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What happens when the Judge speaks out?

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Deputy President of the Supreme Court of the United Kingdom

Holdsworth Club Presidential Address

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Judges come in all shapes and sizes and, slowly but surely, from increasingly diverse backgrounds. But one thing unites them all – the judicial oath, by which they undertake to do right to all manner of people according to the laws and usages of this realm.

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What happens when the Judge Speaks out?

Lord Hope of Craighead KT¹

Judges come in all shapes and sizes and, slowly but surely, from increasingly diverse backgrounds. But one thing unites them all – the judicial oath, by which they undertake to do right to all manner of people according to the laws and usages of this realm. Doing right to all manner of people demands of the judge the virtues of independence and impartiality. As every law student knows, article 6(1) of the European Convention on Human Rights guarantees to everyone the right to a fair trial before an independent and impartial tribunal. Under our system the professional judge is that tribunal, and we are fortunate in that it is very rare in this country for a professional judge to fail to meet that standard. An appointments system which is open to scrutiny and wholly independent of the executive, and a well-resourced judicial education system, ensure that people who are selected to serve as judges can be relied on to have the necessary skills and the right temperament.

But judges are human beings, not robots. Human nature being what it is, things happen. Things may be said, both on and off the bench, which should have been phrased differently or perhaps should not have been said at all. They may expose the judge to scorn or ridicule on the one hand or to serious criticism, suspension and even removal from office on the other. And it is now well established that it is not enough for a judge to say, when it is suggested that something that he has said or done shows that he was biased, that he does not believe that he was biased at all. It is enough to disqualify the judge that he was apparently biased. The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that he was biased.² Like the reasonable man (or “the reasonable person”, as one of his qualities, surely, is that he or she is gender-neutral), the fair minded and informed observer is a creature of fiction. This creature is, nevertheless, a person of real substance under whose watchful but not over-critical gaze – the observed is fair-minded, after all – the conduct of judges up and down the country is constantly being scrutinised.

¹ Deputy President of the Supreme Court of the United Kingdom. I am grateful to my judicial assistant, Joseph Barrett, for his assistance in preparing this lecture.

² *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, para 100.

It is not always easy to know when the line between what is acceptable behaviour and what is not is being crossed. I should like in this lecture to reflect on this problem, which affects every judge from the most junior to the most senior. Like so many other things in law, getting the balance right is crucial. On the one hand there is the judge, whose reputation or career may be at risk. On the other there is the public interest in the fair and impartial administration of justice. Every time the issue arises those who have to deal with it are faced ultimately with the same question. Have we struck the balance in the right place?

But before I go any further I must express my thanks to the Birmingham Law School for their very kind invitation to preside over the Holdsworth Club this year and to give this lecture. In almost every decade throughout its existence the Club has had a Scottish judge as its President: three Lords of Appeal in Ordinary (Lords Macmillan, Keith of Avonholm and Kilbrandon), two Lord Presidents of the Court of Session (Lords Normand and Lord Rodger of Earlsferry), one President of the Court of Justice of the European Communities (Lord Mackenzie Stuart) and one Senator of the College of Justice in Scotland (Lord Cameron). My appointment has a foot in each of the first two decades of this century – the noughties and the tenties, I think they are called – and I am the first member of the newly created Supreme Court of the United Kingdom to receive this great honour. It is a very real privilege for me to have been thought worthy to follow in the footsteps of my Scottish predecessors, not to mention all the other judges of the highest distinction from England and Wales and Northern Ireland who have preceded me as your President. Special thanks must go to George Applebey who has made the arrangements for this lecture and taken such care to see that I was in the right place at the right time.

The occasions when the judge gets into trouble for speaking out can be divided loosely into the following categories: (a) the casual or careless remark; and (b) the result of a deliberate choice or course of conduct. They can also be divided into occasions when the judge is (a) on the bench; (b) off the bench and acting in an individual capacity; and (c) off the bench and acting in a representative capacity in his capacity as chief justice. I should like to have a look at the problems that arise in each of these various categories.

Until quite recently judges were largely left to themselves to decide how they should regulate their conduct. They resisted the idea that they were in need of guidance, just as they resisted the idea that they should be trained once they were in office. But in 1988 Mr Justice Thomas, a judge of the Supreme Court of Queensland, broke new ground. He published a study of judicial ethics in Australia.³ Nine years later the Canadian Judicial Council produced a set of ethical principles for the guidance of the Canadian judiciary.⁴ This was followed

³ See *Judicial Ethics in Australia* (2nd ed, 1997).

