

The rule of law and the separation of powers

(A lecture delivered by Deemster David Doyle at the Oxford Union on 16 July 2015 as part of the Small Countries Financial Management Programme)

Opening comments

Today we have unprecedented levels of access to news, information and people. With computing performance now doubling every 18 months, tomorrow will bring levels of connectivity and access that are quite literally beyond our imagination. These rapidly developing technologies are changing the ways in which we communicate and administer justice while also changing the expectations of the users. Access to everything is the growing expectation of everyone. Global communication and the sum of all knowledge in the palm of your hand is a game changer.

But when this is added to what is rapidly becoming unfettered access to news channels, politicians, celebrities and everyone else, the expectation of access grows. For example just one of the social media channels, Twitter, has 217 million active users, Barack Obama has over 60 million followers, but this is somewhat overshadowed by the American pop singer Katy Perry who has over 70 million followers. Well you can sing along with her songs, which you cannot with Barak Obama's speeches.

The relevance of this situation to my subject this evening is the expectation of access. Access to directly or indirectly question, call to account or hold up to ridicule anyone in public office may be regarded by some as a major step forward for democracy. But this may potentially undermine the effectiveness of the separation of powers within the rule of law which is in itself one of the mainstays of democracy.

If the separation of powers is to be maintained the executive and the legislature cannot reasonably expect to have unfettered access to the judiciary. To ensure judicial impartiality a judge must not be subjected to influence by anyone outside the physical or virtual court room whether in government, media, big business or elsewhere. This can be a frustration for some politicians and their advisers who are seeking a quick and popular solution and may well see access to the judiciary as a way towards that solution.

As I will explain shortly, even just the perception that the judiciary have been inappropriately accessed can be enough to destabilise their impartiality.

So inappropriate access to the judiciary cannot and will not be tolerated and to help you clearly understand what is and what is not appropriate access I have drafted my top 10 tips for maintaining the separation of powers on the ground which I hope will be operationally and practically useful.

Some theory

But first, briefly, some theory.

The separation of powers is not a new idea. There were traces of it in Aristotle's writings.

One of the chief proponents of the separation of powers was Baron Montesquieu. Born in France in 1689 he lived to the age of 66 and in that time spent 2, what must have been

formative years, in England. Not long after returning from England he wrote his treatise on political theory, *The Spirit of the Laws* (1748) in which he stressed the importance of the independence of the judiciary in terms of the separation of powers as follows:

"[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be the end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

(from the translation by Thomas Nugent, New York: Hafner Press 1949 page 151).

Some years earlier, John Locke, *Two Treatises of Government* (1690) (Cambridge, 1994) at 326 had stated:

"It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage."

James Madison in *Federalist No 47* (1788) commenting on Montesquieu's views stated:

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."

Lord Neuberger in *Magna Carta: The Bible of the English Constitution or a disgrace to the English nation?* (18 June 2015) at paragraph 52 commented that:

"Montesquieu's theory is consistent with the rule of law, and, provided that the legislature is elected periodically by universal suffrage, it is also consistent with democracy. It is unsurprising that, while they are complementary, in some important ways, democracy and the rule of law are in tension. Democratic government is loosely based on the notion that the majority should prevail over the minority and should be able to decide on the laws of the land. Whereas much of the rule of law is concerned with protecting minorities and, in particular the individual against the state. The tension between the rule of law and democracy is reflected in the potential for conflict between the courts and the legislature."

In April of this year I cycled over some of the French territory formerly occupied by the learned Baron. With three others I cycled over 650 kilometres from St Malo to Bergerac. This in itself was no mean feat but we did it in under 34 hours with heavy panniers. It was a great adventure but somehow I think my calendar was deceiving me when it said I was on holiday – some holiday. I was glad to get back to work. You will not be surprised if I confess that I am happier sitting on the bench than on the saddle. But frankly, directly after that trip, I had trouble sitting anywhere.

