

Reflections on significant moments in the role of the Judiciary

Personal Support Unit Fundraising Breakfast

Lord Neuberger, President of the Supreme Court

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1. At the risk of sounding like a schoolteacher, let me start with a few fundamental constitutional principles. First, there are three branches of government, the legislature (the House of Commons and House of Lords) the executive (ministers, civil service, local government) and the judiciary (the courts and judges). In summary terms, the legislature makes the law, the executive carries the law into effect, and the judiciary interprets and enforces the law. And it is fundamental to a modern civilised society that these three branches of government are independent of each other and respect each other's territory.
2. Secondly, the two pillars which are essential to any modern civilised society are democratic government and the rule of law. Democracy on its own cannot always be relied on, as the experience of Hitler's Germany and Mussolini's Italy show. The rule of law does not just require clear laws, it requires just laws, including fundamental rights such as freedom of expression. It also requires independent judges who give effect to the laws, because having laws which cannot be enforced by citizens with access to courts is almost worse than having no laws.
3. Thirdly, the UK is rather unusual in that it has no formal coherent and overriding constitution, a position shared only by Israel and New Zealand. We have Parliamentary supremacy, which means that the legislature has the trump card, so that Parliament can enact legislation which overturns a judge's decision. Despite the occasional suggestion that "unelected judges" have overridden Parliament, we cannot do that – quite a contrast with the US where their Supreme Court can overrule legislation approved by Congress and the President if it breaches the US Constitution. However, we distinguish between secondary legislation, which is put before Parliament by the executive for approval, and whose validity, despite parliamentary approval, can be challenged in court, and primary legislation, statutes, whose validity cannot be challenged in court. Additionally, in our common law system, judges not only have the duty of upholding the rule of law, which

includes deciding issues of criminal, civil, family and public law, and involves ensuring that the executive acts lawfully: judges also make law provided that it does not conflict with legislation.

4. The notion that the judges had a vital function which was entirely independent of the executive was developed in the 17th century: it emerged from the long tussle between the Stuart Kings who with their Privy Council represented what we now know as the executive, and Parliament, which was starting to flex its muscles.
5. In one of his famous essays written early on in that century, Lord Chancellor Bacon described Judges as “the lions under the throne”¹, by which I think he meant that their function, reflecting where he placed them, was to act in support of the executive. His contemporary and rival, Edward Coke, later Chief Justice, advised a disappointed James I in the 1611 Case of Proclamations that “the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm”². But, five years later, the lack of judicial independence was demonstrated by James’s sacking of Coke, on the advice I might add of Bacon. Coke got his own back when he helped ensure that Bacon had to resign from being Lord Chancellor for accepting bribes.
6. Under James’s son, Charles I, the judiciary did the King’s bidding, for instance holding that the King could levy taxes by his own decision, without Parliament’s sanction³. The executive or royal power to make law was finally put to rest with the Glorious Revolution in the Bill of Rights of 1688, and the irremovability of Judges was then confirmed in the Act of Settlement thirteen years later.
7. In the 18th and 19th centuries, the judges, although no longer under the Royal thumb, were fairly quiescent in the field of public and constitutional law. However, they made some important constitutional decisions. One of their finest hours was in 1765, after Nathan Carrington and three other King’s messengers, acting under the orders of Lord Halifax, Secretary of State, had broken into John Entick’s home and removed various

¹ Francis Bacon *Of Judicature* Essays, Civil and Moral, Ch 56 (1625)

² *Case of Proclamations* (1611) 12 Co Rep 74

³ *Chambers v Bromfield* (1636) The eighth charge of Long Parliament’s impeachment against Mr Justice Berkeley, 1641

supposedly pernicious pamphlets, causing significant damage in the process. Lord Camden the Chief Justice of Common Pleas said that Mr Carrington had been guilty of trespass to Mr Entick's land as the "silence of the books" meant that the King and therefore the executive had no statutory or common law power to enter forcibly onto a citizen's land⁴.

