



SENIOR PRESIDING JUDGE
FOR ENGLAND AND WALES

The Judiciary: The Third Branch of the State

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(1) Introduction¹

1. It is a real pleasure to have been invited to speak here tonight. I do so conscious of the fact that the very first judge to hold the position I do at the moment, that of Senior Presiding Judge for England and Wales², was also the holder of a truly signal distinction: the Victoria Cross. That was Sir Tasker Watkins, to whom I shall return in a moment.
2. I should make one matter clear at the outset; although in what I say I am necessarily mindful of my position as a serving Judge, the views I express to you here are my own. The notion that the Judiciary has only one view on any topic, let alone a topic of this nature, is simply unreal.
3. There are many reasons for a dialogue between the Judiciary and the Armed Forces, very much including this institution which provides such enviable opportunities for study and reflection. To my mind, the Armed Forces and the Judiciary fulfil the two primary functions of a State: the Defence of the Realm and the provision of a justice system. If the State succumbs to its external enemies, all is lost. If a State does not uphold law and justice, no other rights can be enforced or entitlements enjoyed. Think even if only for a moment of those states where rights are precarious. We each therefore, in our separate ways, play a vital role. We have much in common; a strong professional ethos; values of self discipline; a preference for reality over posturing. There is additionally the need to

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

² Appointed in 1983 by Lord Lane CJ.

understand and address the reality that the reach of the law now extends into some areas, perhaps only decades ago the exclusive province of the Executive. There is also one critical difference. Whereas you are (if I may put it this way) the sharp end of the Executive, we are the third branch of the State, distinct from both the Legislature and Executive. I return to Sir Tasker Watkins.

4. Sir Tasker Watkins, who would ultimately become the deputy Chief Justice in 1988, was awarded the VC for his conduct in battle in Normandy shortly after the D-Day landings. As a young Lieutenant, and the only officer left in his company, he led his men across a booby-trapped cornfield whilst under heavy machine-gun fire. They then took two enemy gun posts and held off an enemy infantry counter-attack in which he and his men were outnumbered by almost two-to-one. He then led a bayonet charge which, as the London Gazette put it, 'resulted in the almost complete destruction of the enemy.'

5. His orders, if he had received them along with the rest of his battalion, were then to withdraw. He never received them. His company wireless had not survived the day's events. The rest of his battalion did however receive the order, and withdrew. Alone behind the lines, he had to lead a handful of men back in the hope of finding and rejoining his battalion. This meant passing through the enemy position at dusk with the light failing and then back through the mined cornfields. Whilst doing so he was challenged at close quarters by soldiers manning a gun post. He ordered his men to scatter, and then charged the post in the face of Bren gun fire. He single-handedly put the gun post out of action, and finally led his men back to the battalion headquarters. He, they, had had a busy day. The Gazette summed it up in the terms,

*'His superb gallantry and total disregard for his own safety during an extremely difficult period were responsible for saving the lives of his men, and had a decisive influence on the course of the battle.'*³

6. It can, I think, safely be said that Sir Tasker knew as well as anyone can the importance of defending democracy, the ideals it represents, and the principles it embodies. Like so

³ London Gazette, 31 October 1944.

many of his generation, he was willing to sacrifice all in their defence. Victory in that armed struggle was essential if they were to survive.

7. Victory at arms however was not enough. Effective defence of the realm was and is a necessary condition for the survival of any liberal democracy, and all that that entails. It has, however, to go hand in hand with something more: a strong and independent legal profession and judiciary. More importantly still, it has to be underpinned by a commitment by the State to the rule of law. These are the themes I wish to develop tonight, underlining the essential roles played by both the Judiciary and the Armed Forces.

(2) The rule of law

8. My starting point is the rule of law. It is unnecessary to take much time with definitions; one knows it when one sees it. A working definition will suffice, namely, that furnished by the late Lord Bingham in his excellent book, *The Rule of Law*:

“The core of the . . . principle is . . . that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”⁴

Interestingly, s.1 of the Constitutional Reform Act 2005 (“the CRA 2005”) acknowledges the rule of law as an existing constitutional principle.