This year's Small Countries Financial Management Programme has been put together under the calm and wise leadership of Mark Shimmin MBE, ably supported by the efficient Elaine Moretta. The helpful website for the programme rightly highlights the need for "outputs" that are "operationally" useful. I think that is a gentle reminder to the likes of me to keep contributions practical rather than theoretical. This need was clearly endorsed by the feedback you all very kindly provided in answer to my questionnaire. Hard as it is for a judge to move away from the delights of abstract, high level academic theory I must now focus on practical issues.

But before I do that let me place on record an important caveat. Each country must decide what is best for its people in respect of the separation of powers and who is to say that what prevails in the Isle of Man and elsewhere is appropriate for your jurisdiction. That is for you and your people to decide.

In every jurisdiction it is inevitable that there will be contact between members of the legislature, the executive and the judiciary. How that contact is managed is, I would respectfully suggest, worthy of attention.

Sometimes, rather than members of the legislature and the executive engaging directly with the judges it is best to put a buffer zone in place between the politician and the judge in order to preserve the separation of powers. You may sometimes be that buffer zone. If you are, and you are contemplating direct contact with the judiciary, it will be helpful to have at your fingertips information regarding the separation of powers and judicial independence.

Now to the promise I made earlier, some practical and operationally useful tips on maintaining the separation of powers. I bet you just cannot wait.

The Top Ten Tips for maintaining the separation of powers

So here are Deemster Doyle's Top Ten Tips for maintaining the separation of powers.

- *Tip 1*

Number one on the list is do not seek legal advice from a judge.

This may seem counterintuitive, after all who would have a better view of a legal situation than a judge? It is easy to believe that in a fast moving world where speed and expediency is everything, a brief conversation with a judge might point you in the right direction or even give you the inside track to a quick solution.

There must have been occasions when you or those you advise have needed legal advice. On these occasions there may have been a temptation to obtain the advice of the Chief Justice but we all need to understand that the Chief Justice is there in accordance with his or her oath to judge and not to advise. The judge is there to judge, not to advise. The clue is in the name.

No matter how tempting it may be to just slip in a quick question, please do not. In fact do not at any time approach judges for legal advice. Even if it is dressed up in a casual

conversational style at a social event. Any good judge should, and will, give you short shrift. So resist the temptation.

The judiciary should not be drawn into inappropriate discussions with the executive or the legislature which may lead to them giving advice. This applies to everyone, the President, the Chief or Prime Minister, the head of police, the lead regulator, the central banker or whoever. No-one should have special access to the Chief Justice, not even, or perhaps especially not, the President or the Chief Minister.

Australian Chief Justice Robert French in *The Chief Justice and the Governor-General* (29 October 2009) powerfully stressed that it is not appropriate for judges to provide legal advice to the Governor General. That is not part of their function and it compromises their independence and impartiality if they provide legal advice.

When my friends (yes surprise, surprise, I do still have some) ask me for legal advice (and that is rare because most of them know it is inappropriate) they are sometimes affronted when I say:

“It is inappropriate for me to give you legal advice, get advice from a good lawyer”

And when they ask me to give them the name of a good lawyer I decline. Not because there are no good lawyers on the Isle of Man but because it would be inappropriate and unfair of me to indicate a preference.

- *Tip 2*

Practical Tip number 2: Do not discuss pending cases or even past judicial decisions with judges.

Whether publically or privately do not discuss pending cases or even past judicial decisions with judges. Past judicial decisions speak for themselves and a copy of the reasons for the decision should be publicly available. So if you want to know a judge’s position on the legal issue read the judgment.

Sir Jack Beatson in *Closer Engagement with Parliament: the importance of developing new conventions* (2 July 2015) at pages 4-5 made the point as follows:

“The general constitutional principles about what is required to protect judicial independence means that judges are not to be questioned about cases which they have decided or in which they have been involved, and do not comment on such cases ...”

The Standing Committee of Tynwald on Public Accounts in its Report (PP0097/13, May 2013) respectfully and properly recognised this important constitutional principle and the importance of parliamentary committees not commenting on and not interfering with judicial decisions when at paragraph 39 it was stated:

“... the decision to grant legal aid had been made by His Honour the First Deemster after hearing the matter in open court. The decision itself is not therefore open to scrutiny by a parliamentary committee.”

