

JUDGES AND POLICY: A DELICATE BALANCE

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(1) Introduction

1. Anyone reading Walter Bagehot's classic 19th century work on the English Constitution might wonder if the judiciary had any role to play in our constitutional settlement. He has chapters that cover the Sovereign, the Cabinet, the Legislature, the Executive. He discusses the checks and balances within the system, but there is no chapter on the Judiciary. Even in his discussion of the US Constitution, he gives a simple binary picture, saying that '*The Congress rules the law, [while] the President rules the administration*'¹ – no reference to Article 3 of the US Constitution, the views of the authors of the Federalist Papers, or the seminal case of *Marbury v Madison*.²
2. Bagehot's readers would come away with the view that there were only two branches of State, although they may have some vague notion that there was something called the Judiciary, as it has a brief walk on part in his chapter on the Legislature, but only to exhort the removal of the House of Lords' judicial functions into a '*conspicuous tribunal*' outside of and no longer '*hidden beneath the robes of the legislative assembly*'.³ They may equally know that there was a Chancery Court that had something to do with Patents, and that there were three common law courts, which were apparently self-funding. They would also find out that there was a Lord Chancellor who had lots of jobs, including that of being '*our chief judge*'.⁴ But that would be about it.

¹ W. Bagehot, *The English Constitution* (OUP, reprint 2001) at 157.

² 5 US 137 (1803).

³ *Ibid* at 96.

⁴ *Ibid* at 150 – 151.

(2) The three branches of State

3. Bagehot isn't the last or only word on our Constitution. Some things have changed since his brusque treatment of the third branch of the State, not least the fact that we now have that conspicuous tribunal: a Supreme Court, of which more later. But fundamentally, things have not changed; in particular, the relationship between the three branches of government. To borrow from Martin Loughlin, at its simplest, Parliament, the Legislature, make the rules; the courts, the Judiciary, interpret and vindicate them; and the Executive implements them, while also developing the policies that Parliament then considers and may transform into the rules.
4. We have an unwritten constitution, which some might think reflects Sam Goldwyn's comment about an oral contract – not worth the paper it's written on. More seriously, the absence of a formal constitution means that Parliament is supreme, save perhaps in extreme circumstances which are most unlikely to occur. The Judiciary comes second, as it holds the Executive to account – by ensuring that it acts within the law. And the Executive comes third.
5. But, although that is the position in principle, the Executive is far from being the weakest branch of the State. A thousand times the number of people work for the Executive as are in the Legislature and Judiciary combined. It has day-to-day control of government expenditure (now over 40% of GDP). Through prime ministerial patronage and party whips, it has a substantial role in Parliament, where in practice it controls much of the legislation. The weakest branch is the Judiciary which, as Alexander Hamilton famously remarked, has:

*'no influence over sword or the purse; no direction either of the strength or the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely Judgment.'*⁵

6. There are periodic tensions between the three branches, which is as it should be. A country where they never disagree is unlikely to be one, as Lord Bingham rightly remarked, that any

⁵ Hamilton, Madison and Jay, *The Federalist Papers*, No. 78 (Oxford 2008).

of us would want to live in.⁶ But tension should not be equated with suspicion, let alone with public enmity or personal criticism. After all, despite their different constitutional roles, the three branches have the common aim of ensuring that our country remains a healthy, prosperous democracy committed to the rule of law. It does society no good whatsoever if they start to criticise each other personally. Mutual respect must be the order of the day everyday.

7. Mutual respect also requires that the three branches should not intrude onto one another's patch. This does not mean that the Judiciary should have no policy role. Separation of powers does not prevent Parliament and the Executive both exercising policy-making roles. Nor does our history support the notion that the courts should be a policy-free zone. The common law is the continuous product of judicial policy-making through decided cases since 1066, but it is policy-making subject to the Legislature. If Parliament does not like what the Judiciary does, it can change the law through statute. And the Judiciary has a limited right, indeed an obligation, to speak out on matters concerning the rule of law.

