Heroes and villains: Society of Editors' Annual Conference: Speech by Lord Justice Igor Judge

So here I am - a villain. Indeed, probably the only villain to address this conference. A judge - an actual judge. An unelected individual, vested with power. Two characteristics I share with newspaper editors and newspaper proprietors.

At least we have something in common. We have something else in common: we believe profoundly in our independences. If the discussion today is anything to go by, you sometimes wonder whether I believe in your independence. And I must ask you the same question: do you believe in mine? Do you really believe in judicial independence?

My own position is simple. I believe in an independent press. For me, the clarion call is the first sentence of the first copy of *The North Briton*, published in 1762, by John Wilkes.

"The liberty of the press is the birthright of a Briton."

I am indebted to Robert Hargreaves' superb history of *Free Speech - the First Freedom* for informing me that the inscription on his tomb reads very simply:

"Near this place are interned the remains of John Wilkes, a friend for liberty."

The Press Complaints Commission was created in 1990. I wonder whether there is a memorial plaque to John Wilkes in any of the great buildings which house our national newspapers, or indeed, in the Press Complaints Commission itself. There should be. At the Old Bailey we celebrate the courage of the jury in Penn and Meade, who, in 1670, resisted a judicial direction to convict the defendants. Historic moments such as these should be marked. For today's meeting, I identify John Wilkes as my hero.

It is interesting to notice the subsequent use of that simple word "birthright", adopted by Lord Bingham of Cornhill, then Lord Chief Justice, in the recent case where the conviction of Derek Bentley some 50 or so years ago was quashed, on the basis that he had been denied another birthright of every Englishman, the right to a fair trial.

The strange thing about birthrights such as these is that they did not come down to us from the Garden of Eden. Birthrights have to be fought for. I was reminded of this obvious, but sometimes overlooked point, by Trevor Bailey. Some of you will wonder who he is. I am of the generation that remembers when England was undoubtedly the first cricketing country in the world, and Trevor Bailey was an automatic choice for that team, at home and abroad. However, I digress. He was commenting that, of his seven close friends at school, four were killed in the war. He said:

"I suppose these events may have made me somewhat intolerant when people start talking about human rights as if these were ordained by God, rather than fought for and died for by man."

Once achieved, the struggle to maintain the principles is constant. A great judge, Lord Reid, gave a salutary warning:

"We have too often seen freedom disappear in other countries, not only by coups d'état but by gradual erosion; and often it is the first step that counts...It would be unwise to make even minor concessions."

If I rewrite John Wilkes and Lord Bingham for today's conference, I should argue that an independent press, and an independent judiciary, both represent birthrights of our community. And if I cause any surprise among you by linking the judiciary and the press in this way, then I have identified what I believe to be a significant problem of perception, leading to misunderstanding and ultimately to the detriment of both. The independence of each is fundamental to the community we serve.

We must, of course, be clear that our independence includes being independent of each other: but I should

have thought it wise, and I am speaking only for myself, for both the press and the judiciary to recognise that, even where we clash - and clashes are inevitable, and criticism on both sides sometimes justified - these problems need to be dealt with in such a way that neither my independence, nor yours, is undermined.

In the final analysis, our independences do not depend on assertion. By that I mean no more than that it is not enough for us to assert the principle to groups of people who believe it anyway. In the end, we are both dependent on the community on whose behalf we are entrusted with that independence. As Mr Hargreaves' history illuminates, so far as the press is concerned, call them what you will, birthrights, or principles, or even principles with the descriptive "fundamental" added to them, have not been immutable. Throughout the ages, the principles have been advocated, but different pressures have arisen to control and limit and constrain. And we do not have to look very far around the world to see for ourselves the too-numerous countries where the independence of the judiciary is not taken for granted, and even some where in the past it has been, but the principle has been subverted. It was I think Nehru who commented, there is no "easy walk-over" to freedom.

