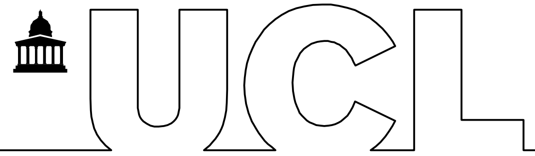

# "INDEPENDENCE UNDER THREAT?"

DAME HEATHER HALLETT DBE

BENTHAM ASSOCIATION PRESIDENTIAL ADDRESS 2012

14 MARCH 2012

## Introduction[1]

I am disappointed that Jeremy Bentham cannot be with us tonight. I should have liked to know how he would have received the 2012 President of the Society founded in his name. He was a supporter of women's rights and therefore our relationship should have started well. However, I am proud to call myself a common lawyer and, of course, a judge and I fear, that once aware of that, our relationship would have deteriorated fast.

Jeremy Bentham was no fan of judges. For him judges and lawyers were conspirators in a criminal plot to secure fat fees with which to line their deep pockets. Over the centuries he has not been alone in his low opinion of lawyers and one might therefore forgive him for his lapse in judgment and over generalisation. However, I cannot forgive him for his failure to appreciate the importance of Judicial Independence (JI). For a man who believed in the rights of individuals, I would ask him, were he released from his cabinet, who better than judges, who have taken an oath to try cases without fear or favour, to maintain the Rule of Law and uphold the rights of the individual? If so, how can they perform that function unless free of inappropriate constraints?

## Judicial Independence

Bentham's antipathy to JI was recently summarised by Professor Galligan of Oxford University, who said this,

> 'Jeremy Bentham was opposed to judicial independence because it made judges unaccountable and allowed them to do what they like. He thought they should be subject to the rigorous scrutiny of public opinion.[2]'

In the light of this, I think we can safely say that Bentham would have vigorously dissented from Anthony Kennedy (Associate Justice of the US Supreme Court)'s view that 'Judicial Independence is not conferred so

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[1] I wish to thank John Sorabji for all his help in preparing this lecture and I wish to apologise to those who have heard and read much on the subject of independence. It is a subject that not only bears repeated examination but demands it.

[2] D. Galligan, *Courts and the Making of Public Policy, Judging Judges*, (The Foundation for Law, Justice and Society) <http://www.fljs.org/uploads/documents/Galligan_Policy_brief%231%23.pdf> at 2; also see F. Rosen, *Elie Halevy and Bentham's Authoritarian Liberalism*, in B. Parekh, *Jeremy Bentham – Critical Assessments*, (Routledge) (1993) at 929.

judges can do as they please. Judicial Independence is conferred so judges can do as they must.[3]' Bentham would no doubt have listened, arched an eyebrow and replied in the style of Mandy Rice-Davies: 'Well, he would say that, wouldn't he.' Bentham believed that an independent judiciary is one which in truth is 'dependent on its own passions and caprice.[4]'

JI began its life hand in hand with the Common Law and there lay the problem as far as Bentham was concerned. Common law, judge-made law, was in his view plain wrong. In Adrian Vermeule's words, the flaw in the Common Law was that it is a system through which 'precedent [trumped] the constitutional views of legislatures and executive officials if necessary.[5]'

It may be that a member of my Inn, the Inner Temple, was partly responsible for his jaundiced opinion of judge made law. In 1610 Sir Edward Coke, the man who did so much to give the Common Law its firm foundation found in favour of Dr Bonham. Dr Bonham had taken on, what I must now call, "the front line regulators" of the day, the then equivalent of the GMC. Despite Acts of Parliament and a Royal Charter apparently giving the regulators the right to act as prosecutor, judge and jury and the power to imprison, Coke ruled robustly that "in many cases, the Common Law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such an Act to be void...some statutes are made against law and right, which those who made them perceiving would not put them in execution.".

Had that decision stood alone, one might have understood how the perception could have arisen that the judiciary had all the power of the legislature, with none of the accountability. However, it did not stand alone and Jeremy Bentham's mistake was a failure to acknowledge the reality of the post-1689 constitutional settlement. The judiciary may well develop the Common Law through precedent, but the Common Law yields to statute, to the will of Parliament. Precedent does not trump the views of Parliament. It may trump the views of members of the executive but that is an entirely different matter. When the courts set aside the views of the executive, or hold the executive to account they do so because they are fulfilling their constitutional role: they are ensuring that the executive, which is required to act within the Law, does so. Bentham's problem here was perhaps an unthinking conflation of Parliament and the executive.

This is surprising given that the separation of powers was at the heart of Bentham's legal philosophy. Bentham argued that our entire constitutional and legal arrangements had to be recast: he wanted codification of the law; clear separation of powers; and open scrutiny of the institutions of governance, which were to be subject to full democratic control[6] by election and, where necessary, recall[7]. Substitute the word "transparent " for open and he might have been a press officer for a modern politician. He believed this openness and accountability were to be achieved by ensuring that the judiciary carried out their role in the full gaze of public scrutiny. He would undoubtedly have favoured the broadcasting of court proceedings, rubbing his hands with glee at the prospect, as he would have seen it, of lawyers and judges grandstanding and showing their colours in their true light.

