

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

Introduction

In November 2016, three High Court judges ruled that the government did not have the legal power to trigger ‘Article 50’ - the EU mechanism that initiates Britain’s departure from the European Union - they needed authorisation to do so from parliament.

Reporting the decision, the Daily Mail pictured three judges above a front page headline stating, “Enemies of The People.”² The MailOnline was more personal in its profile of the “judges that blocked Brexit”, stating: “one founded a European law group, another charged the taxpayer millions for advice and the third is an openly gay ex-Olympic fencer.”

The then Lord Chancellor, Liz Truss issued a response stating, “the independence of the judiciary is the foundation upon which our rule of law is built and our judiciary is rightly respected the world over for its independence and impartiality.”³ Lord Neuberger, the then president of the Supreme Court commented on the BBC’s Radio 4 Today Programme:

“We were certainly not well treated. One has to be careful about being critical of the press particularly as a lawyer or judge because our view of life is different to that of the media. Certainly in our terms they were quite off beam in terms of what they were concentrating on. I wouldn’t criticise them, save to the extent that undermining the judiciary for no good reason is not good for the rule of law.”⁴

So when we ask, whether certain criticism of the judiciary is stepping over the line, we should look at the extent to which the criticism harms the rule of law; in other words, to the extent that the criticism harms the independence of the judiciary.

¹ R (Miller) v Secretary of State for Exiting the European Union [2016] EWHC 2768 (Admin)

² ‘Too Little Too Late’, <https://www.newlawjournal.co.uk/content/too-little-too-late-1> (accessed 27 November 2017)

³ ‘Liz Truss backs Judiciary after Brexit Ruling Backlash’, <http://www.itv.com/news/update/2016-11-05/liz-truss-backs-judiciary-after-brexite-ruling-backlash/> (accessed 27 November 2017)

⁴ ‘Brexit Article 50 Case Saw Some Media ‘Undermine Rule Of Law’, Lord Neuberger Says’ http://www.huffingtonpost.co.uk/entry/lord-neuberger-media-article-50_uk_58a56072e4b045cd34bea9c4 (accessed 27 November 2017)

It is beyond the scope of this essay to explore in detail the evolution of the role of the judiciary and the separation of powers.

The Judiciary and the Rule of Law

In our unwritten constitution, judges are accorded continued judicial independence⁵. They cannot be voted out in an election and they cannot be appointed and removed by an elected leader. We can trace it to, King William III's approval of the Act of Settlement 1701, which established tenure for judges unless Parliament removed them. This echoed an older rule that ensured members of the higher judiciary were immune from being sued or prosecuted in a civil or criminal court for acts performed related to their judicial role. Lord Bingham, in his book "The Rule of Law"⁶ outlined the reasoning behind the independence of the judiciary:

There is little advantage in the promulgation of laws, however benign, unless there are judges who are able and willing to enforce them. Otherwise, the powers that be can disregard the laws with impunity. But if the judges are to enforce the law against the highest authority in the state they must be protected against intimidation and victimisation.

However, there is still good reason to hold judges to account, if they fall short of their judicial oath to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affectation or ill will."⁷ Samuel Johnson wrote, during the period where it was impossible to remove a judge that:

*'There is no reason why a Judge should hold office for life, more than any other person in publick trust. A Judge may be partial otherwise than to the Crown: we have seen Judges partial to the populace. A Judge may become corrupt ... A Judge may become froward from age. A Judge may grow unfit for office in many ways. It was desirable that there should be a possibility of being delivered from him by a new King ...'*⁸

⁵ Constitutional Reform Act 2005, s.3

⁶ Tom Bingham, *The Rule of Law* (Penguin, 2011) pp 91

⁷ Promissory Oaths Act 1868, section 4.

⁸ James Boswell, *Life of Johnson*, Oxford Standard Authors, 3rd edn, ed, R.W. Chapman, corrected by J.D. Freeman (Oxford University Press, 1976) pp 619-20).

Therefore, protecting the rule of law requires a balancing exercise in order to maintain respect for the judiciary and the wider justice system. The rule of law is lost if the public are not confident that the judges are making their decisions impartially.

Today, judges face legitimate accountability in many different forms, their decisions are subject to appellate or judicial review. There are various misconduct processes which can remove judges from office. One course is to complaint to the Judicial Conduct Investigations Office (JCIO). The JCIO deals with judges behaving improperly but does not deal with complaints related to independent judicial decisions or case management.

If we do not protect judges from victimisation and intimidation, especially in circumstances where the judiciary make decisions in politically sensitive areas, we risk a judiciary that may be hesitant to enforce the law against the powerful. If a judge has to be accountable to the government or parliament for their decisions, they would be subject to their influence, eroding their impartiality. However, a judiciary that cannot be removed at all risks a judiciary that is able to act partially with no fear of punishment. Sufficient accountability is required to avoid loss of faith in the justice system.