It is inappropriate and unseemly to engage in a debate with a judge about his previous decisions. More fundamentally in respect of pending cases the judge must decide them only on the evidence and argument presented in open court, whether physical or virtual, in the presence of the parties or their legal representatives and not on the basis of secret discussions behind closed doors or firewalls in the absence of all the relevant parties.

The Practice Rules for Manx Advocates (2001 para 19 (2)) states that:

“Except when making an application to the Court, an advocate must not discuss the merits of the case with a judge, magistrate or other adjudicator before whom the case is pending, or may be heard, unless invited to do so in the presence of the advocate for the other side, or the other party.”

So in short, a member of judiciary can only discuss cases with members of court staff or others insofar as it is appropriate and necessary to enable them to do their jobs.

- *Tip 3*

Practical Tip number 3: Take care what you say if you or those you advise disagree with a judicial decision.

Not all judicial decisions will be popular with everybody. Some of them will not be popular with anybody. There will be occasions when Presidents, heads of state, Ministers and maybe even you disagree with a judicial decision.

So, what do you do?

Well, first of all I would recommend that you do not make rapid or ill-informed criticism of the judicial decision. I say ill-informed because it would be almost impossible for you to see all the information that was presented to the judge upon which he or she reached judgment. Worse still, you may be tempted to openly criticise individual judges.

In Australia, a jurisdiction known for robust debates and frank exchanges of views, Standing Order 193 of the Australian Parliament provides that a politician:

“... shall not use offensive words ... against a judicial officer, and all imputations of improper motives and all reflections on those ... officers shall be considered highly disorderly.”

In the Manx Customary Laws of 1601 it was expressly provided that anyone who criticised a Deemster would be fined £10 for each time offending and “their ears to be cut off besides”. Sadly the Act was repealed in 1876. Had it been otherwise any self-respecting journalist or legal academic who possessed both ears would regard them as badges of shame! (See Judge of Appeal Hytner’s comments in *Barr* 1990-92 MLR 398 at page 410).

But on a serious note please beware of making personal criticisms of judges, not out of respect for the judges (although that would be nice), but out of respect for the constitution.

The two oft-quoted examples of David Blunkett and Charles Clarke provide evidence in respect of the tensions between government and the judiciary. You may recall that there was considerable coverage, at the time, of David Blunkett’s attacks on English judges for

their decisions on asylum-seeker cases. Charles Clarke, also a former Home Secretary in England, tried to speak privately to senior judges to obtain their advice about terrorist control orders. Commentators use these two examples as classic examples of how politicians should not conduct themselves in their dealings with the judiciary.

Lord Falconer (a former Lord Chancellor) provided the best advice to politicians when before the House of Lords Constitution Committee he said:

"If you disagree with a decision, say what you are going to do; if you are going to appeal, say you will appeal; if you are going to change the law, say you will change the law.

If you cannot appeal and cannot change the law then my advice would be to keep quiet because there is not much you can do about it.

It is a pretty unwise thing for a minister to say that there is something [wrong with the law] but we are not going to do anything about it.

What is objectionable is something which expressly or impliedly says that there is something wrong with these judges for reaching this conclusion."

This wise advice was followed by the Manx Chief Minister in a written answer provided on 28 February 2012 when he stated:

"Judicial independence is a fundamental principle of the legal system and decisions made by judicial officers can only be challenged through any appeal procedures which are provided by law."

The Manx Treasury Minister (in response to a question in the House of Keys, 23 October 2012) stated:

"It is important to recognise the fundamental principles of the rule of law, the separation of powers and the independence of the judiciary. The relationship between the judiciary, the legislature and the executive branches of Government should be one of mutual respect for each other, recognising the proper role of the other parties."

Lord Neuberger (the President of the UK Supreme Court), who kindly spared some of his limited time to join us on the Island for Tynwald Day this year, put it this way:

"It does society no good whatsoever if [politicians and judges] start to criticise each other personally. Mutual respect must be the order of the day every day."

