# LEGISLATIVE, EXECUTIVE AND JUDICIAL POWER

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1. My talk is programmed as The View from the Court. Looking back, I can identify one area under continuing development: the relationship between the three pillars of state, legislature, executive and judicial. It is a truism that this varies not just with time, but also with legal culture. Countries with written constitutions and Marbury v Madison powers of interpretation have charted a different course, for different reasons, from our own. But we are not static. The growth of public law, the ECHR and EU law have all contributed to change domestic culture, and to push it in a more interventionist direction. That raises questions about the appropriate balance between the three pillars of state.

2. The focus here is inevitably on situations where one of the three pillars appears to impinge upon or threaten an area which another claims for itself. The focus in this connection is, from the judiciary's viewpoint, on the area of fundamental rights. Most if not all constitutions and systems claim to respect fundamental rights. Everyone pays lip service to general principles like liberty, freedom of speech, association and religion, personal autonomy, privacy and equality. Sometimes, a less familiar fundamental right may emerge, like transparency in public administration: see the recent UK Supreme Court case of *Kennedy v Charities Commission*[1]. But the different institutions of state, and indeed the public and press, do not always see the ownership or content of such rights in the same way, let alone the manner in which and extent to which they should be protected, or how they interrelate when different rights point in different directions.

[1] [2014] UKSC 20.

3. The reality is that there are choices. But who makes such choices? Is it always for the judiciary to do so? The question was well put by Lord Hoffmann in the Privy Council in *Matadeen v Pointu* [1999] 1 AC 98. Equality of treatment - and its obverse, the recognition of relevant differences - are fundamental to the very concept of law. But Lord Hoffmann distinguished between equality as a general democratic principle and as a justiciable rule. He said:

> 'Of course persons should be uniformly treated, unless there is some valid reason to treat them differently. But what counts as a valid reason for treating them differently? And, perhaps more important, who is to decide whether the reason is valid or not? Must it always be the courts? The reasons for not treating people uniformly often involve ….. questions of social policy on which views may differ. These are questions which the elected representatives of the people have some claim to decide for themselves. The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle – that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied'.

4. The conventional judicial answer to this point is we do our best to identify which principles have the greatest societal value and which are more susceptible of judicial protection – in the sense that we have the appropriate institutional understanding and competence to protect them. There is thus a spectrum. At one end, courts identify and strive to control excess of power in core areas, such as those involving personal liberty, inhuman treatment or freedom of speech or expression. At another point, they recognise the greater institutional competence of the legislature or executive in policy decisions involving the raising and deployment of scarce resources.

5. That this is never going to be easy is illustrated by a recent leading case. *R (Unison) v Lord Chancellor* [2017] UKSC 51, involved the Lord Chancellor's power to set employment tribunal court fees to recover tribunal costs. The Supreme Court analysed the case in ringing terms (which according to the internet brought one commentator near to tears) and struck down the fees regulations as unfairly deterrent and arbitrary in effect. It concerned the constitutional right of access to justice. Justice was not a commodity, the cost of which litigants must recoup. It was and is a general good, benefitting society at large and avoiding litigation. As a party to this judgment, I of course agree. All the same, a very different picture was seen by Sir Stephen Laws QC, former Parliamentary counsel[2]. For him the Unison judgment "turns the rule of law on its head, transforming it into a test that allows the courts, with the benefit of hindsight, to quash government decisions on the basis not of how they were made but of how they turn out in practice", and is a case of "judicial overreach" taking the courts into areas of resource deployment where they should not be. If Sir Stephen is really saying that courts should ignore consequences, simply because these were not predicted (and even though they may have been well-foreseeable), I still disagree.

6. What constitutes unacceptable "activism" is of course a matter on which different views may be held in society. I leave aside the cheap answer: who on earth wants an inactive judge? Within as without the judiciary, complete uniformity of approach is an impossible idyll, even if it would be ideal (which I do not think it would be). That is apparent by looking at the international scene, with widely different roles being attached to the German Constitutional Court, the French Conseil constitutional and the UK Supreme Court, not to

[2] His paper, Second-Guessing Policy Choices, is one in a series published by free-market thinktank Policy Exchange's Judicial Power Project.

