

NEITHER CLOISTERED NOR VIRTUOUS? JUDGES AND THEIR INDEPENDENCE IN THE NEW MILLENNIUM*

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It is a great privilege for me to be invited to give this lecture which commemorates one of the outstanding common law judges of the century whose family are so happily represented here today and to follow, like a solitary page behind a line of Wenceslases, in the footsteps of the far more august speakers who have preceded me in this role. I know how much the invitation pleased my father, Lord Beloff, a faithful member of this Club, and only regret that he did not live long enough to save me from errors and infelicities that, in the absence of his usual wise guidance, it will inevitably contain.

I have chosen as my title a corruption of one of Lord Atkin's most celebrated *dicta* "Justice is not a cloistered virtue" uttered as part of the advice of the Privy Council to His Majesty in *Ambard v. Attorney-General for Trinidad and Tobago*.¹ The case revolved around the conviction for contempt of court of the editor for a leading article in the *Port of Spain Gazette* entitled "The Human Element." The editorial criticised in a manner that would have astounded the editor of *The Sun*, both for its polysyllabic vocabulary and for its moderate tone, the alleged inequality of sentences passed in the islands for certain criminal offences.

Lord Atkin's observation was apt for my purposes in a number of overlapping ways. It is not, I hasten to assure you, that I intend to verge on the contemptuous in my remarks about the judiciary of England and Wales. Many of my best friends are judges and I hope that this situation persists beyond the conclusion of this lecture - and at least as long as I remain a practising member of the Bar.

But I wish to raise some questions about them with, of course, the *greatest* respect, a phrase that, I will explain for any non-lawyers present, when uttered in Court, bears the precise opposite of its literal meaning.

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¹ [1936] A.C. 322 at 335.

I wish to suggest that contemporary criticism by *others* than myself of judges would stretch even the tolerance of Lord Atkin.

I wish to examine whether and to what extent, judges either as volunteers or as conscripts have now emerged so far from the cloister into the arena as to put in jeopardy the independence which is their single most precious virtue.

And I wish to consider how the process of erosion can be halted, if it has not already gone too far.

Let me start, as so much discussion about the role of the contemporary judiciary in England must start, with the case of General Pinochet. For I have little doubt that the case and its consequences will have had as dramatic an effect on perception and, as a result, treatment of the judiciary as any other single happening in the recent past.

The bizarre sequence of events in the *Pinochet* case which led to the three decisions indexed blandly in the Law Reports as *Ex p. Pinochet Ugarte Nos. 1*,² 2³ and 3⁴ is well known. In the first case the House of Lords split three-two in favour of the proposition that the General was not immune for reasons of sovereignty from extradition to Spain on charges of torture. In the second, the House unanimously set aside that decision on the grounds of apparent bias of one of the Law Lords involved, Lord Hoffmann, who had not disclosed his links to Amnesty International, an intervener in the proceedings. In the third, the House split five ways on the same issue as had been raised in the first hearing and, while favouring, again by a bare majority, extradition did so on extremely limited grounds, indeed advised the Home Secretary to reconsider whether to exercise his discretion to extradite. The case is now poised on a journey from the Bow Street Magistrates to the Divisional Court.⁵

There were some obvious lessons to be learned.

The first and foremost was the critical importance of the twin precepts that justice not only be done, but be seen to be done, and that, for that purpose, no man may be a judge in his own cause. As Lord Hope observed: "One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered;"⁶ and as Lord Nolan, the most recent, if not the onlie

² *R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 1)* [1998] 3 W.L.R. 272.

³ *R v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 2)* [1999] 2 W.L.R. 272.

⁴ *R. v. Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No. 3)* [1999] 2 W.L.R. 827.

⁵ General Pinochet was not extradited by the Home Secretary on the grounds of his poor health. He subsequently returned to Chile.

⁶ [1999] 2 W.L.R. 272 at 288.

begetter of the standards which should guide those in public life added "In any case, where the impartiality of a judge is in question the appearance of the matter is just as important as the reality."⁷

The second was that our judges can nowadays be involved in decisions freighted with political implications of the highest sensitivity: it indeed may strike someone not versed in the niceties of extradition law as odd that English judges should have *any* role in deciding whether a former leader of a friendly foreign state must stand trial in the courts of another friendly foreign state.

The third is that a result of litigation can often depend upon the composition of the tribunals. One could construct, what I shall loosely call a pro-Pinochet majority out of the members of the appellate committee who sat in cases one and three. *Quot judices tot sententiae*, if I may surreptitiously make use of a language now barred in the age of Woolf - the Vulpine era - from the vocabulary of our Courts. This proposition, familiar even to pupil barristers, let alone the subscribers to the American realist school of jurisprudence, may not have made hitherto a similar impact upon the general public. On the Clapham omnibus, they are said to speak of other things. But the attention of that public is now inevitably focussed upon who selects the Law Lords, and who indeed selects the panels in any particular appeal, and, more generally, how senior judges are chosen for their distinctive constitutional role.