(Judges and Policy : A Delicate Balance 18 June 2013 at paragraph 6)

Our *Commonwealth (Latimer House) Principles on the Three Branches of Government* give very good guidance to all:

"While dialogue between the judiciary and government may be desirable or appropriate, in no circumstances should such dialogue compromise judicial independence."

- *Tip 4*

Practical Tip number 4: Be careful if you are thinking of consulting judges on proposed legislation or government policy.

Judges must resolve disputes which often concern the legality of actions and the interpretation of legislation. If a judge is involved in the creation of the legislation he may not be perceived to be impartial when it comes to administering justice.

It is therefore not normally appropriate for judges, who may be called upon to interpret or decide disputes on such legislation, to give advice or comments on legislation. In this situation advice should be provided by the Attorney General and other lawyers engaged by the government and there should, of course, be full public consultation.

It may seem like common sense to seek judicial comment on proposed government policy but judges should not comment on political matters or matters of political policy. However, judges may sometimes comment on the practical consequences of policy choices and proposed legislation especially if such could adversely impact on the rule of law.

There are recent signs that the tide in England may be turning in favour of more engagement between the various branches of government in specific areas (see for example Sir Jack Beatson's comments on 2 July 2015 in *Closer engagement with Parliament: the importance of developing new conventions* referring to *The Politics of Judicial Independence in the UK's Changing Constitution* by Gee, Hazell, Maleson and O'Brien). All this must however be set in its proper context. England is a large jurisdiction which has an extremely sophisticated constitutional structure and a jurisdiction where the well-established ground rules in respect of engagement between judges and politicians, with a few notable exceptions, seem to be increasingly better understood by leading academics, senior politicians and members of the judiciary.

But beware in small compact jurisdictions - commenting on government policy is still a minefield for judges and politicians. Comment by the judiciary may quickly become ammunition for those seeking to gain political advantage and may be the subject of spin by the various players in the political process. This could damage both the government and the judiciary.

It is important however that judges do not become isolated from the communities they serve. There is sometimes a fine line between what may be perceived as unhelpful isolation and unwise participation.

Judges are sometimes ideally placed to suggest areas of law reform that would merit further consideration by the legislature (see for example my judgment in *Lombard Manx Limited v The Spirit of Montpelier* delivered on 11 December 2014 referring at paragraphs 90-99 to the need for modern insolvency legislation and previous calls for reform by Deemster Corlett in *Kaupthing Singer & Friedlander (Isle of Man) Limited* 2009 MLR 516 at paragraphs [13] and [14] and Deemster Gough in *Munnin Navigation Limited v Petrodel Resources Limited* judgment delivered 12 September 2014 at paragraph 63).

Moreover there are times when it is necessary and appropriate to participate in the public consultation process on policy or legislative proposals. To take just two relatively recent examples:

- as First Deemster I provided the government with a response to its consultation on Criminal Justice Strategy in 2012. It is worthy of note that in the formal consultation document our Minister of Home Affairs cautioned that “we must be respectful of the independence of the Judiciary”;
- I also provided a response to a document issued by the Council of Ministers inviting comments on the Scope of Government in 2012 in which I was keen to underline the need for the continuing independence of the support services provided to the judiciary.

Lord Neuberger in *Where Angels Fear to Tread* (2 March 2012) put it succinctly at paragraph 29 as follows:

“[Judges] cannot comment on political matters or matters of public policy, but can rather comment on the practical consequences of certain policy choices.”

Sir Jack Beatson in *Judicial Independence and Accountability: Pressures and Opportunities* (16 April 2008) stated that judges should not comment:

“...on the merits, meaning or likely effect of provisions in any Bill or other prospective legislation, or on the merits of Government policy, save in very limited circumstances. To do so could be seen to call into question their impartiality in the event of subsequently being called upon to apply or interpret those provisions in a court case.”

- *Tip 5*

Practical Tip number 5: Do not ask a serving judge to chair a public inquiry.