mention the US Supreme Court. The role of the law is culturally disposed, even if one would not accept all the aspects of the Chinese view of the rule of law with Chinese characteristics as simple variations on the theme of relations between an independent judiciary and the executive. And, looking the matter purely domestically, the law is an art, not a science.[3] Professor Dworkin went too far when he suggested that an ideal judge, whom he called Hercules, would always be able to identify a correct answer. Hercules was the only human ever admitted to Olympus, and, much though one may admire one's colleagues, I am not confident that any of us are in that league. However, the virtue of the doctrine of precedent and of an effective appellate system is to synthenise such differences. Judges need also to be careful to articulate and clarify the considerations which identify rights as fundamental and justiciable, and the weight attaching to them.[4] Sir Philip Sales, soon to join the Supreme Court, has suggested extra-judicially that the search is for rights which Parliament must itself be taken to have accepted.[5] This sits neatly within English traditions of Parliamentary supremacy, but it ascribes a coherence and accessibility to Parliamentary thinking which is I think unrealistic. The reality is that the judiciary as an independent pillar seeks itself to identify and reflect the best values of society as a whole.

7. Against this background, I thought I would take two situations where institutional competence has been a prominent consideration. The first is

[3]Professor John Finnis has described the ambit of judicial power as being the: 'final resolution of disputes between parties – by application of pre-existing law to established facts': John Finnis, 'Judicial Power: Past, Present and

[4] Even where the law is not clear, Professor Finnis might argue that law is a normative concept, which, once identified by judicial decision, can be seen as having in reality always existed. This attractive explanation of the declaratory of the common law cannot conceal the existence of real choices, made by judges incrementally and on a principled basis through case-law. See also Lord Sumption speaking extra-judicially 'The Limits of Law' 27th Sultan Azlan Shah Lecture, Kuala Lumpur, 20 November 2013, p. 15.

[5] See *Rights and Fundamentals in English Law* (2016) CLJ 86 and *Modern Statutory Interpretation* (2017) 38 Statute Law Review 125. His suggestion that the ultimate enquiry should be whether there is a sufficient overlapping consensus from different political and normative perspectives to justify a conclusion that Parliament must have intended to legislate on the basis of the right, notwithstanding the actual language used, sits closely within traditional English views of Parliamentary supremacy.

illustrated by recent cases on assisted dying, in the UK, Canada and New Zealand. In *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, the law prohibiting assisted suicide was challenged by sufferers from locked-in syndrome as being incompatible with article 8 of the ECHR, the right to respect for private life. In the Supreme Court, there was agreement on some points. First, article 8 was engaged, in the sense that there was interference with it, which would require to be justified[6]. Second, the European Court of Human Rights, if the issue of justification came before it in Strasbourg, would accept the United Kingdom's legislature's choice as being within the "margin of appreciation", that is as falling within an area where the Strasbourg court would not criticise a Member State for its choices. But, third and importantly, that international position was not the last word domestically. Rather, it was for the domestic courts to determine the proper roles of the legislature, executive and judiciary in this context: see *In re G* [2008] UKHL 38[7]. In that case, the House of Lords was uncertain whether the ECtHR would hold a Northern Irish law which permitted adoptions by married couples or same sex civil partners, but prohibited it to opposite sex cohabitees, to fall outside the margin of appreciation available to UK law-makers. But we held the law incompatible with the domestically incorporated Convention rights.

8. At this point in *Nicklinson*, the nine Justices sitting diverged, quite radically, in their opinions. The objective, protection of life and the interests of individuals who might otherwise be or feel pressurised to end their lives, was legitimate, and the prohibition was rationally connected to it. But was the

[6] See Hass v Switzerland (2011) 53 EHRR 33, [51], stating that one aspect of private life within Article 3 is the right of any individual (provided he or she is capable of freely reaching a decision) to decide by what means and at what point his or her life will end, cited at [29] per Lord Neuberger; [154] per Lord Mance and [264] per Lord Hughes.

[7] See: [70] per Lord Neuberger; [162]-[163] per Lord Mance; [230] per Lord Sumption; [267] per Lord Hughes; [295] per Lord Reed. It is true that a main purpose of the Human Rights Act 1998 was to avoid domestic outcomes falling short of Strasbourg outcomes, and so ending the previous position, whereby UK litigants had to go off to Strasbourg to vindicate their Convention rights. But it does not follow that domestic outcomes may not go further than Strasbourg outcomes.

prohibition no more than necessary to accomplish the objective? Did it strike a fair balance between the rights of the individual and the interests of the community? And who was to judge this, the courts or Parliament?