⁴ Canadian Judicial Council, *Ethical Principles for Judges* (1998).

in 1998 by a guide that was published for the Council of Chief Justices of Australia.⁵ Then in 2003 a set of principles, known as the *Bangalore Principles of Judicial Conduct*, was prepared by senior judges from several countries of the Commonwealth. In the following year these principles were endorsed by the United Nations Human Rights Commission at Geneva. They included the principle that propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge. So a working group was set up by the Judges' Council of England and Wales to see if a guide would be acceptable here and, if so, what it should say. After extensive consultation with the judiciary, its *Guide to Judicial Conduct* was published in 2004. The UK Supreme Court has its own guide, which is closely modelled on that for England and Wales.⁶ A guide to judicial conduct in Scotland was approved by the Judicial Council for Scotland in December 2009.

As you can imagine, there is much common ground between these various documents. They are also in essence advisory, not prescriptive, in nature. By that I mean that they are not to be taken as providing a list, or code, of prohibited and permitted behaviour. That would conflict with the independence of the judiciary, which is the guiding principle. Boxing judges in by a precise set of rules, telling them what they can and cannot do, would tend to impede the freedom of action which they must enjoy in the public interest. So these documents are described as “guides”, which set out “principles”. In the United States the word “code” is used. In 1973 the Federal Judicial Conference adopted the *Code of Judicial Conduct for United States Judges*. Its content, however, is essentially that of a guide. It sets out a series of canons by which judges should regulate their conduct. It does not resort to a precise list of do's and don'ts. Canon 6A(6) of the US Code, for example, provides that a judge should abstain from public comment about a pending or impending proceeding in any court which might reasonably be expected to affect the outcome of the proceeding or impair its fairness. Wording of this kind leaves much to the discretion of each judge as to what he or she should or should not do.

There are, indeed, limits as to the guidance that can be given by documents of this kind. The *Guide to Judicial Conduct* for England and Wales, for example, deals with the issue of propriety of conduct, which was one of the *Bangalore Principles*, in chapter 5. Paragraphs 5(1) and 5(2) state, unsurprisingly:

“(1) A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

(2) As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.”

⁵ Council of Chief Justices of Australia, *Guide to Judicial Conduct* (2002).

⁶ UK Supreme Court, *Guide to Judicial Conduct* (2009).

As for what may and what ought not to be said, paragraph 5(6) states:

(6) A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.”

The Supreme Court’s *Guide to Judicial Conduct* makes the same points in much the same way. Under the heading of “Impartiality” it states in paragraphs 3.1 and 3.2:

“3.1 Each Justice will strive to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the individual Justice and of the Court.

3.2 Each Justice will seek to avoid extra-judicial activities that are likely to cause him or her to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.”

As general guidance, this is of course helpful. But it leaves much to the judge’s own discretionary judgment. The question is, how does this all work out in practice?

Let me take first the careless or casual remark by a judge when off the bench. The first case that I should like to mention to illustrate the problems that this can give rise to is *Bradford v McLeod*.⁷ This was a case that arose out a remark which a Scottish sheriff made at a dance held at Ayr Ice Rink by the Ayr Curling Club which he attended during the miner’s strike in 1984 when Arthur Scargill was the General Secretary of the National Union of Mineworkers and Mrs Thatcher was the Prime Minister. The sheriff was one of the permanent sheriffs at Ayr Sheriff Court, which is a court of criminal jurisdiction and is located in an area where at the relevant date there was an active mining industry. He was also an expert in the history and practice of the sport of curling. So he no doubt felt that he could relax, as he was among friends at a purely social gathering. Unfortunately for him, however, one of those present was a solicitor, Mr Penney, who was regularly instructed to act for members of the National Union of Mineworkers. Like the sheriff, Mr Penney was a member of the committee of the curling club. He knew the sheriff well, and the sheriff knew that the solicitor acted for mineworkers. Late in the evening the conversation among members of the committee turned to the topic of the moment, which was the showing on television of scenes of violence at various collieries in England. A police officer had been shown striking a mineworker repeatedly about the head and body with a baton, and a mineworker had been shown assaulting a police officer

⁷ 1986 SLT 244

by kicking him with both feet. At some point in the conversation the sheriff, a large man with a booming voice and a powerful personality, made various remarks which indicated just how he felt about this issue. Among these was the comment that he would not grant legal aid to miners. The granting of criminal legal aid was, in those days, a matter that was left to the discretion of the presiding judge in each case. The sheriff exercised this jurisdiction in Ayr Sheriff Court.