The fourth, and maybe most doleful, is that judges can make mistakes. Lord Hoffmann has never explained publicly the circumstances of his non-disclosure; but his failure has been expensive in terms of his own reputation and the reputation of the judiciary as well as to the public purse. I lack nothing in admiration for him. He was in a former incarnation my Roman law tutor at Oxford. He is nowadays recognised as an intellectual powerhouse among even the present Law Lords. But as Homer nodded, so, alas, did Hoffmann. I want to develop some further thoughts from this point of departure. Judges share with other lawyers the unpopularity which inevitably stems from involvement in other peoples disputes; if there were no disputes, there would be no need for judges; and the exercise of dispute resolution, touches the lives of citizens on a micro, if not a macro basis, more intimately than the activities of other organs of government. From the very nature of their function springs the very imperative for their independence. But we take it as axiomatic that our judiciary not only *should* be, but *are* independent - by which we mean broadly that the judges approach cases before them, untainted by any interest in their outcome, free from any outside pressure to reach a decision in a particular way, and excluding from their consideration, so far as is humanly possible, any of those prejudices

⁷ *Ibid* at 288.

which are the product of class, race, gender, or genes. As Lord Saville has recently written, the best judges are “people who will apply the rule of law, people who are able, and seen to be able, to put aside their personal feelings and views.”⁸

We institutionalise judicial independence by immunizing the higher judiciary from dismissal other than by address to both Houses of Parliament,⁹ and by legislation which prevents judicial salaries from being diminished other than by statute itself.¹⁰ It is well settled for the same policy reasons that judges *as well as* other participants in the forensic process are immune from action for statements made in the course of proceedings, even if made maliciously,¹¹ and certainly if made foolishly!

We view with a sense of distaste but also of comparative satisfaction stories from overseas such as - and I take them at random from the last twelve months -

the attack by the Government of the People’s Republic of China on the decision of the Court of Final Appeal to give mainland children born to Hong Kong residents a right of abode in the former colony:

the invitation extended by President Mugabe to three Supreme Court judges of Zimbabwe to resign because they pointed out in a judgment that Armed Forces are not entitled to arrest civilians:

the unconvincing verdict on bizarre sexual charges against former Deputy Prime Minister Anwar in Malaysia;

and, least remarked in this context but maybe the most telling of all, the acquittal of President Clinton on charges of impeachment, where the requisite dispassionate analysis by the Senate, *pro tem* constituted as a Court of law and fact, curiously led *all* Democrats to one conclusion and *all* Republicans to another. No better example could be furnished of politics trumping law. But though such gross aberrations would not conceivably occur in this jurisdiction, in any sense of

⁸ *Commercial Lawyer* 1999 (speech 27th January, 1999).

⁹ The Act of Settlement 1701.

¹⁰ See the Supreme Court Act 1981 s.12; the Administration of Justice Act 1973 s.9

¹¹ *Mond v. Hyde* [1999] 2 W.L.R. 499.

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complacency about the domestic state of judicial independence completely justified?¹²

Let me start with the *casus belli* in the Hoffmann case. I very much doubt that conflicts of interest in the personal sense are a pervasive problem in this country. And hitherto there has been a hallowed customary way of dealing with them if and when they arise. The case of *Megacorp International v. Worldwide Plc.* is called on; and the Judge says to Counsel before it starts, "I should mention that my aunt Agatha has a parcel of 10 shares in the Plaintiff company in case either side has any objection to my sitting." Counsel have a purely formal whispered interchange with their Instructing Solicitors and say in chorus, "My Lord - or it may be my Lady - my clients are perfectly content for you to hear this matter." The Judge groans inwardly at the prospect of an eight week reinsurance trial, spanning as it does, Lords, Wimbledon, Henley and the Open Golf Championship, and the case continues. It is recorded that when Lord Justice Russell made a similar statement in the Court of Appeal, at the start of what threatened to be a lengthy and tedious hearing, Lord Denning, the then Master of the Rolls, leant over and said, "If my brother Russell thinks he avoids sitting in this matter on as flimsy a pretext as that, he should think again." But we live in more sensitive and less civilised times. The Lord Chancellor wrote in stark terms to the Senior Law Lord in the wake of *Pinochet No.2* urging "every effort to ensure that such state of affairs would not occur again" and requiring appropriate consideration and, if need be, disclosure of any such potential conflicts of interest.¹³ And the word has gone out at lower levels too. Judge Henry Pownall, retired from the Old Bailey said in his valedictory a fortnight or so ago that he found it "sad, even offensive, being bombarded by bump from on high telling me that I must disclose my personal interest I may have or might have, which might be seen to have some effect on my judgment - as if I had not complied since pupillage." *The Sunday Times* somewhat tendentially purported to identify judges, including three in the High Court, who were said to have flouted the rule that *commercial* directorships should be surrendered on appointment.¹⁴

In truth, there was far more smoke than fire. But judges have become wary, in circumstances of some perceived potential partiality, shunning even the traditional way of seeking parties' waiver of objection to their sitting, to which I

¹² Halsbury's Laws (4th ed.) vol. 8(2) para.303; e.g. *Mond v. Hyde* *ibid* at 508

¹³ The letter of 17th December, 1998. More than 100 M.P.s signed an early day motion calling (unsuccessfully) for amendments to the Access to Justice Bill to introduce a compulsory register of judges' interests.

¹⁴ 28th March, 1999.

have already referred, and have recused themselves on a number of grounds; not only of shareholding (however small) in a corporate party, but of an Oxford degree where the University was a litigant, membership of the same set of Chambers as one of the advocates, and, in one of my own cases, the fact that the Judge had the day before received communion from a Dean who was a member of the relevant Committee of the Respondent quango! Judge Hooton who famously adjourned a criminal trial to ensure his presence at the Wimbledon semi-finals (which he was, despite the predictable press hullabaloo contractually entitled to do) chose not to sit in a case involving a hunt saboteur because of his own interest in rough shooting.¹⁵ Caesar's wife might have regarded some of these reactions as over sensitive.

