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The Rule of Law, the Executive and the Judiciary

The Right Honourable
Lord Thomas of Cwmgiedd
Lord Chief Justice of England and Wales

It is an incomparable honour to follow in the footsteps
of so many distinguished lecturers by commemorating such
an outstanding judge, jurist and head of state of this Kingdom
by giving the thirty-first lecture in this series
so celebrated the world over.

Lord Thomas of Cwmgiedd

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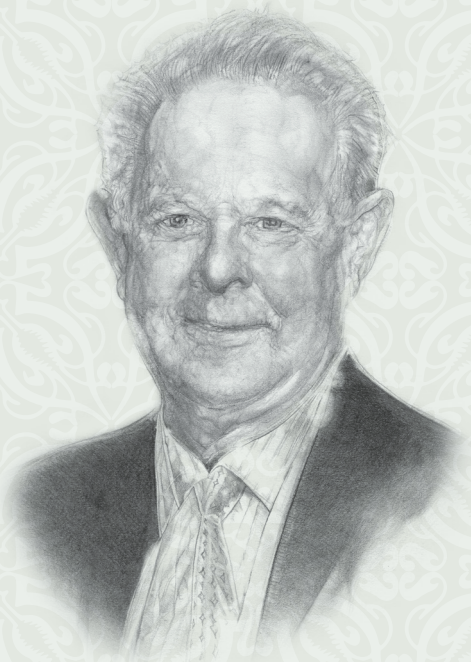

Roger John Laugharne Thomas
(*b.* 22 October 1947)

The Rule of Law, the Executive and the Judiciary

Roger John Laugharne Thomas, Lord Thomas of Cwmgiedd is the Head of the Judiciary and President of the Courts of England and Wales, the most senior position in the United Kingdom judiciary.

Lord Thomas is the first Chief Justice of England and Wales to deliver the Sultan Azlan Shah Law Lecture.

Lord Thomas was born in 1947. He was educated at Rugby School, and read law at Trinity Hall, University of Cambridge where he graduated with a Bachelor of Arts in Law in 1966. He then proceeded to obtain a Juris Doctor degree from the University of Chicago where he was made a Commonwealth Fellow.

Lord Thomas was called to the English Bar in 1969 by the Honourable Society of Gray's Inn. He became a Queen's Counsel in 1984 and was appointed a Recorder in 1987. In January 1996, he was appointed as a judge of the English High Court and was assigned to the Queen's Bench Division. In 2003, Lord Thomas was elevated to the English Court of Appeal and appointed to the Privy Council.

Lord Thomas was the Senior Presiding Judge of the Court of Appeal from 2003 to 2006. In October 2008, he was appointed Vice President of the Queen's Bench Division and Deputy Head of Criminal Justice, and in October 2011, he was appointed the President of the Queen's Bench Division.

On 1 October 2013, Lord Thomas was appointed as Lord Chief Justice of England and Wales, and made a Life Peer in the House of Lords.

Lord Thomas presided over a number of high-profile cases, including *Julian Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) (WikiLeaks founder Julian Assange's appeal against extradition from the United Kingdom to Sweden), as well as *Abu Hamza & Ors v Secretary of State for the Home Department* [2012] EWHC 2736 (Admin) (radical cleric Abu Hamza's legal battle against extradition to the United States of America).

In October 2016, Lord Thomas delivered the judgment of the Divisional Court of the English High Court in the landmark constitutional case of *R (Miller and others) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), which ruled that the United Kingdom government could not initiate withdrawal from the European Union pursuant to Article 50 of the Lisbon Treaty on European Union by way of royal prerogative,

and instead required an Act of Parliament authorising the government to do so. The decision of the Divisional Court was upheld by a majority of the UK Supreme Court in January 2017 in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. See further remarks on this case on pages 150, 314 and 340 above.

Lord Thomas is a Bencher of Gray's Inn and an Honorary Fellow of Trinity Hall, University of Cambridge.

In October 2017, Lord Thomas retired as the Chief Justice on reaching the mandatory age for retirement of judges in the UK.

Lord Thomas is married to Lady Elizabeth Ann Buchanan with two children.

Editor's note

From December 2017 to October 2019, Lord Thomas served as Chairman of the Commission on Justice in Wales, tasked by the Welsh Government to examine the delivery of justice, legal services and legal education in Wales and issues relating to revolution. The Commission published its report in October 2019 to set a long term vision for the future of justice in Wales.

Lord Thomas was appointed Chairman of the London Financial Markets Law Committee in November 2017.

In November 2018, Lord Thomas was appointed President of the Qatar International Court and Dispute Resolution Centre, following in the footsteps of two of his predecessors and former Sultan Azlan Shah Law Lecture speakers, Lord Woolf (twelfth speaker, 1997) and Lord Phillips (seventeenth speaker, 2003).

Lord Thomas has been the Chancellor of Aberystwyth University since January 2018.

I have little doubt that all judges seek to deliver justice to the highest standards—ensuring cases have a proper pre-trial procedure, getting cases to trial or appeal quickly, conducting a fair hearing and giving clear and cogent reasons for decisions.

Confidence that a system operates in this way is one of the most important factors in maintaining public trust and protecting independence. A failure to do so leaves the judiciary's independence open to attack by the executive.

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The Rule of Law, the Executive and the Judiciary

Lord Thomas of Cwmgiedd
Lord Chief Justice of England and Wales

Thirty-first Sultan Azlan Shah Law Lecture delivered on 28 November 2017 in the presence of His Royal Highness Sultan Nazrin Shah and Her Royal Highness Tuanku Zara Salim.

Your Royal Highnesses, distinguished ladies and gentlemen. It is an incomparable honour to follow in the footsteps of so many distinguished lecturers by commemorating such an outstanding judge, jurist and head of state of this Kingdom by giving the thirty-first lecture in this series so celebrated the world over.

