



JUDICIARY OF
ENGLAND AND WALES

THE MASTER OF THE ROLLS – LORD DYSON

THE THIRD ANNUAL BAILII LECTURE

CRITICISING JUDGES: FAIR GAME OR OFF-LIMITS?

27 NOVEMBER 2014

1. [INTRODUCTION]
2. My choice of subject this evening is prompted by a personal experience when I was a High Court judge. I had decided a case about the release of six IRA members, all of whom had been sentenced to life imprisonment.¹ In anticipation of lengthy delays which were blighting the Parole Board at the time, the prisoners submitted their applications for release six months early. The Home Secretary refused to refer their cases to the Board until their minimum tariffs expired, and the prisoners applied for judicial review.
3. I held that the Home Secretary's decision was unreasonable on ordinary public law grounds. Leading counsel for the Home Secretary told me that he was instructed not to seek to appeal the decision. And that, I assumed, was that.
4. But my ruling had clearly struck a political nerve, and a media storm ensued. Michael Howard, who was Home Secretary at the time, was interviewed by John Humphreys the following day on Radio 4's *Today* programme. He

¹ *R v Home Secretary, ex parte Norney* [1996] COD 81.

criticised my judgment in no uncertain terms. But most striking was his comment about my record as a High Court judge. He said this:

... we'll have to see what the outcome is if indeed we do appeal. The last time this particular judge found against me ... the Court of Appeal unanimously decided that he was wrong. So we'll have to see what happens if we do appeal. These things are quite difficult to predict ...

5. The tone of Michael Howard's attack was probably unremarkable to regular listeners of the *Today* programme. After all, animated political debate on the radio is commonplace. But for lawyers and judges who are accustomed, to borrow the words of former New South Wales Chief Justice Gleeson, to "deciding [cases] in the peaceful and calm atmosphere of court, not under surroundings of ... infuriated party politics",² this was a shock.
6. In the event, there was no appeal and my record therefore escaped further scrutiny on this occasion (!).³ When interviewed some time later by Joshua Rozenberg, the Home Secretary appeared to step back from his personal criticism of me. He insisted that his comments had been intended to highlight the unpredictability of judicial review, rather than question my character or competence as a judge.⁴ However, an anonymous senior judge dismissed Mr

² Chief Justice Gleeson, *High Court Anniversary Speech at Banco Court, Supreme Court of Victoria* (6 October 2003) (citing Edmund Barton, first Prime Minister of Australia).

³ For a full account of the episode see Rozenberg, *Trial of Strength* (Richard Cohen 1997), pp.2-6.

⁴ Rozenberg, *Trial of Strength* (Richard Cohen 1997), pp.5-6.

Howard's interview as "dreadful", "outrageous" and "a complete breach of the conventions".⁵

7. It is this final criticism which leads me to the subject of this evening's lecture. I wish to deal with two questions. First, what conventions (if any) govern the criticism of judges? Secondly, when (if ever) may a judge respond to criticism? In an age of rapid technological development, changing media culture and constitutional evolution, I think that these questions deserve urgent attention. If there are conventions, they need to be justified and defended for the 21st Century, not just asserted or assumed.

What conventions govern the criticism of judges?

8. Conventions are difficult to pin down. A great deal of academic ink has been spilt on formulating a test to identify them. But a basic definition will suffice for present purposes. I will proceed on the basis that a convention has two core components: first, a degree of consensus between the relevant actors and secondly, a degree of convergence in their practices. There is a further complication in our country, in that several conventions go beyond custom and practice, and fill the interstices in our uncodified constitution. The convention that judges are not criticised at all is essentially a social convention. The convention that the Executive does not criticise judges is rooted in the separation of powers and the independence of the Judiciary. It is part and parcel of the convention that judges do not speak out extra-judicially against the legislation it is their constitutional role to interpret.

⁵ Rozenberg, *Trial of Strength* (Richard Cohen 1997), p.4.

9. Writing in 1966, Sir Louis Blom-Cooper claimed that there was indeed a convention that judges should not be criticised in public at all. He wrote:

Criticism of the judiciary over the last fifty years has been confined to conversations over the coffee cups and to the seclusion of private solicitors' offices and barristers' chambers ... The English have cloaked their judges with an immunity from public criticism ...⁶

10. On Sir Louis Blom-Cooper's thesis, a convention against publicly criticising judges had existed at least since the early 1900s.

