Beyond the Bench: Newcastle Law School seminar 15 September 2022

Keynote address by Rt Hon Lord Dyson

What judges do is very important. It affects the lives of most if not all of us in different ways. Until recently, they have been seen as rather remote, austere figures about whom little is known as individuals. And yet they are very public figures. Their salaries are paid out of the public purse. Although their independence is rightly prized as an important feature of our unwritten constitution, they are public servants in the sense that what they do is in the public interest. It is in the public interest that they determine private and public law disputes fairly and in accordance with the law. It has been accepted for some time that serving judges, when performing in the public arena, should not be restricted to speaking through their judgments. The cautious and rather austere Rules that were promulgated in 1955 by the then Lord Chancellor, Lord Kilmuir, stated that, generally speaking, it was undesirable for judges to make public any statements at all. But these were abolished by Lord Mackay of Clashfern in 1987. He said that judges should be allowed to decide for themselves what they should do; but he was careful to say that they should avoid public statements either on general issues or on a particular case which cast any doubt on their complete impartiality and that they should avoid issues which were or might become politically controversial.

When I was appointed as a high court judge in 1993, I received no training or guidance as to what I might say extra-judicially. The convention that judges did not need to be told how to do any aspect of judging was long- standing. Whatever its juridical basis may have been, there was no doubt that it was well entrenched until fairly late in the 20th century. The Judicial Studies Board (now the Judicial College) was established in 1979. Until then, judges had received no formal training. Many older judges were resistant to the idea of judges being told how to do their job. But over time, training was welcomed and its scope was extended. It came to be appreciated that there were aspects of judging that could be taught: it was not all about untutored, innate and instinctive judgment.

How far (if at all) it was proper for me as a serving judge to travel outside the confines of judging or what it would be proper for me to do when I retired was left entirely to me to decide. It was left to the judgment and good sense of the individual judge to act as they thought appropriate. It may be that it was felt by

senior judges that to prescribe the contours of what was permissible would breach the canon of non-interference with judicial freedom.

The Guide to Judicial Conduct was first published in 2003. By this time I was in the Court of Appeal. It was published without fanfare and I did not receive any training as to how the Guide should be applied in practice. That is perhaps not surprising because the Guide is based explicitly on the principle that responsibility for deciding whether or not a particular activity or course of conduct was appropriate rests with each individual judge. As the Guide says: [It] is therefore not a code, nor does it contain rules other than where stated. Instead, it contains a set of core principles which will help judges reach their own decisions". The three basic principles guiding judicial conduct are stated to be judicial independence; impartiality; and integrity.

The Guide does go on to give some useful guidance on specific issues which are germane to this seminar. Of particular relevance is the statement that, by long standing convention, judges should not comment publicly on (i) the merits, meaning or likely effect of government policy or proposals, including proposed legislation; (ii) the merits of public appointments; or (iii) the merits of individual cases. The conventions are said to operate to promote the dignity of the judicial office, the finality of judgments and, crucially, the independence of the judiciary from the other branches of government.

Despite this guidance, much continues to be left to the good sense and judgment of the individual judge. Thus, for example, the Guide states that judges should, so far as is reasonable, avoid extra-judicial activities "that are likely to cause them to have to refrain from sitting because of a reasonable apprehension of bias". The question of whether there is a reasonable apprehension of bias is by no means always easy to resolve, as some of the decided cases testify. And yet that is the test that a judge is required to apply when deciding whether, for example, to speak extra-judicially on an issue. The prudent approach is to say no in cases of doubt. But some judges are more cautious than others. Some will harbour doubts in circumstances where others would not.

I shall start with the convention that judges should not comment publicly on government policy and proposed legislation. No serving judge would consider it right to comment on policy or legislation outside the sphere of Justice and I am not aware of any judge having done so. Public comments by serving judges on Government policy outside the sphere of Justice would be rightly regarded as none of the judge's business and in breach of the separation of powers.

