BINGHAM CENTRE FOR THE RULE OF LAW

WEARING THE MOURNING ROBES OF OUR ILLUSIONS:

JUSTICE IN A SPIN

Sir Alan Moses

Second Annual Tom Bingham Lecture
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Wearing the Mourning Robes of our Illusions: Justice in a Spin[1]

Most judges rather pride themselves on their clarity of thought, the powers of persuasion which they bring to their judgments; some with justification. How piquant it is, then, that the public learn so little from the judges and their judgments about the law, the legal system and the judges themselves. We should place Lord Bingham in a category apart: his judgments shine on the legal landscape with bright humanity.

[1] I am grateful to Alistair Henwood at the Bingham Centre and Elizabeth Bardin at the Royal Courts of Justice for their research, and to Stephen Ward of the JPO and Ben Wilson of the SCPO for all their advice and guidance.

Let us consider four methods by which the law is communicated; you will have no difficulty in deciding which is least likely to succeed.

Let us start with judgments and Lord Templeman's attempt at the homely: *A Schedule D taxpayer, like any other taxpayer, must eat in order to live; he does not eat in order to work…the cost of tea consumed by an actor at the Mad Hatter's Tea Party is different, for in that case the quenching of a thirst is incidental to the playing of the part. The Commissioners appear to have derived some assistance from the fact…that Mr. Quinn's appetite at work exceeded his appetite at home, and from Mr Quinn's evidence, which they accepted, that he did not regard lunch as a personal habit…*[2]

For my second category consider the TV Guide, say Sunday night, a few weeks ago: Death in Paradise, Broadmoor, when Fred met Rose, Bloody Sunday, the death of Marilyn Monroe.

Or, third, let us thumb through the summaries prepared by Gorkana for the Royal Courts of Justice: *Vicar's sham wedding trial collapses…Brutal robber who slashed OAP's throat on run from same*

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[2] *Caillebotte v Quinn* 30 TC 225,226

jail as Skull Cracker. Violent Inmates allowed Out of Prison to Take Driving Lessons…Six months on bail for being sent spoof video of a tiger having sex and Judge Caught Out..a planning judge had to be told what was meant by sixes and fours.

Or fourth: *Mr Justice Caradoc Willoughby Evans, a long name for a small, rotund but impressive man in red robes, came through crimson velvet curtains and was helped into his splendid red chair. Having breakfasted on bacon and eggs, black pudding, mushrooms, toast and Oxford marmalade served by a butler in the judges' lodgings overlooking the park….Willoughby Evans was delighted by the turnout…never had such a case engendered such publicity. With any luck he'd notch up enough points to be promoted to the Court of Appeal. He liked the idea of the black and gold robes of a Lord Justice. He had worked very hard on his judgment…and had treated himself to a glass of champagne with his morning kipper* (Jilly Cooper seems to have forgotten that he had eaten black pudding with all the trimmings[3]).

Judgments do great credit to the intellectual acuity and sheer pounding grind of their authors, but they are written for other lawyers. The parties will, in most cases, only receive the result through a filter of explanation from their lawyers, unless they have

[3] *Pandora*, Jilly Cooper, Bantam 2002

the misfortune to be in the family division. The judgments are written mainly for some superior court. And if you have the good fortune to be in the Supreme Court, you will of course have to persuade the others and demonstrate to the world that you alone are right, even though you are in a minority of one.

Judgments are, generally, not addressed to and not designed for the non-lawyers. We, lawyers, and you, judges, have learnt our law by understanding written texts, by pouring over judgments, statutes and statutory instruments. Techniques of analogy and syllogism, of inductive reasoning and inference, must be deployed by both author and reader or listener.[4] But no-one could say with any conviction that judges exhibit any competence at talking to the public. We, I mean they, rely on others to explain what they mean.

Judges' methods of communication, even when they are communicating outside court, echo in a different universe to that from which nearly everyone learns about the law and the legal system. Most people's ideas about the law and legal systems are miles away from what lawyers, judges or professors of law think about the law, because the public acquires its information and understanding of the law from a totally different source from that which feeds the lawyer.

