

## **Preserving judicial independence in an age of populism**

**North Strathclyde Sheriffdom Conference, Paisley**

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1. It is an honour and a great pleasure to join you at your conference today.
2. My talk is about preserving judicial independence in a populist age. That there are threats to judicial independence in many countries is not open to doubt. Some of those threats are the result of the rise of populism. Others are innate in the structure of some societies and polities. When I represented the Scottish judiciary on the European Network of Councils for the Judiciary we had to suspend the membership of Hungary because of the measures taken by its government to get control over its judiciary. More recently, the government of Poland has been at loggerheads with the European Union over its attempt to replace many members of its judiciary with people more in sympathy with the governing party. In a long running battle of wills with the European Commission, it was only this Wednesday that the Polish government backed down in the face of an order from the Court of Justice of the European Union and agreed to reinstate Supreme Court Justices whom they had forced to retire early. But that does not mean that the threat to judicial independence in Poland has gone away. The governing Law and Justice Party has already managed to appoint a majority of judges to the Constitutional Tribunal, which can veto legislation, and, through the Party's control of the National Council of the Judiciary, which is the body that nominates judges in Poland, it has the power to appoint all future judges.
3. There are therefore live threats to the rule of law within the European continent. Nearby, in Turkey, in the aftermath of a failed military coup, the government has dismissed about 4000 judges and prosecutors, one in four of their complement, on the ground that they were associated in some way with the exiled cleric Fethulla Gulen, whom Mr Erdogan accuses of having masterminded the coup. Further afield, in Malaysia the incoming government is anxious to improve its judicial system precisely because it believes that its predecessor had sought to undermine judicial independence. In Myanmar, the judiciary have been effectively under the control of the Army and plans to build a truly independent judiciary will take a

long time to come to fruition. In the largest county in the world, China, the role of the Party in the constitution means that the concept of the rule of law does not involve judicial independence from the executive arm of government: the Party is the guardian of the constitution. As a result, the concept which my Chinese counterparts speak about, called “the rule of law with Chinese characteristics” differs significantly from the familiar concept of the rule of law in leading western countries. Indeed, the Chief Justice of China is on record as saying that the independence of the judiciary is “a western heresy”.

4. Even in established western democracies where there is the formal separation of powers, the politicisation of judicial appointments can cause people to see senior judges as political figures and undermine the perception of substantive judicial independence. When I was in Washington DC in November 2016, to deliver a lecture shortly after the presidential election, I had accepted, in my innocence, an invitation to a gala dinner by the Federalist Society which turned out to be a well-established Republican Lawyers’ pressure group. My hosts were very pleasant but, because of the political nature of their organisation, I insisted on paying the non-insubstantial cost of my ticket to preserve my political neutrality. My naivety is not the point of this tale. What fascinated me was that many establishment republican lawyers who were no fans of the elected President had voted for him only in order to have a Republican nominated for the Supreme Court. The partisan nature of the process of the appointment was apparent from the unfortunate Senate confirmation hearing which followed and the heated demonstrations in Washington DC which accompanied it.
5. The size of the public demonstrations which have taken place in Warsaw and Washington show that the identity of the judiciary is a matter of considerable public concern if there is perceived to be a political motivation behind their appointment or dismissal.
6. Returning to the United Kingdom, I speak about the role of the judiciary in upholding the rule of law, what underpins judicial independence, the effect of the Brexit litigation and the continuing political debate on the role of the judiciary. Those of you who attended the Sheriffs’ Association Biennial Conference in Dunkeld in March may have read the lecture which I was due to give there had the snow not prevented me from returning to Scotland. The analysis which I give about the pillars which underpin judicial independence is, unsurprisingly, the same as that which I advanced in that lecture and I apologise if for you this part of my lecture involves the auditory equivalent of déjà vu.

