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This year Swansea's Institute of International Shipping and Trade Law is celebrating its twentieth anniversary. From a small but ambitious three-person operation under its founder Professor Rhidian Thomas in 2000, it has now developed into a leading European research centre specialising in commercial and maritime law. Its current 18 academic and practitioner members are dedicated to education, training, fostering relations between academics and practitioners worldwide, and delivering cutting edge research.

A major part of the celebrations was the 2020 Institute lecture on 7 December. For this we were delighted to host Sir Peter Gross, recently retired from the Court of Appeal having previously been a doyen of the commercial Bar, now active as an arbitrator at his old chambers Twenty Essex, and just appointed to lead the government's commission on the operation of the Human Rights Act.

The subject of the lecture, appropriately and indeed very topically, was The Judiciary Today – The Least Dangerous Branch; the result, a masterly, wide-ranging and historically extraordinarily well-informed analysis of the delicate balance between the legislative, executive and judicial branches.

The event, delivered remotely owing to the ongoing contagion, we see as a major contribution to the ongoing discussion of the place of the English judiciary not only in the UK polity itself (both pre and post-Brexit), but in the legal world outside the UK. In our view it certainly bears hearing more than once. For those who wish to do this, or who did not manage to tune in the first time, Sir Peter has kindly given us permission to make an edited version of his talk available to the public, the academic community and anyone interested. We are delighted to do so.

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THE LEAST DANGEROUS BRANCH – THE JUDICIARY TODAY

THE Rt Hon SIR PETER GROSS

INSTITUTE OF INTERNATIONAL SHIPPING AND TRADE LAW

SWANSEA UNIVERSITY – PUBLIC LECTURE

SWANSEA, 7 December 2020

INTRODUCTION[1]

1. It is a great pleasure to be here today, albeit virtually, to deliver this Institute of International Shipping and Trade Law ("IISTL"), Swansea University, Public Lecture. It is an honour for me to do so, for a number of reasons. First, it is the Centenary Year for the University. Secondly, I am acutely conscious of the distinguished lecturers in previous years, including but by no means confined to Lord Clarke of Stone-cum-Ebony. Thirdly, I have previously participated in two excellent Colloquiums organised by the IISTL and wrote the Foreword to the Book which followed the first of those two.[2] Fourthly, it is a matter of great personal pride that over the period 2013 – 2015, I was Senior Presiding Judge ("SPJ") for England and Wales.

2. Adopting the timeless expression of Alexander Hamilton, my topic is, *The Least Dangerous Branch – The Judiciary Today. As Hamilton* put it*, the*

[1] I am most grateful to Dr John Sorabji, Nine St John Street Chambers, for his very considerable assistance in the preparation of this Lecture.

[2] *New Technologies, Artificial Intelligence and Shipping Law in the 21st Century* (2020), edited by Professors Baris Soyer and Andrew Tettenborn, comprised of the papers presented at the Fourteenth Annual International Colloquium of the IISTL, held at Swansea on 10-11 September, 2018. I also had the pleasure of participating in the Sixteenth Annual International Colloquium of the IISTL, held virtually on 10 and 11 September 2020.

Judiciary has no influence over "either the sword or the purse"; it has neither "FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments".[3] My focus is on the relationship between the Judiciary and the other branches of the State, a subject of significant and continuing scrutiny. I also seek to underline the immense role the Judiciary must and can play in the post-Pandemic and post-Brexit world. The views expressed are my own.

3. I advance four principal propositions:

(I) First, mutual respect between the three branches of State, the Legislature, Executive and independent Judiciary, is of the first importance.

(II) Secondly, the fact of Parliamentary or Executive distaste for a particular Court decision or line of decisions does not, of itself, furnish guidance for a sound policy response.

(III) Thirdly, the traditional virtue of Judicial reserve or restraint should be retained as an institutional strength.

(IV) Fourthly, the "brand" of the English[4] Judiciary is internationally acclaimed and forms an important part of "Global Britain" and the UK's "soft power"; nothing whatever should be done to weaken it; instead, it should be maintained and strengthened.