9. It is easy to take this for granted. To understand its true value, it is necessary to stand back, to look at some of the things that I would not take the rule of law as meaning. Put another way: let us look at the Good, the Bad and the Ugly, so that we will be in a better position to appreciate the good.
10. First, the ugly. By this I mean formalism, devoid of content. The idea that the “Rule of Law” simply refers to rule by law. It is the idea that there are formal rules, which have to be complied with by the State and its citizens. The content of those rules is irrelevant.

⁴ T. Bingham, *The Rule of Law*, at 8.

It makes no difference if they are morally repugnant, as we would all now quite rightly hold laws legalising slavery or torture. I do not think that the mere adherence to formal rules regardless of content constitutes the rule of law in the sense we know and value it.

11. Next, the bad. To illustrate this let me take you back to Ancient Rome and two statements made by one its leading figures: Cicero. The first is his claim that the safety of the public is the highest law – ‘*Salus populi suprema lex esto*’⁵. The second is his claim that amidst the clash of arms law falls silent – ‘*Silent enim leges inter arma*’⁶. Why do they fall silent? Because in doing so they secure the safety of the public. Here the rule of law takes on an entirely more dangerous shape: it is tyranny’s justification. To serve the highest law anything becomes justifiable, even to the extent that general laws or, in those countries with written constitutions, constitutional provisions can be set aside. In this situation, there is little law and what there is exists in name only. Such claims, ancient or modern, are fraught with danger. They illuminate the wisdom underlying the proposition advanced by John Locke, English philosopher, ‘*where law ends tyranny begins*’. They also serve as a reminder that the most finely crafted constitutions are not, by themselves, reliable bulwarks against tyranny.

12. Contrast, the dissenting speech of Lord Atkin in *Liversidge v Anderson*⁷, heard by the House of Lords in the course of World War II. The issue was internment⁸ and the House of Lords held that a court of law cannot inquire as to whether the Secretary of State had reasonable grounds for “believing a person to be of hostile associations”. But in a remarkable and famous dissenting speech, given the charged and dark days of September 1941, Lord Atkin held that the Secretary of State had not been given a subjective and unconditional power of internment. Lord Atkin said this⁹:

⁵ M. T. Cicero, *The Laws in The Republic and The Laws*, (Oxford) (2008) (Rudd ed.) at 152.

⁶ M. T. Cicero, *Defence Speeches, Pro Milone: Asconius’ Account*, (Oxford World Classics) (2008) (Berry ed) at 169.

⁷ [1942] AC 206. A similar issue had arisen at the height of World War I: *R v Halliday*[1917] AC 260; for the strong dissenting speech of Lord Shaw of Dunfermline, see esp. at p.276.

⁸ Cf the position in the US, in the context of the internment of Japanese-Americans: see *Korematsu v United States*, 323 US 214 (1944), discussed in Noah Feldman, *Scorpions* (2010), esp., at chapters 25-26.

⁹ at pp. 244 – 245

"I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive..."

.....In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles I.

I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister. To recapitulate: The words have only one meaning. "

That passage, one surmises, introduced a touch of frost in relations between Lord Atkin and his colleagues, who were all of a different view. What followed could have done nothing for collegiality:

"I know of only one authority which might justify the suggested method of construction: 'When I use a word' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.'"

In this case from World War II, in the event national security prevailed on the true construction of the measures in question. But – and it is something of which this country can be proud – at a time of indisputable national emergency, the importance of the liberty of the subject was vigorously canvassed.¹⁰

¹⁰ See, Lord Bingham, "Mr. Perlzweig, Mr. Liversidge and Lord Atkin", in *The Business of Judging* (2000), at pp. 211-221.

13. This is an appropriate moment to return to the good and to John Locke. He argued that the only lawful form of government rests on the consent of the people. His ideas inspired the Founding Fathers of the United States. They also have a long standing resonance here, in this country, with our uncodified constitutional arrangements.
14. The essence of our unwritten constitutional settlement has since at least Magna Carta, a document which celebrates its eighth hundred anniversary next year, rested on the involvement of and consent of the citizen. A number of examples may be helpful.
15. The first is trial by jury, acknowledged and reaffirmed by the Magna Carta's assertion of the right to trial by your peers. I do not wish to make an extravagant claim. There are many manifestly respectable legal systems without jury trial. But the jury¹¹ has made a distinctive contribution to our system. Juries of course determine cases according to the evidence. For present purposes, however, the important point is this. Juries were and are drawn from the populace. They are not office-holders of the State. They can fairly be said to keep the State on trial during each criminal trial. Occasionally, through an acquittal, they deliver a healthy corrective to the powers that be.
16. My second example rests on the most famous of Magna Carta's chapters: chapter 29. It is as follows,

"No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice."