8. Lord Camden's contemporary, Lord Chief Justice of the King's Bench, Lord Mansfield, was the founder of modern English commercial law and developed and simplified insurance law in particular. But his most famous case was *Sommersett's case*⁵, which he heard in 1772. In that case, he held that English law did not permit a United States resident to exercise his rights over his slave, saying that slavery was "so odious that nothing can be suffered to support it but positive law", and as there was no such law, it was not recognised.
9. In both these landmark cases, one can see the judiciary performing its vital function of upholding the rule of law and curbing excesses of the executive by protecting the rights of citizens against the state. Indeed, by making the point that forcible entry or even slavery might be lawful if it could be found to be so "in the books" or "in positive law", these two great judges were also acknowledging Parliamentary supremacy: if Parliament authorised such matters the courts would have to acknowledge that they were lawful.
10. While Charles Dickens was writing about the interminable fictional case of *Jarndyce v Jarndyce*⁶, the 19th century was pretty quiet when it came to constitutional cases. Anyone reading Walter Bagehot's classic work on the English Constitution published in 1867⁷ might have wondered if the judiciary had any constitutional role at all. His chapters cover the Sovereign, the Cabinet, the Legislature, the Executive, but there is no chapter on the Judges. Bagehot's readers would come away with the view that there were only two branches of State, although they may have some vague notion that there was something called the Judiciary, as it has a brief walk on part in his chapter on the Legislature, but only to exhort the removal of the Law Lords' judicial functions into a "conspicuous tribunal" outside of and no longer "hidden beneath the robes of the legislative

⁴ *Entick v Carrington* [1765] 19 Howell's St Tr 1029

⁵ *Sommersett v Stuart* (1772) 20 St Tr 1

⁶ Charles Dickens, *Bleak House* (1852-1853)

⁷ Walter Bagehot *The English Constitution*, 1867

assembly”. They would also find out that there was a Lord Chancellor who had lots of jobs, including that of being “our chief judge”. But that would be about it. (150 years on, Bagehot would have been gratified to see the Law Lords had indeed moved out of the House of Lords to the Supreme Court, and astonished to see that the Lord Chancellor was no longer a judge – or even a lawyer.) So, the constitutional functions of the judiciary in the 19th century was low-key almost to the point of non-existent.

11. We have to move forward to 1941 before we come to the next case in this story, but it is one which shows that the judiciary were still rather spineless – at least in war-time. *Liversidge v Anderson*⁸ concerned a 1939 Defence Regulation which empowered the Home Secretary to detain anyone whom he had “reasonable cause” to believe had “hostile origins or associations”. In May 1940, the Home Secretary decided to exercise this power under an order which stated that he had “reasonable cause to believe [a certain Mr] Liversidge to be a person of hostile associations” without stating why he held that belief. Four Law Lords held that it was enough that the Home Secretary stated that he had the requisite reasonable belief, and that the court could not enquire into the matter further, even though they accepted that this was not the natural meaning of the regulation.
12. Lord Atkin disagreed, saying that he “viewed with apprehension” the fact that his colleagues “when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive”; the Government’s arguments, he said, “might have been addressed acceptably to the Court of King’s Bench in the time of Charles I” ; and he suggested that there was “only one authority which might justify” the Home Secretary’s interpretation, namely, “‘When I use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean, neither more nor less’”⁹. The Lord Chancellor (Viscount Simon) tried in vain to persuade Lord Atkin to tone it down. It is said that Lord Atkin’s judicial colleagues thereafter never had lunch with him.
13. However, less than thirty years after the *Liversidge* case, it became clear that the judiciary were becoming much more assertive. In the 1968 *Anisminic*¹⁰ decision, the Law Lords had to consider the Foreign Compensation Act 1950, which provided for a Commission which would decide whether persons whose foreign property had been confiscated

⁸ *Liversidge v Anderson* [1942] AC 206

⁹ Lewis Carroll, *Through the Looking Glass and What Alice Found There* (1871)

¹⁰ *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

should be entitled to compensation. The Act specifically provided that any decision by the Commission to accept or reject a claim could not be challenged in a court. The Law Lords nonetheless held that they could quash the Commission's refusal to accept the appellant's claim, on the ground that, in making its decision, the Commission had made an error of law which went to its jurisdiction, and therefore a court could, indeed should, interfere.

