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THE JUDICIAL ROLE TODAY

LORD JUSTICE GROSS

QUEEN MARY UNIVERSITY, LAW AND SOCIETY LECTURE

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Introduction[1]

1. It is a great pleasure to have been invited to give this year's Law and Society Lecture. Earlier this year, in another lecture, I addressed the topic of "Judicial Leadership"[2]. My subject on this occasion is the judicial role today, exploring some of its boundaries

2. A number of different answers might be given to the question as to the judicial role today. Some of course, border on the facetious, the confused and the wry. The caricatures include the irascible Judge; though in times past – we are of course much better today – that was not necessarily a caricature. So the story is told of counsel in an 18th century Scottish appeal saying "I will now, my Lords proceed to my seventh point...", the Lord Chancellor (Thurlow) riposted, "I'll be damned if you do....this House is

[1] I am most grateful to John Sorabji, Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, for his assistance with the preparation of this lecture.
[2] Gray's Inn, Gresham College Lecture, Barnard's Inn, 23 June 2016

adjourned till Monday next".[3] For some politicians and parts of the media, we veer seamlessly between dinosaurs, hopelessly out of touch to indispensable for our integrity, detachment and judgment. In an age of celebrity, apparently a job in its own right today, the very confused might suggest that was our role. However, despite the popularity of Judge Rinder and his US counterpart, Judge Judy, not to mention reality TV stars, we are not celebrities nor would we want to be. The idea of '*I'm a judge get me out of here*' does not bear thinking about.

3. The more serious might suggest that the judicial role is to decide cases in court; applying the law to the facts to secure justice according to law, and doing so through the application of modern case management powers. They might also suggest it is to develop the law, subject to Parliament's sovereign right to enact legislation to revise, amend or correct such common law developments. Others might suggest that it is to resolve political questions because, as has been said, albeit in respect of the United States – '*Scarcely any political question arises . . . that is not resolved, sooner or later, into a judicial question*'.[4] Yet others suggest, rightly in my view, that politics is not the province of the judiciary.

4. These answers do however point towards the true nature of the modern judicial role. The Judicial role calls for reserve. Judges do not court public controversy, even while they may (as recent events have shown) be called upon to adjudicate on matters of controversy. I wish to examine here the nature of judicial reserve: independence from the other branches of the State while not existing in splendid isolation from them and, in particular, the ways in which the Judiciary can co-operate with the Executive in securing the effective administration of justice; further, how the Judiciary helps provide constitutional stability through the role it plays in developing the law and the limits placed on that role. I should stress that the views expressed are my own. I should also make it clear that I am not talking about Brexit or the Brexit litigation.

[3] Recounted in Alan Paterson's, *Final Judgment: The Last Lords and The Supreme Court* (2013), at p.33.
[4] A. de Tocqueville, *Democracy in America*, (Everyman edn, 1994 reprint) at 280.

5. As an over-arching proposition, I shall suggest that the Judiciary, as an institution, gains respect through its reserve: respect that saw the Judiciary as the third most trusted profession in an Ipsos MORI poll conducted last year (doctors and teachers were first and second.[5] Reserve does not mean splendid – still less unworldly – isolation. We have no wish for celebrity status; we avoid public statements and courting political controversies; but we have and need a firm grasp of the world around us, even as it changes socially, politically, morally and – increasingly - technologically. You recognise this by entitling your annual lecture, "The Law and Society Lecture".

The Judiciary and the Executive

6. The starting point in looking at the relationship between the Judiciary and Executive is obvious. It is the Judiciary's role to interpret the law, where appropriate develop it, and uphold it. It is the Executive's role to, again where appropriate, execute the law, act within it, and develop it through the formulation of policy that may then be translated into law through the Parliamentary process.

7. It might be said that the Judiciary could assist the Executive in both its duty of executing and acting within the law and in the formulation of policy. Historically, the Judiciary has played such an advisory role. Perhaps the most famous example was the Ship Money case; *R v Hampden* (1637) 3 Howell State Trials, 825. Ship money was a prerogative tax that had been historically, albeit relatively infrequently, levied by the King.