7. Judicial independence is a critical component of the concept of the rule of law, as we see it in Europe and more widely in Western democracies. In our tradition, impartial adjudication by the judiciary requires the separation of powers. In our modern history the executive organs of the State have been subjected to the rule of law by, among others, an independent judiciary.
8. In view of its power over the judiciary, which it funds and whose judgments it enforces, the most obvious candidate against whom independence is asserted is the executive branch of government. But judges also need to act independently of parliamentarians, the media, pressure groups and powerful individuals or corporate organisations. Judges take a judicial oath to “do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will”. To do right, that is to decide cases impartially and in accordance with the law, judges must be independent of all litigants and also of all who might directly or indirectly seek to influence the outcome of a legal action, including their fellow judges who are not sitting on the particular case.
9. I have lectured on this subject before - if you are interested you can find my Lincoln’s Inn Lord Denning Society lecture on the Supreme Court website – but today I wish to link that analysis of the ten pillars of judicial independence to the wider challenge of populism.
10. In analysing the pillars of judicial independence, I have remembered Georges Clemenceau’s quizzical protest at President Woodrow Wilson’s proposed fourteen points as a programme for world peace in 1918: “*Quatorze?*” He said, “*Le bon Dieu n’ a que dix.*” I have followed that example.
11. What then are the ten pillars?
12. My first pillar is a clear constitutional commitment to the independence of the judiciary and the rule of law. What is required is a constitutional framework which recognises these elements. Until recently, the United Kingdom enjoyed the reality of judicial independence by constitutional convention rather than by statutory statement. That was a product of our fortunate political and social development over several centuries. We now have a clear

constitutional statement in the Constitutional Reform Act 2005 which in section 1 recognises and preserves the constitutional principle of the rule of law and in section 3(1) provides:

*“The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.”*

That is an important duty which Parliament has given not only to the Lord Chancellor but to all Ministers of the Crown.

13. The CRA also prohibits the Lord Chancellor and other Ministers of the Crown from seeking to influence particular judicial decisions through any special access to the judiciary, and requires the Lord Chancellor to have regard to the need to defend judicial independence, the need of the judiciary to have the support necessary to enable them to exercise their functions, and the need for the public interest to be represented in decisions affecting matters relating to the judiciary or otherwise to the administration of justice. In Scotland, as you know, a similar guarantee of judicial independence has been enacted by the Scottish Parliament in section 1 of the Judiciary and Courts (Scotland) Act 2008, which imposes duties on the First Minister, the Lord Advocate, the Scottish Ministers and all persons with responsibility for matters relating to the judiciary and the administration of justice.

14. My second pillar is the exclusion, or at the very least the minimisation, of political considerations as an influence on the appointment and promotion of judges. The Latimer House Guidelines, which the Commonwealth adopted in 2003, require “an appropriate independent process for judicial appointments” that will

*“guarantee the quality and independence of mind of those selected for appointment.”*

Each of the jurisdictions of the UK now has an independent Judicial Appointments Commission on which the judiciary are represented. The Chair of the Commission and a majority of its members are not judges. There is an open competition preceded by advertisement in which people are invited to apply for appointment. The Commission recommends candidates to the relevant minister who has a limited power of veto.

15. My third pillar is adequate finance. This involves at least three things. First, judges must be given adequate salaries to ensure their integrity and impartiality. Judges should receive fair remuneration, and changes to their salaries and pensions must not be used as a means of influencing judicial decision-making. In the United Kingdom, the Senior Salaries Review Body is the non-political body charged with making recommendations to the Government on the remuneration of among others the judiciary. Sadly for judges, the Government does not always implement their recommendations, particularly in times of economic difficulty or crisis. Secondly, the Government must provide the finance to allow the judicial system to operate effectively. This includes maintaining or constructing court buildings, providing sufficient staff and, increasingly in recent years, investing in information technology to improve the efficiency of the court system. The third element, which happily has generally not been a major concern in this country but which will require to be reviewed regularly in the light of recent terrorist violence, is resources to protect judges and court users from violent attacks. This includes maintaining sufficient security within court buildings to deter and prevent violence.
16. My fourth pillar is that judges should have personal immunity from suit for acts and omissions in the exercise of their judicial functions. Judges deal with disputes and, often, the disputatious. It is not uncommon for disappointed litigants in person to make unfounded claims about the behaviour of judges. They are able to invoke complaints procedures, as I shall mention, but they cannot sue the judges for acts that they carry out in performing their functions. The importance of immunity has long been recognised. Lord Stair said that without it, “no man but a beggar or a fool would be a judge”.
17. My fifth pillar is security of tenure. In the United Kingdom judges of the High Court and the courts above can be removed only by a resolution of both Houses of Parliament. This was the product of the political battles of the seventeenth century. In that century, when judges held office “during the King’s pleasure”, they were regularly sacked. There were then, and until 1830, only 12 judges in the common law courts of England and Wales; four in each. Yet Charles II sacked 11 judges in the last eleven years of his reign and his brother, James II, sacked 12 judges in the three years of his reign before he was overthrown. It was not until the Act of Settlement of 1701 that judges of the higher courts gained security against dismissal at the will of the Crown.