Where is the line?

A clear way of discerning the boundary between legitimate criticism and criticism that crosses the line is to look at how the judiciary has dealt with criticism that threatened to undermine confidence in the justice system and how this has evolved over the years.

Making harshly critical and offensive comments out of court about judges used to be a criminal offence in England and Wales. This was called the common law criminal offence of scandalising the judiciary in England and Wales. It was abolished by Section 33 of the Crime and Courts Act 2013.

In the Privy Council case of *Ambard v Attorney General of Trinidad and Tobago*⁹, a local newspaper was found in contempt by the Trinidad and Tobago Supreme Court for criticising discrepancies in sentencing in two distinct attempted murder cases. The Privy Council overturned the decision, with Lord Atkin stating:

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, and are genuinely exercising a right of

⁹ *Ambard v Attorney General of Trinidad and Tobago* [1938] AC 322

criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

So judges must be allowed to suffer criticism, even unfair scrutiny. However Lord Atkin drew a distinction between those engaging in genuine and wrong-headed criticism to those acting maliciously or those imputing improper motives to those taking part in the administration of justice. There is a clear line between arguing that judges wrongly interpreted the law and maliciously arguing that the judges had political “enemies of the people” motives.

We can see this in Lord Russell’s formulation of the offence in the case of *R v Gray*¹⁰, where scandalising the judiciary means “any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority.” One form of criticism could elevate legal discussion, the other can contribute to a lack of faith in the legal system.

We can conclude that discourteous and malicious criticism made in bad faith which undermines public confidence in the judicial system is clearly beyond the line. However this may lead us to ask, to what extent is uncivil disrespectful criticism is allowable. One could argue that questioning the judge’s competence, for example, could risk damage to public confidence in the administration of justice

As Lord Atkin makes clear, a certain level of ‘outspoken’ personal criticism is allowed. In the Court of Appeal case of *Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 2)*¹¹, the court did not hold *Punch* magazine in contempt of court for publishing an article critical of the judiciary. Lord Denning MR said:

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

¹⁰ *R v Gray* [1900] 2 QB 36, 40

¹¹ *R v Commissioner of Police of the Metropolis, Ex parte Blackburn (No. 2)* [1968] 2 Q.B. 150, 154 (Court of Appeal)

So it comes to this: Mr. Quintin Hogg has criticised the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the uttermost.

Lord Justice Salmon followed:

It follows 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. The criticism here complained of, however rumbustious, however wide of the mark, whether expressed in good taste or in bad taste, seems to me to be well within those limits.

Allowance is given to outspoken and uncivil criticism. The reputation of the judiciary would suffer if judges were protected excessively to the extent that it harms legitimate discussion of a judge's conduct and the quality of legal decisions. In 1987 the Daily Mirror published on its front page upside down photographs of three judges carrying the disrespectful caption, "You Fools!" The criticised judges upheld the Crown's application for an injunction against the press, banning the press from publishing the Spycatcher memoirs. Lord Justice Sedley reacted to the Daily Mirror front page commenting that, "not only deference but civility towards the bench has become unmodish."¹²

Lord Diplock would concur, he described the application of contempt law to statements "scandalising the judges" as "virtually obsolescent in England." However, there is a marked difference between a judge a fool, and calling a judge an enemy of the people. Although the common law offence of scandalising the judiciary was applied very rarely, it is not certain whether or not the courts would have taken action if the Mirror had chosen a more provocative headline.

The abolition of the common law offence of scandalising the judiciary was recently done in the light of the Northern Ireland Attorney General reviving it to bring contempt of court proceedings against Peter Hain. In his autobiography, Peter Hain said that he thought a particular judge was "off his rocker" and described the judge's conduct as "high-handed and idiosyncratic." The QC withdrew the proceedings after Mr Hain wrote an apologetic letter. Parliament later passed Section 33 of the Crime and Courts Act 2013 removing the criminal offence.

¹² S. Sedley, 'Foreword', in I. Cram (ed.) Borrie and Lowe: The Law of Contempt, 4th ed (London: LexisNexis Butterworths, 2010) p. viii

Lord Pannick said, “*respect for the judiciary, so vital to the maintenance of the rule of law, is undermined rather than strengthened by the existence and use of a criminal offence which provides special protection against free speech relating to the judiciary.*”¹³

Yet the removal of the offence does not unequivocally demonstrate that the boundary has moved, it is a recognition that judges have other measures to defend themselves against harassment and victimisation.

