THE JUDICIARY*

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The conception of the judge as a man learned in the law, who is utterly independent of the executive, and who administers what he considers to be the law without fear or favour, is now firmly embedded in our minds. We boast today that not only is the judge uninfluenced by political considerations but that his very appointment is divorced from politics—being made, and made only, because he has proved himself professionally to be the best man for the job. But this was not always so. Indeed, in England, it is no older than the revolution of 1688. Prior to that time, English judges were expected to be as partial politically as is the case in certain modern States where the rule of law is not observed. The judicial role was regarded, not as a means of obtaining government under law, but as a method of administration, to execute a given policy, whether of the Crown or of Parliament. Thus, as you will remember, Bacon, in his essay 'Of Judicature', speaks of the relations of judges to the government in these terms: 'Let judges also remember, that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty'. And thus impartiality in a judge was only tolerable if no point of sovereignty was likely to be checked.

The role of the judge was twofold, part political servant of the Crown and part, and only part, arbiter of private disputes. Any judge who checked a point of sovereignty, whether the Sovereign or the House of Commons was for the time being in control, was liable to be removed from office. And thus, failure to please politically led to the dismissal by the Crown in 1616 of no less a man than that great champion of the common law, Sir Edward Coke, Chief Justice of the King's Bench, of Chief Justice Crewe in 1626, of Chief Justice Heath in 1634, and of Sir Thomas Mallet, the Chief Justice, who was arrested in his own court by the parliamentarians in 1642. And, moreover, to gain the pleasure of the Crown was to risk the animosity of the Commons. Nor did moderation please. Sir Francis Pemberton, who was Chief Justice in 1681, tried to take a middle course, only to be dismissed twice by the Crown and to be imprisoned twice by the House of Commons. The apex of the judge as partial politician was of course reached in the case of Judge Jeffreys immediately before the system disappeared. His reputation was bad,

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merely because he was the last, and probably the most partial, of partial judges. He became in 1671, at the age of 23, Crown Serjeant of the City of London as a result of his political connections, and then, anticipating no further advancement from the party, he became a King's man. The rewards flowed smoothly, he became Recorder of London, and in 1683 he became Chief Justice of the King's Bench. As you know, he was renowned for his brutality, and an example of this occurred in the trial of Sir Thomas Armstrong. Sir Thomas was alleged to be implicated in a plot to kill Charles the Second and, having fled to Holland, had been declared an outlaw. The Dutch returned him and he came before Jeffreys. Sir Thomas Armstrong argued that, under an old statute, if an outlaw came and surrendered himself to the Chief Justice within a year, he was entitled to a fair trial. Judge Jeffreys rejected his plea and the trial ended thus: Chief Justice—'Nay be as angry as you will, Sir Thomas, we are not concerned with your anger, we will undoubtedly do our duty'. Sir Thomas—'I ought to have the benefit of the law and I demand no more'. Chief Justice—'That you shall have by the grace of God. See that execution be done on Friday next according to the law. You shall have the full benefit of the law'. And no wonder, therefore, that the Assize in the West of England in 1685, conducted by Judge Jeffreys, is famed for his injustice and his ruthlessness. And yet that same man—and this is often forgotten—in private disputes was renowned for his judicial detachment and for his sympathy. But he was the last of the political partial judges; and thereafter there emerged what John Locke in 1690 referred to as 'the indifferent judge deciding according to the established law'.

The Act of Settlement of 1701 laid down the conditions of independence in which this spirit of judicial detachment could grow, since it provided that the judge could only be removed by a vote of both Houses of Parliament and, further, in the reign of George the Third, the salaries of the judges became a fixed charge on the Consolidated Fund, thus avoiding the possibility of annual criticism in Parliament when the salaries were discussed.