This internationally renowned annual lecture is made possible by the farsightedness and generosity of Your Royal Highnesses. We are extremely grateful to Your Royal Highnesses for the warmth and generosity of your welcome and the immense hospitality we have been shown and been able to enjoy. We cannot thank you enough. We are also very grateful to Tan Sri Visu Sinnadurai and his team for the wonderful arrangements made for this lecture.

The rule of law in a time of rapid change

As we still measure generations as a thirty-year period, I considered that the theme of this first lecture in the next generation of lectures ought to address the issues facing a new generation in our democracies. But those issues can only properly be addressed if they are grounded in what His Royal Highness Sultan Azlan Shah considered as the defining feature of democratic government—the first part of the title—the rule of law. His definition given in 1984 when giving the 11th Tunku Abdul Rahman Lecture* captures its essence in powerful yet ordinary language:

> "The Rule of Law" means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by the law and be subject to it. The ideal of the Rule of Law in this sense is often expressed by the phrase "government by law and not by men".

The second and third parts of the title are addressed to two of the branches of the state whose relationship is key to the rule of law, for as His Royal Highness later pointed out, without a judiciary endowed and equipped with all the attributes of real independence there cannot be the rule of law. [1]

First, I will look at the current position and the likely changes as I perceive their effect on the rule of law. I will then turn to consider how best to protect the position for the new generation by strengthening the independence of the judiciary and the interdependent relationship between the executive and the judiciary.

> As His Royal Highness pointed out, without a judiciary endowed and equipped with all the attributes of real independence there cannot be the rule of law.

I will begin by identifying four changes which are occurring across the world which present particular issues for the rule of law:

(1) The digital or technological revolution, sometimes described as the fourth industrial revolution. This is not only changing the way in which we work, communicate and obtain information, but is also bringing about significant issues in relation to the management of, and access to, big data, education and, with the development of artificial intelligence, future ways of working.

(2) Globalisation, in part brought about by the digital revolution. This presents significantly increased problems in developing law, rules and regulations that can be applied internationally to foster trade and commerce and to contain the growth of dominant positions in markets.

(3) The very significant migrant flows, in particular to Western Europe. These have resulted in large scale recourse to courts under human rights instruments.

(4) Conservation of natural resources, protection of the environment and concerns on climate change. These are also now issues for the courts.

In addition to these worldwide changes, I think it is important to highlight two additional factors that are of particular importance in the West:

(1) The re-awakening of populism, the decline of deference and an increasing popular scepticism about many state institutions.

(2) A reluctance on the part of the executive and the legislature to take difficult decisions in certain areas, preferring to leave such issues to the judiciary who can then be criticised for the decisions made.

The universal acceptance of the rule of law

There is, at first sight, one matter that might make for optimism about the ability to deal with such significant changes whilst maintaining the rule of law—the universal acceptance of the rule of law as a fundamental principle. This acceptance does on its face suggest that the executive, the legislature and the people of a state understand the principle, because normally people do not accept what they do not understand. However, it is necessary to ask four questions:

(1) Is there in truth an understanding of what is meant by the rule of law, particularly by the executive?

(2) Is there a commitment by the executive to do what is necessary to uphold the rule of law?

(3) Is the ambit of the rule of law extending so that it includes the maintenance by law of social and economic rights?

(4) What objective considerations apply to the allocation to the judiciary of their role in the development of law?

I am afraid that it is necessary to reflect a degree of caution in the answers to be given to each of these questions, at least judged by reference to the UK:

(1) I think there has been a marked decline in the understanding of the operation of the constitution, the separation of powers and role of the judiciary, despite what has been done by judges and, as regards the executive in the UK by its own legal advisers, to try and ensure that there is such an understanding.

(2) The operation of the rule of law requires a commitment, particularly by the executive, to accept decisions made by independent judges and to support them when they are attacked or abused for making decisions that are politically inconvenient.

(3) If there is an understanding of, and commitment to, the rule of law there has, I think, been insufficient appreciation of the effect of the expansion of its scope. The rule of law developed in the context of the use of law to settle disputes between individuals and to protect against the arbitrary exercise of power by the state in matters such as the deprivation of liberty or the making of decisions to expropriate property.

However, there have been two significant developments. Charters of rights have increasingly moved from what some[2] have characterised as providing procedural or formal protection to the provision of more extensive

substantial rights such as the right to human dignity, the right to the protection of personal data, the freedom of arts and sciences, the right to education and to engage in work, the right to working conditions which respect health and safety, and the right to access preventative health care and medical treatment.

> The rule of law requires a commitment, particularly by the executive, to accept decisions made by independent judges and to support them when they are attacked or abused for making decisions that are politically inconvenient.

The second development, the ever-increasing recourse to the courts in attempts to give effect to these rights, has become a significant feature of the last few years. There is insufficient public understanding and, to a surprising extent in the UK, insufficient understanding on the part of the executive and the legislature of the effect this has on the ambit of the rule of law.[3]

(4) In the light of these matters, I think there is an insufficient appreciation of the need to give more objective consideration to the allocation of functions in relation to the rule of law and the extent to which certain rights set out in charters are appropriate for judicial development.

The judiciary's accumulated credit through earning the public's trust

I do not have the same caution in saying that the judiciary in the UK and in many other states faces the future with a relatively high degree of credit for what they have done and consequently a very considerable degree of public trust. In the UK, virtually every institution of government has encountered severe damage to its position and its reputation and a decline in respect with the rise of populism. The judiciary has, however, by and large been immune from this.

