

**Transform
Justice**

Rethinking judicial independence

Edited by Matthew Rogers and Penelope Gibbs
July 2017

About Transform Justice

Transform Justice is a national charity campaigning for a fairer, more humane, more open and effective campaign. Penelope Gibbs set up the charity in 2012 to help create a better justice system in the UK. Transform Justice promotes change through generating research and evidence to show how the system could be improved, and by persuading practitioners and politicians to make those changes.

The research and production of this report has been kindly supported by the Hadley Trust.

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Registered charity number 1150989

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Acknowledgements

I wish to express my thanks to all of the authors who contributed to this report for providing their time and expertise.

Sir Alan Moses, chairman of Independent Press Standards Organisation (IPSO) and a former Lord Justice of Appeal

Nicola Silverleaf, former magistrate

Bernard Hunter, former magistrate

Blair Gibbs, consultant and former senior policy advisor to the Lord Chancellor and justice secretary

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Introduction

Rt. Hon Sir Alan Moses

We need to think about a crucial and profound issue which affects us all: how may judicial independence be protected while judges learn to engage and participate in the communities in which they serve?

Few would question the need for the judiciary, from the magistrates' court up to the Supreme Court, to maintain respect for the judiciary and preserve its authority; without judicial authority, the rule of law cannot survive. But there are many, often conflicting, views as to how that may be achieved at every level. No one can doubt that the problems of engaging the community while maintaining independence are not confined to the highest level of judge, or to those who deal most directly with the community in which they live, such as the magistrates.

At every level, independence and authority cannot be maintained and improved merely by retreating behind a shell of silence and exclusivity. Society suffers, and so do the judges. This report shows that judicial independence cannot serve its master, the rule of law, unless it shows greater sensitivity to the modern demands and techniques of communication. The simple and traditional method of preserving independence and authority was for judges to do no more than maintain a total and, it was assumed, dignified, silence.

Reasoning and speaking through judgments, within the confines of a court, and in no other forum, was, we were all taught, the safest rule. This is enforced with far greater rigour at the magistracy level than among the higher judiciary, even to the extent of banning many of the useful and traditional means of engagement in the community, such as chairing a probation review panel or participation in a community justice panel. Yet there is a danger of inflexible rules, applied with too little thought of what we want from our judges at every level.

Of course we need reasoned and reasonable decisions from those with the authority they earn from their independence. But we also need to understand how judges work, and discuss and develop the extent to which they can and are willing to engage with the community. They can, in a modern society, no longer command respect from mere deference.

Judges must be able to show they understand and are prepared to listen to the members of the community with whom they deal and whom they serve. The purpose of engagement is for both sides of the divide to learn from each other. Judges have as much to learn from engagement as the community. Society needs to think about judges, and what it needs and has a right to demand from them. But judges also need to consider how they might contribute with far greater subtlety to that understanding.

In the past, it was believed that the best way for judges to command respect and avoid ignorant criticism, and even abuse, was to maintain silence. Indeed, it remains a prevalent view that in return for an absence of criticism, the judges will keep their mouths shut. But is that any longer a bargain that serves the community? It is a bargain which is from time to time broken, noisily and provoking judicial outrage, as the article 50 case illustrated.

If judges contributed with greater vigour and clarity to an explanation of the issues involved and how the judiciary should approach them, then, at least if ignorant criticisms will not altogether be avoided, the ignorance of the criticism would be all the more apparent. The institution of the judiciary is surely, by now, of sufficient strength to withstand abuse while developing more modern and open channels of communication.

This compilation of essays demonstrates the complexity and the significance of the problems of developing a relevant policy on judicial independence that meets the needs of a diverse and demanding community. They also meet a vital need to ensure that these issues are vigorously debated. In an age of misunderstanding, which flows from misinformation, I hope this report will provoke the development of the modern policy for which Penelope Gibbs and her colleagues are such powerful advocates.

Part I: Are magistrates second-class citizens?

Are magistrates less independent than paid judges?

Penelope Gibbs

Magistrates used to be almost self-governing. They controlled the budgets of their court, the employment of court staff, the recruitment of new magistrates, and the disciplining of peers.⁰¹ Now, they no longer have control over any of these, and are arguably less independent than the paid judiciary. Paid judges may be less inclined to break the (unwritten) rules on judicial independence, but magistrates are more constrained in what they can say and do inside and outside the courtroom – and by the disciplinary process that will await them if they fall below the required standards of judicial conduct.

Discipline

All judges are subject to the *Guide to Judicial Conduct*⁰², though this was not written with magistrates in mind. This is enforced by the Judicial Conduct Investigations Office (JCIO). Complaints about paid judges are referred for adjudication straight to the JCIO, which usually looks at cases on the papers, then publishes its judgment. Magistrates have two extra disciplinary overseers, the local advisory committee and the justices' clerk. Having heard the complaint, the advisory committee refers its decision up to the JCIO for confirmation.

A justices' clerk sits on an advisory committee disciplinary panel as a note taker. The panel is technically independent but those who have been through the process say the clerk has a strong influence on the case at every stage, which can make the process seem unfair and non-transparent.⁰³ The clerk (a civil servant) also advises the bench chairman and individual magistrates informally on what they can and can't do – advice some feel is overcautious.

Speaking out

Paid judges who are not in very senior positions seldom speak directly to the media. However, they use comments in court to convey messages to the wider world, notably about the constraints of sentencing. They are not forbidden from speaking directly to the media, and can refer to the principles of conduct for guidance. Magistrates frequently want to engage with the press, for instance, by contributing to a local newspaper article or writing a letter to a national newspaper. They are nearly always dissuaded from doing so, though, either by their clerk or by their bench chair. When magistrates do interact with the press without permission, they get into big trouble.⁰⁴

Engagement with criminal justice agencies

Magistrates have gradually been stopped from participating in forums where local criminal justice matters are discussed. They used to be on local probation boards and sat on community safety partnerships (CSPs), but the former no longer exists and magistrates were banned from the latter in 2012. They might wish to participate in a local criminal justice board (LCJB), but again they cannot. However, each LCJB has a circuit judge from the local area as a point of liaison. The judge is independent of the board itself but receives all of the minutes and is encouraged to attend the meetings, especially when issues relating to the judiciary arise.

01 http://transformjustice.org.uk/main/wp-content/uploads/2013/05/Managing_magistrates_courts.pdf

02 <https://www.judiciary.gov.uk/wp-content/uploads/2010/02/guidance-judicial-conduct-v2016-update.pdf>

03 <http://www.transformjustice.org.uk/is-the-magistrates-disciplinary-process-a-kangaroo-court/>

04 <http://www.transformjustice.org.uk/where-is-the-line-which-judges-should-not-cross/>

Associations

Perhaps most absurdly of all, magistrates are banned from being married to particular people, while no such ban appears to apply to paid judges. A magistrate cannot be married to a bailiff, a police special constable, or a police and crime commissioner (PCC). They also cannot be independent custody visitors and may be restricted in their volunteering – if they work for the relationship support charity Relate or sit on an independent monitoring board, they may be forced to do so in a different area to their local bench area. None of these hard and fast rules apply to paid judges.

Risky business

Why do the rules, or the interpretation of the judicial conduct guide, appear to differ so much between magistrates and paid judges? One answer may be that, as the paid judiciary has gained greater management control over magistrates, they have used the judicial conduct principles as *rules* to police the behaviour of ‘unruly’ magistrates.⁰⁵ While paid judges generally do not put their heads above the parapet, and culturally are unlikely to transgress the guide’s principles, magistrates have always been seen as more maverick and risky.

When the paid judiciary had no control over magistrates, they also had no responsibility for them. As they have gained responsibility (via the Constitutional Reform Act 2005) and justices’ clerks have become part of the civil service, both have imposed a more risk averse culture on magistrates. This problematic approach has contributed to low morale in the magistracy, and to a greater gulf between magistrates and the communities they serve.

⁰⁵ https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1xuw6pgd2b1rf/uploads/2015/12/Judicial_Conduct_Magistrates_Rules_2014.pdf

The magistracy and the 'uniformed' judiciary: double standards?

Nicola Silverleaf

Although arising from the same guidance, codes of practice have emerged that distance the magistracy from their local community for what could be considered damage limitation purposes rather than the demonstration of judicial independence. The result, at a time when the purpose of the magistracy in the 21st century is being reviewed, is a missed opportunity to re-engage with local justice.

Setting the scene

In 2017, there were 16,129 serving magistrates⁰⁶ compared to around 30,000 in 2006⁰⁷. These part-time unpaid volunteers are required to sit for at least 13 days, or 26 half-days, a year; they spend the rest of their time in the community. The onus is on the magistrate to represent the citizenry when in court, but to act as a member of the judiciary at all times.

