LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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JUDICIAL INDEPENDENCE AND RESPONSIBILITIES

16TH COMMONWEALTH LAW CONFERENCE, HONG KONG

9TH APRIL 2009

No one who had any reservations about the principle of judicial independence would be here. Indeed it has been the constant subtext of many of the discussions. So to begin with, at any rate, I am simply repeating what we all know. However, it bears constant repetition. First, because when we speak of judicial independence, and then speak of the rule of law, we tend to make it sound as if we have two separate concepts, when they are as closely intertwined as a mutually dependent and loving couple after many years of marriage, where one simply cannot survive without the other. And second, to remind us that we should never take either judicial dependence or the rule of law for granted. It would indeed be unwise to assume that judicial independence is inviolable. There are among us today men and women of the Commonwealth, and in one particular case men and women who are no longer of the Commonwealth, who have direct experience that it is not. And in the light of their experiences, the rest of us have humbly to recognise how fortunate we all are. Nevertheless, eternal vigilance is a necessary price, worth paying, not exclusively by judges and lawyers, encased within that mythical ivory tower so beloved of pundits and commentators, who do not understand that our daily diet reveals all we need to know about the sadnesses and tribulations of humanity, and its capacity for good and evil, but also a responsibility to be accepted by a free and independent media, as well as an alert community.

On an occasion at a meeting of judges in Europe I was describing why we in England are proud of the jury system. In a mildly jesting way I told the assembled company that the jury provided a safeguard against unacceptable laws. By way of an absurd example I suggested that if Parliament passed a law that said that all women with red hair should be sent to prison for 12 months, we would expect a jury to find anyone prosecuted under such an absurd law not guilty, even if the defendant's crowning glory was the striking red of a Titian painting. One of the Supreme Court judges of a western European country afterwards chided me in the most pleasant possible way. He reminded me that apart from the United Kingdom, not one of the countries represented at that meeting, and all were European democracies, had not at some time in the last century at least once, if not twice, been subject to their

own home grown dictators or their invading armies. The places where things have gone wrong include countries which believed that they were mature democracies, where these things did not and could not happen, but they did. But they did.

Recent events in Belgium underline this point. "Fortisgate", as the affair came to be known arose in consequence of the worldwide banking crisis. Fortis was Belgium's biggest financial service company until October 2008 when it found itself facing bankruptcy. Its bailout by the state led to legal proceedings during the course of which it was found that the government had tried to influence the judges who were adjudicating on the legality of the proposed sell-off. The Minister of Justice was forced to resign when the Prime Minister admitted publicly that one of the Minister's officials had contacted the husband of a judge of the Court of Appeal on several occasions during the course of the litigation. It shocked the community and we must all be glad that it did shock the community. We do not know all the facts, but we must also agree with the Deputy Prime Minister who said "those who have done wrong must clearly take their responsibilities". If the judge listened to any of these blandishments without reporting it, she had, in my view, failed in her responsibilities.

This provides us with a recent salutary example that these things can happen, even in a mature democracy, where, and perhaps because, the principles are taken for granted. There was, of course, no physical intimidation, no threat to security of judicial tenure, none of the extremes of tyranny. But it is the first steps which have to be watched. The first incursion by the executive into impropriety. The first compromise by the judiciary with principle. We are all familiar with the employee who steals from his employer. The most difficult time is the first time the hand goes into the till. After that, each successive time is less difficult. The problem with the phrase "eternal vigilance" is that it appears to focus on the long term. But the focus is the immediate, today, every day. The insidious dangers are no less threatening than the obvious ones, and for the judiciary to acquiesce in the first small, even tiny, steps, may ultimately be terminal.

The justification for judicial independence has been examined time without number by wiser jurists and philosophers than me. Convinced as I am that no formulation can be complete, but in the context of the many splendid contributions to which I have listened at this wonderful Conference, may I offer this possible formulation for consideration. In a democratic country all power, however exercised in the community, must be founded on the rule of law. Therefore each and every exercise of political power must be accountable not only to the electorate at the ballot box, when elections take place, but also and at all times to the rule of law. Independent professions protect it. Independent press and media protect it. Ultimately, however, it is the judges who are guardians of the rule of law. That is their prime responsibility. They have a particular responsibility to protect the constitutional rights of each citizen, as well as the integrity of the constitution by which those rights exist. The judge therefore cannot be out for popularity. He – or she – cannot please everyone. He should never try to please anyone. That includes the judge himself. He should never use his office to confirm his predilections or to allow