About three months later a mineworker appeared before the sheriff charged with disorderly conduct. He was represented by Mr Penney, who asked the sheriff in open court to disqualify himself from hearing the case in view of the remarks that he had made at the social gathering. He said they indicated that he had made up his mind with regard to miners and that justice could not be seen to be done. The sheriff said that he was flabbergasted that remarks made privately at social gathering could be relied on in this way, and he refused to disqualify himself. His response attracted the attention of the press, so the remarks which he had made in private were made public in the media. A few weeks later 14 other mineworkers appeared before him, the same motion was made and he again refused it. This time however his decision was taken to judicial review in the High Court of Justiciary. There was not much authority to guide the court, as to what it should do. This was, you will appreciate, long before the Human Rights Act 1998 and the recent authorities on the topic of apparent bias such as *Locabail*⁸ and *Porter v Magill*.⁹ But there was some previous Scottish authority to the effect that it was vital in every criminal prosecution that justice should be seen to be done, and there was an observation by Eve J in an English patent case that it was enough that a suspicion of the person's impartiality was created in the mind of a reasonable man even though in fact no bias existed.¹⁰ So the High Court held that the sheriff ought to have disqualified himself. It applied the principle that justice should not only be done but should also be seen to be done. The inevitable consequence of the sheriff's remarks was that he had disabled himself from dealing with any case involving a miner,¹¹ and the convictions were set aside.

That case serves as a warning to judges that they cannot let their guard slip even in the course of casual conversation among colleagues at a private social function. It arose out of a remark made before the hearing at which the sheriff was asked to disqualify himself. But remarks after he issued his decision can also create a suspicion that the judge was biased when he made it. A recent example of this came before the Supreme Court last December. The last case in which the House of Lords gave judgment before its appellate functions were transferred to the Supreme Court was Ms Debbie Purdy's case against the Director of Public Prosecutions in which she asked for an order requiring him

⁸ *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451.

⁹ [2001] UKHL 67, [2002] 2 AC 357.

¹⁰ Law v Chartered Institute of Patent Agents [1919] 2 Ch 276.

¹¹ Per Lord Justice Clerk Ross, 1986 SLT 244, 248F.

to clarify his policy for the prosecution of assisted suicide.¹² The issue that was discussed in that case was and remains controversial. One of the Lords of Appeal who sat on that case was Lord Phillips of Worth Matravers. In an interview which he gave to the press shortly before the opening of the Supreme Court in his capacity as its President¹³ he said, among other things, that he had considerable sympathy for those who found themselves in a situation similar to Ms Purdy. His remarks to that effect, when published, also received publicity in the other sections of the media.

Paragraph 8.1 of the Guide of Judicial Conduct advises judges that they should exercise their freedom to talk to the media with the greatest circumspection, and paragraph 3.3 of the Supreme Court's Guide advises the Justices, when making contributions in public, to take care to avoid associating themselves with any particular organisation, group or cause in such a way as to give rise to a perception of partiality towards it. Easier said than done, of course, and I am quite sure that it did not occur to Lord Phillips that he had crossed the line in what he said, especially as the judgment in that case had already been given. A group which was strongly opposed to the legalisation of assisted suicide saw things differently, however. A leading member of the group, Mrs Davis, presented an application to the Supreme Court for the decision of the House of Lords in Ms Purdy's case to be set aside on the ground that one of the members of the appellate committee that heard that case was apparently biased.¹⁴ There was a precedent for the taking of that step in the *Pinochet* case,¹⁵ where the decision of an appellate committee of which Lord Hoffmann was a member was set aside on the ground he had not declared his connections with Amnesty International which was an intervener in that case. The application was referred to a panel of Justices, none of whom had been a member of the appellate committee in Mrs Purdy's case. They dismissed it on the ground that it did not have reasonable prospects of success – in other words that the fair-minded and informed observer, having considered the facts, would not have concluded that there was a reasonable possibility that when he heard the case Lord Phillips was biased.¹⁶ The case does serve as a reminder however of how careful judges must be in what they say even after the case is over.

Sometimes a judge may be suspected of bias when he or she has said or done nothing at all. That was the situation in another Scottish case.¹⁷ This time the allegation was made against Lady Cosgrove, a judge of the Court of Session, who had heard a petition for the review of a decision of the Immigration Appeal Tribunal to uphold the decision of an immigration adjudicator to refuse the petitioner's claim for asylum. The petitioner was a Palestinian and the judge, Lady Cosgrove, is Jewish. It was not suggested that she could not be impartial merely because she was Jewish. But she was also a member of

¹² *R(Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2009] 3 WLR 403.

¹³ *The Daily Telegraph*, 10 September 2009.

¹⁴ Application in *R(Purdy) v Director of Public Prosecutions*, 8 December 2009.

¹⁵ *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119.

¹⁶ Decision of 12 December 2009.

