



MASTER OF
THE ROLLS

LORD NEUBERGER OF ABBOTSBURY MR

WHERE ANGELS FEAR TO TREAD

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(1) Introduction¹

1. It is a great honour to preside over the Holdsworth Club this year and to deliver its annual lecture. It is not only that I am following in the footsteps of a star-studded cast, fitting as that notion is for the week of the Oscars ceremony. It is also that William Searle Holdsworth was a giant of English law; his seventeen volume *History of English Law*², a staggering achievement in cataloguing the Law's progress from Anglo-Saxon times to the twentieth century.
2. The law does not, of course, stand still. The changes which the English legal system has undergone over the last fifty years would have astonished Holdsworth. There are the home-grown developments in administrative law, which has blossomed out of all recognition since the 1960s, and there have been notable developments in the law of obligations, trust and land law. But even more striking is the European dimension. The wide-ranging consequences of the introduction of European Union law have been only gradually appreciated since we acceded to the Common Market, as it then was, in 1972. And then there is Human Rights law, which has had an enormous effect through the incorporation of the European Convention into English law. And, I think, EU and Human Rights law have also had an indirect effect on our thinking – leading, for instance, to a more principle-based, as opposed to precedent-based, approach by judges when it comes to deciding cases.
3. These developments will no doubt keep a future Holdsworth busy for quite some time. I imagine that one of the larger volumes in his future history will be the constitutional law volume. Scottish and Welsh Devolution, the 1999 reforms to the House of Lords, and the Constitutional Reform Act 2005 with its reform of the office of Lord Chancellor, and the creation of a UK Supreme Court, on their own would ensure any such volume would be a healthy size. These reforms were, I suggest, influenced by our European connections. Human rights led to, or at least encouraged, the 2005 Act, because of the view that a Government minister could not be a judge, and that no judge could sit in the legislature. The EU umbrella made it easier to contemplate devolution, even independence, for smaller parts of the UK.

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

² W. S. Holdsworth, *A History of English Law* (Vols. 1 to 17) (Methuen) (1932).

4. In considering what I might talk about today, it struck me that you might be interested in some aspects of those constitutional developments. In particular I thought I might focus on what Keith Mason, a former President of the Court of Appeal of New South Wales, described as '*the right of every judge to contribute to public debate.*³' In doing so I intend to heed the warning, picked up by E M Forster as a title for one of his novels, given by Alexander Pope in his *Essay on Criticism*, that '*fools rush in where angels fear to tread*'. Pope immediately went on to say,

*'Distrustful sense with modest caution speaks,
It still looks home, and short excursions makes;
But rattling nonsense in full volleys breaks,
And, never shocked, and never turned aside.
Bursts out, resistless, with a thundering tide,'*

I shall do my best to avoid any thundering tide, but, as Pope also reminded us, hope, of course, springs eternal⁴.

5. Is Mason correct in talking about a judge's right to contribute to public debate? If he is right, to what extent can a judge properly make such a contribution? In examining these questions, I shall start with the Kilmuir Rules, named after Lord Kilmuir, Lord Chancellor from 1954 to 1962, the former David Maxwell Fyfe QC, and previously Attorney-General and Nuremberg prosecutor. He was not perhaps the most popular of men, at least judging from the famous contemporaneous couplet about him,

*'The nearest thing to death in life
Is David Patrick Maxwell Fyfe.'*⁵

(2) The Kilmuir Rules – A time to keep silent

6. In July 1955 Lord Kilmuir was approached by the then Director-General of the BBC, Sir Ian Jacob, who asked for assistance in respect of a lecture which the BBC was considering broadcasting about famous judges of the past. The Director-General asked if the BBC could interview a number of senior judges for the programme.
7. Lord Kilmuir consulted the Lord Chief Justice, the Master of the Rolls and the President of, what was then the Probate, Divorce and Admiralty Division. After considerable thought, Lord Kilmuir, with as he put it, 'the united approval' of the three Heads of Division, sent the following reply to Sir Ian Jacob,

'It is, I think, agreed that there are positive advantages to the public when serious and important topics are dealt with through the medium of broadcasting by the highest authorities. We are likely, for example, to get a better assessment of the qualities of some eminent Judge of the past through an existing member of the Judiciary than from anyone else.

But the overriding consideration, in the opinion of myself and of my colleagues, is the importance of keeping the Judiciary in this country insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the course of the actual

³ Mason, *Should Judges Speak Out*, (JCA Colloquium, Uluru, 9 April 2001) (http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_mason_090401) (Bold in original text).

⁴ Pope, *Essay on Man*.