his prejudices to gain some kind of spurious judicial respectability. However because he is not accountable to the electorate as the members of the legislature are, he is entitled to apply the relevant law, but only the relevant law, and although he must be aware of his powers, it is critical to the independent exercise of his responsibilities that he should fully recognise the limitations of his power. Having been entrusted with huge power, judges have an ultimate responsibility to see that when exercising the power vested in them, they use it lawfully in precisely the same way as they ensure that political and other powers vested in other institutions of the State are exercised lawfully. Without independence, and without respect for judicial independence these desirable, indeed elementary facets of a civilised community, are threatened. At the same time, no individual, or group of individuals, nor even any judge, however high his office, has any dispensing power – that is, the power to set aside or disregard the law. In the middle of the 17th century, not long after the execution of a King who claimed that Rex is Lex, and after a public trial, Thomas Fuller observed, "Be ye never so high the law is above you". Well the law is above any individual judge too. No individual judge is Lex either. The absence of any dispensing power was, and remains, fundamental to the rule of law. Judges cannot dispense with it. Parliament itself cannot dispense with it. None of our democratic institutions may do so. They are, of course, entitled to change it.

So where does this take us? The judge must apply the law as it is, not as he would wish it to be. But, and this is a very important but, judicial creativity – I deliberately do not use the undefined word activism – is acceptable provided it is within the law. And this is where the common law has such strength. In the common law it has been accepted for a thousand years, indeed it is the essence of the common law, that judges may develop the law by applying its fundamental principles to new conditions and declaring them. If it were otherwise, the common law would have been an atrophied rather quaint system of jurisprudence, confined to the small island off the coast of Europe where it originated, the subject of learned doctorates by university scholars rather than a body of law applied throughout the world, but adaptable and adapted to local conditions. Sometimes the common law finds new words to describe old principles. May I just go back to the hypothetical law that said that all women with red hair should be sent to prison for 12 months. Let us suppose that the government of the day acknowledged that juries would never convict, so that the statute was drafted to provide that trial in such cases should be the responsibility of the judge sitting without the jury. Would the judge be obliged to convict her? May I just suggest, because now is not the time to discuss it in detail, that you should watch out for a new emanation from the common law, based on long-established fundamental principles, so fundamental that nobody thought it worthwhile writing it down. The word, some of you will already have seen, but which you will all increasingly see, is "constitutionality". It is a word with a great future. In other words, if the executive wished the legislature to pass such an outrageous Act, it should do so in language that was so plain, that the public conscience would be revolted, and the legislation fail, or if passed, the price would be paid at the next election.

In deciding every case, the judge must be free from any form of pressure, direct or indirect, which might interfere with or influence his obligation to decide the case before him or her in accordance with his honest judgment and according to law. The Bangalore Principles of Judicial Conduct in June 1998, following a meeting of judges of the Commonwealth, explained the principle in these words:

> "Judicial independence is a pre-requisite to the rule of law, and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects."

Or as one of our great thinkers, Edmund Burke, one of the many Englishmen who said publicly that the complaints of the then British colonists, in what we now call the United States, in the 1770s were entirely justified, the rule of law requires the "cold neutrality of an impartial judge".

The concept of judicial independence carries with it the clearest possible understanding that the judge is not to be subjected by anyone – government, media, litigant – to fear or favour, or invited to display affection or exercise ill will towards one side or the other, or indeed anyone in his court. The judge must resist fear or favour, affection or ill will, in whatever form it may take. That is pressure from the outside. But the judge is responsible to his conscience and to the administration of justice to make sure that he is not allowing himself to be influenced in his judgment by even the tiniest twinges of fear or the mildest blandishments of possible favour. Judges know that sometimes their decisions will be greeted with derision and the most intense public hostility. Why should we pretend that that does not create pressure on the judge? It does. The judge's responsibility is to be impervious to it. Because if he allows his decision to be influenced by the possible consequences to him, or even to his family, he is allowing himself to be corrupted. That corruption has nothing to do with money. His judgment is flawed. Justice is tarnished. That, too, is an awesome responsibility.

It is therefore fundamental that there are no circumstances in which the executive may even appear to tell judges how cases should be decided. Even when the public agrees with the executive at the particular time in relation to the particular point, future public confidence that justice will be done impartially and independently will be eroded. In the end, I firmly believe that the public, even if dissatisfied with an individual decision in an individual case, wants its judiciary to be independent of the executive.

