Bill* (1997 Cm. 3782) preceded and laid the ground for the Human Rights Act 1998.

<sup>20</sup> I borrow this phrase from Elspeth Attwooll's *The Tapestry of the Law: Scotland, legal culture and legal theory* (Dordrecht, 1997). MacCormick, *Rhetoric and the Rule of Law*, chap. 13. But contrast, for example, J. Balkin 'Ideological drift and the Struggle over Meaning', *Connecticut Law Review*, 25 (1993) 869.

<sup>21</sup> See Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

### III. Judicial Independence—a Pious Fraud after all?

Ministerial concern about judicial interference in political issues is matched by legal concerns that the domestication of the Convention Rights has led to enhanced judicial activism, giving the judges an openly political role in deciding priorities among legally recognised values. This comes on top of the substantial growth of judicial review of administrative and governmental action during the Thatcher and Major years. As Home Secretary, Michael Howard set the precedent followed by subsequent Labour Home Secretaries when he complained of judges usurping domains of ministerial discretion and overruling ministers on essentially political questions.<sup>22</sup>

More generally, it is a widely held view that judges are simply a different kind of lawmakers from parliamentarians and ministers, but are lawmakers just the same. ‘The day is long gone’, say Chris Himsworth and Alan Paterson, ‘when the Law Lords could credibly deny that lawmaking is part of their role. As Lord Reid of Drem observed . . . over thirty years ago, “we do not believe in fairy tales any more”’.<sup>23</sup> We can add that general view of the judicial function to more specific and recent complaints about judicial intrusion into the political realm. We may then end up with enhanced scepticism about the very idea of a separation of powers. It seems yet another fairy tale that it is possible to draw any clean or clear line between judicial and legislative functions. One contemporary critic of the Montesquieu theory indeed includes the judiciary, in the USA in particular but also in the United Kingdom, as participants in the legislative power.<sup>24</sup> The declaratory theory of judicial interpretation, though it may have some life left in it, seems most prominently asserted in the recent *Kleinwort Benson* case in which the Law Lords apparently re-wrote the English law concerning the recoverability of money paid under a mistake of law.<sup>25</sup> ‘Some declaration of pre-existing law that was!’ an objector might say.<sup>26</sup>

<sup>22</sup> See D. Woodhouse, ‘Judicial Independence and Accountability within the United Kingdom’s New Constitutional Settlement’, in Canivet, Andenas and Fairgrieve (eds.) *Independence, Accountability, and the Judiciary*, pp. 121–44 at p. 127.

<sup>23</sup> Chris Himsworth and Alan Paterson, ‘A Supreme Court for the United Kingdom’ in Canivet, Andenas and Fairgrieve (eds.) *Independence, Accountability, and the Judiciary*, pp. 99–120 at p. 112, quoting Lord Reid, ‘The Judge as Law Maker’ in *Journal of the Society of Public Teachers of Law* (NS), 12 (1972), 22.

<sup>24</sup> I. Claus, cited above, n. 10.

<sup>25</sup> *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 417.

<sup>26</sup> But see the discussion in N. MacCormick, *Rhetoric and the Rule of Law* (Oxford, 2005), pp. 256–6.

Moving to more recent controversy, over the permissibility of detaining terrorist suspects without trial, or about what is to be deemed torture, or inhuman or degrading treatment of such suspects, one may ask: 'What is the key issue when the matter comes before the law courts? Is it what the law is, or is it what the law shall be?' If it is the former, no doubt the judges are the most competent decision makers. But if it is the latter, why should judges have the final say, not elected politicians holding office in a democratically accountable government? Really, the one question is: 'Who should make that law, and be final arbiter of its meaning? Parliament and ministers answerable to it? Or judges answerable to no one?' (It is usual, in such talk, to add 'unelected' before 'judges'.)

Legal neo-realists, many traditional positivists and most if not all exponents of Critical Legal Studies can more or less join hands on this issue. Whether it is politicians or judges who take the final decisions about matters of this kind, the decisions are ineluctably political ones.

Hence this line of thought raises a crucial point material to the judicial independence debate. If judges are simply another set of political actors alongside of ministers, MPs and senior civil servants, by what right do they have the final say? What is their independence other than a kind of designed-in unaccountability for the political content of inevitably political decisions (albeit they may be in various ways accountable in respect of other aspects of their conduct)? It can be argued that all the stuff I put forward in my introduction about present-day problems in Scotland and other parts of the United Kingdom merely amounts to a kind of complicity in pious fraud. Judges are not decision-makers of a cleanly different kind from ministers or legislators. They are as much political actors as anyone else. Political decision-making is a seamless web, and the distribution of decision-making power among different institutions or persons is largely arbitrary, or, at any rate, highly pliable. The case for a specially protected judicial sphere depends on a false view about the possibility of differentiating what is strictly juridical from what is strictly political. In that case, however many people proclaim their deep concern for judicial independence, they may simply be victims of a dominant ideology.