How has this come about? It is not a subject on which there has been much inquiry, but I think that it is due to the fact that the judiciary has built successfully on its skills largely in its traditional roles, such as resolving private disputes and making criminal trials fair. It has also adopted a cautious step-by-step approach to administrative law and concentrated on the application of general legal principles and of human rights charters to ensure fair procedures and compliance with such procedures in the making of decisions by the state and state officials. It has recognised generally that great caution is needed when the judiciary is asked to make decisions on policy issues rather than the procedure by which others determine policy. It has appreciated the significant difference between, on the one hand, deciding that the executive has to follow a fair procedure, whilst leaving the decision to the executive and, on the other hand, embarking on the making or at least the shaping of the decision itself.

A central issue for the judiciary is the maintenance of that trust in the face of the changes to which I have referred. The re-awakening of populism, so evident in the USA, UK and some of Western Europe presents an additional problem, as the judiciary is so often the butt of populist politicians who see it as a constraint on their ambitions and policies. How, therefore, is that trust to be maintained for the future, for it is the bedrock of the rule of law?

> Great caution is needed when the judiciary is asked to make decisions on policy issues rather than the procedure by which others determine policy.

In my view, there are two key considerations which apply both to the maintenance of that trust and to the strength of the rule of law:

(1) the safeguarding of the independence of the judiciary and a careful management by the judiciary of any threats to that independence;

(2) the strengthening of the interdependent relationship between the executive and the judiciary, particularly by better delineation of their respective roles.

How is the independence of the judiciary safeguarded and trust maintained?

Self-evidently the task of safeguarding judicial independence and the maintenance of trust in the judiciary is a vast topic. There is a huge literature on this subject and, as has been recently pointed out, it is a subject on which judges frequently speak.[4]

There is, however, much that that needs emphasis in relation to the future. I would like to address nine topics, primarily drawing on my experience in the UK:[5]

(1) diversity in recruitment of judges in the UK and some other states;
(2) the process of appointment;
(3) terms of service, salaries and pensions;
(4) resourcing the courts;
(5) high standards in the delivery of justice;
(6) governance, ethics and discipline;
(7) the education of the public, the media and social media;
(8) the maintenance of the status quo;
(9) the judiciary's own understanding of its constitutional role.

There are of course other matters such as judicial training and the need for a strong and fully independent legal profession, and the proper provision of legal assistance

for those who cannot afford legal representation, but time does not permit a discussion of all matters.

Diversity in recruitment of judges in the UK and some other states

Most discussions of independence concentrate on the process of appointment. Although I shall turn to this, a more important question in the UK and some other states is whether judiciaries are recruiting the right people in terms of the wider remit of the judiciary and helping them in the advancement of their potential and their skill as judges.

> A judiciary needs the best and the brightest who reflect the people of the state, particularly their different backgrounds, their different philosophies, and their different ethnicities.

I have no doubt that it is imperative for judiciaries, which all face the issues I have outlined, to engage in active recruitment and career development. A judiciary needs the best and the brightest. There are also states such as the UK which need not only the best and the brightest, but the best and the brightest who reflect the people of the state,

particularly their different backgrounds, their different philosophies, and their different ethnicities. Diversity in this sense is not an aspiration for such states, but a necessity if the judiciary is to continue to command the confidence of the less deferential society and successfully to deal with the significant issues I have outlined.

In the UK, when appointments were made by the Lord Chancellor, there was the appreciation of the need for proactive recruitment and planning to ensure that there was a sufficient pool of judges from whom the most senior appellate judges and judges holding leadership posts could be appointed. The model was very much one based on the traditional British civil service, with one significant difference—widespread confidential soundings on people's background and the consequent lack of transparency. With the Constitutional Reform Act 2005, the emphasis shifted to a transparent and open system of appointment, but to the neglect of active recruitment, career development and ensuring a sufficient pool of appointees for senior posts. This lack of emphasis has been appreciated and proper progress is in hand to ensure much greater diversity.

The process of appointment

Even though proactive recruitment and career development of the broad type I have described is essential, an independent judiciary requires an independent process

of appointment. There are many states where judges are appointed through a process in which either the executive or legislature or both have a decisive voice. In such states, the emphasis is on security of tenure to protect judicial independence rather than an independent appointments process. Although I see force in the argument that the appointment to judicial office in itself will bring out the qualities necessary to sustain independence, a process of appointment which removes the influence of the executive and the legislature provides for greater certainty and greater confidence that the appointee will be independent. The system of appointment in England and Wales provides for one of the most independent processes in the world; it is interesting that the suggestion recently made by the new President of the Supreme Court that there should be greater political involvement,[6] has so far attracted little support.

That is because the system of judicial appointments in the UK, as it has evolved in the 12 years since 2005, has generally struck the right balance as regards the influence of the executive.

The appointment of the Chairman of the independent Judicial Appointments Commission is of central importance, as the Chairman has a key role in the working of the Commission. There is therefore a carefully constituted panel comprising a person nominated by the Lord Chancellor, with the agreement of the Lord Chief Justice, a nominee of the Lord Chief Justice and a person

selected by the person nominated by the Lord Chancellor with the agreement of the Lord Chief Justice. The danger of attempts to try and exert pressure on such a small body is averted by the careful selection of the Chairman of this Selection Panel. The other Commissioners are appointed by a similarly constituted panel but with the addition of the Chairman of the Commission—one illustration of the key role of the Chairman. Of course, there is dialogue with the Lord Chancellor during this process which has on occasions required the Lord Chief Justice and the Chairman of the Selection Panel (or the Chairman of the Commission) to be robust and independent, but that has been characteristic of such Chairmen.

