

The Abuse of Power

The Hon. Sir Stephen Sedley

In October 2011 The Hon. Sir Stephen Sedley delivered the Annual COMBAR Lecture at Middle Temple Hall.

Once upon a time, in a small town in the Midlands which has now vanished into the Birmingham conurbation, a Sabbatarian group secured a majority on the local council. One of their aims was to halt the growing disregard of Sunday as a day of rest and prayer and the use of the Sabbath for secular entertainment. So, when the company which owned the local Gaumont cinema applied to the council for permission to open on Sundays, they granted the application, since they had no good reason not to, but made it a condition that the permission was not to include children under 15. For the Sabbatarians this was a very satisfactory condition because it meant that, unless they were prepared to leave their children unsupervised in the house (this was before the days of universal domestic television), parents would not be able to go to the cinema on Sundays either. Effectively the councillors had succeeded in keeping the local cinema closed on the Sabbath.

The Sunday observance laws had since the late 18th century forbidden Sunday entertainments. But by the 1940s the cinema had become a mass entertainment medium. To enable them to open on a Sunday, the one day when most working people were able to go, Parliament in 1932 passed the Sunday Entertainments Act, allowing local authorities to lift the ban on Sunday entertainments on such conditions as each authority thought fit to impose. This was the power which the Wednesbury councillors – for it was they – used when in 1947 they purported to allow the cinema in Walsall Street to open on Sundays.

It was not surprising that Associated Provincial Picture Houses, who a few years earlier had spent a small fortune upgrading the Walsall Street cinema to a state-of-the-art Gaumont picture palace, took exception to this and went off to the High Court to challenge it. The argument was straightforward enough: if, as was uncontested, it was appropriate to let the Gaumont open on

Sundays, it was a misuse of the statutory power to annex a condition which had nothing to do with either physical or moral safety and much to do with religious doctrine, and which meant that the permission granted with one hand was being taken away with the other.

Every law student knows what the Court of Appeal said about the law; but one wonders how many of them know what the court actually decided¹. Associated Provincial Picture Houses lost in the High Court and lost again in the Court of Appeal. Not for the first or last time, the court set out a shining set of principles on which it would unhesitatingly restrain abuses of power, and then declined to apply any of them to the facts before it.

In its time and place, this was unsurprising. For reasons which are still not fully explored or understood, judicial review of governmental action, which had been developed and refined by the Victorian judges, fell into a long sleep after 1914 from which it has awoken only in our lifetime. In the course of it, a succession of challenges to the way in which the power created by the 1932 Act was being deployed or manipulated by local authorities had come before the courts, but effectively all of them had failed. So disused had public law become that the *Wednesbury* case itself was brought not by application for a prerogative writ but by an ordinary civil action for a declaration that the resolution was *ultra vires* and unreasonable. The judicial response, well exemplified by the decision, was that government, both central and local, was to be left to get on with its job without an over-nice regard to the legality of what it was doing. In a period in which stable governments were rare and the country was having to be run by senior civil servants who outranked most ministers in experience and competence, such a judicial policy was intelligible. But it meant, when in 1947 Lord Greene came to deliver his judgment on the *Wednesbury* affair after a weekend's reflection, that the principles he was able to recite from his own training in public law in the halcyon days before the Great War were not going to be enough to bring about any interference with the council's eccentric resolution.

¹ [1948] 1 KB 223

Like its protagonists, the *Wednesbury* decision itself has merged into history. The borough in 1974 became part of the borough of Sandwell, and the Gaumont in Walsall Street became a bingo hall. I do not believe that any modern court of judicial review would allow a public authority's decision like the *Wednesbury* resolution to stand. It might be held to be vitiated by the council's attempt to enforce a view of how young persons should spend their Sundays which lay beyond its remit – in other words, by an irrelevant consideration. But it would almost certainly be struck down because of the annexure of a condition which made the permission itself practically worthless. If, in other words, the councillors had had a good reason for not permitting the Gaumont to open on Sundays, they could and should have simply refused to allow it; but, evidently having no such reason, they could not logically allow Sunday opening and in the next breath stifle it. The resolution, to use Lord Greene's taxonomy, was irrational.