I disagree strongly with this line of objection. It seems to me to be based on a faulty analysis or understanding of the possibility of applying practical reason of a specifically juristic kind even to the solution of controversial and politically sensitive questions of law, such as those posed in nearly every case involving application of the Human Rights Act. The

same practical reason comes to bear on these politically salient issues as in others of equal difficulty but less political sensitivity.

Most often, statute law, probably quite recent statute law, is at the heart of the kinds of controversy that most concern us. Any statute, for example one or another Prevention of Terrorism Act, represents a new input into an already ongoing legal system. The legal system has already deep-seated principles about personal liberty built into it. Added to that are competing recent statutory obligations to apply Convention Rights as domestic rights. The restrictions on liberty imposed by the new Act take effect in that context. To make sense of this newly enacted law one has to read it in the light of the existing legal system to see what changes it brings about, and how best to make sense of newly enacted rules in the whole context of the amended but continuing legal system.

It will not be remarkable if a judge or an advocate forms an understanding of the whole meaning and impact of the enacted law that does not perfectly match that of the politicians who participated in enacting it as law. It will certainly be formed in a different general context, based on awareness of the law more than on attention to a particular political programme or a particular security emergency. The longer legislation sits in the statute book unamended, the more must this be the case. Many statutes fall to be applied long after the particular lawmakers who promoted them or enacted them have moved on to different concerns, suffered electoral defeat, even retired altogether, or died.

In just such settings, respect for the Rule of Law imperatively requires insulating the courts and the judiciary from improper political pressures by members of the executive and the legislature. This is a cornerstone of all the most authoritative human rights declarations, charters and conventions currently in force in Europe and around the world. Even a politician who is understandably surprised, disappointed or even outraged by the interpretation a judge or bench of judges has given to recently enacted law has to beware of undermining the rule of law on which her or his own position also in the end depends. Politicians ought not to interfere with or put pressure on judges to take a particular political line in legal interpretation, except by the weight and quality of the interpretative arguments their own advocates advance in open court. The law once enacted, it is the courts that have the last word in ascribing authoritative meaning to it in any case of controversy.

When parliamentarians or ministers are dissatisfied with the results, their legitimate recourse is that of a return to the legislative drafting board with a view to producing a new version of the law that will be

yet clearer in pointing the way to the desired outcome. The sequence of re-enactments of legislation amending quite recent statute law about terrorism affords an object lesson in this.

It is trivially true that the law is always a target for political action. All political parties with any kind of reforming programme, whether of the left or of the right or of the ever-more-crowded centre, or of an ecological or a consumer-protectionist or trade union sympathetic cast of mind, need to change the law. Parties elected on a reform ticket need to carry out their reforms. Political reforms need legal enactment. New ministers with reforms to bring forward need legislative time, and legislative draftsmen, and ways to translate political principles into workable laws. What makes the laws workable, however, is their subsequent implementation through judicial decisions on the basis of interpretations that may have to be refined and then refined again through the stages and processes of appeal. This cannot but involve both putting it in the context of a coherent overall conception of the legal system, and also implementing the values implicit in the legislation, those very values that have been argued out in the political process.<sup>27</sup>

Recently, the search for overall coherence has become both acute and yet acutely difficult in areas concerning liberty and security, where important human rights commitments and new restrictive laws have to be read together as a coherent whole. I know of no more powerful example of painstaking and careful legal-coherentist reasoning than that expounded by Lord Bingham in his leading speech in the first of the *A v Home Secretary* terrorist suspects cases.<sup>28</sup>

It is no part of my argument that judges are infallible or always wiser than other mortals. Unfortunate judicial embroilment in politics can occur otherwise than by some actual or attempted exercise of improper influence by ministers or other politicians—or, indeed, agents of big business. Judges who resist or denature political reforms that have been successfully embodied in legislation run a similar risk, and do so more culpably. Some thinkers of the Critical Legal Studies (CLS) movement indeed go so far as simply to deny the existence of any gap at all between law and politics, precisely because of the role the courts play in implementing the law. ‘Critical’ theorists point out that judges are always having to choose whether to pursue values akin to those that currently prevail

<sup>27</sup> This is substantiated in MacCormick, *Rhetoric and the Rule of Law*, pp. 139–41.