Chapter three of the judicial conduct guide addresses impartiality, the issue that causes most difficulty to the magistracy and its advisers.⁰⁸

- 3.1 A judge should strive to ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants, in the impartiality of the judge and of the judiciary.
- 3.2 Because the judge's primary task and responsibility is to discharge the duties of office, it follows that a judge should, so far as is reasonable, avoid extra-judicial activities that are likely to cause the judge to have to refrain from sitting on a case because of a reasonable apprehension of bias or because of a conflict of interest that would arise from the activity.

During their initial training, magistrates are made aware of the guide and why it is important. Complaints brought against magistrates tend to be concerned with their conduct in an individual case, or with views being expressed more widely, which are deemed not compatible with the office. Those individuals who are subject to complaints for expressing their own views tend to be handed the ultimate sanction of being removed from the bench.

Judicial clerks interpret the rules for magistrates and advise the bench; they also monitor the activities of individual magistrates. They must contain and manage risk, especially of reputational damage to the bench as a whole. Resource constraints and an inherent aversion to risk make it likely that the clerks will advise against any activity that is peripherally connected with criminal justice. Due to the power and influence exercised by the clerks, their assessment of risk is likely to be accepted by the bench.

This approach has tended to discourage participation in social and fundraising events that benefit legal charities or bodies. The judicial conduct guidance states:

Social activities need to be assessed in the light of the judge's duty to maintain the dignity of the office and not to permit associations which may affect adversely the judge's ability to discharge his or her duties.

However, the following examples suggest a clear case of double standards:

Magistrates in one local justice area (LJA) were advised against participating in a quiz evening held by the family lawyers organisation Resolution by

06 <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2017/>

07 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243134/7273.pdf

08 Op.cit., n.2

two separate clerks, who said at the time:

I don't think it would be right for you to support it, there could easily be a perception of bias. I know this might seem harsh as the aims as stated on the [event's] website appear laudable.

At that particular event, all the participants were professional firms working in family law; the quiz master was a family judge and there were two full tables of family judges. Over the years it had become a matter of pride for the family circuit judges to beat the team from the local chambers.

None of those experienced and qualified people understood why magistrates were particularly vulnerable to suggestions of bias; it was suggested that the magistrates themselves had an exaggerated opinion of their own importance.

Further examples of recently 'banned' events include a sponsored walk to raise funds for local legal advice charities – attended and supported by the high sheriff and a serving high court judge – and a fundraising dinner where the keynote speaker was a family judge.

The government's reform agenda

The government's reform programme, *Transforming our justice system*⁰⁹, has contributed to magistrates' disengagement from local justice. Two of its purposes are relevant to this argument: efficiency and standardisation.

The reforms are intended to make the criminal justice system more efficient by reducing costs and delays through automation, rationalising processes, and introducing digital working. These have included

mergers of LJAs and the consequent formation of larger benches – some of over 800 magistrates – covering much wider areas. The National Bench Chairmen's Forum (NBCF), funded by HM Courts & Tribunals Service (HMCTS), promotes communication between bench chairs and allows best practice to be shared.

The reforms are also designed to improve the consistency of sentencing across the country through introducing sentencing guidelines and centrally developed training to assist with structured decision-making. This has always been an ambition, and now software-based solutions make it cheaper and easier to achieve. They also de-risk the process and improve the perception of fairness, thereby reducing the likelihood of appeal.

Increasing digitalisation and the coalescence of LJAs have reduced the need for localisation from a Ministry of Justice (MoJ) perspective. For resource allocation purposes, it makes sense for justice to be dispensed from anywhere. Politics and administration are still local, however, and demographics and crime patterns differ. More responsibility is being devolved to local councils, so there needs to be a link between what local resident populations want and pay for, and the justice system's role in delivering it.

The role of magistrates in local justice now

Historically, when magistrates were appointed to a relatively small LJA on the basis of employment or residence, the link of an individual to the locality was clear. Tension has always existed between being local and remaining independent, but the risks have been mitigated by magistrates declaring an interest when they know the person(s) involved in a case. This is more of a problem for teachers and local tradesmen;

⁰⁹ https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf

some conflicted occupations such as police officer or local council employee are sensibly prohibited.

What doesn't make sense, however, is the removal of community links for reasons of risk assessment without replacing them with something that fulfils the same purpose, and in which magistrates can continue to engage. This is particularly pertinent given the possibility of abolishing LJAs in favour of a single justice area for the country, allowing magistrates to sit anywhere

So is 'local' now about society rather than individuals: understanding the prevalence of different types of crime, and the effect they have on a community?

Being active in a CSP could help, but magistrates are no longer permitted to be involved. CSPs are a statutory partnership of organisations that work together to create strategies to reduce crime and disorder in their local area. There are about 300 CSPs in England and 22 in Wales, each made up of representatives from the police, local authorities, fire and rescue authorities, the health service, and the probation service.¹⁰ These 'responsible authorities' work together to protect their local communities from crime and to help people feel safer; they work out how to deal with local issues like anti-social behaviour, drug or alcohol misuse, and reoffending. CSPs also work with PCCs.

The CSP strategic plan identifies prevalent crimes, some of which may appear to be low-level but have a high nuisance value, and focusses resources on prevention. CSP-identified priorities at an individual case level can be communicated to the courts via a community impact statement prepared by the police. Such a statement has a number of possible uses, but it can support a charging decision and provide local context when sentencing decisions are made.

Attendance at a CSP would be a cheap and effective way to show that magistrates are interested in their local communities. Magistrates were actively encouraged to send a representative to the predecessor bodies, crime and disorder reduction partnerships (CDRPs), to act as a conduit for information to the bench, but some attended in a different capacity. Examples of their expertise included drug rehabilitation, and setting up a food bank to address food poverty and reduce acquisitive crime.

Magistrates are very often engaged citizens who carry out several roles in their communities, some of which predate their appointment. On retirement, many volunteer with local charities or other third sector organisations. Even if being a magistrate was not the reason for joining a CDRP or CSP at the time, any views expressed could be, and have demonstrably been, considered to represent the views of the magistracy. Alternatively, (perhaps because of the lack of a compelling argument against) the perception caused by their absence hasn't been that magistrates are keen to preserve their independence, but that they have become increasingly remote and out of touch with local needs.

An unintended consequence is likely to be disruption of the link between local crime reduction initiatives and the bench. For example, against the wishes of the city council, the local bench is no longer represented on the Cambridge City CSP upon advice given to the council leader from a presiding judge. This type of binary decision-making was on false pretences; although expressed in terms that suggests it was to protect the interests of an individual magistrate involved in trying a case, it actually reflected a lack of trust in the capacity of magistrates to behave appropriately when not under close scrutiny.

¹⁰ <https://www.gov.uk/government/publications/2010-to-2015-government-policy-crime-prevention/2010-to-2015-government-policy-crime-prevention#appendix-4-community-safety-partnerships>

At the time, a compromise was reached allowing the bench chair with a legal adviser as 'minder' to attend the annual strategy meeting of the CSP to hear the setting of priorities for the year ahead, but not to participate in proceedings. Now that the bench chair has changed, even this limited role has been allowed to lapse quietly; five local CSPs have been left feeling that the magistracy has no interest in local issues, yet still can't understand why.

What is the direction of travel?

There are signs that these existing and emerging dilemmas are being recognised. Giving oral evidence to the Commons justice select committee on the future of the magistracy in 2016¹¹, the then chief magistrate, Howard Riddle, said, apropos the independence of magistrates:

We are looking at whether there is any justification for a difference between the rules for the magistracy and for the full-time professional judiciary. It is subtle.

Illustrating this subtlety, at the same committee session, the senior presiding judge and leader of the digital reform programme, Lord Justice Fulford, said:

At the moment, they can sit on or participate in a wide variety of different organisations, including crime prevention panels, the family mediation service, independent monitoring boards, local children's safeguarding boards, and the Parole Board – the list goes on and on.

But how many people would understand the difference between a CSP (from which magistrates are excluded) and a crime prevention panel, or be

able to identify the difference between Resolution and the family mediations service? Is this proposed distinction in the rules useless to the general public as an indicator of independence?

In conclusion, chapter 4.1 of the judicial conduct guide says:

As a general proposition, judges are entitled to exercise the rights and freedoms available to all citizens. While appointment to judicial office brings with it limitations on the private and public conduct of a judge, there is a public interest in judges participating, insofar as their office permits, in the life and affairs of the community.

The double standards for magistrates and judges cannot help to bring this about.

¹¹ <http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-2015/magistracy-evidence-16-17/>

The slow strangling of the magistracy

Anonymous magistrate

Slowly the noose is being tightened around the magistracy; while not drawing its last breath, it is gasping for air. I analyse how this tightening is happening in order to further reduce magistrates' independence.