[4] *When the Law goes Pop*, Richard K Sherwin, University of Chicago Press 2000

A few members of the public are compelled reluctantly to participate as litigants and for them it is a deeply dispiriting experience. Some may enjoy sitting on a jury, the one opportunity, unless you are a magistrate, to participate in the process of judging. For them the law is a criminal trial and nothing more, they may not even be there at the time of sentence, nor are they ever likely to learn whether prison "worked" in the case of the person they convicted.

People learn about the law, judges and the courts only though the prism of the media, just in the same way as they learn about all facets of social life: science, medicine and politics. And there is no shortage of information about the law. The media greedily devours legal events: they are, after all, a constant source of news.[5]

The law is valuable to those whose task it is to make the media popular. The challenge for them, in an age when consumers are *more inclined to drift along electronic screens*[6] is to keep the public reading or watching. Crime, its detection and its punishment remains a focus of endless fascination because it tells stories, full of immediacy and zip. Legal stories provide a compelling narrative of

[5] *Law Lawyers and Popular Culture*, Lawrence M. Friedman, 98 Yale LJ 1579
[6] *Sherwin.ibid*

fear and misery, of the chase, of blood, of sex and retribution.[7] The stories have narrative drive, black and white and no shades of grey.

The law comes to the public in bite-size thirty-second chunks, or with a narrative which has a beginning and an end, preferably an execution, in an hour and a half. You can forget about the civil law. The judges here know that as soon as you confess to someone you are not a judge at the Old Bailey, you are no judge at all. There are not many popular series about dry, or even wet, shipping litigation and I know of no films about capital gains tax.[8] But whilst legal events, and usually crime, prove an ever flowing source of news and entertainment, their legal meaning, their place within the law, their context, is not.[9]

Some lawyers and judges are ready to condemn popular legal culture as distortion. The message delivered to the public is not complex legal reality, it does not approach the legal meaning of the event.[10] However low the crime rate sinks, people will continue to prefer to believe that they are beset with a crime wave.[11] However many more people we send to gaol, however pointless and expensive the process, people will continue to believe that prison works: the clang of the prison gates, as all film-makers know,

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[7] *Ibid.* 1596
[8] *ibid.* 1589
[9] *A Story of Miscarriage: Law in the Media*, Nobles and Schiff, JL & Soc'y 21 2004
[10] *Ibid.* 228
[11] *Democracy under Attack*, Ch 3 2013, Malcolm Dean, The Policy Press University of Bristol

produces a clear and satisfying end. And the media's skill and understanding that they must build on people's expectations, feed their beliefs and prejudices, will inevitably produce a not so merry-go-round in which the media provide a narrative of legal events on the assumption of what people believe, which itself provides the source of greater prejudice, even further from the complex reality of the law.[12]

But those who complain at the filter of popular culture, at what is described as populist jurisprudence, are beating the wind; far better that they devote their energies to harnessing the wind. Politicians know how to harness the wind, how to feed into the cycle of belief fed by legal popular culture. They too must tailor their content to their audience, spin the image and edit the bite…to seize the moment on the screen. As a former shadow law officer, David Howarth puts it*…political authority rests on the ephemera of media reputation and fame…even*, he says, *legislation is treated as a form of press release*[13]*.* (Think of the *Social Action, Responsibility and Heroism Bill,* met on 4 November by Lord Pannick's shrug or, earlier, Garnier's disdain: *we don't think about what is in the legislation we just think about the flags we are running up the flagpole in order to send a message*).[14] So it is hardly surprising if penal populism rises to the top of the political agenda as we

[12] *Ibid.* Ch 10
[13] *Law in Politics, Politics in Law*, Ed Feldman, Hart 2013 61
[14] Hansard Debate on 2nd Reading in HL

approach an election, or that how the law approaches immigration, asylum, and the absence of any right to social security benefit under EU Treaty Law, remains lost and submerged in the din of campaign.