But what about comment on policy or legislation within the sphere of Justice? The Guide states that there is, in principle, no objection to members of the judiciary speaking on legal matters *which are unlikely to be controversial* at lectures, conferences or seminars. But opinions may differ as to what is likely to be controversial. By convention judges may speak *privately to Government* about policy and proposed legislation. Indeed, Government welcomes such private comments and finds them a useful part of the consultation process that leads to legislation. This is especially the case as regards contributions from leadership judges, in particular the Lord Chief Justice. Judges also respond privately to consultation papers issued by the Law Commission. *Public* comments by serving judges on government policy or proposed legislation are rare. One exception is where they are invited by a Select Committee of Parliament to give evidence about policy or proposed legislation.

The existence of the convention that, generally speaking, a serving judge should not comment publicly on government policy or any proposed legislation is not in doubt. In my view, this is a sensible convention. To have various judges expressing a multiplicity of opinions about government policy or legislation would serve no useful purpose. Worse, it would run the risk of confusing the general public about what the judiciary thinks about potentially important legal issues, thereby undermining public confidence in it.

The other convention that I wish to mention is that judges should not comment on the merits of individual cases. What is objectionable about judges criticising or otherwise commenting on the judgments of other judges extra-judicially? It seems to me that there needs to be a compelling reason to justify such an interference with a judge's right to freedom of expression. The principal reason given by the Guide appears to be to avoid the risk that the judge may have to refrain from sitting in a case because of a reasonable apprehension of bias. This could arise where a judge has commented on a judgment in case A in which an issue has been decided and the same issue arises in case B which the judge has been asked to hear. I accept that there is a risk of this occurring very occasionally. If it does, the judge may feel the need to recuse himself or herself. It will usually be possible to identify the risk in advance of the hearing and a different judge asked to hear the case. This is unlikely to cause any problem. The possibility of the need for a recusal seems to me to be a weak justification for advising judges never to comment on the merits of other cases.

The convention is not justified on the basis that there should be comity between judges. Judges act independently of each other. They owe no duty to each other. They frequently express disagreement with each other in judgments in appeals or

in dissenting judgments. So why should they be inhibited from criticising or otherwise commenting extra-judicially on judgments of other judges?

One reason might be that the most effective way to arrive at a sustainable conclusion on a point of law is to have it tested in the crucible of oral argument by opposing advocates. A judge who ventures into difficult areas of law without the benefit of adversarial argument, so the argument might run, is less likely to produce a good decision than one who has witnessed the testing of the arguments by opposing advocates. I suggest that this is not a convincing reason for judges to refrain from expressing their opinions on legal issues extra-judicially. Brilliant judges may well be more likely to produce a good decision on their own than less talented judges are able to do even with they have the benefit of adversarial argument. After all, academics usually write without the benefit of adversarial argument and some of their work is outstanding.

Another reason might be that to allow judges, especially lower tier judges, to criticise the judgments of their peers or even judges senior to them might create confusion, at least in the minds of laypersons; and it might damage the reputation of the judicial system. It might be said that this would be bad for the Rule of Law. This does not seem to me to be a good reason for muzzling judges either. It is inherent in a system like ours in which decisions within the judicial system are susceptible to appeal that judges may disagree with each other.

I conclude, therefore, that there is no good reason for judges to feel inhibited about commenting on decisions of other judges. Senior serving judges frequently give lectures and participate in seminars on all manner of legal subjects. They are encouraged to do so. The role of a UK Supreme Court Justice includes "promoting understanding of the justice system, the Supreme Court and the rule of law both inside and outside the Court, for example through lectures". It is inevitable that such lectures will include discussion about important court decisions. It is unrealistic to suppose that such discussion will be entirely descriptive and neutral. Anodyne description is unlikely to be of much interest or value and certainly would not warrant input from a Justice of the Supreme Court. What is required and expected is a critique and an element of evaluation. And indeed, that is what happens. I gave many lectures in my judicial career on all manner of topics relating to the law and the justice system. Some contained more controversial comment than others. So far as I am aware, I was never criticised for doing so. I hope and believe that some of the lectures made a contribution to the understanding of the law and the system. I also believe that the fact that I was speaking as a judge (rather, say, than as an academic lawyer) did provide some added value.