⁵ Anon

*performance of his judicial duties, must necessarily bring him within the focus of criticism. It would, moreover, be inappropriate for the Judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment . . .*⁶

8. I interrupt my citation of Lord Kilmuir's reply to Sir Ian to remark that I can only imagine the horror with which Lord Kilmuir, Lord Goddard CJ, Lord Evershed MR and Lord Merriman P, would have viewed several members of the Supreme Court discussing their role, approach to work, home life and recreations on television⁷. As for their reaction to my colleague, Lord Justice Stanley Burnton, appearing as an amateur food critic on last week's episode of *Masterchef*⁸, the mind boggles. If giving grave and weighty views on Lord Mansfield, Chief Justice Holt and Chief Justice Coke was beyond the pale, it does not bear thinking about what Lord Kilmuir would have regarded the most senior judges discussing who peels the potatoes at home, how they shop at Tesco's, whether they cycle to work, or how they write their judgments, let alone senior judges giving their views on mango and passion fruit cr me brulee.

9. Reverting to Lord Kilmuir's reply, he went on to say this,

' . . . My colleagues and I, therefore, are agreed that as a general rule it is undesirable for members of the Judiciary to broadcast on the wireless or appear on television. We recognise, however, that there may be occasions, for example charitable appeals, when no exception could be taken to a broadcast by a Judge. We consider that if Judges are approached by the broadcasting authorities with a request to take part in a broadcast on some special occasion, the Judge ought to consult the Lord Chancellor, who would always be ready to express his opinion on the particular request.

*The expression of views in the foregoing paragraph is subject to the important qualification that, as you are already aware, the Lord Chancellor has no sort of disciplinary jurisdiction over Her Majesty's Judges, each of whom, if asked to broadcast, would have to decide for himself whether he considered it compatible with his office to accept.*⁹

10. At least from the viewpoint of the early 21st century, I find it very difficult to see how a programme about the great judges of the past might have elicited a general rule of Trappist silence on the part of the current Judiciary. All the more so when it was said to be a rule which aimed to insulate the Judiciary from the '*controversies of the day.*' Perhaps Lord Kilmuir's real aim was to avoid the floodgates being opened. Once judges could appear on programmes broadcast for amusement, even if the aim was partly educational, where might it all end? No comment was the general rule for Lord Kilmuir, but, as with any general rule, it had a number of possible exceptions.

11. Mason suggests that one such exception was the ability of senior judges who happened to be members of the House of Lords to speak on matters of controversy, on policy questions arising from legislation before Parliament. As he noted, Lord Woolf while Master of the Rolls, '*opposed the provision in the Criminal Justice Bill 1997 for mandatory sentences.*¹⁰ Equally, it did not stop my other predecessor as Master of the Rolls, Lord Denning, speaking against the incorporation of the European Convention on

⁶ Letter from Lord Kilmuir to Sir Ian Jacob K.B.E. of 12 December 1955, reprinted in Barnett *Judges and the media – the Kilmuir Rules*, (1986) Public Law 383 at 384 – 385.

⁷ Channel 4

⁸ BBC 1 (22 February 2012).

⁹ Lord Kilmuir, *ibid.*

¹⁰ Mason, *ibid.*

Human Rights into English law when the then Bill of Rights Bill was before the House of Lords in 1976¹¹: as he put it, he hoped that the Convention, its words and extent, ‘*be not made part of our law of England.*’¹²

12. Attractive as it may be to see this as an exception to the Kilmuir Rules, I doubt that it was a genuine exception. One consequence of our historical approach to separation of powers was that individuals could sometimes belong to more than one branch of the State at the same time. Members of the legislature, i.e. MPs and Peers, could, and of course still do, form part of the executive: as Secretaries of State and Ministers, they effectively in charge of every Ministry. The Lord Chancellor was not simply head of the judiciary, but also a member of the legislature and of the executive. The House of Lords, through the Law Lords – or, more accurately, its Judicial Committee – exercised judicial authority as the *de facto* Supreme Court of the United Kingdom. The Law Lords were thus not only members of the legislature, but also the judiciary.
13. *Pace* the eighteenth century Baron de Montesquieu, who famously praised Great Britain for achieving separation of powers, I have to say that our system of government is and has always been based on pragmatism, not on principle, on organic practical development not detailed theoretical codes. Context therefore is and was all. In the 1806, for instance, fifty years after Montesquieu’s death the Lord Chief Justice, Lord Ellenborough, was actually a member of the Cabinet¹³, but that has never happened since then. For present purposes, the point is that, when acting as a member of another branch of the State, for instance as a member of the House of Lords, judges expressing their views would be doing so as a member of that other branch, not as members of the judiciary. As legislators, the Kilmuir Rules would have had no application to them.
14. Having said this, there were genuine exceptions to the Kilmuir Rules. The most obvious was the fact that judges could, and very often did give lectures and speeches, no doubt on interesting but safe subjects such as the rule in *Foss v Harbottle*¹⁴, or the principle in *Rylands v Fletcher*¹⁵. Thus, from 1955 to 1987, all bar a handful of Holdsworth lecturers were members of the senior judiciary¹⁶. No doubt when he gave the Holdsworth lecture the following year, Lord Kilmuir was mindful of the rules he laid down in 1955. More generally one would have expected that those lectures, and for that matter any other speeches or, indeed, any books or articles written by sitting judges¹⁷, steered clear of controversies. And almost always they did.
15. But in his 1974 Hamlyn lectures, *English Law – the New Dimension*¹⁸, Lord Scarman entered into a detailed discussion of the question whether English law should incorporate entrenched Human Rights protection. He drew this conclusion,