8. Charles I was often in want of money, and relied on the prerogative to raise it. A certain John Hampden refused to pay. Proceedings were commenced: could the King require payment under the prerogative? Could there be taxation without representation, or more accurately, taxation without the consent of those represented in and by Parliament? The

[5] See Ipsos MORI, *Ipsos MORI Veracity Index 2015: Trust in Professions*, <https://www.ipsos-mori.com/researchpublications/researcharchive/3685/Politicians-are-still-trusted-less-than-estate-agents-journalists-and-bankers.aspx>.

Court of Exchequer Chamber, while divided on the issue, came down in favour of the King. He won the battle, but, of course, not the war: Parliament would outlaw ship money through the Ship Money Act 1640; and Charles would lose his throne and his head after the Civil War in 1649.

9. Before Hampden's case came on for trial, Charles wanted to know what his prospects of success where. A perfectly ordinary thing for any litigant to want to know. Charles did not however go to his legal advisers. He went to the judges and asked their advice by way of an extrajudicial opinion. They said he would win. While most litigants keep their legal advice confidential, Charles did not. He had it made public. Specifically, he had it published in all the courts, including the court that was to hear the case.[6] Charles was not the last king to use the judiciary as his advisers. Lord Mansfield, amongst the most famous of our Lord Chief Justices, was for a considerable period of time the chief, if not always acknowledged, adviser to the King on matters of policy and government.[7] He was also a member of the Cabinet, as was one of his successors, Lord Ellenborough.

10. The problems here are obvious. It is difficult, to say the least, to see how it could be said that Hampden could have had a fair trial given the published advice to the King. Even if the advice had been kept secret, the same conclusion follows, compounded by secrecy. Any form of collusion between Judiciary and Executive is strictly out of bounds; a feature of our constitution that took until the 19th Century to become properly embedded. As Lord Phillips CJ put it, commenting on criticism of the judiciary for not being willing to provide legal advice to the then government,

> '*judges must be particularly careful not even to appear to be colluding with the executive when they are likely later to have to adjudicate on challenges of action taken by the executive.*'[8]

[6] See T. Plucknett, *A Concise History of the Common Law*, (5th edn, Liberty Fund reprint) at 52.
[7] N. Poser, *Lord Mansfield: Justice in the Age of Reason*, (McGill) (2013).
[8] Lord Phillips CJ cited in House of Lords, Select Committee on the Constitution, Sixth Report of Session 2006 – 2007 (HL 151) at [96].

They must be careful not to do so because such conduct is inconsistent with judicial independence and the right to fair trial; to justice being done and being seen to be done. It is inconsistent with the rule of law. Such things may not have mattered for Charles I (at least not until his trial when he challenged the legality of the process[9]); they are central to our constitution today, a point underpinned by the statutory prohibition on members of the Government from attempting to use their position to influence individual cases now set out in sections 3(1) and 3(5) of the Constitutional Reform Act 2005. There is also an obvious practical dimension; any such advice, inappropriately and improperly, given by one Judge, would not bind any others, although it would certainly be clear grounds for recusal of the judge or judges who had proffered the advice.

11. This is not, however, to rule any form of advice out of bounds. There are three clear constitutional mechanisms through which the judiciary can play an advisory role.

12. First, as identified by Lord Thomas CJ, the judiciary can provide assistance to the Executive on '*technical and procedural*' aspects of proposed legislation. This is not to comment upon the policy underpinning the legislation, or whether it would achieve those aims, or whether it would pass muster if challenged on human rights grounds. It is to comment on the '*practical consequences of proposals and outline how they would interact with existing procedure*'[10]; to enable the Executive to better understand those potential consequences.

