JUSTICE Tom Sargant memorial annual lecture 2007

Are judges now out of their depth?

Professor Conor Gearty

Centre for the Study of Human Rights, London School of Economics

Wednesday 17 October 2007

Freshfields Bruckhaus Deringer, London

50th Anniversary
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50 years of defending the rule of law

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The lecture was chaired by **Lord Goodhart QC**, chair of JUSTICE Council

A member of the appellate committee of the House of Lords was thoughtful enough to send me an email last week, explaining that as this was the night of the law lords' annual dinner it was not likely that many of their lordships would be in the audience. The email was headed 'not waving but drowning': exactly raising the further question that lies under the title that Roger and I concocted in order to lure you here this evening. If judges are indeed now out of their depth, does this matter? Can they swim? If they can, being out of their depth should come as a welcome chance to show off, to get fully into their amphibious stride.

The point wasn't one I had addressed when I had first woven a painfully elaborate and some might say endlessly recurring swimming-pool metaphor into a book I did on the Human Rights Act, a few years ago. My idea was that if the whole of the public sphere could be reduced to a swimming pool, then judges were best at engaging with those bits close to their own function that I said lay in the shallow end (criminal justice; fair proceedings; civil liberties; and the like) whilst being largely incapable when things drifted across to the deep water on the far side, the social, taxation, foreign and other policy stuff that judges did not come across in the course of their day-to-day work and on which, therefore, they should not be claiming any special expertise – even when tempted to do so by litigants. The point had been especially worth making in the context of human rights – the law in this realm is so abstract that many different kinds of arguments can potentially be made. My observation on the Human Rights Act case-law was that most of the litigation was about matters floating about in the middle, with judges being asked to decide to which end of the pool these questions truly belonged: I may even have written about judges being on their tip-toes striving to stay upright: I am afraid to check. It had never occurred to me to ask, why couldn't they swim?

I can see now that I was misled by mixing my metaphors, or rather by using one image in two different ways. To me in the book 'out of their depth' meant unable to cope, not up to this particular task, being in the wrong job. I had brought the swimming pool into it because it seemed a clever way to make the same point, without realising that it spun the metaphor off in a whole new direction. But introducing this possibility of swimming adds a whole new depth (or perhaps I should say dimension). Giving the key note address at a recent conference in Oxford, the founder of the modern women's shelter movement Erin Pizzey spoke in passing of how so few children she had come across in her work had been able to swim. Swimming required trust: trust in themselves, trust in others, and this was a trust that these children – many of whom had been abused by their fathers – had not had. Here perhaps is a way of bringing together the two strands of my metaphor: judges

who are headed towards the deep end of policy need to be trusted – by themselves and by others – if they are to be able to turn the apparent difficulty of being out of their depth into a strength, not to drown in the inundation of broad policy before them but rather to wave confidently while resolving the difficulties before them with a few firm judicial strokes.

So the lecture this evening is about more than just deciding whether the judges are indeed now out of their depth. It is also about whether, if they are, they nevertheless enjoy sufficient trust to be able to swim on regardless, asserting their jurisdiction in areas that are historically far away from the sorts of things that they have traditionally done.

My answer to these questions tonight take the form of three propositions of which I hope to persuade you: first, that though the judges are not now out of their depth, they must be on their constant guard against becoming so and there is some evidence that the guard of at least some of them has been dropping of late; second, that if the judges do find themselves by accident or design out of their depth they must on no account swim – and this is the case *even if* they feel that they enjoy sufficient confidence on the part of the public to be able to do so: judges, in other words, have no business swimming even when they are able to – they belong in the shallow end; and thirdly a right understanding of the judicial role along these lines is essential if the integrity of the judicial function is to be assured into the future and now – a time of little social conflict and high trust in the judicial branch – is exactly when this understanding can be honed and refined to the benefit of future generations.

