

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

### I. Introduction

‘ENEMIES OF THE PEOPLE’ pronounced the *Daily Mail*<sup>1</sup> on the judges who heard *R (on the application of Miller) v SoS for Exiting the EU*<sup>2</sup> in the Divisional Court. The now infamous front page (‘the article’) combined an unsubstantiated condemnation of the carefully reasoned judgment and a menacing headline with an unpleasant undercurrent of homophobia.<sup>3</sup>

It caused an uproar: over 1,000 complaints were made about the headline to newspaper regulator the Independent Press Standards Organisation.<sup>4</sup> Liz Truss, the then Lord Chancellor, delayed for two days before issuing a short statement,<sup>5</sup> despite being under a statutory duty to ‘uphold the continued independence of the judiciary’.<sup>6</sup> Her response was aptly described by Lord Justice Judge as ‘a little too late – and quite a lot too little’.<sup>7</sup>

Lord Neuberger, the then president of the Supreme Court, was interviewed by the BBC about the headline after *Miller’s* appeal.<sup>8</sup> He accused the *Daily Mail* of ‘unfairly undermining the judiciary and therefore the rule of law’.<sup>9</sup> While recognising that ‘if you have a free press these things can happen’, Lord Neuberger warned that ‘if it became standard practice then I’d be worried’.<sup>10</sup> He appeared to suggest that if such media coverage became commonplace a response might be required; perhaps the law should intervene. Prior to 2013, it could have done.

### II. Scandalising the court

‘Scandalising the court’<sup>11</sup> is a form of contempt involving public criticism of the judiciary. The classical formulation of this offence can be found in a judgment drafted by Wilmot J in 1765 which was preserved but never delivered:<sup>12</sup>

The arraignment of the justice of the judges, is arraignment the King’s justice; it is an impeachment of his wisdom and goodness in the choice of his judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and

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<sup>1</sup> *The Daily Mail*, 4 November 2016, available online at <[www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html](http://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html)> (accessed on 27 November 2017).

<sup>2</sup> [2016] EWHC 2768 (Admin); [2017] All ER 158.

<sup>3</sup> The article approvingly quoted a Leave campaign source who said the court had ‘declared war on democracy’, adding pointedly that Lord Etherton MR lives with his husband whom he married at ‘Jewish ceremon[y]’, (n 1).

<sup>4</sup> *The Independent*, 10 November 2016, available online at: <[www.independent.co.uk/news/media/daily-mail-nazi-propaganda-front-page-ipsa-complaints-brexit-eu-enemies-of-the-people-a7409836.html](http://www.independent.co.uk/news/media/daily-mail-nazi-propaganda-front-page-ipsa-complaints-brexit-eu-enemies-of-the-people-a7409836.html)> (accessed on 27 November 2017).

<sup>5</sup> ‘Truss in dock over art 50 case uproar’ in *The New Law Journal* (Issue 7722, 10 November 2016).

<sup>6</sup> Section 3(1) of the Constitutional Reform Act 2005.

<sup>7</sup> Lord Justice Judge, quoted from J Robins, ‘Too little, too late’ in (n 5).

<sup>8</sup> ‘The Today Programme’, *BBC Radio 4*, 16 February 2017.

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*

<sup>11</sup> The Scottish equivalent is quaintly called ‘murmuring judges’.

<sup>12</sup> The case was abandoned prior to judgment on ‘technical grounds’, *Arlidge, Eady & Smith on Contempt* (5<sup>th</sup> edn, Street & Maxwell 2017) p 422.

indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice.<sup>13</sup>

The offence fell into abeyance<sup>14</sup> until it was revived in 1900.<sup>15</sup> The last successful prosecution for scandalising the court in England was in 1931,<sup>16</sup> although the offence persists in several common law jurisdictions.<sup>17</sup>

Although Lord Diplock described scandalising the court as 'virtually obsolete' in 1985,<sup>18</sup> a former MP, Peter Hain, was threatened with prosecution in Northern Ireland for comments he made about a High Court judge in 2012. In response, the Law Commission recommended the abolition of the offence in a consultation paper published the same year. This happened in June 2013.<sup>19</sup>

### III. Argument

The contention of this essay is that calling judges 'enemies of the people' does not cross the line of legitimate accountability. The OED's primary definition of 'legitimate' is '[c]onforming to the law or to rules'<sup>20</sup> and I accordingly understand 'legitimate accountability' to be public critique within the law. As I touch upon below, the headline and accompanying article were legal. The question is therefore whether the article *ought* to cross the line of legality.