13. An important publication in this regard is the Judicial Executive Board's "*Guidance to the judiciary on engagement with the Executive*"[11]. As this document points out, the

[9] See G. Robertson, *The Tyrannicide Brief*, (2006, Vintage).
[10] Lord Thomas CJ, *The Judiciary, the Executive, and Parliament: Relationships and the Rule of Law*, (Institute of Government) (1 December 2014) at [17] – [20] <https://www.judiciary.gov.uk/wp-content/uploads/2014/12/institute-for-government.pdf>.
[11] Judicial Executive Board, *Guidance to the judiciary on engagement with the Executive* (15 July 2016) <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/guidance-to-the-judiciary-on-engagement-with-the-executive.pdf>.

need to preserve judicial independence, necessarily limits judicial engagement with the Executive. It states that,

"*Specifically, constitutional conventions preclude or restrict judicial comment on: the merits of legal cases or decisions; the merits of public figures or appointments; the merits of policy or the merits, meaning or likely effect of prospective legislation; or, policy proposals subject to consultation when a formal response by senior leadership judges is intended.*

Engagement, however is permissible and if permissible will be in the public interest..."[12]

The principal areas where engagement is permissible call for a judicious mix of fortitude, reserve and fine judgment. These are:

"*First, it is permissible for the judiciary to comment on the technical and procedural aspects of policy and legislation when the aim is not to influence policy or pass judgment on the merits of proposals or the effects of legislation.*

Secondly, it is permissible for the judiciary to comment on the merits of policy or legislation that affects the independence of the judiciary or the rule of law."[13]

Accordingly, there is the need to distinguish between "*policy*" – out of bounds – and "*practical consequences*", legitimately the subject of judicial engagement[14]. In practice, the distinction can involve a fine line but the guiding principle is clear. So too, comment on judicial independence and the rule of law, gains force when sparingly invoked; but on occasions, invoked it must be.

14. The second and third mechanisms are outwith the scope of tonight's discussion but should be mentioned for completeness. The second, a much underused mechanism, is that of making a reference to the Judicial Committee of the Privy Council under section 4 of the Judicial Committee Act 1833. It has, as I understand it, only been used a handful of times since the 1950s.

[12] Ibid at 2.
[13] Ibid at 3.
[14] By way of example, as noted in the Judicial Executive Board's "*Guidance"* document, there was timely and effective consultation on the changes thereafter introduced by The Legal Aid, Sentencing and Punishment of Offenders Act 2012, to the way in which Judges were required to credit time spent in prison awaiting trial against a sentence of imprisonment.

15. The third is constitutional review under devolution legislation.[15] In this respect the Supreme Court can review the legality of proposed legislation which the devolved legislatures in Scotland, Wales or Northern Ireland have introduced, i.e., whether the proposed legislation is *intra vires* the devolved legislature's powers. This form of constitutional judicial review is unique within our constitutional settlement, and again has only been used a small number of times.[16] .

16. We have then three forms of advice that the Judiciary can give to the Executive: constructive advice on practical and technical issues concerning proposed legislation; declaratory advice on a wide range of topics via the Judicial Committee of the Privy Council; and, and advice in the form of constitutional review of devolved legislation by the UKSC. Each form of advice is however kept within proper constitutional bounds so that it does not undermine judicial independence, or amount to what Lord Phillips CJ referred to as 'collusion'. Most importantly for tonight's purposes, the first form of advice cannot go to the meaning, interpretation, or merits of proposed legislation.

17. Advice can be given then but within clearly defined bounds. In none of these instances, do we see the shadow of Charles I and his attempt to suborn judicial decisions through securing 'judicial advice' on how his case might turn out. We are indeed fortunate to live in a society where Executive suborning of the Judiciary, through either blunt or subtle mechanisms, is unthinkable. A glance at the situation internationally shows that this is anything but the norm in all too many parts of the world. We ourselves can never afford to be complacent.

[15] See: Scotland Act 1998, ss33 and 36(5); Government of Wales Act 2006, ss112 and 111(7); Northern Ireland Act 1998, ss11 and s13(6).