There is today much less emphasis on Lord Greene's pigeonholes, and rightly so. First of all, they are far from being a complete account of how public law stood even in the doldrum years. They omit, for example, the use of a power for a collateral or improper purpose, a vice which the Victorian judges had clearly identified. Today it is generally accepted that the defining question in modern public law is whether the impugned official action represents an abuse of power.

We have got here by a long and circuitous route. The power of the High Court to strike down or prohibit unauthorised acts of government and to require the repair of unlawful omissions was well established by the 16th century. But it was not until the mid-19th century that the growing need for statutory regulation of Britain's booming industrial and commercial society gave powers to boards, commissions and inspectorates whose notions of due process and whose understanding of their own remits were not the same as the courts'.

Lawyers and judges took the short cut of describing the courts' supervisory role in the Latin phrase *ultra vires*, a concept which was already bringing company law into disrepute by allowing limited liability companies to renege on their contractual obligations by pleading their own incapacity to

enter into them. But the metaphor of a governmental body, whether national or local, elected or appointed, as a company with prescribed powers was never a very satisfactory one. If taken literally, as it too often was, it led the courts to ignore transgressions which could not be matched against a real or supposed rulebook. For frequently the relevant rules were not prescribed by the donor of the power but derived from what Mr Justice Byles famously described, in 1863, as the justice of the common law. When a builder named Cooper put up a house in Wandsworth without notifying the local Board of Works, and the board razed it to the ground without first hearing what he had to say about it, the fact that the empowering statute had omitted to provide for anything resembling a hearing was held not to matter: what mattered was that to act in such a way was an abuse of power, and the courts were there to stop it².

Nobody doubts that power – any power – can be abused; and nobody is likely to assert that abusing it is a good thing. Like sin, we are all against it. We all know, too, that Lord Acton wrote “Power tends to corrupt, and absolute power corrupts absolutely”³, though why a casual line in a letter to a bishop should have achieved such celebrity is something of a mystery. Even more mysterious is what was going on in the mind of the Dragon Lady, the late Madame Nhu, when she remarked half a century ago: “Power is delightful, and absolute power is absolutely delightful”. But whether she was neatly parodying Lord Acton or innocently misquoting him, she knew what she was talking about. As the Sister-in-law of the South Vietnamese dictator Ngo Dinh Diem, Mme Nhu had accumulated powers which, according to one American commentator, were the equivalent of simultaneously running the CIA, the FBI, the Congress and the press.

An autocrat can do almost anything without exceeding his powers. In a state which acknowledges the rule of law, by contrast, there are multiple constraints on the exercise of power. Breaking these bounds may attract political or public censure but is not necessarily a justiciable

² *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180

³ *The life and letters of Mandell Creighton* (1904), reproducing a letter of 3 April 1887 from Acton.

abuse. Nor, however, is the abuse of power necessarily deliberate or reckless. It may happen by pure inadvertence, as it probably did in Wandsworth; it may be done, as it most often is, for political advantage; very rarely its motive may be corrupt; or – as Mme Nhu reminded the world – it may be done, as arguably it was in Wednesbury, for the sheer satisfaction of doing it.

I want to consider such abuses, though without assigning any single motive to them, in three contemporary contexts, none of them the now familiar context of judicial review. One is the possible misuse of Parliament's own constitutional supremacy. The second is the misuse by ministers of the Royal Prerogative. The third, arguably the most insidious, is the use of the power of communication, both in governmental and in private hands, in order to disinform.

