

Moral Courage in the Law

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Lady Hale, President of the Supreme Court

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I have been thinking quite a bit about courage recently. It all began when I was asked to contribute an introduction to a chapter in a book telling the stories of 28 holders of the Victoria Cross and the George Cross: *On Courage: Stories of Victoria Cross and George Cross Holders: The Sebastopol Project* (Constable, 2018). I chose Sir Tasker Watkins VC. Superficially we had a few things in common.

He came of humble origins in a Welsh mining village. He was educated in state schools and hugely helped by winning a place at Pontypridd Grammar School. He studied Law, but as an external London University student while working in the chemical industry. He was called up at the outbreak of World War Two and soon awarded a commission. He was posted to the front in Normandy shortly after D-day in 1944. He led his men to attack the enemy positions. They were cut off from physical and radio contact so did not get the message to retreat, and he managed to storm four of the enemy positions, three entirely on his own, kill all the enemy, and make it back to his own lines. Soon afterwards, the German army was on the run. After the war he went to Bar and had a stellar career. He was appointed a High Court Judge in the Family Division in 1971, although he was soon transferred to the Queen's Bench Division where he eventually became de facto Deputy Lord Chief Justice.

He had displayed physical courage of the very highest order. I see that as a mainly male model of courage. Though women can undoubtedly show it too, only three out of the 28 stories are those of women (and, of course, all won the George Cross rather than the Victoria Cross). But Tasker Watkins also showed a different kind of courage, the kind of courage all good barristers need to show. The courage to fight the cases they should fight; and the courage not to fight the cases they should not fight. The courage to stand up to the judge when the judge is bullying or unsympathetic or even not listening properly; and the courage to stand up to the client when the client is being unreasonable or wants what he cannot get or, worse still, wants the barrister to do something he cannot do because it is in breach of his higher duty to the court and the rule of law.

That is a model of courage to which women can aspire as much as men. It is the model of courage which Millicent Fawcett had in mind when she uttered her famous rallying cry ‘Courage calls to courage everywhere’. We tend to think that the brave members of the women’s suffrage movement were the suffragettes of the Women’s Social and Political Union, who were eventually prepared to break the law and suffer the appalling consequences of doing so for the sake of the cause. But the law-abiding suffragists of Millicent Fawcett’s National Association of Women’s Suffrage Societies were the targets of quite astonishing hostility and violence from their opponents.

Their main technique was to organise marches – the largest of which was the great pilgrimage of 1913. The marchers came from all over England and were greeted with remarkable hostility along the route to London. In Cheltenham, for example, the pilgrims’ banners were snatched by a crowd of several hundred, the poles snapped and thrown away, handbells were rung during speeches so that no-one could hear, the local Minister was hit in the eye by a missile, two pilgrims tried to escape by bicycle but were chased down the street, pushed to the ground and pinned against the railings while their hats and other articles of clothing were torn from them. In Cirencester, students from the Royal Agricultural College ‘rushed’ the lorry the speakers were using as a platform; some of the students dressed in drag; they tried to overturn the lorry and pummel the speakers, again tugging at their clothes before besieging them in the house to which they escaped. Millicent Fawcett herself witnessed similar incidents in Grantham, the throwing of dead rats, plump with maggots, crushing a male sympathiser, hurling the filthiest obscenities.

It required physical courage to stand up to such bullies. But even more it required moral courage to take up the unpopular cause of women’s suffrage in the first place. Some very senior Judges have spoken of the moral courage it needs to be a Judge and stay true to the very moving judicial oath which we all swear – ‘I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will’.

In 2008, Lord Judge, then Lord Chief Justice, speaking at a conference on ‘Equality in Justice’, said that:

‘Judges must also have moral courage – it is a very important judicial attribute – to make decisions that will be unpopular with the politicians and the media and

the public, and indeed perhaps most importantly of all, to defend the right to equal treatment before the law of those who are unpopular at any given time.’

Lord Clarke, then Master of the Rolls but soon to become a Supreme Court Justice, quoted this when discussing the ‘good character’ needed to become a judge (in ‘Selecting Judges: Merit, Moral Courage, Judgment and Diversity’ (2009) 5(2) HCQR 49):

‘ . . . individuals who are likely to be swayed by public opinion, who might not make the right, the just decision because it is an unpopular decision or because it is adverse to their interests cannot properly be seen as having good character. Moral courage rather than moral cowardice is needed for good character to be satisfied.’