[16] The first reference, from Northern Ireland, was withdrawn. See further, *Attorney-General for England and Wales v National Assembly for Wales Commission* [2012] UKSC 53, [2013] 1 A.C. 792; *Re Agricultural Sector (Wales) Bill, Attorney General for England and Wales v Counsel General for Wales* [2014] UKSC 43, [2014] 1 W.L.R. 2622; and *Re Recovery of Medical Costs for Asbestos Diseases (Wales)Bill* [2015] UKSC 3, [2015] A.C. 1016.

18. This is not however the end of the judicial relationship with the Executive. Uniquely, the body that administers the courts and tribunals, Her Majesty's Courts and Tribunals Service (HMCTS), is a partnership between the Executive and the Judiciary. HMCTS officials thus have dual duties to the LC and the LCJ.[17]

19. The Lord Chancellor is under a statutory duty to secure an efficient and effective system to support the business of the courts,[18] and to secure sufficient resources to achieve that end.[19] The Lord Chief Justice is responsible for, amongst many other things, the effective deployment of judges within the courts, again so as to achieve the proper administration of justice.[20]

20. Now, an obligation to provide resources is one thing, though an indispensable and principled starting point. Performance of that obligation, at a time of financial stringency from which the justice system despite its fundamental importance cannot be wholly immune, is another. In terms of the practical provision of resources to the justice system, in England and Wales, there is (to put it colloquially) only "one game in town": the HMCTS Reform Programme. That programme is one of strategic reform; a once in a generation opportunity. The reform programme has three integrated strands: first, the transformation of court IT, to bring our IT provision into the 21st century; secondly, to rationalise the court estate; thirdly to change our working practices. With the support and agreement of the Treasury, the Ministry of Justice and successive Lord Chancellors[21], funding of some £700 million has been agreed[22]. Moreover, the Treasury has agreed various flexibilities and the "ring fencing" of the proceeds of asset sales[23], so that these

[17] Framework Document ("FD"), para. 2.4. It may be noted that references in the FD to the LCJ are deemed also to include the SPT (FD, para. 1.4).
[18] Courts Act 2003, s.1
[19] Constitutional Reform Act 2005, s.17(2).
[20] Constitutional Reform Act 2005, s7.
[21] The Rt Hon. Chris Grayling MP, the Rt Hon. Michael Gove MP and, more recently, the Rt Hon. Elizabeth Truss MP, who said at her swearing in: "I am a great supporter of reform and modernisation throughout the courts and tribunals system; and that urgent task will be high on my agenda in the months ahead, as I know it is for senior members of the judiciary."
[22] The figure rises to £1 billion plus if varoiu sother criminal justice reform moneys are aggregated as well.
[23] Themselves an important part of the reform programme.

can be reinvested in the programme. The reform programme can only be accomplished by joint working between the Judiciary and the Executive.

21. Some fundamentals need emphasis. This is not a programme where (as the LCJ put it) reform is "done to" the Judiciary. Quite the contrary, judicial participation is essential if the programme is to succeed. Further, by its nature, much of the programme must be judicially led. Still further, this is not a cost-cutting programme. This is a programme designed to improve the delivery of justice. There will be – and should be savings – but they will come by way of efficiencies driven by the use of modern technology that it is patently obvious the courts should utilise properly. Once these fundamentals are grasped, it can readily be seen that the reform programme (contrary, with respect, to a view recently expressed[24]) does not impinge on judicial independence. It should instead enhance such independence. In short, the Judiciary is not doing the government's bidding; the Judiciary is instead leading a programme which it has promoted throughout.

22. Turning to judicial leadership of the programme, both the LCJ and the Senior President of Tribunals (SPT) have been actively and fully engaged[25]. Subject to the LCJ and the Judicial Executive Board, I was privileged as Senior Presiding Judge to serve as Judicial Lead for the reform programme, a role now fulfilled by my successor, Lord Justice Fulford. I and now, he, worked on the establishment and continued operation of Local Leadership Groups of judges to ensure effective participation by all levels of the judiciary in all parts of the country – so that they can influence the development of the programme. Equally, innovative ideas are being tested against practical experience by the judiciary in Judicial Engagement Groups[26]; thus we ensure that we do not build reform on untested theory. In another development, Lord Justice Briggs has recommended the