¹⁷ *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416.

the International Association of Jewish Lawyers, which produced a quarterly publication which included some articles which were fervently pro-Israel and others which were just as antipathetic to the Palestinian Liberation Organisation, of which the petitioner said she was a supporter. The argument was that, as she was a member of the Association, Lady Cosgrove must have received the publication and read the articles. But she had not said anything to anybody about them. Her reaction to the articles was quite unknown. The question was what the fair-minded and informed observer, having considered the facts, would have made of this. Would she have concluded that, simply because Lady Cosgrove must be assumed to have read the articles, she was not impartial? The House of Lords held that that was a step too far. It could be assumed that the judge was as capable as any other intelligent person is of forming her own views about what she had read. Thus the complete absence of anything that she said or did to associate herself with the published material was crucial. Had she dropped even the slightest hint on any occasion, however informal, that she was in sympathy with what was published the result might well have been quite different. As it was, since she had said and done nothing at all, the conclusion had to be that the test of apparent bias was not satisfied in her case. That case offers some reassurance to judges who like to be well informed and are observed reading the *Sun* or some other such tabloid which has taken sides on an issue which comes before them judicially. They can read what they like, so long as they do not say or do anything to associate themselves with what has been written.

It is very rare for a judge whose capacity to continue as a judge is not being called into question to be accused of apparent bias because of things he or she said while on the bench. I shall deal briefly with the more serious cases of judicial misconduct later. Leaving them aside for the moment, judges who say things in the ordinary course of their duties are at risk of being criticised on other grounds – of being soft on crime, for example, or of being out of touch. Clare Dyer, the legal editor of the *Guardian*, one of a panel of legal journalists giving evidence to the House of Lords Select Committee on the Constitution when it was examining relations between the judiciary, the media and the public, said that judges are increasingly being seen as “too left wing, too bleeding liberal, too wet, too pro-human rights and too soft”.¹⁸ I am sure that we can all think of examples: the judge who suggests in the course of his remarks when sentencing in a rape case that the victim asked for it, the judge who imposes a sentence which complies with the sentencing guidelines but the victim or the victim’s family regard as far too lenient or the judge who asks a question to which anyone who has got it is expected to know the answer – who is Katie Price, who or what is Lady Gaga or what is “Twitter”, for example.

¹⁸ 6th Report, Session 2006–7, oral evidence on 6 December 2006.

Remarks of that kind are embarrassing, of course. They provide food for the media who like to make fun of the judges. But they can sometimes give rise to unfair criticism. A judge is required to give reasons for and explain the effect of the sentence he or she selects and must have regard to the sentencing guidelines.¹⁹ This involves commenting on those aspects of the case that point to leniency, if there are any, which must be taken into account. Taken out of context they may suggest that the judge was soft on crime and attract sensational headlines in the tabloid newspapers: “Victim’s fury as girl gets a slap on the wrist”, for example.²⁰ But in their context they can be seen to be an accurate application of the guidelines and entirely reasonable. Apparently crass remarks made during a trial may be due to the judge’s very proper desire to remove any possible risk that a jury may not understand the evidence. So not everything that the media makes fun of is down to the judges. The risk of misunderstanding is just part of the job – one of the consequences of the fact that, under our system, trials are heard in public. Long before article 6(1) of the European Convention guaranteed the right to a fair and public hearing to everyone, Jeremy Bentham declared that openness was the keystone of justice. As he put it, “Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account”,²¹ “Publicity is the very soul of justice”, he said. “It is the keenest spur to exertion and the surest guard against improbity. It keeps the judge himself, while trying, under trial.”²²

Next, there is the case where the judge’s statement is the result of a deliberate choice or course of conduct. A judge may be disqualified from hearing a case because of something said before he or she accepted judicial office. That happened in the case of another Scottish judge, Lord Hardie. He sat on the government benches in the House of Lords as Lord Advocate during the debates on the devolution Bills, including the Bill which became the Scotland Act 1998. Three years later, following his appointment to the bench, he was asked to sit as a member of an appeal court which was hearing an appeal against the dismissal of an application by a remand prisoner who was seeking a mandatory order against the Scottish Ministers for his transfer from Barlinnie Prison, on the ground that the conditions under which he was detained there were incompatible with article 3 of the Convention,²³ to a prison whose conditions would comply with article 3.²⁴ The question was whether, having regard to the provisions of section 21 of the Crown Proceedings Act 1947, it was competent to make an order of that kind against the Scottish Ministers. Lord Hardie had spoken about this in the House in reply to an opposition amendment to the effect that the court should not make an order for specific performance against a member of the Scottish Executive. He said that it was

¹⁹ Criminal Justice Act 2003, sections 172 and 174.

²⁰ The Sun, 16 February 2010. The girl had been given a sentence of 12 months’ imprisonment suspended for two years, ordered to do 300 hours of community service and found liable to pay £2,000 in costs, after having been convicted of perverting the course of justice by making a false allegation of rape.

