

APPGDC INQUIRY INTO THE
INDEPENDENCE OF THE JUDICIARY

(A) Generally

1. Even before Ms Gina Miller had brought her case in 2016 against the Secretary of State for Exiting the European Union¹, the Master of the Rolls, Lord Dyson, had in the UK expressed concern in the growing tendency to fault-finding of the judiciary. In his Bailii Lecture in 2014 titled, “*Criticising Judges: Fair Game Or Off-Limits?*” he prophetically noted how ‘the convention against criticism of judges’ decisions has been eroded, even if it remains in place, albeit sometimes precariously, for Government Ministers’ and that ‘uncertain and testing conditions therefore lie ahead.’² After the flurry of criticism that followed Ms Miller application being heard in the UK Supreme Court³ a Policy Exchange Paper, “*Does Political Criticism of Judges Damage Judicial Independence*”, adverted to how ‘one or more of the Ministers said that the judges were “divorced from reality” and were “hard-left activist judges”, conducting ideological experiments”, who had “eroded any trust that remained in our legal system.”⁴ If truth be told heightened criticism of judges has not been confined to Britain. From America to Central and Eastern Europe ‘the nature of attacks on the judiciary’ now is such that in 2021 the German Law Journal carried an article on such ‘judicial independence attacks – vulgar, clumsy, systemic, and insidious’ which ‘are dangerous and must be met with effective responses.’⁵
2. The focus of this short Paper is on the period in the UK since the establishment of the Supreme Court after the year 2016 only.

(B) Specifically

3. **The Lord Chancellor:** Whilst Ministers have a statutory duty to uphold the independence of the Judiciary, it is well remarked that the Lord Chancellor in particular has a further duty to defend judicial independence. On 3rd November 2016 after the Daily Mail carried a headline, criticising the Lord Chief Justice, Lord Thomas, and two senior colleagues as ‘Enemies of the People’,⁶ there appears to have been a marked failure by the Lord Chancellor to rise to the occasion and defend the judiciary from such attacks. Eventually, in March 2017 The Lord Chief Justice (‘LCJ’), Lord

¹ *Miller & Anor, R (On the Application Of) v The Secretary of State for Exiting the European Union (Rev 1)* [2016] EWHC 2768 (Admin) (03 November 2016) (Available at <http://www.bailii.org/ew/cases/EWHC/Admin/2016/2768.html>).

² Lord Dyson, “*Criticising Judges: Fair Game or Off-Limits*” *The Third Annual Bailii Lecture*, 27th November 2014, at p.27, para 80 (Available at <https://www.judiciary.uk/wp-content/uploads/2014/11/bailii-critising-judges.pdf>)

³ The case reached the Supreme Court in 2017 : *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5 (24 January 2017) (Available at <http://www.bailii.org/uk/cases/UKSC/2017/5.html>)

⁴ J.B. Heydon, “*Does Political Criticism of Judges Damage Judicial Independence*”, *A Policy Exchange Judicial Power Project Paper*, February 2018, at p. 9 (Available at <https://policyexchange.org.uk/wp-content/uploads/2018/03/Does-Political-Criticism-of-Judges-Damage-Judicial-Independence.pdf>)

⁵ James E. Milner & Peter Curos, “*Recent Attacks on Judicial Independence: The vulgar, the Systemic, and the Insidious*” *German Law Journal* (2021), 22, pp. 1159-1191, at p. 1190 (Available at <https://www.cambridge.org/core/journals/german-law-journal/article/recent-attacks-on-judicial-independence-the-vulgar-the-systemic-and-the-insidious/C17564C422E17580A3C36BD704342E26>)

⁶ James Slack, “*Enemies of the people: 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 Daily Mail*, 3rd November 2016, (Available at <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>)

Thomas, who was in 2016 sitting in the High Court, which found against the government that forced ministers to obtain parliamentary backing before triggering Brexit, was himself forced to defend himself and his colleagues. He was said to have ‘launched a forthright attack on the justice secretary, Liz Truss, for her failure last year to defend judges.’ The LCJ referred ‘to the article 50 Brexit court case’ when ‘he told the House of Lords constitution select committee Truss was “completely and utterly wrong” to say she could not criticise the media’ in turn for their having attacked the judges as they had done. As the LCJ pointed out, ‘There’s a difference between criticism and abuse and I don’t think that’s understood.’ The LCJ told the House of Lords constitution select committee that, ‘The circuit judges were very concerned’ and that it apparently got so bad that, ‘They wrote to the lord chancellor because litigants in person were coming and saying “you’re an enemy of the people”’. The LCJ was clearly of the view that judicial independence was being compromised with judges not being able to perform their constitutional role, when he remarked that, ‘I don’t think it is understood either how absolutely essential it is that we [the judges] are protected because we have to act as our oath requires us without fear or favour.’⁷ He added, ‘I can understand how the pressures were on in November, but she has taken a position that is constitutionally, absolutely wrong’ because it was the Lord Chancellor’s duty to defend the judges.