(3) The Human Rights Act, the EU and Judicial Review

8. It is sometimes suggested that the Judiciary has arrogated to itself a much greater policy role, with the growth of judicial review, the advent of human rights, and the UK's membership of the European Union.
9. The growth of judicial review, JR, since the 1960s, reflects the significant expansion of the power of the Executive, although it is also attributable to judges who grew up in the questioning 60's and 70's replacing those who came of age in the conventional respectful 40's and 50's. We must always bear in mind that the ability to hold the Executive to account is essential to the rule of law: it protects citizens from administrative excess and ensures that the Executive adheres to the law. It is equally essential for the maintenance of Parliamentary

⁶ Tom Bingham, *The Rule of Law* (Penguin 2010).

sovereignty. We should take great care in any approach to reduce access to judicial review. It is a small price to pay for a democratic and just society.

10. Incorporation of the European Convention and membership of the EU have both given the judges significantly greater powers over policy questions. However, they each result entirely from the Legislature's decisions expressed through statute – the European Communities Act 1972 and the Human Rights Act 1998, HRA, two statutes which, like any other, the courts must apply. And what Parliament gives, Parliament can take away or cut down. There is a good degree of disquiet about the effect that the HRA and our membership of the EU have had on the development of our law and on the relationship between the Judiciary, Parliament and the Executive.
11. That disquiet is a political matter for democratic debate, for those who make policy in the Executive and, ultimately for those who make law in Parliament. The judges' role is to apply the law provided by Parliament, and they cannot simply disregard the HRA or the European Communities Act 1972. And if we uphold the law in a way that Parliament does not like, it can enact further legislation. All too often, the consequences of the UK's membership of the EU and adoption of the Convention are discussed in an absurdly one-sided way, invoking caricature and misrepresentation. Human rights exist to protect the individual from the excessive and arbitrary actions of the State, and the international, pan-European dimension of the Convention carries significant advantages as well as disadvantages. And membership of the EU also involves a trade-off.
12. But, ultimately, the issue of staying in the EU or with the Convention is for Parliament, because judges are not democratically elected or democratically accountable. This ensures that we maintain our independence and impartiality, and it also ensures that we cannot enter into competition with the Legislature. However, because they are not elected, judges do not have to worry about short term popularity, which means that they can take decisions which are unpopular but right, and which would be more difficult or even impossible for MPs.

(4) Constitutional Reform Act

13. Two other recent legislative developments are also worth mentioning. The Constitutional Reform Act 2005 changed the whole judicial structure of the judiciary. Gone is the ‘old style’ Lord Chancellor, that anomalous character who was the country’s top judge, the Judiciary’s representative in the Cabinet, and the speaker of the House of Lords – a Grand Panjandrum or Lord High Everything Else. The Lord Chief Justice, the LCJ, is now head of the English and Welsh judiciary, with many of the Lord Chancellor’s former administrative, regulatory, educational, communication and disciplinary functions. The tribunal members have now become judges, more than doubling the size of the judiciary. There is a fairly complex judicial hierarchy, including an LCJ’s cabinet consisting of the eight or so most senior judges, a judicial parliament, more formal regulatory, disciplinary and educational bodies and rules. Given the importance of the LCJ sitting on leading cases, the role has become very burdensome indeed – and very important.
14. Judicial appointments have been passed to a Commission, the Judicial Appointments Commission, which consists of judges and lawyers, and a majority of lay people. The benefits of this modern appointments system are increased (i) transparency, (ii) acceptability, (iii) professionalism, and (iv) quality lay involvement. However, it comes at a price, which as I see it consists of an increase in (i) cost, (ii) delay, (iii) loss of judicial sitting time, (iv) concentration on process, and (v) unhappiness for the unsuccessful.
15. The Lord Chancellor remains the minister responsible for representing the Judiciary in Cabinet, but he also retains much control over the English and Welsh courts and judges – for instance in relation to money for them, a degree of responsibility for senior judicial appointments, and ultimate policy. He is also minister for the prisons. So, under the new system, the Judiciary has the advantages of greater institutional independence and a stronger, more influential minister, but the disadvantage of a minister who is less familiar with its

workings and concerns, and who has concerns and a budget which extends to a very politically sensitive area.

