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1. Judicial Conduct and Ethics for the Judges of England and Wales

SUMMARY: 1. Judicial Conduct and Ethics for the Judges of England and Wales – 2 The principles of conduct and ethics for the modern judge.

At a speech at a conference of Commonwealth judges in Nairobi in 2007, the then Lord Chief Justice Lord Phillips felt able to say

"I am fortunate in coming from a jurisdiction where it is inconceivable that a litigant should even attempt to bribe a judge".

That is certainly not something that he could have said about the British judiciary 200 years ago.

The fight to establish an independent, impartial and ethical judiciary in the United Kingdom has been a long one but then the history of the judiciary in the United Kingdom is a long one.

The first professional judges were appointed until the beginning of the 13th century and the first evidence of any formalised ethical requirements for judges is the existence of a judicial oath in 1346. At that time judges were required to swear that they would

"in no way accept gift or reward from any party in litigation before them or give advice to any man, great or small, in any action to which the King was a party himself".

However, although the judges were promising not to be corrupt, they were certainly not promising to be independent of the executive or to be prepared to hold the King to account. Indeed, the description of judges at that point is best summed up by the ancient description of them as "Lions under the Kings throne". This reflected the fact that judges were appointed and dismissed by the King, at will.

Things did not change significantly until the middle of the 17th century and most significantly until the Act of Settlement in 1701. This was the Act of Parliament, which William of Orange was forced to agree to as a condition of him being offered the throne after the Catholic James II had been deposed. Amongst other things it significantly restricted his power to dismiss judges and paved the way for a modern judiciary and an understanding of the rule of law.

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In 1825 a Parliamentary Commission strengthened the position of the judiciary by, amongst other things, greatly increasing their judicial salaries, so reducing the necessity for them to earn a living by any other means than holding judicial office.

The last judge to be dismissed by a King was Sir Jonah Barrington in 1830, but that was only after Parliament had held an inquiry, concluded that he had misused funds allocated for the running of his court and petitioned the King for his dismissal.

In 2006 the last piece of the jigsaw was put in place. Until that point, members of the highest court of the land, the House of Lords, not only exercise a judicial function but were also part of the legislature, by virtue of their membership of the upper chamber of Parliament. from 2006 onwards with the establishment of the Supreme Court whose members do not sit in the Lords, strict separation between the judiciary the legislature and the executive was established and the principle of complete independence for the judiciary cemented.

2. The principles of conduct and ethics for the modern judge

In understanding the way in which conduct and ethics for the modern judiciary in the United Kingdom is approached it is important to bear in mind the history I have sketched above. The hard- won independence of the judiciary is a significant influence on the modern approach to judicial conduct. Judges understand that to accept the office of judge is to voluntarily accept limits on personal freedom. That is the price they pay for being able to perform their functions, maintaining the confidence of the public (which is high, at about 80%) and, when necessary, holding the Government of the day to account.

For instance, unlike other countries, it is unheard of for a judge to comment in the media on the ruling of another judge. Whilst that might mean curtailing a Convention right to free speech, it means that there can be no question of that judge's impartiality and no threat to the independence of judges reaching a decision which might be controversial, at least not from a colleague!

It must also be recalled that we do not have a career judiciary. Our judges are all appointed having enjoyed a previous career as part of one of the legal professions and, therefore, already having had to subscribe to a code of professional conduct and ethics. For a newly appointed judge is not new to the idea that their conduct in public and private life is necessarily constrained by principles to which other people are not required to adhere and which go much beyond the mere necessity to comply with the law of the land.

It is also important to bear in mind that the United Kingdom has no written constitution. In many countries, the written constitution is an important source of a code of conduct and ethics for the judiciary. No such Code, in the strict sense of the word, exists for UK judges.

Instead, the principles of conduct which guide UK judges are to be found in a variety of sources. In part these are treaties (such as the European Convention on

Human Rights) or legislative provisions, in part, unwritten "conventions" and customs, the source of endless academic debate.