I have first to excuse my failure to include the judiciary in this sweep of the searchlight. Thanks to a visceral and no doubt misplaced sense of loyalty to a bench on which I sat for nearly two decades, I am in a poor position to take an objective look at it. But I am certainly conscious of its vulnerability to abuse. Sitting in Room 101 (presciently nominated by George Orwell as the place where the thing you most dread happens to you), I used regularly to be asked to grant injunctions to freeze the assets of claimants' business competitors who were alleged to owe them money – a form of order which, as claimants well knew, could put a small business swiftly on the rocks. The application, made in the nature of things in the defendant's absence, was commonly supported by an affidavit, sworn by or derived from an enquiry agent, containing complete details of the defendant's bank accounts. I began to make a practice of asking counsel for an assurance, on instructions, that this information had been lawfully obtained. If it had not been, I would refuse to make an order because the claimant had not come to court with clean hands. I never once received an affirmative answer to my question. The News of the World débacle has now confirmed why, but the use not only by journalists but by lawyers of private investigators with ready access to corrupt officials and police officers is not new. The legal profession bears blame

for turning a profitably blind eye to it; but I think too that the judges could and should have done more to root it out.

Nor am I going to be saying much about the use by ministers of their status to attack judges whose decisions they dislike. When a prime minister, Tony Blair, feels free to attack a judge, Mr Justice Sullivan, for having “taken leave of his senses” in a decision on the Afghan plane hijackers which was unanimously upheld by the Court of Appeal; and when a Home Secretary, Teresa May, with her own prime minister’s backing, attacks the Supreme Court in very similar language over a cautious and balanced decision that not all sex offenders need remain on the register for life, something is going wrong with the rule of law and the separation of powers: far from judges seeking to influence the political process, politicians appear to be seeking to influence the judicial process.

All that I propose to say about this culture of ministerial abuse is that its seriousness was recognised by the Select Committee on the Constitution in its 2007 report, which advised that the next revision of the Ministerial Code, which Downing Street periodically issues, should contain strongly worded guidelines about public comment by ministers on individual judges. Yet the Code today still contains nothing about ministerial attacks on judicial decisions. One can speculate about the reasons for this omission, but they are unlikely to be divorced from the fact that ministerial attacks on judges play well with much of the press.

Parliament’s supremacy in our constitution is not today in question, though more than one academic commentator and more than one judge has suggested that its legislative power is not unlimited. But supreme power, whether or not subject to formal limits, carries a high degree of responsibility. One such responsibility is not to misuse the immunities which the parliamentary function necessarily attracts. Another is to maintain the separation of the state’s powers, of which parliamentary sovereignty is one element only: another element, judicial independence, is no less important.

The latter of these obligations might at one time have been dismissed as mere aspiration, but since the enactment of section 3 of the 2005 Constitutional Reform Act ministers have been under an explicit statutory duty to uphold the independence of the judiciary. It may yet become necessary to test whether the duty is enforceable. All one can do for the present is note that in 2007 the House of Lords Select Committee on the Constitution, reporting on the wave of ministerial attacks on judges, spoke of:

“.... the need for an independent judiciary able to interpret the laws made by Parliament, particularly when Ministers do not appear to understand the constraints that apply to their policies, or indeed the full content of legislation that they proposed to parliament.”⁴

Article 9 of the 1689 Bill of Rights, one of the foundational documents of our democracy, forbids the impeachment or questioning in any court or place out of Parliament of “the freedom of speech and debates or proceedings in Parlyament”. The protection that this gave to a courageous member like Samuel Plimsoll in his campaign for safe merchant shipping, conducted in a parliament stuffed with shipping interests, has been amply justified. But the necessary quid pro quo was, at least until recently, a reciprocal recognition by both Houses of Parliament that they were not to defy or impugn the decisions of the courts – something constitutionally distinct from the practice of ministerial briefings against individual judges. The reason was and is that it is the courts and not Parliament who have the sovereign function of interpreting and applying the law. If members object to the courts’ decisions, their recourse is to persuade Parliament to change the law, possibly even retrospectively. If they consider a judge of the senior courts unfit for office, he or she may be removed on an address of both Houses of Parliament, but not otherwise⁵.