Let me begin, then, with the first of these propositions. It is directly concerned with the question of judicial competence. I have alluded earlier to what I feel is the central remit of the judge in our politico-legal culture. The core of his or her work is concerned with determining the facts of individual cases and applying the law to those facts: this is what judges have been mainly for and what they feel most confident about. Where the state is involved as prosecutor we call this the criminal law; where it is private parties disputing the application to them of settled law or seeking (more ambitiously) to reinterpret that law to their advantage, the result are cases that we describe as falling within the common law. In the very old days the latter was constituted by judicial rulings uninfluenced by statute, but nowadays it is not thought contradictory to view a case between private litigants that turns on a particular statutory provision as fitting squarely within the common law. A third tier of judicial work is the control of government, the insistence that public authorities act lawfully. This legal control of administrative action, originally quite narrowly focused on issues of straightforward (or narrow) *ultra vires*, has grown in its reach in the decades since the early 1960s. The first expansionary device was to insist that disputes between the state and individuals should mimic the court-room through the adoption of various rules of natural justice that were either magicked out of the common law or confidently read into statutes that made no explicit allowance for them. This was followed by an increased propensity on the part of the higher courts to allow their view of this or that administrative action as unreasonable to mature into a ruling that it was 'so unreasonable that no reasonable authority could have done it' and was therefore also unlawful: thus did a throwaway judgment of the court of appeal in 1948 (the *Wednesbury* case) come to be deployed as a quasi-constitutional control on not the *procedural correctness* but the *substance* of executive action.

We forget now quite how controversial these expansions of the judicial remit were when they were first being essayed in the late 1960s and through the 1970s: they were usefully recalled by my

colleague and friend Professor Jeffrey Jowell at the start of his Sargant memorial lecture last year. In those days the discussion of quite what the judges should be allowed to do in a democracy was a lively one – John Griffith's famous Chorley lecture in 1978 did not come out of nowhere. It is worth recalling now – and I will return to this point at the end of my talk – that what engendered the fireworks then were two factors that have been noticeably absent *so far* from today's discussion; the 1970s saw both a Labour administration determined to push ahead with an agenda that in the context of the status quo of the day was radical (comprehensive education; new race relations law; protection for trade unionists engaged in strike action). It was also a time when the judicial branch was widely perceived by democratic decision-makers and many members of the general public as reactionary and out-of-touch.

It may be the different mood of politics today that explains how it is that the vast empowerment of the judicial branch represented by the Human Rights Act 1998 should have generated nothing like the heat that the occasional deployment of *Wednesbury* unreasonableness did in the 1970s. That the powers are greater might perhaps be allowed to go unsaid and certainly unargued before an audience as knowledgeable as this: section 6(1) with its overarching requirement that public authorities act compatibly with Convention rights; the introduction of a whole new array of open 'convention rights' by which such authorities must thereafter be bound; the entrusting to the courts of the task of fleshing out what these rights mean and then insisting that the officials and others designated as public authorities must succumb to this new and necessarily definitive version of what the law entails. It is hard now to believe but it is only a few years ago that the refusal to allow a test of 'proportionality' into domestic law was confirmed by a unanimous ruling of law lords, not least on the basis that it would allow the judges too intrusive a role in the business of governing.

Now as we know, via the opening allowed by the imperative of permitting exceptions to Convention rights ('necessary in a democratic society' and the like), proportionality is everywhere. It is a looser test than ever *Wednesbury* was, requiring analysis of means and ends, the assessment of the legitimacy of statutory objectives, and much else in a similar vein. How have the judges managed so far – despite all these statutory inducements to adventure – to stay in the shallow end?

I will come back to the overall political climate as possibly supplying an answer a bit later but some of the explanation surely lies in a subtle change in the way in which the judges have gone about their business in the Human Rights Act era. When everything is possible you have to work out what it is truly appropriate to do. In the old days, certain statutory terminology invited the judges in, whatever the context: 'if the Secretary of State is satisfied that'; 'If the authority has reasonable cause to believe' and phrases like these were cues for judicial oversight, with the question of whether the function under scrutiny was appropriate for judicial review being in the background rather than the foreground of the analysis. True the judicial scrutiny was more benign than under human rights law but it was also less function-sensitive, so that when it did bite it could do so in a way that appeared dangerously subversive of elected authority or of public policy: *Tameside* is the locus classicus because under cover of the supposed logic of *Wednesbury* unreasonableness it appeared to do both. This test failed to appreciate that sometimes decision-makers are being deliberately irrational. As the Irish Supreme Court judge Mr Justice Henchy has remarked there are many examples of public decisions which sensibly 'reject logic in favour of other considerations'.