More recently, Lord Burnett, current Lord Chief Justice, has linked the need for Judges to display moral courage to the fundamental constitutional principles of the independence of the judiciary and rule of law (address to Commonwealth Magistrates and Judges Association Conference, Brisbane, 2018):

‘ . . . institutions are only as effective as the individuals who operate them. An effective judiciary is one constituted of effective judges. That, most obviously means judges who are well qualified and appointed on merit. But it means more than that. A judge with these essential characteristics is not necessarily a good judge if he or she is not willing, when necessary, to make difficult decisions which upset powerful people and may be unpopular. A good judge will not let ambition influence the outcome of a case or play to the crowd in the expectation of praise. A good judge must demonstrate good character beyond the sense of an absence of questionable behaviour. He or she must be capable of showing moral courage when making difficult decisions.’

It is, of course, embarrassing for any judge to claim to be such a paragon when we all know that we are not, or at least not always, so. But several dimensions of moral courage emerge from these statements and I can think of others.

First, there is the courage to stand up to the media, who may or may not be reflecting general public opinion. The media can react strongly and personally against those whom they perceive to be acting against the media's interests. An example is the case of *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081, where a majority in the Supreme Court upheld the grant of an interim injunction to prohibit the publication of the identity of a married person caught up in a sex scandal: a matter of no public interest whatsoever (but a matter in which the public were intensely interested). We were ridiculed – I was reportedly 'known for my radical liberal ideas' and also known as Ms Diversity (neither, apparently, a good thing) – while the dissenter was praised. Ironically, despite this, the newspaper settled the case, agreed to pay damages and to maintain the anonymity of everyone involved: [2016] EWHC 2770 (QB).

Perhaps fortunately, most senior judges do not engage with social media or the tabloid press. This may or may not be a good thing, but it does mean that we can – and should - ignore or brush off such personal taunts. But the rule of law may be put at risk if the media go too far. The most obvious example is the case of *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61. Could the government rely on the royal prerogative to trigger the process of leaving the EU or did they need the sanction of an Act of Parliament? Because of the importance of the case, it was heard by an unusually strong Divisional Court, consisting of the Lord Chief Justice, the Master of the Rolls and Lord Justice Sales. When they handed down judgment against the government, the Daily Mail published pictures of the three over the banner headline 'Enemies of the People: Fury over "out of touch" Judges who defy 17.4 million Brexit voters and could trigger constitutional crisis'. Lord Justice Sales has described how he felt ('Legalism in constitutional law: judging in a democracy' [2018] PL 687):

‘ . . . curiously detached from the press coverage. It was almost as though it was happening to someone else. Part of the reason for this was that the judgment had been finalised several days before the hand down, as is usual. From my perspective it was "done and dusted" and my attention had moved on to other cases I had been dealing with in the meantime.

Over the next few days I felt unusually exposed when moving round London on foot and on public transport. However, no one approached me. This allows me to be sanguine about the experience of being front page news. My sense of anxiety abated. In fact, the sense of threat felt most real when I received a visit

from two police officers of the anti-terrorism unit of the Metropolitan Police to conduct a security review at my home. Fortunately, they assured me that their review of online activity and social media did not indicate an especially heightened threat of physical attack.’

But then the press caravan moved on – to the Supreme Court where, for the first time in living memory, all 11 then serving Justices sat on the panel. Was taking this unusual course simply a wise way of protecting the court from an accusation that the result might have been different had a different panel been selected? Or was that too succumbing to media pressure? At least, as Sales LJ put it, the 11 of us offered ‘a more diffuse target’. But this did not stop the Daily Mail from singling out four Justices for their alleged European links and sympathies – describing Lord Reed, for example, as ‘a Brussels man to his fingertips’ (Andrew Pierce, ‘And now here’s the next lot lining up to have a go: Judges who will rule on Brexit impact’, *Daily Mail*, 7 November 2016). How wrong they can be: two of the four alleged Europhiles dissented from our decision to uphold the Divisional Court by a majority of eight to three. But the Daily Mail’s response to our decision was very clever. They published the same size pictures of the three dissenters under the banner headline ‘Champions of the People’.

Curiously, what the public and the media may not have appreciated was that the basic principle we were upholding had been established during the constitutional struggles of 17th century, when Parliament and some of the Judges were fighting to establish the ascendancy of Parliament and the rule of law over the powers of the executive – in those days the King rather than the Prime Minister and the cabinet, but the principle is the same. Those were the days when the Judges really did have to display moral courage in standing up to the government.

The most famous among them was Sir Edward Coke. He had been Attorney General under Queen Elizabeth and in the early years of James I but was appointed Chief Justice of the Court of Common Pleas in 1606. He soon began to display a fierce independence of the monarch. In the famous case of *Prohibitions del Roy* (1607) 12 Co Rep 63, the King claimed to be able to decide legal cases for himself. Coke told him that he could not: ‘true it was, that God had endowed His Majesty with excellent science and great endowments of nature; but His Majesty was not learned in the laws of his realm of England; . . . the law was the golden met-wand and measure to try the causes of the subjects.’ Despite the King’s anger, Coke kept his position; indeed in 1613 he became Chief Justice of the Court of King’s Bench, where it was probably thought that he could

do less harm; but in 1616, the *Case of Commendams* was the last straw. The Judges, prompted by Coke, wrote to the King telling him that his using writ of commendams to allow a person to hold a bishopric and its revenues without performing its duties was illegal and they would not enforce it. Summoned before the King, Coke refused to retract (though all other judges did) and was sacked.