⁴ HL Paper 151, 26 July 2007, para. 55

⁵ Originally laid down in the Act of Settlement, 1700.

Some of this historic settlement has threatened to fall apart with the deliberate naming in the Upper and Lower Houses earlier this year of two claimants whose identity had been expressly protected by court orders. It is unsurprising that the media, from whom such disclosures earn applause, at worst cheered and at best equivocated. But it is both surprising and disturbing that the Speakers of both Houses, especially the Commons, where the Speaker has disciplinary powers, appear to have done nothing to call the two members to account for the use of parliamentary privilege to avoid prosecution for what appeared to have been a calculated contempt of court.

In 1996 a junior minister and member of the Bar, Neil Hamilton, issued proceedings for libel against the Guardian newspaper. He also sued Mohammed Al Fayed, who claimed to have paid him substantial sums of money for asking parliamentary questions. (Evidently nobody had told Mr Al Fayed that if you have a sensible question for a minister your MP will ask it free of charge). On a preliminary application, a Queen's Bench judge ruled that the case against the Guardian, as pleaded, could not be tried without infringing article 9 of the Bill of Rights. There was no interlocutory appeal against the decision. Instead an amendment was moved to the Defamation Bill then before Parliament, permitting an MP or peer (or for that matter a witness before a parliamentary committee) who was involved in defamation proceedings to waive, "so far as concerns him, the protection of any enactment ... which prevents proceedings in Parliament being impeached or questioned in any court ..." – in other words to disapply article 9 of the Bill of Rights in his or her own personal interests.

Although the Lord Chancellor had moved other amendments to the Bill, he did not move this one. On Lord Mackay's invitation it was moved by Lord Hoffmann, and in spite of principled opposition in the Upper House from distinguished lawyers and historians, who pointed out that article 9 was there to protect the legislature as a body, not to give individual members a weapon which they could use as it suited them, it was passed in both Houses.

Neil Hamilton, having used the waiver to continue with his action against the Guardian, abandoned the case shortly before trial. He went on to lose his libel action against Mohammed Al Fayed in circumstances which were both dramatic and ironic. Mr Al Fayed failed in his attempt to get the action stayed on the ground that it could not be properly tried without infringing the Bill of Rights: this, the House of Lords held, was taken care of by Mr Hamilton's own waiver. Then, shortly before the jury trial, it came to the knowledge of Mr Al Fayed's lawyers that Mr Hamilton had a few years earlier tabled an amendment to a finance Bill which, although later withdrawn, would have improved the tax position of oil companies, including Mobil, whom he had been advising as junior counsel. He had subsequently billed Mobil for a fee of £10,000. A late amendment of the defence was allowed in order to plead the receipt of this money as a corrupt act, and the jury in due course returned an affirmative answer to the judge's question: "Are you satisfied ... that Mr Hamilton was corrupt in his capacity as a Member of Parliament?" Whether the answer was based on Mr Al Fayed's allegation that Mr Hamilton had been collecting cash in brown envelopes in return for placing questions, or on the Mobil episode (which depended not at all on Mr Al Fayed's testimony), or on both, we cannot know for sure, though the court of appeal later took the view that Mr Hamilton's chance of weathering the Mobil evidence was slender⁶. But the irony is that, had it not been for Mr Hamilton's earlier decision to waive the protection of the Bill of Rights in his own interests, it might not have been possible for his tabling of a parliamentary amendment to be called in question by Mr Al Fayed way of defence to his libel proceedings.

Not long after the libel action, in 1999, the Joint Committee on Parliamentary Privilege advised that the provision which had been slotted into the Defamation Act should be repealed and any power of waiver be placed in the hands of each House; but, in spite of opportunities to reverse it, in 2011 it is still on the statute book. If the reason is that, notwithstanding its

⁶ *Hamilton v Al Fayed*, CA, 21 December 2000; [2001] EMLR 394

distorting effect on the constitution, parliamentarians are content to leave it there for a rainy day, they might reflect that those who live by such a waiver can also perish by it.

