“Judicial Independence in the Digital Age: The Challenges and Opportunities of Social Media for Judges”

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by

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"If it is accepted, as I argue, that a judge, when sitting in his court, is frequently required to make decisions which involve an assessment of where the public interest lies and so make a political decision, then he cannot be said to act neutrally, although he may still be the person best suited to make that particular decision… The falseness arises when judges are presented, or present themselves, as neutral arbiters capable of providing unpolitical solutions to political problems or of expressing unpolitical opinions on political issues. It is when the claim to neutrality is seen, as it must be, as a sham that damage is done to the judicial system…"

JAG Griffith, *The Politics of the Judiciary*, 1997. p.57

ABSTRACT

This thesis questions the way judicial legitimacy is constructed – around the perception of independence – in the contemporary constitution, particularly in light of the advent of social media. It will be argued that judges should not be restricted from engaging with social media in their professional capacity and that at present the rules regulating a judge's use of social media under the Guide to Judicial Conduct are unsuitable. This thesis will explore this restriction and the ways in which the perception of judicial independence is used as justification for restricting individual judicial office holders' use of social media. Therefore, this thesis plugs the current gap in the literature exploring the relationship between the UK's Judiciary and social media. Engaging critically with the doctrine of judicial independence in this context provides one way in which to reimagine the model of judicial legitimacy as it is currently derived from judicial independence, in favour of a model of legitimacy attained through public awareness and engagement. Therefore, this thesis will provide a timely and original analysis of the role of the Judiciary in the modern constitution.

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TABLE OF CASES AND LEGISLATION

CASES

UK Case Law

Cases of The European Court of Human Rights

Cases of the US Supreme Court

LEGISLATION

TABLE OF CONTENTS

"I got a message from a Supreme Court justice recently thanking me for tweets about a particular case. THEY ARE HERE (emoji)."[1]

Introduction

At present in the UK, the Guide to Judicial Conduct (GtJC) prevents judges from blogging or micro-blogging in a professional capacity.[2] Restrictions placed on judges engaging with social media are currently deemed as necessary given the need for judges to "be, and be seen to be, independent of all sources of power or influence in society, including the media and commercial interests."[3]

However, as the tweet quoted above from Adam Wagner demonstrates, judicial officeholders in the UK appear to be on social media despite the restrictions set out under the GtJC. Although judges are permitted to blog/micro-blog in a personal capacity, it is clear from this tweet above that even permitted *personal* engagement can transcend into the realms of *professional* engagement given the ease with which identities may be discovered online. In this instance a Supreme Court judge has openly declared their professional status, albeit within the assumed confidence of Wagner, which is an apparent violation of the GtJC's restrictions. It is therefore inevitable that encounters such as these will blur the distinction between personal and professional engagement further. This suggests that the current restrictions placed on judges blogging/micro-blogging in a professional context are unsuitable for managing an individual judge's relationship with social media.

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[1] Twitter.com, @AdamWagner1
accessed via https://twitter.com/AdamWagner1/status/1386032509989818370

[2] Courts and Tribunals Judiciary, *Guide to Judicial Conduct* (March 2020) at p.18 accessed via, https://www.Judiciary.uk/wp-content/uploads/2020/03/Guide-to-Judicial-Conduct-Guide-Fourth-Amendment-2020-v3-1.pdf and, Courts and Tribunals Judiciary, *Blogging by Judicial Office Holders* (August 2012) accessed via, https://www.Judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/blogging-guidance-august-2012.pdf

[3] GtJC (2020), at p.6

The presence or potential presence of judges online is a very new phenomenon, and therefore currently underexplored in UK literature. This thesis bridges the gap between constitutional scholarship and the emerging need to consider the constitutional impact that social media as a site of power will have on the role of the Judiciary in the future. Whilst the relationship between the UK's constitutional framework, judicial independence and social media has not yet been investigated, it is likely to become necessary as contemporary legal professionals (and social media users) ascend to the judicial bench.

This thesis argues that the UK's current constitutional dynamics rely on the perception of judicial independence in order to generate legitimacy for the judicial role. When we consider this dependence placed on *perception* in light of new sites of constitutional power, such as the Fifth Estate or "Social Media", then the flawed nature of the constitutional idea of judicial independence is revealed. The Fifth Estate becomes a potential site of scrutiny that reveals a lack of independence to the public. This means that social media has the potential to undermine the ways in which judicial independence provides legitimacy to the courts.

As will become clear over the course of this thesis, the judicial institution has an awareness of the fragility of judicial independence and the reliance that is placed on perception in order to maintain the traditional constitutional framework which grants them their legitimacy. As a result, their approach to the Fifth Estate is one generated out of fear that social media may reveal judicial independence for what it is: a façade that is given constitutional significance through the belief that it exists, rather than through any real or meaningful demonstration that it does exist in actuality.

In this way, this thesis argues that judicial independence is a barrier erected by the Judiciary that is, (1) impossible to maintain as a result of social media, (2) is inconsistent with the role of the Judiciary in modern society and, (3) is not sufficient to legitimize the public's trust in the Judiciary as a constitutional actor.

The restrictions placed on judges using social media in a professional capacity provide us with an example of judicial independence as a barrier. The Judiciary prevent individual judicial office holders from engaging with social media in their professional capacity and this restriction places a barrier between judicial conduct and the public's perception of this conduct in order to maintain the appearance of independence and thus the legitimacy of their constitutional role in modern society.

This thesis argues that judicial independence is an archaic barrier that no longer suits the function of the Judiciary in the UK. A Judiciary that is focused on maintaining the perception of an independent Judiciary in the eyes of the public is simply inconsistent with the Judiciary that is needed in modern society. The Judiciary should move away from its dependence on perception as a way of maintaining the legitimacy of their constitutional role and instead focus on becoming an institution that places importance in connectivity, social awareness, and responsibility. A reevaluation of their current approach to social media provides a timely and innovative way to begin this reimagination of the judicial role in the digital age.

This introduction will now expand upon this analysis in three key sections. The first section will guide the reader through the thesis, offering a breakdown and overview of each chapter, including its structure, key arguments, and conclusions. The second will introduce and elucidate upon a number of key terms and frameworks integral to an understanding of this thesis and the investigation within. The final section of this introduction will outline the approach to research that this thesis has taken and the way in which research has been conducted in order to reach its conclusions. This introduction will ultimately demonstrate the importance and purpose of this thesis, its position within the wider school of thought, the common themes that thread throughout its analysis and the recommendations it will make for the future of this area.

0.1. Towards a Modern Judiciary: A Chapter Breakdown

The first chapter in this thesis explores the traditional, broad principles of the UK constitution, such as the Separation of Powers, Rule of Law and Parliamentary sovereignty and how these principles inter-relate to institutionally specific doctrines such as Judicial Independence. The chapter explores the evolution of the Judiciary, particularly in the context of 20th and 21st century legislative reform, to argue that the constitutional principles as they apply to the Judiciary are increasingly unsuitable for the Judiciary's current and future constitutional role. The unsuitability of the current constitutional framework will only become more obvious when we consider the impact of the fourth and Fifth Estates of power (in Chapter II).

In Chapter I, I will begin by exploring the role of the Judiciary in the UK, firstly, by mapping the historical development of the Judiciary over time. The role that the UK Judiciary has played in the UK's uncodified constitutional arrangement has evolved incrementally, with the Bill of Rights 1688 and Act of Settlement 1701, being landmarks of significant constitutional development that molded the Judiciary into what we might loosely term the Judiciary *as we see it today*. It will be noted that the end of the 20th and beginning of the 21st century saw some of the most notable changes to the role of Judiciary and its interaction with other sites of constitutional power in the UK. This chapter will therefore focus on the Human Rights Act (HRA) 1998,[4] the rise of judicial review as a remedy for violations of power committed by other branches of government and the Constitutional Reform Act (CRA) 2005.[5] The way in which the latter *constrains* the role of the Judiciary and the former *constrains* the other two branches of government will be discussed, concluding that the CRA 2005 as a mechanism to enhance notions of independence and

[4] Human Rights Act 1998
[5] Constitutional Reform Act 2005

separation does not negate the politicization resulting from the consideration of inherently "political" questions in the courtroom.

An analysis of the HRA 1998, judicial review and the CRA 2005 reveals that they are indicators that signal the changing role of the Judiciary in the 21st century. The HRA 1998 and CRA 2005 do not *create* or *destroy* the politicization of the judicial role, but they do reveal the ways in which the politicization of the Judiciary has been formalized in the UK's modern constitution.

The structure of Chapter I calls upon Roger Masterman's work "The Human Rights Act 1998 and the separation of powers" found in his monograph, *The Separation of Powers in the Contemporary Constitution. Judicial Competence and Independence in the United Kingdom*.[6] Within this chapter, Masterman refers to the "macro-level" separation of function and the allocation of specific roles to the Judiciary, Executive and Parliament, and the "micro-level" functioning of constitutional principles as how "in *practice (*emphasis added) the courts manage the boundary between consideration of policy and law, and of interpretation and judicial legislation."[7]

This separation of "macro" to mean *function* and "micro" to mean *in practice* is drawn upon and taken further in Chapter I to also include "nano" principles of the constitution. To this end, I will claim that the principles of parliamentary sovereignty, separation of powers and rule of law are best described as "macro" principles, judicial independence and accountability as "micro" principles, and judicial recusal, determination of conflicts of interest and bias as "nano" principles. The macro principles of the constitution apply to each of the institutions of government and how they interact with one another, the micro principles apply specifically to the judicial institution and

[6] Masterman, R. *The Separation of Powers in the Contemporary Constitution. Judicial Competence and Independence in the United Kingdom.* (CUP, 2011)
[7] Ibid, at p.4

the role that it plays as a constitutional actor in the UK, and the nano principles as they relate to the conduct of the individual judicial office holder within the judicial institution.

In this way, the constitutional arrangement as it applies to the Judiciary in the UK will be described as an inverted pyramid. In this pyramid the macro, micro and nano principles of the constitution are stacked upon one another with the nano principles at the foundation of this structure. It is the nano principles that apply to *individual* judges and guide their *individual* conduct and it is this individual conduct that impacts on the rest of the pyramidical structure and therefore on our understanding of the constitutional framework of the UK.

The individual conduct of the judge is therefore foundational to the relevance of the micro and ultimately macro principles of the constitution. If we can say, as Masterman does in the context of the separation of powers, that these constitutional principles do not find their relevance as templates of "institutional design requiring clear and inviolate separation" of institutions of power but rather as "dynamic and fluid explanation[s] of how the Judiciary interact"[8] with the Executive and legislative branches of government, then we can also use this framework to unpack what the addition of two new or *newer* sites of power, the fourth and Fifth Estate, has on our understanding of the constitutional framework in the UK.

To explore this, Chapter II will discuss the addition of two other sites of constitutional power. The first to be considered is the Fourth Estate. The history and emergence of the media (print press) as a Fourth Estate of power will be considered, alongside the way in which the Fourth Estate acts as a site of power capable of scrutinising the actions of the Judiciary. The approach that the Judiciary takes to engagement with the Fourth Estate, and vice versa, will be unpacked and it will be concluded in this section that the Judiciary engage at an *institutional l*evel, despite the Fourth Estates scrutiny of *individual* conduct. The Judiciary's approach to the Fourth Estate

[8] Ibid.

is rooted in the need to maintain the *appearance* of the *public's perception* of independence, impartiality, and integrity.

The invention of Web 2.0 technologies and the establishment of social media as a core mode of communication will then be considered. It will be argued in the second half of this chapter that social media is sufficiently distinct from the Fourth Estate as to warrant being a distinct site of constitutional power. Calling on the work of O'Regan, it will be argued that the Fifth Estate is distinct from the fourth in seven identifiable ways: *(1)* scale, *(2)* breadth *(3)* instantaneous communications *(4)* algorithmic distribution of information, *(5)* anonymity, *(6)* editing and ethical requirements and *(7)* The Private Majority Superpowers.[9] In addition, this chapter will argue that "virality" also distinguishes the Fifth Estate from the fourth and this should therefore be seen in addition to O'Regan's seven principles.

Overall, Chapter II argues that we should consider the macro, micro and nano principles as they were conceptualized in Chapter I, against the backdrop of *five* sites of institutional power, rather than the traditional *three*: these five sites are the legislative, the Executive, the Judiciary, the Fourth Estate (traditional media) and the Fifth Estate (social media). It will therefore be concluded in this Chapter that the UK's constitutional framework is pentagonal rather than tripartite in nature, and that the dependence placed on perception of judicial independence in order to prop up the constitutional framework of the UK is significantly affected when we consider the potential that the Fifth Estate of power has to erode at this perception and change the nature of who can be considered as "the public."

Like the approach that the Judiciary takes to the Fourth Estate, the Judiciary take an institutional approach to the Fifth Estate. This institutional approach will be explored in detail in the first half of Chapter III, with the social media accounts (Twitter, Facebook, YouTube, Instagram, and LinkedIn) of HMCTS and the Supreme Court providing evidence of the

[9] O'Regan, K. "Hate Speech Online: An Intractable Contemporary Challenge" (2018) *Current Legal Problems*, Vol.71, No.1. pp.403-429

relationship between the judicial institution and the Fifth Estate. The role that the Judiciary see the Fifth Estate playing in their interactions with the public will be explored and it will be revealed that the institutional use of social media platforms differs little from engagement with the Fourth Estate, despite the key differences between the fourth and Fifth Estates, and that as with traditional media, the institutional approach to social media is grounded in caution in order to protect the appearance of independence, impartiality and integrity of the Judiciary.

In the second half of Chapter III, the way in which *individua*l judicial office holders interact with the Fifth Estate will be considered. The various iterations of the Guide to Judicial Conduct (GtJC) will be examined to understand the rules that guide a judge engaging with blogs/micro-blogs. It will be seen that individual judicial office holders are restricted from engaging with social media in their professional capacity, and the final sections of this Chapter will be dedicated to exploring the reasons why these guidelines issued to judges under the GtJC are unsuitable for navigating judicial use of social media. Chapter III reveals to us that social media is seen as a source of power capable of compromising the legitimacy of the judicial institution. As a result, social media impacts on the way in which the constitutional structures discussed in Chapters I and II are maintained. The judicial approach to the Fifth Estate reveals a dependence on perception of judicial independence that is necessary in order to prop-up the constitutional structures previously considered. The Fifth Estate is therefore a site of power capable of compromising the legitimacy of the judicial institution as it is currently derived from judicial independence, and it is for that reason that individual judicial office holders are restricted from engaging online in their professional capacity.

Chapter IV of this thesis will unpack the need to maintain the appearance of judicial independence as a legitimate justification for withdrawing individual judicial office holders from the Fifth Estate. The current institutional approach to the engagement of individual judges with social media is arguably framed in terms of risk, and the fourth chapter of this thesis will take a closer look at these risks as justification for isolating judges from digital networks.

These risks include, the combative and evolving nature of social media platforms, privacy and data concerns associated with social media use and concerns surrounding the meaning of "friendship" online and the "like" button. Each of these risks will be considered in turn, and this Chapter will conclude that though there are significant risks that come with social media engagement, and that some of these risks are indeed judicial specific thus having a unique impact on the Judiciary, they are not sufficient justification for restricting professional use of social media. Therefore, the risks do not provide sufficient reasons for an individual judge's professional withdrawal from the Fifth Estate.

Having considered the risks associated with social media use, the fifth and final Chapter, will look at the potential benefits that might arise as a result of promoting and encouraging individual judicial engagement with the Fifth Estate. Amongst these benefits are, the potential to develop and display civic awareness, the ability to access wider demographics and inform more widely about the justice system, enhance transparency, and better understand modern technologies in order to enhance technical literacy and competency amongst the judicial population. These potential benefits of this judicial engagement with social media argue for a reimagination of the importance placed in the perception of judicial independence as the main source of legitimacy for the Judiciary, in favour of judicial engagement, connectivity and social awareness as a way of supporting the inverted pyramidical structure considered in the first two chapters of this thesis.

The final section of Chapter V will provide a framework recommending judicial education for use of social networks. The idea of restriction will be rejected in favour of education; where judges are provided with regularly updated, platform specific and comprehensive guidance on "good" social media practice and the benefits that may arise from engagement, both for the individual judge's social awareness and technical competency, and for the public in whose name judges administer justice. The current framework for judicial education will be critiqued and this section will analyse the number of ways in which this current educational program may be

improved upon and how this might look in the future. It is this educational framework and a focus on connectivity and engagement over restriction and isolation that better supports the constitutional framework discussed in this thesis. Judicial independence as a principle that currently legitimizes the judicial role in the UK can therefore be superseded, although not rejected entirely, in favour of social engagement.

The conclusions of this thesis will be twofold. Firstly, this thesis will conclude that judges should be allowed to engage with digital networks in their professional capacity. Recommendations will be made as to an educational framework that may adequately prepare individual judges for engagement with the Fifth Estate that not only (1) negates any perceived risks to the perception of independence, impartiality and integrity but, (2) advances the ways in which engagement with the Fifth Estate of constitutional power can be used as a tool for social engagement, outreach and connectivity.

Secondly, the addition of a Fifth Estate of power requires us to think differently about the constitution as it is said to exist in the UK. Most notably for the purpose of this thesis, the Judiciary must reassess the way in which they engage with the Fifth Estate if indeed an individual judge's conduct is measured by the potential it has to damage the *perception* of the macro, micro and nano principles of the constitution. Given that these principles are reified in nature, the current response to engagement with the Fifth Estate will not adequately protect against an erosion of the principle of judicial independence as it is perceived to exist by the public.

Therefore, this thesis will argue that the reliance placed on *perception* as a way to underpin the constitutional framework and the Judiciary's position within that framework requires reconfiguration. Given the addition of a Fifth Estate of power and noting the increasingly political role of the Judiciary, this thesis presents a timely opportunity to question the role that we see the Judiciary playing in modern society.

The current constitutional framework is dependent on individual judges being *seen* to act independently, impartially and with integrity. But this focus on the perception of these principles

is missing the point. Instead, we should be acknowledging the inherently political nature of (some) decision making and accept that engagement with the public through the Fifth Estate will be the natural progression of the way that the Judiciary functions in society. Once we accept this, the potential risks associated with social media no longer provide sufficient justification for precluding a form of engagement that is increasingly inevitable on the level of the individual judge, and also beneficial to the contemporary constitutional framework.

0.2. Definitions and Context of Thesis Research

In most instances, the terms used in this thesis can be given their natural meaning or definition. In some cases, the terms used require a more in-depth explanation as to what is meant by them, why I have chosen to use them and consideration of any debate surrounding their meaning. This section will therefore briefly introduce what is meant by *(1)* the Judiciary, *(2)* the digital age, *(3)* the Fourth Estate and, *(4)* The Fifth Estate.

Reference to "the Judiciary" in this thesis will be taken to mean the Courts and Tribunals Judiciary in the UK. Therefore, reference to "the Judiciary" includes all judges or judicial office holders, who are either salaried or fee-paid, including magistrates and coroners in the UK. There is scope to find nuance in the various hierarchies of the judicial system, for example, the difference between a tribunal judge's use of social media when compared to a Justice of the Supreme Court, and where this is the case, this thesis shall make a note of this distinction.

There are certain instances where rules and regulations do not apply universally across the whole of the UK. For example, the Judicial Conduct Investigations Office (JCIO), created by the Constitutional Reform Act 2005, has a statutory duty in England and Wales only and is distinct from The Judicial Complaints Reviewer established by the Judiciary and Courts (Scotland Act) 2008. For this thesis, where guidance differs across jurisdictions in the UK, then the approach taken in England and Wales will be considered.

This thesis is titled *Judicial Independence in the Digital Age: The Challenges and Opportunities of Social Media for Judges,* and so it is important to note to whom judicial independence refers, and to also unpack what is meant by the "Digital Age." The term Digital Age will be used in lieu of alternatives such as the internet age, computer age etc., both as a way to achieve consistency throughout this thesis and because this term best describes the period of history through which we are currently living. It is not merely the internet or computers that have heralded a transition from traditional industry, but the digitization of society that best describes the changes that began in the mid-to-late 20th Century.

As Dutton notes, many technical developments have shaped the Internet of the twenty-first century, such as the emergence of email communication and the Web, and "no serious student of the Internet's history would subscribe to the notion of a single inventor jump-starting a predetermined trajectory of development."[10] Indeed, the ways in which the internet has shaped and has been shaped are numerous and the ecology of the internet is a constantly evolving terrain wherein outcomes may be anticipated or predicted but are not certain. The Digital Age therefore refers to our current historical period in which industry, business and the way in which society communicates and connects is digitized.

The following terms will be more closely unpacked in Chapter II of this thesis, but for the benefit of the reader, it is worth briefly outlining what is meant by "the Fourth Estate" and "the Fifth Estate" in this introduction. Far prior to the emergence of the digital age in which we live today and following the works of the notable French political philosopher Montesquieu, the *three estates* of power found meaning in their ability to describe the three functions of state: the Executive, Parliament, and the Judiciary. As Chapter I will go on to discuss, there is much debate as to the role that each of these estates plays in the UK and the functional separation between them. Each of these estates of power is capable of placing limits upon and being limited by its fellow

[10] Dutton, W H. *The Oxford Handbook of Internet Studies* (2014) OUP, Chapter I, "Internet Studies: The Foundations of a Transformative Field" by W H Dutton, at p.9

institutions, and indeed, much of this thesis is dedicated to unpacking the limits placed upon the judicial institution and the ways in which institutions transgress the descriptive boundaries of separation into the political arena. These three estates of power represent the three institutions of government in the UK, which play both a crucial part in the modern political process and exist as essential components of a functioning democratic society.[11]

Alongside Montesquieu's traditional three estates, and for the last two centuries, has sat a Fourth Estate. The Fourth Estate is not a governmental institution like its three counterparts but can certainly be said to play an important role in the democratic process. The term, said to be coined by Anglo-Irish political theorist Edmund Burke, first referred to the print press, and later came to symbolize the media as a whole.[12] Therefore, in this thesis, the "Fourth Estate" is given its dictionary definition as "newspapers, magazines, television, and radio stations and the people who work for them who are thought to have a lot of political influence."[13] In this way, it will be used interchangeably with *the media*, *the press*, *newspapers*, and *traditional media,* although it is noted here that the "Fourth Estate" does not merely refer to the media or the press as an entity in and of itself, but rather the ways in which these collective entities are able to wield social influence and form part of the way in which politics is conducted in the United Kingdom.

The role that the media has played in:

> "Defending the public interest and in fulfilling the role of a watchdog on government's activities has been heavily debated, analyzed, and investigated, and its power on the political scene and influence on the policy-making process cannot be denied."[14]

[11] Al-Rodhan, N A F. *The Emergence of Blogs as a Fifth Estate and their Security Implications* (Slatkine, 2007) at p.12
[12] Ibid.
[13] Cambridge Dictionary Definition
[14] Al-Rodhan, N A F. *The Emergence of Blogs as a Fifth Estate and their Security Implications*, at p.12

More recently, “information and news… are no longer the exclusive domain of politicians and professional reporters.”[15] The emergence of the digital age brought with it changes to the way in which society views and consumes news, with major national media outlets ceasing to be the *only* easily accessible source of news, although their influence remains indisputable.[16] The prevalence of the internet in modern society changed the way in which news is reported, consumed and exchanged, with users (or ‘netizens’) being able to choose from an exponential range of sources, and network with one another by providing comments or analysis on social media platforms.

These “networked individuals” or “blogosphere” are what are now referred to as “The Fifth Estate.” Unlike the Fourth Estate, the term itself is not given a dictionary (Oxford or Cambridge) definition, perhaps demonstrating the lack of consensus as to its natural meaning or a reluctance to acknowledge it as distinct from its predecessor, an idea that is firmly rejected in Chapter II. However, for the purpose of this thesis, the Fifth Estate will be given Graham and Dutton’s meaning of “networked individuals” via social media who are able to hold the other estates of power to account.[17] Additionally, the term “the Fifth Estate” will be used interchangeably with *social media*, *the internet*, and *Web 2.0*, although like with the Fourth Estate, it should be noted that the Fifth Estate results from and is formed by social media, the internet and the Web, is facilitated by the mobilization of individual users who communicate and form networks with one another online.

0.3. Approach to Thesis Research

The originality of this thesis lies in the analysis of judicial independence as a constitutional principle against the backdrop of social media and its proliferation in modern society. As the

[15] Ibid, at p.13
[16] Ibid, at p.12
[17] Graham, M & Dutton, *W H. Society and the Internet: How Networks of Information and Communication are Changing Our Lives* (OUP, 2014)

chapter outline demonstrates, this thesis takes a doctrinal and black-letter approach to this analysis. As such, it explores and critiques a range of primary and secondary materials, including case law, legislation, international guidelines, and domestic guides to conduct in order to establish the constitutional position of the Judiciary in the UK within the context of their engagement with social media.

Given that this is a nascent area of scholarship there are many ways in which this research, or similar research, may have been conducted and may be conducted in the future, although given the current ban on judicial participation on social media platforms, it is the author's opinion that an empirical assessment would not yet be appropriate. As such, this thesis is not an empirical study of any current use of social media by judges or future legal professionals. Instead, this thesis is working at the forefront of constitutional law and undertakes a doctrinal investigation into the inevitable implications of judicial engagement with social media on the UK's constitution. This thesis is therefore focused on analysing constitutional principles, rather than empirical data, and aims to establish a framework to help us understand the challenges and opportunities of social media for the Judiciary, which could provide the basis for further research.

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Chapter I: The Judiciary as a Constitutional Actor in the United Kingdom

1.0. Introduction

In Chapter I, I will consider the three estates as they exist in the United Kingdom: the Legislature, Executive and Judiciary. For the purpose of this thesis, this chapter will predominantly focus on the role of the Judiciary in the constitutional arrangement of the UK and the constitutional principles that define the role of the court as legal adjudicators.

The common theme of this chapter is the way in which the Judiciary as an institution is both constrained and is capable of constraining as it acts within the constitutional arrangement of the UK. The purpose of this chapter is to set the theoretical framework for the discussion to follow. This will be essential as we come to discuss potential new sites of power, such as the emerging Fifth Estate to be considered in Chapter II, and how this might impact on the current framework in place that dictates the role of the Judiciary as a constitutional actor. We must understand the doctrinal foundations upon which the Judiciary is built if we are to deem it either capable or incapable of adapting to the reality of modern society wherein the internet and social media are core components of everyday life.

Following a brief overview of the early development of the Judiciary as an actor separate from the other branches of government, the discussion will focus on significant changes that have shaped the contemporary Judiciary, such as the Human Rights Act 1998 and the Constitutional Reform Act 2005. Through this analysis we can identify the current structure of our present-day Judiciary and the mechanisms by which institutional separation is sought.

Having considered the historical evolution of the Judiciary in the UK, I will go on to unpack the principles upon which the judicial institution, and the constitution on the whole, is founded. Building on the work of Masterman, I will categorise these into three sections, the “macro”, “micro” and “nano” principles of the UK’s constitution. I will begin by considering the “macro principles”:

parliamentary sovereignty, the separation of powers and rule of law. Whilst these are by no means an exhaustive list of fundamental principles, they are fundamental in understanding the allocation of power between the three institutions of government, and most importantly, understanding how the Judiciary functions in this tripartite structure. These three principles can be considered "macro" in that they relate to the institutions of power in the UK's constitution on the whole.

The historical consideration of each of these doctrines shall be considered in Section 4.0, attributing the works of Montesquieu and Dicey as the foundations upon which these principles might be considered to operate in the UK. However, I will agree with the modern challenges to the doctrine's application in a UK context, calling on the work of Masterman and Jennings to question the relevance of these constitutional doctrines as descriptive devices in the UK. I will note that the principles of parliamentary sovereignty, separation of powers and rule of law are essential to our understanding of the decisions made by institutional actors, the complexity of the relationship between institutions of power and the ways in which these institutions exercise this power, thus, maintaining their relevance in our modern constitution, albeit in a way not envisaged by their originators.

In Section 5.0, I will term the principles of judicial independence and accountability "micro" principles. These are the principles upon which the conduct of the Judiciary and its individual members are based. I will look at the formal mechanisms in place to ensure institutional separation of the Judiciary from its fellow governmental institutions, but I will note that the concepts of independence and accountability cannot be strictly considered in terms of institutional separation. More importantly for the purpose of this thesis, we must also look towards the independence and accountability of the judge as an individual actor within the existing constitutional framework.

Finally, I will discuss the "nano" principles of the constitution: the doctrine of judicial recusal, and the determination of bias. These doctrines do not look at the overall picture of the relationship between the institutions of government (macro), do not relate to the conduct of the

Judiciary as a way of promoting the interests of the collective (micro), but instead relate to the individual behaviour, actions and beliefs of the singular judge in a specific instance. It is at this point where the emphasis that is placed on the perception of conduct, as opposed to actual conduct, is most evident. It is this *individuality* that has implications reaching all the way up to the micro and macro principles of the constitution. As Griffith says, where neutrality is revealed as a sham, damage is done to the judicial institution. The dependence placed on the perception of "the public" as opposed to actual conduct attempts to maintain this sham. However, as this thesis will go on to assert, the rise of new sites of constitutional power will further erode this pretence and if the Judiciary wish to avoid further damage, they must adapt their relationship with both the fourth and Fifth Estate.

As we shall see, doctrines of the constitution attempt to both legitimize and constrain the allocation of power amongst the three institutions of government. In theory, these principles work in tandem to both constrain the role of the Judiciary by limiting their transgressions into the political realm, whilst also legitimizing the Judiciary as an institution capable of being tasked with administering justice in society. However, the expectations of judicial conduct are based on perceptions rather than the actuality of their actions. It is enough that judges are *seen to* act within the normative framework of conduct. So, the theoretical principles intended to depoliticize the Judiciary, in some way deny or mask the actuality of their politicization. I will continue to question what this means for the constitution as I consider the addition of a fourth and potential emergence of a Fifth Estate as new sights of constitutional power in Chapter II.

2.0. The Evolution of the Judiciary in the United Kingdom

The Judiciary as we know it today is the result of over 1,000 years of legal evolution.[18] We have seen justice develop from trial by ordeal to the process that we are familiar with today. Whilst the history of the Judiciary has not been without its trials and tribulations, we might say that the Judiciary as an institution has changed more in the past 20 years than in its previous 1000 years. The coming into force of the Human Rights Act 1998 in 2000, and the developments that came with the Constitutional Reform Act 2005, changed and are still changing the judicial landscape in ways that could not be foreseen.

The following subsections of this Chapter will be dedicated to recounting the historical development of the judicial institution in the United Kingdom. The changes made by the HRA 1998 and CRA 2005 will be discussed in order to contextualise the institution as we understand it to exist in our current constitutional arrangement and the ways in which it constrains and is constrained within the doctrinal structures discussed in the latter stages of this Chapter's analysis. This is necessary for us to unpack the way in which judicial independence currently legitimizes the judicial role and scrutinise the suitability of this form of legitimacy in the latter chapters of this thesis.

2.1. The Historical Development of the Courts in the UK

Legal history and a study of the development of the common law in the UK "is a story which cannot be begun at the beginning."[19] As Plucknett acknowledges, "however remote the date at which we start, it will always be necessary to admit that much of the still remoter past that lies behind it will have to be considered as directly bearing upon the later history."[20] Much like Plucknett, "into the enormous field of pre-history we shall not venture."[21] It is enough to

[18] Courts and Tribunals Judiciary, "History of the Judiciary" accessed via, https://www.Judiciary.uk/about-the-Judiciary/history-of-the-Judiciary/
[19] Plucknett, T F T. *A Concise History of the Common Law* (2001, 5th Edition, The Lawbook Exchange Ltd.) at p.3
[20] Ibid.
[21] Ibid.

acknowledge the priceless contributions that Roman law, running its course for a thousand years, and other still more ancient legal civilisations such as Greek, Semitic and Egyptian have had on the first beginnings of what we might consider our recorded history of common law.[22]

With this in mind, the first real trace of our *modern* Judiciary emerged in the twelfth century, as it became possible to identify a small group of court officials who had particular experience in advising the King on the settlement of disputes.[23] As Brooke notes, from this emerged the justices in Eyre who held a mixed administrative and judicial jurisdiction, the combination of which led to great dissatisfaction and the justices to be largely regarded as engines of oppression.[24]

It was during the thirteenth century that the Court of King's Bench emerged, in which justices were "assigned for the holding of Pleas before the King himself."[25] Edward I, during his reign between 1277-1307, instituted reforms that would create the Inns of Court as we know them today as centres of legal education and the tradition by which judges would be appointed from members of the Bar.[26] The first Statute of Westminster 1275 made numerous changes in procedure, many of them designed to protect the subject against the King's officers, given that "evidence collected…the previous year had revealed a good deal of oppression."[27]

The following Tudor period and reformation saw significant changes for the Judiciary, who from "time to time...refused to obey royal commands if they judged them to be contrary to the law."[28] During this period the Judiciary maintained their right to interpret the law freely and independently, thus beginning to solidify the notions of separation with which we are familiar today.[29]

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[22] Ibid.
[23] Brooke, H. "The History of Judicial Independence in England and Wales" (2015) EHRLR Vol.5, pp.446-459, at p.447
[24] Ibid.
[25] Ibid.
[26] Ibid, at p.448
[27] Plucknett, T F T. *A Concise History of the Common Law,* at p.27
[28] Ibid.
[29] Ibid.

The following periods did not mark the end of problems and trials for the judicial institution in Hanoverian Britain. As Brooke notes, this "long constitutional conflict was all about power" and more specifically the institution with whom power resides.[30] The forcible removal of James II and assertion of parliamentary supremacy over the Crown, in the 1689 Bill of Rights, shifted this historically contentious distribution of power. The passing of the Act of Settlement[31] in 1701 solidified further the Judiciary as a separate constitutional actor in the UK. Prior to the formal recognition of the principles of security of judicial tenure, there were many examples of judges being removed from office for failing to decide cases in accordance with the whims of the Monarch.[32] The Act marked judicial independence as a fundamental concept in the UK by putting formal mechanisms in place for the removal of judges from judicial office.

The Judicature Act in 1873 abolished the old central courts that had existed since the Middle Ages, and replaced them with a Supreme Court of Judicature, which consisted of a High Court of Justice and Court of Appeal. The act divided cases into specialist divisions, bringing particular types of business before judges who were particularly familiar with them.[33] The demand for this reform came from Britain's leading "industrial, commercial and financial interests" wherein "complex commercial cases often required the attention of different branches of law in different courts."[34]

The House of Lords was established as the highest court of appeal by the Appellate Jurisdiction Act in 1876.[35] Following the establishment of the HoL as the highest court in the land, twelve "Law Lords" were appointed as the Appellate Committee to hear and decide the various

[30] Brooke, H. "The History of Judicial Independence in England and Wales" at p.451
[31] The Act of Settlement 1701
[32] Courts and Tribunals Judiciary, "Independence" accessed via, https://www.Judiciary.uk/about-the-Judiciary/the-Judiciary-the-government-and-the-constitution/jud-acc-ind/independence/
[33] Plucknett, T F T. *A Concise History of the Common Law* at p.212
[34]UK parliament, "The Judicature Acts of 1873 and 1875" accessed via, https://www.parliament.uk/about/living-heritage/transformingsociety/laworder/court/overview/judicatureacts/
[35] Appellate Jurisdiction Act 1876

appeals that came before the House.[36] Certainly, the fact that the Law Lords were a Committee of the House of Lords raised issues and questions as to the appearance of independence from the Legislature prompting the government's decision, albeit several centuries later, to create a new Supreme Court for the UK.[37]

Whilst the Judiciary had certainly emerged from 20th century with greater sophistication as an institution, especially when compared to the days of trial by ordeal in the 12th century, the evolution of the Judiciary as it functions today cannot be marked as complete without considering the incorporation of the European Convention on Human Rights into domestic law via the Human Rights Act 1998 and the changes brought about by the Constitutional Reform Act 2005.

2.2. Judicial Review and The Human Rights Act 1998

The 1960s witnessed a "formative moment" for judicial review, with the "quartet"[38] House of Lord judgments marking a turning point in the development of administrative law.[39] The emergence of judicial review in the quartet cases was developed further in the 1980s, as the role of the courts in reviewing the actions of the Executive branch began to change their position within the tripartite structure of the constitution. Judicial review, which allows individuals to challenge the exercise of power by government bodies, may be sought as a remedy under the three circumstances of

[36] Barrett, M. *The Law Lords. An Account of the Workings of Britain's Highest Judicial Body and the Men who Preside Over it* (Palgrave Macmillan, 2001)
[37] See Masterman, R. "A Supreme Court for the United Kingdom: two steps forward, but one step back on judicial independence" (2004) *Public Law*, Spring pp.48-58, at p.48, with reference to the *Department of Constitutional Affairs, Constitutional Reform: A Supreme Court from the United Kingdom* CP 11/03 (July 2003)
[38] See, *Ridge v Baldwin* [1964] AC 40*, Padfeld v Minister of Agriculture* [1968] UKHL 1*, Conway v Rimmer* [1968] AC 910*,* and *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147
[39] Arvind, TT. Kirkham R. Sithingh, D M. Stirton, L. *Executive Decision-Making and the Courts. Revisiting the Origins of Modern Judicial Review* (Hart Publishing, 1st Edition, 2021)

illegality, irrationality and procedural impropriety as set out in the renowned *re the Council of Civil Service Unions*[40] or GCHQ case.

This cornerstone of the UK's constitution, the doctrine of parliamentary sovereignty, was not seen to be threatened by the expansion of administrative law to allow for individual application for judicial review. Not least because primary acts of legislation were still not to be considered within the bounds of review, rather the courts were tasked with examining the decision-making process of public bodies exercised through secondary legislation or statutory instruments.[41] So, the Judiciary was seen to be enforcing the will of Parliament by checking the exercise of delegated power to ensure that this process did not step outside the bounds of the power conferred upon it by Parliament itself.

Whilst this remains the case, and judicial review is only one of several ways in which individuals can hold the government to account for the process by which it reaches decisions, the application of judicial review has undergone some change since its inception. The inclusion of decisions made under the royal prerogative as being justiciable expanded the scope of review,[42] however, access to legal aid for judicial review claims was severely restricted by the coalition government's introduction of LASPO in 2013 and between 2015 and the end of September 2019, applications for review fell by 44%.[43]

Perhaps one of the greatest changes has been the rhetoric surrounding the doctrine, having begun as a doctrine intent on exerting the will of parliament, it has now moved towards one that is aimed at frustrating it. This notion of disgruntlement over judges "thwarting political decisions"[44] certainly comes in the wake of Brexit, most notably seen with the tabloid response

[40] *re the Council of Civil Service Unions* [1984] 3 All ER 935
[41] *Pickin v British Railways Board* [1974] UKHL 1
[42] *Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9
[43] Bowcott, O. "What is judicial review and why doesn't the government like it?" (Tues 11 Feb 2020) The Guardian, accessed via, https://www.theguardian.com/law/2020/feb/11/what-is-judicial-review-and-why-doesnt-the-government-like-it
[44] Ibid.

to *Miller* as having foiled "the will of the British people."[45] Following the government's defeat in both *Miller (No.1)*[46] and *(No.2)*,[47] the Conservative party in their 2019 manifesto promised to "update" administrative law and ensure that "judicial review is not abused to conduct politics."[48]

Seen now as a mechanism by which the rights of the individual might be protected from the abuse of power by the Executive, justification for judicial review has framed the Judiciary as a political actor within the constitution. The way in which judicial review has been used by its applicants and the subsequent reaction from parliament, and occasionally (former) judges themselves,[49] has allowed for judicial review to become the platform upon which a political melee might take place.

In addition to this increased political tension arising from the appropriate use of judicial review, the implementation of the ECHR into domestic legislation in the form of the Human Rights Act in 1998, impacts on our understanding of the role of the Judiciary. Prior to the HRA coming into force in 2000, Parliament was said to uphold domestic human rights in line with the European Convention on Human Rights (ECHR), to which the UK became a signatory in 1951. The debate prior to the enactment of the HRA revealed diametrically opposing views as to whether the determination of human rights ought to be within the political realm in an open deliberative forum, or whether they should be a "matter for representatives who may be removed by the electorate."[50]

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[45] Slack, J. "Enemies of the People" Daily Mail (4 Nov 2016)
[46] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5
[47] *R (on the application of Miller) v The Prime Minister, Cherry and others v Advocate General for Scotland [2019]* UKSC 41
[48] The Conservative and Unionist Party Manifesto 2019, accessed via https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf, at p.48
[49] See for example, BBC The Reith Lectures, Law's Expanding Empire "Jonathan Sumption – Law and the Decline of Politics" accessed via https://www.bbc.co.uk/programmes/m00057m8
[50] Masterman, R. *The Separation of powers in the contemporary constitution: judicial competence and independence in the United Kingdom* (2011, Cambridge University Press) at p.36

As Masterman observes to its critics the HRA 1998 would result in political institutions ceding power to unelected and unaccountable judges and that the courts themselves may become politicized as a result. The HRA would push the Judiciary further into the remit of the political realm, inviting judges to "depart from textual analysis and the application of rules set down by the Legislature into the analysis and application of ever more 'woolly' principles"[51] So, it is argued that a substantive bill of rights transfers significant political power from the Legislature to the Judiciary and that this is undesirable.[52] However, the converse of this argument would suggest that human rights "are of such importance that they should be placed out of the reach of passing majorities, insulated from the pressures of party politics and ensured in a written, entrenched, document."[53] Allan claims that whilst the courts may be striking a balance between inherently political concepts, they might fashion this "reasonable balance as a matter of legal doctrine."[54]

In practice, the HRA has in some way struck the middle ground between these two arguments, achieving neither one nor the other fully. The HRA does not go as far as to "strike down" legislation, in the same way as its US counterpart. Instead, the HRA relies on the notion of interpretation and only goes as far as s.4, allowing for a "declaration of incompatibility."[55] Thus, the Judiciary are awarded a measure of responsibility over the protection of individual rights, whilst the perceived supremacy of Parliament over the judicial branch is upheld in the UK's constitutional framework. However, although the HRA has not given the Judiciary an explicit political power to wield over the elected branches in the name of individual rights, there has certainly been an implicit politicization of the judicial role. Freeing rights from the political whims of Parliament has come at the expense of the Judiciary being able to claim removal from the political realm. The inherent nature of these questions being brought before courts is political, as

[51] Ibid, at p.38 quoting Griffith, J A G. "The Political Constitution" (1979) *The Modern Law Review*, Vol. 42, Issue 1, pp.1-21
[52] Ibid, at p.39
[53] Ibid.
[54] Ibid, at p.40 quoting Allan, T R S.
[55] HRA 1998, s. (4)

Lady Hale and Lord Reed assert in *Cherry*/*Miller (No2)* "although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it."[56] Whilst we might say that judges make decisions on the basis of legal doctrine, the implications of these decisions reach much further than this and at times have political consequences.[57]

As with the case of judicial review as it is discussed above, in some instances deciding the parameters of human rights before the courts has framed the Judiciary as an opponent of parliament. Questions regarding rights might be decided in the courts, but they are also heard in the political arena, and the Judiciary as decision makers do not emerge unscathed from this. The fact that the courts are *perceived* to be making political decisions, to an extent, means that they *are*.

If the expanded potential of the judicial review process to challenge the political decisions of government ministers and the enactment of the HRA has indeed "furthered the politicization of the judicial decision-making process"[58], then we might see the Constitutional Reform Act 2005 as its potential counterweight. The CRA shall now be considered, questioning the extent to which it has been successful in insulating the judges from exposure to the political controversy of the legislative branch.[59]

2.3. The Constitutional Reform Act 2005

[56] Judgment of Lady Hale and Lord Reed in *Miller (No2)*, para. [31]
[57] For example, the controversy surrounding *Hirst v United Kingdom (No2)* ECHR 681, for further information see The Guardian, "Prisoners 'damn well shouldn't' be given right to vote, says David Cameron" Press Association (2013, Fri 13th December) accessed via https://www.theguardian.com/politics/2013/dec/13/prisoners-right-to-vote-david-cameron
[58] Masterman, R. *The Separation of powers in the contemporary constitution: judicial competence and independence in the United Kingdom* (2011, Cambridge University Press) at p.3
[59] Ibid.

Given the Judiciary's contemporary role as gatekeepers of individual domestic rights, new questions arise as to the democratic legitimacy of not only an unelected Judiciary but the clandestine arrangement as to their appointment. The introduction of the HRA meant that new political burdens were being placed on the Judiciary in public law cases with no clearer understanding as to how this might impact on the Judiciary as an independent branch of government.

Some five years after the HRA came into force, Parliament enacted the Constitutional Reform Act 2005. For the first time in English history, the 2005 Act awarded statutory recognition to the importance of judicial independence. The Act formalises that "the Lord chancellor, other Ministers of the Crown and all with responsibility for matters relating to the Judiciary or otherwise to the administration of justice must uphold the continued independence of the Judiciary."[60] Despite this new statutory acknowledgment, the Act fails to define what is meant by judicial independence nor what is required to guarantee its protection. And so, although the CRA recognises the significance and value of upholding judicial independence, it does not necessarily take us any closer to defining it as a concept.

The Act does make three significant changes to the way that the Judiciary operates and interacts with other constitutional actors and the public. Each of these changes goes some way to upholding the principles of independence. However, there are still significant shortcomings in the protection and advancement of independence, and it is in doubt whether the CRA has been a victory for judicial independence or has in fact diminished the value of the principles of independence in practice. As Woodhouse notes, given the "elusive nature of judicial independence, it is also difficult to determine what developments might put it under pressure or undermine public confidence in the Judiciary."[61] Rather than provide actual changes to the

[60] Constitutional Reform Act 2005 (CRA) s.3(1)
[61] Woodhouse, D. "The Constitutional Reform Act 2005 – defending judicial independence the English way" (2007) *International Journal of Constitutional Law*, Vol 5, Issue 1, pp.153-165

independence and impartiality of the Judiciary, the CRA might instead be said to have enhanced the appearance of independence. For instance, the establishment of the Supreme Court appeared to provide a solution to the challenge posed to the principle of judicial independence by the fact that members of the highest court in the land also sat within a chamber of the legislature. This was particularly pertinent following the coming into force of the HRA, given that the ECtHR considered judicial independence to be central to the right to a fair trial under Article 6 of the ECHR in its *Procola v Luxembourg* judgment.[62] Interestingly, here too, the ECtHR focused on the impact that the performance of dual roles would have on the *perception* of judicial independence: "[t]he mere fact that certain persons successively performed these two typed of function [judicial and advisory] in respect of the same decisions is capable of casting doubt on the institution's structural impartiality."[63] Accordingly though, as we shall see, the creation of a Supreme Court provides merely a symbolic solution to concerns about judicial independence, this would be arguably enough to satisfy both the ECtHR and the needs of our domestic constitutional architecture.

This analysis of the 2005 Act will be divided into three parts. The first section of the Act modified the office of the Lord Chancellor in its role as head of the Judiciary, speaker in the House of Lords and cabinet minister. The second established and set the parameters for a UK Supreme Court and the final section dealt with judicial appointment and removal. I will now consider each of these changes in turn with the order giving no deference to significance in order to determine the current role that the Judiciary plays in the UK constitution.

2.3.1. Arrangements to Modify the Office of the Lord Chancellor

[62] *Procola v Luxembourg* (1996) 22 EHRR 193
[63] Ibid, at para.[45]

The first change to be considered in this chapter will be the modification of the office of Lord Chancellor. Prior to the changes in 2005 the role of Lord Chancellor held the office of speaker of the House of Lords and oversaw all aspects of judicial life including salaries, complaints, and discipline. Schedule 6 of the 2005 Act amended this, removing judicial oversight from the Lord Chancellor, and establishing the Lord Chief Justice as head of the Judiciary. According to s.17 of the 2005 Act, the Lord Chancellor no longer takes the judicial oath and can no longer act in a judicial capacity, meaning that there is no longer a judge in the UK who also holds a ministerial position.

Arguably, the modification of the office of Lord Chancellor and the transference of judicial oversight to the Lord Chief Justice has strengthened the values of judicial independence. One of the most notable criticisms of the previous role had been the blatant overlap between the Chancellor's position as both minister and judge. This was seen to compromise the principles of separation of powers, with the Lord Chancellor having footholds in both Parliament and the Judiciary.

However Hazell suggests, in his interview of over 150 judges, ministers and officials, that the Judiciary "feel strongly that the 2005 changes have weakened judicial independence" and many of the judges were still "in mourning for the old Lord Chancellor."[64] It was the belief of some judges that despite suggestions of a conflict of interest between the roles of the Lord Chancellor, the position helped to ensure "that concerns of the Judiciary were heard at the highest level."[65] This suggests that concerns for the separation of Executive and judicial function were of secondary importance to some judges, with the need for a figurehead with wide reaching power to preside over the Judiciary and be able to impact on decisions at the highest level.

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[64] Hazell, R. "Judicial Independence and accountability in the UK have both emerged stronger as a result of the Constitutional Reform Act 2005" (2015) *Public Law: The Constitutional & Administrative Law of the Commonwealth*, Issue 2, pp.198-206 at p.202

[65] Bradley A W, Ewing K D & Knight C J S. *Constitutional & Administrative Law* (17th Edition Pearson, 2018) at p.407

Ultimately, Hazell disagrees with the Judiciary on this matter. He argues that there are now "multiple guardians" of judicial independence instead of all the responsibility for the protection of independence being placed on the single Lord Chancellor. Interestingly, the 2005 Act statutorily entrenches the principles of independence, specifically referencing the need for the Lord Chancellor to uphold the values of judicial independence in s.3 (6). Here, the Act requires the Lord Chancellor to have regard to the need to defend judicial independence, provide support for the Judiciary in order for them to properly exercise their function and take into account that the administration of justice must be properly represented to the public.[66]

However, O'Brien comments that in reality, the office of Lord Chancellor has withered politically and functionally since the removal of its parliamentary functions by the CRA.[67] Although the express provision for the protection of judicial independence was given in 2005, the existence of the Lord Chancellor as this "special guardian" of judicial independence no longer exists.[68] O'Brien uses the *Miller*[69] case as an example of this limited role the Lord Chancellor now plays as a protector and advocate of independence. The Lord Chancellor at the time, Liz Truss, was subject to severe criticism for what was perceived to be a slow and inadequate response to the widespread media criticism post-*Miller*.[70]

The *Miller* case also provides us with an example of how judges have recently become more widely visible and thus more exposed to criticism. Although Hazell believes senior judges to be more media-wise than their predecessors, they may no longer be able to rely on the Lord Chancellor to speak for them and so must be more ready to speak for themselves.[71] This may pose problems for the protection of judicial independence. Where judges are subject to extreme

[66] CRA 2005, s.3(6)(a)-(c)
[67] O'Brien, P. "'Enemies of the people': judges, the media, and the mythic Lord Chancellor" (2017) Public Law Nov Supp (Brexit Special Extra Issue 2017) pp.135-149 at p.149
[68] Ibid.
[69] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5
[70] O'Brien, P. "'Enemies of the people': judges, the media, and the mythic Lord Chancellor" at p.135
[71] Hazell, R. "Judicial Independence and accountability in the UK have both emerged stronger as a result of the Constitutional Reform Act 2005" at p.199

criticism, particularly of a personal or sensitive nature, and are simply left to get on with the job themselves, judges may be driven to speak to the media or make public statements where it may be inappropriate of uninformed of them to do so.[72] This potentially imperils their own appearance of impartiality.[73]

Perhaps it may be time for "judges and the legal profession to be their own guardians"[74] even, as O'Brien notes, in times of crisis.[75] This will undoubtedly have some impact on the perception of an independent Judiciary in the UK and may call in to question the way in which judicial independence currently legitimises the judicial role in the UK constitution.

