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“Where is the line between legitimate accountability and calling judges ‘enemies of the people’?”

*"Politics are the most important thing in life—for a newspaper, anyway." Henrik Ibsen "An Enemy of the People"*¹

In 1748, Montesquieu commended England as a model of the separation of powers—yet judges sat in Cabinet and the final court of appeal was the upper chamber of the legislature². In the following centuries, the legal system of England and Wales evolved various forms of legitimate accountability. Nonetheless, in 2016, the Daily Mail declared that three High Court judges were “Enemies of the People”, describing their ruling in *R (Miller) v Secretary of State for Exiting the European Union* as “an attack on democracy”³. This phenomenon is not restricted to the judiciary—Conservative MPs who recently “rebelled” against enshrining a Brexit date in law have been labelled “mutineers”⁴ as well as “a cancer within their party and traitors to their country”⁵, subsequently receiving numerous threats over social media⁶. The EU Referendum has created an unquestionable political juggernaut driven by the “will of the people”⁷.

The media “[asserts] that by adjudicating on [Brexit], judges are subverting democracy”⁸ and frustrating this inexplicable will in a “watermark of post-referendum hysteria”⁹. This claim is problematic. Firstly, mechanisms exist to enforce judicial accountability whilst maintaining a balance with the essential principle of judicial independence, critical to the rule of law and functioning democracy. Secondly, *Miller* barely registers¹⁰ as consequential in the process of leaving the EU. The press ignored what the judges were doing in practice—upholding the rule of law and answering a legal issue. Why then, were people so angry?

¹ Henrik Ibsen, “*An Enemy of the People*” <<https://www.gutenberg.org/files/2446/2446-h/2446-h.htm>> accessed 1 November 2017

² Stephen Sedley, “*Lions under the Throne: Essays on the History of English Public Law*” (Cambridge University Press, 2015) 172

³ James Slack, “Enemies of the people: Fury over ‘out of touch’ judges who have ‘declared war on democracy’ by defying 17.4m Brexit voters and who could trigger constitutional crisis” (Daily Mail, 3 November 2016) <<http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>>

⁴ Steven Swinford, “The Brexit mutineers: At least 15 Tory MPs rebel against leave date with threat to join forces with Labour” (The Telegraph, 14 November 2017) <<http://www.telegraph.co.uk/news/2017/11/14/nearly-20-tory-mps-threaten-rebel-against-brexit-date-brutal/>>

⁵ LeaveEUOfficial, “The 15 Tory MPs planning to vote against enshrining the Brexit date into UK law are the cancer within their party and traitors to their country. Total disregard for the people's democratic choice” (Twitter, 15 November 2017) <<https://twitter.com/leaveeuofficial/status/930745964561825792>>

⁶ Rowena Mason and Heather Stewart, “Daily Telegraph ‘Brexit mutineers’ front page blamed for threats to MP” (The Guardian, 15 November 2017) <<https://www.theguardian.com/politics/2017/nov/15/daily-telegraph-brexit-mutineers-front-page-has-backfired-say-mps>>

⁷ Patience Wheatcroft, “If peers apply the brakes to Brexit, we’ll be doing our job” (The Guardian, 5 August 2016) <<https://www.theguardian.com/commentisfree/2016/aug/05/peers-brakes-brexit-doing-our-job>>

⁸ Mark Elliott, “Courts, democracy and Brexit: Some home truths” (Public Law for Everyone, 5 November 2016) <<https://publiclawforeveryone.com/2016/11/05/courts-democracy-and-brexit-some-home-truths/>>

⁹ Charlie Cooper, “Courts fear return of ‘Enemies of the people’ hysteria” (POLITICO, 8 August 2017) <<https://www.politico.eu/article/brexit-courts-fear-return-of-enemies-of-the-people-hysteria/>>

¹⁰ Mark Elliott, “The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle” CLJ [2017] 29

This essay will argue that an appropriate line for accountability can be found within our current system, supported by increased judicial engagement and diverse appointments. Firstly, it will define and assess “accountability”, secondly, explore the problems with radical alternatives to the current model, and finally, present proposals for reform.

I. Defining judicial accountability.

“To no one will we sell, to no one deny or delay right or justice” Magna Carta, 1215¹¹

What “is meant by “accountability”, and for what and to whom should individual judges and the judiciary as an institution be accountable”¹²? Accountability is often misunderstood, “simply identified with elections or with “catching out” those who are charged with public responsibilities, without any sense of its exact contribution to our understanding of democracy”¹³. Notably, judges are already accountable through the publication of their judgments, the Office of Judicial Complaints, upon appeal to higher courts, Article 6 ECHR as expressed by the Human Rights Act¹⁴ and other mechanisms beyond this essay. Yet, as Lady Hale observed through Rackley’s argument “Once we accept that who the judge is matters, then it matters who our judges are”¹⁵.