One of the most important discrete powers of the state is adjudication. For self-evident reasons this function, in any society which respects the rule of law, has to be in the hands of competent judges who decide cases free of pressure from either executive government or the legislature. Until not long ago it was possible to point to this as a uniformly respected principle of our constitution.

Then in 2004 government promoted an Asylum and Immigration Bill which contained two highly controversial clauses. One was a radical privative clause which would have shut off all appeal to the regular courts and all judicial review of asylum and immigration decisions. It provoked a predictable storm of academic and professional outrage. Ronald Dworkin, in a lecture delivered in Cambridge, urged the judiciary to refuse to implement it if it was passed; Lord Woolf spoke out publicly against it; and in the end it was dropped. But it had succeeded in what a hardened cynic, unlike me, might have suspected was its real purpose: to distract attention from a second highly objectionable clause, clause 8, which was duly and quietly passed into law.

Although its principal target is the first-instance judges in the asylum appeal system, the provision binds the appellate courts which have to consider the tenability of their determinations. Section 8, as it now is, of the 2004 Act provides Claimant's credibility.

(1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.

(2) This section applies to any behaviour by the claimant that the deciding authority thinks—

(a) is designed or likely to conceal information,

(b) is designed or likely to mislead, or

(c) designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.

The enactment so far appears to be addressed to immigration judges who were born yesterday. Although on its face it applies to Home Office and Border Agency officials too, there was no conceivable need for them to be directed by primary legislation. This was the delivery of a demeaning lecture to a tranche of the judiciary. On it went:

(3) Without prejudice to the generality of subsection (2) the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead—

(a) failure without reasonable explanation to produce a passport on request to an immigration officer or to the Secretary of State,

(b) the production of a document which is not a valid passport as if it were,

and so on, through a series of acts and omissions – destroying documents, refusing to answer questions, failing to seek asylum in other safe countries or to apply for it on arrival here - which could have been captioned ‘Instructions to grandmothers on how to suck eggs’. But slotted into it was the mandate I have quoted to disbelieve the evidence of someone who has used a false passport to enter this country in order to seek asylum. Unlike the other forms of suspect behaviour, this one carries no ‘reasonable explanation’ proviso. In some cases there may in truth be no good excuse for using false papers; but in others, among them the most serious, there may have been no other way of escaping a despotic regime. Yet the legislation sought to interfere with the already difficult judicial function of deciding whether such a person’s account of torture or persecution is true, by compelling judges, possibly contrary to their judicial oath, to hold against such people the very means by which they may have been forced to flee. It also had the unjust object of turning a foolish or manipulative act, such as making for the UK in preference to another safe country, into

a ground for disbelieving what might be a perfectly truthful account of why the individual fled in the first place.

So far as I know, this attempt to use the legislative power not to set down the law the judges are to follow or to adjust the rules of evidence or procedure, but to direct judges how to find facts, a function which is constitutionally theirs alone, is unique. At least I hope so. But it was not a momentary aberration. The provision was the fulfilment of a public threat the Home Secretary, David Blunkett, had made in the spring of the previous year when, to a fanfare of abuse led by the Daily Mail, Mr Justice Collins had ruled that the Home Secretary was misapplying his own legislation in denying all benefits to asylum-seekers who in his view had failed to seek asylum on arrival, regardless of his own statutory obligation not to let individuals fall into a state of destitution amounting to cruel or inhuman treatment – an obligation specifically introduced into the legislation by the Home Secretary himself in order to respect the UK's international human rights obligations.

Mr Blunkett, seemingly forgetting this, told a radio interviewer that he was fed up with Parliament debating issues and judges overturning them. He also told the Daily Telegraph that judicial intervention was threatening democracy. He announced an immediate appeal. When it failed, his leading counsel told the Court of Appeal that there would be no further appeal and that the Home Secretary would be acting on the law as explained by the court. But departmental press briefings following the first-instance decision had by then made it clear that the government had already decided to introduce legislation to tie the hands of the judges. Hence the clause of the 2004 Bill that became section 8; and hence too, or so the cynic would speculate, the lightning conductor of the abandoned privative clause.