Magistrates should be appointed for their common sense but this approach has gone out of fashion when defining the ideal characteristics you are looking for when appointing magistrates. It has been replaced by a multitude of so-called competences such as commitment, sound judgement, and social reliability, all of which effectively mean common sense. The appointment process has become so complex and time consuming, that it discourages many people from applying such as those who are employed and/or from an ethnic minority.

A magistrate's main strength must be to make sensible decisions within the confines of the law. To achieve this, they must ensure they are a judge, but also an ordinary citizen by effectively representing the community they're from and understand. This is something the fee-paid judiciary can never do as part of their own 'judges circle' community.

Let me give you an example of a common sense decision. Imagine a 12-year-old boy who was appearing in a youth court charged with breaking a broom at the local care home where he lives. He did so in a fit of temper as a result of being punished for some minor misdemeanour. It was the third care home he had been placed in within three months and he had no previous convictions. The bench had previously experienced many other cases of this type coming from this particular care home. He was clearly a difficult lad but was he a criminal? The bench said the case should never have seen the light of day and his behaviour should have been dealt with by the care home and not brought to the court. They also

expressed the view that the care home should invest more money in dealing with the behavioural difficulties of vulnerable children. Their decision was an absolute discharge – they used their common sense.

But using this common sense, and expressing it openly, can sometimes bring you into conflict with the grey edges of the rules. When this happens, magistrates can be disciplined openly and/or the system is changed so that, if magistrates repeat the same action, they will break the rules in the future. For example, some magistrates started blogs but they became watered-down after the senior judiciary became concerned at the damaging impact they might have on the judiciary.

This leads me onto another example of magistrates being 'gagged'. Historically, when magistrates have left their role, they were given a presentation and made a farewell speech in open court in front of crown prosecutors, defence lawyers, probation officers, the public, and the press. Alas, this is no longer a regular occurrence. Civil servants stopped this because they did not want local people hearing what their representatives thought of the justice system. This farewell is now done behind closed doors and consequently nobody can come to listen.

The current discipline procedure appears designed to reduce our independence and does not work for two reasons. Firstly, the rules are too restrictive. I have often been critical of the prosecution and the defence, and thankfully local journalists have reported on my comments in the local newspaper. A magistrate has the power to say and do what they like within the confines of the court, provided they keep within the law. The care home case mentioned above was duly reported in the local paper, and the reporting led to a change in practice. But this was

some 15 years ago and now I would expect to be disciplined under some new rule – possibly the one about first clearing with the bench chairman anything you say in open court. Today, few reporters are in court and instead, understandably, rely more on social media for stories.

Secondly, the system does not work because of the discipline process. I know of many examples where the person hearing the matter knows one of the individuals who brought the complaint very well, which has ultimately led to the discipline hearing. Discipline matters must be taken out of the hands of the judiciary and put in the hands of an independent body.

Having worked extremely well over many centuries, the magistracy does not now fit well with current civil servants or the higher judiciary; over the years, magistrates taking on roles such as the chair of probation boards have become almost non-existent. Nowadays, senior judges pour over endless law books and precedents to reach their court decisions but yet, when they are out of court, make other decisions on a whim with no clear evidence. An example was when magistrates were forbidden from applying to become PCCs unless they took leave of absence.

I would suggest that these tight rules and the threat of discipline are a further reason that there are few volunteers from ethnic minority communities or those in employment. They do not want to be bound by endless rules they do not understand and which are administered for the wellbeing of those that are responsible for them.

My many years of experience as a magistrate has given me insight as to what is needed to move the magistracy forward and release the noose. It can only function through the respect it is given by the people

it serves. The justice system needs to regain the respect of those that work within it and also of the local community. This respect is the backbone of the magistrates' court and is easily lost but virtually impossible to regain.

Magistrates must have the centralised civil service shackles removed and be allowed to administer the law locally again, using common sense and without the fear of poor and biased discipline procedures. The senior judiciary should support magistrates to retain their independence instead of looking down from their ivory towers and occasionally throwing them crumbs off of their learned table. Step back everyone and allow the magistracy to get on with the job they have been doing successfully for 650 years.

Part II: Speaking out

What is 'unjudicial' conduct?

Bernard Hunter

My own interest in the subject of judicial independence started in May 2015. A month earlier the government had introduced the criminal courts charge in the Criminal Justice and Courts Act 2015; it placed a mandatory duty on the justice secretary to charge convicted offenders to help cover 'relevant court costs' of the proceedings. After being a magistrate for twelve years and a bench chairman for eight, I decided that in conscience I could not take any part in imposing the charge.

That was not an easy decision given the huge satisfaction I had derived from my role. I tried to engage the Magistrates Association in the matter, but there seemed to be far too little fuss being made of this issue by them or anyone else, so I decided to resign as a magistrate. But in doing so, I wanted to find a way of drawing public attention to this shocking legislation. I arranged leave of absence and then resigned on-air on Radio 4's *Law in Action* in November 2015.¹² That interview was well received by many.

Soon thereafter, the justice select committee produced an excoriating review of the charge¹³, and the then Lord Chancellor and justice secretary, Michael Gove, quickly removed it, so that it was no longer applicable from 24 December 2015.¹⁴

I was very well aware that the authorities would not be pleased with my action – even I am not sure if I should be allowed to act in that way as a sitting magistrate. However, I reasoned that, in a civilised society, such an intervention should be possible, so I sought to have the issue aired by withdrawing my on-air resignation, thus triggering a disciplinary process.

That was a frustrating experience because the issue never did get properly considered.

A conduct panel, and then a disciplinary panel, and then the Lord Chief Justice and Lord Chancellor, found that I had 'failed to act judicially'. They deemed that the proper sanction was to remove me from the bench, which happened in November 2016.¹⁵

But none of the above has explained what acting 'unjudicially' means, and it appears not to be defined anywhere. Nor have they explained how I 'undermined the authority and impartiality of the court' – the phrase the disciplinary panel used to explain why article 10 [freedom of expression] of the Human Right Act 1998 did not apply to this situation.

Given the lack of clarity and the subjective nature of their conclusions, and especially as I contended that I did not act unjudicially, natural justice, normal judicial procedures and the rules should require that I be given a proper explanation. I have appealed to the judicial appointments and conduct ombudsman on the basis that proper process has not been followed because of that omission. I await their response but am not expecting a helpful one.

The central contention of the authorities throughout has been that the giving of the interview was 'unjudicial'. An important principle is at stake here, so they must be made to explain why my action was 'unjudicial'. It is not enough that the MoJ does not like it – it undermined the judiciary with its charge in the first place.

Nor is it enough to say that it might encourage others – magistrates are responsible people, and each case must be judged on its own merits. Are teachers sacked for complaining about curriculum legislation?

The explanations I seek are no mere technicality. There is no evidence that I have done any harm to the judiciary, and indeed have probably enhanced

¹² <http://www.bbc.co.uk/programmes/b06np61n#play>

¹³ <https://www.publications.parliament.uk/pa/cm201516/cmselect/cmjust/586/586.pdf>

¹⁴ <https://www.gov.uk/government/speeches/courts>

¹⁵ <https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1xuw6pgd2b1rf/uploads/2016/11/Mr-Bernard-Hunter-JP-JCIO-Investigation-statement-3916.pdf>

its reputation in the face of the damage done to it by the charge. There has been no suggestion that I undermined my own standing as a magistrate, prejudiced my ability to fulfil my obligations with fairness and impartiality, or that the public think any the less of magistrates in general.

The Media guidance for the judiciary¹⁶ makes clear that magistrates and judges speaking out, especially on any 'political' issue, is frowned upon, and it urges the involvement of the judicial press office for advice and guidance. It is only 'guidance' though and nowhere is there a prohibition or a 'must' – always 'should'. Indeed, the introduction states that it should be left to judges themselves to decide whether, and on what conditions, they should give interviews to journalists or appear on radio or television. I did not seek advice on whether to be interviewed because I would have been told not to be interviewed. I would have felt bound to ignore that, so asking was pointless.

In summary, I contend that it can be correct, and indeed judicial in some exceptional circumstances, for a judge or magistrate to speak out in measured tones about existing legislation. The need for such action would be much reduced if there were effective alternative channels, but there are not. In essence, the authorities say that it is always wrong to engage publicly with anything 'political', but are not prepared to explain why, beyond a vague notion of it being 'unjudicial'.

¹⁶ <http://www.transformjustice.org.uk/wp-content/uploads/2017/07/media2014-august-2014.pdf>

Lessons to be learned: Sir Paul Coleridge

Rob Allen

When judges are appointed, they swear an oath or affirmation to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will. Is this sufficient to ensure their independence and impartiality or should limits be placed on their activities outside court? And if so, how should these be policed? A recent case sheds some important light on these difficult questions.