FDR AND COURT-PACKING

4. An exclusively current and domestic focus is too limiting. Before, therefore, developing these propositions, it is helpful to stand back and

[3] Cited in *The Least Dangerous Branch* (1986 ed.), Alexander M. Bickel.

[4] Strictly, the Judiciary of England and Wales; for convenience throughout here, "English"

turn to the remarkable saga of the failed attempt by the great US President, Franklin Delano Roosevelt ("FDR") to pack the US Supreme Court, arising from frustration over the Court's repeated striking down of New Deal legislation in the 1930s[5]. In passing, that episode further serves as a reminder that recourse to labels is simplistic. So, today, the temptation is to categorise interventionist (or "activist") Judges as "progressive" and those favouring Judicial restraint as "conservative". However, in the USA controversy of the 1930s, the exact opposite prevailed; "progressive" Judges favoured restraint and deference to the legislature; "conservative" Judges were interventionist in defence of what they saw as the encroachment by the New Deal legislation on rights of property and contract. Beware labels.

5. The background to the court-packing attempt was graphically outlined in the biography of Chief Justice Hughes[6], US Chief Justice at the time:

"The most dramatic and far-reaching struggle involving the court came over the use of federal power to control the national economy. The depression of the thirties had thrust upon the government numerous obligations that it had never before assumed. Swept into office on a pledge of drastic action, President Franklin D. Roosevelt had launched a series of bold experiments with little regard for the limits of federal power. From the first days of the New Deal it was obvious that our constitutional system was undergoing a wrenching such as it had not experienced since the Civil War."

[5] I neither express nor imply any view as to the controversy surrounding Supreme Court appointments much debated in the 2020 US election.

[6] Pusey, *Charles Evans Hughes* (1951), Vol. II, at p.731 ("Pusey")

6. In 1935 and 1936, the Supreme Court struck down two "signature reforms"[7] of the early New Deal: the *National Industrial Recovery Act* ("NIRA") and the *Agricultural Adjustment Act* ("AAA")[8]. With regard to NIRA, the Court not only held that the law exceeded Congress's power over "interstate commerce" but also criticised the "delegation" of its authority to the President. It has been said of the first decision – concerning offences involving the sale of an "unfit chicken" to a butcher, that the offences "…had about as much effect on interstate commerce as a mosquito on a herd of elephants".[9]

7. Other similar decisions followed, typically by a majority, in which it was at the least perceived that the Court favoured rights of property and contract over the social policy underpinning the New Deal. In November 1936, FDR was re-elected to his second term as President. Flushed with political success[10], FDR stunned his own party's Congressional Leadership and the nation, when, on 5 February 1937, after discussions with only a tiny circle of advisers[11], he launched the court-packing plan in a special message to Congress.

8. FDR felt that the Court was thwarting the national interest. The Judges could not be dismissed, as they enjoyed lifelong tenure. FDR could have sought a constitutional amendment enlarging federal powers but was unwilling to wait, given the time it would have taken. Nor was he attracted

[7] Feldman, *Scorpions* (2010), at p.106 ("Feldman")
[8] *Schechter Poultry v United States* 295 US 495 (1935); *United States v Butler* 297 US 1 (1936).
[9] Pusey, at p.739
[10] Caro, *Lyndon Johnson: Master of the Senate* (2002), at pp. 57 and following ("Caro")
[11] Principally Attorney General Homer Cummings and Solicitor General Stanley Reed: Feldman, at p.107

to other options such as a statute limiting the Court's jurisdiction or a law requiring more than a majority vote to nullify an Act of Congress. Instead, he proposed to enlarge the Court's membership. He sought power to nominate a new Justice for every sitting Justice over the age of 70 – so, curiously equating "age with incompetence, or at least hostility to the New Deal"[12]; the effect would have been to increase the Court's membership from 9 to 15.

9. The measure was initially presented as intended to relieve the Courts of congestion and avoid injustice; the Supreme Court, FDR suggested, was labouring under a heavy burden.[13] Initially it was assumed that the President's sweeping election victory meant that he would prevail. Then, "Across the country came a rumble of protest".[14] An adroit campaign of opposition was mounted, resulting in the leeching of otherwise loyal support for the President and the New Deal. For its part, the Senate Judiciary Committee decided to avoid haste and permitted two months of deliberation; as the debate continued and America's Senate and people had a chance to think it over, initial enthusiasm began to diminish[15].

