ELLIOTT & QUINN'S
ENGLISH LEGAL SYSTEM

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Pearson

Twenty-first Edition 2020/2021

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> decency, that a judge in 2017 should be faced with the problems thrown up by this case and should have to express himself in such terms.
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> . . .
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> If, when in eleven days' time she is released from ZX, we, the system, society, the State, are unable to provide X with the supportive and *safe* placement she so desperately needs, and if, in consequence, she is enabled to make another attempt on her life, then I can only say, with bleak emphasis: we will have blood on our hands.

The uncertainty around Brexit has prompted a number of the Supreme Court Justices to speak out in speeches and interviews.

As these instances become more frequent, we also see judges challenging the idea of them being 'out of touch' through communications. Mr Justice Peter Jackson broke from convention in the case of a 14-year-old boy who had applied to the court to leave the home of his mother and stepfather, in order to move to Scandinavia with his father. Jackson J gave his judgment in the form of a letter directly written to the boy, clearly explaining his decision and the reasons for it (***Re A (Letter to a Young Person)*** (Rev 1) (2017)). This example was followed by the deputy District Judge Lucy Reed in 2018 in an adoption case, who wrote her judgment in order that the baby's father, who had a learning disability, would understand her decision (***A Council* v *Jack's Mother, Jack's Dad and Jack*** (2018)).

In ***R (Unison)* v *Lord Chancellor*** (2017) we saw the Supreme Court make a finding that employment tribunal fees introduced by the government in 2013 were unlawful. Lord Reed's judgment on the importance of access to the courts, as a core element of the rule of law, was very powerful indeed (for more on this, see Chapter 15: Paying for legal services).

Judges also regularly speak out on developments within the court service; judicial commentary for 2018 included the slippage of advocacy skills for solicitor-advocates and in-house barristers (for a study commissioned by the SRA/BSB), the crisis in the family justice system (Sir Andrew McFarlane, President of the Family Division), the withdrawal of Government funding for the problem-solving Family Drug and Alcohol Court (Sir James Munby) and immigration lawyers who use litigation to delay removal proceedings (Mr Justice Green). The year 2019 saw judges criticising government austerity policies (Lady Hale) diversity in the judiciary (Lady Hale again), case delays (Judge Simon Carr), knife crime (Mr Justice Bryan), jury duty excuses (Judge Andrew Menary QC), the need for family lawyers to report 'unreasonable judges' (Sir Andrew McFarlane) and Lord Neuberger of Abbotsbury (former President of the Supreme Court) warning that cuts to the justice system will eventually lead to a 'breakdown of the rule of law'.

The Bigger Picture: The media and freedom of expression

The media (including newspapers, television and radio) hold considerable power and their role depends on them having the right to inform the public. Any restriction on their freedom of expression is an irritation to the media and it is the judges who are required to police the scope of this freedom. The right to privacy has therefore been extended by the courts. This was highlighted in the judgment of Mr Justice Eady in the High Court when he ruled that the *News of the World* had been wrong to publish a story about Max Mosley (the president of the body that regulates Formula 1 racing) paying prostitutes to act out sadomasochistic activities. Mosley's parents were well-known Fascist sympathisers who had reportedly been friends and supporters of Adolf Hitler. The newspaper suggested that the sexual activities

had a Nazi-style theme. This judgment of Mr Justice Eady was publicly criticised by the editor of the *Daily Mail* in 2009, who made a very personal attack on the judge himself, and the tone of this attack raises questions about how far the independence of the judiciary is sufficiently protected from the pressures of the media. In 1900 a newspaper editor was convicted for contempt of court for calling a judge an 'impudent little man in horsehair', but such a response would seem disproportionate today. The Judicial Communications Office acts as the press office for the judiciary and it issued the following statement in response to the editor's speech:

> Judges determine privacy cases in accordance with the law and the particular evidence presented by both parties. Any High Court judgment can be appealed to the Court of Appeal.

It is understandable that the judges would not want to enter into a public dispute with a newspaper editor, but it is also noteworthy that Government Ministers, and in particular the Lord Chancellor who under the Constitutional Reform Act 2005 is responsible for protecting the independence of the judiciary, did not speak up in support of the judges in relation to the ruling in the ***Miller*** case. As a politician, the Lord Chancellor will be anxious to keep the media on his or her side ready for the next general election.

In relation to the ***Miller*** press coverage (see p. 210), the way in which the press 'stirred up' the public both pre- and post-judgment was largely unprecedented. The online version of the *Daily Mail,* MailOnline, essentially 'trolled' the judges ruling at the High Court: Lord Chief Justice Lord Thomas, Lord Justice Sales and Master of the Rolls Sir Terence Etherton. Running a profile on the 'judges that blocked Brexit' the paper turned the focus on the judges themselves with large photographs and an accompanying line that read:

> One founded a EUROPEAN law group, another charged the taxpayer millions for advice and the third is an openly gay ex-Olympic fencer.