(4) The Supreme Court

16. The 2005 Act also created Supreme Court. The mysterious Law Lords, embodying the most senior UK court, were seen to be a constitutional solecism – Judiciary muddled in with the Legislature. So propriety and visibility were achieved when they emerged, after 133 years, as a chrysalis hidden in the House of Lords into the sunlight of their own building on the other side of Parliament Square. The Supreme Court Justices have the same powers as the Law Lords, but we exercise it under much greater public awareness – we have our own building, our name says what we are, we have many more visitors, we broadcast our hearings and all our judgments, we have our own website, even our own tweets, and our own communication staff. We are also a separate department from the Ministry of Justice, and separate from the other court services around the UK.
17. This openness and transparency is not for reasons of self-importance or self-conscious modernity. It is a fundamental aspect of the administration of justice that it is done in public, so citizens know how justice is being done, and judges can be held to account. That is at least as true of the UK's top court as it is of any other court. In the Supreme Court, we have no witnesses, no juries, so broadcasting is no problem, and therefore it is right that it is being done.
18. The Supreme Court is not merely the top UK court: it is virtually the only UK court, as Scotland and Northern Ireland each have entirely separate court, judicial and legal systems from England and Wales. So, of the twelve Justices at least one must be Scottish and at least one Northern Irish. Apart from deciding appeals in important private law and public law disputes, the Supreme Court has been assigned an important role by Parliament, in that it

decides devolution issues relating to Scotland and Wales, and to Northern Ireland, suggesting to some commentators a small move to a constitutional court.

19. Next year's Scottish independence referendum may put an end to our jurisdiction north of Hadrian's wall, but we will have to wait and see whether there is a yes vote, and, if there is, what its consequences are. If there is a no vote, many people predict that there will be increased powers for Edinburgh, which may well mean more responsibility for the Supreme Court. The referendum is an important constitutional event which is likely to have a significant effect on the Judiciary, but it is just the sort of issue into which judges should have no input.
20. The Welsh position is a little different. At the moment, there is no imminent move for Welsh independence, but devolution to Cardiff is being stepped up. Unsurprisingly, the Welsh Ministers would like to see a seat on the court reserved for a Welsh Justice. At the moment, at any rate, there is, in my view, an insufficient body of Welsh law to justify this, but things may well change in the future. However, as the Welsh First Minister fairly says, judicial decisions, and above all those of the Supreme Court, have to command public respect and confidence. Accordingly, the right course I propose to take, which I formally announce this evening, is that on any appeal involving Welsh devolution issues, the Supreme Court panel will, if possible, include a judge who has specifically Welsh experience and knowledge. So long as there is no such full time member of the Supreme Court, we will have to look to the Court of Appeal, and I have initiated discussions with the Lord Chief Justice and the Master of the Rolls in that connection.

(5) Legal costs and legal aid

21. While judges should keep out of the Scottish independence debate, the most obvious topic on which the Judiciary can properly contribute, and sometimes have a duty to contribute, is the rule of law. It is therefore entirely proper for the Judiciary to stress to the Executive and

Parliament that it is fundamental to the rule of law that every citizen, perhaps above all the poor, the vulnerable, the disadvantaged, should be able to go to court to vindicate their rights or to defend themselves, whether to challenge excesses of Executive power, to protect private rights, to be compensated for wrongs, to secure family rights, or to defend themselves if prosecuted.

22. Let me start by stressing a point that I have made before and which I make no apology for making again. The historic justification, and primary duty, of any civilised government is to ensure the defence of the realm from foreign threats and the rule of law at home – i.e. to ensure its citizens are free from both foreign and domestic threats. If it cannot provide those timeless and fundamental features, a government is not worthy of the name, and all its other services, which are of far more recent origin, such as education, health, and welfare, become valueless. Securing the rule of law at home requires, amongst other things: a high quality and independent judiciary; an accessible and effective court system; and an accessible, high quality, independent legal profession.

23. Legal advice and legal proceedings are beyond the means of most people. There are three principle problems: (i) legal services are expensive; (ii) court procedures are not always proportionate and (iii) money for legal aid is scarce. The duty to face up to these problems does not just lie with the Government. The Government's legal aid bill increased very substantially in real terms between around 1965 and around 2000, but it has been cut since then, and the Ministry of Justice is now, regrettably, if unsurprisingly, proposing a significant further reduction. There is a fundamental public duty on the Government, and also on the legal profession and the Judiciary to work constructively together with a view to best maintaining access to justice in the face of the harsh realities of Government finances. Lawyers and judges have a duty to help make the system work, as well as warning of the risks of cuts.