10. The Justices took the view that they would not appear before the Senate Judiciary Committee. However, intimations had been given that they wished the Committee to have an authoritative statement of the facts as to the state of the Court's workload. In the event, over the weekend of 20 – 21 March, a letter from Chief Justice Hughes was prepared (approved

[12] Newman, *Hugo Black* (2nd ed., 2006), at p.211.
[13] Pusey, at p.751
[14] Pusey, at p.753
[15] Caro, at pp. 60-61

by two other Justices). It was read to the Committee at its hearing on Monday 22 March, with dramatic effect, akin to a bombshell; the somewhat colourable FDR cover story that Court-packing was necessary to relieve the burden on the Court and to assist it in coping with the workload, was holed beneath the waterline[16]. It was the beginning of the end, though the end was some time in coming.

11. More was to follow. In 1936, the Court had struck down a New York State minimum wage law by a 5-4 majority, with Justice Roberts casting the deciding vote.[17] However, on 29 March 1937, the Court dramatically gave judgment, upholding a Washington State minimum wage law, by a 5-4 majority – with Justice Roberts casting the deciding vote for upholding the statute.[18] Whether the Court altered its view in response to pressure from the Roosevelt Administration – encapsulated in the memorable phrase, "the switch in time that saved nine"[19] – or whether the Court-packing plan had no bearing on the outcome[20], almost matters not at this remove. The fact is that the tide in the Court had turned, itself further undermining the Court-packing plan.

12. Subsequently[21], other "progressive" state legislation was upheld by the Court; one of the "conservatives" on the Court, Justice Van Devanter

[16] Pusey, at pp. 754-757; Urofsky, *Louis D. Brandeis* (2009), at pp. 716-717 ("Urofsky")
[17] *Morehead v New York, ex rel Tipaldo* 298 US 587; Pusey, at pp. 700 and following
[18] *West Coast Hotel v Parrish* 300 US 379; the drama of the occasion is well-conveyed in Pusey, at pp. 757 and Feldman at pp. 115-117.
[19] Newman at p.214, citing Alsop and Catledge, *The 168 Days* (1938). Intriguingly, *The 168 Days*, which appears from other US sources to be the leading work on the Court-packing plan, is only available at a price in excess of £300 – or, if access can be obtained to peruse in one or two libraries, is not available to be taken out! Hence the need to draw on a variety of other US sources.
[20] As vigorously contended by Pusey (CJ Hughes' biographer), at p.703 and pp. 757 and following.
[21] Feldman, at pp. 119 and following.

retired on 18 May 1937; the Senate Judiciary Committee voted 10-8 against the Bill; on 13 July 1937, the Majority leader in the Senate, Senator Robinson, an ardent supporter of the proposal and to whom a seat on the Court had been promised by FDR once vacant, died of a heart attack. The end finally came on 22 July[22] when the Senate sent the Bill back to committee with a commitment that it would not be reintroduced in that session – described as sending the Bill to "oblivion"[23].

13. Various lessons emerge. The first goes to the real danger of under-estimating public disquiet at a serious threat to the independence of the Judiciary and the Rule of Law, whatever the first-blush appearances. Once the true motive for the Bill emerged, it became clear that FDR had (unusually) overplayed his hand. As has been said:

"The Court was a sacred symbol in the American covenant. A direct assault was the political equivalent of sacrilege."[24]

Secondly, as another writer has observed, had FDR waited only a little longer, he "could have had victory without paying such a heavy political price".[25] Thirdly and at least equally importantly for present purposes, assuming that the Supreme Court had overreached itself in opposition to certain New Deal legislation, the law (on this assumption) had righted itself. FDR had indeed only needed to wait a little longer.

[22] Thus it would seem *The 168 Days* (5 February – 22 July)
[23] Feldman, at p.121
[24] Newman, at p.211
[25] Urofsky, at p.718. As to the price in terms of politics in the Senate, see Caro, at pp. 63 and following.

