

**Courts and the Making of Public Policy**

# Do the Media Influence the Judiciary?

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## Executive Summary

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- Judges, in a broad sense, are open to the influence of the media like anyone else, but the judicial oath and training render them well aware of their obligation to put matters of opinion to one side when deciding the cases before them. That obligation equally applies to opinions they have seen expressed in and by the media, not merely because such matters are legally irrelevant, but because they are almost invariably based on an incomplete and inadequate knowledge of the facts.
- Judges are well aware that criticism from unsuccessful parties, interest groups, or campaigning newspapers may follow any decision of theirs in a matter of high public interest and they accept it as going with the territory. Juries, however, may bring in verdicts which are surprising to some observers, not least the judge, following intense media coverage of a particular case.
- With respect to sentencing, judges should have regard to public opinion, if not necessarily to follow it, and in this respect, they are largely reliant on, and to a degree influenced by, the responsible media. Indeed, in the 1990s, persistent concern and criticism by thoughtful commentators persuaded the judiciary that in cases of rape and causing death by dangerous driving, the level of sentencing prevalent at the time often failed to reflect the seriousness with which society regarded those offences, and the judicial guidelines were altered accordingly.
- In a 1982 study into the reference groups that actively influenced the decision making of the Law Lords at the time, the principal influences were found to be the quality of the judgments in the courts below, the arguments of counsel, interaction and discussion with their colleagues, and legal academic opinion.
- The present members of the Supreme Court may live somewhat less insulated lives than the Law Lords of thirty years ago, but are more likely to be influenced by the European Courts and Human Rights Act than the media. This is evidenced in their recent decisions in the field of human rights, most notably in relation to alleged terrorists and asylum seekers, which they must have been well aware would be highly unpopular with many organs of the press, not to mention the government.
- Media pressure did lead to the opening up of the Family Courts to the press, though this was not for the purposes of currying favour with the press, but because of the harm being done both to the child care system and the reputation of family judges by the complaints of aggrieved parties to which they could not reply and the consequent allegations of secret justice.
- More recently there has been a comparable response to the justifiable media concern in the report of Lord Neuberger's Committee, set up following the press furore over so-called super-injunctions. While the report disappointed certain heightened expectations within the media that substantive law matters in relation to privacy would be changed, it has set in train the making of appropriate rules to improve practice in that respect and prevent what have on occasions rightly been seen as abuses of procedure. Both in that report, and in his recent Judicial Studies Board Annual Lecture 2011, Lord Neuberger is showing himself admirably attuned and responsive to the concerns of the media.
- At the turn of the year, Lord Justice the Lord Chief Justice issued interim guidance on the use of social media by persons in court pending a public consultation involving the judiciary, prosecutors, lawyers, the media, and 'interested members of the public'. This followed the decision of a District Judge at the bail hearing of Julian Assange to allow the tweeting of the hearing by a reporter, in contrast to the usual ban on use of mobile phones.

## Do the Media Influence the Judiciary?

The question '*Do the media influence judges?*' is a question too broadly put to merit easy treatment. Whatever may have been the position in the past, the modern judge – at whatever level – is an intelligent, interested, and informed member of society who reads the newspapers and watches television like anyone else, so that in a broad sense his or her knowledge of the human condition and what goes on in the world is open to the influence of the media like anyone else's.

However, judges take a judicial oath and receive judicial training which they take seriously and which render them well aware of their obligation to put matters of personal opinion to one side when deciding the cases before them. In coming to a decision, their task is to apply the law to the facts and circumstances of the case as they appear from the evidence before them. That obligation equally applies to opinions they have seen expressed in and by the media, not merely because such matters are legally irrelevant to the judge's task, but because they are almost invariably based on an incomplete and inadequate knowledge of the facts of the particular case as well as (on frequent occasion) on a misunderstanding of the legal issues involved.

### **Media criticism and judicial impartiality**

I take the question, '*Do the media influence judges?*', to be directed to whether or not consciously or subliminally, the decisions of judges are nonetheless influenced by the views of media commentators and in particular may be motivated by the judge's concern that his or her decisions may be either praised or attacked in the media, once delivered. As a general proposition, I do not believe that they are. Judges, who are creatures of flesh and blood, are no doubt delighted if their decisions *are* the subject of approval, publicly expressed. Equally they may feel frustrated, even wounded, if their decisions are

criticized (particularly when criticism is based on incomplete knowledge, or a misunderstanding, of the facts and issues in the case). But, historically, judges' backs have been broad and they remain so.