These days High Court Judges hold office *quamdiu se bene gesserint* and not during Her Majesty's pleasure, so we are not so easy to sack. But we still have on occasions to stand up to government in ways that may not be popular with Ministers and civil servants. A recent example could be *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409. The Supreme Court held that the introduction of fees for employment tribunal cases (Employment Tribunals and the Employment Appeals Tribunal Fees Order 2013) was unlawful. The Lord Chancellor's statutory power to impose fees had to be read subject to the fundamental constitutional right of access to justice. Fees had to be affordable and must not make it futile or irrational to bring a claim. Lord Reed emphasised that access to the courts is inherent in the rule of law, even though this is not always understood by the Government. It is a common misconception that courts provide a service that is of benefit only to the 'users' rather than to society as a whole:

‘At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other.’

Most often, when we are standing up to government we are standing up *for* Parliament, as the UNISON case showed. But might we sometimes have to stand up *to* Parliament? This is a much trickier question, as the two governing principles of our Constitution are the rule of law and the sovereignty of Parliament. The crunch comes when the two might be seen to be in conflict. Sometimes, of course, Parliament itself has told us to: the Human Rights Act gives us power to make a declaration that a provision in an Act of the UK Parliament is incompatible with the rights protected by the European Convention on Human Rights. This doesn't change the law, or the result of the case, but it allows us to tell Parliament that we think that the law needs to be changed to comply with the Convention. And so far it always has been – eventually.

The most recent high profile example of a conflict between an Act of Parliament and the Convention rights is probably the case brought by the *Northern Ireland Human Rights Commission* [2018] UKSC 27, [2018] HRLR 14, challenging the prohibition on abortion (except to save the life of the mother or to prevent serious and permanent damage to her health), contained in the Offences against the Person Act 1861 which still applies without modification in Northern Ireland. A majority of five to two Justices held the ban incompatible with Convention rights in cases of fatal foetal abnormality. A majority of four to three also held it incompatible in cases of rape or incest. It was, of course, intensely controversial. Some Justices took the view that it was a matter for the people and politicians in Northern Ireland and not for the courts. My own view is that the whole point of fundamental rights is to protect individuals – often unpopular individuals – from unjustified invasions of their rights by the will of the majority. So we have to subject such invasions to intense but principled scrutiny and not be afraid to say that they are unjustified if that is the case. Indeed, Parliament itself has told us that we can.

Such differences of view may also require us to have the moral courage to stand up to colleagues with whom we disagree. We are fortunate in our court that we all respect one another. Even if we disagree, I believe that we do so out of conscientious adherence to legal principle, and not out of any lack of the moral courage to make a decision which some may think bold. And we stay friends afterwards. Nor do we have recognisable 'camps' or factions. We are not predictable enough. Not all Supreme Courts are so fortunate.

The media, government and Parliament are not the only powers in the land. There are powerful interest groups of many sorts. Obviously big business is one. Trade Unions are another. It is hard to think that a case would be decided on the basis that one party was more powerful than

the other. But we all have conscious or unconscious sympathies for one side rather than the other which we do have to do our best to recognise and to conquer. A well-known example is personal injury actions – there have always been judges who are more sympathetic to claimants who have been injured at work or in a road traffic accident and other judges who are more sympathetic to the insurance companies fighting the claim. Another example could be employment cases – some judges may be more sympathetic to the claims of employees against their employers and others may be more sympathetic to the employers.

We need, therefore, the moral courage to recognise and stand up to our own prejudices, pre-conceptions and predispositions – and the first step is recognising that we may have them.

There are other aspects to standing up to oneself. I recently read a judgment on the esoteric and usually mind-numbing subject of costs. These days an acquitted defendant in a criminal trial can only get costs against the prosecution in very limited circumstances – usually where they have acted in some way improperly. The question was what was meant by improperly. There was a line of cases giving it quite a broad meaning in that context. This meant that more acquitted defendants could get their costs. But there was another line of cases, dealing with when the lawyers acting in a case can be ordered to pay the costs wasted because they have behaved improperly. That line imposed a more stringent test. This meant that fewer lawyers had to pay wasted costs. And there was a recent pronouncement by the then Lord Chief Justice that the more stringent test also applied in the context of ordering the prosecution to pay the defence costs. The Judge reviewed all the cases thoroughly and decided to follow earlier line of cases and not to follow what the Lord Chief Justice had said.