Although the Lord Chancellor no longer has any role in the appointment of judges below the level of the High Court, the Lord Chancellor has three occasions in appointments to the High Court and above in which influence can be exercised:

(1) The Lord Chancellor is consulted about the terms of the appointment prior to the competition for the appointment. In practice, this has proved to be the most important way through which the influence of the Lord Chancellor has been brought to bear. For example, it happened when the Lord Chancellor stipulated a minimum period of service for my successor which had the effect of ruling out candidates whom many considered were appointable. In many states, the Chief Justice is appointed

on the basis of seniority; plainly there are circumstances where someone who has a very short period measured in terms of months in which to serve should not be eligible, as this weakens the judiciary. However, it seems to me that it should be entirely a matter for the Commission to reach a view on the appropriate length of service; this should not be a matter on which a Lord Chancellor should for the future express a view.

(2) The Lord Chancellor can express views about the candidates just like other consultees. No criticism can properly be made, in my view, of this function. In offices where the judge is likely to have dealings with the Lord Chancellor or other ministers in relation to administration or other matters where there is an interdependency with the executive, it is entirely right that the appointment panel should have the views of those with whom the holders of the office will deal.

(3) When the appointing Commission makes a report, the Lord Chancellor has the statutory power to ask the Commission to think again and, if it maintains its position, the Lord Chancellor can reject the appointment. As the accountability of the Commission for the recommended appointment is of paramount importance, the Commission in recommending the appointment must give cogent reasons for its decision, supported where appropriate by the actual evidence. It is plainly right that those reasons be scrutinised with great care and thoroughness and questions

be raised if necessary, as there is an important public interest in the accountability of the Commission. Indeed, knowledge of scrutiny ensures that recommendations are carefully thought through. There is no risk of abuse in relation to the recommendations as the Commission can only be asked to reconsider its recommendation, or the recommendation can only be rejected, if written reasons are given by the Lord Chancellor. This is the plainest possible safeguard against any improper use of the power not to accept recommendation.

Terms of service, salaries and pensions

It is important that careful attention is paid to the terms of service, remuneration and pensions of judges. On terms of service, it has, for example, been accepted since the early 18th century in the UK that security of tenure must be provided to protect from dismissal any judge who makes a decision that the government finds unacceptable, a position that is now almost universally accepted.

In relation to remuneration, there are obvious reasons why judges must be properly remunerated—particularly avoidance of corruption and the recruitment of the best. The independence and trust reposed in judges should not be compromised by judges seeking to supplement their income by other means. Some states permit judges to accept other employment; some states allow judges to be arbitrators and

retain the fees themselves, as distinct from the UK where such fees are remitted to HM Treasury. Other states permit judges to take on roles such as playing in an orchestra or making speeches for remuneration. Such employment is, in my opinion, highly undesirable as it reduces the standing of the judge and invariably lays the judge open to the allegation that sufficient time is not being devoted to judicial duties, but to earning an income from other pursuits.

It is also right that proper provision is made for judges' pensions, as it is again important for all the judiciary that on retirement a judge does not enter into an activity that can tarnish the reputation of the judiciary. This is often an issue that is overlooked. Every retired judge is always referred to as a retired judge; the trust and confidence that needs to be maintained in the serving judiciary can be undermined by the activities of retired judges who remain closely identified with the judiciary. By convention in the UK, former judges are not entitled to practice law or advocacy. It is also expected that they exercise considerable care in any work they choose to do. The provision of proper pensions is essential if such rules are to be maintained.

Resourcing courts

It is now accepted that proper financing of the courts and the importance of the role of judges in their administration is critical to judicial independence. In short, judges cannot

be independent if they do not have the proper resources with which to do their work and have an effective role in the way in which the resources are expended. Although judges have always had to fight their corner for resources, I do not believe there is any issue of principle that is now disputed. In the UK, we have come a long way in the last 30 years,[7] but there needs to be vigilance. One way of the executive undermining the independence of the judiciary is either to curtail resources or offer more, but only by way of inducement to support a particular government policy.

> A judiciary must be prepared to be fully accountable for the delivery of justice to the highest standards which the resources provided to the judiciary make possible.

High standards in the delivery of justice

I have little doubt that all judges seek to deliver justice to the highest standards—ensuring cases have a proper pre-trial procedure, getting cases to trial or appeal quickly, conducting a fair hearing and giving clear and cogent reasons for decisions. Confidence that a system operates in this way is one of the most important factors in maintaining public trust and protecting independence.[8] A failure to do so leaves the judiciary's independence open to attack by the executive.[9]

The highest standards are not achieved without the fulfilment of three conditions.

(1) A judiciary must be prepared to be fully accountable for the delivery of justice to the highest standards which the resources provided to the judiciary make possible. In the UK the judiciary sets out what it is doing in an annual report[10] and is prepared to answer questions about it to Parliament.[11]

(2) Judges must engage in the reform and modernisation of the system of the delivery of justice. There is at present an unparalleled opportunity for each judiciary to be at the forefront of deploying technology which must be seized. There is of course a risk, for most types of reform will generate opposition. For example, when judges seek to curtail the cost of litigation, either by a fixed cost regime or by costs budgeting (both of which have been attempted in the UK), it is inevitable that some lawyers will oppose the curtailment of costs. It can forcibly be argued that issues such as these are policy issues and judges run the risk of alienating the profession or of making themselves unpopular.[12]

However, despite these risks, the judiciary must be proactive in reform. They must also provide the leadership in the major changes that will soon come to legal education and legal practice consequent upon the technological revolution. Judges must recall that in the 18th century, Lord Mansfield, without doubt one of the greatest common law Chief Justices, was a great reformer of procedure, though

he is seldom remembered for this.[13] He attacked with equal vigour every occasion of delay or expense; reform of practices at the bar was his first aim. As was said of him:

> He set himself to restore the due proportion between principle and practice which alone could satisfy the needs and advancing society. The law is to be justified to the litigant.

