Judicial Leadership and the Rule of Law.

a lecture in memory of HH Judge Roger Elsey former Resident Judge in the Sovereign Base Area of Akrotiri and Dhekelia

It is a great honour to have been asked to deliver this lecture albeit in circumstances where we greatly regret that Mrs Justice Cheema Grubb is unable to be present. I know how disappointed she will be that she is unable to deliver a lecture on this occasion today: this is a subject about which I know she feels passionately.

I am honoured to be asked to step into the breach but I am also honoured to speak at this occasion which is to celebrate the judicial work and leadership of Roger Elsey Resident Judge in the SBA until his untimely death last October. I knew Roger from just after the time of his appointment when I had just been appointed to my current role, and as we got to know each other embarking on these new roles , a very good friendship developed. Upon meeting Roger for the first time, it was immediately clear to me that an outstanding appointment had been made and that the Sovereign Base Area were very lucky to have him as their Resident Judge. I am delighted that Sue Elsey and the family are on this webinar: it is good to be brought together in this way.

Roger had enjoyed a distinguished legal career at the Bar and as a District Judge in the Magistrates Court before his appointment to the SBA in 2019. He practiced at the Bar from Broad Chare chambers in Newcastle and aged 49 was appointed a District Judge in Teeside Magistrates Court. In 2010 he was appointed the designated judge for the Magistrates Courts in the North East and in 2014 he was nominated to sit on the Judicial Business Group for the North East. Over the following years he was authorised to sit in every aspect of Magistrates Court work including being authorised by the LCJ in 2018 to sit in applications under the Terrorism Act 2000. It is worthy of note

I think that only a few of District Judges in the UK are authorised to sit in terrorist cases – Roger was one of them.

These are the bald facts of his legal career but of course to be a good judge and Roger was a very good judge, you must bring wisdom and good judgement to your work with a keen sense of fairness and empathy for your fellow man and woman – Roger had those qualities in abundance. It is therefore a great privilege to speak on this occasion.

So to judicial leadership and the Rule of Law.

Judges have not always had a very good press from our greatest writers. You will remember the opening chapter of Bleak House where Charles Dickens begins with is description of implacable November weather in London where there is mud in the streets and fog everywhere but he writes

> *' never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition of the High Court of Chancery…on such an afternoon The Lord High Chancellor ought to be sitting here – as he is- with a foggy glory round his head, softy fenced with crimson cloth and curtains, addressed by a large advocate in whiskers, a little voice, and an interminable brief, and outwardly directing his attention to the lantern in the roof. where he can see nothing but fog.'*

The interminable never-ending case was, of course, Jarndyce v Jarndyce where justice was never achieved as the law and the lawyers were engaged in their own closed world without reference to the wider world outside – and the consequences of their foggy lack of progress in reaching a just result caused Dickers to write the warning about going to court: *' Suffer any wrong that can be done you, rather than to come here'.*

I think for any lawyer , and particularly any judge , Bleak House should be compulsory reading. What is described there is a legal system, and a judiciary that is unconnected with the world in which it is set, and which

is inward looking and completely unaware of the consequences of its inactivity and inefficiency for litigants and the wider society . Dickens had been a law clerk before he was an author and his insights into the mid Victorian English legal system before the reforms of the 1870's shows us how things can go wrong for a legal system.

However, for an example of judicial leadership I think we need look no further than Lord Atkin's dissenting judgement in Liversedge v Anderson 1942 AC 406. You will remember the facts: in the WW2 the Home Secretary had a power to intern people if he had a reasonable cause to believe they had hostile associations. He exercised his powers in respect of Robert Liversedge committing him to prison but giving no reason. On appeal the courts had to decide to what extent if at all judges could investigate the objective basis for the Home Secretary's belief that he had a reasonable cause. The majority of the HL held that as long as the Home Secretary asserted that he had such a reasonable belief, and was acting in good faith, then the statutory requirements were met.

However, in Lord Atkin's dissenting judgement he said that the majority had abdicated their responsibility to investigate and control the executive, and were being *"more executive-minded than the executive".* Atkin protested that theirs was *"a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister,"* and went on to make a profound statement concerning judicial leadership and the Rule of Law:

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

He went on to refer to the exchange between Humpty Dumpty and Alice in Wonderland saying that their exchange was the only authority for what was being contended before him in court. Lord Atkin quoted from Alice in Wonderland in his judgement:

> *"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean, neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be the master, that's all."*

Lord Atkin concluded that

> *" After all this long discussion the question is whether the words "If a man has"[reasonable cause to believe] can mean "If a man thinks he has [reasonable cause to believe]". I have an opinion that they cannot and the case should be decided accordingly.*

Lord Atkin came under great pressure to change his judgement in the midst of war in 1942. In an exceptional example of judicial courage and leadership, he did not. He was not prepared to agree to put a strained construction on words with the effect of giving an uncontrolled power to the Home Secretary. He stood out against the unjustified encroachment of the state into the freedom of the citizen, even in times of war. As time went on this great dissenting judgement has been recognised as authoritative, and the views of the majority wrong.