This onslaught wasn't the reserve of the tabloid press however – the *Telegraph* ran with a similar headline: 'The judges versus the people', again accompanied by photographs of the three High Court judges.

This seeming attempt to pit the 'common man' against the judiciary highlights a real issue in terms of public understanding of the law and constitutional principles – something the media were happy to exploit. Former Attorney General Dominic Grieve noted:

> There is something smacking of the fascist state about them [the headlines attacking judges] . . . It shows either a total misunderstanding of the UK constitution, which such critics periodically extol – or a deliberate desire to destroy it.

Some might suggest that a mere newspaper headline doesn't have the power to influence people or indeed impact society – though *The Sun*'s coverage of the 1989 Hillsborough disaster would suggest otherwise.

The tension between judges and the media has increased as judges have sought to strengthen the protection of celebrities' right to privacy, considering that there is no public interest in allowing, for example, the publication of a celebrity footballer's sex life. Judges have been prepared to issue what have become known as 'super injunctions', preventing any publication that would identify the relevant celebrity. These injunctions have been undermined by the use of social networking sites, such as Twitter, to publish the name regardless of the injunction. In addition, politicians have chosen to name the relevant celebrities in Parliament, relying on the legal protection offered to them under the doctrine of parliamentary privilege. The risk is that the authority of judges is being undermined and the public will be less willing to respect the decisions of judges more generally.

10.10.6 Right-wing bias

In addition to an alleged readiness to support the Government of the day, the judiciary has been accused of being particularly biased towards the interests traditionally represented by the right wing of the political spectrum. In his influential book *The Politics of the Judiciary,* Griffith (1997) states that:

> . . . in every major social issue which has come before the courts in the last thirty years – concerning industrial relations, political protest, race relations, government secrecy, police powers, moral behaviour – the judges have supported the conventional, settled and established interests.

Among the cases he cites in support of this theory is ***Bromley London Borough Council* v *Greater London Council*** (1982). In this case the Labour-run GLC had won an election with a promise to cut bus and tube fares by 25 per cent. The move necessitated an increase in the rates levied on the London boroughs, and one of those boroughs, Conservative-controlled Bromley, challenged the GLC's right to do this. The challenge failed in the High Court, but succeeded on appeal. The Court of Appeal judges condemned the fare reduction as 'a crude abuse of power', and quashed the supplementary rate that the GLC had levied on the London boroughs to pay for it. The House of Lords agreed, the Law Lords holding unanimously that the GLC was bound by a statute requiring it to 'promote the provision of integrated, efficient and economic transport facilities and services in Greater London', which they interpreted to mean that the bus and tube system must be run according to 'ordinary business principles' of cost-effectiveness. The decision represented a political defeat for the Labour leaders of the GLC and a victory for the Conservative councillors of Bromley.

Other cases cited by Griffith include: ***Council of Civil Service Unions* v *Minister for the Civil Service*** (1984) – the 'GCHQ' case in which the House of Lords supported the withdrawal of certain civil servants' rights to belong to a trade union; ***Attorney General* v *Guardian Newspapers Ltd*** (1987), which banned publication of *Spycatcher,* a book on the security services, even though it was generally available in America and Australia; and several cases arising out of the 1984 miners' strike, such as ***Thomas* v *NUM (South Wales Area)*** (1985), in which injunctions were sought to prevent protesters collecting at pit gates and shouting abuse at those going to work. The judge in that case, according to Griffith, had some difficulty in finding the conduct illegal, but eventually decided that it amounted to 'a species of private nuisance, namely unreasonable interference with the victim's right to use the highway'; Griffith describes the decision as 'judicial creativity at its most blatant'.

Commentators have also noted that the great advances in judicial review in the 1960s and 1970s came almost entirely at the expense of Labour policies, and that judicial reluctance to review Government decisions of the executive is most likely to be decisive in cases where the Government in question is a Conservative one. However, the past quarter of a century has seen a shift; the decisions of the mid-1990s Conservative Home Secretary, Michael Howard, were several times found illegal by the courts. Legal journalist and writer Joshua Rozenberg argued that the bias at least in favour of the establishment has broken down.

The early-2000s Labour Home Secretary, David Blunkett, expressed displeasure on a number of occasions with the decisions of the courts, particularly where these decisions ran counter to his policies on sentencing and immigration.

10.10.7 Bias against women

In her book *Eve was Framed*, Helena Kennedy (1992) argues that the attitude of many judges to women is outdated, and sometimes prejudiced. The problems are particularly apparent in cases involving sexual offences: Kennedy cites the comments of Cassell J in 1990, that a man who had unlawful intercourse with his 12-year-old stepdaughter was understandably driven to it by his pregnant wife's loss of interest in sex.

Kennedy alleges that women are judged according to how well they fit traditional female stereotypes. Because crime is seen as stepping outside the feminine role, women are more severely punished than men, and women who do not fit traditional stereotypes are treated most harshly.

The Judicial Studies Board, responsible for the training of judges, has issued judges with the *Equal Treatment Bench Book*. This advises judges on equal treatment of people in court and the appropriate use of language to avoid causing offence by, for example, being sexist.