4. A former Lord Chief Justice, Lord Igor Judge, even thought that in failing in her statutory duties Liz Truss, the Lord Chancellor, may have broken the law ‘by keeping a near-silence in the face of a torrent of abuse targeting three high court judges,’ and that her ‘failure to come to the defence of the judiciary for nearly 48 hours – and her lukewarm response when she did – means if she were taken to court she would likely be found to have acted unlawfully....’⁸
5. By May 2020 an article in the Prospect Magazine was writing about ‘the fall of the Lord Chancellor’ and how in a ‘once mighty constitutional office, the role is now played by political minnows’ such that ‘our democracy is the weaker for it.’⁹
6. **Political Interference:** In September 2019, when the court of session in Edinburgh said the suspension of parliament was “unlawful”, the Business Minister, Kwasi Kwarteng, suggested “many people” think judges are biased in relation to Brexit and was criticised for his comments. Kwarteng had said that, “I think that they are impartial, but I’m saying that many people, many leave voters, many people up and down the country, are beginning to question the partiality of the judges.”¹⁰ Criticism of Kwarteng came from the President of the Law Society of England and Wales, Simon Davis, who said the role of judges was to interpret the laws that parliament passes and that, “They do so impartially, without fear or favour. We should take pride in our system of justice which provides equality before the law. He called on influential voices, in politics and the media, “to avoid intemperate language and resolve to protect and promote the rule of law, supporting our judiciary, independent from interference”. Criticism also came from Richard Atkins QC, the chair of the Bar Council, who stated, “I strongly urge those in positions of authority not to undermine the courts or judges. Without the legal protections that the courts afford we are all in peril. The Bar Council expects the government to uphold the rule of law in this country.”

⁷ Owen Bowcott, “Lord chief justice attacks Liz Truss for failing to back article 50 judges”, 22nd March 2017 (Available at <https://www.theguardian.com/politics/2017/mar/22/lord-chief-justice-castigates-liz-truss-for-failing-to-defend-judges>)

⁸ Harriet Agerholm, “Liz Truss may have broken law in failing to defend Brexit judges, warns former lord chief justice” *The Independent*, 19th November 2016 (Available at <https://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>)

⁹ Jake Richards, “The Fall of the Lord Chancellor”, *Prospect Magazine*, 15th May 2020 (Available at <https://www.prospectmagazine.co.uk/politics/the-fall-of-the-lord-chancellor-government-law-constitution-truss-grayling-buckland>)

¹⁰ Amna Mohdin, “Brexit: Kwasi Kwarteng criticised for ‘biased judges’ comment”, *The Guardian*, 12th September 2019. (Available at <https://www.theguardian.com/politics/2019/sep/12/brexit-kwasi-kwarteng-criticised-for-biased-judges-comment>)

7. On 1st December 2020, the present LCJ, Lord Burnett of Maldon, said that MPs need to be taught not to meddle in the courts, as he warned that political interference in the courts has reached unprecedented levels. This was after a letter had been sent by a number of Tory MPs to judges about the *Charlie Elphicke* sexual assault case. The LCJ's officials had denounced this letter as 'improper.' This then led¹¹ Lord Burnett of Maldon to remark that, "there's been nothing quite like it in my experience." Some parliamentarians, he pointed out, did not have "an instinctive understanding" of the need to respect the independence of the judiciary and the constitutional boundaries between lawmakers and judges.
8. It is significant that this row followed other recent controversies, which included not just that over the Supreme Court's Brexit ruling on Article 50, but also the Home Office criticising "activist" immigration lawyers.
9. This is why Lord Burnett had to make it clear that such "general attacks on lawyers are extremely unfortunate" and that "a general attack on the legal profession undermines the rule of law." He then said that the judiciary would be considering tuition for new parliamentarians on how to deal with judges! In his words, "[i]t does seem to me that even if it amounts to a very short briefing to new members of both Houses of legislature of the boundaries between our respective rules and the need to respect the independence of the judiciary, that is something that we are considering."
10. Lord Burnett added how, "[t]here have been a number of instances which have bubbled up into the public domain of what might be thought to be interference. There needs to be sensitivity displayed by all branches of the constitution as to the proper sphere of the others and where the boundaries lie." In fact, while he was clear that judges understood their role, he warned that "I'm less confident that all parliamentarians have an instinctive understanding of where those boundaries lie."
11. On 4th October 2019¹² the Irish Times reported how a number of recently retired judges, which included, Lord Hope, Lord Cullen, Sir David Edward, and Lord Sumption, had reacted strongly to remarks by the Attorney General, Sir Geoffrey Cox QC in the House of Commons, when he said "there may very well need to be parliamentary scrutiny of judicial appointments in some manner." This drew swift criticism from distinguished former judges who described these comments as 'wholly misguided', 'devoid of merit' and 'both unprincipled and useless.' In fact, it was suggestive of 'an overt attempt to stuff the court with political creatures, which would discredit any one appointed by such a method.'
12. Lord Burnett, however, does not support 'coercive steps' against politicians, saying: 'I think this is something which is best dealt with by calm response from the professions, and I hope my response will be judged to have been calm, to explain why attacks of that sort are not appropriate.'¹³
13. **Proposed Reforms to Judicial Review:** These, as set out in the Interpretation Bill, would enable the government to strike out findings from judicial reviews that the Prime Minister and his

