



JUDICIARY OF
ENGLAND AND WALES

THE JUDICIAL SYSTEM IN A MODERN DEMOCRACY

RCDS LECTURE

8 MAY 2015¹

INTRODUCTION

1. It is a great pleasure to be here and to participate in your splendid course. My topic is “The Judicial System in a Modern Democracy” – a proper topic for discussion and reflection on this, the 70th anniversary of VE Day. In characteristically terse style, *Alanbrooke’s* diary entry for 8th May, 1945, began with this line: “A day disorganised by victory! A form of disorganisation I can put up with.”²
2. I should make one matter clear at the outset; although in what I say I am necessarily mindful of my position as a serving Judge, the views I express to you here are my own. The notion that the Judiciary has only one view on any topic is simply unreal.
3. It is a pleasure to be here for another reason. My personal view is straightforward. The Armed Forces and the Judiciary fulfil the two primary functions of a State: the Defence of the Realm and the provision of a justice system. If the State succumbs to its external

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

² Field Marshal Lord Alanbrooke, *War Diaries 1939-1945*, ed. by Danchev and Todman, at p.688.

enemies all is lost. If a State does not uphold law and justice, no other rights can be enforced or entitlements enjoyed. We each therefore, in our separate ways, play a vital role – so that dialogue between us must be welcome and this talk today can be seen as a small part of that dialogue.

4. To my mind, the Armed Forces and the Judiciary have much in common: a strong professional ethos; values of self discipline and a preference for reality over posturing. There is also one critical difference. Whereas you are, if I may put it that way, the sharp end of the Executive, we are the independent third branch of the State, distinct from both the Legislature and Executive. My aim today is to focus on the working of the judicial system in a modern democracy and, hence, necessarily on the Judiciary, the independent third branch of the State.

THE RULE OF LAW

5. The Rule of Law is a priceless asset of this country³. We tend to take it for granted, which we probably should not. At the risk of anniversary overload, the 800th anniversary of *Magna Carta* is a good year to remind ourselves why it matters.
6. Perhaps the two most famous chapters of *Magna Carta* are these:

³ *In re Guardian News & Media Ltd and others* [2015] 1 Cr App R. 4, at [10]

“ 39. No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.

40. To no one will we sell, to no one will we deny or delay right or justice.”

These chapters do a number of things. They guarantee property rights, for instance. They provide the guarantee of the right to fair trial; to due process; to equality before the law. They are also the means by which the sovereign is bound to act according to the law of the land, just as much as anyone else. No one is above the law. Nor can the law be set aside, denied or suspended.

7. *Magna Carta* is a subject all its own. At the conclusion of their delightful book, *Magna Carta Uncovered*, the authors, Anthony Arlidge QC and Lord Judge (the immediate past LCJ), say this⁴:

“ For centuries those two Latin words, not themselves used by the self-interested barons who gathered at Runnymede in 1215 have stood for ideas and principles far beyond their parochial comprehension. It was indeed a Great Charter. In 1215 it was short lived and appeared to have no future, yet the ideas for which it was the inspiration have triumphed and are with us still.”

⁴ At p.167

8. Again, as summarised by *Arlidge and Judge*⁵, our history reveals the accretion to *Magna Carta* of concepts now in general legal currency, including “due process” and “the rule of law”, which have provided the basis for our liberties.
9. This may, of course, sound largely historical and theoretical. It should not be forgotten, however, that attempts to circumvent due process lay behind both the English civil war and the Glorious Revolution - “Glorious” because it was peaceful and which firmly established our modern constitutional settlement through what would be the 1688 Bill of Rights. Thereafter, William and Mary were offered the Crown on the basis that they would abide by the law. In other words it was government by consent of the governed. It was government according to law and the limits it imposed.
10. What then of the Rule of Law? It is unnecessary to take much time with definitions; one knows it when one sees it. A working definition will suffice, namely, that furnished by the late Lord Bingham in his excellent book, *The Rule of Law*:

“The core of the . . . principle is . . . that all persons and authorities within the state, whether public or private, should be bound by and

⁵ At p.3

entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”⁶

11. Interestingly, s.1 of the Constitutional Reform Act 2005 (“the CRA 2005”) acknowledges the rule of law as an existing constitutional principle.

