

Lions or squeaking mice?



Lord Justice Keene

The Fifth Annual Lecture to be presented to the Society for Advanced Legal Studies was given by Lord Justice Keene on 12 June 2002, who spoke on judges and judicial review at the start of the 21st century.

In giving this annual lecture not only do I follow in dauntingly illustrious footsteps, but few practising judges would ever claim to be engaged in legal studies to a degree which could by any stretching of the English language be described as “advanced.” In the higher courts, we are after all mostly drawn from the ranks of the Bar, whose approach to academic legal writings was memorably captured by John Mortimer in *R v Rumpole*:

‘Rumpole applied a torn-off page of the Criminal Law Review to the electric fire, and lit his small cigar.’

Sir John Smith is probably not alone amongst academic lawyers in regarding the judiciary as belonging to the same camp as Rumpole.

The source of the first part of the title of this lecture was, of course, Francis Bacon, the then Lord Chancellor, who described the judges as ‘Lions under the throne.’ The mice are of more recent origin. They derive from the reactions to the famous Second World War case of *Liversidge v Anderson*, which concerned the words “if the Secretary of State has reasonable cause to believe” in regulation 18B, and in the course of which Lord Atkin delivered his powerful dissenting speech, where he spoke about having listened to arguments which might have been addressed acceptably to the Court of Kings Bench in the time of Charles I. The subjective interpretation adopted by the majority in the House of Lords – an interpretation of extreme deference to the executive – provoked a letter to Lord Atkin from Mr Justice Wintringham Stable. Written in characteristically trenchant terms from the judges’ lodgings in Leicester, where he was then on circuit, the letter expressed approval of Lord Atkin’s dissent, and then added:

‘I venture to think the decision of the House of Lords has reduced the stature of the judiciary, with consequences that the nation will one day bitterly regret. Bacon, I think, said the judges were the Lions under the throne, but the House of Lords has reduced us to mice squeaking under a chair in the Home Office.’

In fact, neither quotation can be taken entirely at its face value, and the contrast between the lions and the mice is more apparent than real. Lord Chancellor Bacon was a

firm supporter of the royal prerogative, and the emphasis in his words was as much on the judges being under the throne as on them being lions.

‘The 12 judges of the realm being the 12 lions under Solomon’s throne, they must be lions, but yet lions under the throne: they must show their stoutness in elevating and bearing up the throne.’ (Essay of Judicature)

As for Stable J, his gloomy assessment has not been borne out by events. *Liversidge v Anderson* is now acknowledged to have been a wartime aberration, and few Home Secretaries in recent times seem to have regarded the judiciary as quite as insignificant as Stable J feared. The charge often heard is not that the judges are too subservient to the executive but rather the opposite, namely that they have become too powerful while remaining unaccountable.

SCOPE OF JUDICIAL REVIEW

It was in fact some Ministerial expressions of concern along these lines, which prompted me to choose this topic. I say at once that such statements of concern by Ministers about the scope of judicial review are not new and are not confined to those of any particular political persuasion. Rather they seem to be the instinctive reaction of a decision-maker when one of his decisions has been overturned in the courts. It was a former Home Secretary in a previous administration who said recently that judicial review

‘started as a valuable exercise in limiting the arbitrary exercise of ministerial powers. Expanded over the years by activist judges, it has begun to substitute government by un-elected judges for government by elected ministers.’ (Michael Howard, The Times, 1 December 2001)

The reaction of the Home Office last December to the decision of Sullivan J in the *International Transport Roth GmbH v Secretary of State for the Home Department*, *The Times*, 11 December, 2001 case, to declare the fixed penalties on lorry drivers and haulage companies, whose vehicles contained illegal immigrants, incompatible with the European Convention on Human Rights, seems almost muted in comparison. The Home Office said that

'The Home Secretary is concerned that, once again, the courts have intervened with an interpretation that has failed to take account of the reasons for the implementation of the policy. An immediate appeal would be launched.'