[24] By the Chairman of the Bar; see Fulford LJ's response of 27th October, 2016.
[25] See, very recently, *Judiciary Matters: Our part in reforming the Courts and Tribunals (October 2016)*, with a foreword written by the LCJ and SPT.
[26] Civil (CJEG), Tribunals (TJEG), Family, Magistrates and Crime and, more recently still, a "Delegated Case Officer JEG".

introduction of a unique Online Court for civil claims, which when implemented – as it will be – will provide a readily accessible means by which citizens can secure access to both consensual dispute resolution mechanisms as well as court adjudication.[27] It presents the opportunity to use technology to widen access to justice very considerably.

23. Judicial leadership is only part of the story. Working on the reform programme requires the closest co-operation between the Judiciary and HMCTS, and particularly its senior management and Board. The Board itself reports to and is subject to its principals: the Lord Chief Justice and Lord Chancellor. Thus co-operation on practical implementation of the programme is a reflection of principled co-operation at the highest level. Whether the issue is the proper implementation of Digital Case Files in criminal proceedings or the development of Online Divorce, or the practical implications of 'Pop-up courts' – a modern version of an old idea, that a court could be held in public buildings such as Town Halls such co-operation is essential.

24. It must be emphasised that just as with the assistance the judiciary can bring to bear in highlighting the practical consequences of proposed legislation, referred to earlier, the leadership and assistance we 'bring to the table' is fundamental to the success of the reform programme, requiring a combination of principle, practicality and the harnessing of technology.

25. In all these various ways in which the judiciary works with the Executive, we demonstrate that the modern judicial role is one that requires us to do more than the 'day job'. It requires us to work with rather than separately from the Executive, while doing so always alert to and within constitutional bounds. Separation of powers may require the judiciary to exercise the judicial function, and the Executive the executive functions of the State, but it does not require them to stand in splendid isolation of each

[27] M. Briggs, Civil Courts Structure Review – Final Report (July 2016), <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16.pdf>.

other. It requires, in the manner and the areas I have sought to outline, constitutional co-operation. In short, collusion is unacceptable; that we will not always agree is an inevitable feature of a democracy[28]; but the more we understand and respect our respective spheres and roles, the less there will be avoidable misunderstandings – to the benefit of the administration of justice, society as a whole and our standing internationally.

Developing the Law and Constitutional Stability

26. The judicial role is still wider than that provided by separation of powers and constitutional co-operation. It is one that influences society in ways going beyond determining the outcome of individual disputes. It is fundamental to providing constitutional stability; its influence on society is one that helps maintain the health and vitality of our democratic constitutional settlement. The Judiciary does this by providing what has been termed 'adaptive efficiency', by which is meant '*the capacity to adjust constitutional interpretation in the face of shocks and effectively deal with new circumstances*'[29] – the ability to deal with changing circumstances within the constitutional framework.[30] Of course the Judiciary does not do this alone; obviously, the Legislature and Executive both have major roles.

27. The judiciary's role is one that stems from the genius of our constitution, which has always accepted that the courts have a central role in the development of the law – subject, of course, to Parliament's constitutional right to amend, revise or correct the common law through statutory supremacy. It is a role, which Sir John Laws in his 2013

[28] See, Lord Bingham, *The Rule of Law* (2010), at p. 65: "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."
[29] See Elkins cited in S. Mittal & B Weingast, *Constitutional Stability and the Deferential Court*, Journal of Constitutional Law 2010 [Vol. 13.2] 337 at 338, and 339.
[30] Ibid at 343.

Hamlyn Lectures, published as *The Common Law Constitution*,[31] noted as having four elements: evolution; experiment; history; and distillation.[32] It is not static; the product of a moment in time.[33] It is capable of evolving as society, and its needs, mores and conditions evolve. It is capable of developing in new, previously untried ways. If they work, they are built on. If not, they are not, and further change can be made.