So how does the judiciary intervene in this seemingly irresistible tide of communication about the law which washes over the public? Traditionally, of course, it does not. Silence has remained the received method of best preserving the dignity and authority of the law and, more particularly, of the judges.[15] Lord Widgery CJ advised that *the best judge is the man who is least known to the readers of the Daily Mail and that therefore judges should not court publicity and certainly should not do their work in such a way as to "catch the eye of the newsman"[16]…*and Lord Bingham said there was "much force" in that old aphorism in his discussion of Judicial Ethics[17].

For the principles as to the extent to which a judge may contribute to public debate we no longer have any need to resort to the Trappist rules of Lord Kilmuir, or even Lord Mackay's injunction in 1987 that *judges must avoid public statements...which might cast doubt on their complete impartiality. Above all, they should avoid*

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[15] *Extra Judicial Speech: Judicial Ethics in the New Media Age*, Hon. Brian Mackenzie, 2 Reynolds Court and Media Law Journal, 185 2012

[16] Quoted in *Extra Judicial Speech: Charting the Boundaries of Propriety*, William G Ross, Georgetown Journal of Legal Ethics, Vol 2 589

[17] *The Business of Judging*, Oxford 2000 II.2

any involvement, either direct or indirect, in issues which are or might become controversial". We now have Lord Neuberger's five principles, expressed in His Holdsworth Club Presidential address in 2012[18], limiting intervention to an educative role (possible principle 1), enjoining careful consideration of the impact on the media (2),(5), and care, circumspection and even self-denial…there may be disagreement but only when conducted in a *seemly* way (3). He sets out in support of what he calls possible principles, mindful of the need not to be too dogmatic - even in a presidential address - the good reasons to remain silent. Judicial authority is maintained by silence. Silence preserves impartiality. Judges might all too easily be perceived to have prejudices, to have committed themselves to a point of view, were they to discuss legal issues in public. Any media-friendly exchange will only lead to accusations that they have exhibited an unseemly bias.

There is also a practical reason for silence; the fear that if judges speak out, it will leave them open to scurrilous attack. It is not just that it is much easier to respond to intemperate and sometimes offensive criticism by maintaining a dignified silence. The heads of the judiciary can offer to those tempted to intemperate criticism the *quid pro quo* of an equivalent judicial restraint (principle 4: *comity requires reticence*). And so with the warning that Lord Neuberger

[18] 2 March 2012

was faced, like others, with the difficulty that everyone knows there is a boundary which must not be crossed, but no-one can quite say where it is or should be. He warns that *it would require very exceptional circumstances before a judge expresses views out of court on a policy or constitutional issue which is inconsistent with his position* (principle 3). And thus, with customary wisdom, if I may say so, Lord Neuberger nails his colours very firmly to the fence. Any sensible judge, seeking to avoid *unseemly disagreement* and mindful of his position, save in very exceptional circumstances, should be paralysed into, if not silence, at least a respectable monotone.

From time to time, Lord Chief Justices do plead for a more liberal conversation with their public: Lord Taylor, wishing to come out of purdah in February 1992, said that he was absolutely in favour of the judiciary being open to criticism by the media. Lord Woolf looked forward, at a lecture at University College Dublin, in 2003[19], once the office of Lord Chancellor was abolished, to the judiciary having *a press office of its own.* But, he added *"Not, I emphasise, to spin, but to provide the media with the basic facts they need."* And thereby, he underlined the root of the problem. By denying either the intention or the possibility of what he called 'spin', he exposed a difficulty that his proposals could not and would not

[19]Irish Jurist 2003

solve. It is this: that what a judge or a lawyer means by "the basic facts the media need" are remote from what the media need. The 'basic facts' are written or spoken in a way that does not begin to grapple with the problem that the way the media communicates to the public is not the way judges or lawyers communicate, either to each other or to the public. If you want the theory you can turn to Luhmann *Systemtheorie*[20] or to Ericson: *each social institution develops a particular discourse. Having a particular discourse is one of the defining characteristics of institutions*[21].

The theory underlines what we must all surely instinctively recognise, that the law and media do not talk the same language and that their priorities in most respects are different. But if your translator does not speak the same language as you do it is absurd to complain that they are not passing on your message; you might do better to learn their language.