Since then but few attempts have been made to remove judges. It is true, one such attempt occurred in 1843 when a motion was introduced in the House of Commons to seek an enquiry into the conduct of Lord Abinger, who was Chief Baron, and who in a trial of certain Chartists was said to have been partial, unconstitutional and offensive. Lord John Russell put the objection in these terms: 'The judge spoke as a politician and a lawyer, and that in his case the judge only should have spoken and the politician should have remained silent'. Well, the motion was defeated but the interest lies not in the result but in the expectation of the conduct of a judge which was implicit in the motion itself. Indeed, coming to more recent times, there is no instance of a judge, whatever his political views and activities may have been before his appointment, ever having been accused of being influenced thereby while on the Bench. But be that as it may, the government of the day continued to raise to

the Bench lawyers who had served the party well. Elevation to the Bench was indeed looked upon as a just reward for political services. And there was indeed this justification for it, that it encouraged lawyers to become politicians and to assist their party in the House of Commons where good men of all professions are sadly needed. But since the last war even that practice has died out. It is impossible to think of any appointment in England to the Bench since the war which can be said to be in any way a political appointment. That does not of course mean that a politician is debarred from becoming a judge, but merely that he must take his place alongside others who are not politicians, and that only the best man for the job will be appointed. Indeed, party politics are so divorced from such appointments that it has happened that a leading member of the Opposition has been appointed a judge.

What then are the requirements of what John Locke described as 'the indifferent judge deciding according to the established law'? Clearly, there are too many to enumerate in detail, but I would like to mention just a few. That he should be a man of complete integrity goes without saying. It is not merely that he must be incorruptible, something that can safely be assumed today, but that he must be intellectually honest, overcoming his natural prejudices and facing difficulties in decision boldly rather than taking some easy short cut to avoid them. Then again—and this is particularly true of the trial judge—he must be patient and courteous so that any litigant before him will feel that win or lose he has had a fair trial. May I give an illusration from my personal experience at the Bar. I well remember appearing for some foreigners in our Commercial Court in a dispute, concerning bills of lading and charter-parties, raising some ten points of law, all interesting points. The case went on for about six days, and at the end the judge gave judgment on all the points against my clients. That very evening we had a consultation and I, perhaps thinking a little of my own pocket, was encouraging them to appeal, and they said 'No. This judge has understood all our points, he has put them better than we could put them ourselves, and he has demolished them. We don't want to appeal'. Now, that judge may not have been a great jurist, but he had the quality of giving satisfaction which, I venture to think, is all important in a trial judge. That same quality involves, I think, what may be called a wise silence. That is not to say that he should be forever silent. He must where necessary put questions to a witness to elucidate some ambiguity; he must on occasion tell counsel what is passing through his mind, if only to give him an opportunity of dealing in argument with the point. But the judge must never, under our system of justice, descend into the arena and, as it were, take over the conduct of the case, putting questions to witnesses or interrupting counsel. Such a course, from whatever motive adopted, can only give the impression that he is prejudiced against one side or the other. And then again, he must have a quick grasp of fact and the ability to find the real points in the case and yet, at the same time, he must not

give the impression that his mind is closed to argument. Perhaps a contrast between the two extremes was neatly put in an epigram referring to Lord Eldon—the Lord Chancellor's slowness of decision and the speed of Sir Thomas Leach, his Vice-Chancellor or 'Vice'. It reads thus:

> 'In Equity's high court there are
> Two sad extremes, 'tis clear:
> Excessive slowness strikes us there,
> Excessive quickness here.
>
> Their source, 'twixt good and evil, brings
> A difficulty nice;
> The first from Eldon's Virtue springs,
> The latter from his Vice.'

Finally, may I repeat what is indeed obvious but I think forgotten; the strength of the judiciary and the respect in which the judges are held depends ultimately in our countries on the strength of the profession and the respect which its members command as upholders of its great traditions. It is not merely that judges are chosen from the profession, the dependence goes much deeper. Thus, the primary task of a trial judge is not to make learned pronouncements on the law but to try the case which comes before him with expedition, judging the relevant facts and arriving at a decision in accordance with general principles of law, avoiding where possible scrutinising the welter of reported cases. And this he can do only if there is a strong profession whose members not only owe a duty to their clients, but a duty to the court to assist the judge to perform this task.

May I end this short address by saying, with all sincerity, how honoured I feel to have received an honorary degree from this vigorous and growing University. Having at Cambridge myself studied geology for three years and law for only one year, I feel a most unworthy recipient, but that only makes this day for me a still more memorable occasion.