In 2012, High Court judge Sir Paul Coleridge set up the Marriage Foundation, a charity that aims *'to confront the scourge of family breakdown by championing long-lasting, stable relationships within marriage'*. Recognising perhaps that fronting a campaign was unusual for a serving judge, Sir Paul, who had spent 14 years in the Family Division of the High Court told the BBC's *Today* programme that *'there comes a time when you have to speak out in circumstances where you feel you know more than anybody involved in the debate'*. If the judiciary remained quiet, he continued, *'it is like doctors who see epidemics going through their surgeries and say "We can't make a comment on that because it might be said to be commenting on the way people are living."*¹⁷

Despite the presence of the great and the good of the legal establishment at the launch of his foundation at Middle Temple Hall on 1 May 2012, not everyone backed Sir Paul's views or his involvement in the campaign. Sir Paul's claims in 2008, for example, that the collapse of the family unit was as big a threat to our society as terrorism, crime, drugs, or global warming, were sensationalist and his attack on the neglect of the issue by successive governments verged on the political.¹⁸ Even right wing think tank Civitas was reported as saying that *'it is very important where you've got a judge who is making decisions about families that they are not clouded by a particular view.'*¹⁹

Sir Paul's campaigning activities did not sit well with the judicial conduct guide. The guide, which draws heavily on the United Nation's Bangalore Principles of Judicial Conduct²⁰, is not binding. It is *'intended to offer assistance to judges on issues... and to set up principles from which judges can make their own decisions and so maintain their judicial independence'*. However, it contains several principles that any involvement in campaigning may breach.

In chapter eight, the guide states that participation in public debate should not cause the public to associate the judge with a particular organisation, group, or cause. The participation should not be in circumstances which may give rise to a perception of partiality towards the organisation, group, or cause involved, or to a lack of even handedness.

The guide also endorses the concern of the Bangalore principles that a judge *'shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else,'* recommending that care be taken in considering whether a judge's name and title should be associated with an appeal for funds, even for a charitable organisation.

Perhaps the most important reason for judges to steer clear of campaigning, is the risk that what they say about issues out of court may make them look biased when dealing with the very same issues in court. Chapter 3.10 reads:

If a judge is known to hold strong views on topics relevant to issues in the case, by reason of public statements or other expression of opinion on such topics, possible disqualification of the judge may have to be addressed, whether or not the matter is raised by the parties.

¹⁷ <http://www.marriagefoundation.org.uk/coleridge-interviewed-on-today-programme/>

¹⁸ <http://www.standard.co.uk/news/family-life-is-in-meltdown-judge-launches-devastating-attack-on-our-fractured-society-6665487.html>

¹⁹ http://www.huffingtonpost.co.uk/2012/04/30/sir-paul-coleridge-divorce-high-court-judge-marriage-foundation-hello-magazine_n_1463570.html

²⁰ https://www.un.org/ruleoflaw/files/Bangalore_principles.pdf

In this case, how could Sir Paul retain – and be seen to retain – an impartial approach to decisions about divorce and family matters if he is heading a campaign to promote marriage and sees divorce and cohabiting as socially undesirable, or worse?

It's not only the guide that sets expectations on judges. The terms and conditions of their employment place a more basic obligation on them. They state that 'High Court Judges should not in any capacity engage in any activity which might undermine, or be reasonably thought to undermine their judicial independence or impartiality.' As well as foregoing political activity, judges must be 'on their guard against circumstances arising in which their involvement in any outside activity might be seen to cast doubt on their judicial impartiality or conflict with their judicial office.'²¹

In December 2012, following a complaint I made, Sir Paul's involvement with the Marriage Foundation was found by the Lord Chancellor and president of the Queen's Bench Division of the High Court not to be incompatible with his role as a High Court judge; Coleridge agreed, however, that a lower profile role within the organisation would be more appropriate for a serving judicial office holder.²²

Within a month, Coleridge in an interview with *The Times*, attacked the government's gay marriage plans as the 'wrong policy' and accused ministers of wasting effort on an issue that affects '0.1 per cent' of the population.²³ His remarks were criticised as troubling and inappropriate by lawyers and a former minister.²⁴ Seven months later, he wrote a comment piece in *The Telegraph* criticising research by the Institute for Fiscal Studies.²⁵

At the end of 2013, Coleridge announced he would step down early from the judiciary, blaming a lack

of support from his colleagues for his stance. In an interview with the *Tablet*, he said that 'he could have continued in his role for several more years had it not been for this [lack of support]'.²⁶ A few weeks later, the Lord Chancellor and the Lord Chief Justice considered Coleridge's decisions to give *The Times* interview and to write in *The Telegraph* article had amounted to judicial misconduct.²⁷

So what are we to make of this? First, public campaigning for changes in social policy are probably incompatible with being a judge. It is even more difficult when the subject of the campaign is at the heart of many of the cases on which the judge will be required to pronounce. Coleridge was naïve to think otherwise and the Lord Chancellor and president of the Queen's Bench Division remiss not to see that when a complaint was first made in 2012.

Second, there is a lack of clarity about the status of the judicial conduct guide. It says it is written to assist judges, but this surely cannot mean that it remains up to an individual judge to decide whether their own conduct is appropriate. The role of the guide in defining judicial misconduct in disciplinary proceedings seems uncertain and should be made clearer. As the preamble to the Bangalore principles says, 'public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.'²⁸

Finally, judges, even when judging each other, do not like their decisions to be flouted. Flagrant disregard for his agreement to take a lower profile made Coleridge's position untenable. He announced he would take early retirement before the second disciplinary inquiry into him was complete. While it only handed him a formal warning, he had lost the support of his colleagues, many of whom had helped

21 https://jac.judiciary.gov.uk/sites/default/files/sync/basic_page/00924_terms_and_conditions.pdf

22 <https://www.judiciary.gov.uk/announcements/ojc-statement-justice-coleridge/>

23 <http://www.thetimes.co.uk/tto/news/politics/article3640662.ece>

24 <http://www.thetimes.co.uk/tto/news/politics/article3640912.ece>

25 <http://www.telegraph.co.uk/comment/10200945/Sir-Paul-Coleridge-IFS-report-on-marriage-misses-the-point.html>

26 <http://www.telegraph.co.uk/news/uknews/law-and-order/10485276/Judge-Sir-Paul-Coleridge-quit-because-of-lack-of-support-over-marriage-stance.html>

27 <http://www.telegraph.co.uk/news/politics/10523138/Judge-Sir-Paul-Coleridge-disciplined-for-stating-views-on-traditional-marriage.html>

28 Op.cit., n.20

him launch the foundation just eighteen months earlier. The judiciary may be able to cope with a maverick – but not one who wilfully ignores the rulings of its elders.

A tale of two constitutional duties: Liz Truss, Lady Hale, and *Miller*

Professor Graham Gee, Judicial Power Project

The importance of the High Court's judgment in *Miller*²⁹, and the intensity of the reactions that it provoked, can be seen in the separate controversies over Liz Truss and Lady Hale. In this essay, I reflect on the two controversies in order to highlight a striking asymmetry in the legal community's overreaction to the first controversy and its muted under-reaction to the second.

In the aftermath of the ruling, the then Lord Chancellor, Liz Truss, was roundly criticized by politicians and the legal community for taking too long (48 hours) to issue a public statement following media criticism of the High Court judges and then issuing a mealy-mouthed public statement affirming the importance of judicial independence.³⁰ Some even speculated that the Lord Chancellor failed to discharge her duty under section 3 of the Constitutional Reform Act 2005 to '**uphold the continued independence of the judiciary**'.³¹ The former Lord Chief Justice, Lord Judge, suggested that Truss had acted unlawfully³², whilst the former Lord Chancellor, Lord Falconer, was one of several voices calling on her to resign³³.

There were several assumptions underlying the criticisms of Truss: (i) there was a clear need to defend judicial independence; (ii) this need triggered the s3 duty on the Lord Chancellor; (iii) vindicating this duty required the Lord Chancellor to issue a public statement; (iv) this statement had to be made within hours of the hostile press coverage of the High Court; and (v) only the Lord Chancellor was able to take effective action to defend the High Court, and in particular the judiciary was unable to take steps to defend itself. As I see it, each assumption is questionable, albeit to varying degrees, with the dubiousness of the assumptions increasing from (i) to (v).

Did the press coverage represent a clear challenge to judicial independence sufficient to trigger Truss's section 3 duty? And, if so, what was the precise nature of that challenge? The challenge was presumably not specific. There were plainly no challenges to the traditional indicia of judicial independence (security of tenure, stable and reasonable remuneration, wmerit-based appointments, etc). And nor was there any credible reason to worry that the coverage would influence individual judges.