The Judicial Press Office, started in April 2005, and the Supreme Court Press Office in October 2009, at least fulfilled Lord Woolf's expectations that the media would be given the basic facts which the judges think they need. There are, we are told, 100,000 followers on Twitterfeed and judgments on its YOUTUBE

[20] Cf Nobles and Schiff *ibid. 222ff*
[21] Ericson RV 1996 *Why Law is Like News* in *Law As Communication*, D. Nielken, Dartmouth 195-230

channel…daily visitor numbers were 80,000 in the past year.[22] So it seems somewhat churlish to complain.

The Supreme Court summaries bear little relation to the stories:

The purpose of the SEA Directive is to prevent major effects on the environment being predetermined by earlier planning measures before the environmental impact assessment ("EIA") stage is reached. The concept of a "plan" or "programme" embodied in the SEA Directive is not something which simply defines the project or describes its merits, but sets the framework for the grant of consent by the authority responsible for approving it.[23]

And the Mirror[24]:

A legal bid to derail the HS2 high speed rail link has been kicked out by the Supreme Court. Judges rejected claims the Government cut corners assessing the £50billion line's environmental impact. Transport Minister Baroness Kramer said: "We welcome that the Supreme Court has unanimously rejected the appeal, which addressed technical issues that had no bearing on the need for a new north-south railway. The Government's handling of the project has been fully vindicated by the highest court in the land. We will now continue to press ahead with the delivery of HS2. It is part of

[22] Francis Gibb, *The Times Law*, 23 October 2014
[23] UKSC 22 January 2014
[24] *Daily Mirror*, 22 January 2014

the Government's long-term economic plan to build a stronger, more competitive economy and secure a better future for Britain."

A summary is not a story; it is not even a press release…*better than nothing*, said Rozenberg in 2012.[25] *Normally you have to persevere until page 2 to find out whether the appeal has been successful. And you can't skip straight to page 2 to find out whether the appeal has been successful because you need to read the first page to know which side has brought the appeal.*

A recent study[26] by Professor Moran of Birkbeck College published by the *Oñati International Institute for the Sociology of Law*[27] in Spain demonstrates the success of the Press Offices. In obedience to the judges in the RCJ and the Supreme Court, they have succeeded in maintaining and reinforcing the separation between the institutions of the law and the institutions of the media. The fear, as expressed by the Judicial Press Office, is of narrative hi-jack: that the court will be drawn into someone else's fight. But in an age when resources and court reporters are so limited, now that all, save an illustrious few, legal correspondents have disappeared, the media are more reliant on official sources, why cannot the courts do a bit of narrative hi-jacking of their own?

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[25] *The Media and the Supreme Court*, Cambridge Journal of Int. and Comparative Law 2012, cited in Moran
[26] *Managing the News Image of the Judiciary: the Role of Judicial Press Officers*
[27] *Onati Socio-Legal Series* v.4.n.4, Law in the Age of Media Logic

No-one can surely suggest that there are not fundamental questions concerning our law and legal system which affect us all: access to legal aid and to justice, our relationship with Strasbourg, the role of legal advisers, law officers and the Lord Chancellor, prisons and the treatment of prisoners, the treatment of immigrants, our relationship with The European Union, the media's relationship with the public, with the police, and the public and the courts' relationship with the armed forces. All issues of vital public concern, all issues hotly debated and of the greatest political moment, and all raising fundamental issues of law, and of our legal system. As in the United States so here…*nearly every public issue becomes a legal issue*. (De Toqueville[28])

The problem is not to increase knowledge, but to increase understanding.[29] If the lawyers and judges do not contribute in a way that will increase understanding then the field is left open to others to describe the issues, and, in a way that will resonate with the public. The law is left defenceless if it is unable, at least, to communicate the boundaries of debate or what is at stake. We know what happens if the field is left open. If judges and lawyers fail to engage, others far more skilled are free to choose the

[28] *Democracy in America* Ch XVI
[29] *The Judge's Role in Educating the Public about the Law*, Marna S Tucker, 31 Cath. UL Rev 201 1981-2

battleground, are left alone to draw the lines which set the parameters of discussion.

