

1. Early in his brilliant study of the Russian Revolution, “A People’s Tragedy,”<sup>i</sup> the historian Orlando Figes sets out an exchange of letters between Queen Victoria and her granddaughter Princess Alexandra. The 22-year-old Alexandra had moved to Russia and was married to the Tsar Nicholas II. News reached Queen Victoria that the new Tsarina Alexandra was unpopular in the Russian court in St Petersburg and had gained a reputation for coldness and hauteur. Queen Victoria wrote to her grandchild with some advice:

“There is no harder craft than our craft of ruling. I have ruled for more than fifty years in my own country which I have known since my childhood and, nevertheless every day I think about what I need to do to retain and strengthen the love of my subjects. How much harder is your situation. You find yourself in a foreign country, a country which you do not know at all where the customs and way of thinking and the people themselves are completely alien to you and nevertheless it is your first duty to win their love and respect.”

2. Alexandra replied with an arrogance which suggested that her reputation was deserved:

“You are mistaken my dear grandmamma; Russia is not England. Here we do not need to earn the love of the people. The Russian people revere their Tsars as divine beings from whom all charity and fortune derive. As far as St Petersburg society is concerned, that is something that one may wholly disregard. The opinions of those who make up this society and their mocking have no significance whatever.”

3. There can be no doubt about which of them was proved right by later events. One of them has many lakes, waterfalls, railways and coach stations, parks, and pubs both real and in TV soap operas named after her. And one of them doesn’t.
4. This exchange of letters between Victoria and Alexandra has stayed with me as I have climbed the judicial ladder. Queen Victoria in her fifty years on the throne had learned an important truth. Even if your position does not depend on being elected to office every few years, it may still be important as a public figure to earn and retain – if not the love, then at least the respect and acceptance of the general population. I and my fellow members of the judiciary are not elected to office – so how far does the acceptance of our role depend – and how far should it depend -- on our taking care to stay in tune with the thoughts and opinions of the general population?
5. The thesis that I hope to develop in this talk is that the answer to this question can be considered on two levels – a theoretical level arising from the position of

the judges in our constitution and the importance of the separation of powers in a democratic country but also at a practical level – societies need judges that they can trust because people will always get into disputes about things. When people do disagree, it's better for society that they have courts and judges to resolve those disputes peacefully. Otherwise, they are forced to take the law into their own hands – but when we talk about people taking the law into their own hands, what we really mean is that there is no law at all other than that the strong and powerful will prevail over the weak and vulnerable.

6. Let me look first at an important area of a judge's workload where the judges are most closely involved in putting into effect the social *mores* of the times. That is when they are enforcing those *mores* as expressed through the enactment of legislation debated in Parliament. Legislation covers almost every aspect of our daily lives in both our work and our recreation. Some statutes deal with the most sensitive moral and ethical issues that a society has to grapple with such as the death penalty, human fertility and embryology, the balance between citizen's human rights and the rights of the community to be protected against violent attack. It is through changes in the law that you can chart the development of the ideology of a society – the gradual abolition of slavery in the early 19th century, the introduction of anti-discrimination laws in the later part of the 20th century, the availability of information from public bodies and the protection of personal data.
7. A large proportion of the judicial case load is devoted to determining and declaring the correct meaning of this legislation. Since the 1970s, the average number of pages per Act passed by Parliament has risen fourfold and the average number of clauses has more than doubled. The number of statutory instruments, that is regulations containing the detailed rules referred to in an act of Parliament has risen from near 2000 per year to an average of 3000 per year between 2010 and 2019.<sup>ii</sup> Even with the highly skilled cadre of lawyers who work full time on drafting the clauses that go into every bill introduced into Parliament, situations arise in real life that were not foreseen and where it is not clear how the clauses are supposed to apply.
8. When judges are called upon to interpret an ambiguous section in an Act of Parliament, they often describe what they are doing as trying to discern the will or intention of Parliament. This means that if one of the possible interpretations put forward by one of the parties to the dispute leads to a result that appears to go against the purpose for which the legislation was enacted, the judges will reject it on the basis that that could not have been what Parliament intended. As Lord Bingham said in one of the leading cases from 2003,<sup>iii</sup> the basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said. But every statute is enacted to make some change or address some problem. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose.