It was, and as we now know, it failed. The Court of Appeal held that the penalty regime established by the *Immigration and Asylum Act 1999* exceeded what was necessary in the interests of achieving improved immigration control, in other words that it was disproportionate and in breach of the Convention.

Such Ministerial reactions to adverse decisions may be no more than expressions of the natural regret all of us feel when we are held to have gone wrong in a decision, and I include judges in that category. It is usually a short-lived sentiment. But, in case such comments reflected a more enduring and perhaps growing concern, it seemed to me to be useful to examine whether there is any basis for the anxiety. After all, it is true that judges are not accountable, in the sense of being subject to periodic election or to dismissal because they make an unpopular decision. The necessity for judicial independence is seen, in this country at least, as requiring not only independence from the executive but also freedom from popular pressure.

One does not foresee any significant change in that independence, which was achieved as a result of the *Bill of Rights* and the *Act of Settlement* and is now embodied in section 11 of the *Supreme Court Act 1981*. Contrary to the images portrayed in some television dramas, no acolytes in dark glasses are sent out by the Lord Chancellor's Department to pressurise judges into deciding cases in a particular way. But if it is right that judges are not accountable as Ministers and other politicians are, have they become too powerful, too interventionist, especially in public law matters? In short, has judicial review grown too big for its boots?

It is right that, looking at the long-term picture, judicial review has certainly grown. There was a lengthy period, from at least the Second World War until the 1960's, when the courts were very reluctant to intervene in decisions by public bodies, unless they could be classified as judicial or quasi-judicial ones. The assumption seems to have been that public power was not open to serious abuse, and therefore intervention was not required. This period of judicial passivity ended with cases such as *Ridge v Baldwin*, *Padfield v Minister of Agriculture* and of course *Anisminic*, respectively 1964, 1968 and 1969. It was, incidentally, remarkably prescient of R F V Heuston in the 1964 edition of his *Essays in Constitutional Law*, p.89 to refer to *Ridge v Baldwin* as

'a decision which may mark the revival in England of judicial control over administrative powers.'

It did indeed. But that was nearly 40 years ago, a time when there was no Crown Office list, far less an Administrative Court, no nominated judges and a very

slow and cumbersome procedure for obtaining one of the prerogative orders. In 1974, there were only 160 applications for leave to seek judicial review. Until 1977, applications for such an order had to go through an oral hearing before (usually) a three judge Divisional Court and, if leave was granted, before a Divisional Court for the substantive hearing. Such a process undoubtedly deterred potential applicants for judicial review. It is therefore scarcely surprising that the number of judicial review cases has grown markedly since those days, and no-one, so far as I am aware, is advocating a return to that state of affairs. The theme in some quarters that judicial review has increased excessively is related to more recent times. Is that borne out by the facts?

INCREASE IN CASES

In numerical terms, there has been a gradual, steady increase in judicial review cases over the last few years. In 1994 there were 3,208 applications for leave to bring judicial review. By 2001 this had gone up to almost 4,800, an increase of 38 per cent spread over a seven-year period. But the figures need closer examination. Within that total, the number of applications in immigration and asylum cases went up from 935 in 1994 to 2,398 last year, an increase of 1463. The more mathematically minded will immediately appreciate that the increase in total applications was almost entirely accounted for by the additional immigration and asylum cases. Last year exactly half the applications for leave in judicial review (or permission, as it is now called) were in asylum or other immigration cases, and the great bulk of those are in fact asylum cases.

So asylum cases on one side, there is no evidence that judicial review is expanding in a quantitative sense. Asylum cases have grown for a variety of reasons, mainly the bitter conflicts in former Yugoslavia, Ethiopia, Afghanistan, Northern Iraq and Sri Lanka. Those reasons do not include a more power-hungry judiciary.