Long gone are the days when there was a Lord Chancellor in cabinet who could be regarded as *the supreme legal adviser. As such, in cases of grave constitutional questions of importance, he may be asked to join with the Law Officers of the Crown in giving an opinion to the Cabinet on some really difficult legal question*[30]*,* as Lord Hailsham described the duties of the Lord Chancellor in 1936. But we must not be too sentimental about it. Lord Bingham points out (in "*the Old Order Changeth*" in 2006) that those high sounding words may not have represented the reality…Lord Hailsham was unable to advise on the abdication (he had suffered a stroke). When the legality of the Suez crisis was questioned Lord Kilmuir was an *outright supporter*.

But unlike his distant predecessor, our Lord Chancellor does understand the language by which the public receives its information about the law and the legal system, he does understand how to set the boundaries of debate about points of complex legal import…he chooses the battleground, and he knows how to sound the flourish before battle commences. This is what he thinks about the grant of legal aid to non-residents: *Most right-minded people*

[30] Bingham: *The Old Order Changeth*, p.89 *Lives of the Law*, Oxford 2012

think it is wrong that overseas nationals should ever have been able to use our legal aid fund anyway…why oh why should you pay the legal bill of people who have never been to Britain? And yes, you've guessed it: *Another group of left wing lawyers has taken us to court to try to stop the proposals*[31].

Now you might say that that would not be particularly persuasive advocacy in court but it was not intended to be. But it would sound pretty good to me if I was not a lawyer and was hearing it from the Lord Chancellor, and he was backed by the Parliamentary Under-Secretary whose unrestrained appeal to keep legal aid for *our people* was unencumbered by any advance knowledge that he was soon to become a law officer…In England, as Voltaire might have said, they sack their law officers when they give their opinions *pour encourager les autres.* And there is no-one to meet this appeal to the public, because judges and the judicial system are fearful to engage lest they are thought to be descending into some political arena which will threaten their authority and their independence. Leaving the field so very open deprives the public of a proper understanding of the issues and implications for them.

If judges want to communicate to the public, then surely they must learn and be prepared to do so rather than to condemn, in tones I

[31] *Daily Telegraph* 20 April 2014

fear that from time to time sound like arachnophobic condescension, what they regard as some black art, redolent of alchemy and witches, the art of spinning. After all, is spinning any more than a rude word for advocacy? That precious and rare bird, the starved and maligned jury advocate, has long understood the art of persuasion. She knows, like politicians, and all those who feed the media, how to tailor content to the medium, how to spin an image…effective persuasion requires control over the narrative. The jury advocate knows how to use narrative, she anticipates the effect of telling a story on her listeners…she needs to tell a story to discover the truth[32]…

And do not let us pretend that our judiciary are unaware of or are unskilled in using persuasive techniques to support the wisdom of their judgments. Some, of course, are more skilled than others. The notion that they merely rely upon a dry analysis and reason does no justice whatever to their persuasive skills; judges understand that, in writing their judgments, it is not sufficient to keep the parties happy with the result, it is necessary to convince a wider audience, to deploy their reasoning in a way that will have some universal appeal. We will all have our favourite examples…I proffer Lord Hoffmann as the most recent exponent: *There may be some nations too fragile or fissiparous to withstand a serious act of*

[32] Friedman *ibid.* 1595

violence. But that is not the case in the United Kingdom. When Milton urged the government of the day not to censor the press even in time of civil war, he said "Lords and Commons of England, consider what nation is whereof ye are, and whereof ye are the governors[33]" (A v SSHD)…No discussion of the art of spin would be complete without reference to *Miller v Jackson: In summertime village cricket is a delight to everyone. Nearly every village has its own cricket field where the young men play and the old men watch. In the village of Lintz in the County of Durham they have their own ground, where they have played these last 70 years. They tend it well. The wicket area is well rolled and mown. The outfield is kept short…Yet now after these 70 years a judge of the High Court has ordered that they must not play anymore*[34]. Lord Denning's play upon the received ideas of the reader, his ability to conjure up a golden age of Englishness and lukewarm beer, his appeal beyond the parties or other lawyers, teaches us how the law should speak to the people.