This chapter does a number of things. It is the guarantee of property rights, for instance. It is the guarantee of the right to fair trial; to due process; to equality before the law. It is also the means by which the sovereign is bound to act according to the law of the land, just as much as anyone else. No one is above the law. Nor can the law be set aside,

¹¹ Its substantial evolution as an institution over the centuries is neither here nor there for tonight's purposes.

denied or suspended. The foreshadowing of Parliamentary sovereignty can be seen here.

17. This may, of course, sound largely historical and theoretical. It should not be forgotten however that attempts to circumvent due process, both Parliamentary and then legal, lay behind both the English civil war and the Glorious Revolution¹² - “Glorious” because it was peaceful and which firmly established our modern constitutional settlement through what would be the 1688 Bill of Rights. One of the grounds on which it did so was that King James II had been in the habit of attempting to set aside the law, was in the habit of removing judges from office and had attempted to establish a new court. His successors William and Mary were offered the Crown on the basis that they would abide by the law. In other words it was government by consent of the governed. It was government according to law and the limits it imposed.

18. This takes me to my last point from Magna Carta. It, and for that matter the Bill of Rights 1688 and the Act of Settlement 1701, were not just documents. They were not simply paper constitutions. They were part of a constitutional settlement that society as a whole, if not all of society, accepted. Here perhaps is the real difference between the good, the bad and the ugly. From Magna Carta, both before and after, we can trace our commitment to it. It is one that we do not only consent to but it is one that as a society we give life to through our institutions of State, just as we hold them to it.

19. This raises the question though, how do we as a society hold our State institutions properly to account? The answer, or at least part of the answer, is through separation of powers, and the different roles we ascribe to those powers. It is to this I now turn.

(3) The judiciary – the third branch of the State

20. Lord Bingham’s working definition of the rule of law (*supra*) will be recollected. Within that definition, we can clearly see what is meant by separation of powers. Within it the three separate branches of the State are delineated.

¹² See, Bingham, *The Rule of Law (supra)*, at p.23.

21. First, we can discern the legislative branch: Parliament, which is responsible for publicly enacting law and is accountable to the electorate for doing so. Secondly, the executive branch: the government, which includes the civil service, the police, who provide security at home, and the armed forces, who provide security abroad. Without the various aspects of the executive branch the law cannot be properly implemented. Equally, only through acting within the law provided by Parliament and the common law, can the executive ensure that the rule of law is maintained. Finally, last but not least, the judicial branch: the judiciary and the courts and tribunals, through which the law is administered – through which all persons and authorities in the State are subject to the general law.

22. The three branches are functionally separate. Parliament does not, for instance, act in a judicial capacity, nor does the executive. James I once tried to do so, by sitting as a judge in court and deliver a judgment. Chief Justice Coke, in a decision that Sir Humphrey Appleby would no doubt have described as brave, held that this was impermissible: the sovereign power – in the land did not exercise the judicial power. As Coke CJ put it,

'The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some Court of Justice, according to the law and custom of England.

*The King may sit in the King's Bench, but the Court gives the judgment. No King after the conquest assumed to himself to give any judgment in any cause whatsoever which concerned the administration of justice, within the realm; but these causes were solely determined in the Courts of Justice.'*¹³

The King like anyone else was subject to the law and custom of the land, and as such had to leave justice in the hands of judges. The consequences of this judgment live with us today. It is unthinkable that a member of the cabinet might attempt to act as a judge in court. It is equally unthinkable that a minister would attempt to influence a judicial decision. Equally, the courts do not legislate, or provide advice to the Executive, except

¹³ *Prohibitions del Roy*, Mich. 5 Jacobi 1, 1607] EWHC KB J23, 77 ER 1342, 12 Co. Rep. 64

in some very limited circumstances, such as on the practical or technical consequences of proposed legislation. Advice on how the law might be applied or how legislation may be drafted to be, for instance, consistent with the European Convention on Human Rights (“ECHR”) is impermissible, as it would tend to undermine judicial independence. The courts may, of course, develop the common law, but they do so according to established principle. And they do so subject to Parliament’s power to enact statute to revise, alter, or abrogate the common law.