Moving away from the convention of not commenting on the merits of individual cases, I should mention the convention that judges should not defend or explain in public their judgments. If a judgment is unfairly criticised, it is tempting to answer back and correct what the judge thinks should be corrected. But this is a temptation that should be firmly resisted. First, the judge is not best placed to make an objective assessment of the fairness of the criticism. Secondly, to answer back may well merely provoke a response and potentially lead to an unseemly squabble, with allegation followed by counter-allegation. Thirdly and fundamentally, such an exercise is damaging to the dignity of the judicial office. If the criticism is based on a misunderstanding of the judgment, it may be possible for the Judicial Office to set the record straight. But otherwise, the judge simply has to take the criticism on the chin and move on. Memories are very short. Even if the judge is angered and feels deeply wounded by the unfairness of the criticism (and judges do have feelings), those who read the criticism will almost certainly forget it very quickly.

An important convention that is almost universally observed by serving judges is not to engage with the Media. So far as I can recall, I only breached this convention twice during my judicial career. The first time was when I gave an interview to Frances Gibb, the legal editor of The Times, shortly after I had been appointed to be the judge in charge of what became known as the Technology and Construction Court. The second was shortly after I had been appointed Master of the Rolls when I was interviewed again by Frances Gibb. On both occasions, I was speaking to the Media in my leadership capacity and not simply as a judge. On both occasions, I wanted to give information about the court over which I was presiding. The second occasion was the more arresting.

I felt that there was little public awareness of the importance of the Court of Appeal and the work that it did. I told the Head of Communications in the Judicial Office that I wanted to request an interview with Frances Gibb. He thought that this would be risky and counselled against it. But I went ahead. The interview resulted in an excellent article published under the headline "We are the powerhouse, the real engine room, says Dyson". I recognised that I had taken a gamble, because I would have no control over the content of the article. But I judged that Frances was unlikely to cause real damage to the reputation of the court. In the event, the article raised the profile of the court and boosted the morale of my colleagues. So everyone was happy.

Since I was appointed as a judge in 1993, there has been a considerable relaxation in what is regarded as acceptable for a judge to do. This reflects the more relaxed attitudes that have become evident in relation to the legal profession and, perhaps,

society more generally. A good example is the televising of court proceedings. This would have been unthinkable even in the late 20th century. In a similar way, the televising of Parliamentary proceedings would have been unthinkable until shortly before it was introduced in the 1980s. These days, televising of these important public activities is not regarded as controversial. On the contrary, it is regarded as highly desirable and an important element of our open democratic system.

But there continue to be limits to what is considered appropriate for a judge to say and do extra-judicially and I have outlined some of them already. One of the leading judges who was keen to loosen the stays was Lord Taylor of Gosforth. He was Lord Chief Justice from 1992 until his untimely death in 1997. He decided to participate in the BBC programme Question Time. He was a modern, approachable man and he wanted to show the public what kind of person was Head of our justice system. I recall watching the programme. It was a public relations flop. It was obvious that he felt seriously inhibited about saying anything interesting at all. What made matters worse was that many of the questions were about political issues of the day and had nothing to do with the justice system. He never appeared on this or any similar programme again and I am not aware that any other senior judge did so either.

The position of retired judges calls for separate mention. It might be thought that retired judges should not be inhibited in the way that serving judges are and should be. Why should the principles of promoting and preserving judicial independence, impartiality and integrity apply to them? They are no longer deciding cases. The answer given by the Guide is that a retired judge may still be regarded by the general public "as a representative of the judiciary" so that retired judges should exercise caution to avoid any activity "that may tarnish the reputation of the judiciary".