I shall examine whether three aspects of the article make it illegitimate: firstly, its errors and inaccuracies; secondly, its insulting mode of expression; and thirdly, that it undermined public confidence in the judiciary. I shall conclude that none of these aspects should fall foul of the law, and therefore that the article, although odious, qualifies as legitimate accountability.

### IV. Error or inaccuracy

While one might have expected the article to have numerous inaccuracies its accusations were sufficiently generalised to fall short of defamation. The Law Commission paper on the abolition of scandalising the court notes that media criticism of the judiciary is more often riddled with 'rhetorical exaggeration and vulgar abuse'<sup>21</sup> than errors. To illustrate, a scandalising the court prosecution in Hong Kong<sup>22</sup> concerned a newspaper which described judges as 'dogs and bitches', the 'public enemy of freedom of the press and a public calamity to the six million citizens of Hong

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<sup>13</sup> Wilmot's Notes 243, 97 ER 94.

<sup>14</sup> At the close of the nineteenth century Lord Morris described it as 'obsolete in this country' in *McLeod v St Aubyn* [1899] AC 549 at [546].

<sup>15</sup> *R v Gray* [1900] 2 QB 36.

<sup>16</sup> *R v Colsey* *The Times* 9 May 1931.

<sup>17</sup> These include Australia, Canada, Fiji, Hong Kong, India, Malaysia, Mauritius, South Africa, Singapore, and Swaziland.

<sup>18</sup> *SoS for Defence v Guardian Newspapers Ltd* [1985] AC 339 at [347A].

<sup>19</sup> Section 33 of the Crime and Courts Act 2013.

<sup>20</sup> *The Oxford English Dictionary* (OUP, 2012).

<sup>21</sup> The Law Commission, *Contempt of Court: Scandalising the Court, Consultation Paper No 207* (2012) p 26.

<sup>22</sup> *Wong Yeung Ng v Secretary of Justice* [1999] HKCA 382.

Kong'.<sup>23</sup> This colourful language was deemed too vague to be erroneous, and the same is true of the article. Error is not, therefore, a feature which marks the article as illegitimate.

Even if the article did contain inaccuracies, if these fell short of defamation then it is unlikely that they alone would be sufficient for it to be illegitimate. As Lord Atkin observed in *Ambard v Att-Gen for Trinidad and Tobago*,<sup>24</sup> a scandalising the court case heard by the Privy Council, the 'path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice'.<sup>25</sup> It is worth noting at this juncture that the article stopped short of explicitly accusing the Divisional Court of bias.<sup>26</sup>

## V. Insulting mode of expression

As discussed above, the article unfairly denigrated the judiciary for the performance of their duties. Insulting public criticism has been identified as the actus reus of scandalising the court; Salmon LJ suggested that 'no criticism of a judgment, however vigorous, can amount to contempt of court providing it keeps within the limits of reasonable courtesy and good faith'.<sup>27</sup> Some forty years later the High Court of Justiciary similarly held that while 'lively and truculent criticism'<sup>28</sup> was acceptable, when this is 'grave and insulting'<sup>29</sup> it becomes contempt.

While the article is certainly insulting, discriminating between public criticism of judges based on tone rather than content wrongly elevates deference to the judiciary. As Mundy J stated in *Harris v Harris; Att-Gen v Harris*, 'that which is lawful if expressed in the temperate language of a legal periodical or the broadsheet press does not become unlawful simply because expressed in the more robust, colourful or intemperate language of the tabloid press or even in language which is crude, insulting and vulgar'.<sup>30</sup> Indeed, finding the original article distasteful or repugnant is no reason to deem it illegitimate. A measure of stoicism is needed when responding to lurid headlines. Simon Brown LJ suggests that a 'wry smile is, I think, our usual response and the more extravagant the allegations, the more ludicrous they sound'.<sup>31</sup> Where the judiciary is insulted in a legal manner this advice is generally sound.