2.3.2. The Establishment of the Supreme Court

I will now move on to s.23 of the 2005 CRA and the formation of a UK Supreme Court and address whether or not moving the final court of appeal out of the House of Lords truly enhanced the separation of the judicial institution from its Executive counterparts or whether this move was indeed a symbolic one. This section will put forward that the formation of a Supreme Court proved largely symbolic in terms of actual separation from the Legislature when compared to its former position in the House of Lords. However, this supports the assertion of this chapter on the whole, that independence and impartiality of the UK's Judiciary is founded upon the perception of independence. It was the opinion of the Labour government at the time of the reforms that putting

[72] See for example, Lord Chief Justice Sir Declan Morgan on BBC The View, claiming that the decision to override aspects of the EU Withdrawal Agreement "might undermine trust in the system of the administration of justice."
[73] O'Brien, P. "'Enemies of the people': judges, the media, and the mythic Lord Chancellor" at p.135
[74] Ibid, at p.149
[75] Ibid, at p.135

a formal end to the judicial role of the House of Lords would go some way to enhancing the appearance of judicial independence.[76]

As Masterman notes, the requirements under Article 6(1) of the European Convention on Human Rights[77] and the desire for a clearer separation of powers motivated the decision to detach the UK's highest appeal court from the Upper House of Parliament.[78] The incorporation of the HRA 1998, specifically in relation to Art. 6, required "a stricter view to be taken not only of anything which might undermine the independence of impartiality of a judicial tribunal, but even of anything which might appear to do so."[79] The fact that the Law Lords previously sat as a Committee in the House of Lords raised issues "about the appearance of independence from the Legislature ."[80]

However, The CRA did not promote the notion that judicial independence requires complete institutional autonomy in the form of a Supreme Court.[81] The Ministry of Justice, formerly the Department of Constitutional Affairs, continues to fund courts and services, and the new court is no more able to strike down legislation (as its US counterpart might) than its predecessor.[82]

Masterman asserts that there remain residual links to the Supreme Courts former days in Parliament:

> "…in spite of the bold claim that the new Supreme court 'will in no way be connected to the UK Parliament', the fact that it is proposed that the 'initial members of the Supreme Court will be the existing Lords of Appeal in Ordinary'

[76] Hyre, J. "The United Kingdom's declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights under the Human Rights Act of 1998" (2004) *Fordham Law Review*, Vol.73, at p.424
[77] European Convention on Human Rights, Article 6(1)
[78] Masterman, R. "A Supreme Court for the United Kingdom: two steps forward, but one step back on judicial independence" at p. 49
[79] Ibid, at p.50
[80] Ibid.
[81] Woodhouse, D. "The Constitutional Reform Act 2005 – defending judicial independence the English way" at p.157
[82] See for example discussions surrounding the use of Section 4 of the Human Rights Act 1998 to establish a dialogue between the courts, Parliament, and the Executive. For more information, Crawford, C. "Dialogue and Declarations of Incompatibility Under Section 4 of the *Human Rights Act 1998*" (2013) *The Denning Law Journal*, Vol.25 pp.43-89

> ensures that there will, at least for the foreseeable future, be a residual link to the UK Legislature within the new Supreme Court."[83]

Of course, writing in 2004 at the dawn of the new Supreme Court in the UK, Masterman was not contemplating the court as it exists today, given that none of the current Justices of the Supreme Court previously sat as part of the House of Lords Appellate Committee. He argues that whilst the separation of the final court of appeal from the UK Legislature represents a step forward for the independence of the Judiciary, there is in fact an "indifferent attitude to issues of independence and impartiality beyond the narrow aim of the removal of the 12 Lords of Appeal in ordinary from the Upper House of the UK Parliament."[84]

Perhaps then it is the "greater visibility of the court"[85] that marks the contrast with its predecessors. This new court has its own building, budgets and staff with greater institutional freedom to run its own affairs and is no longer "hidden away" in the House of Lords.[86] Further, the Supreme Court's willingness to engage with modern technologies, their new Twitter account with over 237K followers,[87] the "Supreme Court Live"[88] website where users can watch court proceedings in real time and their new website, which has taken a step away from the minimalist website of the old Law Lords,[89] has changed the way that the public is able to interact and engage with the highest court in the land. Despite this, the notion of a fair trial under Art. 6 of the ECHR is not merely "concerned with risks and appearances" but "actualities" as well.[90]

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[83] Masterman, R. "A Supreme Court for the United Kingdom: two steps forward, but one step back on judicial independence" at p.51
[84] Ibid, at p.57
[85] Hazell, R. "Judicial Independence and accountability in the UK have both emerged stronger as a result of the Constitutional Reform Act 2005" at p.199
[86] Ibid.
[87] Supreme Court Twitter Account https://twitter.com/uksupremecourt?lang=en
[88] Supremecourt.uk, Watch Live, https://www.supremecourt.uk/live/court-01.html
[89] Hazell, R. "Judicial Independence and accountability in the UK have both emerged stronger as a result of the Constitutional Reform Act 2005" at p.202
[90] Masterman R. "A Supreme Court for the United Kingdom: two steps forward, but one step back on judicial independence" at p.51

One of the greatest challenges facing the Supreme Court, as Hazell acknowledges, is that decisions are now more highly charged politically, often played out in the media. Although governments will often experience tensions with judges; the difference now is that they are more likely to come out into the open.[91] And so, while the aim of a new Supreme Court was to demystify elements of the decision-making process, this can often tread a thin line between improving public understanding and diminishing the respect for the judicial institution.

It would be fair to assume that the move out of the Houses of Parliament would reduce the likelihood of this confusion between independent judicial law maker and politician. However, the establishment of the new Supreme Court may have had the opposite effect. It is possible that increased exposure of the court has renewed a sense of engagement with court procedure. Where previously the House of Lords Appellate Committee was cloaked behind the mystery of the Palace of Westminster, now the general public can see the court for themselves in Parliament Square. They can take a guided tour of the Supreme Court, sip from an "excellent espresso-based coffee from a wood-fired roaster"[92] at the Supreme Court's café, purchase Supreme Court Merchandise from the gift shop and log on from the comfort of their homes to watch the courts proceedings live.

2.3.3. Alterations to Judicial Appointment and Discipline

The final change imposed by the CRA 2005 was the alteration to the procedures in place for judicial appointments and discipline. Prior to the CRA, the Crown on the advice of the Lord Chancellor was responsible for appointing judges in English and Welsh courts. The process for judicial appointment is now made formally through an independent body, the Judicial

[91] Hazell, R. "Judicial Independence and accountability in the UK have both emerged stronger as a result of the Constitutional Reform Act 2005" at p.199
[92] The Supreme Court, Our Café, accessed via https://www.supremecourt.uk/visiting/cafe.html

Appointments Commission (JAC), in which the Lord Chief Justice is consulted as to appropriate candidates for judicial appointment.

Under the CRA, the JAC's statutory duties include selecting candidates based solely on merit, selecting people of only good character, and having regard to the need to encourage diversity in the range of persons available for judicial selection.[93]

With the decision now being held in the hands of an independent body, the CRA might go some way to enhancing the appearance of independence and impartiality of the Judiciary overall. This is especially true about the influence of politicians or more senior ranking judges on the decision-making process and the negative impact this might have had on the perception of whether judges were truly being selected solely on merit. The decisions for judicial appointment are now more transparent and the reasons and process for judicial appointment are enshrined within statutory requirements.

In theory, the statutory provision for the advancement of diversity and inclusion enhances the perception of an impartial Judiciary. A Judiciary that is seen as representative in terms of gender, ethnicity, socioeconomics and is indicative of the population overall is more likely to be perceived as impartial by the general public. In reality, the effect of s.64 seems to be of limited value in this regard. Statistically in 2021, 34% of court judges were female,[94] while those judges that identify as either Black, Asian or Minority Ethnic came in at only 9%.[95] The incorporation of s.159 of the Equality Act 2010[96] into s.63(4) of the CRA has done little to enhance diversity in the Judiciary. The Equal Merit Provision, also known as a "tie breaker" allows for an instance where candidates of equal merit are selected, preference is given to a candidate for the purpose of

[93] CRA 2005, s.63(2) and s.64
[94] Ministry of Justice "Diversity of the Judiciary: Legal professions, new appointments and current post-holders – 2021 Statistics" (15 July 2021) accessed via https://www.gov.uk/government/statistics/diversity-of-the-Judiciary-2021-statistics/diversity-of-the-Judiciary-2021-statistics-report
[95] Ibid.
[96] Equality Act 2010

enhancing diversity. Inserted into the CRA in 2013 by the Crime and Courts Act,[97] s.63(4) has not produced much practical change, given that since 2013, the appointment of female judges has increased (in percentage) by only 7.5% in 8 years.[98] Similarly, candidates of ethnic minority have increased by 2.2%.[99]

Undoubtedly, the Judiciary are under-representative in terms of gender and ethnic diversity. There is evidence to suggest that this lack of female and ethnic minority representation amongst the Judiciary contributes in some way to a perception of partiality or of being out-of-touch. This is an opinion that is often voiced and furthered by the press and media commentary.[100]

Especially in the wake of Brexit the mass media have flagged this lack of representation, albeit through the use of sensationalist media headlines and click-bait online commentary, that raise questions as to the ability of a non-representative Judiciary to make impartial judgments.[101] Despite the greater transparency afforded to the decision-making process by the CRA, it is clear that "progress is not as fast as we could wish"[102] and that this is having an impact on the perception of judges as capable of fulfilling their impartial judicial function.

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[97] Crime and Courts Act 2010

[98] Courts Diversity Statistics 2013-2014, accessed via https://www.Judiciary.uk/publications/judicial-diversity-statistics-2014/

[99] Ibid.

[100] For examples, see Doyle, J for the Mail Online "Out-of-touch Judges to be given lessons in popular culture (after one asked who are the Beatles?)" (16 June 2012) accessed via http://www.dailymail.co.uk/news/article-2160110/Out-touch-judges-given-lessons-popular-culture-asked-Beatles.html and Verkaik, R. "Judges are out of touch, says furious Blunkett" 14 May 2003, The Independent Online, accessed via, http://www.independent.co.uk/news/uk/crime/judges-are-out-of-touch-says-furious-blunkett-104765.html and Glover S for the Mail Online "Judges are unelected, out of touch and shockingly arrogant" (2011, 21 May) accessed via https://www.dailymail.co.uk/debate/article-1389326/Super-injunctions-Judges-unelected-touch-shockingly-arrogant.html

[101] See for example, Linning S & Slack J "Radical feminist who is a long-running critic of marriage, the judge happy for the law to be seen as an ass and 'the cleverest man in Britain': The Supreme Court judges who'll rule on Brexit" The Daily Mail (2016, 3 November) accessed via https://www.dailymail.co.uk/news/article-3902854/Radical-feminist-long-running-critic-marriage-judge-happy-law-seen-ass-cleverest-man-Britain-Supreme-Court-judges-ll-rule-Brexit.html

[102] Courts and Tribunals Judiciary, *Judicial Diversity Statistics 2017*, An Introduction from the Lord Chief Justice, accessed via https://www.Judiciary.gov.uk/about-the-Judiciary/who-are-the-Judiciary/diversity/judicial-diversity-statistics-2017/

With regards to the disciplining of individual judges, the advice given by the Judicial Conduct Investigations Office (JCIO) influences the removal and discipline of members of the Judiciary. The JCIO is an independent statutory body supporting the Lord Chancellor and Lord Chief Justice in their joint responsibility for judicial discipline in England.[103] Established in October 2013, the JCIO replaced the Office for Judicial Complaints.

Investigation by the JCIO can result in either the removal of a judge from a specific case in which there may be the appearance of bias or misconduct, or in the less likely scenario removal from office entirely. Between 2016-2017, the JCIO received 2,652 complaints, a number which has steadily risen from 1,674 in 2006.[104] In 2017, 42 of those complaints resulted in the Lord Chancellor and Lord Chief Justice taking disciplinary action against a judge. Although this comes at only 0.2% of the population of judges in the UK, as of 2009, both the Lord Chancellor and Lord Chief Justice agreed to name judges who were disciplined for misconduct. As the Guardian points out, this "roll of dishonour"[105] can even be freely accessed online[106] and go as far as to detail the offence itself and the subsequent punishment.[107]

Although we are still seeing only a negligible number of judges per year being held to account through the JCIO proceedings, the change is again seen through the greater visibility of the process itself. The impact of this is untold. On one hand seeing justice be done has its benefits. A transparent complaints process aids public understanding and engagement with the Judiciary. Those that have been wronged can feel vindicated and those that have wronged are suitably and

[103] The Judicial Complaints Reviewer manages judicial complaints procedures in Scotland.
[104] Statistics via JCIO Annual Reports and Publications 2016-2017 and 2006-2007, accessed via, https://judicialconduct.Judiciary.gov.uk/reports-publications/
[105] Rozenberg, J. "Who is judging the judges?" The Guardian (Tues 25 March), accessed via, https://www.theguardian.com/law/2014/mar/25/who-judges-the-judges
[106]Judicial Conducts Investigation Office Website accessed via https://judicialconduct.Judiciary.gov.uk/disciplinary-statements/2017/
[107] For example, District Judge Timothy Bowles & others Statement from the Judicial Conduct Investigations office (JCIO 18/15, issued on the 17th March 2015) with reference to the investigation into the allegation that they viewed pornographic material on judicial IT equipment in their offices, accessed via, https://s3-eu-west-2.amazonaws.com/jcio-prod-storage-1xuw6pgd2b1rf/uploads/2015/03/JCIO_press_statement_-_4_judges_-_17_March_2015.pdf

publicly punished, perhaps deterring others from repeating the mistakes of their predecessors. Despite this heightened visibility of complaints procedures, the published disciplinary statements are deleted after one year where the judge is not removed from office, and after five years where the judge is removed. Although disciplinary procedures are publicly available, that is only the case for a limited period, with the slate being wiped clean the next year.

2.4. The Judiciary as a Political Actor in the UK's Constitution

Having considered the way in which the Judiciary has evolved in recent years, this thesis will assert that the Judiciary, often as a result of this aforementioned evolution, play a political role in society. This section will explore this statement as to the political role of the Judiciary and justify why this politicization is relevant against the backdrop of emerging digital technologies.

The foundations for the debate as to judges being political actors within the UK's constitutional framework was laid down by J A G Griffith. Whilst contemporary commentators have both criticised and advanced Griffith's claims about the politics of the Judiciary, it is with his work that this section will begin.

The central thesis of Griffith's work, *The Politics of the Judiciary*, asserts that judges in the UK:

> "Cannot be politically neutral because they are placed in positions where they are required to make political choices which are sometimes presented to them, and often presented by them, as determinations of where the public interest lies; that their interpretation of what is in the public interest and therefore politically desirable is determined by the kind of people they are and the position they hold in our society…"[108]

To Griffith, "judges are part of the machinery of authority within the state and as such cannot avoid the making of political decisions."[109] As Lord Devlin claimed:

[108] Griffith, J A G. *The Politics of the Judiciary* (5th Edition) at p.336
[109] Ibid, at p.293

> "In theory the Judiciary is the neutral force between government and the governed. The judge interprets and applies the law without favour to either and its application in a particular case is embodied in an order which is [as to the to enforce… British judges have never practiced such detachment…judges regard themselves as at least as much concerned as the Executive with the preservation of law and order…Whereas under most systems the judgment is formal, brief and to the legal point, the British judge may expatiate on what he is doing and why he is doing it, and its consequences; and because of his prestige he is listened to."[110]

It is this tendency of judges to expatiate that makes the Judiciary in the UK "more than just a neutral arbitral force."[111] As Griffith notes, this is most obvious in controversial matters:

> "When the public interest is involved, judges become active and cannot suddenly become coy about enforcing laws – if necessary, by their own procedures – which they believe to be politically controversial."[112]

Griffith, whilst asserting his analysis of the judicial role in the UK's constitution as being descriptive in nature, also highlights the normative value of judges moving beyond what may previously have been thought of as their usual bounds. Quoting Lord Woolf, Griffith agrees that it is "one of the strengths of the common law that it enables the courts to vary the extent of their intervention to reflect current needs."[113]

Griffith's theory of politicization is shaped by his notion of judges "by their education, training and class" exercising their power in accordance with a particular code and a particular set of values."[114] In this way, Griffith suggests that "there is a constant not changing judicial philosophy exercised in accordance with a particular, and presumably unchanging, set of values."[115]

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[110] Griffith, J A G. *The Politics of the Judiciary*, Citing Lord Devlin writing after the industrial dispute of 1972, at p.293
[111] Ibid.
[112] Griffith, J A G. *The Politics of the Judiciary* (5th Edition) at p.295
[113] Ibid, Quoting Lord Woolf at p.331
[114] McConville, M, Marsh, L. *The Myth of Judicial Independence* (OUP, 2020) at p.212
[115] Ibid.

However, this thesis does not aim to assert that the politicization of the Judiciary may be described in terms of liberalism or conservatism, or that judges are political actors because they are "at real risk of exhibiting bias in favour of state interest as against the interests of the individual citizen",[116] or indeed, *vice versa,* as a result of their education or class. Instead, this thesis seeks to explore the political role of the Judiciary, not in terms of party politics, but the way in which the Judiciary make decisions with the "public's interest" in mind, and the impact this in turn has on the public.

Their education, training and class is not irrelevant to this discussion. However, it is relevant to the extent that their social standing and background impacts on the ways in which they make decisions that impact on the public, as opposed to signifying an inclination to act liberally or conservatively or in tension with one party over the other.[117]

Certainly, the politics of the Judiciary can be explored in partisan terms as Former Supreme Court Justice, Lord Sumption, has in *Trials of the State: Law and the Decline of Politics* (based on his five BBC Reith Lectures in 2019). Sumption makes the claim that "law does not occupy a world of its own. It is part of a larger system of public decision-making" but that in addition to this, judges have "fill[ed] the gap" for those with whom have little faith in politicians and the political process.[118] As such, "the courts have developed a broader concept of the rule of law which penetrates well beyond their traditional role of deciding legal disputes and into the realms of legislative and ministerial policy."[119] For Sumption, the politicization of the Judiciary results from the absence of effective politicians.

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[116] Griffith, J A G. *The Politics of the Judiciary*, at p.52

[117] See also Stevens, R. in *The English Judges: their Role in the Changing Constitution* at p.141, where he describes the political role of the Judiciary as "remedying the democratic deficit" or keeping a sense of balance in the constitution where the government is faced with a "chronically weak opposition."

[118] See The Independent Review of Administrative Law (March 2021) Chaired by Lord E Faulks QC, accessed via https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf at para 2.56 p.48, wherein the Good Law Project proclamation that "Our politics is broken" is referenced.

[119] Sumption, J. *Trials of the State: Law and the Decline of Politics* (2019) Profile Books, at p.34

Rather than tread this line of argument, this thesis will fit more in line with Gee's (et al) meaning of "politics",[120] that:

> "Insofar as judicial independence is sometimes confused with judicial isolation, this first sense of politics is a useful reminder that judges always remain part of the 'political' – as in governmental – apparatus of the state, even when they hold other political actors to account on legal grounds."[121]

So "politics" or "political" is as Gee et al., claim: "a broad and flexible term." In *the Politics of Judicial Independence in the UK's Changing Constitution*, the term "political" is given its meaning in "a transactional sense of negotiations about the day-to-day implementation of judicial independence and accountability undertaken by actors in the political and legal systems."[122] Like Gee, this thesis is not suggesting that "judges are simply politicians in judges' robes, nor deny the distinctiveness of law and legal reasoning."[123] However, judges do "help to secure socially and economically desirable goals."[124]

Therefore, politics arises "whenever questions in the public sphere do not have clear or easily agreed solutions."[125] It is at this juncture between *answering questions* that are in the *public's interest* that have a *public impact*, that "politics" for the purpose of this thesis will be understood to exist.

Certainly, the constitutional reforms of the early twenty-first century impacted on the scope of the questions considered by the courts and the ways in which they impacted on the public. The Human Rights Act 1998 (HRA) and Constitutional Reform Act 2005 (CRA) undoubtedly altered the shape of the UK's constitution, with the courts delivering judgments "which encroach into area of public policy once considered the preserve of elected politicians" and enjoying "greater power

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[120] Although Gee (et al.) believes the "most important… ingredient of most political activity" is "Politics as negotiation", this thesis responds to the prior two sections in "The politics of judicial independence and accountability" exploring "Politics as Government" (at p.24) and "Politics as Power" at p.25
[121] Gee, G (et al.) at p.24
[122] Gee, G et al. *The Politics of Judicial Independence in the UK's Changing Constitution,* Chap.2 at p.9
[123] Ibid.
[124] Ibid.
[125] Ibid, at p.23

over the justice system in matters such as judicial selection, discipline, deployment and the funding and management of the courts.“[126] The impact of the HRA 1998 and CRA 2005 on the politicization demands a wider exploration has been given in the first chapter of this thesis.

Gee’s predication that the HRA 1998 and CRA 2005 would “not be the last word”[127] for the role of the Judiciary in the UK’s changing constitution, has been realized. No better example is provided for than by both *R (on the application of Miller and another) v Secretary of State for Exiting the European Union (Miller No.1)*[128] and *R (on the application of Miller) v The Prime Minister (Cherry/Miller No.2)*.[129]

In the former, the court held by an 8 to 3 majority that the Government must consult Parliament before triggering Art.50 of the Treaty on European Union, in order to begin negotiations for the UK’s exit out of the European Union. Whilst this dealt a blow to the government, on the question of whether or not the devolved administrations of Scotland, Wales and Northern Ireland must consent (by law or by constitutional convention), the Supreme Court unanimously agreed that they did not. In *Miller No.1*, the role that the Supreme Court see politics playing in legal-decision making is made clear:

> “It is worth emphasizing that nobody has suggested that this is an inappropriate issue for the courts to determine…Those are all political issues which are matters for ministers and Parliament to resolve. They are not issues which are appropriate for resolution by judges, whose duty is to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society.”[130]

Neuberger further asserted that “judges are neither the parents nor the guardians of political conventions; they are merely observers.”[131] This insistence as to the legal, not political, decision

[126] Ibid, *Introduction* at p.2
[127] Ibid, at p.30
[128] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5
[129] *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41
[130] *Miller No.1* at para. [3] p.4
[131] Ibid, at para. [145] p.47

making power of the court was surely in reaction to the previous High Court decision that had been met with, what Richard Burgon MP coined, "hysterical headlines," some of which "personally attack[ed] the judges who heard this case."[132] The divisiveness of the Brexit debate in the political arena impacted on the way in which the High Court's decision was perceived, as evidenced by the divisive reporting at the time. The Daily Mail's now infamous headline of "enemies of the people" was joined by the Daily Telegraph's front page, "the judges versus the people."[133]

The need for the courts to establish the remit of their political decision making was once again required in *Cherry/Miller (No.2)*. The court found unanimously that the advice given by the Prime Minister to the Queen that Parliament should be prorogued at a "crucial moment in the Brexit process" was unlawful.[134] Taking a different tact to that taken by the eleven-justices in the 2017 *Miller (No.1)* case, the Judiciary were able to find a political matter justiciable by framing the question in terms of the limits to the prerogative power. As Gordon says, in doing this, the Supreme Court were able to "sidestep – rather than engage with – the legal and political difficulties concerning the justiciability in principle of a decision to prorogue Parliament."[135]

The decision in *Cherry/Miller (No.2)* stated that:

> "Although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reason for the courts to refuse to consider it."[136]

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[132] Owen Bowcott and Heather Stewart, "MPs condemn newspaper attacks on judges after Brexit ruling The Guardian (Fri 4 Nov 2016) accessed via https://www.theguardian.com/media/2016/nov/04/labour-condemns-newspaper-attacks-on-judges-after-brexit-ruling

[133] See, Slack, J "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 (2016, 3 November) accessed via https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html and also, "Judges vs the people" Government ministers resigned to losing appeal against Hight Court ruling." The Telegraph, accessed via https://www.telegraph.co.uk/news/2016/11/03/the-plot-to-stop-brexit-the-judges-versus-the-people/

[134] Gordon, M. "The Prorogating Case and the Political Constitution" (30th Sept 2019) UK Const. L. Blog, accessed via https://ukconstitutionallaw.org/2019/09/30/mike-gordon-the-prorogation-case-and-the-political-constitution/

[135] Ibid.

[136] *Cherry/Miller (No.2)* at para. [31] p.12

Moving away from the approach taken in *Miller (No.1)*, the Supreme Court emphasized that "many if not most of the constitutional cases in our legal history have been concerned with politics."[137] Indeed, decisions often have a "political hue to them."[138] To some, the *Cherry/Miller (No.2)* decision marked an "inept foray into high politics."[139] With others, like Elliot, arguing that the judgment amounted to "nothing more than an affirmation and application, albeit in a politically fraught context, of orthodox constitutional law."[140] Certainly, as Gordon claims, the decision did "promote significant substantive political values, while generating doubts about the legal claims which underpin them."[141]

The politicization of the Judiciary as it is said to exist by its forefather, Griffith, has been "hotly contested in contemporary constitutional scholarship."[142] This thesis will not contribute to this debate, but rather acknowledge that both Griffith's approach and the subsequent debate surrounding legal and political constitutionalism, as Gordon says, "enhances our ability to understand the norms and institutions of the UK's constitutional order."[143] In this way, any framing of the debate between political and legal constitutional ideas is unnecessary for the purpose of this thesis, except to acknowledge that through an understanding of this debate, we might emerge with "deeper insights into the purposes and limitations of constitutional law in general."[144]

By Griffith's own admission, his examination is limited to the working of the "three institutions – Parliament, the government, and the Judiciary." It is clear "that each of these groups

[137] Ibid.
[138] Ibid.
[139] Finnis, J. "The unconstitutionality of the Supreme Court's prorogation judgment" (2019) Judicial Power Project, Policy Exchange accessed via https://policyexchange.org.uk/wp-content/uploads/2019/10/The-unconstitutionality-of-the-Supreme-Courts-prorogation-judgment.pdf
[140] Elliot, M. "A new approach to constitutional adjudication? Miller II in the Supreme Court" (2019) Public Law for Everyone, accessed via https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/
[141] Gordon, M. "The Prorogating Case and the Political Constitution" UK Cont. L. Blog.
[142] Gordon, M. "Parliamentary Sovereignty and the Political Constitution(s): From Griffith to Brexit" (2019) King's Law Journal, Vol.30, No.1 pp.125-147 at p.125
[143] Ibid,
[144] Ibid, at p.127

influences the way in which the others act, and it is clear, the particular, that the Judiciary may oppose the government to the extent of declaring its actions invalid."[145]

However, this thesis will work outside the scope of the three traditional estates of government. Whilst there has been attention paid to the relationship of the Judiciary with the media, it is the purpose of this thesis to consider Griffith's politicization, and the more recent demonstrations of the Judiciary's political role in *Cherry/Miller* (No.2) and view this in a new way. Most notably, through the lens of the emerging Fifth Estate or *social media*, and the way in which this new and complex site of public power may impact on the doctrines of the constitution *describing* the role of the Judiciary, and whether they *ought to* apply to the function of the Judiciary in our modern and digital society.

3.0. The Doctrinal Framework of the Constitution

The following sections of this chapter will be dedicated to outlining the constitutional principles that will frame further discussion into the role of the Judiciary in the UK, against the backdrop of their increasingly political role. I will begin by considering the wider constitutional principles of Parliamentary sovereignty, separation of powers and rule of law. I will view these principles as a lens through which to consider the power invested in the Judiciary, the relationship between the Judiciary and the other traditional institutions of government and the relationship with the public, in whose name the Judiciary fundamentally wields power. Similar to the approach of Masterman in his work, "The Human Rights Act 1998 and the separation of powers", I will call parliamentary sovereignty, the separation of powers and rule of law "macro" principles, in that they are over-arching constitutional principles responsible for determining the allocation of power between

[145] Griffith, J A G. *The Politics of the Judiciary* (5th Edition) at p.335

institutions.[146] I will discuss the doctrines according to the works of scholars such as Montesquieu and A V Dicey, but will also tap into the modern school of thought to acknowledge that this traditional conception of institutional separation cannot be strictly applied to the UK. Instead, they provide a framework in which to "frame" and "inform" political and legal debate.[147]

I will then consider what I will call "micro" principles, being firstly the principles of judicial independence and accountability. Next, I will assess the "nano" principles of the constitution: judicial bias and the doctrine of recusal. I have chosen to structure them in this way to reflect the remit of these doctrines; the separation of powers and rule of law apply cross-institutionally across the three sites of governmental power, the principles of judicial independence and accountability relate to the Judiciary specifically, and finally, the doctrine of recusal and bias as they apply to the individual judge. Analysing these constitutional principles in this way reveals that the nano principles of the constitution are foundational to the wider, more general, principles and the UK's constitutional framework is therefore dependent upon the independence and conduct of individual judicial officeholders. This will be important as the thesis goes on to consider the impact of social media on the perception of this individual independence and also question the usefulness of judicial independence as a principle that justifies the Judiciary's current constitutional role.

4.0. The "Macro" Principles of the Constitution

There are a number of important principles that provide a framework for understanding the nature of the UK's uncodified constitution. We must note that the doctrines of democracy and internationalism for example, all play an essential role in understanding the way in which the three traditional institutional branches of government interact with one another and the public. For the

[146] See the work of Masterman, R. "The Human Rights Act 1998 and the separation of powers" in *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (pp.33-59) in which he discusses the "separation of function at the macro level – the specific roles that have been allocated to the Judiciary, Executive and Parliament by the HRA 1998" at p.33
[147] Masterman, R, Wheatle, S. "Unpacking separation of powers: judicial independence, sovereignty and conceptual flexibility in the UK constitution" (2017) *Public Law*, Jul, pp.469-487 at p.487

purpose of this thesis, I will limit in depth discussion to the three principles of parliamentary sovereignty, the separation of powers and rule of law because these are the most relevant to understanding the role of the Judiciary in the UK's constitutional arrangement and unpacking the allocation of power within the UK's constitutional framework.

4.1. Parliamentary Sovereignty

As Gordon notes, the status of the doctrine of parliamentary sovereignty in the contemporary UK Constitution is much contested.[148] The developments considered above, such as the HRA 1998 and the "expansive vision of the judicial role"[149] in the early 21st Century, has left the role of parliamentary sovereignty in the UK less assured than Dicey's original vision of the "keystone of the constitution."[150]

Despite this, as Gordon argues it is both customary and necessary to begin with Dicey when establishing what the sovereignty of Parliament means.[151] To Dicey, the principle of Parliamentary sovereignty is that Parliament has:

> "Under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament."[152]

Therefore, to use the "proverbial example" as Young does, "if Parliament wished to pass a statute requiring the slaughter of all blue-eyed babies, it could do so." This is the "positive aspect" to sovereignty, wherein Parliament, as a matter of law, may enact primary legislation on any subject

[148] Gordon, M. *Parliamentary Sovereignty in the UK Constitution*, (1st Edition, Hart, 2015)
[149] Ibid.
[150] Dicey, A V. *The Law of the Constitution* (1885) pp.39-40
[151] Gordon, M. *Parliamentary Sovereignty in the UK Constitution*, at p.13
[152] Dicey, A V. *Introduction to the Study of the Law of the Constitution* (8th Edition, Macmillan, 1915) pp.37-38

matter it decides. Contrast this with the "negative aspect", where the other institutions of governance, or the courts, cannot question the validity of this legislation once it is recognised as a valid statute.[153]

As Young notes, three further clarifications ought to be made. Firstly, that Parliament refers to the power of the Houses of Commons, Lords and the monarch acting together in order to enact legislation. Secondly, Dicey does no argue that Parliament's legislative powers are completely unlimited. Dicey distinguished between the legal and political sovereignty of Parliament, wherein Parliament is said to have legislative power subject to limits such as "the possibility of popular resistance."[154] However, these are not legal limits to the doctrine. Parliament may therefore be "subject to a range of political, moral or practical limits at any moment, but this does not endanger its claim to possess legislative sovereignty."[155] To again refer to Youngs example, this means that "if Parliament were to pass a law authorizing the slaughter of blue-eyed babies, the governed are likely to rebel, or refuse to obey the law."[156]

Therefore, as Masterman puts forward:

> "The continuing validity of the sovereignty doctrine is therefore – not only a result of political and legal actors thinking that it matters, or an indication that Parliament is the core institution responsible for the generation of legal norms – a corollary of its broader symbolism. Sovereignty in the UK is not bestowed upon the constitution upon the law or upon the judges. Sovereignty resides in Parliament; an institution whose members are accountable to, and ultimately removable by, the electorate."[157]

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[153] Young, A. *Parliamentary Sovereignty and the Human Rights Act*, (Bloomsbury, 2008) at p.2
[154] Dicey, A V. *Introduction to the Study of the Law of the Constitution* (1915) at p.76
[155] Gordon, M. *Parliamentary Sovereignty in the UK Constitution*, at p.14. Gordon (at p.15) argues that Dicey's account of Parliamentary sovereignty can be characterised as legally unlimited legislative authority to the UK parliament. This is what he terms an "alluringly straightforward notion", yet the meaning of unlimited legislative authority is indeed a contested one.
[156] Young, A. *Parliamentary Sovereignty and the Human Rights Ac*t, at p.3
[157] Masterman, R. "Juridification, Sovereignty and Separation of Powers." (2009*) Parliamentary Affairs*, Vol.62 No.3, pp.499-502 at p.501

Thirdly, Parliament's law-making powers are "limited by the nature of sovereignty itself: namely that Parliament cannot pass a law which binds it successors."[158]

Whilst Dicey's notion of a sovereign Parliament is undoubtedly the starting point for discussion, it has not gone uncontested. Gordon rejects Dicey's idea that Parliament cannot bind itself in favour of the "manner and form" theory pioneered by Jennings, admitting "the possibility of a legally sovereign Parliament exploiting its legislative authority to enact certain kinds of 'limits' which would 'bind' itself and its successors."[159]

As Gordon concludes, the traditional account of the doctrine of sovereignty is "increasingly subject to challenge, sometimes to the point of rejecting that [it] has any continuing legal force at all." However, it is its nature "as a legal norm" that argues for its "current and continuing legal validity."[160]

4.2. The Separation of Powers

Given the complexity of the doctrine of separation of powers and its academic development spanning across several centuries, it is a difficult exercise to summarise its significance in the UK's constitutional arrangement. In its simplest sense, the doctrine of separation of powers dictates that all constitutional actors; the Executive, Legislature and Judiciary, should be kept separate in terms of both their functions and the people who operate them. It is the French philosopher, Montesquieu, who is commonly treated as the founder of the modern doctrine of separation of powers. Montesquieu states that "when legislative power is united with Executive

[158] Young, A. *Parliamentary Sovereignty and the Human Rights Act*, at p.3
[159] Gordon, M. *Parliamentary Sovereignty in the UK Constitution,* at p.15
[160] Ibid, at p.55

power in a single person or in a single body of the magistracy, there is no liberty… nor is there liberty if the power of judging is not separate from legislative [and] Executive power."[161]

A similar approach was taken by John Locke, an English philosopher, who wrote that it "may be too great a temptation to human frailty… for the same Persons who have the power of making laws, to have also in their hands the power to execute them."[162] Thus, both Locke and Montesquieu's theoretical analysis of the separation of powers can be summarised as the opposition to the concentration of state power in a single person or collective. Indeed, most institutional theory has been centred on an understanding of the necessity to wield state or governmental power in a way that promotes society's principles and ideals and the need for this power to be "controlled in order that it should not itself be destructive of the values it was intended to promote."[163]

Prior to the mid-twentieth century, the doctrine of the separation of powers operated at the forefront of European constitutional theory for distinguishing the institutional structures of free societies from those of non-free societies.[164] However, more recently the doctrine of separation has been subject to extensive academic criticism. The doctrine has come under fire as both a system of government suited to modern circumstances and as a doctrinal framework in which to understand or describe modern systems of government.[165]

Bradley and Ewing claim that there are degrees of separation in most modern jurisdictions.[166] Lord Steyn compares the constitutions of the United States and United Kingdom for example, stating that in "all democracies there is some principle of separation of powers, ranging from a strong principle, as in the United States, to a comparatively weak one, as in

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[161] Montesquieu Baron de, Charles-Louis de Secondat, *The Spirit of Laws* (1978; G Bell and Sons Ltd 1914) at Chap.6
[162] Locke, J. *Two Treatises of Government.* Ch. XII, para.143 See also Greaves, H R G. "Locke and the Separation of Powers" *Politica* Vol I, pp.90-112
[163] Vile, M J C. *Constitutionalism and the Separation of Powers* (2nd ed, OUP, 1998) at p.2
[164] Ibid, at p.10
[165] Ibid.
[166] Bradley, A W, Ewing, K D. *Constitutional and Administrative Law.* (14th ed. Harlow, 2008) at p.81

Britain."[167] The difference between these two approaches to separation largely results from the nature of the US constitution when compared to that of the UK. In the US, the separation of powers is embodied within a written constitution. And so, Articles (1) - (3) of the US Constitution ensure the separation of each branch of government by holding each branch accountable to the others.

The UK has never had a written constitution,[168] or a supreme law and the actual functioning of its constitutional organs is instead largely determined by conventions or political norms.[169] Much of the academic criticism surrounding the appropriateness of the doctrine centres on its incompatibility with the inter-institutional relationships of the UK constitution and the lack of constitutional framework put in place to guarantee Montesquieu's conventional approach to separation.

Credit for the most noteworthy criticism of just such an application is usually be given to legal commentator, A V Dicey. It was Dicey's view that doctrine of the separation of powers as it applies to the UK is "in some sort, the offspring of a double misconception."[170] Dicey critiqued Montesquieu's doctrinal treatment of the separation of powers, asserting that although "one merit of representative government [is that it] favours the separation of powers" in the UK this is merely a "nominal separation."[171] It is clear that the doctrine of separation of powers is no "unambiguous set of concepts."[172] To the contrary, the doctrine of separation has been subjected to polarized scrutiny often resulting in "extraordinary confusion in the definition and use of [its] terms."[173]

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[167] Steyn, J. "The Case for a Supreme Court" (2002) *Law Quarterly Review*, July Vol.118, pp.382-296
[168] An exception being the Instrument of Government 1649-1660 established during the interregnum of Oliver Cromwell
[169] Read, J S. "The Constitution, Parliament and the Courts: Towards a Commonwealth Model" Chap 4, at p.35 Contained within *Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach* (Cavendish Publishing House, London, 1999) Edited by Hatchard, J. and Slinn, P.
[170] Dicey, A V. *Law of the Constitution*, at p.338
[171] Dicey, A V. *Comparative Constitutionalism.* (2013 OUP) Edited by Allison, J W F Editor's Note at p.XXXIX
[172] Vile, M J C. *Constitutionalism and the Separation of Powers*, at p.2
[173] Ibid.

However, a "malleable definition of a term by no means equates to an absence of meaning."[174] And so, it may be that the flexibility of the doctrine provides one of its greatest strengths.

Stevens adopts this critique, asserting that the notions of separation in the United Kingdom are "cloudy" and "certainly its penumbra, and even its core, are vague."[175] However, Stevens continues by suggesting that while no general theory of separation exists constitutionally, surprisingly effective informal systems for the separation of powers have developed. Perhaps it is as Lord Simon of Glaisdale in his parliamentary address puts it, the UK has not a "separation of powers but something far more subtle and far more valuable – a balance of powers."[176] To an extent, Lord Woolf supports this notion. In his parliamentary address in the House of Lords on the Criminal Justice Bill 1997, he notes that British "liberties have been protected by careful constitutional balance between different arms of government. The Executive, Legislature and the Judiciary are usually sensitive in not trespassing upon each other's role. That sensitivity involves self-restraint."[177] Here, Lord Woolf alludes to the normative manifestation of the doctrine of separation and highlights the necessity of the judicial restraint in keeping up the appearance of the doctrine.

And so, regardless of whether the United Kingdom has a traditional doctrinal separation or whether there is instead a subtle balance, the political and judicial culture in the UK provides protection for the separation of each constitutional actor which are notably "missing in the law."[178] It can be said that a doctrine which is widely believed in and is taught extensively to students can therefore logically be considered to have both existence and traction.[179] In this sense, the doctrine of separation is asserted rather than defined.[180] The mere acceptance into political culture is

[174] Hall, H, Oliva J G, *Religion, Law and the Constitution: Balancing Beliefs in Britain* (Routledge, 2019) at p.285
[175] Stevens, R. *The English Judges: Their Role in the Changing Constitution*, at p.367
[176] HL Deb, 17 February 1999, vol 597, cc710-39
[177] *Hansard,* HL, 27 January 1997, col. 997. Lord Woolf
[178] Stevens, R. *The English Judges: Their Role in the Changing Constitution,* at p.367
[179] Hall, H, Oliva J G, *Religion, Law and the Constitution: Balancing Beliefs in Britain*, at p.287
[180] Stevens, R. *The English Judges: Their Role in the Changing Constitution*, at p.374

enough to guarantee the importance of the doctrine in the United Kingdom's constitution. This approach suggests a Marxist reification of separation; to *make into a thing*.[181] Judges and academics do not "simply believe in the fairy of separation of powers; they continue to clap, and therefore, give it life."[182] And so, belief in the existence of a separation alone is enough to breathe life into the doctrine. This means that the rhetorical, or at least politically rhetorical nature, of the doctrine itself is not enough to render it unimportant when considering the relationship between the Executive, Parliament and Judiciary.

So, the doctrine is neither Montesquieu's idealist separation, nor Dicey's merely descriptive in value. Instead, the separation of powers is a "fluid encapsulation of constitutional dynamics" and as Masterman and Wheatle claim, this "flexibility is central to the place of the separation of powers in the UK's constitution and has allowed the doctrine to retain credence in the face of obstacles to its straightforward application."[183]

Ultimately, the separation of powers in the UK is a product of the legislative, judicial, and political decisions that regulate and describe the relationships among the three core branches of government. Thus, the separation of powers is essential to our understanding of the decisions made by institutional actors, the complexity of the relationship between institutions of power and the ways in which these institutions exercise this power.

4.3. The Rule of Law

We might best start by looking at the rule of law as it was understood by A V Dicey, although his approach has since been heavily and convincingly criticised. While it is acknowledged that the

[181] Marxist reification or *thing-ification* taken to mean occurring when an abstract concept describing a relationship or context is treated as a concrete thing. Hypostatization will be taken to mean the effect of reification resulting from supposing that whatever can be named, or conceived abstractly, must actually exist.
[182] Hall, H, Oliva J G, *Religion, Law and the Constitution: Balancing Beliefs in Britain*, at p.287
[183] Masterman, R, Wheatle, S. "Unpacking separation of powers: judicial independence, sovereignty and conceptual flexibility in the UK constitution" at p.472

ideologies, if not the turn of phrase, of the rule of law can be traced as far back as the musings of Aristotle,[184] the rule of law and its application to modern constitutions, namely that of the UK, can be originally attributed to Dicey's work in his book published in 1885, *An Introduction to the Study of the Constitution*.

In his book, Dicey gives three meanings or attributes three points of view to the rule of law. Firstly, that no man is above the law in that "every man, whatever be his rank or condition, is subject to the ordinary law of the realm."[185] Second, Dicey contrasts the application of the rule of law in the UK to that of "foreign constitutions."[186] He notes that the constitution of the UK is pervaded by the rule of law as a result of judicial decision making and the incremental process of the common law, rather than as a result of direct reference to the rule of law within a codified constitution.[187]

Finally, and perhaps most notably for the purpose of this chapter, Dicey defines the rule of law as ensuring that should a man be accused of a crime of the land, his breach of the law should be established before the "ordinary courts of the realm."[188] The legal decision makers of the land cannot be cherry picked by government, or influential bodies and individuals. Instead, an accused should sit before judges who are held to the levels of independence and impartiality which can be expected of them.[189]

Dicey's anachronistic three points of description of the rule of law and how it manifests within a nomocracy has been criticised by Jennings in his work *The Law and the Constitution*.[190] Jennings argues that it is not enough to put it as Dicey does, that "Englishmen are ruled by the

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[184] English translation: "It is better for the law to rule than one of the citizens… so even the guardians of the laws are obeying the laws."
[185] Dicey, A V. *Introduction to the Study of Law of the Constitution* (1915, 8th ed. London, Macmillan) p.114
[186] Ibid, at p.115
[187] Bingham, T. *The Rule of Law* (Penguin UK, 2011) at p.3
[188] Dicey, A V. at intro p.*IV*
[189] Bingham, T. *The Rule of Law* at p.2
[190] Jennings, I W. *The Law and the Constitution* (2nd edition, London Press Ltd, 1938) See Appendix II, at p.285, where Jennings criticises Dicey's notion of (1) the supremacy of the law (2) Equality before the law and (3) the result of the ordinary law.

law and by the law alone."[191] Jennings believes that the rule of law is "not capable of precise definition."[192] It is instead an attitude, an expression of liberal and democratic principles, in themselves vague when it is sought to analyse them, but clear enough in their results."[193]

The concept of the rule of law itself has also been the subject of criticism from a wide range of academic disciplines and social commentators. Raz argues that there is now a tendency to use the rule of law as a shorthand description of all positive aspects of any given political system.[194] Indeed, the expression itself may be considered more like ruling class chatter and this ideological abuse and general overuse of the rule of law has rendered the expression academically meaningless.[195] Although it is acknowledged that the rule of law can have very different meanings varying from country to country, the concept, or at least the continued belief in the concept, has done little to prevent global atrocities taking place and the abuse of state power or individuals within that state. In 20th Century Europe, the Nazi party were able to further their agenda by placing their political supporters in leading judicial positions.[196] Even today, politicians still use the Judiciary to wield unjust punishments; bribery of judges is still taking place.[197] So, a Marxist theorist may present the rule of law as a cloak or legitimating ideology in which the class-based hegemonizing function of law is maintained.[198] A feminist theorist may instead argue that the rule of law furthers the *maleness* of law propping up the oppression of women in society.[199]

However, despite the frequency and ferocity in which academic criticism is levelled against Dicey's description of the rule of law as a describing principle at all, it can be said to have

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[191] Dicey, A V. *Introduction to the Study of Law of the Constitution,* Chapter IV at p.120
[192] Jennings, I W. *The Law and the Constitution*, at p.47
[193] Ibid.
[194] Raz, J. "The Rule of Law and its Virtue" in, Raz, *The Authority of Law: Essays on Law and Morality* (OUP, 1979) at p.210
[195] Bingham, T. *The Rule of Law*, at p.4
[196] For example, Roland Freisler as President of the People's Court during the Second World War.
[197] For example, Safi, M. "Indian Supreme Court 'in crisis' over retired judge corruption case" 14 Nov 2017, The Guardian Online, accessed via, https://www.theguardian.com/world/2017/nov/14/india-supreme-court-in-crisis-retired-judge-corruption-case-cash-for-decisions
[198] Stewart, C. "The rule of law and the Tinkerbell effect: Theoretical considerations, criticisms and justifications for the rule of law" (2004) MQLJ 7
[199] Ibid.

normative effect in the UK. Although the rule of law may be deemed all too subjective and uncertain to truly make any reference to its application meaningful, the approach of judges and the gravitas afforded the doctrine in leading judgments has maintained the significance of the rule of law despite its many shortcomings and semantic uncertainty.

In this way, the doctrine can be said to have developed as a norm through the actions and behaviour of leading judges in the UK. One example of this can be found in the House of Lords ruling in *Jackson and others v Her Majesty's Attorney General*[200] where Lord Hope asserts that "the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based."[201] Another is the *Alconbury*[202] case in which Lord Hoffmann remarks that "there is…another relevant principle which must exist in a democratic society. That is the rule of law."[203]

Statements such as these, made by leading judges, cannot simply be dismissed as "meaningless verbiage."[204] The fact that judges are prepared to rely on the rule of law as a justification for a decision- or decision-making process shows the effect that the doctrine can have in practice. This approach provides evidence for the normative manifestation of the rule of law in the UK. And so, similarly to the doctrine of separation of powers, if we do not believe in the rule of law, it will simply cease to exist.[205]

5.0. The "Micro" Principles of the Constitution

The constitutional principles outlined above inform the relationship between the governmental institutions and determine the hierarchy of norms within the constitution.[206] The principles that will

[200] *Jackson and others v Her Majesty's Attorney General* [2005] UKHL 56
[201] Lord Hope of Craighead in *Jackson*, at para. [107]
[202] *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23
[203] Lord Hoffmann in *Alconbury*, at para. [73]
[204] Bingham, T. *The Rule of Law* at p.4
[205] Stewart, C. "The rule of law and the Tinkerbell effect: Theoretical considerations, criticisms and justifications for the rule of law"
[206] Masterman, R. *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (2010, CUP) Introduction, at p.4

now be considered are specific to the Judiciary and govern the way in which judges are expected to conduct themselves, both in a professional and personal sense, to uphold the notions of both the separation of institutional power and the rule of law. These will be called the “micro” principles of the constitution, in the way that they are responsible, in practice, for upholding the notions of the macro principles as they are discussed above in relation to the Judiciary.

First, judicial independence will be considered. This section will look at the meaning of this term in its traditional sense and the multiple ways in which the doctrine strives to define the role of the judge, justifying the complex societal arrangement where one individual is tasked with determining the fate of others. The accountability of the Judiciary will then be considered as well as the mechanisms through which judges are held to account for both their professional and personal actions.

It will be said that the principles of judicial independence and accountability function as a normative framework for individual conduct wherein they act as both legitimising and constraining principles. In theory, independence legitimises the judicial role as arbiter of fairness on behalf of the public in whose name they administer justice, whilst also attempting to constrain their ability to traverse into the political realm. The mechanisms for accountability prevent the removal of judges by the other institutional branches based on decisions that may be disliked, whilst ensuring that judges are seen to be answerable for their decision making and are not viewed by the public as “above the law.”

It is this regulation of individual judicial conduct that props up the wider constitutional principles of the separation of powers and rule of law. However, as with the latter, the dependence on public perception operates at the very core of these principles, and they are thus subject to the whims of the society in which they are given value. This is particularly relevant when I go on to consider the inclusion of the fourth and Fifth Estate of power into a traditional understanding of the UK’s constitutional framework, in Chapter II.

It is important to note here that whilst judicial independence can be regarded as a mechanism of institutional separation, judicial independence as a principle does not merely refer to the Judiciary as a separate branch of government, but also to the separation of the individual judge from a political actor. So, judicial independence as a principle relates to the separation of the Judiciary from other branches of government but may also refer to the independence and impartiality of the individual judge.

5.1. Judicial Independence

An independent Judiciary might be seen as one of "the most essential characteristics of a free society."[207] The principles of judicial independence and the necessity of an impartial Judiciary free from Executive influence have been afforded importance at an international level with the United Nations Basic Principles on the Independence of the Judiciary and the Role of Lawyers.[208] The UN principles outline the need to "respect and observe the independence of the Judiciary" in order to "establish conditions under which justice can be maintained…"[209] Concern is raised at an international level as to the independence of the Judiciary from the influence of the Executive branch of government and the impact that this is likely to have on democratic process. The UN principles highlight that there is still some concern that in certain circumstances, there "exists a gap between the vision underlying [the principles of independence] and the actual situation."[210] The necessity to bridge this gap is justified with an emphasis on the important role judges play

[207] Chemerinsky, E. "What is Judicial Independence – Views from the Public, the Press, the Profession, and the Politicians" (1996) *Judicature*, Vol. 80, Issue 2 at p.73
[208] Basic Principles on the Independence of the Judiciary and the Role of Lawyers. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985. Endorsed by the General Assembly resolutions 40/32 and 40/146
[209] Ibid, at *Introductory Remarks*
[210] Ibid.

within society, given that they are charged with "the ultimate decision over life, freedom and rights."[211]

When carrying out their judicial function, judges must be seen to not only be free from improper influence from government, but also from a range of sources. This may include the media, individual litigants, pressure groups, self-interest, or influence from more senior ranking judges.[212] In order for the Judiciary to act within the constraints of the rule of law, as discussed above, each judge must be seen to decide cases based solely on given evidence and apply no prior partiality to their legal reasoning. Therefore, the doctrine of judicial independence puts emphasis on judges *appearing to be* independent.

This provides a lower threshold for compliance within the constraints of the doctrine; actual impartiality being the utopic alternative that is striven for in the UN Basic Principles mentioned above. An important example of this UK approach can be seen in the judgment and subsequent unprecedented decision to overturn the judgment in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* and the subsequent unprecedented decision to overturn it.[213] It was enough that Lord Hoffmann may have been perceived to be biased towards the plight of Amnesty International, where he was the chair and where his wife also held full-time employment.[214] For advocates of judicial independence and the rules governing the removal of judges from sitting on cases, the impact of this precedent was certainly unsettling. Steven's puts forward that once the press "went to work…[and] began taking strong positions, many demanding or expecting that Lord Hoffmann would resign"[215] it became almost inevitable that the decision

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[211] Ibid.
[212] Judicial Independence, Judiciary.gov.uk, accessed via https://www.Judiciary.gov.uk/about-the-Judiciary/the-Judiciary-the-government-and-the-constitution/jud-acc-ind/independence/
[213] [1998] UKHL 41
[214] Lord Hoffmann's ignorance to potential conflicts of interest were called into question in Lord Hope's recent publication, *UK Supreme Court 2009-2015: Lord Hope's Diaries*, (2019, Avizandum Publishing Ltd) For more information, see Rozenberg, J. "Pinochet's ghost still haunts the Law Lords" The Law Gazette (4 Feb 2019) accessed via https://www.lawgazette.co.uk/commentary-and-opinion/pinochets-ghost-still-haunts-the-law-Lords/5069084.article
[215] Stevens, R. *The English Judges: Their Role in the Changing Constitution,* at p.371

would not stand. Although there was no actual evidence of bias on Lord Hoffmann's part, appearances seemed to be as bad as reality.[216] Interestingly, Lord Hutton remarked that the "public confidence in the integrity of the administration of justice would be shaken if the decision stood."[217] This only highlights the importance of the perception of independence with the provisions put in place to protect independence taking a back seat to media pressure and public opinion.