28. Anyone looking at any area of our law will see the extent to which the courts have led the way, developing, shaping and refining the law. From contract, including commercial, shipping, insurance and international trade, tort to equity and trusts and the work-in-progress on restitution, to the development of civil rights long pre-dating the Human Rights Act 1998, the list goes on.[34] As Lord Nicholls put it in *National Westminster v Spectrum Plus* in 2005,

> '*The common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast with current social conditions and expectations. That is still the position. Continuing but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary. . . It is because of this that the common law is a living instrument of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live.*'[35]

29. The broad point is this. There is almost no area of our law that is not the product of judicial decision-making. The courts weave out of individual disputes, precedent, statute, and where appropriate decisions and developments from other jurisdictions, a system of law that is capable of adapting to the needs of a changing society. As such it calls for creativity, judgment, sometimes the courage to lead, reflecting broader societal changes, and, on other occasions, the wisdom of restraint or reserve.[36]

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[31] (CUP) (2014).
[32] Ibid. preface, p.xiii. See too, *per* Diplock LJ (as he then was) in *Hong Kong Fir v Kawasaki* [1962] 2 QB 26, at 71: "The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their progenitors."
[33] Lord Judge, *Judicial Independence and Responsibilities*, in *The Safest Shield* (2015) at 276.
[34] By way of examples: *Entick v Carrington (1765) 19 Howell's State Trials 1030; Scott v Scott* [1913] AC 417
[35] [2005] AC 680 at [32].
[36] None of this is to ignore or discount statute or the work of the Law Commission but to recognise the absolutely central role of the Judiciary in maintaining the robust health of the law; of the common law.

30. This ability to react to new events and new ideas is an essential feature of our constitution's adaptive efficiency. It helps shape the law to ensure its continuing relevance. And that it is ultimately subject to statutory codification or reverse by Parliament, ensures that such developments cannot go beyond the realm of democratic accountability and acceptance. In this way common law developments do not become a constitutional pinch-point; citizens have other constitutional mechanisms to challenge peacefully and secure the correction or amendment of common law developments.

31. Pausing here, few would today defend a declaratory theory of law, which posited that judges did not develop or reform the law but merely declared what it had been. We should not, however, be too disparaging. Lord Devlin[37] powerfully argued against judicial law-making in advance of the social consensus[38], *a fortiori*, in the field of statute law; the keepers of the boundaries should not be amongst the outriders[39]. For good measure, he added that "Enthusiasm is not and cannot be a judicial virtue."[40]

32. Under the so-called "façade approach"[41], judges keep quiet as to judicial law-making; in Lord Radcliffe's striking words:

> "…. *respect for it will be greater, the more imperceptible its development.*"[42]

Even, however, assuming agreement that the façade theory does not suffice - Lord Reid described it as a fairy tale[43] - there remains a major and intriguing question as to the circumstances in and extent to which judges should develop and reform the law.

33. For my part, no single bright line can be drawn; there are a host of factors in play. The boundary between legitimate development of the law and judicial legislation is elusive.

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[37] *The Judge as Lawmaker* in *The Judge* (1979)
[38] *Op cit*, at p.9
[39] *Op cit*, at p.17
[40] *Op cit*, at p.5
[41] Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (2013), at p.264.
[42] *Ibid.*
[43] *Op cit.*, at p.266

As Lord Goff of Chieveley observed in *Woolwich Equitable Building Society v Inland Revenue Comrs* [1993] AC 70, at p. 173:

"I feel bound...to say that, although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case...."

A quintessentially common lawyer's observation, if I may say so.

34. As so often, Lord Bingham provides guidance.[44] He highlighted a number of cautionary "road signs" which ought to give aspirant judicial lawmakers reason to pause: (1) Where affairs had been legitimately ordered on a certain understanding of the law; (2) Where although a rule of law was seen to be defective, its amendment called for a detailed legislative code, unsuited to introduction by judicial decision; (3) Where the question involved an issue of current social policy on which there was no consensus within the community; (4) Where an issue was the subject of current legislative activity; (5) Where an issue arises in a field far removed from ordinary judicial experience. Even where a change in the law was called for, a Judge would be well advised to "walk circumspectly". As he put it: "On the whole, the law advances in small steps, not by giant bounds."[45]