Any judge who started life in the law, as I did, as a barrister in the early 1960s, was appointed in the late 1980s, and has only recently retired, will have seen the stereotype of the High Court judge transformed in certain organs of the press from that of a port-soaked reactionary, still secretly resentful of the abolition of the birch and hostile to liberal influences of any kind, to that of an unashamedly progressive member of the chattering classes, spiritually if not actually resident in Islington or Hampstead, out of touch with 'ordinary people', and diligently engaged in frustrating the intentions of Parliament with politically correct notions of Human Rights.

Judges are well aware that criticism from unsuccessful parties, interest groups, or campaigning newspapers may follow any decision of theirs in a matter of high public interest and they accept it as going with the territory, however much they may fume in private. I do not know whether or not Mr Justice Eady fumes in private over the press he receives for conscientiously applying principles introduced into the law by Parliament under the Human Rights Act, however I would have every sympathy for him should it be the case.

But, moving from the general to the particular, the topic of media influence may best be approached by drawing two distinctions: first, between the law as applied in the *criminal* courts and the decisions of judges in the civil courts; second, between the substantive law as applied in individual cases and, on a wider front, the procedures followed under Rules of Court and Practice Directions, including, in particular, the hearing of cases in open court.

### **Criminal courts**

So far as the criminal law is concerned, I can confidently say that, in deciding whether or not guilt has been established, no judge or magistrate does other than decide each individual case by reference to the law and whether or not the particular ingredients of the offence have been established.

I cannot of course speak for juries and the verdicts which they give in cases of high media interest. Sometimes it is indeed the case that, having been directed by the judge as to the legal ingredients of the offence and the burden of proof in relation to the evidence, they bring in verdicts which are surprising to some observers – not least the judge. However, whether or not the media have played any influence in that decision is something which only the jury would be able to answer. In that respect all the judge can and does do is to direct the jury firmly to ignore any media comment or attention which the case has received either before or during its progress, to refrain from research on the internet, and to decide the case solely on the basis of the evidence they have heard.

### **Sentencing and public opinion**

So far as the exercise of sentencing is concerned, the position is somewhat different however. Subject to such parliamentary constraints as are imposed on them, including guidelines produced by statutory bodies such as the recently formed Sentencing Council, judges are the individuals by whom society has decided that criminals should be punished following a finding of guilt, and it is their responsibility to decide what the punishment should be. In doing so, they are entitled, and indeed it is part of their function, to have regard to public opinion, though not necessarily to follow it. In this respect, judges are largely reliant on the responsible media and, in the sense and to the extent that they accept what they hear and read, it can be said that they are influenced by them.

Judges are, however, astute not to equate the opinion of the public *at large* with opinions expressed by newspaper editors or television commentators on

particular issues, let alone press campaigns on behalf of an individual or particular interest group. In relation to the prevalence of crime, it is far better for judges to pay attention to the crime figures on the ground and the incidence and predominance of particular types of crime, whether locally or nationally, when passing sentence.

The position was best set out by the House of Lords in a case in 1997 when it pointed out the distinction between:

*public concern of a general nature with regard to, for example, the prevalence of certain types of offence, and the need that those who commit such offences should be duly punished; and... public clamour that a particular offender whose case is under consideration should be singled out for severe punishment.*

As another Law Lord added in the same case: 'A sentencing judge must ignore a newspaper campaign designed to encourage him to increase a particular sentence. It would be an abrogation of the rule of law for a judge to take into account such matters'. That is what I believe judges and magistrates do. Having considered the record and personal circumstances of the offender, together with any relevant published guidelines, which will usually be the governing factor in the level of sentence passed, it is legitimate, and on occasion desirable, to pass a higher or more lenient sentence than that laid down in the sentencing guidelines, whilst making very clear the judge's reasons for doing so.

As I have already indicated judges do, and in my view should, read newspapers (in which respect such reading should not be limited to the broadsheets), in order to acquaint themselves with matters of public concern. They also should, and do, watch current affairs programmes on television, particularly those which deal with topics relevant to their decisions such as prison conditions or the state of the child care system. Such awareness may also assist them to gauge the strength and quality of an identifiable

body of public opinion which drives them to conclude that they are wrong and the public right in relation to sentences for particular categories of crime. There is little doubt that that is what in fact occurred in the 1990s, when persistent concern and criticism by thoughtful commentators persuaded the judiciary, through the medium of the Lords Chief Justice and the Court of Appeal Criminal Division, that in cases of rape and causing death by dangerous driving, the level of sentencing prevalent at the time often failed to reflect the seriousness with which society regarded those offences. Accordingly, the judicial guidelines pronounced from time to time by that court were altered.