The challenge was more likely to be diffuse: press coverage might contribute to an erosion of public confidence in the judiciary, a concern especially pertinent at a time of seemingly heightened public distrust of national institutions. Whether isolated press coverage represents a diffuse challenge to the independence of the judiciary seems more arguable than many of Truss's critics concede.

There is, for a start, interesting research from the United States that suggests over-the-top criticism of the judiciary can actually buttress public support for judicial independence. I also agree with Joshua Rozenberg's take that '**far from striking a chord with its readers, the Daily Mail's coverage – which initially included an online reference to the master of the rolls as an 'openly gay ex-Olympic fencer' – showed how out-of-touch it has become**'.³⁴ At risk of being forgotten is that Liz Truss did actually issue a press statement within 48 hours of *Miller* affirming the importance of judicial independence, and later wrote a letter to *The Times* in similar terms. Lord Judge complained that Liz Truss's statement was '**much too late and too little**'.³⁵

If the concern is that the coverage represents a diffuse challenge to judicial independence, then little perhaps turns on the length of time that it took Truss to issue a statement. What seems to have driven

29 <https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union-accessible/>

30 <http://www.independent.co.uk/news/uk/politics/liz-truss-brexit-ruling-high-court-judges-criticised-a7399586.html>

31 <http://www.legislation.gov.uk/ukpga/2005/4/section/3>

32 <http://www.independent.co.uk/news/uk/politics/liz-truss-broken-law-failing-defend-brexit-judges-warns-former-lord-chief-justice-igor-article-50-a7426511.html>

33 <http://www.thetimes.co.uk/article/justice-secretary-must-quit-for-failing-judges-says-ex-law-chief-lxdrbr2ll>

34 <https://www.lawgazette.co.uk/comment-and-opinion/truss-and-judges-power-and-responsibility/5058856.article>

35 <https://www.thetimes.co.uk/article/a-great-british-asset-judges-who-wont-be-bribed-or-told-what-to-do-6gf9dk9sh>

much of the criticism of Truss is that she should have acted much more vigorously and much more quickly because the judges cannot speak out on their own behalf. Here again I take a different view.

Contrary to what Lord Judge has said, there is fairly broad agreement that one consequence of the 2005 reforms is that today's judiciary has a much greater responsibility to defend their own independence. The judges have ample means to do so, including:

- (a) an intervention by a senior judge
- (b) a 'media panel' of judges who are trained to speak publicly on controversial issues of public salience
- (c) the Judicial Press Office can pro-actively engage with the media in ways akin to the Supreme Court's communication team
- (d) a retired senior judge such as Lord Judge or Lord Woolf could be a 'proxy' available to the media on both the day the judgment was released, and the few days after
- (e) the Lord Chief Justice can raise the press coverage in the occasional meetings that he has with newspaper editors

For better or worse, the basic point of the 2005 Act was in effect to standardise the office of the Lord Chancellor so that he or she would take a governmental line on matters relating to the judicial system. For all of the references to the separation of powers, the essential motivation behind the 2005 reforms was to mould the role of Lord Chancellor into one better able to deliver on government policy priorities. Part and parcel of this was the 2005 Act stripping the office of the attributes that previously

made its occupants well positioned to defend the independence of the judiciary (i.e. the requirement to be legally qualified, sitting in the House of Lords, with the person appointed to the role typically in the twilight of their professional career).

This does not mean that Lord Chancellors cannot defend judicial independence; they can and do. But it does mean that there will be limits on the ability of the officeholder to serve as an effective guardian of judicial independence. And at the end of the day, post-2005 Lord Chancellors will tend to be more reactive than pro-active, doing the right thing, only after exhausting all the other possibilities.

It is striking to contrast the hyper-critical reaction of the legal community to how Truss approached her section 3 duty with the overwhelmingly muted reaction to Lady Hale's comments on *Miller* in a lecture to law students in Malaysia in November 2016.³⁶

Around 600 words of the speech were devoted to the article 50 litigation. Most of these words are devoted to a short and accessible summary of the main legal issues, with Lady Hale taking care to outline the primary arguments of each side. However, she ventured beyond a mere summary of the legal questions argued before the High Court, when she said 'another question is whether it would be enough for a simple Act of Parliament to authorise the government to give notice [under article 50], or whether it would have to be a comprehensive replacement for the 1972 Act'. This question formed no part of: (a) the High Court's judgment, (b) the skeleton arguments of the two leading claimants; (c) the relief sought by the claimants; or (d) oral argument before the High Court, except indirectly.

Lady Hale should not have raised this question, and exhibited poor judgement in doing so. A basic

³⁶ <https://www.supremecourt.uk/docs/speech-161109.pdf>

constitutional duty imposed on all judges – but especially applicable to judges in top courts – is to take considerable care and exhibit due caution if proposing to discuss an issue that might subsequently come before their court. Judges ‘are human beings, not robots’, as Lord Hope has remarked, and ‘it is not always easy to know when the line between what is acceptable...and what is not is being crossed’.³⁷

This is not an occasion where it is difficult to know if the line was crossed; unfortunately, it was. Indeed, it is important to emphasise how awry Lady Hale’s judgement was on this matter. This was not an inexperienced judge commenting on a case that may or may not have come before them at some unknown juncture. This was a very experienced judge publicly commenting on probably the most high profile and portentous case to come before the UK’s top court. She did so knowing that the case would be appealed to the Supreme Court, and that all 11 of the justices would hear the case within a matter of weeks.

In a press release defending Lady Hale, the Supreme Court conceded that Lady Hale raised a question that was not before the High Court.³⁸ It characterised the question of whether a comprehensive statute is required to give notice under article 50 as ‘not a new issue’ due to the fact that ‘a number of politicians have raised the same question’. This underscored how far Lady Hale’s comments veered from an impartial summary of the legal arguments before the High Court. There is a tendency for some lawyers to implicitly apply a de minimis threshold to what represented just a few words in Lady Hale’s speech. However, as Matthew Scott noted, ‘anodyne though it appears at first reading, [the question raised by Lady Hale] is in fact politically explosive’.³⁹

Lady Hale suggested in an interview with the *Solicitors Journal* that it would have been ‘discourteous’ to her

Malaysian hosts not to touch on *Miller* in her speech.⁴⁰ A more pertinent consideration might have been to pay appropriate courtesy to the parties in the case, her colleagues on the Supreme Court, and the High Court by not raising an issue that had not been argued in the litigation. For my part, I suspect that Lady Hale’s comments fall short of the recusal test as set out in cases like *Porter v Magill*⁴¹ and *Locabail*⁴². I doubt that a fair-minded and informed observer, after having considered the facts, would conclude that there is a real possibility that Lady Hale is biased.

Last week Lady Hale was promoted to president of the UK Supreme Court, having served as its deputy president since 2013. This promotion reflects, among other things, the many valuable contributions that Lady Hale has made to public life. Arguably, however, the episode in Malaysia could be cited as evidence of a lack of the diplomatic skills, political judgement, and sure-footedness that is essential for the role of president. At the very least, Lady Hale could be said to have shown a shaky grasp of the political and media environment in which top judges now operate if ‘she had not expected her speech to be so quickly picked up by the press or that it would receive such a wave of criticism’.⁴³ This is surprising since Lady Hale has been in the UK’s highest court for 13 years, and is very familiar with the constitutional duty that judges must exhibit due caution when talking about legal issues that may come before them.

My suggestion, then, is that Liz Truss’s failings were arguable and not manifest, while Lady Hale’s were unarguable and manifest. There might, then, be scope for legitimate criticism of both. What is striking is to compare how few lawyers thought Lady Hale’s comments worthy of public criticism, yet so many seemed keen to criticise Liz Truss in the days after the High Court’s judgment.

37 <http://www.birmingham.ac.uk/Documents/college-artslaw/law/holdsworth-address/holdsworth09-10-hope.pdf>

38 <https://www.supremecourt.uk/news/lady-hales-lecture-the-supreme-court-guardian-of-the-constitution.html>

39 <http://www.telegraph.co.uk/news/2016/11/17/after-discussing-brexit-potential-legal-hitches-lady-hale-may-b/>

40 <https://www.solicitorsjournal.com/news/201611/exclusive-lady-hale-will-%E2%80%99>

41 *Porter v Magill* [2002] 2 AC 357

42 *Locabail (UK) Ltd v Bayfield Properties Ltd and Another* [2000] 2 WLR 870

43 *Op. cit.*, n.40

The legal community seemed to jump to the defence of Lady Hale, but jumped on Liz Truss. I acknowledge that the legal community has a special obligation to defend judicial independence. But might one not have expected those who were so quick to criticise Truss to be equally fastidious in criticising Lady Hale. This asymmetry does not reflect well on the legal community. Not only does it risk improperly insulating senior judges from legitimate criticism, it also exposes the dominant legal mindset as tending to run in one direction: 'judges good, politicians bad'.