‘The legal system must now ensure that the law of the land will itself meet the exacting standards of human rights declared by international instruments, to which the United Kingdom is a party, as inviolable. This calls for entrenched or fundamental laws protected by a Bill of Rights—a

¹¹ Lord Denning, 369 H.L. Deb. 797 – 801 (March 25, 1976).

¹² Lord Denning, 369 H.L. Deb. 800 (March 25, 1976).

¹³ Interestingly defended by Lord Brougham (after he had ceased to be Lord Chancellor) in a speech in the House of Lords, HL Deb 07 July 1837 vol 38 cc1836-43

¹⁴ (1843) 2 Hare 461

¹⁵ (1868) LR 3 HL 330

¹⁶ <<http://www.birmingham.ac.uk/schools/law/alumni/presidents.aspx>>.

¹⁷ See, Mason *ibid*.

¹⁸ See, Sir Leslie Scarman, *English Law – A New Dimension*, (Stevens & Sons) (1974) <

http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/English_Law_the_New_Dimension.pdf> .

*constitutional law which it is the duty of the courts to protect even against the power of Parliament. In other words, there must be a constitutional restraint placed upon the legislative power which is designed to protect the individual citizen from instant legislation, conceived in fear or prejudice and enacted in breach of human rights.*¹⁹

16. In 1974, as today, questions such as the need for human rights protection and whether to incorporate the European Convention were hot topics, as the 1976 Bill of Rights I referred to earlier demonstrates. Lord Scarman, then a member of the Court of Appeal, did not simply enter into the policy debate: he offered his conclusion on how that debate should be resolved. Not wanting to stop with human rights, Lord Scarman entered more controversial waters; waters which remain controversial today, that is to say whether the courts could strike down legislation. In words which would echo in *obiter dicta* in the House of Lords decision of the first Hunting Act case²⁰, particularly those of Lord Steyn²¹, Lord Scarman said this,

*'Before the era of untrammelled legislative sovereignty imposed upon the modern law by Parliament's victory in the seventeenth century and made respectable by the theories of Bentham and Austin in the nineteenth, the common law judges felt able to sit in judgment upon a statute and our legislators did not shrink from enactments that were intended to play the part of entrenched provisions protecting the fundamental rights of the individual— Magna Carta, Habeas Corpus for instance. There is no reason why the common law should not accept a return to earlier attitudes: no reason why a curb should not be placed on Parliament herself when the issue is one of human rights.'*²²

Not just human rights incorporation, but also the court's ability to curb the power of Parliament. Perhaps this was one of those exceptions to the Kilmuir Rules, which arose as a consequence of the Lord Chancellor having, as he had put, no power to discipline.

17. Other exceptions to the Kilmuir Rules existed. I discount the fact that judges have often been called upon to chair Royal Commissions or Inquiries²³. These, like the example I mentioned earlier of speaking in Parliament, are instances where a judge dons a non-judicial hat. They were outside the ambit of the Kilmuir Rules. The most significant true exception was that of the ability of the senior judiciary to comment on matters which affect the proper administration of justice; that is to say on matters which impinge on the judicial branch of the State; on the court's ability to fulfil, as Lord Diplock put it, its constitutional function of doing justice²⁴.

18. In November 1987, the Kilmuir Rules passed into history, when Lord Mackay LC set them aside. As he explained in his 1993 Hamlyn lectures, he took the view that the Kilmuir Rules were inconsistent with the principle of judicial independence. He concluded that,

¹⁹ Scarman, *ibid* at 19 – 20.

²⁰ *R (Jackson) v A-G* [2006] 1 A.C. 262

²¹ [2006] 1 A.C. 262, paras 101-2

²² Scarman, *ibid* at 20 – 21.

²³ See, for instance, J. Beatson, *Judicial Independence and Accountability: Pressures and Opportunities*, (2008),

< <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/beatsonj040608.pdf> >

²⁴ *Bremer Vulkan Schiffbau v South India Shipping* [1981] AC 909

‘ . . . those who have been given Her Majesty’s Commission for the discharge of judicial office should have the judgment to decide such matters for themselves.’²⁵

From then on, it was a matter for individual judges to decide whether and how they might take part in public discussions. It may therefore be said that from 1987 judges had, in Mason’s terms, a clear right to enter into public discussion: a right which as Lord Mackay said, and as even Lord Kilmuir had ultimately acknowledged, was a matter for them to decide how to exercise.