PROPOSITIONS AND REFLECTIONS

14. *First*, *there is an unanswerable case for mutual respect between the three branches of the State, avoiding institutional overreach*. That is not a call for abdication of the judicial function or pusillanimity; nor is it an assertion that all judicial decisions should be uncritically approved. Moreover, some tensions between the branches of the State are unavoidable and, in a democracy, healthy. My proposition means what it says: the State and its citizens are best served when mutual respect prevails between the three branches, each avoiding institutional overreach. Disagreement is one thing; lack of respect another. In this context it is noteworthy that mutual respect has been and remains a hallmark of our constitutional arrangements. As was said in the House of Lords in the "*Hunting Act*" case in 2005,

'*In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality . . . is maintained to a large degree by the mutual respect which each institution has for the other.*'[26]

15. Going back slightly further in time to 1992, Nolan LJ (as he then was) in *M v Home Office* elaborated the nature of the relationship between the Courts and the Executive. The careful, constitutional, balance struck, one which is inherent in our commitment to the rule of law, as he explained, was one that required the

[26] R (Jackson & Ors) v Her Majesty's Attorney General [2005] UKHL 56; [2006] 1 AC 262 at [125].

'courts . . . respect all acts of the executive within its lawful province, and [which saw] . . . the executive . . . respect all decisions of the courts as to what its lawful province is.'[27]

16. This takes me to my *Second proposition: the fact of Parliamentary or Executive distaste for a particular Court decision or line of decisions – hardly remarkable – does not, of itself, furnish guidance for a sound policy response*.

17. On any view, knee-jerk responses can be ill-advised. Simply by way of example, in the immediate aftermath of the controversy occasioned by the Supreme Court's decision in the second *Miller* case,[28] concerning prorogation, voices were heard calling for US type "confirmatory" hearings for senior judicial appointments. But this country has no such tradition[29] and, for my own part, I would be dismayed were such hearings introduced. It would be wise to beware what one wishes for; partisan proponents of any such course need to reflect on how matters would look under a government of a very different persuasion from that which they favour. In any event, it would inevitably introduce a party-political colouring to judicial appointments. It is a feature of the current English Judiciary that our system has not been politicised in any such fashion. From personal experience, it was a significant strength of our Courts that colleagues did not know the party-political views of those with whom they sat – and, it goes without saying, I never encountered a case where the decision was influenced by (let alone hinged on) matters of party politics.

[27] *M v The Home Office* [1992] QB 270 at 314

[28] *Miller, R (on the application of) v The Prime Minister* [2019] UKSC 41; [2020] AC 373.

[29] I express no view on the desirability of such confirmatory hearings in the US.

18. This is not to say that careful deliberation is not appropriate. If there is a valid case that boundaries have been over-stepped by any of the branches of State, a variety of options are available, including "wait and see", statutory correction and calm and measured consideration by way of independent review.

19. I start with "wait and see". Staying with the second *Miller* case, some suggested that the Court overstepped the mark. For others it was no more than the application of well-established principles through which the Courts considered whether the Executive had gone beyond its lawful boundary. Over time, its true scope will become apparent. For those concerned or alarmed by the decision, there is time and room to wait and see. As already discussed, had FDR waited just a little longer, he need not have embarked on the ill-fated Court-packing plan.

20. There is, indeed, a very great deal to be said for leaving matters to time and the fourfold common law method: evolution, experiment, history and distillation.[30] The common law evolves as circumstances change. That is how it retains its relevance. Judicial tides ebb and flow. From time to time it advances and then retreats; changes can be made. As was rightly noted by Peter du Ponceau as long ago as 1824, of the common law,

'*Its bounds are unknown; it varies with the successions of ages, and takes its colour from the spirit of the times, the learning of the age, and the temper and disposition of the judges. It has experienced great changes at*

[30] So well-described by Sir John Laws in his 2013 Hamlyn Lectures, *The Common Law Constitution* (CUP, 2014), Preface, p. xiii.

different periods, and is destined to experience more. It is by its very nature uncertain and fluctuating; while to vulgar eyes it appears fixed and stationary.'"[31]

