



Report on issues relating to the rule of law in England and Wales for the Vienna Bar Presidents' Conference 2019

Judicial independence

Judicial independence is a cornerstone of the rule of the law. Recent developments in the United Kingdom serve to highlight that defending this principle in the face of media and political attacks on the judiciary remains a challenge and that there is much work to be done in educating the public about the role of an independent judiciary.

Judges perform a public function and make decisions on issues which are inherently a matter of public interest. It is important that the judiciary, which is the ultimate guarantor of the media's Article 10 rights, should be willing to accept criticism from the media.

However, there is an important difference between criticising a given judicial decision and personal vilification of the judges that have given the decision. The latter is a potential threat to the rule of law as it undermines the role of judges, who are discharging their duty to decide cases impartially. In those circumstances, there is a need for the Lord Chancellor (Cabinet Minister responsible for the judiciary), to speak out in defence of an independent judiciary.

The recent case of *Miller v Secretary of State for Exiting the European Union* brought these issues into stark relief. The case concerned a judicial review challenging the Prime Minister's decision to seek to use prerogative powers to invoke Article 50 TFEU (thus triggering the UK's departure from the European Union) on the grounds that only an Act of Parliament could trigger Article 50. The case therefore centred on a major political issue which has divided the country and Parliament.

Judgment was given at first instance by a Divisional Court of the High Court comprising the Lord Chief Justice, Lord Thomas, the Master of the Rolls, Sir Terence Etherton and Lord Justice Sales. The High Court allowed the judicial review.¹

The *Daily Mail* ran a front-page article the next day, publishing photographs of the three judges above a headline that read "Enemies of the People". The article's sub-heading gives a flavour of the contents: "Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.4m Brexit voters and who could trigger constitutional crisis". The

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

article included biographies of the three judges in terms that questioned their impartiality, gratuitously mentioning that one was “openly gay”, and was a brazen attack on judicial independence.²

Disappointingly, the then Lord Chancellor, Liz Truss, was unwilling to unequivocally defend the judges against these personal attacks.³ Both the Bar Council and the Senior Judiciary spoke out to defend the position of the judges, who were vindicated in legal terms when the Supreme Court upheld the Divisional Court’s decision. This judgment did not thwart the Referendum result, as Parliament subsequently passed an Act enabling Article 50 to be invoked.

Access to Justice

The justice system in the United Kingdom has seen deep cuts to public spending following the imposition of austerity measures, with serious implications for access to justice. The major recent piece of legislation in this area is the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which came into force in April 2013.

There have been major cuts in legal aid, affecting those with the least financial resources to secure access to justice. First, whole areas of law have, in effect, been excluded from legal aid, with the majority of cases involving housing, debt, welfare benefits, employment, immigration and clinical negligence now being outside the scope of legal aid. Access to legal aid in family cases has also been greatly restricted and is only now available in cases where there is evidence of domestic violence or child protection issues.⁴

In addition, overall spending on legal aid has been cut drastically, with £950 million cut from the budget in the period between 2010 and 2016.⁵ The effects of these cuts are being felt across the justice system, with official figures showing that the proportion of litigants with legal representation fell from 60% in 2012 to 33% in the first quarter of 2017. As many of these cases involve very serious issues, such as whether a parent may lose access to a child in a divorce, this is deeply concerning.

The judiciary has, on occasion, spoken out publicly on these matters. Baroness Hale, President of the Supreme Court, has called the cuts a “false economy”, as, in many cases, access to good legal advice early on can resolve many problems. There are also major additional costs associated with the greater length of time it takes to try cases involving unrepresented persons. The cuts have also involved major reductions in the fees paid to

² <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>

³ <https://www.theguardian.com/politics/2017/mar/22/lord-chief-justice-castigates-liz-truss-for-failing-to-defend-judges>

⁴ *Is Britain Fairer?* The state of inequality and human rights 2015, Equality and Human Rights Commission, p.76.

⁵ *The Guardian view on legal aid: cuts have caused chaos and must be reversed*, Editorial, The Guardian, 12 August 2018.

barristers and solicitors for doing legally aided work. This has led to plummeting morale and to many able young lawyers deciding against a career doing publicly funded work.