Patrick Bartle, the stipendiary magistrate who heard the application to extradite General Pinochet was revealed in *The Times*, as a member of the Conservative Party. While this might make him an endangered species, it could hardly by itself disqualify him from hearing the case, - and did not, in the event, prevent him from making an extradition order. Many judges have been or are members of or voters for political parties. If such membership or sympathy were held to disqualify from sitting in any case with political implications (as distinct from a case actually involving that political party) we should soon have no eligible judges at all!

But, more important, the notional cure is becoming more malign than the supposed disease. Challenges multiply as the so-called Hoffmann card is played. A golden opportunity is given to unscrupulous litigants to affect the make up of their Court by asserting a lack of independence, while fearful in fact of independence itself. By coincidence this very week the Court of Appeal consisting of the Lord Chief Justice, the Vice-Chancellor, and the Master of the Rolls - Tom, Dick and Harry, if I may be familiar - are deciding a series of appeals which may result in guidelines to curb what the Lord Chancellor has trenchantly termed "a legal industry."¹⁶

Interestingly few, if any, have sought to question whether it was appropriate for a Judge such as Lord Hoffman to be a member of even so apparently admirable a body as Amnesty. The present Lord Chief Justice, in a book edited by the present Solicitor-General, wrote only a few years back: "In this country a judge will undoubtedly expect to exercise considerable discretion about the bodies with which he will allow himself to be associated, and in avoiding

¹⁵ *The Times*, 7th August, 1999.

¹⁶ The Court of Appeal is set to resolve the issue as to when a judge may or may not sit in a series of test cases in October: *The Times*, 6th September, 1999. See now *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* [2000] 2 W.L.R. 870.

involved in any campaigning organisation of even a non political kind.”¹⁷ After all one person’s political prisoner is another person’s terrorist.

Judges have also become more public and therefore publicized since the abolition of Kilmuir Rules, which prohibited them from media contact unless specifically authorised by the Lord Chancellor. The rationale was that silence greatly enhanced their reputation for wisdom. At a time when we are now becoming as familiar with the media judge as we once were with the media don, the jury is out on whether it has been further enhanced by their speaking out. In my view, judges should be judged on their *ex cathedra* judgments, not their *extra-curricular* pronouncements, and should seek to confine themselves to the former.

Yet looming on the horizon is the insidious phenomenon of televised Courts. I say insidious because quite apart from the potential for perverting what purports to be educational into what is envisaged as entertaining, the presence of television can necessarily affect judicial behaviour: *no-one* behaves in the same way *on camera* as *in camera*. The performance of Judge Ito at the O.J. Simpson trial, should stand as a warning signal. It is not only advocates, but judges who can be tempted to play to the gallery. Immunity from such infection of their independence should, in my view, be preserved. Comprehensive coverage of cases would stupefy. Edited coverage would distort. All television corrupts, selective television corrupts absolutely.

There are a number of other ways in which the judiciary become involved in political controversy via extra-curricular activities, though as a result of compulsion, not free will, through their recurrent chairing of enquiries of a political character¹⁸ which (significantly) become known by the name of the presiding judge: Nolan,¹⁹ Scott,²⁰ Saville,²¹ Phillips,²² something (interestingly) only permitted in the United States in situations of national emergency, as exemplified by the Warren Commission inquiry into the assassination of President John F. Kennedy. [The canons of judicial conduct promulgated by American Bar Association are hostile to such involvement unless the inquiries are law-connected.]

¹⁷ Sir Thomas Bingham, “Judicial Ethics” in *Legal Ethics and Professional Responsibility*, Ross Cranston (ed.) (Oxford, Clarendon Press, 1995).

¹⁸ G.Drewry, “Judicial Inquiries and Public Reassurance” [1996] *P.L.* 368.

¹⁹ *Committee on Standards in Public Life: issues & questions* [London, H.M.S.O., 1994].

²⁰ *Report of the inquiry into the export of defence equipment and dual-use goods to Iraq and related prosecutions* [London, H.M.S.O., 1996].

²¹ Bloody Sunday.

²² Bovine Spongiform Encephalopathy [B.S.E.].

The Scott Report was actively undermined by the former Government - through leak and spin - the modern methods of character assassination. The Executive by such political attacks, increases the danger of destroying the very reputation for impartiality that judges need to perform their judicial functions: and underscores the undesirability of their initial involvement in *such* non-judicial activity.

Lord Saville - to take a contemporary example - is not only required to investigate the correctness of the conclusions of an earlier inquiry by Lord Widgery, the Lord Chief Justice, an exercise which by necessary implication involves his predecessor inquisitor in criticism, but has himself been subjected to judicial review in relation to his decision to refuse anonymity to army witnesses.²³

It is in one way admirable that Lord Saville's status as a Law Lord does not save him from review when sitting in a non-judicial and subordinate capacity as Chairman of an Inquiry. However, the spectacle of a High Court or even Appeal Judge impugning *his* judgment is not calculated to promote confidence in the hierarchy of tribunals; and the problem is compounded by the calls for his resignation in the right wing press (broadsheet as well as quasi-tabloid) attendant upon his initial defeat in the Divisional Court. His participation in his important exercise, in my view, damages (though no fault of his own) his future image as an impartial arbiter above the fray. And now the Hoffman defence has intruded even into this sensitive area. The families of the deceased are contemplating a challenge to the Court of Appeal's decision to restore anonymity on the grounds that Lord Woolf, who presided, had served for two years in the army on national service - although why this should necessarily be thought to predispose him to the military is not by any means obvious.