I question whether this is a convincing justification for the restriction on retired judges' freedom to comment on aspects of the judicial system or on decided cases. Interference with any person's right to freedom of expression requires cogent justification. This includes the right to freedom of expression of retired judges. The general public may believe that retired judges are representatives of the judiciary, but they clearly are not. They are not performing judicial functions and no informed member of the general public can reasonably believe that they are doing so.

There is a real public interest in learning from retired judges what they think about burning legal issues of the day. They may have much to contribute to the debate generated by legal reforms or important decisions of our highest courts. The

general public are permitted to hear from academics and journalists and frequently do so. Why should they be prevented from hearing what retired judges have to say, especially recently retired senior judges? The best of these have had great experience of thinking about and dealing with legal issues in the real world of the courtroom. The risk that if they speak they may tarnish the reputation of the judiciary seems far-fetched to me. Judges tend to be cautious and circumspect in what they say. They are unlikely to go wild once they retire.

It is interesting that the Guide merely advises retired judges to "exercise caution". It is difficult to know what this advice means in practice. My impression is that very few retired judges have the appetite to comment on Government policy or court decisions. But some do and the Media rapidly work out who they are. Perhaps the most well-known of these was the late Judge Pickles. He was a circuit judge who was given to making forthright comments on cases even before he retired. His production of comments gained momentum after he retired. The Media loved him and I expect many members of the general public did too. He was not an outstanding jurist, but that did not matter so far as the Media were concerned. Judge Pickles was something of a maverick.

In my view, there is nothing objectionable in retired judges speaking publicly about legal issues of the day, including interesting current cases. It is axiomatic that comments should be, and are overwhelmingly likely to be, measured and responsible. If they are, no right-minded person would consider that they will damage the reputation of the judiciary or the justice system. I doubt whether even intemperate or inflammatory comments would do any real damage. In an extreme case, the Lord Chief Justice might feel impelled to say something. Almost certainly it would be better to ignore such comments. But it is not possible to prevent a retired judge from saying or doing something inappropriate if that is what they want to do. In my opinion, none of these possible difficulties is sufficient to justify seeking to interfere with a retired judge's right to freedom of expression.

I should add that there may be a useful analogy here with former members of a Government Cabinet. They are free to comment on decisions of their former colleagues. Once they cease to be members of Cabinet, they are no longer bound by the convention of Cabinet collective responsibility. It is no easier to see what justification there could be to restrict their freedom to comment on Government decisions than to restrict the freedom of retired judges to comment on decisions of judges.

As a postscript, I should say a word about the publication of judges' memoirs and diaries. First, memoirs. In writing my own memoir "A Judge's Journey", I did

not think as hard as perhaps I should have done about whether there were any areas of my professional life that should have been off-limits. I gave a frank account of what it was like for me to be a judge and about some of the key events of my judicial life. I do not recall any incidents which I wanted to describe, but did not describe because I felt inhibited about doing so.

As for diaries, I did not keep a diary (other than an appointments diary). It is well known that Lord Hope of Craighead did keep a detailed diary of several years of his life in the UK Supreme Court. The details included descriptions of the deliberations of the Justices of the Court and the exchanges that passed between them. I confess that it would never have occurred to me to publish to the world such exchanges. It seems to me obvious that they are confidential. If judges know or believe that what they say to their colleagues when they are discussing how a case should be decided is likely to be published, that is bound to have a seriously inhibiting effect on what they say. It is one thing to keep a record of the exchanges for one's personal use. It is quite a different matter to publish the record to the world for all to see. I greatly regret the fact that Lord Hope chose to publish this record.

I should conclude my remarks by congratulating the Law Faculty of Newcastle University for organising this seminar. The subject of extra-judicial activity is important and has not received the attention that it deserves. In recent years, there has been growing interest in academic circles and more widely in judges: who they are and what they do. But there has been insufficient focus on what it is legitimate for serving and retired judges to do when they are not deciding cases. This seminar, to which some very distinguished academics have contributed, has gone some way to making good that deficiency. I hope that it will stimulate more thought and discussion about this important subject.