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[3] Hellman, *Justice O'Connor and "The Threat to Judicial Independence": The cowgirl who cried wolf?*, 39 (2007) Arizona State Law Journal 845 at 859.
[4] Bentham cited in G. Postema, *Bentham and the Common Law Tradition* (Clarendon Press) (1986) at 363 – 364.
[5] A. Vermeule, *Law and the Limits of Reason*, (OUP) (2009) at 19.
**[6]** Bentham, *The Works of Jeremy Bentham* (ed. Bowring) (1843) (William Tait, Edinburgh) Vol. 9 *The Constitutional Code.*
[7] Bentham, cited in G. Postema, *ibid* at 375 .

Justice, of course, must be open. Bentham was one of the first to recognise that fact. He argued the judiciary should operate under the watchful eye of what he called the 'Public Opinion Tribunal.[8]' Through such openness and scrutiny, all members of society could, he thought, be educated properly to understand the public interest. Further, he believed that the public opinion tribunal so educated could then exercise their sovereign power through the electoral process. The people were his "Caesar". The judiciary, like the other branches of the state should be subject to Caesar's will. To my ear that sounds distressingly like a call for the election of judges as in some parts of the US system. For those who find that prospect alluring I cannot resist the temptation to rehearse the details of a case cited by a colleague in another lecture and with which I am sure many of you are familiar Caperton v Massey Coal Co (June 2009)[9]. To my mind it puts paid once and for all to any suggestion that judges should be elected, if that is what Bentham had in mind.

Caperton and Massey were business rivals. Caperton sued Massey and won a $50 million verdict from the jury. Massey's CEO Blankenship spent $3 million supporting the campaign of Brent Benjamin an attorney for a seat on the West Virginia Court of Appeals, to which he knew the appeal was heading. After winning election to the court, Justice Benjamin refused to recuse himself from hearing the appeal and cast the deciding vote in the court's 3-2 decision in Massey's favour. The dissenting minority found the majority's reasoning incomprehensible.

Somehow Caperton won a rehearing. Benjamin who was by now Chief Justice selected the judges to hear the appeal. Caperton lost again. In the Supreme Court in Washington Caperton won on the grounds that there was an appearance of lack of impartiality (I should say so) but the victory was only 5:4. Some very distinguished jurists were in the dissenting minority, including Chief Justice Roberts and Justice Scalia. It is instructive to see how Justice Scalia (another Bencher of my Inn) put it:

> "Blankenship has made large expenditures in connection with several previous West Virginia elections, which undercuts any notion that his involvement in this election was "intended to influence the outcome" of particular pending litigation."
>
> "It is also far from clear that Blankenship's expenditures affected the outcome of this election. ………….Justice Benjamin just might have won because the voters of West Virginia thought he would be a better judge than his opponent. Unlike the majority, I cannot say with any degree of certainty that Blankenship "cho[se] the judge in his own cause." I would give the voters of West Virginia more credit than that."

I know little about the voters of West Virginia, but I confess I find this reasoning surprising. The *perception* that the vote of one judge on the court had been bought was all too obvious. *Certainty* that a litigant had chosen the judge in his cause was surely not required.

To my mind, this case is a glaring example of why a system of electing judges is wrong. First, there is the obvious reason that an election today inevitably involves a campaign, a campaign requires funding and the person or people providing the funds may appear to acquire, by their financial support, inappropriate influence over the court.

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[8] Bentham, *The Works of Jeremy Bentham* (ed. Bowring) (1843) (William Tait, Edinburgh) Vol. 9 *The Constitutional Code* at 41 to 44, 155 to 160

[9] Sir Anthony Hughes February 2011

Further, security of judicial tenure is the primary means through which a society committed to the Rule of Law ensures that at an individual, and consequently, institutional level the judiciary as a body is insulated from extraneous influences. It is a necessary precondition for a judge to adjudicate without fear or favour; to adjudicate solely on the facts established by the parties and according to the applicable law. Rendering judicial office subject to removal, or the threat of removal, by an electorate undermines the Rule of Law and an effective democracy. It does so because it places pressure on each judge to have in mind the electorate's views, or perceived views, when deciding a case rather than the facts and the law. There lies the path to arbitrary justice. Accountability through the ballot box rather than being an essential element of a healthy democracy undermines it.

Bentham never grappled with the fact that his theory would place all three branches of the state at the mercy of "'the opinion of the moment', or of the opinion of the majority of the moment.[10]" His faith in the view that if our institutions were reformed as he wanted, Caesar would be better informed and would therefore never lapse into the opinion of the moment, but would only ever be 'measured and enlightened[11]' was at best naïve and at worst foolish.

A further criticism of Bentham's approach is that it contains a fallacy. It conflates independence with unaccountability. The two are not necessarily the same. Independence does not imply, require or necessarily justify the latter. The judiciary can be independent of the other branches of the state without being unaccountable. As is well known, judges are accountable in a number of ways. They are accountable, for instance, in respect of their judicial decisions through proceedings being held in open court, in public. They must give reasons for their decisions. They are accountable through the appellate process. They are accountable in cases of misconduct. In respect of the development and interpretation of the law, they bow to Parliament, which can correct those developments through legislation. This is the separation of powers in action.