9. One way in which judges have sought to do this is by a greater readiness to step in to prevent people taking advantage of the fact that there has been an obvious mistake in the drafting. The House of Lords held over 20 years ago that if the drafter of the legislation has inadvertently failed to give effect to the purpose of a particular section in the statute, the courts can step in provided it is clear what Parliament would have said if they had said what they meant.<sup>iv</sup>
10. Judges have also found a way of updating old legislation if it is clear that the words used then should now encompass a new situation that did not exist when the legislation was enacted. This is known as the 'always speaking' doctrine. It means that terms used in legislation are not frozen to the meaning at the date when the legislation was enacted but can change as society and technology changes. For example, in 1880 the term "telegraph" in the Telegraph Act 1869 was held by the court to include a telephone, although the telephone had not yet been invented when the Act was passed.<sup>v</sup> Another example is a line of cases applying provisions of the Rent Acts giving rights to a "member of the tenant's family". The decisions of judges as to who counts as a member of your family for this purpose have changed over the years so as to reflect changes in social attitudes. In 1950 the Court of Appeal held that, where a man and woman had lived together for many years without marrying, the tenant's partner was not a "member of the tenant's family" for the purposes of the Rent and Mortgage Interest Restriction Act 1920.<sup>vi</sup> 25 years later the Court of Appeal on similar facts reached a different view.<sup>vii</sup> Another 25 years on, the House of Lords held that a tenant's homosexual partner was a member of his "family" within the meaning of the equivalent provision of the Rent Act 1977.<sup>viii</sup> As Lord Bingham put it in a well-known case, "If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now."<sup>ix</sup>
11. As Lord Bingham suggests, the always speaking doctrine can only go so far, however. Last year in *HMRC v News Corp*, for example, the Court of Appeal was asked to consider whether digital online editions of *The Times* and the Sunday Times fell within the term "newspapers" so that they should, like paper newspapers be zero-rated for VAT purposes. We decided that digital newspapers raised different issues that made them distinct from physical print newspapers, and the always speaking doctrine did not allow the court to extend the term "newspaper" to cover this new digital product.
12. This issue was discussed by the great American jurist and US Supreme Court Justice, Benjamin Cardozo in his lectures delivered in 1921 and published under the title "The Nature of the Judicial Process".<sup>x</sup> In his third lecture "The Method of Sociology: The Judge as Legislator", he quotes a fellow jurist as saying this:

"It is the function of our courts to keep legal doctrines up to date with the *mores* of the public by continual restatement and by giving them continually

new content. It is the necessity and duty of such legislation that gives to judicial office its highest honour and no brave and honest judge shirks the duty or fears the peril.”<sup>xi</sup>

13. Judge Cardozo notes that there can be no assurance that judges will interpret the *mores* of their day more wisely and truly than other men. That, he said, was beside the point. The point is rather, that this task of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfil their function as judges, it can hardly be lodged elsewhere. If they act, he says, with conscience and intelligence they ought to attain in their conclusions a fair average of truth and wisdom.
14. To which I would say “Yes, but...” Judges have always recognised that some matters are best left to Parliament. Two cases show where the Supreme Court has recently drawn this line. The first case is the very difficult subject of the prohibition of assisted dying. In *Nicklinson* in 2014 the majority of the nine justices sitting concluded that Parliament was inherently better qualified than the Court to assess whether the law should be changed. Parliament should, they decided, be given the opportunity to consider the position.<sup>xii</sup>
15. By contrast in *Steinfeld and Keidan* in 2018,<sup>xiii</sup> the Supreme Court did make a rare declaration of incompatibility under the Human Rights Act in respect of the law which provides that only same sex couples can enter into a civil partnership as an alternative to marriage. The Court granted the declaration even though the Government had held an inconclusive consultation, had rejected the immediate extension of civil partnerships to different sex couples and was still actively considering what to do.
16. Judicial restraint is a hallmark of the recognition of the constitutional doctrine of the separation of powers. The classical formulation of separation of powers was that provided by the French Enlightenment philosopher Montesquieu. In his 1748 book *The Spirit of Laws* Montesquieu conceptualised a tripartite system of government composed of the legislature, executive and judiciary as independent but interdependent organs of the state. He proclaimed, perhaps rather dramatically, that “[t]here would be the end of everything, were the same man or the same body... to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.”<sup>xiv</sup>
17. But respecting the separation of powers between the judiciary, the legislature and the executive goes both ways. Just as some matters are regarded as the province of the democratically elected Parliament, others are regarded as within the purview exclusively of the judges. Foremost amongst those are criminal sentencing and procedure and this is the context in which senior judges have been most explicit about the role of the judges in our society.
18. Take for example the Privy Council case on an appeal from the Supreme Court of Mauritius in 2006. This concerned the validity of an amendment to the

constitution of Mauritius when the legislative assembly there purported to remove the power of the courts to grant bail to someone arrested for an offence of terrorism or a serious drugs offence. The provision denying the chance of being granted bail had been passed by a vote of three quarters of all the members of the democratically elected assembly. When a defendant challenged the constitutional validity of the ban, the State of Mauritius argued “How could it be unconstitutional if the ban on bail was contained in the constitution itself?” The Supreme Court of Mauritius nevertheless held that the ban was unconstitutional because it was an interference by the legislature into functions which are intrinsically within the domain of the judiciary. It is important that the grant or refusal of bail is under judicial control, and that judges have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.

