THE RELATIONSHIP BETWEEN JUDICIAL INDEPENDENCE AND JUDICIAL PARTICIPATION IN POLICY AND LAW-MAKING

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An Inherent Tension?

I thank the Judicial Yuan for the invitation to speak to you today on the subject. I start by referring to two cases, each involving a bench of seven judges, by ay of introduction and illustration. Neither case has yet been determined and I offer no hints at either outcome.

In May of this year I was sitting in the Supreme Court of the United Kingdom. We were hearing conjoined appeals brought by three appellants, each of whom had lost a relative as a result of a doctor's allegedly negligent failure to diagnose a treatable condition.[2] The appellants had each witnessed their loved one's death. They sought damages for the psychiatric harm which they had sustained as a result of that experience.

I mention this case because the relevant legal rules, that is those regarding damages for secondary victims of negligence, have been developed almost entirely by the courts, without legislative or governmental involvement. They were created by the courts primarily to compensate those who had witnessed an horrific accident, or its aftermath, which caused injury or death to a close relative. The appellants had witnessed the death of a loved one, but had not seen an accident or the negligent act which had caused the death. As is common in medical negligence cases, the death occurred some time after the alleged negligence. The appellants urged the UKSC to apply what they submitted was the existing legal test to situations like theirs. The arguments raised issues of public policy; whether applying that test to this area of damages would create uncertainty or inconsistency in the law and broaden the class of potential claimants for secondary harm to an unacceptable degree.

When it first enunciated the principles applicable to claims by secondary victims, the predecessor court to the UKSC, the House of Lords, held[3] that the various public policy considerations, which were raised by the question of where to draw the limit of liability,

[1] I am grateful to my law clerk, Ysabeau Middleton, for preparing the initial draft of this paper.
[2] *Paul* v *Royal Wolverhampton NHS Trust* UKSC 2022/0038; *Polmear* v *Royal Cornwall Hospitals NHS Trust* UKSC 2022/0044; and *Purchase v Ahmed* UKSC 2022/0049.
[3] *McLoughlin* v *O'Brian* [1983] 1 AC 410.

were justiciable policy matters[4] which should be left to the "good sense" of judges in individual cases.[5] The UK government later considered the issue, and concluded that it was preferable for the courts to have the flexibility to continue to develop the law in this area, rather than to attempt to impose a statutory solution.[6]

In July, I was back in Edinburgh, sitting on an interesting case, in purely Scottish terms, about the development of the principle of corroboration in criminal cases. This is the idea, long ingrained in Scotland and now almost unique in the western world, that no-one can be convicted of a crime, except where the legislature dictates otherwise, unless there is evidence from at least two witnesses implicating the accused in the offence.[7] The requirement is said to have its origins in the Old Testament of the Bible[8] and it developed through Roman[9] and Canon (ie Church) law. It was firmly part of Scots law at least by the time when our distinguished Institutional Writers took up their pens at the end of the 17th and into the 18th centuries.[10] By that time continental Europe had abandoned the requirement but in Scotland, which had become unified with England in 1707 and whose laws were protected by the Treaty of Union, the principle remained.

Ever since then the Scottish courts have periodically analysed just what the principle means in practice. It is readily acknowledged that, for a conviction to follow, there is no need for there to be two eye witnesses to a crime. Guilt may be established by one eye witness supported by circumstantial evidence or by facts and circumstances alone. What, however, was it that required to be corroborated and how? Public concern about how it operated in civil cases, notably personal injury claims, had led to its abolition in these cases[11] and eventually in all civil litigation.[12] A flexible approach appeared to be emerging in criminal cases in order to meet modern conditions or expectations.[13] Yet the leading text book, which was published in 1964, re-affirmed the principle that the critical or crucial facts (the *facta probanda*) each required to be corroborated.[14] These included the identity of the accused and the essential facts of the crime.

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[4] See Lord Edmund-Davies at 427 – 428 rejecting Lord Scarman's view (at 431) that policy considerations were not justiciable; and Lord Wilberforce at 421 – 422, Lord Russell at 429 and Lord Bridge at 441 – 443.

[5] Lord Bridge at 443.

[6] Ministry of Justice Consultation Response *The Law on Damages*, May 2009, CP(R), 9-07 at 51.

[7] *Morton* v *HM Advocate* 1938 JC 50, LJC (Aitchison), delivering the opinion of the Full Bench at 55.

[8] Numbers 35 v 30; Deuteronomy 17 v 6 and 19 v 15.