If judges today do not emulate Lord Mansfield by keeping a legal system up to date by using the latest technology and reducing cost, they put themselves at risk of having the executive or legislature make the reform for them in a way that not only can undermine their position, but which shows that the judiciary is out of touch with what the public wants. Failure to undertake far reaching reform and provide leadership to those reforms will imperil the credit balance that the judges have built up.

(3) Judges must engage widely in making sure they develop the law so it is in tune with advances in science and developments in the operation of the financial markets, such as fintech. One example from the UK is the joint work with the Royal Society in making sure that judges correctly apply the science relevant to cases in front of them.[14]

Governance, ethics and discipline

So far, I have looked at what must be done to ensure proper recruitment, independent appointment, proper resourcing

and the delivery of high standards in the business of judging. But none of this will protect the independence of the judiciary unless there is a proper system for the governance of the judiciary, together with the devising of ethical codes and a fair and effective machinery for discipline.

In my view, the importance of the proper governance of the judiciary is one that receives insufficient attention. I do not know why this is so. The study of the governance of most other institutions and business enterprises is well understood. It may be that it was thought that governance was either something judges did not need or was so simple that it could be devised ad hoc.

I recently covered this subject in the Lionel Cohen Lecture in Jerusalem.[15] I wish only to draw attention to the importance of a judiciary having a proper governance structure; it is essential to all the tasks that I have listed under the headings, and in particular to its relations with the executive in the maintenance of the rule of law.

The education of the public, the media and social media

Judges have always regarded as part of their ordinary work, helping in the education of lawyers. Speeches to students and judging moots are now commonplace. Much of this is traditional, re-paying what was done for them when young and seeing the importance to the delivery of justice of having lawyers as well-educated as possible.

However, judges in the UK are becoming used now to speaking to wider groups about the centrality of justice and the working of the system.[16] There are a number of reasons for this. First, given the importance of a proper understanding of the rule of law and the role the courts now play, it has become accepted that there is a duty on the judiciary to explain the system as much as possible. Second, because of the greater specialisations in employment, it is quite likely that the broad understanding many had of society no longer exists; many may have a vague idea of what the courts do, but it is of particular importance that there is a much better understanding. Third, it suits some to misrepresent what the courts do or have decided in a particular case. Fourth, the centrality of justice needs to be understood by the public if there is to be public support for the courts being properly resourced.

> The centrality of justice needs to be understood by the public if there is to be public support for the courts being properly resourced.

This has been a striking change, for until about 12 years ago the judiciary of England and Wales had no communications office and no direct relationship with the press. It is correct that the Lord Chancellor's Department would deal with press stories about the judiciary, but explaining what the judiciary does through active engagement with all forms of media in promoting a broader

understanding of the role of the judiciary is a very clear example of a change that has been, and remains, essential.

One of the very difficult issues for the judiciary is the decline of the print media, the growth of social media and the considerable appetite for direct news. The extent to which the judiciary should utilise social media or promote the greater use of broadcasting of proceedings beyond telecasting arguments on cases under appeal is a very difficult subject. The judiciary, however, has to consider radical change in their methods of communication if society at large is properly to understand the work they do.

The maintenance of the status quo

I next need to add a word about the position of the judiciary in upholding the rule of law in a state where there is a desire for a change in governance of the state. This issue is seldom mentioned in the context of judicial independence, but it is one of importance to the rule of law and public confidence in the judiciary, as it is easy for a judiciary to be seen as a bulwark against change. One example must suffice—the prosecution of a dissenter charged by the state with a crime for political reasons or for which the public do not think he should be convicted. As the history of many states has shown, it is very easy for the judiciary to be seen as supporting the status quo, because the principle of the rule of law is invoked to require its application to the prosecution of dissenters.

In the UK, since the decision in *Bushell's* case in 1670 [17] that a jury could not be punished for its verdict, the jury has provided a little-appreciated solution to the strict application of the rule of law in political cases that range from the trial of the Seven Bishops on the eve of the Glorious Revolution in 1688 to the trial of Clive Ponting in 1985. As a jury is entitled to acquit even if the evidence proves that the defendant has committed an offence, the rule of law is upheld.

I mention this briefly as it is an illustration of a much more difficult problem arising from the emphasis on the rule of law in so many states where there is no democracy. How does a judiciary deal with the rule of law in such circumstances? Time does not permit a proper examination of this. I can, for the present, leave this to others, as it is not an issue in which the UK has experience more recent than the 17th century.

The judiciary's own understanding of its constitutional role

It is accepted the judiciary must not engage in political issues. But what does this mean? Many have said this requires "judicial restraint". In his Denning Society Lecture in 2016,[18] Lord Hodge set out what he described as "role recognition" [19] in preference to "judicial restraint":

> In short, there are decisions of policy, which involved social, economic or political preferences that are properly the domain of the elected branches of government. Not only do the courts lack the resources to formulate policy and assess the practical consequences of decisions on such matters, but also the courts cannot be politically accountable for them in a democracy. … To my mind it is appropriate to speak of judicial restraint not as a general description of a judge's approach to his or her role but only when the boundary between the merits of policy and its lawfulness are not clear. Judges are not and should not be players in a political process. Were they to be so, their impartiality would be lost.

I agree with Lord Hodge, but I think the issue is better approached by shifting the focus from looking at the issue from the position of the judiciary to considering it by reference to the interface between the judiciary and the executive—their interdependence.

The interdependence of the judiciary and the executive in upholding the rule of law

I therefore turn to the interdependent relationship between the executive and the judiciary because it is important when looking at the respective functions of the judiciary and executive, whether granted under a constitution, a charter

of rights or specific legislation, to have a clear view as to the role each is properly capable of performing. There is far too seldom a debate on this before a constitution, a charter or legislation is adopted.