Something of the nature of the possible problems was highlighted at home in the context of a number of Control Orders issued under the Prevention of Terrorism Act. This led a former Home Secretary publicly to criticise the "total refusal" of the Law Lords to discuss the issues of principle involved in these matters, and for him to put forward the suggestion that it was time "for the senior judiciary to engage in a serious and considered debate about how best legally to confront terrorism in modern circumstances". Accordingly he suggested that some "proper discussion" would be very helpful between the Law Lords and the Home Secretary, in effect for the Law Lords to advise him

about what steps might or might not be struck down. He made the point, and it is a fair one, that the idea that such discussions would corrupt the independence of the Law Lords would be "risible". I agree with him; it would not. I also quite understand that intelligent members of the public might themselves wonder why such discussions should not take place. But none of that is in point. Such discussions would have represented one of those tiny first steps of which we should beware. When this issue was ventilated before the House of Lords Select Committee on the Constitution (and this is not the House of Lords sitting in its judicial capacity) the Committee considered it essential that the members of the court "should not even be perceived to have pre-judged an issue as a result of communications with the executive". In principle such discussions, even if not concealed from the public, would not, in their effect, be very different from the approaches to the judge in the Fortis case. Their motive might be different; but the consequences, in particular the damage to public confidence in the independence of the judiciary would be the same.

This means we have to recognise not only when our independence is at risk, but when the perception of our independence may be at risk. We have to recognise that however ill-founded a perception may be in fact, perception itself is a fact. As it was once said, "the judge who gives the right judgment while appearing not to do so may be thrice-blessed in Heaven but on Earth he is no use at all".

In England and Wales, judges, particularly senior judges, have huge increased administrative burdens, in effect, consequent on the changes by which the Lord Chancellor ceased to be Head of the Judiciary in England and Wales and transferred many of his responsibilities to the Lord Chief Justice. Therefore, there has to be constant contact and communication between us. Without it the system would grind to a halt. Between us however we have to see that the increasing need for these discussions does not become too cosy. There is no difficulty when the Lord Chancellor and Secretary of State for Justice of the day happens, like the present incumbent, to be, by background and qualification and experience, thoroughly familiar with and understanding of the separation that there must be between him and the judges. There might be a different problem if one of his successors happened, like the former Home Secretary, not fully to appreciate some of the subtle and important refinements of principle. Section 3(5) of our Constitutional Reform Act 2005 expressly provides that "the Lord Chancellor and other Ministers of the Crown must not seek to influence particular judicial decisions through any special access to the judiciary". I am glad to see it set out in writing. But I suspect that if it were not written down, the principle of constitutionality would supply the missing words.

There are more mundane areas of responsibility which at a meeting like this I am not prepared to shirk. Judges are obliged, surely, to maintain their knowledge of the law, keeping up to date with its developments, whether through the courts, or through the legislative process. That is a personal responsibility, both to learn, and to offer to teach from our own experience and by way of example. But it is not just a question of keeping our knowledge up to date. We must, as a body, throughout the Commonwealth, indeed

anywhere where judges sit, address the problems created by and the potential for modern technology, the proliferation of paper, the endlessness of information, the length of our own judgments, the ability of lawyers to inundate the court with bumph, or paper by the trillion-load. This requires judges to manage their cases much more robustly. The proposals may involve technical procedural changes, but at heart they require judicial insistence on proper case management. We must train ourselves to take advantage of the technological developments so that our systems are improved by it, so that the judges are its masters and not its slaves, so that the judges run the cases and the cases do not run the judges. If we are not alert to this we will end up being overwhelmed by modern technology.

What I am driving at is that the judiciary has an institutional responsibility to ensure that inefficiencies in the legal system do not, as Lord Denning once remarked, "turn justice sour". In 1215 when King John signed the great Magna Carta it was agreed, "To no-one will we deny or delay right or justice". Over the centuries, our greatest writers have identified the consequences of inefficiency. In Hamlet, Shakespeare listed it among the "whips and scorns of time". At the very start of Bleak House, Charles Dickens identified its ability to exhaust finances, patience, courage and hope. Can you imagine anything worse than exhaustion of hope? And if hope is exhausted through the process of litigation, or a long-delayed criminal trial, how can we, as judges, disclaim any responsibility for it?