The media, of course, are not slow to leap on bandwagons, even when they do not set them rolling. Another by-product of *Pinochet No.2* was an extraordinary intrusion into and exposure of Lord Hoffman's private life - or a version of it. Headlines in the press about "Legover Lennie" and "Lennie the Loin" may sufficiently give the bitter flavour of the witch hunt. Ministers and M.P.s are prevented by Parliamentary rules from attacking the character of judges.²⁴ The press labour under no such restraint, external or internal. The right of free expression - the familiar justification - provides no excuse. The European Convention on Human Rights itself qualifies such right by considerations of the need to maintain "the authority and impartiality of the judiciary" (Article 10(2)); equally the various considerations listed in Article 8(2) which would override

²³ *R. v. Lord Saville of Newdigate ex parte A* [1999] T.L.R. 290; *R. v. Lord Saville of Newdigate & others ex parte B & others* [1999] 4 All E.R. 860.

²⁴ Halsbury's Laws (4th ed.) vol.8(2) at para.303.

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the right to respect for private life do not appear to be in play in any way in the case of Lord Hoffman. There was, in short, no link between press punishment and judicial error: the interest of the public and the public interest were fatally confused. When Lord Atkin spoke in *Ambard* of the need for justice “to suffer the scrutiny and respectful, even though outspoken comments of ordinary men,” I doubt he would have had in mind something akin to Hoffmania.²⁵

The demystification of the judiciary is, of course, a phenomenon and by-product of our age. The sugar coating to the burdens of office dissolves: the pomp and circumstances depart. Cyril Hare in his 1930s classic, *Tragedy at Law*, reminds us of the glories that were the old Assizes.

“A Rolls Royce of cavernous size purred at the door of the Lodgings. The High Sheriff, faintly redolent of moth balls but none the less a shining figure in the full-dress uniform of a Volunteer Regiment long since disbanded, strove to bow respectfully and to avoid tripping over his sword at the same time. His chaplain billowed in unaccustomed black silk. The Under Sheriff gripped his top hat in one hand and in the other the seven foot ebony wand, surmounted by a carved death’s head, ... Behind, the Judge’s Clerk, the Judge’s Marshal, the Judge’s Butler and the Marshal’s Man formed a sombre but not less satisfying group of acolytes.”

His Lordship’s peevish complaint, “No trumpeters,” reminds us that these were times not only past, but *perdu*. I do not suggest that it is in any way necessary to reconstitute the glories of a bygone age. I merely surmise that if judges lodged in a motel, and lunched at McDonalds, people might be less prepared to accept that the law still had any majesty, or the judges’ rulings any authority.

If judicial independence depends in part on the illusion that judges were different from the mere mortals whose fate was in their hands, the illusion is all but shattered. The demands of the bureaucrats are rampant as in every walk of *modern* professional life. As George Bernard Shaw might have said, - a little unfairly it may be, - those who can do, those who can’t regulate.

The civil service interpreting and applying Government policy, compel judges to do less than *full justice* by taking account of considerations which extend beyond doing right in the particular case. Only last week, Lord Justice Rose, no silent spokesman for the judicial cause, warned that the recent proposals from the Lord Chancellor’s department for “planned work which begins at 9am and

²⁵ *Supra* n.1 at 335.

finishes not before 5pm,” and for performance targets to be set had “very serious implications which the authorities have not appreciated in relation to the role of our independent judiciary.” I am not a campaigner for judicial indulgence - although I suspect that those who have not participated in litigation have only a shallow notion of the stresses involved for the professional players - judges as well as advocates. But I do recognise that cases cannot be treated like guests on the bed of Procrustes with portions lopped off at either end to suit the *diktats* of some bureaucratic notion of an ideal timetable. No profession is ever enthusiastic about regulation from outside; but the activities of, for example, dons and doctors, who voice equal resentment, do not have a constitutional dimension.

The tension is palpable. Lord Steyn said:

“They (judges) do not share the modern adoration of the deity of economy, on the whole they put justice first.”

A distinctive form of pressure upon judicial independence is a move towards positive discrimination. Earlier this year the *Labour Research Magazine* analysed 652 judges including the 85 appointed since the start of 1997 and concluded that the majority were white males and largely the product of independent schools and Oxbridge.²⁶ Two celebrated campaigning solicitors then wrote an article in *The Times* suggesting that this was unacceptable.²⁷ They argued that in environmental cases in particular “the judges natural instincts ... are to protect property and the interests of the corporate world rather than those of the ordinary citizen” - the opposite analysis, I note, to that conventionally contained in the editorial columns of the *Daily Mail*.

I do not subscribe to the shallow view that evaluation of fact or analysis of law is a robotic exercise; what, for example, a judge regards as a credible explanation given by a witness for some event may be affected by cultural considerations: what is or is not the appropriate legal principle to apply, and of what it consists, may be so likewise. As Lord Hoffmann himself has said in a recent speech: “[s]ince judges are also people, this means that some degree of diversity in their application of values is inevitable.”²⁸ Many legal problems have a *range* of potential solutions - *Pinochet*, I repeat, illustrates the point. But although fact-finding is an important aspect of the judicial act, it is not distinctively so. In England, after all, we conventionally assign to non-legally

²⁶ *Labour Research Magazine*.

²⁷ Marilyn Day & Russell Levy, “Why Judges must declare their interests” *The Times*, 31st August, 1999, but see the letter from Benedict Birnberg on 6th November, 1999.

²⁸ *Pigłowska v. Pigłowski* [1999] 3 All E.R. 632 at 644.