23. The three branches are also separated in other ways. In a large number of countries the executive and legislative branches are entirely distinct. Here the distinctions are more practical than theoretical but there remains a functional and constitutional distinction between the roles of legislature and executive.

24. We take a stricter approach to separation between the judicial and other branches. Judges are not permitted to stand for Parliament, a position they share with the armed forces, or enter into political debate.¹⁴ Judges are not now permitted to take a position in the executive. Lord Ellenborough, Chief Justice in the early 19th Century, may have briefly held a cabinet post, but he was the last judge to do so. Though the House of Lords in its judicial capacity was manifestly independent from both legislature and executive, since 2009 and the opening of the UK Supreme Court, Parliament through the Law Lords no longer acts in a judicial capacity, so dispelling even that wholly theoretical concern.

25. Interestingly the same separation exists between the armed forces and the political world. The Duke of Wellington stands out as the only “modern” exception, proving the rule - and even he was long-past his days of active military endeavour when he resigned his office of Commander-in-Chief in 1827 to take up office as Prime Minister the following year.¹⁵ The only other exception is, as we all know, Oliver Cromwell, military leader and then Lord Protector. But his experience was not entirely happy.

¹⁴ House of Commons Disqualification Act 1975, s1.

¹⁵ After World War II, it is perhaps a puzzle why Alanbrooke did not and, arguably, a source of relief that Montgomery’s sorties in this area were somewhat limited.

26. One crucial consequence of the structural and institutional separation of powers is that the branches can come into conflict with each other. This is, of course, a possibility that cannot exist where power is concentrated in a single set of hands. Courts, for instance, sometimes give judgments against the interests of the executive. Ministers lose cases before the Courts. Judicial review of executive or local government action sometimes requires such action to be quashed. Statutory provisions are declared to be incompatible with the ECHR under the Human Rights Act 1998. Nobody likes losing litigation. But that is the price we pay for our commitment to the rule of law. As Lord Bingham put it¹⁶:

“There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live”.

It is a price worth paying.

27. Judicial independence is safeguarded in a number of ways. First, appointments are essentially the preserve of the independent Judicial Appointments Commission (“JAC”); party politics play no part in judicial appointments and (realistically) have not done so at least since World War II. It was not ever thus. So, Salisbury, arguably a Prime Minister of great distinction, took the view that *“within certain limits of intelligence, honesty and knowledge of the law, one man would make as good a judge as another, and a Tory mentality was ipso facto more trustworthy than a Liberal one”*.¹⁷ Likewise, it is said of Lord Halsbury, Salisbury’s Lord Chancellor (responsible for many poor quality political appointments), that when naming his worst appointment, his companion retorted *“perhaps, but there are others whose claims ought not to be overlooked”*.¹⁸ Secondly, apart from age and health grounds, Judges of the High Court and above cannot be removed from office without an address passed by both Houses of Parliament. Thirdly, the oath taken by the Lord Chancellor, under s.17(1) of the CRA 2005 requires him to respect the rule of law and defend the independence of the Judiciary. Above all, fourthly, there is the force of history and tradition, already emphasised and which cannot be under-estimated. To reiterate, it would today be unthinkable for a Minister or

¹⁶ *The Rule of Law (supra)*, at p.65

¹⁷ Cited in Robert Stevens, *The English Judges: Their Role in the Changing Constitution* (2002), at pp.14-15.

¹⁸ Cited in David Foxtton, *The Life of Thomas E. Scrutton* (2013), at p.152.

other politician to seek to influence a judicial decision – though that is not a reason for complacency.

28. I come back to the theme with which I started. The Judiciary comprise the third branch of the State – and none the less so because we do not have a more formal separation of powers beloved of constitutional theory. The Judiciary is not simply a group of senior officials forming part of the executive. The constitutional significance of this difference needs to be understood, absorbed and kept well in mind. That is not always so, even amongst some who should know better. To adopt Sir Sydney Kentridge QC's turn of phrase¹⁹, the danger is otherwise one of "incremental encroachments".