²¹ J Bentham, *Rationale of Judicial Evidence* (1827), p 524.

²² Article 3 provides, inter alia, that no-one shall be subjected to degrading treatment; the argument was that his treatment in Barlinnie was degrading because of the practice known as “slopping out” – emptying each morning the buckets that serve as toilet facilities in cells that have no flushing toilet.

²³ *Davidson v Scottish Ministers* (No 2), 2005 SC (HL) 7.

unnecessary because the Crown was already protected against such orders by the Crown Proceedings Act.²⁵ It was held that there was a risk of apparent bias where a judge was called upon to rule judicially on legislation which he had drafted or promoted during the parliamentary process. Lord Hardie had committed himself to a view on the very point that was raised in the appeal, he ought not to have sat on the case and the decision of the court on which he was a member was vitiated.

What of deliberate statements made out of court by those who are already judges? The test of apparent bias applies to them too. The question is whether they should be allowed to make statements to the media or anyone else in public at all. Half a century ago there was no room for any debate on the point. In December 1955 the then Lord Chancellor, Lord Kilmuir, promulgated what became known as the Kilmuir Rules. He told the Director General of the BBC that it was important to keep the judiciary insulated from controversies of the day. This meant that it was as a general rule undesirable for judges to take part in radio or television broadcasts. He said that so long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable. By contrast, every utterance he makes in public except in the course of his judicial duties must necessarily bring him within the focus of criticism. He added that it would be inappropriate for the Judiciary to be associated with anything that could fairly be interpreted as entertainment. Although these remarks were directed to appearances on the BBC they were taken to amount to rules that should be applied to appearances in public by judges generally.

Lady Cosgrove's case demonstrates the wisdom of the view that the judge who remains silent is unassailable.²⁶ But it has its disadvantages, and as time goes on it has been seen to be unworkable. Not long after the Rules were promulgated it could be observed that judges had not desisted from their practice of giving public lectures. For example, this series of lectures, a kind of entertainment – to use Lord Kilmuir's expression – that was already well established in the judicial calendar, did not cease because of them. Indeed Lord Kilmuir himself was President of the Holdsworth Club in 1955-1956. In 1956 He spoke about the Nuremberg trials. In 1954 Lord Birkett delivered an address on advocacy. There were other such events too, such as the Hamlyn lectures and conferences such as the Commonwealth Law Conference and the annual conventions of the American and Canadian Bar Associations. They were used by judges to make statements on matters of public interest. For example, in 1955 at the first Commonwealth Law Conference, Lord Radcliffe

²⁵ Hansard, HL Debates, vol 593, col 2044

²⁶ See fn 13, above.

spoke on the work of the Judicial Committee of the Privy Council. In 1974 Lord Scarman in his Hamlyn lecture called for the incorporation of the European Convention on Human Rights into our law. And the Rules did not apply when a judge retired, even when he was introduced to his audience by reference to his judicial office.

In November 1987 Lord Mackay of Clashfern caused a ripple of surprise when, as Lord Chancellor, he abolished the Rules. The context in which he made this announcement has been described as a gentle steer towards judicial activism that started in the early 1960s and was accelerating in the 1980s, and the changing profile of the judiciary.²⁷ But his decision was firmly based on principle. Lord Kilmuir had asserted that, so long as a judge keeps silent, his reputation for wisdom and impartiality is unassailable. But, as the Book of Proverbs tells us, even a fool if he holds his peace is deemed a man of understanding.²⁸ A secretly biased judge is still a biased judge. Silence in itself, after all, is not a cardinal, overriding virtue. Lord Mackay said that he believed that judges should be allowed to decide for themselves what they should do and that this was not the business of government – of which, as Lord Chancellor, he was of course a member. He was careful to say, however, that judges must avoid public statements either on general issues or on a particular case which cast any doubt on their complete impartiality, and that they should avoid issues which were or might become politically controversial. There will, no doubt, be times when it is best to keep silent. But reticence, not absolute silence, is what the judicial office requires.

The Lord Chancellor now has no supervisory or disciplinary role in regard to the judges. This is a consequence of the separation of powers under the Constitutional Reform Act 2005.²⁹ So it is for the judiciary itself to regulate this part of what judges do, by judicial training and through the Guide to Judicial Conduct. The guiding principle is, of course, that judges should not engage in any activity which would compromise their impartiality. But, so long as that line is not crossed, they have quite a lot of freedom to discuss in public general issues of current interest. They made do so in lectures or on the radio. Clive Anderson's series on BBC Radio 4, which he calls *Unreliable Evidence*, is a good example. Judges from all levels within the judiciary have taken part in it, discussing the approach that courts take to matters of general interest on which they are equipped to comment such as youth justice, ancillary relief in family cases and relations between our domestic courts and the European Court of Justice. This has been described as institutional information, informing

²⁷ Gerry Rubin, *Judicial Free Speech versus Judicial Neutrality in Mid-Twentieth Century England*, 27 *Law and History Review*, issue 2, para 64.