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trained persons, lay-magistrates and jurors, fact finding functions. The *distinctive* quality of a judge, is knowledge of the law and its application. Such quality is not particular to, nor dependant upon gender or race or social class. But giving all due weight to such factors, it would be intensely damaging to judicial independence if any factor other than perceived judicial merit were to be the criterion for judicial appointment. As the Lord Chancellor himself has put it: “[o]ur higher courts should not be sculpted to conform to some notion of social, political, sex or any other balance.”²⁹ [I mention *en passant* that one of the reasons why members of the bar may be well (if not uniquely) qualified to be appointed to the bench on the basis of their previous professional experience arises from the fact that years of acting, faithful to the cab-rank rule, as the mouthpiece of the client, in the sphere of public law where I practise, sometimes for citizen against government, sometimes for government against citizen, has bred an habitual ability to see and appreciate *both* sides of any argument. The necessarily correlative disadvantage, I should in candour add, is an inhibition as to choosing between such arguments and an erosion of any sense of what is right and what is wrong, as distinct from what can or cannot plausibly be argued.]

I do not suggest that appropriate efforts should *not* be made, as they are being made, to encourage applicants for judicial office from *all* sectors of the legal profession, nor that it was other than entirely sensible for the Lord Chancellor to appoint Sir Leonard Peach to review the whole system of judicial appointments. But the Judge who owed appointment to positive discrimination would be the prisoner of the circumstances of such appointment. The current gender and ethnic imbalance in the judiciary reflects no more than the historic imbalance in the Bar, the pool from which candidates from the Bench are overwhelmingly selected. As the Bar broadens its intake (as it has done), so will a growing number of women and ethnic minority persons ascend to the Bench. If the constituency of potential appointees broadens - solicitors - even academics for appellate positions - this tendency will be encouraged. It would be as unwise to accelerate this natural and inevitable process as it would be to interfere with the timetable of childbirth. It is only to spare their blushes that I decline to name at least two women who, within fifteen years and two members of ethnic minorities who within three decades, will surely be members of whatever supreme court we then enjoy.

I draw an analogy from my experience at Oxford. The fact that the number of independent school educated students at Oxford is disproportionately high, occurs despite genuine and strenuous efforts to reach out to a wider world of

²⁹ Speech to the Third World Common Law Judiciary Conference, Edinburgh, 5th July, 1999.

applicants, not because of a desire to keep a closed academic shop. If critics wish us to discriminate positively in favour of the under represented, they should say so, and be prepared to debate the implications of that strategy. They should not claim, fallaciously, that we ourselves are guilty of discrimination: Refusal to discriminate positively is *not* itself discrimination.

I turn from the issue of who should be appointed - I shall return to the 'how' later - to the issue of how they should be paid. A reasonable remuneration for judges is in principle justified as a bulwark against the risk of corruption. Mercifully the debate about the level of judicial salaries in this country needs to take no account of that factor. But there are more subtle ways in which pay issues intersect with issues of judicial independence.

At present judges are ranked in Groups from 1 to 7.2 Lord Chief Justice through to District Judge and have their salaries uprated annually by statutory instrument laid before Parliament. Account is taken of the recommendations to the Review Body on Senior Salaries, who provide *inter alia*, "independent advice to the Prime Minister and the Lord Chancellor on the remuneration of the holders of judicial office." I am presently Chairman of the Judicial Sub-Committee of that body, and indicate that nothing I say should be regarded as other than provisional - indeed I raise questions rather than provide answers - and certainly does not represent conclusions of the body itself.

But I note performance related pay is now common in the senior civil service: it is due in the foreseeable future for the senior military.³⁰ At sometime the issue is bound to be posed. Is it feasible to introduce the same system for judicial salaries? In such a system of performance related pay, judges within a particular group could have a variety of salaries, reflecting (no doubt within bands) their relative performances.

But there are a number of problems which would necessarily arise in the context of any such scheme.

- (a) By what criteria is judicial performance to be judged? Is a judge's performance to be assessed by his throughput - the number of cases decided? Or the extent to which his judgments are appealed, unsuccessfully or at all?
- (b) Who would exercise the judgment?
- (c) (Critically) On the basis that such judgment could be translated into pay differentials - a technical matter, no doubt as

³⁰ *Twenty-First Report on Senior Salaries of the Review Body on Senior Salaries*, Cm.4245 (Stationery Office, 1999) at para.55.

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capable of achievement in this area as in others - what would be the consequences for judicial independence?

None of these questions, I suggest, is susceptible of any easy answer. It can be said cogently that the Lord Chancellor makes evaluations for promotion: that if X is elevated to the Court of Appeal, it is on the basis that he or she is assessed as a better candidate than Y, so that differentiation is not itself impossible. Against that the impact on judicial independence of a division of judges, within a single tier, into sheep and goats would have to be most carefully weighed. The public might ask whether the favoured judges had not earned their salary spurs by their amenability to the powers that be.

I have spoken so far of fetters imposed upon judges from without: I turn now to judicial behaviour from within. Judges cannot be held responsible for many aspects of the enhancement of their purely judicial role - the accession to the European Community, the enactment into domestic law of the European Convention on Human Rights; the ascription of functions to the Privy Council in consequence of devolution of policing the type of conflicts, familiar to the judiciary in federal jurisdictions. But judges have also become authors of their own misfortune, unnecessarily attracting accusations of overreaching themselves, not showing that “judicial restraint,” publicly proclaimed as a virtue last week by the Prime Minister’s wife.

Accession to the European Community gave judges legitimate power to set aside Acts of Parliament as contrary to a higher law - an experience customary for judges operating in a state with the written constitution, but alien to the domestic judiciary since, in the 17th century, Sir Edward Coke asserted a similar power by reference to a higher order of *natural* law. It was, however, unwise for some Judges to assert, even if theoretically, a power to do the same merely because the legislation offended against what they see as fundamental rights. Lord Woolf³¹ and Lord Justice Laws³² in particular have hinted that parliamentary sovereignty may not be absolute.