Now, of course, that numerical approach is an extremely crude test of what is happening, redolent of the old rag-trade maxim 'Never mind the quality, feel the width.' The real issue is whether the courts are becoming more interventionist, more willing to quash decisions of public bodies, including those of government ministers. The basic approach in judicial review has, with one major exception to which I shall come, not changed significantly. The object of such review is to ensure that such public bodies act lawfully, rationally and fairly, as Lord Diplock emphasised in the GCHQ case back in 1985, although he expressed it more elegantly than I have done. Can anyone say that those criteria should not be observed by public decision-makers? At the same time, the courts recognise that such bodies, and especially government, have their own proper sphere for decision-making on the merits, free from judicial interference.

DEVELOPING PRINCIPLES

It is true that, over time, the principles of judicial review have developed and expanded as part of the common law. The myth that such principles were merely part of Parliament's presumed intention when it legislated has been exposed, Lord Woolf describing it as a 'fairy-tale.' As a result, judicial review is now applicable not just to the exercise of statutory powers but also to that of non-statutory powers, including some of the prerogative powers, as the GCHQ case itself made clear. I say 'some of the prerogative powers', because the courts accept that the prerogative is sometimes concerned with matters of high policy, such as the making of treaties, deployment of the armed forces or the allocation of domestic finance between one desirable objective and another. In such cases the courts acknowledge that they are not equipped to make decisions. In contrast, we had a case in the Divisional Court earlier this year where we decided that the courts could intervene over the exercise of the royal prerogative when used to reduce a prisoner's sentence in return for his help to the police or other authorities.

In addition, there has been the emergence of the concept of legitimate expectation, whereby the courts will enforce a clear representation or promise by a public authority as to how it will deal with a particular matter. As is well known, this concept first emerged in this country in cases involving an expectation of procedural steps being taken, such as an expectation of being consulted. But over the years the principle has come to be applied in cases of substantive expectation, that is to say where a substantive benefit had been promised.

One of the earlier instances of this was *ex parte Unilever*, a tax case where the Inland Revenue was prevented from changing its stance without warning to a taxpayer over the late submission of claims for loss relief. More recently substantive legitimate expectation has been approved in the *Coughlan* case, where the Court of Appeal held that a promise to a severely disabled patient by the local health authority that specially adapted accommodation would be her 'home for life' could not simply be abandoned by a decision to move her into a different kind of institution.

So there has been the inevitable slow, incremental growth of the principles of judicial review over time, somewhat expanding its scope. Yet even legitimate expectation has not broken entirely new ground. Even before it appeared, the courts were seeking to find a principled way of preventing public bodies from resiling from their promises to the citizen, without conflicting with their public duty. Initially the courts sought to do this by using the private law concept of estoppel in cases such as *Wells v Minister of Housing and Local Government* in 1967 and *Lever Finance Ltd v Westminster City Council* in 1971. It was never a happy importation into the public law field and, as Lord Hoffmann has recently emphasised in the *R v East Sussex County Council, ex parte Reprotech Ltd* [2002] UKHL 8

case, it has now effectively been replaced by the concept of legitimate expectation.

In addition, the courts had themselves been evolving a more sophisticated approach towards the standard to be applied in judicial review cases where fundamental rights were involved. As long ago as 1987 in *ex parte Bugdaycay*, the asylum case, Lord Bridge declared that within the normal limits of judicial review

'the court must, I think, be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny.'

The same emphasis on a variable standard, depending on the degree of intrusion into fundamental rights by the public body, was repeated in *R v Secretary of State for the Home Department, ex parte Brind* [1991] AC 696, and appears in ringing terms in the judgment of Sir Thomas Bingham, MR, in *R v Ministry of Defence, ex parte Smith* in 1996. That was the case where there was a challenge to the government's then policy of prohibiting gays and lesbians from serving in the armed forces. The Master of the Rolls said:

'the court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation, the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.'

That approach to the concept of *Wednesbury* unreasonableness is clearly a flexible one.