Currently, it seems that the popular perception of judicial accountability is tainted by a narrative within Western politics¹⁶ which suggests judges are part of an ongoing “Us” (“The People”) versus “Them” (“Elites”) struggle. Therefore, while accountability mechanisms exist, the perceived accountability disconnect between the public “Us” and the judicial “Them” matters most. This disconnect is attributable to the diffusion of accountability throughout institutions, such as the judiciary, the EU, regulators, corporations and markets¹⁷, whereby people feel aggrieved by the loss of direct political accountability engendered by globalisation.

Judicial decision-making courts controversy and typically possesses a European dimension—the legality of mass state surveillance¹⁸, whole life sentences¹⁹ or the case of Charlie Gard²⁰ are the tip of a perceived accountability deficit within the national conversation. Oliver

¹¹ The British Library, “Magna Carta, 1215” <<http://www.bl.uk/learning/timeline/item95692.html>> accessed 3 November 2017

¹² “The Accountability of the Judiciary” < <https://www.judiciary.gov.uk/wp-content/uploads/JCO/.../accountability.pdf>> 3

¹³ Jeremy Waldron “Accountability: Fundamental to Democracy” NYU Colloquium [2014] 1

¹⁴ Shimon Shetreet, “Judges on Trial: The Independence and Accountability Of The English Judiciary” (2nd edn, CUP 2013) 272-354

¹⁵ Lady Hale, “Keynote address” (Conference to mark the tenth anniversary of the Judicial Appointments Commission, 6 November 2015) < <https://www.supremecourt.uk/docs/speech-151106.pdf>>

¹⁶ Robert Peston “WTF?” (1st edn, Hodder and Staughton 2017) 25

¹⁷ “The Politics of Accountability” by Tony Wright in “The Cambridge Companion to Public Law”

¹⁸ Reuters Staff, “Privacy Groups challenge UK data surveillance at European court” (Reuters, 7 November 2017) <https://uk.reuters.com/article/uk-britain-surveillance/privacy-groups-challenge-uk-data-surveillance-at-european-court-idUKKBN1D72TR>

¹⁹ Alan Travis “European judges uphold UK right to impose whole-life jail sentences” (The Guardian, 17 January 2017) <https://www.theguardian.com/law/2017/jan/17/european-judges-uphold-uk-right-to-impose-whole-life-jail-sentences>

²⁰ Rosalind English, “Charlie Gard: Stasbourg Court rules parents’ case inadmissible” (UK Human Rights Blog, 20 June 2017) <https://ukhumanrightsblog.com/2017/06/20/charlie-gard-strasbourg-court-imposes-another-stay-on-supreme-court-ruling-to-consider-parents-arguments/>

Wendall Holmes Jr.'s axiom that "the life of the law has not been logic; it has been experience" is relevant here. "Elite" judges are perceived as ignoring "The People's experience", leaving them disenfranchised—on Brexit, on prisoners, and on human rights; this deficit is a threat to judicial independence, and is the form of accountability which must be addressed.

II. Threats to judicial independence

"People in this country have had enough of experts" Michael Gove²¹

An independent judiciary is central to British democracy —courts derive their legitimacy from their independence, their authority granted by the resultant neutrality and reference to legal standards, not political ones²². The office of the Lord Chancellor has been diminished by Liz Truss' recent failure to adequately defend the judiciary under s17 of the Constitutional Reform Act 2005, "[a promise] to respect the rule of law and defend the independence of the judges"²³ The consequences of the Daily Mail's attack are not merely symbolic:

"Thomas [said] that other, less senior judges had written to [Truss] to express concerns because Litigants in Person were coming and saying 'you're an enemy of the people.'"²⁴

51% of judges reported concerns for their safety in court, 78% reported a loss of earnings in recent years and 2% felt valued by the government²⁵. Judicial independence is threatened by political backlash, and the Government must take action or face a further judicial exodus²⁶ Additionally, unless Parliament clarifies the new UK-EU court relationship and the status of EU law, judges may be susceptible to politicisation if left with "wide discretion"²⁷.