Judges do not, of course, limit themselves to a highly spun judgment. In March 2009 Lord Hoffmann, in his JSB lecture, *the Universality of Human Rights*[35] challenged the court in Strasbourg for cloaking itself with what he described as unwarranted grandeur and attacked the constitutional legitimacy of its judges:

[33] *A v SSHD* [2005] 2 WLR 87 [95]
[34] *Miller v Jackson* [1977] 3 WLR 20, cited *Is Common Law Irrational?* NILQ 55 4 Melissaris
[35] JSB Annual Lecture 2009

Liechtenstein, San Marino, Monaco and Andorra, which have a combined population slightly less than the London Borough of Islington, having four judges, and Russia, with a population of 140 million, has one judge. He warmed to this theme; the 18 members of the sub-committee who elect them were chaired, he said, by a Latvian politician, by a labour trade unionist without legal qualification and a conservative politician called to the Bar in 1972 who, *so far as I know has never practiced*. Lord Sumption prefers to deploy his art of persuasion in Kuala Lumpur to Middle Temple Hall…*the Strasbourg court has become the international flag-bearer for judge-made fundamental law extending well beyond the text which it is charged with applying*.

Do not think that I am, for this purpose, seeking to question the propriety of such statements, rather I wish to pay tribute to these masters of the googly, the doozra and the wrong 'un. They do not limit themselves in judgment or in lecture to dry rational analysis for fear of any accusation of entry into political controversy.

So the question arises as to why judges should not follow these examples, why they should not deploy these skills in more widespread communication with the public, and not merely in lectures and articles, written for each other. There is, I suggest, a pressing need to do so and no adequate reason for disdain. As the

scope of government action which is regarded as reviewable has increased, so the belief that judges can insulate themselves from judicial controversy by silence becomes less and less sustainable. It does not seem to me that the constant criticism that judges have over-stepped the mark (they are always in that context described as *unelected*) should be met by silence. Despite the loss of deference, the judiciary surely has far greater institutional strength and resilience than those who criticise them, be they politician or journalist. Judges do have an obligation to maintain their institutional independence and I suggest they can best achieve that aim by explaining what they are doing and how they seek to uphold the rule of law. It is surely beyond question that the judges are under an obligation to maintain and enhance confidence in the legal system.[36] To do so it is necessary to advance understanding of how it operates and the basis for its decisions, in a way which adopts the methods by which others communicate. They do have a duty to break down misconceptions, to explain what they are doing. As Dawn Oliver has remarked, acceptance and understanding of the rule of law is weaker in the absence of the powerful and respected traditional office of Lord Chancellor. Human rights and the European Convention "do not fit popular culture"[37]…it will not do merely to talk of these issues in judgments and lectures…judges

[36] See, e.g., *On a Judge's Duty to Speak Extrajudicially*, Stephen J Fortunato Jr, 12 Geo J, Legal Ethics *679 1998-9*

[37] In Feldman *ibid* Pt. 5 Ch 16, *Politics, Law and Constitutional Movements in the UK*

need to learn to talk about them using the means of communication deployed by politicians and the media.

It would be silly to pretend that judges, so long skilled in the art of aloof silence, would be comfortable in such an environment. Of course they cannot speak about their own cases or comment upon them even after they are appealed, however delightful that would be…but that should not prevent them participating in discussions of pressing concern. They already make clear their opposing views in their legal lectures and articles; you need only contrast the views of Laws LJ[38] with those of Sales LJ[39].

It is, of course, necessary for me not merely to propose a solution. Perhaps a suitably adapted one has already been found.[40] Let me introduce the *persrechter*, the press judge in the first instance courts in Holland and the *persraadsheer*, the press judge in the Dutch appellate courts…they have been liaising with the media in Holland (there are equivalents in Belgium and Croatia) for nearly forty years, and they are trained and skilled in doing so. If you ask who is best equipped to present the legal system of which they form the central part, is it not a judge?, provided only that he is capable of learning the language, rather than leaving it to others.