11. I will argue that this convention in the wide sense defined by Sir Louis no longer exists, if it ever did. For quite some time now, judges have faced unprecedented scrutiny by politicians and the public, particularly in the media. Modern history is laced with examples of criticism from both quarters. The social conventions that used to regulate such conduct have, in my opinion, disappeared. A few examples of modern criticism, first from politicians and secondly from and in the media, will suffice to make my point.

i) Criticism by politicians

12. I begin with criticism from politicians.

13. My first example is the fierce criticism targeted at Collins J in 2003. The judge had handed down a decision about the provision of support to destitute asylum seekers.⁷ The judgment was an unappetising read for Ministers, who wished to restrict the circumstances in which asylum seekers could access state support.

⁶ Blom-Cooper, 'The Judiciary in an Era of Law Reform' (1966) 37 Political Quarterly 378.

⁷ *R (Q) v Secretary of State for the Home Department* [2003] EWHC 195 (Admin).

David Blunkett, the Home Secretary, articulated his disagreement in no uncertain terms. He told the *News of the World* that he was “personally fed up” with judges overturning decisions made by politicians. “It’s time”, he said, “for judges to learn their place”.⁸ Most disturbingly, there were allegations that the press had been briefed against Collins J by Whitehall.⁹

14. This was, perhaps, a sign of things to come. My second example took place in 2006. Judge John Griffith Williams was called upon to sentence a man who had been convicted of sexually assaulting a 3-year old girl. He handed down a life sentence with a 5-year minimum tariff. This was in accordance with the then applicable guidelines. Dr John Reid, the Home Secretary at the time, was quick to express his dissatisfaction. He said that the sentence was unduly lenient and implied that the Attorney General, who had the power to refer the sentence to the Court of Appeal, should think the same. A battery of further criticism followed. Alun Michael MP invited judges to “wake up and smell the coffee” because they “simply [weren’t] getting it”, and Vera Baird QC (a Junior Minister) told Radio 4 listeners that she thought the judge had “got the [sentencing] formula wrong”.¹⁰ Dr Reid’s comments drew sharp criticism from the Attorney General, Lord Goldsmith, who promised to make an independent decision on the merits of the case, “not in response to political or

⁸ *News of the World* (23 February 2003).

⁹ Bradley, ‘Judicial independence under attack’ [2003] PL 397, 400-401.

¹⁰ For a full account, see HL Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, 6th Report of Session 2006-07, paras 45-49.

public pressure”.¹¹ Ms Baird subsequently issued a public apology, but only after discussion with the Lord Chancellor, Lord Falconer.¹²

15. My third example concerns criticism that was delivered by a Prime Minister. In 2006, Sullivan J gave judgment in a case concerning six Afghani nationals who had hijacked a plane to escape the Taliban. Contrary to the ruling of a panel of immigration adjudicators, the Secretary of State refused to allow the men to remain in the UK. Sullivan J held that the Secretary of State’s decision was an abuse of power and violated Article 8 of the European Convention on Human Rights.¹³ Tony Blair was not of the same opinion. He saw an opportunity to turn the rhetoric of the judge’s decision around when he said that “it’s an abuse of common sense frankly to be in a position where we can’t [deport these men]”.¹⁴ The Court of Appeal disagreed. It dismissed the Home Secretary’s appeal against the ruling and commended Sullivan J’s “impeccable judgment” at first instance.¹⁵

16. My final example is from 2012. It is striking because, like my personal anecdote from 1995, it involved a measure of *personal* criticism aimed at a judge. In January 2012 Peter Hain MP, who had previously served as Secretary of State for Northern Ireland, published an autobiography.¹⁶ As one might expect of publications of this kind, it did not pull its punches. Girvan J,

¹¹ *The Guardian* (14 June 2006).

¹² *BBC News* (19 June 2006). Available at: http://news.bbc.co.uk/1/hi/uk_politics/5096266.stm

¹³ *R (S) v Secretary of State for the Home Department* [2006] EWHC 1111.

¹⁴ *BBC News* (10 May 2006), available at: <http://news.bbc.co.uk/1/hi/uk/4757523.stm>

¹⁵ *R (S) v Secretary of State for the Home Department* [2006] EWCA Civ 1157, para 50.

¹⁶ Peter Hain, *Outside In* (Biteback 2012).

who was at the time a High Court judge in Northern Ireland, was described as “high-handed”, “idiosyncratic” and “off his rocker”.

17. Prime Minister David Cameron supported Mr Hain’s right to express himself in these terms. In the House of Commons he said this:

... there are occasions, as we all know, when judges make critical remarks about politicians; and there are occasions when politicians make critical remarks about judges. To me, that is part of life in a modern democracy ... ¹⁷

18. But Mr Hain was prosecuted for scandalising the court (about which more later), and the prosecution was only withdrawn after he issued a full apology. Girvan J was subsequently appointed as a Lord Justice of Appeal in Northern Ireland.