19. The appeal from that judgment came before the Privy Council (which is the Board where justices of the Supreme Court hear appeals from a number of former Commonwealth and other countries). The Privy Council agreed with the Supreme Court of Mauritius.<sup>xv</sup> The Board held that the constitution entrenched the principle of the separation of powers between the legislature, the executive, and the judiciary. As Lord Rodger said, Democracy does not only mean that the people must decide who should govern them. It means that fundamental rights should be protected by an impartial and independent judiciary.
20. It is that independence and impartiality which enables and indeed requires judges to take decisions which may be unpopular with the public, and also sometimes, with the Government or Parliament. This has been an important part of the judicial function for centuries – protecting the rights even of the most unpopular members of society against excessive action on the part of the State. I remember in one of our first Constitutional law lectures at university being taught about the great case of *Entick v Carrington*. In November 1764, four men broke into the premises of the writer John Entick and ransacked his cupboards looking for seditious pamphlets that they suspected he had written. John Entick sued them for trespass – for coming onto his land without his permission. Their defence was that they had been authorised to carry out the search by the Secretary of State, Lord Halifax. Did the Secretary of State have the power to authorise someone to go onto Entick’s land without his consent? The Lord Chief Justice Lord Camden held that Lord Halifax did not. Only Parliament or the common law could provide a justification for their actions, not an individual member of the Government.
21. More recently, this was explained by Lord Hope in a case where the House of Lords held that the regime then in place for imposing control orders on suspected terrorists was unlawful because the orders had been made taking into account evidence heard by the judge in a closed hearing when the nature of that evidence was not disclosed to the Appellants. The nine-strong bench of Law Lords held that the Appellants had not had a fair trial and the control orders could not stand.

Lord Hope articulated the balance between majority interests and minority rights which the courts must strike when he stated that:

“it is the first responsibility of government in a democratic society to protect and safeguard the lives of its citizens. That is where the public interest lies. It is essential to the preservation of democracy, and it is the duty of the court to do all it can to respect and uphold that principle. But the court has another duty too. It is to protect and safeguard the rights of the individual... In this case [the right in issue is] ... the right to a fair trial. That is a right that belongs to everyone... even those who are alleged to be the most capable of doing us harm by terrorism.”<sup>xvi</sup>

22. This echoed an earlier comment he had made about the lawfulness of the indefinite detention of foreign suspected terrorists in Belmarsh prison. Lord Hope commented that the case was dealing with actions taken on behalf of society as a whole which affect the rights and freedoms of the individual. This is where courts may legitimately intervene, to ensure that the actions taken are proportionate:

“It is an essential safeguard, if individual rights and freedoms are to be protected in a democratic society which respects the principle that minorities, however unpopular, have the same rights as the majority.”<sup>xvii</sup>

23. This question is also addressed by Albie Sachs the great South African jurist and judge. In his fascinating book “The Strange Alchemy of Life and Law”<sup>xviii</sup>, he recounts his experience as a justice on the South African Constitutional Court. He says that just about every case they heard, required the justices to make value judgments on issues of major social and moral importance. How does that square with the respective roles of Parliament and the courts?

24. It is, he said, the judicial responsibility for being the ultimate protector of human dignity that sometimes compels judges to enter what might be difficult terrain. It is precisely in situations where political leaders may have difficulty withstanding popular pressure and where human dignity is most at risk that it becomes an advantage that judges are not accountable to the electorate. It is at these moments, that the judicial function expresses itself in its purest form. Judges, able to rely on the independence guaranteed to them by the Constitution ensure that justice is done to all, without fear, favour, or prejudice.

25. All of this poses the question of how far judges are entitled to rely on their own views as to right and wrong, even if they know that those views may not accord with the views of the majority of society? Returning to Justice Cardozo, he gives a more light-hearted example than the rather serious cases I have referred to so far. Let us suppose, he says, a judge who looks upon theatre-going as a sin. It would not be right for him to give effect to that view if it was relevant in deciding a particular case if the judge knows that his view conflicts with the dominant

standard of right conduct in society. Judge Cardozo concludes that the judge is under a duty to conform to accepted standards of the community, of the mores of the times.