The rule of law, however, has proved robust enough to weather this squall. When the meaning of section 8 finally came before the Court of Appeal, counsel for the Home Secretary did not attempt to support its plain meaning. Both sides adopted the emollient ministerial explanation given to the Lords that “The clause will not force a deciding authority to give undue weight to any

of the factors it lists.” With this encouragement the court decided that the words requiring judges to treat the listed acts as damaging the claimant’s credibility were to be read as if they said “potentially damaging the claimant’s credibility”. They did so on the ground that it was to be assumed that Parliament did not intend to interfere with judicial independence⁷. So it goes.

There is a second form of legislation, the Order in Council, which receives no parliamentary attention at all. Some Orders in Council are made under express statutory powers and rank as statutory instruments. Those providing for governance of the colonies, however, continue to be made by the Queen in Council as an exercise of the Royal Prerogative. They form a major exception to the rule, laid down four centuries ago in the *Case of Proclamations*⁸, that the Crown cannot legislate without the advice and consent of Parliament. They thus represent a form of ministerial power which Mme Nhu would have recognised as absolutely delightful, for the Privy Council does not even meet to discuss them and the Monarch’s assent to them is a constitutional formality.

In an article published in 1994, when he was still in opposition, Jack Straw wrote:

“The royal prerogative has no place in a modern western democracy ... [It] has been used as a smoke-screen by Ministers to obfuscate the use of power for which they are insufficiently accountable.”⁹

It has nevertheless been one of the achievements of modern public law to bring the ministerial use of the Royal Prerogative within the reach of judicial review, starting in 1967 when the High Court asserted its supervisory jurisdiction over the first criminal injuries compensation scheme, which had been deliberately set up by the Home Office without enabling legislation, and culminating,

⁷ *JT (Cameroon) v Home Secretary* [2008] EWCA Civ 878

⁸ *The Case of Proclamations* (1611) 1 Co. Rep. 74; 24 ER 646

⁹ *In Power and the Throne: the monarchy debate*, ed Barnett (1994)

ironically, in the confirmation by the House of Lords in the Chagos islanders' case in 2008 that judicial review ran to the prerogative power to legislate by Order in Council for the colonies.

I say 'ironically' because the Chagos islanders' case, like the *Wednesbury* case, failed to deliver on its legal promise. Having confirmed the view of the Divisional Court and the Court of Appeal¹⁰ that prerogative Orders in Council are open to judicial review for abuse of power, a bare majority of the House declined to exercise the jurisdiction on facts which had seemed to 7 other judges (potently among them Lord Bingham) to establish a clear and shameful abuse of power by the British government¹¹. In 2000 a Divisional Court had struck down as ultra vires a local ordinance purporting to exile the Chagossians from their islands, and the Foreign Secretary, Robin Cook, had undertaken to Parliament that the wrong would now be put right. For the time being, it was: the Chagossians were given a legal right of return. We still do not know what it was that four years later prompted some FCO officials to advise the Foreign Secretary to renege on his predecessor's honourable act and to do by Order in Council what the court had held could not be lawfully done by ordinance – exclude the Chagos islanders for ever from their homeland. But we do know that the Foreign Secretary who did it was Jack Straw¹².

The Chagos islanders' case has a further bearing on my subject. In the *CCSU* case in 1984¹³, Lord Roskill listed a number of prerogative functions which in his view could never come within the purview of the courts: the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament, the appointment of ministers. Giving judgment in the Court of Appeal in the Chagos islanders' case, I ventured to wonder whether in the light of modern experience these examples all held good. Would the courts be powerless if it was proved to them that an honour was being granted in return for payment? Or if some future

¹⁰ *Bancoult v Foreign Secretary* [2007] EWCA Civ 498; [2008] QB 365

¹¹ [2008] UKHL 61; [2009] 1 AC 453

¹² See D. Snoxell, *Journal of Imperial and Commonwealth History*, vol 36 no 1 (2008) and vol 37 no 1 (2009).