For example, in the UK, I have little doubt that Parliament passed the Human Rights Act 1998 (empowering the UK courts themselves to give effect to the European Convention on Human Rights) because it trusted the judiciary on the basis of the judiciary's development of fair procedures and the limited form of judicial review of which many had experienced. It may be that some in Parliament had little real idea of the extensive functions that they were in fact conferring on the judges. Nor may some in Parliament have properly appreciated that judges, when making what judges regarded as perfectly permissible decisions on the scope and meaning of the Human Rights Convention, would respond to criticism of what was termed judicial law-making, by saying that Parliament had conferred on the judiciary the making of such decisions by enacting the Act.

Interdependence

That provides the context to interdependence. First what do I mean by interdependence, as it is a term far less used than independence?[20] I attempted to define interdependence in the Ryle Memorial Lecture[21] given earlier this year in the Houses of Parliament as comprising:

(1) a clear understanding by each branch of the state of the constitutional functions and responsibilities of the other branches of the state;

(2) mutual support by each branch of the other branches when carrying out the functions and responsibilities which the constitution has assigned to the other branches;

(3) non-interference in the proper working of the functions and responsibilities which the constitution has assigned to another branch by showing a proper and mutual respect for the role of the other branches.[22]

Interdependence therefore requires a clear common understanding of what are the proper constitutional functions of the different branches of the state. This applies most acutely in respect of the functions of the judiciary.

Difficulties can arise even where the function entrusted to the judiciary is appropriately within its responsibility

In some cases, a common understanding is straightforward—for example it is for the judiciary to determine the proper extent of the powers of the executive under the prerogative. Such an issue arose, as has become well known, because of the terms in which the judiciary

were attacked for the decision made on a challenge to the attempt by the executive in the UK to give notice of Brexit under Article 50 without parliamentary approval. When the Divisional Court decided that the executive had no prerogative power to give notice, the judges were subject to the abuse of being described in the media as "enemies of the people". It was the plain duty of the executive to provide mutual support to the judiciary[23] and it shocked many across the world when it did not.

Another illustration is the issue addressed in the Twenty-first Sultan Azlan Shah Lecture by Baroness Helena Kennedy[24] when she drew attention to the terrorism legislation which had been enacted in the UK. It should have been clear that it was for the judges to determine the compatibility of the powers of detention, the use of evidence obtained by torture and the regime of control orders with the Human Rights Convention. It should have come as no surprise that it was for the judges to set out clear principles of what was compatible with the rule of law.

The clear statements of principle by the courts in these two areas have now been clearly accepted as the proper province of judicial decision making. It would have been far better if this had been understood at the time the decisions were made.

(1) The importance of the duty of the executive, and in particular the role of the Lord Chancellor, in defending the independence of the judiciary is now much better

understood;[25] as is, the particular importance of having a member of the cabinet who has a real understanding of this particular responsibility and can develop good working relations with the judiciary.

(2) The clear decisions in respect of terrorist legislation have enabled the principle of interdependence to work. There has been a much more constructive approach to dealing with the balance between fairness to those accused of being terrorists and the public interest in maintaining security in protecting intelligence methods. Once the judges had established what the rule of law required in these key cases, the executive acted, by and large, in a more constructive manner; methods were worked out for achieving the balance which I have described. Amongst the most constructive developments were clear rules about the necessity for full disclosure (where the judge is the final arbiter) and the open conduct, to the greatest possible, of all terrorist cases.[26]

In these two illustrations an eventual outcome was reached which was consistent with the rule of law.

However, even though tension between the judiciary and the executive from time to time is healthy for democracy, the rule of law is, in my view, better served by constructive engagement and a better understanding of what is appropriate for decision by the judiciary and what properly lies within the functions of the executive and the legislature. There needs to be a proper debate as to the scope

of what is entrusted to judges before the task is entrusted to judges. Judges have a significant interest in delineating what is to be entrusted to them, if they are to continue to be the repositories of trust by the people and to retain their independence.

The nature of the contemporary problem

I referred at the outset to the development of rights in more recent charters of rights which have come a long way from rights relating to liberty, fair trials and fair procedure. Although this is a hugely welcome development, it must be seen in the context that the meaning and scope of every right is to be made on the basis that the charter or constitution is a "living instrument" and that judges have powerful tools available to them such as proportionality, reasonableness and non-discrimination which can be extensively employed by the judges [27] to effect wide ranging change.

Judges have, by and large, had to work out for themselves the appropriate limits of judicial development of rights by self-restraint or by self-recognition of their role. In privacy issues, particularly relating to data, judges have been generally successful in striking the right balance between the interests of the individual and the interests of society. Were they to make decisions, save in very narrow cases, on rights to euthanasia, or abortion, or assisted suicide, many would question whether these were decisions where the judges were entitled to develop rights set out in charters

or use tools such as reasonableness or proportionality to determine such questions.

Given issues relating to the digital revolution, migrant flows and the environment to which I referred at the outset, it would, in my view, therefore be much better if proper thought was given at the outset in the debate leading to a charter or other legislation (and in the drafting of the charter or other legislation) to the role of the judiciary in the development, delineation and enforcement of such rights and whether certain rights were best left to further executive or legislative development.

> Judges have a significant interest in delineating what is to be entrusted to them, if they are to continue to be the repositories of trust by the people and to retain their independence.