19. What observations can we make on the basis of examples such as these? I suggest there are five, some of which are more profound than others. First, the source of criticism is more likely than not to be the Home Secretary. That is undoubtedly because Home Secretaries are regularly on the receiving end of judicial review challenges, and their decisions tend to engage contentious issues of public policy. Tension is therefore inevitable.

20. Secondly, the subject-matter of the vast majority of criticisms is the Human Rights Act 1998 and the European Convention on Human Rights.

¹⁷ Hansard HC 18/04/12 Col.317.

21. Thirdly, most if not all of the criticisms have been prompted by rulings which uphold the interests of individuals over those of the government. It would appear that Lord Irvine's invective against the government "cheer[ing] the judges when a win is secured and boo[ing] them when a loss is suffered" still has mileage.

22. Fourthly, all but one of the recent criticisms has been directed at the judge's *decision*, rather than his personal abilities or motivations. And in the exceptional case, the critic apologised.

23. Fifthly, despite occasional lapses, the convention remains that while Cabinet Ministers may disagree with a judgment, it is still off-limits for them to criticise the motives or probity of the judge who made the decision. The point is neatly illustrated by a news report in the Sun on Sunday [13 July 2014] of a ruling by Judge Bernard Dawson sitting in the Upper Tribunal of the Immigration and Asylum Chamber, that a drug dealer could not be deported to his native United States on his release from prison, because he would not be able to receive treatment there for his diabetes and high blood pressure. The Home Office official statement said: "We are disappointed by the tribunal's decision and we have appealed against it". On the other hand, Philip Davies MP felt no such constitutional constraint, and told the newspaper: "This is a perverse decision which highlights the idiocy of the judges who determine these cases."

24. I am not alone in reaching this fifth conclusion. In its 2007 Report on relations between Parliament, the executive and the judiciary, the House of Lords Select Committee on the Constitution concluded that there was "widespread

agreement” on the limits of what ministers should and should not say.¹⁸ “It is acceptable”, according to the Report, “for Ministers to comment on individual cases”.¹⁹ What remains unacceptable, however, is an express or implied statement that there is something wrong with the judge who reached the decision.²⁰ This appears to be all that is left of the convention.

25. Before I leave my domestic examples I pause to note, with some relief, that ministerial criticism is not reserved for judges in this jurisdiction. For example, in late 2010 Prime Minister David Cameron told the House of Commons that the ruling of seventeen Strasbourg judges against our blanket ban on prisoner voting made him feel “physically ill”.²¹

26. Further, Justice Kirby, then Justice of the Australian High Court, has observed that incidents of political criticism against British judges “seem positively genteel by comparison to those which have engaged the Australian judiciary” (!).²² A notable example is the criticism prompted by a case in 1996 about indigenous title to land.²³ The Premier of Western Australia dismissed the

¹⁸ HL Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, 6th Report of Session 2006-07, para 42.

¹⁹ *Ibid*, para 41.

²⁰ *Ibid*, citing with approval the oral evidence of Lord Falconer.

²¹ Hansard HC 03/11/10 Col.921, referring to *Hirst v United Kingdom (No.2)* (2006) 42 EHRR 41.

²² Kirby, ‘Attacks on Judges – A Universal Phenomenon’ (1998) 72 Australian Law Journal 599.

Available at: http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_mauui.htm

²³ *Wik Peoples v Queensland (“Pastoral Leases Case”)* [1996] HCA 40; (1996) 187 CLR 1.

High Court's decision on this subject as "rantings and ravings",²⁴ whilst the Premier of Queensland dismissed some of the High Court judges as "dills about history".²⁵ More recently, Prime Minister Julia Gillard launched what was described as an "extraordinary" attack against Chief Justice Robert French.²⁶ The Chief Justice had quashed a controversial arrangement for returning asylum seekers to Malaysia.²⁷ The Prime Minister personally accused Chief Justice French of inconsistency between his High Court ruling and decisions that he had made earlier in his judicial career about government immigration policies.

ii) Criticism in the media

27. What, then, of the media? There is, of course, an important difference between media criticism and political criticism. The media and all the commentators who are given air time or space on television, radio and newspapers are not a limb of government or Parliament. Unlike the executive, they cannot be governed by "constitutional" conventions against criticising judges, although in my view they should comply with their own professional rules and conventions.

²⁴ Kirby, 'Attacks on Judges – A Universal Phenomenon' (1998) 72 Australian Law Journal 599.