We must therefore first address the fact that there is a price to be paid for independence. Personally, I need no convincing of the fundamental - there I go, but it *is* fundamental - principle of an independent and free press. For that I am prepared to read rubbish in my papers. If one or other of them wants to be filled with tittle-tattle and gossip about the sexual antics of this sportsman, or that, or this actor or actress, so be it. If, to urge a political point of view, the reporting is slanted so far as to be misleading, while I disagree with the process, I believe the price of tolerating it is worth paying. And when as a judge I am misreported - an observation taken out of context, or a decision subjected to ignorant criticism - that too forms part of the price I am prepared to pay for the ability of an independent press to report any ill-considered observations I may make in their true context, and to criticise me when criticism is merited. But that is my personal view. In the end, the community decides whether the price is worth paying. As John Wilkes himself made clear, the liberty of the press is the birthright of the individuals who make up the community. And it is no good fooling ourselves that we have not recently come close to the imposition of some sort of regulation of the press beyond self-regulation.

Again, I am speaking personally. My concern is that media comment on political and constitutional affairs, including the judiciary, the judicial system and the administration of justice, identifying bad laws or legislation which may cause damage, and perhaps most important of all, revealing corruption and dishonesty, if and when it arises in public life, which is one facet of your responsibilities, may be devalued in the eyes of the public, and therefore eventually in our legislators, by the distasteful pursuit of those who do not seek publicity, and have no particular public standing or office, by the chase for the glory of the story, and by reporting or comment which may serve to undermine the fairness of a trial, even if it does not amount to contempt of court (which are other facets of the operation of your independence).

Just a few brief words on that topic only: I am convinced that there has been a huge change in the way in which arrests have been reported. Arrest is based on suspicion. It does not amount to proof. I ask you to compare the way in which arrests in notorious cases are now reported, with the way in which they were reported 25 years ago. I think you would describe the change as dramatic. And as to payments to witnesses, do you not expect that any court should view with particular concern, the evidence of any witness who has any sort of motive or personal benefit to be gained from a particular outcome of a trial? If you were the defendant, would you not believe that, if a witness stands to gain from a particular result, surely it is sensible to view that evidence with some caution.

Returning to my theme, if the public believes that press freedom should be constrained in any way, then you must face up to it. Saying, "Self regulation works" is an assertion. It has to be shown that it does, and that it meets up to the public's requirement. This, in the end, if I may repeat Wilkes' words, is their birthright, not yours.

If legislation were produced to curb what you would describe as your freedoms, what would you expect the judges to do? Listening to this afternoon's discussion, you would say that this has already happened. What, in our constitution, do the judges have power to do? May I start by saying that it would be pointless to attack "unelected" judges for applying the law. That would not stop you saying it, and it might be gratifying

to strike out and say it. But would it do any good?

Our independence is not absolute. Judicial independence is subject to constraints. It is integral to the judicial oath, which I took, not only that I would act without fear or favour, affection or ill will, but that in doing so I would do "right...after the laws and usages" of the realm. No individual, or group of individuals, nor any body has any Dispensing power - that is, power to set aside or disregard the law. Apart from the fact that he was a Catholic, it was James II's claim to monarchical power to dispense with the anti-Catholic laws which, in 1688, led to the rebellion which drove him out of the country, and the great Bill of Rights which declared:

"The pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament, is illegal."

Parliament cannot dispense with the law, although, of course, it may change it. The Prime Minister himself - and I am not making a political point - cannot say this or that legal prohibition shall not apply to - taking a ridiculous example - the members of his Cabinet. And judges too are similarly bound by the law. It was Samuel Johnson who observed:

" To permit a law to be modified at discretion is to leave the community without law. It is to withdraw the direction of that public wisdom by which the deficiencies of private understanding are to be supplied."

We had a relatively recent example of severe criticism of the great Lord Denning, and two of his colleagues, whose decision on complicated legislation involving trade unions, the British Steel Corporation, and others in the private sector of the steel industry, was acknowledged by the House of Lords as wrong, and wrong because of "the desire of the Court of Appeal to do justice". That, after all, was perhaps the most appealing of Lord Denning's many judicial qualities. But the point of the criticism was that the court had failed to do justice "according to law". I cannot quote the whole of a lengthy speech from Lord Scarman in *Duport Steel Ltd -v- Sirs*, in 1980, but it summarises both the jurisprudential and practical reasons why judges must apply the law. Perhaps this will give you sufficient of the flavour of the point I am seeking to make.