I think the example of what happened in the judgements of the HL in Liversedge v Anderson illustrate that the Rule of Law is not to be understood simply as what the majority in the Supreme Court or the HL have held to be the law at any particular time ; nor can the Rule of Law simply be what statute enacts. The Rule of Law is based on a more fundamental set of truths. So what does the Rule of Law mean? Politicians often speak of upholding the Rule of Law, and lawyers speak of it as a core principle, but what is its essential quality? In UK in 2005 the Constitutional Reform Act reformed the role of the Lord Chancellor and stated at section 1 that nothing within the Act adversely affects the existing constitutional principle of the Rule of Law, nor the Lord

Chancellor's existing constitutional role in relation to that principle. In his oath of office the Lord Chancellor swears to 'respect the Rule of Law'. However, the Act never defines what the principle of the Rule of Law means.

Lord Bingham, a modern judge who demonstrated great leadership in support of the Rule of Law, discussed this lacuna in the legislation and went on the deliver his analysis in his seminal Sir David Williams lecture in 2006. I know work is being done in this University on the operation of the Rule of Law drawing on his work in this field. The core of the rule of Law according to him was that *'all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered by the courts.*' He relied upon Thomas Paine's great declaration that ' *in free countries, the law ought to be King; and there ought to be no other'*.

Lord Bingham identifies 8 conditions of a society which if present demonstrate the presence of the Rule of Law. I will set them out again and accompany them with some brief thoughts on their operation from my perspective as a working judge.

(i) The law must be accessible and as far as possible intelligible, clear and predictable.

Jeremy Bentham writing at the end of the 18th century criticized customary law in general, and common law in particular, for failing to satisfy this requirement: he considered that the sources of law were hidden in obscurity and though there were spurious appeals to precedent, much of the law was just made up by the judges as they went along.
It is surely true that if judges are unable to express their findings clearly and succinctly, or if legislatures become hyperactive in generating an

abundance of laws which are difficult to understand or follow, then the Rule of Law is undermined and diminished. I am a criminal judge in UK where Parliament seems particularly interested to pass frequent legislation both primary and secondary of great complexity dealing with sentencing reform. These changes have profound effect on people's lives , but the frequency of legislative change means that at times legislative coherence can be lost and the law becomes inaccessible. Professional lawyers must be able to advise on what the law is, and what the likely outcome of a legal adjudication will be.

(ii) Disputes must generally be resolved by the application of law rather than the exercise of discretion.

In a modern system of administrative law, the possibility of the exercise of a discretion by public officials outside a policy must be possible, but that discretion must be properly framed and authorised and the application of rules and judicial procedures must be preserved for those cases where liberty and well-being are most seriously at stake.

The development of judicial review in the UK over the last 50 years or so has been a striking development of the common law which has provided constitutional supervision of public authorities. Lord Diplock in 1982 described the development of judicial review, when it had just begun, as having been the greatest achievement of the English courts in his judicial lifetime (R v IRC, ex parte National Federation of Self – Employed and Small Businesses Ltd 1982 AC 617, 641 C) . Lord Goff in Kleinwort Benson Ltd v Lincoln City Council 1999 2 AC 349 , 378 E referred to the development of judicial review in English courts as '*radical judicial developments*' which through decisions of the courts in the middle of the century had led to the creation of our modern system of judicial review.

Lord Mustill in R v SoSHD ex parte the FBU 1995 2 AC 513, 567D carefully explained the scope of judicial review and the delicate balance in play between judges, the executive and Parliament:

> *"The courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory that belongs to the executive, to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended… To avoid a vacuum in which the citizen would be left without protection against a misuse of executive powers the courts have had no option but to occupy the dead ground… Absent a written constitution much sensitivity is required of the parliamentarian, administrator and judge if the delicate balance of the unwritten rules evolved… is not to be disturbed, and all the recent advances undone'.*

The heart of the judicial review jurisdiction is to ensure that public bodies respect the Rule of Law.

(iii) The law must apply equally to all.