The judges have certainly avoided dragging the whole administrative process before them to test its rationality under cover of the supposed demands of the Human Rights Act: the *Tamesides* of the era

of human rights are few and far between (I shall return to one or two of them shortly). This restraint has been achieved despite all the opportunities temptingly provided by the Act through a new emphasis on function, on which kinds of public actions require to be subjected to close judicial scrutiny (via the language of rights, rationality and proportionality) and which do not. In other words, the judges have been feeling their way to something akin to the American concept of close scrutiny. Vague terms like 'margin of appreciation', 'discretionary area of judgment' and deference to the primary decision-maker – all question-begging in different ways – have been increasingly replaced by meaningful discussion of 'relative judicial competence', of whether the issue before the court is one which calls for careful rights-scrutiny.

The great success of the case-law under the Human Rights Act so far has been this foregrounding of function. Decisions on the burden of proof, the criminal process, the punishment of offenders, police powers and the like attract the rigorous application of human rights law. So too do those decisions concerning vulnerable persons (prisoners, terrorist suspects and asylum seekers for example) which carry quasi-penal consequences. But cases which could theoretically engage the Convention, on housing, on taxation, on planning, on welfare or on some other issues of public policy perceived to be outside what the judges have usually done, or to involve a whole array of potential litigants beyond the claimant before them, or to be in some other kind of way imaginative or distinctive – these are likely to be given short-shift, not because the argument cannot be made (under the Human Rights Act practically anything is possible) but because the judges choose not to open their eyes this wide.

To pick an example of such almost structural passivity, taken almost at random from last month in the Divisional Court, neither the Federation of Tour Operators nor its counsel can have been too surprised to learn that Mr Justice Stanley Brunton had been unpersuaded by their argument that a doubling of air traffic duty at seven weeks notice was not a breach of the right to property of the federation's members –despite the fact that other laws had prevented them from passing the rise onto their customers (unlike commercial airlines). The Federation was up against not only opposing counsel from Her Majesty's Treasury but the judge's instinctive sense that he was being asked to stray a little far from what he was supposed to be doing. The same could be said of recent decisions on the privacy impact of the compulsory purchase order for the Olympic village, on the attempt by parents to secure the school of their choice under cover of the Convention's right to an education, and the desire of litigants to subject the commercial arbitration process to the rigours of Strasbourg-inspired due process. The factors that induce this 'Pilate-moment' on the part of a judge are many: perceptions of right function are not only a consequence of rational reflection on the separation of powers but are the result as well of history, practice and the expectations of the legal culture within which the judge is situated. Barristers are paid not only for their brain-power but also for their judgment on where their client's case fits.

What happens when the judges view that an area is right up their street and therefore calls for close judicial scrutiny, and yet it is one on which the legislature also feels strongly, and where it has legislated quite intentionally to achieve certain outcomes? A brilliant feature of the Human Rights Act is that it both anticipates and resolves this problem. The law can only be twisted so far to accord with Convention rights – beyond the realm of what is possible the judges need to defer to Parliament even in an area that they believe to be one on which they are particularly specialist. Unlike the US, Canada, South Africa, Ireland and many other places, the judges cannot impose their version of rights on the legislature even in those cases where they are sure that the subject matter of the

litigation before them falls within their sphere of competence, and sure also that the provisions under scrutiny are irredeemably in breach of Convention rights. The only remedy available to them in such circumstances is the unenforceable declaration of incompatibility, a declaration not of defiance but of deference, a judicial observation rather than court order.

This is where the concept of judicial deference properly fits: whereas restraint is about a judge not drifting into the deep end, deference is about having to give way even when he or she is in the shallow end. Deference, in other words, is not some judicial gloss on the Human Rights Act, it is built into the structure of the Act itself. Restraint and deference are not the same: the first is about knowing your job, the second about knowing your place. 'Institutional self-consciousness' might be as good a way as any of describing them both in action.

After one or two false starts, the senior judiciary have shown an impressive collective awareness of where they fit in the new regime. In the famous Belmarsh detention case for example, the matter – personal liberty – was held to be well within the 'relative judicial competence' of the judicial branch but the clarity and unequivocal nature of the provisions under scrutiny (the Anti-terrorism, Crime and Security Act 2001) meant that a declaration of incompatibility was the only available option. A rare bad decision by the lords was, in contrast, the controversial rape shield ruling in *A v Secretary of State for the Home Department (No 2)* in which a then recently enacted safeguard for complainant witnesses in rape trials was emasculated by aggressive judicial fiat when a declaration of incompatibility is what should have followed if the judges disliked the law as much as they evidently did – sure the issue (the conduct of a criminal trial) was bang in their zone of competence, but Parliament had taken a view of how the issue should have been dealt with and the judges should have deferred to that.