24. We judges have to look at our procedures, and make them more efficient and proportionate in all fields, and this includes more judicial control before and during hearings, including criminal trials. In civil and family justice, the Jackson and Norgrove reforms are both aimed at cutting cost and delay and will hopefully improve things. But more radical solutions may be required – such as dispensing with disclosure of documents and cross-examination, even with an oral hearing, in smaller cases: better to have a judge’s summary decision quickly at proportionate cost, than a disproportionately delayed decision at exorbitant cost, or no decision because it is too expensive to get to court. We may well have something to learn from on-line dispute resolution on e-Bay and elsewhere. And the lawyers have to play their part too.
25. I would like to give two more specific warnings to the Government about cuts in legal aid, based on past experience.
26. The first concerns the structuring of any cuts. It is a mistake to have a new legal aid regime with a costs structure which will drive out the best lawyers. Good lawyers save money, because they are less likely (i) to waste time in and out of court, (ii) to be responsible for miscarriages of justice, and (iii) to engender appeals and retrials. It is also a mistake to structure legal aid costs so as to reward lawyers for doing long trials: it inevitably means that trials last longer and cost more, and lawyers should be rewarded for cases lasting less time, not more.
27. Secondly, the money problems faced by legal aid are also faced by the courts system, and it is vital for the Ministry to appreciate that any changes which are made to reduce legal aid and cut the cost of litigation are likely to have a knock-on effect on the cost of the courts. Less legal aid means more unrepresented litigants and worse lawyers, which will lead to longer hearings and more judge-time. More judicial control of cases will mean more judge-time out of court to understand the details of each case in advance.

(6) Standards and diversity in the Judiciary and the legal profession

28. Without a strong, independent, respected and responsible Judiciary, the rule of law is a dead letter. I believe that we have a very strong and respected Judiciary at the moment, but there are areas of concern. As the gap between the earnings of successful lawyers and the judicial pay increases, maintaining high standards may prove hard.
29. There is also a diversity shortfall – especially at the top. Diversity is important for two reasons. It is simply unjust if people have fewer opportunities in life because of, for instance, gender, sexuality, ethnicity, socio-economic background or disability. This is all the more so in a profession dedicated to securing justice. Secondly, if judicial positions are only open to a small proportion of the population, it is statistically inevitable that we will not be appointing the best and the brightest, which is against our national interest.
30. We have been making some progress. Gender diversity is improving. The Court of Appeal is now about to have seven Lady Justices, where there have never been more than four. Recent appointments to the High Court show an appointment rate of about 30% for women. A lot more work needs to be done in other respects: the ethnic minority representation among the senior judiciary is very low, and the socio-economic background of the senior judiciary is almost monolithic.
31. These figures reflect the make-up of the legal profession where, for instance, 11% of the top QCs and partners in the top firms are women. Given that the judiciary is drawn from the profession this poses significant problems. The duty on the judiciary to improve diversity also applies to the legal profession. Lawyers occupy a special place in society, but that carries with it responsibilities as well as rights. The legal profession must do more to improve diversity. More broadly, if we really want to increase diversity, the problem has to be tackled throughout society, in our universities, schools and at home.
32. While it is a bit of an over-simplification, there are currently two legal professions. I am not referring to barristers and solicitors, but to lawyers who serve rich individuals and

companies, and lawyers who serve ordinary citizens. Both are vital to this country, but in very different ways. In a capitalist world, a country needs first class lawyers to advise and act for businesses. Our commercial lawyers do this and more, in that they have made London probably the commercial legal, and dispute resolution, centre of the world, greatly supporting the UK economy. The other lawyers are vital to the rule of law: without competent legal advice and representation, legal rights would be worthless. The former group of lawyers are doing fine, the latter are under intense pressure from legal aid cuts and, at least in some areas, from an overmanned profession.

(7) Conclusion

33. I have covered quite a lot of ground so, inevitably, I have rather skated over many important issues. This was intentional. I wanted to stimulate you to ask questions. I am about to discover if that has been successful. Please feel free to raise any points, whether or not they have been touched on in this brief talk. I cannot promise to answer them satisfactorily, but I will do my best.

34. Thank you.

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