¹¹ Martin Bentham, "MPs need to be taught not to meddle in the courts, says the country's top judge" *The Evening Standard*, 1st December 2020. (Available at <https://www.standard.co.uk/news/politics/justice-parliament-crime-rape-courts-b128128.html>)

¹² "UK: Political interference with judiciary condemned by former judges", *Irish Times*, 4th October 2019 (Available at <https://www.irishlegal.com/articles/political-interference-with-judiciary-condemned-by-former-judges>)

¹³ Carmel Rickard, "UNPRECEDENTED LEVELS OF POLITICAL INTERFERENCE WITH COURTS' – CHIEF JUSTICE", 3RD DECEMBER 2020, *African LIIS* (Available at <https://africanlii.org/article/20201203/'unprecedented-levels-political-interference-courts'---chief-justice>)

ministers disagree with¹⁴. The proposal has been castigated by none other than Ms Gina Miller on the basis that, '[t]he fact that the supreme court found in my favour in the prorogation case 12 – 0, and that Johnson's advice to the Queen was unlawful, void and of no effect, allowing parliament to reconvene, is what appears to be fuelling his vengeful 'war' on judges.'¹⁵ The appointed independent review of administrative law, chaired by the former justice minister Lord Faulks QC, only recommended modest changes for judicial review in March 2021. This was after the Law Society of England and Wales said the system was "working well and achieving its purpose", and the Bar Council of England and Wales rejected the suggestion that there was a conflict between judicial review and the "proper and effective discharge of government functions". On the contrary, they had described judicial review as a "critical mechanism" for securing proper and effective government functions. For her part, Dame Vera Baird QC, the victims commissioner, said that judicial review was a means of enhancing the effectiveness of government and not undermining it.

14. It is in these circumstances too, that Scotland's most senior judge has attacked planned regulatory reforms as unwarranted and unacceptable interference by the government and parliament with the country's independent legal system. Lord Carloway, the lord president of the Court of Session, was wholly unpersuaded by the move to overhaul the regulation of legal services in a bid to improve transparency. He even went so far as to accuse ministers of starting from "the fundamentally flawed premise that the legal profession in Scotland regulates itself" because the ultimate arbiter is whoever is serving as lord president. However, the judges said: "This is incorrect. The regulator of the legal profession is the Court of Session in the form of the Lord President." For this reason, they declared that "The judiciary will resist with all its strength this and any other attempt by government or Parliament to remove the court's regulatory powers."¹⁶

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¹⁴ Jessica Elgot, "Johnson publishes plans to regain power from courts and MPs", The Guardian, 1st December 2020 (Available at <https://www.theguardian.com/politics/2020/dec/01/boris-johnson-publishes-plans-to-take-power-back-from-courts-and-mps>)

¹⁵ Gina Miller, "Boris Johnson's 'war on judges' is a fiction – the truth is, it is an attack on all of us" The Guardian, 8th December 2020 (Available at <https://www.theguardian.com/commentisfree/2021/dec/08/boris-johnson-war-on-judges-judicial-review-justice-for-ordinary-citizens>

¹⁶ Alistair Grant, "Planned legal reforms in Scotland condemned by judges and branded an 'assault on the rule of law'", The Scotsman, (Available at <https://www.msn.com/en-gb/news/uknews/planned-legal-reforms-in-scotland-condemned-by-judges-and-branded-an-assault-on-the-rule-of-law/ar-AASF0Hj>)