(4) The Armed Forces and the Judiciary

29. What then of the relationship between the judiciary and the armed forces? Most obviously, it is an aspect of the relationship between the judicial and executive branches of the State. The armed forces, like the police and any other aspect of the executive, are subject to the law. On one level, this calls for the armed forces to be given legal authority to exist. Article 6 of the 1688 Bill of Rights prohibited the existence of a standing army unless established by Parliament. Thus there is a necessity for the regular enactment of an Armed Forces Act. Of course, as I am sure the Navy would point out, it exists under a different aspect of the law: the Royal Prerogative. I am more than happy to acknowledge that fact, not least as the prerogative power to press gang individuals into the navy still exists, even if it is said to now be redundant²⁰ - and I would not care to find the Queen's shilling in my drink later.

30. The armed forces are subject to the law in another way. They are subject to both military and civil law, as the great constitutional scholar Dicey put it, to the general law of the land.²¹ This can, of course, bring with it the same types of issues as those that arise between the judiciary and other aspects of the executive.

¹⁹ Admittedly in a somewhat different context; see *Free Country: Selected Lectures and Talks* (2012), at p.167

²⁰ L. Maer & O. Gay, *The Royal Prerogative*, (Parliamentary Briefing Paper, 30 December 2009) at 8 <www.parliament.uk/briefing-papers/SN03861.pdf>

²¹ A. V. Dicey, *Introduction to the Law of the Constitution*, (10th ed), chapter 9.

31. Pausing there and for better or worse, it is striking how the law today reaches parts it hitherto did not, formerly the exclusive preserve of the executive. Thus, notably, the intelligence and security agencies are subject to a framework of law; as Sir David Omand expressed it, they cannot escape back into the shadows.²² They are indeed subject to a range of oversight, statutory, ministerial, Parliamentary and legal, often not widely appreciated.

32. So too with the armed forces. *Smith v Ministry of Defence*²³ is a recent decision very much in point. By a majority, the Supreme Court held that the adequacy of equipment, planning or training for deploying a military force abroad was not immune from scrutiny pursuant to the procedural obligation under Art. 2 of the ECHR and that the applicability of the substantive obligation under that article to military operations depended on the individual facts – and therefore could not be disposed of without a factual inquiry. Accordingly, the claims could not be struck out. The majority decision has given rise to a degree of disquiet, as indeed it did in the Supreme Court itself. Lord Mance, in his dissenting judgment, noted how the majority’s decision would be ‘*likely to lead to the judicialisation of war.*’²⁴ As a serving judge I cannot and do not comment further.

33. In his recent book Robert Gates, former US Secretary for Defence²⁵, quotes a line often (if perhaps wrongly) attributed to George Orwell:

‘We sleep soundly in our beds because rough men stand ready in the night to visit violence on those who would do us harm.’

The quote was in one sense wrong. It is not rough men who stand ready; it is citizens who stand ready; citizens in uniform, but citizens who are subject to and abide by the law who do so. They are citizens – like those who serve on juries, who serve in Parliament, who vote in elections, and who, as members of the judiciary, play an essential part in ensuring that our constitution remains a living instrument, alive in all our the hearts and minds.

²² *Securing the State* (2010), at p.254.

²³ [2013] UKSC 41; [2014] AC 52

²⁴ [2014] AC 52 at [150].

²⁵ Robert M. Gates, *Duty: Memoirs of a Secretary at War* (2014), at p.546

34. I opened this talk by referring to Sir Tasker Watkins VC. We live in an age where there are few individuals with his experience of both service in the armed forces and in the judicial branch of the State. The proper and effective functioning of any State, like ours, committed to the rule of law depends on its branches understanding and being respectful of each others' respective roles and functions. Understanding is the basis from which the branches can work together within a framework of separation of powers to maintain liberty, security and the rule of law. The judicial branch through upholding and developing the law provides one part of that overall framework. The armed forces through providing security according to law provides another part of it. Through working effectively the State ensures that it maintains public consent to and engagement in our constitutional settlement, ensures that public safety is secured and secured in a way that does not permit law to fall silent.

35. In the absence of individuals who have first hand experience of both the judiciary and the armed forces, I think – and hope you agree – that we must develop a dialogue which breeds a proper understanding of our two roles. I hope this lecture has served as a small part of that dialogue.

36. Thank you very much for inviting me.

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