19. The irony underpinning the abolition of the Kilmuir Rules was that they were considered to be inconsistent with judicial independence, when the rationale behind their introduction was the belief that they were a necessary means of preserving judicial independence. Before turning to assess the world after Kilmuir, and now also after the 2005 Act, it is appropriate briefly to consider the nature of judicial independence, of which there are two aspects: individual and institutional independence.

(3) After Kilmuir – Judicial Independence

20. Individual independence refers to each judge’s ability to decide any particular case by applying the right law to the right facts. Judges must be independent of the parties, and must not be subject to any pressure or inducement from the parties. They must have no interest in the outcome and must be open-minded and impartial in their approach to the issues. A speech on a subject which may become the subject of judicial determination, and in which the judge’s views on the subject are expressed in a particularly uncompromising or trenchant way, could be seen as compromising this aspect of judicial independence. That is because it could be said that, if the issue on which they had spoken came up in litigation, they could not approach it with an open mind. Entering into the controversies of the day can result in a judge being unable to determine those controversies judicially.
21. A famous example of this comes from the United States. Supreme Court Associate Justice Scalia is a judge whose lectures are without doubt a must see. As one commentator put it, *‘Scalia is the most likely to offer the jurisprudential equivalent of smashing a guitar on stage.’²⁶* No doubt whilst engaging in a moment or two of intellectual pyrotechnics Justice Scalia *‘criticized a federal court of appeals ruling that [the] inclusion of [the words] “under God” in the Pledge of Allegiance violated the First Amendment. . . . Nine months later, when the Supreme Court voted to review that ruling . . . , Scalia acceded to the plaintiff’s request that he recuse himself from the case.’²⁷* A judge should always tread carefully when considering in an extra-judicial capacity the decisions of lower courts. You simply cannot know if or when you will be called upon to determine the very issue. You can consider the issue, express tentative views or preliminary views, but to quote Sir Humphrey Appleby, it is a brave judge who criticises a decision they may possibly have to consider judicially.
22. And it is action as well as words which can compromise a judge’s independence. So when the Hunting Bill was voted on in the House of Lords in 2003, two Law Lords, Lord Hoffmann and Lord Scott, voted against it (and indeed Lord Scott actually made his maiden speech in 2001 against an earlier Hunting Bill), as they were entitled to do before

²⁵ Lord Mackay, *The Administration of Justice*, (Stevens & Co) (1993) at 25 – 26 <

http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/The_Administration_of_Justice.pdf>.

²⁶ Talbot (2005) cited in L. Baum, *Judges and their audiences*, (Princeton) (2008) at 37.

²⁷ Salmon (2003) and Lane (2003) cited in L. Baum, *ibid.* at 2.

the 2005 Act excluded all judicial office-holders from the chamber. Having voted against the Bill, they were precluded from taking part in the important subsequent cases considering the validity of the resulting Act and its compatibility with the European Convention.²⁸

23. (Parenthetically, I should express some doubts about this principle of recusal or perceived bias, generally accepted though it is. If Lord Hoffmann and Lord Scott had not voted on the Foxhunting Bill, or if Justice Scalia had not expressed his opinion on the Pledge of Allegiance, presumably they would have been entitled to hear the appeals in question. But, if anything, it could be said that that would have been more pernicious than their hearing the appeals after expressing their views. If they had kept quiet or not voted, their views, or prejudices, would have been no different but they would have been secret. There is, therefore obvious force in the argument that the presently accepted approach discourages transparency and encourages hypocrisy, or, to put the point another way, the present system seems to value justice being seen to be done above justice actually being done.)
24. But whether that is right or wrong, it does not detract from the fundamental importance of individual independence. Institutional independence goes wider than individual independence. It refers to the constitutional principle that the judiciary is independent of the other two branches of the State. It is the constitutional principle that the judiciary cannot properly be influenced by the executive, or the legislature, in carrying out the judicial function. Influence, whether overt or covert undermines the judiciary's ability to decide cases on their merits. Justice under the influence is no justice at all. It is inimical to the rule of law and our democratic system.
25. Institutional independence can be compromised in a number of ways. It can be compromised through improper access to the judiciary by the executive in respect of individual cases; a point now reflected in the statutory prohibition in such access through section 3(5) of the Constitutional Reform Act 2005. It can be compromised through the judiciary being drawn into discussions with the executive and legislature, which, for instance, call on the judiciary to offer legal advice, to comment on the lawfulness or constitutionality of policy or proposed legislation.
26. An example can again be drawn from the United States. From 1933 to 1945 Frances Perkins was US Secretary of Labour, and responsible for what would become the basis of the US social security system: the Social Security Act 1935. Its passage through Congress was evidently not an easy ride. Congress wasn't the only potential problem. There was, it would seem, a fear that the US Supreme Court might strike down the legislation. Secretary Perkins found herself in conversation at what is described as a '*social occasion*' with the then Supreme Court Associate Justice, later Chief Justice, Harlan Stone. Secretary Perkins, jokingly, complained that '*she was unsure how to design a social security system that the Court would accept.*' Justice Stone's response was not it seems to laugh at the jocular comment, but rather to treat it seriously. His answer: he '*advised her that "the taxing power is sufficient for everything you want and need."*²⁹ Under cover of a social, jocular comment, the executive asked for legal advice and a judge gave it. In doing so, Justice Stone could be said to not only have compromised his individual independence – there was no way he could not properly have determined the issue judicially – but equally he compromised the institutional independence of the judiciary.
27. A similar point arose here when the Home Secretary, Charles Clarke MP, raised with the House of Lords' Select Committee on the Constitution the possibility that the Law Lords