### **Civil courts**

Turning to the field of civil decisions, it is again perhaps useful to distinguish between two categories of case. The first may be regarded as the ordinary day-to-day work of the civil courts, both at first instance and on appeal, in the field of contracts and corporate disputes, industrial accident cases and employment cases in which the law is clear and press interest or comment tends to be limited to those cases where celebrities are involved, the facts are particularly sensational or unusual, or the award by way of damages compares unfavourably with the level of awards in a different field of law or by reason of some statutory limitation. Again, in such cases, it may confidently be said that the judiciary simply go about the business of deciding the case according to well-established principles of law.

On the other hand, there are cases which raise interesting and previously undecided points which may or may not attract the attention of the press at first instance, but do so as they proceed on appeal. This tends to arise where the issues involve questions of 'human rights', a topic which inspires varying emotions in the breasts of newspaper editors, particularly if invoked by litigants whose cause they regard as undeserving. I particularly have in mind the Control Order cases and other decisions involving the rights of suspected terrorists and asylum seekers. It also certainly applies to cases where the rights or

interests of the press themselves may be adversely affected, notably the recent spate of cases involving the right to privacy on the part of celebrities and the grant of so-called super-injunctions. But other examples which spring to mind from a jurisdiction with which I have recently been well acquainted, are cases involving difficult moral and ethical issues as in the case of the conjoined twins (*Re A*) and the assisted suicide cases (*Pretty* and *Purdy*).

Again, it is my experience and belief that judges who become aware of the opinions of editors or the content of *parti pris* articles directed to the case or category of case which they are trying, simply ignore them when coming to their conclusions in the case before them. Indeed the categories of case I have just instanced are testimony to this. At the same time, once a judge is aware of close media interest in a case which he or she is trying, it is not only legitimate but advisable to ensure that the points that are inherently the most vulnerable to misunderstanding or misrepresentation in a feverish editor's or commentator's mind are dealt with in the judgment in terms which clearly spell out the basis of the decision.

This is well illustrated by a passage from the judgment of Foskett J in the recent application by Ms Shoesmith for judicial review of the OFSTED Report in connection with the Baby P case and her subsequent dismissal by Haringey Council, which was the subject of high media interest and widespread misunderstanding of the issues. He prefaced his judgment with the following observations:

*24. Almost anything that happens in connection with the Baby P case, or with its wider implications, occasions comment. That is entirely to be expected and is, of course, a welcome feature of any informed and balanced public debate about how tragedies of the nature that occurred in relation to Peter can be avoided in the future. Whether the outcome of the present court case has anything to contribute to that important debate will be for others to judge. However, any informed and balanced view of the*

*consequences of the case before the court needs an understanding of the precise issues for consideration and the way in which the court deals with those issues. It does also require a clear appreciation of what this case is not about.*

In the paragraphs which followed the Judge made clear which matters of press interest either did not arise or would certainly not be resolved in his judgment and made the point that the issues for his decision were in fact entirely about the fairness of the procedures followed by OFSTED and Haringey. The Judge was also wisely astute to state later in his judgment:

*46. Given the intense media and public interest that there is in Peter's case, particularly in connection with the Claimant's position in relation to it, there are a few matters I should make plain at the outset. Given some of the issues I have been asked specifically to consider, most of the points will be well understood by lawyers, but since it is possible that this Judgment will be read beyond the legal fraternity I have felt it sensible to state them.*

...

*48. Second, the Claimant is undoubtedly of the view that she has been subject to press and media interest and intrusion that has gone beyond an acceptable threshold, a view that appears to be shared by others and, at least to some extent at some stage, according to an interview in the papers before me, by the Secretary of State himself. Again, I cannot avoid reference to the involvement of the press in relation to some parts of the background since it forms a significant feature of that background and may have a bearing on at least one important feature in the case. However, anything I say about the press interest should not be seen as either condemning or condoning what has occurred. There will be those who consider the press interest in the Claimant to have been entirely appropriate and called for; there will be those who consider it to have been unfairly*

*personalised and unnecessarily and aggressively intrusive. That is a matter of personal opinion and taste. My position on this issue must be one of neutrality. No issue of law arises from it ...*

*49. Third, I can deal with the issues and arguments in this case only on the basis of the evidence put before me.'*

That seems to me an impeccable exercise in judicial distancing from the views and influence of the media, as well as the politics of the matter, whilst catering for the need for clarity in terms readily able to be understood.