[9] Code of Justinian Book IV, Title XX concerning witnesses, Theodosian Code 11.39, The Trustworthiness of witnesses.

[10] MacKenzie: *Matters Criminal* (1699) 269; Hume: *Crimes* 285.

[11] Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s 9.

[12] Civil Evidence (Scotland) Act 1988, s 1.

[13] *Gillespie* v *MacMillan* 1957 JC 31.

[14] Walker & Walker: *Evidence*, 1st ed, para 382.

The principle was re-examined by a court of five judges in 1997[15] which held that, in rape cases, proof that an alleged victim was distressed immediately after the event could corroborate the victim's lack of consent to whatever had happened, but not what had happened. This limitation on how sexual offences might be proved became a matter of controversy. Proposals, from me incidentally,[16] to abolish the requirement for corroboration were made and initially accepted[17] before being abandoned in the face of political opposition. Nevertheless, society has moved on since the 1990s. In Scotland, as elsewhere in the United Kingdom and Ireland, there has been an explosion in the reporting and prosecution of sexual offence cases. The question which now re-emerged, on a reference from Scotland's chief prosecutor, was not whether the requirement for corroboration should be abolished (that being a matter for the legislature) but how it should be defined.[18] This raised a significant question of the degree to which the courts, rather than the legislature, should set the policy on what constitutes sufficient evidence in criminal cases.

Do these types of case give rise to a tension between the role of the judiciary and those of Parliament and the executive? In each, one side argued that there should be no change in the law, other than by Parliamentary process. The other urged the court to develop the law. The separation of powers is a fundamental feature of international contemporary democracy; albeit that there are different models which may be followed in different countries. An essential aspect of this is that the judiciary must be independent of the government and the legislature. This means that the judiciary must be separate in both authority and function from all other participants in the justice system.[19] The judiciary must carry out their function free from any external influences, pressures, inducements, threats or other forms of interference.[20] The judiciary is entitled to respect for its independence. It ought not to be placed under pressure to decide cases which come before it in a particular way. There are famous examples of this in British legal history. In the seventeenth century, Stuart kings, Charles I and Charles II, commonly wrote to the Scottish courts to give them directions on the outcome in particular cases. This persisted until the Claim of Right 1689.[21] In 1947, the then Lord Chancellor, Lord Jowitt, wrote to the then Lord Chief Justice of England, Lord Goddard, to advise that it was his expectation that the courts would "not be lenient to these bandits [who] carry arms [to shoot at the police]" and to express the view

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[15] *Smith* v *Lees* 1997 JC 73.
[16] The Carloway Review (2011) 286.
[17] Criminal Justice (Scotland) Bill 2013, s 57.
[18] *Lord Advocate's Reference* No 1 of 2023.
[19] *Beauregard* v *Canada* [1986] 2 SCR 56, Dickson CJ at 73.
[20] The Bangalore Principles of Judicial Conduct, United Nations Office on Drugs and Crime, para 1.1 (bangaloreprinciples.pdf (unodc.org)); Constitution of the Republic of China, article 80 (moj.gov.tw); Statement of Principles of Judicial Ethics for the Scottish Judiciary, December 2016, at para 4.2 (judiciary.scot).
[21] Claim of Right Act 1689 (legislation.gov.uk).

that the justice system had become "soft and woolly" when dealing with serious crime.[22] The corollary of judicial independence is that the other branches of the state are entitled to expect that the judges will not step outside of the bounds of their authority and engage in politics.[23]

Therein lies the possibility of tension. The executive determine policy. The legislature turns that policy into law. The judiciary interpret and apply that law.

If the judiciary's authority and function is to be separate to that of the executive and the legislature, how can the courts legitimately participate in policy and law-making? What is more, public policy is a flexible concept. It is subject to the vagaries of the social mores and habits of the time. When judges consider it, does that leave a backdoor open through which external influences and pressures may enter into their decision-making? Tension can arise when the executive, the legislature or the public perceive that the judiciary has encroached into the world of politics. This became the focus during the course of UK's exit from the European Union. There were a series of legal challenges regarding the proper process to be gone through in order to effect withdrawal. The courts were subject to criticism from the press and the former Prime Minister, Boris Johnson, for their decisions. This sparked national debate.[24]

At first glance, my comments may seem to be primarily of relevance to those practising within common law or hybrid systems, where judicial precedent is a formal source of law and where it is not unusual for the executive to leave the law to be developed by the courts, undisturbed by legislation. It may be of less relevance in systems which are heavily influenced by civil or Roman law principles or those which are otherwise principally governed by a detailed code. Nevertheless, I am optimistic that some of the themes, which I will touch upon, will be of interest to those practising in civil systems and/or under a code. There are relevant similarities between common law, hybrid and civil systems, including the principle that persons in comparable situations ought to be treated in broadly the same manner. The rule of law and judicial independence are of paradigm importance in any democracy, whether the underlying system of law is common, hybrid or civil. Whilst judges in civil law systems do not create law as such, precedent is still important to them, as it often

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[22] Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (1993) at 95 (Internet Archive).

