

Transcript of an event at Policy Exchange “Enclaves and Exclaves: Limits and exceptions to the doctrine of judicial review”

with Dyson Heydon AC QC

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Thank you very much Professor Ekins.

Ladies and gentlemen, it's a great honour to have been invited to deliver this lecture. The Judicial Power Project, I think, is a welcome initiative by Policy Exchange, because the power of the courts in recent decades has expanded dramatically. Expansion has been accompanied by growing confidence on the part of at least some judges as to the topics on which they're competent to adjudicate, and that fuels still further growth in their jurisdiction.

The phenomenon requires public debate and scrutiny. Supporters of the current role of the courts can only value, I think, reasoned and objective assessments of where things presently stand, if only to allow later developments to stand on a firmer footing. For critics, or potential critics, of present trends, the Judicial Power Project can allow this silent revolution – which has been carried out largely without Parliamentary sanction – to receive the attention and the scrutiny and the criticism that a substantial change of this kind deserves.

What I propose to do is just examine first the courts' development of their jurisdiction to effect judicial review, and then to consider some isolate exceptions to the general rule of the unchecked advance of judicial power – what you might call enclaves in a hostile province. One of those exceptions relates to the so-called prerogative immunities possessed by the executive – that is to say, common-law rights to behave in a certain way without any statutory backing for doing so. To those common-law prerogatives there is tending now to be pressure for them to be diluted or pushed in.

Another matter, which I will deal with a little later, concerns the position of Members of Parliament. Historically they have asserted considerable immunities to themselves, both in England and Australia recently there have been members of the legislature who get into trouble with the criminal law and attempt to rely on privileges of that kind to escape its consequences by asserting that Parliament has exclusive control over their activity.

Let me just begin by saying this, though: a critic might see the rise of judicial review as being simply an illustration of a very common judicial desire – and in many ways a healthy one – that is to increase the power of particular sectors of the judiciary at the expense of other institutions of the state. Those other institutions might be other courts, they might be the legislature, or they might be the executive. It's healthy because it has for a long time been a maxim that it's a good thing for a court to expand its jurisdiction. Trial judges, for example, enjoy expressing and relying upon what they call their position of advantage, particularly in relation to questions of domina-based credibility. Intermediate appellate courts deprecate that preferred position: they stress instead the importance of achieving a correct result. Intermediate appellate courts also stress the importance of arriving at correct conclusions of law, based on their own earlier decisions or those of foreign ultimate appellate courts whether or not the local ultimate appellate court has

said anything to the contrary. Of this, of course, the leading exemplar was Lord Denning. For its part, the ultimate appellate court strives to keep lower appellate courts within their proper roles. A cynic might say that that simply reveals a certain institutional self-interest: each level of court desires to increase its own jurisdiction at the expense of other levels, and acts accordingly.

The courts can also seek to increase what you might call their collective jurisdiction. In places where the courts can invalidate legislation as going beyond constitutional power, it's possible for the courts to move into a pre-eminent position compared with that of the legislature, and all courts sometimes act on Bishop Hoadly's perception that those with authority to interpret laws given by others are, by reason of that authority, the true law-givers.

This paper touches on a particular battlefield which has grown in significance in recent decades. The battle is between the courts and the executive. The courts have the power to weaken the executive, in effect, by compelling it to act within jurisdiction and invalidating its conduct if it does not. I think if not the direct cause of this but a powerful factor in this was Chief Justice Marshall's assertion in *Marbury v Madison* that the courts had the power to strike down statutes inconsistent with the United States constitution – in other words, that the court had power to impose its view of the constitution upon the other branches of government. Now, in Chief Justice Marshall's day, which was 215 years ago, that was far from being an inevitable conclusion. Even after *Marbury v Madison* for decades American state judges rejected equivalent powers under equivalent constitutional arrangements. Even those judges who assumed powers that we would now call powers of judicial review conceived of their role in very different terms from their modern American counterparts, in that they'd've deferred, in large measure, to the popular will and they regarded judicial review as an exceptional expedient.