9. Four Justices (Lords Sumption, Hughes, Reed and Clarke) concluded that it would involve an institutionally inappropriate usurpation of the role of Parliament for the courts to adjudicate upon these issues. In Lord Sumption's view, the issue was "an inherently legislative issue for Parliament, as the representative body in our constitution, to decide" for three reasons:

    1. It involved a choice between two fundamental but mutually inconsistent moral values upon which there was no consensus in society, such choices being inherently legislative in nature;
    2. Parliament had made the relevant choice not to change the law. To try to do so through the courts would subvert the democratic process;
    3. The parliamentary process was a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas.

    Only if it had been possible to say that "Parliament had abdicated the task of addressing the question at all, so that none of the constitutional organs of the state had determined where the United Kingdom stood on the question" might, in Lord Sumption's view, other considerations at least arguably have arisen. I would also the first reason. Why is it axiomatic that a choice between different moral values is fundamentally legislative? Some moral views are profoundly detrimental to basic freedoms, including the right to decide on one's own fate.

10. At the other end of the spectrum, a minority composed of Lady Hale and Lord Kerr would have made a declaration of incompatibility with Article 8 ECHR.

They considered that, while s.2(1) of the Suicide Act 1961 was justified as a general rule, Parliament should have provided an

> "exception for people who have made a capacitous, free and fully informed decision to commit suicide but require help to do so…"

with a process devised to identify those few people who would fall within that exception (and so protect others): [314] and [231] per Lady Hale.

11. In the middle, were Lord Neuberger, Lord Wilson and myself. We concluded that it would not be institutionally inappropriate for the court to adjudicate upon the claim but that we should not do so at that time and in those circumstances. One important pragmatic reason was the way the case had been presented below, which was focused on mercy killing, not than assisted suicide. Evidence had not been adduced which made suitable for determination of the issue of assisted suicide which had become central in the Supreme Court. Much of the evidence was secondary material gleaned from the Canadian first instance proceedings in *Carter v Canada* 2012 BCSC 886. There was a lack of reliable evidence regarding the risk to vulnerable individuals arising from the relaxation of the blanket prohibition on assisted suicide: [182].

12. But another important reason of principle was dialogue with the legislature: Parliament should be given a further opportunity to consider whether to amend s.2. As Lord Neuberger explained at [118]:

> "Parliament now has the opportunity to address the issue of whether section 2 should be relaxed or modified, and if so how, in the knowledge that, if it is not satisfactorily addressed, there is a real prospect that a

> further, and successful, application for declaration of incompatibility may be made."[8]

I cited the US Supreme Court judgment of *Washington v Glucksberg* 521 US 702, 735, where Rehnquist CJ expressed the importance of 'an earnest and profound debate about the morality, legality, and practicality of…assisted suicide' and said that the holding in that case 'permits this debate to continue as it should in a democratic society'. I agreed, saying that

> 'Parliament is certainly the preferable forum in which any decision should be made, after full investigation and consideration, in a manner which will command popular acceptance': [190].

13. Even within the UK, therefore, there are significant differences regarding the role of the court and the judge.[9] The intermediate solution, which Lord Neuberger, Lord Wilson and I adopted, may be said to have respected Parliamentary sovereignty, but some might suggest that it also challenged it to a degree, by giving Parliament little choice but to address the problem directly.

14. Since *Nicklinson,* Parliament has indeed reconsidered the state of the law on assisted suicide and decided to leave it unchanged. But which way does that cut? In *R (Conway) v The Secretary of State for Justice* [2018] EWCA Civ 1431, a challenge by a terminally ill sufferer from motor neurone disease, the Court of Appeal ruled that it cut emphatically against court intervention. We shall have to see which view prevails if a further appeal proceeds.

[8] I was influenced in this connection by: "the very frequent consideration that Parliament has given to the subject over recent years…and …. by the knowledge that Parliament currently has before it the Assisted Dying Bill and the hope that this may also give Parliament an opportunity to consider the plight of individuals in the position of Mr Nicklinson and Mr Lamb…this will give Parliament the opportunity to confirm, alter or develop its position" [190]

[9] Palmer "*The Choice is Cruel: assisted suicide and Charter Rights in Canada*" (2015) CLJ 191, p.194.

15. The Canadian case of *Carter* went to the Supreme Court, which has a power to strike down legislation as infringing the constitution or the Canadian Charter of Rights and Freedoms.[10] The appellants[11] challenged the prohibition of assisted dying on the basis of section 7 of the Canadian Charter enshrining the right to '…life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

16. The Supreme Court declared the law invalid to the extent that it prohibited a physician from assisting the suicide of a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. The law was at odds with the legal protection of patient autonomy in medical decision-making and the right to 'decide one's own fate'. The right to life was also engaged because the prohibition had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. The law was overbroad and had consequences grossly disproportionate to its object'. It caught individuals who were not vulnerable, but competent, fully informed, and not subject to any coercion or duress. There were less 'drastic means of achieving the legislative objective' of protecting the vulnerable from being persuaded to commit suicide, in that (i) the procedures used by doctors to assess informed consent and decisional capacity could identify vulnerability on an individual basis: [106] (ii) the risks could be mediated through a carefully designed and

[10] See s.52(1) of the Constitution Act 1982.