12. While there are perfectly legitimate arguments as to the over-judicialisation of aspects of government, including as some have recently suggested, the conduct of military operations, none of these can or should call into question the importance of the Rule of Law. The Rule of Law is not some tiresome nuisance to be overcome by an impatient policy-maker or member of the Executive. It is indispensable to our rights and liberties; consider, if only for a moment, living in a society where daily life is subject to arbitrary executive measures. Consider too – for it is of the first importance – the risks to investing and doing business in States where the Rule of Law does not prevail, so that deals, investments and profits are vulnerable to the whim and caprice of officialdom. It is the Rule of Law which provides the framework for civilised daily life, together with the requisite certainty and security for doing business. It is no surprise that legal London is a massive earner of invisible exports for this country.⁷

⁶ At p.8.

⁷ The output of UK legal services in terms of value added to the economy was **£22.6 bn** in 2013 or 1.6% of total GDP - *UK City –UK Legal Service 2015 report*

THE THREE BRANCHES OF THE STATE

13. A convenient way of understanding the working of the Rule of Law in this country is through the doctrine of the separation of powers and the roles we ascribe to our State institutions. Our unwritten constitution is not as precise as some as to the separation of powers but the outline of the three separate branches of the State can be clearly discerned.

14. First, there is the legislative branch: Parliament which is responsible for publicly enacting law and is accountable to the electorate for doing so. Secondly, the executive branch: the government, which includes the civil service, the police, who provide security at home, and the Armed Forces, who provide security abroad. Without the executive branch, laws passed by Parliament cannot properly be implemented. Finally, last but not least, the judicial branch: the judiciary and the courts and tribunals, through which the law is administered – through which all persons and authorities in the State are subject to the general law and through which the Rule of Law is maintained.

15. The three branches are functionally separate. Parliament does not, for instance, act in a judicial capacity, nor does the executive. The executive like anyone else is subject to the law of the land. It would be unthinkable in this country that a minister would attempt to influence a judicial decision. I pause to emphasise this point. It is not

only unthinkable that a minister would indicate to a Judge the result that he might wish. It is equally unthinkable that a minister would seek to intervene in the choice of the Judge/s to try a case or hear an appeal or in the listing of cases – with the potential to delay cases that are embarrassing to the Executive or to expedite others. Conversely, the courts do not legislate, or provide advice to the executive, except in some very limited circumstances, such as on the practical or technical consequences of proposed legislation. Advice on how the law might be applied or how legislation may be drafted to be, for instance, compliant with the European Convention on Human Rights (“ECHR”) is impermissible, as it would tend to undermine judicial independence. The courts may, of course and do, develop the common law – a matter to which I return – but they do so according to established principle. And they do so subject to Parliament’s power to enact statute to revise, alter or abrogate the common law.

16. The three branches are also separated in other ways. In a large number of countries, the executive and legislative branches are entirely distinct. Here, the distinctions are more practical than theoretical but there remains a functional and constitutional distinction between the roles of legislature and executive.

17. We take a stricter approach to separation between the judicial and other branches. Judges are not permitted to stand for Parliament, or

enter into political debate.⁸ Judges are not now permitted to take a position in the executive. Though the House of Lords in its judicial capacity was manifestly independent from both legislature and executive, since 2009 and the opening of the UK Supreme Court, Parliament through the Law Lords no longer acts in a judicial capacity, so dispelling even that wholly theoretical concern.

18. Interestingly, the same separation exists between the Armed Forces and the political world. The Duke of Wellington stands out as the only “modern” exception, proving the rule – and even he was long-past his days of active military endeavour when he resigned his office of Commander-in-Chief in 1827 to take up office as Prime Minister the following year. The only other exception is, as we all know, Oliver Cromwell, military leader and then Lord Protector. But his experience was not entirely happy.

19. One crucial consequence of the structural and institutional separation of powers is that the branches can come into conflict with each other. This is, of course, a possibility that cannot exist where power is concentrated in a single set of hands. Courts, for instance, sometimes give judgments against the interests of the executive. Ministers lose cases before the Courts. Judicial review of executive or local government action sometimes requires such action to be quashed.

⁸ House of Commons Disqualification Act 1975, s.1

Statutory provisions can be declared incompatible with the ECHR under the Human Rights Act 1998⁹. Nobody likes losing litigation. But that is the price we pay for our commitment to the rule of law. As Lord Bingham put it¹⁰:

“There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live”.

It is a price worth paying.