18. My sixth pillar is the separation of powers. In this I am speaking of the way in which different branches of government conduct themselves in relation to judicial matters. In the United Kingdom this is governed by convention. Thus the Government does not attempt to use its contacts with the judiciary to influence the outcome of legal cases other than through the advocacy of their counsel in the courts. Ministers generally exercise restraint in commenting on judicial decisions whether or not they are in the Government's favour. It would be contrary to parliamentary custom or convention for the Minister to launch an attack on the courts or the judiciary as a whole. Within Parliament it is a parliamentary custom, supported by rulings of the Speaker, that an attack on a judge's character or motives, or charges of a personal nature or a call for his or her dismissal, should be made only on a substantive motion on which a vote will be taken, and also that arguments that a judge had got a decision wrong should be made in moderate language. Those rulings and the *sub judice* rule, prohibiting parliamentary debate of matters currently before the courts, are intended to regulate the relationship between politicians and judges.

19. Judges seek to maintain good relations with Ministers and civil servants to ensure the efficient operation of each branch of government. But each branch of government must remember the proper limits of such contact. Latimer House Guidelines are very much in point:

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

20. There is another aspect to the separation of powers. The judiciary and the Courts and Tribunals Service are served by civil servants whose loyalty, so long as they perform that role, is owed to the judicial branch of government. There is ample evidence of civil servants giving their undivided loyalty to the judicial branch so long as they work for it.

21. Seventhly, judicial independence is supported by a particular form of accountability. The public generally have access to the courts and can see justice being done. Judges are accountable for their decisions by the requirement to state their reasons for those decisions. Until a case is finally determined by the Supreme Court, a judgment may be subjected to review by an appellate court. The Government, Parliament and the public have access to published judicial decisions, which can be the subject of informed debate. In recent years

the courts have worked to enhance public access to their work in order to promote understanding of that work. In my court, hearings are posted on our website and are streamed live on the internet, and you can access recordings of the court handing down judgments on YouTube. Since 2012 the Supreme Court has had a Twitter profile by which it notifies followers about the progress of appeals, the outcome of judgments and other selected news. It now has over 230,000 followers. Modern forms of accountability have also included the formulation and publication of ethical guidelines which allow the public to understand what they may expect of a judge. Formal complaints procedures have been put in place to allow the investigation of complaints and the imposition of sanctions on the judicial office holder if the complaint is justified.

22. My last three pillars are concerned with what judges must do to protect judicial independence.
23. There is, eighthly, what I call “role recognition”. It is incumbent on judges to see with clarity the limits of the judicial role. In short, there are decisions of policy, which involve social, economic or political preferences that are properly the domain of the elected branches of government. Not only do the courts lack the resources to formulate policy and assess the practical consequences of decisions in such matters, but also the courts cannot be politically accountable for them in a democracy. There are other limits. The UK Parliament is sovereign and Article 9 of the Bill of Rights prevents the courts from questioning what takes place in Parliament.
24. Judges are not and should not be players in a political process. Were they to be so, their impartiality would be lost. In recent years, senior judges have given public lectures to explain the justice system in a way which was forbidden sixty years ago. But we have to be careful about the content of those lectures. We must avoid commenting on contentious questions of policy outside very limited areas. Thus, judges may legitimately advise on proposals relating to the justice system and matters of technical law reform, into which they can offer insights, but must avoid unnecessary political controversy. We must also avoid lobbying parliamentarians in our own interest.
25. My ninth pillar is performance and moral authority. Judges must do their jobs well. Judges must be true to their judicial oath and act impartially and honestly. They must dispose of the

business of the courts speedily and efficiently. They must also avoid political involvement and comply with the recognised ethical standards both in their work and in their private lives.