Right or wrong, this showed moral courage in two ways. First, he did not take the easy way out. Often one way out is much easier than another. In that case, to take what the Lord Chief Justice had said rather than to plough through the other cases and think it through. In the appeal court, to agree with a colleague's leading judgment which looks about right, rather than forming one's own independent view based on careful thought and reading. In any case, to take the line of least resistance rather than the riskier course.

An extreme example of this sort of moral courage was shown by Lord Mance in the *Northern Ireland Human Rights Commission* case. He was very firmly of view that Northern Ireland abortion law was incompatible with the Convention in all three respects. But he also formed view that the

Commission did not have the standing to bring the case. So we had no power to make a formal declaration of incompatibility. This was undoubtedly a tenable view on the language of the statute defining the powers of the NIHRC and three other Justices agreed with him. But another view was undoubtedly also tenable, and three of us would have held that NIHRC did have standing. It certainly takes moral courage of a high order to adopt an interpretation which means that you cannot make the order which you think should be made.

Second, the costs case is an illustration of another point made by Lord Clarke. We must have the moral courage to stand up to our perception of what is most likely to find favour with our superiors and thus to further our own careers or enhance our reputations. It takes such courage to disagree with the view of the Lord Chief Justice, especially if this involves ordering the prosecution to pay costs running well into seven figures.

But whatever the moral courage we expect of our Judges, we should not forget the moral courage required of other actors in the justice system. I've already mentioned the courage which lawyers must have, in the face of the courts and of their clients. But there is also the courage some litigants must have to fight for what is right, as the dinner ladies of St Helen's found when they pursued their claim for equal pay for work of equal value. They were sent a letter by the employers warning them of dire consequences if they persisted in their claims. As the employment tribunal explained:

'The letter . . . contained what was effectively a threat. It spelt out a danger that the applicants might deprive children of school dinners, and that they might cause redundancies among their colleagues. . . . It was more than a matter-of-fact reminder of what might happen if they went on with a complaint. . . . It is directed against people who were in no position to debate the accuracy of the respondents' pessimistic prognostications. The reaction to such a letter may be, even where there is a well-justified belief in the justice of one's case, surrender induced by fear, fear of public odium or the reproaches of colleagues. . . the letter was intimidating.'

Not only this, the warnings of dire consequences had also been sent to all their fellow workers in the catering department and incurred for them 'some odium' from colleagues as a result. As I put

it when their complaint reached the judicial House of Lords (*St Helens Borough Council v Derbyshire and Others* [2007] UKHL 6, [2007] 2 AC 31):

‘This is a classic case of "blaming the victims". The victims of long-standing and deep-seated injustice should not be made to feel guilty if they pursue their claims for justice. But it is all too tempting to try to do so, especially if their success may have far-reaching consequences.’

But whatever the moral courage we in the legal system of this country may be called upon to display, it is as nothing compared with the courage which is required of judges in many other parts of the world. There are many examples, but a recent one is the Supreme Court of Pakistan in the well-known case of *Asia Bibi* (Criminal Appeal No 39.L of 2015, *Mst Asia Bibi v The State*). She was convicted of blasphemy in 2010 and sentenced to death. The High Court dismissed her appeal in 2014. But in October last year the Supreme Court allowed her further appeal. Her case was that she and other women had been harvesting berries in a field. She offered to fetch water for some women who wanted it. But they refused to take water from a Christian woman and an argument ensued. She denied having insulted the Prophet during it. The judges subjected the prosecution case to minute examination and found many discrepancies between the prosecution and court witnesses’ accounts. They bravely spoke out against the misuse of the blasphemy law by levelling false accusations and against people taking the law into their own hands. As the Chief Justice noted,

‘. . . no one could be allowed to defy the name of the Holy Prophet Muhammad (peace be upon him) and be left unpunished, but there is another aspect of the matter; sometimes, to fulfil nefarious designs the law is misused by individuals levelling false allegations of blasphemy. Stately, since 1990, 62 people have been murdered as a result of blasphemy allegations, even before their trial could be conducted in accordance with law. Even prominent figures, who stressed the fact that the blasphemy laws have been misused by some individuals, met with serious repercussions. A latest example of misuse of this law was the murder of Mashal Khan, a student of Abdul Wali Khan University, Mardan, who in April 2017 was killed by a mob in the premises of the university merely due to an allegation that he posted blasphemous content online.’

To be true to their judicial oaths in the face of such pressures and in such an atmosphere demands moral courage way above anything which has been asked of the judges in this country. I hope and pray that respect for the independence of the judiciary and the rule of law will continue to flourish here – but it is up to us to deserve that respect.