Incorporation of the European Convention on Human Rights will give the Judges legitimate power to invalidate executive action as violating its provisions. It is, however, unwise for some judges to proclaim that they should make judgments as if the Human Rights Act were which, by design it is not, already in force.³³

³¹ [“Droit public – English style” [1995] *P.L.* 57

³² “Law and Democracy” [1995] *P.L.* 72.

³³ *R. v. D.P.P. ex parte Kebilene* [1999] 3 W.L.R. 175, [C.A.], but see [1999] 3 W.L.R. 972, [H.L.]; *R. v. Governor of Brockhill Prison ex parte Evans (No. 2)* [2000] 3 W.L.R. 843; *R. v. North & East Devon Health Authority ex parte Coughlan* [2000] 2 W.L.R. 622.

Judicial review provides a salutary discipline against abuse or misuse of executive power. It is, however, unwise for judges to proclaim themselves as consciously filling a political vacuum left by an ineffective opposition.³⁴

It is sensible that judges have sloughed off the barren literalism of traditional methods of statutory construction in favour of a purposive approach which seeks to discern the true intent of the legislation. It is, however, unwise for judges to seek to impose - and avowedly so - their own values upon a legislative framework so as to reach results which the legislature would never have contemplated, and which, had it contemplated them, it would surely have opposed. The areas of treatment of refugees and of prisoners serving life sentences provide a wealth of illustrations from recent law reports.

Ultimately, it must be accepted that judges lack democratic legitimacy. As unelected persons it is not their role, except where compelled to do so, to subvert the sovereignty of Parliament. The more involved in political issues they become, the more important it is that they should be then seen to be non-political.

This then engages the question of the infringement of separation of powers in our historic constitution, the relevant part of which, the House of Lords, is under scrutiny by Lord Wakeham's Royal Commission.

In my view, irrespective of either the personal qualities of the individuals involved, or the contributions that Law Lords can make to the legislative (and, in the case of the Lord Chancellor, also the executive process) in an era when the judicial function has become inextricably involved in politics, it is no longer appropriate that judges should police laws in whose making they have a constitutional role.³⁵³⁶

The overriding disadvantage, in my view, of the possession of membership of Parliament, on the one hand, and judicial functions on the other, relates to the *appearance* (as distinct from actuality) of judicial partiality - and consequent confusion in the public mind about the role of judges. Judges must not only be independent, but be seen to be independent; they should fulfil - and be thought

³⁴ Lord Woolf *Neile Lecture*.

³⁵ "If the judiciary is to act as an effective check on overweening Government, it should be untainted by direct involvement with the legislative or the executive." *The Economist*, 16th December, 1995. See also D.Pannick Q.C., "When legal and judicial functions no longer mix" *The Times*, 7th June, 1999.

³⁶ In the 1870s, the intention of the reformers, Lords Cairns and Selbourne, had been to end the role of the House of Lords as a judicial body, as well as the Judicial Committee of the Privy Council. In place of these two would be an aggrandised Court of Appeal, known as the Imperial Court of Appeal, sitting in the new Law Courts to be built in the Strand. It was only by the 1876 Appellate Jurisdiction Act that the House of Lords had its appellate power restored.

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to fulfil - the aims of the judicial oath “without fear or favour affection or ill will.” If judges are members of a political institution, the perception of their necessary independence from the political process is blurred.

When the *Fire Brigade* case³⁷ which involved the then Secretary of State, Michael Howard’s, proposals to make cuts in the Criminal Injuries Compensation Scheme came on before the Appellate Committee it was difficult to find five Law Lords to sit judicially, since so many of them had already spoken out, in debates and elsewhere *against* the proposal. (And had they spoken out *in favour*, the problem would have been equally visible and actually worse, since judges should not appear to be *creatures* of the other branches of government.) The fact that the Law Lords split three-two with the minority suggesting that the majority were trespassing into the province of the legislature underlined the danger of the *status quo*.

Constitutional conflicts of interest seem to me to provide a far greater cause for concern than personal ones. Section 13 of the Defamation Act 1996 was introduced by way of amendment by Lord Hoffmann to rectify the position by which an M.P., who chose to sue for libel a newspaper who had impugned his Parliamentary conduct, could have his action dismissed because the newspaper could not, on account of Article 9 of the Bill of Rights, defend itself by justifying its allegations, by referring to proceedings in the House, with the result that a fair trial was impossible. But how *far* Section 13 entrenches upon Parliamentary privilege is a moot point; and fell for decision earlier this month when the case of *Neil Hamilton v. Mohammed Al Fayed* reached the House of Lords.³⁸ Would it have been possible for Lord Hoffmann to sit and determine the objective meaning of Section 13 when he had, no doubt, a fixed subjective view about its purpose?

I turn to the position of the Lord Chancellor, that earthly three-in-one, with some trepidation since I stand in the very room where he made his notorious, if humorous, comparison of himself to Cardinal Wolsey. He is not only the senior judge, and the head of the judiciary in England and Wales. He is also a politician who serves in the Cabinet and has a responsibility for a major executive and spending department.

The Lord Chancellor’s involvement in politics has an unavoidable effect on the *assessment* of the independence of his judgments. Lord Chancellors may sit less frequently than they once did (in the same way as Attorney-Generals appear far less in Court as advocates for the Government than they did). But when they do sit, their role is compromised. It may have been coincidence that in *Pepper*

³⁷ *R. v. Secretary of State for the Home Department ex parte Fire Brigades’ Union* [1995] 2 A.C. 513.