So the common law had not been static. There were these valuable, if relatively modest, developments in judicial review principles. Even in that context there were occasional dramas, where the courts came into conflict with central government over a matter regarded by the latter as of importance. The Pergau Dam case, *R v Secretary of State for Foreign Affairs, ex parte World Development Movement*, provides a vivid example. Yet all that the court there was doing was construing an Act of Parliament, one of its normal functions, and doing so according to established principles. The defeat for the Secretary of State came about because the Government of the day had not been prepared to take the advice of its legal advisers before drafting and promoting the statute. That was an exceptional case, which in fact illustrates the general rule

normally applicable: that is to say, there is normally a valuable creative tension between the executive and the courts.

As judicial review expanded in the 1960's and 1970's, government responded in a positive way by producing the booklet to assist civil servants in their work, 'The Judge over Your Shoulder'. But that booklet was a positive response, attempting to ensure that civil servants operated in ways which met the standards required by the courts.

IMPACT OF THE HUMAN RIGHTS ACT 1998

You will have noticed that I have been using the past tense, and for good reason. It brings me to the major exception I referred to earlier, something which has undoubtedly altered the relationship between the courts and the executive, and that is the *Human Rights Act* 1998. The incorporation of the European Convention on Human Rights into our domestic law has inevitably changed the approach of English courts towards public decision-making, at least where those rights, or one of them, are engaged. It not merely empowers, it actually requires, the courts to adopt a more interventionist stance. Yet at the same time it remains for the courts to work out the extent of such intervention, and that may give rise to some difficulties over the next few years.

Three aspects of the *Human Rights Act* seem to me to be particularly relevant to the role of the courts in judicial review cases. First, there is the obligation imposed by section 3, the provision dealing with the interpretation of statutes. The court must interpret an Act of Parliament 'so far as it is possible to do so' in a way compatible with Convention rights. This of course applies to all cases where statutes and Convention rights are concerned; not just judicial review cases, but already such cases have involved considerable discussion of section 3. In order to construe a statutory provision so as to be compatible with convention rights, the court may have to "read down" the power (as Lord Steyn put it in *R v A. (No.2)*), in other words giving to the statutory wording a meaning narrower than its ordinary meaning. In essence, the court is restricting the apparent scope of the power. That happened most obviously in *R v Lambert* where the House of Lords construed section 28 of the *Misuse of Drugs Act* 1971 as imposing only an evidential burden on a defendant, despite the wide language of the section.

Secondly, there is the court's obligation under section 4 of the *Human Rights Act* to declare a provision of primary legislation incompatible with a Convention right where it cannot construe it compatibly, even using section 3. Here therefore we have the power, and the duty, to scrutinise Acts of Parliament against the criteria of Convention rights, involving the courts in an exercise only previously engaged in where a conflict with European Community Law was alleged. It is a power which has already been used in a number of cases: the haulage case, *Roth*, already

referred to; the case about the discharge of mental health patients (*R (on application of H) v Mental Health Review Tribunal, North and East London Region* [2001] EWCA Civ. 415; [2001] 3 WLR 512; and *Matthews v Ministry of Defence*, *The Times*, 30 January, 2002 where the court considered the provisions in the *Crown Proceedings Act* 1947 enabling the Secretary of State to certify that personal injury or death suffered by a member of the armed forces was attributable to his service and so preventing the Crown from being sued in tort. At first instance, it was concluded that those provisions were incompatible with Article 6 and the right of access to a court, but the Court of Appeal has recently reversed this.

Of course, the court's in declaration in such cases does not affect the legal validity or force of the statutory provision in question, as section 4(6) of the *Human Rights Act* makes clear. Consequently the court is not challenging the sovereignty of Parliament as lawmaker. The separation of powers remains intact. Nonetheless, as the decision in *Roth* and the reaction to it shows, that formal fig-leaf of section 4(6) may not offer very much protection for the courts where the statute embodies a policy initiative of government to which a minister is committed. The fact that the courts merely "declare" incompatibility, rather than striking down the statutory provision, may not always suffice to turn away Ministerial wrath.