²⁸ Book of Proverbs, 17.28.

²⁹ See Part 2 of the Constitutional Reform Act 2005, which modifies the office of the Lord Chancellor.

the public about the nature and importance of judicial independence and how courts function and why they function as they do.³⁰ Experience has shown that they can discuss issues of that kind in a sensible and informative way without falling into the trap of compromising their impartiality. As Lord Phillips's interview with the press shows, there is still a need to be careful. The closer one gets to an issue of current controversy, the greater the need for care. And the golden rule is that judges do not discuss individual cases. But I think that one can say that Lord Mackay's abolition of the Rules was a good thing. It has enabled judges to come out of the closet and share their thoughts and experiences of the law in action in public where it is safe and proper for them to do so.

Lastly, there are occasions when a judge speaks out off the bench when he is acting in a representative capacity, for example as the chief justice. There is no doubt that chief justices as a group have greater freedom to say things in public. Indeed it is generally accepted that they have a responsibility to do so, especially if they think that a judge is being criticised unfairly or that the independence of the judiciary as a whole is at risk of being compromised by the executive. It is, surely, far better that a judge who is being attacked unfairly by the press, or by anyone else for that matter, should leave it to the chief justice to speak out on his behalf. The office of chief justice carries with it greater authority. Leaving it to the chief justice protects the judge from becoming involved personally in his own defence. As the Guide to Judicial Conduct puts it in paragraph 8.1.1, a judge should refrain from answering public criticism of a judgment, from the bench or otherwise. Where the criticism is acute and unwarranted, he should refer the matter to the chief justice who may indeed already have sprung to the judge's defence on his own initiative. But there may be occasions when he can quite properly speak in his own defence. For example, Eady J, who regularly hears defamation cases brought against the media, was criticised by the editor of the *Daily Mail* when he was giving evidence to a Parliamentary committee. He had described him on previous occasions as unaccountable and as hostile to freedom of speech and accused him of moral and social nihilism. In his evidence he said that he was arrogant and amoral, although he added that this was not intended to be anything personal.³¹ Some months later the judge responded in a paper which he gave at a conference in which he pointed out, without mentioning names, that letting off steam in this way simply had to be recognised as an inevitable consequence of adopting the balancing approach required by the Human Rights Act 1998 and focusing intensely on the particular facts of the case.³²

³⁰ By the Hon John Doyle, Chief Justice of Australia, at an Australian Judicial conference in Uluru, April 2001.

³¹ In evidence to the Parliamentary Select Committee on Culture, Media and Sport, 23 April 2009.

³² *Privacy and the Press: Where are we now?*: Justice Conference, 1 December 2009; see *Campbell v MGN Ltd* [2004] 2 AC 457.

Sometimes members of the executive react to judicial decisions which they do not like by making a personal attack on the judge. There have been a number of such cases during the life of the present government. Home Secretaries have attacked judges for making decisions which they did not like about the rights of asylum seekers and for passing sentences which they regard as too soft. Usually there is a political edge to such attacks. Home Secretaries may be tempted to react to public opinion, without much regard to what the law requires and with a close eye on what is likely to attract the attention of the media. When the Lord Chancellor was head of the judiciary it was his responsibility to stand up for the rule of law and to remind his colleagues in government that they should desist from such conduct as the judges are independent of the executive. He is no longer the head of the judiciary, but section 1 of the Constitutional Reform Act 2005 provides that the provisions of that Act do not adversely affect his constitutional role. Section 3 provides that the Lord Chancellor and other Ministers of the Crown must uphold the continued independence of the judiciary. As duties, these provisions are probably unenforceable in a court of law. Their value lies in what may be described as the court of public opinion, and this is where the chief justices in this country have a particular responsibility in drawing attention to failures by ministers to respect them.