Moreover, radical reform would imperil the rule of law. Indeed, it is argued that the U.S. possesses a "transparent system of electing judges" over the judicial appointment model²⁸. There are several issues with the American system that would diminish the quality of the

²¹ Henry Mance, "Britain has had enough of experts, says Gove" (Financial Times, 3 June 2016) <<https://www.ft.com/content/3be49734-29cb-11e6-83e4-abc22d5d108c>>

²² Mark Elliott, "Courts, democracy and Brexit: Some home truths" (Public Law for Everyone, 5 November 2016) <<https://publiclawforeveryone.com/2016/11/05/courts-democracy-and-brex-it-some-home-truths/>>

²³ Stephen Sedley, "Lions under the Throne: Essays on the History of English Public Law" (Cambridge University Press, 2015) 272

²⁴ Estelle Shirbon, "Branded 'enemies of the people' over Brexit case, senior UK judges hit back" (Reuters, 29 March 2017) <<http://www.reuters.com/article/us-britain-eu-judges-idUSKBN1701BA>>

²⁵ Frances Gibb, "Dejected judges look to exit as pay falls and personal danger grows" (The Times, 10 February 2017) <<https://www.thetimes.co.uk/article/fears-for-safety-falling-pay-and-low-morale-threaten-exodus-of-judges-sz39j998p>>

²⁶ The Brief team, "Peers sound alarm over plummeting judicial morale" (The Times: The Brief, 2 November 2017) <<https://www.thetimesbrief.co.uk/users/39175-the-brief-team/posts/22185-peers-sound-alarm-over-plummeting-judicial-morale>>

²⁷ Owen Bowcott and Peter Walker, "Rule of law in UK at risk after Brexit, says former supreme court president" (The Guardian, 21 November 2017) <https://www.theguardian.com/law/2017/nov/21/rule-of-law-in-uk-at-risk-after-brex-it-says-former-supreme-court-president>

²⁸ The Sun staffers, "God forbid the free press would want to question the intentions of Remoaners and the thin-skinned Supreme Court chief" (The Sun, 17 February 2017) <<https://www.thesun.co.uk/news/2885816/god-forbid-the-free-press-would-want-to-question-the-intentions-of-remoaners-and-the-thin-skinned-supreme-court-chief/>>

judiciary. Firstly, elections require campaign contributions which produce the idea of judicial bias. Secondly, elected judges are not necessarily the most qualified candidates. As John Oliver explains, “[s]ometimes the right decision is neither easy, nor popular, and yet campaigns force judges to look over their shoulder on every ruling...”²⁹ This is problematic, because as Waldron notes:

“[Elected politicians] are often obliged to explain themselves to the people via the news media, and an unsatisfactory account, an account that the people or a majority of them are likely to judge harshly, can rebound to the detriment of a politician’s career.”³⁰

Direct accountability conflicts with judicial independence, whereby judicial independence means judges “uphold the rule of law, preserve the separation of powers, and promote due process of law.”³¹ As Lord Bingham observed, judges should “decide cases before [them] solely on their legal and factual merits [...] in the exercise of an objective, independent, and impartial judgment”³² Elections mean decisions can be endangered by extra-legal reasoning if judges can be removed for being “soft on crime”³³ or by making unpopular decisions in the eyes of an electorate. Moreover, Greene suggests that where voters do not have a conception of the candidates, or the qualities—such as impartiality—which may be beneficial, elections are too great a risk³⁴.

For instance, when Iowa’s Supreme Court struck down a ban on same-sex marriage, anti-same-sex marriage groups spent around \$500,000 to successfully unseat three judges—bar associations and lawyers rivalled these donations³⁵, contaminating the judiciary with influence from across the political spectrum. In Britain, tighter regulations on campaign spending exist³⁶, but this highlights the influence of money, and politics, in subjugating the rule of law; this is a capricious game, considering the recent attacks on the judiciary, and manifest displeasure with the ECtHR or the ECJ—courts often confused by a lack of public legal comprehension. Additionally, the British judiciary is held in high regard internationally, as Lord Judge explains:

²⁹ Last Week Tonight, “Elected Judges: Last Week Tonight with John Oliver (HBO)

<<https://www.youtube.com/watch?v=poL7l-Uk3I8>> 5:40

³⁰ Jeremy Waldron “Accountability: Fundamental to Democracy” NYU Colloquium [2014] 19

³¹ Meryl J Chertoff, “Trends in Judicial Selection in the States” 42 McGeorge L Review 47, 62 [2010] 51

³² Tom Bingham in Shimon Shetreet, “Judges on Trial: The Independence and Accountability Of The English Judiciary” (2nd edn, CUP 2013) 179