The modern view of *Marbury v Madison*, which eventually prevailed, did face a powerful rival approach, which is articulated by James Bradley Thayer in the late 19th century. From 1811 there is evidence of the correctness of that approach, although it was professed a lot before that time. His approach did not deny that it was legitimate to conduct judicial review of legislation on constitutional grounds, but he did significantly qualify that legitimacy. In effect, he said that legislation should not be declared void unless there was no room for reasonable doubt about its constitutionality. That line of thought rested on the idea that while the judiciary had the primary role of decisions on the question of law, the legislature had the role of initiating and enacting legislation. The question was not whether the court thought an act was unconstitutional: the question was rather what judgement the court should allow to another department of government which had been given the responsibility under the constitution of enacting legislation.

That approach of, in effect, giving the benefit of the doubt to the legislature, and only overturning its legislation if there was no possible view on which its constitutionality could be based... that approach has not been adopted in relation to judicial review of statutory constitutionality, either within power or outside power – it doesn't matter whether on a reasonable view it might be thought to be within power. Something like that doctrine operates in American administrative law now, though it does not on the other hand operate in many common-law jurisdictions as a matter of administrative law.

For our present purposes, the importance of *Marbury v Madison* is this: it led to an increased status in American courts; it led to the extraordinary manipulative power that

American courts exercise over wide areas of American life, and American conceptions of the importance of the courts have tended to influence their counterparts elsewhere. That is true of countries who have a written constitution – whether it's along the same lines as the American constitution or not doesn't matter, but a written constitution which compels a decision on whether a given statute is or isn't valid. And it also has led, I think, to judicial review in a wider sense – that is to say, judicial review of administrative action, of executive action.

The adventure, really, which was embarked on in *Marbury v Madison*, the end of which Chief Justice Marshall couldn't foresee, led to the generation of sufficient energy to legitimise a strong extension of judicial review of administrative action. In English law, of course, it is I think trite to say that since *Ridge v Baldwin* in 1964 a revolution has taken place, both in regard to the decisions reviewable and in regard to questions like the standing to review them. And that has been paralleled by the modern importance of refugee law, law applying to those seeking asylum, to some extent to human rights law, to terrorism law, and to new substantive fields like environmental law.

Some of those trends stem from the judiciary. Others turn more on substantive statutory change. And almost all of these changes, and increases in power, correspond with a particular interest of some segments of public opinion. I think we have to bear in mind that there is one dangerous factor in judicial review: judicial review is intended to examine whether or not a member of the executive acted within statutory power or acted within common-law power. The question of whether or not a decision was a meritorious one doesn't matter as long as there was power to make it – that's the strict approach. But in the course of reviewing the validity of a decision, the analyst often drifts into trying to work out whether it was the correct decision.

In traditional administrative law, one of the traditional rounds of intervention is of course the *Wednesbury Doctrine*, the doctrine that a decision would be set aside if it is so unreasonable that no reasonable decision maker could have made it. There is a natural human tendency to try and work out what a reasonable decision is – what I, the judge, think a reasonable decision would be. And having worked out that that is *the* reasonable decision, to conclude that there is no other possible reasonable decision.

The position, therefore, I think, in general, is this: in previous times, there were various fields which were thought to be the subject of either legitimate discretion within the executive, or as topics of political contest, which were ultimately controllable by the parliamentary questioning of ministers, criticism of responsible ministers, the forced resignations of ministers, condemnation by the media and the public, votes of No Confidence in parliament leading to the fall of the Government, and the outcome of consequential General Elections. Those were consequences which were seen as appropriate to control certain types of executive misbehaviour.

Those fields, though, now are starting to be regarded as legitimate areas for intervention by means of judicial review. That follows from a number of causes. Judicial review can be recognised and employed by opposition politicians to stall the programme of governments, or embarrass governments; it can be employed by campaigners on a particular issue; it can be employed by those directly affected by government decisions.

There is another factor, I think, in the growth of the judicial function and the growth of judicial review. It's not simply a question of the tactics of litigants or the explicit conferral of powers onto the courts. No doubt people have always been cynical about elected

representatives, but I think the present time is a time of increased cynicism about elected representatives, and the capacity of the political process to produce efficient results. Politicians are seen as self-interested, feeble, sometimes corrupt, and basically intellectually dishonest. Even when their policies are adopted by reference to public opinion, the policies tend to be tarred by the same brush – the public despises the untidy, and even sordid, compromises which are necessary to make the legislative process work.