³⁸ *Hamilton v. Al Fayed (No. 1)* [2000] 2 W.L.R. 609.

v. *Hart*,³⁹ (which established that, within limits, ministerial statements in Parliament were legitimate aids to construction of statutes) Lord Mackay dissented on the pragmatic ground that resort to such grounds would increase the cost of litigation.⁴⁰ Was it the judge who spoke or the politician, Cabinet colleague of the Chancellor of the Exchequer?⁴¹ More important would the public be convinced that it was the former, not the latter?

Lord Irvine has sat equally sparingly but one of his two (so far) reported cases concerned the right to use the highway for protest, a sensitive issue with obvious political overtones⁴² and one whose legally controversial nature was exemplified by the three-two split in the House. The Lord Chancellor ought sensibly to be ruled out of membership of the Appellate Committee whenever, for example, a decision of a Cabinet colleague is under challenge. But what if it were a decision of a local authority? Would it make a difference if the authority were of the same (or different) political stripe to that of the Lord Chancellor? The moment it is appreciated that the boundary lines between the indefensible and defensible are not fixed, but fluctuating, pragmatism as well as principle suggests that it is better (and simpler) for the Lord Chancellor not to sit at all. Given that even a Lord Chancellor with the legendary energies of the present incumbent has only been able to sit twice in two years suggests that the sacrifice involved is more formal than real. Lord Irvine does not, however, accept that he is *hors de combat* even for constitutional cases,⁴³ and even with his back to the wall - I do not say wallpaper - has made throughout the year a formidable, but I believe ultimately unpersuasive case, for retention of the plurality of his powers.

The European Commission of Human Rights has ruled that the position of the Bailiff of Guernsey, who, in a smaller world by far than that in which the Lord Chancellor holds triple sway, has legislative, executive and judicial roles, violates, if he sits judicially, Article 6 of the European Convention on Human Rights (itself scheduled to the Human Rights Act 1998) which guarantees, *inter*

³⁹ [1993] A.C. 593.

⁴⁰ *Ibid* at 615.

⁴¹ Lord Steyn in "The Weakest and Least Dangerous Department of Government" [1997] *P.L.* 84, makes a more general point about the way in which the Lord Chancellor's compromise by collective responsibility at a time of financial stringency: "The Lord Chancellor as a Cabinet Minister represents the voice of reform guided by the Treasury perspective. The view of the Judge is rather different. They do not wholeheartedly share the modern adoration of the deity of economy. On the whole they put justice first." [at p.91]. See also Sir Nicholas Browne-Wilkinson V.C., "The Independence of the Judiciary in the 1980s" [1988] *P.L.* 44 at p.50.

⁴² *D.P.P. v. Jones* [1999] 2 W.L.R. 625.

⁴³ *Supra* n.29.

alia, “an independent and impartial tribunal.”⁴⁴ If the European Court of Human Rights (which has recently heard the case) reaches the same conclusion - and the matter is presently under consideration - reform may be the *only* option.⁴⁵

I confess that I reach these conclusions without relish. I do not believe that nations with a long history of evolving democratic government should lightly discard traditions or images which have served them well. A sense of history, even a *soupçon* of ceremony, is no bad thing. If I may adapt what Oliver Wendell Holmes said about the law, the life of constitutions is not logic, but experience. Rules often matter less than practice; convention and compromise have valuable roles. But if perceptions of the essence of justice have become more sensitive, then the institutions which provide that justice must adapt to those perceptions.⁴⁶

I return lastly to the question of judicial appointments. The statutory protection of the higher judiciary against arbitrary dismissal or diminution in benefits because of offence caused to the Government of the day contrasts vividly with the fact that though in form the Queen’s judges in substance they *owe their appointment* to the Government, the Lord Chancellor, or in the case of the Law Lords the Prime Minister acting inevitably on his advice, which allows for political calculation to inform the minds of the appointer, though not the appointed.

There are, it must be recognised, nowadays no more appointments as a reward for *political* service. At the start of the century, membership of the House of Commons was often seen as a springboard to judicial office. By its end even the reversionary right of the Attorney-General to the Lord Chief Justiceship, indeed to any judicial post, had long since atrophied. The reasons lie partly in the inability of any one any longer to enjoy a career in politics simultaneously with a career in law of sufficient distinction to make an appointment to the bench credible: partly because of an increased scrupulousness in the Lord Chancellor.⁴⁷ However, the fact that the power is not abused does not mean that it is not capable of abuse: nor can it eradicate the perception for potential abuse.

No judges rightly stand higher in the esteem of their colleagues, the profession and the public at large than Lord Bingham, the Lord Chief Justice, and Lord Woolf, the Master of the Rolls; but it is not without interest that each ranks

⁴⁴ *Richard James Joseph McGonnell v. The United Kingdom* (Application No.28488/95) paras.56-57.

⁴⁵ The Court upheld the finding of a violation in its decision of 8th February, 2000. See *The Times* 22nd February, 2000; 8 B.H.R.C. 56; & [2000] P.L.R. 69. See also the Scottish case of *Starrs v. Ruxton* 2000 S.L.T. 42; [2000] H.R.L.R. 191.

⁴⁶ Lord Steyn, *supra* n.41 at p.91.

⁴⁷ See Lord Bingham of Cornhill, L.C.J., “Judicial Independence” *Annual Lectures JSB* 1996.

among the handful of judges who were actually supportive of the Mackay and Irvine legal reforms; nor that Lord Justice Rose, the judges' candidate for the office of Lord Chief Justice on the untimely death of Lord Taylor, had been an outspoken critic of the then Home Secretary's sentencing proposals as well as having suggested that some female appointments to the High Court bench owed more to a policy of political correctness than of selection on merit.⁴⁸

[In December, 1973, when Sir John Donaldson, a High Court Judge was sitting as the first President of the Industrial Relations Court, 187 Labour M.P.s called for his removal for "political prejudice and partiality." Donaldson ended his career as Master of the Rolls, but not until there had been a change of administration.⁴⁹ What was unpalatable to the Labour M.P.s, was appetising to Mrs. Thatcher.]

