Lord Neuberger at the Hong Kong Foreign Correspondents' Club

The Third and Fourth Estates: Judges, Journalists and Open Justice

26 August 2014

1. The rule of law is fundamental to any civilized society, and the rule of law means, at the very least, that a society is governed by laws which are properly enacted, clearly expressed, publicly accessible, generally observed, and genuinely enforceable. Enforceability includes access to the courts for people to enforce rights and to defend themselves. Rights which are unenforceable are as bad as no rights at all. The rule of law also requires the honest, fair, efficient and open dispensation of justice. And therefore there is no hope for the rule of law unless we have judges who are independent, honest, fair, and competent, and who are seen to be independent, honest, fair, and competent.

2. Judicial honesty, fairness and competence can be dealt with relatively quickly. It is self-evident that if judges are dishonest, if the judiciary can be bribed or suborned, the rule of law will be fatally undermined. If judges break the law, what possible hope is there that anyone else will bother to observe it? Similarly, competence and fairness are essential requirements of a judge. An incompetent or unfair judge is almost as much of a contradiction in terms as a dishonest judge. Competence is a prerequisite for judicial office. So is fairness, which involves judges making sure that the law is applied equally and in the same way irrespective of the means, gender, age and other characteristics. It is why justice is traditionally portrayed in western art as blind.

3. Judicial independence merits a little more attention. Traditionally, there are three branches of any state. There is the legislature, which makes and develops the law; there is the executive, which carries out and enforces the law; and there is the

judiciary, which interprets and gives effect to the law. The rule of law requires the three branches to be generally independent of each other, because their functions should be distinct. Those who make the law should not be involved with interpreting or carrying it out; those who carry the law out should not make it or interpret it; and those who interpret the law should not make it or it or put it into effect.

4. Independence for the judiciary means that the legislature and the executive should not be able either (i) to interfere with, or influence, judicial decision-making, or (ii) to remove judges from office. Judicial independence is particularly precious. That is for two reasons. First, as Alexander Hamilton, one of the founding fathers of the United States, observed in 1788[1] when helping frame the US Constitution, the judiciary "is beyond comparison the weakest of the three departments of power", and "all possible care is requisite to enable it to defend itself against attacks" from the executive or the legislature. The second reason it is particularly important that the judiciary is independent of the legislature and the executive is because of the functions of judges.

5. At least in a democratic society, the legislature is often seen to have the greatest legitimacy of the three branches because it is democratically elected. However, that very fact means that it should respect the independence of the judiciary. Democracy is not faultless and it can lead to the tyranny of the majority – and, in extreme cases, it can lead to tyrants or worse; both Hitler and Mussolini came to power democratically. Politicians are frequently driven to take decisions based on expediency: that is not intended to be a criticism, it is the nature of the role. The courts can therefore usefully act as a brake on political calculation and short termism. Furthermore, the very fact that judges do not have to worry about being re-elected or losing their jobs means that they can and should sometimes make the difficult, unpopular decisions which are understandably very difficult for

[1] *The Federalist No 78,* 14 June 1788

politicians. But this is a power which judges should exercise diffidently and cautiously.

6. As for the executive, a judge has no more important function than to protect citizens against abuses of power of an increasingly mighty executive branch of government. So the last thing we need is the executive getting involved in the decisions or security of tenure of the judiciary.

7. Thus, one can well see why Hamilton went on to approve the political philosopher Montesquieu's statement that "there is no liberty if the power of judging be not separated from the legislative and executive powers"[2]. So the much used expression "separation of powers" embraces judicial independence.

8. There has been concern in some quarters in Hong Kong about the possible undermining of judicial independence in the light of the suggestion from a PRC white paper that judges "administrate" the Special Administrative Region. The concern reminds me of the worry which some UK judges have about the fact that their email address ends with ".gov.uk". "We are not part of the Government; we are independent", they cry. Well, like many legal issues, the argument is ultimately about the meaning of a word, and words are slippery things. The word "Government" can be properly used to mean either the executive alone or all three branches including the judiciary. And the word "administration" is similarly imprecise: one can say that Hong Kong used to be under British administration, which would include British judges; and one could refer in the UK to Mr Cameron's administration which would certainly not include the judges. It may be a somewhat cheap point, but I note that the judicial oath which I took, in common with all Hong Kong Judges, included promising to "*administer* justice without fear or favour"[3].

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[2] *The Spirit of the Laws,* (1748) Vol 1, p 181

[3] Part V of Schedule 2 to Oaths and Declarations (Amendment) Bill 1997

9. I know that there has also been much talk in Hong Kong about the white paper's suggestion that judges in the HKSAR should be "patriotic". A judge is expected to be patriotic to the extent that he or she takes an oath of allegiance – in the United Kingdom to "be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second" as the sovereign of the country, in Hong Kong to "bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China"[4]. Indeed, the judges of England and Wales are called Her Majesty's Judges. And the 16th century Lord Chancellor, Francis Bacon, also a brilliant essayist and alleged writer of Shakespeare's plays, is famously reputed to have referred to the English judiciary as the lions under the throne. (In light of what I have just said about judicial honesty, I regret to tell you that Bacon had to resign as Lord Chancellor for accepting bribes.)