Judges therefore cannot distance themselves from some responsibility for inefficiency and delay. Others contribute to it. Resources, money, men and women of sufficient quality, a principled legal profession, these are all required to make a system more efficient but in my view, and like everything I have said today, it is a personal one, judges nowadays should accept a measure of responsibility to ensure that the court processes are as efficient as possible. This must be led and supported by the senior judiciary. For some this involves a re-think of culture. Judges really must not sit there and wait for the parties to present their cases. They must know the case each side intends to present, and prepare accordingly. And it can be done. For some years at home we suffered from what was described as the "adjournment culture". We have introduced much more stringent rules of procedure in both the criminal and civil courts. Huge amounts of residential training have been prepared for judges at every level. With this training we are gradually killing off the adjournment culture. It takes judicial effort; it involves professional cooperation. It takes time, and no-one can do it alone. But we should remember how, after one very long hearing, with many adjournments, a judge in England complained that a case had taken him seven days to try. He then pointed out that that was one day longer than the Almighty himself needed to create the entire universe. This is a new dynamic. But nowadays there is an increased expectation of everyone in positions of responsibility. Judges are not immune from it. Indeed we are part of it.

And this leads me to say something, very briefly, about what judicial independence is not. It is not, and if it ever was it cannot continue to be, an excuse for judicial inefficiency or idleness. There are thousands, perhaps indeed hundreds of thousands of judges of different kinds at different levels

throughout the world. Some, I firmly believe a few, indeed a very, very few, but some, are not hard-working. Some are not wholly committed to their responsibilities. Taxed with the practical consequences to the public of their idleness and lack of commitment, they may wield the shield of independence. But for them, as a shield, it is paper thin. And we, fellow judges, must blow it aside. There is the public interest in blowing it aside. But there is this too: if we do not accept that responsibility, it will be unsurprising if others decide to try to take it from us. And then, there is a danger that a problematic circle would be complete. It would then be possible for a perfectly efficient judge, who had in one way or another crossed the government of the day, to find himself indicted for his idleness when the government was seeking to get rid of his independence of mind and spirit. We are not in comfortable territory here, but the principle of judicial independence cannot be divorced from judicial responsibility. In short, we must not permit the inadequacies of a few to provide an executive attracted to the idea of limiting or interfering with judicial independence an excuse to interfere.

There is no time now to do more than identify further strands of our structures which contribute to judicial independence. But the appointments system should not be controlled by the executive, and the deployment of judges, the listing of cases in court, judicial training and the discipline of judges should be subject to judicial not executive control.

There are two final observations. A few years ago, I was speaking in Argentina, not long after the rule by their military government had come to an end. I hope you will forgive me for repeating something I said then. The critical aspect of judicial independence, underpinning the entire concept, is that although the principle of independence benefits the judge sitting in judgment, who must do what he or she believes to be right, undistracted and uninhibited, the overwhelming beneficiary is the community. When judges speak out as they do, in defence of this principle, they are not seeking to uphold some minor piece of flummery or privilege, which goes with their offices: they are speaking out in defence of the community's entitlement to have its disputes, particularly those with the government of the day, and the institutions of the community, heard before an impartial judge who is independent of them all. The principle must be defended, not for our own sake as judges, but for the sake of every community which truly embraces the rule of law. Among our tasks, we have to ensure that the rule of law applies to everyone equally, not only when the consequences of the decision will be greeted with acclamation, but also, and not one jot less so, indeed, perhaps even more so, when the decision will be greeted with the most intense executive or public hostility. In the end, all judges, wherever they exercise their offices, in whichever court or countries they do, must accept this burdensome responsibility. Judicial independence and responsibility are therefore two sides of the same coin.

What this conference has shown us is how things have gone wrong in the past, and how they may go wrong, even when unanticipated, and the dreadful consequences for the community when the rule of law and the independence of the judiciary are subverted. During the discussions I was acutely aware of how fortunate most of us are, and how dreadful the loss of these principles is

for some of us. We judges and lawyers from the Commonwealth who all, in our different ways, share the heritage and blessings of the common law, derive mutual support from each other. To those among you who struggle on through the darkest of nights desperately hoping for a new dawn I have a message from a small church in the heart of England, in Leicestershire. It was four years after the King was executed. Oliver Cromwell had dispensed with Parliament. And in 1653 a brave man founded an Anglican church. This is what you read on the stone inside the church.

> "In the year 1653 when all things sacred were throughout the nation either demolished or profaned, Sir Robert Shirley, Baronet founded this church; whose singular praise it is to have done the best of things in the worst of times and hoped in the most calamitous."

To do the best of things in the worst of times, and to maintain hope in the face of catastrophe, is an ultimate test for any human being. It is a test that some of you have passed. It is a test that I hope all of us would pass.