The institutional independence of the judiciary from the executive and legislative branches is an aspect of the separation of powers, a constitutional principle dear to Bentham's heart. Traditionally it was taken to mean the separation of the executive, the legislature and the legal system leaving the judiciary to act according to the law and uninfluenced by politicians or the executive. However, the rise in multinational corporations, some of whom have incomes higher than the GDPs of small countries and the rise in the power of the media, suggest it may be necessary to re think the categories of potential influence upon the judiciary. Bentham would agree. He understood the possibility of improper influence being brought to bear upon the judiciary as a whole and upon individual judges.

In the Defence of Liberty he discussed maintenance and champerty, which prohibited strangers to litigation financially supporting legal proceedings and from doing so for a profit[12]. In the course of his critique he conjured up this image of our medieval law courts. It was, he said:

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[10] G. Postema, *ibid* at 373.
[11] G. Postema, *ibid* at 366.
[12] See Law Commission, *Proposals for the reform of the Law Relating to Maintenance and Champerty* (1966) 4 at [9], which defines maintenance as '*the procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings without lawful justification*', and champerty as the provision of maintenance for '*a share of the proceeds of the action or suit or other contentious proceedings where property is in dispute.*'; and see *Hill v Archbold* [1968] 1 QB 686.

> “ a mischief in those times . . . that a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench.”[13]

The swaggering barons of medieval times used brute force to strike terror into the heart of the quivering judge. The barons of today may not be so unsubtle but their influence is no less powerful. It seems, from the following quote, that whatever else Bentham thought about judges he thought the judges of his day robust enough to withstand any onslaught from barons of any description. He observed:

> “what cares an English judge for the swords of a hundred barons? Neither fearing nor hoping, hating nor loving, the judge of our days is ready with equal phlegm to administer, upon all occasions, that system, whatever it be, of justice or injustice, which the law has put into his hands…”[14]

I am confident that our 21st Century Judges in the UK have sufficient phlegm to resist external threats, inducements or influence should they arise. However, will that always be the case? We are all acutely conscious of the vast increase in legislation and of controversial legislation. As the moral authority of other institutions declines there is a greater and greater recourse to the law as a solution to all problems. More is demanded of the law and of the judges. The judges are thrust into the limelight in a way which would have been unheard of years ago and in a way of which Bentham might have approved.

**External pressures**

In recent years the judiciary in England and Wales has come under increasing pressure from both the press and the politicians and Bentham’s wind of public opinion. Criticism is widespread and often ill informed. Decisions of the courts, unpopular with the press or Government ministers, have led some to comment in personal terms about the judges responsible. At least one is reported as issuing a threat. My examples are all relatively modern. I could have cited one from the cuttings this week.

The first example I wish to consider is that of Congreve v Home Office[15], which dates back to the 1970s and the days of Lord Denning. It was a case about TV licence fees. For those with long memories, before 1975 the TV licence was £12 a year. On 29 January 1975, the Home Secretary made an Order under the Wireless Telegraphy Act 1949 raising the licence fee to £18 a year. A number of people took advantage of the fact that they were forewarned of the impending increase. Shortly before it came into effect on 01 April, they obtained new licences despite the fact their licences had not, at the time, expired.

As Lord Denning put it, ‘the Home Office was furious.[16]’ It wrote to the offenders threatening to revoke their licences unless they paid an extra £6. Mr Congreve, one of the £12 licence fee holders, issued proceedings seeking a declaration that the Home Office could not lawfully revoke his licence. He lost at first instance. The Court of Appeal however allowed his appeal, and declared that the proposed revocation of his licence was unlawful.

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[13] Bentham, *The Works of Jeremy Bentham (*ed. Bowring) (1843) (William Tait, Edinburgh) (1843) Vol. 3, *A Defence of Usury*, Letter XII at 19.
[14] Bentham, *A Defence of Usury*, Letter XII at 19.
[15] [1976] Q.B. 629.
[16] [1976] Q.B. 629 at 647.

In the course of the appeal proceedings, leading counsel for the Home Office made a remarkable submission. Lord Denning summarised it as follows,

> 'In the course of his submissions, Mr Parker said at one point – and I made a note of it at the time – that if the court interferes in this case, "it would not be long before the powers of the court would be called in question". We trust [Lord Denning added] that this was not said seriously, but only as a piece of advocate's licence.[17]'

My second example moves closer to the present. You will no doubt remember the furore over so-called super-injunctions and hyper-injunctions. During it the Daily Mail attributed a view to an MP that judges should be summoned to Parliament, made subject to Parliament's contempt powers and packed off to the Tower. The headline was worded as follows: 'Let's threaten them with prison': MP goes to war with judges who hand out gagging orders.[18]' I should say that it is far from clear that that is what the MP said or meant.

My third example moves across the Atlantic where this theme of imprisoning the judges was explored further. In Arthur Hellman's critique of threats in the United States to JI he comments on an initiative in the State of South Dakota called 'Jail 4 Judges'. In November 2006 the initiative ensured a proposed Constitutional amendment was placed on a State ballot paper. The proposal sought to

> 'cut back substantially . . . judicial immunity: it would . . . have created an elaborate system of special grand juries that would 'investigate, indict, and initiate criminal prosecution of wayward judges' . . .[19]'

The rationale behind this US version of sending judges to the Tower was explained by Hellman in this way,

> 'The proponents of the "Jail 4 Judges" initiative have made no secret about what they are trying to do: they want to intimidate judges. They have proudly proclaimed that by wearing their JAIL T-shirts they send "that intimidation factor flowing through the judicial system." So there is no ambiguity as to their goal; an independent judiciary is exactly what they are trying to destroy.[20]'

Thankfully the Jail 4 Judges campaign only received 11% of the vote.