10.10.8 Judicial impartiality

In October 2018 a case emerged where judicial impartiality was called into question; Judge Robert Altham sentenced three protestors over their participation in a demonstration against fracking, where they climbed on top of lorries and refused to move for several days. It later emerged that the family business (JC Altham & Sons) run by his sister and parents, was a current supplier to the oil and gas industry. In an expedited hearing at the Court of Appeal, the sentences were later quashed for being 'manifestly excessive'. The appellants' barrister, Kirsty Brimelow QC drew attention to a letter addressed to Lancashire Council and signed by the judge's sister, which called on them to approve fracking: 'He should not have sentenced, because there is sufficient evidence here to raise apparent bias.'

10.10.9 Influence of Freemasonry

Freemasonry is a fraternal organisation which is viewed in popular culture as a secret society. It does not ordinarily allow women to join. Among its stated aims is the mutual self-improvement of members, and there has long been concern about the extent of membership among the police as well as the judiciary, on the basis that loyalty to other Masons – who might be parties in a case, or colleagues seeking promotion – could have a corrupting influence. Josephine Hayes, former chairwoman of the Association of Women Barristers, told newspapers that anecdotal evidence suggested there was public concern about the influence that Masonic membership might have on judges: clients whose opponents were Freemasons had been known to express worries that the judge might also be one. She pointed out that, although fears of actual influence might be unfounded, the concern that it might exist weakened confidence in the legal system.

The Association of Women Barristers also suggests that Freemasonry may have a discriminatory effect on women lawyers' chances of appointment to the Bench. It points out that because the current system of appointment looks at recommendations by existing judges, men benefited by the opportunities which Freemasonry provides to meet senior judges. Such opportunities, it points out, have become even more valuable now that the practising Bar has grown to over 16,000, so that judges no longer necessarily know all candidates for the

Photo 10.3 The offices of the Freemasons in central London

Source: Alex Segre/Alamy

judiciary personally. The Association has argued that judges should be obliged to resign from the Freemasons on appointment to the bench. The former Lord Chancellor, Lord McKay, opposed such a rule, arguing that as a matter of principle individuals should be free to join any lawful organisation they wished. He pointed out that the judicial oath requires all judges to swear 'to do right to all manner of people . . . without fear or favour, affection or ill will'. He suggested that this meant there was no conflict of interest between membership of the Freemasons and judicial office.

In an attempt to introduce greater transparency, a questionnaire was sent in 1998 to all members of the judiciary asking them to declare their 'Masonic status'. Five per cent of those who responded stated that they were Freemasons. In 2009 the government decided to stop collecting this information.

10.10.10 Lack of specialisation

A very distinctive feature of the English system is that judges tend not to specialise: instead, they are organised in terms of the hierarchy of the courts in which they work. In France, for example, every region has its own court structure, and there will be hundreds of judges of equal status, instead of the elite group that forms the pinnacle of our judiciary. It has been

argued that this arrangement prevents our judiciary from developing the kind of expertise that, in France, has contributed to the development of specialist courts such as the *Conseil d'État,* which deals with administrative law; the development of our administrative law is said to have suffered as a result. However, it can also be argued that the English model gives the highest judges an overview of the whole system, which helps ensure that different branches of law remain fundamentally consistent with each other.

In any case, there are some signs that the system is changing. First, the growth of tribunals has removed many specialist areas from the ordinary courts: most tribunals are presided over by people with specialist knowledge of the relevant areas. The growth of mediation systems as an alternative method of dispute resolution (see Chapter 25) has also contributed to this. Secondly, Lord Woolf's report on the civil justice system recommended that High Court and circuit judges should concentrate on fewer areas of work, though he did not suggest that they actually became specialists in particular subjects.

10.10.11 Shortage of time

There is a growing concern that judges currently have insufficient time allocated for them to read the papers for a case. Court of Appeal judges are allocated only four reading days a month when they can do legal research. The rest of the time they are expected to be hearing court cases. This is in striking contrast with some appellate judges in the US who only hear cases four days per month.

Answering questions

Questions about the judiciary generally focus on their independence, but as this is closely related to appointments, background and selection, you need to know more than just the information under the heading of 'Independence of the judiciary', as the following examples show.

1. What are the roles and responsibilities of the judiciary? Does the selection process in England and Wales ensure that appropriate people are selected to carry these out? *University of London, International Programmes LLB*
2. The position of Lord Chancellor in the past clearly breached the doctrine of separation of powers. How have the reforms contained in the Constitutional Reform Act 2005 addressed this breach of a fundamental constitutional principle? In your view, have these reforms been successful?
3. 'For nearly 300 years, the English judge has been guaranteed his independence.' How far is this true? In your opinion, can the decisions of our judges be regarded as satisfactory to all members of society?
4. What measures have been taken to make the judiciary more representative of society?

For answers to these questions, visit the companion website at go.pearson.com/uk/he/resources