10. While I therefore wonder whether there is anything to worry about in the White Paper, let me make it clear that I am not seeking to take sides in the political argument. In the light of separation of powers, you will appreciate that that would be inappropriate for a judge. Furthermore, I cannot pretend to any expertise or knowledge which would justify my presuming to talk about that issue. However, in principle, I am no more in favour of complacency than I am of alarmism. I enthusiastically subscribe to the notion that the price of liberty is eternal vigilance[5]. Thus, since 1996 when I became a judge, a senior Cabinet minister, the Home Secretary, has sometimes made inappropriate remarks about a judicial decision, and the judiciary always makes it very clear that the remarks should not have been made and are inconsistent with judicial independence. This is very sensible: any threat to judicial independence has to be headed off at the pass.

11. Judicial independence is not inconsistent with judicial patriotism, because the way in which judges demonstrate their patriotism is by an irrevocable and undiluted

[4] ibid

[5] According to Lord Denning in *The Road to Justice* (1988), the first person to coin this idea was the Irishman, John Philpott Curran in 1790, but other originators have been identified.

commitment to the rule of law, which involves resolving disputes independently, fearlessly, honestly, fairly, and in accordance with the law, and as efficiently and openly as their capabilities and circumstances permit. However, it is just as important that judges are *seen to be* resolving disputes independently, fearlessly, honestly, fairly and in accordance with the law, and as efficiently and openly as possible.

12. That is what open justice is all about. Open justice is an essential feature of the rule of law. In its most basic form, it means that court hearings take place in public and judges' decisions are available to the public. If courts sit in private, judges cease to be properly accountable for their decisions, as the public do not know what the evidence and arguments were put before the judge, or why the judge reached a particular decision. Judges will start to get into bad habits if the public and the press are excluded from their courts. And, even if judges resist the temptation to misbehave, how can the public have confidence in them if nobody can see them at work? Sunlight, it has been said, is the best of disinfectants[6]. It is no coincidence that, in England, it was decided that evidence obtained by torture could not be given to a court[7] in the same year that the notorious secret tribunal, the Court of the Star Chamber, was abolished[8]. Sometimes, cases, or aspects of cases, have to be kept secret, e.g. to protect children or confidential information, but, as has been emphasised time and again by judges, in such cases secrecy should only be permitted if it is absolutely necessary, and, even then, it should be kept to a minimum.

13. Open justice is not just about the courts being open to visitors physically. I think that there is a strong case for saying that they should be televised: that is merely the modern extension of enabling the public to enter the courts physically. Of course, concerns about intimidation of witnesses and juries, and about witnesses

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[6] Louis D Brandeis, *Other People's Money – and How Bankers Use It* (1914)

[7] *A v Secretary of State* [2005] UKHL 71, [2006] 2 AC 221, para 12, per Lord Bingham

[8] *The Habeas Corpus Act 1640*, which took effect the following year

and lawyers playing to the gallery have to be addressed, but they do not apply to appeals. In the UK most of the Supreme Court hearings are filmed and streamed, and the Court of Appeal is taking steps in that direction too. The OJ Simpson trial may have been a lesson in how not to do it, but I have found the filming of the Oscar Pistorius trial impressive.

14. It is not just trials and hearings which must be accessible: it's also our decisions. It can be a formidable task even for an experienced lawyer to read through and understand a difficult Supreme Court decision running to hundreds of paragraphs, with a number of conflicting or subtly different judgments. I have previously commented on how, when reading some previous judgments, I find myself rather losing the will to live, and it is particularly disturbing when I realise that it's a judgment of mine that I'm reading. We judges owe it to the public, at least in cases which are important or have excited wide interest, to ensure that our decision and essential reasoning are as comprehensible as possible to the public. In such cases, there is a great deal to be said for the court providing a summary of the decision, expressed in clear and simple language. Both in the Hong Kong Court of Final Appeal and the UK Supreme Court, we routinely provide to anyone who wants it, a two page document which attempts to explain concisely and clearly the facts, issues and decisions reached in every appeal which we decide. In the Supreme Court, we also give the judgments orally in a televised version, which is even shorter.