Or should they? Just under the surface of *A v Home* Secretary is a distaste for the deference required by the Human Rights Act, a hankering after a stronger judicial role. By deference here I mean acceptance that Parliament is the senior partner, not the restraint that flows from a good understanding of function. As lawyers ourselves, we know better than most people how easy it is for lawyers to convince ourselves that we know best, and then to persuade ourselves that we have a duty to test all laws, even those passed by a democratic legislature, for consistency with what we know to be right. From this perspective the Human Rights Act – with its preservation of parliamentary sovereignty, its inbuilt judicial deference, was a huge disappointment. The European Union allows judicial override of legislation, as do most written constitutions: the 'why not here?' school of thought has not been eradicated by the clarity of the parliamentary language in the Human Rights Act.

And in *Jackson v Attorney General* it may have got its second wind, a chance to launch a new campaign. This was the case in which the Hunting Act 2004 was challenged as beyond the powers of Parliament to enact – it will be remembered that the legislation, which banned hunting with dogs, had been achieved only in the face of the opposition of the House of Lords and had therefore only got to the Queen for signature through invocation of the procedures for bypassing the Lords set out in the Parliament Acts 1911-49. Now the legal point in the case seemed entirely clear – the Parliament Acts set out a special way of bypassing the upper house, disallowing such a short-cut in just two situations (concerned with budgetary matters and avoiding elections) which unarguably did not arise here. But of course where you have a determined client and a very deep pocket you have important litigation.

Jackson commanded the attention of nine law lords and provoked a series of dicta on what exactly constituted an Act of Parliament. Eschewing the obvious – that the 2004 Act was legitimate because the process under which it had been enacted was legitimate, and that that process was legitimate because the Parliament Act 1949 had been a form of delegated legislation properly made under the 1911 Act, there being no additional constraints on the Commons' power under the parent statute that could be read into the 1911 Act so as to lead to any different conclusion than this – the Lords were left with the task of explaining what exactly the beast before them was.

The meaning of 'an Act of Parliament', previously so simple – Commons, Lords and Crown – had been complicated. Exactly how this played out in the hunting context is not my concern this evening: the 2004 measure emerged from the process unscathed, its (I would say misplaced) dignity as an act of the sovereign legislature upheld and so we do now have a hunting ban. But some of their lordships were worried that if they did not weave some new judicial controls into what parliament could do under the Parliament Act, then it was possible that at some future point in time Parliament could use the legislation to do something truly dreadful, abolish elections perhaps (by cancelling out the prohibition on postponing elections in one 'Act' and then indefinitely postponing them in the next) or moving the administration beyond the rule of law, or some such fundamentally authoritarian manoeuvre.

Together with those who look enviously at other places, a dread of some hypothetical horror in the future is one of the great driving forces in the argument for constitutional reform: 'look what might happen under our current system; we must act now to make it impossible'. The 'what if?' school is however even less coherent than the 'why not here?' crowd. Lawyers in general and judges in particular are deluded if they think that the constraints that they erect today can prevent such dreadful situations unfolding tomorrow. Hitler brushed aside a lot more than the few negative rulings of the Weimar judiciary that he encountered on his way to power and a Hitler figure in Britain would be unlikely to be any different. Restraints of this sort are far more likely to be successfully called in aid to defy democratic government than they are to prevent despotic takeover. That is why we should not succumb to the temptation to turn our fear of an unlikely and - if it were to materialise - legally unstoppable future into the driving force of our constitutional jurisprudence today.

In *Jackson*, Lord Bingham saw this and explicitly allows that parliament could use the 1911 Act to extend its own life. Certain of his colleagues could not help but hedge their bets: Lord Brown of Eaton-under Heywood was not prepared to 'give such a ruling as would sanction in advance the use of the 1911 Act for all purposes, for example to abolish the House of Lords ... or to prolong the life of Parliament.' The first of these examples shows how easily the content of what is extreme can vary: the end of civilisation to one set of (judicial) eyes is the final achievement of democracy to others. There have to be similar anxieties about Lord Carswell's refusal to commit himself where an Act under the 1911 procedure causes 'a fundamental disturbance of the building blocks of the constitution' – were this the yardstick of judicial control of legislation, we would still be living in the age of Lord Liverpool, with neither a Catholic nor a middle (much less working) class voter in sight. Lord Steyn's certainty that the achievement of parliamentary sovereignty was the work of judges and not various political actors allowed him to assert that it was 'not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism,' but what this seemed to mean in practice should give its supporters pause: 'In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to

consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish'. Would this include all the laws that already restrict judicial review or which change the ordinary role of the courts, by for eg withdrawing jury trial? If not how do we know which is exceptional and which not? Even Baroness Hale's speech, replete though it was with evidence of democratic sensitivity, suggested that '[t]he courts [would be right to] treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.'