¹³ [1985] AC 374

government proposed to embark on what was, under the Nuremberg principles, a war of aggression? Or if a Home Secretary used the royal pardon, or an Attorney-General the power to abandon a prosecution, for an illegal or improper reason? Or if a future prime minister sought to appoint a convicted fraudster to ministerial office or refused to invite the Monarch to prorogue a Parliament which had run its course? If such things were ever to occur, people might think the law was deficient if the courts could not do anything about them.

Let me turn lastly to an area where it is very difficult indeed to envisage the courts being able to intervene – the power to disseminate information which is not true. The media and government share with private individuals the inestimable, albeit qualified, privilege of free speech. But while the individual today may have access through the web to what was once inaccessible dissemination, it is government and the media which still possess the megaphones. Free speech, as I said in the case of the evangelical street preachers, is a right which includes “not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to provoke violence”¹⁴. It also, more troublingly, includes the slapdash, the inaccurate and the downright mendacious, provided the untruth does not defame an individual or strike at the administration of justice.

Let me mention here one small instance of the distorting effect which the pressure on journalists to titillate rather than to educate has on the reporting of court decisions, and of how casual the gathering and reporting of news can become even in respectable quarters. When in 2003 Mr Justice Collins gave the controversial asylum law judgment which I have mentioned, I was telephoned by a BBC radio producer to ask if I would take part in a live discussion about the press furore. I said that I wouldn't, because judgments have to speak for themselves, and I assumed the producer had read this one. There was a pause. No, said the producer, he hadn't. Well has the presenter read it? Another pause. “We're busy people, you know; I'm sure he'll try.” Did they have

¹⁴ *Redmond-Bate v DPP* [2000] HRLR 249; (1999) 7 BHRC 375

a copy of it, then? “Well, no, but I’m sure we can get one.” At this point I took the conversation off the record, with the result that I am not at liberty to tell you what followed.

Instances of press stories which owe more to a combination of journalistic imagination and editorial or proprietorial agendas than to fact or research are ten a penny. The Daily Mail’s momentary posting earlier this month of an account of Amanda Knox’s reaction (“sobbing uncontrollably”) to the dismissal of her appeal against her murder conviction, when her appeal had in fact succeeded, is only the latest, slightly comical, episode in the ignoble history of British tabloid journalism. But I want to look at a bigger issue, the compensation culture which, as we all know, has come to blight our legal system and, through it, our society.

We know it because the press has repeatedly told us it is so. The expression seems to have originated in an article about welfare by Bernard Levin in the Times in 1993. Between 1996 and 2004 references to it in the press rose year on year from near-zero to over 450. It had some basis, without doubt, in the advent of conditional fee agreements and of claims management companies which were making a living by ambulance-chasing. But the House of Commons’ Constitutional Affairs Committee in 2006 found no evidence that the growth of risk aversion was related to these factors. Over the same period, although tribunal claims increased with the creation of new causes of action, the total number of claims in the courts steadily declined. Moreover, the great majority of awards that were made were small; and costs as a fraction of GDP, though in absolute terms embarrassingly high, were lower not only than in the US but than in much of Europe¹⁵.

This, naturally, had no effect at all on those for whom the existence of a compensation culture was a necessary condition for an assault on the Human Rights Act, the health and safety legislation, personal injury litigation and laws forbidding discrimination and restricting dismissal. The assault was supported – as it continues to be – by an unstoppable stream of news items about absurd

¹⁵ See James Hand, ‘The compensation culture: cliché or cause for concern?’, *Journal of Law and Society*, vol 37 no 4 (Dec. 2010)

claims, most of them allegedly human rights-based, showing how easy it now was to get compensation for anything. That few of them ever came to court, and that those which did generally failed, went pretty much unrecorded.