26. In an age in which the authority of public institutions is under attack, judges depend upon retaining the trust of the public. At the start of her Reith Lectures in 2002 Onora O'Neill quoted Confucius, "Trust should be guarded to the end: without trust we cannot stand." In recent years documents setting out ethical guidance for judges have become widespread at national and European levels. In Scotland, and in the United Kingdom more generally, judges have enjoyed considerable moral authority; but that moral authority has to be earned every day.
27. Finally, my tenth pillar is maintaining political and public understanding. There is a danger to judicial independence if elements in the media portray a caricature of the judiciary and if judges, politicians and officials with responsibility for the administration of justice do not act to correct misunderstandings. Judicial communications officers, who can explain the work and decisions of the judiciary to the media, are now a necessary part of the modern justice system. This is not a question of spin; it is a commitment to openness, which is a form of explanatory accountability in a democracy. The rule of law, and judicial independence as its essential component, is a political achievement. All judges have a duty to take care to preserve political and public support for the rule of law; senior judges in particular have a duty to explain. For the rule of law is based ultimately on society's confidence in and consent to our judicial institutions.
28. Since the enactment of the Constitutional Reform Act in 2005 in the UK and in Scotland the enactment of the Judiciary and Courts (Scotland) Act 2008, there have been significant changes to our political system which affect the administration of the law. The Lord Chancellor no longer acts as a bridge between the three branches of government, as presiding officer in the House of Lords, a member of the Cabinet and the senior judge in England and Wales. The selection of candidates for judicial appointments became the role of the Judicial Appointments Commission or, in Scotland, the Judicial Appointments Board. The Lord Chief Justice of England and Wales and in Scotland the Lord President have taken on much of the responsibility of speaking for the judiciary which used to be the task of the Lord Chancellor.



29. In their book called “The Politics of Judicial Independence in the UK’s changing Constitution” by Gee, Hazell, Maleson and O’Brien, the authors warned that the disengagement of politicians from the justice system and the judiciary, which the recent reforms have brought about, could be the greatest threat to judicial independence in future. This disengagement comes on top of longer term trends: in the past there were many MPs who were practising lawyers or who had had significant experience of legal practice; there were also many judges who had had political experience. Not so now in London or in the Scottish Parliament. This poses a risk that there will be shallower understanding between politicians and judges of their respective roles in our constitution. Senior judges have therefore to work closely with ministers and civil servants within the boundaries set by the Latimer House Guidelines which I mentioned when discussing the sixth pillar.
30. That provides the context for turning to the Brexit litigation. The attacks by the press on the Divisional Court in the Brexit litigation and the inadequate response of the then Lord Chancellor caused outrage among the judiciary. The comments of the press and of a senior government minister were calculated to give the message that the judges had improperly allowed their private views on the merits of Brexit to influence their legal judgment.
31. It was encouraging that many in the legal profession spoke out against this charge and against the initial refusal of the Government to defend the judiciary. Sir Jeffrey Jowell QC, when commenting in a measured way on the events in January 2017, stated: “Rebutting the content of the attacks on judges need in no way question the freedom of the press. It simply engages in the substance of the allegations.” He concluded that in the context of the then charged political climate, in which the press coverage was calculated to dent public confidence in the integrity of the judiciary, “a prudent Lord Chancellor should surely have acted to stem the risk of damage that such misleading and inflammatory allegations may cause”.
32. Later, when giving evidence to the Constitutional Committee of the House of Lords in March 2017, Lord Thomas, the Lord Chief Justice did not accept that the principle of press freedom prevented the government from correcting intemperate press statements, observing that there was a difference between criticism and abuse.

33. In making this distinction between criticism and abuse he was surely correct. It would undermine democracy if a government could dictate to the media what they were to say. But there is no constitutional principle that ministers cannot contradict abusive or inaccurate press comments.

34. By the time the Supreme Court heard the appeal from the Divisional Court in December 2016, and certainly by the time it issued its judgment in January 2017, some of the heat had gone out of the political debate on the role of Parliament in the invocation of article 50. When the press criticised the decision of the UK Supreme Court on the article 50 challenge in January 2017, the Lord Chancellor was quick to issue a supportive statement in which she said:

“Our independent judiciary is the cornerstone of the rule of law and is vital to our constitution and our freedom. The reputation of our judiciary is unrivalled the world over, and our Supreme Court justices are people of integrity and impartiality.

While we may not always agree with judgments, it is a fundamental part of any thriving democracy that legal process is followed. The Government has been clear that it will respect the decision of the court.”

35. Anyone interested in maintaining the rule of law would struggle to find fault with such an endorsement of the importance of legal process to a democracy. Further, since the general election last year, the Lord Chancellor has emphasised the importance of the role of his office in upholding the rule of law and preserving the independence of the judiciary.

36. Democratically elected governments have a vital interest in the maintenance of the rule of law. It is a bastion against those who would use chaos as a ladder. The undermining of democratic governments and the rise of authoritarian dictatorships in several countries in Europe in the 1920s and 1930s involved the subordination of legal process to politics. We in the United Kingdom have had a very fortunate political history in recent centuries and do not face such a threat. But our history must not cause us to lose sight of the vital role of law in preserving democracy in an age when there are many totalitarian states which do not share our values.