**This article was first published on Policy Exchange's Judicial Power Project website in November 2016 and has been updated for this report with kind permission from the author.*

Part III: Regaining judicial independence

Judicial independence, the criminal justice system, and community engagement

Phil Bowen

With rising levels of domestic⁴⁴ and sexual abuse⁴⁵, violence⁴⁶, and unrest⁴⁷ in our prisons, and where far too many ethnic minority citizens are behind bars⁴⁸, it begs the question: what is at the heart of such a troubled criminal justice system?

'Communities are at the heart of the criminal justice system and we need to make sure that national laws and national priorities can be delivered at a local level – and that national priorities are informed by, and can respond to, the needs of local communities.'⁴⁹ These are the words of the MoJ at its most ponderous and technocratic. Herein lies a sentiment that magistrates of yesteryear would have received with as little sense of astonishment as if they had been told that England's middle order had collapsed before lunch.

Of course, back in those 'good old days', benches sentenced people to custody at wildly different rates, administration of justice was a cosy and local afterthought, and there was more than a touch of quill pen and dusty rooms to the reality of our local justice system.

And yet, in a time of court closures, of merging magistrate benches, of national contracts for private probation companies, questioning whether that sentiment is really true these days is a much more lethal question. Can we really put any faith in the idea that communities are at the heart of our justice system now?

Our magistrates are the justice system's most visible commitment to communities, and many of them speak with fondness of a time when, despite all its stuffy drawbacks, they knew their patch. Now, many reflect on the loss of a world where the magistracy and communities connected.

We now find ourselves in a place where our justice system has retreated from the communities it serves, dragging the judiciary back with it. Within that context, can we really blame the judiciary for retreating alongside the rest of the justice system, sitting safely behind the bench, its independence intact? In that world, what prospect is there for a system where 'communities are at the heart of the criminal justice system' and where the judiciary plays a significant role in realising that?

In 2015, the Lord Chief Justice said:

The judiciary must reflect society to maintain legitimacy: The maxim, "justice should not only be done, but must also be seen to be done," is ordinarily taken to require transparency, impartiality, fairness, and propriety. But in a broader sense, it must also encompass the principle that the public needs to have confidence in the judiciary that serves it, so as to strengthen the legitimacy of the judicial process.⁵⁰

So how can the judiciary re-engage with communities and re-assert the legitimacy of the judicial process, while keeping its independence intact? There are a number of opportunities. Perhaps the most crucial lies in redrawing of the role and shape of our magistracy. As a recent justice select committee report stated:

It is unfortunate that the government's evident goodwill towards the magistracy has not yet been translated into any meaningful strategy for supporting and developing it within a changing criminal justice system.⁵¹

That dilly-dallying must end, and end positively. Instead of the slow casual and neglectful erosion of the ethos and traditions of our magistracy, there

44 <https://www.justiceinspectorates.gov.uk/hmic/wp-content/uploads/increasingly-everyones-business-domestic-abuse-progress-report.pdf>

45 <http://www.telegraph.co.uk/news/2016/09/05/violent-crimes-against-women-in-england-and-wales-rise-by-10-in/>

46 <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/summer%202016%20briefing.pdf>

47 <http://www.telegraph.co.uk/news/2016/12/16/prison-riot-breaks-hmp-birmingham/>

48 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/568680/bame-disproportionality-in-the-cjs.pdf

49 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/209659/transforming-cjs-2013.pdf

50 <https://www.judiciary.gov.uk/wp-content/uploads/2015/09/speech-lcj-judicial-independence-in-a-changing-constitutional-landscape.pdf>

51 <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/165/165.pdf>

could be many new roles that magistrates can take up, as well as continuing to exercise their role in courts. These span the whole of the criminal justice system from the point of arrest to the end of sentence.

These roles could include developing new approaches to resolving low-level disputes through community resolutions, before cases come to court. This could lead to having magistrates trained in restorative justice, and volunteering to sit on community resolution panels, based on the work they have done in scrutinising out of court disposals. It could include holding offenders to account in the community post-sentence. Magistrates could hold the regular accountability reviews required for out of court disposals, in civic buildings. These hearings would be designed to motivate and monitor offenders, and would also help the magistracy gather useful feedback about the operation of community sentences in their area.

None of this should be a challenge to judicial independence – indeed, part of the reason these new roles are especially suited to the magistracy is that they would demand independence from the executive agencies of the state. They would need to be underpinned by a commitment to training and skills, and new recruitment that emphasises the lay judiciary’s role in court as a well-spring for procedural fairness. But they would be much more a reassertion of the magistracy as the principle expressions of the role that an independent judiciary can play in community engagement, rather than a revolution.

Hand in hand with a revitalised magistracy, efforts to re-engage with communities must overcome the temptation to see the present retreat from old-style local courthouses as the retreat of our court system

out of some of our communities entirely. Instead, as law reform group JUSTICE has pointed out in its report, *What is a Court?*, by reconceptualising ‘court and tribunal rooms as “justice spaces”,’ they envisage a court and tribunal estate made up of a number of responsive and flexible parts, including ‘“Pop-up” courts... which draw on the flexibility of the justice space model to employ a range of public buildings as simple and standard justice spaces on an ad hoc basis.’⁵²

In other words, just because there aren’t dedicated court buildings, this shouldn’t mean that there are no local courts. Instead, we can re-imagine the experience of attending court in our towns and villages, and see court closures as a liberating opportunity to put the judicial process back closer to communities.

Lastly, and perhaps most controversially, we must ensure that the adoption of new technology is seen as an opportunity to better serve communities of need, previously ill served by our courts, and not see online processes as yet a further step back from communities. As the Lord Chief Justice said in 2016 in response to questions from the justice select committee on online court systems, ‘the quality of justice must be enhanced by reform and not diminished. If it is diminishing, then we have gone wrong’.⁵³ In making the judicial process a more online system, we have the opportunity to spread legal expertise and local community advice and support, and make it more accessible and more affordable than ever before.⁵⁴

With the investment promised to deliver the reforms, we must ensure that the online systems we build increase access to justice, especially for some of the most vulnerable in our society. For example, current proposed online conviction processes are

52 <https://justice.org.uk/wp-content/uploads/2016/05/JUSTICE-What-is-a-Court-Report-2016.pdf>

53 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/lord-chief-justice-annual-report-2016/oral/43679.html>

54 Richard & Daniel Susskind (2015) *The Future of the Professions* (Oxford University Press)

likely to include a high number of defendants with vulnerabilities including mental illness, addiction, and learning difficulties.

Therefore, we should provide online advice to accompany the online resolution process, in partnership with established advice providers, which have strong local links and experience of working with vulnerable groups. In order to reduce reoffending, the provision of assisted digital support should offer referral to support services for vulnerable clients, as is already provided by those courts with liaison and diversion services and community advice and support services.

By rethinking how the court connects with communities, with a reform-minded judiciary leading the charge, we can again sow the seeds of a court system and judiciary that would be coming back into communities, its independence not just intact but enhanced, its legitimacy renewed. The realities of austerity may mean that we can't have a local court in every town, and maybe not even the magistracy as we used to know it. But that should not stop us thinking about how justice connects back up with the lives of our citizens.

Seeking judicial independence through greater diversity

Penelope Gibbs and Matthew Rogers

Earlier this year, Peter Herbert, the part-time judge and chair of the Society of Black Lawyers, came before a disciplinary panel because he had allegedly suggested 'Racism is alive and well...sometimes in the judiciary', as part of his speech at a rally criticising the Election Commissioner's decision in 2015 to declare Lutfur Rahman's election as mayor of Tower Hamlets void.

In April, Herbert was formally reprimanded by the JCIO after the disciplinary panel found his comments were 'inappropriate and put the reputation of the judiciary at risk, which amounted to misconduct.'⁵⁵ In the same week, Herbert had sent a letter to the Lord Chief Justice, which said:

I fundamentally disagree that what I said posed any risk to the reputation of the judiciary. On the contrary your decision and that of the minister herself [the then Lord Chancellor, Liz Truss], coupled with the actions of the panel combine to leave me in no doubt this is an example of direct race discrimination and victimisation.

According to *The Guardian*, he is suing the MoJ for alleged race discrimination at an employment tribunal.⁵⁶

Herbert voices the unsaid and unsayable from within the establishment and appears to be the only one doing so. Until there are more black, Asian, and minority ethnic (BAME) judges who feel able to speak out, judicial independence will have little meaning to most of society.