Interestingly, unlike many constitutional principles, judicial independence is afforded a certain understanding, albeit a limited understanding, by the general population of the United Kingdom. Discussions that include the ideas of judges being free, or at a slightly lower threshold appearing to be free, from personal bias and influence from the government are afforded an understanding by a layperson. Indeed, discussions of judicial bias can be seen to grace the covers of British tabloids regularly, taking the Daily Mail's recent response to the ruling in the *Miller (No1)* case as but one example.[218] This puts the principles of judicial independence in an interesting position, where it is put-on trial by the public and the mass media.

This makes the *perception* of independence even more important. The light in which the Judiciary is portrayed to the public, often through the media in its many guises, is a significant factor when forming public perception of independence. Take perhaps this hypothetical scenario based on the facts of the *Pinochet* case. Had Lord Hoffmann's affiliation with one of the parties not been exposed, could his judgment still be seen as impartial? Technically speaking it would not have been. The case would have gone ahead with Lord Hoffmann's decision forming the final judgment. Theoretically, this raises concerns. Of course, if we have knowledge of factors that may

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[216] Ibid.
[217] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.2)* [1999] 1 All ER 577, para. [599] via Stevens, R. at p.371
[218] For example, Slack, J. "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 (2016, 3 November) accessed via https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html

incite bias then it can be fair to say that a judge or judgment may be perceived to be prejudiced in some way. But what about bias that we do not know about, or more importantly that we are not told about. The more judicial bias is revealed to us, the clearer the cracks in independence become.

5.2. Judicial Accountability

Both judicial independence and accountability may be seen as two sides of the same coin. Whilst the Judiciary needs a certain sufficiency of independence in order to ensure their separation from the Executive, if this level is too great, they may become insufficiently accountable.[219] And so, these two principles act as counterweights to one another, constantly striving to achieve an optimum balance between holding judges accountable for their words and actions whilst also protecting their independence from external influence.

Accountability is generally understood to be holding someone completely responsible for what they do and ensuring that they can give a satisfactory reason for it.[220] And so, accountability manifests in two ways: explanatorily or sacrificially. Explanatory accountability requires individuals to give an account as to their actions. Whereas sacrificial accountability calls for individuals who have failed to perform to the standards expected of them to either resign or be removed from their position.[221]

It is without question that, like anyone who holds a position of authority and responsibility, judges should be held accountable for their actions. However, how this accountability should be achieved presents a complex predicament. If judges were held to the standard of sacrificial accountability, much like the standard expected of politicians or public figures, then the important

[219] Hazell, R. "Judicial Independence and accountability in the UK have both emerged stronger as a result of the Constitutional Reform Act 2005" at p.202

[220]Cambridge Dictionary definition, accessed via https://dictionary.cambridge.org/dictionary/english/accountable

[221]Courts and Tribunals Judiciary, "About the Judiciary", accessed via https://www.Judiciary.gov.uk/about-the-Judiciary/the-Judiciary-the-government-and-the-constitution/jud-acc-ind/principles-jud-acc/

principles of judicial independence may be compromised. If an individual judge were to fear repercussions, such as the loss of their job, as a result of reaching a certain judgment, it would be difficult to say that their decision abides by the principles of independence in that it is made freely and on legal principles alone.

Instead, judges are held to the standard of explanatory accountability. This means that judges are required to give an account as to their actions, as is sometimes referred to as answerability. In some ways this limited form of accountability can result in a lack of liability even when something has gone wrong or when someone is in the wrong.[222] And so, although ensuring judicial independence and freedom from external pressure is one of the cornerstones of democracy, the way that this independence is achieved in practice is "treated with suspicion."[223] In eliminating the threat of removal from their position, there may be scope for the misuse of power or for there to be an assumption that judges are "held above the law."[224] Indeed, judges are awarded immunity, and so cannot be sued, for any acts carried out within the scope of their judicial function.

However, that is not to say that judges are not held to account for any of their actions. The Judicial Conduct and Investigations Office (JCIO) is tasked with supporting the Lord Chief Justice and Lord Chancellor in their joint role as judicial disciplinarians. In accordance with the Judicial Discipline Regulations 2014 and the supporting rules, the JCIO operates in order to deal with all judicial disciplinary issues in a way that is "consistent, fair and effective."[225] These issues range from falling asleep in court and general rudeness, to the use of offensive language, criminal convictions or the failure to declare a potential conflict of interest.[226] Complains surrounding the

[222] Greenwood, J. *New Public Administration in Britain* (Routledge, 2005), p.238
[223] "About the Judiciary" accessed via, https://www.Judiciary.gov.uk/about-the-Judiciary/the-Judiciary-the-government-and-the-constitution/jud-acc-ind/principles-jud-acc/
[224] Ibid.
[225]Judicial Conduct Investigations Office. "About Us", accessed via, https://judicialconduct.Judiciary.gov.uk/about-us/
[226]Judicial Conduct Investigations Office. "Making a Complaint", accessed via, https://judicialconduct.Judiciary.gov.uk/making-a-complaint/what-can-i-complain-about/

issuing of judgments, the award of costs and damages or sentencing decisions are listed as falling outside the scope of investigation.[227]

And so, the JCIO specifically deals with a judge's personal conduct and does not concern themselves with grievances surrounding judgments or case management. This makes judicial accountability unusual in that judges are being held accountable for their personal conduct but not for the actual quality of their judicial decision making. The lack of avenue for scrutiny of the decision itself is presumed to be counter-balanced by the appeal process, whereby the parties can seek a change to the decision based on the merits of a case and when it is reviewed by a higher authority in the court hierarchy. This does not stand when we consider the judgments handed down by the Supreme Court given that they are the final court of appeal in the UK.

6.0. The "Nano" Principles of the Constitution

In the following section, the doctrine of recusal and the nature of conflicts of interest and judicial bias will be considered. The doctrine of recusal is intended to take effect prior to hearing the case, upon the determination of a conflict of interest, with enquiries into bias being launched after the case has been heard.

This section considers the "nano principles" of the constitution: the doctrines of recusal, conflict of interest and bias as mechanisms for upholding the wider normative framework outlined in previous sections. Whilst the application of these doctrines is narrow, they are nevertheless responsible for holding up the wider principles above it. It is the doctrine of judicial recusal, conflict and bias that place the burden upon the individual judge to support the notion of collective independence and accountability, and further the separation of institutions overall. As we shall see, the doctrine allows for recusal on the basis of perception rather than through conducting an

[227] Ibid.

investigation into actuality, thus maintaining the appearance of accountability without challenging the appearance of independence and impartiality.

6.1. The Doctrine of Judicial Recusal

The doctrine of judicial recusal enables a judge who is lawfully appointed to hear and determine a case to stand down from that case, thus leaving its disposition to another colleague or colleagues.[228] Judges are expected to do so where there are "circumstances which may give rise to a suggestion of bias or an appearance of bias"[229] And so, the doctrine of recusal is dependent on the judicial instincts of the office holder with the burden being placed on the judgement of the individual judge to decide where it is appropriate to decline hearing a case.

The doctrine is significant from the point of view of individual litigants, who are unlikely to be persuaded that a judge's prior involvement with the subject matter of the litigation did not have at least something to do with the decision. But for the individual judge, this might be the "unkindest cut of all."[230] Some judges may generally accept that they will make mistakes of fact or law, however, "an accusation of a want of probity after the fact is quite another matter."[231]

6.2. Conflict of Interest

To recuse themselves from hearing a case, a judge must identify that there is a potential conflict of interest with one of the parties to a case. There is no clear definition of what surmounts to being a conflict of interest in the context of judicial recusal. There are however a number of instances outlined that act as guidelines within the Guide to Judicial Conduct that are "likely to be applicable

[228] Hammond, R G. *Judicial Recusal Principles, Process and Problems* (1st Edition, Hart Publishing, 2009) at p.3
[229] GtJC (2020), "Dealing with Conflicts of Interest" at p.22
[230] Hammond, R G. *Judicial Recusal Principles, Process and Problems*, at p.5
[231] Ibid.

despite the absence of hard and fast rules"[232] as to situations that may arise where there is a potential conflict of interest. These cases involve close family members, friendships, or personal animosity towards those involved in the case and current/recent business associations.[233]

Guidance refers the judicial reader to *Locabail (U.K) Ltd v Bayfield Properties Ltd*[234] for authoritative guidance regarding relations that may exist between parties to litigation. Although Lord Bingham states that it would be both "dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias"[235] he goes on to list a number of factors, dependent on the facts and the nature of the issue to be decided, that may not conceivably give rise to circumstances where an objection could be soundly based. Included in this list are a "judge's social or educational or service or employment background or history...previous political associations, or membership of social or sporting or charitable bodies."[236] Also included in this list are the "extra-curricular utterances"[237] of judges. Bingham lists textbooks, lectures, speeches, articles, interviews, reports, or responses to consultation papers as examples of such extra-curricular remarks.[238] Notably, though for obvious reasons relating to the date of the judgment, Lord Bingham does not include blogging or micro-blogging in his list of potential extra-curricular utterances.

As the doctrine of conflict of interest relies heavily on the subjective instincts of the individual judge, it can have an inconsistent application in practice. We can use *Emerald Supplies Ltd v British Airways*[239] as an example of this. Justice Peter Smith's judgment came under fire from commentators and senior judges alike when he begins by outlining "the problem"[240] involving

[232] GtJC (2020), at p.21
[233] Ibid, at p.22
[234] *Locabail (U.K) Ltd v Bayfield Properties Ltd* [2002] QB 451
[235] *Locabail*, at para. [25]
[236] Ibid.
[237] Ibid.
[238] Ibid.
[239] *Emerald Supplies Ltd v British Airways* [2015] EWHC 2201 (Ch)
[240] *Emerald Supplies Ltd*, para. [6]

British Airways losing his own personal luggage on a return flight to Florence. He further describes how he "really feels for other people who have the misfortune to fly with BA"[241] and repeatedly questioned BA's counsel "again and again, why his personal luggage had not arrived."[242] After outlining his grievance with BA he "immediately realised there would be a conflict, potentially, depending on why the luggage did not go the way it should have done."[243] Despite believing it was "impossible to keep the two separate" Smith claims that "a reasonably minded observer...would not think that merely because [he had] raised issues over the non-delivery of [his] luggage [this] should lead to the possibility of bias."[244]After raising his issues with BA and the instances where this case overlapped with his particular baggage dilemma, Smith stated that the reasonable person would not think that there was the possibility of conflict yet he decided to recuse himself from the case. In July 2015 the JCIO launched an investigation into allegations against Justice Smith. In what Rozenberg comments on the Legal Cheek website as "jumping before he was pushed",[245] LJ Smith retired two days before the set disciplinary hearing, thus halting any action that the JCIO may have planned to take against him. This deferred the discussion as to the actuality of his bias in the *Emerald Supplies Ltd* judgment.

6.3. Bias

Bias is an inclination or prejudice for or against one person or group, especially in a way considered to be unfair.[246] When applied to a judicial context, bias becomes the antonym of impartiality or the assertion that judges should "do right to all manner of people after the laws and

[241] Ibid, para. [14]
[242] Rozenberg, J. "Open Justice for Judges" (2nd October 2017) Law Gazette, accessed via https://www.lawgazette.co.uk/comment-and-opinion/open-justice-for-judges/5063036.article
[243] *Emerald Supplies Ltd*, para. [19]
[244] Ibid, para. [24]-[26]
[245] Rozenberg, J. "Look out for a retirement announcement from the High Court's Mr Justice Peter Smith" (11th April 2017) Legal Cheek, accessed via https://www.legalcheek.com/2017/04/joshua-rozenberg-look-out-for-a-retirement-announcement-from-mr-justice-peter-smith/
[246] Oxford Dictionary Definition

usages of this Realm, without fear or favour, affection or ill-will".[247] The judge should have no mind to the "race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status" etc. of the parties before the court.[248] Any judge "who allows any judicial decision to be influenced by partiality or prejudice… violates one of the most fundamental principles underlying the administration of justice."[249] This is what we refer to as "actual bias." Of course, the proof of actual bias is difficult, if not impossible to determine, because the law does not question a judge about the extraneous influences on his mind,[250] and not least because it is a futile exercise to attempt to determine the influence on the human mind at all.

Instead, the common law places a "lesser burden of showing a real danger of bias without requiring [parties to litigation] to show that such bias actually exists."[251] Lord Bingham unpacks this lower threshold test for bias in *Locabail*, referring to the historical divergence in English authorities.[252] The reasonable suspicion or reasonable apprehension of bias as set out in *R. v. Mulvihill* [1990][253] is considered and dismissed. The real danger or likelihood of bias test laid out in *R v Gough* [1993][254] provided clarification of the law. Here Lord Goff states the test in terms of "real danger rather than real likelihood" and does so in order to "ensure that the court is thinking in terms of possibility rather than probability of bias."[255] Whilst Lord Goff is more explicit than others in placing the burden of proof on potentiality rather than actuality, care is taken throughout all cases discussing bias, with *Locabail* being no exception, to avoid referring to the actuality of

[247] Judicial Oath accessed via https://www.Judiciary.uk/about-the-Judiciary/the-Judiciary-the-government-and-the-constitution/oaths/
[248] GtJC 2020, at p.20
[249] *Locabail*, at para. [3]
[250] Ibid.
[251] Ibid.
[252] *Locabail*, para. [16]
[253] *R. v. Mulvihill [1990]* 1 WLR 438 at 444
[254] *R v Gough* [1993] AC 646
[255] Ibid, at p.670

bias. We see recurring phrases such as “thought to”,[256] “may have”[257], “could”[258], “might”[259] and “potential”[260] throughout.

One exception to this is the automatic disqualification rule first considered in *Dimes v. The Proprietors of the Grand Junction Canal* (1852),[261] where on proof of the requisite facts, the existence of bias is effectively presumed. Upon first consideration of this rule, we may assume that the discussion of actual bias is imminent. However, what *Dimes* and the subsequent application of the automatic disqualification rule in the notorious case of *Pinochet (No. 2)*, show us again is the reluctance or denial of actual bias.

In *Dimes* the decrees made by and on behalf of the Lord Chancellor were set aside on the grounds that he had a substantial shareholding in the respondent company. And so, whilst financial interest in a case is likely to engage the rule of automatic disqualification, the judgment in *Dimes* claims that; “no one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party but applies to a cause in which he has an interest.”[262]

Pinochet again sets the threshold at “preserv[ing] the appearance of non-bias rather than the fact of non-bias” setting the threshold at potentiality. Rather than examining all the material available and establishing that there is “no danger of the alleged bias having created injustice,” the justices “indulged in no investigation of the background facts” thereby being unable to “declare on what actually occurred and has to deal only with the appearance of what occurred.”[263]

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[256] *Locabail,* para. [25]
[257] Ibid, para. [19]
[258] Ibid, para. [8]
[259] Ibid, para. [20]
[260] Ibid, para. [10]
[261] *Dimes v. The Proprietors of the Grand Junction Canal* (1852), 3 HL Cas 759
[262] *Dimes,* at p.793
[263] *Pinochet* (No. 2), at p.124

As the court stress in *Pinochet (No. 2)*, it is an "issue of public interest in seeing that the Judiciary is acting fairly and a duty on the House to see that confidence is maintained."[264] It cannot be clearer that the courts must attempt to preserve the *appearance* of the Three I's at the expense of factuality. And so, at the point where judges self-determine the extent of their own bias, during this decision-making process, the individual judge must decide on what the "public" might "perceive" to fall within the parameters of real danger of bias.

Whether or not the automatic disqualification rule or real danger of bias test are engaged, the judge must always "ensure that no one in court is exposed to any display of bias or prejudice from any source."[265] And so, the threshold for identifying bias is set at appearance or perception. The judge must not expose actual bias but must instead hide behind the veil of appearance. Any display of bias casts a doubt on the independence of the judge and renders him unable to appropriately discharge his judicial function as an arbiter of fairness in society. The mere suggestion or potentiality of bias is enough to do this, and the actuality of bias need not be revealed.

More recently, in *Serafin v Malkiewicz and others*,[266] the Supreme Court were once again reluctant to consider actual bias and centred the judgment around the possibility of an unfair trial. The 2020 case concerned libel in respect of an article that had been published addressing issues of interest to the Polish community in the UK and considered s.4 of the Defamation Act 2013 as it related to the public interest defence to defamation.

The Court of Appeal found that the conduct of the original trial in the High Court, by Mr Justice Jay, had been unfair towards the claimant.[267] During the Court of Appeal decision, the

[264] Ibid, at p.122
[265] GtJC (2020), at p.8
[266] *Serafin v Malkiewicz and others* [2020] UKSC 23
[267] *Serafin v Malkiewicz and others* [2019] EWCA Civ 852

court did not make express reference to bias, but observed that "one is left with the regrettable impression of a judge who, if not partisan, developed an *animus* toward the claimant."[268]

Skirting around whether or not Mr Justice Jay had in fact acted out of an inclination to behave unfairly, Lord Wilson claimed that the Court of Appeal's "observation may come close to a suggestion of apparent bias on the judge's part towards the claimant. But the clear focus of the court was on whether the trial had been unfair."[269] Therefore, The Supreme Court whilst agreeing with the Court of Appeal's assessment that there had been an unfair trial and that the case be remitted for a full retrial, disagreed with the CoA that the judge had given the appearance of bias against the claimant. Granted, Lord Wilson, speaking on behalf of a unanimous panel of justices was "utterly devastating about the way Jay had handled the case"[270] writing that:

> "When one considers the barrage of hostility towards the claimant's case, and towards the claimant himself acting in person, fired by the judge in immoderate, ill-tempered and at times offensive language at many different points during the long hearing, one is driven, with profound regret, to uphold the Court of Appeal's conclusions that he did not allow the claim to be properly presented; that therefore he could not fairly appraise it; and, that, in short, the trial was unfair… the judge harassed and intimidated [the claimant] in ways which surely should never have occurred if the claimant had been represented."[271]

Despite these assertions, the Supreme Court did not consider the possibility of actual bias, preferring to deny the appearance of bias against the claimant and emphasise the inquiry into the unfairness of the trial itself. The Court of Appeal had concluded that on numerous occasions Mr Justice Jay "appeared to descend into the arena, to cast off the mantle of impartiality, to take up the cudgels of cross-examination and to use language which was threatening and bullying."[272] Despite this, the prospect of Justice Jay displaying *actual* bias was not entertained by either the CoA or SC.

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[268] Ibid, at para.[114]
[269] *Serafin v Malkiewicz and others* [2020] UKSC 23 at para.[37]
[270] Rozenberg, J. "A bad day for Jay J" (15 June 2020) The Law Gazette, accessed via https://www.lawgazette.co.uk/commentary-and-opinion/a-bad-day-for-jay-j/5104585.article
[271] [2020] UKSC 23 at para.[48]
[272] [2019] EWCA Civ 852 at para.[114]

This leads to a strange outcome: that the judge had been unfair, but that this is not categorised as displaying bias or partisanship. Lord Reed observed during the hearings that a judgment which results from an unfair trial is "written in water."[273] However, the role that the judge played in this dilution of legal reasoning seems unclear. Whilst it was discussed, in clear and certain terms, that Mr Justice Jay had developed an "*animus*" or temper toward the claimant, the *why* of this was never considered. If we ask *why* Mr Justice Jay "harassed and intimidated" the claimant, we might get to the bottom of whether he displayed bias against him. The important question here is the "why?". Even in extreme circumstances such as the behaviour displayed by Mr Justice Jay, the Supreme Court shy away from exploring the "why" of judicial behaviour thereby avoiding a discussion surrounding actual bias.

7.0. Public Perception as Integral to the "Macro, Micro and Nano" Principles of the Constitution

The role that the public plays, being seen as a passive and objective one, is integral to the operation of the doctrines in the constitution. The public's perception acts as a threshold for compliance with the constitutional principles discussed in this chapter, and yet the notion of who the public is remains largely unexplored in this context.

It is this dependence placed on perception of an intangible public that provides the normative platform upon which the macro, micro and nano principles of the constitution stand. The framework of the constitution does not simply exist because the courts and other governmental institutions enforce separation through common law principles or legislation, i.e., through the CRA, although this does ground the principles with elements of descriptive reality. It truly exists because it is believed that it *ought* to. What the public perceive to be, or not to be, forms the foundations of these principles. At the point closest to the individual judge, as he or she

[273] [2020] UKSC 23 at para.[49]

makes a decision relating to the case before them and their potential connections or bias towards it, they must judge their standards, and in turn their standards will be judged, based on what the public perceive to be, as opposed to what exists. At this very base level, judges are beholden to the standards expected of the public, even though the public in this context does not exist.[274]

This cloaks the reality of partisanship and bias. This in turn impacts on the reality of independence and thus up the pyramid this flaw travels, so that the very pinnacles of the constitution, the principle of separation and rule law, are also revealed to be hollow. Public perception is therefore the veil that the realities of the UK's constitutional framework hide behind. As Griffiths claimed, it is at the point where this sham is revealed, that true damage might be done to the judicial institution.[275]

8.0. Conclusion

The purpose of this chapter has been to unpack the historical development of the Judiciary so that we might contextualise its function in the UK at this time. The doctrinal framework, regulating the role of the Judiciary in relation to its constitutional counterparts, has been considered and found to be normative in existence in that it depends solely on reification, or belief, to exist. It is this normative framework of doctrinal principles that currently regulates the conduits of power running between each of these institutions. Institutions are separate because they *ought* to be, the Judiciary is independent because it *must* be and judges are impartial because we, the public, *believe* them to be.

The normative doctrinal framework discussed above can therefore be viewed as an inverted pyramid. The separation of powers and rule of law exist at the top of this structure:

[274] In Chapter VI I will argue that Web 2.0 technologies and social networks change the nature of "who the public are." Therefore, the standards of conduct expected of judges is solidified as a result of the internet, shifting the requirement away from perception and toward reality.
[275] Griffith, J A G. *The Politics of the Judiciary*, at p.47

doctrines that are integral to our understanding of the UK's constitution and are bountiful with historical significance. Further down, the principles of judicial independence and its counterweight, accountability: each responsible for ensuring that the Judiciary's position within the hierarchical structure of the constitution does not undermine the significance of the principles above it. Finally, at the base, the notions of bias and conflicts of interest and the mechanism for judicial recusal: the actions of the individual judge responsible for maintaining the appearance of independence and thus institutional judicial separation from its counterparts. These foundational principles are incumbent on the judgement of the individual and are hinged on the importance of perception rather than actuality. So, actions taken by the individual judge have an impact on the structures above it.

Now we might ask, what happens to this normative understanding of the power dynamic between the Judiciary, Parliament, and the Executive, when we consider additional sites of power? Has the inclusion of a Fourth Estate, the media, impacted on this normative framework? Further, does the power vested in an emerging Fifth Estate, *new* media, reveal the fragility of these traditional structures? Is it possible that emerging digital technologies might reveal a hollowness to the foundations regulating judicial conduct, changing the meaning of the public, breaking down barriers to perception and exposing the actuality of conduct? What impact might this have on the doctrinal framework above it, which might be more significant in terms of doctrinal hierarchy but is nevertheless dependent on the continued existence of foundational principles to prevent the whole structure from crashing down.

This thesis will go on to consider these questions and ultimately ask, how might the Judiciary adapt to interact with these new sources of power in the digital age?

Chapter II: The Pentagon of Separation

1.0. Introduction

Having explored the doctrines governing the institutions of power in the UK, more specifically the way in which the Judiciary fits into these structures in Chapter I, in this chapter I will consider the potential addition of another two sources of power that interact with our traditional understanding of the balance of power within the UK's constitutional arrangement. As such, we can view the institutions of government as a pentagon, rather than tripartite, given that newer estates of power impact on the relationships and dialogues between the three traditional sites of government.

The first of these sources of power is the Fourth Estate, or what we would consider to be traditional forms of news media, both print and televised. There has been a host of nuanced discussion as to the media as separate institution in the UK. I will draw on this existing body of literature and unpack the relationship between the Judiciary and news media as they scrutinise the actions of one other. Whilst this relationship is a complex one, there is little room for doubt that the news media itself may be considered a separate constitutional actor, thus earning its term as the *fourth* institutional estate of power. Our original notion of the separation of powers is altered significantly when we consider the addition of news media as a source of power, both capable of holding to account and being held to account by its traditional governmental counterparts.

The subsequent sections of this chapter will be dedicated to analysing our evolving constitutional understanding in the digital age. More specifically, I will look at the emerging nature of technologies and the way in which these technologies are capable of separating and establishing themselves as a *new* source of media and thus potential centre of power. Whilst discussion of an emerging Fifth Estate has surfaced recently, the way in which this additional seat of power might impact on the Judiciary is currently underexplored in the UK.

This chapter will look at the ways in which the Fifth Estate may be considered separate from its predecessor. Where the Fifth Estate is said to be new, then the relationship between it and other institutions of governance must also evolve in order to take into account this contemporary development. Specifically, for this thesis, I will look at this emerging Fifth Estate as a body of collective scrutiny and the impact this might have on the Judiciary as a site of power within the constitutional framework of the UK.

2.0. The Fourth Estate

In the following section, I will discuss the emergence of the Fourth Estate as a public forum and the relationship that this estate of power has with the Judiciary of the UK. I will begin by outlining the historical development of the Fourth Estate, or what is more commonly termed the press or news media and unpack the transition from observer to watchdog. I will look at the way in which the relationship between the Fourth Estate and the Judiciary changed to meet the demands of this new watchdog estate and how individual judicial conduct is managed by the judicial institution in order to preserve the *macro*, *micro* and *nano* constitutional principles outlined in Chapter 1 of this thesis.

I will refer to the potential "demise of the Fourth Estate" noting that very recently, the reputation of news media as a watchdog estate has been compromised and the Fourth Estate might not always be deemed to be a reliable or trustworthy public forum capable of adequately and impartially holding the other institutions of power to account. The potential demise of the Fourth Estate will be addressed concurrently with the rise of the Fifth Estate and the emergence of a new site of power that has the potential to shift the power dynamic between institutions that have been previously discussed.

2.1. A Brief History of the Fourth Estate

The Fourth Estate can trace is origins back more than 300 years, with the English printing press emerging in 1476 and the first newspapers being seen in Britain by the early 16th century. These papers were, however, slow to evolve, with the largely illiterate British population relying on town criers for news.[276] The Reformation saw a relinquishing of monarchy control over the printing press and the abolition of the Licensing Act 1694 "put an end to the heavy censorship that had previously prevailed to the detriment of free speech and press" and vocational journalists began to emerge, boasting greater freedom to criticise and debate.[277]

After the violent disruption of the 17th century, England began to enjoy internal stability and prosperity. Technological expansion, expanding colonialism and a flourishing economy gave birth to the new middle class. It was this middle class who developed an interest in education and a desire for news, with this increased literacy causing a boom in the proliferation of newspapers.[278] By the 19th century, as put by Carlyle, "there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all."[279] In a time of "limited suffrage, but growing literacy", the "bastard estate" as dubbed by Schultz, prospered.[280]

In its earliest manifestation, the Fourth Estate "was considered another elite, which could relay the views of other elites to the population to help garner public support" but by the end of the nineteenth century "the popular press was well established"[281] and the Fourth Estate began its transition from reporter to investigator.

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[276] News Media Association, "History of British Newspapers" accessed via http://www.newsmediauk.org/History-of-British-Newspapers
[277] "English Press: Then and Now. The Age of Journalism" accessed via https://web.archive.org/web/20170410190829/http://www.aboutenglish.it/englishpress/journalismage.htm
[278] Ibid.
[279] Carlyle, T. *On Heroes, Hero Worship and The Heroic in History* (James Fraser, 1841)
[280] Schultz, J. *Reviving the Fourth Estate. Democracy, Accountability, and the Media* (Cambridge University Press, 2009) at Introduction, 'Paradoxes of the Bastard Estate'
[281] Ibid, at p.3

2.2. The Fourth Estate: From "Reporting to Investigating"[282]

The growing movement of support for the notions of freedom of expression saw a place for the press as a "means of such expression."[283] This change in ideology meant that the press was no longer satisfied with reporting on the activities of the traditional three institutions of power but instead began to exercise "its own voice" taking "a more activist role, scrutinising the consequences of actions and decisions" taken by the institutional elite on the "ordinary people."[284]

This activist role is often captured in the metaphor "the watchdog", where the notion of the free press is likened to the traits of a canine: loyal, courageous, and strong.[285] This movement towards fulfilling its watchdog dog role ran alongside advancements in the notion of freedom of expression and the Fourth Estates' economic freedom from the other institutions of power. Writing of the late Georgian press, Roach claimed that "true censorship lay in the fact that the newspaper had not yet reached financial independence, and consequently depended on the administration or the parties." In support, Asquith writing in 1975, argued that "it was the growing income from advertising which provided the material base for the change of attitude from subservience to independence."[286]

As Schultz notes, the proliferation of this financial freedom resulted in the press exercising a "role as an independent institution in the political system," thus earning itself status as a separate estate of power.[287] News media began to "speak with its own voice" rather than echoing "the voice of the Parliament or the Executive government." To Schultz, the press was no longer viewed as an elite institution, relaying the thoughts and opinions of other elites to the population. Instead,

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[282] Ibid, at Chapter 8
[283] Ibid, at p.3
[284] Ibid.
[285] Cooper, S D. *Watching the Watchdog: Bloggers as the Fifth Estate* (Marquette Books, 2006) at Introduction p.13
[286] Asquith, I. "Advertising and the press in the late eighteenth and early nineteenth centuries: James Perry and the *Morning Chronicle,* 1790-1821" (1975) *Historical Journal*, xvii
[287] Schultz, J. *Reviving the Fourth Estate. Democracy, Accountability, and the Media*, at p.73

news media diversified, taking advantage of both its institutional and commercial status whilst pushing the notion of social responsibility.

This narrative surrounding the triumphant rise of a free press in mid-Victorian Britain has not gone unchallenged. This orthodox history of the press, with emphasis on the free market and legal emancipation as the foundation of press freedom, provides "a powerful, mythological account" on the development of the press from its reporting to investigating role. [288] Curran and Seaton put forward that this interpretation of press history is sustained by "focusing attention upon mainstream commercial newspapers, while ignoring or downplaying the development of the radical press."[289] It is only through this selective perspective that the rise of a free press appears plausible. Curran writes that during the late half of the 18th century and early 19th Century "a section of the commercial press did indeed become more politically independent, partly as a consequence of the growth of advertising" thus reducing dependency on political financial backing.[290] However, the growth of advertising and financial freedom did not automatically "transform the commercial press into an 'independent Fourth Estate.'"[291] The idea of advertising as the "midwife of press independence" according to Curran, is directly contradicted by the "emergence of the radical press as a political force in the early nineteenth century…radical papers did not obtain significant advertising support; yet they were independent both of government and the opposition in Parliament."[292]

To an extent, the print press did become the "people's forum" acting as "the first line of defence against abuse by the other 'estates' or institutions of representative democracy."[293] As

[288] Curran J, Seaton J. *Power Without Responsibility Press, broadcasting and the internet in Britain* (7th Edition Routledge, 2010) at p.3
[289] Ibid, at p.6
[290] For example, Curran at Part I, p.6 references the *Observer* as being the last English newspaper to receive a clandestine government grant and The Times's magisterial declaration on Boxing Day 1834 that it would no longer accept early information from government offices as this was inconsistent with 'the pride and independence of our journal'.
[291] Curran, J. "The struggle for a free press" in *Power Without Responsibility Press, broadcasting and the internet in Britain,* at p.6
[292] Ibid, at p.6-7
[293] Schultz, J. *Reviving the Fourth Estate. Democracy, Accountability, and the Media*, at p.73

Kunczik notes, the Fourth Estate in principle acted as a "feedback mechanism of democratic system management."[294] Securing some freedoms from institutions of government the press, most notably the radical press, became a platform through which competing views could be addressed or concerns of aggrieved individuals could be amplified.

Distinction must be drawn here between the disputed freedom of the print press and the emergence of broadcast media and televised news. The period of 1900 to 1940 was a time of rapid transformation where the hegemony of print was undermined by the rise of film, radio and television which first broadcast in Britain in 1936.[295] The freedom of print press might be seen as distinct from the establishment of the British Broadcasting Corporation (BBC) and the commercialisation of television in the mid-twentieth century. The BBC, as the first public service broadcaster in the UK, was established under a Royal Charter and operates under its Agreement with the Secretary of State for Digital, Culture, Media, and Sport. Unlike the print press and the freedoms won by commercialisation and advertising, the BBC is principally funded by annual television licence fees, the price of which is determined by Parliament.

The independent commercialisation of broadcasting media and the end of the BBC's monopoly in the 1950's began to diversify broadcasting news. Reith, the first Director of the BBC compared the introduction of commercial broadcasting into the UK "with that of a dog racing, smallpox and bubonic plague."[296] Despite Reith's admonishment, the ITV network service was born, intending to act as a "political counterweight to what was seen as the BBC's 'red' (as in The Labour Party) bias."[297] To an extent, the ITV provided "an energizing; populist force which gave expression to working-class culture."[298] However, as Curran notes, the addition of channels such

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[294] Kunczik, M. *Concepts of Journalism: North and South* (1988, FES)
[295] Curran, J, Seaton, J. 'New media in Britain' in *Power Without Responsibility Press, broadcasting and the internet in Britain* at p.235. Curran argues the "needs of war radically altered education and broadcasting" at p.145, and "new weight [was] given to public opinion by the war" at p.150.
[296] Reith, J C W. in HL Deb, 06 May 1952, vol 176, cc 603-4
[297] Curran, J, Seaton, J. *Power Without Responsibility Press, broadcasting and the internet in Britain*, at p.163
[298] Ibid.

as ITV were "as vulnerable to political pressure" as the BBC, given that it also depended on public support, not to legitimise a licensing fee, but to increase its advertising revenue.[299]

There are arguments both in favour or against viewing both the print press and broadcast media as separate institutions. Together, print and broadcast news media provided new platforms for those who felt that their "perspective and concerns have been inadequately addressed" through conventional methods of institutional accountability.[300] Where parliament, the Executive and the Judiciary was perceived to have failed the individual or interest groups, news media, for better or worse, has provided a powerful public forum through which these issues could be heard, debated and the actions of those in power scrutinized. So, for some time, the press has been seen as a check on the power of the three branches of government. As our "watchdog estate" the press "has enjoyed – if not always merited – a privileged place among our social institutions, and a warm fuzzy metaphor to symbolize it."[301]

2.3. The Relationship Between the Fourth Estate and the Judiciary

Undoubtedly, "the principal [sic] of checks and balances between institutions becomes more complicated when the relatively unaccountable news media is included in the system."[302] The evolution of news media from observers to commercially driven watchdogs certainly impact on the way in which the Fourth Estate and the traditional institutions of power interact with one another. The relationship between news media and the other estates might be seen as a symbiotic one, where there is a "recognition that each institution needs the other to fulfil its functions and advance its position."[303] However, whilst this mutual dependence is acknowledged by the judicial

[299] Curran, J, Seaton, J. *Power Without Responsibility Press, broadcasting and the internet in Britain*, at p.163
[300] Ibid.
[301] Cooper, S D. *Watching the Watchdog: Bloggers as the Fifth Estate*, at p.13
[302] Schultz, J. *Reviving the Fourth Estate. Democracy, Accountability, and the Media*, at p.73
[303] Ibid, at p.79

institution, the norms governing the interaction between its individual actors and news media are often outlined in terms of risk as we shall see below.

2.3.1. The Judicial Institution and the Fourth Estate

We might begin by looking at the institutional or collective approach to engagement with the Fourth Estate. As outlined by HM Courts & Tribunals Service, "the principle of open justice is a longstanding feature of our legal system."[304] The public has the right to know what happens in courts and tribunals and the upholding of fairness in the justice system relies on this transparency. One of the ways that the principle of transparency is upheld is through managing the relationship between the judicial institution and the attendance and reporting of proceedings by the news media. The Ministry of Justice Press Office is the initial point of contact for all breaking news and major developments, including interview requests, departmental enquiries, facts, figures and statistics, statements, and diary information. The Press Office is therefore the go-between for journalists and the judicial institution, opening channels of conversation that allow the Judiciary to communicate to the public through journalists and members of news media.

Where the Judiciary faces criticism in the news media, The Judicial Media Panel, established in 2008, consists of a number of judges who are "media trained" and selected for "the purposes of dealing with criticisms based on a failure by the media to appreciate the constraints under which the judge was working."[305] This media panel acts on behalf of the institution on the whole, relying on select individuals to clarify issues with the news media.

[304] HM Courts & Tribunals Service and Chris Philp MP, Press Release "Updated media guidance will ensure easier access to court information" Published 5 March 2020, accessed via https://www.gov.uk/government/news/updated-media-guidance-will-ensure-easier-access-to-court-information

[305] Media Guidance for the Judiciary (2014), at p.12

In response to the media's attention shifting to the personal lives of individual judges, Her Majesty's Courts and Tribunals Service issued guidance in 2018,[306] providing advice as to how staff in both courts and tribunals might conduct themselves in scenarios involving the Fourth Estate. The guidance provides an overall summary alongside detailed jurisdictional advice, distinguishing between the criminal courts, civil courts, family court and tribunals.

As outlined by the General Guidance, in addition to the more general HMCTS Press Office, the Judicial Press Office assists individual judges and magistrates with media advice. The JPO operates a "24 hours a day, seven days a week service" to address urgent press maters. It is a "specialist, dedicated facility" independent of the Ministry of Justice and HM Courts and Tribunal Service, responding to media interest as it arises and anticipating, wherever possible, high profile and controversial issues to prepare statements and responses in advance.[307] Where the individual judge or magistrate is the focus of media interest, rather than the case or overall court, then the media are referred to the JPO. In addition to the Judicial Press office, the Supreme Court runs its own press office, dedicated to "providing a comprehensive service to media professionals seeking information about the [Supreme] Court's hearings and wider work."[308]

In addition to referring judges to the relevant Press Office, the updated guidance outlines a number of "General dos and do nots" for judges interacting with the Fourth Estate.[309] The guidance acknowledges that whilst each encounter with the news media is likely to be different, there are some general tips that can help to foster a "productive relationship" between individual judges and the media.[310]

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[306] HM Courts and Tribunals Service (GOV.UK). *Guidance to staff on supporting media access to courts and tribunals" HM Courts and Tribunals Service* (Published 24 October 2018, Last updated 5 March 2020), accessed via https://www.gov.uk/government/publications/guidance-to-staff-on-supporting-media-access-to-courts-and-tribunals

[307] Media Guidance for the Judiciary (2014), at p.12

[308] The Supreme Court, "Press Office", accessed via https://www.supremecourt.uk/press-office.html

[309] HM Courts and Tribunals Service, *Guidance to staff on supporting media access to courts and tribunals*, p.3

[310] Ibid, at p.3

Alongside the general advice issued to judges and magistrates, HMCTS have also released media guidance for the purpose of "managing high profile/high interest trials or hearings."[311] Amongst the dos, judges might give journalists details of any reporting restrictions, they might give their full name but no further personal details, and they should try to reply to the journalist even if the information cannot be provided in order to foster courtesy. Judges should avoid saying "no comment" without providing a reason whilst being aware that they do not have to respond immediately to a media query.[312]

Overall, the Judiciary interacts with the Fourth Estate with caution, hoping to ensure judges do not "get mixed up in the political process and, more importantly, [are not] seen to have got mixed up in the political process."[313] Chapter I of this thesis established the importance placed on perception when legitimizing the judicial role through the appearance of judicial independence. When consider the Judiciary's approach to the media, the way in which the Judiciary and individual judicial officeholders interact with the Fourth Estate of power is crucial to maintaining this perception of independence. It is after all, the purpose of the Fourth Estate, to see and to show that which can be seen. The Judiciary's attitude to news media is therefore born out of the need to maintain their appearance of independence, impartiality, and position as observers rather than participants in the political arena. Each interaction depends upon the requirement that above all else, the Judiciary and its individual actors, must not be seen to be "mixed up in the political process."[314] The news media in this respect acts as a conduit for public perception, the media reveals what can be seen to the public in order for the public to scrutinise the actions of the Judiciary.

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[311] HM Courts and Tribunals Service, "Managing high profile/high interest trials or hearings" accessed via https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869794/HMCTS_Managing_media_access_to_high_profile_cases_March_2020.pdf

[312] HM Courts and Tribunals Service, "Guidance to staff on supporting media access to courts and tribunals" at p.3

[313] Media Guidance for the Judiciary (2014), at p.8

[314] Ibid.

Therefore, to the judicial institution, the news media becomes a liability for the notion of independence, given its power to disrupt the appearance of independence, impartiality, and integrity of individual judicial officeholders. Each interaction of the institution or individual judge with the Fourth Estate is framed in terms of the risks of engagement and the perils of transcending the bounds of conduct that is permitted. Caution is advised at every turn. As such, the news media is a conduit through which the Judiciary legitimize their role in the eyes of the public and therefore maintain the traditional framework of the UK's constitutional principles.

2.3.2. Scrutiny of Individual Judges by the Fourth Estate

The way in which the Judiciary engage with the Fourth Estate is clear. They exercise caution, favour a collective approach over an individual one and see engagement through the lens of risk management. In this way, the Judiciary attempt to take control of their narrative, using the media as a tool to "stress the importance of judicial independence."[315] In exercising caution and relying on media panels and specialists when engaging with the Fourth Estate, the Judiciary limit the opportunity for individual judicial officeholders to compromise their appearance of independence and impartiality by *going rogue*. Thus, the independence, impartiality, and integrity of the institution overall is maintained.

However, it takes two to tango. Whilst the Judiciary might attempt to control their own engagement with the Fourth Estate, the Fourth Estate does not always play by the same rules in return. Although the Judiciary have extensive rules and guidance as to how individual judges should conduct themselves in media encounters, it is not guaranteed that the media will adhere to the same set of standards. So, although the Judiciary intend to interact with the Fourth Estate in a certain way, the outcome of this interaction is far from certain. In this way: even if the Judiciary dances perfectly, the media might step on their feet anyway.

[315] Media Guidance for the Judiciary (2014), at p.10

This means that the outcome of engagement between the Judiciary and the Fourth Estate can vary depending on the news outlet and/or journalist, as opposed to the way in which the situation was handled by the individual judge. Gordon, writing in the context of media coverage in human rights claims, distinguishes between the "Good" and "Bad" approach.[316] The "Bad Press", Gordon claims, "distorts meaning" often "in support of a hostile right wing political agenda."[317] The paradigmatic example of such a newspaper is the *Daily Mail*. In contrast, the *Guardian* might be identified as the traditional "Good Press", accepting the universally of rights, the substantive values of liberty and demonstrating compassion for the groups or individuals who are demonised by the "Bad Press."[318] As Gordon notes, framing the debate around a diametrically opposed "Bad" and "Good" press is, to an extent, a caricature of what is in reality a more varied landscape.[319] However, the positions adopted by both the "Good" and "Bad" press can be identified as political in nature, because both "Good" and "Bad" press outlets have political agendas. In this way, it is the political, or at least subjective, nature of media coverage that defies the rules and regulations that the Judiciary impose to regulate it. Irrespective of the way in which the Judiciary conduct themselves, the Fourth Estate will impose their own political agenda on this conduct.

Criticism of the Judiciary in the media is of course, no new thing. In the 1930's Lord Atkin of Aberdovey remarked that a career in the Judiciary is by no means a "cloistered virtue" and that media criticism of judicial office-holders – however harsh or misconceived – is a fact of life.[320] However, the coming into force of the HRA 1998 has brought these concerns to the forefront. One high profile example of this was seen with the government's refusal to implement the ECHR's

[316] Gordon, M. "Instrumentalism in human rights and the media. Locking out democratic skepticism?" Chapter 10, at p. 252 as part of, Farrell, M. Drywood E & Hughes E. *Human Rights in the Media: Fear and Fetish* (Routledge, 2020) pp.252-271
[317] Ibid, at p.252
[318] Ibid, at p.255
[319] Ibid, at p.256
[320] Media Guidance for the Judiciary (2014), at p.26

judgment in *Hirst (No.2)*,[321] which had made recommendations as to a change in the enfranchisement of prisoners in line with Article 3, Protocol 1 of the European Convention on Human Rights (ECHR).[322] The serving Prime Minister at the time, David Cameron, was moved to claim that the enfranchisement of prisoners made him feel "physically ill."[323] As Murray claims, a complex combination of factors "transformed prisoner voting from an issue that excited virtually no attention….to an intractable stand-off between successive UK governments and the Strasbourg court."[324] Pursued by a "swathe of the UK's national print media, and in particular the *Sun*, *Star*, *Express*, *Daily Mail*, *Times* and *Telegraph*" the issue of prisoner voting became one of headline news, with the ECHR judgment being to some a "monstrous judicial power grab."[325] Indeed, reporting on the decisions in Hirst "devoted little attention to the judges' reasoning" and was instead framed in terms of "violence and fear."[326] The narrative surrounding *Hirst* as a convicted murderer, a growing anti-Strasbourg sentiment amongst the UK press and the government's move to categorize its response to *Hirst* as part of its "tough-on-crime" agenda politicised what may have otherwise been considered a legal decision.

However, as Gordon notes, the claim of human rights law to circumvent politics through its grounding in universal values is an impossibility.[327] As such:

> "There is no objective argument from reason which can establish the natural or fundamental character of either the particular human rights identified in a legal scheme of protection or justify as uncontentious the ways in which these basic rights are fleshed out and applied in specific contexts."[328]

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[321] *Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849
[322] European Convention on Human Rights (ECHR), Art. 3 Protocol 1.
[323] Cameron, D MP. HC Deb, Vol 517, col 921 (3 Nov 2010)
[324] Murray, C R G. "Monstering Strasbourg over prisoner voting rights" as part of, Farrell, M. Drywood E & Hughes E. Human Rights in the Media: Fear and Fetish (Routledge, 2020) at Chapter 4
[325] Ibid, at p.102 and 124
[326] Ibid, at p.109
[327] Gordon, M. "Instrumentalism in human rights and the media. Locking out democratic skepticism?" at p.256
[328] Ibid, at p.257

This politicisation of human rights decisions being played out in court, and the political nature behind the Fourth Estate's coverage of these decisions, means that today, even more so, magistrates and judges operate in the public eye and so must expect to be subject to comments and scrutiny by the media, no longer purely in terms of the decision itself but also scrutiny of the individual making the decision.

This identifiable shift towards scrutinising the actions of the individual judge as opposed to collective institution has led to a "proliferation of subjective media comment, including editorials and opinion columns...about individual judges and cases."[329] None is more notable than the *Daily Mail's* "Enemies of the People"[330] headline in response to the *Miller* case, where the three judges noted in the article had deemed it necessary for an explicit Act of Parliament to be passed to invoke Article 50, rather than use the royal prerogative to begin leading to the withdrawal of the UK from the European Union.

Human rights claims have resulted in increasing the tension between the Executive and the Judiciary, and in turn, the media plays out this relationship like "a story…possibly creating a gladiatorial sense about some of the reporting that might be causing anxieties on the judicial side."[331]

3.0. The Emergence of a Fifth Estate

[329] Media Guidance for the Judiciary (2014), at p.7

[330] Slack, J. "Enemies of the People" (4 Nov 2016) Daily Mail, accessed via, https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html

[331] Charles Clarke giving evidence to the House of Lords Select Committee on the Constitution, 6th Report of Session 2006-2007: Relations between the Executive, the Judiciary and Parliament." (2007) HL Paper 151 at para.[34]

It is clear that the Fourth Estate, as Reynolds notes, is by no means "tomorrow's chip paper."[332] The print press and their broadcast iterations "still enjoy significant reach" and whilst "it is smaller, weaker and less profitable that before…[it] still bites."[333] Despite this, there has been a significant power shift wherein roles previously assigned to the Fourth Estate have been transferred to what will now be referred to as the "Fifth Estate". As a result of this, the UK's constitutional arrangement does not consist of three or four, but five sources of power or "estates". As we shall now see, whilst the Fifth Estate has modest beginnings, it can now be considered a powerful, new, source of power wherein emphasis is placed on individuality to hold the other estates of government accountable. This new media can be seen as distinct from its predecessor, the Fourth Estate, despite having inherited similar characteristics and shortcomings.

The remainder of this Chapter will be dedicated to unpacking (1) what or who the Fifth Estate is (2) why the Fifth Estate emerged and, (3) the reasons why it can be considered as being separate from the Fourth Estate.

3.1. What or *who* is the "Fifth Estate"?

The public availability of the internet in 1991 impacted on the way that the public accessed, processed, and distributed information. The evolution of the internet saw "web logs" or for short, "blogs" become commonplace as spaces where personal information was shared. Whilst it is a challenge to establish a precise definition of a blog "because of their wide variety of goals, formats frequency of updates, and methods of presenting information",[334] it is generally deemed to be a

[332] Reynolds, S. "It's not me, it's you. Examining the print media's approach to 'Europe' in Brexit Britain" in, Farrell, M. Drywood E & Hughes E. *Human Rights in the Media: Fear and Fetish* (Routledge, 2020) at p.58-59
[333] Reynolds, S. at p.59 quoting Gapper, J. "Fleet Street's European Bite Remains Sharp" *Financial Times* (22 June 2016)
[334] Al-Rodhan, N A F. *The Emergence of Blogs as a Fifth Estate and their Security Implications*, at p.15

space online where individuals record their "thoughts, opinions, or experiences that [they] put on the internet for other people to read."[335]

As the internet evolved, so too did the spaces available for individuals to record their thoughts, opinions, and experiences. 2003 saw Mark Zuckerberg, alongside his fellow Harvard College roommates, build a website called "Facemash" allowing "users to objectify fellow students by comparing photos of their faces and selecting who they deemed as 'hotter.'"[336] This website, taken down by Harvard, would provide the "framework for what was to become Facebook", the most widely used social media site across the globe. In February 2004, the first iteration of Facebook (thefacebook.com) was born, and the internet as a space for creating and sharing ideas was changed indefinitely.

Alongside Facebook,[337] numerous other social media sites emerged, including Twitter[338] in 2006, YouTube[339] in 2005 and Instagram[340] in 2010. With these sites came a change in definition with posts on social media platforms being described as "microblogs" as opposed to their longer predecessors. A microblog is therefore a blog "in the form of a short message for anyone to read."[341]

Alongside its countless other functions, the internet is an amalgamation of blogs and micro-blogs hosted on social media platforms. As with blogs, there are a number of challenges presented when attempting to conceptualise what is meant by social media, not least because the "speed at which the technology is expanding and evolving, challenges our ability to define

[335] Cambridge Dictionary Definition
[336] Barr, S. "When did Facebook start? The story behind a company that took over the world." *The Independent*, (23 August, 2018) https://www.independent.co.uk/life-style/gadgets-and-tech/facebook-when-started-how-mark-zuckerberg-history-harvard-eduardo-saverin-a8505151.html
[337] https://www.facebook.com/
[338] https://twitter.com/
[339] https://www.youtube.com/
[340] https://www.instagram.com/
[341] Cambridge Dictionary Definition

clear-cut boundaries around the concept."[342] In 2015, Obar identified several commonalities among current social media or social networking services.

The first is that at present social media services are Web 2.0 Internet-based applications. Obar notes that prior to the early 2000's, internet users would most likely spend their time reading the works of other users online. Rather than a substantive shift in technology, the millennium brought a shift in ideology, where the internet user transitioned from consumer to participant. The average internet user in our current time fulfils the role of "prosumer" where the applications used allow users to "create, interact, collaborate and share in the process of creating as well as consuming content."[343] Web 2.0 serves as the platform upon which social media services provide users with participatory and collaborative content creation.