Previous justification for protecting judges from insult drew on the convention (expounded by the *Kilmuir Rules*<sup>32</sup>) that judges did not communicate with the media, were therefore unable to

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<sup>23</sup> *ibid* at [19].

<sup>24</sup> [1936] AC 322.

<sup>25</sup> *ibid* at [335].

<sup>26</sup> Although detailing that Lord Thomas (then Lord Thomas CJ) was a 'founding member of the European Law Institute' and former 'president of the European Network of Councils for the Judiciary' may insinuate bias, nothing concrete was alleged (n 1). cf. allegations of bias in *Barfod v Denmark* (1989) 13 EHRR 393, for example.

<sup>27</sup> *MPC ex p Blackburn* [1968] 2 QB 150.

<sup>28</sup> *Anwar Respondent* [2008] HCJAC 36; 2008 SLT at [32].

<sup>29</sup> *ibid*.

<sup>30</sup> *Harris v Harris; Att-Gen v Harris* [2001] 2 FLR 895 at [372].

<sup>31</sup> *Att-Gen v Scriven*, CO 1632/99.

<sup>32</sup> For the full text of the *Kilmuir Rules* see A W Bradley 'Judges and the Media: the Kilmuir Rules' [1986] *Public Law* 383 and 384.

defend themselves, and so deserved special status. The *Kilmuir Rules* have been relaxed,<sup>33</sup> and judges appear increasingly willing to respond to negative media stories.<sup>34</sup> A Judicial Press Office has now been established which can respond to media criticism on behalf of judges.<sup>35</sup> There is therefore little reason for judges, alone among public servants, to be deserving of unique protection from insult. This cannot be the justification for finding the *Daily Mail's* article illegitimate.

## VI. Undermining public confidence in the judiciary

As Wilmut J's formulation of scandalising the court indicates, the need to uphold public confidence in the judiciary is the central justification for finding media criticism to be illegitimate. The High Court of Australia put the argument succinctly: '[t]he authority of the law rests on public confidence, and it is important for the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges'.<sup>36</sup>

Describing the judiciary as the enemies of those they serve epitomises the undermining of public confidence in judges. The dearth of information about the legal basis for the decision in *Miller* and the anti-establishment sentiment surrounding Brexit meant there was a serious risk that the article would undermine the rule of law. I believe that, despite these well-founded concerns, there are good reasons that the headline and article were nonetheless legitimate.

First, it would be counterproductive to treat the article as illegitimate. The narrative of the judiciary frustrating the will of the people would hardly be improved by questioning the freedom of the press to condemn the judgment in *Miller*. As the US Supreme Court noted, 'an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect.'<sup>37</sup> Questioning the right of newspapers to condemn judgments in strong terms will rarely help repair damage done to the public's perception of judges.

As Lord Pannick has argued, treating public criticism of judges as illegitimate 'will inevitably deter people from speaking out on perceived judicial errors'.<sup>38</sup> We are accustomed to living in a society where the media feels comfortable scrutinising the courts. *The Times*, for example, was damning of Lord Lane CJ's 'worthless certainty'<sup>39</sup> when he failed to allow the appeal of the Birmingham Six. This kind of judicial criticism is a healthy part of a functioning democracy;

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<sup>33</sup> They were relaxed in 1989, for a brief account see *Arlidge, Eady & Smith on Contempt* (5th edn, Street & Maxwell 2017) p 418, footnote 318.

<sup>34</sup> For example, Popplewell J successfully sued the newspaper *Today* for libel in 1992 (*The Times*, 22 and 24 July 1992). More recently, in 2011, Sedley LJ received an apology from the *Daily Telegraph* for publishing unfounded allegations about him (*The Telegraph*, 9 March 2011).

<sup>35</sup> See discussion in Lord Dyson MR, *The Third Annual Baili Lecture, Criticising Judges: Fair Game or Off-Limits?* 27 November 2014 at [72]-[75].

<sup>36</sup> *Gallagher v Durack* (1983) 152 CLR 283 at [234].

<sup>37</sup> *Bridges v California* 314 U.S. 252 (1941) at [270].

<sup>38</sup> Lord Pannick, *The 26th Sultan Azlan Shah Law Lecture, Scandalising the Judiciary: Criticism of Judges and the Law of Contempt* (5 September 2012).