The courts, therefore, are perceived – or some courts perceive themselves – as being outside politics, or above politics, and as being capable of reviewing the complex policy decisions of government by reference to objective criteria. If you look at affairs in India, you see there an extreme version of the reaction against an unsatisfactory political class. The courts have taken the approach of having a sweeping policy oversight and responsibility. The court in India goes out and tries to notice problems, and make positive orders that responsible people fix those problems. There tends to be a gap between the people who are concerned with actually starting litigation to improve their lot in life and the court's capacity to ride that piece of litigation into new fields as the court sees fit.

Now, things aren't like that here, or in most parts of the common-law world, but it is true, I think, that there is throughout the common-law world a tendency to see the court as a kind of balm or salve for the sore created by the ineffectiveness of the political process.

Now let me just start with some basic propositions. The Crown or the executive can be said to have three kinds of power. The first is power conferred by legislation, and there is of course a vast amount of that. The second is power conferred by the common law. The powers in that second category are often called prerogative powers; traditionally they were thought to be immune from judicial review, and that immunity is now under growing challenge. The third category of powers on which the executive can rely are the powers which the Crown as a legal person shares with any other legal person, for example the power to enter contracts – subject to, if money is needed, the money being appropriated by Parliament, the Crown is usually thought to have the power to contract.

There was a dispute between Dicey and Blackstone as to this tripartite taxonomy: Dicey considered that there was no barrier between the second and the third categories; he saw the prerogative simply as being the residue, in the hands of the Crown, of all the powers that hadn't been taken away from it by the legislature. Blackstone, on the other hand, thought that the prerogative – true prerogative powers, the second class I mentioned – were those unique to the Crown and were not shared with other persons, so to him you had to have a third class of powers that were shared by other persons.

Each of Dicey's view and Blackstone's view has judicial support, and what I want to just note now is that sometimes in that second category there is separated out a distinct subcategory. It includes powers to summon, prorogue or dissolve Parliament, to assent to Bills, and to appoint Ministers and Judges. Sometimes those powers are located in constitutions or statutes, in which case they fall outside the second category. And that type of power I've just discussed had not attracted challenge to anything like the same extent as the other powers in the second category. The examples of the balance of powers in that second category are things like the power to institute criminal proceedings by *ex officio* indictment, or the power to terminate criminal proceedings by entering a *nolle prosequi*, or the prerogative of mercy, the prerogative to make treaties and conduct foreign affairs, the prerogative to control the use of the armed forces, the power to consent to related proceedings, and the power to grant honours. Now, the

significance of some of these powers, of course, varies very greatly from instance to instance. But that is an area in which it was thought there was almost complete immunity and which now can be seen, I think, that there isn't so clear and secure an immunity.

In the mid-1980s, the House of Lords decided that the mere fact that the executive must rely on a common-law prerogative did not, of itself, give it immunity from judicial review. What instead was decided – this was the *Council of Civil Service Unions* case – was there may very well be immunity in all the traditional instances, but that immunity will not be based merely on the prerogative: it will be based on the fact that there is some aspect of relevant subject matter which may make it right that there should be an immunity, or there might be some disparity in the skills and capacities of Ministers and members of the executive as compared to the courts, and so on.

Now, there were arguments advanced to justify the old view that the mere existence of prerogative gave immunity. One was that there was a sufficient check on the abuse of executive power in the individual responsibility of Ministers to Parliament and the collective responsibility of the Ministry to Parliament. Another view was that the King could do no wrong. Another, in the words of Sir Owen Dixon, was that the counsels of the Crown are secret. There are other justifications, namely that the prerogatives often involve matters of political judgement, they relate to a particular subject matter justifying immunity, or are different from statutory executive powers in that if a power rests in a statute, you can by construction work out what the scope of the statute is, what the criteria are which the statute requires to be satisfied for the power to be exercised, and in general you can work out what the purpose of the power is from the statute. If you're talking about a common-law prerogative power, of course, in one view it's not so easy: there will be no express words telling you what the limits and the relevant criteria are, and it may be difficult to work out in any other way what those limits are.