35. Applying this guidance, in some areas, fearless independence must be combined with great care as to second-guessing the Executive – national security being an obvious case in point. While abdication of the judicial function is plainly unwarranted and unacceptable what is required here is sensible deference and restraint, recognising what has been termed "comparative institutional competence"[46] and, for that matter, democratic legitimacy and accountability.[47]

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[44] *The Judge as Lawmaker* in *The Business of Judging* (2000), at pp. 31-32.
[45] *Op cit.*, at p.32
[46] Paterson, *op cit.*, at p. 276.
[47] *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 per Lord Hoffmann at [62], '*Postscript. I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the*

36. By contrast, in other areas of lower political profile, development or reform of the law is unlikely in the absence of judicial law-making. Two examples perhaps suffice. The first concerns the tort of negligence; the assumed facts of *Donoghue v Stevenson*[48] would have been unlikely to spark Parliamentary intervention, although the mere unlikelihood of Parliamentary action is not itself a proper justification for judicial law-making. The striking contrast between "*timorous souls*" and "*bold spirits*"[49] exemplified in *Donoghue v Stevenson*, perhaps suggests the contribution made by judicial temperament to judicial development of the law.

37. The second example goes to the law of restitution, which may be said to have evolved from the 18th century decision, of *Moses v Macferlan* (1760)[50] – notably, Lord Mansfield's willingness in that case to craft from the common law forms of action a novel application of the law to provide the means to secure repayment of monies that it would otherwise be unjust to permit an individual to retain. Moving with the times but with great care, that inheritance was transformed incrementally by the common law into what has been termed the third branch of the law of obligations. A striking decision in this area was *Woolwich Equitable Building Society v Inland Revenue Comrs (supra)*, where the House of Lords (by a majority) set aside the long established position that money paid under a mistake of law to a public authority was irrecoverable, where the demand to pay was *ultra vires*; that was indeed a "bold" step but one of the reasons for taking it was that there was no prospect that Parliament would intervene. Thus, absent judicial development, the injustice would remain, with little effectively done to ensure that (in this regard) public authorities acted within the law.

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consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.'

[48] [1932] AC 56.

[49] See, *Candler v Crane, Christmas & Co.* [1951] 2 KB 164, *per* Denning LJ (as he then was), at p.178

[50] (1760) 2 Burr. 1005.

38. Looking ahead, a looming challenge for judicial development of the law will undoubtedly be presented by technological changes and social media. Confining myself to social media and though I can do little more than flag the issue, we can already see the strains imposed on witnesses, defendants and the justice system itself by the vitriolic and abusive comment which social media can generate Once again, the judiciary needs to strike a balance between reserve and circumspection on the one hand, coupled with a firm grasp of the world around us and its implications; we cannot afford simply to stay aloof.[51]

39. On any view, in seeking to determine the boundaries for legitimate development of the law, labels are best avoided. Thus, extensive judicial law-making is praised by some as "progressive", doubtless because they assume that the law will be developed in ways of which they would approve. A moment's reflection on the US Supreme Court in the New Deal era, would dispel such simplistic notions. Judicial activism in that era involved a "conservative" majority in the Supreme Court, for some time, striking down substantial chunks of President Roosevelt's legislative proposals, nearly resulting in a stand-off and packing of the Court. By contrast, Judges then thought to be "progressive" counselled judicial restraint and deference to the legislature.[52]

40. As I have already emphasised, in this jurisdiction, there is, in any event, a safeguard. I confine myself to one example. It is, as we all know, a highly contested question whether

[51] A recent and fascinating presentation by Regional Employment Judge Barry Clarke, at the Commonwealth Magistrates' and Judges' Association ("CMJA") Conference in Guyana, September, 2016 gave a number of compelling reasons for coming to grips with the internet and social media, including these: (1) The world is changing and Judges are part of it; (2) Social media generates evidence; (3) Social media creates noise around the legal process; (4) Social media may be the key to the Online Court; (5) Social media erodes courteous and informed public debate; (6) Loss of privacy.