Secondly, social media can be defined by its user-generated content. It is the "endless number of user-generated decisions that populate social media sites across the internet."[344] In this way, it is the active participation of the user that "fuels" the service. Social media sites are in this way dependent on their users providing content, rather than the users being dependent upon the content provided by the service. Thirdly, social media is defined by the individuals and groups that create "user-specific profiles for a site or app." So, a web 2.0 platform might only be defined as a social media service where the users individual profile services as a "backbone" to its function. Without inputting identifying information, the service would be unable to form "network connections between user accounts" and would thus nullify its purpose as a means of connectivity. Finally, social media is defined not simply by its user-created profiles, but in the way that the site facilitates the "development of social networks online by connecting a [single] profile

[342] Obar, J. "Social media definition and the governance challenge: An introduction to the special issue" (2015) *Telecommunications policy*, Vol 39, Issue 9
[343] Ibid.
[344] Ibid.

with those of other individuals and\or groups."[345] In this way, social media can be identified by its ability to create "links among users and user-generated content in virtual space."[346]

As a result of the evolution of Web 2.0 and the vastness of the internet, there is some debate as to what and who make up the Fifth Estate. Al-Rodhan, writing at the dawn of social media, identified blogs as constituting a new site of public power.[347] More recently, Dutton has described the concept of the Fifth Estate as envisioning "the Internet as a platform through which networked individuals can perform a role in holding institutions such as the media and government more accountable."[348] Dutton is less concerned with what the Fifth Estate is made up from i.e., blogs and micro-blogs, but who the Fifth Estate is, i.e., networked individuals. Users create content, in whatever form, "from posting photos on blogs to commenting on websites", and this content can amplify, or bypass entirely, "the traditional mass media of the Fourth Estate, but in doing so it can fulfil many of the same functions of holding up the activities of government, business, and other institutions to the light of a networked public."[349] To Dutton, the Fifth Estate is:

> "Not simply a new media…but a distributed array of networked individuals who use the Internet as a platform to source and distribute information to be used to challenge the media and play a potentially important political role, without the institutional foundations of the Fourth Estate."[350]

Despite the differences in scope and terminology, most would agree that the Fifth Estate is made up from individuals empowered by Web 2.0 technologies. Therefore, whilst there are distinctions to be made between "blogs", "micro-blogs" and "social media", we might identify enough common

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[345] Ibid.
[346] Ibid.
[347] Al-Rodhan, N A F. *The Emergence of Blogs as a Fifth Estate and their Security Implications* (Slatkine, 2007) at p.13
[348] Dutton, W H & Dubois, E. "Empowering Citizens of the Internet Age. The Role of a Fifth Estate" as part of Graham, M & Dutton, W H. Society and the Internet: How Networks of Information and Communication are Changing Our Lives (1st Edition OUP, 2014)
[349] Ibid, at p.239
[350] Ibid, at p.239

themes amongst them to claim that on the whole, each of these forms of Web 2.0 communication or expression make up the "Fifth Estate." Therefore, the Fifth Estate can, and will, be used synonymously with "blogs" and "social media" throughout this thesis.

Although the definition of the Fifth Estate is in flux, one thing is certain. The emergence of the Fifth Estate "has allowed regular citizens with no political or journalistic background to reach a substantial Web audience, make their voices heard, and have a real effect on public opinion and policy making."[351] It is this potential for blogs and social media to shape policies that truly grounds them as a new estate of power. As Al-Rodhan claims:

> "The potential and real influence of blogs on policy shaping, and the impact they have already had on numerous faces of international politics, including elections, media reporting from zones of conflict, and corporate and congressional policies, have left us to the claim that blogs deserve the title of 'Fifth Estate.'"[352]

3.2. Why did the "Fifth Estate" emerge?

In some ways, the answer to this question is simple. The Fifth Estate emerged because it could. Advancements in technology inevitably created a space wherein a new form of media communication could flourish, and whilst it has not replaced the Fourth Estate, it has emerged as something new and distinct from it. However, we might also say that the Fifth Estate emerged as a result of necessity. The decline of the print press as a reputable institution, alongside fast-paced advancements in technology, led to a power vacuum in which the Fifth Estate flourished. Somewhat paradoxically, we might also say that the Fifth Estate has been partially responsible for the decline of the Fourth Estate given that news providers "are no longer managers of a scarce resource, they are struggling to sustain a business and a role in an environment of information overload."[353]

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[351] Al-Rodhan, N A F. *The Emergence of Blogs as a Fifth Estate and their Security Implications*, at p.13
[352] Ibid.
[353] Murray, C R G. "Monstering Strasbourg over prisoner voting rights" at p.115

Although the fifth is a direct product of the failings of the fourth, its emergence has in turn changed the ways in which individuals consume news and it therefore may be responsible for some of the loss of power the print and broadcast press may be accused of.[354]

It would be short-sighted indeed to claim that the Fourth Estate no longer holds any power in the UK.[355] Technology and the expansion of Web 2.0 technologies has by no means brought about the death of the print press. As Reynolds asserts, despite newspaper sales declining, research suggests that the press still enjoys significant reach.[356] This can be said both in terms of the press's print coverage and its diversification into the digital realm as newspapers develop their own online platforms and generate clickbait content to staunch the flow of readers away from traditional news outlets towards ideologically driven websites.[357]

However, we might cast doubt as to the ability of the press to sufficiently hold the three institutions of government to account. This is not to say that doubts about the suitability of the Fourth Estate as an institution capable of scrutinising governmental actions means that it no longer holds power in the UK. To the contrary, in being a non-partisan actor scrutinising the government, the press has maintained some relevance in the UK.[358]

It is important to note the limitations of the press in the UK and its contemporary place as the Fourth Estate of institutional power. So, we might unpack the reasons why the Fourth Estate might be, as Schultz claims, "flawed."[359] Has the move away from its humble beginnings as

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[354] Ofcom, "News Consumption in the UK: 2020" statistics suggest that although TV remains the most-used platform for news, 45% of adults claim to use social media for news. Accessed via https://www.ofcom.org.uk/__data/assets/pdf_file/0013/201316/news-consumption-2020-report.pdf

[355] An examination, such as that conducted by S Reynolds in "It's not me, it's you. Examining the print media's approach to 'Europe' in Brexit Britain", of the print media's approach to Brexit and the subsequent outcome of the UK's European Referendum in 2016, is clear evidence of the power that the print press holds with regards to its contemporary reach and influence.

[356] Reynolds, S. "It's not me, it's you. Examining the print media's approach to 'Europe' in Brexit Britain" at p.58-59

[357] Murray, C R G. "Monstering Strasbourg over prisoner voting rights" at p.116

[358] For example, Seaton, J. "Brexit and the Media" (2016) *The Political Quarterly* 87(3), pp.333-337 remarks that, "the conundrum is that as the print media decline in circulation, journalistic reach and revenue, their power has never seemed greater."

[359] Schultz, J. *Reviving the Fourth Estate. Democracy, Accountability, and the Media,* at p.4

independent watchdog to *commercial-led commentator* diminished public trust in the Fourth Estate and if so, what does this tell us about the emerging Fifth Estate?

There is a clear need and desirability for an estate of power that can scrutinise the actions of governmental institutions wielding power over individuals. The print press at its formation, as outlined in Section 2.1, may have begun as an unbiased observer of government acting as a watchdog against infringements of individual rights and freedoms. However, even where news media succeeds in its most idealised form, as envisaged by its forefathers, it is at present only capable of doing so in a flawed way.[360]

Of all the checks and balances built into representative democracies, the press is the only one whose success is measured commercially.[361] Therefore, for Schultz, there is "widespread, and reasonable, doubt that the contemporary news media can any longer adequately fulfil the historic role the press created for itself several hundred years ago." The "ideal of the news media successfully fulfilling a political role that transcends its commercial obligation has been seriously battered. Its power, commercial ambitions and ethical weakness have undermined its institutional standing."[362]

In some ways the financial independence of the press from the other institutions of government is often a strength; "a news media that is profitable has much greater autonomy…financial success can insulate a news organisation from the demands of politicians, lobbyists, advertisers and merchants." However, the "lure of profit" may prevent the Fourth Estate from conducting its originally envisaged role as independent watchdog. Only in the "most conscientiously managed organisation will it be possible to ensure that the cross-promotion of the company's diverse interests does not distort news judgements."[363] The reality is that few news

[360] Ibid, at p.4
[361] Schultz, J*. Reviving the Fourth Estate. Democracy, Accountability, and the Media*, at p.3
[362] Ibid, at p.1
[363] Ibid, at p.5

companies ever truly succeed in managing these competing interests and the public is "becoming increasingly sceptical of the methods and standing of the news media."[364]

So, the press in becoming a "vast international business" is "increasingly suspected of exercising self-interested political and economic power" rather than acting as an independent estate capable of scrutinising the actions taken by its institutional counterparts.[365] The transition from print to television might be responsible for catalysing this demise, with press coverage being "increasingly driven by the expectations of entertainment."[366] The commercialisation of the press means that newspapers and broadcasting institutions sell product and services, they are themselves "commercially manufactured products" with the news itself being "a product that has a tradable value in the marketplace."[367] The 24-hour news cycle has also led to a saturation coverage of public and political figures, with the purpose being to reveal intimate details of their private lives often "with the moral certainty of an afternoon soap."[368] This coverage is often rationalised by asserting that "understanding the character of a public figure will aid understanding of his…decisions."[369] In reality, this focus on the "celebrity like" status of public figures has shifted the expectations of consumers, with some readers seeking out news platforms not simply for political or breaking news, but primarily for sports and celebrity news.[370]

In addition to the commercialisation of the press, the loss of local level reporting and focus on London-centric concerns has changes the way that news reporting is conducted in the UK. The globalisation of news has led to the gradual depletion of local news outlets, or what Seaton dubs the "old ecology of reporting."[371] This has significantly changed the landscape of the Fourth

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[364] Ibid, at p.6
[365] Ibid, at p.4
[366] Ibid.
[367] Street, J. *Mass media, politics and democracy* (2nd Edition, Palgrave Macmillan, 2011) at p.161
[368] Ibid.
[369] Ibid.
[370] Ofcom, "News Consumption in the UK: 2020" Produced by Jigsaw Research (13 August 2020) see Figure 2.6, 52% of adults 16+ use various news outlets, such as television, radio, newspapers (printed) in order to read celebrity news, and 62% do so for sports related news.
[371] Seaton, J. "Brexit and the Media" at p.333

Estate. Previously, local stories and regional accountability "fed up a chain to become national stories."[372] However, as Seaton notes, this local news structure has decayed irreparably, and no alternative mechanism has developed. This leaves those living in communities outside of regional centres feeling "increasingly remote" and as though they are unacknowledged, unheard and lack agency.[373] As a result, "communities no longer see their reality reflected back to them."[374]

The Fifth Estate provides a remedy for this. Public attention is held by the press for only a short period of time, given that "news that is even a day old is already old news."[375] For the Fifth Estate, "on the contrary, news is news as long as people are interested." Thus, "blogs help to maintain afloat issues that have been unduly neglected or forgotten and restore interest in them after any potential general media frenzy calms down."[376] Local or regional issues of importance that may be neglected by the London-centric press maintain their relevance online. This possibility of controversial or *hushed* issues "coming back to light week or months after the mainstream media have moved on to other breaking news may influence policy makers to be more thoughtful in designing future policies and more responsible about their actions."[377]

As Al-Rodhan notes, the mainstream media, for the most part, feature the same major news and events, highlighting some issues and soft-pedalling others. In contrast, the Fifth Estate does not seek to provide an "all-inclusive picture of world events."[378] The Fifth Estate rejects the careful curation of news. This therefore promotes eclecticism so that individual users can pick the sites and blogs that correspond to their needs and favour them over those that are either of no interest to their beliefs or contradict them. This ultimately attracts readers or *users* by staying

[372] Ibid.
[373] Ibid.
[374] Ibid, at p.334
[375] Al-Rodhan, N A F. *The Emergence of Blogs as a Fifth Estate and their Security Implications,* at p.94
[376] Al-Rodhan, N A F. at p.94, citing Scott, E. "'Big media' meets the 'Bloggers'" (February 2004) Kennedy School of Government Case Program
[377] Ibid, at p.94
[378] Ibid, at p.90

away from imposing specific topics on individuals and offering them a choice in the news they receive.[379]

The print press is often criticised for its "deep-rooted traditions, which means that the mass media, or at least its largest outlets, have become increasingly standardized and homogenized."[380] There is a growing awareness that most news outlets are owned by a small number of elite media moguls, indeed, the phrase *media empire* "seems appropriate describing the modern media conglomerate [whose] reach is broad and seemingly comprehensive."[381] Although the same can be said for social media, whose small number of owners reside in Silicon Valley, the difference lies in the level of *perceived* control over content. It is widely thought that media owners wield power within and through their corporations, and often there is a belief that this power deriving from media ownership is often used to malign ends.[382] Whether or not people truly believe that media moguls seek global domination, they *are* seen as having influence over what is published in their tabloid newspapers. The exact opposite is proclaimed of social media, where the emphasis is placed on individual user responsibility. Users believe they may "choose what to read or to watch and cannot have any views or opinions imposed on them" in the way they might with traditional media.[383] The owners of social media are, or would have us believe to be, very far removed from the point at which content is generated and ideas are shared. The social media user believes themselves to be in control of their timeline,[384] when compared to the print press which is perceived to be owned, dominated, and manipulated by the "elite."

So, there has been a shift in the way that news outlets report news, and the expectations of those that consume it. Therefore, the question might be less whether the Fourth Estate is capable of scrutinising governmental institutions, and more whether the public always expects it

[379] Ibid.
[380] Ibid, at p.91
[381] Street, J. *Mass media, politics and democracy* at p.162
[382] Ibid, at p.159
[383] Al-Rodhan, N A F. *The Emergence of Blogs as a Fifth Estate and their Security Implications*, at p.91
[384] As will be discussed further in this thesis, this is often a misguided belief.

to. The break down in local reporting and display of clear commercial agendas have pushed consumers towards an individualistic approach wherein they wish to *take back control* of their news sources.[385] To those consumers that are disillusioned with the press, the internet provides "warm, embracing communities" wherein "you can get more of what you like and can avoid exposure to what you disagree with."[386] It seems unlikely that the creators of social media sites, like Facebook and Twitter, intended to create a space where users could air their perennial frustrations with the Fourth Estate and form a new, equally as powerful, estate capable of acting as a constitutional check on political and judicial institutions, yet, it is clear that this is what is has become.

This is not to say that the shortcomings of the Fourth Estate were not inherited by the Fifth Estate, but a whole new set of standards, and concerns, have emerged alongside them. So, the Fifth Estate has not emerged because it is more reliable than the Fourth Estate, if anything, it is deemed to be less reliable. However, its capacity to provide new and different opportunities for scrutiny of institutional actors has led to the establishment of a genuine Fifth Estate.

3.3. How does the Fifth Estate differ from traditional forms of news media?

Although 24-hour news media outlets adapted their approach and maintained their relevance through online news coverage, social media is a *new* public forum in which the emphasis is placed on the individual user rather than the collective company. Undoubtedly news media companies make use of social media platforms to disseminate their content, but they, like individuals, are still *users* of social media.[387] Social media allows individual users "to move, undermine and go beyond

[385] This will be unpacked further in the following sections of this chapter, where the rise of the term "fake news" and the implications on the distribution of information online will be considered.
[386] Seaton, J. "Brexit and the Media" at p.334 and 336
[387] Press using social media does so with significant reach. However, the difference is that individuals now have that same, if not greater reach and so news accounts join the many other millions of social media users. Although the BBC News Twitter account (@BBC News, accessed via https://twitter.com/bbcnews?lang=e) can boast 11.9M followers, Harry Styles (@Harry_Styles accessed via https://twitter.com/harry_styles?lang=en) has three times that number, with 36.9M followers. In fact,

the boundaries of existing institutions."[388] It has changed "the way we do things, such as how we get information, how we communicate with people and how we obtain services" and "it can alter the outcomes of these activities."[389] In this way, social media has become a *new* thing and as such, is a *new* source or loci of power and influence distinct from its predecessor, the Fourth Estate.

Therefore, the Fifth Estate is capable of acting as a new forum through which individual users with access to social media can in some way contribute towards scrutinising the actions of institutions asserting their will over its citizens. As such, the way in which our traditional institutions of power, and for the purpose of this research the Judiciary in particular, interact with this new estate becomes hugely significant to our understanding of the constitutional arrangement in the UK. Over the span of the following sections of this chapter, I will unpack why social media is not merely an extension of the Fourth Estate or a "networked Fourth Estate" and why it is instead capable of acting as a new source of institutional power, thus requiring a reimagining of our traditional understanding of the *macro*, *micro* and *nano* doctrines governing inter-institutional relationships.

As Thelwall sets out in his Chapter "Society on the Web"[390] we must look at the key characteristics of social media and consider its threats and potentials when compared to the Fourth Estate. Fundamentally, we must understand the ways in which new media will be capable of giving voices to individuals and holding institutions to account in new ways. O'Regan suggests that the differences between social media and the Fourth Estate exist in 7 ways: *(1)* scale, *(2)*

@dog_rates (accessed via https://twitter.com/dog_rates), an account providing "professional dog ratings" with a satirical edge, have a similar number of followers to BBC News. Social media is an equaliser in this respect, where the BBC reaches just as many (if not less) people, as a celebrity singer or satirical dog rating account.

[388] Dutton, W H, Dubois, E. "Empowering Citizens of the Internet Age. The Role of a Fifth Estate" at p.239

[389] Ibid.

[390] Thelwall, M. "Society on the Web" contained in *The Oxford Handbook of Internet Studies*, Edited by William H. Dutton (2014, OUP) pp.69-85

breadth, *(3)* instantaneous communication, *(4)* lack of filtration, *(5)* anonymity, *(6)* market domination and *(7)* algorithms.[391]

I will now consider each of these differences in turn, building on this by adding an eighth difference: *(8)* virality, so that we might compare the Fourth Estate to the fifth, in order to assert that differences between them solidifies social media's position as a distinct estate of power.

3.3.1. Scale

As O'Regan notes, the global spread of the internet is breath taking.[392] With more than half the population having access to the internet, the sheer scale of Web 2.0 technologies begins to supersede the scale of our traditional understanding of news media. The Office for National Statistics published its report in 2018 that 90% of adults in the UK class themselves as regular internet users, with that figure going up to 99% in adults aged 16 to 34 years.[393] When you expand these statistics globally as of December 2019, 4.13 billion people across the world have access to the internet.[394] Although this is focused predominantly on the western world, access is not exclusive in this regard with large parts of the developing world averaging on adult internet use at 40-49%.[395] The sheer scale, and quantity, of digital content generated by users "dwarfs all forms of publication that have preceded it."[396]

3.3.2. Breadth

[391]O'Regan, K. "Hate Speech Online: An Intractable Contemporary Challenge" (2018) *Current Legal Problems*, Vol.71, No.1. pp.403-429
[392] Ibid, at p.403
[393]Office for National Statistics, Statistical Bulletin "Internet Access – Households and Individuals, Great Britain: 2018" accessed via, https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2018
[394] Ibid.
[395] Ibid.
[396] O'Regan, K. "Hate Speech Online: An Intractable Contemporary Challenge" at p.416

Acknowledging not just the magnitude but the breadth of the accessibility to online communication is certainly significant. The internet provides a platform, in theory, for discourse and networking that is irrespective of boundaries and borders, whether this be very literal geographical borders or more abstract borders such as gender, class, sexuality, etc. Unlike traditional forms of news media, that are often specific to or limited by one or at most a few jurisdictions, the cross-jurisdictional reach of social media means that systems put in place in one jurisdiction will not apply in others.[397]

When we consider both scale and breadth and apply access to the internet with the number of users active on social media platforms, we begin to understand the size of social media platforms as user-accessible forums. As of December 2019, Facebook has over 2.50 billion active users per month, meaning that over half of internet users world-wide regularly make use of the site. Other sites such as Instagram boast 1 billion monthly active users and one of the biggest social media platforms in China, Sina Weibo has 445 million monthly active users in the country alone. When taken together, as of January 2020, 49% of the global population are active social media users.[398]

3.3.3. The Instantaneous Nature of Communication

One of the key differences between social media and traditional news media is the instantaneous nature by which communication can be disseminated. Publication on social media is instantaneous, meaning that a tweet issued by @therealDonaldTrump, prior to his removal from Twitter (and Office) in January 2021, reached "the devices of his followers within seconds."[399] This means that any mechanisms designed to halt the movement of this content will likely take effect long after the content has reached a wide audience.

[397] Ibid, at p.416
[398] Tankovksa, H. "Social Media – Statistics & Facts" (Feb 25, 2021) Statista, accessed via, https://www.statista.com/topics/1164/social-networks/#topicHeader__wrapper
[399] O'Regan, K. "Hate Speech Online: An Intractable Contemporary Challenge" at p.416

Whilst the instantaneous nature of communication via social media has its drawbacks, it has also provided countless benefits in the digital age. Facebook's safety check disaster feed has revolutionised the way that individuals involved in natural and man-made disasters and terror incidents can instantly update their profile to show Facebook friends that they are safe. And a similar feature 'Crisis Response' allows Facebook users who are situated near crises to offer immediate access to transport, accommodation or supplies.[400]

However, tools such as Facebook's Crisis Help, alongside the immediacy of the dissemination of information leaves little margin for error. In a *damage is already done* scenario, where remarks or information is incorrect, inappropriate, or made in haste the immediacy of its dissemination means that posts, tweets and likes can be communicated to millions in seconds. This has changed the way that we communicate socially wherein two hundred and eighty characters tweeted hastily or in error can create a representation of an individual or company that cannot be retracted in virtual space. This refers not just to instantaneous access to information[401] but also the instantaneous ability to voice your own opinion, thus contributing to the instantaneous access to information by others. This immediacy has proven problematic time and again on social media platforms such as Twitter where users, make hasty online remarks that are instantaneously circulated globally in the seconds taken for the comment to be removed either by the social media platform or the user themselves.[402]

3.3.4. Algorithms, Filter Bubbles and Echo Chambers

[400] Facebook, Crisis Response, accessed via, https://www.facebook.com/about/crisisresponse/
[401] Information in a very literal sense, in that it is irrespective of its factual accuracy.
[402] For example, Khan S, The Independent "Trump corrects tweet boasting about his writing after it has spelling mistakes" (Wed 4th July, 2018), accessed via, https://www.independent.co.uk/news/world/americas/us-politics/trump-twitter-writer-spelling-mistake-pore-over-pour-jk-rowling-a8430321.html

An algorithm is a "set of mathematical instructions… given to a computer… [that] will help to calculate an answer to a problem."[403] Based upon an IP address, search engines and social networking platforms can tailor content using readily available factors such as age, gender, income group and ethnicity.[404] This means that the distribution of information on the internet is capable of being tailored to the individual. Thelwall gives the example of a US female searching for Wagner being shown a page about the composer, whereas the top ranked result for a male conducting that same search could be shown Wagner-branded male grooming products.[405] We may also use Twitter's "in case you missed it" application, where the site learns, and changes content output based on a user's reactions to online content presented to them in the past as another key example.

This subjective exposure to online information may allow like-minded individuals to form what are termed "echo chambers" or "filter bubbles" where online users are insulated from contrary perspectives.[406] By engaging online you are essentially creating for yourself an "algorithmically constructed bubble"[407] wherein your online experience conforms to your individual preferences. This is a form of homophily or a "tendency to surround ourselves with others who share our perspectives and opinions about the world."[408] Whilst this is a principle long established by human social interaction, the development of digital networks has arguably exacerbated homophilic effect.

Some of this is done by choice, i.e., by choosing who to follow, who to friend and which URLs to share. However, social media sites seek to tailor individual users' experiences based on

[403]Cambridge Dictionary definition. Accessed via, https://dictionary.cambridge.org/dictionary/english/algorithm
[404] Thelwall, M. "Society on the Web" at p.71
[405] Ibid.
[406] Allcott, H, Gentzkow M. "Social Media and Fake News in the 2016 Election" (2017) Journal of Economic Perspectives, Vol 31, No 2, pp.211-236, at p.211
[407] Dubois E, Blank G. "The Myth of the Echo Chamber" *The Conversation* (2018, 8th March) https://theconversation.com/the-myth-of-the-echo-chamber-92544
[408] Gillani, N, Yuan A, Saveski M, Vosougi S & Roy D. "Me, My Echo Chamber, and I: Introspection on Social Media Polarization" (2018) *WWW 2018: The 2018 Web Conference*, April 23-27

their personal characteristics, location, browsing histories, or social networks "in ways that are invisible to the user."[409] A study conducted by the University of Illinois suggested that more than half their participants were unaware of News Feed curation and algorithms, instead believing that all their Facebook friends' posts showed up on their news feed.[410]

So, take for example the act of an individual who chooses to purchase and read the Daily Mail newspaper. That individual is choosing to be exposed to the information contained within, regardless of whether they do so critically. Now, compare this to clicking on one Daily Mail Online post. There is a chance that this action will algorithmically result in you seeing many more Daily Mail articles on your news feed or suggested options in the future. This goes above and beyond the simple act of purchasing just the one newspaper. In acting one way, one time, the algorithm will make assumptions about the information you wish to view and remove the choice element of an individual's exposure to information. This would be akin to the more times you purchase a print copy of the Daily Mail, the fewer alternative newspapers become visible to you on the newsstand.

3.3.5. Anonymity

The anonymity of digital networks has changed the way in which individuals communicate socially and this differs vastly from traditional forms of journalism. Web-based technologies allow for both invisibility and anonymity in both new and complex ways.

Barak (et al.) refers to a study conducted in 1969, examining the impact of anonymity on administering electric shocks to others – with the anonymous group of shock administers behaving more aggressively, delivering longer shocks than their non-anonymous counterparts.[411]

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[409] Borgesius Z, Frederik J, Trilling D, Moeller J, et al. "Should we worry about filter bubbles?" (2016) *Journal on Internet Regulation* Vol.5, No.1

[410] Eslami, M, et al. "'I always assumed that I wasn't really that close to [her]': Reasoning about invisible algorithms in the news feed" accessed via, http://www-personal.umich.edu/~csandvig/research/Eslami_Algorithms_CHI15.pdf

[411] Barak, A, Lapidot-Lefler, N. "Efforts of anonymity, invisibility, and lack of eye-contact on toxic online disinhibition" (2012) *Computers in Human Behavior* Vol.28, pp.434-443 at p.435

This concept of anonymity and the way in which it impacts on human behaviour is certainly not new, however, the ways in which individuals perceive themselves to be participating in the online world anonymously has had a significant impact on the way in which social media functions and the risks that emerge from its use.

In some ways, the *perceived* anonymity that social media provides enhances a user's engagement online. Social media platforms may be used to discuss sensitive topics, that the user may feel unable or afraid to address either offline or identifiably through fear of repercussions or social judgment. However, there are clear drawbacks associated with anonymity and engagement online. Firstly, users may feel able to express themselves online in ways that they would not do using any other forms of communication, in a negative or toxic way. This is described as the "online disinhibition effect."[412] When online disinhibition is coupled with the need for self-validation and "cyber-recognition,"[413] networking users feel bolstered by the anonymity or facelessness that the internet provides and therefore disseminate information that they would be unwilling or unable to do so offline.

At times this anonymity might shield users from accountability, whether this is when making comments that your friends, family or the public would find offensive or distasteful if you were to voice them offline. Or, when anonymity provides shelter from legal accountability, when a Proxy Server or Virtual Private Network ("VPN") is used to conceal an Internet Protocol (IP) address.[414]

However, the most significant risk that comes with anonymity is that it is *perceived*, and never guaranteed. Although users may choose to be nameless, withhold personal details such as photographs and locations, or use a pseudonym, the realities of social media are such that no

[412] Suler, J. "Psychology of the Digital Age" (2004) *CyberPsychology and Behavior*, Vol.7, pp.321-326
[413] Walters, M. "Barrister's tweeting trouble" (2 April 2019) The Law Society Gazette. Accessed via https://www.lawgazette.co.uk/commentary-and-opinion/barristers-tweeting-trouble-/5067737.article
[414] An Internet Protocol (IP) address is a "unique string of characters that identifies each computer using the Internet Protocol to communicate over a network" (See Oxford Dictionary Definition)

user is ever truly anonymous. According to the International Computer Science Institutive and University of California-Berkeley who run a cross-disciplinary research group titled "Teaching Privacy," your "information footprint on the Internet is like your body in the physical world: it represents your identity." As with:

> "Seeing some part of your body, seeing some part of your information footprint – like the location of the device you're posting from or the pattern of your language – may make it possible for someone to uniquely identify you even when there is no name or other explicit identifier attached…it is virtually impossible to remain anonymous on the Internet. As a consequence of the protocols used for Internet communication, some details of your device's setup are communicated to your Internet service provider, and often to the site or service you are using."[415]

As the "Teaching Privacy" team state, the best possible advice is: "don't do anything online that you wouldn't do in public." The realities of anonymity online when coupled with potential toxic disinhibition raise new concerns for individuals when communicating in an online, as opposed to offline, context.

3.3.6. Market Majority

We have already considered the role of media conglomerates and the perceived impact that elite media moguls have on the content of traditional media, but it can also be said of social media, that the industry is dominated by a small number of powerful companies.

The CEO of Facebook, Mark Zuckerberg, has been quoted claiming that "in a lot of ways Facebook is more like a government than a traditional company. We have this large community of people, and more than other technology companies we're really setting policies."[416] The scale of this large community is perhaps understated in this quote. Facebook is the largest collective entity of users globally and put into context, is 2 times larger than the population of China.

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[415] The Teaching Privacy project, "There's No Anonymity" accessed via, https://teachingprivacy.org/theres-no-anonymity/

[416] *Mark Zuckerberg quoted in* Klonick, K. "The New Governors: The People, Rules, and Processes Governing Online Speech" (2017-2018) *Harv. L. Rev*. Vol. 231, pp.1598-1670

The domination of a small number of companies, largely Google, Facebook, Twitter, Oracle, Cisco, and Wikipedia, means that there are as few as these 6 private companies who contribute the largest concentration of information being hosted and distributed online. This is what Timothy Garton Ash terms the domination of the "private superpowers"[417] wherein a small number of online platforms post and are responsible for the monitoring of most online speech globally.

One of the key differences between the online superpowers and the traditional media moguls, is that the users of the service do not see there being a connection between the content they post, like and share, with the developers and owners of these companies. Facebook users when posting are unlikely to believe that Zuckerberg himself is impacting on the ways in which that post will be viewed and disseminated. In fact, given the dependence Web 2.0 technologies have on algorithms, it is unlikely that there is any *person*, let alone Zuckerberg himself, who may be making these decisions.

3.3.7. Editing and Ethical Requirements

As Thelwall comments, the internet has been widely heralded for its potential to democratize access to, and the provision of, information.[418] However, the benefits of this democratisation of information comes with an equal number of concerns. Critics of online platforms such as Twitter and Facebook contend that these sites are "purpose built for spreading misinformation, with the reach of a story dependent on its ability to go viral – something that often depends on sensationalism and emotional reactions more than truth itself."[419] Named as 2017's word of the year, the term "fake news" is popularly used to describe this purposeful spreading of false

[417] Garton Ash, T. *Free Speech. Ten Principles for a Connected World* (Atlantic Books London, 2016) Chap. "Cosmopolis" at p.21
[418] Thelwall, M. "Society on the Web" at p.71
[419] Carson, J. "Fake news: What exactly is it and how can you spot it?" The Telegraph (25 July 2018) accessed via https://www.telegraph.co.uk/technology/0/fake-news-exactly-has-really-had-influence/

information online. A phenomenon that has its origins in the Octavian campaign of disinformation to reach victory over Marc Anthony in the Final War of the Roman Republic in 32 BC,[420] fake news runs at the forefront of media discussion surrounding ISP involvement in the distribution of content with links to election campaigns, such as Trump's 2016 election and Leave.EU.

In February 2019, the Digital, Culture, Media and Sport Committee published "Disinformation and 'fake news': Final Report"[421], an inquiry into the spread of disinformation online and individuals' rights over their privacy. The committee disregards the term "fake news" in favour of "disinformation" citing concern that fake news has "taken on a variety of meanings, including a description of any statement that is not liked or agreed with by the reader."[422] The report states that whilst the internet has brought many freedoms across the world, it also carries the "insidious ability to distort, to mislead and to produce hatred and instability."[423] The Committee go some way towards addressing the UK's attempts, or lack thereof, to regulate and enhance the legal liability of the private superpowers when it comes to the spreading of disinformation.

The Committee draws comparisons with the approach taken by other European countries, such as Germany and France. In January 2018, the German government passed the Network Enforcement Act (NetzDG) forcing tech companies to remove hate speech from platforms within 24 hours, threatening fines of $20 million if content is not removed. In France, judges can order the immediate removal of online articles that they decide constitute disinformation during election campaigns.[424]

As such, there are questions still to be asked about how the Fifth Estate is and will be regulated. One of the key challenges in this regard is the cross-jurisdictionality of social media

[420] Ibid.
[421] Department for Digital, Culture, Media and Sport. "Disinformation and 'fake news': Final Report" HC 1791, 18 February 2019, accessed via, https://publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1791/1791.pdf
[422] "Disinformation and 'fake news': Final Report", at p.10
[423] Ibid, at p.6
[424] Ibid, at p.12

and the way this sets it apart from the Fourth Estate and the traditional tools used to regulate it. For example, the Independent Press Standards Organisation (IPSO) regulates the UK's newspapers and magazines, holding then to "account for their actions, protect[ing] individual rights, uphold[ing] high standards of journalism and help[ing] to maintain freedom of expression for the press."[425] Or in addition the Advertising Standards Authority (ASA) who regulate the advertising industry in the UK. Each of these independent regulators is responsible for newspaper content and advertising standards in the UK. However, unlike with the Fourth Estate, it is unclear as to whether user generated content online becomes the responsibility of the social media platform, or whether the ownership of content is shifted to the individual. The point at which social media providers are responsible for the information on their platforms is currently a hot topic of debate. Social media developers and owners are quick to paint their platforms as a space for individual users to generate and distribute content, rather than taking responsibility as a company for generating it. However, where the line is drawn in terms of when social media *hosts* content*,* as opposed to *generates* content*,* provides a wealth of regulatory concerns. Unlike the regulatory standards applies to news distribution and advertising offline, it is unclear who ought to take responsibility for these standards online. In addition, it is left to the social media superpowers to in effect "regulate themselves" as there is no cross-jurisdictional regulator who is, or is capable of, regulating content across multi-platforms and physical borders.

Currently, the UK rely on a number of "offline" tools such as Defamation law, Copyright Law and Sexual Offence Law in order to criminalise certain activity, communication, and dissemination of content online. These current provisions focus predominantly on traditionally illegal content, largely including hate crime, inciting violence and terrorism.[426] In these cases, ISPs

[425] Independent Press Standards Organisation "What we do" accessed via, https://www.ipso.co.uk/what-we-do/
[426] See for example, Malicious Communications Act 1998, Communications Act 2003 etc.

are expected to actively monitor and remove content. No such rules apply where information is deemed to be factually incorrect.

It is not just the lack of independent regulation of ISPs when managing the distribution of content in the UK that raises concerns. The fewer ethical requirements expected of vocational journalists when posting online when compared to print journalism content poses a significant problem as does the general public's ability to post and disseminate information using these platforms. In contrast, most traditional publications "insert an editorial decision between author and publication, a decision that is normally taken by a person other than the author"[427] meaning it is less likely to contain, errors, inaccuracies or be subject to the whims of individual bias.

As Murray comments, online columnists are no longer "subject to the same professional expectations concerning fact handling as reporters."[428] Moreover, content can be relayed with no requirements for "third party filtering, fact-checking, or editorial judgment."[429] This can be compared to the traditional process of print reporting where content will be passed through several editing stages and proofing prior to print. This means that there are fewer safeguards preventing anybody from expressing opinions online that can reach from hundreds to millions.

Theoretically an individual user "with no track record or reputation can reach as many readers as Fox News, CNN, or the New York Times."[430] However, Thelwall argues that this theoretical equality of information provision does not occur in practice. Whilst an individual user's post is equal, in theory, to a BBC online news story as both posts are given equal treatment by the very infrastructure of the Web, in reality search engines favour content that is popular over unknown content. So, in practice, sites like BBC News, which are widely recognised as being valuable sources of information, are likely to appear in everybody's search results and individual blogs and comments with little or no following are unlikely to appear in anyone's results.

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[427] O'Regan, K. "Hate Speech Online: An Intractable Contemporary Challenge" at p.416
[428] Murray, C R G. "Monstering Strasbourg: The United Kingdom's media and prisoner voting rights", p.15
[429] Allcott, H, Gentzkow, M. "Social Media and Fake News in the 2016 Election" at p.211
[430] Ibid.

3.3.8. Virality

As O'Regan notes, the Fifth Estate is distinct from the fourth in the 7 ways addressed above. In addition to the breadth, scale, etc. of social media, a number of these factors come together to create a "virality" to the Fifth Estate that is not evident in the fourth. Virality is a "critical concept in social media because it is how information rapidly – and often uncontrollably – propagates across the Internet."[431]

Virality can be defined as being "the percentage of people who have created a story from a post out of the total number of unique people who have seen it."[432] Brooks uses the example:

> "Posting a photograph onto a Facebook page, and it being seen by 10,000 unique individuals. You might assume further that 1,000 of these individuals cause a follow-up story to be created (which might happen if any of them clicks "like," comments on the photograph, or shares it to their own page or profile. In this example, the photograph will have achieved a virality of 10 percent."[433]

However, virality does not merely refer to the unique number of visitations of views a post may receive, but the way in which this post might "go viral" or be mimetically altered.[434] So, this is mass communication with an unpredictability not seen with traditional media, where users are able to repost content, but perhaps most importantly create new elements to that content.

Biologist Richard Dawkins pioneered the study of memes in 1976, referring to the meme "as a culture analogue to a gene."[435] Memes are similar to genes in the way that "they pass cultural

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[431] Brooks, A W. "Social Media 101" (2012) *GPSolo*, Vol.29(3) pp.54-57
[432] Ibid.
[433] Ibid.
[434] A term used to "describe something that quickly becomes very popular or well known by being published on the internet or sent from person to person by email, phone etc." See Cambridge Dictionary Definition of "Viral"
[435] Dawkins, R. *The Selfish Gene* (OUP, 1976)

information and ideas between individuals and generations."[436] Memes, like their genetic counterparts, undergo a "process of constant replications and transformation."[437] Somewhat like a childhood game of *Telephone*: "the result obtained at the end of the chain might have little in common with the original… yet preserves recognisable features or elements that would allow linking the final [result] with the initial one."[438] Not without criticism, Dawkins's link between culture and genetic replication has lived on through the digital revolution in order to best describe one of the ways in which content is distributed and transformed online through internet memetic culture.[439]

Meme in the context of social media has therefore come to mean, "an image, video, piece of text, etc., typically humorous in nature, that is copied and spread rapidly by internet users, often with slight variations."[440] In this way, memes express opinions and ideas with a "close reliance on the context."[441] A good example of this is the "retweet with comment" function on Twitter, where each user is able to take an original post and create something *new* from it.

Undoubtedly memes have become a:

> "Phenomenon of the Internet culture and a cherished communication artefact of our time…when users endorse, like or adjust memes, they by doing so agree or disagree with the norms and values that these spreadable texts promote. Memes are a site of contestation of collective identities, the arena where the hegemonic meets the alternative, and the public chooses the winner by clicking 'like' or 'dislike', and, most importantly, 'share'."[442]

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[436] Denisova, A. *Internet Memes and Society: Social, Cultural, and Political Contexts* (Routledge New York, 1st Edition, 2019) at p.6
[437] Ibid.
[438] Ibid.
[439] For example, Susan Blackmore in her monograph *The Meme Machine* (OUP, 1999), wherein she theorises that "meme theory" better explains altruism than genetics.
[440] Oxford Dictionary Definition
[441] Denisova, A*. Internet Memes and Society: Social, Cultural, and Political Contexts*, at p.11
[442] Ibid, at p.10

It is not merely the ease with which original content can be passed on, distributed immediately and anonymously and across international and platform borders, but the way in which during the process of this passing on of content, it can be imitated, copied, and transformed from its original form. Take for example the recent viral photoshopping of Bernie Sanders into memes across the world. As Biden was sworn in as the 46th president of the United States, Senator Sanders became one of the:

> "…biggest memes of 2021, after people immediately latched on to an image of him watching the ceremony…the image shows Mr Sanders slumped in a fold-out chair, socially distanced from other guests. Rather than the formal attire worn by other attendees, he is decked out in a parka and a large pair of fluffy mittens."[443]

This meme took life and inspiration from every corner of cultural reference, and it would also be fair to say that it was not immediately apparent why this meme was humorous. It just simply *was*. The unpredictability of *what* and *how* a post may go viral and the way in which it will be received by netizens is what makes the social media space so volatile.

As we shall go on to explore in the following chapters of this thesis, it is this combined virality or "the capability to share and re-share content exponentially" alongside internet meme culture that makes the expression and conduct of judicial officeholders when engaging online "more vulnerable to public scrutiny" when compared to engagement with the Fourth Estate of power.[444]

4.0. The Fifth Estate as it Impacts on the "Public" and "Perception"

[443] Finnis, A. "Bernie Sanders meme: Why Senator sitting wearing mittens at the inauguration went viral, and the best memes" (January 25 2021) i news, accessed via https://inews.co.uk/light-relief/offbeat/bernie-sanders-meme-sitting-chair-mittens-inauguration-photo-best-memes-843288

[444] Kurita, S. "Electronic Social Media: Friend or Foe for Judges" (2017) *St Mary's Journal on Legal Malpractice & Ethics*, Vol 7:2, Article 3, pp.184-237 at p.185

In Chapter I, it was stated that the role that the public plays in the maintenance of the normative constitutional framework on the UK is a passive and objective one. The "public" and the "perception" of the Judiciary in the eyes of this public act as a threshold for the expected standards of individual judicial conduct (the nano constitutional principles). This conduct then impacts of the perception of the institution on the whole (the micro constitutional principles) and then ultimately impacts of the way in which the Judiciary is seen to constrain or be constrained as a site of power in the UK's tripartite constitutional arrangement (the macro constitutional principles.)

The way in which the Fourth Estate is integrated into this framework provides context and background as to the approach taken by the Judiciary to the newer Fifth Estate. The relationship between the Fourth Estate of power and the judicial branch is managed at an institutional level and each engagement with the Fourth Estate is framed in terms of the risks it presents to the perception of the macro, micro and nano principles of the constitution. However, through the use of a Press Office and Media Panel, each encounter with the Fourth Estate is managed and is framed in terms of risk. Although the Judiciary cannot control how the Fourth Estate engage in return, they are able to control and predict their output. In this way, the way that the Judiciary engages with the Fourth Estate facilitates the perception of judicial independence. The Fourth Estate may report unfavourably upon the personal conduct of an individual judge, but the judge's individual or the Judiciary's collective engagement in return does not "descend into the arena." Therefore, there is an acknowledgement that the Judiciary will be scrutinised by the Fourth Estate, perhaps with unfavourable outcomes, but the perception of independence and impartiality is maintained through judicial conduct.

The way in which perception of independence is maintained through institutional engagement with the Fourth Estate is significantly altered when we consider the emergence of a Fifth Estate of constitutional power. The Fifth Estate changes who the public is and the way that conduct is perceived. As stated previously, the Fifth Estate "has allowed regular citizens with no political or journalistic background to reach a substantial Web audience, make their voices heard,

and have a real effect on public opinion and policy making."[445] We have seen that these "networked individuals"[446] challenge our understanding of the public. The following chapters will go one step further than this by looking not just at the way that the Fifth Estate changes who the "public" is, but the way that engagement with digital networks changes how conduct is *perceived*. It will be argued that engagement with digital networks present users with nuanced and often unpredictable scenarios and interactions, wherein expected professional standards of conduct may be unsuitable for managing interactions with user-generated online norms.

As we shall now see, the Judiciary's response to engagement with the Fifth Estate is similar to their approach to engagement with the Fourth Estate. Engagement with the Fifth Estate is controlled at an institutional level, and restriction of professional use of social media is seen to prevent any erosion of the public's perception that might result from engagement with digital networks. However, this chapter has demonstrated that the Fifth Estate is distinct from the fourth, and that the way in which the Judiciary currently interacts with the Fourth Estate is non-transferable when engaging with the Fifth Estate. The Fifth Estate can reveal the perception of judicial independence to be what it truly is: a sham. The differences between the fourth and Fifth Estates of power explored in this chapter tell us that the Judiciary should not have a blanket approach to engagement with both institutional sites of power. Their current approach to the Fourth Estate cannot simply be applied to their current and future approach to the Fifth Estate given these differences. Social media can reveal the flaws in judicial independence in new and unpredictable ways. Individual judicial office holders will be scrutinised in new ways and so the perception of independence that currently legitimizes the judicial role will be challenged by the addition of the Fifth Estate as a constitutional site of power.

Rather than advocate for placing tighter restrictions on a judge's use of social networks to protect the perception of judicial independence, the remainder of this thesis will argue that

[445] Al-Rodhan, N A F. *The Emergence of Blogs as a Fifth Estate and their Security Implications*, at p.13
[446] Dutton, W H, Dubois, E. "Empowering Citizens of the Internet Age. The Role of a Fifth Estate" at p.239

changing the Judiciary's current approach to the Fifth Estate provides a timely opportunity for us to reimagine the importance placed on the perception of judicial independence in the constitutional framework. Instead, the Judiciary should seek new ways to legitimize the judicial role in the digital age, for example, connectivity and social awareness.

5.0. Conclusion

It is clear that the Fifth Estate is distinct from its predecessor. Social media and user-generated content has provided a new public forum, capable of holding the traditional institutions of government to account through new and unpredictable channels of communication. Acknowledging the Fifth Estate as a new site of power requires us to re-evaluate the constitutional principles discussed in Chapter I. The macro, micro and nano principles of the constitution are contingent upon the perception of the individual judicial office holders conduct. But this framework is no longer limited to the tripartite institutional interactions of the institutions of government but must expand to also provide a framework for the conduct regulating judicial interactions with the fourth and Fifth Estate. This chapter has demonstrated that the Fifth Estate changes the way in which an action may be perceived, and by whom. So, the way in which the Judiciary interacts with this new site of power is constitutionally significant, given that the normative existence of the principles of the constitution discussed in Chapter I must be *believed* in, in order to exist.

The following Chapters of this thesis will look at how the Judiciary have thus far interacted with this new site of constitutional power. We will see that the Judiciary have taken an institutional approach that differs very little from its approach to engagement with the Fourth Estate. Engagement with the Fifth Estate is seen to be risking the barrier of perception, and therefore, individual judges should not engage in their professional capacity in order to prevent any possible erosion of this barrier. It will be seen that the Fifth Estate is capable of eroding at the barrier of perception, and that restriction on professional use does little to protect against this. However,

this does not mean that judges should continue to be restricted or be restricted even further in their personal capacity. Instead, the dependence placed on *perception* when engaging with the Fifth Estate should be re-evaluated.

Chapter III: The Judiciary's Engagement with the Fifth Estate

1.0. Introduction

This chapter will consider *(1)* the approach of the judicial institution to the Fifth Estate, and *(2)* the regulation of individual judicial officeholders' engagement with the Fifth Estate. In a similar way to the Fourth Estate, the Judiciary favour an institutional approach when dealing with social media. This chapter will begin by stating the approaches taken by leading judicial actors, such as Her Majesty's Courts and Tribunals Service (HMCTS) and the Supreme Court (SC), in order to draw out the general approach to social media taken by the judicial institution on the whole.

This chapter will describe the use of Facebook, Twitter, YouTube, Instagram, and LinkedIn by the judicial institution and reflect upon the purpose, target audience and actual audience of the engagement. The Judiciary approach the Fifth Estate in a similar way to the fourth. The Fifth Estate is used as a tool for promoting the doctrines of separation, independence, impartiality, and integrity to the public. This confirms the assertions in Chapter I of this thesis, that the principles of judicial independence and separation of powers must be promoted in order for them to remain constitutionally significant. The Judiciary must be seen to be independent, and they are currently using social media to communicate their positioning within the constitutional framework of the UK to those who *follow*, *like* and *subscribe* to their accounts.

This collective over individual approach follows a similar pattern to engagement with the Fourth Estate but fails to consider the differences between traditional media and the new site of constitutional power; the Fifth Estate. This chapter will analyse the current framework of guidance for individual judicial office holders, most notably the Guide to Judicial Conduct (GtJC) and Blogging by Judicial Office Holders Guidance (BJOHG), when engaging with social media.[447] This

[447] The Guide's to Judicial Conduct dating from 2004-present day and Blogging by Judicial Office Holders guidance (2012)

chapter will then unpack why this guidance is unsuitable for regulating the relationship between the Judiciary and the Fifth Estate. This will be examined in four parts: *(1)* Inconsistency with international norms and standards, *(2)* failure to take into account the differences between the fourth and Fifth Estates, therefore regulating online conduct using offline standards, *(3)* presents real problems for current legal professionals and future judicial officeholders and, *(4)* failure to prevent judicial misconduct online.

2.0. The Institutional Approach to Engagement with the Fifth Estate

It is commonplace for institutions to make use of a collective identity in order to engage with fellow users on social media sites. Indeed, judicial institutions are joined online by a majority of businesses, and other branches of government.[448] An institutional approach is often deemed to be useful in order to communicate a common message to users of a service and the Judiciary is no exception in wanting to do this.

The following sections will focus on the participation of two judicial institutions. Firstly, Her Majesty's Courts and Tribunals Service (HMCTS) and secondly, The Supreme Court of the United Kingdom (SC). These two institutions have been selected for the purpose of this chapter in order to get a diverse as possible account of the Judiciary as an institution and their engagement with social media, given that other courts in England and Wales do not have a presence online.[449] That these two institutions represent either the civil servants working within the ministry of justice for the benefit of the Judiciary or only the most senior judges in the UK raises interesting questions. It is interesting to note that the portrayal of collective identity is inherently linked with the most powerful aspects of judicial decision making. It is worth remarking upon here the lack of

[448] For example, @UKCivilServcie, accessed via https://twitter.com/ukcivilservice?lang=en
[449] An exception being in Scotland with @SCTScourtsribs accessed via https://twitter.com/SCTScourtstribs

incorporation or voice that junior courts or tribunals have when determining or indeed representing this identity.

This approach can also be viewed in the context of HMCTS's inclusion within the Ministry of Justice, and the nuanced constitutional arrangements under the CRA 2005 that blur the distinction between Executive and judicial branch of government. As such, it is difficult to identify just one approach to engagement online and call it an "institutional approach", however, for ease when comparing an approach taken by a collective body to an individual social media profile, and for the purposes of this chapter, the HMCTS and Supreme Court will be seen as representing the collective Judiciary as an institution.

2.1. HM Courts and Tribunals Service (HMCTS)

HM Courts and Tribunals Service (HMCTS) is an Executive branch of the Ministry of Justice, responsible for the administration of the courts of England and Wales alongside non-devolved tribunals in Scotland and Northern Ireland. HMCTS aims to provide a "fair, efficient and effective justice system."[450] As such they are responsible for the administration of most courts and tribunals in England and Wales, including the High Court and Court of Appeal but excluding the Supreme Court. They support an "independent Judiciary."[451]

In 2016, HMCTS launched a £1bn reform programme, designed to "bring new technology and modern ways of working to the way justice is administered." It was claimed that our judicial systems have "not kept pace with the world around us" and so it must be the aim of the Executive branch to make "justice less confusing, easier to navigate and better at responding to the needs of the public." As such, the vision for reform was to "modernise and upgrade the justice system"[452]

[450] HM Courts & Tribunals Service, "About us" accessed via https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about
[451] Ibid.
[452] HM Courts & Tribunals Service, "Guidance: The HMCTS Reform Programme: Information on our reform programme, including how to engage with the programme, get involved in projects and stay updated on

allowing users to opt in to resolving simple disputes online or by introducing digital working in courts. The goal of the 2016 reforms was to ensure that proceedings are open to the public and the media. This might be to allow individuals access to outcomes of case, with technology providing a framework to move beyond the free access to some case law on the database site BAILII.[453] The 2016 report saw technology as an opportunity to diversify access to the law, allowing users access to judicial decisions without requiring memberships or subscriptions to specialised, and often expensive, legal databases.

The reform program attempted to modernise the courts and create a more "effective system."[454] The success of reform can be measured against the backdrop of the global COVID-19 pandemic in 2020, with the reliance on technology and instant communication media to ensure that essential services continue to run. In March 2020, the case of *Fowler (Respondent) v Commissioners for Her Majesty's Revenue and Customs*[455] made legal history as the first Supreme Court case to be conducted entirely via Cisco WebEx video conferencing. Despite breakthroughs in the application of technology to provide court services during the ongoing global pandemic, even prior to the disruptions caused by COVID-19, at the end of December 2019 there were 37,434 outstanding in the crown courts alone, an increase of 13% on the previous year.[456] This calls into question whether the attempted modernization of the judicial system has indeed modernised and upgraded "the justice system so that it works better for everyone."[457]

The role that social media played in this modernization can be seen when looking at HMCTS's creation of various social media accounts and channels between 2016-2018.