[11] Gloria Taylor who had been diagnosed with a neurodegenerative disease and Lee Carter who, despite having taken her mother to the Swiss assisted suicide clinic, Dignitas, believed that her mother should have been able to die at home.

monitored system of safeguards and regulation [117] The Court in short took the same view as the minority of Lady Hale and Lord Kerr in *Nicklinson*.

17. Another difference between the UK majority and Canadian approaches here appears. The Canadian Supreme Court suspended its declaration for 12 months to allow the Government the opportunity to introduce the legislation necessary to give effect to the Court's decision and, following a further 6-month extension, Bill C-14 was enacted. We have in the UK flirted with, and in principle accepted, the concept of prospective overruling[12]. We have also accepted the possibility of postponing the making or suspending the operation of an order declaring a law invalid. But we have not in practice found any of these possibilities it easy to accommodate in practice. In *HM Treasury v Ahmed* [2010] UKSC 5, we refused by a majority to suspend declarations. We distinguished, on perhaps doubtful grounds, the instructive Hong Kong Final Court judgment in *Koo Sze Yiu v Chief Executive* FACV Nos 12 and 13 of 2006[13]. Perhaps, the declaratory theory of common law has too firm a hand on United Kingdom courts.

18. Finally, in *Seales* [2015] NZHC 1239, a lawyer diagnosed with a brain tumour sought a declaration that New Zealand legislation criminalising assisted suicide was contrary to articles of the New Zealand Bill of Rights Act ('**NZBORA**') protecting the right to life and prohibiting torture or cruel treatment. She relied on the implied but relatively untested common power to

[12] *National Westminster Bank plc v. Spectrum Plus Ltd* [2005] UKHL 41.

[13]The government's application in *Ahmed* was to suspect the operation of declarations as to the invalidity of certain statutory instruments made by the Treasury freezing terrorist suspects' assets. The Crown had sought suspension so that institutions holding the frozen assets would be able to continue to hold them until remedial legislation was introduced. The majority distinguished the judgment in *Koo Sze Yiu v Chief Executive* FACV Nos 12 and 13 of 2006, where the Court suspended its declaration of invalidity in relation to surveillance legislation, for a period to enable the Hong Kong executive to continue to operate surveillance, pending new a legislative scheme, on the ground that it was not the executive, but financial institutions, whose continuing activity the executive wished to encourage. But such activity depended on the existence of the invalid orders by the orders, so the distinction may be more open to question than the majority thought.

make such a declaration found to exist in *Taylor v AG and Anor* [2015] NZHC 1706 at [61]-[66].[14]

19. The High Court of New Zealand refused any declaration. The right to life was engaged, but the interference was not disproportionate to the ban's objective, the protection of all life: [190]; and this was consistent with principles of fundamental justice [170ff]. Collins J applied a similar proportionality analysis to the Canadian Supreme Court in *Carter*, but reached the opposite conclusion, mainly because of greater stress on the division of power between the branches of government and adherence to what he described as "the traditional role of judges in New Zealand" – this was even though he acknowledged that Parliament had "shown little desire to engage with these issues".[15]

20. Collins J therefore took an even more limited view than Lord Sumption, who in *Nicklinson* had expressed the view that a refusal to engage at all by the legislature might encourage court intervention. There is something to be said for Collins J's view. Activity within the legislature is generally outside courts' scrutiny, though its outcome may be examined. How can courts conclude that a legislature has "refused to engage"? Much in any legislature happens outside public scrutiny, in corridors or rooms, and, if no one has presented a bill on a particular topic, the reason may often be that the outcome would be inevitable.