Nevertheless it is difficult for chief justices to know how best to react to attacks of this kind. Public criticism of the Minister may serve only to make matters worse. Lord Woolf, when he was Chief Justice of England and Wales, decided to write privately to David Blunkett protesting at his attacks on judges in the case of asylum seekers. We know this because in his audio-diary for July 2003 David Blunkett said that he had received “an outrageous letter from Harry Woolf”.³³ This may give you some hint of the problems that chief justices face in getting their point across. Prior to the coming into effect of the Constitutional Reform Act it was the practice for chief justices to be made members of the House of Lords when or shortly after they were appointed. This gave them the right to speak publicly in the Chamber on issues relating to the independence of the judiciary. This was a powerful weapon which, if sparingly and carefully exercised, could be used to great effect. Lord Lane, Lord Taylor of Gosforth, Lord Bingham of Cornhill and Lord Woolf all exercised this right during their time as chief justice. One can only speculate, of course. But I suspect that one of the reasons why the government was so keen to disqualify all senior judges, including the chief justice, from sitting in the House of Lords was to deprive the chief justices of this opportunity. David Blunkett and Lord Woolf

³³ David Blunkett, *The Blunkett Tapes: My life in the Bear Pit* (2006), p 267.

⁴³ (1973) 413 US 15, 34; the line of authority starts with *Roth v US* (1957) 354 US 476

⁴⁴ at p. 32

were still in office as Home Secretary and Chief Justice when the reforms which led to the passing of the Constitutional Reform Act were announced from Downing Street, and David Blunkett was one of the prime movers behind these reforms. The ultimate weapon that remains with the Chief Justice is to make his views known to a Select Committee such as the House of Commons Select Committee on Constitutional Affairs. But like all ultimate weapons this is something to be resorted to as seldom as possible.

Looking further afield, chief justices of some jurisdictions within the Commonwealth have been particularly active in speaking out on behalf of the judiciary. It is well known that judges have struggled to retain their independence in some parts of Commonwealth Africa. The most notable event was when Chief Justice Anthony Gubbay, who had been standing up for the rule of law in Zimbabwe, was forced out of office in March 2001 by the executive. In June 1998 a group of Parliamentarians, judges, lawyers and legal academics joined together at Latimer House in Buckinghamshire at a Colloquium on Parliamentary Sovereignty and Judicial Independence within the Commonwealth. The product of the Colloquium was a document known as the Latimer House Guidelines in which various principles were set out for preserving judicial independence. In an amended form they were endorsed by the Heads of Government of the Commonwealth in 2003 and published as the Commonwealth (Latimer House) Principles on the Three Branches of Government.³⁴ Encouraged, no doubt, by this development, chief justices have developed the practice in some jurisdictions of stressing the importance of this principle in the addresses that they are expected to give to the legal profession at the opening of the legal year.

Sometimes things said in these addresses are directly critical of the executive. As often as not the issue to which the remarks are directed is that of money. The judiciary depend for the running of the court system on funds provided by the executive. The ideal which was favoured by the Latimer House Guidelines was that the judiciary would control its own budget. That is not something that is looked on with favour by the executive, and a paragraph that was designed to promote it had to be removed before the Heads of Government would approve of the document. In his address at the opening of the legal year in Trinidad and Tobago on 16 September 1999³⁵ however the Chief Justice, Michael de le Bastide, complained that efforts were being made to make the judiciary's access to funds voted to it by Parliament subject to the approval or

³⁴Published by the Commonwealth Secretariat, the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association and the Commonwealth Lawyers' Association in April 2004.

³⁵Commonwealth Judicial Journal, vol 13, no 2, December 1999, p 30.

disapproval of the Attorney General. He declared that if this were to happen the Attorney would have a stranglehold on the judiciary. He referred to a point that the Chief Justice of Zimbabwe had made in a paper delivered to the Latimer House conference that an executive which controlled the budget could twist the arm of the judiciary if it did not behave to its liking. He went on to express fears that the independence of the Bar was being compromised and said that the President of the Law Association had joined with the Attorney General to subvert the independence of the judiciary. These and other remarks gave rise to acrimonious statements in reply by the Attorney General and the President of the Law Association.³⁶ The row that this caused refused to die down, so a Commission of Inquiry was appointed by the Government to investigate the administration of justice in Trinidad and Tobago presided over by Lord Mackay of Clashfern. It found that the Chief Justice's allegations that the executive was endeavouring to undermine the independence of the judiciary were not well founded. But the Chief Justice's ability to continue to perform the duties of his office was not called into question.

In his address at the opening of the legal year in Trinidad and Tobago in September 2009 the current Chief Justice, Ivor Archie, again used the occasion to stress the need for the administration of the courts to be independent of the executive.³⁷ As he put it, independent and effective court administration is needed to make the separation of powers and judicial independence a reality, as effective court administration provides the judiciary with the necessary device to protect judicial independence. He embarked on a detailed criticism of a draft constitution which the executive had put into the public domain for consultation and debate. He said that some of its provisions would reverse the progress that had been made in recent years and depart from internationally accepted norms including the Latimer House principles. Forceful though these remarks were, he was more tactful than his predecessor. He went out of his way to say that he hoped that his remarks would not be construed as a personal criticism of anyone. This seems to have avoided the public row that had erupted a decade earlier. But the Chief Justice of Gibraltar, Derek Schofield, was not so fortunate.