<sup>28</sup> *A (FC) and others v Secretary of State for Home Affairs* [2005] 2 AC 68 at 90–129.

in legislative programmes, or values opposed to them.<sup>29</sup> In a curious way, their most dire opponent, Ronald Dworkin, himself also elides any real differentiation between the deepest legal questions and those of political and moral philosophy.<sup>30</sup>

It took me a whole book—my recent *Rhetoric and the Rule of Law*—to argue this matter to a conclusion that seemed to me satisfactory. The ‘critical’ thesis about law-application is grossly overstated when it denies that there really can be objective legal arguments that give better or worse interpretations regardless of personal preferences among judges. On this Dworkin and I are in agreement, and he saw this light long before I did. Objective grounds of legal preference do indeed exist, though of course there is frequent and honest subjective disagreement about these. Judges can make mistakes, and of course they sometimes do, even if there can be no correcting the mistakes of final appellate tribunals save through subsequent scholarly and journalistic critique and eventual judicial response to that, if it has been well and convincingly stated. Judges can also take sides in an improper way, and sometimes do. One very distinguished judge once confessed that there was a time when, in respect of trade union law, the judiciary seemed generally to act on the basis of a probably unconscious kind of class bias.<sup>31</sup> They can surely be biased on other grounds—look at the language in some of the nineteenth-century cases about women’s right to vote or to undertake medical education.<sup>32</sup> There must be present-day parallels, though it would not serve my present purpose to dig them up.

Errors that are possible are not inevitable, nor are they universal. Judges can indeed, and by my impressionistic judgement most of them do, steer well clear of any kind of political partisanship in fulfilling the duties of their office. Thus do they keep well out of politics in any crude sense.<sup>33</sup> Common sense confirms the main thrust of the sociological case Niklas Luhmann advances in his ‘system theory’ of law, concerning the

<sup>29</sup> Compare generally D. Kennedy, *A Critique of Adjudication* (Cambridge, MA, 1997); A. Norrie (ed.), *Closure or Critique* (Edinburgh, 1993), esp. chap. 7 (P. Goodrich, ‘Fate as Seduction’).

<sup>30</sup> R. Dworkin, ‘Hart’s Postscript and the Character of Political Philosophy’, *Oxford Journal of Legal Studies*, 24 (2004), 1–37.

<sup>31</sup> Compare Lord Justice Scrutton, ‘The Work of the Commercial Court’, *Cambridge Law Journal*, 1 (1921–3), 6–20 at 8.

<sup>32</sup> See A. Sachs and J. H. Wilson, *Sexism and the Law* (London, 1978).

<sup>33</sup> McCormick, *Rhetoric and the Rule of Law*, chap. 13. But contrast, for example, J. Balkin, ‘Ideological drift and the Struggle over Meaning’, *Connecticut Law Review*, 25 (1993), 369.

distance that can be maintained, and that perhaps has to exist, between the political and the legal.<sup>34</sup>

Taking politics in a larger view, however, as concerning whatever is for the common good of a polity and its citizens, the non-partisanship of the judiciary, coupled with their institutional and individual independence, is itself a precious political achievement. If there really can be states that live by the Rule of Law as a genuine achievement, not an ideological smokescreen, it does depend on a successful, if not necessarily a formal and absolute, separation of powers. Such a separation ensures that different functions are carried out by different agencies each of which reasonably trusts the others to keep to their own patch according to local constitutional understandings.

It is not then the case that judges and courts are in every sense non-political—of course they ought to be non-partisan, refraining from taking sides overtly in matters of inter-party dispute in the ongoing political struggles of the day. But achieving non-partisan impartiality is itself a particular political role, one of inestimable value in securing constitutional balance. It is by participating in this way that judges contribute most to sustaining the common good of the polity. There is no single constitutional blueprint for free government, nor any one-size-fits-all version of the separation of powers. Judicial independence comes with quite acceptable local variations in different constitutional traditions and structures. Some forms of ‘judicial activism’ are tolerated and tolerable in one kind of liberal state that would seem intolerable in another.

In both England and Wales and in Scotland we are in a period of transition. Established and unwritten, perhaps even hitherto unspoken, norms that have supported judicial independence and facilitated mutually respectful distance between the judicial and the other branches of government are changing and require new articulation. To do this well calls for much careful reflection about the process whereby it is done as well as about outcomes that may be desirable. In the opening section of the paper I expressed concern that the executive has tended to take too much of a directing role in what needs to be a conversation with several parties. For one arm of state to take too strong a lead in setting the balance between it and the others cannot be healthy. This does not undermine proper deference to the democratic will that is expressed in parliamentary legis-

<sup>34</sup> N. Luhmann, *Law as a Social System*, trans. K. Ziegert, ed. D. Nobles and others (Oxford, 2004), chaps. 9 and 10, esp. at pp. 408–9; for constructively critical discussion, see MacCormick, *Institutions of Law*, chap. 10.



lation. It concerns how we should collectively come to the moment of legislative decision on deep constitutional issues.

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