21. I come next to statutory correction. There is, in any event, in this jurisdiction, a safety valve: by reason of Parliamentary Sovereignty, common law developments can always be reversed by statute. So, if, for instance, Parliament concludes that the principle articulated in *Miller* is one that needs correction it has the power to reset the balance between three branches of State. As with any legislative developments, the steps Parliament takes will then be subject to scrutiny and democratic accountability. Such developments are not so easily taken in the US. Where, for instance, a decision of the US Supreme Court is considered to be in need of resetting it may require a Constitutional Amendment; such amendments are rare and far more difficult to secure than an Act of Parliament. The Judiciary, here, is indeed the "least dangerous branch". There can be no principled objection to statutory reversal of a Court decision or line of decisions of which Parliament disapproves or considers in need of course-correction. That approach is therefore open - though it too requires careful thought. Legislation can be a blunt instrument and carries the risk of focusing on the "last War" rather than the next, with the risk of unintended consequences[32].

[31] Cited in *Elgizouli v Secretary of State for the Home Department* [2020] UKSC 10; [2020] 2 WLR 857 at [104].
[32] Consider the *Fixed Terms Parliaments Act 2011* (c.14), which, it would appear the Government now intends to repeal: https://www.gov.uk/government/news/government-to-fulfil-manifesto-commitment-and-scrap-fixed-term-parliaments-act

22. An additional variant is the noteworthy approach of the present Government in commissioning a number of Reviews of different aspects of the justice system. Provided such Reviews are independent, credibly constituted and conducted in a calm and measured manner[33], no proper objection can be taken to them; to the contrary, they facilitate a rounded, contextual consideration of their subject-matter.

23. The first of these Reviews is the *Independent Review of Administrative Law* ("IRAL"), launched in July 2020 to consider options for reform to the process of Judicial Review. The 6-strong panel, under the Chairmanship of Lord Faulks QC, will put forward options for consideration by the Lord Chancellor and the Chancellor of the Duchy of Lancaster – it is hoped in relatively short order. As provided by its Terms of Reference ("TOR"), IRAL:

> *"... should examine trends in judicial review of executive action, ("JR"), in particular in relation to the policies and decision making of the Government. It should bear in mind how the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can be properly balanced with the role of the executive to govern effectively under the law."*

This is very much an area where the boundaries between law and politics can be troubling and are capable of giving rise to constitutional tensions. Notably, issues of justiciability are included in the IRAL TOR. The balance struck by IRAL will be of obvious importance, given the values and interests involved, some of a fundamental nature.

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[33] Lord Burnett CJ, Evidence to the House of Lords' Constitution Committee (13 May 2020) at 14 <https://committees.parliament.uk/oralevidence/379/pdf/>.

24. The second Review is the *Independent Human Rights Act Review* ("IHRAR"). I declare an interest as, at the request of the Lord Chancellor, I have accepted the invitation to Chair it and am delighted to do so. At the outset, I underline that IHRAR is deliberately so-named – it is and will be an "independent" Review. As the Lord Chancellor said recently when appearing before the *Houses of Parliament, Joint Committee on Human Rights*[34], this will be an "*independent process of mature reflection"* within the context of "*enhancement and protection"*. The conclusions of the panel, whose members have been selected on the basis of their wealth of experience and coming from a variety of senior legal and academic backgrounds, are in no way pre-ordained. The Review will be UK wide. It is concerned with the operation of the *Human Rights Act 1998 (*"the HRA"); its remit does not extend to the European Convention on Human Rights ("the Convention"), of which the United Kingdom is committed to remain a signatory. The UK's contribution to human rights law is immense, founded on the common law tradition, continued with the UK's contribution to the drafting of the Convention and more recently to the enactment of the HRA. The HRA has now been in force for 20 years and it is timely to review its operation, constituting, as it does so important a part of the legal framework of the UK.

25. As set out in its TOR, IHRAR will look at two key themes:

    (I) The relationship between domestic Courts and the European Court of Human Rights ("ECtHR");

    (II) The impact of the HRA on the relationship between the Judiciary, the Executive and the Legislature.