The third important feature of the *Human Rights Act* is the obligation imposed on the courts by section 2 to take account of the Strasbourg Court's jurisprudence. Central to that jurisprudence is the principle of proportionality, which now has to be applied by the English Courts in all cases, including those concerning public decisions, where there is a potential breach of a Convention right. This is not wholly new territory, since it has already operated where European law issues have been involved, but the area where proportionality is to be applied has been vastly extended since 2 October 2000.

What is quite clear is that proportionality requires the court to go further in its scrutiny of the decision under challenge than merely applying the test of *Wednesbury* unreasonableness, *i.e.* is the decision one within the range of decisions to which a reasonable decision-maker *could* have come. The House of Lords has spelt out the distinction in the crucially important case of *Daly: R (Daly) v Secretary of State for the Home Department* [2001] 3 WLR 1622. That was the case where the claimant successfully challenged the policy, which required all prisoners to be out of their cells while searches took place, including searches of legal correspondence. The House of Lords held that such an indiscriminate ban on prisoners being present could not be justified. It was an excessive and disproportionate interference with the prisoners' right of legal professional privilege. In the course of his speech, Lord Steyn, with whom the rest of the House agreed, endorsed the test of proportionality formulated in the

Privy Council case of *de Freitas*, namely the three questions of whether:

- (i) *the legislative objective is sufficiently important to justify limiting a fundamental right;*
- (ii) *the measures designed to meet the legislative objective are rationally connected to it; and*
- (iii) *the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'*

Lord Steyn was at pains to emphasise that this does not mean that there has been a shift to a merits review. There is still an area of 'due deference', which the courts will allow to the decision-maker. Nonetheless, the third part of the test does involve the court applying its own judgment to whether the decision-maker has struck a proper balance between the right interfered with and the legitimate objective. That is a whole new ballgame. Traditionally the courts have in judicial review taken the position that the weight to be attached to different factors relevant to the decision is a matter for the decision-maker, subject only to *Wednesbury* unreasonableness. That has been seen as inherent in a discretionary power to make decisions. In Convention rights cases, the courts will henceforth apply a more intensive scrutiny to the balance struck by the decision-maker than would have happened under the *Wednesbury* principles.

It is right to note that the degree of intensity applied by the courts when scrutinising a decision will normally allow some margin of appreciation to the decision-maker, and that that margin will vary, depending on the subject-matter and the rights involved. That has been well demonstrated by the Court of Appeal's recent decision in *Samaroo* [2001] UK HRR 1150, a deportation case raising the issue of whether deportation of the claimant was a proportionate interference with the right of respect for family life under Article 8. Dyson LJ said the court had to decide whether a fair balance between the individual's rights and the legitimate aim of the public body had been struck, recognising that the decision maker still has a discretionary area of judgment. In deciding on what degree of deference to that judgment was required, the court should have regard to the nature of the right, the extent to which the issue requires consideration of social, economic and political factors, the extent to which the court has a special expertise, as it does, for example, in criminal matters and whether the rights involved have a high degree of constitutional protection such as freedom of expression or access to the courts.

It was held that the Secretary of State should be allowed a significant degree of discretion in assessing the proportionality of his decision to deport the claimant, bearing in mind amongst other things the court's lack of expertise in judging how effective the policy of deporting those foreign nationals convicted of serious drug offences was in deterring such offences.

The decision has been criticised, but the approach adopted in *Samaroo* seems to me to be right. The court's ability to make a sensible judgment about the balance struck between the public objective being pursued and the means employed to pursue it will vary, depending on the subject matter. The degree of deference accorded to the decision-maker will therefore vary as well. There is an interesting parallel here with the House of Lords' decision in *Alconbury* [2001] UKHL 23, where the view was taken that, where major planning or highway decisions were being taken by the Secretary of State, one was in the realm of issues of wide public importance, where the accountability of the decision-maker to Parliament was a relevant factor.