Available at: [http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_maui.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_mauai.htm)

²⁵ Horrigan, *Adventures in Law and Justice: Exploring Big Legal Questions in Everyday Life* (UNSW Press 2003) p.208.

²⁶ *The Australian* (1 September 2011), available at: <http://www.theaustralian.com.au/national-affairs/dennis/story-fn59niix-1226127337399>

²⁷ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

28. There is nonetheless a close relationship between media criticism and political criticism of judges. A media uproar is liable to prompt political criticism of judges, and vice versa. Furthermore, and most importantly for present purposes, there has been a parallel decline of the convention against media criticism of judges. Let me illustrate this.

29. I begin with the last successful prosecution for the (now abolished) offence of scandalising the court. In 1900 the editor of the *Birmingham Daily Argus* published a scathing article about Darling J. He said this:

No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horsehair, a microcosm of conceit and empty-headedness.²⁸

30. These uncharitable criticisms were, according to later analyses, not entirely misplaced.²⁹ But they nonetheless attracted a criminal sanction of £100, and the editor was forced to issue a public apology.

31. Secondly, the *Spycatcher* episode. In 1986 the House of Lords ruled that an injunction should be granted against the publication of Peter Wright's *Spycatcher* book, which had already been published to a global audience outside our jurisdiction.³⁰ The *Daily Mirror* reacted to the ruling by publishing front-page photographs of Lords Brandon, Templeman and Ackner. The

²⁸ See (1900) 82 LT Reports 534.

²⁹ Pannick, *Judges* (OUP 1987) pp.111-112.

³⁰ *Attorney General v Guardian Newspapers (No.1)* [1987] 1 WLR 1248.

photographs were rotated upside down and the headline set out in capital letters read “YOU FOOLS!”.³¹ *The Mirror’s* criticism was to some extent vindicated when the House of Lords reversed its ruling several years later.³²

32. Thirdly, the wrongful conviction of the ‘Birmingham six’ in the late 1980s. This inevitably generated media hostility. Lord Chief Justice Lane, who had presided over the men’s unsuccessful appeal in 1988, became the target of acute criticism. *The Times* published an article about Lord Lane which deprecated the “narcissistic arrogance” of his “worthless certainty” about the correctness of the jury’s verdict.³³ It called for him to step down. Lord Donaldson, Master of the Rolls, later criticised the media response as a scapegoating exercise, but only after Lord Lane had retired.³⁴

33. My final example is the most recent and shows the link between media criticism and disapproval of judges in Westminster or Whitehall. The criticism concerned Collins J, who you will recall had attracted criticism from David Blunkett for his 2003 ruling on destitute asylum seekers. The Home Secretary’s broadside inevitably spilled over into the media, and *The Telegraph* carried this comment noting that:

One man’s rulings have thwarted all moves meant to stem the tide of refugees ... Whenever the Government has been on the wrong end of

³¹ See Law Commission Report No 335, para 70.

³² *Attorney General v Guardian Newspapers Ltd (No.2)* [1990] AC 109.

³³ *The Times* (18 March 1991).

³⁴ Shetreet and Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, CUP 2013), p.388.

an asylum ruling in recent years, Collins J has often been the villain of the piece ... This particular judge is considered a serial offender in Whitehall.³⁵

34. So, there you have four examples of media criticism. They all concern newspaper articles. But the contemporary picture is, of course, more complex. Thanks to the proliferation of online forums, criticism is no longer confined to established media outlets such as newspapers and television channels. Everybody is now a potential critic. It is therefore unsurprising that judges have been targeted by sharp criticism and outright abuse on the internet. As early as 1999 the Lord Chancellor's Office successfully requested an internet service provider to remove a website that was considered to be inappropriately offensive towards judges.³⁶

35. What observations, then, may be drawn from these examples of media criticism, and how does it differ from criticism by politicians? The first is that media criticism is framed in less inhibited language than political criticism. In response to *The Mirror's Spycatcher* headline in 1986, Sedley LJ observed that "not only deference but civility towards the bench has become unmodish".³⁷

36. Secondly, the boundary between personal and professional criticism is less well-respected in the media than by politicians. Even where the subject of

³⁵ *The Telegraph* (20 February 2003).

³⁶ Cram, *A Virtue Less Cloistered: Courts, Speech and Constitutions* (Hart 2002), p.209.

³⁷ Sedley, 'Foreword' in Cram (ed.), *Borrie and Lowe: The Law of Contempt* (4th edn, LexisNexis Butterworths: 2010).

criticism is an individual decision, the judge is unlikely to escape from a degree of character assassination. A good example is the vilification of Lord Lane after the release of the 'Birmingham six' in the early 1990s.