Lord Hope sums up the underlying assumption of those of their lordships whose views on these rarefied constitutional matters we now have to hand, thanks to the determination of the Countryside Alliance to negate the will of the elected representatives of the people. To Lord Hope 'parliamentary sovereignty is no longer, if it ever was, absolute.' Instead, 'the 'rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based'. Though he himself rows back from the implications of this ('the final exercise of judgment on these matters must be left to the House of Commons'), his concession so lacks an intellectual basis as to resemble a mere failure of nerve.

Out of the waters muddied by the confusion over what an Act of Parliament is and by wild hypotheses about the future has re-emerged an old canard from our pre-democratic past, the claim that it is for the courts to assess whether a piece of paper in front of them is truly an Act of Parliament regardless of whether or not it has jumped the minimal hoops which assert that it clearly is. A fourth hoop, 'does it please the judges', is once again hovering dangerously in the background, camouflaged by grandiose talk of the rule of law, principles of constitutionalism and disturbance to the constitutional order.

Many of the judges who subscribe to these views are widely admired in our society. Their supporters in the legal profession and in the academic world command authority and respect. But admirable individuals though they are, these men and women are judicial rather than political personalities. Their views as to what is an egregious human rights breach or as to what is right or wrong are just that – views. We might trust them, just as they trust themselves – but this does not make the jurisdiction they are claiming one that is right. That the judges believe they are able to cope with being out of their depth by dint of their swimming strength should not blind us to the fact that need to return – and return quickly – to the shallow end. A judge in the court of appeal reacted to my title by asking about life-jackets, but I don't think these are provided where judges embark on such aquatic constitutional voyages. I think the better further image is of the democratic lifeguard diving in to force these expert swimmers, against their protests, back where they belong, in the shallow end of a rule of law that defers to the wisdom of the crowd – even when convinced of its stupidity.

I end with some concluding observations on the third of the three points I wanted to make this evening, on why now is a good time to clarify the right role of the judiciary in Britain's system of government. It will be obvious from what I have already said that I believe the key to this to be a proper understanding of the judicial function, of the competence, or 'relative competence', of the judicial branch, and that a sense of what the judges ought to be doing flows out of a number of historical channels – among them certainly a theory about the separation of powers and the rule of law, but also including the expectations of the Bench as it right behaviour that are rooted in tradition, in the culture of legal practice in this country and in the caution that has been inbred into the system by the errors the past.

The last of these must not be avoided: viewed historically, the judges' record in the field of the protection of civil liberties and what would today be called human rights is not a good one – nor have they often been in the van of social progress; rather the reverse in fact. We must be vigilant against the mistake of allowing our enjoyment of a particular generation of unusually progressive and thoughtful judges to mature into a theory that would give their successors as well as the current incumbents power over our democratic branch – arguably the trap into which the enthusiasts for the Warren Court allowed themselves to fall. But behind every Warren there may be first a Burger and then a Rehnquist; behind a Marshall there may lie a Clarence Thomas; behind a Brennan a Scalia and so on down the dismal line. In this regard there may now have been enough appointments for a proper sociological analysis to be made of the appointments to the bench for which the new Judicial Appointments Commission has responsibility: what kind of people are coming through? How diverse are they? Would we trust them to police our democratic system in a few years time on the look-out for 'fundamental disturbances' of which they disapproved?

If we were ever to have a truly social democratic government in the United Kingdom, some decisions – the renationalisation without market compensation of state assets sold off in the Thatcher/Major era; the abolition of private schools or at very least the denial of charitable status to them; a prohibition on second-home ownership; a ban on private vehicular transport in urban areas; a strengthening of union collective bargaining; and yes *contra* Lord Brown the abolition of the House of Lords – might seem quite mad to the kind of men (and women?) who may already have started their journey to high judicial office. But there version of what is mad should never on that account alone be described as bad or worse still unconstitutional and therefore unlawful. The deep end is for elected representatives: the people not the judges are their life-guards.

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