The two spectres at this feast of fabrication have been the insurance industry, which foots most of the bills both for litigation and for settlements, and the press itself, for whom privacy claims have now joined the financial burden of libel actions. But there is a more serious agenda than the urge not to relinquish a good story whether it happens to be true or not. A significant proportion of compensation culture stories are attributed, usually falsely, to the Human Rights Act. Prisoners, the public now believes, can sue under the Act for not being allowed to vote or to access pornography; paedophiles and rapists can refuse on privacy grounds to register their electronic addresses and identities; robbers under siege by the police have to be supplied with Kentucky fried chicken and cigarettes; photographs of fugitive criminals cannot be publicised because of their human rights; acquiring a cat is now a complete defence to deportation ... the nonsense rolls on with very little to impede it.

In 2004 the Better Regulation Task Force subheaded their report on *Better Routes to Redress* “Compensation culture: exploding the urban myth”. For they found that there was no such culture; what was causing problems was the belief that there was one. The report was welcomed by government and was acted on in the Compensation Act 2006, which regulated claims-management enterprises and restated the common law negligence test so as to protect desirable activities. But the flow of articles about the compensation culture actually peaked in the wake of the report, and it is still running at about 100 a year.

The report in 2006 of the Commons’ Constitutional Affairs Committee, which I mentioned earlier, concluded, for the reasons I have touched on, that the UK was not moving towards, much less embedded in, a compensation culture. The problem, it found, was a culture of risk aversion which the myth was actually provoking. Enter a new government. The Prime Minister asked the

veteran politician and entrepreneur Lord Young “to investigate and report back ... on the rise of the compensation culture over the last decade, coupled with the current low standing that health and safety legislation now enjoys, and to suggest solutions”. Lawyers will admire the way the questions came armed with the answers: as every cross-examiner knows, you don’t leave these things to chance.

Despite this, in his chapter captioned “Compensation culture” Lord Young wrote:

“Britain’s ‘compensation culture’ is fuelled by media stories ... and by constant adverts ... The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality.”

That, chiming as it did with all that had previously been established, seemed to be that.

But turn back to the title page of the report, and you read that it follows a review of “the operation of health and safety laws and the growth of the compensation culture”. Then turn the page and read the prime minister’s foreword:

“A damaging compensation culture has arisen....”

If the health and safety legislation is to be cut back as an excessive burden on employers and their insurers, and the legal aid system as an excessive burden on the Treasury, the myth that these, along with the Human Rights Act, are fuelling a culture of extravagant claims and personal irresponsibility is too useful to shelve simply because it isn’t true.

I have written elsewhere about the absence from the texts of the world’s human rights instruments of a right to be told the truth, or at least a right not to be lied to. As the philosopher Julian Baggini recently pointed out, Winston Smith in the nightmare state of *1984* was not asking for the luxury of freedom to believe and to assert that two and two make five: the freedom he wanted was simply to be able to insist, in a society which had lost its grip on truth, that two and two make four. We have not yet come to that pass, but the steady and serious erosion of the bright

line between knowledge and belief is mirrored, in the world of journalism and of politics, in the now routine collapsing of fact into comment and of belief into fact.

If, then, the right of free expression is capable of being a stalking horse for the power to mislead and to disinform, where do we stand? There is no easy answer. I have said both in and out of court that the one thing that would be even worse is a ministry of truth – a body empowered to decide officially what is fact and what is not. But, as I have also argued elsewhere, the marketplace of ideas in which the true drives out the false is a fiction which no thinking survivor of the twentieth century – the century of the grand and murderous lie - can possibly believe in. Somewhere between the unacceptable - a ministry of truth - and the unbelievable - the marketplace of ideas - an answer has to be found. Patently, in 2011, it is not self-regulation. In the not too distant future Lord Justice Leveson may tell us what it is.