Our judges and magistrates do not represent the people they serve and the diversity deficit widens as you go further up the judicial ranks. The 2017 judicial diversity statistics revealed that just seven per cent of court judges and ten per cent of tribunal judges

who declared their ethnicity identified as BAME; the majority of BAME judges sit in the lower courts.⁵⁷ Meanwhile, only 28 per cent of all judges are female. More than half (54 per cent) of magistrates are female, whereas in both the High Court and the Court of Appeal, just one in five judges are female.

Until very recently the Court of Appeal had more judges from just nine top public (fee-paying) schools than judges who went to state schools.⁵⁸ Among the 12 current Supreme Court justices, there is only one woman and none are from a BAME background; only two were not privately educated.

While the senior judiciary is dominated by a narrow social elite, it is unlikely to retain credibility, or to be able to reach out to diverse communities. Maybe the 'enemies of the people' accusation after the High Court's decision in *Miller*⁵⁹ particularly hurt because judges do not represent the people and, to a great extent, keep themselves apart from the people.

Even magistrates, who are supposed to represent ordinary members of the community, do not. Just eleven per cent of magistrates are from BAME communities, a significantly lower proportion than in the population as a whole. In some areas there are no black or Asian magistrates at all. Magistrates tend to be old (average just under 60) and upper middle class.

If the judiciary is to reflect society to maintain its legitimacy, as the Lord Chief Justice, Lord Thomas, advocated in 2015,⁶⁰ then change must happen sooner rather than later. The judiciary may suggest the tide is already turning given the higher numbers of female judges and those from a BAME background who are under 40.⁶¹ Worryingly, however, 39 per cent of BAME judges intend to leave the judiciary in the next five years – none is expected to reach

55 <https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1xuw6pgd2b1rf/uploads/2017/04/Recorder-Donald-Peter-Herbert-OBE-JCIO-Investigation-Statement-1317.pdf>

56 <https://www.theguardian.com/law/2017/apr/06/judge-peter-herbert-disciplined-jcio-speech-racism-judiciary>

57 Op. cit., n. 6

58 Blackwell, M.C. (2012). *Old Boys' Networks, Family Connections and the English Legal Profession*, [2012] Public Law, 426.

59 Op. cit., n. 29

60 Op. cit. n. 50

61 Op. cit. n. 6

retirement age in that time.⁶²

The Judicial Appointments Commission (JAC) is also trying to break down barriers through its diversity strategy.⁶³ The JAC continues to work with the judiciary, MoJ, and legal professional bodies through the Judicial Diversity Forum, which has established a working group to investigate the feasibility of providing pre-application judicial education for prospective candidates.

The JAC also adopts the equal merit provision (EMP), enabling it to select a candidate for the purpose of increasing judicial diversity where two or more candidates are considered to be of equal merit. In 2016-17, 12 recommendations were made using this process.⁶⁴

These are all welcome developments, but as JUSTICE found in its report, increasing judicial diversity, progress has been **'too slow and interventions insufficient'**.⁶⁵ Its main proposal was **'targets with teeth'** for selection committees for every court lacking gender or ethnic diversity. The **'teeth'** would be monitoring, transparency, and reporting obligations on a new Senior Selections Committee, and the current JAC, which would set targets for diversity for each level of the judiciary, reporting on its progress to a parliamentary committee.

JUSTICE said there was an **'unprecedented opportunity'** ahead with the nine Supreme Court justices – all from England and Wales – set to be replaced over the next three years, resulting in further vacancies cascading down the judiciary. **'With such a high number of appointments needing to be made across the senior judiciary, there is a real chance to change the demographic composition of our judiciary rapidly. Should this opportunity not be seized there is a risk that the quality of the judiciary**

may fall and white, male hegemony on the bench will be further entrenched.'

Can an institution so lacking in diversity maintain public trust if it continues to stand in splendid isolation from communities and from the wider criminal justice system? In a recent survey of the paid judiciary, less than half felt valued by the public (43 per cent), and half were concerned by their loss of judicial independence – this loss was felt more among the lower ranks.⁶⁶ Maybe if judges were truly diverse, both in their thinking and their background, they would be more confident about the public's perception of them and readier to let go of some conventional ideas of independence.

62 <https://www.judiciary.gov.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf>

63 <https://jac.judiciary.gov.uk/diversity-strategy>

64 <https://jac.judiciary.gov.uk/equal-merit-provision>

65 <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/04/JUSTICE-Increasing-judicial-diversity-report-2017-web.pdf>

66 Op. cit. n. 62

Judges with budgets: the problem-solving court

Blair Gibbs

The recent High Court ruling in *Miller*⁶⁷, supported by the Supreme Court⁶⁸, is a prominent reminder of the judiciary's independence. Far below the exalted heights of the senior judiciary, hundreds of ordinary criminal courts process cases every day that rely on the same independence of mind exhibited by magistrates, district judges, and recorders. But what if this independence of mind is not enough to make a court effective? What is the value of independent judges if they operate in a system that makes them increasingly dependent on the decisions of others?

A fair criminal justice system needs independent judges to command public confidence but it also needs the sentences passed by those judges to be effective, and too often they are not, because services designed to tackle reoffending are beyond the reach of the court. One innovation – the problem-solving court – provides a solution.

If independence in this context means autonomy, but also implies authority, and with it capability, then traditional judicial actors in English and Welsh criminal courts lack the ability to be truly independent for a number of reasons. Judges now rely less on their individual expertise because sentencing guidelines have ossified into strict rules – limiting their discretion in the name of 'consistency'.

Judges are largely ignorant of the impact of their decisions, as they receive no systematic feedback on sentencing outcomes (even though most professions would value this), making them overly reliant on anecdote, and the unimaginative advice of overstretched probation officers. And judges have become increasingly subject to the financial decisions of others, either within the bureaucracy of the courts system that manages them, or the ecosystem of the wider justice sector and the probation, health, and drug treatment agencies meant to service the court.

Courts today have very poor visibility on the services available in their area, and have little or no feedback on the effectiveness of drug or mental health provision, or even whether the defendant has accessed any of these services before. This lack of oversight, and, ultimately, of ownership of the sentences passed in court, is a serious limitation on developing judicial professionalism, and a key argument for the problem-solving approach.

This situation is partly the result of conservative judicial attitudes, resisting innovations like problem-solving justice or data analytics that would improve judges' decision-making and reveal their biases, and partly it is the centralised system they have come to operate within, which does not exist to liberate or empower the judge – quite the opposite. And many of the constraints that exist on judges today are a product of a centralising trend in the last fifty years that has taken place without much public debate.

For many centuries, judges in England and Wales enjoyed a special status – our constitutional history meant they were fireproofed from political interference and their local roots gave the judiciary a local connection and the financial autonomy to operate their courts and to pass sentences. But as assizes were abolished and the courts were regularised in the mid-twentieth century, the funding and control by the central state increased, local judicial management was eroded, sentencing policy was nationalised, and financial dependence on government grew.

In other sectors, including health, education and, to some degree, policing this political trend did serve to raise standards and improve consistency, but at the cost of eroding local links and stifling innovation, and the same is true in the courts. Today, the post-war tide of treasury-driven public service reform has

67 Op. cit., n. 29

68 <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>

just about reached the courts, and it is bringing much needed investment in new infrastructure and technology. But it has not yet unlocked innovation in how the criminal courts are run.

Whereas the family courts have adjusted to public demands for more transparency and a new emphasis on cutting delays in the interests of the child, there has been no similar revolution in the criminal courts, and no sign that one is imminent. And unlike in policing, major investment and modernisation in our criminal courts is happening without a debate about accountability, or the right role for government in the funding and management of the system.

Localism and the problem-solving court

In the face of this centralising trend that has eroded true judicial independence, stands the localism of problem-solving courts that take power and authority away from administrators of a system and return it to the judge in court. The long-standing appeal of the problem-solving court is that it puts the judge in the driving seat and US judges like Victoria Pratt in Newark, or Alex Calabrese in Brooklyn, are independent in a whole different way as a result.

The Centre for Justice Innovation has documented the strong evidence that exists for problem-solving courts⁶⁹, and they are now an established model in many common law jurisdictions for a minority of criminal cases. Some types of court are more effective than others, but where it exists, the problem-solving model reduces reoffending and has been embraced by the judiciary. The pioneers of this judicial revolution in America have made their courts – institutions like Red Hook in New York – agents of social reform that actively contribute to public safety and community cohesion.

Regrettably, none of these features exist in England and Wales. Our evidence from pilots here is poor because we have trialled them inadequately and in too few places; the evaluation of the flagship pilot in North Liverpool was flawed⁷⁰, so scepticism abounds in Whitehall. This also explains why pilots that were popular locally never sustained themselves because central government funding evaporated when ministerial interest waned.