²⁸ R (*Jackson*) v A-G [2006] 1 AC 262 and R (*Countryside Alliance*) v A-G [2008] 1 AC 719.

²⁹ Perkins (1946) cited in L. Baum, *ibid.* at 83 – 84.

might in future meet members of the executive to discuss potential legislation, not least so that the Executive would have some guidance from the Judiciary as to how the highest courts would view the legality of proposed legislation relating to control orders and the like; that is to say the compatibility of such legislation with the European Convention on Human Rights³⁰. Unlike in the Perkins-Stone meeting in the US, the suggested meetings were no doubt not meant to be '*social occasions*', but private occasions. So they would not have come within the ambit of the defunct Kilmuir Rules. That being said, the same principle was engaged: the need to ensure that the Judiciary did not enter into the controversies of the day in order to ensure that judicial independence was not undermined. This was made all the more patent because the controversy was the subject of proposed legislation the nature of which would more than likely end up being judicially scrutinised by the then Law Lords.

28. Lord Phillips CJ, whilst sympathising with the Home Secretary, outlined how '*judges must be particularly careful not even to appear to be colluding with the executive when they are likely later to have to adjudicate on challenges of action taken by the executive.*³¹ Entering into the controversies of the day by offering, or being perceived to offer, advice to the executive on how claims in which it might be involved would be determined was properly beyond the pale; a point made by the House of Lords' Constitution Committee when it concluded that the suggestion risked '*risks an unacceptable breach of the principle of judicial independence. It is essential that the Law Lords, as the court of last resort, should not even be perceived to have prejudged an issue as a result of communications with the executive.*³² How could a litigant in proceedings to which the Executive was a party not conclude that there was a perceived bias and lack of independence on the part of the Judiciary, where the issue at stake was one on which the senior Judiciary had advised the Executive?
29. The same point can also be made in respect in respect of the legislature. In the years since the 2005 Act there has been an increasing, and perhaps not entirely beneficial, tendency for members of the judiciary to be asked to give evidence to Parliamentary committees. In the main, the parameters in which the judiciary can assist such committees is well-understood. Judges cannot, for instance, comment on individual cases. They cannot comment on political matters or matters of public policy, but can rather comment on the practical consequences of certain policy choices. Most pertinently they cannot offer such committees legal advice, just as they cannot provide the executive with legal advice.
30. Ironically, there is at least arguably a long-established statutory mechanism through which the Executive can obtain advice of the nature which the Home Secretary suggested without, arguably, calling into question judicial independence. Section 4 of the Judicial Committee Act 1833 is still in force, and it provides that,

*'His Majesty may refer any other Matters to Committee. It shall be lawful for His Majesty to refer to the said Judicial Committee for hearing or consideration any such other matters whatsoever as His Majesty shall think fit; and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid.'*³³

³⁰ See C. Clarke, Select Committee on the Constitution (Examination of witnesses, 17 January 2007, Q122ff) <<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/7011702.htm>>

³¹ Lord Phillips, *The Role of the Judge* (26 February 2007) at cited at House of Lords, Select Committee on the Constitution, Sixth Report of Session 2006 – 2007 (HL 151) at [96] <<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>>.

³² House of Lords, Select Committee on the Constitution, Sixth Report of Session 2006 – 2007 (HL 151) at [97].

³³ <http://www.legislation.gov.uk/ukpga/Will4/3-4/41/section/4>

It is hardly surprising that it was not invoked by the Home Secretary; the section was, I think, last used in 1957 following a reference from the House of Commons. The question referred to the Judicial Committee, which was constituted of the Lord Chancellor, the Lord Chief Justice, and five Law Lords, was '*whether the House of Commons would be acting contrary to the Parliamentary Privilege Act, 1770, if it treated the issue of a writ against a Member of Parliament in respect of a speech or proceeding by him in Parliament as a breach of its privileges.*'³⁴ It was unquestionably appropriate to refer such a question to the judges, as it seems to me that there could have been no question of such an issue being justiciable in the courts, as it related to Parliament's powers in relation to an MP in connection with its privileges, a matter over which the courts could have no jurisdiction.