³³ Derek Willis, “‘Soft on Crime’ TV Ads Affect Judges Decisions, Not Just Elections” (The New York Times, 21 October 2014) <<https://www.nytimes.com/2014/10/22/upshot/soft-on-crime-tv-ads-affect-judges-decisions-not-just-elections.html>>

³⁴ Norman L Greene, “How Great is America’s Tolerance for Judicial Bias? An Inquiry into the Supreme Court’s Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States” 112 W. VA LR 873, 946 [2010] 945

³⁵ “Judging the Judges” (The Economist, 24 November 2012) <<https://www.economist.com/news/united-states/21567109-money-and-back-room-politicking-are-contaminating-selection-judges-judging>>

³⁶ Nick Anstead “*Internet and campaign finance in the US and the UK: an institutional comparison*” JITP 5(3) [2008] 285-302; The Electoral Commission, “Candidate spending and donations at elections” <https://www.electoralcommission.org.uk/find-information-by-subject/political-parties-campaigning-and-donations/candidate-spending-and-donations-at-elections> accessed 14 November 2017

“[Because] of the quality of the judiciary but [also] the fact they know the judges are beyond bribery [and] doing what they are told by anybody.”³⁷

If Britain is to retain its status as a global legal centre³⁸ beyond Brexit, preserving judicial independence is vital. Overall, assessing the American system yields the argument that the merit-selection process supplies the greatest judicial independence³⁹—reform should therefore focus upon judicial selection and public engagement to restore confidence in the judiciary.

III. Reform

“At times of great change, the central role of the judiciary upholding the rule of law remains a constant, as do our impartiality and independence” Lord Chief Justice, Sir Ian Burnett⁴⁰

Three examples of judicial speech can be examined to command greater levels of accountability—explanation of judgments, requests for interviews and responses to criticism⁴¹—overall, a concept of “public engagement”—are undervalued assets in the search for accountability. Bindman rightly suggests that “[this does not mean that] judges [have] to be on the six o’clock news every day, but once in a while certainly would not hurt”⁴². Indeed, regularly promoting clear judicial reasoning would increase confidence in the judiciary at a time of polarised debate. The judiciary must break convention and engage in a constructive dialogue, or face the imposition of external labelling through the press and social media.

Greater public engagement would facilitate a deeper understanding of the judiciary. Firstly, the use of plain English in delivering judgments is crucial in communicating understandable judicial reasoning to both the parties and the public⁴³. Secondly, judges must take more of an active role in community life in delivering this reasoning. HHJ Wildblood QC, who regularly participates in public forums in Bristol, utilized Buzzfeed to highlight the problems Litigants in Person face—often due to LASPO’s legal aid cuts—in accessing justice⁴⁴. Public engagement benefits judicial accountability by humanising and integrating the role of the judge into everyday understanding. Thirdly, Sir Alan Moses has argued that judges should explain decisions with greater clarity to avoid, or expose, ignorant criticism, learning to

³⁷ Frances Gibb and Damian Whitworth, “A great British asset: judges who won’t be bribed or told what to do” (The Times, 19 November 2016) <<https://www.thetimes.co.uk/article/a-great-british-asset-judges-who-wont-be-bribed-or-told-what-to-do-6gf9dk9sh>>

³⁸ The Law Society of England and Wales, “England and Wales: The jurisdiction of choice” <https://www.standard.co.uk/news/uk/world-s-super-rich-choose-english-courts-to-settle-their-disputes-7542010.html> 9

³⁹ Jeri Zeder, “Elected vs. Appointed?” (Harvard Law Today, 1 July 2012) <https://today.law.harvard.edu/book-review/in-new-book-shugerman-explores-the-history-of-judicial-selection-in-the-u-s/>

⁴⁰ Owen Bowcott, “Brenda Hale sworn in as first female president of UK’s supreme court” (The Guardian, 2 October 2017) <<https://www.theguardian.com/law/2017/oct/02/brenda-hale-sworn-in-as-first-female-president-uk-supreme-court>>

⁴¹ Stephen Bindman, “Judicial Independence and Accountability” 42 UNBLJ 59, 66 [1996] 61

⁴² Ibid, 65

⁴³ John Cooper, “Three cheers for a judge who sounds like normal people” (The Times, 12 August 2016) <<https://www.thetimes.co.uk/article/three-cheers-for-a-judge-who-sounds-like-normal-people-kndbkt5f>>