Lord Steyn has suggested that separation of powers can only be ensured if the Lord Chief Justice is head of the judiciary.⁵⁰ One might logically add (though Lord Steyn does not) if he - or she - appointed the judges. I doubt, however, that such a bird would fly. On the contrary, any move is likely to be in the other direction; Lord Patten, the former education Minister, has already suggested that in so far as the judicial role has become objectively politicized, so the elected politicians must have a role, like Congress in the United States, in appointment of the judges.⁵¹ The leader of the Conservative Party, William Hague, has developed that thought to its logical conclusion by calling for a House of Commons' veto on senior judicial appointments.⁵² Dr. Liam Fox has suggested that newly appointed candidates should appear before a new joint committee of both Houses of Parliament where his or her views could be sought on a range of political and legal matters.⁵³

Any such schemes would be the fatal blow to the independence of the judiciary. That our potential judges should be Borked and Thomassed will add to the haemorrhage of talent which the High Court bench is already sustaining. Lord Browne-Wilkinson, the Senior Law Lord, will apparently say in an interview in *The Times* tomorrow that while willing to sacrifice several million pounds of income in advancing from Bar to Bench, he would not have accepted office if he had had to undergo such a cross-examination. I cite only the most

⁴⁸ J. Rozenberg, *Trial of Strength: the battle between ministers and judges over who makes the law* (London, Richard Cohen, 1997)

⁴⁹ He was appointed Master of the Rolls in 1982, as Lord Denning's successor. Mrs Thatcher's government came to power in 1979.

⁵⁰ *Supra* n.41 at p.91

⁵¹ *The Times*, 16th March, 1999.

⁵² *The Times*, 25th February, 1995.

⁵³ Dr. L. Fox, *Holding our Judges to Account* (London, Politeia, 1999).

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notorious recent examples of Congressional inquisition, which were fuelled by a heady cocktail of political partisanship and political correctness, so that one nominee was never appointed and the other is a maimed presence on the Bench. Indeed, as disquieting as the treatment meted out to such nominees, is the reason *why* they were nominated, that is to say, to sustain a particular philosophical majority on the Supreme Court Bench. The U.S. Supreme Court bench contains judges of surpassing ability; but their method of selection is something which should not lightly be transplanted. In my view, it is even less acceptable that nomination should be the plaything of a multitude of elected politicians than that it should be the perquisite of a single unelected one. I would prefer some form of appointments commission,⁵⁴ whose membership and whose functions should be legislatively defined so as to ensure that merit alone was the touchstone of elevation to the bench. I appreciate that it will be asked: *Quis custodiet ipsos custodes!* Who will appoint the appointers? And that this will only remove at one stage potential political influence in appointment. But there is no perfect solution. What is important is that my proposal increases not narrows the distance between the politicians and the judiciary. Accountability - the favoured buzz word of those who take the other view - is in my view, a euphemism for control. From my perspective the virtues of an appointments commission is not that it exposes judges to, but that it protects them from, the excesses of democratic or popular selection.

Lord Atkin had strong belief in the separation of powers between executive, legislature and judiciary. Like Lord Denning, several of his most memorable judgments upholding the rule of law, were dissents, more valuable for the principle they asserted than the precedent they set.⁵⁵ *Liversidge v. Anderson*, the subject of two distinguished Atkin lectures, being the best known example.

But in a private letter to Sir Herbert Evatt written in 1940, Atkin touched a broader chord:

⁵⁴ G.Drewry, "Judicial Appointments" [1998] *P.L.* 1; N.Addison, "How Canada can help choose Judges" *The Times*, 30th March, 1999.

⁵⁵ See *Wankie Colliery Co. v. I.R.C.* [1921] 3 K.B. 344 at 365. What he said in *Liversidge v. Anderson*, [1942] A.C. 206, the subject matter of two Atkin lectures, is a published classic. But equally vibrant is his observation in *Wankie Colliery Co. v. I.R.C.* where he described the Crown's contention that excess profits duty would be levied on owners in respect of profits made by their predecessors as one which "would exceed the wildest dreams of the most imaginative high prerogative lawyers in the very worst time of our history." [at 365]. In *Ford v. Blurton* (1922) 38 T.L.R. 801 - "many will think that at the present time [1922] the dangers of attack by powerful private organizations or by encroachments of the executive is not diminishing." [at 805] - words not less applicable in 1999.

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“How little the public realise how dependent they are for their happiness on an impartial administration of justice. I have often thought it is like oxygen in the air: they know and care nothing about it until it is withdrawn.”⁵⁶

I have sought to ventilate my own concerns in this historic club to a more sentient and sophisticated sector of the public.

If my lecture has been more patchwork quilt than monochrome cloth it is because the concept of judicial independence admits of no solitary or universally accepted definition. But we can legitimately seek to preserve and protect that which we cannot precisely describe. I fervently hope that the enemies of independence that I have identified can be kept at bay; and that all four estates of the realm (for I will accept the media into that category in terms of actual, if not legal power), but also the wider public will recognize the value of judicial independence, and strive to diminish the dangers to it. It is not in the people's interest to have the people's judges.

⁵⁶ Quoted by Geoffrey Lewis in *Lord Atkin* (Butterworths, 1983) at p.222.