When Chief Justice Schofield used his speech at the opening of the legal year in Gibraltar in 1999 to criticise the executive he caused great offence. He had taken as his theme risks to the independence of the judiciary if it was not to be given control of its own budget. This was against the background of what

³⁶ Sir Fred Phillips, *Commonwealth Caribbean Constitutional Law* (Cavendish Publishing Ltd, 2002), p 280.

³⁷ *Commonwealth Judicial Journal*, vol 18, no 2, December 2009, p 3.

had been discussed and agreed at Latimer House in June 1998 and had been published as the Latimer House Principles in December 1998. His remarks were comparatively restrained in comparison with those which had been made on the same theme by Chief Justice de la Bastide in Trinidad and Tobago a month earlier. But they excited a political controversy in Gibraltar as they were seized upon by the opposition as a stick with which to beat the government. One thing led to another, and when some years later the Chief Justice opposed constitutional reforms that would, in his view, have undermined his position as head of the judiciary his position became untenable. Relations between him, the Bar and the executive broke down completely. He was suspended from office by the Governor and, following an adverse report by a panel of senior judges and advice by the Judicial Committee of the Privy Council under section 4 of the Judicial Committee Act 1833, he was removed from his office as Chief Justice of Gibraltar by Her Majesty.³⁸

One of the central questions in the Chief Justice of Gibraltar's case was how far it was open to a chief justice to exercise his own judgment as to what the need to protect the independence of the judiciary required of him. The answer to it was that he can exercise his own judgment, but he must be acutely sensitive to the risks that public criticism of the executive may give rise to. The likely reaction of opposition parties, the media and the legal profession generally must be taken into account. A chief justice who has the confidence of the legal profession is reasonably secure, but there is no guarantee that what he says will achieve his aim just because he is the chief justice. At best, there is a risk that what he says, if not very carefully phrased, will lead to a loss of respect for the judiciary. At worst, there is a risk that he will be removed from office on the ground that he is incapable of performing the functions of a chief justice.

Removal from office is the sanction of last resort where a judge says things while on the bench which are so incompatible with the judicial function as to amount to misbehaviour or demonstrate unfitness to continue to act as judge. As I said at the outset, however, instances of this happening are very rare. Usually misdemeanours of this kind are dealt with by a rebuke by the chief justice, coupled with a warning that more serious consequences may be expected to follow if the conduct is repeated. If the judge does repeat it despite such a warning, this suggests that there is a more fundamental defect of character which may justify the judge's removal from office.³⁹

³⁸ *Hearing on the Report on the Chief Justice of Gibraltar* [2009] UKPC 43.

³⁹ See, for example, *Stewart v Secretary of State for Scotland* 1998 SC (HL) 81.

The really interesting cases where judges who speak out get into difficulty are not of that character, however. For the most part they are cases where the judge was acting in a way that could not be said to cast any doubt on his or her fitness for office or ability. They are cases where what is said may cause embarrassment to the judge and perhaps to his reputation too and, if it makes it impossible for him to sit, will disrupt the court's programme – causing delay and extra cost to the litigants. These are consequences which every judge will wish to avoid. The margin for error is quite thin, and a judge who speaks out will and must be careful. But freedom of expression is a right which belongs to everyone, including the judges. They have a part to play in informing the public on matters of general public interest. Risky though this may be, I suggest that it is better that they should speak out from time to time rather than remain for ever silent. Judicial independence really is the key. The rule of law depends on it, after all. So the judges must have the confidence of the public. But this has to be earned, and I believe that is most likely to be achieved by their engaging with the public when it is safe and proper to do so.

This, perhaps, is why this series of lectures has played such an important part in upholding the best traditions of the practice and study of law in this country. Long may it continue.

Biography

Lord Hope of Craighead is Deputy President of the Supreme Court of the United Kingdom. Formerly a QC at the Scottish Bar he was later appointed a Senator of the College of Justice in Scotland, and Lord President of the Court of Session and Lord Justice General, Scotland's highest judge. In 1996 he became a Lord of Appeal in Ordinary, then as one of the senior Law Lords in 2009 he oversaw the transition from the House of Lords to the new appellate jurisdiction of the United Kingdom Supreme Court. Lord Hope was among the first Justices of the Supreme Court, and its first Deputy President. He has been Chancellor of the University of Strathclyde since 1998. In 2009 Lord Hope was appointed to the Order of the Thistle, the highest chivalric honour in Scotland, equivalent to the Order of the Garter in England.



Lord Hope of Craighead (centre), with the Holdsworth Club Committee 2009-10 and Professor Rob Cryer (right), Head of Birmingham Law School

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