⁴⁴ Emily Dugan “This Judge Says He Cries When He Has To Take Children Away From Their Parents” (Buzzfeed, 14 October 2017) <https://www.buzzfeed.com/emilydugan/this-judge-says-he-cries-when-he-has-to-take-children-away?utm_term=.sjQozQWmX#.lxV7mRL9r>

“engage and participate in the communities in which they serve”⁴⁵. The promotion of “legal literacy” educates the public so they may meaningfully engage in debate, rather than absorb mere sensationalism; indeed, UK law schools currently operate “Streetlaw” programmes within their local communities, facilitating an understanding of the impact of the law upon community life⁴⁶. An image reform which humanises judges, such as the recent BBC4 Supreme Court documentary⁴⁷, is a useful starting point for reintegrating the judiciary into the public consciousness.

Finally, it has been argued the process of judicial selection to the Supreme Court could be made more accountable by a gender-balanced commission, the publication of an “equal merit” policy, encouraging candidates with non-traditional backgrounds or careers, and an expansion in the size of the Selection Commissions⁴⁸. A combination of these suggestions in practice could create “accountability” through greater diversification of the judiciary at its highest level, representing a wider range of backgrounds by increasing the likelihood of a wider consideration of candidates. Diverse representation generates accountability by reducing the alienating effect of appointments exclusive to a niche pool of candidates. Recent judicial diversity statistics note only 11 per cent of magistrates (1,686) declared themselves as from a black, Asian, and minority ethnic background. Just four per cent (635) of magistrates are aged under 40⁴⁹. The importance of role models from the highest judicial echelon to the lower courts cannot be understated—it would have a tangible impact on inspiring participation of individuals from underrepresented groups⁵⁰ within the legal community; this could contribute to reducing perceptions of judges as being outside of the communities they serve.

IV. Conclusion

“The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!” President Trump, via Twitter⁵¹

The brand “enemy of the people” has been a “death sentence” throughout history⁵². The phrase does not evoke constructive accountability—it is designed to divide communities,

⁴⁵ “Judges urged to come out of their shell of silence and exclusivity” (Solicitors’ Journal, 1 August 2017) <<https://www.solicitorsjournal.com/news/201708/judges-urged-come-out-their-%E2%80%98shell-silence-and-exclusivity>>

⁴⁶ “Pro bono: Streetlaw” <<https://www.birmingham.ac.uk/schools/law/life/pro-bono/streetlaw.aspx>> accessed 12 November 2017; UK and Ireland Streetlaw Best Practices Conference (15 September 2016) <https://www.birmingham.ac.uk/facilities/CEPLER/news/2016/UK-and-Ireland-Streetlaw-Best-Practices-Conference.aspx>

⁴⁷ BBC4, “The Highest Court in the Land: Justice Makers” <<http://www.bbc.co.uk/programmes/b00xz0s5>> accessed 3 November 2017

⁴⁸ Graham Gee and Kate Malleson, “Selecting the Justices: Four suggestions” (UKSC Blog, 13 October 2014) <<http://ukscblog.com/selecting-the-justices-four-suggestions>>

⁴⁹ “Judges urged to come out of their shell of silence and exclusivity” (Solicitors’ Journal, 1 August 2017) <<https://www.solicitorsjournal.com/news/201708/judges-urged-come-out-their-%E2%80%98shell-silence-and-exclusivity>>

⁵⁰ Thekla Morgenroth et al, “The motivational theory of role modelling: How role models influence role aspirants’ goals” RGP 19(4) 465-483

⁵¹ Andrew Higgins, “Trump Embraces ‘Enemy of the People’ a Phrase With a Fraught History (The New York Times, 26 February 2017) <<https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html>>; realdonaldtrump “The FAKE NEWS media [...]” (Twitter, 17 February 2017) <<https://twitter.com/realdonaldtrump/status/832708293516632065?lang=en>>

⁵² BBC News staff, “‘Enemies of the people’: Trump remark echoes history’s worst tyrants” (BBC News, 18 February 2017) <http://www.bbc.co.uk/news/world-us-canada-39015559>

pronounce illegitimacy, and sell controversy. The judiciary in England and Wales must maintain the impartiality preserved through its independence, and perform their role without fear of reprisal, for the legal system to function properly. With the advent of mass social media, the dissemination of “fake news” begets ignorant criticisms of judges legitimately performing their function of holding power to account within democracy. Radical reform is undesirable— instead, judges must engage more widely with the public; appointments should be sourced from the widest pool of diverse talent to foster a representative judiciary. To this end, the line for accountability may be adjusted to be in tune with public life, and the rule of law less alien to those within its reach.

1998 words