This means of course that there can be no distinction between citizens of the country within the jurisdiction and others. A state cannot pick and choose the people to whom the law applies. That is a principle that has been vindicated in legal cases that arose during the post 9/11 period in respect of Guantanamo Bay in the US, and the Detention Orders legislation in UK. In the latter case Lord Bingham held that the UK legislation was incompatible with ECHR and was disproportionate by permitting the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.

(iv) The law must protect fundamental human rights.

A state which even through a democratically elected Parliament passed a statute which forced the exposure of female children on the bare mountainside, to use Lord Bingham's example, could not be a state which was observing the rule of law, notwithstanding its compliance with the statute enforcing such a grotesque policy.

In UK, judges of the High Court and above and equivalent judges in Scotland and Northern Ireland may issue a declaration of incompatibility to the ECHR when considering legislation. This means that Parliament then has the opportunity to change the law to bring it into compliance with the ECHR. This recognises the constitutional doctrine of the sovereignty of Parliament.

There is also a fast track procedure to achieve compliance through the use of secondary legislation although this has been rarely used. The number of declarations of incompatibility have been small in comparison to the number of challenges. However s. 3 of the Human Rights Act requires all judges at all levels in the judicial system, in so far as this possible, to give effect to all primary and secondary legislation so as to be compatible with Convention rights. This is the course often adopted by the courts when such an issue arises.

(v) Disputes must be resolved without prohibitive costs or inordinate delay:

Access to legal aid is an essential feature of any legal system that operates within the Rule of Law. And as every common lawyer should know – justice delayed is justice denied. For those of us in the criminal courts the exercise of case management powers in setting time tables, and ensuring that the real issues in the litigation are set out well before the trial so that resources are directed at essential topics and not peripheral issues, has

been an important part of our experience of a modern criminal justice system. Interminable delays before trial are unacceptable and undermine the Rule of Law. This has been a pernicious effect of the Covid period over the last 2 years: it has added to the delays before trial, with adverse effects on the engagement of witnesses and the complainants in the process. This undermines the efficacy of the criminal justice system and confidence in the operation of the Rule of Law is diminished.

(vi) Public officials must use their powers reasonably and not exceed their powers.

This means that the Rule of Law requires independent judges who have the power to rule against the decision of ministers and public officials carrying out a government policy. The whole process for the appointment of judges must be independent of the executive. In UK we now have a Judicial Appointments Commission which is independent of the executive and runs competitions for new judges and draws up a list of those who are suitable for appointment. Of grave concern for the operation of the Rule of Law is any attempt by an executive to manipulate the appointment of people as judges who are seen to be loyal to the wishes of a particular government minister or ruling party. Striking at the independence of the judiciary in this way is to undermine the Rule of Law, because it brings into question the independence of the judge being required to adjudicate upon the exercise of powers by public officials.

(vii) The system for resolving differences must be fair:

The adjudicative procedures provided by the state should be fair to all parties. With the increased use of remote hearings in recent years with advocates and Defendants appearing over live links of various kinds during the recent pandemic, the Coronovirus Act 2020 emphasised the need for all participating in such hearings to be able to both see and hear

each other at all times during the hearing. If they cannot then the hearing is unlawful. I have understood this to be a practical requirement underpinned by our commitment to the Rule of Law, that notwithstanding these aids to communication the fundamental requirement that all people must be able to fully participate in the hearing is sacrosanct, and without it, the process ceases to be fair to all parties. Full participation requires being able to hear and see everyone participating, whilst at the same time being seen and heard by other participants.

(viii) A state must comply with its international law obligations.

It is I hope inconceivable that a state which respected the Rule of Law could embark upon an action which it knew to be unlawful.

In conclusion, Lord Bingham said in his 2006 lecture that judges "*are not, as we are sometimes seen, mere custodians of a body of arid prescriptive rules but are, with others, the guardians of an all but sacred flame which animates and enlightens the society in which we live*'. I am delighted that as lawyers and judges operating in our respective courts and jurisdictions, we are able to share in the guardianship of this flame and reflect together on these great principles which are so important to the sustenance of a peaceful democratic rules based world.

I would like to end this lecture by commending this University and the Department of Law which has organised this webinar; you are uniquely placed to be a forum where these principles are articulated and discussed being at the crossroads of 3 continents - which are all places which need these principles as never before. And I think you can bring particular insights into these issues through your physical location in this part of Cyprus which lives with the continuing consequences of

conflict. I wish you well in the impressive research and project work in which this Department is engaged.

Mr Justice Mark Bishop

Presiding Senior Judge,

Sovereign Base Area of Akrotiri and Dhekelia.

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