

## **BOOK REVIEW**

### **BEING A JUDGE IN THE MODERN WORLD**

**Edited by Jeremy Cooper**

(Oxford University Press, UK, 2017)

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It is something of a modern cliché to cite the *Daily Mail* as an example of the more hysterical fringe of the mainstream press, but even by its own standards the newspaper reached new heights in the wake of the High Court's decision in *R (on the application of Miller and Dos Santos) v Secretary of State for Exiting the European Union*<sup>1</sup>. Despite the rather dry constitutional point that was actually in issue (whether the executive possessed a prerogative power to leave a treaty without Parliamentary approval) the *Mail* left no doubt as to its view of the case: 'Enemies of the people' screamed the headline, with the article going on to suggest that the claimants "had formed an 'unholy alliance' with the judiciary."<sup>2</sup> Clearly the position of even the most senior members of the judiciary is far from the distinguished isolation of previous centuries.

This increased press 'scrutiny' is just one of a number of topics covered by the wide-ranging '*Being a Judge in the Modern World*'. With a list of contributors including both the Lord Chief Justice and his predecessor, two current Supreme Court justices and the Senior President of Tribunals, it is of little surprise that this deceptively slim volume covers such a variety of issues. The link is that each chapter is the text of a speech given by its particular author on the topic of 'Being a Judge in the Modern World', a lecture series organised by the Judicial College. It is made clear in the editor's introduction that each speaker would "deliver a lecture with the

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<sup>1</sup> [2016] EWHC 2768 (Admin); [2017] 1 All ER 158 and upheld by the Supreme Court, [2017] UKSC 5; [2017] 2 WLR 583.

<sup>2</sup> 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' *Daily Mail* (London, 3 November 2016) 1.

## BOOK REVIEW

same title, but with absolute freedom to address the issue in any way they saw fit with neither guidance nor censorship from the Judicial College.”<sup>3</sup>

This was an admirable goal, but once one commences reading the substantive speeches that lack of guidance begins to feel like less of an asset. It is certainly true that the modern judge faces a considerable number of pressures, some of which are novel and some more familiar which are exacerbated by changes in both the legal system and in society as a whole. Some of the chapters provide thought-provoking examples: such as the judge who made the mistake of copying and pasting counsel’s written submissions into his judgment;<sup>4</sup> or the availability of access to justice in an age of austerity.<sup>5</sup> This wider focus is perhaps most notable in contributions from non-judicial figures, such as Baroness Chakrabarti CBE and Alan Rusbridger. There is a commendable emphasis on the reality of the judge’s position in the modern world and the book makes a persuasive argument that such a position is beset by challenges on all sides. We are told by various contributors that judges are misunderstood by the public and stereotyped by the press, that their decisions are exploited by grasping politicians and they are themselves often ignored or unrepresented by the other branches of government.

It is easy to sympathise with, to borrow the title of Joshua Rozenberg’s chapter, the ‘Embattled Judge’. As observed by the current Lord Chief Justice Thomas, the average journalist (and by implication man on the Clapham omnibus) imagines a judge spending his lunch adjournment “at his Inn consuming port and stilton...[when] the actuality [is] that he had been working on the judgment he was about to give and eating a sandwich in his room”.<sup>6</sup> A theme which runs through a number of the chapters is what should be expected from our judges in this “modern world”. Many of the contributors line up to decry the traditional view of the outdated “crusty old buffer”<sup>7</sup> and judges are repeatedly exhorted to “engage” with justice and the modern world. Yet in just as many chapters, and often from the same writers, there are dire warnings of the dangers of the judge who overuses social media, or that we live in an age of bloggers and ‘fake news’. Some

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<sup>3</sup> Jeremy Cooper, ‘Introduction’ in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP 2017).

<sup>4</sup>See Joshua Rozenberg QC, ‘The Embattled Judge’ in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP 2017) 53.

<sup>5</sup> Lord Justice Ryder, ‘The Modernization of Access to Justice in Times of Austerity’ in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP 2017).