More fundamentally, many judges have a cultural aversion to the philosophy that a court should take a proactive role beyond the adjudication of guilt, or that a judge should be involved in seeking to tackle offending behaviour by supervising and supporting offenders to change. In England especially, but also elsewhere, there remains much resistance to what some judges have dubbed the 'social worker' role, even in the face of the high reoffending rates that persist from traditional sentencing approaches.

It was only the renewed political interest in problem-solving courts of the former Lord Chancellor and justice secretary, Michael Gove, beginning in 2015, which led civil servants to revisit the operating principles of this type of criminal court, the special function it performs, and the role of the judge within it. In considering how such a court could be made to work, the implications go to a wider debate about the judicial role itself and whether, to be truly independent, never mind effective, judges should be empowered to become budget holders.

The problem with problem-solving courts

Problem-solving courts need access to a range of services to support offenders, most of whom have multiple complex needs that previous court-ordered disposals have not addressed. In England, however,

69 <http://justiceinnovation.org/wp-content/uploads/2016/08/Problem-solving-courts-An-evidence-review.pdf>

70 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217393/liverpool-community-centre.pdf

almost all of these services sit outside of the court and are now funded and commissioned by other central agencies, many with a limited local footprint. Giving these new courts leverage over these services either needs local political leadership from police and crime commissioners to form a coalition of willing sponsors – still an approach that many could and should pursue – or some means of giving the court that role itself.

The obvious risk with new pilots was that they would start out being dependent on many pre-existing contracts that other agencies would have no incentive to adjust to, so as to accommodate the small cohort going through one court. Then the pilot would either win special treatment because it was quickly favoured by local bureaucrats; or it tried to deliver problem-solving within the current arrangements, which were already patchy and inadequate. Therefore, it was critical that new court pilots found a way to plug into local providers, including statutory NHS services, and be given ownership over treatment referrals as part of sentence progression, with clear reports on activity delivered and outcomes achieved. Some degree of financial control for the court would be the clearest way to do that.

The court as a commissioner

The concept is simple: make the judge the budget-holder and, by implication, the court would become the commissioner. Offenders opting into the problem-solving court would constitute a small cohort whose criminogenic and healthcare needs would be met by the services that the court paid for.

Each pilot court would control a bespoke budget for such cases, and would be free to arrange services that matched their caseload. The judge would have

a lever to get services that the court's clients needed as determined by probation, but potentially in future by the court itself if they assumed the pre-sentence report role. The court could then hold not just the offender responsible for attending, but the service providers accountable for their delivery.

The working group established in 2016 by the Lord Chancellor and Lord Chief Justice briefly explored this idea.⁷¹ However, some members objected to judges becoming commissioners of services. The view was that giving judges a budget would take them beyond their role as impartial adjudicators, and would muddy the distinction between independent judge and service provider. However, the discussion arose from a consensus that problem-solving courts are totally reliant on the soft power of the judge to corral other agencies to provide their services to the court. Would this be enough?

In other jurisdictions like Canada, this arrangement is formalised, or made possible pragmatically by having other agency staff seconded to work at the court and therefore under the influence of the judge that they work alongside, even if they are not formally accountable to them. But that fundamental dependency in our criminal court model has never been addressed here.

So the previous pilots were left to rely on charismatic leadership. This can achieve a great deal, and under Judge Baker in St Albans Crown Court, and Judge Fletcher at the original North Liverpool Community Justice Centre, there was this judicial leadership to steer the project and get other agencies to play ball. Where those agencies were not based in the court building – a huge advantage for North Liverpool – they were often within the judge's purview, and felt obligated to provide services to the court's clients, as requested.

⁷¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/499465/tor-problem-solving-courts.pdf

The working group accepted that establishing new problem-solving pilot courts would either need the same serendipitous arrangement of co-located agencies working out of one building (enhancing judicial influence and team spirit) under the leadership of a single, charismatic judge (setting direction and brokering deals), or some other mechanism for binding services into the court so that referrals were predictable and on tap, making treatment and diversion a meaningful part of a sentencing order.

Full co-location in the former scenario was problematic as many courts were closing, and a smaller estate would struggle to accommodate a dedicated pilot court alongside housing a range of other ancillary agencies in the same building. The second approach looked more feasible, but it needed a willingness to trial an innovation like judge-owned budgets. If that reform is ever implemented by the current government, this conundrum needs addressing. Without new budgetary levers, judges in the pilot areas could be left with some of the powers to do problem-solving well, but not all of them.

More flexible sentencing powers but the same poor options around treatment could see offenders sentenced by a problem-solving court avoiding a prison sanction, and still not getting the support to address their offending. This scenario would undermine public confidence in the experiment – something which is necessary if problem-solving justice is ever to take hold in England and Wales as it has in America.

Conclusion

Giving selected judges of these problem-solving courts their own budgets would be a way of properly piloting its potential, and it would also be a move against the centralism of courts that has held sway for too long. Rather than being an independent, but largely passive adjudicator, these courts would be built upon active, authoritative judges who are engaged with the lives of the defendants before them.

Such courts cannot function without independent judicial leadership but neither can they be fully effective in a state as centralised as ours, unless these judges are set free from the constraints of ordinary court administration and given some control of the money. This proposal was a step too far even for those who could adjust to the radical idea that courts should try and fix problems, not just pass verdicts.

Wider judicial scepticism still needs to be overcome, but if the government wants to tackle reoffending and take forward problem-solving justice in England and Wales, the problem of judicial dependence on monolithic public services needs solving.

Conclusion and recommendations

Penelope Gibbs

The interpretation and disciplining of judicial independence are creating the following problems within the judiciary and magistracy and in the outside world:

- Judges and magistrates are now less involved with criminal justice practitioners and agencies than ever before, banned from sitting on or even observing these committees for fear they may be accused of bias in the courtroom.
- Despite a crying need for the judiciary to communicate to the public about their role, most judges are stopped, either actually or culturally, from speaking out. This fuels media and public distrust of the criminal justice system.
- The judiciary disciplinary system is non-transparent and punitive. This exercises a chilling effect on judicial activity and activism.
- There appear to be double standards operating as to what paid judges and magistrates can do, with the latter more strictly policed, despite their greater confidence in dealing with the outside world.
- A lack of diversity in the judiciary is contributing to judges in lower courts and magistrates feeling a loss of judicial independence.
- This invisible straightjacket of rules appear to be contributing to very low morale amongst the paid judiciary and the magistracy.

These are big problems that need big solutions, not simply an exhortation to the Lord Chancellor to defend the independence of the judiciary. The senior judiciary needs to open up a conversation

both within and outside the judiciary to ask whether the price they (and society) are paying for the current interpretation of judicial independence is too high. We all need to discuss what judicial independence means, what the real threats to it are, and whether the current regime is based on an overly cautious risk model.

We need to look around and abroad to see how other jurisdictions that treasure judicial independence manage to interpret it much more freely. In the US, problem-solving court judges chair regular meetings with practitioners in which they discuss in detail the progress of each person going through the court programme. American judges sit on the boards of not-for-profit organisations, which provide services to those serving sentences. Does this do more harm than good or vice versa?

In Romania, judges see it as part of their role to engage with the public; Judge Cristi Danilet has two Facebook profiles and many thousands of followers.⁷² He posts updates on court proceedings and takes part in television interviews. Most English and Welsh judges would hate the exposure, but such promotion enhances public confidence in the Romanian judiciary.

Public trust in the England and Wales judiciary is still very high but, if the parameters of judicial independence do not move with the times, this may change. I would suggest the judiciary embarks on an open policy-making project to tackle the aforementioned problems, which would involve:

1. Asking open-ended questions about what judicial independence is and what it should be; i.e. in opening up the judiciary, what risks are worth taking and which are not?

⁷² <http://www.transformjustice.org.uk/how-open-can-a-judge-be-meet-judge-cristi-danilet-of-romania>

2. Engagement with citizens, practitioners, court users, journalists, academics, and criminal justice agencies through workshops, surveys, and open invitation meetings in local areas;
3. Engagement with judges at all levels, including retired judges;
4. Active promotion of the project in social and mainstream media;
5. A draft policy paper published for public consultation.

It is important that the executive and Parliament should have no final say in the policies the judiciary decides to implement, but it would be worth obtaining their views along the way. Through conducting the judicial independence project in an open, inclusive way, the judiciary will escape from groupthink and be able to consider contrasting views before formulating new policy. They may benefit from fresh ideas and gain the confidence to take risks to the benefit of society as a whole.

Equally, this collection represents just some views on a multi faceted subject. It is meant to open not close the debate. If you would like to contribute please tweet using [#judicialindependence](#) or contribute a blog for Transform Justice to publish - anonymous or authored.

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