No matter what size the jurisdiction, judges should resist being sucked into the political controversies of the day by chairing public inquiries. For a small compact jurisdiction, there are further dangers in inviting serving judges to chair public inquiries. With few judges available, using their precious time to chair public inquiries can take them away from vital judicial work and risk them being disqualified from judicial involvement in the issues surrounding the public inquiry.

Dame Heather Hallett in *Independence Under Threat* (14 March 2012) referred to:

“... the dangers of judges becoming involved in public inquiries blurring the edge which marks the sharp definitions of the functions of the judiciary on the one hand and the executive and legislature on the other.”

Kemoy Bokhary (of the Hong Kong Court of Final Appeal and Crocky the Crocodile fame, see *Crocodile at Law* and *The Law is a Crocodile*) in his *Recollections* at page 358 concisely and clearly outlined the main problems well when he stated:

“One of the problems caused when judges undertake inquiries is of course that the number of judges available for judicial work is reduced. It is true that a deputy can be appointed, but it is not a complete solution.

Another problem is that inquiries can involve the judge in controversy. That is not to be downplayed ...”

Judges should always be on their guard against being abused for political purposes and avoid any conduct that may be perceived to undermine their judicial authority.

- *Tip 6*

Practical Tip number 6: Do not seek to privately or publicly influence a judge.

The separation of powers must be defended by avoiding private discussions with judges and inappropriate comments in public. Unfortunately lack of direct private access to the judiciary can infuriate some politicians such as English Home Secretaries who are often desperate to quickly define the best course of action for the public good. This frustration may tempt some politicians to apply pressure, by cultivating, via the media or other public pronouncements, the public perception that the judiciary are aloof or simply do not want to get involved and do not care. Nothing could be further from the truth.

The main motivation of the judiciary is to uphold the constitution and the rule of law.

The judiciary are conscious that the discussions the politician is seeking may be baby steps which could lead, if left unchecked, toward the breakdown of the separation of powers. Whether inadvertent or intentional, politicians should not be permitted to take any steps that may lead to a perception that they are trying to inappropriately influence the judiciary. Mere perception can put judicial independence at risk. Even if public perception has no factual basis it can become tantamount to a public fact. Lord Hughes in *Misick* [2015] UKPC 31 at paragraph 21 stated:

“Part of the significance of independence is that it ensures a public perception of impartiality.”

- *Tip 7*

Practical Tip number 7: If you pick a fight with a judge be prepared to be disappointed.

Now this is not to suggest that ‘picking a fight’ with a judge may be similar to ‘picking a fight’ with Arnold Schwarzenegger, Sylvester Stallone or Bruce Willis, or indeed all three. There is unlikely to be a knife or machine-gun wielding judge or breath-taking explosions. However, you will still most certainly risk great damage to your reputation and more importantly damage public confidence in the administration of justice.

Lord David Pannick, the well-respected English QC, wrote an article in *The Times* (28 February 2013) entitled “Home Secretary needs to be reminded about separation of powers” in which he stated:

“It is always unseemly for ministers to pick fights with the judiciary. On this occasion, the weakness of Ms May’s case makes her attack especially foolish ...

It would be more appropriate for the Home Secretary to appeal to the Court of Appeal and, if necessary, the Supreme Court against decisions to which she objects rather than to appeal to the readers of the *Mail of Sunday* with a degree of aggression that, in other contexts, would lead to an anti-social behaviour order ...

It is, of course, equally essential to democracy that the laws made by Parliament are interpreted and applied to the circumstances of individual cases by independent judges, and not by ministers ... ministers [are required] to "uphold the continued independence of the judiciary". It is surprising and regrettable that a Home Secretary needs to be reminded of the principle of the separation of powers."

Lord Phillips (a former President of the UK Supreme Court) in *Judges must not only be independent but must be seen to be independent – the birth of the UK Supreme Court* (9 December 2013 in Hong Kong) referred to David Cameron's reaction to a Supreme Court decision which ruled that it was incompatible with the Human Rights Convention to put sex offenders on the sex offenders' register for life, without giving them the chance, in due course, to demonstrate that they no longer posed a danger and should be taken off it and stated:

"David Cameron ... said publically that he was appalled by our decision, a comment that was echoed by the Home Secretary ... Using the Supreme Court as a political punch-bag is not desirable, and I have reason to believe that Ken Clarke performed his duty as Lord Chancellor by making that clear to the Prime Minister. I hope that the present Lord Chancellor will be similarly robust should the need arise."