[23] Lord Neuberger, *Judges and Policy: A Delicate Balance* (Institute for Government, 18 June 2013) (supremecourt.uk); Lord Cullen, *The Judge and the Public*, 1999 SLT (News) 261 – 266 at 266.

[24] See HC Deb 25 September 2019, vol 664 at col 775 (Prime Minister's Update - Hansard - UK Parliament); HC Deb 18 July 2022, vol 718 at col 726 (Confidence in Her Majesty's Government - Hansard - UK Parliament); and Slack, *Enemies of the People: Fury over High Court judges who defied Brexit voters and could trigger constitutional crisis*, Daily Mail, 3 November 2016 (Daily Mail Online).

constitutes the starting point of judicial thinking.[25] That is particularly true when a judge is dealing with *jurisprudence constant*, that is the principle of civil law that a court should give great weight to a legal rule that has been accepted and applied in a long line of cases.[26]

In this paper, I advance the proposition that judicial participation in policy and law-making, when exercised within the proper bounds, is a manifestation of, and provides reinforcement to, the principle of judicial independence. Where then is the line to be drawn?

Drawing the Line: Policy and Law-Making in Individual Cases

What kind of policy can a judge legitimately consider?

What are the proper bounds of judicial participation in policy and law-making? Two questions arise. What kind of policy can a judge legitimately consider when determining an individual case? When can the court develop, change or make new law?

When reference is made to judges reviewing public policy, it is not to the policy of the government of the day. Judges should not be considering the government's policy when determining cases which come before them, except insofar as that policy has been translated legislation. They cannot intervene in disputed matters of social policy.[27] Public, as distinct from social, policy in this context is better described as legal policy. Legal policy is the collection of principles which judges consider the law has a general duty to uphold. It is confined to justiciable issues.[28] Generally, these principles can be described as those concerning the administration of justice and the rule of law. In any democratic state, not only is it permissible for judges, in the determination of individual cases, to consider and ensure that the decision follows the rule of law, they have a duty to do so.[29] Specific examples of legal policy include: every right must have a remedy;[30] justice must be administered by the courts in public;[31] evidence which has been unfairly obtained ought to

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[25] Guillaume, *The Use of Precedent by International Judges and Arbitrators*, Journal of International Dispute Settlement, Vol 2, No 1 (2011) 5 – 23 at 6.
[26] Black's Law Dictionary, 9th ed (2009).
[27] *C (A Minor)* v *Director of Public Prosecutions* [1996] AC 1, Lord Lowry at 28.
[28] *Bennion, Bailey and Norbury on Statutory Interpretation* 8th ed at 821.
[29] See *Commonwealth (Latimer House) Principles on the Three Branches of Government* (reaffirmed 2013), Commonwealth Lawyers' Association, Principles I, II(b) and IV (commonwealth-latimer-principles-web-version.pdf (cpahq.org)); The Bangalore Principles, *supra* at 7 – 8; *Judges and Policy: A Delicate Balance*, *supra* at para 21.
[30] *Whitehouse* v *Lord Advocate* 2020 SC 133, LP (Carloway) at para 99 and *Wightman v Secretary of State for Exiting the European Union* 2019 SC 111, LP (Carloway) at para 21; citing Bankton: *Institute* IV, xxiii, 1.
[31] *A* v *BBC & Secretary of State for the Home Department* [2015] AC 588, Lord Reed at para 23.

be excluded;[32] rules concerning the age of criminal responsibility;[33] and, a solicitor engaged in the defence of an accused person is immune from suit for negligent conduct during the exercise of his right of audience before the court.[34]

Law must be developed coherently and in accordance with principle.[35] A relevant matter of legal policy, or principle, must be in issue in a particular case before the courts can develop or change the law. The courts should seldom attempt to seek out problems which they can then solve. If there is no principled basis on which to develop or change the law, the courts should not do so. Legal policy is not a backdoor to decision-making which lacks independence. It is the key to the front door, which leads to legitimate judicial development of the law.