Two similar issues have arisen in the UK under the legislation to give effect to Brexit. The first issue relates to the effect to be given in the UK to the modification, development or interpretation of the law of the European Union after Brexit by the courts, as the law will be part of UK law, but the decisions of the Court of Justice of the EU will no longer be of binding effect. It is presently envisaged that the UK courts will be given a very wide discretion on

whether to follow such decisions with virtually no guidance; the Supreme Court is, moreover, to be given a discretion as to whether to overrule a decision of the Court of Justice of the EU made before the date of Brexit. Such an approach has the advantage of simplicity and being able to blame judges for unpopular decisions. But is it sensible to assign to the judiciary such a broad function?

The second issue relates to the powers that the executive is presently seeking to acquire to make significant changes to the law by regulation without the need for legislation passed by Parliament. As regulations made by the executive can be challenged before the courts, there is a degree of concern, particularly in relation to the more controversial matters which might be changed by regulation, that the courts will become the forum for debate and challenge to decisions of the executive that are better challenged in the legislature.

It follows from what I have already said that there is a better course in relation to both these issues arising out of Brexit, if the rule of law is to be better served and the independence of the judiciary better protected. There should be detailed consideration as to the scope of what the judges should properly be asked to do. In my view, if there is no such discussion and inappropriate functions are given to the judiciary, it will be corrosive of the rule of law, for the rule of law is threatened if a case can be made that judges are deciding issues which are essentially political in nature, even though the legislation has imposed that role on them.

The issue is still very much alive in the UK, so I will not go further into the complex detail, save to say that protest has been made against the passing of such powers to the judiciary.

A precedent?

For the reasons I have given, therefore, judges should not be the passive recipients of new functions, but should take a more proactive role at the stage when new functions are suggested.

In 1868, a proposal was made to transfer from the House of Commons to the courts, the duty to decide disputed elections. The Lord Chief Justice wrote to the Lord Chancellor to oppose this. After referring to the confidence of the public in the impartiality of the judiciary, the Lord Chief Justice said:[28]

> This confidence will speedily be destroyed, if, after the heat and excitement of a contested election, a Judge is to proceed to the scene of recent conflict, while men's passions are still roused, and, in the midst of eager and violent partisans, is to go into all the details of electioneering practices, and to decide on questions of general or individual corruption, not unfrequently supported or resisted by evidence of the most questionable character. The decision of the Judge given under such circumstances will too often fail to secure the respect which judicial decisions command

> on other occasions. Angry and excited partisans will not be unlikely to question the motives which have led to the judgment. Their sentiments may be echoed by the press. Such is the influence of party conflict, that it is apt to inspire distrust and dislike of whatever interferes with party objects and party triumphs.

Fortunately, such cases have been rare. However, the then Lord Chief Justice was right in identifying the question as to whether it was proper for judges to be involved, for the appropriateness of the courts being involved was raised when, after an interval of over a hundred years, a disputed Parliamentary election case came to the courts. The judges were able to say that a conscious decision had been made by Parliament to entrust the task to them.

The global position

Plainly it is necessary, in a world where news travels so quickly and globalisation has had such profound influence, that the judiciaries of states which have such close connections as is the case between Malaysia and the UK, to work out a common approach to the maintenance of the rule of law within their respective states. In saying this, we must not forget the role of the judiciary in ensuring the rule of law internationally by a joint approach tackling issues such as the smooth operation of international trade, the growth of the digital economy and fintech, and the resolution of interstate disputes on trading agreements.

Tentative steps are in place to take this forward through the operation of the Standing International Forum of Commercial Courts formed at a meeting in London earlier this year. This is also a vast subject where urgent development and thinking is needed, as the judiciary will not be able to make the progress that is needed unless there is a clear view of their position in relation to the rule of law within their own states. However, time does not permit me to cover this in this lecture.

Conclusion

Of necessity, I have spoken very largely of the UK. However, the issues of which I have spoken are of much more universal application. Their resolution will require constant vigilance and judicial courage.

The generosity of Your Highnesses in holding these lectures in honour of one of the great jurists of the world, His Royal Highness Sultan Azlan Shah, makes possible this exchange of ideas and the necessary debate and reminds us of a steadfast example for all of us to follow.

Editor's note

*The 11th Tunku Abdul Rahman Lecture entitled, "Supremacy of Law in Malaysia", delivered by HRH Sultan Azlan Shah is reproduced in *Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches of HRH Sultan Azlan Shah*, Professional Law Books and Sweet & Maxwell Asia, 2004, pages 13–33.

Endnotes

1 "Fifty Years of Constitutionalism and the Rule of Law", Opening Address delivered at the 14th Malaysian Law Conference, 29 October 2007, reproduced in Visu Sinnadurai (ed), *His Royal Highness Sultan Azlan Shah: A Tribute*, RNS Publications, 2014, pages 55–75.

2 I do not wish to enter into the debate as to the distinction between formal (or procedural) rights and substantive rights: see for example Bingham, *The Rule of Law*, Penguin, 2010, at pages 66–67. It is not necessary to do so here.

3 In addition to charters of rights, there has been the significant growth of international humanitarian law and the extension of human rights into the field of armed conflict. Although I think this is now better understood by some in the UK as a result of cases arising out of the Iraq and Afghanistan wars, this has been a development which took many by surprise, given the much narrower scope of the Geneva Conventions relating to the conduct of war and other armed conflict.

4 Beatson LJ in his November 2017 Atkin Lecture calculated that in 2015 judges in the UK had given 71 lectures on this subject, 45 in 2016, and 38 in the first eight months of 2017. See https://www.judiciary.gov.uk/wp-content/uploads/2017/12/beatson-lj-atkin-lecture-20171201.pdf (accessed on 8 August 2018).

5 In early 2017, in the course of two lectures, one in Jerusalem and one in the Houses of Parliament in London, I examined the manner in which the judiciary's constitutional position had evolved in England and Wales in the decade since the major changes brought about by the Constitutional Reform Act 2005, consequent upon reform of the office of Lord Chancellor.