At least the disgruntled Ministers in Scotland who took exception to a recent decision of the Supreme Court did not threaten them with prison. They just threatened to withdraw funding. They may have spoken in haste and regretted their words later but speak them they did.

Other threats may be less obvious. Last year the British press was full of reports of the sentences imposed by the courts on those caught up in the summer UK riots. Some of the sentences were tough but as the Court of Appeal Criminal Division declared they were tough for good reason and in accordance with settled principles. Yet, Ministers were accused of improperly whipping up the judges into a frenzy of harsh sentencing. Lord Macdonald QC, a distinguished lawyer and former DPP, was moved to comment that the courts risked being

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[17] [1976] Q.B. 629 at 652 – 653.
[18] Daily Mail, 07 April 2011 <http://www.dailymail.co.uk/news/article-1374223/Lets-threaten-prison-MP-goes-war-judges-hand-gagging-orders.html> .
[19] Hellman, *ibid* at 852.
[20] Hellman, *ibid* at 852.

swept up in a "collective loss of proportion". Judges were complimented by Number 10 on their tough sentences and accused by others of thereby doing the Government's bidding.

It is unusual for the judiciary of England and Wales to be criticised for passing harsh sentences. The most vocal criticism is usually reserved for sentences seen as unduly lenient. Reporting can often contain emotive and sometimes intemperate language. Despite the fact there is in place a well regulated regime for referring unduly lenient sentences to the CACD, a press campaign was launched to " name and shame" those judges whom they accused of being "soft on crime". The campaign involved daily features on particular judges, complete with photographs of the judges and on occasion representatives of the press would lie in wait outside the judges' private homes to "doorstep" them and members of their families.

Another way of undermining JI is not to bother with criticism or threats but simply to ignore judicial decisions, as Newt Gingrich declared he would do if he were elected President of the United States and the US Supreme Court decided cases against him[21]. Why not? The judiciary is the weakest branch of the state. It has, as Alexander Hamilton put it, neither sword nor purse[22]. The answer to that question can also be drawn from the United States. Mr Gingrich was not the first to think he could ignore the Supreme Court.

In 1832 the US Supreme Court heard the case of Worcester v Georgia[23]. It held a statute of Georgia to be void on the grounds it was in violation of Federal law and issued an order requiring the State of Georgia to release from detention a Samuel Worcester. Georgia refused. President Andrew Jackson also refused to take any action to enforce the Supreme Court's ruling. He expressed the view that it was a matter for the states and he had no power to intervene. South Carolina took President Jackson at his word, and passed a statute which made it clear it viewed federal law as an optional extra. If the President can pick and choose which laws are to be followed, why not the State of South Carolina? By refusing to enforce the Supreme Court's judgment, the President had sent out a clear message that federal law did not apply to all. By failing to uphold the US Supreme Court's decision, he undermined the Rule of Law. Unsurprisingly he rapidly took steps to undo the damage caused by his initial decision.

The lesson to our politicians is clear. If the executive were to choose to carry through a threat to the judiciary by simply refusing Gingrich or Jackson-like to implement a court judgment that would be the end for the Rule of Law. If the executive chose to undermine the independence of the judiciary by ignoring judgments, why should anyone else abide by them? Why should they pay their taxes? Threats have consequences. A threat to the independence of the judiciary if carried through is a threat not simply to the judiciary. It is a threat to the executive, to the authority of Parliament, and to the electorate.

The final example I wish to give is the group of people who use the internet to defy and threaten judges. I confess to a love of the internet. It has revolutionised my life. However, there is a down side. Some do abuse it. To date we have seen 2 women jailed for disobeying a judge's directions not to use the internet, thereby prejudicing the course of justice. We have seen the crusaders who believe that whatever they do to further their cause is justified: eg the animal rights activists who, in an attempt to intimidate me put my personal details, the

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[21] C. McGreal, *Newt Gingrich: I would ignore supreme court as president*, The Guardian (19 January 2012) '*Newt Gingrich has pledged that on his first day as president he will set up a constitutional showdown by ordering the military to defy a supreme court ruling extending some legal rights to foreign terrorism suspects and captured enemy combatants in US custody*.' <http://www.guardian.co.uk/world/2012/jan/19/newt-gingrich-ignore-supreme-court-president>

[22] Hamilton, *ibid* at 379.

[23] 31 US (6 Pet) 515

details of my husband and young children, of my widowed mother, my widowed mother in law and a farmer in Kent who had nothing to do with me on the internet under the banner "their homes are not bomb proof". There are the activists who object to the principle of so called super injunctions who will deliberately flout court rulings not to identify a claimant. There are members of parliament who feel entitled to join in, using the cloak of parliamentary privilege, to name individuals whom the court has ordered should not be named. There are representatives of the press who then feel entitled to report the proceedings. Finally, there are the simply malicious: the "court baiters". There are people who for no reason other than sport, indulge in court baiting – publishing for the sake of it material the court has ruled confidential.