<sup>6</sup> Lord Thomas of Cwmgiedd, ‘Reflections of a Serving Lord Chief Justice’ in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP 2017) 25.

<sup>7</sup> Ibid.

of the most trenchant observations are made by Lord Carnwath in ‘Reflections on the Tribunal Reform Project’, who notes that on the official judicial website the two questions answered are “Do judges use gavels?” and “Why do people bow when they come into court?”<sup>8</sup>. It is clear from this book that many believe that, for good or ill, the judiciary has an image problem – old, outdated and staffed by elderly white men.

This leads on to one of the few themes that almost all contributors at least touch on – that increased diversity on the bench is a crucial step towards a more representative and modern judiciary. The tone is set by Lord Judge in the first chapter who highlights both a current lack of diversity and the flaws of any approach based on ‘quotas’ or positive discrimination. This view is then questioned by Baroness Chakrabarti, who rather coyly refers to “bringing in people from a wider pool”<sup>9</sup>, before in the next chapter Joshua Rozenberg QC again warns of the demotivation that any system of preference can create. Thus it continues until Lady Hale of Richmond’s comprehensive account of the current state of diversity in the judiciary in the penultimate chapter. This is the book at its best – major figures both inside and outside the legal system expressing their (not necessarily complementary) views on the idea of judges in the modern world. At these times, it is commendable that the “absolute freedom” was practised as well as promised by the Judicial College.

Yet this freedom is at the same time the book’s greatest weakness. That penultimate chapter referred to above can be found nestled between a very general overview by Lord Thomas of the position of the judiciary in wider society (including such disparate areas as devolution, the separation of powers, the relevance of the judiciary to small traders and the use of the Welsh language in court) and a chapter from Lord Justice Laws on the power of statutory interpretation. By nature any collection of the works of others will suffer from a lack of continuity, to a greater or lesser extent, but this is particularly pronounced in this volume.

As already noted, in their desire for oratorical freedom, the Judicial College did not provide a common starting point beyond the title of the lecture. Unfortunately, the age old dichotomy between certainty and flexibility that underlies all of our law is also present here – and it could be argued that this book has got that balance wrong. Mrs. Justice Bernard begins her lecture by asking, “what is meant by the modern world, and from

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<sup>8</sup> Lord Carnwath of Notting Hill, ‘Reflections on the Tribunal Reform Project’ in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP 2017) 107.

<sup>9</sup> Baroness Chakrabarti CBE, ‘Walking the Tightrope of Independence’ in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP 2017) 47.

## BOOK REVIEW

whose perspective?”<sup>10</sup> The answer here is clearly “the speaker’s”. It seems slightly churlish to make a criticism of inviting a broad range of opinion, and this may well have been a real strength of the lecture series (which took place across the country to different audiences). However, when collected together, it becomes unfortunately clear that most of the chapters say as much about the speaker as about their supposed theme. Thus Alan Rusbridger dwells at length on the economics of online journalism (and even manages to sneak his “comment is free” motto into his speech); Baroness Chakrabarti concentrates on the Iraq war, closed trials and police tactics; Mrs Justice Bernard’s view from the Caribbean is more of a view *of* the Caribbean; Lord Carnwath as Senior President of Tribunals speaks on, yes, tribunals; as already mentioned, it falls to the only female Supreme Court Justice to provide a full speech on diversity issues; et cetera.

No criticism is intended of the writers or their chosen subjects, nor of the Judicial College and the original lecture series. However, the variety of speakers and topics makes it difficult to establish a coherent picture of what exactly it is to be a judge in the modern world. One could argue, with some justification, that this is not what was intended – the book is more of a series of vignettes which each go some way to illuminating a facet of the role of the modern judge. Yet even when looked at in this wider context, there remains a disconnect between what each speaker is trying to achieve. Some, such as Lord Carnwath and Professor Cooper on tribunals, take a very descriptive approach to how our legal system has changed in recent years. Others, such as Rozenberg and Lord Judge focus on what qualities the modern judge needs to succeed. Then in some of the later chapters, the focus shifts again to the constitution as a whole and the judiciary’s place within it. All are interesting; all relate to judges and the modern world; but they do not relate in any but the most tangential way to what has come before. It is hard to shake the feeling that this is a book to be dipped into, or at most one which may spur the reader to inquire further into a particular field.