If the court is not being urged to develop or to change the law, it is unlikely to be appropriate to consider legal policy at all.[36] Once the necessary tailoring of a particular area of law has been carried out, and the relevant legal tests are settled, the courts ought not to keep looking to the underlying policy in order to determine individual cases differently.[37] The underlying policy will have been factored in during that process of tailoring. Legal tests have a greater degree of clarity, definition and practical applicability than legal policy,[38] which tends to be general and at a high-level of abstraction. Legal tests give certainty to litigants about how legal policy is likely to apply in their case. Eliding the two can create uncertainty.[39]

When can the courts develop, change or make new law?

Even where there is a principled basis on which to develop the law, the court has to consider whether it is open to it to do so. This will depend on various factors. The first is the extent of any existing Parliamentary involvement. Is the area of law already governed by statute, as opposed to judicial precedent?[40] Has Parliament considered and declined to fix the issue?[41] If the answer to these questions is yes, the court should be cautious about

[32] *Tole* v *HM Advocate* 2013 SLT 1227, Lord Carloway at para 12.
[33] *Ross* v *HM Advocate* 1991 SLT 564, Lord McCluskey at 573.
[34] *Wright v Paton Farrell* 2006 SC 404, LP (Hamilton) at para 32.
[35] *Fairchild* v *Glenhaven Funeral Services* [2003] 1 AC 32, Lord Bingham at para 32.
[36] Except as a cross-check to ensure that the reasoned result is consistent with the underlying policy (*Trustees of the Barry Congregation of Jehovah's Witnesses* v *BXB* [2023] 2 WLR 953 at para 82).
[37] *Ibid* at para 58; *Barclays Bank Plc* v *Various Claimants* [2020] 2 AC 973 at paras 24 – 27.
[38] *Lister* v *Hesley Hall Ltd* [2002] 1 AC 215, Lord Hobhouse at para 60.
[39] *Cox* v *Ministry of Justice* [2016] AC 660 at para 41.
[40] See *Whitehouse*, para 98.
[41] *C (A Minor)*, Lord Lowry at 28.

developing or changing the law.[42] The second is the potential scope of the change. If change would be radical,[43] or if it would have a substantial impact upon a fundamental legal doctrine,[44] the court should, once more, be cautious before making that change. The third is the effect of change. The court should not change or develop the law unless it considers that the effect would be to promote finality and certainty.[45] An innovation which destabilises the law is to be avoided. An example of this, which is well-known to Scots lawyers, is the decision of the House of Lords in *Sharp v Thomson.*[46] In an attempt to produce a just outcome, the House of Lords held that the "beneficial" ownership of the flat had been transferred, although no written conveyance had been registered. The trouble with this was that beneficial ownership was not a concept with had previously existed in Scots property law. The confusion created was such that the Scottish Law Commission recommended[47] that Parliament legislate to disregard the concept of beneficial ownership for the purposes of insolvency.[48] The fourth is where it is clear that the subject matter is clearly best left to the legislature, such as the level of welfare benefits or taxation.[49]

Reconciling Policy, Law-Making and Judicial Independence

Members of the judiciary are duty-bound to uphold fundamental legal policy, the rule of law and the proper administration of justice,[50] through their decisions. Since judicial independence cannot exist without these principles, and *vice versa*, there is no clearer example of the interdependent relationship between judicial independence and judicial participation in policy. Without the continual protection of these principles by the judiciary, judicial independence would be undermined, both by the judiciary's failure to protect them and by the likely consequences of their failure to do so.

Provided that the conditions for judicial development of the law are met, this too is a manifestation of judicial independence. Unlike Parliament, the judiciary must guard against

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[42] It may however be necessary for the court to do so in circumstances where the issue before it is justiciable and the legislative regime does not provide an answer. The court cannot say "pass" in such circumstances. See Lord Walker: *Developing the Common Law: How far is too far*? Victoria Law Foundation, Annual Oration, Melbourne, September 2012 at 27 - 30 (www.supremecourt.uk).

[43] *Vaickuviene* v *J Sainsbury* 2014 SC 147, para 31; *Kleinwort Benson* v *Lincoln City Council* [1999] 2 AC 349, Lord Goff at 378; Lord Bingham: *The Rule of Law* (2011) at 45.

[44] *C (A Minor)*, Lord Lowry at 28.