Individual judges have brought libel action against newspapers for allegations against their competence. The Today Newspaper in 1992 published an article alleging that Mr Justice Popplewell fell asleep during a murder trial. Mr. Justice Popplewell sued the newspaper and won a retraction and damages.¹⁴ Characterisation of the senior judiciary as lazy is an established caricature. One could visit William Hogarth’s famous 1758 painting, “The Bench,” which portrayed the senior judiciary dozing off. Lord Justice Sedley recently brought action in the High Court against the Telegraph Media Group and won an apology and damages. Therefore, even if it was allowable for criminal contempt proceedings, judges are not hesitant to defend themselves from defamatory comment.¹⁵

The Article 50 judgment was not the only judicial decision to provoke a wide public discussion. The coverage of the Lavinia Woodward case, led some to believe HHJ Ian Pringle QC’s decided to give Lavinia Woodward a suspended sentence because he believed she was “extraordinary’ and it would damage her surgeon career.”¹⁶ The newspapers neglected to provide a complete picture of how the judge applied statutory guidelines.¹⁷ This provoked a fierce discussion on social media, accusations of a miscarriage of justice which lead to the JCIO receiving and rejecting three complaints related to the decision.¹⁸ Free speech allows people, or publications to be in error, however it is crucial for the judiciary, or other public figures to challenge misconceptions to ensure public confidence is not undermined.

¹³ D. Pannick, ‘We do not fear criticism, nor do we resent it: abolition of the offence of scandalising the judiciary’: Public Law Issue 1 January 2014 (Sweet & Maxwell, 2014) pp 5 - 10

¹⁴ Indeed, this is a not uncommon criticism, in 2001 a criminal trial was abandoned after the defence counsel accused the judge of falling asleep. For a full history of these incidents see ‘Trial Abandoned as Judge ‘Nods’ Off’ <https://www.theguardian.com/uk/2001/dec/18/claredyer> (accessed 27 November 2017)

¹⁵ ‘Lord Justice Sedley’ <http://www.telegraph.co.uk/news/8372001/Lord-Justice-Sedley.html> (accessed 28 November 2017)

¹⁶ ‘Oxford University student who stabbed her Tinder lover in a drink and drug fuelled rage could be spared jail by a judge because she's 'extraordinary' and it would damage her surgeon career’ <http://www.dailymail.co.uk/news/article-4510778/Student-stabbed-lover-spared-jail.html#ixzz4zwtJF8Nb> (accessed 28 November 2017)

¹⁷ ‘No, Lavinia Woodward didn't avoid jail because she was posh, clever and pretty’ <https://www.newstatesman.com/politics/uk/2017/09/no-lavinia-woodward-didnt-avoid-jail-because-she-was-posh-clever-and-pretty> (accessed 27 November 2017)

¹⁸ ‘Lavinia Woodward judge complaints dismissed by watchdog’ <http://www.bbc.co.uk/news/uk-england-oxfordshire-41449560>

Conclusion

To summarise, the line between legitimate and illegitimate accountability of the judiciary has evolved over the years.

The common law contempt offence has been abolished but when it was active, it was rarely used. In contempt law the judiciary allowed sufficient scope for outspoken and unfair criticism. The judiciary provided a clear guide that criticism goes over the line when there is a risk of damage to public confidence in the administration of justice.

Yet the line has not moved so far that the judiciary would not take action to defend their reputation when needed against specific allegations. Judges have issued libel and defamation proceedings against newspapers that criticise their competence. There is still a certain limit to what we can say about the judiciary.

The continuing rise of alternative news media has brought about a plurality of views and comment. ‘Fake News’ may be critical, unfair and offensive - but a newspaper headline describing judges as ‘enemies of the people’ has less effect of undermining the judiciary in the modern age that it would have done fifty years ago. Lord Neuberger when discussing the media reaction to the Miller judgment, said he believed, “I think that it made non-lawyers more aware of the role of the court, and gave them a better idea of how justice is administered in this country.”¹⁹

Looking forward, the rule of law is more vulnerable than it appears. The pollster ‘Yougov’ commissioned a poll²⁰ in the wake of the Daily Mail headline, showing that a third of the public have an unfavourable view of senior judges, while a little under a half have a positive view. The ratings showed a Brexit dimension to the poll showing that overall those who voted leave had a far more negative view than those who voted remain. To maintain faith in the justice system, there are further challenges ahead for the senior judiciary to face as our courts decide on other politically sensitive decisions post-Brexit.

¹⁹ ‘Reflections on significant moments in the role of the Judiciary - Personal Support Unit Fundraising Breakfast - Lord Neuberger, President of the Supreme Court 16 March 2017’ <https://www.supremecourt.uk/docs/speech-170316.pdf> (accessed 27 November 2017)

²⁰ ‘Despite Article 50 controversy, senior judges are viewed more favourably than any British politician’ <https://yougov.co.uk/news/2016/12/05/despite-article-50-controversy-senior-judges-view/> (accessed 27 November 2017)