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progress and developments" published 9 November 2018, Last updated 6 February 2019, accessed via https://www.gov.uk/guidance/the-hmcts-reform-programme

[453] British and Irish Legal Information Institute, accessed via https://www.bailii.org/

[454] GOV.uk, "The HMCTS Reform Programme" accessed via https://www.gov.uk/guidance/the-hmcts-reform-programme

[455] *Fowler (Respondent) v Commissioners for Her Majesty's Revenue and Customs* [2020] UKSC 22

[456] Grierson, J. "Number of outstanding crown court cases reaches two-year high" (March, 2020) The Guardian, accessed via https://www.theguardian.com/world/2020/mar/26/number-outstanding-crown-court-cases-reaches-two-year-high-covid-19-crisis

[457] GOV.uk, "The HMTS Reform Programme" accessed via https://www.gov.uk/guidance/the-hmcts-reform-programme

According to HMCTS, their main use for their social media presence was "to communicate with you" referring to its users.[458] Through their various social media channels, including Facebook and Twitter, HMCTS aims to "reply to general enquiries from public and professional court users" and to assist in "reducing contact through other enquiry channels."[459] In this sense, rather than the HMCTS's social media presence revolutionizing the way that the judicial institution interacts with the public, it is an extension of their more traditional enquiry channels.

To determine the effectiveness of this approach, the engagement with individual platforms must be broken down. It is important to recognise that each social media platform offers users a nuanced experienced and therefore the type of content that is encountered, and engaged with, will differ depending on the account that is being used. By looking at the individual accounts that span the diverse range of social media platforms, we will determine what the purpose of each account is. Therefore, we must look to the way in which the account interacts with other users of the same service, the potential audience of each platform and the reach of the information shared.

2.1.1. HM Courts & Tribunals Service's Social Media Policy

HMCTS use four social media sites: Facebook, Twitter, LinkedIn, and YouTube. Each page is moderated by a dedicated media team and this team respond to all enquiries within official office hours and monitor HMCTS's social media presence out of hours. Much like the Media Panel responsible for engaging with the press, civil servants act as the voice of the Judiciary when engaging with the Fifth Estate.

As per the guidelines, comments that involve "abuse, racist, sexist, homophobic or inflammatory" content will be deleted. In addition, "comments considered to be spam…personal information given such as telephone numbers and address details" etc. will also be moderated

[458] GOV.uk, HMCTS, "Social Media Use: How we use Social Media to Communicate with You" accessed via https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/social-media-use
[459] Ibid.

and deleted. In addition, the dedicated media team will interact with other users on their social media channels by "welcome[ing] feedback, ideas and engagement for all [their] followers." In addition, they may "follow or 'like' you back if you follow or 'like' [them]." HMCTS may "choose to share content" which is considered to be relevant, and they aim to reply to "general enquiries from public and professional court users to help reduce contact through other enquiry channels."[460] They do this by reading all @replies and direct messages and ensuring "that any emerging themes or helpful suggestions are passed to the relevant colleagues in HMCTS."[461]

Throughout their social media policy, HMCTS reiterate that 'sharing' or 'liking' or 'following' does not imply or reflect "endorsement of any kind."[462] In keeping with the doctrinal principles considered in Chapter I, they also reiterate their inability to "engage on issues of party politics" but "will direct enquiries to the relevant page on GOV.UK where appropriate."[463]

2.1.2. Facebook

Listed as a government organisation, HMCTS are followed by 2,275 people on the Facebook site.[464] Their profile page, created in October 2018, can be followed, liked, or messaged. Links to the www.gov.uk/hmcts website are present and public users have the option to send a private message, write a review, and check-in with the page.

The "verified badge" function provided by Facebook appears next to a Page confirming that an account is an authentic presence of the organisation it represents.[465] This allows HMCTS to be labelled an organisation, rather than an individual user, and they can communicate directly with global users of the platform. This also reassures followers of the account that they are

[460] Ibid.
[461] Ibid.
[462] Ibid.
[463] Ibid.
[464]Facebook, HMCTSgovuk, accessed via https://www.facebook.com/HMCTSgovuk
[465]Facebook.com, "What is a verified Page of profile?" accessed via https://www.facebook.com/help/196050490547892

communicating with the authentic account and thereby likely to be a trustworthy source of information.

HMCTS claims that sites like their Facebook page are designed to open up channels of communication between the organisation and the public, with individual users being able to like and comment on uploaded content.[466] We might question the success of this, with one Facebook user commenting, “Help, help, help !!!” on a recent post, but receiving no public reply from HMCTS.[467]

More recently, the page has been used to distribute information regarding COVID-19 policies and guidelines, directing followers of the page to resources posted on their website or government advice.[468] Posts focus on providing advice or assistance for current users of the service who may be facing issues or have questions regarding remote court hearings, with the hashtag #OnlineCourts recurring throughout recent posts.[469]

In addition to information distribution, the Facebook page provides links to recruitment services, most notably calls for Magistrate Volunteers.[470] This is an interesting deviation from sharing information content as it is targeted at potential volunteers who might “use their everyday skills”, rather than at users of the HMCTS service.[471] This appears to be a good use of Facebook, given the need to reach “people from all walks of life” and with “no legal background.”[472]

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[466] GOV.uk, “HM Courts & Tribunals Service. Social Media Use: How we use Social Media to Communicate with you” accessed via https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/social-media-use

[467] For example, Facebook, HMCTSgovuk accessed via https://www.facebook.com/HMCTSgovuk/posts/1760410274135687

[468] For example, https://www.gov.uk/guidance/going-to-a-court-or-tribunal-during-the-coronavirus-covid-19-outbreak?fbclid=IwAR1JPDK5zU_E_G1hO3BMO3PBX3umeqTKjA4ePMRgUftikjAOtiFr0r8TLqo#on-the-day-of-your-hearing

[469] For example, Facebook, HMCTSgovuk accessed via https://www.facebook.com/HMCTSgovuk/posts/1760410274135687

[470] Facebook, HMCTSgovuk, accessed via https://www.facebook.com/HMCTSgovuk/posts/1762370857272962

[471] Magistrates Recruitment, Volunteer as a magistrate, accessed via https://magistrates.Judiciary.uk/?fbclid=IwAR1uFPXaTLtQlbHpTZqQ93qDAY9oLw9b9_wATWIOYRc7glzNlRmLJpllA3Y

[472] Ibid.

Whilst the @HMCTSgovuk Facebook page provides a different platform for distribution of information, the content of that information is already widely available on the GOV.UK website. In addition, given the relatively small number of followers, when compared to the UK's 45.94 million users of Facebook and 1.49 million users of the justice system between April 2019-March 2020, the reach of the page is clearly limited.[473] Looking back to posts between December 2020-October 2018, HMCTS is yet to publicly respond to a single comment publicly. Instead, there is evidence of Facebook users responding to each other's comments, generating a community and network of individual users, with the HMCTS page merely acting as a platform on which, or conduit through which, to do so.

The purpose of the Facebook page is evidently to distribute information to the service users of HMCTS or for recruitment, therefore not intending to be distributed to Facebook users more widely. The page therefore acts as an opportunity to conduct a free marketing campaign, with relatively limited impact and reach and with little profile holder-to-user interaction.

2.1.3. Twitter

HMCTS currently operates four separate Twitter channels, including corporate, CEO, Wales, and careers pages. On its official Twitter channel, it boasts 11.8K followers and follows a further 1,163 in return (figures as of August 2020),[474] a significantly higher figure than their Facebook following, perhaps attributed to the earlier creation of the page in October 2015.

Similarly, to its Facebook counterpart, the HMCTS Twitter page provides users with a link to the HMCTS website information page and is verified, assuring public users that the information provided by the account comes directly from the stipulated source. Unlike the HMCTS's Facebook

[473]Criminal Justice Statistics quarterly, England and Wales https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/910530/criminal-justice-statistics-quarterly-march-2020.pdf
[474] Twitter Profile: @HMCTSgovuk accessed via https://twitter.com/HMCTSgovuk

account, Twitter does not provide the option for individual users to privately message the corporate account, instead allowing for direct avenues of communication to take place whilst publicly commenting on tweets and replies.

Much like their Facebook page, HMCTS focus largely on redistributing information contained on GOV.UK, and similarly there appears to be little engagement in terms of replies to individual users engaging with their tweets.

Outside of the regular announcements that echo the content posted on HMCTS's Facebook page, their Twitter account has launched an interesting segment labelled #SpotlightSessions, where individuals working in various capacities in HMCTS tweet about their role. Most recently, Linda, a team leader in the Mental Health Tribunal, outlines her role, the challenges she encounters and the aspects that she enjoys in a 12-tweet thread.[475] It is interesting to note that Linda's thread saw a significant increase in likes, when compared with the majority of HMCTS tweets that focus on providing links to the GOV.UK website.

The purpose of HMCTS's Twitter account seems to fit in line with what we know about their Facebook presence; that content is geared towards user information, fits within the framework of existing content contained on government webpages and with little to no user-to-user engagement.

2.1.4. LinkedIn

LinkedIn is a social networking site preferred by professionals to connect and strengthen professional relationships.[476] As of March 2021, HMCTS has a following of 45,459 on LinkedIn

[475] Twitter, @HMCTSgovuk, accessed via https://twitter.com/HMCTSgovuk/status/1336945248640114688
[476]LinkedIn, "What is LinkedIn and How Can I Use It?" accessed via, https://www.linkedin.com/help/linkedin/answer/111663/what-is-linkedin-and-how-can-i-use-it-?lang=en

and the page provides further user information of over 2,760 current or former employees.[477] Similarly to the social media sites outlined above, the page provides basic information about the organisation and website links to the HMCTS information webpage.

Taking a similar approach to their Twitter page, HMCTS's LinkedIn posts also include #SpotlightSessions. At present post and video content centres around COVID-19, such as the recently posed video "14 additional 'nightingale' courtrooms"[478] and regulations surrounding court users and social distancing. In a similar pattern to Facebook and Twitter, the media team responsible for operating HMCTS's presence on LinkedIn do not engage with users who comment, like, celebrate, support, love, find insightful or express curiosity towards posts and videos.[479]

2.1.5. YouTube

Alongside their Facebook and Twitter accounts, HMCTS joined YouTube in October 2015. Including a brief description of their responsibilities, the channel is used to "publish videos about the service [they] provide."[480] With 643 subscribers and a potential user base of 2 billion, the YouTube channel could be considered the least populated of HMCTS's social media presence.

Whilst YouTube is responsible for the dissemination of video content, it is the 2nd most-used search engine being superseded only by Google and is therefore also commonly used for public information gathering. With this in mind, the HMCTS provides a number of educational playlists aimed at users of the service, including but not exclusively information for "jurors and jury

[477] See, https://www.linkedin.com/company/hm-courts-&-tribunals-service/people/
[478] See, https://www.linkedin.com/feed/update/urn:li:activity:6767730632182267904/
[479]For example, "Use LinkedIn Reactions" accessed via, https://www.linkedin.com/help/linkedin/answer/101466/use-linkedin-reactions?lang=en
[480] "Social Media Use: How we use Social Media to Communicate with you"

service”[481] and a “who’s who”[482] in court. In addition, the YouTube account has recently launched a set 360º court tour,[483] a “Coronavirus safety measures in our buildings playlist”[484] and a 3-video playlist on “Online probate: new feature for legal professionals Oct 2019.”[485] As with the previous content, these videos are aiming to be educational or used as educational resources and are more recently concerned with communicating COVID-19 measures, regulations and access to courts and tribunals.

Confirming the earlier assertion made that YouTube currently has the least reach of HMCTS’s social media platforms, the majority of videos average less than 200 views, with the most viewed upload “Justice matters”, a “video that details how the HMCTS change programme will make services better for everyone who uses them” reaching 6,400 views (as of March 2021).[486]

As with the approach taken to their previous social media profiles, the media team responsible for running HMCTS’s YouTube presence do not engage with users. Whilst this seems like an active omission on sites like Facebook and Twitter where users comment actively and regularly, HMCTS’s YouTube have the comment section “turned off” on a number of their videos.[487] In addition to this, YouTube has none of the direct messaging services provided by

[481]HMCTSgovuk, YouTube, “Your Role as a Juror” accessed via https://www.youtube.com/watch?v=6gLSlrviF7w&list=PLORVvk_w75PwKfRzl2odM143If5kEPngp

[482]HMCTSgovuk, YouTube, “Who’s who” accessed via https://www.youtube.com/watch?v=JsLATco_5QE&list=PLORVvk_w75Pz4Fyuub7hjXH70Xyt2mu-r

[483]HMCTSgovuk, YouTube, “Bournemouth Courts 360 Main Court” accessed via, https://www.youtube.com/watch?v=GHSUDK_7cLU

[484]HMCTSgovuk, YouTube, “Coronavirus safety measures in our buildings” accessed via, https://www.youtube.com/watch?v=02KvzMjMc2I&list=PLORVvk_w75PwAGrviBWYgiQmcIHdHLt7p

[485]HMCTSgovuk, YouTube, Online probate: new feature for legal professionals Oct 2019 accessed via, https://www.youtube.com/watch?v=JAWB46heeSg&list=PLORVvk_w75PyfRxKxNYG2DKfYeOlt79dR

[486]HMCTSgovuk, YouTube, “Justice matters” accessed via, https://www.youtube.com/watch?v=3_xDMTQ6DJQ

[487] Users may opt to turn off comments for a video or alternatively comments aren’t available when “a video’s audience is set as Made for kids, or a video is private.” In addition, a user may choose to (1) hold potentially inappropriate comments for review, (2) hold all comments for review (3) allow all comments, and (4) turn off comments. See, YouTube Help, “Learn about comment settings.”

other social media sites, but where comments are turned on, users are able to interact with videos anonymously by posting and replying to comments.

2.2. The Supreme Court

The Supreme Court of the United Kingdom has a separate administration from those governed by HMCTS. As considered in Chapter I, established by Part 3, s.23(1) of the CRA 2005, the Supreme Court is the final court of appeal for all UK civil cases and criminal cases from England, Wales, and Northern Ireland. Concentrating on cases deemed to be of "the greatest public and constitutional importance"[488] the Supreme Court is face of the Judiciary for the public at large, with its members and former members, such as Lady Hale and Lord Sumption, becoming notable public figures engaging in public debate.[489]

Alongside their Video Link Live function accessible via their website,[490] The Supreme Court has a significant presence over several social media platforms, including Twitter, Instagram, and YouTube. Their social media policy outlines the ways in which these platforms are used to communicate the work of the Supreme Court to wider audiences.

2.2.1. The Supreme Court Social Media Policy

Although the Supreme Court may be the public face of the Judiciary, like with HMCTS, their social media accounts are operated by an in-house communications team and the judges themselves do not play a role in content creation on Twitter, Instagram, and YouTube. Taking a similar approach to HMCTS, the Supreme Court's communications team "welcome feedback from

[488] The Supreme Court, Role of the Supreme Court, accessed via https://www.supremecourt.uk/about/role-of-the-supreme-court.html
[489] For example, "Lord Sumption for the Mail on Sunday" accessed via https://www.dailymail.co.uk/home/search.html?s=&authornamef=Lord+Sumption+For+The+Mail+On+Sunday
[490] Supreme Court Live, accessed via https://www.supremecourt.uk/live/court-01.html

followers and will read all @replies" but do not consider communication via social media to be official correspondence, nor do they guarantee an individual reply to Twitter and Instagram messages as a result of "resource constraints."[491]

As with the HMCTS's social media account, the Supreme Court's accounts outlined above "cannot engage on issues of party politics" nor can they "offer legal advice" or "enter into discussion about published judgments."[492] In this way, the institutional approach attempts to protect the perception of independence. Individual judges, or in this case Supreme Court justices, are removed from the public eye and instead the relationship with the Fifth Estate is managed vicariously through a communications team.

2.2.2. Twitter

The @UKSupremecourt[493] Twitter account is managed in-house by the Supreme Court's communications team.[494] With 272.8 thousand followers (as of March 2021), it is currently the Judiciary's most populated social media presence. As stated in their social media policy, followers of the account can "expect 2-3 tweets a week covering the cases, judgments, and corporate announcements of the Supreme Court."[495]

Despite the significantly higher proportion of followers when compared to HMCTS, the content produced by the @UKSupremecourt account is similar and user engagement with this content is also relatively low. As with @HMCTSGovuk, most tweets are dedicated to recruitment,[496] or educational material relating to the handing down of Supreme Court

[491] The Supreme Court, Our Terms and Conditions: Social Media Policy, accessed via https://www.supremecourt.uk/terms-and-conditions.html#section-02
[492] Ibid.
[493] Twitter, @UKSupremeCourt, accessed via https://twitter.com/uksupremecourt?lang=en
[494]The Supreme Court, Our Terms and Conditions: Social Media Policy, accessed via https://www.supremecourt.uk/terms-and-conditions.html#section-02
[495] Ibid.
[496] See, https://twitter.com/UKSupremeCourt/status/1359448570634653698

judgments.[497] Although video links to judgments tend to receive little to no user engagement, occasionally, and notably controversial judgments such as *Uber BV and others v Aslam and others*[498], and *R (on the application of Begum) v Special Immigration Appeals Commission,*[499] attract significant attention with the former receiving 1.4K retweets, 2.5K likes and 147 comments (as of March 2021).

2.2.3. YouTube

As with the HMCTS's YouTube account, The Supreme Court utilises YouTube to create visual content to distribute to its 13.5 thousand subscribers.[500] Included in this is "judgment hand downs, valedictories and swearing-in ceremonies."[501] Having joined in November 2012, the channel boasts over 1.5 million video views, with "What is the Supreme Court?"[502] and "R (on the application of Miller) v The Prime Minister & Cherry & Others v Adv. General for Scotland)"[503] being amongst the most viewed. Given that YouTube is a video-sharing platform, the channel acts in a similar way to the Video Link Supreme Court Live function provided by The Supreme Court Website. Rather than web users having to tune in to judgments live, the channel provides subscribers the opportunity to watch a summary judgment in their own time.

2.2.4. Instagram

Followed by 12.2 thousand fellow Instagram users (as of March 2021), followers of @uksupremcourt can expect 2-3 posts a week as well as "the occasional Instagram 'story.'"[504]

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[497] See, https://twitter.com/UKSupremeCourt/status/1362719032332455936
[498] *Uber BV and others v Aslam and others* [2021] UKSC 5
[499] *R (on the application of Begum) v Special Immigration Appeals Commission* [2021] UKSC 7
[500] https://www.youtube.com/user/UKSupremeCourt
[501] The Supreme Court, Our Terms and Conditions: Social Media Policy
[502] UKSupremeCourt, YouTube, https://www.youtube.com/watch?time_continue=1&v=wTHrynZIsBo
[503] UKSupremeCourt, YouTube, https://www.youtube.com/watch?v=UeLbVQBupWE&t=1s
[504] Ibid.

Diverging from their approach on Twitter, the Instagram account claims to "follow life outside the courtroom" and "features information about [their] educational work and the outreach events that the Justices take part in."[505] This goal is realised to an extent, with various posts being more colloquial in nature and focusing on aspects outside of judgments, such as staff members participation in "#GreatLegalBake"[506] and promotion of the "Supreme Court colouring book."[507]

It is worth noting that whilst HMCTS have a Facebook account, the Supreme Court have chosen to use Instagram instead. In some ways, these sites are comparable in reach, although Facebook still boasts the highest volume of social media users in the UK. However, whilst this choice might be unintentional, it might be worth noting that the communications teams responsible for managing the Supreme Court's social media might have an awareness of the differences in demographics between Facebook when compared to Instagram.[508] The choice to engage on Instagram as opposed to Facebook certainly suggests that the Supreme Court wish to engage with, and see themselves capable of engaging with, this newer and more visual arena.

If engagement is the measure of success, then the level of engagement witnessed on @uksupremecourt seems to suggest that this decision to interact via Instagram was an interesting, and perhaps wise, one. This certainly paves the way for a discussion surrounding the potential that new sites, often favoured by younger demographics, have for the Supreme Court. This will be considered in the following section.

2.3. The Role of social media for the Judicial Institution

[505] https://www.instagram.com/uksupremecourt/?hl=en
[506] https://www.instagram.com/p/B8i_wWAppMK/
[507] https://www.instagram.com/p/CCqOC3Mpa4I/
[508] Usage of Facebook in teens and young adults has dropped in favour of Instagram, with 79% of 30-49 and 68% of 50-64 using Facebook, when compared to Instagram that has 47% 30-49 and 23% 50-64. See Chen, J. "Social media demographics to inform your brand's strategy in 2020" (Aug 2020) accessed via https://sproutsocial.com/insights/new-social-media-demographics/

Having considered the approach taken by HMCTS and the UK Supreme Court to Facebook, Twitter, Instagram, YouTube, and LinkedIn, it is worth reflecting upon the purpose of this engagement.

It is clear that the Judiciary view the role of social media to be similar to that of the Fourth Estate, or at times as a way to reduce traffic in "other enquiry channels."[509] In this way, the current institutional approach to social media is simply using a new conduit to achieve old goals. The communications teams responsible for engaging with the Fifth Estate on behalf of the institution act as an extension of the Press Office. HMCTS provide regular "Press releases" mirrored by the Supreme Court's "News releases"[510] and the content of these statements differ little from the posts "covering cases, judgements, and corporate announcements" on their social media accounts.[511] For example, a News release published on the 27th of January 2020, titled "Lord Hodge named Deputy President of the Supreme Court"[512] was echoed on Twitter in an identical format.[513]

So, whilst sites like Twitter might be a new platform with which to communicate information and educational resources to the public, it is being used in a similar way to more traditional platforms, or it is simply seen as an online extension of engagement with the Fourth Estate. It was argued in Chapter II that the Judiciary's attitude to news media is born out of the need to maintain their appearance of independence, impartiality, and position as observers rather than participants in the political arena. The news media in this respect acts as a conduit for public perception, the media reveals what can be seen to the public for the public to scrutinise the actions of the Judiciary. The exploration of the Judiciary's current approach to social media demonstrates that

[509]HMCTS Social Media Policy, "Our social media channels" accessed via https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/social-media-use

[510] For example, HM Courts & Tribunals Service "New 'Nightingale court' opens in Taunton' (10 February 2021) accessed via https://www.gov.uk/government/news/new-nightingale-court-opens-in-taunton

[511] For example, Supreme Court Social Media Policy, "followers of [@UKSupremecourt] can expect 2-3 tweets a week covering the cases, judgments, and corporate announcements of the Supreme Court." Accessed via https://www.supremecourt.uk/terms-and-conditions.html

[512] For example, "Lord Hodge named Deputy President of the Supreme Court" 27 January 2020 accessed via https://www.supremecourt.uk/news/Lord-hodge-named-deputy-president-of-the-supreme-court.html

[513] For example, Twitter @UKSupremeCourt accessed via https://twitter.com/UKSupremeCourt/status/1221778338370506758

it is no different from the conclusions made regarding the Fourth Estate. Like the fourth, the Fifth Estate is seen as a platform on which to promote the notions of independence, impartiality, and integrity, and perhaps most importantly, so that the public might see or perceive these notions to exist.

One of the only differences here is that the Press Office take enquiries from journalists and news outlets, whereas communications teams must actively post content. The Fourth Estate asks questions and concerns itself with the response, whereas the Fifth Estate demands action and asks questions later. Although it is expected that HMCTS and the SC will communicate some similar information via social media as they would to the traditional press, this does demonstrate a missed opportunity for the Judiciary. As discussed in the previous Chapter, the Fifth Estate provides an opportunity for new and innovative forms of communication, as opposed to a mere transition of Fourth Estate interaction into the digital realm.

In a similar way to HMCTS and the SC's respective Press Office's, the communications teams responsible for their social media profiles act as a third-party intermediary between the Judiciary and the public. Interestingly, these communications teams are Civil Servants, bound by the Civil Service Code, meaning that there is a dependence on the Executive to be the voice of the Judiciary. This undoubtedly blurs the distinction between the judicial and Executive branch of government, but it also begs the question of whether the content posted via social media truly reflects the Judiciary as an institution. This dependence on civil servants to provide an institutional voice has not always worked to the advantage of the institution, perhaps one of the most notable examples of this being the *"Arrogant and offensive. Can you imagine working with these truth twisters?"* tweet fired from the government's official Civil Service Twitter account.[514] Despite the tweet referring to the prime minister's defence of Dominic Cummings during the COVID-19

[514] The Civil Servant "The rogue civil service tweet spoke for most of us. I hope the author isn't found" (Mon 2 May 2020) The Guardian, accessed via https://www.theguardian.com/commentisfree/2020/may/25/rogue-civil-service-tweet-uk

pandemic lock-down being hastily deleted, as the Guardian comments, it "lit up the WhatsApp groups around Whitehall."[515] Dubbed by some as a "brave heretic",[516] this one lone civil servant was able to give a voice to the institution, whether it wanted it or not. Despite the oft assertion that content posted on social media "does not imply endorsement of any kind",[517] the reality is that once information is circulated online, it has the capacity to shift perception. Clearly, depending on civil servants to manage social media profiles does not always guarantee that the attitude of the institution overall will be represented.

Considering the posts discussed in the prior sections that were posted across various social media platforms by both HMCTS and the SC, it is clear that engagement focuses on advertising, recruitment, and judgment distribution, with the communications teams responsible for posting content rarely, or never, responding to or interacting directly with other users of the platform. To an extent, this makes the current institutional approach superficial in nature. Rather than making use of the comment functions that make social media distinctive from webpages, both the HMCTS and SC post links to the gov.uk website, upload hearings or judgments and do not upload tailored platform specific content using platform specific tools such as Instagram's "reels" or Facebooks "Live" functions. Although this shows a lack of appreciation for the differences between the fourth and Fifth Estate, this does also speak for the expected audience of their social media posts. Although both HMCTS and the SC describe their social media profiles as informing the "public", it is clear from the content posted that they have a narrow view of who this public might be. Perhaps at the forefront of this *definition* are users of the service who require easily accessible and up to date information regarding court facilities or more recently COVID-19 procedures. Alongside one-off users of courts and tribunals, content is evidently geared towards potential employees and legal scholars or practitioners. As discussed above, posts on all five

[515] Ibid.
[516] Ibid.
[517] GOV.uk, HMCTS Social Media Policy, "Our social media channels"

social media platforms centre around recruitment, links to access judgments or corporate announcements. The expected audience of these posts varies little between platforms, proving a lack of appreciation for the potential for variety of audiences, in terms of demographics, across different social networking sites.

Overall, the Judiciary demonstrate a very limited view of social media as a communication tool. Whilst the five accounts considered above are undoubtedly the most populated social media platforms to date, the constantly evolving hierarchy of social media platforms, where sites like TikTok and Snapchat can rise and fall in use by millions in months, it is clear that the Judiciary are not taking the full picture into account. The only exception to this is the current SC's approach to Instagram. Their profile, "following life outside of the courtroom…and the outreach events that the Justices take part in",[518] demonstrates promise and suggests a willingness to make use of the full range of tools made available on sites like Instagram.

3.0. Guidance for Judicial Officeholders When Engaging with the Fifth Estate

None of the social media accounts outlined above are operated by the Judiciary or judges themselves. Undoubtedly, social media can be a valuable tool for whole institutions to communicate information to individual users and to receive feedback from the users in turn. This institutional approach to engagement online is heavily regulated by social media policies and is undertaken by communications teams.

The Judiciary is not alone in its institutional approach to engagement with social media. It is common practice for institutions to make collective use of social media platforms, with accounts like the ones described above, distributing information to individual users who *follow* or *like* the account. However, this is more often done as an addition to individual use, rather than in

[518]Supreme Court Social Media Policy, "Instagram content"

replacement of it. The NHS,[519] Universities[520] and Political Parties[521] all have collective social media profiles, but this does not come at the expense of its use by individual members. Whilst doctors,[522] lecturers[523] and politicians[524] may find themselves bound to codes of conduct regulating their online use and will expect to be the subject of disciplinary proceedings, where their use transcends these confines, they are often active users within their professional capacity.

Whilst the Judiciary acts similarly from an institutional standpoint, as we shall now see the individual use of social media by judges differs from that of the common approach. We might argue that this individual engagement with social media is unnecessary given that interaction with the Fifth Estate is done on an institutional level by individuals who are not themselves judges. Indeed, as we shall see, the current approach taken by the Judiciary in the UK is one of individual restraint. However, it will be argued in the following Chapters of this thesis that the restrictions placed on judges engaging online in their professional capacity are problematic for a number of reasons: namely that they deny the realities of social media, do little to prevent the harms associated with social media, do not reflect the current reality of individual judicial use of social media and are ultimately futile, given the active presence of legal professionals, thereby future judges, online.

To unpack each of these issues, we must begin to look at the way in which the judicial institution instructs its individual members on engagement with the Fifth Estate and the domestic and international confines in which this relationship is managed. We will see that there is a

[519] @NHSuk accessed via, https://twitter.com/NHSuk?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor

[520] e.g., @LivUni accessed via, https://twitter.com/LivUni?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor

[521] e.g., @UKLabour accessed via, https://twitter.com/UKLabour?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor

[522] See General Medical Council Guidance at https://www.gmc-uk.org/ethical-guidance

[523] See University of Liverpool, "Social Media Compliance Policy: External Relations, Marketing and Communications Department" (2018) accessed via, https://www.liverpool.ac.uk/media/livacuk/computingservices/regulations/social-media-policy.pdf

[524] e.g., "Labour's Social Media Policy" accessed via, https://labour.org.uk/members/my-welfare/my-rights-and-responsibilities/coc-social-media/

discrepancy between the way that judges *should* conduct themselves on social media and the way that they *do*.

3.1. The Guide to Judicial Conduct

The Guide to Judicial Conduct is a written Guide, outlining the "range of restraints that are inherent in the acceptance of judicial office" and the "obligations placed on judges by the taking of the Judicial Oath" in both England and Wales.[525] The Guide is a written document, offering assistance to individual judges, establishing principles from which judges are guided to "make their own decisions."[526] Rather than prescribing a detailed code of behaviours, the Guide is intended to be a tool for judges to use to deal with any issues that they might encounter during their time in office, thereby upholding the constitutional norm of judicial independence as it was considered in Chapter I. The Guide to Judicial Conduct was first drafted by the Judges' Council in 2013 and has subsequently been amended multiple times. The following sections will now consider each iteration of the Guide to Judicial Conduct from its inception until the present day and summarize the evolution of the advice given to individual judges concerning their engagement with the Fifth Estate.

3.1.1. The Guide to Judicial Conduct, Judiciary of England, and Wales (2013), amended July (2016)

Following the publishing of Judicial Studies Board paper in 2002, titled "Guidelines to Judicial Ethics", the Guide to Judicial Conduct was drafted using a working group of judges, under the

[525] GtJC (2013, amended 2016), Foreword
[526] Ibid.

chairmanship of Lord Justice Pill and was published in 2004 by the Judges' Council. Following this publication, it was expected that the Guide be kept under review to deal with any "points of principle that may not be dealt with in the [current] Guide or that may need revision."[527] Amongst these points was the evolution of social media and the increased need for guidance to be issued to judges relating to their handling of engagement with the emerging Fifth Estate.

Under section 8.11, the 2013 publication outlines guidance for "Social Networking and Blogging."[528] It is stated that:

> "…whilst the use of social networking is a matter of personal choice… judges are encouraged to bear in mind that the spread of information and use of technology means it is increasingly easy to undertake 'jigsaw' research which allows individuals to piece together information from various independent sources."[529]

Judges must attempt to "ensure that information about [their] personal life and home address is not available online" and are guided to a "simple way of checking" i.e., to type your name into an internet search engine such as Google.[530] A number of bullet points outline some general ways judges should remain vigilant online:

> "…Be wary of publishing more personal information than is necessary. Phone numbers, dates of birth, and addresses are key pieces of information for security fraudsters. Other users probably don't need to know such details – if any contacts do need them send them to individuals separately.
>
> Posting some information could put your personal safety at risk. For example, your address, details of holiday plans and information about your family could be used for criminal purposes.
>
> Check your privacy settings. You can restrict access to your profile to ensure you information is kept to a restricted group.
>
> Check the terms and conditions of any sites you sign up to ensure you are aware of who owns data posted on the site and what the owners of the site can do with your data."[531]

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[527] Ibid.
[528] Ibid, at p.26
[529] Ibid, at p.26-27
[530] Ibid, at p.27
[531] Ibid.

3.1.2. Blogging by Judicial Officeholders Guidance

Included in the 2013 guidance is Appendix 4, "Blogging by judicial office-holders." Applying to all courts and tribunal judicial officeholders in England and Wales, the guidance stipulates that whilst "blogging by members of the Judiciary is not prohibited… judicial office-holders who blog (or who post comments on other people's blogs) must not identify themselves as members of the Judiciary."[532]

Appendix 4 defines a "blog" as "deriving from the term web log" and is a "personalized journal published on the internet."[533] In line with the GtJC 2013 a blog is described as:

> "The maintenance of, or adding content to, a blog. Blogs tends to be interactive, allowing visitors to leave comments. They may also contain links to other blogs and websites. For the purpose of this guidance blogging includes publishing material on micro-blogging sites such as Twitter."[534]

Referring to the standards of conduct expected of judges in the offline world, the guidance reminds officeholders of the needs to "conduct themselves, both in and out of court, in such as a way as to maintain public confidence in the impartiality of the Judiciary." As such, whilst the guidance does not directly prohibit blogging or micro-blogging by members of the Judiciary in England and Wales, it does prevent them from doing so in their judicial capacity.

If a judicial officeholder should choose to blog or micro-blog in a personal rather than professional capacity, they must avoid "expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the Judiciary in general." This also applies to blogs purporting to be anonymous because "it is impossible for somebody who blogs anonymously to guarantee that his or her identity cannot be discovered."

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[532] Ibid, at Appendix 4 p.37
[533] Ibid.
[534] Ibid.

3.1.3. The Guide to Judicial Conduct, Judiciary of England, and Wales March (2020)

As the Foreword of the Guide to Judicial Conduct, published in March 2018 and amended in both March 2019 and 2020, acknowledges, "much has happened since 2003."[535] As discussed in Chapter 1 of this thesis, the Constitutional Reform Act of 2005 removed many of the powers historically held by the Lord Chancellor and gave the Lord Chief Justice responsibility for the welfare, training and guidance of the Judiciary of England and Wales. Changes also occurred in the "wider aspects of judicial and public life."[536] Increased media interest in the Judiciary and the legal process has "intensified public scrutiny of judicial conduct and decision making" and importantly the "rise of social media has presented new questions and concerns for which guidance is required."

Despite the 2020 Guidance referring the reader to the emergence of the Fifth Estate and the potential concerns and questions raised in relation to judicial officeholders' interaction with social media, the updated guidance does little to update the existing position on judicial blogging and micro-blogging. As with the 2013 (updated in 2016) Guide to Judicial Conduct, members of the Judiciary are:

> "Encouraged to bear in mind that the spread of information and use of technology means it is increasingly easy to undertake 'jigsaw' research which allows individual to piece together information from various independent sources…care should also be taken both by the judge and their close family members and friends to avoid the judge's personal details from entering the public domain through social networking system such as Facebook and Twitter."[537]

[535] GtJC (2020), at Foreword p.3
[536] Ibid.
[537] GtJC (2020), at p.17

As with Section 8.11 of the 2013 GtJC outlined above, the updated version of the guidance describes a number of ways judges should be "wary" when engaging with the social networks. In addition to the bullet points discussed above, the updated guidance states that "judges should also be wary of: (4) Lack of control over data once posted." Lastly, judges should refrain from "posting photographs of themselves in casual settings whether alone of with family members and/or friends."[538] This caution against "selfies"[539] is the only way that the 2020 guidance differs substantively from its 2013 predecessor and was scrutinized by various news outlets at the time. The Daily Mail wrote in March of 2018, "No more selfies please, m'lud! Judges are told not to post picture online – to keep their 'dignity'" wherein the guidance was hailed as "extraordinary" but "coming at a time of deepening concern over the manner in which private pictures are published online."[540]

3.2. The Judicial Conduct Investigations Office (JCIO)

The Guides to Judicial Conduct discussed above are frameworks "intended to offer assistance to judges" and as "a set of core principles which will help judges reach their own decisions" rather than as a strict "code" of practice.[541] Despite this, the Judicial Conduct Investigations Office (JCIO) exercise disciplinary powers under part 4 of the CRA 2005 over all courts and tribunals judges, magistrates and coroners.[542] When exercising their powers under the CRA they "may choose to have regard to this Guide…[but] are not obliged to follow it."[543]

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[538] Ibid.
[539] Oxford Dictionary definition: *"refers to a photograph that one had taken of oneself, typically one taken with a smartphone or webcam and shared via social media"*.
[540] Doughty, S. "No more selfies please, m'lud! Judges are told not to post pictures online – to keep their 'dignity'" (28 March 2018) Mail Online, accessed via https://www.dailymail.co.uk/news/article-5555849/Judges-told-not-post-pictures-online-dignity.html
[541] GtJC (2020), at Introduction p.4
[542] Constitutional Reform Act 2005, Part.4
[543] GtJC (2020), at p.5

The JCIO took responsibility from the Office of Judicial Complaints (OJC) in 2013 and operates independently while assisting the Lord Chancellor and Lord Chief Justice in the "effective and efficient operation of the system of judicial complaints and discipline."[544] The JCIO publishes disciplinary statements, where judges accused of misconduct are handed down sanctions or punishment. These statements are published online every year and are deleted after one year for any sanction below removal from office, or after five-years when the sanction includes removal from office. As acknowledged by the JCIO's publication policy, the Lord Chancellor and Lord Chief Justice might "decide jointly to issue press statements in any case, decline to issue a statement, or delete statements, based on the individual circumstances of a case."[545]

The JCIO's statutory remit is to "deal with complaints of misconduct" and by their own admission this includes how a judge behaved personally, such as the "inappropriate use of social media."[546]As Appendix 4 of the GtJC states, "judicial office-holder who maintain blogs must adhere to [the] guidance and should remove any existing content which conflicts with it forthwith."[547] Any failure to do so can "result in disciplinary action" by the JCIO.[548] And so, whilst the GtJC intends to "guide" a judges use of social media, as opposed to strictly regulating it or imposing absolute standards, the application of these rules by the JCIO in order to discipline judges who transcend the guide's bounds means that in practice, they are enforceable rules as opposed to suggestions.

4.0. The Problems with the Current Restrictions Regulating Individual Judges Use of social media

[544] GtJC (2013, amended 2016), at p.29
[545] Judicial Conduct Investigations Office, "Disciplinary Statements Publication Policy" accessed via https://judicialconduct.Judiciary.gov.uk/disciplinary-statements/publication-policy/
[546]Judicial Conduct Investigations Office, "About Us" accessed via, https://judicialconduct.Judiciary.gov.uk/about-us/
[547] GtJC (2013, amended 2016), at p.37
[548] Ibid.

Restricting the access of individuals within an institution to social media may seem appealing, the risks of social media are well documented, and the impact that these risks pose to judicial-specific users are in some circumstances amplified as we will discuss in Chapter IV of this thesis. However, the current guidelines in place regulating judicial officeholders use of social media in England and Wales are problematic for several reasons. This section will concern itself with understanding the current approach that favours institutional engagement over individual engagement and will highlight a number of ways in which the current guidance is inadequate for regulating an individual judge's relationship with the Fifth Estate.

Firstly, I will unpack the discrepancy between international standards and current domestic standards, most notably referring to the UK's approach to anonymity and engagement within a judge's professional capacity. In order to gain a picture of the international approach, the UNODC Guidelines on the Use of social media, Eastern European CEELI Report and U.S state-by-state guidelines will be summarised.

Secondly, we must question the impact current prohibitions on individual use within a professional capacity has on the future of the Judiciary. As millennials advance through their legal professions, so too will the number of individuals holding judicial office who have been raised with the internet as their core method and model of information gathering and communication.[549] Thus, there is an inevitability that those raised in a digital culture will one day sit on the bench. Barristers, solicitors, law students and law academics have an active presence on social media platforms. Given the often-permanent nature of digital content, we must question what happens with individual engagement when the user transitions professionally from lawyer to judge. Will a new judge be expected to delete their former social media presence and therefore the perception of judicial independence will be protected?

[549] Oxford Dictionary Definition, "…*denoting people reaching young adulthood in the early 21st century*."

Finally, we can refer to evidence from disciplinary proceedings against individual judges to reveal social media use amongst the judicial population, albeit where it is done badly. It is clear that restricting use of social media in a professional capacity does not combat bad behaviour. This results in *bad* behaviour being punished at the expense of encouraging *good* behaviour, leading the relationship between the Judiciary and the Fifth Estate to be viewed negatively and in terms of risk management.

So, if restricting use in a professional capacity *(1)* falls outside of accepted international norms, *(2)* denies the permeating nature of social media, *(3)* presents problems for future judicial officeholders and *(4)* fails to prevent misconduct online, we might question what justifications the Judiciary have for doing so in the first place?

4.1. The Differences between the Current Approach in England and Wales and Accepted Norms in Other Jurisdictions

This section will look at the ways in which the domestic guidelines deviate from the norms established by guidelines on judicial use of social media in non-UK jurisdictions, looking specifically at *(1)* The Global Judicial Integrity Network and their approach to the use of social media by judges, such as the non-binding guidelines issued by the UNODC, *(2)* The eastern European approach, such as the CEELI Institute in Prague for Central and Eastern Europe and *(3)* the North American guidelines that vary significantly state-to-state. Whilst it is acknowledged that this outlines some, rather than all, approaches to judicial use of social media, I argue here that these examples are representative of the global approach in a way that can be meaningfully compared to the current standards expected of judges in England and Wales.

4.1.1. The United Nations Office on Drugs and Crime (UNODC) and the Global Judicial Integrity Network (GJIN)

In April 2015, the 13th United Nations Congress on Crime Prevention and Criminal Justice adopted the Doha Declaration, an initiative backed by Article 11 of the UN Convention against Corruption and with aims to integrate "crime prevention and criminal justice into the wider United Nations agenda, to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation."[550]

In order to put the Declarations ambitions into reality, the United Nations Office on Drugs and Crime (UNODC), launched a Global Programme "aimed at helping countries achieve a positive and sustainable impact on crime prevention, criminal justice, corruption prevention and the rule of law" with aims to take a "people-centred approach" that "builds effective and accountable institutions at all levels."[551]

The UNODC focus on four inter-related components or pillars, most notably for the purpose of this thesis, "resilient, reliable and transparent institutions" and "education for justice." Therefore, one of the key initiatives of the Global Programme was the establishment of the Global Judicial Integrity Network (GJIN), with aims to "assist judiciaries across the globe in strengthening judicial integrity and preventing corruption within the judicial system."[552] Corruption, according to the GJIN – whether actual or perceived – poses a real threat to confidence in the rule of law. Launched in April 2018, judiciaries, and judges "from around the world adopted a Declaration on

[550] UNODC,13thUnited Nations Congress on Crime Prevention and Criminal Justice "Doha Declaration" (Doha, 12-19 April 2015) accessed via https://www.unodc.org/documents/congress//Declaration/V1504151_English.pdf
[551]UNODC, "About the Global Programme" accessed via, https://www.unodc.org/dohadeclaration/en/index/about.html
[552] "Global Judicial Integrity Network" accessed via https://www.unodc.org/ji/

Judicial Integrity" and identified the use of social media by judges "as a priority topic for the Network."[553] This Declaration:

> "… highlighted the importance of the development of guidance materials and other knowledge products to help judges address challenges to judicial integrity and independence, including those created by the emergence of new information technology tools and social media."[554]

As a follow-up initiative The United Nations Office on Drugs and Crime (UNODC) hosted an Expert Group Meeting in November 2018. During this meeting:

> "Judicial and legal experts from different regions drafted an initial proposal for a set of guidelines on judges' use of social media, based on existing regional and national standards and experiences, including the Bangalore Principles of Judicial Conduct and its Commentary."[555]

Alongside this meeting and through an online survey disseminated in 2017, "judges and other justice sector stakeholders from around the world expressed their concerns regarding the use of social media by members of the Judiciary." With this feedback and the Declaration on Judicial Integrity in mind, the GJIN established a set of non-binding guidelines that could:

> "*(a)* serve as a source of inspiration for judiciaries that are contemplating addressing the topics; and *(b)* inform judges on the various risks and opportunities in using social media."[556]

[553] European Commission for Democracy Through Law (Venice Commission) "Use of Social Media by Judges Deontological Rules or Instructions/Relevant Case-Law: Contribution by the Venice Commission to the Guidelines on judges' use of social media prepared by the UNODC Global Judicial Integrity Network" (Strasbourg, 29 April 2019) CDL-PI(2019)003 accessed via, https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2019)003-e
[554] Ibid, at p.1
[555] Ibid, at para.[2] p.2
[556] Ibid, at p.2

As such, the UNODC guidelines address several risks and opportunities in raising judge's awareness and use of social media. According to the UNODC, "use of social media by individual judges should maintain the moral authority, integrity, decorum, and dignity of their judicial office" provided that judges are "aware of, and take into consideration, practical aspects of online forms of expression and association."[557] Given that there is:

> "a vast array of social media platforms available, with each platform offering different services, providing different opportunities for interaction, and targeting different audiences… different expectations may arise regarding the content, type and frequency of engagement for different platforms…depending on the nature and type of the social media platform."[558]

Importantly, the guidance's preamble acknowledges that social media has become an important part of the social life of many people and communities, changing the way in which information about them is collected, communicated, and disseminated. The nature of judicial office, with emphasis being placed on the "public confidence in the integrity and impartiality of the courts" means that whilst judges, like other citizens, are entitled to freedom of expression, belief, association and assembly, their use of social media does raise specific questions and ethical risks that ought to be addressed.[559]

The UNODC guidelines, like the Guide's to Judicial Conduct, outline the risks of social media use by judges. Individual judges using social media should be aware of the "potentially greater reach in terms of publicity or amplification to larger networks, and greater permanence of statements" made online and should be "made aware of technology terminology and the potentially significant implications of relatively small and casual actions (such as 'liking')."[560]

[557] Ibid, at para. [6] p.4
[558] Ibid, at Preamble p.2
[559] Ibid, at p.3
[560] Ibid.

The UNODC highlights that the use of social media by judges is a "complex" one.[561] However, rather than framing guidance in terms of risk-assessment and caution, one of the most notable differences between the UNODC guidelines and those drafted for the Judiciary of England and Wales is the consistent acknowledgement of the benefits social media might have for the judiciaries of its member states.

Whilst it is acknowledged in the UNODC guidelines that judges "using social media have led to situations where those judges have been perceived to be biased or subject to inappropriate outside influences" conversely, "social media can create opportunities to spread the reach of judges' expertise, increase the public's understanding of the law, and foster an environment of open justice and closeness to the communities that judges service."[562]

As discussed in Chapter I of this thesis, the expectations of the judicial conduct in the UK are based on the Three I's: independence, impartiality, and integrity. The UNODC guidelines reaffirm this but also cite the Bangalore principles of Judicial Conduct, adding "propriety, equality, and competence and diligence" to the core values expected of a judge's work and life.[563] Given that there is "nowadays a vast array of social media platforms available with each platform offering different services, providing different opportunities for interaction, and targeting different opportunities for interaction" there ought to be "different expectations…. regarding the content, type and frequency of engagement for different platforms."[564] The UNODC guidelines go even further to stress the need for different approaches depending on the "nature and type of the social media platform" taking into account that "most social media platforms constantly evolve."[565]

Unlike the Blogging by Judicial Office-Holders Guidance referred to in the GtJC, the UNODC approach suggests that "judges may use their real names and disclose their judicial

[561] Ibid, at para.[6]
[562] Ibid, at p.2
[563] Ibid, at para.[16] p.5
[564] Ibid, at p.2
[565] Ibid.

status on social media" suggesting that they must only do so where it is not against "existing rules" as it is in the UK.[566] The UN guidelines acknowledge the contrasting views on the identification of judges on social media and its use in a professional context by individual judges. The use of "pseudonyms by judges on social media" has been debated and no consensus has been reached on the issues, as such, the UNODC guidelines neither recommend nor forbid the use of pseudonyms for the purpose of judges engaging with the Fifth Estate.

Although guidance on the use of pseudonyms is neutral, the active participation of judges within the professional capacity is encouraged, referring the reader to the Bangalore Principle of Judicial Conduct and the Commentary surrounding judges' ability to educate the public and the legal profession or engage in public commentary, possibly including through the "use of social media in addition to other forms of communication."[567] The ability to do so effectively would be called into question where judges are unable to identify as social media users, given that users are unlikely to appreciate the authority with which the judge speaks where they are using a pseudonym or are prevented from acknowledging their status as judicial officeholder.

This emphasis on the potential benefits of social media engagement for judiciaries across the globe would suggest that the UK judicial approach is operating somewhat outside of these expectations. The UNODC takes into consideration the "differences in cultures and legal traditions" of signatories, but we might ponder what the discrepancy between the UNODC established standards and those outlined by the GtJC for England and Wales, says about our legal culture and the trust that we place in the Judiciary to maintain the expected standards of independence, impartiality, and integrity within the UK's constitutional framework.

4.1.2. The CEELI Report: Central and Eastern Europe

[566] Ibid, para.[12] at p.4
[567] Ibid, para.[8] at p.4

The CEELI Institute is a non-profit organisation based in Prague that works toward the "development and training of an international network of legal and judicial professionals committed to advancing the rule of law."[568] In 2019, they published a report titled "Practical Guidelines on Use of Social Media by Judges: Central and Eastern European Context" wherein recommendations are given by a "core working group of the Network's judges…[who] examine in detail the challenges of social media use, in order to provide their colleagues with explanations and guidance on how to use social media in a way that avoid[s] pitfalls and ethical problems."[569]

The goals of the report are to "provide judges with a clear overview on the pros and cons of social media use and… how to use it safely."[570] Importantly, the document is relevant to "individual judges who are active on social media, and also to those responsible for setting national standards for judicial conduct…and [does] not deal specifically with the use of social media by courts, ministries or national judiciaries."[571] The report outlines 10 recommendations for the beneficial use of social media networks by individual judges. Included in these recommendations is the need to "1. Represent the Judiciary Well in ALL Social Media Content." As such, judges should "determine what role, either professional or personal, they will appear under or serve on social media" and decide whether they want to "network professionally and provide expert insight." [572] Whilst "mixing the professional and the personal can be confusing for your followers" it can also "help to shape your image as a 'real person' rather than a remote symbol of the justice system, seemingly untouchable for other members of the society in which you live."[573]

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[568] The CEELI Institute Report "Practical Guidelines on Use of Social Media by Judges: Central and Eastern European Context" accessed via https://ceeliinstitute.org/wp-content/uploads/2020/01/CEELI_SoMe_Guidelines_Judges-FinalV2.pdf
[569] Ibid, at Foreword p.9
[570] Ibid.
[571] Ibid, at p.10
[572] Ibid, at p.13
[573] Ibid, at p.14

The report makes a clear distinction between personal and professional use but unlike the current UK Guidelines, the benefits of professional use are acknowledged, and the report provides a framework for judges seeking guidance on good professional social media use. Overall, the CEELI report makes it clear that, "at the end of the day, social media is a major part of modern life. A blanket instruction to judges to simply "stay off social media" is a not a realistic suggestion in the current age."[574] The goal should not be to "limit your own participation in social communications" but to "control your use of new technologies…in the most efficient and positive way possible."[575]

The 10 recommendations outlined by the CEELI Institute will be unpacked in further detail in Chapter V, when this thesis goes on to consider the advantages of education over restriction.

4.1.3. The U. S Approach

Much of the commentary drawn upon in this thesis has originated from academics based in the U.S analysing the risks and benefits of judicial engagement with social media in U.S courts. There is a simple explanation for this, firstly that it is yet to be acknowledged as a concern or area of serious discussion in the UK, and because the U.S has proven to be a breeding ground for varying state-by-state approaches, ranging from encouragement of active professional use of social media to strict restrictions.