[45] *Ibid*; *Kleinwort Benson,* Lord Goff at 378.

[46] 1997 SC (HL) 66.

[47] Scottish Law Commission, "Discussion paper on *Sharp v Thomson*" (July 2001), Discussion Paper No 114 (scotlawcom.gov.uk).

[48] *Cf*, *Al-Rawi v Security Service* [2012] 1 AC 531 and *Gregg v Scott* [2005] 2 AC 176.

[49] *Nyamayaro v Secretary of State for the Home Department* 2019 SC 537.

[50] Lord Neuberger: *UK Supreme Court decisions on private and commercial law: The role of public policy and public interest*, Centre for Commercial Law Studies Conference, 4 December 2015, para 31 (supremecourt.uk).

societal pressure when determining such issues. The judiciary has no constituents. Its members cannot be lobbied, nor can they defer to popular sentiment.[51] Judicial power must be wielded only for the purpose of giving effect to the will of the law.[52] When the courts develop the law within the proper bounds, they demonstrate their independence from external, political pressures.

Outside of the day-to-day determination of individual cases, some courts may hold supervisory powers. By 2011, 83% of the world's constitutions provided for some form of judicial review of executive action or legislation.[53] Almost all decisions made by the executive have a political element to them.[54] Therefore reviewing the lawfulness of executive decision-making may necessitate consideration of executive policy. Despite this, judicial review by an independent judiciary is widely considered to be an essential component of the rule of law.

Around the world, judges are often appointed to chair public inquiries.[55] Public inquiries will often concern a contentious political or social issue, yet judges are routinely appointed to chair inquiry panels. This is not solely due to their legal skills, but because of their experience as impartial decision-makers and the public trust in their independence.

The judiciary may have a duty to respond to government consultations or proposals which raise issues concerning the administration of justice.[56] There are few, if any, interest groups who are better-placed to comment upon the state of the justice system than practising lawyers and judges. In responding, they can help to ensure that the rule of law, the proper administration of justice and judicial independence are respected by any eventual reform.

I have spoken of the tension which can arise between the different branches of the state, but the judiciary, in examining policy and developing the law, when appropriate, can lend support to Parliament and the executive. Parliament may be reluctant to develop particular areas of the law because these areas are unpopular with voters or lack political

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[51] See Lord Stewart: *The Rule of Law and the role of the Law Officers*, Annual Conference of the Scottish Criminal Bar Association, 3 December 2021 (GOV.UK).
[52] *Osborn* v *Bank of the United States* 22 U.S. 738 (1824), Chief Justice Marshall.
[53] Ginsburg and Versteeg, *Why Do Countries Adopt Constitutional Review*? 30 Journal of Law, Economics and Organization 587 (2014).
[54] *Cherry* v *Advocate General for Scotland* 2020 SC (UKSC) 1, at para 31.
[55] Recent UK examples include the appointment of: Sir Martin Moore Bick as chair of the Grenfell Tower Inquiry (Grenfell Tower Inquiry); Baroness Hallett as chair of the Covid Inquiry (covid19.public-inquiry.uk); Lady Smith as chair of the Scottish Child Abuse Inquiry (Scottish Child Abuse Inquiry); and Lord Bracadale as chair of the Sheku Bayoh Inquiry (Sheku Bayoh Inquiry).
[56] As is the case in Scotland: see the Judiciary and Courts (Scotland) Act 2008, s 2(2)(b) and (c).

imperative.[57] The courts cannot decline to determine a justiciable issue, even if it is socially contentious or sensitive. Lord Stewart, the Advocate General for Scotland, recently spoke of how proper judicial decision-making supports the government in the provision of sound and confident legal advice. He said:

> *"When I or instructed counsel stand up in court, I know that I need not add any political sweetener to my submissions – I can speak candidly without looking over my shoulder. The lawyers in my office, in their duty to speak truth to power, know that they can explain the law in such terms, with the authority of the highest courts behind them."*[58]

At times, tensions may arise between the judiciary and the other branches of the state. That is inherent in any system which contains appropriate checks and balances. A nation in which the separate branches never disagree is unlikely to be one in which the judiciary is acting independently. It is unlikely to be one in which any of us would want to live.[59]

Lord Carloway
Lord President of the Court of Session
18 September 2023

[57] See *Whitehouse*, at para 98.
[58] *The Rule of Law and the role of the Law Officers, supra.*
[59] *Judges and Policy: A Delicate Balance, supra* at para 6; see also *The Rule of Law*, *supra* at 8 – 9.