37. The events of November 2016 now seem far away although only 16 months have passed. With the passage of time it may be possible to assess the effect of those events.
38. The first question I ask myself is: how much long-term damage did those events inflict on the rule of law? With the passage of time, I have to say that I think that, because the events of November 2016 were not repeated in January 2017 or afterwards, they did not do much long-term damage. It is important to keep matters in perspective. The robust institutional response to those events has not gone unnoticed in political circles. In the United Kingdom there is no pressing threat to the rule of law of the nature that we have seen in some other countries.
39. But those events did cause some damage. First, the international reputation of the United Kingdom for the maintenance of the rule of law and the quality of its legal systems, which is an important source of soft power and also of earnings for the country, may have been dented by the international publicity given to those events. I have heard foreign judges and lawyers expressing both surprise and concern. Secondly, and perhaps most seriously, while it is not possible to quantify the impact of those events, the suggestion by the press, whether implicit or explicit, that the judges of the Divisional Court were consciously attempting to block the service of an article 50 notice and thus thwart the democratic will, serves to undermine the confidence of those, who gave credence to the allegations, in the impartiality of judicial decision-making. That criticism goes far beyond the robust criticism of the merits of a decision which judges have encountered in the past. Thirdly, the events did nothing to encourage able lawyers to give up legal practice for a judicial career.
40. But it may be that the events of November 2016 are representative of other trends and tensions. Disagreements between the judiciary and legally eminent Lord Chancellors have occurred in the past. Robust press criticism of judicial decisions is not new. Examples include the criticism of the House of Lords for granting an injunction against the publication of “Spycatcher” in 1986, in which the Daily Mirror published front-page photographs of three members of the panel under the banner headline, “You Fools”. As guardians of free speech, judges are required to show tolerance to criticism of their work. In addition, government ministers have occasionally vented their frustration about judicial decisions, such as when in February 2003 the Home Secretary, David Blunkett, wrote a piece in the *News of the World* entitled “It’s time for judges to learn their place”. Occasional tensions

between the executive and judicial branches of government are inevitable in a democracy which is working successfully. The Lord Chancellor is expected to advise ministers of the need to uphold judicial independence if lines are crossed and in Scotland I am confident that the Lord Advocate would act likewise. For example, in 2011, when ministers criticised the Supreme Court decision that people on the sex offenders register might apply for review of their inclusion, the Lord Chancellor, Kenneth Clark, wrote to both the Home Secretary and the Prime Minister to remind them of their statutory duty.

41. I turn to consider two suggestions which emerged from the controversy over the Brexit litigation. One suggestion was that judges should abandon their traditional reticence and join in the public debate. The other is that politicians should be involved in the selection of candidates for appointment to senior judicial office.
42. How far should judges speak out? Since 1987 when Lord Mackay as Lord Chancellor abrogated the so-called Kilmuir Rules, it has become much more common for senior judges to give lectures and speeches explaining the operation of the legal system and developments in our law. Supreme Court Justices, Court of Appeal judges and in Scotland senior judges in the Court of Session often receive invitations to lecture on such subjects. Indeed, the giving of such lectures is part of the job description of Justices of Supreme Court.
43. But the topics on which judges should speak extra-judicially must be chosen with some care. To enter the political debate would in my view involve a failure to maintain the eighth pillar, which is role recognition. It is of central importance that judges do not adopt political stances and get involved in current political controversies. There is much to be said for an institutional rather than an individual response to what is perceived to be unfair criticism or abuse. Statements by the Lord President, the Lord Chief Justice of England and Wales or the President of the Supreme Court and clarifications by the Judicial Press Office are much more likely to be effective than a response by the judge who has been impugned.
44. Can senior judges do more to promote public understanding? When they give speeches and lectures on such topics as the rule of law and judicial independence or on the working of the legal system, their audience is self-selecting and judges find themselves addressing the converted or at least those with a strong propensity towards agreement with the judicial outlook. If the comments of the press in November 2016 were a reflection of a widely-held

public view, it is unlikely that the speeches of senior judges have had much impact on public perceptions outside the legal community.