The varying degree to which social media use is permissible by members of the Judiciary in the U.S makes it an interesting analogy for us to explore the current guidelines in the UK and their potential shortcomings. Of course, it is essential that analysis of the U.S approach is viewed in light of judicial retention elections and the different way in which judges are selected in the U.S when compared to the UK. Out of 50, there are 39 states across the US that use retention

[574] Ibid, at p.10
[575] Ibid, at p.22

elections, meaning that around 87 percent of state court judges face re-election and therefore need to run public re-election campaigns every four years.[576] Aside from the pros and cons of electing judicial officeholders, it is clear that social media provides an invaluable resource in order for this 87 percent of judges to launch and manage their election campaigns and to connect with the public who will ultimately decide their fate. Therefore, rules regarding judicial use of social networks must consider the differences between approaches in the US compared with the UK considering this.

During the early stages of discussions relating to judicial engagement with social media, Mitchell identifies the emergence of two approaches in the US, differing state-to-state and revolving around either an "integrative" or "restrictive" approach to judicial use of social media.[577] Currently, at least sixteen states have issued formal judicial ethics opinions or have decided cases on this topic," [578] although "anecdotal evidence suggests that judges commonly use social media even when their state ethics committee has not yet issued an advisory or formal opinion on the issue."[579]

In a nutshell, most states looking at the issue of social media and judicial ethics have adopted an attitude of, "it's fine for judges to be on social media but proceed with caution" or in short, the U.S has a "cautiously integrative or permissive approach."[580] Except, as Browning notes, in the most restrictive state, Florida, where this is not the case. Therefore, there has been an erosion of the dichotomy between restrictive or integrative approaches to social media, so that we can now identify a common theme having emerged from commentary across the whole

[576] Liptak, A. "U.S. Voting for judges perplexes other nations" (May 25, 2008) The New York Times, accessed via https://www.nytimes.com/2008/05/25/world/americas/25iht-judge.4.13194819.html
[577] Mitchell, N J. "Judge 2.0: A New Approach to Judicial Ethics in the Age of Social Media" (2012) *Utah Law Review*, vol 4 at pp.2127-2158 at p.2133
[578] Browning, J G. "The Judge as Digital Citizen: Pros, Cons, and Ethical Limitations on Judicial Use of New Media" (2016) *Faulkner Law Review,* vol.8, no.1 at pp.131-156 at p.132
[579] Mitchell, N J. "Judge 2.0: A New Approach to Judicial Ethics in the Age of Social Media" at p.2135
[580] Browning, J G. "Why Can't We Just Be Friends – Judges' Use of Social Media" (2014) at p. 489 and 510

country (US):[581] that "nearly all of the ethics opinions and much of the commentary either directly or indirectly recognize the utility of social media."[582]

Looking outside of the state-by-state approach, the American Bar Association's (ABA) Formal Opinion on *Judges' Use of Electronic Social Networking Media*, issued in 2013, is the only opinion that is national in scope.[583] Foremost the ABA Opinion is "pro-social media and acknowledges that judicious use of such sites can be a valuable means of reaching out to and remaining accessible to the public."[584] Indeed, "social interactions of all kinds… can be beneficial to judges to prevent them from being thought of as isolated or out of touch."[585]

When used "with proper care", judges are able to benefit "both their personal and professional lives," and "as their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach."[586] This clearly contrasts with the UK approach, that places strict limitations of judicial use in a professional capacity and makes no mention of the value social media has for public outreach and accessibility.

4.2. The Implications for Legal Professionals and the Future of the Judiciary

According to the American Bar Association, 80% of lawyers use social media for professional purposes.[587] Whilst there are no corresponding surveys currently undertaken in the UK, it is fair

[581] Ibid, at p.2133
[582] Mitchell, N J. at p.2136
[583] American Bar Association, "Judge's Use of Electronic Social Networking Media" (February 21, 2013) Formal Opinion 462, accessed via https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf
[584] Browning, J G. "Why Can't We Just Be Friends – Judges' Use of Social Media" (2014) at p.511
[585] ABA Opinion 462, at p.1
[586] Ibid, at p.4
[587] Statistics taken from American Bar Association Legal Technology Survey Report (2020) accessed via https://www.americanbar.org/groups/law_practice/publications/techreport/

to say that a good deal of legal professionals in England and Wales also make use of social networking sites given that the UK was home to 45 million active social media users in 2020.

Not only are lawyers making use of social media, but they are being actively encouraged to do so. Importantly, the restrictions on use of pseudonyms and micro-blogging in a professional capacity do not apply to Barristers and Solicitors in the UK. The Law Society of England and Wales (LS) published a Practice Note on "Social Media" outlining what is to be viewed as "good practice in this area." The note issued to lawyers in 2019 aims to both "increase understanding of social media in the profession" and "provide guidance to individuals and practices engaged in, or that may be considering whether to engage in, social media activity." Unlike the GtJC, the Law Society's note considers the "benefits" of engaging in social media activities and acknowledges the advantages social media has for legal professionals looking to use social media in their professional capacity. As the practice note remarks:

> "The growth of the use of social media by clients may result in a corresponding expectation that the legal profession should also embrace it as part of its working practices. Social media can offer many professional and personal benefits…It also provides opportunities for professional networking and enables geographical barriers to be broken down. For example, setting up a profile on LinkedIn allows global access to your profile."[588]

In addition to its commercial purposes and global reach, social media provides legal professionals with opportunities to "debate, share opinions and share experiences by 'posting' or commenting in public spaces." The Law Society of England and Wales responded to a survey published in 2012 by the International Bar Association stating that:

> "Online social networking (OSN) provides real opportunities for the legal profession, and it is important that it keeps up to date with the opportunities social media presents. There is the opportunity for direct and immediate feedback from clients

[588] The Law Society, "Social Media Practice Note" (5 Dec 2019) accessed via https://www.lawsociety.org.uk/en/topics/business-management/social-media

> who have used legal services, for conversation and interaction between practices and their clients."[589]

Likewise, the Bar Standards Board (BSB) acknowledges that its members are "likely to want to use social media for a variety of private and professional reasons."[590] As such, both the Law Society and Bar Standards Board distinguish between personal and professional use of social media but do not restrict the members of each profession from participating online in both capacities. Under section 4.1. of The Law Society's guidance, the difference between personal and professional use is referred to and solicitors are encouraged to consider the visibility of their personal use to other professionals or clients. The note on social media also summarizes each social media site, suggesting that both LinkedIn and Twitter "are social networking sites that are widely used and recognised by professionals" whereas other well-known social networking channels such as Facebook and YouTube "may only have limited business use", however, this does "not mean that [solicitors] should discount these channels as viable social media channel to be used professionally."[591]

Given the "inherently public nature of the Internet" it is acknowledged that anything published "online may be read by anyone and could be linked back to [their] status as barrister."[592] In the same way as the GtJC, both the Law Society and Bar Standards Board reiterate the potential risks involved with engagement online, not least the:

> "…potential blurring of the boundaries between personal and professional use, and the importance of recognizing that the same ethical obligations of professional conduct apply in an online environment."[593]

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[589] International Bar Association, "The Impact of Online Social Networking on the Legal Profession and Practice. An Initiative of the Legal Projects team." (2012, February) at p.13 accessed via https://www.ibanet.org/Committees/Divisions/Legal_Practice/Impact_of_OSN_on_LegalPractice/Impact_of_OSN_Home.aspx

[590] Bar Standards Board Handbook, "Social Media Guidance" (2019, October) https://www.barstandardsboard.org.uk/uploads/assets/c7cea537-53f8-42a8-9f6d8ef1832a7db9/Social-Media.pdf

[591] Ibid, para. [4.2]- [4.3]

[592] Ibid, para. [2]

[593] Ibid, para. [1.2]

In addition to the warning over the boundaries between personal and professional conduct, the Bar Standards Board warn their members not to engage in "heated debates or arguments" and to consider the "content and tone of what you are posting and sharing."[594] However, guidance does not prevent legal professionals from using social media in a professional context.

The use of social media amongst legal professionals is not exclusive to current lawyers but can also be extended to include law students and the future of the legal profession. As of 2020, 97% of those aged between 16-24 have an active social media profile and so undoubtedly law students across the UK are engaging online prior to and during the development of their legal careers. As outlined by the International Bar Association in their 2012 study, it is often "felt that social networking sites could be used to reinforce positive professional relationships between students and professors, provided that law professors' online profiles are appropriate for student viewing."[595] Alongside professional development, sites can "also act as an accessible platform to discuss and share materials and a convenient tool for communicating course information and engaging student participation." So, law students do not simply have social media profiles, but actively engage with law academics and professionals in order to network and information gather.

Rather than having social media access restricted in their professional capacity, lawyers and law students in the UK are encouraged not to "fear" but to "embrace social media."[596] Indeed, there are those within the profession who are hailed as successes, with Legal Cheek referring to the "slew" of solicitors and barristers who "dabble" in what they term "vlawging."[597] "Legal

[594] Ibid, para.[3]
[595] International Bar Association. "The Impact of Online Social Networking on the Legal Profession and Practice. An Initiative of the Legal Projects team." (2012) at p.26
[596] Lawyer Monthly, "Here's why firms shouldn't fear embracing social media" https://www.lawyer-monthly.com/2019/01/heres-why-law-firms-shouldnt-fear-embracing-social-media/ (Last accessed Sept 2021)
[597] Hussain, A. "The 10 best legal social media users of 2020" (March 2020) Legal Cheek accessed via, https://www.legalcheek.com/2020/03/the-10-best-legal-social-media-users-of-2020/

Influencers"[598] such as Jonathan Seitler QC, better known for his iteration of YouTube's "Carpool Caselaw"[599] and Linklaters trainee Eve Cornwell,[600] have garnered fame through their innovative hybridization of YouTube-legal-content. The success of legal influencers is not only evidence of law professionals making effective use of social media to communicate with the public but provides evidence that the public are interested in the creation of this content.

The prolific use of social media by current legal professionals in the UK, whether in a personal or professional capacity, will have an impact on the way in which the Judiciary of the future will need to address social networking when holding judicial office. The permanency and virality of the Fifth Estate as they have already been considered in Chapter II, means that law students and professionals of today will have a permanent digital footprint as their career progresses and they inevitably form part of the judicial branch. The permanency of social media data and the way in which it can be stored, shared, and mimetically transformed means that irrespective of the GtJC's prohibition on professional use of social networks, legal professionals' posts, likes and shares will be visible and available to scrutinise upon and after their appointment to the bench. The blanket prohibition on professional use of social networks by judicial office holders will ultimately be rendered futile, as legal students and professionals in the early stage of their careers begin or continue to engage with the Fifth Estate. This can surely be compared to the way in which the views of judge's pre-judicial appointment may still be associated with the judge, i.e., Lady Hale's pre-judicial academic writings.[601] However, the key difference lies in the 8 differences identified in Chapter II. It is expected that a judge prior to appointment may have written or given a lecture on an area of the law, having originated from an academic or

[598] Ibid.
[599] "Carpool Caselaw: Season 1, Episode 1 (London Kendal St v Daejan)" accessed via, https://www.youtube.com/watch?v=7ckYlVlm6X8
[600]Eve Cornwell, YouTube, accessed via, https://www.youtube.com/channel/UCM8qRGoiaLwmMv31L7xeeEQ
[601] Prior to judicial appointment Lady Hale was one of the founding editors of the Journal of Social Welfare Law, frequently published in *Mental Health Law*, *Women and the Law* etc.

professional background. However, the Fifth Estate is capable of communicating these opinions, or wider non-legal discussions, with vast and unpredictable audiences in a way that an academic journal or conference may not.

4.3. Evidence of Judicial Misconduct Online

Whilst the sections above have addressed the ways in which the current standards for judicial conduct online in England and Wales fall short of accepted practice and foresight, we might also say that the GtJC also fails to succeed in its core objective: to prevent judicial misconduct online. Given that judges are prevented from engaging in their professional capacity and are warned only of the risks engagement online brings with it, the rules have thus far not prevented judges from behaving badly online.

Thus far in 2020, the JCIO have issued disciplinary statements to two sitting judicial officeholders. The first, Recorder William Waldron QC who was "found to have posted political comments on social media which could have brought the Judiciary into disrepute." Waldron was issued with "formal advice" with the Lord Chancellor and Lord Chief Justice taking "into consideration that Recorder Waldron QC accepted responsibility for his actions and gave assurances as to his future conduct."[602] Secondly, Deputy District Judge Hebblethwaite who was again issued formal advice after "he was found to have misused social media, whilst identifying himself as a judicial office holder."[603]

In addition to the social media transgressions committed by judicial-office holders this year, a number of other judicial officeholders have been disciplined for their inappropriate use of social media. The JCIO regularly delete disciplinary statement, making it difficult to ascertain the

[602] Judicial Conduct Investigations Office, "Statement from the Judicial Conduct Investigation Office: Recorder William Waldron QC" (28 January 2020) JCIO 05/20
[603] Judicial Conduct Investigations Office, "Statement from the Judicial Conduct Investigation Office: Deputy District Judge Hebblethwaite" (29 June 2020) JCIO 26/20

precise number of judges who have been seen to fall outside of the expected standards of conduct. The Law Society Gazette reported in 2018 on two magistrates having been "hauled over the coals" for misconduct online. In one case, Atul Gandecha was issued with formal advice after he "posted a picture of himself on social media along with a caption 'which could have created the impression that he did not take his role as a magistrate seriously."[604] In the other matter, "Roger Warrington was issued with a warning for his involvement in an inappropriate conversation on social media."[605] The Gazette refers to the criticism that JCIO investigations have come under, noting that infamous legal blogger @BarristerSecret "asked why details in the public notice were subject to 'secrecy'" adding "this is a shining example of why JCIO findings should contain the actual facts of the misconduct."[606]

> More notoriously, Recorder Jason Dunn-Shaw was removed from office after:
>
> "Using a pseudonym to post comments (some of which were abusive) on a newspaper website about a case in which he had been a judge and another in which he had been a barrister. In his own name he also used publicly available social media sites to post material or not remove material which was not compatible with the dignity of judicial office or suggested a lack of impartiality on matters of public controversy."

As @BarristerSecret noted, the details of Dunn-Shaw's comments were not included in the official statement from The Judicial Conduct Investigations Office, however, Legal Cheek reported that Dunn-Shaw using the alias "Querelle" posted comments online branding those who disagreed with his sentencing "donkeys." Legal Cheek also note that in another case, using his alias, he "posted comments on the local news website which went into great detail about the circumstances

[604] Hyde, J. "Magistrates rapped over inappropriate social media posts" The Law Society Gazette (28 July 2018) accessed via, https://www.lawgazette.co.uk/news/magistrates-rapped-over-inappropriate-social-media-posts/5067100.article
[605] Ibid.
[606] Ibid.

surrounding the case" and it was "at this point that a relative of the… victim issued a complaint to the JCIO."[607]

Irrespective of the exact number of judges transgressing the bounds of the GtJC and facing disciplinary action by the JCIO, preventing judges from engaging online in their professional capacity does not prevent them from engaging in inappropriate activity online, and importantly, being caught doing so. Thus, this calls into question the independence and impartiality of the Judiciary. In this way, the current restrictions on individual judicial office holders engaging with social media in their professional capacity is doing little to protect the constitutional dynamics considered in Chapter I and II. The perception of judicial independence is compromised in the eyes of the public, irrespective of the restrictions currently in place on use of social media by judges.

5.0. Conclusion

This chapter has outlined the approach taken by the Judiciary in England and Wales to the Fifth Estate. To begin with, the chapter explored the institutional approach taken by both the HMCTS and Supreme Court and the ways in which these institutions use social media as a tool for communication. It was acknowledged that the institutional presence on social media is managed by a team of communications specialists, whose job is to run each social media profile of their respective institutions. This collective response to social media is common and HMCTS and The Supreme Court are joined on most social media platforms by most government departments.

[607] Connelly, T. "'Donkeys' and 'trolls': Judge sacked for using alias to criticise online commenters who disagreed with his decisions" (12 April 2017) Legal Cheek, accessed via, https://www.legalcheek.com/2017/04/judge-who-used-alias-to-call-online-commenters-donkeys-sacked/

However, the approach taken by the Judiciary differs when we unpack the guidelines given to individual judges on how they conduct themselves online. Most notably, guidance distinguishes between personal and professional capacity, and individual officeholders may face disciplinary action from the JCIO if they are caught transgressing these rules. This chapter remarks on the GtJC being framed in terms of risk management and the perils of social media. The guidance issued to judges about individual use of social media outlines the dangers of poor online conduct and reminds judges that a failure to comply within the parameters of the guidelines may also make them a subject of JCIO disciplinary proceedings.

The way that the domestic approach compares to approaches taken in wider jurisdictions was also explored, concluding that the guidelines issued in other parts of the world more commonly make no distinction between personal and professional capacity. In addition, whilst most guidelines are concerned with the risks of social media, they also consider the benefits of individual judicial use of social media equally.

Unpacking the guidance given to judges regarding use of social media revealed a common theme: that the current guidelines are unsuitable for guiding an individual judicial officeholder's relationship with the Fifth Estate. This chapter has ultimately shown that the domestic guidelines 'guiding' a judge's engagement with social media are framed in terms of risk, fall short of international norms, fail to appreciate online communications as inherently new and distinct from engagement with the Fourth Estate and ultimately do not prevent judges from getting it wrong. The following Chapter will therefore unpack the justifications for these restrictions, ultimately calling into question the validity of the risks of social media as justification for restricting judicial access in a professional capacity.

Chapter IV: The Potential Risks for Individual Judges Engaging with the Fifth Estate

1.0. Introduction

The potential risks of the internet are well documented given that cybercrime, cyberbullying, and trolling are now truly entrenched in our understanding of how the internet functions. It is for that reason that most professions such as doctors, architects and sports persons institute approved policies or guidelines for monitoring use and advocating professionalism within their respective fields.[608] As I have covered in Chapter III, the UK Judiciary is certainly no exception to this institutional approach, however, unlike the professions listed above, individuals within those institutions are not restricted from professional engagement online.[609]

Having already analysed the problems with the guidance issued to judges with regards to their relationship with the Fifth Estate, this Chapter will now explore in more detail the reasoning behind this prohibition on professional participation with social media. It is the purpose of this chapter to understand the risks that judges might face online and to take a closer look at *why* the judicial institution is reluctant to allow individual judges to participate with social media.

Guidance issued by the Judiciary to its individual judicial office holders does not specify why judges are restricted from engaging with social media in their professional capacity. In this regard, the restriction on professional engagement is tautological in nature.[610] The Judiciary does

[608] IBA, p.7 see for example Guidance issued by the General Medical Council, "Doctors' use of Social Media" Published 25 March 2013 accessed via https://www.gmc-uk.org/-/media/documents/doctors-use-of-social-media_pdf-58833100.pdf

[609] Doctors may find themselves bound to a code of conduct that prevents them disclosing sensitive information, or sports persons may find themselves in trouble with regulating bodies where they express unsavoury comments online, but they are not prevented from disclosing their professional status when blogging/micro-blogging. See for example Guidance issued by the General Medical Council, "Doctors' use of Social Media" Published 25 March 2013 accessed via https://www.gmc-uk.org/-/media/documents/doctors-use-of-social-media_pdf-58833100.pdf

[610] Upholding the tenets of post-structuralism, I use the term tautology as Barthes does, to describe how, "one takes refuge in tautology as one does in fear, or anger, or sadness, *when one is at a loss for an explanation* (italics my own for emphasis)."

not try to justify why judges are restricted from micro/blogging in a professional capacity – they just *are*.

Therefore, instead of unpacking *explicit* justification for this restriction on professional use, we can *infer* from Judicial Guidance or look to academic commentary to discover what the justification for the prohibition might be. This chapter will identify *five* key risks that arguably present justifications for preventing judges declaring their professional status online. One-by-one, these risks will be explored: *(1)* risks to privacy and data, *(2)* risks of social media as a combative space, *(3)* risks of social media as an evolving space, *(4)* the complexity categorising online relationships and, *(5)* whether social media specific engagement, such as "liking" presents risks for judicial users.

Although these five risks present nuanced challenges for judges engaging with social media, as we shall now see, these risks *do not* warrant restricting judge's use of social media in a professional capacity. This is because the risks *(1)* do not distinguish between personal and professional use *(2)* impact on non-judicial users but do not defeat engagement and, *(3)* may be safeguarded against as a result of a judicial office holders professional experience.

As we have seen throughout this thesis so far, the sanctity of perception is maintained above all else. The restriction on judges' use of social media in their role as judicial office holders is justified based on the risks to the perception of the judge as an independent, impartial arbiter acting with integrity and the potential this has to reflect poorly on the institution on the whole. But this, like Barthes tautology, roots the Judiciary's response to social media in fear or uncertainty.

This chapter does not deny these risks, but it does deny that they are an adequate *explanation* for restriction.

2.0. Privacy and Data Risks

As stated above, the GtJC does not claim that the risks to privacy and data justify restricting professional use of social media. In fact, nowhere in either versions of the GtJC or the BLOHG are justifications given as to *why* judges are prohibited from participating online in their professional capacity. However, the guidance issued to judges on "Social networking, blogging and Twitter" is dominated by the potential privacy and data risks that come with social media use. We can infer from this that the potential risks to data and privacy are seen as justification enough for restrictions and no further exploration into any other risks is required. There is fear that social media may "damage public confidence" in a judge's "own impartiality or in the Judiciary in general" and the fear of this risk is enough to justify restricting a judge's access to social networks.[611]

If this is the case, then we might ask *(1)* what are the potential risks, *(2)* do they pose a significant risk to judicial users in their professional capacity when compared to non-judicial internet users and, *(3)* are privacy and data risks legitimate justification for restricting a judge's access to social media?

2.1. What are the Potential Privacy and Data Risks of social media?

Social media presents nuanced risks and challenges for users wishing to engage with networking platforms. Upon "signing up" to a social networking site, users must enter a legal relationship with social media providers. They often do so "without reading the terms" and provide a wealth of personal information, such as real names and contact details to use the service. Information that is posted via social networking sites is not "limited to biographical contact information" but also includes information about a person's "overall behaviour on the internet."[612] So, there are privacy risks brought about by the "willing" public display of information and data on personal profiles and

[611] Blogging by Judicial Office Holders Guidance (2012)
[612] CEELI Report, at p.29

less visible risks brought about by the storing of data by social media companies in order to continuously build your user profile.[613]

The way in which this data is collected, stored, and owned impacts on the privacy of those using social media services. The sharing and culmination of data might be viewed in positive terms; data collection might bring people with similar viewpoints together, or information collected might be used to create targeted advertisement that is useful for users. On the other hand, the impact of compromising user privacy is usually viewed in negative terms or is seen as one of the significant *risks* of using social media platforms. Each of these risks is nuanced, depending on the type of data that is collected, and ultimately who it is used by and for what purpose. Risks may range from impacting on cyber-security to physical safety, or to damaging the reputation of users to trapping online individuals within web-based echo chambers.

Online participation comes hand-in-hand with these risks and for most users, the risk to privacy is traded off against a desire to participate in and engage with social networks. Some inexperienced internet users might be unaware of risks to personal data, others might be keenly aware and therefore take steps, such as anti-virus software, in order to minimize the risks.

I will now consider a number of these notable, but not exhaustive, risks to privacy that arise from the use of social media platforms. These risks can be both tangible or intangible, in that they can exist purely online or can become offline crimes committed against the individual. Social media has provided a new platform for traditional crime and new forms of cyber-crime to thrive, and, not only are there risks, but these also manifest as crimes that can have an impact on the safety of an individual in the real-world.

[613] Ibid.

2.1.1. Cybercrime

According to Europol's Assessment of Internet Organised Crime Threats, Cybercrime is one of "the most dynamic forms of crime encountered by the law."[614] Cybercrime has risen in both scale and complexity in recent years, and most notably with the recent pandemic pushing essential services online.[615] As time passes, "the cyber-element of cybercrime infiltrates nearly every area of criminal activity."[616]

The risks associated with Cybercrime come two-fold. Firstly, in the form of cyber-dependent crimes, where the internet becomes "both the tool to commit the crime and the target of the crime."[617]Secondly, through cyber-enabled crimes, wherein traditional crime can be "increased in scale" by using advancements in technology. Crimes include hacking to trolling on social media and phishing or identify theft.[618] As users take up the opportunities presented by social media to connect with other users, so to criminal networks seek opportunities to up-scale and diversify crime.

The risks of falling victim to both cyber-enabled and cyber-dependent crime permeate every form of internet use, and concern both inexperienced and experienced users alike. Each of these crimes will now be explored, to then unpack the ways in which they might disproportionately impact on judicial officeholders using social media in their professional capacity when compared to the lay user.

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[614] EUROPOL, European Union Agency for Law Enforcement Cooperation 2020, *Internet Organised Crime Threat Assessment (IOCTA) Strategic, policy and tactical updates on the fight against cybercrime* (2020) accessed via https://www.europol.europa.eu/iocta-report
[615] Ibid, at p.13 "COVID-19 Demonstrated Criminal Opportunism"
[616] Ibid, at p.6
[617] Crown Prosecution Service (CPS), "Cyber/online crime" accessed via https://www.cps.gov.uk/crime-info/cyber-online-crime
[618] CEELI Report, at p.29

2.1.2. Phishing and Hacking

The National Cyber Security Centre (NCSC) defines Phishing as when "criminals attempt to trick people into doing 'the wrong thing', such as clicking a link to a dodgy website."[619] According to the NCSC, millions of people are sent phishing emails wherein they are asked for "sensitive information (like bank details). Some phishing emails may contain viruses distinguished as harmless attachments, which are activated when opened."[620]

Phishing emails occasionally use "publicly available information about you" such as information obtained from social media profiles in order to make "their phishing emails appear convincing."[621] Therefore, in order to minimise the risk or "make yourself a harder target" it is advised that users consider their "digital footprint."[622]

A successful phishing scam might result in a user's personal information and details being used to hack their device or social media account. A hacker is defined by the NCSC as being someone with "some computer skills who uses them to break into computers, systems and networks"[623] and therefore hacking is the process by which a person gains "unauthorised access to data in a system" usually for some illicit purpose.[624]

This guidance issued by the NCSC mirrors that given to judicial office holders under the GtJC. Users ought to review their privacy settings and be aware of the personal information friends, family, and colleagues post on social media platforms.[625] In doing so, users are less likely to be "tricked" into providing passwords to online accounts or providing bank details and payments.

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[619] National Cyber Security Centre, "Phishing attacks" dealing with suspicious emails infographic" (2020) accessed via https://www.ncsc.gov.uk/files/Phishing-attacks-dealing-suspicious-emails-infographic.pdf
[620] Ibid.
[621] Ibid.
[622] Ibid.
[623] NCSC Glossary, "Hacker" accessed via https://www.ncsc.gov.uk/information/ncsc-glossary
[624] Oxford Dictionary definition… *"the gaining of unauthorized access to data in a system or computer"*
[625] See NCSC Infographic "Make yourself a harder target" and GtJC March (2020) at p.17

2.1.3. Ransomware

As we have noted above, there are various types of cybercrimes, and "one of the latest – and most dreaded – is ransomware, also called *digital extortion* or *digital blackmail*."[626] Generally speaking, Ransomware is a kind of "malware (malicious software) that prevents users from accessing their…personal data using various methods."[627] Ransomware comes in a variety of shapes and sizes, impacting on individuals, corporations and governments alike, and given the "shift to the information age…a successful ransomware attack against an unprotected system can have catastrophic consequences."[628] For the purpose of this section, we are interested in home-based threats that impact the individual social media user and might therefore impact on the individual judge when engaging with social networks.

It is extremely difficult for an individual user to prevent against a ransomware cyber-attack, even where users are tech-savvy and regularly install and update antivirus software. Given that ransomware is continually evolving, antivirus technology is often one step behind, providing a remedy rather than a cure. The most notable and sophisticated ransomware is "location-aware", meaning that it targets victims according to their geographical area, using their language and specific information. Tactics also include "impersonating law enforcement agencies" or antivirus software itself; this is called "scareware" where victims are presented with false security alerts and convinced to purchase something that they do not need. [629] It is estimated that by 2021, ransomware attacks will have "cost the world $20 billion."[630]

Some variants of ransomware, such as Doxware (see Section 4.4.) seize personal data from social networking sites so that the perpetrator can "threaten the victim to release

[626] Hassan, N A. *Ransomware Revealed A Beginner's Guide to Protecting and Recovering from Ransomware Attacks*, (Apress, 2019) at p.3
[627] Ibid, *definition in brackets added*
[628] Ibid, at p.4
[629] Ibid, at p.22
[630] Ibid, at p.8

compromised data to the pubic unless a ransom is paid." This personal data can include "photos, videos, confidential information, chat conversations" etc. to the public.[631]

2.1.4. Doxing

As noted above, it is becoming increasingly common for cybercriminals to hack into social media accounts and seize personal data. When personal information is collected and released without the permission of the account holder, this is called "doxing" or sometimes "doxxing." This is often done with the intent to "humiliate, threaten, intimidate or punish the identified individual."[632] Doxing "ultimately, makes data into a weapon."[633]

The purpose of doxing it to take something perceived to be private and put it into the public domain, often despite privacy settings or caution of behalf of the user. Therefore, crimes such as this can be mitigated, but not entirely avoided, by an awareness of the risks of engaging with social networking sites and care being "taken by both the judge and their close family members and friends to avoid the judge's personal details from entering the public domain through social networking systems such as Facebook or Twitter."[634]

2.2. The Risks to Judicial Users: When *Private* Sometimes Means *Public*

Like lay-users, the judicial-user is at risk of falling victim to crime, ranging from hacking to trolling, but unlike lay-users, judges must navigate the online world in a way that gives effect to the

[631] Ibid, at p.7
[632] Douglas, D M. "Doxing: a conceptual analysis" (2016) *Ethics Inf Technology,* Vol 18, pp.199-210, at p.199
[633] McNealy, J. "What is doxxing, and why is it so scary" (May 16, 2018) The Conversation https://theconversation.com/what-is-doxxing-and-why-is-it-so-scary-95848
[634] GtJC (2020), at p.17

constitutional principles outlined in Chapter I. We must explore the extent to which these risks can move beyond the traditional risks to the principles of independence, impartiality, and integrity to understand why privacy and data risks are implicit, if not explicit, justifications for restricting professional use.

To determine this, we must ask two questions. Firstly, are we able to distinguish between non-judicial-users and judicial-users when considering the likelihood of falling victim to these cyber-crimes? Or put more simply, does the mere fact that a user can be identified as a judge make them more desirable targets for cyber-criminals? Secondly, irrespective of the probability of risk, is the impact of that risk amplified when we consider judicial users? Does the potential of these crimes, to damage personal safety and reputation, impact on the perceived independence, impartiality, and integrity of a judge, in such a way that justifies completely preventing them from engaging with social media in their professional role?

In order to answer that first question, we can ask whether the mere fact of being a judicial officeholder makes one more likely to "do the wrong thing" in clicking fraudulent links or divulging sensitive information. It would be remiss to assume that all judges are "technology dinosaurs." Judges are warned about the ways in which their data is used and stored. They are also told of the possible lack of control over their data once it is posted, and that some of this data "may be collected without the user's knowledge or consent through electronic tracking and third-party applications."[635] Individuals might divulge personal data accidentally, where the judicial user is inexperienced and does not realise that communication thought to be private is actually accessible to the public, or when third parties intentionally reveal private data.

It is also possible that judges might be seen as alluring targets for scams. If their identity as judicial officeholder is revealed, given their role of arbiters of the law, judges may find that they receive a higher quantity or quality of phishing email, potentially making it more likely they will

[635] CEELI Report, at p.29

click on the link and have their social media accounts subsequently hacked. This is a purely hypothetical risk, and this thesis does not have the current scope to attach empirical evidence to this claim.

Whilst it is possible that judges might be seen as alluring targets for social-media-based scams in a way that a non-judicial-user might not, it should be asked whether this is a new risk, given that judges have always and will always been at risk of extortion or bribery given the nature of their role as legal arbiters in society. Irrespective of social media, judges are at risk of being targets for bribery, given that a party to a case may seek to further the agenda of their case by influencing the judge in some way. Therefore, social media presents new ways to fall victim to crime, but this is not unique to judicial users, and parallels can be drawn between the way that judges ought to be aware of the risks to their privacy offline as well as online.

So, the key difference must be that judges are more at risk from the outcomes of falling victim to cybercrime, rather than from falling victim to the crime itself. It is the *impact* or *result* of having personal or private correspondence revealed to the public that might be of harm to judicial users, given the need to maintain the *appearance* of the constitutional principles underpinning the integrity and dignity of judicial office.

Like the non-judicial internet user, a judge may find that unauthorised access to their social media account and the mining of personal data may pose risks to their physical or financial safety, but the real risk for judges lies with their reputation as independent, impartial arbiter being called into question. The hacking of a social media account takes the power away from the user and leaves the judge at the mercy of the hacker, but this is no different from extortion or bribery in the "real-world." The difference lies in the scale, speed and permanency of the data being exposed to the public, thereby compromising the *image* of the judge in the eyes of the public.

For example, prior to the existence of social media, a blackmailer, armed with a compromising photograph or letter might be capable of at best revealing this to the judge's

network of friends and/or family, and at worst have it published in a national or local newspaper, where it will be seen by readers but physically discarded with the newspaper itself.

Now take the same example but consider that the blackmailer has social media at his/her disposal. In an instant, a private message containing a photograph or compromising comment could be revealed to the public. A photograph could be liked and shared millions of times, in seconds it can cross jurisdictional boundaries, and if the judge is particularly unlucky, given a whole new life or meaning of its own upon being turned into a gif or meme.

The possibility of the crime exists, albeit in new digital formats, but the result is very different. The judge is not only at risk of his picture being seen by family or in a newspaper, but every social media user across the globe who actively wish to see it, and perhaps most importantly for this point, even those who don't.

The increase in potential scale and demographic of the public presents a new way for judges to be *seen* transgressing the bounds of the principles of independence, impartiality, and integrity. However, rather than acknowledge these new potential risks to reputation, guidance issued to judges frames the risks in terms of privacy and data security. Judges are encouraged to raise personal privacy settings and are prohibited from participating in a professional capacity, all the while avoiding the crux of the issue;[636] that it is not the potential social media has to invade privacy, but the way that an invasion of privacy might appear to the public that poses the real concerns for the Judiciary.

2.3. Are Privacy and Data Risks Justification for Restricting a Judge's Professional Access to social media?

[636] "…automatic privacy settings. Often it is possible to raise privacy settings within social media forums." GtJC (2020), at p.17

So, it has been established that it is not the risk of cybercrime, but the potential impact that cybercrime might have on public perception that poses potential risks for judges participating online in their professional capacity. If this is so, we must ask whether preventing judges from engaging in their professional capacity negates these risks and are these risks ultimately justification for prohibiting professional use of social media? The answer, in short is, no.

This is true for a number of reasons. Firstly, cyber-criminals are unlikely to make a distinction between private and public. A private Facebook account, for example, contains enough details such as name, location, birth date, that any person, let alone an enterprising criminal, might easily connect the private individual user with their professional role. Therefore, risks to privacy exist irrespective of the GtJC's insistence that judges must only blog or micro-blog in a "private" way and not within their professional capacity. It is easy enough to discern the identity of a judge irrespective of declaring their "judicial" status and any potential damage to the judge's reputation will transpire irrespective of the distinction between personal and professional use.

Secondly, a user may take less care when publishing private or public content when doing so in a "personal" as opposed to "professional" capacity. The institution's insistence that judges "raise privacy settings"[637] may have the opposite effect of that intended. As Jackson suggests, choosing not to place strict privacy restrictions on social media accounts "helps keep [users] keenly aware of what [they are] posting and how it will be perceived."[638] Encouraging privacy may in reality bolster users to post or tweet "in a moment of anger, frustration or misplaced humour"[639] with users having uninformed confidence in strict privacy settings guaranteeing total protection from damage to reputation. This is commonly referred to as the "online disinhibition effect" or as Eltis states, "the condition that leads people otherwise aware of proper social and professional behaviour to go off the rails and say things they would know not to broadcast publicly if the world

[637] GtJC (2020), p.18
[638] Jackson, B A. "The Brave New World of Social Media" (2014) *Judges' Journal*, Vol.53, Issue 4, pp.12-15
[639] Ibid.

could easily identify them."[640] With the human tendency to reveal information online that you would not otherwise reveal in the offline world, coupled with a naive assumption that data that begins anonymously will always stay that way, it is possible that allowing personal use, but not professional use has the opposite of the desired effect and the risks to public perception are exacerbated. Given that the internet is decentralized and developed as a forum where all participants theoretically have an equal voice, professionals, or authority figures, like judges, may feel like they can lower their standards of conduct because their status and authority are not relevant or implicated.[641]

The disciplinary proceedings raised in Chapter III, against former Crown Court Judge J. Dunn-Shaw, supports this notion. Dunn-Shaw evidently felt emboldened by his perceived anonymity and thereby free to make "abusive" comments online.[642] In Dunn-Shaw's case, a misinformed sense of privacy and lack of awareness led him to conduct himself in a way he might not have if he had believed the comments to be public.

Finally, the potential that social media has to damage reputation is by no means unique to the Judiciary. Every time a user engages with a platform, whether personally or publicly, they run the potential risk of being exposed, shamed, and socially ostracised.[643] Raising privacy settings and preventing professional engagement, may go some way towards but will not completely prevent this. It is true that engaging with social media presents new, and sometimes heightened, risks and these risks may manifest in damage to a judge's reputation. A judge's online privacy might be compromised, and correspondence previously thought to be private, made public. But these risks will manifest irrespective of the distinction between personal and

[640] Eltis, K. "Does Avoiding Judicial Isolation Outweigh the Risks Related to "Professional Death by Facebook"? (2014) *Laws*, Vol 3, Issue 4, pp.636-650, at p.637
[641] McPeak, A. "The Internet made me do it: Reconciling Social Media and Professional Norms for Lawyers, Judges, and law Professors" (2019) *Idaho Law Review* Vol.55, at p.215
[642] Judicial Conduct Investigations Office Statement, Recorder Jason Dunn-Shaw, JCIO 15/17 (11 April 2017)
[643] See for example, "cancel culture." The work of journalist Ronson, J. *So You've Been Publicly Shamed* (Picador, 2015) is prominent in exploring public shaming as an internet phenomenon.

professional engagement. Not only this, but they are risks accepted every day, by every internet user, to reap the rewards that social media has to offer.

Ultimately, any potential privacy and data risks do not justify restricting judicial use of social networks in a professional capacity. The use of privacy and data in the GtJC is based on an outdated understanding of social media, with a lack of appreciation for the blurring of boundaries online. There is no clear safeguard of boundaries in social media and so the need to protect "privacy" is no more than a ceremonial contrivance, truly intended to protect the "reputation" of the judge. But the judge, like every internet user, whether they choose to engage personally or professionally will run the risk of damaging their reputation. Unless judges were to be completely restricted from social networks, i.e., a blanket prohibition on personal use, then the risks to public perception are the same irrespective of whether they blog in a personal or professional capacity.

3.0. Social Media as Combative Spaces

The GtJC makes no mention of the perils of social media outside of privacy safety and concerns. However, much like the way judges are expected to conduct themselves offline, there is an expectation that judges must "avoid expressing opinions, which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality."[644]

Like guidance relating to privacy and data safety, the ways in which social media presents a risk to public confidence is unexplored in the GtJC. However, it is implicitly stated that social media can provide a platform to express potentially damaging opinions. Clearly, social networks pose a risk to a judge's ability to conduct themselves in a way that avoids damaging public confidence.

[644] GtJC (2020), p.18, when compared to p.7 "judges should avoid situations which: might reasonably reduce respect for judicial office or might cast doubt upon their judicial impartiality…"

As Jackson claims, communication via social media can be particularly challenging to manage because "in the absence of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly."[645] A judge expressing an opinion online may damage public confidence in a way that was not intended or foreseen. But going even further than that, they are expressing an opinion in a space that at times *promotes* combative interaction. As we shall now see, not only must users navigate potential misinterpretation, but they must also navigate a combative space that can encourage antagonistic behaviour in its participants.

3.1. In What Ways are social media "Combative"?

On the day Facebook reached its 1 billion users, its founder Mark Zuckerberg claimed, "a more open and connected world is a better world." In this new technology era, social media "brings stronger relationships with those you love, a stronger economy with more opportunities, and a stronger society that reflects all our values." Despite Zuckerberg's assertion, it is clear that internet is far from a utopic space of agreement and cooperation.

Some social media sites exist as explicitly antagonistic spaces. Sites such as 4chan, the "reigning (dark) prince" of the internet, exists for participants to do "their damnedest to create, circulate, and transform the weirdest, most disgusting, and overall funniest memetic content possible."[646] On sites such as this, users display no "sympathy – just laughter in the face of their target's distress."[647]

More mainstream social media platforms, such as Twitter or Facebook, are not inherently combative spaces but do present combative scenarios in new and often unpredictable ways. McEvoy terms this combativeness as "virtual battlespace",[648] wherein a realistic view of social

[645] Jackson, B A. "The Brave New World of Social Media" at p.12
[646] Phillips, W, Milner R M. The Ambivalent Internet: Mischief, oddity, and Antagonism online (Polity Press, 2017) at p.112
[647] Ibid.
[648] Manjikian McEvoy, M. "From Global Village to Virtual Battlespace: The Colonizing of the Internet and the Extension of Realpolitik" (2010) *International Studies Quarterly*, Vol 54, at pp.381- 401

media is “territory with borders, bad neighbourhoods, and good neighbourhoods, as well as dark places offering sanctuary to one’s enemies.”[649] McEvoy presents some social media users as “Cyberspace combatants.” Social media allows “the mobilization of large numbers of individuals across vast geographic expanses” but this means both “good citizens (netizens) and bad citizens (trolls)” are mobilized.[650] “Trolls, in contrast to good cyberspace citizens, do not accept community norms and cannot be counted upon to play by the rules.”[651] McEvoy asserts that in their most innocuous form:

> “… a troll changes the tenor of a conversation and destroys user’s trust in the safety of an Internet community. In his most dangerous form, the troll is an insurgent behaving like a pirate, plunderer, or military irregular, destroying territory, files and communities.”[652]

Emphasising the combative nature of online spaces, McEvoy refers to the US Army and Marine Corps Counterinsurgency Field manual which describes trolls as “guerrillas who use the Internet as a training ground.”[653] This militaristic terminology is a far cry from the Zuckerberg’s utopic vision of a connected “better world.”

However, the combative nature of social media is not always this clear cut. As Philips and Milner explore, participation online can be both “simultaneously antagonistic and social, creative and disruptive, humorous and barbed.”[654] In this way, they describe social media engagement as “ambivalent.” In its everyday usage, the “word *ambivalent* [emphasis in text] is often used as a stand-in for ‘I don’t have an opinion either way’, sometimes stylized as the blasé ‘meh.’” Instead, Philips and Milner intend ambivalent to reflect the Latinate prefix (*ambi-*) to mean, “both, on both

[649] Ibid.
[650] Ibid, at p.394
[651] Ibid.
[652] Ibid.
[653] Ibid.
[654] Phillips, W, Milner R M. *The Ambivalent Internet: Mischief, oddity, and Antagonism online*, at p.9

sides."[655] Whilst "trolling" can be explicitly described as "deliberate, playful subterfuge, and the infliction of emotional distress on unwitting or unwilling audiences", instances of "trolling" taking place are not so black and white in reality. Trolling can be an imprecise "behavioural catch-all" because it does not capture the underlying "tonal, behavioural, and aesthetic characteristics" of this behaviour.[656] Whilst in some instances, trolling is indeed combative and intends to wound, in others it creates "weird" outcomes, where "silliness, satire and mischief" forms the main basis of intent.[657]

Whilst cyberspace may indeed be a "battlefield" the battle lines are blurry, and the rules of engagement are often equally as unclear. Of course:

> "It can be difficult to discern the difference between mischief and sincerity in embodied spaces as well… but it is particularly potent in public conversations online, where observers have far fewer opportunities to consider paralinguistic signals…and…rarely have access to the full relational context of a given interaction."[658]

Whilst the combative nature of the internet gives rise to explicitly antagonistic or as Phillips and Milner would prefer "ambivalent" interactions online, the combative nature of social media interactions may also have "social costs" in the real world.[659]

Whilst the internet is certainly capable of creating a space, such as Facebook, which "offers potential for personal liberation, the creation of structures of international cooperation, and

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[655] Ibid, at p.9
[656] Ibid, at p.7
[657] Phillips & Milner claim that the term "trolling" is ultimately unhelpful as it often posits a playful or performative intent and can minimize the negative effects of the worst kinds of online behaviors. Online expression can inspire divergent responses in divergent audiences – just as behaviors described as trolling can erroneously subsume divergent practices with divergent ends. Trolling is not singular; this type of interaction inhabits a full spectrum of purposes – all depending on who is participating, who is observing, and what set of assumptions each person brings to a given interaction, see pp.7-9
[658] Phillips, W, Milner R M. *The Ambivalent Internet: Mischief, oddity, and Antagonism online,* at p.50
[659] Myers, D G. "A Social Psychology of the Internet" (2016) *International Forum of Teaching and Studies*, Vol 12 No.1, at pp.3-9

greater citizen mobilization and participation" it is also fraught with risk. Social media at times reveals itself to be a:

> "Dark, sinister extension of some of the most dangerous and ungoverned parts of our physical world, a new type of failed space with the potential to breed real threats which will quickly spill over into the real world."[660]

An example of this is *"slacktivism"*, described as being the substitution of real, costly help, for feel-good internet clicks and sharing of prosocial videos. In addition, social media is often accused of disrupting and draining time from healthy face-to-face relationships, with users' faceless anonymity enabling deindividualization.[661]

Social media has been cited as one of the leading causes in recent extreme *group polarization,* where "people in like-minded groups tend to reinforce their shared views and shift toward the extreme."[662] The internet often serves as a "social amplifier" that can both feed and strengthen shared views. As Myers acknowledges, sometimes this can be a good thing, "peacemakers become more pacifistic and cancer survivors find mutual support" but the same works in reverse; "racists become even more racist" deepening existing social divisions.[663]

So, with personal implications for the individual user and wide-reaching political implications, the potentially combative nature of social media is multifaceted indeed.

3.2. The Risk of Combative Spaces for Judicial Users

In an offline context and when conducting themselves in court, a judge should "seek to be courteous, patient, tolerant, punctual and should respect the dignity of all."[664] To an extent, this

[660] Manjikian McEvoy, M. "From Global Village to Virtual Battlespace: The Colonizing of the Internet and the Extension of Realpolitik" at p.398
[661] Myers, D G. "A Social Psychology of the Internet" at p.4
[662] Ibid.
[663] Ibid.
[664] GtJC (2020), at p.7

goes against everything we know about social media, where communication can be unpredictably combative in nature.

In giving evidence to the House of Lords' Constitution Committee in 2010, former Lord Chief Justice, Lord Judge reiterated that judges "have to be very careful not to be seen to be entering into the political arena."[665] As explored in Chapter II, this caution against a judge descending into the political arena dictates the relationship that judges have with the Fourth Estate. Whilst the Fourth Estate can give rise to combative scenarios, the combative nature of social media is distinct from this. Although the print press may publish a favourable, or unfavourable, article relating to an individual judge, whether this be regarding their personal conduct or professional decision making, the combative nature of this is clear. Judges may be subject to positive or negative reporting, often predictably dependent upon the news outlet doing the reporting,[666] but the role that the judge plays in this is a passive one. They are being reported upon, sometimes in a combative way, but other than the correction of misreporting,[667] the judge is not an active participant in this combative encounter.[668]

However, the risks for a judge entering the *Fifth Estate arena* are very different. Social media is combative in a new way, where the rules of engagement are unclear and the distinction between "good" or "bad" behaviour is blurred. Whilst a judge can be cautioned against descending into the arena through their interaction with the Fourth Estate, a judge might find themselves in the Fifth Estate's arena through the simple act of engaging. In this arena, there are new or sometimes no rules and "insurgents"[669] lurk around every corner.

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[665] Media Guidance for the Judiciary (2014), at p.8
[666] Reynolds, S. "It's not me, it's you. Examining the print media's approach to 'Europe' in Brexit Britain" at p.58-59
[667] Media Guidance for the Judiciary, at p.14
[668] Unless they actively choose to be, using Lord Sumption's Daily Mail Opinion Column as an example, See Lord Sumption for the Mail on Sunday, accessed via https://www.dailymail.co.uk/home/search.html?s=&authornamef=Lord+Sumption+For+The+Mail+On+Sunday
[669] Manjikian McEvoy, M. "From Global Village to Virtual Battlespace: The Colonizing of the Internet and the Extension of Realpolitik" at p.381

Given that the principles of independence, impartiality and integrity are at the core of the way that judges are expected to conduct their personal and professional lives, this combative nature of social media platforms shifts the goal posts as to the way in which judges might conduct themselves with these core principles in mind. Certainly, independence, impartiality and integrity may be harder to sustain in an arena that presents unpredictable combative scenarios and where harm can transgress digital borders to affect outcomes in the offline world.

3.3. Does the Combative Nature of social media Justify Restricting a Judge's Professional Access to social media?

Social media is an unpredictable combative space, where interactions can range from explicitly harmful to "weird."[670] Undoubtedly, this new combative space presents concerns for the Judiciary, who at their core, seek to maintain the appearance of the constitutional principles of independence, impartiality, and integrity. However, we must question whether preventing judges from engaging in their professional role protects them from the combative nature of social media?

Trust is placed in judges every day to be "courteous, patient, [and] tolerant."[671] In their offline role, judges will encounter new and unpredictable scenarios, so does the uniquely combative nature of cyberspace render a judge incapable of demonstrating these qualities online?

As this section has proven, social media presents new challenges given the complex combative nature of communication hosted online. Whilst explicitly combative scenarios may be avoided, the unpredictability, or what Philips & Milner call the "ambivalence," of social media use, means that judicial users may be pulled into combative scenarios unwittingly, or not even realise that they are engaged in a combative scenario in the first place. The lack of, or differences in, social cues online make avoiding combative encounters with other users particularly challenging,

[670] Phillips, W, Milner R M. *The Ambivalent Internet: Mischief, oddity, and Antagonism online*, at p.7
[671] GtJC (2020), at p.7

and we might go so far as to hypothesise that at some point or other, every social media user will witness or be party to a combative encounter.

But is *combative* synonymous with *harmful*? When engaging with the Fourth Estate, it is clear that the Judiciary wish to avoid a combative encounter that would result in a damaging descent into the fray, in that it may impact on the public's perception of the judge as an impartial arbiter of the law.[672] But *combative* encounters need not be *damaging* encounters. If "combative" is seen here as more of an agonistic representation of combat, where the outcome is not bodily harm, but rather a non-physical hostility, more akin to dialogic play online, we might argue that the combativeness of social media is not as potentially damaging to the perceptions of independence, impartiality, and integrity as we might first assume. An agonistic combat need not demonstrate partisanship. A hostile meme, or tweet in reply to a judge is not inherently harmful, what matters most is the judge's response to this encounter. This response will be shaped and nurtured by encountering combative scenarios and learning how to avoid or navigate them in the future.[673]

Judges are presented with new and combative scenarios every day, as they negotiate the adversarial trial process of which they are umpires. Within this combative encounter, they are expected to maintain standards of non-partisanship, and the encounter, whilst combative in nature, is not inherently harmful. Judges are therefore no stranger to combat, and further, despite the partisanship nature of that combat, judges are trusted to remain outside of it. This is certainly more challenging in the digital age, given the blurred distinction between playful and harmful but it is not impossible. Take Justice Willett (of the Texas Supreme Court) who in the US, "may be the most well-known member of the Judiciary" using social media who, when engaging with other users on social networking sites, has "one cardinal rule: [he doesn't] throw partisan sharp

[672] Media Guide for The Judiciary (2014) citing Lord Bingham in 1996, "I think it is absolutely fundamental that judges should be very careful indeed to make sure that they do not publicly make statements that undermine their reputation for impartiality and neutrality."
[673] The importance of enhancing tools for judicial education will be considered in Chapter V of this thesis.

elbows."[674] Taking Justice Willett's advice, judges may see the space as combative and witness combative encounters or as we shall see in the following section, fall unwittingly into these encounters. However, the way in which they personally conduct themselves need not be combative. Social media might be a virtual battlespace, but no-one said anything about picking a side.

4.0. Social Media as Evolving Spaces

As with the combative nature of social media outlined above, the Guide to Judicial Conduct does not consider the transitory nature of social media and the risks that come with a space that is in a constant state of flux. The GtJC 2020 refers its readers to "Microblogs" such as "Twitter" and "Facebook" but does not unpack the individual features of these sites or the nuanced differences between these platforms and other mainstream social media sites.[675]

So, the evolutionary nature of social media is not explicitly nor implicitly a justification for preventing judges from using social media in their professional capacity, but it is certainly one of the challenges all users face when engaging with social networks and will therefore be considered in this section.