15. And, of course, most members of the public, even dare I say it most lawyers, do not get their information about court hearings and decisions from visits to the courts, watching streamed hearings, reading judgments or reading written summaries. The source of such information about such matters for most people is the media – from newspapers, television, radio, and now electronic media. Just about the time that the founding fathers, including Alexander Hamilton, were discussing and writing their remarkable declaration of independence and constitution, people were beginning to realize that there was a new source of influence coming into existence – the newspapers. Indeed, it would seem that it

was literally a year before Hamilton wrote about the independence of the judiciary that the UK politician Edmund Burke first coined the expression "the Fourth Estate" as a reference to the press[9].

16. The media, and perhaps particularly the written media, have a very important function in relation to the judiciary and therefore to the rule of law. The media play an essential part in ensuring open justice by reporting to the public what goes on in court and what judges and juries have decided. The media also provide a vital forum for comments and discussion about such matters. Open justice involves the public and the media understanding what goes on in court and what judges have decided. But open justice also requires that there should be healthy and informed discussion about the judicial process and judicial decisions. Judicial decisions are not simply there to be handed down to an admiring and meekly receptive public, who do not answer back. It is important that the public should be able to express, as well as to form, views about judges' decisions. Indeed, if journalists cannot report on what goes on in court, and if journalists and indeed members of the public, cannot give their views on what goes on in court, that would undermine freedom of expression, another vital ingredient of a modern democratic society. The media therefore have the right to report fearlessly on what the courts are doing and deciding, uncomfortable though that may be for us judges from time to time.

17. But just as judges must not abuse their privileges which are accorded to them because of the importance of judicial independence, so should journalists and other communicators not abuse the privileges accorded to them because of the importance of freedom of expression. So, inaccurate and unfair reporting of a judge's decision in order to make a good story is an abuse of the freedom of expression accorded to the press and it undermines the rule of law. Of course, one

[9] At least according to Thomas Carlyle (Lecture V in *On Heroes, Hero-Worship and the Heroic in History*) and Oscar Wilde (*The Soul of Man under Socialism* Fortnightly Review Feb 1891, 290). It is fair to say that Burke may have seen the three traditional estates as the Lords Spiritual, the Lords Temporal and the Commons.

cannot be too precious in one's definition of "inaccurate" or "unfair" in this context. Journalists reporting on a court decision are almost always bound to simplify what a judge has said: it would be impossible not to do so. But journalistic licence goes further than that: it is unrealistic not to accept that there will be a degree of exaggeration, one-sidedness, even "spin" in newspaper reports of some controversial cases.

18. It is part of freedom of expression that newspapers and other media should be able to criticise a judgment or to campaign for a change in the law. But persuasion should be based on accuracy and truth rather than misreporting and propaganda. It is one thing to disagree with a judgment and to fight to change its effect. It is quite another thing to misstate what was said in the judgment. Truth is every bit as precious a commodity as fearlessness.

19. Freedom of the press is an aspect, albeit a vital aspect, of freedom of expression. In the United Kingdom, a highly contentious issue on which judges have frequently had to rule is the conflict between the right of the newspapers to report on the private lives of celebrities, footballers, models, film stars and the like, and the right of those celebrities to maintain their privacy – a conflict which is said to be between freedom of expression and respect for privacy. Nobody doubts that the two rights exist and very few people would deny that some cases throw up tensions between the two rights which are hard to resolve. Some people suggest that freedom of expression is such an important right that it should rarely be trumped by a privacy claim – a view which approximates to the practice in the United States though not in Europe.

20. I would like to end with two thoughts on privacy and freedom of the press. First, I would suggest that, at least in many cases, the right to privacy is not, in fact, really a separate right, but, in truth, it is an aspect of freedom of expression. If I want to do or say something which I am only prepared to do or say privately, then it is an interference with my freedom of expression, if I cannot do it or say it because it will be reported in a newspaper. Accordingly, at least in many cases, a

fight in court between a person who wishes to keep what he or she has said or done confidential and a newspaper who wishes to publish what was said, is a fight between two competing claims each based on freedom of expression.

21. The other point arises from the consequences of the astonishing developments in IT: the ease with which information can be transmitted and received across the world, the ease with which words and scenes can be clandestinely recorded, and the ease with which information can be misrepresented or doctored. These developments may make it inevitable that the law on privacy, indeed, the law relating to communications generally, may have to be reconsidered. It undermines the rule of law if laws are unenforceable. There is no doubt that these technological developments give rise to enormous challenges for people involved in the law and people involved in the media.

22. In conclusion, judges and journalists have much in common. First, because of two fundamental principles, the rule of law and freedom of expression, we each are accorded important privileges in the interest of society as a whole. Secondly, at the present time, each of these privileges are as important as they ever were, because of the need to hold the domestically increasingly mighty executive arm of government to account. Thirdly, each of these privileges carry concomitant responsibilities which we judges and journalists should never forget. Fourthly, with the remarkable recent developments in the electronic world, the weight of these responsibilities is greater than it ever has been.

23. Thank you very much.

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26 August 2014