37. Thirdly, there is little evidence of a convention against criticising judges' decisions in the media. Quite the contrary. Media outlets are prepared to voice their opinions on judgments which they consider engage important public interests and favour and quote commentators or interest groups of their choice who do the same. Even if the views quoted are not explicitly endorsed by the newspaper itself, the commentators are often selected to promote and favour an agenda or world view supported by that newspaper and presumably most of its readers.

38. Fourthly, and in my opinion most significantly, the popular image of the judge as expressed through media criticism is in a state of flux. Potter J captured this process of transformation colourfully when he said extra-judicially:

... the High Court judge was, in the late 1980s, typically portrayed in some parts of the media as a port soaked reactionary, still secretly resentful of the abolition of the birch and hostile to liberal influences of any kind. The same judge is now, in the same parts of the media, an unashamedly progressive member of the chattering classes, spiritually if not actually resident in Islington or Hampstead, out of touch with

“ordinary people”, and diligently engaged in frustrating the intentions of Parliament with politically correct notions of human rights.³⁸

39. I agree with this observation. The tenor of much media criticism against judges has moved away from complaining that judges have *too much* sympathy for the interests of government and the Establishment, towards judges being *too disruptive* of those interests. The contrast between the *Daily Mirror's* reaction to the *Spycatcher* decision in the late 1980s and the *Daily Telegraph's* reaction to Collins J's ruling on destitute asylum seekers in 2003 illustrates this point neatly. If the judges are to come to terms with media criticism, this is a point that must be grasped.

40. Before I move on, I pause again to note that we must maintain a sense of proportion. Much of the criticism administered in the media in this country is positively inhibited compared to the criticism levelled against our Australian counterparts. Justice Kirby, for example, has recorded examples of judges being described as “bogus”, “pusillanimous”, “evasive”, “feral”, “pathetic” and “self-appointed Kings and Queens”.

Explanations

41. How, then, can we explain this decline of the social convention against criticising judges? As Chief Justice McLachlin of the Canadian Supreme

³⁸ Shetreet and Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, CUP 2013), p.388.

Court said, “[t]his is not the world we judges thought we knew, comfortable and secure. What, we are driven to ask, is happening?”³⁹

42. Let me begin by saying where I think the explanation does not lie. It is true that the offence of scandalising the court was abolished last year. That offence criminalised “[a]ny act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority”.⁴⁰ The potential chilling effect of this offence was clear. But in my judgment the proliferation of criticism against judges cannot be attributed to this change in the law for two reasons. First, and most obviously, the offence was only abolished last year and all of my examples of criticism predate that event. Secondly, the last successful prosecution of scandalising the court was in 1931,⁴¹ and the chilling effect of the offence has therefore been minimal in recent years.

43. In my opinion, the true explanation lies elsewhere.

44. There has been a change in popular culture. Deference towards people who occupy positions of authority has “become more unfashionable [since] the 1980s”.⁴² As Munby LJ observed in a case about a litigant who had conducted protests outside the doors of a court:

Society has in large part lost its previous habit of deferential respect.

Much of what might well, even in the comparatively recent past, have

³⁹ McLachlin, ‘The role of judges in Commonwealth society’ (1994) 110 LQR 260, 261.

⁴⁰ *R v Gray* [1900] 2 QB 36, 40.

⁴¹ *R v Colsey*, *The Times* 9 May 1931.

⁴² Shetreet and Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, CUP 2013), p.387.

been considered by the judges to be scurrilous abuse of themselves or their brethren has today, as it seems to me, to be recognised as amounting to no more than acceptable if trenchant criticism.⁴³

45. I think, however, that Lord Taylor of Gosforth (former Lord Chief Justice) took this social explanation too far when he argued that:

As personal and political expectations have risen, people have become more determined to realise them. If things do not go their way, they are not prepared, as our forbears often were, to accept disappointment philosophically.⁴⁴

46. In my opinion, this unfairly trivialises the genuine opinions that are expressed by politicians and in the media about judges' decisions. Taken to extremes, it would reduce every criticism of a judge to a crude expression of self-interest by the losing party. That is not, I think, what any growth in criticism of judges is about.

47. So, with that qualification, my first explanation is a change in popular culture. My second explanation is a closely related change in media culture. We are all aware, post-Leveson, of the pressures that face the modern media industry. In its 2012 Report, the Law Commission attributed an erosion of the convention against criticising judges to changes in journalistic practices.⁴⁵ The pressure to produce stories which sell newspapers has undoubtedly led to more aggressive reporting techniques, from which judges are not immune. In a recent speech,

⁴³ *Harris v Harris* [2001] 2 FLR 895, para 372.