[14] Such a declaration has only been made once in a judgment delivered just over a month after Seales, so the scope of this power was 'relatively untested' relative to its UK equivalent: Martin, 'A Human Rights Perspective of Assisted Suicide: Accounting for Disparate Jurisprudence' (2018) Med Law Rev 98, 107

[15] He said: "The changes to the law sought by Ms Seales can only be made by Parliament. I would be trespassing on the role of Parliament and departing from the constitutional role of Judges in New Zealand if I were to issue the criminal law declarations sought by Ms Seales' [13]. ….
Although Ms Seales has not obtained the outcomes she sought, she has selflessly provided a forum to clarify important aspects of New Zealand law. The complex legal, philosophical, moral and clinical issues raised by Ms Seales' proceedings can only be addressed by Parliament passing legislation to amend the effect of the Crimes Act. I appreciate Parliament has shown little desire to engage in these issues. The three private members bills that have attempted to address the broad issues raised by Ms Seales' proceeding gained little legislative traction. However, the fact that Parliament has not been willing to address the issues raised by Ms Seales' proceeding does not provide me with a licence to depart from the constitutional role of Judges in New Zealand' [211].

21. These contrasting decisions illustrate different judges' perceptions of their role relative to other branches of government.[16] Since a declaration of incompatibility does not actually involve overturning Parliament's intention, but leaves Parliament to take any remedial steps it decides, one might think that courts would be more willing to make such a declaration.[17] But the UK and NZ courts held back even from that, whereas, in Canada, the Supreme Court had no hesitation in exercising its express constitutional power to strike down the criminal provisions prohibiting assisted suicide.[18]

22. The second situation I intend to examine concerns the recent challenge by the Northern Ireland Human Rights Commission to Northern Irish abortion law. Abortion is prohibited even in cases of fatal foetal abnormality, incest and rape. The only exception is where the mother's life would be at risk or she would suffer serious long-term damage to her physical or psychological health – the *Bourne* exception: *R v Bourne* [1939] 1 KB 687. In practice, almost no abortions are carried out under that exception due to its lack of clarity and the severity of punishment which doctors face if they wrongly perform an abortion. The Commission relied on the European Convention of Human Rights Articles 3 (prohibition on torture, inhuman or degrading treatment) and 8 (right to private life). The Supreme Court by a majority held that the Commission lacked standing, but would, that aside, have made a declaration of incompatibility. The law was, in the view of a majority inconsistent with Art 8 ECHR in relation to fatal foetal abnormality (as opposed to severe abnormality), incest and rape.

[16] See also, Martin n 14.
[17] However, this has not protected UK courts from criticism. See Finnis, n 3.
[18] See discussion in Lisa Burton Crawford and Jeffrey Goldsworthy, Chapter 15 'Constitutionalism' in *The Oxford Handbook of the Australian Constitution* (eds Saunders and Stone) (OUP, 2018).

23. Apart from standing, there was another threshold issue – whether the Court should express any view on an issue which was current and under hot debate in Northern Ireland. The Department of Justice and the Attorney General of Northern Ireland, relying on *Nicklinson*, submitted that the NI Assembly should be given the opportunity of completing its unfinished work of examination of the present law. An obvious difficulty with that was that, although the Assembly had discussed the matter and commissioned further work, it had then become inoperative and there has been no effective Northern Ireland government since January 2017.

24. Quite apart from that, however, other more important differences, in my opinion, distinguished *Nicklinson*[19]. First,

> '118. *Nicklinson*…centred on a difficult balancing exercise between the interests of different adult persons: on the one hand, the sufferer with locked-in syndrome, unable to act autonomously, but unable to receive assistance to commit suicide; on the other hand, the others, elderly or infirm, who might feel pressured by others or by themselves to commit suicide, if assistance were permissible. The balancing of autonomy and suffering against the risks to others was and is a particularly sensitive matter. The legislature had chosen an absolute protection against the latter risks, with which the courts should not, at least at that juncture, interfere.'

25. In contrast, in relation to abortion, there was:

> "119. …….in law no question of a balance being struck between the interests of two different living persons. The unborn foetus is not in law a person, although its potential must be respected. In addition, the current legislation already recognises important limitations on the interests and protection of the unborn foetus. It permits abortion of a healthy foetus in circumstances where the mother's life would be a risk or where she would suffer serious long-term damage to her physical or

[19] In *Conway* (para 18 above), the Court of Appeal noted that the facts and evidence put that case in this respect in same category as *Nicklinson*.

psychological health. There is therefore no question of any absolute protection of even a healthy foetus."[20]

26. Second, in *Nicklinson* the UK approach had corresponded with that taken in almost the whole of the rest of Europe. In contrast, the Northern Irish approach to abortion was out of kilter with the rest of the United Kingdom, to which it is otherwise so closely related, not to mention almost every other European state.[21]