Having said all that, proportionality does involve the courts in a relatively new exercise and one which may often require a closer scrutiny of public decisions than before. There is potential here for greater conflict between the courts and the executive. Certainly the *Human Rights Act* has widened the court's powers and their approach will be different. But certain points need to be borne in mind when it is suggested that the judiciary is becoming too powerful:

- (1) What has happened is not the result of some exercise in self-aggrandisement by the courts, at the expense of the other elements in our constitution. It was Parliament which passed the Human Rights Act, which requires the courts to uphold Convention rights and to take account of the Strasbourg jurisprudence.
- (2) There seems to be little evidence that the courts have allowed these additional powers to go to their heads. Cases since the Act came into force show rather that the courts still observe the principle that there is a proper sphere of influence reserved to the executive, which the courts will respect. Against cases like *Daly* and *Roth*, one can set *Alconbury*, *Samaroo* and *Rehman* [2001] UKHL 47. The last of those was the House of Lords' decision about the ability of the Special Immigration Appeals Commission to differ from the Home Secretary on the question of whether a foreign national was a danger to national security. Even though SIAC includes a person with experience of national security matters, the Lords held that it could not differ from the Home Secretary on that issue except on *Wednesbury* unreasonableness grounds. So far, therefore, the picture seems to be one of considerable judicial self-restraint, and recognition of the legitimate rights of a democratically elected body to legislate and to govern. Parliament remains sovereign.
- (3) The role of the courts in protecting the fundamental rights of individuals and minorities is not new. It is a classic task of the courts in a democracy to protect the rights of the individual citizen, sometimes against the majority. Parliamentary sovereignty alone does not ensure this, as Albert Dicey himself was eventually

forced to recognise. When Dicey was asked why Parliament did not command all blue-eyed babies to be killed, an important part of his answer was that MP's were not usually men of outrageous ideas. However, he was an Ulsterman, and in 1913 it became clear that MP's were about to vote in favour of the Home Rule Bill. Not long afterwards, Dicey lost his faith in Parliamentary sovereignty and pledged himself to violent resistance by signing the Ulster Covenant. The fact is that a modern liberal democracy is not only about government according to the wishes of the majority. It is also based on certain fundamental human rights, which are not automatically protected by majority rule. As John Stuart Mill said nearly 150 years ago in his introduction to 'On Liberty', there is a risk of the tyranny of the majority:

'The people may desire to oppress a part of their number and precautions are as much needed against this as against any other abuse of power. The limitation therefore of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community.'

This country has long subscribed to that. That is why the United Kingdom played a major part in drafting the ECHR, so much so that there are those amongst the French judiciary who regard it as an Anglo-Saxon intrusion into the civil law. The role of the courts in protecting the rights of individuals and of minorities, whether they are asylum seekers, gypsies, prisoners, gays or lesbians or others, is as crucial as ever to our democratic health and it is a task from which we should not shy away. One only has to think of the problems of Northern Ireland, exacerbated by the disregard of minority rights over a long period of time, to appreciate that the institutions of democratic government can themselves be put in peril if such rights are not respected.

I would, however, add one note of caution. The line will not always be easy to draw between deciding that a public body's decision offends against the principle of proportionality and remaking the decision itself on its merits. It is a more delicate task than was involved in the *Wednesbury* unreasonableness test and inevitably some mistakes will be made. There are dangers in a more interventionist approach. The more that Judges get involved in difficult issues of public concern, the more pressure there is likely to be for them to defend their decisions. Not long ago one leading politician was floating the idea that judges should, before being appointed, appear before a Parliamentary committee for confirmation of their appointment. (William Hague, speech to Centre for Policy Studies, 1998). That is a slippery slope, which would lead to the political views of Judges being considered before they were appointed and to a real threat to judicial independence.