- *Tip 8*

Practical Tip number 8: Think about the potential implications of asking a judge to be a member of a committee.

Given that most judges are devoid of ego, never opinionated and are frequently found speaking in public (in the case of your speaker tonight only one out of three is not bad) it is hardly surprising that there may be occasions when you might be tempted to invite a judge to be a member of a committee. After all with knowledge of the law, clear thinking and professional objectivity, a judge on a good day, can be useful in a committee environment, but beware there is always a need to think through the potential implications. Unnecessary involvement in committees also takes valuable and scarce judicial time away from the core judicial function, namely judging.

Moreover, serving on a committee could be incompatible with a judge's duties. This incompatibility may be practical, professional or just the way it may be perceived by others.

Lord Justice Leveson resigned on 9 May 2007:

"... from the new Board of the Ministry [of Justice] on the basis that membership of a board responsible for prisons was not compatible with judicial office."

(*Dicey Revisited: Separation of Powers for the 21st Century* 28 November 2008 at page 9).

For an example closer to home, I took steps for the First Deemster (that's me) to be removed from the Tynwald Membership Pension Scheme Management Committee. You may be surprised to hear that this was not because I thought it may be just too exciting for a man of my constitution. It was in fact because I felt that this position plainly conflicted with the need for judicial independence. It was just not right to have a serving judge (a chief justice) chairing a committee which dealt with the pensions of politicians - potentially a very hot political potato. Added to this I might be unable to hear any legal dispute or appeal that might relate to the activity of the committee.

In compact jurisdictions with limited resources it may be tempting to involve judges in work other than judging. Resist that temptation because if judges are asked to wear too many hats the independence of the judiciary may be compromised.

- *Tip 9*

Practical Tip number 9: If you ask a judge to give a public lecture, take care with the topic.

Now you are thinking "If only we'd known this earlier we could have made tonight so much more enjoyable". Maybe by requesting a topic such as prize pumpkin cultivation on the Isle of Man. My specialist subject. But then again, maybe not.

As it stands I think you are fairly safe with this evening's topic, "The rule of law and the separation of powers", because of the breadth and general nature of the topic. The moment you ask a judge to talk about past, recent or imminent judgments, or politically charged issues or issues which may lead to public controversy, you are putting your speaker, the judge, in a potentially tricky position.

Lord Steyn unfortunately had to step down from judicial involvement in one of the UK cases concerning the unlawful detention of suspected terrorists because of a lecture he had given in respect of those detained in Guantanamo Bay without trial.

In my own backyard on the Isle of Man the Code of Conduct for Members of the Judiciary (paragraph 11) clearly states that:

"Members of the judiciary may write, lecture, teach and participate in activities concerning the law, the legal system and related activities provided that such activities do not compromise or prejudice the performance of their duties or functions."

So when in doubt take a step back and look at the big picture. A controversial subject may look irresistibly delicious on a running order and may even deliver a very engaging presentation. However, the negative knock-on effects of the presentation may create a destructive tidal wave in its wake that eventually swamps the rule of law and benefits no one.

- *Tip 10*

And finally, Practical Tip number 10: Ensure that those who provide administrative support to the judiciary are independent.

It is vital that the judiciary's support staff (including registrars, court service chief executives, court clerks, personal assistants, librarians, ushers and others) are not subjected to any political direction or improper political influence as that would also taint the independence of the judiciary.

Lord Woolf in *Judicial Independence not Judicial Isolation* (26 April 2007) stressed that those providing administrative support to the judiciary need:

"... to be conscious of the special nature and responsibility of their work for the courts and the judiciary involving as it did the need to preserve the independence of the judiciary."

Lord Phillips in his lecture on *Judicial Independence & Accountability* (8 February 2011) underlined the need for the administrative support provided to the judiciary to be independent of the executive and stated that the chief executive of the court must owe his or her primary loyalty to the President of the Court and not to a politician.