What do these examples have in common? By one means or another, the effect is to undermine individual judicial decisions and potentially to bring influence to bear upon the judiciary as a whole. Furthermore they demonstrate that such threats can come from any direction: from the executive, from the press, from Parliamentarians, from the public and from distinguished commentators. Thus is exposed the potential fragility of judicial independence.

I should not want to give the impression that judges are delicate flowers who expect to be able pass judgment without criticism of any kind. Judges understand and accept the importance of freedom of expression and a free press. They expect robust criticism of their decisions from whatever quarter. Sadly, they are growing accustomed to unpleasant personal attacks. Judges are meant to be sufficiently hardy to take the criticism on the chin, shrug it off and carry on doing their job. I have no doubt that our current generation of judges will continue to do just that. However, judges are only human. If, in the future, the press and politicians cross the line more frequently and more dramatically- what effect will the drip drip drip of public criticism have? The press and or members of the public may not realise the effect a constant barrage of ill informed personal attacks can have upon a judge and on his family. Might the barrage one day go further and have an effect on a professional level- might it influence the outcome of a case? Might it prevent the judge from taking the brave but just decision? We all think not and hope not. We must be given sufficient resources to train and support our judges to cope with the inevitable glare of the limelight to ensure that it does not. In the meantime we need constantly to remind those in positions of influence how precious our judicial system is to our constitution, our democracy and our reputation abroad.

Who will do the reminding? Where are the guardians of judicial independence ever ready to support the institution of the judiciary and ward off attack? The judges themselves obviously; academics obviously; politicians and members of the executive one would hope. Until recently the Lord Chancellor as "top judge" and a member of the Cabinet was well placed to fulfil this role. Since the Constitutional Reform Act 2005, although no longer top judge he or she has a statutory duty to act as guardian of the judiciary's independence. Successive Lord Chancellors have taken that duty seriously, albeit one or two may have needed nudging into action. But what happens if a non lawyer, (or even a lawyer), of a similar frame of mind to Newt Gingrich who resents what he sees as the court's intrusion into political life, takes office as Lord Chancellor? Will he or she be as ready or willing to step in and act appropriately as guardian of the constitution?

Will they be there to explain to the various committees of the Houses of Parliament the legitimate extent to which they may demand answers of judges? Is it a coincidence that the demise of the Lord Chancellor as "top judge" has coincided with a huge and exponential rise in the requests of Parliamentary committees for judges to attend before them? For the most part, judges are, of course, happy to assist. Anxious to dispel the myths of the

ivory tower and to help where they can, judges have responded willingly on matters within their expertise. However, there are dangers. Judges cannot on the one hand demand respect for their individual and institutional independence and on the other hand appear to descend into the political arena. Indeed they should be wary of entering any contentious public arena on a less than a judicial level.

A number of colleagues have written and spoken on the subject and I wish I had time to cite them all. Beatson J has written eruditely, as one would expect, on the dangers of judges becoming involved in public enquiries, blurring the edge which marks the sharp definitions of the functions of the judiciary on the one hand and the executive and legislature on the other. Another colleague, in an excellent lecture which I commend to you, entitled the Mask of the Judge, Moses LJ agreed arguing that:

> "One of the essential arguments against the use of judges on inquiries is that it undermines the authority of the judge; although the government and executive take advantage of that authority to cloak the inquiry with respectability, the conclusions do not have the authority of a judge. If the conclusions are undermined so is that authority."

He foresaw the dangers in letting what he called "the mask of the judge" slip. He said this:

> "authority to give a decision lies in the very fact that the judges are unelected and do not account for their decisions, save in the reasoning they provide within their judgments. If there is a problem to be solved which has no correct solution, whether a baby should be allowed to die, whether evidence vital to protect life should be obtained through torture, whether detention may be in the interests of public safety, the one thing democracy requires is an answer recognised as authoritative. That requires the recognition of the authority of a judicial decision and that requires a mask."

As you know he recently delivered a typically thought provoking and forthright lecture attacking the proposed system of QASA. It is a highly controversial topic. Does that mean he fell into the trap about which he has so eloquently warned us? Did his mask slip? In my view, it did not. I do not intend to comment one way or the other on the merits or otherwise of QASA and the dangers he foresees; I come, therefore, not to bury this particular Caesar, nor to praise him. But, I do come to support his right to speak out on an issue which he perceived to be of fundamental importance to the system of justice in this country, namely the independence of the legal profession. There are threats to the independence of the legal profession (about which I too shall be speaking in another lecture) and some of them must be taken seriously. An independent judiciary is dependent upon an independent legal profession. The Rule of Law cannot survive without both. It is not descending into the arena of politics or policy to speak on independence.