[52] See, by way of examples from the extensive literature Merlo J. Pusey, *Charles Evans Hughes*, Vol. Two (1951), at chapters 69 – 71; Roger K. Newman, *Hugo Black: A Biography* (1997), *passim;* Jeffrey Rosen, *Louis D. Brandeis: American Prophet* (2016), esp. at chapter 3.

assisted suicide should be legalised here as it has been elsewhere.[53] It involves a wide range of moral, ethical, religious and social issues - thus, policy issues. The present position, following the decision of the Supreme Court in R (*on the application of Nicklinson and another) v Ministry of Justice* in 2014[54]is that assisted suicide remains unlawful.

41. The Supreme Court neither overturned the law provided by section 2 of the Suicide Act 1961, something which it cannot do due to the constitutional principle of Parliamentary supremacy, nor did it make a declaration of incompatibility in respect of the section pursuant to the powers granted to the courts under the Human Rights Act 1998. While it was accepted by the majority that the court had the power to make such a declaration, in the circumstances of the case it chose not to do so. It took this course of action in order to provide Parliament with a proper opportunity to consider the issue.[55] The position taken by the Supreme Court can be contrasted with that taken by the Supreme Court of Canada.[56]

42. We can see two distinct approaches. In Canada and, for that matter, the United States in respect of a variety of the most controversial social policy issues[57], the courts armed with the constitutional authority to determine the validity of laws on the one hand required the legislature to rectify what they regarded as impermissible and so required legislatures and governments to accept a change in the law. In the United Kingdom, the courts unable to strike down legislation (except where authorised to do so in respect of matters in conflict with European Union law under the terms of the European Communities Act 1972) and only able to make declarations of incompatibility under the Human Rights Act 1998, cannot take such steps. Through the elegant mechanism of the 1998 Act, they can,

[53] For instance, in Belgium and the Netherlands. See, by way of example, the Belgian Euthanasia Act of May 28, 2002; Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2002 (The Netherlands).
[54] [2014] UKSC 38, [2015] AC 657.
[55] [2014] UKSC 38, [2015] AC 657 at [118], *per* Lord Neuberger of Abbotsbury PSC. See too, the discussion under the heading "Parliament or the courts", in the judgment of Lord Sumption JSC, at [230] and following.
[56] *Carter v Canada (Attorney General)* 2012 BCSC 886 at [1386]ff.
[57] For example, abortion and gay marriage

in such a case, highlight to Parliament and the government where law is inconsistent with fundamental rights, but they cannot go as far as the courts on the other side of the Atlantic. The judicial quality of reserve or restraint is thus very much in play, in a context where Parliament and Government remain well attuned to the importance of fundamental rights.

43. Accordingly, our constitution does not enable courts to give unamendable answers to ultimate questions. Nor has Parliament "outsourced" such questions to the courts[58]. What outsourcing there has been is more limited and remains, just like the common law, subject to Parliamentary supremacy. Political debate and discussion and legislative action can always have the final word.

44. That the courts can stimulate and frame debate and discussion is an important means by which public thinking can be enhanced, and on occasion can prompt and facilitate a legislative response.

45. Pulling the threads together: the Judiciary can and must continue to develop the law, in keeping with its role. By doing so, it facilitates adaptation to changing circumstances and thus constitutional stability. In performing its role, the Judiciary will be well cognisant that it operates within a framework of Parliamentary sovereignty. It is a hallmark of the manner in which the Judiciary has thus far proceeded that our courts are not politicised; that few (if any) members of even the Supreme Court are household names and that Judges are not perceived to have individual agendas – certainly the outcomes of cases before our courts cannot be predicted on the basis of political or personal sympathies. Underlying all this is the quality of reserve or restraint, one of the Judiciary's great strengths and serving to keep decision-making within the proper ambit of the common law method[59].

[58] A. King, "*Who Governs Britain?*" (2015) (Pelican), at p.273.
[59] So aptly outlined by Sir John Laws.

46. Thank you.

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