4.1. In What Ways are social media "Evolving"?

Social media and the world of cyberspace is what Vallor terms a "rapidly changing techno social environment."[676] Digital networks can be seen as continuously evolving or as evolutionary spaces. They are not static and are therefore incapable of consistency. You may find yourself getting to

[674] Jackson, B A. "The Brave New World of Social Media" at p.12
[675] GtJC (2020), at p.17
[676] Vallor, S. *Technology and the Virtues: A Philosophical Guide to a Future Worth Wanting* (2016, Oxford Scholarship Online), Chap.2, accessed via http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780190498511.001.0001/acprof-9780190498511

grips with Facebook one day, only to have the program change its interface the next or even be wholly replaced by a new networking platform entirely.

Certainly, one of the risks of cyberspace is that a user can never fully come to terms with a program's functions before those functions evolve and change. Not only do the interfaces evolve, but so do the social norms and language used on each individual platform. Social media is "everywhere, in a dizzying and constantly evolving array of forms."[677]

There are hundreds of social networking sites, each with different features, although at present Facebook, Twitter, Instagram, and LinkedIn can be cited as the UK's most popular sites. Every day, the companies that host these platforms add "new features to their structures", generating new ways for users to connect with other users.[678]

Whilst these platforms are constantly shifting, we can identify the constant elements or "building blocks" of social media. The first main feature is user profiles.[679] Typically, social media allows users to "create profiles and look at the list of people with whom the user is in contact and the contact lists of other users." Additionally, social media enables "online connections which allow other users to comment on the contents created by the users." The third main feature is the connectivity of "online grounds which enables users to access the detailed information about another user who creates content by visiting their profile page."[680]

Outside of these three constants, social media is constantly in a state of flux. Each social networking site is continuously working towards updating their services and the interfaces by which these services are delivered. These updates range from entire interface changes, such as "New Facebook" and the company's major web format redesign in September 2020, compared

[677] Ibid, at p.182
[678] Dawot, N I, Ibrahim R. "A Review of Features and Functional Building Blocks of Social Media" (2014) *8th Malaysian Software Engineering Conference (MySEC),* pp.177-182, at p.178
[679] Ibid.
[680] Ibid.

to smaller changes such as LinkedIn's recent addition of "swipe-up links to LinkedIn stories" merging a feature typically associated with Instagram.[681]

These design decisions and policies set by platforms "steer user behaviour."[682] So, in addition to understanding the systems and interfaces that make social media platforms distinct from one another, a user must appreciate the different set of norms, and the potential to violate these norms, within each of these evolving spaces. As McLaughlin and Vitak note, online etiquette – also known as netiquette – is "difficult to define in these spaces because both the environment in which the users interact, and the composition of their social network are constantly evolving."[683] As in the offline world, social norms are "a framework through which people determine what behaviours are acceptable and unacceptable."[684] In the online world, these are both explicit, as seen in social media terms of use[685] and implicit, wherein the norms are not "written down but understood by the group in general."[686] Ultimately, *full* understanding "demands familiarity with a number of broad cultural norms and references."[687]

4.2. The Risks of Evolving Spaces for Judicial Users

Although the risks relating to the evolving nature of social media spaces are not cited as either explicit or implicit justifications for restricting a judge's access to social media, the risks to lay-users are well documented and have been cited by academics in the US, such as McPeak, to

[681] Hutchinson, A. "LinkedIn Adds Swipe-Up Links to LinkedIn Stories" Social Media Today (Jan 12. 2021) accessed via, https://www.socialmediatoday.com/news/linkedin-adds-swipe-up-links-to-linkedin-stories/593277/
[682] McPeak, A. "The Internet Made Me Do It: Reconciling Social Media and Professional Norms for Lawyers, Judges, and Law Professors" at pp.205-232
[683] McLaughlin, C, Vitak J. "Norm evolution and violation on Facebook" (2011) *New Media & Society*, Vol 14(2) pp.299-315, at p. 300
[684] Ibid.
[685] See Facebook Terms of Service, accessed via https://www.facebook.com/terms.php
[686] McLaughlin, C, Vitak J. "Norm evolution and violation on Facebook" at p.300
[687] Phillips, W, Milner R M. *The Ambivalent Internet: Mischief, oddity, and Antagonism online*, at p.111

express concerns about the ways in which social media sites may be used by judicial office holders in their professional capacity.

Social media is a constantly evolving space where the changing environment itself "affects the character and nature of human behaviour."[688] Where social media platforms, and the norms of engagement, are in a constant state of flux, then boundaries of conduct cannot be firmly established. The user must be malleable in order to navigate this evolving space.

McPeak states that the expectations of conduct for judges may clash with the "ever-evolving social media norms"[689] For example, a judge may not be aware of updates to Facebook's privacy settings and may unwittingly or unknowingly post a comment believed to be private on a public forum. Likewise, a judge may not realise that Facebook have updated the "like" button to include "reactions" such as "love, care, haha, wow, sad and angry."[690] Without an understanding that the "like" button has changed in order to provide new reactions to user's comments and posts, it is possible that a judge may react to another users post about their new job, or the birth of a new baby etc., as being "sad or angry." Or a post about the passing of a loved one, "haha or wow." The changing nature of the platforms and a failure to keep pace with these changes runs the risk of the judicial user being misinterpreted, misunderstanding, or unknowingly violating online social norms.

This is true for each social media user. The potential to fall behind the ever-evolving social norms that regulate online conduct is a risk that every user faces when engaging online. However, the constantly evolving nature of social media, not merely in terms of user interfaces, but the way in which users engage with each other and generate new implicit social norms, can present specific risks for judicial users who are tasked with maintaining the perception of the constitutional

[688] McPeak, A. "The Internet Made Me Do It: Reconciling Social Media and Professional Norms for Lawyers, Judges, and Law Professors" at p.232
[689] Ibid.
[690] Facebook, "Like and React to Posts" accessed via https://www.facebook.com/help/1624177224568554/like-and-react-to-posts/?helpref=hc_fnav

principles of independence, impartiality, and integrity. The need to maintain the appearance of these doctrines puts judges in a position where in falling behind the standards, or misusing certain online functions, could compromise this appearance in the eyes of the public.

Where a judicial user is unable to keep pace with changes to the social media environment, they run the risk of engaging in a way that causes offence, perhaps reacting to a newspaper article about a trial involving a celebrity robbery with “haha” for example. However, the consequences for judicial users might move beyond “offensive” and into the realm of casting doubt onto the judge’s integrity or impartiality. What if the judge later found himself presiding over the trial of the kidnapper of that child? Does the fact that the judge reacted to a post on Facebook with “haha” make them unsuitable to hear the trial? Does this cast doubt onto his/her character, or indeed impartiality? These are all questions that ought to be considered as social media platforms and the norms that regulate conduct on these platforms evolve.

4.3. Does the Evolving Nature of social media Justify Restricting a Judge’s Professional Access to social media?

The evolving nature of social networks at first glance appear to present serious risks to judges who must maintain the appearance of independence, impartiality, and integrity. The way in which online social norms are in a constant state of flux, alongside the fluidity of the platforms themselves, means that judges engaging with social media run the risk of running afoul of these norms or misunderstanding the nuanced and unique functions each platform provides for its users.

However, the law itself is an evolving entity, and judges are trusted to interact with it in their professional capacity. Whilst there are certainly differences between the fluidity of the common law and that of social media, it is worth noting here that evolution and malleability need not always be viewed as a risk, and judicial understanding and appreciation for the changeability

of the law may in fact equip them with the skills needed to navigate the complexity of online spaces.

Rather than justifying restriction, the evolving nature of social media should *encourage* engagement online. Take the example mentioned in the section above. The possibly of a judge reacting to a post with “haha” is likely where that judge is unfamiliar with the nuanced possibilities of “liking and reacting” on Facebook. The judge, by merely engaging on Facebook, runs the risk of compromising his/her appearance of integrity and impartiality. However, does this mean that the judge should be restricted from using the platform entirely? Surely there is a more elegant solution than this.

Although social media platforms are in a constant state of flux, the best way to keep pace with the changing way users interact online is to be active in that interaction. There is a chance that a judge, upon embarking on Facebook for the first time, may transgress online social norms – i.e., at first, they may not understand the difference between pressing “like”, or “love” or “sad.” This may lead to scenarios like the one above, where the judge’s impartiality and integrity is called into question, and possible damage to the reputation of that judge and perhaps the Judiciary overall may be compromised. However, a lesson has been learnt. That active judge will do his/her best not to make that mistake again, and importantly, they will now understand the nuanced differences between “reacting” to posts on Facebook and be vigilant of any potential changes to the platform in the future.

The evolving nature of social media and shifting online norms is therefore not legitimate justification for complete professional withdrawal from engagement, but rather, it might provide an argument for *encouraging* engagement online. Judges can *get to grips* with the evolving nature of the law and might be trusted with understanding the way in which social media may change and evolve over time. Where judges are prevented from experiencing this evolution for themselves, then the evolving nature of social media becomes truly hazardous.

In this way, the evolving nature of social media speaks less to the need for restriction, and places emphasis on malleable, comprehensive and practice based educational tools, as we shall consider in the following chapter.

5.0. Complexities Categorising Online Relationships

Judges are expected to display "discretion in personal relationships, social contacts and activities."[691] However, the nature of "relationships" and friendships change when we consider engagement with the Fifth Estate. The way in which users must navigate this complexity with online connectivity presents nuanced risks for judges, who must also navigate the need to maintain the perception of independence, impartiality and integrity when making practical decisions as to their conduct.

The GtJC relies on the "judgement" and "instincts" of the judicial office holder when considering personal relationships and the way in which this might impact on perceived bias.[692] However, the complexity surrounding the nature of online relationships presents several challenges for judges when exercising personal judgement around relationships, friendships and whether they ought to recuse themselves from hearing a case.

We must therefore ask *(1)* whether a digital friend has the same meaning as a real-time friend, *(2)* does this complexity surrounding online friends present risks to the perception of independence, impartiality, and integrity and, *(3)* if online friendships risks damage to the perception of judicial independence, then does restricting a judge's professional engagement with the Fifth Estate remedy this?

[691] GtJC (2020), at p.7
[692] Ibid, at p.18

5.1. The Meaning of "Friendship" Online

Chambers in her monograph, *Social Media and Personal Relationships: Online Intimacies and Networked Friendship*, asserts that "one of the most striking changes in personal life during late modernity is the use of social media for conducting personal relationships."[693] Indeed, this social shift has seen a "growing significance in the public display of personal connectedness and the importance of the term 'friendship' in managing these connections."[694] Users of online services are experiencing new ideas and forms of "intimacy, friendship and identity" and in turn, these services are both supporting and complicating personal ties and relationships.[695]

The term "friendship" is used to identify connectivity online, although this term does change from platform-to-platform, with Twitter preferring the "following" function and sites like LinkedIn opting for "connections." Chambers argues that this notion of friendship, in whatever format, "is a major ideal being exploited as a principal feature of social network site communication." This new form of friendship is being "shaped by conventions that vary considerably from those associated with the traditional sense of friendship formed before Web 2.0."[696] This digitalised era is, for example, the first in which personal connections of friendship become formalised through online public display.[697]

Networking is the "ostensible purpose" of social media, "using one's chain of connections to make new friends, dates, business partners etc."[698] Underlying each social networking site is a "core set of assumptions – that there is a need for people to make more connections, that using a networking of existing connections is the best way to do so, and that making this easy to do is

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[693] Chambers, D. *Social Media and Personal Relationships: Online Intimacies and Networked Friendship* (Palgrave Macmillan, 2013) at p.1
[694] Ibid.
[695] Ibid.
[696] Ibid, at p.4
[697] Ibid.
[698] Donath JS, Boyd, D. "Public displays of connection" (2004) *BT Technology Journal* Vol.22, No.4, pp.71-82, at p.71

a great benefit."[699] Chambers lists some of the reasons why users might connect with one another. From a study conducted in 2006 by Boyd, it was found that people 'friend' each other online because they are "1. Actual friends; 2. Acquaintances, family members, colleagues; 3. It would be social inappropriate to say 'no' because you know them."[700] These reasons all link back to the offline world, wherein the user's online interaction is either because of the offline connections or will have some impact or other on their offline friendship. However, outside of these offline/online hybrid interactions, a number of online specific reasons for "friending" were identified. Included in this list; "4. Having lots of Friends makes you look popular… 7. Their profile is cool so being Friends makes you look cool; 8. Collecting Friends lets you see more people" and perhaps tellingly "13. It's easier to say yes than no."[701]

The difference in the reasoning behind why users friend one another means that the word "friend" is "being applied to all declared connections whatever their nature or intensity."[702] Browning agrees, asserting that the meaning of friendship "means less in cyberspace than it does in the neighbourhood, or in the workplace… or anywhere else that humans interact as real people."[703] Indeed, "friendships on Facebook may be as fleeting as the flick of a delete button."[704] Social networking sites "have become so ubiquitous that the term "friend" on these pages does not convey the same meaning that it did in the pre-internet age."[705]

Facebook friendship might therefore be an "indicator" of a more personal relationship but the mere status of being a "friend" on Facebook does not guarantee friendship. Facebook

[699] Ibid.
[700] Chambers, D. *Social Media and Personal Relationships: Online Intimacies and Networked Friendship,* in reference to Boyd, D (2006) at p.6
[701] Ibid, at p.7
[702] Ibid.
[703] Browning, J G. "Why Can't We Be Friends? Judges' Use of Social Media" (2014) University of Miami Law Review Vol. 68:487 at p.491
[704] Ibid, at p.492
[705] Florida Judicial Ethics Advisory Commission Opinion 2009-20

friendship signals the potential of friendship, but it is unclear where in the spectrum of stranger-to-acquaintanceship-to-friend, the relationship actually falls.[706]

The design of each social networking site, and the tools of engagement that it uses, also play a key role in shaping the type of personal connections formed.[707] LinkedIn for example classes users as "connections" and is often used in a professional context. This makes it much more unlikely that a LinkedIn connection is a "friend" in the typical sense of the word, when compared to a Facebook "friend" given the nature of the platform. Twitter and Instagram use "followers" as a synonym for friendship, however, the purpose behind these platforms are less to "connect people all over the world"[708] and rather to help users "create, find, join, and share in experiences that matter to [them]."[709] Therefore, the interface, terminology and purpose behind each platform changes, making it even more challenging to distinguish between online-friendships, mere online acquaintances or "friends", "followers" or "connections" who are in fact offline-strangers.

5.2. The Complexity of Online Friendships as Potential Risks for Judges

The meaning behind friendship, the reasons why people friend one another and the implications online-friendships have on offline-relationships is complex and often subjective. Despite this, rules governing judicial conduct place the responsibility on the judge to understand this nuance and make decisions based on rules intended to govern offline conduct to online contexts. This means that when deciding whether or not an online connection or activity could pose a significant risk for the perception of impartiality, the judge, when exercising their individual judgment, must have a

[706] *Sluss v Kentucky*, 381 S.W.3d 215, 220-22 (Ky. 2012) via Browning, at p.493
[707] Chambers, D. *Social Media and Personal Relationships: Online Intimacies and Networked Friendship* at p.5
[708] Facebook About, accessed via https://www.facebook.com/facebook/about/
[709] Instagram Terms of Use, accessed via https://help.instagram.com/478745558852511/

thorough understanding of the nuanced approach between different tools of engagement used by each social networking site. Simply being “friends” on Facebook is not a clear indication of offline friendship, and “following” someone on Twitter is not a clear indication of a purely online friendship. The goal posts are shifted depending on the type of platform, the way in which the user engages with tools of engagement on the platform, and the reason the user chooses to use the platform in the first place.

Under the 2020 amended Guide to Judicial Conduct, judges are advised as to the appropriateness of personal relationships and concerns over perceived bias.[710] In this section, a “great reliance must be placed on the judgement of the judicial office holder”[711] in order to determine the appropriateness of existing relationships with parties to litigation and friendship with, or personal animosity towards a party stands to be a compelling reason for disqualification. Additionally, “friendship may be distinguished from acquaintanceship which may or may not be a sufficient reason for disqualification, depending on the nature and extent of such acquaintanceship”[712] and it is the judgement of the individual judge that must ascertain whether a friendship or acquaintanceship exists and whether it is to be regarded as a sufficient reason for self-disqualification.

The guide refers the reader to *Locabail*, a case previously discussed in detail in Chapter I, where in summary, the court claim “it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias” as “everything will depend on the facts, which may include the nature of the issue to be decided.” Nor “at any rate ordinarily, could an objection be soundly based on the judge’s…extra-curricular utterances (whether in textbook, lectures, speeches, articles, interviews, reports or responses to consultation papers)”.[713]

In contrast:

[710] GtJC (2020), at p.18
[711] Ibid.
[712] Ibid.
[713] *Locabail (UK) Ltd v Bayfield Properties Ltd*. para.[25]

> "A real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of the individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected evidence of that person in such outspoken terms as to throw doubt on his ability to approach such a person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind… or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudiced and predilections and bring an objective judgment to bear on the issues before him."[714]

The court in *Locabail* argue that the answer as to what constitutes friendship "one way or the other, will be obvious."[715] It is true that at first instance, a judge may look to the actual or real-time relationship and it is likely that in most cases this will be "obvious", or the judge will be able to use the real time relationship in order to make a decision as to whether or not that individual is a friend or mere acquaintance. But there may be instances where there is no face-to-face connection or interaction between the judge and individual; where the judge is faced with a purely digital-friendship or a "friendship" in the very literal digital sense, where there is no actual relationship between the judge and the individual or where they were not aware of the digital "connection."

Despite assurance of obviousness by the court, when we consider *Locabail* as a lens to explore digital friendship, it is clear that the determination of friendship is anything but "obvious" and that there is scope for the judge to be conflicted when making decisions relating to their online interactions with parties to a case. The restrictions on professional access to digital network does little to combat this uncertainty because it will also arise in scenario's involving personal use of social media. In some ways, the nebulous nature of the rules governing personal relationships

[714] Ibid.
[715] Ibid.

provides flexibility for the judge to take into account the complexity of digital friendships. Clearer and stricter rules, making online friendship grounds for automatic disqualification for example, may make for a less nuanced approach and may not take into account the reality of digital friendships as occasionally fleeting.

On the other hand, rules guiding judicial conduct may be attempting to apply standards designed for offline interactions to online relationships. Restricting access in a professional capacity, through fear of revealing impartiality, once again places perception above all else. For example, simply not being "friends" with another user on Facebook does not prevent that user's "friends" being visible to the public. A variety of privacy settings available on Facebook might make the users posts inaccessible, but their friend lists, interests and bio might otherwise be available.[716] As stressed in the previous sections, merely making one's account "private" cannot assure users that their posts, likes and friend lists will not become available to the public.

Additionally, whether a judge is publicly or privately friends with a party before their case, in theory, matters little. The only distinction is that the former makes the public aware and the latter is more likely to remain undisclosed. So, restricting professional use of social media platforms sends a clear message. Judges might "friend" other legal professionals or "like" the tweets of political parties on their private profiles, but they should not do this on a professional account. The personal and professional distinction is seen as a way of lessening visibility and therefore the chance for a revealed connection to reflect negatively on the perceived impartiality of a judge. This might lead us to ask whether we, as users of the justice system, are satisfied with rules that encourage behaviour to be kept behind closed doors as opposed to in the open, where the public might scrutinise the actions of the legal arbiters making important decisions that impact on society. In other words, is this lack of transparency an appropriate or acceptable route to judicial legitimacy for us, as dependants on the justice system?

[716] Facebook Privacy Settings, accessed via https://www.facebook.com/help/325807937506242

5.3. Do Online "Friendships" Justify Restricting a Judge's Professional Access to social media?

As Browning puts it, the issue of judges, social media and connectivity online is best described with one of the social networking site's contributions to our twenty-first century lexicon: "It's complicated."[717] Clearly the question of whether or not the risks of connecting online, and the impact this might have on the public's perception of bias, justify restricting judicial engagement with the Fifth Estate is a complex one. But whilst it is complex, it is not necessarily unique. The risks that digital friendships may compromise the perception of bias in the eyes of the public calls back to common themes emerging throughout this thesis. Namely, that the Judiciary in the UK has taken a restrictive approach to individual and professional participation with digital networks and that this restriction is seen as solving the problems or negating the risks encountered online.

However, like the risks previously considered in this chapter, the ways in which online friendships may compromise the perception of independence and impartiality are not exclusive to *professional* engagement. Like with the risks to privacy and data as they act as justification for restricting professional access, this restriction is tokenistic at best, and ignorant of the way in which the Fifth Estate functions at worst. Personal use as opposed to professional use may appear to offer enhanced privacy and therefore reduce the risk of connections being revealed to the public, thus protecting the perception of independence and impartiality. However, in reality, social media provides a platform on which connections may be revealed, irrespective of the assumed or assured levels of privacy and security. Therefore, actual independence is not an assured route to legitimizing the judicial role.

[717] Browning, J G. "Why Can't We Just Be Friends – Judges' Use of Social Media" at p.533

So, the question we would be better off asking is whether the mere presence of a Facebook "friend" or Twitter "follow", irrespective of the real-world connection, is likely to be perceived as a conflict of interest or a display of bias *when*, rather than *if*, it is revealed to the public? If so, then does restricting professional access to social networks protect perception and therefore uphold the normative constitutional framework as it is understood to exist in Chapter I of this thesis?

Whether or not the presence of a Facebook friend is grounds for judicial recusal prior to a case being heard or potential bias after the effect has not been explored in the UK. This is likely to be because, as noted above, in the majority of cases, a friendship or acquaintance will be easily identifiable because of a real-time relationship. But as social networks increasingly permeate the way in which we communicate with one another, and as a result of the ongoing social-distancing measures in place as a result of the COVID-19 pandemic and the dependence placed on technology as a result,[718] the likelihood of purely "online" friendships with no parallels in the real-world, are increasing.

Although this has not yet been considered in any reported cases in the UK, in other jurisdictions, such as the U.S and Switzerland, there have been a number of cases looking at the changing nature of friendship online and the impact this might have on the connectivity of individual judges.

At least ten states, an American Bar Association Judicial Ethics Opinion and a number of recent cases have attempted to address these issues in the U.S.[719] States such as Florida Massachusetts, Oklahoma, and Connecticut "take a strict view on the issue of social media

[718] Note that currently, there are workforces or teams who have never met each other in the real-world. See for example, The Telegraph, "'I've never met my colleagues' – how it feels to start a new job in lockdown" (19 May 2020) accessed via, https://www.telegraph.co.uk/business/2020/05/19/never-met-colleagues-feels-start-new-job-lockdown/

[719] Browning, J G. "Why Can't We Just Be Friends – Judges' Use of Social Media" at p.510

friendship."[720] The Florida Supreme Court Judicial Ethics Advisory Committee's concern is that "friending" requires "a process of selecting some individuals while rejecting others and the communication of that selection in the public forum of social networking sites."[721] This creates a "class of special [users] who have requested this status" and would therefore "appear to the public to be in a special relationship with a judge."[722]

Several other states noted by Cooper, such as New York, Kentucky, South Carolina, Maryland and Ohio – "take a more permissive view of social media friendships."[723] For example, as Cooper notes, The New York State Advisory Committee on Judicial Ethics suggest that "there is nothing wrong with social network connections by themselves."[724] However, judges should "consider whether any such close online connections, alone or in combination with other facts, rise to the level of 'close social relationship' requiring disclosure and/or recusal."[725]

The California Committee takes a "middle ground approach" informing judges to "look at a variety of (nonexclusive) factors in determining whether there is an *appearance* (emphasis added) of impropriety."[726] These factors include, "the nature of the social networking site… the number of 'friends' on the page… [and] the judge's practice in determining whom to include."[727]

According to Browning, most states have viewed the "mere existence of a Facebook 'friendship,' without more, as signifying very little due to the realities of 'friendship' in the digital age."[728] So the approach taken in the U.S seems to be that in general, Facebook friendship is not automatic grounds for recusal, but there is complexity and disagreement given that cases in Florida have actively disagreed with this.

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[720] Cooper, B P. "Judges and Social Media: Friends with Costs and Benefits" (2014) *Professional Lawyer*, Vol. 22, No.3 pp.26-37 at 31
[721] Ibid, at p.31
[722] Florida Supreme Court Judicial Ethics Advisory Committee, Advisory Opinion (201) 2010-6, accessed via http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html
[723] Cooper, B P. "Judges and Social Media: Friends with Costs and Benefits" at p.31
[724] Ibid, at p.31
[725] Ibid, at p.31 quoting N.Y State Advisory Comm. On Judicial Ethics, Advisory Op. 08-176, at 2 (2009)
[726] Ibid, at p.31
[727] Ibid.
[728] Browning, J G. "Why Can't We Just Be Friends – Judges' Use of Social Media" at p.532

In Switzerland, the Federal Court argued that "the mere fact of being a "friend" on Facebook – in the absence of other elements – does not in itself make it possible to conclude that there is a friendly relationship excluding the judge."[729] Thus, judges "can be present on social networks and make contacts there without their impartiality being *a priori* compromised."[730]

If the UK were to take a similar approach to the emerging trend seen in jurisdictions like the U.S and Switzerland whose courts have considered these issues, then being "Facebook friends", whether on a personal or professional account, may not be grounds for automatic judicial recusal. As Cooper acknowledges, we can perhaps "overstate the power, and potential for abuse, of these online connections."[731] People, or "the public" are generally able to "understand that social media 'friendship' tends to be less significant than traditional friendship" and that these connections alone should not "create the appearance of impropriety."[732]

Clearly, the complexity of "friendships" online and what this means for judges' use of social media is unexplored in the UK, but this does not mean these issues are unimportant. Whether or not the Judiciary restrict professional use of social media by individual judicial officeholders, the problems surrounding personal use of social networking sites remain, and connections online will be revealed to the public. Whether or not these relationships qualify for automatic recusal in the UK must be discussed and standardised in order for judges to understand and manage their relationships online.

6.0. Does "Liking" Equate to "Agreeing With"?

As with the risks outlined above, the Judiciary's approach to social media is rooted in the fear that social networks have the potential to reveal potential partisanship to the public. The fear is not

[729] See Switzerland Federal Court (ATF 144/159) Original judgment given in French but see European Commission for Democracy Through Law (Venice Commission) document for paraphrased translation. Accessed via https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2019)003-e at p.10
[730] Ibid.
[731] Cooper, B P. "Judges and Social Media: Friends with Costs and Benefits" at p.34 *Conclusion*
[732] Ibid.

explicit, but it is clear from the restriction on professional use itself, that social media is seen as a platform that risks breaking down the façade of perception and revealing partisanship to the public. This section will now explore the nuanced and intricate ways in which social media is capable of breaking down barriers of perception and the complex ways in which bias may be revealed through interaction with the Fifth Estate such as "sharing" and "liking", concluding that although there are new ways in which potential partisanship may be revealed to the public, the solution to this does not lie in restricting a judge's professional access to the Fifth Estate.

6.1. The Meaning of a "Like"

It is not just the terminology and nature of friendship that changes from platform-to-platform. Depending on the social networking site being used, users might share, repost, story and like (to name a few) the posts of other users. This begs the question, does "liking" for example, equate to agreeing with?

Facebook would have us believe that "clicking like below a post on Facebook is a way to let people know that you enjoy it without leaving a comment"[733] and, Twitter similarly claims that "likes are represented by a small heart and are used to show appreciation for a Tweet."[734] Despite these assertions by the platforms themselves as to the simplicity of liking equating to appreciation or enjoyment, the realities of the ways in which users both "like" and interpret being "liked" in return vary and can often look very different from what we might traditionally conceive as "liking" something.

[733]Facebook, "What does it mean to "Like" something on Facebook?" accessed via https://www.facebook.com/help/110920455663362

[734] Twitter, "How to like a Tweet" accessed via https://help.twitter.com/en/using-twitter/liking-tweets-and-moments

Robbins argues that social media "replaces old institutions; other times it augments them."[735] Robbins notes that "where once a neighbor would show allegiance to a political candidate by staking a sign to the front lawn, a user now clicks Like on a candidate's Facebook Page instead." But there is resistance to the idea of the like equating to agreement. As with "friending, users might "like" a comment for various reasons. Perhaps they find the comment amusing. Or liking is an acknowledgment that they have seen it or to report it to proper authorities.[736] Jayni argues that "just because you 'like' a post doesn't mean you 'agree' with it. 'Liking' a post means something different for everyone."[737]

Although the meaning behind a like is often nebulous, there are "real-world" risks that come with liking, retweeting, and sharing as they permeate *all* use of social media sites. Public figures are regularly being held to account for "retweeting" or "liking" content online. Recently, Rebecca Long-Bailey, Former Shadow Secretary of State for Education, was dismissed for retweeting an article containing an "antisemitic conspiracy theory."[738]

Indeed, users do not have to be public figures or celebrities to be punished for "shares" and "likes" that are deemed to be outside the scope of user-generated norms. In 2015, a man was fired by his employer for "liking a picture of a wolf jumper." He was told that he had "bullied the jumper's owner by 'liking' the 'inappropriate' photograph."[739] In addition, school students are

[735] Robbins, I P. "What is the Meaning of Like: The First Amendment Implications of Social Media Expression" (2014) *7 Fed Cts L Rev*, Vol. 123 pp.123-148
[736] Jayni, D. The Law and Leadership Institute Online "The Difference Between 'Like' and 'Agree'" 4 Oct 2017 accessed via https://www.lawandleadership.org/social-media-week-topic-3/2017/10/3/the-difference-between-like-and-agree
[737] Ibid.
[738] Walker, P et al. "Rebecca Long-Bailey sacking reignites Labour turmoil over antisemitism", (25 June 2020) The Guardian, accessed via https://www.theguardian.com/politics/2020/jun/25/keir-starmer-sacks-rebecca-long-bailey-from-shadow-cabinet
[739] Smith, L. "Man sacked for 'liking' Facebook picture of a jumper – and he was fired by TEXT" (3 Nov 2015) The Mirror, accessed via, https://www.mirror.co.uk/news/uk-news/man-sacked-liking-facebook-picture-6761774

being punished for their like history, with the 20 students suspended "after liking a threatening photo on Instagram" being one of many examples.[740]

The "like" (or equivalent) button fundamentally lacks nuance and has a panoply of meanings. There is no telling what the intention behind the "like" is or was. Was it because the user agrees with it, because the user disagrees with it, because the user wishes to save the post in order to return to it, or they have simply done it by mistake? The consequences of "liking" are just as far sweeping, other users may infer for themselves what this "like" means. Irrespective of the intention behind the like, or the way in which the like is perceived, the consequence of a "like" can have real-world implications.

6.2. The "Like" Button and the Risks it Poses to Judicial Users

The complexity around the "like" button is perhaps one of the greatest barriers to judges using social media, in both a personal and professional capacity. As Cooper notes, the "special danger[s] posed by social media" to judges relates to "the ability to endorse or 'like' other individual or organizational users."[741]

This complexity may best be contextualised within the prohibition on salaried judges "undertaking any kind of political activity or having ties with a political party."[742] When conducting themselves offline, judges must therefore not attend "political gatherings, political fundraising events, contribut[e] to political parties or speaking within political forums."[743] In addition, judges

[740] Grigonis, H. "More than 20 students suspended after liking a threatening photo on Instagram" (27 March 2017) Digital Trends, accessed via, https://www.digitaltrends.com/social-media/school-suspends-students-for-liking-threatening-post/
[741] Cooper, B P. "Judges and Social Media: Friends with Costs and Benefits" at p.30
[742] GtJC (2020), at p.12
[743] Ibid.

"should not participate in public demonstrations which would associate them with a political viewpoint."[744]

The nuance surrounding the "like" button, and whether this represents agreement or indeed "association" calls this guidance into question. It is fundamentally unclear as to whether a judge "liking" the post of a politician equates to their agreement of that politician's politics or agenda. It is equally unclear as to whether following The Labour Party (@UKLabour) means that a judge agrees with Labour's new manifesto for example. It is this nuance and complexity around action and effect online that poses unique risks for judges.

Judges must not attend political gatherings, protests, and events. But to what extent does participation in online groups, or engagement with posts and comments, also count as affiliation with a political party? Both the intention behind, and the effect of, a like is nuanced and complex. A judge may like a political candidate's post for a number of reasons, and as we have clearly established, not all of these reasons equate to "liking" in the traditional sense, or agreement with the post. In turn, individual users may interpret what the "like" means very differently from one another. To some, the "like" will signal agreement. To others, it may go unnoticed or be unremarkable. This is very different from attending a political rally for instance. Attendance at a political event clearly signals agreement or affiliation with that political party or belief. The guidance is clear that a judge ought not to attend a UKIP rally, but it is less clear whether "liking" a tweet from UKIP (@UKIP) falls under association with a political viewpoint, and if it doesn't – should it?

There is also little conversation as to the power and scope of the "like" button outside of this political context. For example, we might also want to consider whether a judge liking or sharing a post criticising a company's "new branding logo" makes them unsuitable to hear an intellectual property dispute between that company and another accusing them of copying their

[744] Ibid.

logo? Does sharing a meme mocking an "anti-masker" render a judge unsuitable for hearing a claim for judicial review, questioning the lawfulness of a government decision to make mask wearing compulsory in supermarkets? These examples are not tweets or posts from political parties or candidates, nor are they explicitly political posts at all, rather they are ambiguous posts that could be interpreted as humorous, or offensive, or neither, depending on who you ask.

As we have already discussed, the Judiciary favours an institutional, rather than individual approach and the way in which it currently attempts to deal with any risks that emerge from the "like" or "share" button is to rely on disclaimers. For example, "the fact that [they] follow a Twitter or Instagram account does not imply endorsement of any kind by the Supreme Court"[745] and they may "follow or 'like' you back if you follow or 'like' [them] – being followed by [them] does not imply endorsement of any kind."[746]

However, this disclaimer has only limited usefulness in practice, and it is highly unlikely that a personal disclaimer on an individual professional account would prevent any repercussions of liking or sharing a post on Facebook and Twitter. Certainly, disclaimers may waive liability, but they are unlikely to solve the problem of perception that the Judiciary is concerned with. Although providing a social media disclaimer might prevent legal ramifications of posting deemed to be offensive or defamatory for example, it does not stop other users from viewing these comments and likes and making their own assumptions based on this. Afterall, the Judiciary are concerned with maintaining the appearance of independence, impartiality and integrity, and a legal disclaimer does little to protect this appearance in the eyes of other social media users.

[745] The UK Supreme Court, "Our social media policy" See, "Following accounts" accessed via https://www.supremecourt.uk/terms-and-conditions.html#section-02
[746] HMCTS, "Social media use" see, "How we interact on our social media channels" accessed via https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/social-media-use

6.3. Does the Complexity Surrounding the "Like" Button Justify Restricting a Judge's Professional Access to social media?

Although advice issued in the GtJC to judges regarding their conduct online makes no mention of the complexity surrounding the "like" (or equivalent), we can establish that the "like" button presents challenges for judges who must "avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the Judiciary in general."[747] Not only might it be uncertain as to whether or not the "like" constitutes agreement with the post, it creates a new way for this potential agreement to become visible to the public. Therefore, a "like" may constitute the expression of an opinion – an opinion which may be nebulous and interpreted differently by different users, and this expression of opinion may be communicated exponentially to other users as the post is liked, shared, retweeted, and redistributed across the social media platform.

To an extent, the ability of the "like" button to reveal potential bias to the public creates a complexity with social media use those non-judicial users of the platform do not face, and as we have already discussed, the concerns around liking and the implications it has on the perception of impartiality cannot be easily reconciled. In this way, the complexity around the meaning of a "like" poses the most significant challenge to the idea of judges engaging on social media. So, does restricting professional access to social media prevent this? In short, it does not, not least because as we have already considered, there is little distinction between personal and professional use online and personal engagement with social media will inevitably involve "liking" or interacting with the comments and posts of other users. Aside from this, there is an inevitability to the digital footprint of future judges. Every "like" and "share" that current legal professionals undertake will form a permeant history accessible to the public. As discussed in the previous

[747] GtJC (2020), at p.18

chapter, this means that though guidance that restricts judicial officeholders from engaging professionally online may be seen as a solution now, in the future, this will not provide an answer.

Perhaps it is no comfort to state that the “like” and the meaning surrounding it causes problems and concerns for every user, irrespective of their professional status. As we discussed above, politicians, students and every day social media users are being held to account for the posts that they “like” and “share”, with some users finding that an online “like” can have very real offline consequences.

This thesis is unable to solve the complexity surrounding the “like” button and what it may or may not imply about agreement or affiliation with political or non-political posts and users. However, it does provide us with an opportunity to acknowledge that the “like” button will present problems and concerns for the future Judiciary. Restricting professional access does not cure these problems, and we must acknowledge this as an area that must be considered by the Judiciary in order to provide its individual office holders with clear guidance and education as to the potential meaning of a “like”, and whether “liking” a post is, or ought to be, grounds for judicial recusal.

Overall, we must think about the role that we see judges playing in our society. Would we prefer that judges isolate themselves from “liking” posts and engaging with the tools of social media to prevent compromising the *appearance* of independence, impartiality, and integrity? Does this mean that the desire to protect perceptions comes at the expense of meaningful and informed engagement with the Fifth Estate and what does this tell us about our Judiciary in the UK?

7.0. Transparency or "TMI"?[748]

One of the key justifications for restricting judges' access to social networks is that the online arena opens the possibility of improper conduct being exposed to the public, thus compromising the public's confidence in the legal system. The Guide to Judicial Conduct states that judges "must avoid expressing opinions which… could damage public confidence in their own impartiality or in the Judiciary in general."[749] In other words, there is fear that heightened scrutiny might reveal impropriety. However, justice must not merely be done, but must also be seen to be done. Transparency is a necessary component of visibility. As Kopf states, "a court finds its proper place in democracy only when the court is transparent."[750] Measures, such as live streaming from the Supreme Court,[751] have already proven that technological advancements may be used to bolster visibility of the Judiciary. So, although the fear that greater transparency will reveal impropriety is justified, we might turn the original justification for withdrawal from social media on its head and argue that there is a possibility that visibility may enhance the public's confidence in the Judiciary.

Judges must act properly and within the, albeit nebulous, constraints of independence, impartiality and integrity, and the public must also see that this is so. Engagement with digital networks inherently creates new possibilities for exposure and visibility and in this way the internet becomes a "two-edged sword"[752] for the Judiciary. Social networks can reveal existing misconduct or producing new forms of misconduct that might be revealed to the public. Engagement goes hand in hand with exposure and where bad behaviour is present, the internet provides a resource

[748] See Collins Dictionary Definition, TMI is an acronym for "Too much information" usually given by a social media user online.
[749] GtJC (2020), at p.19
[750] Kopf, R. "Judicial Transparency and Blogging Judges" (2015) Litigation, Vol. 42, Issue 1, pp.6-9, at p.6
[751] The Supreme Court, Video on Demand *https://www.supremecourt.uk/watch/video-on-demand.html*
[752] Gibson, J. "Social Media and the Electronic "New World" of Judges" (2016) International Journal for Court Administration, Vol. 7 No. 2, at p.2

wherein the traditional notions of privacy are broken down and this behaviour is exposed to the public.

Hull claims that "the need for transparency in the law must be separated from the desire for transparency as to the individuals who administer the law."[753] To Hull, the right of the public to receive insight into the personal activities and behaviour of judges must be separated from the right to receive information on matters of public concern. This argument distinguishes between the appropriateness of scrutinising a judge's personal conduct when compared to their professional conduct. Hull argues that while an open social presence online undoubtedly provides some personal and professional benefits to the judge, the impact on the legal system itself must take precedence. So, it is necessary to restrict the activity of judges online in order "to preserve the integrity of the judicial system."[754]

However, this separation of professional and personal conduct and the perceived impact this has on the integrity of the justice system seems flawed. The personal conduct of a judge is inherently linked through the concepts of independence, impartiality, and integrity, to their professional capacity. As the GtJC states, the principle of independence guides the "way in which [judges] discharge their judicial functions and as to the conduct of their private lives."[755] Some, although admittedly not all, aspects of a judge's personal life must be transparent if the public is to be assured that they are conducting their professional role with integrity and in an independent, impartial way. Further, Hull's approach fails to appreciate how heightened scrutiny and transparency of personal and professional conduct is also capable of bolstering public confidence in the Judiciary and the legal system overall. Cooper describes disclosure as disinfectant, where "nothing provides stronger evidence to the parties of [judicial] impartiality than open disclosure."[756]

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[753] Hull, B. "Why Can't We Be Friends – A Call for a Less Stringent Policy for Less Stringent Policy for Judges Using Online Social Networking" (2011) 63 Hastings LJ 595, at p.194
[754] Ibid, at p.194
[755] GtJC (2020), at p.6
[756] Cooper, B P. "Judges and Social Media: Disclosure as Disinfectant" (2014) *SMU SCI. & Tech L Rev*, Vol.17, p.521, at p.533

Indeed, “the more the public knows about judges’ political views and personal habits, the better informed we will be about the basis for their decisions.”[757]

So, we might distinguish between two separate instances of misbehaviour. Firstly, conduct that is deemed to be improper that is revealed to us through social media but that also exists in the “real world” and secondly, improper conduct that is online specific. This is where conduct is deemed to step outside of the parameters of independence, impartiality and integrity using online standards. The former can be easily interpreted as a benefit of engagement online. If participation and investigation via social media platforms reveals to us a conflict of interest that exists in the offline world, then this is a good thing. Social media is used in this instance as a tool to scrutinise judicial conduct in the offline world and ensure that their conduct is in line with the standards of propriety expected of them, and ultimately, cases are decided fairly.

The latter scenario is more complex. Social media has presented new ways in which judges might transgress the parameters of the principles of independence, impartiality, and integrity. In this sense, judges might undertake bad behaviour online in a way that they would not have otherwise conducted themselves offline. Arguably there would be no need for transparency if the judge were not afforded the opportunity to behave badly in the first place. However, this denies one of the first assertions of this chapter, that social media participation, in one form or other, is inevitable.

8.0. Conclusion

Upon reading this chapter, one might be forgiven for thinking that the solution is straightforward: judges should be prevented from engaging with social media in both a personal and professional context in order to limit the possibility of any of these risks. But this is not an elegant solution at

[757] Ibid.

all. Whilst it might solve some immediate problems, it certainly does not prepare us for the Judiciary of the future, who will come with a fully-fledged social media background that can be discovered by any social media user who wishes to look. But even more importantly than that, it stifles any potential that the Judiciary might have to emerge from these risks as a modern constitutional participant in our society. Yes, the risks are numerous and complex, but restricting access further will only push these problems onto the next generation of judges, and as we shall now see, this fails to take into account the potential benefits that social media provides its users and the ways in which this might enhance the public's perception of an independent and impartial Judiciary in the UK.

Chapter V: The Potential Benefits for Individual Judges Engaging with the Fifth Estate

"As modern society grows increasingly complex, it becomes necessary for the Judiciary to diversify, in order to bring a wider range of skills, perspectives, and experiences into the pursuit of justice."

- Arden, M. *Common Law and Modern Society: Keeping Pace with Change*[758]

1.0. Introduction

The risks associated with social media use have been considered and disregarded as providing a legitimate justification for restricting judges use of social media in their professional capacity. Although these risks present nuanced and sometimes compelling reasons to restrict access to social networks, they are rooted in fear that the perception of the constitutional principles of independence, impartiality and integrity will be challenged and that as a result the integrity or *majesty* of the institution overall will be compromised. In this way, the Fifth Estate is viewed by the Judiciary as a site of power capable of eroding at the barrier of perception, and as Griffith claimed, "this is when damage to the Judiciary is done."[759]

But one thing is certain, the Fifth Estate is well established as a site of constitutional power. At the beginning of the millennium, it may have been claimed, or indeed hoped, that social media was a fad or passing craze. This is no longer a realistic claim or assessment of the role that social media and technology play in our modern society. There is an inevitability to social media engagement, not simply because of its permeating nature in society, but because the future of the Judiciary will be formed from current legal professionals and students for whom the Fifth

[758] Arden, M. *Common Law and Modern Society: Keeping Pace with Change* (OUP, 2015) at p.217
[759] Griffith, J A G. *The Politics of the Judiciary,* at p.57

Estate plays an integral part in their social construction. The Fifth Estate exists, it is powerful, and it is not going anywhere, anytime soon.

If we can acknowledge the inevitability of participation online, we might move away from a relationship that is defined purely in terms of its risk and the ways in which it may *undermine* the role of the Judiciary in society. Instead, we might look forward, and towards a socially integrated and engaged Judiciary.

To this end, this fifth and final chapter will consider the potential benefits that come with professional engagement with social networks. At a time when judges are often criticised for being "out of touch",[760] it is possible that social networks present an untapped resource for judges to *(1)* develop and demonstrate civic awareness, *(2)* inform wider demographics about the workings of the UK's legal system *(3)* better understand the platforms being used as evidence in cases, and therefore bolster confidence in the legal system on the whole.

2.0. Developing and Demonstrating Civic and Social Awareness

Civic awareness can be defined as the moral or civic responsibility of an individual to recognise themselves as a member of the wider social fabric. Such an individual is willing to see the moral and civic dimensions of issues and to make or justify informed moral and civic judgments.[761] Undoubtedly, civic awareness and engagement is a desirable human characteristic, judges as humans are not exempt from this. In some ways, we can see overlap with the concepts of integrity expected by the GtJC, although civic awareness refers not simply to the conduct of oneself but as to how an individual can see larger social problems to be at least partly their own.[762]

[760] See "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 (2016, 3 November)
[761] Edited by Ehrlich, T. *Civic Responsibility and Higher Education*, (The American Council on Education and the Oryx Press, 2000) at p.*XXVI*
[762] Ibid, at p.*VI*

Judges should therefore be expected to have regard to the impact of their decision making on the individual before them and society on the whole but must at the same time maintain their appearance of independence and impartiality. It is the paradoxical nature of these requirements that pose difficulties for both the offline and online judge. Judges ought not "be cut off from the community that they serve but must, at the same time […] maintain a certain distance from those who come before them."[763]

Social media provides a feedback tool for users and in this way, civic awareness can be both developed and demonstrated online. Social networks allow the user to enhance knowledge and understanding by creating greater access to information and discussion. The same networks can also be used to communicate this enhancement. In this way, the internet is a valuable resource for the Judiciary wherein judges can inform and be informed through online engagement.

As such the internet is a valuable tool for connectivity, but it is also capable of breaking down barriers in ways that the offline world cannot. As discussed in Chapter II, social media platforms provide anonymity, give access to wider audiences, and operates cross-jurisdictionally. Additionally, as discussed in Chapter IV, these platforms can at times promote combative interactions in a constantly evolving way. So, judges might find ways to develop and display their civic awareness of the impact that legal decision making has on the community to wider audiences, but in doing so open themselves up to the potential of wider or indeed, more hostile, public scrutiny.

So, what can be done about it? Clearly, social media presents nuanced risks that are amplified when considering judicial users. However, do these risks outweigh the potential benefits of using social media to develop understanding of wide-ranging social issues and demonstrating this understanding to other users of the platform?

[763] Eltis, K. "Does Avoiding Judicial Isolation Outweigh the Risks Related to "Professional Death by Facebook"? at p.638

This section will argue that the current restrictions on judges using social media in their professional capacity tip the scales too far in favour of isolationism at the expense of recognising the importance of connectivity in the digital age. In other words, fear of increased scrutiny leads to decreased connectivity. But this decreased connectivity might actually be contributing to the problem that it is directly trying to prevent. Isolating judges from the "digital world" might lend credence to the argument that judges are indeed, "out of touch."[764]

2.1. The Ethical/Moral Role of Judges

In *the Children Act*[765] written by Ian McEwan, the main fictional protagonist Fiona Maye, a Family Division High Court judge, takes a trip to the hospital where she visits with the appellant before her in a case. Here she attempts to determine whether he truly wishes to decline life-saving medical treatment at the behest of his devoutly religious parents. In some ways Fiona's actions present a nightmarish scenario for the protection of judicial independence, impartiality, and the notion of non-partisanship in judicial decision-making. In others, Fiona challenges us to reconsider the role of the judge, not merely as an arbiter of impartiality, but as an active and informed participant in society.

As envisaged by McEwan, judges are being increasingly exposed to and are expected to consider morally problematic and sensitive issues. This is especially true when we consider the Human Rights Act 1998 and the fact that judges must make "value-laden judgments" as a result.[766] Judges are being faced by moral dilemmas with wide reaching social implications and interest. We might use the recent judicial decision given by Judge Anthony Hayden in *Alder Hey*

[764] See "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 (2016, 3 November)
[765] McEwan, I. *The Children Act* (Nan A. Talese, 2014)
[766] Arden, M. *Common Law and Modern Society: Keeping Pace with Change,* at p.270

Hospital v Evans [767] as an example of this, wherein the High Court heard an appeal launched by Alder Hey Hospital seeking the controversial removal of life-support for a young infant in their care. The decision made by Justice Hayden removed parental responsibility from Mr. and Mrs. Evans and concluded that "continued ventilatory support [was] no longer in Alfie's best interests."[768] The decision given by Justice Hayden and upheld in the Court of Appeal, was met with wide-spread media attention[769] and triggered protests and roadblocks outside of the hospital. In response to the decision several petitions including a change.org and Facebook shared petition, titled "For a different judge to reassess Alfie Evans' case" was signed by 51,862 online users in 2018.[770]

Rather than debate the merits of Hayden's decision in the *Evans* case, it is interesting to look at this judgment and the reaction on social media from the perspective of the individual Facebook users who took to social media as a way to combat, or remedy, a judicial decision they believed to be unfair or lacking. This tells us that individual Facebook users believed that a social media led protest or campaign was capable of changing the outcome of this decision. It is clear that the individual social media users either did not agree with the decision or believed in part that it was Judge Hayden's personal opinion or actions, as opposed to legal interpretation, that undermined this decision and resulted in its "failings." The tells us a lot about the role that the public, or more specifically social media users, see ethics or moral judgement playing in legal decision making. Therefore, we might ask whether or not judicial independence truly generates legitimacy for judicial decision making, especially where the case is highly contested or involves controversial moral or ethical judgments.

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[767] *Alder Hey Hospital v Evans* [2018] EWHC 308 (Fam)
[768] Ibid, para.[1]
[769] "Who was Alfie Evans and what was the row over his treatment" (28 April 2018) *https://www.bbc.co.uk/news/uk-england-merseyside-43754949*
[770] "For a different judge to re-assess Alfie Evans' case" Change.org *https://www.change.org/p/uk-parliament-for-a-different-judge-to-reasses-alfie-evans-case?recruiter=422027126&utm_source=share_petition&utm_medium=copylink&utm_campaign=psf_combo_share_message&utm_term=share_petition*

2.2. Social Media as a Tool for Developing Social Awareness

Judicial decision making does not exist in a vacuum, many decisions "resolve issues which have consequences far beyond the particular case in which the judgment is given." The law has an essential role in society, and it should therefore "be developed to meet changing conditions. In other words, it must connect with society."[771]

This heightened social awareness may be integrated through promoting and enhancing judicial diversity in terms of ethnic, cultural and gender demographics. But it is also essential that judges, while in office, keep pace with social development. Social media has become an everyday component of life and has been integrated into the ways in which individuals connect with each other.

All judges who are not participating online are being kept from an essential tool for heightening social awareness and therefore developing the common law in a way that responds to society in meaningful ways. Arden remarks that whilst social awareness may be gained by reading up on issues, awareness gained in this way is rarely a substitute for that obtained by experience.[772] Judges must themselves participate in society to be fully able to respond to the challenges that society faces. This is true not just in the offline world, but in the online world, where society is changing and connecting in new and innovative ways.

Civic awareness is required, "because society has itself changed."[773] As the previous chapter noted, relationships are now much more varied and complex. For example, commonly accepted standards and meanings of family have moved "away from the traditional idea of a nuclear family."[774] In addition, as Arden notes, there have been immense technological developments and advances in medical and other sciences. Therefore, it is inevitable that judges

[771] Arden, M. *Common Law and Modern Society: Keeping Pace with Change,* at p.271
[772] Ibid, at p.272
[773] Ibid.
[774] Ibid.

will need to develop the common law as society itself progresses. If they are unable to do so, then there is "a risk that the law will not respond to society's needs or that it will be unworkable in practice. An awkward judgment can block what may be socially desirable progress."[775]

Undoubtedly social media, when used irresponsibly and without due diligence, can be a poor source of information gathering. As asserted in previous chapters, social networks are combative, give rise to group polarization and can often favour fiction over fact. But this is not about information gathering in a micro sense. Instead, we should be focusing on good use of social media as a macro cosmic view of society – a view that can only be achieved through active participation. This thesis does not reach so far as to suggest that social media sites, like Facebook, would be an appropriate tool for judges to conduct research into specific topics or take a measure of social perception around a moral issue and as a result, directly influence their decision-making. But social media does open up a view of society, the issues that are facing it and the people who exist within it, in a new and continuously evolving way.