26. But how then does the judge decide what are the accepted standards of the community? The answer is, says Cardozo, that the judge must get his knowledge just as the legislator gets it, from experience and study and reflection. In brief, he says, the answer as to how a judge decides what are the accepted standards of the community is “from life itself.”
27. Of course, there are a number of assumptions underlying that answer that it is useful to unpack and perhaps to challenge.
28. Humane and thoughtful though they undoubtedly are, Cardozo's comments are expressed in terms that would not be used today in that they assume that judges are and are likely to remain all men. He was writing in 1921 and it took another 60 years before Justice Sandra Day O'Connor was appointed to the US Supreme Court and another 23 years after that before Baroness Hale was appointed to our own ultimate court of appeal, then the House of Lords.
29. Judicial diversity is an important topic and the subject of many different lectures. The importance of diversity is more than simply ensuring that the judiciary is a better reflection of the society it serves. It is a recognition that the line between the subjective views of the judges on questions of morality and social issues and the objective assessment of what is the right answer is much less clear cut than either Justice Cardozo or Justice Albie Sachs may suggest. A judge may be expected to share the notions of right and wrong prevalent in the community in which he or she lives. Those notions are no longer regarded as homogeneous - they probably never were homogeneous. But for centuries there was only one such set of notions that really counted for anything, that of the dominant cadre of white male middle class judges. When people speak about diversity they often talk about the need for the perspective and life experience of women, members of ethnic minority communities and other under-represented groups to be brought to bear on judicial decision making. But there is also increasingly a recognition that actually male judges are not completely neutral in their own views and the experience they bring to the office. So, when women are appointed, it does not mark the first occasion on which a subjective life experience is brought to bear on the daily work of the judge.
30. Let me now turn to a more practical answer to the question of why judges are entrusted by society with the task that we undertake day in day out of deciding disputes between the parties. The role of the judges in resolving disputes is as old as society itself. Even in Biblical times we know there was a lot of litigation with Moses being warned by his father in law Jethro to set up a judiciary rather than try to decide all the cases himself.<sup>xix</sup> The fact is that we need law in order for our society to function smoothly and because human beings want to do a wide variety of very complicated things, the law has to be complicated and that leads

to disputes. When people cannot resolve a dispute themselves, they need an independent person they can trust to give them the answer. In some cases what is important is not so much the actual answer, but that there is someone to give an answer that everyone involved – even the person who loses the argument, will accept.

31. Let me give two very different examples.
32. When lockdown was imposed in response to the pandemic, millions of shops and businesses had to close their doors. Many of them looked at their insurance policies and saw that they were covered for business interruption resulting from infectious diseases. Thousands of claims had been brought under such policies by business suffering heavy financial losses and some 370,000 policyholders were said to be affected. But many of the insurers said that the wording of the particular clause in their policy did not cover this particular situation and refused to pay out.
33. For example, some of the clauses in the insurance policies said that losses from business interruption are covered if the loss results from the occurrence of a notifiable disease like Covid within a specified distance of the insured premises, say 25 miles. But said the insurers, even if the business owner can show that someone within 25 miles of his shop did have Covid, you cannot say that it was **that** person's illness that caused the lockdown and hence the closure of the business. The insurers said the loss was only covered if the business could show that it was because of that illness within the 25-mile radius that the business was interrupted.
34. So, the policy holders and the insurers reached an impasse. How do you resolve this? The answer was that the Financial Conduct Authority which regulates the insurance industry and a number of the major insurance companies gathered together a sample of differently worded business interruption clauses each of which is found in many thousands of policies and ask the court to decide which of them cover the lockdown losses and which of them do not.
35. The Supreme Court was able to expedite the hearing and provide a resolution quickly which gave both businesses and insurers alike the clarity they needed. The judgment was handed down a few days short of a year after the World health Organisation declared that Covid was an international pandemic.
36. The Supreme Court held that yes, there did have to be someone with Covid within the 25-mile radius of the shop in order for the insurer to have to pay out. But, they held, that it was enough that the public health measures were taken in response to all the cases of Covid in the country as a whole. That was because all the individual cases of Covid which had occurred by the date of the lockdown were equally effective proximate causes of that measure. It was therefore sufficient for a policyholder to show that at the time of the Government imposed



lockdown, there was at least one case of COVID-19 within the geographical area covered by the clause.<sup>xx</sup>