⁴⁴ Lord Taylor, 'Justice in the Media Age' (1996) 24 *Arbitration* 258, 259.

⁴⁵ Law Commission Report No 335, para 70.

for example, Lord Judge LCJ highlighted the media practice of “door-stepping” judges and their family members, which has mercifully died down in recent years.⁴⁶ They cannot comment on decisions outside court, and the regulators’ guidelines recognise that fact.

48. But it would be wrong, I think, to attribute the decline of conventions against criticising judges purely to cultural changes. There is an important constitutional narrative here, too.

49. My third explanation is therefore the enactment by Parliament of the Human Rights Act 1998. Professor Shetreet and Dr Turenne make this point in their fascinating book about judicial independence. They argue that:

There is less criticism of the competence and integrity of the English judges [than previously] ... However, the advent of the Human Rights Act ... calls for judgments of a more ‘evaluative’ kind, prompting complaints that judges are striking down policies of the democratically elected.⁴⁷

50. Judges are now required to make difficult decisions as to the proportionality of the acts of public authorities and to conduct assessments about the fairness of policy decisions which affect the lives of large numbers of their fellow citizens. What is more, the policy decisions often raise issues which ordinary people (as well as politicians and the media) can understand and on which they

⁴⁶ Lord Judge LCJ, ‘The Judiciary and the Media’ (28 March 2011), available at: <http://www.bfhu.org/images/download/lcj-speech-judiciary-and-the-media.pdf>

⁴⁷ Shetreet and Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd edn, CUP 2013), p.388.

have opinions which they express freely. That is how it should be in a free democratic society.

51. Theresa May's speech to last year's Conservative Party Conference about Article 8 rights which cited Maya the cat and the case about the American diabetic I mentioned earlier, are two of many examples that support this thesis. Indeed, it is the enactment of the Human Rights Act that has, in my opinion, had the greatest influence on the re-definition of judges' popular image as anti-establishment, anti-democratic figures.

52. My fourth explanation is also related to the Human Rights Act. It is the growing currency of freedom of expression as a political and constitutional value in this country. Although the Strasbourg authorities have equivocated about whether Article 10 protects writers who criticise judges,⁴⁸ there can be no doubt that politicians and the media have been emboldened in their criticism by the principles of transparency and accountability that have swept across our governmental landscape. As Lord Pannick observes, "Judges, like other public servants, must be open to criticism because in this context, as in others, freedom of expression helps to expose error and injustice and it promotes debate on issues of public importance".⁴⁹

How should judges respond?

53. How, then, should judges respond to criticism from politicians and from others in the media or elsewhere?

⁴⁸ See McBride, 'Judges, politicians and limits to critical comment' (1998) 23 EL Rev (Supp) 76, 82-85

⁴⁹ Pannick, "'We do not fear criticism; nor do we resent it': abolition of the offence of scandalising the judiciary [2014] PL 5, 9.

i) *'No well-tuned cymbal' – the traditional policy of silence*

54. In 1995 I chose not to respond to the criticisms levelled against me on the *Today* programme. That was consistent with the policy of judicial silence that prevailed at the time. In 1625 Sir Francis Bacon, then Lord Chancellor, wrote in an essay that “an overspeaking judge is no well-tuned cymbal”.⁵⁰ That opinion has prevailed for more than three centuries.

55. It found currency, for example, in what Lord Kilmuir said in 1955: “so long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable”.⁵¹ Indeed, Chief Justice McLachlin built this quality into her popular stereotype of a judge who “decides only what is necessary, says only what is necessary, and on no account ever talks to the press”.⁵²

56. But this proclivity to remain absolutely silent began to be broken down in the 1980s under Lord Mackay, Lord Chancellor, and Lord Taylor as Lord Chief Justice. In my view, this was a welcome development. Unchecked public criticism of judges undermines confidence in the judiciary. This, in turn, has deleterious consequences for the administration of justice. As Lord Judge CJ said in a recent lecture about judges and the media:

⁵⁰ Spedding, Ellis and Heath (eds.), *Works of Francis Bacon*, vol. VI (Hurd and Houghton: 1861) p.3.

⁵¹ See Bradley, ‘Judges and the Media – The Kilmuir Rules’ [1986] PL 383, 385.

⁵² McLachlin, ‘The role of judges in modern Commonwealth society’ (1994) 110 LQR 260, 260.