Every judge, upon taking up office, must swear a judicial oath. The form of the oath, settled by Act of Parliament in 1868, is as follows

"I will do right to all manner of people after the laws and usages of the Realm, without fear or favour, affection or ill-will".

In more accessible English, this amounts to a promise to be fair, independent and impartial.

By way of formal guidance for judges, that 1868 oath remained the only source until the United Kingdom formally adopted the Bangalore Principles of Judicial Conduct, and in 2002, the Lord Chief Justice of England and Wales produced the first Guide to Judicial Conduct. That guide is updated annually and is based on the Bangalore principles. It is not, however, intended as a set of rules or a formal code. Its ambition, as expressed in the foreword is merely to set out the "basic set of principles guiding judicial conduct ... a guide, not only as to the... discharge of judicial functions but also as to how they conduct their private lives to the extent that this affects their judicial role".

The guide, alongside the Diversity and Equality Policy remain the only written documents (with the exception of the well-developed case law on recusal) to which judges may turn for help in resolving ethical or conduct dilemmas.

The emphasis on providing guidance and avoiding rules certainly stems from the strong principle of personal as well as institutional dependence for the judiciary. Judges are expected to use their own judgement when deciding on an appropriate course of conduct in any particular situation.

To what extent the principles underlying ethical conduct for judges are deontological or instrumental in nature is also a matter for debate. It should be recalled that although it is expected of judges that they live their professional and personal lives in accordance with those principles, whether or not there is any real danger of them being found out in a breach, the possibility of exposure is an increasing and ever- present danger. Technology and, in particular, the omnipresence of cameras and social media means that privacy is an increasingly rare commodity.

The risk of poor conduct by a judge being exposed is a risk to the reputation of the whole judiciary. A judiciary which does not command the respect of the public it serves cannot effectively deliver its part in securing the rule of law. Furthermore, that risk gives comfort and ammunition to those elements who have an interest in undermining judicial independence for political or other reasons.

Even as early as the promulgation of the Bangalore Principles at the start of the new millennium, the vital importance of public confidence and the role of an ethical judiciary in delivering rule of law was recognised (as can been seen from the recitals to the Principles) as a key reason for the development in internationally

agreed norms of judicial conduct. The Doha declaration (which gave rise to the Global Integrity Network) went further and explicitly stated the vital importance of rule of law and the contribution of the judiciary to it as a basis for economic and social development. These drivers seem to me to be of a broadly instrumental nature.

Unlike many European countries, the United Kingdom and its constituent jurisdictions, England and Wales, Scotland, and Northern Ireland, do not have a High Council of Justice with regulatory or disciplinary powers.

In England and Wales there is a (relatively small by European standards) 28-member Judges Council. Some of its members including the Lord Chief Justice are ex-officio, others are representative of various constituent parts of the judiciary, for example the Tribunals judiciary and the Magistracy. For the purposes of this article the Council has two important functions. Firstly, it supplies the membership of a sub-committee which reviews and updates the Guide to Judicial Conduct. However, ultimately, like much of the governance of the judiciary in England and Wales, the final approval of the revision rests with the Lord Chief Justice, the leader of the judiciary.

The Judges Council also nominates three members to sit on the Judicial Appointment Commission. The Commission is the independent body, dominated by lay people and with no political representation, which oversees the process of appointing applicants to the judiciary.

Finally, I should mention the role of the Judicial Conduct Investigation Office (JCIO). This too is an independent body, charged with the investigation of complaints of misconduct by members of the public and the legal professions. The JCIO is not able to deal with complaints about judicial decisions, either procedural or substantive. It can, however, deal with complaints where the alleged conduct fails to meet the standards of personal or professional conduct demanded by the principles set out in the Guide to Judicial conduct. The JCIO investigates and, if it upholds the complaint, makes a recommendation to the Lord Chief Justice as to sanction. The ultimate sanction of dismissal from office can only be administered if the Lord Chief Justice and the Minister of Justice each agree. The decisions of the JCIO are published together with the sanction.