Now, that last group of justifications I mentioned – political judgement, particular subject matter, and so forth – those arguments have tended to survive as grounds for conferring immunity to particular prerogatives, or, in a weaker fallback version, for exercising restraint in reviewing the exercise of the powers. The others – the King can do no wrong, the counsels of the Crown are secret, that type of reasoning – have not survived. That fate parallels the rejection of equivalent arguments in cases involving the review of statute-based powers.

A consequence of the overturn of the view that prerogative decisions were immune, and the perception that some of the arguments used to justify that outcome are empty, has meant that the prospects of judicial review are now greater than they were before, in relation to the prerogatives. There have been certain spheres of executive activity which traditionally have been thought to be beyond judicial review, and they can be viewed as islands of executive power, or they can be viewed as enclaves, if you like, in a judicial province. The judges rule the province of judicial review of administrative action, but they don't rule the whole of the province – there are little islands of immunity within that province.

One of those islands – in a sense quite a large island – is the island occupied by the power of the executive to conduct foreign affairs, to conduct defence, and to conduct intelligence work. In 1971, Lord Denning, in dismissing Raymond Blackburn's application for an injunction restraining the accession of the United Kingdom to the Treaty of Rome – and history would have been very different of course if that injunction had been

granted – did so on the ground that an exercise of the prerogative power to make treaties “cannot be challenged or questioned in these courts – period”. And in 1985, Lord Roskill said: “The courts are not the place wherein to determine whether a treaty should be concluded, or the armed forces disposed of in a particular manner.”

Those statements unquestionably reflected the traditional received conventional wisdom. You can see some simple illustrations of the deference, if you like, of the courts to the executive by considering the following examples. On the question of whether a particular entity is a sovereign state, and who the ruler of that state is, those are questions usually determined conclusively by a certificate or a statement from the relevant Minister. It was not open to the parties to call evidence or to try and present argument to the contrary. The same sort of regime applied on other issues: has a country or forum recognised a foreign state? What are the boundaries of the foreign state? What are the dominions of the foreign state? What is the extent of foreign territorial waters? Is there a state of war between the foreign state and another state?

Those are all matters to be “decided” by the receipt of a certificate stating what the position was. Then you have – moving away from those more formal, diplomatic-related questions – if you wanted to know whether goods which the Government wanted to requisition were urgently required for use in connection with the defence of the realm, in the prosecution of a war, or other matters involving national security, you did so by getting a certificate from a relevant Minister to that effect. And Lord Parker said that the statements of Ministers on the matters should be treated as “conclusive of the fact” – in other words, incapable of being contradicted.

In modern times a less absolute approach has been taken, and it tends to illustrate a weakening in the former immunities. Where Justice Simon Brown said that the courts “must give great weight to the executive on matters of national security”, so in determining the meaning of United Nations Security Council Resolution 1441, on the question of whether debate about that would be damaging to the national interest, he said that weight had to be given to the views of the executive.

Now of course to give something weight, even great weight, is quite different from treating it as conclusive. Similarly, when the issue was whether a formal request should be made by the British Government to the United States Government for the return of people detained at Guantánamo Bay, the views of an official that a formal request of that kind would be ineffective and counterproductive was, while not conclusive, heavily relied on.

On the other hand you can see in cases of that kind occasional expressions of doubt about the reasoning of the Ministers or the officials, or demonstrations of inconsistencies and contradictions in the Government evidence. Those are signs of a slow, silent change. It’s like Fabianism: the inevitability of gradualness, little changes like that which over time come to work a complete departure from the starting position.

And a related change in recent decades is this: in the days of Lord Denning, even the days of Lord Roskill, who viewed foreign affairs as a field of absolute immunity from review, we now have, in particular cases, inquiries being conducted by the courts into whether the court ought to decline to reverse a decision because it is ill equipped to do so, or whether the court regards itself as being sufficiently equipped to examine the matter for itself on the merits. So inquiries going to questions like whether there can be a sensible scrutiny of a particular decision. And again, as time goes by, these departures

from an absolute ban on examination of the legal merits of a matter will come to alter the law considerably. In short, the chance of decisions being reviewed which were once held to be automatically immune is now greater. Whether or not the court will consider an intervention will depend much more on the circumstances.