37. The point I am making here is that once my colleagues in the Supreme Court hand down their judgment, we expect that everyone will accept that that is the answer – the insurers who had refused to pay up will now pay up and the businesses that had made claims that were held to be untenable will accept that they have no claim. They will be disappointed, but at least they now know the answer. This was a practical answer which solved a problem of great anxiety for business owners and indeed insurers
38. A very different example is provided by the High Court’s 2017 decision in *Oldham Metropolitan BC v Robin Makin*.<sup>xxi</sup> This case concerned the disposal of the body of the Ian Brady, the notorious “moors murderer” who died in May 2017 at Ashworth high security psychiatric hospital. Brady was one of the most reviled criminals of the 20<sup>th</sup> century – described in another judgment about him in 2001 as ‘uniquely evil’.<sup>xxii</sup> No one wanted to be involved in dealing with his remains and no local authority wanted any of his ashes to be scattered in their area, particularly not on the moors where he had committed his terrible crimes and where it was thought the remains of his victims might be buried.
39. Brady had left a will appointing a solicitor to be his executor and specifying for example what music should be played at his funeral. Public feeling was running high and there was a risk of public disorder.
40. What to do? By the time the case came before the Chancellor of the High Court, Brady’s body had been lying in a mortuary freezer for five months whilst arguments raged.
41. The Chancellor gave precise directions about what should happen. As to cremation he directed that there be no music and no ceremony. No flowers and no photography. He named the three people who could attend and ordered that the ashes be disposed of at sea within 7 days. And that is presumably exactly what happened because a judge had ordered that that was what should happen.
42. So, I would say that in a practical sense judges do an important job that needs to be done for everyone to rub along together in a reasonably harmonious way. And I like to think that the public accept that we do it reasonably well and that even if they do not always agree with what we decide, they recognise that value in having us there to make those decisions.
43. I started with a quote from Queen Victoria so let me finish with a quote from our present Queen, Elizabeth. She said once “It’s all to do with the training: you can do a lot if you are properly trained.” In the course of a career as a lawyer and particularly in a judicial career you undergo a lot of training about the law. But just as important, you also get to learn a lot about human nature, how and why people behave well and how and why they behave badly. That is true whether you specialise in presiding over criminal trials or in commercial disputes. To my

mind, it is the glory of our legal system, particularly the development of the common law, that it is rooted in and grows out of the lived experience of ordinary people. Judges for centuries past, and all over the world, have been able to play their part in that development and I hope it will be my privilege to be part of continuing that work into the future.

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- <sup>i</sup> *A People's Tragedy: The Russian Revolution, 1891-1924* Professor Orlando Figes (1996) pubd Jonathan Cape.
- <sup>ii</sup> Lord Justice Haddon-Cave, 'English Law and Descent in Complexity', 17 June 2021
- <sup>iii</sup> *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687.
- <sup>iv</sup> *Inco Europe Ltd and others v First Choice Distribution (a Firm) and others* [2000] 1 WLR 586.
- <sup>v</sup> *A-G v Edison Telephone Co* (1880) 6 QBD 244
- <sup>vi</sup> *Gammans v Ekins* [1950] 2 KB 328
- <sup>vii</sup> *Dyson Holdings Ltd v Fox* [1976] QB 503
- <sup>viii</sup> *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27
- <sup>ix</sup> *Quintaville* op cit.
- <sup>x</sup> *The Nature of the Judicial Process* Benjamin N Cardozo (192) Yale University Press, recently republished in the Legal Legends series by Quid Pro Quo Law books.
- <sup>xi</sup> Benjamin Cardozo *The Nature of the Judicial Process* p. 135 citing Arthur L Corbin 29 Yale LJ 771
- <sup>xii</sup> *Nicklison and another v Ministry of Justice* [2015] AC 657.
- <sup>xiii</sup> *R (oao Steinfeld and Keidan) v Secretary of State for International Development* [2020] AC 1.
- <sup>xiv</sup> Montesquieu, *The Spirit of Laws* (1748), section 6 of Book 11.
- <sup>xv</sup> *The State (Mauritius) v Khoyratty* [2006] UKPC 13.
- <sup>xvi</sup> *Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action* [2009] UKHL 28 at [76]
- <sup>xvii</sup> *A and others v Secretary of State for the Home Department* [2004] UKHL 56, para 108.
- <sup>xviii</sup> *The Strange Alchemy of Life and Law* Albie Sachs (2009) (OUP Oxford).
- <sup>xix</sup> Exodus Chap. 18 verses 13 to 26.
- <sup>xx</sup> *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1.
- <sup>xxi</sup> *Oldham Metropolitan Borough Council v Makin* [2017] EWHC 2543 (Ch).
- <sup>xxii</sup> *R v Secretary of State for the Home Department ex parte Hindley* [2001] 1 AC 410.