20. Judicial independence is safeguarded in a number of ways. First, appointments are essentially the preserve of the independent Judicial Appointments Commission (“JAC”); party politics play no part in judicial appointments and (realistically) have not done so at least since World War II. It was not ever thus. So, Salisbury, arguably a Prime Minister of great distinction, took the view that *“within certain limits of intelligence, honesty and knowledge of the law, one man would make as good a judge as another, and a Tory mentality was ipso facto more trustworthy than a Liberal one”*.¹¹ Likewise, it is said of Lord Halsbury, Salisbury’s Lord Chancellor (responsible for many poor quality political appointments), that when naming his worst appointment, his companion retorted

⁹ Though in this country the statutory provision remains intact; it is left to Parliament to change the law if it sees fit to do so.

¹⁰ *The Rule of Law (supra)*, at p.65

¹¹ Cited in Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (2002), at pp.14-15.

*“perhaps, but there are others whose claims ought not to be overlooked”*¹².

Secondly, apart from age and health grounds, Judges of the High Court and above cannot be removed from office without an address passed by both Houses of Parliament. Thirdly, the oath taken by the Lord Chancellor, under s.17(1) of the CRA 2005 requires him to respect the rule of law and defend the independence of the Judiciary. Above all, fourthly, there is the force of history and tradition, already emphasised and which cannot be under-estimated.

21. I come back to the theme with which I started. The Judiciary comprise the third branch of the State – and none the less so because we do not have a more formal separation of powers beloved of constitutional theory. The Judiciary is not simply a group of senior officials forming part of the executive. The constitutional significance of this difference needs to be understood, absorbed and kept well in mind. That is not always so, even amongst some who should know better. To adopt Sir Sydney Kentridge QC’s turn of phrase¹³, the danger is otherwise one of “incremental encroachments”.

¹² Cited in David Foxton, *The Life of Thomas E. Scrutton* (2013), at p.152.

¹³ Admittedly in a somewhat different context; see *Free Country: Selected Lectures and Talks* (2012), at p.167

THE WORK AND WORKINGS OF THE JUDICIAL SYSTEM

22. Under this heading, I would like to address the “what” and the “how”.

What areas does the judicial system cover? How do we organise ourselves to do it?

23. As to the “*what*”, I start with everyone’s first thought: the criminal justice system. We have an adversarial system: the State (the Crown) brings the charge; the State must prove it, almost universally in this area, so that the judge of fact is sure of the defendant’s guilt. The English criminal justice system has some distinct features, shared to a degree by others in the common law world. First, the overwhelming majority of criminal cases are tried¹⁴ before lay magistrates – a volunteer judiciary, around 23,000 strong, which brings its own and varied perspective of everyday life to bear in dealing with these cases, subject only to advice as to the law from a legally qualified legal adviser¹⁵. Secondly, the more serious crimes dealt with in the Crown Court, are tried by a Judge and Jury. The Judge holds the ring and directs the Jury as to the law. The Jury is the tribunal of fact and decides whether the defendant is guilty or not guilty. Juries are comprised of 12 members of the public, randomly selected. To my mind, the jury system¹⁶ provides an impressive and healthy safeguard;

¹⁴ Approximately 95% of cases are dealt with in the magistrates’ courts.

¹⁵ This is not to overlook the role of professional District Judges (Magistrates’ Court).

¹⁶ Whatever reservations there might be around the edges – for instance as to whether more work should be dealt with in the magistrates’ court or whether fraud should be tried by Juries.

no one in this country can be convicted of serious crime by a professional Judge alone. From personal experience of trying serious crime – including murder and terrorism – I know of the diligence and care with which Juries approach their task. They form a very important part of our ability to guarantee fair play. The involvement of lay magistrates and juries reflects active public engagement in our justice system. Sentencing is a matter for magistrates or Judges as the case may be; we seek consistency through the application of previous decisions of higher courts (in particular, the Court of Appeal Criminal Division) and the Guidelines laid down by the Sentencing Council.

24. Next, the Justice system must provide a framework for dealing with disputes between the citizen and the State, concerning rights, entitlements and liabilities. Much of this work is undertaken by Tribunals – think, for example, of housing benefits, the dole, immigration and asylum matters and tax disputes. Much, though by no means all this work, is undertaken in a relatively informal setting and without lawyers. The procedure is distinctly less adversarial and more inquisitorial than in the Criminal Justice System. It is here too that we encounter Judicial Review, the procedure for challenging (in simple terms) the lawfulness of Executive action: has a minister or government department overreached itself, acted unlawfully, unfairly, unreasonably or, in particular contexts, disproportionately? We also encounter the

need to strike a balance between individual rights (not least under the ECHR) and the interests of the community – whether between privacy and freedom of speech, public order, the prevention of crime or national security. Unsurprisingly, these are topical and, from time to time, controversial areas.