### **Other external influences on judicial decision-making**

So far as appellate judgments are concerned, the only book with which I am familiar which has been directed specifically to judges' own accounts of the influences at work upon them in the course of appellate judicial decision-making is a work written as long ago as 1982 by Professor Alan Patterson of the University of Strathclyde, who for that purpose was granted interviews by nine active Law Lords including Lords Pearson, Reed, Salmon, and Wilberforce who were still sitting at the time and Lords Denning, Devlin, Pearce, and Radcliffe by then retired. It is an illuminating work.

Professor Patterson's researches were directed to ascertaining which potential or would-be reference groups actively influenced the Law Lords when deciding appeals and, as an associated question, to what people or groups they had in mind as an audience when framing their judgments. The first interesting matter which emerged was how few of their Lordships had given any active thought to the matter. However, analysis of their answers revealed three principal influences so far as their decision-making processes were concerned.

First, the quality of the judgments in the courts below. Second, the arguments of counsel before them. Third, and most influential, the interaction and discussion with their colleagues about the case in question and, fourth, legal academic opinion.

In this last respect, as Lord Diplock put it:

*In contrast to the judicial attitude in my early days at the Bar, judges no longer think that the sources of judicial wisdom are confined to judgments in decided cases and, exceptionally, some pronouncement of the illustrious dead. In appellate courts, at any rate, when confronted with a doubtful point of law we want to know what living academic jurists have said about it, and we consider that counsel have not done their homework unless they come equipped to tell us about it.*

What is noteworthy is that none of the Law Lords mentioned the media as a source of influence in their decisions or saw it as their function to target or address the media when delivering a judgment.

But that was as far as they went. As Lord Pearson put it:

*We have a certain amount in our minds from having lived in this country for maybe sixty-odd years, having read the newspapers and talked to people. You have got to take Her Majesty's judges, I suppose, to that extent as representative of popular opinion. They do what they think is just. One hopes it coincides with what the community thinks just, but then the community is probably divided into sections which think different things are just.*

As to the audience for their judgment, their Lordships acknowledged that, where possible, their judgment and reasoning should be intelligible to the man in the street, but the preponderant view was that the function of their judgments was to correct the decisions of their courts and to provide guidance to them and that, when writing their judgments, they were aiming at what Lord Radcliffe described as 'the middle distance', namely the courts whose judgments they were dealing with (including the court of first instance) and the world of lawyers generally.

### ***The Supreme Court and modern judiciary***

I do not think that, similarly questioned and researched, the present members of the Supreme Court would give much different replies. I have no doubt that they live somewhat less insulated lives than the Law Lords of thirty years ago and that their personal views and life experiences have moved with the times so as to shape a number of somewhat different underlying assumptions about society than those prevalent thirty years ago. I also consider that they would acknowledge a greater debt and more readily refer to the writings of academic lawyers, with whom they come into greater contact and have more extensive dialogue today. They would also be far readier to refer to decisions in Commonwealth jurisdictions, as well as the decisions of the European Court of Justice and the European Court of Human Rights to whose decisions they must now pay regard under the Human Rights Act. However, I doubt that any would admit to being influenced in their individual decisions by views expressed in the media. Nor is there reason to doubt their word in the light of a number of their decisions in the field of human rights, most notably in relation to alleged terrorists and asylum seekers, which they must have been well aware would be highly unpopular with many organs of the press, not to mention the government.

No doubt the same is true of the judges of the Court of Appeal and High Court judges, though, when dealing with cases of wide media interest, I suspect they would emphasize the necessity not simply to target the lawyers of the 'middle distance' referred to by Lord Pearson, but also the need to use plain language appropriate to elucidate the reasoning for the benefit of the media and wider public.

I have already cited by way of example the judgment of Foskett J in the *Shoesmith* case, but again the long judgment of the Court of Appeal in *Re A* (the conjoined twins case) also illustrates how, having adverted initially to the high public interest and intense media coverage, including the fact that there had been strong ethical expressions of opinion as to

the proper outcome, the court made clear that it was not a court of morals but one whose duty was to find and apply the relevant principles of law to the unique situation with which the court was confronted. That was the full extent of reference to media opinion in a judgment some 130 pages long.