14. So in a quarter of a century the judiciary had gone from holding that they could not interfere with a decision when the regulation concerned plainly entitled them to do so to holding that they could interfere with a decision when the legislation concerned appeared to forbid them from doing so. And ten years after the *Anisminic* case, Lord Diplock said that "the time ha[d] come" for the Law Lords to acknowledge that the majority in *Liversidge* "were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right"¹¹.
15. I think that this change of judicial approach was partly attributable to the passing of the conventional and hierarchical 1940s and 1950s, and the onset of the more questioning and disrespectful 1960s and 1970s. Also, as government agencies and quangos proliferated and the peace-time powers of the executive increased, judges started to move away from their rather deferential and supine attitude when reviewing the lawfulness of the exercise of executive powers, and became more aware of their constitutional function to protect citizens against the increasingly mighty state.
16. Quite apart from this, the decision in the *Anisminic* case was an example of the courts applying a rule which is of particular importance in a country like the UK without a coherent overriding constitution. That rule was "the principle of legality" laid down in 1999 by the Law Lords in the *Simms* case¹², where it was characteristically well expressed by Lord Hoffmann in these terms.

"[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden 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. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words

¹¹ *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952, 1011

¹² *R v Home Secretary ex p Simms* [2000] 2 AC 115, 131

were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.”

17. The *Simms* case was decided very shortly before the Human Rights Act 1998 came into force. By making the European Convention on Human Rights effectively part of UK law, the 1998 Act has undoubtedly given the judges a greater ability to protect citizens of this country against inappropriate interference in their lives. Thus, until the 1998 Act came into force, there was no legislation in the UK which specifically protected freedom of expression or privacy. So, the courts could not prevent a newspaper publishing illicitly obtained photographs of the TV star, Gordon Kaye of ‘*Allo ‘Allo!* fame, lying at death’s door in intensive care in a hospital¹³. It is instructive to compare the *Kaye* decision with the post-2000 proceedings brought by Naomi Campbell¹⁴ after the Daily Mirror had published a photograph of her in a publicly visible location entering a drug rehabilitation clinic: the publication was held, to be an infringement of her legal right to privacy under the Convention.
18. Of course, the effect of the 1998 Act has been felt in many different areas, including influencing the judicial approach to decisions of public bodies. Perhaps the most significant human rights decision has been *A v Home Secretary*¹⁵, where the Law Lords held unlawful an order which permitted the detention of foreign nationals who could not be charged because of a lack of admissible evidence against them, nor deported because they would face torture in their country of origin. The grounds for unlawfulness were that the order unjustifiably discriminated against foreign nationals. If the Human Rights Act had not been in force, this decision could not have been made.
19. It is I think important to emphasise that human rights do not represent a judicial power-grab: it was Parliament which decided to bring human rights into our law, and to give the judges the power, indeed the duty, to ensure that all individuals’ human rights were properly respected and given effect to. Because it covers so many different circumstances, there are lots of cases involving human rights, and it is inevitable that one or two will have surprising outcomes. It is inherent in the concept of the rule of law that

¹³ *Kaye v Robertson* [1991] FSR 62

¹⁴ *Campbell v MGN Ltd* [2004] 2 AC 457

¹⁵ *A & Ors v. Secretary of State for the Home Department* [2005] 2 AC 68

there are laws of general application, and human existence is so varied that it is inevitable that, however sensible and well-drafted it is, any general rule will on unusual facts sometimes lead to a curious or surprising result.

20. The Human Rights Convention is particularly prone to play an important part in the law of a country such as ours which unusually has no overriding coherent constitution. The rights contained in the Convention would be regarded as established constitutional rights in a country with a formal written constitution, and those rights would be expected to be enforced as a matter of routine by domestic judges. It is largely because we have no such constitutional rights in this country that the introduction of the Convention into our law has been seen to have such a significant effect.