... it does matter to the welfare of the community, and the preservation of the independence of the judiciary, that the confidence of the community in its judiciary should not be undermined.⁵³

57. Inaccuracies and misunderstandings are particularly conducive to undermining confidence

ii) The alternatives to silence – three parameters

58. But this does not mean we should open the floodgates to uninhibited dialogue between judges and critics. I think Lord Hope struck the right balance when he said in a recent lecture at Birmingham University that:

There will, no doubt, be times when it is best to keep silent. But reticence, not absolute silence, is what the judicial office requires.⁵⁴

59. It is therefore necessary to set some parameters within which judges may respond to criticism without doing violence to the nature of their office. In my view, there are three important limitations.

60. The first is impartiality. Responses to criticism pose a threat to judicial independence on two fronts. A response may give the appearance of the judge stepping into the political arena. In turn, this may raise doubts about the judge's ability to make objective judgements about the relevant legal issue. If

⁵³ Judge LCJ, 'The Judiciary and the Media' (28 March 2011). Available at:

<http://www.bfhu.org/images/download/lcj-speech-judiciary-and-the-media.pdf>

⁵⁴ Lord Hope of Craighead, 'What happens when the Judge speaks out?' (19 February 2010), p.11.

Available at: <http://www.birmingham.ac.uk/Documents/college-artslaw/law/holdsworth-address/holdsworth09-10-hope.pdf>

judges comment on cases outside court, they undermine the integrity of what they (or their colleagues) have said in court. The spectre of a press conference on the steps of the court to explain and justify a long or short sentence handed down from the bench is inconceivable, but would be the logical extension of any comment beyond re-stating what has been said in open court already. As Lord Woolf observed, a cosy relationship with the politicians or the press is equally liable to prompt suspicions of dependence upon the media, and therefore partiality.⁵⁵

61. The second parameter is professionalism. A judge must not respond to critics in a way which imperils his own professionalism or that of his or her fellow judges. Indeed, conduct which is inconsistent with the “dignity of the judicial office” is prohibited by the Lord Chief Justice’s *Guide to Judicial Conduct*.⁵⁶

62. The third parameter is tolerance. As the Guide to Judicial Conduct says: “As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen”.⁵⁷ Sachs J once made a related point in the South Africa Constitutional Court when he observed that:

⁵⁵ Lord Woolf, ‘Should the media and the judiciary be on speaking terms?’ (2003) 38 Irish Jurist 25, 30.

⁵⁶ *Guide to Judicial Conduct* (2013), paragraphs 5.1(2) and (6). Available at: http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf

⁵⁷ *Ibid*, paragraph 5.1(2).

... as the ultimate guardians of free speech, the judiciary [should] show the greatest tolerance to criticism of its own functioning.⁵⁸

63. A judge must therefore be more tolerant of criticism than a member of the public. Every decision will produce winners and losers. It will upset some parties, and please others. That is simply the nature of the judicial office, and judges must be prepared to accept that.

iii) Responding to criticism – individual and institutional solutions

64. Judicial responses to criticism must therefore be acutely measured. They must comply with all three parameters. But what is the best solution?

65. There are, I think, two potential approaches. The first is to allow judges to respond personally. The second is to set up an institutional framework for responding to criticism. For reasons which I will set out, I favour the institutional solution.

66. Let us first consider the personal response. This would involve a judge striking back against criticism which has been levelled against him by a minister or a journalist. The response could take the form of a press release or, far more riskily, a media interview.

67. In my view, there are a number of hazards associated with personal responses. Understandably, unfair criticism is liable (in rare cases) to produce intemperate responses from judges. As Lord Pannick observes:

⁵⁸ *The State v Mamabolo* (2001) 3 SA 409 at paragraph 78.

Perhaps because cogent criticism of the judiciary is now so rare, its appearance causes disproportionate excitement and leads otherwise sensible people to act in irrational ways.⁵⁹

68. Such excitement must of course be avoided at all costs. It tarnishes the judge's appearance of impartiality. It also has the potential to imperil the professionalism of the judicial office as a whole.

69. But even well-measured personal responses are troublesome. They give the appearance of the judge being an active participant in a political conversation, rather than a neutral administrator of the law. A judicial response might invite a counter-response, and what then? As soon as the judge enters the arena of political discussion, the boundary between his personal politics and his status as an impartial administrator of justice begins to break down.

70. The institutional solution, which invites a collective response to criticism, avoids these problems. An institutional approach would nominate an individual or an organisation to respond on behalf of judges whose decisions have been targeted for criticism.