Again, despite a strong tide of media opinion flowing in support of Ms Purdy's efforts to achieve clarification by the Director of Public Prosecutions of her, or her partner's, position in respect of assisting her suicide, there is no suggestion whatever in the judgments of the Court of Appeal or House of Lords that any regard was paid to the views of the media; the decision necessarily being based on the law as it presently stands.

I mentioned at the outset a distinction to be drawn, when it comes to media influence, between the judges' application of substantive law and the procedures of the court. I do consider that, in relation to the procedures of the court, and in particular questions of accessibility and openness, the modern judiciary are as a body sensitive and, where appropriate, responsive to informed criticism in the media.

I can speak personally to this by saying that, as President of the Family Division and the *ex officio* Chairman of the Family Procedure Rules Committee, I was certainly influenced by the media pressure for the opening up of the Family Courts to the press, in particular in relation to public law child care proceedings, subject to there being in place suitable reporting safeguards to preserve the anonymity of the children concerned. This was not, I may say, for the purposes of currying favour with the press, but because of the harm which it seemed to me was being done both to the child care system and the reputation of family judges by the complaints of aggrieved parties to which they could not reply, and the consequent allegations of secret justice. Accordingly, in consultation with the Ministry of Justice, the Committee amended the Family Procedure Rules in 2009, and I issued an accompanying Practice

Direction and Guidance permitting wide press access to family proceedings. This did indeed lead to a considerable reduction in attacks on family judges and their decisions made on the basis of incomplete information as to the detail of child care proceedings, once the press were able to hear for themselves the nature of the evidence and to witness the care with which judges perform their role in deciding those cases.

### **Super-injunctions and increased transparency**

More recently there has been a comparable response to the justifiable media concern in a different field, in the report of Lord Neuberger's Committee set up following the press furore over so-called super-injunctions.

While the report disappointed certain heightened expectations within the media that substantive law matters in relation to privacy would be changed or made the subject of direction from on high, which expectations were inevitably stated in the report to be a matter for Parliament and for the courts in their decision-making role, the report did two very useful things. It clarified the difference between the true (and very rare) 'super-injunction' in relation to which charges of secret justice inevitably carry weight and the more frequent (though still rare) cases where a public judgment is given in the matter but one or both parties are anonymized for reasons made clear in the judgment. Second, the report clarified and emphasized the procedural steps required of parties proposing to seek anonymity in cases of high press interest and it has set in train the making of appropriate rules and/or practice directions to improve practice in that respect and prevent what have on occasions rightly been seen as abuses of procedure.

Both in that report, and in his recent annual Judicial Studies Board Annual Lecture 2011, with its clarion call for clarity and simplicity in judgments on the one hand, and more accurate reporting on the other, Lord Neuberger is showing himself admirably attuned and responsive to the concerns of the media, and this is to be welcomed.

The same can be said of Lord Judge the Lord Chief Justice when, at the turn of the year, he read in the press the decision of a District Judge, at the bail hearing in respect of Julian Assange, to allow the tweeting of the hearing by a reporter, in contrast to the usual ban on use of mobile phones, and the different view subsequently taken by a High Court Judge. Lord Judge swiftly issued interim guidance on the use of social media pending a public consultation involving the judiciary, prosecutors, lawyers, the media, and 'interested members of the public'. This noted the absence of any statutory prohibition on the use of live text-based communications in open court and provided for application to be made, formally or informally, by any person present in court to activate the use of a mobile phone, laptop, or similar piece of equipment for the purpose of making live text-based communications in relation to the proceedings.



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**Sir Mark Potter** is the recently retired President of the Family Division and Head of Family Justice. Called to the Bar in 1961, he had a general common law practice specializing in commercial law and professional negligence. He became a QC in 1980 and chaired successively the Professional Conduct and Public Affairs Committees of the Bar Council. He was made a High Court Judge (Commercial Court) in 1988, Presiding Judge of the Northern Circuit (1991-94), and a Lord Justice of Appeal in 1996. He was Chairman of the Lord Chancellor's Legal Services Advisory Panel (2000-5). As President of the Family Division and Court of Protection, he introduced and oversaw new procedures for press access to hitherto private proceedings.

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