However, to avoid the risk of the mask slipping, judges must be cautious in their choice of topics, venues and of accepting every invitation to speak. Most importantly, boundaries must be observed by those who put the judge in the public arena and ask them to speak or answer questions. Unfortunately, (and perhaps understandably it not being their world), politicians focussed on their own quest may not always be aware that boundaries exist let alone where they lay. The constitution requires a recognition of those boundaries. There must be someone who accepts responsibility; someone prepared to warn and or reprimand those who over step the mark. Someone who understands as Lord Falconer did (and I am sure Ken Clarke does) how a politician should respond to decisions of the courts they dislike. If the law develops in a way which is unacceptable to the public, the answer is not to launch personal attacks upon the judges or seek their dismissal from office, it is for Parliament to change the law. Lord Falconer told the House of Lords Constitution Committee: "If you disagree with a decision, say what you are going to do; if you are going to appeal, say you will appeal; if you are going to change the law, say you

will change the law. If you cannot appeal and cannot change the law then my advice would be to keep quiet because there is not much you can do about it … It is a pretty unwise thing for a minister to say that there is something [wrong with the law] but we are not going to do anything about it." "What is objectionable … is something which expressly or impliedly says that there is something wrong with these judges for reaching this conclusion"

Lord Falconer, dare I say it, seems to have understood the post 1689 constitutional settlement in a way that Bentham did not.

That brings me to the question of resources. Here I am at risk of entering the political or policy arena so I shall tread particularly warily. As I have said an independent judiciary can only function effectively when supported by an independent legal profession. Yet we are living in hard times and difficult choices have to be made on how to spend precious resources. I speak from the luxurious position of one who does not have to make the tough choices. I shall say only this, therefore, the legal system may not always tug at our heart strings in the way that the NHS and the education of small children may do, but it is none the less vital. It is essential to a healthy democracy and the Rule of Law. I hope that whatever resources are allocated to funding litigation, and whatever means are deployed, they are sufficient to ensure proper access to justice to those who need it, without undermining the ethos of the legal profession. Similarly, I hope that whatever resources are allocated to the Courts and Tribunals Service they are sufficient to allow judges to do their job.

Penny Darbyshire an academic spent 7 years researching and then worked shadowing judges of every level. She was given unprecedented access to our rooms and our discussions. She has recently published a book entitled Sitting in Judgment: The Working Lives of Judges. The judges are referred to by initials – I shall not reveal mine! Under the heading <u>Resources and the Threat to Independence</u> she said this:

"Spending money on justice does not attract votes. The courts are out of sight and out of mind. Many judges work in straitened circumstances. Buildings are badly designed or crumbling; lodgings are shabby; IT systems uncoordinated and decades behind the outside world, with a lack of support…Judges do not complain of their own conditions because they know their staff are paid a pittance and public agencies under funded. Conditions can only get worse." She continued with an explanation of the nature and significance of the cuts required in Ministry spending.

The problem is the same the world over. I was approached by legislators in Hong Kong asking me if everyone else has to cut back, why not the courts and the judges? Why should they be immune? I do not suggest they should be and I understand that in such straitened times, talk of Judicial Independence may cut little ice with vast swathes of the public and the press. But, resources, or rather the lack of them, is a potential threat and cannot be ignored.

The same could be said about judicial training. I must repeat the same health warning: it is not for me to try to dictate the allocation of precious resources. However, I have already spoken of the importance of training our judges not just in judge craft, black letter law and the social context of their judging, but also in how to withstand outbursts of public disapprobation. Two professors who probably know more about the judges of this country than the judges themselves have spoken on the subject of the importance of training to judicial independence. If they will forgive me therefore I shall quote from them. Professor Dame Hazel Genn of UCL has asked and answered the question of why do we need judicial training in this way:

> "Legislation and common law are together fundamental to economic and social stability and the achievement of social justice. The judiciary are responsible for interpreting legislation and regulations, for applying and developing the settled legal principles of the Common Law, for imposing penalties on offenders and providing remedies for injustice. Judicial decisions are highly significant for individuals and for the wider society. The daily decisions of the judiciary have a fundamental impact on the liberty, livelihood and reputation of citizens. They have a critical role in making effective legal provisions designed to improve social justice, protect the weak and vulnerable, enforce responsibilities, and maintain social order. The integrity and legitimacy of the legal system depend on the judiciary at all levels having the necessary degree of knowledge and skill to deliver accurate legal decisions by processes that are demonstrably fair and perceived to be so by victims, offenders, litigants, witnesses, the legal profession and the public at large. The role of judges in courts and tribunals requires additional knowledge and skills of a type and level that are not acquired in the course of a professional legal career, let alone any other career."

Her colleague here at UCL Laws, Professor Cheryl Thomas, the holder of the first chair in Judicial Studies in the UK, agrees. In a report on judicial training across Europe she said this: [24]

> "Judicial independence encompasses both the real and perceived lack of political interference in judges' neutral interpretation of the law, and the ability of judges to make unpopular decisions that are right in law. Challenges to judicial independence (often in the guise of political proposals to reform the judiciary and legal process) can grow out of concerns over the ability of the judiciary to meet the demands of a rapidly changing justice system. In order to preserve their independence judges increasingly need to demonstrate a wide range of skills – some of which have traditionally not been covered by judicial training programmes. In the 21st century, the ability of judicial training and education programmes to adapt and enable judges to develop new skills in non-traditional areas is a key element in promoting judicial independence."