31. Section 4 however provides for an apparently unfettered discretion, and so it arguably contemplates a judicial advisory opinion on the legality of proposed legislation, or even as to how to frame legislation. Whether it does is perhaps a question for the Judicial Committee under a section 4 reference, but, if it does, could it properly be said that that would undermine the institutional independence of the judiciary? It is arguable that it would not, because judges sitting on the Committee would be fulfilling a constitutionally and statutorily prescribed function, not as judges but as Privy Counsellors – they would be donning a non-judicial hat. They would therefore, arguably, not call into question the institutional independence of the judiciary, although it might be difficult to square that with the principles which were invoked to justify the separation of powers in the 2005 Act. Perhaps the past has something to offer our constitutional future. If the 1833 Act validly can have such an effect, it would preclude any judge who sat on the Committee from later sitting in Court to determine any relevant legal challenge: that would be a matter of individual independence.
32. Having taken a short detour around the principle of judicial independence, I now turn back to consider the approach judges might take in the post-2005 Act world.

(4) Judicial Engagement after the Constitutional Reform Act 2005

33. The position we find ourselves in now is very different from that in which the Kilmuir Rules were both established and abolished. The fundamental difference is that since 2005 our unwritten Constitution has been on a more formal footing, particularly so far as judicial independence is concerned. In place of the judicial committee of the House of Lords, there is the Supreme Court, which is quite separate from the legislature. The Lord Chancellor is no longer head of the judiciary; that role now rests with the Lord Chief Justice. The Lord Chancellor remains however responsible for representing the judiciary to the executive, and the legislature³⁵, although the Lord Chief Justice does have a right to make representations to Parliament³⁶, a right which has not so far been exercised.
34. Judicial comment therefore takes place now not only in the absence of the Kilmuir Rules, but in an environment where judicial independence and the separation of powers is more obviously an aspect of our constitutional framework, and where the former means of judicial comment arising through established constitutional mechanisms where the judge could don a legislative hat are, for instance, no more. Thus, the 2005 reforms reduced the avenues by which the Judiciary could enter into public debate, so the remaining avenues are almost inevitably likely to be more travelled. Against this changed background to what extent can and should the judiciary contribute to public debate? To what extent can they do so without damaging judicial independence?

³⁴ *Re Parliamentary Privilege Act 1770* [1958] 1 WLR 151 <
<http://www.bailii.org/uk/cases/UKPC/1958/1.html>>

³⁵ Constitutional Reform Act 2005, s1 and s3.

³⁶ Constitutional Reform Act 2005, s5.

35. Judges should obviously be very cautious about publicly discussing the controversies of the day when speaking extra-judicially. Cautious not only in the choice of subject, but also in the manner in which their contributions to public debate are phrased. If they choose to be brave, to quote Sir Humphrey again, they should not be surprised to find themselves facing a robust response from the executive or the legislature – or indeed, from the fourth estate, the media. And it would be hard to retreat behind the shield of judicial independence and complain about the nature or tone of any responses.
36. But it goes much further than that. It is quite inappropriate for politicians publicly to criticise decisions of judges or, even worse, judges themselves in connection with the performance their judicial function. In court, judges often have to decide what the law is, including whether ministers and other members of the executive have complied with their legal duties. In doing so, judges are applying the law as they understand it, and that often involves seeing whether Parliament's will as expressed in legislation has been carried out. It is wrong in principle, undermining of the rule of law, and simply unfair on the judiciary for politicians to criticise the judges when they are carrying out their judicial function. Ministers can say they disagree or are disappointed by the decision; ministers can appeal the decision; ministers can put legislation before Parliament to override the decision. But they should not criticise. And the judge concerned should not answer back, so it is unfair; and if he or she does answer back, the consequence is unseemly and more undermining.
37. Mutual respect between the judges and the politicians is essential. But as the word 'mutual' emphasises, it is a two-way process: each must respect the other's turf and not trespass on it. If judges criticise government policy in speeches, their complaints when Ministers publicly criticise judges will inevitably ring rather hollow. A judge can scarcely complain about Ministers criticising him for the way he is doing his job if he criticises Ministers for the way they are doing their jobs. And if they slang each other off in public, members of the judiciary and members of the other two branches of government will undermine each other, and, inevitably, the constitution of which they are all a fundamental part, and on which democracy, the rule of law, and our whole society rests.
38. So, too, a judge must be careful about making brave out-of-court pronouncements on issues which he may later be called on to decide judicially. Such remarks may result in Scalia-like judicial recusal, because parties perceive the judge's individual independence to be compromised in respect of subsequent proceedings where the issues in question may arise. A series of trenchant comments on a subject, or wide range, of subjects may also tend to bring the institutional independence of the judiciary into question. It is no doubt a fine line, but care is needed to ensure that it is not traversed.
39. In saying this I am acutely aware of the fact that I may be said to have been guilty of having been too brave in some of my speeches. Last year, for instance, I discussed the nature of Parliamentary sovereignty and tended to reject the notion that the courts could strike down legislation, I also suggested that Parliamentary sovereignty was an established principle and that it wasn't something which the courts unilaterally to alter. In making these points, I entered into an area of constitutional, and academic, controversy and debate. It is a topic on which the court has not definitively ruled upon, because the UK courts have not had to consider the scope and ambit of what is described in section 1 of the 2005 Act as the '*existing constitutional principle of the rule of law.*' While expressing a view, I made it clear that my mind was not closed on the topic, taking a leaf out of the book of Lord Walker of Gestingthorpe, who when giving a lecture on the rule in *Hastings-Bass*³⁷ to King's College Law faculty in 2002³⁸.