25. It is, furthermore, a fundamental part of the State's duty to provide a civil justice system. As expressed by Lord Diplock in *Bremer Vulkan v South India Shipping Corporation*¹⁷, “Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access.” In her 2008 Hamlyn Lectures, *Judging Civil Justice*, Dame Hazel Genn took as her starting point¹⁸ “...that the machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights.” She went on to posit that civil justice was a public good, going beyond settling disputes between individuals.¹⁹ This is of course all the more so, when it is remembered that many disputes between citizen and State fall within the overall rubric of “civil justice”. In my view, the civil justice

¹⁷ [1981] AC 909, at p. 977

¹⁸ At p.3

¹⁹ At pp. 16 *et seq*

system, like the Criminal Justice System, is part of a branch of the State, not simply another public service.²⁰ There is of course much room for debate as to how civil justice is to be provided – in particular, what procedures should be followed, how, with the removal of legal aid we should deal with Litigants in Person (“LIPs”) and to what extent advances in technology mean that use can be made of online dispute resolution (“ODR”). Similarly, there is a continuing debate as to the relationship between litigation, arbitration and mediation (or other forms of Alternative Dispute Resolution, “ADR”); that said, it is difficult to conceive of a civilised State without a functioning civil justice system.

26. Finally, people marry, have children, separate and divorce. A system of family justice completes this bird’s eye view of the judicial system as a whole. Indeed, family justice has no choice but to deal with some of the most intractable and fraught problems in society. Family breakdown, child abuse, custody of and contact with children. All these are draining topics, many of which (those classed as “private” law) must now be adjudicated upon by Judges in cases where there are LIPs on both sides. Contemplate a ruling in a small room, depriving a parent (probably a father and whatever his previous failings) of future contact with his children. When it is occasionally said that “Judges are

²⁰ *Genn, supra*, at pp. 45 *et seq*

out of touch”, I really do pause to wonder. There is of course a host of other work undertaken as part of the delivery of family justice, including, not least probate matters arising on death – but time does not permit more than the briefest of summaries²¹.

27. As to the “*how*”, we divide our work hierarchically, jurisdictionally and geographically. So, we have lower and higher courts – for example, the magistrates’ and Crown Courts in the field of criminal justice and, of course, the High Court, Court of Appeal and Supreme Court. Our jurisdictional divisions are to a considerable extent historical. We have the Queen’s Bench Division, covering a very wide range of work, including criminal appeals, common law civil and administrative law work and the Commercial Court. We have the Family Division, which does what its name suggests. Finally, we have the Chancery Division – which grew out of that part of our law known as Equity – and deals with trusts and property disputes, extending to Company Law, competition law and an assortment of business disputes where there is a not insignificant overlap with the Commercial Court. Like many institutions in this country, practical strength and the strength of tradition, trumps theoretical tidiness. Finally, our work around the country is divided geographically by Circuits – 6 in all: South East (which includes London), Western, Midland, Wales, Northern and

²¹ A shortage of time also resulting in the omission of any discussion as to coroners.

North Eastern. It is this last reference which provides the easiest introduction to the position I currently hold, that of Senior Presiding Judge (“SPJ”) – I have the privilege to be the 8th holder of that office.

28. But before I say something about the position of SPJ, I must first make mention of Her Majesty’s Courts and Tribunal Service (“HMCTS”). A functioning justice system requires not just courts and Judges but a properly funded, efficient and effective administration. That is the role of HMCTS. By way of another perhaps curious English arrangement, HMCTS is a partnership between the Lord Chief Justice (“LCJ”), as head of the Judiciary and the Lord Chancellor (“LC”), who has ministerial and Executive responsibility for the justice system and also wears his hat as Secretary of State for Justice. HMCTS operates in accordance with the Framework Document, agreed between the Judiciary and the Executive and laid before Parliament. Civil servants working for HMCTS owe dual duties to the LCJ and LC. The Board of HMCTS has a distinguished and independent Chairman; it has judicial representatives (of whom I am one); executive directors and Non-Executive Directors (“NEDs”). The current Board seeks to operate in accordance with “best practice” for public company boards and ultimately reports to both the LCJ and LC. As to funding, the Ministry of Justice (“MoJ”) negotiates with Her Majesty’s Treasury (“HMT”) for its annual allocation; that allocation is then divided

(broadly) between the MoJ's three principal functions – Courts, Legal Aid and Prisons (“NOMS”). The proposed allocation by the LC on behalf of the MoJ to HMCTS must first be agreed by the HMCTS Board and then be accepted by the LCJ, in what is known as the “Concordat” process.