I agree with both. The job of judging has become increasingly complex and requires a number of skills which not all of us will have honed to perfection before joining the bench. A well-trained judiciary is more likely to command the confidence of the public, the press and commentators. A well-grounded and supported judge who provides properly crafted and objective reasons for his or her decisions is less likely to be the subject of ill informed criticism (though sadly there is no guarantee as some of my colleagues can testify).

So far, the Judicial College has been able to accommodate the cuts in our budget required by the MOJ without making too drastic a reduction to our programme and without feeling we have been treated unduly harshly. I emphasise so far.

Finally, I turn to judicial appointments. I do so for the sake of balance and for fear otherwise of sounding like a Benthamesque conspiracy theorist. Here we have an example of a government, the executive, giving up the power to appoint judges (an important constitutional power) and handing it to an independent commission. In my view they are to be commended. I have commented publicly more than once on the fact I am a total convert

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[24] From C. Thomas and D. Piana, Judicial Training & Education Assessment Tool: Meeting the Changing Training Needs of Judges in Europe, Report to CEPEJ (October 2007)

to the new system and I now speak on the subject with the zealotry of the convert. An independent commission appointing judges can only support and enhance the independence of the judiciary.

However, the system as established under the CRA is not perfect and requires some reform. Many of us have given evidence to the House of Lords Constitutional Committee or written on the subject. My comments focus principally upon the fact that the Act allows for the significant involvement by the executive in the appointments process, should the Lord Chancellor choose to use his powers. This has led some to question whether there should be any political involvement at all in the process. Others, given what they perceive as excessive "judicial activism", have raised the prospect of greater political involvement (to my mind ignoring the lessons from across the Atlantic).

As you know, under the present system, once the Lord Chancellor receives a recommendation from the JAC, he may (i) accept the selection; (ii) reject it; or (iii) require the JAC or the selection panel to reconsider. He may reject only on the basis that the person is not suitable. He may ask for reconsideration only on the basis that there is not enough evidence that the person is suitable for the office, or there is evidence that the person is not the best candidate on merit. He must give reasons in writing for rejecting or requiring a reconsideration of a selection.

What if, as some would prefer, the JAC was obliged to provide a list of names from which the Lord Chancellor of the day may select his or her favoured candidate rather than at present the JAC's recommending one candidate for one post. Would a Minister be tempted (even subconsciously) to prefer the candidate who has not sat regularly in the Administrative Court and been a thorn in the flesh of the Government? On the other side of the coin, would our judge of the future, keen on promotion and forever in the firing line of the Administrative Court, be tempted even unconsciously to sway with the political wind knowing the way in which it was all too clearly blowing?

Former US Court of Appeals Justice Guido Calabresi concluded (somewhat unfairly in my view) that 'the greatest threats to judicial independence [were] judges with ambition'[25]. The suggestion was in effect that a judge, like Cassius, with lean and hungry looks and an eye ever on promotion might weigh their decisions carefully. They might play to the gallery. Rather than keep their eye firmly, and solely, on the legal and factual merits, such a judge might consider how their decisions will be considered by those who control the promotion process.

Historically, there has been little scope for Cassius-like behaviour amongst judges here. We have not had a career judiciary. To a degree that is likely to change. Promotion is becoming more common. The idea of a career judiciary, as a means to secure greater diversity amongst the judiciary, formed part of the Neuberger Report's recommendations[26]. It is likely to become more common as a consequence of this, to the benefit of us all.

Some fear that such a necessary (and I emphasise I do consider it necessary) reform carries with it a possible danger in that it might create the climate for Cassius to flourish. However, to my mind, that is a significant risk, only if the appointment and the promotion of judges are in the hands of those who might take exception to a particular decision. The risks decrease virtually to non existence if the appointments are in the hands of an independent commission.

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[25] G. Calabresi cited in Hellman *ibid* at 860.

[26] Report of the Advisory Panel on Judicial Diversity 2010.

As far as any involvement of Parliament itself in the selection of the top judges is concerned, I question, what purpose would be served? What questions could Parliamentarians properly ask? Could they ask the candidate for their political views? Could they ask the candidate for their views on religion, the ECHR, abortion or euthanasia? If so, on what basis? Surely their personal beliefs are irrelevant to the job they have to do - which is to apply the law objectively without fear or favour or ill will.

I remember an American colleague whom I was told would make an admirable candidate for appointment to the United States Supreme Court. When I questioned her as to her chances she said nil. I asked why - she replied: "because I have been a serving judge for too long. There are too many of my decisions out there to be picked over by the politicians." The idea of too much experience as a judge disqualifying you from the highest judicial office was a novel one to me.

Thus there are a number of ways in which external influence can be brought to bear upon the judiciary, not necessarily deliberately but nonetheless effectively.

**Internal pressures**

There are a number of ways in which judges themselves can undermine judicial independence; the most obvious example of which is by taking a bribe. We are blessed in that it is extraordinarily difficult to find an example in British history. One has to go back centuries, for example to the days of Francis Bacon, philosopher, scientist, sometime Attorney-General and Lord Chancellor who ended his political and legal career, as he put it, as a 'broken reed.[27]' He must have been a broken rich reed because he confessed to twenty-three acts of taking bribes from litigants whilst Lord Chancellor. This is such a rare and ancient example of that kind of corruption and provides no basis for any present threat and I shall move swiftly on.