PUBLIC CONFIDENCE IN THE JUDICIARY

But how can a more interventionist approach be reconciled with the independence of the judiciary and the lack of formal public accountability of the judges? It seems to me that the answer can only lie in sustaining and increasing public confidence in the judiciary, so that the public is prepared to see the courts upsetting decisions made by public bodies, even by government ministers. The courts will not always have public opinion on their side on a particular issue. That is inevitable when the court is protecting the rights of a perhaps unpopular minority. But it then becomes all the more important that the judiciary retains the trust and confidence of the public in general terms.

It may well be that we have some way to go to achieve that end. Research by Professor Hazel Genn suggests that the public regards judges as old, out-of-touch, and as not understanding the lives and values of ordinary people. When an ICM poll in 1994 asked the question: 'Which types of people do you trust?' only 27 per cent of respondents ticked 'judges' - as compared, for example to 81 per cent for doctors, 49 per cent for teachers and so on. We did rate better than estate agents (6 per cent) and politicians (5 per cent), and at the bottom came car salesmen and journalists with 3 per cent a-piece! The reason why more did not trust judges was not that they regarded them as corrupt but once again that judges were regarded as being out of touch. That same message has emerged from the British Crime Survey.

I do believe that there are some false public perceptions here. To many members of the public who obtain their information from television, judges spend their time either in court wearing long wigs and banging a gavel, or in palatial lodgings on circuit, accompanied everywhere by their own private detective. The reality, which is that for the most part we lead fairly ordinary lives, travelling on tubes and buses, going to the pub and the cinema, watching the World Cup and so on, seems difficult to get across.

But we ourselves could do more. I believe that more openness about our work and us is required. The public should know that judges are now extensively trained in how to handle a case, how to sentence, how to use modern technology, and how to respect the customs and values of minority groups in the community. The evidence is that those who have had first hand knowledge of judicial performance have a reasonably high opinion of judges. When jurors in over 3000 criminal cases were asked in 1993 how well the judges had performed in such tasks as keeping a fair balance between the defence and the prosecution and explaining things to the jury, over 99 per cent thought that the judge had performed either 'very well' or 'fairly well'. The lesson is that we are not successful in getting the message across to the public at

large. As Lord Taylor said in 1992, the judges have themselves in part been responsible for the public misconceptions through our self-imposed isolation.

Some valuable steps are already being taken to improve things and to get the message across. The Lord Chancellor's Department and the Citizenship Foundation have recently produced an excellent booklet for teachers and schoolchildren, encouraging school visits to courts. But the Judges themselves need to be more willing to discuss their work, obviously in somewhat general terms, so as to promote greater public understanding. We need a judicial website, not just a Court Service website, and of course we need a more representative judiciary containing a greater proportion of women and those from minority ethnic groups. It is only if we achieve greater public awareness of what we do and how we do it that we will overcome the misconception that we are out of touch with the world at large. And it is only by doing that that we are likely to achieve the long-term public confidence that is required if the courts are to be able successfully to perform their changing role in the field of judicial review.

My conclusion is that, while the *Human Rights Act* has brought about a shift in the relationship between the courts and the executive, the courts are still going to be performing their classic task of protecting individual rights, while respecting the traditional territory occupied by Parliament and government. So far, the judges are exercising their powers with caution, and I expect that to continue. It is, of course, the law which is supreme in this country, not the judges. If Parliament wishes to change the law, it can do so, and the courts will loyally apply that law. There need be no fear that the judges are taking over.

It was Tacitus who said in his *Annals*: 'Judges are best at the beginning and deteriorate towards the end.' I may already have passed the critical point, but in the hope of avoiding further deterioration, I shall stop there. 

Lord Justice Keene

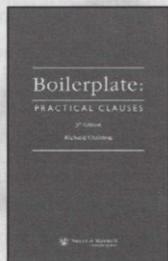
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