³⁷ *Re Hastings-Bass* [1975] Ch 25

40. If a point on which a judge had expressed an opinion out of court was raised in a case, the court would have to consider it, and resolve it according to the arguments raised by the parties. My view on Parliamentary sovereignty remains as it was. But there are legal and constitutional arguments to the contrary, and if the issue comes before me, I shall decide it on the arguments. After all, it is by no means unknown for a judge to be called on in an appeal capacity to decide a point of law which he had decided in a court below. That happened to Lord Phillips in the House of Lords shortly after he went there, as senior Law Lord – and he decided that he had been wrong on a point which he had decided a couple of years earlier as Lord Chief Justice in the Court of Appeal³⁹. Indeed, it is not so long ago that Judges could sit on appeals for themselves. In that connection, one of my favourite cases is *Martindale v Falkner*⁴⁰, decided in 1846. At first instance, Maule J found for the plaintiff. On the defendant's appeal, Tindal CJ delivered a short judgment upholding Maule J. Cresswell and Erle JJ also gave short judgments upholding Maule J. The sole dissenter was Maule J who would have allowed the appeal on the ground that he had been wrong. His attitude shows the independent fearless – even, dare I say, brave - attitude one would hope for from a judge.
41. In the field of braveness, some might also place Lord Sumption's recent F.A. Mann lecture, entitled *Judicial Political Decision-Making: The Uncertain Boundary*⁴¹, in which he questioned the extent to which the judiciary over the past twenty years or so has seen fit to interfere with the decisions of the executive. Sir Stephen Sedley, who has recently retired from the Court of Appeal, recently published a detailed critique of that view in the London Review of Books. Controversy has certainly been engaged. One of the points Sir Stephen makes though is that Lord Sumption's lecture '*harms the standing of the judiciary and confidence in the law.*'⁴²
42. A difficulty with this point might be said to be that Lord Sumption was not a member of the judiciary when he gave the speech. His appointment to the Supreme Court had, however, been announced, but he had not yet taken the judicial oath. He was therefore, at least, arguably free to comment as he liked. On the other hand, would equity regard him as already a judge, on the basis of *Walsh v Lonsdale*⁴³, in the sense that he was between contract and completion? Sir Stephen, as a former judge, no doubt felt that he was free to comment as he liked. Yet, even that point is not quite so simple as it first appears: Sir Stephen sits as a part-time judge in the Court of Appeal – so is it one rule for full time Judges and a different rule for part time judges?
43. Another recent example worth mentioning is a speech delivered last November by Lady Hale. In her opening address to the Law Centres Federation Annual Conference, she described some aspects of the Government's proposed legal aid reforms as '*fundamentally misconceived*'⁴⁴, and went on to describe other aspects of it as a '*false economy*'⁴⁵. Such comments enter the territory of government policy, and, indeed, a particularly controversial aspect of policy. As such it might be said that, notwithstanding

³⁸ (2002) 13 King's College Law Journal 173

³⁹ See *R v G* [2010] 1 AC 43 overruling *R v K* [2008] QB 827

⁴⁰ (1846) 2CB 706

⁴¹ < http://www.legalweek.com/digital_assets/3704/MANNLECTURE_final.pdf >

⁴² S. Sedley, *Judicial Politics*, London Review of Books Vol 34. No. 4 (23 February 2012) 15 – 16.

⁴³ (1882) 21 Ch D 9

⁴⁴ B. Hale, Law Centres Federation Annual Conference Opening Address, (2011)

(http://www.supremecourt.gov.uk/docs/speech_111125.pdf) at 5

⁴⁵ B. Hale *ibid* at 3.

the caveat at the opening of her address, which was to the effect that it is not for judges to criticise government policy⁴⁶, such comment was inappropriate.