The first lecture, the Lionel Cohen Lecture, concentrated on the cohesion and governance of the judiciary as that is key to the proper functioning of an independent judiciary as the third branch of state; the second, the Michael Ryle Memorial Lecture, considered the relationship between the three branches of the state highlighting not only their independence, but also their interdependence.

See https://www.judiciary.uk/wp-content/uploads/2017/05/lcj-lionel-cohen-lecture-20170515.pdf and https://www.judiciary.uk/wp-content/uploads/2017/06/lcj-michael-ryle-memorial-lecture-20170616.pdf (accessed on 8 August 2018).

6 "Judges, Power and Accountability: Constitutional Implications of Judicial Selection", 11 August 2017, https://www.supremecourt.uk/docs/speech-170811.pdf (accessed on 8 August 2018).

7 Lord Browne-Wilkinson in his FA Mann Lecture in 1988, "The Independence of the Judiciary in the 1980s" [1988] PL 44, was the first in the UK to cogently set out this principle.

8 Sir Geoffrey Vos, Chancellor of the High Court, set out in a lecture "Limits of and Threats to Judicial Independence", given at Victoria University, Wellington New Zealand in October 2017, the importance of this issue in the eyes of many European judges.

9 The clearest contemporary example is Poland where the executive and legislature in Poland have taken steps to change the appointment process and make other changes which will affect the independence of the judiciary. They have obtained popular support by claiming that justice is not effectively delivered by the Polish judiciary.

10 See, for example, the Lord Chief Justice's 2017 annual report, published in September 2017: https://www.judiciary.gov.uk/wp-content/uploads/2017/09/lcj-report-2017-final.pdf (accessed on 8 August 2018).

11 Both the President of the Supreme Court and the Lord Chief Justice answer questions for a committee of each House of the UK Parliament.

12 See the powerful arguments made by Beatson LJ in his November 2017 Atkin Lecture, referred to in note 4 above.

13 See CHS Fifoot, *Lord Mansfield*, OUP, 1938, Chapter III.

14 This has resulted in joint seminars on medical issues and in the production of primers which provide authoritative and up-to-date information about matters such as DNA. The first of these was published in November 2017: https://royalsociety.org/~/media/about-us/programmes/science-and-law/royal-society-forensic-dna-analysis-primer-for-courts.pdf (accessed on 8 August 2018).

15 https://www.judiciary.gov.uk/wp-content/uploads/2017/05/lcj-lionel-cohen-lecture-20170515.pdf (accessed on 8 August 2018).

16 I dealt in detail with this subject in The Lord Williams of Mostyn Memorial Lecture in 2015, "The Centrality of Justice: Its Contribution to Society, and Its Delivery", printed in *Being a Judge in the Modern World*, OUP, 2017; also available at https://www.judiciary.uk/wp-content/uploads/2015/11/lord-williams-of-mostyn-lecture-nov-2015.pdf (accessed on 8 August 2018).

17 (1670) 124 ER 1006.

18 "Upholding the rule of law: how we preserve judicial independence in the United Kingdom", 7 November 2016, https://www.supremecourt.uk/docs/speech-161107.pdf (accessed on 8 August 2018).

19 This is one of the ten pillars described in the lecture as being the basis of judicial independence.

20 A term used by Jackson J in the US Supreme Court in *Youngtown Co v Sawyer* 343 US 579 (1952), at 635:

> "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

21 "The Judiciary Within the State—The Relationship Between the Three Branches of the State", 15 June 2017, https://www.judiciary.gov.uk/wp-content/uploads/2017/06/lcj-michael-ryle-memorial-lecture-20170616.pdf (accessed on 8 August 2018).

22 See, for example, *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46; [2012] 1 AC 868, at [148].

23 I set this out in more detail in the Michael Ryle Memorial Lecture (see note 21 above) at paragraphs 58–67.

24 *Legal Challenges in Our Brave New World*, in *The Sultan Azlan Shah Law Lectures II: Rule of Law, Written Constitutions & The Common Law Tradition*, RNS Publications and Sweet & Maxwell, 2011, pages 273–323.

25 As I explained in the Michael Ryle Memorial Lecture (see note 21 above), it was necessary for me to make clear, when the Article 50 litigation was finished, that the position taken by the then Lord Chancellor had been wrong: see paragraph 66 of the lecture, and the evidence I gave in Parliament at https://www.parliament.uk/documents/lords-committees/constitution/Annual-evidence-2016-17/CC220317LCJ.pdf (accessed on 8 August 2018).

26 Another example has been the development and refinement of the use of special advocates—where a judge authorises the appointment of a security vetted lawyer from a panel. That lawyer is then entitled to see the relevant documents withheld from the defendant because of security considerations and, in closed hearings, to put questions to witnesses and make arguments which the lawyer considers the defendant would have made.

27 One example of the use of such tools outside the context of a charter, is the development of general principles by the Court of Justice of the European Union in relation to age discrimination: *Mangold (2005) C-144/04; Pereda (2009) C-227/08; Kucukdevichi (2010)C-555/07; Ajos (April 2016) C-441/14.*

Even though the courts of EU nations are bound by decisions of the Court of Justice of the European Union, the Danish Supreme Court refused to follow the development of general principles in relation to age discrimination on the basis that Denmark had not agreed to a court developing general principles outside the scope of the treaties on the European Union.

In its view, that had the consequence that the legislation enacted by the Danish Parliament should prevail over the European Court's general principles: *Dansk Industri (acting for Ajos) v The estate left by A*, decision of 16 December 2016.

28 Cited in *R (Woolas) v The Parliamentary Election Court* [2010] EWHC 3169; [2012] QB 1.