A good example of this is the use of technology in judicial proceedings. Lord Judge was never renowned for his technophilia – as Lord Dyson said, “In a word, the IT revolution has completely passed him by. Surprisingly, he disputes this, but it is true. His whole family will say that it is true, even his grandchildren. It is as if the IT revolution never happened. Emails, no; BlackBerry, no; mobiles, no; ipads, no. I could go on.”<sup>11</sup> Yet his speech

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<sup>10</sup> Desirée Bernard, ‘A View from the Caribbean’ in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP 2017) 83.

<sup>11</sup> Lord Dyson MR, ‘Valedictory address for Lord Judge’ (London, 30 July 2013) <<https://www.judiciary.gov.uk/announcements/valedictory-addresses-lord-judge/>>.

contains one particularly noteworthy section which poses a fascinating question. “Can we, perhaps most of all, recognise the dire danger of burying our system, our common law system, under mounds and mounds of so-called authorities, decided cases which are supposed to assist the judge by directing him or her to the relevant principle? If we could use modern technology to distil the essential principle to be applied by the court into two or three paragraphs, rather than two or three folders of so-called authorities, that would be a triumph.”<sup>12</sup>

There is so much in this chapter to discuss. Is the former Lord Chief Justice merely advocating better use of modern technology, or a far more radical reform which could involve a dramatic change to the use of legal precedent in court? What could be the effects of a system where the context and explanation of a many-paged judgment is replaced by a “two or three paragraph” summary – in other words, where centuries of legal educators exhorting students to read the case not the headnote is reversed? Unfortunately, this issue is not returned to, due to the very nature of the work as a collection of independent speeches. This is far from the only example even within this one area – later Lord Justice Ryder makes tantalising reference to online courts<sup>13</sup> while Lord Thomas warns against their dangers.<sup>14</sup> Perhaps it is asking too much to expect such points to be somehow naturally brought to the mind of other speakers (and it should be emphasised that it was an explicit part of the Judicial College lectures that speakers would not be “briefed”) but it once more highlights the problems with collating such a disparate collection under a single heading.

On this note, it would be wrong to not at least briefly mention the later chapters in the volume. Two chapters are by Lord Thomas, two by Lord Justice Ryder and as noted above, a chapter by Baroness Hale on diversity and one by Lord Justice Laws on the power of statutory interpretation. These certainly add a more academic air to the volume, with a much greater emphasis on constitutional principles. However, it is hard not to classify them as essentially addressing “the judiciary in the modern world”, rather than “being a judge” per se.

It is perhaps one of the perils of academia that one can easily develop a subject-specific view of legal writing. Yet there is some merit in attempting to answer the wider question of what a book can teach the reader by asking

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<sup>12</sup> Lord Judge, ‘Reflections of a Retired Lord Chief Justice’ in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP 2017) 19.

<sup>13</sup> Lord Justice Ryder, ‘The Modernization of Access to Justice in Times of Austerity’ in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP 2017) 141.

<sup>14</sup> Lord Thomas of Cwmgiedd, ‘The Centrality of Justice’ in Jeremy Cooper (ed), *Being a Judge in the Modern World* (OUP 2017) 160.

## BOOK REVIEW

the narrower question of “which module would I recommend this book as reading for?” The answer is, in part, many. Many of the later chapters mentioned above would be extremely suitable reading for a student (or researcher) of constitutional law; discussions of the modern profession and diversity in legal skills and practice modules would be aided by chapters such as those by Baroness Hale and Joshua Rozenberg; the very specific insights as to tribunals are probably of most use to those undertaking professional courses or beginning in practice. As a coherent whole, the book does not really provide a clear picture of exactly what being a judge in the modern world entails. As a collection of distinct and separate perspectives, it has much value.

Thus in sum this book is much like its titular “modern world”: at times disparate, diverse and lacking in coherence; yet containing insights and issues very much worthy of further study.