Now let us pause for a moment and go back to the traditional absolute immunity. What were the reasons why the conduct of foreign affairs and defence remained immune from judicial review? One reason which the courts repeatedly stressed was that the executive had much greater access than the courts did to useful experience and expertise. A related reason is that the executive had much better access to local knowledge, and information specific to a particular problem. A related consideration is the complexity of the policy question involved, and particularly with that there was a perception that a distinction is to be drawn between what you might call political decisions and decisions based on individual justice. The fundamental task of the courts – its almost universal task – is to look at a controversy between two parties and examine their individual positions, and apply the law to those positions.

If on the other hand you are talking about the merits of recognising another government, or providing information to another government, or denying information to another government, there will be factors of a political character to be taken into account. The court is not just concerned with the rights and wrongs of two individuals: it's concerned with the possible impact on a whole society and a whole nation. An argument similar to that has been employed in relation to defence questions, not just foreign-policy questions. Decisions on whether to declare war or to seek peace, or about using the armed forces in war, or using them in peace in preparation for war – those are policy decisions or political decisions. Individual interests will certainly be affected, as the Government attempts to ensure the survival of the state, but the process of reasoning involving questions of policy is alien from the judicial function of the courts. Lord Reed said that it was almost certainly true that if judges had control over declaring and waging of war it would probably do more harm than good.

Another factor lining the background of the old reluctance to intervene is that international relations – relations between states – necessarily involve a measure of compromise between the states, or attempts to get compromise between the states. The law, said Lord Sumption, is animated by a combination of abstract reasoning and moral value-judgement – a heady mixture that seems a great deal more attractive and more honourable than the messy compromises that are in practice required to maintain relations with foreign states. The short point, I suppose, is that if you endeavour to enter this messy world of compromise, you will probably prevent the executive making satisfactory compromises, and you probably won't greatly assist the litigants on whose behalf you are making that attempt either.

Lord Hoffmann saw judicial reticence in relation to national security as turning not only on the greater expertise of politicians, but on the serious potential results of decisions affecting national security, and he therefore considered that some legitimacy had to be found to justify those decisions, and that legitimacy was found in the responsibility of politicians to the Parliament and ultimately to the people. Judges alone could not be fairly expected to take responsibility for decisions of that kind. He saw security questions as concerning the interests of the entire realm, and also concerned the use of public funds, and those who safeguard those interests and spend public funds have to take into

account a range of more factors than a court either can or is likely to be able effectively to do.

So much, then, for the prerogatives. There has been no massive revolution, no single, *Donogue v Stevenson*-like decision which reverses a whole body of law. Instead there has been a repeated statement by the courts that that old conclusions of absolute immunity, and the arguments that led to them, aren't entirely satisfactory now, and the matter has to be looked at case by case in light of the particular circumstances.

The other thing I want to do this evening is to deal with the traditional prerogatives and privileges of Parliament to govern its internal affairs and proceedings. Now, Parliament has power to punish for contempt, and it can imprison people for that. Normally one thinks of the power to imprison or the power to effect criminal sanctions as something exclusively vested in the courts – not so. Parliament also has power to impose sanctions on its members for misconduct in office – or at least the House of Commons does; not all Westminster parliaments throughout the world have the full reach of the powers of the House of Commons. It's customary to use the phrase "exclusive cognizance" in this: parliaments in the Westminster tradition have exclusive cognizance in relation to their internal affairs unless there is a statutory qualification to that or some other constitutional provision affecting that. And it is in effect a question of law whether there is a relevant parliamentary privilege, and the courts have power to determine the existence and the extent of parliamentary privilege.

One of the doctrines out of which exclusive cognizance is said to have arisen was the premise that Parliament was a high court and it had its own peculiar law which was not known to the ordinary King's courts. Now that premise, of course, is the product of another age. Incursions have been made upon the exclusive cognizance of Parliament through the laws of contract and tort: neither Parliament nor its officers have any immunity from the law of contract if a contract is made and broken; the same is true if someone trips on a slippery floor on Parliamentary premises.