29. I return to my role as SPJ. I have already referred to the geographical division of work between Circuits. The Judicial business of the Circuits is the responsibility of Presiding Judges (“PJJ”) for each Circuit. Those PJJ report to me and I report to the LCJ. One of my most enjoyable duties is spending a week a year visiting each Circuit – perhaps my equivalent of your tours of inspection. Essentially, my role is operational, though there is a very high level of policy involved and almost daily contact with HMCTS and the MoJ. Nationally, the LCJ is assisted by a Judicial Executive Board (“JEB”), of which I am one of the members and which serves (in a very loose sense) as a “cabinet”. We also have, nationally, a Judges’ Council, broadly an indispensable consultative assembly comprised of Judiciary of different levels and with a national geographic spread. One of the features of the way we have – to date – run our affairs is that each PJ and SPJ tends to do the job somewhat differently. To my mind beneficially, each of us has the flexibility to do so, thus also enhancing our ability to react to Macmillan’s dictum, “Events, Dear Boy, Events”.

30.As – indeed – events have transpired, my two principal areas of activity (over and above “Business As Usual”) have been (i) HMCTS Reform and (ii) Performance. Time does not permit even a cursory discussion of these two matters – but, in a nutshell, HMCTS Reform is a 5 year, £700 million integrated programme, designed to transform our IT, revisit our estate and bring change to a good many of our working practices. We cannot continue as we are and, to my mind, the only alternative to managed decline is HMCTS Reform – utilising investment to improve the delivery of justice and through such improvements to make savings as well. My role is to lead for the Judiciary on HMCTS Reform, subject to the LCJ and the JEB.

31.Performance involves doing whatever the Judiciary can to improve the efficiency of the courts’ performance. To be clear, it does not in any way involve straying into judicial decisions, over which I neither have nor would wish to have any control whatsoever. It is more a focus on deployment, structures and procedures, so as to provide a more efficient and effective service. The biggest change of the last 2 years or so is that we now systematically use data which we were already collecting. To repeat, none of this in any way encroaches on individual judicial independence.

FLASHPOINTS

32. In a common law system such as our own, no one could sensibly suppose that Judges do no more than mechanistically apply the law. We are of course Judges not legislators but the common law contains, as wonderfully summarised by Sir John Laws, in his 2013 Hamlyn Lectures, “an enriching combination of principle and flexibility: of old roots and new growth. Those privileged to practise in the common law may therefore be involved not only in applying it, but in creating it; and in doing so they will surely always have in mind the art of the law: its enhancement by elegance, economy and clarity.”²² Self evidently, our task is to strike the right balance; neither permitting the law to ossify nor striking out in a manner more appropriate to the legislature than the judiciary – some times easier said than done.
33. It is also apparent that the wider the ambit for judicial discretion, especially in areas of political sensitivity, the greater the challenge to achieve the right combination of judicial fearlessness and independence with an appropriate sense of restraint, recognising the proper sphere of the other two branches of the State.
34. It is in this territory where one can discern potential flashpoints and, at once, sense the challenges they present; amongst these are the following:

²² *The Common Law Constitution*, at p.xv

- (i) Freedom of opinion and combating terrorism;²³
- (ii) Judicial review of Executive decisions, especially in the ECHR sphere;
- (iii) The fact that the law now reaches parts it did not previously reach – notably in relation to military matters and the work of the security and intelligence agencies.

35. Those examples are anything but exhaustive; I think they are of relevance in the context of your course; each requires a lecture or more of its own; I leave them to you for your reflection and consideration, having I hope done something to explain the context in which they arise, namely as part of the working of a judicial system in a democracy.

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²³ *The Common Law Constitution (supra)*, Lecture II, at pp. 31 *et seq*