21. Human rights have been something of a new toy for lawyers, and the temptation to play with the new toy at the expense of the old toy is natural. And human rights have tended rather to put the common law in the shade. This tendency was disparaged in the 2013 Supreme Court *Osborn* case¹⁶, where Lord Reed explained that the 1998 Act “does not ... supersede the protection of human rights under the common law ..., or create a discrete body of law based upon the judgments of the European court. Human rights continue to be protected by our domestic law”. And a year later in the *Kennedy* case¹⁷, Lord Mance and Lord Toulson reiterated the point and concluded that the common law might well give a journalist the right to see documents relating to a Charity Commission inquiry in circumstances where human rights law as developed in Strasbourg would not.

22. That it is not all about human rights is well demonstrated by other recent cases in the Supreme Court. It would be inappropriate to list them all, but let me end with three of them. First, there is the *Evans* case¹⁸, where the Court refused to accept that the Attorney General, a member of the executive, could overrule a decision of the Upper Tribunal, a court and therefore part of the judiciary. The case had some press coverage as it concerned the publication of so-called “black spider” letters written by the Prince of Wales. The notion that the executive could overrule a decision of the judiciary represented the world turned upside down, but all members of the court accepted that Parliament could provide for it in a statute. The question was whether it had done so.

¹⁶ *Osborn v The Parole Board* [2014] AC 1115, paras 56 and 57

¹⁷ *Kennedy v The Charity Commission* [2015] 1 AC 455

¹⁸ *R (on the application of Evans & Anor) v Attorney General* [2015] 1 AC 1787

Five of the seven of us effectively relied on the principle of legality to say that such overruling could only occur in very limited circumstances, by giving the statutory provision a very circumscribed meaning.

23. Secondly, there is the *Public Law Project* case¹⁹, which concerned a statutory instrument, ie secondary legislation, made under a statute which enabled secondary legislation to change the statute. We took the opportunity to confirm the common law principle that “a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach”²⁰. In affirming this rule, the Court was effectively upholding Parliamentary supremacy²¹.
24. Finally, of course, there is the *Miller* case²². It was an interesting triangulation exercise between the executive, the judiciary and the legislature. The judges were effectively being asked whether the executive could carry out one of its fundamental functions, international treaty-making and ending, without the formal approval of Parliament in circumstances where the performance of that function would lead to a substantial change in our law. None of the eleven Justices who heard the case disagreed as to the applicable principles: the question was whether by an existing statutory provision, section 2(1) of the European Communities Act 1972, Parliament had given the executive the necessary authority. Eight of us said it had not and three thought it had.
25. It is hard to predict how significant the *Miller* case will be in legal terms. It remains to be seen once the dust has settled, but the decision affirmed the central role of the courts in upholding the rule of law, and our judgment also affirmed some fundamental constitutional principles including the supremacy of Parliament in the UK’s constitutional arrangements. In addition, because the case attracted so much media coverage, I think that it made non-lawyers more aware of the role of the courts, and gave them a better idea of how justice is administered in this country. The case certainly gave

¹⁹ *R (on the application of The Public Law Project) v Lord Chancellor* [2016] AC 1531

²⁰ *Ibid*, para 27

²¹ *Ibid*, para 25

²² *R (on the application of Miller & Anor) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583

the concept of open justice real meaning and real purpose, and I hope it did the same for the rule of law.

26. Finally, given that I am talking this morning at a breakfast organised by the Personal Support Unit, it would be wrong to end without recording the importance of the PSU and its many volunteers in the vital quest to maintain and improve access to justice and fair hearings, two essential ingredients of the rule of law. The PSU has ensured that thousands of litigants in person, legally unrepresented litigants, are treated more effectively, and have a far less torrid time in court, than would otherwise have been the case. The PSU has also ensured that thousands of hearings have been more focussed and shorter than they would otherwise have been to the benefit of the parties, any lawyers and the judge.

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