<sup>39</sup> *The Times*, 18 March 1991.

it can be imperilled when media criticism of judges is constrained, as has been the case with the heavy-handed application of scandalising the court in some common law jurisdictions.<sup>40</sup>

Finally, there is a touch of pretension to the discourse surrounding the *Daily Mail's* article. *The Telegraph* published a similar piece on the *Miller* judgment headlined 'Judges vs the People'<sup>41</sup> which garnered far less criticism. While the *Telegraph's* article adopted a more tempered tone, it nonetheless described the case as a 'plot' to halt Brexit. One cannot help but wonder whether if the same article had appeared in a tabloid newspaper it might have been treated a little differently.

At the heart of calling judges 'enemies of the people' was a misunderstanding, not only of the law relevant to *Miller*, but of the function of the judiciary itself. Condemning the article as execrable does not remedy these misunderstandings. In a scandalising the court case in the Ontario Court of Appeal, Cory JA remarked that '[h]yperbole and colourful, perhaps even disrespectful language, may be the necessary touchstone to fire the interest and imagination of the public'.<sup>42</sup> I do not wish to underplay the venom of the *Daily Mail's* article, but Brexit is a rare moment of public engagement with the law. More could have been done to seize such an opportunity.

## VII. Conclusion

When Lord Neuberger retired from the Supreme Court he chose to end his valedictory remarks by namelessly alluding to the article. He said that 'misconceived attacks on judges undermine the rule of law domestically and the international reputation of the legal system with its consequential financial benefits to the country.'<sup>43</sup> The outgoing president was right that public criticism of the judiciary can undermine the function of our legal system, and he was also right to blame 'ministers and parliamentarians [who] do not provide us with appropriate support'<sup>44</sup> for their response to such outbursts.

The *Daily Mail's* article was hardly unprecedented. For example, following the House of Lords' first judgement in *Att-Gen v Guardian Newspapers Ltd*<sup>45</sup> (commonly known as 'Spycatcher') the *Daily Mirror* published inverted pictures of the judges who heard the case with the headline 'YOU FOOLS'. What was perhaps more unusual about the *Daily Mail's* article was the tepid response of establishment figures. As discussed in the introduction to this essay, Liz Truss made no effort to defend the judiciary following the article. The Prime Minister's statement was as

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<sup>40</sup> See discussion, for example, at (n 21) p 2.

<sup>41</sup> *The Telegraph*, 3 November 2016, available online at <[www.telegraph.co.uk/news/2016/11/03/the-plot-to-stop-brexit-the-judges-versus-the-people/](http://www.telegraph.co.uk/news/2016/11/03/the-plot-to-stop-brexit-the-judges-versus-the-people/)> (accessed on 27 November 2017).

<sup>42</sup> *R v Kopyto* (1987) 47 DLR (4<sup>TH</sup>) 213 at [226].

<sup>43</sup> *Lord Neuberger and Lord Clarke's Valedictory Remarks*, 28 July 2017, available online at <[www.youtube.com/watch?v=bcWjnmph5nQ](http://www.youtube.com/watch?v=bcWjnmph5nQ)> (accessed on 27 November 2017).

<sup>44</sup> *ibid.*

<sup>45</sup> [1987] 1 WLR 1248.

lacklustre as the Lord Chancellor's.<sup>46</sup> It is telling that Theresa May appointed the article's author, James Slack, as her Press Secretary less than six months after he published the offending piece.

Calling judges 'enemies of the people' is nonetheless legitimate; it is the kind of accountability that should be tolerated in a free society. It is also, however, a symptom of worrying social trends. It is incumbent on the legal profession to improve understanding of, and therefore engagement with, our judicial process. This is impossible without the support of politicians. The most effective method for maintaining respect in the judiciary and therefore the rule of law is not to declare public criticism illegitimate, but to shape political discourse so that calling judges 'enemies of the people' is risible rather than menacing.

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<sup>46</sup> The Prime Minister defended the *Daily Mail* rather than condemning the article, see *The Financial Times*, 'Theresa May defends press attacks on high court judges', available online at <[www.ft.com/content/c0cad18e-a441-11e6-8898-79a99e2a4de6](http://www.ft.com/content/c0cad18e-a441-11e6-8898-79a99e2a4de6)> (accessed on 27 November 2017).