Less obviously than bribery or corruption, a judge can compromise their decisional independence through having an actual or perceived interest in the litigation as explored in ex parte Pinochet[28] or Locabail (UK) Ltd v Bayfield[29]. However, cases of actual interest are also exceedingly rare[30] and cases of perceived interest unusual[31].

Another way in which independence could be compromised would be for a judge or judges to decide cases on political rather than legal grounds. This was what happened in England centuries ago in the Court of Star Chamber which, as Maitland rightly described it, was 'a tyrannical court . . . a court of politicians enforcing a policy, not a court of judges administering the law . . .' It was a court of policy because it determined cases according to the policy of the King. Its decisions were political decisions, and not legal ones. The days of the Star Chamber are long gone. One might have thought the prospect of judges entering into the arena of political decision-making had also long gone in developed democracies. However I must again cross the Atlantic. We all remember the unedifying spectacle of Bush v Gore in 2000 when respected Justices of the Supreme Court were accused of deciding the case on party political lines. Most commentators agreed that they had they done so, they

[27] See *The Parliamentary History of England from the earliest period to the year 1803*, Vol. 1 (1806) (Hansard) at 1513, per F. Bacon '*My lords, it is my act, my hand, and my heart; I beseech your lordships to be merciful to a broken reed.*'
[28] [2000] 1 AC 119
[29] [2000] QB 451
[30] See, for instance, *Howell & Ors v Lees Millais & Ors* [2007] EWCA Civ 720.
[31] See Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, (Sweet & Maxwell) (2006) at 72ff.

were unfit for office. Yet Mark Tushnett, constitutional scholar of Harvard University, has said that 'if he were a judge, he would decide a close constitutional case by "making an explicitly political judgment. . ."[32]' He would take whatever decision advanced the cause of socialism. That view has, unsurprisingly, been roundly criticised.

Advancing an agenda, as Arthur Hellman rightly has it, 'whether ideological, or political, or personal' in any way other than through the application of law and the rule of law, is to 'pervert the very concept of judicial independence.[33]' 'If judges start behaving like political actors, it is hard to justify the extraordinary protections that guard their independence.' More than that, if judges do decide cases according to their personal inclinations rather than legal reasoning, they undermine the Rule of Law.

Judges must take care not to decide cases in order to further their own political beliefs, or for that matter their own personal beliefs or interests. They must not seek the approbation of newspaper editorials, public or political plaudits. A judge who plays to the gallery, either through their judgments, through articles or even lectures such as this one, in pursuit of praise would be one who has placed their own self-interest ahead of justice. Such a judge would pose as great a threat to the institutional independence of the judiciary as one who decided cases in order to advance their own political agenda.

That is not to say that a judge should not where necessary take a stand. As Justice Edwin Cameron of South Africa has said, this is a vital ingredient of judicial independence. Being willing to take a stand, to see equal justice before the law is done to all, no matter who they are, what they have done or are said to have done, calls for judges to set aside self-interest. It requires, as both Lord Judge CJ and Lord Clarke MR have put it, "moral courage"[34].

A judge must have the courage to make an unpopular decision, to face with equanimity adverse press coverage, public condemnation or political ire, where that decision is the one required by law. To do justice without fear or favour is something which either applies to all or it applies to none.

**Conclusion**

I started tonight's lecture by noting how Bentham was not a fan of judges; that he thought their independence enabled them to do as they pleased. No judge does as they please. Any who did would not remain a judge for long. They do not and would not because of the strength of their commitment to the independence of the judiciary.

The proper interpretation of just law and its application to true facts is the sole means by which justice can be achieved. A weak judiciary, one which is subject to the influence, or control, of the other branches of the state, private corporations or the electorate, is one which cannot achieve justice. An impartial arbiter deciding between competing claims of right cannot be beholden to or under the influence of those who bring forward the competing claims. Equally a weak judiciary is one which can too easily be subject to internal threats to its independence.

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[32] M. Tushnett, *The Dilemmas of Liberal Constitutionalism*, 42 Ohio State Law Journal (1981) 411 at 424, cited in Hellman *ibid* 859.
[33] Hellman *ibid* at 859 – 860.
[34] I. Judge, *Diversity Conference Speech*, (London) (March 2009) at 2; A. Clarke, *Selecting Judges, Merit, Moral Courage, Judgment and Diversity*, (September 2009) at [30].

An independent and properly accountable judiciary is the means by which the promises of democracy are rendered effective[35]. We must hold fast to that truth, as we have since the Act of Settlement. If we do not, and threats to judicial independence cease to be the rare slips which they have been, we undermine not just the judiciary but, more crucially, we undermine our commitment to the Rule of Law, or democracy.

I conclude with some remarks from Lord Judge LCJ at the 16th Commonwealth law conference in Hong Kong in April 2009(8) because I cannot put it any better:

> "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 the 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 everyone. 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 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 society are threatened. At the same time no individual, or group of individuals, not even any judge, however high his office, has any dispensing power – that is, the power to set aside or disregard the law"

[35] *Pace* Breyer, *America's Supreme Court*, (2011) (Oxford) at 218, '*judicial independence forms one necessary part of a judicial institution that can help to make the Constitution's promises effective.*'