71. In this jurisdiction the Lord Chief Justice has been given the role under the 2005 Constitutional Reform Act as head of the Judiciary, of official mouthpiece for judges, in succession to the Lord Chancellor; and in parallel the Judiciary has its own (small) press office .

iv) The Press Office Solution

⁵⁹ Pannick, *Judges* (OUP 1987) p.121.

72. The Press Office solution was commended by Lord Woolf in 2003, when he said that:

We have been greatly helped by the Lord Chancellor's Press Office and, when the office of Lord Chancellor is abolished, I am sure the judiciary must have a Press Office of our own. Not, I emphasise, to spin, but to provide the media with the basic facts they need.⁶⁰

73. I am pleased that Lord Woolf's prediction came to pass under the Constitution Reform Act. The Judicial Press Office now carries out excellent work on behalf of judges up and down the country. .

74. I expect the Office's excellent support to continue.

75. The use of modern technology, such as the Judicial Office Twitter account, should be encouraged in this respect. It has already improved the Office's ability to pre-empt inaccurate reporting by distributing faster and greater quantities of accurate information (such as full transcripts of a judgment or a judge's sentencing remarks) ahead of the next news cycle.⁶¹ Fire-watching, not fire-fighting, must be the aim of the game. With the full remarks available, the news stories, the commentary and the follow ups are in the context of the full facts.

The Lord Chief Justice

76. The Lord Chief Justice is also well-placed to offer an institutional response to criticism. In 2009 Lord Hope said that primary responsibility for defending

⁶⁰ Lord Wolff, 'Should the media and the judiciary be on speaking terms?' (2003) 38 Irish Jurist 25, 33.

⁶¹ <https://twitter.com/JudiciaryUK>

judges against criticism should rest with the Lord Chief Justice.⁶² He regretted, however, that the Chief Justice's ability to discharge this function had been compromised by the disqualification of senior judges from sitting in the House of Lords.⁶³

77. I am more sanguine about that. Paragraph 6.40 of *The Cabinet Manual* confers on the Chief Justice the important right to "make written representations to Parliament on matters which he or she believes are of importance relating to the judiciary or the administration of justice". This reflects the power provided by section 5 of the Constitution Reform Act 2005. He and other judges give evidence to Select Committees, and he sends an annual written report to Parliament.

78. The Chief Justice also enjoys a valuable opportunity to respond to critics through the medium of an annual Press Conference. For example, earlier this month Lord Thomas CJ, whilst making clear he could not comment on any actual cases, expressed his support for the naming of defendants in secret terrorist trials; in November 2013 he responded to criticism about the over-zealous application of Article 8 in deportation cases; and in 2012 Lord Judge

⁶² Lord Hope of Craighead, 'What happens when the Judge speaks out?' (19 February 2010), p.13.

Available at: <http://www.birmingham.ac.uk/Documents/college-artslaw/law/holdsworth-address/holdsworth09-10-hope.pdf>

⁶³ Ibid.

commented on concerns about the length of the proceedings which preceded the deportation of Abu Hamza.⁶⁴

79. I hope that, if the noise of criticism from ministers and the press becomes louder, the Judicial Press Office and the Lord Chief Justice will continue to serve as important correctives to unfair comment and misinformation about judges.

Conclusions

80. To conclude, the convention against criticism of judges' *decisions* has been eroded, even if it remains in place, albeit sometimes precariously, for Government Ministers. Uncertain and testing conditions therefore lie ahead.

81. In my opinion, it is time for judges (if they have not already done so) to accept these changes that have been brought about by shifts in our culture, our constitution, and our technology. In my view it is right that judges' reasoned decisions should be open to public debate and scrutiny. Our courts are open and free, and the media perform a valuable job in our democracy of reporting the courts and the Justice System to the wider public. What I hope is that the debate should be reasoned and based on the evidence. And what is not fair or reasonable is to impugn the motives of judges, or ascribe them to prejudices.

82. Judges must expect criticism and, where appropriate, they must offer a robust response. This response should take the form of a well-organised, measured, institutional reply.

⁶⁴ <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/News+Release/lcj-press-conference-270912.pdf>

83. We must, however, maintain some perspective. Judges' primary responsibility is judging, not public relations. I therefore conclude with the ringing words of my predecessor Lord Denning, who had this to say about the criticism of judges:

We do not fear criticism, nor do we resent it ... Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires ... Silence is not an option when things are ill done.⁶⁵

84. Finally, I wish to express my gratitude to Mr Tom Pascoe, my former judicial assistant, for his considerable assistance in preparing this lecture.

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⁶⁵ *R v Commissioner of Police of the Metropolis, ex parte Blackburn (No 2)* [1968] 2 QB 150, 155.