"But in the field of statute law, the judge must be obedient to the will of Parliament as expressed in its enactments. In this field, Parliament makes and unmakes the law, the judge's duty is to interpret and apply the law, not to change it to meet the judge's idea of what justice requires...If the result be unjust but inevitable, the judge may say so, and invite Parliament to reconsider its provision. But he must not deny the statute. Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable..."

He continued:

"But the constitutional separation of powers, or, more accurately, functions, must be observed if judicial independence is not to be put at risk. For, if people and Parliament come to think that the judicial power is to be confined by nothing other than the judge's sense of what is right (or, as Selden put it, by the length of the Chancellor's foot), confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of the judges. Their power to do justice will become more restricted by law than it need be, or is today."

So it comes to this. Whatever power judges may have to develop the common law, and, subject of course, to their powers to interpret statute, Parliament is entitled to change the law made by the judges, as well as develop or amend statute law, as Parliament deems proper. In a modern democracy, ultimate responsibility for the law depends, not on the judges, but on the elected legislature. Because of a tendency in some quarters to equate the executive and the legislature, I emphasise not the executive, but the legislature. Not the wishes of a government minister, however strongly expressed; but simply the words of the statute which Parliament has been persuaded to pass. If Parliament does not pass the legislation hoped for by ministers, the judge is bound to study, not the ministers' briefings to the press before or after the legislation, or the language used in the parliamentary debate. We are concerned with the meaning of the words of the Act of Parliament itself. Any other approach would very quickly lead us down the road to law-making by government edict.

So, as judges, how should we be obliged to examine curbs on the independence of the press? We should, of course, examine any such legislation with great care. We should, of course, apply what Lord Hoffman recently described as "the principle of legality". This principle "means that Parliament must squarely confront what it is doing, and accept the political costs. Fundamental rights cannot be over-ridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process." We should, I have no doubt, treat the principle of a free and independent press as a matter of what Lord Steyn described only a few days ago in a public lecture, as a constitutional right. An approach to legislation founded on such principles, requires an independent judiciary. Ignoring the political aspirations of ministers expressed in speeches, and focusing exclusively on the words used by Parliament, requires an independent judiciary. A pusillanimous judiciary, a timid judiciary, a cowed judiciary, or a judiciary whose independence has been undermined by the consequences of the legislative process, itself influenced by constant and unfair carping criticism of the judiciary, would be less able to spring into the breach to defend the independence of the press, to force the legislature of the day to spell out precisely what it meant, so as to enable the public to appreciate what was being proposed in its name. Only the most clear and express legislation would suffice.

I am privileged to be sent my regular copy of *Media Lawyer*. I identify examples of cases where "gagging" orders were imposed, where I could not see that they were justified. I also notice examples where, very sensibly, courts allowed themselves to be addressed by or on behalf of the media, and remove the "gags". All that is to the good. I hope it reflects a better judicial understanding of its own powers. Incidentally, I also hope that the press will sometimes recognise that a gagging order is not merely justified, but obligatory: and I see that Walter Greenwood, in this month's copy, has been expressing concern about the fact that the Home Office does not appear to trust "judges to use existing powers without the need for new laws". He will forgive me for taking him out of context, but, if he is right, that is precisely when we should burnish up the twin shields of our independences.

You do not have to look into your books, nor do you require 20/20 vision, to recognise the twin hallmarks of a tyranny: a subservient press and a subservient judiciary. It is very rare in history to find examples of a society which enjoyed an independent, free press, but was marred by a subservient judiciary, or where an independent judiciary flourished alongside a subservient press.

The theme of this judge's view is, I hope, clear. Those of you who accept the thesis may want me to illustrate - if briefly, by way of example - reporting and commentary that may, by stealth and insidiously, make it easier for a government, if so minded, to undermine judicial independence.