One of the Government's major changes in 2013 was to introduce fees for people wishing to bring employment-related claims, such as claims for unfair dismissal, in the Employment Tribunal. The impact of the reform was drastic; the number of applications in employment tribunals fell by 81% in the first year.⁶ In July 2017, the Supreme Court held unanimously that the employment tribunal fees were unlawful under both domestic and EU law because of their effect in reducing access to justice. The judgment contains a powerful statement of the vital importance of unfettered access to justice for the rule of law, which stretches far beyond the facts of any given case.⁷

Proposed terrorism legislation

The uneasy balance between individual liberty and collective security has once again been disturbed by the Counter-Terrorism and Border Security Bill, which has passed through Parliament and is currently awaiting Royal Assent. A few of the most widely discussed rule of law issues surrounding the proposed legislation are as follows.

- 1) 'The law must be accessible ... intelligible, clear and predictable.'⁸

The Bill has faced significant criticism for its vague and unclear terms. By way of example, many objections have been made to Clause 1 of the Bill, which criminalises expressions of support for a proscribed terrorist organisation. In its review of the proposed legislation, the Joint Committee on Human Rights noted that this Clause fails to meet the required standard of clarity, as it 'potentially catches a vast spectrum of conduct' and is 'unclear as to what type of expression would or would not be caught by this offence'.⁹

- 2) 'The law must afford adequate protection of fundamental human rights.'¹⁰

Counter-terrorism legislation often authorises significant curtailments of individual human rights. Human rights groups have expressed particular concern about Clause 3 of the new Bill, which would criminalise obtaining and viewing terrorist material over the Internet. In relation to this Clause, the former Independent Reviewer of Terrorism Legislation, Max Hill QC, has notably commented that 'a principled boundary line as to the legitimate usage of criminal law is being crossed'.¹¹

⁶ *Is Britain Fairer?* The state of inequality and human rights 2015, Equality and Human Rights Commission, p.77.

⁷ *R(on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.

⁸ Tom Bingham, *The Rule of Law* (Penguin, 2011) 37.

⁹ Joint Committee on Human Rights, *Legislative Scrutiny: Counter-Terrorism and Border Security Bill, Ninth Report of Session 2017–19* (2018, HL 167, HC 1208) [18].

¹⁰ *Supra* n1 66.

¹¹ Max Hill QC and Professor Clive Walker, 'Counter Terrorism and Border Security Bill: Submission in Relation to Clause 3', Submission to the Joint Committee on Human Rights, 8 July 2018.

It has been argued that Clause 3 constitutes a disproportionate and unnecessary interference with the right under Article 10 ECHR to receive and impart information,¹² and that it 'risks criminalising academic inquiry, journalistic investigation or passive curiosity without any intention to harm.'¹³ It must be remembered that Article 10 applies 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.'¹⁴

- 3) 'The rule of law requires compliance by the state with its obligations in international law as well as in national law.'¹⁵

The rule of law requires our counter-terrorism legislation to respect human rights also because the UK is bound by various international instruments, such as the ICCPR, and various UN Security Council resolutions that specifically concern terrorism.¹⁶

The UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms has detailed a number of reasons why the UK's new Bill would not comply with these international obligations in its current form.¹⁷

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¹² Supra n2 [33].

¹³ 'Liberty's Second Reading Briefing on the Counter-Terrorism and Border Security Bill 2018' (Liberty, June 2018) – available at <https://www.libertyhumanrights.org.uk/sites/default/files/Liberty%27s%20Second%20Reading%20Briefing%20%20on%20the%20Counter-Terrorism%20Bill%20FINAL.pdf>.

¹⁴ *Handyside v United Kingdom* App No 5493/72 (ECHR, 7 December 1976) [49].

¹⁵ Supra n1 110.

¹⁶ See, for example, UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373; UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566; UNSC Res 2178 (24 September 2014) UN Doc S/RES/2178.

¹⁷ OHCHR, 'Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (17 July 2018) UN Doc OL GBR 7/2018 – available at <https://www.ohchr.org/Documents/Issues/Terrorism/SR/OL-GBR-7-2018.pdf>.