Now what is the test, though, which marks out the areas where there still is a parliamentary immunity, a parliamentary privilege, and there is not? The test in Canada was said to be narrow. The question was whether there was a privileged sphere of activity, and that required demonstration that the relevant matter is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the Government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency. In the House of Lords in *Queen v Chaytor* 2011 the matter was examined and a similar conclusion was arrived at: Members of Parliament who are accused of misconduct in relation to allowances were not permitted immunity because they were Member of Parliament and the allowances related to their remuneration.

In Australia there was a similar sort of case recently which is interesting because of a spirited argument that was advanced on behalf of the accused. It concerned a man named Edward Moses Obeid. He was elected to the New South Wales Legislative Council, which is the upper house of the parliament of New South Wales, and that happened in 1991. For 20 years he served there, and he served as the Minister for Fisheries from 1999 to 2003. His fame or his notoriety in New South Wales did not arrive from his role as a minister, it arose because of his influence within the New South

Wales branch of the Australian Labor Party, and his dominant role in a leading faction of that party – or a sub-faction of the party’s right faction – over the 20 years or so he was in Parliament. As time went by, Mr Obeid first fell from the Ministry and then he came up in an inquiry by a body called the Independent Commission Against Corruption, and it came to be noticed that he seemed to have many more assets than his Parliamentary salary would justify. And eventually he was prosecuted on the charge of having committed a common-law crime, having wilfully misconducted himself in a public office.

The indictment charged that while he held public office as a member of the Legislative Council, he had made representations to a senior public servant in order to get an outcome which was favourable to his family and to his personal interests. His lawyers, having contended that that was an impermissible infringement on matters that were the exclusive cognizance of Parliament – in effect they contended that Parliament had jurisdiction to punish him for anything he had done contrary to the law, but not the courts. They raised those matters in an interlocutory application before the trial judge, and the trial judge refused their application; they appealed against that refusal to the Court of Appeal, and that was refused; so then the trial proceeded and he was convicted and sentenced to five years’ imprisonment. Then he appealed again to the Court of Criminal Appeal, in effect re-running that ground but modified slightly, as we shall see.

In the first instance, in the first hearing before the trial judge, it was contended that misconduct of a member of the Legislative Council in the course of discharging his functions was a matter only for the Legislative Council. The trial judge rejected that, and he said that the powers and privileges of the Legislative Council were not equivalent to those of the House of Commons. In particular he said that the Legislative Council has the power to expel members, but it doesn’t have power to punish them criminally. He also said that the powers and privileges of the House of Commons do not go so far as Obeid’s team asserted. That second finding, of course, is of more than parochial interest. The trial judge relied extensively on the decision of the Supreme Court of the United Kingdom in *Queen v Chaytor*, but in consequence he held that the crime of wilful misconduct in public office was not the discharge of a function incidental to the office, and hence it was not an ordinary crime, and hence it was not quintessentially a matter appropriate for the Legislative Council to determine. The trial judge said that the conduct of Mr Obeid did not affect the internal administration of the House, it didn’t occur within the precincts of Parliament, it didn’t relate in any way to the legislative or deliberative processes of the House or its members.

Now, when Mr Obeid was convicted and he brought his second appeal to the Court of Appeal – and I should say that the appeal to the trial judge failed for the reasons basically given by the trial judge – he adjusted his arguments in his second appeal to the Court of Criminal Appeal. He said what was involved wasn’t a question of jurisdiction, which was the point of the first argument; instead it was a principle of non-intervention. He said the courts ought to adopt a principle of not intervening in matters that fall within the cognizance of the Legislative Council. He argued that a charge involving assessment of the standards and responsibilities and obligations of a Member of Parliament would lie within the exclusive cognizance of Parliament, and should be examined by reference to the rules, regulations and informal protocols of Parliament governing those standards. Those contentions were rejected. The idea that there should be a self-denying ordinance was rejected. The idea that the civil courts should decline to exercise jurisdiction was

rejected. Chief Justice Bathurst said that the courts should decline to exercise jurisdiction only in narrow and recognised exceptions into which Mr Obeid's case did not fall.

Now it is true, I think, that this is not an appealing case from the point of view of seeing it as a vehicle for examining the exclusivity of parliamentary power. I say that because Mr Obeid's conduct was a long, long way from the heart of parliamentary activity. But the arguments advanced by his counsel, which are too detailed to describe here, as to why the courts were an inappropriate forum for the adjudication of the offences in light of the historical privileges of Parliament does deserve consideration. It does raise a question similar to some of the issues that cluster around the prerogatives just earlier, namely: what can the courts do safely and confidently, and what is it that they cannot do safely and confidently?