45. We live in an age in which many get their news not from the press and traditional information providers but via social media. The modern methods of accountability which I have listed under the seventh pillar make an important contribution. But I question whether institutional initiatives, very valuable as they are, reach a sufficient number of people, who do not have ready access to justice or have not engaged with the legal process, in order adequately to inform the public debate. The reaction of people who were caught up in the Grenfell Tower tragedy to the announcement of the public inquiry may be a salutary warning of the alienation of elements of our society from the legal system. It is a reminder of the importance of preserving access to justice by those who do not have the private means to fund skilled legal representation.
46. In an age in which much commentary on events takes place on the internet and not infrequently involves uninhibited language, I doubt whether the active involvement of individual members of the judiciary on social media would be compatible with the eighth pillar, which is the recognition of the limits of the judicial role. But there may be a role for the Ministry of Justice, for the Judicial Press Office, or for charities which promote the rule of law, in explaining the importance of the rule of law, the workings of our legal system, and particular judicial decisions.
47. It is not just populism which has given rise to criticism of judges. There has been considerable academic comment on the rise of judicial power, especially as a result of the enactment of the Human Rights Act 1998, which requires judges to make evaluative judgments on the fair balance between the public interest and an individual's rights, and concerns have been expressed about certain aspects of the jurisprudence of the Court of Justice of the European Union. The think tank, Policy Exchange, has since 2015 developed what it calls the Judicial Power Project, in which it criticises the rise of judicial power which it sees as a threat to the political constitution of the UK. Some of the criticism is strongly worded in its attacks on "judicial overreach" and has been judged by other commentators to be overstated. But judges should be aware that all power requires justification and we should be alive to and reflect upon the arguments of those who are concerned about the enhancement of the judicial role in the common law world. The debate, set out in the

University of Queensland Law Journal in 2017 (vol 36, no 2 2017), with arguments for and against the concerns about judicial power, makes interesting reading.

48. Serious academic debate and populism can overlap. The recent controversy over the decision of the Inner House to refer a question of the revocability of article 50 to the Court of Justice of the European Union is an example. It might have been helpful to my court if the press had properly reported that our decision not to hear the case was on the simple basis that we had no jurisdiction.
49. The second suggestion is that there should be greater political involvement in the appointment of the most senior judges because some of the decisions by judges have political consequences. One suggestion which has been aired by some politicians and commentators is that there should be parliamentary confirmation hearings on the US model. I question the utility of this suggestion. Judicial decisions which have political consequences are not the same as political decisions. Senior judges have a mandate to determine disputes in accordance with the law and with their judicial oath. They have no political mandate to bring their personal political views into their reasoning and, in my experience, work hard to leave their personal views outside the door of the court. There is a real risk that confirmation hearings might give legitimacy to political decision-making within the judiciary and thus bring about the opposite of what its proponents seek.
50. Another suggestion, which the President of the Supreme Court, Lady Hale, floated for discussion, without personally endorsing it, is that the selection panel for senior judicial appointments should be expanded to include a senior politician from the governing party and a counterpart from the opposition. This is less radical than parliamentary confirmation hearings and would introduce an element of democratic or political involvement in the appointments process. But some have questioned what it would achieve. If politicians on such a panel were to bring political considerations to bear in the selection of senior judges, would such factors be relevant considerations in the appointment of the judges? If the politicians did not bring such considerations to the table, what would be their democratic contribution to the deliberations of the appointments panel?
51. I am not persuaded that the current system of appointment is broken. It is capable of improvement, but I see no need for any radical change which might politicize it. We have an

independent Judicial Appointments Board in Scotland and Commission in England, which assess candidates on their merits and make recommendations to the Scottish and UK Governments. As Lady Hale has observed, the qualities of independence, incorruptibility, judicial competence and diversity are important considerations. Political allegiance has been generally treated as irrelevant for many years. The relevant Scottish Ministers, including the First Minister, and in England and Wales, the Lord Chancellor have the power to veto an appointment, if they think that a candidate is not suitable, but in each case he or she must give reasons for the exercise of that power. There is thus a political safeguard in place. Most significantly, in contrast with the United States of America, if a judicial decision is made which is contrary to the wishes of Parliament, Parliament can legislate to change the law.

## Conclusion

52. The pillars of judicial independence remain in place in the UK but judges need to protect the rule of law. As Lord Neuberger explained in his valedictory address, “misconceived attacks on judges undermine the rule of law domestically and the international reputation of the legal system”. The judiciary must conduct itself and respond institutionally to such attacks. An independent legal profession is essential to preserving rule of law. But the preservation of the rule of law depends ultimately on the support of the public for the institutions that uphold the rule of law. For, as the great American judge, Billings Learned Hand said: “Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.”

53. Thank you.