Aharon Barak also put it well in *The Judge in a Democracy* at pages 79-80 when he stated:

“Judicial independence means building a protective wall around the individual judge that will guard against the possibility of influencing decisions ...

Institutional independence is designed to build a protective wall around the judicial branch that prevents the legislative and executive branches from influencing the way judges realize their roles as protectors of the constitution and its values. The judicial branch must therefore be run, on an organizational level, in an independent manner. It should not be part of the executive branch and should not be subject to the administrative decisions of the executive branch.”

Michael Gove (appointed Lord Chancellor and Secretary of State for Justice on 10 May 2015) has recently reiterated the need for the insulation of the British judiciary from politics. In his first major speech at the Legatum Institute on 21 June 2015 Mr Gove stated:

“So both as a matter of enlightened economic self-interest, and as a matter of deep democratic principle, it is vital that the institutions which sustain and uphold the rule of law are defended and strengthened. That means vigilance to make sure the judiciary maintain their independence and their insulation from politics.”

From April of this year the Isle of Man’s General Registry, which provides administrative support for the judiciary (in effect our Court Service), was restructured. The Minister of Policy and Reform recognised the need for the Manx judiciary to be insulated from politics and for the judiciary’s support staff to be independent. It is his stated intention that the restructure will enable the Courts Service to “focus on supporting the independent judicial process and enhancing the high international reputation of the Island’s courts”. For me this also highlights the need for continuous improvement in every aspect of legal process.

Closing comments

As I hope my top tips have demonstrated, the separation of powers is not a high-flown academic ideal. It is fundamentally practical common sense that often requires strict self-control on the part of the legislature, the executive and the judiciary and all those who assist them in carrying out their important and burdensome public functions.

When driven by a vision and tempted by opportunity or the need for speed even good people cannot always be relied on to do the right thing for everyone involved.

It is the way we respect and nurture the body of fundamental principles that make up a constitution that maintains proper behaviour within a civilised community. And the separation of powers is a vital plank in any constitution. History has time and again shown that unlimited power in the hands of one person or group in most cases means that others are suppressed or their powers curtailed. The separation of powers in a democracy is to prevent the abuse of power and to safeguard freedom and justice for all.

However, in some jurisdictions there is no pretence and there is no separation of powers. There is just an edict from on high.

But perhaps the more dangerous are those jurisdictions where the separation of powers is just showy pretence and as such represents a thin veneer that is used to mask deep set corruption and the judiciary is forced to put on a show of sham impartiality and illusory independence.

Just as dangerous as that are those jurisdictions where politicians and others do not fully understand the importance of the separation of powers to a country's constitution. This is a danger created through ignorance rather than bad intent but the adverse impact on the rule of law may be the same.

This is why the separation of powers is such a precious jewel that needs to be polished and defended at every turn. This is why we must all remain vigilant in the protection of the separation of powers especially with the simple practical stuff such as my Top Ten Tips.

The modern obsession with speed, immediacy and the shortest distance between two points, combined with the pressures of public office, politics and the ballot box can make it hard for some politicians to observe the separation of powers. As Lord Neuberger recognised in *Magna Carta: The Bible of the English Constitution or a disgrace to the English nation?* (18 June 2015) at paragraph 62:

"The need to offer oneself for re-election sometimes makes it hard to make unpopular, but correct decisions."

Politicians must however respect and strictly adhere to the fundamental constitutional principle of the separation of powers and in particular avoid taking steps which may compromise, or appear to compromise, the independence of the judiciary. The separation of powers can be the fine line between a functioning democracy and a country in chaos.

To maintain the separation of powers all judges need the help of every member of the communities which they serve. In particular we need the help of those advisers and decision-makers in positions of influence. We need your help.

Participants in the Small Countries Financial Management Programme 2015, it is my sincere hope that you will continue to do all you can to ensure that the rule of law is upheld through the separation of powers.

David Doyle
First Deemster and Clerk of the Rolls of the Isle of Man
16 July 2015