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[38] Hamlyn Lectures 2013
[39] Feldman *ibid.* Ch. 15, *Law and Democracy in a Human Rights Framework*
[40] Lieve Gies, *The Empire strikes Back: Press, Judges and Communication Advisers in Dutch Courts*, Journal of Law and Society. 32.3 450-472 Sept 2005

A press judge may learn the skills of public communication his colleagues so steadfastly refuse to deploy, just as a jury advocate learns how to engage and excite the jury. She will not share the judicial suspicion of journalists, she will talk to them, respond to their questions and demonstrate that they are ready to discuss and debate. If judges advocate in lectures and even in judgments, why should they not do so with the media and through the media to the public? It is no answer to say that they will only be partially reported…that is what happens already. Of course even a press judge would have to learn to restrain herself from commenting on a case which is not resolved in such a way as might appear in favour of one side or the other, but that should not prevent a discussion about the issues, about their implications or about their importance or lack of significance, in a way which arouses the interest of the listener. Let media liaison through media judges, in various court centres, at various court levels, and respond to criticism and set the boundaries within which reasoned and rational debate can take place. I was reminded by the JPO with, I must say, lips ever so slightly pursed, that care would need to be taken as to who was chosen…we would not want, he said, someone who wants to hog the limelight or is a maverick…quite! But I reject the notion that an insufficient number of suitable judges could not be found to work, in rotation, for engagement with the media.

It would also have the advantage of increasing judges' understanding. As lawyer and former MP Howarth put it: *lack of understanding of law arguably makes a politician technically and morally defective, but lack of political experience in a lawyer makes that lawyer not a purer person but merely a worse lawyer*[41]*.* During all the noisy polemics about the role of the judiciary in democracy, surely Lord Bingham's unrivalled exposition of the part the judiciary plays in a democracy needs no spin, but does need to be delivered over after over. *I do not accept the distinction between democratic institutions and the courts. It is of course true that the judges in this country are not elected and not answerable to Parliament…Parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.*[42] I acknowledge that there is no easy answer as to how Lord Bingham's explanation of the true role of the judge may continue to resound. The belief persists and prevails that, save for the annual Lord Chief Justice's Press Conference, there are too many dangers in allowing even specially trained and nominated judges to speak to the media. I merely venture to suggest that when you weigh the difficulties against the absence of any

[41] Howarth in Feldman *ibid.*
[42] *A v SSHD* [2005] 2 AC 42

counterblast to misinformation and misunderstanding about the law and what judges do, the balance that has hitherto been struck has done no service to the law.

The Chairman of this vitally important institution offered the most gentle of Jowell-like admonitions that the title of what I proposed to say gave insufficient clue as to what would follow. I am conscious of having kept you and he in the dark too long…let me explain. Perhaps one of the greater inhibitions against adopting a course of more open communication is the fear that it might expose the failures and the fallibilities of our legal system and of the judiciary. The law is fraught with illusion, the illusion that there is any clear frontier between the province of the law and the province of the politician, that the law is accessible to all, irrespective of wealth or privilege, or that there *are clear-cut and certain answers, even in an ideal world of wholly good and rational men*[43].

The hero of *Le Colonel Chabert* is not the colonel, who, watched by his emperor, led the cavalry charge which brought victory at Eylau, and was believed to have been killed, struck down by a Russian sabre. He was not dead but returned to Paris, penniless and suffering from his wounds, to claim his inheritance and reclaim his wife, who had remarried, and who falsely denied that he was her

[43] Sir Isaiah Berlin

former husband. Balzac's hero is the lawyer Derville who proved that the Colonel's claim was true. Here are Derville's final words after he has said his last goodbye to his former client, betrayed yet again by his wife, destitute and demented as a result of his head wound. *There are, in our society three men who are unable to hold the world in high regard: the priest, the doctor and the lawyer*. *They wear black robes, perhaps because they wear the mourning cloak of all virtues and of all illusions.* We need to dispel the illusions. We need to tell: *others about truth and reason, about law and justice and about the masked rage of retribution and….about the civilising force of compassion and mercy. Therein lies the fate of truth, justice and law in our time*[44]*.*

And you can be sure of this: we have some pretty good stories to tell.

[44] Sherwin *ibid p.264*