27. Dissenting, Lord Reed, for the minority, would have attached greater significance to the boundaries of judicial power, saying that judges have "neither any special insight into such questions nor any political accountability for their decisions".[22]

28. In summary, even though a declaration of incompatibility has no impact on the validity of the law, judges in the UK remain acutely concerned about their role in the constitutional framework, when deciding whether or not to make such a declaration. Nowhere is this more important than when we are dealing with morally sensitive issues affecting a devolved region. Notwithstanding

[20] I went on to point out that: "The Northern Ireland position is in that respect also more nuanced than the Irish position considered in *A, B and C v Ireland* (2010) 53 EHRR 13, where the profound moral views identified by the European Court of Human Rights subordinated the interests of the unborn foetus in only one situation, namely where the pregnant woman's life would otherwise be compromised."

[21] I said: "120. *Nicklinson*… was decided against a background where the attitude maintained by the United Kingdom Parliament reflected a similar attitude across almost the whole of the rest of Europe. Northern Ireland is, in contrast, almost alone in the strictness of its current law, with Ireland's even stricter regime being about to be reconsidered in another referendum. That does not of course mean that the Northern Irish position may not be justifiable. The margin of appreciation has its domestic homologue in the respect due to "the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies", which I mentioned in *In re G* [130]. But the close ties between the different parts and peoples of the United Kingdom make it appropriate to examine the justification for the differences in this area with care.".

[22] "At national level, it is equally important that the courts should respect the importance of political accountability for decisions on controversial questions of social and ethical policy. The Human Rights Act and the devolution statutes have altered the powers of the courts, but they have not altered the inherent limitations of court proceedings as a means of determining issues of social and ethical policy. Nor have they diminished the inappropriateness, and the dangers for the courts themselves, of highly contentious issues in social and ethical policy being determined by judges, who have neither any special insight into such questions nor any political accountability for their decisions." [12].

this, a majority indicated a preparedness to intervene on the issue of abortion raised by the Northern Ireland Commission.

29. Let me venture a few further words on a subject which Nicholas Mostyn suggested, but which I have rejected, as a main topic of today's talk: the privacy or the publication of family proceedings. Nicholas has I mind that I was the author of the judgment in *PJS v News Group Newspapers Ltd* [2016] UKSC 26. But the balancing exercise was there between the privacy rights of the adults and especially perhaps the children involved in the alleged activity and the freedom of expression rights of the press and public. In the absence of any genuine public interest in publication, the former prevailed. In family proceedings, the privacy rights of the family members and children involved face not merely the freedom of expression rights of the press and public, but the basic principle that justice takes place publicly and accessibly, so that its due administration may be a matter of public scrutiny and record.

30. In deciding not to take this subject as my main theme, I was not only influenced by the distance from it of the *PJS* decision. I was also influenced, indeed daunted, by its exhaustive consideration in Lady Hale's Nicholas Wall Memorial lecture in April this year. It would be presumptuous of me to seek to better that. But one factor has changed since then, and is perhaps worthy of mention. That is that, with the advent of the General Data Protection Regulation ("GDPR"), and although there is as yet no equivalent instrument governing the European institutions, the European Court of Justice has decided (by extra-judicial decision, the subject of press release No 96/18) that proceedings on a reference to it should prima facie be anonymised, as regards the names of natural (not legal) persons and any additional elements likely to permit identification. This is to be a general rule in such proceedings. The approach is one which already had support in some domestic jurisdictions.

31. In her Nicholas Wall Memorial address, Lady Hale said of the GDPR:

> "So it looks as if this all boils down to whether, if a journalist or academic wants to publish the data, the controller – presumably the court – considers that publication would be in the public interest. A special steer is given in favour of freedom of expression and information, but it looks as if we are back to balancing open justice, the public's right to know what goes on in courts and the author's right to tell them, against the privacy interests of the data subject."

She went on to suggest, on the basis of research which she quoted, that children were unhappy that simple anonymisation would suffice to protect their interests, in an era when internet and other research can rapidly draw indirect connections.

32. If one is asking now towards which direction UK law can and should balance, the European Court of Justice's extra-judicial decision may be seen as a pointer, towards the anonymisation which has been traditional in family proceedings, and away from the more recent moves to introduce more transparency into such proceedings. By the same token, it could herald a huge change in the traditional transparency of UK legal procedures in areas outside family law – one which Brexit may perhaps mean will not be imposed on the UK by the ECJ. Like Brexit itself, this will remain uncertain unless and until it happens! And on that note, I have said enough. Thank you for your attention, and best wishes for the rest of this conference.