[34] Oral evidence: *Ministerial scrutiny: human rights,* HC 978 Wednesday 18 November 2020

26. IHRAR will consider the approach taken by domestic Courts to jurisprudence of the ECtHR, including how the duty "to take into account" ECtHR jurisprudence has developed – and the possibility of strengthening the dialogue between domestic Courts and the ECtHR. It will consider whether the HRA strikes the correct balance between the roles of the Courts, the Government and Parliament. Moreover, it will consider whether the current approach risks domestic Courts being unduly drawn into questions of policy. The panel will then consider whether and, if so, what, reforms might be justified. As part of its work, IHRAR will also examine the circumstances in which the HRA applies to acts of public authorities taking place outside the territory of the UK, with consideration of the implications of the current position, and whether there is a case for change. Though very much a decision for the panel itself[35], it is likely that the panel will in due course call for evidence and views - and it is hoped will receive a range of contributions. It is intended that the panel will report to the Lord Chancellor in the summer of 2021. Its report (very likely couched in terms of options, rather than binary recommendations) and the Government's response will be published. For tonight's purposes, it may therefore be seen that an important part of IHRAR is concerned with the relationship and the balance struck between the three branches of the State.

27. There is, furthermore, some discussion of a Review to consider *reforming the Supreme Court*. As yet at least, I am not aware whether this has gone

[35] Which I would not seek to anticipate.

beyond the realms of discussion though it has earlier this year generated two papers produced by the think-tank *Policy Exchange*[36], together with an interesting Foreword by the Rt Hon. The Lord Thomas of Cwmgiedd. It has also sparked vigorous criticism[37]. We shall have to wait and see.

28. Above all in this context, whether considering statutory reversal of a Court decision or line of decisions, or reviewing aspects of the Justice System, there is the acute need to keep in mind babies and bath water. Hence the clear distinction between Parliamentary or Executive distaste for a Court decision and a sound, and considered, policy response to it, founded on mature reflection. Our Judicial system is simply too valuable a national asset in every sense to pursue a remedy in haste which will do more damage than the mischief at which it is aimed.

29. This takes me to my *third proposition: mutual respect and the avoidance of institutional overreach cuts both ways; the traditional virtue of Judicial reserve or restraint should be retained as an institutional strength*. Judges cannot be criticised for deciding matters of public controversy[38]; that is part of the Judiciary's role – emphasised when the Legislature "outsources"[39] to the Judiciary open-ended political, moral or social questions, especially when a social consensus is lacking[40]. But it is no part of a Judge's role to court public controversy and Judges ought not to be seen as "celebrities". That the identification of a recently appointed Supreme Court Justice whose initials were given as "PS"[41] on the BBC

[36] Written by Derrick Wyatt QC and Richard Ekins.
[37] See, for instance, "Supreme Court reforms are 'cheap revenge', the *Times*, 16 November 2020.
[38] Consider by way of recent examples (and they are examples only): deportation of foreign criminals; non-criminal hate incidents; the additional Heathrow runway.
[39] See King, *Who Governs Britain?* (2015, Pelican), at p.273.
[40] Consider the debate on abortion in the US.
[41] Lord Sales JSC

programme *Pointless* yielded a "pointless" answer – no member of the public was able to identify the Judge's name from their initials in the game – certainly and happily suggests that Judges generally remain far from being celebrities!

30. Plainly, in our common law system, Judges do develop the law, so facilitating adaptation to changing circumstances and ensuring the law's continued relevance. The fiction that Judges merely declare the law is no more than that[42]. There is, however, a line between legitimate Judicial development of the law, within the proper ambit of the common law method and unwarranted judicial law-making. That there is no single bright line and that the line is elusive[43] does not mean it does not exist; judgment and Judicial leadership are required to stay on the right side of that line.

31. Judicial literature is replete with cautions in this area. So, Lord Devlin[44] argued powerfully against judicial law-making in advance of the social consensus, *a fortiori*, in the field of statute law; the keepers of the boundaries should not be amongst the outriders[45]. For good measure, he added that "Enthusiasm is not and cannot be a judicial virtue"[46].