I hasten to make the point that I am not now commenting on this government, or the next government of this country, whatever its political hue. But, as with our independences, I do not believe that we should ever take the self-satisfied and smug position, saying to ourselves, "After all, this is England, or Great Britain" - as synonymous with the proposition that real extremists will never be given, or never be able to take power. Look at France, and remember who came second in the presidential election. Look at Germany, and reflect on the representation Hitler's party won in the Reichstag through the democratic process, which he used to subvert the constitution.

So to my four examples.

First, let me take a small example of how public confidence in the judiciary can be undermined. The Proceeds of Crime Act 2002 is on the statute book. Last week, Dame Elizabeth Butler-Sloss, the President of the Family Division, had to consider the statute, and taking it briefly, its possible implications on the principle of legal professional privilege. And the extent to which lawyers were required to disclose possible unlawful financial transactions by their clients. The issue was, and is, extremely important. In principle, as she pointed out, the legislation was not merely concerned with financial laundering by major drug dealers and fraudsters. In principle, it extended to the cash to the gardener, the cash to the nanny, or undeclared receipts of cash by individuals with small business. I read at least one article which was extremely critical of the judge, saying, in effect, that the decision provided yet another demonstration of how out of touch with reality judges are. It was not suggested that the decision was wrong in law, or that the judge could have interpreted the legislation in a different way. So, it was the judge's fault, and Middle England wouldn't like it. And Middle England, reading that newspaper, would not unreasonably see it as yet another example of

judicial folly, or lack of practical experience of the real world.

Yet what was the President to do? Whether she personally likes the law or not had to be ignored. She had to decide the case on the basis of the legislation. So here was a judge, under criticism for reaching a conclusion required of her by the law passed by the legislature. So a few more insidious, tiny little droplets undermining public confidence in the judicial system were spilled.

Yet where were you all when the legislation was passed? Did you inform the public of what its representatives in Parliament had in mind, or the likely long-term consequences of the proposed legislation?

Second, I return to sentencing.

When I read Bob Satchwell's briefing note to you, I was reminded of the kind of thing that I say about judges.

"What should not be forgotten is that tens of thousands of stories are published in national, regional and local newspapers every week. Only a tiny proportion raise any cause for concern or complaint. Politicians and the public should recognise the immense achievements of newspapers as well as focusing on their imperfections."

I accept Bob Satchwell's analysis. Much the same could be said about judicial decisions. But saying that "politicians and the public should recognise" the achievements of newspapers does not of itself mean that they will.

When I last came to this meeting, those of you who were here will remember I asked a series of questions. I am very profoundly tempted to do so again, but I shall not. It remains a fact that every survey, from any source, into the public knowledge and understanding of the criminal justice system, and sentencing policy in particular, demonstrates that the public is sadly but profoundly misinformed. The latest British Crime Survey tells its own story. Well over 80% of the population overestimated the amount of violent crime. Well over 80% believed that significant numbers of rapists aged over 21 were not sent to prison. 56% believed that only up to 60% of adult rapists were sent to prison. A further 26% thought it was 60% to 85%. Only 18% put the figure somewhere between 85% and 100%. The facts are straightforward. In such cases, 98% are sent to prison, and I believe the remaining 2% were detained under the Mental Health Act orders. Given these facts, and similar misapprehensions, it is hardly surprising that over 80% of the population also believe that sentencing courts are much too lenient. Who is responsible for this public ignorance? Well, we can blame soaps, and docu-dramas, and faction, but what other sources of information does the public have?

I have on a previous occasion identified at least four unacceptable consequences of a general perception among the community that sentencing courts are always over-lenient. May I summarise them?