44. It seems to me though that, while it may have been brave, it was not impermissible for Baroness Hale to make the points she did. Judges can, I suggest, properly comment publicly on matters which go to the heart of the functioning of the judicial branch of the State. In some circumstances, it could be said to be their duty to do so. In the past, it would have been easier for them to do so whilst donning their legislative hats in the House of Lords, or via the Lord Chancellor. But those days are now gone. Public comment in respect of the proper administration of justice, an accepted exception to the Kilmuir Rules, is more important now that it was when those rules were in place. Like any important right it should, of course, be exercised with due care while fully accepting that by entering into the policy debate with government, government can properly answer back, and in such a debate it is always Parliament which has the final word – at least if the view expressed in my aforementioned talk is correct.

(5) The possible principles

45. So much for boldness and caution. What might the principles be?

46. First, it seems to me only proper that judges, with their wisdom and experience, should be free to comment extra-judicially on a wide range of issues. In doing so they play an educative role. In areas such as constitutional principles, the role and independence of the judiciary, the functioning of the legal system, and access to justice, and even important issues of law, this role cannot be underestimated.

47. Secondly, any comment should be made following careful consideration of the impact which it might have on both aspects of judicial independence. The Scalia situation should be avoided as should the Harlan Stone situation.

48. Thirdly, a judge should consider the effect on the judiciary generally of any view expressed. The judiciary's claim to institutional independence depends in part on its institutional reputation and standing. An individual judge may regard a particular statement as justified and be prepared to take any consequent criticism, but the effect on the judiciary generally may render it inappropriate to make the statement. It may be inevitable that judges may disagree on a policy or constitutional issue when sitting in court, and it may occasionally be inevitable out of court (e.g. when appearing before a Parliamentary committee). However, it would, I suggest, be unfortunate if it frequently occurred voluntarily. If such a disagreement does arise, it should be argued in an entirely seemly way, as I believe the Sumption-Sedley debate has been conducted.

49. The 2005 Act makes it clear that the Lord Chief Justice is head of the English and Welsh judiciary, and I would have thought that it would require very exceptional circumstances before a judge expressed views out of court on a policy or constitutional issue which is inconsistent with his position. Of course, this is normally a self-denying ordinance as, provided that they do not bring the judiciary into disrepute, judges are independent and free to express their views, as even Lord Kilmuir accepted.

50. Fourthly and more specifically, a judge should think carefully about how any statement about politically controversial issues, or matters of public policy, might affect, or be affected by, the separation of powers, and comity between the three branches of the

⁴⁶ B. Hale, *ibid* at 1, 'It is not the proper role of any judge to attack Government policy. If the Government of the day decides that the right solution to a massive budget deficit is massive cuts in public spending, that is a matter for them to decide and Her Majesty's loyal opposition to oppose if they see fit. The role of Her Majesty's loyal judges is to decide the resulting disputes according to law.'

State. May it be said, for instance, that the statement trespasses into forbidden territory, and, if so, can it be justified on the basis that it falls within the appropriate ambit of judicial speaking out? And, if it can, is it expressed in terms suitable for a judge entering the arena in a non-judicial capacity? The same considerations arise when members of the executive or legislature seek comments from serving Judges. Comity and the separation of powers may well call for reticence.

51. Fifthly, judges should think carefully of their audience, and the impact their comments might have upon it, and upon any wider audience, including the media. Might that impact, or potential impact, call into question their independence, their ability to carry out their fundamental role of doing justice according to law? Could it call into question judicial independence? In particular, if a judge is proposing to discuss a point which may subsequently come to court, care should normally be taken to make it clear that the judicial mind is not closed.
52. Sixthly, and in this I agree with Justice Mason, judges should not seek publicity for its own sake, or use their '*office as a springboard for causes (however worthy)*'.⁴⁷
53. Seventhly, there are rather a lot of judicial speeches being made at the moment. I wonder whether we are not devaluing the coinage, or letting the judicial mask slip. In the light of the fact that I may be characterised as a serial offender, perhaps the less I say about that point, the better.
54. In my view, the development of judicial comment on a wide range of legal and constitutional issues, through speeches, lectures and articles, carries with it more benefits than drawbacks, but it calls for much care, circumspection, rationing, and even self-denial, when it comes to considering whether to speak, what to say and how to say it. It also calls for an understanding by all concerned of the proper boundaries within which comment can properly be made. Those boundaries are now in much starker focus than they were previously, as a consequence of the 2005 Act.
55. One result of that Act has been to highlight both the nature and importance of the independence of the judiciary and the need for careful thought by all three branches of the State as to how that independence can be properly maintained. At their best, extra-judicial comments in speeches and lectures help to maintain that independence; at their worst they risk undermining it. That is why vigilance is needed.
56. Thank you.

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⁴⁷ Mason, *ibid.*