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[42] Even if, at times, the silence of Judges as to Judicial law-making may not be unhelpful. Under the so-called "façade approach" (Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (2013), at p.264; in Lord Radcliffe's striking words (cited *ibid*) "*…respect for it will be greater, the more imperceptible its development*."

[43] As Lord Goff of Chieveley observed in *Woolwich Equitable Building Society v Inland Revenue Comrs* [1993] AC 70, at p.173: "*I feel bound…to say that, although I am well aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case.*" A quintessential common lawyer's observation, it might be said.

[44] *The Judge as Lawmaker* in *The Judge* (1979)

[45] *Op cit*, at pp. 9 and 17

[46] *Op cit,* at p.5

32. As so often, Lord Bingham provided guidance, highlighting a number of cautionary "road signs"[47] which ought to give aspirant judicial lawmakers reason to pause. Further, even where a change in the law was called for, a Judge would be well-advised to "walk circumspectly" – as Lord Bingham put it "On the whole, the law advances in small steps, not by giant bounds."[48]

33. Much more recently, Lord Sumption has explored the place of law in public life, posing questions as to the "expanding empire of law" and the "decline of politics".[49]

34. None of this is to say that legitimate judicial development or reform of the law is to be deprecated; to the contrary, it is essential in a common law system. The law of tort, to give but one example, was transformed by judicial decision – and it is fanciful to imagine Parliament giving time to questions on assumed facts concerning a snail in a ginger beer bottle.[50] In considering the Judicial role, however, it is important to have regard to "comparative institutional competence"[51], to democratic legitimacy and the "acceptable limits of unelected power"[52], matters which underline the

[47] *The Judge as Lawmaker* in *The Business of Judging* (2000), at pp.31-32.
[48] *Op cit*, at p.32. These were: (1) Where affairs had been legitimately ordered on a certain understanding of the law; (2) Where although a rule of law was seen to be defective, its amendment called for a detailed legislative code, unsuited to introduction by judicial decision; (3) Where the question involved an issue of current social policy on which there was no consensus within the community; (4) Where an issue was the subject of current legislative activity; (5) Where an issue arises in a field far removed from ordinary judicial experience. See too, *Elgizouli (supra)*, *per* Lord Reed PSC, at [170].
[49] *Trials of the State: Law and the Decline of Politics* (2019), *passim*, based on his *Reith Lectures*. Unsurprisingly, such views are controversial and have stimulated a rich seam of debate; see, for example, Joshua Rozenberg's, *Enemies of the People? How Judges Shape Society* (2020).
[50] *Donoghue v Stevenson* [1932] AC 56.
[51] Paterson, *op cit,* at p.276
[52] The topic explored by Sir Paul Tucker, *Unelected Power* (Princeton University Press, 2018), Preface at pp. x-xi and *passim*.

importance of judicial reserve or restraint, even allowing for the safety valve of Parliamentary supremacy.

35. I turn to my *fourth Proposition: the "brand" of the English Judiciary is internationally acclaimed and forms an important part of "Global Britain" and the UK's "soft power"; nothing whatever should be done to weaken it; instead, it is to be maintained and strengthened*. Any controversy between the three branches of the State cannot and must not be allowed to distract from the major role which the Judiciary has to play in the post-Pandemic and post-Brexit time ahead.

36. Internationally, the reality is that the English Judiciary is held in the highest regard. That is, of course, no warrant for complacency or arrogance; but it is an accurate statement of which we should not be shy. Principally, such regard flows from the English Judiciary's independence, impartiality, integrity and expertise. The Commercial Court[53] - this year celebrating its 125th year - welcomes litigants from all corners of the globe; there is no "home ground" advantage[54]. Such independence should be neither weakened nor curtailed. It is a cornerstone of the Judiciary's reputation internationally and the Judiciary is the cornerstone of Legal UK.