We've seen in recent times old institutions tending to become segregated from their past. The Judicial Committee of the House of Lords was abolished; the office of the Lord Chancellor was not abolished but its functions were greatly changed, and the composition and the functions of those institutions which once blurred the boundaries between the exercise of executive, legislative and judicial power have gone.

But there is a factual aspect of segregation as well. There was once a well trodden route from the bar to politics to judicial office. Now there is a segregation of the practice of politics from the practice of the law. It was once common for barristers to retain busy practices while simultaneously serving as Members of Parliament, but that has become extremely rare. Parliaments and democratic assemblies are increasingly populated by those who have chosen politics not as a vocation but as a full-time career. There have been, of course, tough politicians who ended up in ultimate appellate courts – almost all the pre-2005 Lord Chancellors, Rufus Isaacs, the first five members of the High Court and quite a number thereafter, Charles Evans Hughes in the United States, and John Marshall himself.

But in the United Kingdom, in the United States, in Australia and elsewhere in the common-law world, appointments of politicians to the courts have become increasingly uncommon, and they seem to have ceased entirely in some final appellate courts. That is significant, I think, because unlike judges in an earlier era, contemporary judges are unlikely to have run for office, or to have experienced extensive contact with the constituents, or lobbyists, or to have been involved first-hand in policy formation. And to an extent unmatched by the predecessors, modern judges have assumed for themselves – sometimes almost as sleepwalkers – by degrees a jurisdiction enquiring into how nations are run and ought to be run, how civil servants make decisions, and how elected officials comport or ought to comport themselves. And they have done so in spite, and possibly even as a result, of their own isolation from such matters over the course of their careers.

These recent expansions of jurisdiction, which are connected with the prerogative immunities, stem, I think, from a measure of judicial self-confidence. It might be asked whether that is warranted. Judges can certainly hold strong personal views on matters of policy, broadly defined, that is because they're intelligent citizens. They can have their own opinions on how nations should relate to each other, and how members of the legislature should exercise their functions. But those personal opinions are not necessarily accompanied by any special experience or competence, which is relevant to

weighing one policy consideration against another, or to determining which ideals are capable of translation into policy and which should remain a noble aspiration.

The career of Mr Obeid raises the question of whether parliamentary procedures, parliamentary debate and interactions of parliamentarians with those who elect them render legislatures better equipped to examine such issues than the courts. Of course, obviously, legislative trials and punishments can be extremely unjust. When the Long Parliament found that it lacked the evidence to justify passing an Act impeaching Thomas Wentworth, 1st Earl of Strafford, it simply passed an Act of Attainder, in which evidence was not required, in order to secure his death.

And legislative inaction can be equally unattractive: it can leave crimes committed by politicians less punished than crimes committed by non-politicians. A party which has a large and tightly whipped parliamentary majority could unjustly pick off its enemies or protect its friends, not on merit but by mere weight of numbers. In contrast, courts are obviously not biased. Courts also are skilled in applying the traditional protections of the criminal trial. Their proceedings are likely to be fairer than any legislative witch-hunt. And legislative inaction may stem not from an informed judgement but from a sort of dog-doesn't-bite-dog mentality. On the other hand, decisions to proceed against an alleged wrongdoer can depend on value judgements, underlining the question: how should politicians conduct themselves in public life? A failure by Parliament to pursue alleged offenders may reflect a recognition that the matter is best addressed by the people: the people can take up the opportunity afforded by the next election to drive from office those politicians who fall short of ethical standards in public life, and the people can vote for those of greater virtue.

Now, should the courts exercise of their concurrent criminal jurisdiction, give due regard to the choices of Parliament in that respect, having regard perhaps to the legislature's greater competence to resolve the issues? Should there be a self-denying ordinance of the character raised by counsel in the Obeid proceedings? Since an appeal by Mr Obeid to the High Court of Australia remains pending it would not be right to offer dogmatic answers to those questions now, but the arguments devised by his counsel, tailored to more borderline circumstances, do provoke thought.