1. If victims believe that nothing will happen to the criminal, they will not report the crime. They will think it pointless. And so the criminal will get away with the crime, and be free to perpetrate another.
2. The fear of crime will increase. This is socially destructive, and there are too many examples of paralysing fear, particularly among the elderly and most vulnerable.
3. Individuals who believe that offenders are not properly punished by the courts may take the law into their own hands and mete out violent retribution. We have all heard of such cases. From there, and the implied tolerance of such crime, there is a very short journey to mob or lynch law. That is no sort of law, and no sort of justice, and in the end it will engulf the innocent as well as the guilty. What price then the "birthright" of every Englishman to a fair trial?
4. I return to the theme of my present paper. A major concern is that a division grows between the community and the judiciary. The judiciary should reflect the concerns of the community it serves. If the public perception is that judges are not doing the job expected of them, then the public itself will more readily tolerate political and populist interference in the judicial decision-making process. If the public were prepared to tolerate interference with judicial independence, do you really think that it could be persuaded to hold fast for the independence of the press?

My next and third example concerns the Human Rights Act 1988.

Much of the discussion has overlooked the fundamental point that this Act is part of our law, and that Parliament has imposed on the courts the obligation to give effect to the text of the European Convention for the Protection of Human Rights, and required the courts also to take account of decisions of the European Court.

It is in this context that the word "unelected" most springs to the pens of newspaper editors and commentators. In giving effect to this text, courts are not embarking on a pleasant little frolic of their own. They are applying the law laid down by the sovereign Parliament. For judges, the application of the Human Rights Act and the European Convention is no more and no less than the principled application of doing justice according to our law. Failure to do so would undermine the principle of the sovereignty of Parliament. Whether judges like it or not, they are required to apply the Convention. Many, but not all of you, welcomed the proposal to implement the Convention into domestic law. Whether you liked it then or not, and whether you like it now or not, and whether or not judges liked it then and now, the Human Rights Act has been enacted, and as judges we have no more power to dispense with it now than we would have done if we had judges appointed immediately after the Bill of Rights.

My fourth comment is whether the good news about the judiciary always has to be buried?

Research was recently conducted by a most distinguished team of researchers, led by Professor Hood at the Oxford Institute of Criminology, into the perception of individuals from ethnic minorities of the way they were treated at court. The result was remarkably favourable, and the point important to the way in which ethnic minorities view the court process. It is critical to the cohesion of the community that all its members should have confidence in the system, whatever their background or origin. Some of the major newspapers hardly carried the story at all. If and when there is research that shows that 98% of those questioned felt that judges were doing a good job, could you avoid the headline which speaks of the 2% who express themselves dissatisfied?

The principle of judicial independence benefits the judge sitting in judgment. The judge does what he or she believes to be right, according to our law, undistracted and uninhibited. But the overwhelming beneficiary of the principle is the community. If the judge is subjected to any pressure, his judgment is flawed, and justice is tarnished. When judges speak out in defence of the principle, they are not seeking to uphold some minor piece of flummery or privilege, which goes with their office. They are speaking out in defence of our community's entitlement to have its disputes, particularly those with the government of the day, and the institutions of the community, heard and decided by a judge who is independent of them all. In Edmund Burke's words, to submit the decision to the "cold neutrality of the impartial judge." Among our tasks we have to ensure that the rule of law applies to everyone equally, not only when the consequences of the decision will be greeted with acclamation, but also, and not one jot less so, indeed, even more so, when the decision will be greeted with the most intense public hostility.

We shall be hearing a great deal in the next few months about the appointment of judges, and indeed the appointment of those responsible for the appointment of judges - in short, the new constitutional arrangements which will follow the abolition of the office of Lord Chancellor. We will not be concerned with dry theory: principles which are of considerable public importance will be under consideration. The discussion may be superficial and easy, or intense and profound. You are free and independent to choose which it shall be, but the debate will really matter, as it will have implications for the independence and quality of the judiciary for many years to come.

I have spoken for too long. You have heard my personal thoughts. This paper was not cleared with any other judge, nor, for that matter, with any politician. It reflects my personal views. I believe that the principles of an independent press and an independent judiciary, although entirely independent of each other, together, and inextricably, form the cornerstones of a free society. That is why I chose the first words of the first sentence of the first copy of *The North Briton*, and identified its author, John Wilkes, with all his defects of character, as one of the great heroes of British history.

views, unless otherwise stated.