37. English law and London as a centre for international dispute resolution remain world leaders; there is no reason why that should change post-

[53] Together with the other specialist Courts within the Business and Property Courts umbrella.
[54] *Bank Mellat v HMT* [2019] EWCA Civ 449, at [1]

Brexit. Such a ranking cannot, however, be taken for granted. Much work needs to be done, building on the mutually supportive relationship between the English Court and the dynamic world of London arbitration. The international dispute resolution market is highly competitive. The figures involved are striking; thus, the UK legal services sector posted a trade surplus of nearly £6 billion in 2019; in that year, total revenue from legal activities in the UK was £36.8 billion[55]. Considered in financial terms alone, the importance of maintaining and strengthening a world-class, independent Judiciary, with its pivotal role in this sector, must be obvious.

38. A noteworthy development in 2020 has been the Courts' and Judiciary's strikingly effective response to the consequences of the Covid-19 pandemic[56]. The Commercial Court, for instance, moved at great pace to adopt the use of technology, which could facilitate remote hearings – that is hearings where some or all of the participants are not in a physical court room. This included, in one early instance, a commercial dispute live-streamed across the Internet.[57] This year also saw the first use of the innovative Financial Markets Test case procedure, to provide clarity in the insurance market in respect of matters arising from the pandemic.[58] Both in terms of the use of technology and of innovative court procedures, the UK has a firm basis in the years to come to continue to provide ready access to high quality justice.

[55] See, The City UK, *Legal Excellence, Internationally Renowned: UK Legal Services 2020*, pp.5-6

[56] The same can certainly be said of the manner in which London Arbitration has responded to the pandemic.

[57] *National Bank of Kazakhstan the Republic of Kazakhstan v The Bank of New York Mellon SA/NV London & Ors* [2020] EWHC 916 (Comm) at [6]. See too the observations in *Attorney General of the Turks & Caicos Islands v Misick and Others* [2020] UKPC 30.

[58] *The Financial Conduct Authority (FCA) v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm).

39. Matters do not end there. Under the unifying umbrella of the Rule of Law, the English Judiciary engages in a wide range of international activity, both multilateral and bilateral. The importance of the Rule of Law simply cannot be under-estimated in terms of strengthening or building institutions in challenging environments. "Judicial Diplomacy" builds bridges between the English Judiciary and the Judiciaries of other States, to the benefit of all parties concerned – so enhancing Global Britain, UK soft power and the national interest[59]. The independence of the English Judiciary is a necessary condition for and fundamental to its international role.

40. Finally, it is necessary to the projection of London and English law abroad that our judicial system domestically moves with the times. As to infrastructure, the Commercial Court[60] cannot be an island – succeeding alone while other Courts flounder; the system-wide Reform Programme must be driven to a conclusion, realising the benefits on offer in terms of modernising the delivery of Justice[61] - and building on the acceleration of the use of technology in Court, so effectively demonstrated in the response to the pandemic[62]. In terms of substantive law, English law must adapt and is adapting, notably in the area of FinTech, "smart contracts" and the like; that is all to the good and very much to be welcomed.[63]

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[59] Work is underway, exploring placing the foundations of Judicial Diplomacy on an institutionalised basis.
[60] And the other specialist Business and Property Courts jurisdictions
[61] Concerns as to Coronavirus serving to highlight the importance of digital working in the justice system.
[62] While not overlooking the problems affecting parts of the system, in particular the conduct of jury trials, where significant further work remains outstanding.
[63] See: *The LawTech Delivery Panel: Legal statement on crypto assets and smart contracts: UK Jurisdiction Taskforce* (November 2019); *AA v Persons Unknown* [2019] EWHC 3556 (Comm). See further, Sir Geoffrey Vos, Chancellor of the High Court, *Leading the Charge – Our international position (Annual Bar and Young Bar Conference 2020, 19 November 2020);* and *Harvard Law School, Online Courts: Perspectives from the Bench and the Bar (20 November 2020)*.

CONCLUSION

I end where I began. Our Judiciary is world-class and independent; but "the least dangerous branch" does not exist in isolation. Justice and the Rule of Law require a shared effort between all three branches of the State. By avoiding distractions and damaging, unnecessary conflict between those three branches – while recognising the inevitability of occasional and recurring institutional tensions – continuing emphasis can be placed on the Judiciary's key role in improving the delivery of Justice domestically, together with maintaining and enhancing the position of English law and London internationally in the post-Brexit years ahead.