In order for judges to be true citizens, they must also be netizens. They must understand the new ways in which people connect and interact with one another, have insight into the realm of cyberspace, and ultimately appreciate the modern challenges to society.

2.3. Social Media as a Tool for Demonstrating Civic Awareness

Not only might social media provide a tool for judges to better understand the society in which they exist, as a peer-to-peer network, it also provides opportunity for judges to feed this back to society. The public is unlikely to view judges as capable of developing the law where judgments are given exclusively by individuals who are, or at least appear to be, disconnected from society. As Arden claims, the "common law is something common to all, and is thus something in which

[775] Ibid, at p.271

all members of society have a share."[776] Demonstrating that judges have an awareness of this reality is crucial, if the Judiciary is to rise to the current challenges it faces. As discussed in Chapter I, the Judiciary's evolving moral role raises the expectations of the public. If the Judiciary is to be tasked with weighing up the values of individual rights, understanding the realities of new relationships and even making life or death decisions, then they must also demonstrate their ability to do so considering not just the law, but the common values shared by society. The current institutional approach to engagement with social media, as discussed in Chapter III of this thesis, is unsuitable for demonstrating social awareness, given that each institutional profile is administered by communications teams rather than members of the Judiciary themselves.

This removes the individual judge from the process, impacting on both the judge's ability to make use of and better understand the platform, and also demonstrating to the public, or the followers of these institutional accounts, that judges are not the voices or individuals behind this engagement. In some ways, this makes the institutional engagement lacklustre or disingenuous; followers do not hear from, or learn from, the judges themselves. Once again, the judges seem "out of touch" or out of reach from the public in whose name they administer justice. In trying to protect the appearance of judicial independence in order to legitimise the judicial role, this very same legitimacy may be compromised

Again, this does not mean that each judge should, within their professional capacity, take to Twitter to discuss the moral issues and dilemmas associated with specific cases brought before them. Instead, social media should be viewed as a tool that judges can use, in their professional capacity, to demonstrate an understanding of the changing norms and expectations of what is deemed to be right or wrong in modern society.

Social media need not be a platform with which to share and discuss controversial views, but it may be a space where different viewpoints and perspectives are heard, opinions are

[776] Ibid.

challenged, ideas are subject to scrutiny and ultimately the user becomes better and more widely informed as a result. An individual judge's mere presence on social media demonstrates to other users of that platform that they are socially aware. Good participation on that platform further demonstrates that they are socially competent.

Indeed, not only might judges be better informed about society, but they might also find that digital networks open up the possibility of communicating this to the public. Whilst we may debate the normativity of judicial politicization, it is much less controversial to assert that judges *ought to be* actively involved and engaged with their local and wider community. As has been demonstrated throughout this thesis, judges play an essential role in society and this importance has only grown over the last two decades. Whether we deny their politicization or not, judges clearly make important decisions every day that will affect individuals and make an impact on society.

This makes it vitally important that judges are able to communicate with the public in a meaningful way, not just to develop their own grasp of social fluidity, but to communicate the role that the Judiciary play in society to the public. The way that the Fifth Estate may be used to enhance that communication undoubtedly requires a reimagining of the "Judiciary's engagement with those [they] serve", and as Dillard notes, this "begins with putting to rest the notion that it is a good idea for judges to essentially separate themselves from the rest of society."[777]

We know that judges engage in some ways with the public when they write judgments, give lectures, or attend events. But the "reality is that there are only so many events that a judge can attend…and only so many hours in the day."[778] The Fifth Estate should therefore be seen as a tool, capable of supplementing public outreach and enhancing the demographic of audiences to whom the judge and the justice system become available. Developing and demonstrating civic

[777] Dillard, S A. "#Engage: it's Time for Judges to Tweet, Like, and Share" (2017), *Judicature* Vol.101, No.1 at pp.10-13, at p.10
[778] Ibid.

and societal awareness need not always be done online, nor is it in every circumstance best achieved online. However, social media does provide an invaluable tool that is currently going unused by the Judiciary in the UK. Digital networks are first and foremost *networks*. The Fifth Estate can be used to build genuine and meaningful networks, connections, and relationships with the community in a way that enhances or supplements offline engagement.

As the next section will consider, the ways in which the Fifth Estate may be used as an effective tool to build, develop and demonstrate social awareness and connectivity to the public enhances not just the perception of the Judiciary as capable of meeting the demands of modern society, but expands the scope and possibility of informing and inspiring new generations, from a variety of economic and cultural backgrounds, to understand and participate in the advancement of the UK's legal system.

3.0. Informing Wider Demographics about the Legal System

As outlined under *The Guide to Judicial Conduct*, when judges consider participation in "Public Debate and the Media"[779] judges must "exercise their freedom to talk to the media with caution" and "should not air disagreements over judicial decisions in the press."[780] They must refrain from engaging in "politically sensitive issues" and should also be aware that "participation in public debate on any topic may entail the risk of undermining public perception in the impartiality of the Judiciary."[781]

There are limited circumstances in which exceptions might apply. The Guide acknowledges instances where the functioning of the courts is "the subject of necessary and legitimate public consideration, and appropriate judicial contribution to this debate can be

[779] GtJC (2020), at p.15
[780] Ibid.
[781] Ibid.

desirable."[782] There is, "in principle… no objection to members of the Judiciary speaking on legal matters, which are unlikely to be controversial, at lectures, conferences or seminars"[783] for example.

So, how might engagement through social networks fall all under this scope of desirable and appropriate judicial contribution to public debate? Clearly social networks present hazards, but we might say that "those who favour serious restrictions" on judges' access to social networking "are all too often guilty of not understanding the technology itself or its benefits as a means of social engagement."[784]

We can easily identify ways in which offline contributions differ greatly from discussion facilitated through social networks. Articles and lectures are likely to go through several stages of editing, proofing and review prior to delivery or publication. In comparison, information can be disseminated immediately and without the need for factual accuracy, on platforms such as Twitter for example, in mere seconds. But in what ways are they similar? Are comments posted on blogs and microblogs really different from lectures or seminars given in real-time? In both instances a certain inclination to agree or disagree with an idea, possibly a political one, is revealed to the public. Indeed, the lecture might be recorded, uploaded online, and distributed via social networks anyway. As U.S district Judge Koph comments, blogs or micro-blogs might not be "materially different from law review articles or speeches given by judges on legal topics."[785]

The key difference is that social networks provide a medium where this contribution to debate may be communicated to internet users worldwide, from a range of age, gender, and economic demographics, rather than the few fortunate enough to have access to the live lecture. Although fear of the broad reach of social media seems justified, as Judge Reyes Jr. claims,

[782] GtJC, p.14
[783] GtJC, p.15
[784] Browning, J G. "Why Can't We Just Be Friends – Judges' Use of Social Media" at p.490
[785] Kopf, R. "Judicial Transparency and Blogging Judges" at p.6-9

judges already engage with the public through a variety of forums, but social media's reach makes for "an ideal medium for judges to inform the public of his or her work."[786]

3.1. Accessing Wider Demographics

The Sentencing Council, in their August 2019 report *Public Knowledge and Confidence in the Criminal Justice System and Sentencing* outline the "use of social media as an effective channel for education about sentencing to target younger people" as one of their recommendations. [787] Similarly, a recent article in The Law Society Gazette titled "Judges Go Online to Explain Their Modern Mission" outlines the online open course that the Judiciary, alongside King's College London, have announced. The article cites Lord Burnett's claim that:

> "It is vitally important that the public understands what a modern judge's role is so that they can have confidence in the decisions they make. The work of the Judiciary is often surrounded by myths based on an outdated view of judges."[788]

In this way, the internet may be a valuable tool in debunking common misconceptions about the role of the Judiciary and introducing them to a new and younger demographic. Digital networks present a medium whereby judges can disseminate factually accurate, expert information about specific areas of law, the role of the judge in court proceedings, and the relationship of the Judiciary in relation to the other branches of government to marginalised groups of society. As the United Nations acknowledges in their *Resource Guide on Strengthening Judicial Integrity and Capacity*, information must not simply be communicated but must be "disseminated in a format

[786] Reyes, P M Judge. "Judges on Social Media" (2019) ***Judges' Journal***, Vol. 58, Issue 3, pp.20-24
[787] Sentencing Council, "Public knowledge and confidence in the criminal justice system and sentencing" (August 2019) *https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf*
[788] Cross, M. "Judges go online to explain their modern mission" (1 October 2019) Law Gazette *https://www.lawgazette.co.uk/news/judges-go-online-to-explain-their-modern-mission/5101627.article*

that is easily accessible for the intended audience"[789] especially for those who "do not have a legal background and may often have limited literacy."[790]

Encouraging active participation with Web 2.0 technologies may allow judges to take control of their narrative and provide the public with correct and "useful information"[791] regarding judicial decisions and the role of the Judiciary. This is mutually beneficial for both the perception of the Judiciary as representative and socially aware, and for the public who are kept informed with accurate, up-to-date information about the workings of the individual judge and the legal system on the whole.

To an extent, the institutional social media accounts discussed in Chapter III aim to fulfil this role. The HMCTS and Supreme Court Twitter, Facebook, and Instagram etc, accounts go some way towards communicating the work of the Judiciary and informing wider demographics about the functioning of the courts and legal system. However, social media is ultimately a space for "individuals who share their views with other Internet users on a variety of different issues."[792] Although a collective engagement with the public online may enhance public understanding and reach wider demographics, the key is in *individual* participation.

Whilst a collective response may reach, for example the Supreme Courts 12.9 thousand Instagram followers, the "wider public understanding of the working of the law […] can be enhanced by the participation of judges" themselves.[793] Individual judges already contribute, and are trusted with, enhancing the public's understanding of the legal system through the extra-judicial activities that are permitted under codes of conduct, such as "lectures, conferences or

[789] UNODC, "Resource Guide on Strengthening Judicial Integrity and Capacity" (2011)
[790] Ibid.
[791] Kopf, R. "Judicial Transparency and Blogging Judges" at p.6
[792] Al-Rodhan, N. *The Emergence of Blogs as a Fifth Estate and their Security Implications*, at p.12
[793] Media Guidance for the Judiciary (March 2012)
https://www.whatdotheyknow.com/request/125047/response/307849/attach/8/mediaguide2012%201.pdf

seminars organised by professional bodies, or by academic or other similar non-profit making organisations."[794]

It is apparent that individual contribution to the "administration of justice and the functioning of the courts" is a necessary, or indeed desirable, component of "legitimate public consideration" and understanding.[795] However, this takes a very narrow view of the *public.* A lecture given at a university, for example, is a far cry from a lecture being freely and publicly accessible to all.

Judicial public outreach isn't truly *public*, or *wide-reaching*, where it is targeted at a small subset of professionals, academics, or law students. Certainly, these groups have a key or vested interest in hearing from a judge, out of professional or educational interest or as a way of contributing to understanding and debate. But this does not resolve the need to access wider demographics or contribute to a wider public understanding of judgments and the working of the justice system. Allowing judges to speak, lecture or present in a professional capacity at a university lecture, but prohibiting them from professionally blogging or micro-blogging, speaks to a privilege that the Judiciary are oft to deny.[796]

Fundamentally, a university lecture may be presented once, to a full lecture theatre in the hundreds, to fee-paying students. However, the scale of this presentation cannot compare to social media's reach, where a post may reach millions of users allowing them to immediately and freely access this information. As previously discussed, this breadth, scale, immediacy and virality of social media content presents nuanced risks for the Judiciary, but these risks manifest in terms of potentially compromising the appearance or perception of the independent judge. Surely, this

[794] GtJC (2020), at p.14
[795] Ibid.
[796] See for example, Judicial Diversity and Inclusion Strategy 2020-2025, Foreword by the Lord Chief Justice, "…Many judges, magistrate and members of the legal professions undertake initiatives to encourage the best people from diverse backgrounds to apply for a and secure judicial appointment…" at p.4 accessed via https://www.Judiciary.uk/wp-content/uploads/2020/11/Judicial-Diversity-and-Inclsuion-Strategy-2020-2025.pdf

desire to protect the image of an independent and impartial Judiciary ought not to come at the expense of a more powerful route to judicial legitimacy via wider public outreach and understanding. The current permission of lectures, but prohibition on blogging/micro-blogging, disproportionally impacts on the engagement and understanding of those without access to higher education or professional membership.

In addition, not only might *more* profiles reach *wider* demographics, but *more* profiles mean *wider* representation. Currently, the institution is represented by the HMCTS, and Supreme Court's social media accounts and so individual social media users have access to this small subset of judges, who may hear cases of great importance, but who are far from representative of the Judiciary (or indeed the public) on the whole. Social media provides a currently unused tool through which judges from a variety of courts, irrespective of hierarchy, may engage with wider subsets of the community. A wider demographic of the Judiciary is able to engage with a wider demographic of the public.

In promoting professional engagement, each judge can choose to declare their professional status, can inform wider subsets of the public about the individual role that they play in the justice system, and can better inform wider groups about the difference between courts and the court process. In this way active participation online becomes a credible and diverse source of expertise which the wider public may look to in order to better understand the judicial role, and the place that individual judges have within the justice system.

3.2. Enhancing the Accessibility of Judgments

Cuts to legal aid and the proliferation of litigants in person and self-representation also make a convincing argument for reimagining the ways in which judgments are delivered to the public. At present:

> "Open access to case law in England and Wales is in a very poor state of health, both in terms of the amount of case law that is freely accessible to the public and in terms of the sustainability and development of the open case law apparatus in this jurisdiction."[797]

The introduction of the British and Irish Legal Information Institute (BAILII) in 2006 went some way to improving the accessibility of judgments, however, as Hoadley notes, "the simple fact is that nowhere near enough judgments from England and Wales's superior courts" are available on BAILII. One of the greatest obstacles according to both Hoadley and Arden is the failure to acknowledge "that a problem even exists" with accessibility. As Arden notes, one of the first steps in remedying the inaccessibility of judgments in the UK is to "recognize that there is a problem" and that this requires some rethinking on some of the basic questions of, to whom are the judgments of the courts truly addressed?[798] What is the purpose of the legal system and who does it serve? Arden compellingly argues that judgment writing ought to serve the community in general and not simply the legal profession or fellow experts in the law.[799]

Judgments should be accessible to the public, but in addition judges ought to consider the audience they are addressing. This is of course, not simply those party to the case before them but by extension, the public to whom access to justice is paramount. Although BAILII has gone some way towards providing free access to judgments, this provision does not tackle the increasing need for judgments to be accessible in both their form and language. Social media is currently an underexplored way of providing access to judgments using natural language.

As Arden says, "changes in society increase the complexity in decision-making, and so, judges must be able to explain the reasons for their decisions in accessible language so that the

[797] Hoadley, D. "Open access to case law – how do we get there?" (Nov 2018) Info Law, accessed via https://www.infolaw.co.uk/newsletter/2018/11/open-access-case-law-get/
[798] Arden, M. *Common Law and Modern Society: Keeping Pace with Change*, at p.244
[799] Ibid.

important parts can be read and understood by laypeople, and not just by other lawyers."[800] For example, a head note on a published report may provide explanation for a layperson, however, as Arden notes, these head notes are produced by commercial publishers and are therefore only available to subscribers to that service.[801] Whilst Supreme Court judgments are published with a "press release containing a summary of the issues and principal reasoning in the judgment… this rarely happens with judgments of the Court of Appeal or the High Court."[802] This means that a lay-person reader may not have access to explanatory material, may find that a pay-wall prevents them from accessing the judgment in the first place or may have to input huge amounts of time "reading and analysing" decisions in order to "work out what the law is."[803]

The inaccessibility of judgments in the UK is a real concern, not least because "courts all over the world look to English law…as the preferred legal system." Leading courts across the world, such as the Conseil d'état in France, are also making steps to enhance accessibility having recently launched a consultation into how judgments could be made more accessible to readers inside and outside France.[804]

There have been plentiful academic projects exploring the ways in which judges in the UK might reimagine the way that they write and deliver judgments. Included in this is Stalford's notable contribution to advancing children's rights and access to justice. Stalford notes the judgment given by Sir Peter Jackson in *Re: A (Letter to a Young Person),*[805] taking the form of a letter to a child, as being an innovative model of judicial decisions that aim to achieve justice. Ensuring that the judgment was written in accessible language and in an approachable format ultimately enhances "children's status and capacities as legal citizens through judgment

[800] Arden, M. *Common Law and Modern Society: Keeping Pace with Change*, at p.271
[801] Ibid, Section C, Part VI, 16 at p.244
[802] Ibid.
[803] Ibid, at p.242
[804] Ibid, at p.244
[805] *Re: A (Letter to a Young Person)* [2017] EWFC 48

writing."[806] So one way for judges to reimagine decision making may be to have greater regard for the target audience, in this case a child, and explain the legal principles accordingly using language that the child before the case, and other children who may be affected by similar issues, may be capable of understanding. The same principle might be said to apply for individuals who have learning difficulties, disabilities or impairments that may prevent them from understanding long and complex judgments.

Another way of enhancing the accessibility of a judgment might be to shorten it. Without a doubt, over the last century judgments have become longer, or as Arden notes, "they have almost trebled" in size.[807] The longer a judgment is, the more time readers must spend reading and analysing it, this expenditure of time and money "makes legal services more expensive" and ultimately the judgment becomes accessible for fewer readers. Occasionally, long judgments are inevitable given the "sheer complexity of the issues arising in modern litigation" but many judgments are often "longer than they need to be."[808] So, judges ought to strive to achieve both excellence and succinctness in order to widen the accessibility of judgments for all those party to the case and for lay-persons who may also be concerned with the judgment.[809]

The ways in which judgments may be made more accessible include, using accessible or natural language appropriate for a variety of age groups or learning capabilities, or to shorten the judgment itself. In some ways, the Fifth Estate provides an interesting resolution to this.

We have already established those social media platforms are widely accessible and currently populated by 53 million users in the UK alone. Aside from the cost of internet access, platforms such as Facebook and Twitter are currently "free" services, with there being no up-front

[806] Hollingsworth, K, Stalford, H. "'This case is about you and your future': Towards Judgments for Children" (2020) *MLR*, Vol. 83 Issue 5, p.1030
[807] Arden, M. *Common Law and Modern Society: Keeping Pace with Change*, at p.241
[808] Ibid.
[809] Ibid, at p.242

cost to the user themselves given that revenue is generated through advertising and data collection.

In addition to widening the accessibility of the judgments themselves, social media might also enhance the way in which, and the language through which, judges may be able to communicate case summaries, explanatory notes, or the judgments themselves. Platforms such as Twitter require concision and precision given that users are bound by upper word limits on posts. Social media might also provide judges with new electronic tools, such as the ability to upload explanatory images or documents and use voice notes or audio functions. Perhaps we might reach even further and suggest that emojis might be used to communicate outcomes concisely, given that there is some scope to argue that emojis are very "useful for enhancing and enriching the text of our contemporary digital conversations and interactions" or may in fact stand-alone as a "visual language."[810]

The idea of delivering judgments in this way would certainly challenge the boundaries of what many would consider the adequate delivery of justice in the UK, and to some the idea of social media judgments might seem dystopic. However, as the UK continues on its path of uncertainty with the COVID-19 crisis and the contingency methods in place, such as virtual Zoom hearings, begin to feel less like a "stand-in" and more like the way of things for the foreseeable future: the UK might not be too many steps away from a reality of social media justice as we might first think.

Currently in China, entire litigation processes can be conducted online, "including filing and service of documents…trial, judgment, enforcement, appeal, and other processes."[811] Alongside what Zou terms China's "avant-garde courts", entire cases are currently being heard on a "mobile court app" which can be downloaded via China's most popular social media app,

[810] Cohn, N. "Will emoji become a new language?" (13 October 2015) BBC Future, accessed via https://www.bbc.com/future/article/20151012-will-emoji-become-a-new-language
[811] Zou, M. "Virtual Justice in the time of COVID-19" (16 March 2020) Oxford Business Law Blog, accessed via https://www.law.ox.ac.uk/business-law-blog/blog/2020/03/virtual-justice-time-covid-19

WeChat. Facial recognition authenticates parties, and they are able to communicate directly with the judge by sending text or audio messages and uploading evidence on the app. Indeed, the entire judgment is delivered via the app.[812] As Zou argues, one of the keys goals of "China's Smart Courts" is to improve access to justice, to increase the courts' quality of services and their accountability, and perhaps most importantly enhance public trust in the Judiciary.[813] Certainly, there are considerable differences between the UK and China's legal system, but as Zou states in "times of crisis" we can see "that the basic function of courts around the world is the same."[814] The key is to deliver justice to the people in an accessible way, and social media certainly has the scope to further this agenda.

As Gibson notes "social media's impact […] is not simply as a new means for publishing judgments and information"[815] but quite possibly a way of enhancing judgments. Access to social media may be capable of changing how courts, and individual judges, perform their day-to-day activities, such as writing and publishing judgments, in an electronically connected community.[816]

4.0. Understanding Through Active Engagement

Regardless of whether or not judges are encouraged to engage online, they are still likely to be exposed to similar technologies in the courtroom. As technology has advanced, so too has the need for the law to keep pace with it. Courtrooms themselves have advanced, videoconferencing, Online Dispute Resolution (ODR) and online research legal databases and tools have become commonplace in the justice system. But separate from legal-specific advancements in technology, judges are increasingly being expected to hear cases on a wide-variety of technology issues.

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[812] Ibid.
[813] Ibid.
[814] Ibid.
[815] Gibson, J. "Social Media and the Electronic "New World" of Judges" at p.2
[816] Ibid.

Judges are increasingly being tasked with determining the admissibility of social media evidence in court, deciphering intention from private messages and charging jurors with online misconduct. Thus, it is important now more than ever that we promote a computer-literate Judiciary capable of meeting the modern demands expected of them.

Take the admissibility of social media as evidence, where the full impact was felt in the aftermath of the 2011 London riots, notably in the Court of Appeal judgment in *R v Blackshaw & Others.*[817] In this instance a number of defendants were charged with criminal offences after they posted inciteful posts on Facebook. It is ultimately for the court to determine whether to admit social media as evidence, such as Facebook posts, in cases and so it is vitally important that judges understand how these platforms function.

Additionally, the more recent case of *Scottow v CPS*[818] concerned the improper use of a "public communications network contrary to section 127 (2)(c) of the Communications Act 2003." This means that an offence is committed if "for the purpose of causing annoyance, inconvenience or needless anxiety to another [she]… persistently makes use of a public electronic network." In this case, the court was assigned to analyse a series of tweets and are at one point tasked with defining "lol" as meaning "laugh out loud."[819]

The proliferation of social media in court cases places a significant burden on the technical literacy of the judge. The most effective way to facilitate understanding and develop technical literacy is through hands on engagement. Judges must be able to fully grasp the nuances of online conversation, such as the differences in user approach across platforms and specific terms such as *liking*, *private messaging* and *sharing* in order to make fully informed decisions about the appropriateness and weight of social media evidence in cases. Therefore, in order to equip judges with the skills to hear cases involving social media, they should be actively encouraged to use it.

[817] *R v Blackshaw & Others* [2011] EWCA Crim 2312
[818] *Scottow v CPS* [2020] EWHC 3421 (Admin)
[819] *Scottow v CPS* at para.[9](15)

As Browning notes:

> "Judges across the country regularly exhibit ignorance of or unwillingness to educate themselves about the technologies around which modern life revolves. And it's not simply a matter of the occasional snickering over a judge not understanding how texting or cloud storage works; court operations from docket management to courtrooms, themselves, are increasingly driven by technology, and, indeed, judges must frequently rule on issues implicating matters of technology."[820]

The current prohibition on professional use of social media isolates judges from something viewed as "so vital by much of the community." [821] This is hardly desirable, nor is depriving judges of technological knowledge (or at least familiarity) that can inform their handling of cases.[822]

Richard Susskind remarks in his chapter "Judges, IT, Virtual Courts and ODR" that judges are "commonly portrayed by the media and in fiction, as old-fashioned and otherworldly."[823] Rather than being made up on "neo-luddites" Susskind claims that many judges are now "committed users of IT and are keen to embrace systems that offer practical benefits in their everyday work, such as email, word processing, and online research."[824] In this instance, Susskind's vision of the digitally literate Judiciary in 2013 may not truly reflect the reality of emerging digital technologies or the impact that they are likely to have on the skills judges will need to decide cases concerning evolving social media. Whilst an ability to use word processing is certainly a desirable trait in legal arbiters, it is perhaps the baseline of understanding as opposed to its pinnacle.

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[820] Browning, J G. "Should Judges Have a Duty of tech Competence?" (2020*) Revista Forumul Judecatorillor (Judiciary Forum Review),* No.2 pp.67-80 at p.68
[821] Browning, J G. "Why Can't We Just Be Friends – Judges' Use of Social Media" at p.533
[822] Ibid.
[823] Susskind, R. *Tomorrow's Lawyers: An Introduction to Your Future*, (OUP, 2013) Chap 10, at p.92
[824] Ibid.

So, as U.S. Justice Jackson comments, it is clear that "justices are not necessarily the most technologically sophisticated people."[825] As an example, similarly to Susskind, Jackson noted in 2014 the lack of use of email in courtrooms and claims that while clerks might regularly email one another, the court as a whole "hasn't really 'gotten to' email" yet. Whilst this might at first seem "quaint and endearing" we must remember that in the UK as well as the US "these are the people charged with interpreting the law of the land on issues like online privacy and digital surveillance."[826] The progression of technology and the risks associated with its continued presence is "what argues for members of the Judiciary staying engaged."[827]

Although Susskind alludes to a willingness to learn and an acknowledgement of the important role technology may have in the lives of *Tomorrow's Lawyers*, judicial readiness to engage with technologies that may be considered fundamental skills may not reflect the 21st century need for a Judiciary capable of advanced understanding of emerging technologies. Indeed, social media is the tip of the iceberg. A judge unable to understand the technological sophistication of Facebook is somewhat as unlikely to understand the use of algorithms to determine recidivism,[828] peer-to-peer bitcoin networks[829] or the ways in which the dark web is increasingly being used as a tool to commit criminal offences.[830]

In addition, judges must be conversant in the ways in which social media functions, not merely for their own benefit or understanding, but in order to grasp the technology that can enable the undermining of the court's authority, such as jurors tweeting or commenting online about cases before them. As Browning notes, the sanctity of the trial process can be undermined by the

[825] Jackson, B A. "The Brave New World of Social Media" (2014)
[826] Ibid.
[827] Ibid.
[828] COMPAS (software) developed by Equivant (formerly Northpointe) is an algorithm used in several states in the US to assess potential recidivism risk of defendants in order to determine sentence length.
[829] See *AA v Persons Unknown & Ors, Re Bitcoin*
[830] See for example, Cuthbertson, A. "Coronavirus tracked: Dark web drug supply surges nearly 200% during Covid-19 pandemic" (01 June 2020) accessed via, https://www.independent.co.uk/life-style/gadgets-and-tech/news/dark-web-drugs-coronavirus-covid-19-a9534236.html

online misconduct of those participating in the process. A judge who is "tech competent will not only be aware of the potential for lawyers and staff to engage in online misconduct but will also be vigilant in detecting the disruptive effects of jurors who threaten the integrity of the justice system through various forms of online misconduct."[831] Therefore, part of a judge's technological competence involves being aware of and proactive about the dangers of impermissible online activities by jurors.[832]

So, the digital competency of the judge is significant when we consider the potential of the internet as a resource for misuse and the role judges will play in determining the criminality of this misuse. Emerging cybercrimes, especially those being conducted through social networking sites, will require new legislation and adjudicators must be capable of understanding "the complexities of the new technologies being used to commit these crimes."[833] Certainly there is scope to argue that judges often make decisions in areas of the law in which they are not specialists, however, the more disputes that make "their way to the judicial arena [that] involve technology issues or the presentation of evidence from less traditional sources" the more it becomes evident that "a judge's role demands tech competence."[834]

5.0. Shifting the Debate Away from Restriction and Towards Education

This thesis has so far argued that *(1)* judges are currently restricted from engaging online in their professional capacity and those that ignore these rules tend to engage in bad online conduct *(2)* there is an inevitability to judges engaging online, whether this be current judges or current legal professionals who will form the Judiciary of the future. Through Chapters IV and V, we have

[831] Browning, J G. "Should Judges Have a Duty of tech Competence?" (2020) at p.77
[832] Ibid.
[833] Ibid.
[834] Ibid, at p.68

discussed judicial specific risks and benefits that might potentially arise from engagement with social networks. We have noted that the current prohibition on professional use of social media does little to combat the reality of the risks that users may encounter when engaging with social networks. In addition, restriction itself may be the root cause of these concerns given that inexperienced users are more likely to fall victim to the perils of techno society.

As a result of the ongoing COVID-19 pandemic, we are currently experiencing a period of social change and fluidity, in which a dependence has been placed on technology in order to keep the cogs of society turning. There is, therefore, no time like the present to reimagine the rules that currently govern the Judiciary's relationship with the Fifth Estate. This rethink should not simply be concerned with combatting the risks that currently justify restriction but should move away from restriction towards education in order to take full advantage of the benefits social networks present for the judicial institution and its individual office holders.

This section will now provide a number of ways in which the current rules fall short of providing judges with suitable guidance for participating online. Rather than simply critiquing the rules for being static and outdated, this section will outline a number of ways in which these rules must be updated if the Judiciary is to *(1)* negotiate the complex relationship between judicial independence and heightened public scrutiny and *(2)* transition into the Judiciary of the future wherein judges are digital competent, socially aware and prepared for the next generation of judges.

These recommendations will be broken down into four key themes that will be necessary for guidelines to keep pace with the transformative nature of digital networks. Guidelines must be *(1)* online and platform specific *(2)* promote *good user* engagement and *(3)* rely on up-to-date and innovative educational tools and *(4)* prepare future legal professionals for their transition onto the bench.

5.1. Online and Platform Specific Guidance

The current standards of conduct expected of judges are designed primarily to regulate offline behaviour. Expecting that judges will be able to make decisions when conducing themselves online using offline norms presents a number of issues. Firstly, the language of online communication is distinct from offline language and fluctuates between different social media platforms. Secondly, framing online guidelines using offline contexts suggests to the reader that the offline world is not distinct from the online world, and this is untrue. Thirdly, offline line rules do not take into account both the nuanced risks and benefits that come from engaging with social networks, risks and benefits that do not exist in the "real-world" for which the guidelines are designed.

For example, members of the Judiciary are instructed to be "courteous, patient, tolerant and punctual."[835] These terms are nebulous at best when considering offline conduct, but when applied to an online context, they mean very little. As noted by the previous chapter, online norms are constantly fluctuating, and conduct that is deemed to be "courteous" online is ambiguous. With so many groups interacting on sites like Facebook, Twitter, and Instagram, "there is a huge potential for norm variance, and thus norm violations are likely to occur."[836]

The "tone and civility"[837] of online interaction varies from its offline counterpart given the absence of physical contact. However, the same basic principles apply. As in the offline world, those new to social media should be given the tools to differentiate between right and wrong, or good and bad. So, what is deemed to be courteous offline might not apply online, further what is deemed to be courteous offline might in fact be a violation of what is deemed to be courteous online – reactions to perceived courtesy online "may be unique due to the very public context."[838]

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[835] GtJC (2020), at p.20
[836] McLaughlin, C. "Norm evolution and violation on Facebook" at p.300
[837] McPeak, A. "The Internet Made Me Do It: Reconciling Social Media and Professional Norms for Lawyers, Judges, and Law Professors" at p.210
[838] McLaughlin, C. "Norm evolution and violation on Facebook" at p.300

What is deemed to be annoying online behaviour is distinct from annoying offline behaviour. One might happily show family and friends a photo album, or several photo albums at a time at a real-time family gathering. Compare this to a site like Instagram, where posting more than one to two pictures a day, even to friends and family, is a taboo - albeit an unwritten one. Sharing all day long is a sure-fire way to be labelled "a spammer." As Balinas's 25 Do's & Don'ts of Social Media remarks, "nobody wants their social media feeds to be filled by a single account."[839] Contrastingly, no such social media "taboo" applies to Twitter engagement, where the opposite may apply and is expected that users may post frequently and consistently.

Courtesy is left undefined in the guide to judicial conduct, with the onus being placed on the individual judicial officeholder to interpret the guidelines in order to manage their own personal conduct. This has few "real-time" implications, "real-world" norms are well established, and violations of those norms are fleeting. In the online world, this is not the case. Expectations of courtesy are constantly changing and evolving, and the repercussions of violating expectations of courtesy are public and permanent.

If judges are to conduct themselves online in a way where risk is minimised and rewards are emphasised, then it is vital that guidance acknowledges the complexity and inconsistency of online norms, using online specific language and terminology. Therefore, guidance issued to judges should be separated from the guidelines regulating judges' offline conduct. Although there are over-laps between norms that regulate offline relationships with online connectivity, guidance should use online specific language and consider the speed at which language evolves in cyberspace.

Although most guidance is framed in terms of offline conduct, where guidance issued to judges is online specific, it is often vague and fails to be platform specific. This means that the current framework of rules is unable to adapt to the developing and complex arena of cyberspace

[839] Balinas, T. "Social Media Etiquette for Business Owners: 25 Do's & Don'ts" accessed via https://www.outboundengine.com/blog/social-media-etiquette-for-business-25-dos-donts/

and the fluctuating norms dictated by users across different platforms. Online guidance issued to judges refers to "micro-blogging" and names Google, Facebook, and Twitter as examples of social networking systems.[840] However, when providing guidance for online conduct, grouping these systems together shows a lack of appreciation for the nuanced differences between various computer-mediated technologies. The interactive sharing of information is conducted differently across distinct platforms, it is regulated by varying industry standards and is in some way governed by the users themselves. Take for example the difference between the mediums of engagement. Twitter tightly caps the length of posts at 280 characters whereas Facebook does not. Facebook allows users to edit posts whereas Twitter does not. Users may express engagement through different terminology such as *liking* and *sharing* on Facebook when compared to *retweeting* on Twitter.

The features that are built into the service do not simply influence how users engage with the platform,[841] but also impact on why users choose to engage. The differences in the tools for engagement provided across distinct platforms provide the reasons why individuals, businesses, politicians, and institutions may choose to engage with that particular platform. Twitter, for example, encourages the sharing of ideas and sparking conversation[842] and might be favoured over Facebook by politicians hoping to convey their position and opinions.[843] Facebook on the other hand focuses on connectivity,[844] linking networks or groups of people together and may thus be favoured by the lay person, hoping to reconnect with a school friend.

[840] GtJC (2020), at p.18
[841] McPeak, A. "The Internet Made Me Do It: Reconciling Social Media and Professional Norms for Lawyers, Judges, and Law Professors" at p.210
[842] "About Twitter" accessed via, *https://about.twitter.com/en_gb.html*
[843] "Twitter accounts affiliated with governments, state leaders, and policymakers are ostensibly used to communicate directly to domestic and foreign publics…" see Duncombe, C. "The Politics of Twitter: Emotions and the Power of Social Media" (2019) OUP, *International Political Sociology*, Vol 13, Issue 4, pp.409-429
[844] "About Facebook" accessed via *https://about.fb.com/*

It is for these reasons that a nuanced user approach across platforms is necessary when regulating online conduct. A platform specific approach provides the user with accurate information regarding the *how* and *why* of the service and enhances the potential for appropriate engagement with other users. Where a general or blanket approach to regulation is favoured, the potential risks of engagement are amplified.

A good approach to guiding judges in online conduct was displayed during the case of *Monroe v Hopkins* [2017] EWHC 433.[845] In an appendix to the judgment, comprehensive advice as to "How Twitter Works" is provided, so that a judge, lawyer, or lay-person reading the judgment might better understand the nuance of the arguments being put forward by the parties in the case. The appendix sets out detailed guidance as to the origins of Twitter,[846] the way in which a user sets up a Twitter account,[847] and the specific functions of Twitter such as hashtags, notifications, and direct messages.[848]

Despite this display of "good" guidelines, the judgment is static. This is how Twitter *worked* when the judgment was given in 2017. Given the constantly evolving and changing nature of platforms, such as Twitter, this advice is already out of date. In paragraph [4] it is states that a tweet can be "up to 140 characters" in length.[849] Currently, in 2021, the character limit on a tweet is 280 characters. Although the "How Twitter Works" section in *Monroe v Hopkins* demonstrates an appreciation for the need to define online terms and acknowledge the platform specific nature of social media communication, it is done so in a static and inaccessible way. Rather than relying on judgments to outline the social networks which they concern, the institution should provide proactive guidelines for personal and professional use that are capable of evolving alongside the networks themselves.

[845] *Monroe v Hopkins* [2017] EWHC 433, at appendix "How Twitter Works"
[846] Ibid, para [1]
[847] Ibid, para [2]
[848] Ibid, para [4]-[7]
[849] Ibid, para [4]

5.2. Promoting *Good* Engagement

As Dillard notes, "a strong social-media presence allows you to help control and protect your reputation and image as a public official."[850] In this way, "the best defense is a good offense."[851]

As we have already seen, there are risks that accompany the use of social media. The current rules prohibiting judicial engagement in a professional context use these risks as justification for withdrawal for social networks and current guidance issued to judges about social media focuses on outlining the potentials of bad behaviour, such as the "risks to personal safety", "risks of fraud" and "lack of control over data once posted."[852] Although it is necessary to warn users of the specific risks each online platform may give rise to, the converse, the promotion and potentials of good behaviour should also be acknowledged.

The Council of Europe's *Internet Literacy Handbook* stresses that "the internet must not be presented as a dark place signposted with danger and caution."[853] It should be the focus of internet guidance to build "digital resilience" and encourage individual users to be "conscious of their own capabilities and responsibilities."[854] When "sensible assistance [is] provided" individuals should be better able to "think critically about what they see and read online, and to make informed and safe choices."[855]

Instead of framing guidance in terms of risk management, social media should be presented as an opportunity to explore its potential benefits, whether this be in promoting the institution, or on a personal level – a space where judges can develop and demonstrate social

[850] Dillard, S A, McCormack, B. "The Robed Tweeter: Two Judges' Views on Public Engagement." (2019) *Journal of Appellate Practice and Process*, Vol.20, No.2 at pp.197-198
[851] Ibid.
[852] GtJC (2020), at p.18
[853] Richardson, J. Milovidov, E, Schmalzried, M. "Internet Literacy Handbook: Supporting users in the online world", Council of Europe, (October 2017), *https://rm.coe.int/internet-literacy-handbook/1680766c85*
[854] Ibid, at Foreword
[855] Ibid.

awareness, engage with the public in whose name they administer justice and prove their ability to act with integrity, not only in the "real-world' but in the online world as well.

Only addressing *the dark side* of the internet paints a one-sided picture for the individual judge seeking guidance for how they should conduct themselves online. Like the Council of Europe's *Internet Literacy Handbook*, "ethical considerations and risk" should be framed alongside guidance for "good practice."[856] Users should be provided with balanced information that allows them to make their own choices. In providing guidance that promotes good behaviour, judges might decide for themselves whether or not the potential benefits of social media participation outweigh the risks.

So, where judges are provided with balanced information that is able to keep pace with developments in social medias evolving landscape, what might this "good" engagement truly look like?

Dillard and McCormack note that, in their view, it "is crucial for judges' social-media accounts to be accurate reflections of who they are in real life."[857] This is because fundamentally, "authenticity resonates."[858] One way of achieving this is to "discuss your interests outside of the law" given that "the people [judges] serve are interested in knowing what kind of person [they] are when [they] take off the robe."[859] In this way, social media could be used to share "hobbies and passions." Indeed, some judges may find it "unusual or even unseemly for a judge to disclose aspects of his or her personal life to the public" but, Dillard and McCormack argue that "good" online engagement is that which "humanize[s] judges" thereby making them "more accessible to the people [they] serve."[860]

[856] Richardson, J, Milovidov, E, Schmalzried, M. *Internet Literacy Handbook*, at p.96
[857] Dillard, S A, McCormack, B. "The Robed Tweeter: Two Judges' Views on Public Engagement" (2019) at p.195
[858] Ibid.
[859] Ibid.
[860] Ibid.

Early on in Judge Dillard's Twitter journey, he received a direct message from a law student, stating that whilst they believed it was "great that [he is] a judge with a fairly active presence on Twitter" his account "is a bit dull" and he ought to "tell us more about who [he is] as a person off the bench."[861] So, in addition to tweets about aspects of the courts and court procedure, Dillard will often tweet on "various non-legal subjects." Good online engagement need not always require in-depth legal analysis, but might include photographs of "pets, and landmarks." Judges might share "views on music, books, films, and television programs." They may even include "humorous quips from…spouses and children."[862]

Good social media engagement need not be *boring* social media engagement. Judges may call on pop culture references, or indeed they might be humorous and witty. Engaging in this way every day with other users sets established standards of conduct that ultimately helps judges to determine *what not to do*. Of course, not every encounter will be "a positive and uplifting experience."[863] But experienced online users will have developed the tools to determine this antagonism from the offset, understand when and when not to engage, and distinguish between "trolling" or "someone who is asking a genuine question or offering constructive criticism that [a judge] can address."[864]

At times, judges must be left to discover bad online behaviour for themselves in order to establish the threshold of what can be considered good engagement. There is no one format of what this good engagement might look like in practice. In reality, judges might use Twitter formally and only for the purpose of legal discussion and clarification. This might indeed be a good starting point for judges who are wary or cautious about engaging with other users online. More confident judicial users, perhaps those newly appointed who have made frequent use of social networks in their prior legal career, may take Dillard's advice to be genuine and to avoid being *dull*. It is not

[861] Ibid, at p.196
[862] Ibid.
[863] Ibid, at p.197
[864] Ibid.

until restrictions on professional use of social media are lifted that we might begin to truly see what this good engagement might look like.

5.3. Developing Rules In-Line with Current Online Educational Practice

In her work, *Technology, and the virtues*, Vallor asserts that "we must create more and better practical spaces *for technomoral education*, places where people may apply the habits of moral self-cultivation to the contemporary challenge of living well with emerging technologies."[865] There are "inevitable surprises awaiting us in our techno social future." However, "education must eschew passive learning of fixed rules and the associated compliance mindset in favour of active habituation and practice across a variety of techno social contexts" thereby fostering habits of "reflection, the stud of technomoral exemplars, and the skills or moral discernment and judgment needed to adapt and flourish in new and evolving techno social circumstances."[866]

One of the best ways to develop the skills needed to make informed, safe, and "good" choices is to participate in the activity itself. Norms, including rules of etiquette, or in this case netiquette, "are learned through experience in a community. For example, children observe how adults and other children behave, absorb theses norms, and learn their community's etiquette at an early age."[867] As Preece notes, "watching what others do is… a common strategy for newcomers to an online community."[868] Active participation on the platform "enables them to judge the tone of the community before launching in, and so avoid causing offense, being ridiculed or putdown."[869] Much like children, in order for new or inexperienced users of social media to understand and keep pace with the evolving social norms, they must participate in the discussion themselves.

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[865] Vallor, S. *Technology and the Virtues: A Philosophical Guide to a Future Worth Wanting*, at p.186
[866] Ibid.
[867] Preece, J. "Etiquette online: from nice to necessary" (2004) *Communications of the ACM*, Vol.47, No.4 pp.56-61, at p.58
[868] Ibid.
[869] Ibid.

Therefore, in order for judges to navigate the risks inherent with social media use, they must be trained in a way that encourages good use of social media platforms. At present, under the CRA 2005 the Lord Chief Justice is responsible for arranging the training of the courts' Judiciary in England and Wales.

This is exercised through the Judicial College[870] whose Strategy 2018-2020[871] cites a number of challenges expected to face the Judiciary such as the UK's exit from the European Union and continued austerity. It is the overriding objective of the college to provide training of the highest professional standard for judicial office holders in order to "enhance public confidence", "promote professional development" and ensure that judges understand the "social context of judging."[872] Judicial training is designed to cover "substantive law, evidence and procedure and other expertise."[873] No mention is made as to whether these "other expertise" include the necessity of digital competency and an understanding of technological developments that may impact on decision making. E-learning[874] as a method of judicial training is acknowledged, although this is the only mention of technology and training in the 2018-2020 strategy.

The Judicial College Prospectus April 2019 - March 2020[875] gives us some indication as to the training judges might expect throughout their appointment. For the first time, the Prospectus includes a seminar titled "Crime: Some Technical & technological Issues" where some digital issues in the courtroom will be considered, including how "judges can develop their skills by better using the DCS (Digital Case System) Word, Excel and Outlook."[876] Although the prospectus

[870] Courts and Tribunals Judiciary, "Judicial College", accessed via, *https://www.Judiciary.uk/about-the-Judiciary/training-support/judicial-college/*
[871]Strategy of the Judicial College 2018-2020, accessed via, *https://www.Judiciary.uk/wp-content/uploads/2017/12/judicial-college-strategy-2018-2020.pdf*
[872] Ibid, para.[12](1)-(5), [13](3)
[873] Ibid, para.[13](1)
[874] Ibid, para.[20]
[875]Judicial College Prospectus April 2019-March 2020, accessed via, *https://www.Judiciary.uk/wp-content/uploads/2017/12/judicial-college-prospectus-for-courts-Judiciary-2019-2020.pdf*
[876] Ibid.

admits that this seminar "remains very much a work in progress", much like Susskind's approach to digital innovation discussed above, the Judicial College seems to be several stages behind advancements in technology and the ways in which it is capable of impacting courtroom proceedings. Where judges are being expected to hear complex cases, such as that in *AA v Persons Unknown & Ors, Re Bitcoin,*[877] regarding complex decryption tools, advanced computer systems and ownership of online data, the need for up-to-date technology to be acknowledged by the judicial college's curriculum is apparent. Currently this seminar is the only mention of technology or technological developments outlined in the 2019-2020 curriculum.

According to *The Judicial Skills and Abilities Framework 2014*, judges should demonstrate and develop skills such as *(1)* assimilating and clarifying information *(2)* working with others *(3)* exercising judgement *(4)* possessing and building knowledge *(5)* managing work efficiently and *(6)* communicating effectively.[878] Although this is not acknowledged under the 2014 Framework, the reality of the digital age has made technology a core component to the development and demonstration of these skills. Social media provides a tool for assimilation and clarification of information, and it permeates the ways in which we communicate with one another at home and in the workplace. As such, social media platforms have become an "indispensable part of our personal and professional lives"[879] and the prevalence of digital networks in the public and private sector makes judicial encounters inevitable.

5.4. Guidelines for Prospective Judges

[877] [2019] EWHC 3556 (Comm), [2020] 4 WLR 35
[878] The Judicial Skills and Abilities Framework (2014)
[879] McPeak, A. "The Internet Made Me Do It: Reconciling Social Media and Professional Norms for Lawyers, Judges, and Law Professors" at p.206

As this thesis has argued throughout, engagement with social networks is an inevitability, not least because current legal professionals and academics who are the future of the judicial branch will engage with, and are currently engaging with, social media. Both lawyers and academics alike tweet, post and share in a professional capacity. Some choose to do some anonymously, like the Secret Barrister, but most do so openly.[880] Irrespective of the private nature of social media engagement, or supposed anonymity, the social media footprint of current legal professionals will accompany them into their new judicial role. Currently the GtJC focuses on the conduct of judicial office holders and does not restrict the use of social media by prospective judicial office holders. Of course, it would be unreasonable to suggest that the Guide should somehow attempt to restrict or limit the social media usage of users who one day aspired to the judicial role. Banning legal professionals from social media is neither desirable nor logistically/jurisdictionally possible, much for the same reasons argued in this chapter: that the presence of legal professionals online enhances the transparency of the justice system and benefits the public's understanding of the profession.

However, the current scope of the restrictions under the GtJC that only include current judicial office holders are not suitable when we consider engagement with digital networks. The key differences between the fourth and Fifth Estate were noted earlier in Chapter II: that online generated content is instantaneous, unfiltered, and perhaps most importantly of all, it is permanent. Therefore, guidance is needed for prospective judges as to how they might engage with social media given that the history of this engagement will be permanently and publicly available to anybody who wishes to look for it.

It is likely that a document such as the GtJC is unsuitable for providing guidance for prospective judges because it is fundamentally aimed at individuals currently in office. Instead, the Judiciary should provide separate guidance for prospective judges that is online and platform

[880] See, @BarristerSecret, accessed via, https://twitter.com/BarristerSecret?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor

specific, promotes *good* user engagement and keeps pace with up-to-date professional practice on social media. Like current judges, prospective judges should have an awareness for both the risks and advantages of being active participants online. The doctrine of judicial independence does not relate to individuals who are hoping to become judicial office holders, but we might instead place a focus on the civic awareness and social connectivity of legal professionals. This means that the same principles that apply to the professional engagement of students, lawyers or academics may be transferred when they begin to engage online as *judges*. Rather than requiring a newly appointed judge to remove their professional social media profiles to maintain the perception of judicial independence, if guidance has been provided to prospective judges prior to their appointment, then their engagement maintains consistency through this transition from lawyer to judge.

Prospective judges are online, and this means that their current engagement with social media will be publicly available after their appointment to the bench. The current restrictions outlined under the GtJC do not prepare future judges for their transition to judicial office holder because restriction at the point at which they become judges is akin to closing the door after the horse has bolted. The digital footprint of prospective judges is and will continue to be available for the public to scrutinise. Currently judges are prevented from professionally engaging online in order to protect the appearance of independence, impartiality, and integrity. However, relying on restrictions when individuals become judicial office holders denies the reality of a judge's prior digital footprint. The restriction will therefore not work, as the Judiciary hopes, to protect the appearance of independence of future judges. Therefore, rather than restricting judicial use of social media, the Judiciary should provide guidance for prospective judges that is, as discussed above, online/platform specific and promotes good engagement. The more consistent prospective judges' online engagement is with judicial engagement, the smoother the transition will be from future to current judicial office holders. Where restriction is disregarded in favour of education, and where the perception of judicial independence is not placed above the judge's social

connectivity and awareness, then the realities of social media are acknowledged and the risks that social media may pose to judicial users are mitigated.

6.0. Reimagining the Framework for Judicial Guidance on social media

This reimagined framework for judicial conduct may take many different formats. It might be integrated into the existing GtJC, by setting new online standards alongside offline ones. It may form a wholly new set of guidelines and principles or be included as part of a judicial education programme. But above all else, it must do three things. It must firstly use online language and be platform specific. Secondly, both the risks and benefits that Web 2.0 technologies present should be acknowledged. Judges and prospective judges should be provided with all of the information regarding the pros and cons of social media use and be able to decide for themselves, whether the potentials outweigh the challenges. Thirdly, and finally, the framework for online conduct must be consistently and regularly updated to reflect the transient nature of technologies and user interfaces. Guidance must not be allowed to stagnate, or the risks to judges engaging online will be amplified. Only through knowledge, education and engagement can judges truly become competent and informed digital citizens.[881]

One of the arguments of this thesis is that judicial participation online is an inevitability, however, it is also worth imagining what the recommendations for judicial conduct online might look like today. The overarching recommendation that stems from this thesis is to remove the distinction between personal and professional conduct from the GtJC (2020) and thereby lift restrictions on a judicial office-holders engagement with the Fifth Estate in a professional capacity. This would do two things: firstly, it would acknowledge the lack of real distinction between personal and professional conduct and the ways in which the internet, irrespective of privacy settings or

[881] "'Digital Citizenship' is the ability to participate in society online…" see McPeak, A. p.211 Mossberger, K. Tolbert, C J. McNeal R S. at p.1

admission of professional capacity, comes with inevitable risks that cannot be mitigated by restricting “professional” access. Secondly, lifting the restriction on professional use of social media by judicial office holders will open up the potential for judges to demonstrate “good” online behaviour, both for the benefit of the individual judge: in their ability to develop their civic and social awareness and enhance their technical competency. A wider subset of the public will also from individual judicial participation online in a way that would have been inaccessible to them prior to this engagement.

Lifting the restrictions on professional engagement must also be accompanied by comprehensive and malleable guidelines and education initiatives such as those discussed above. The Judicial College are (as of April 2021) yet to update their Strategy (2018-2020) so it is unclear whether or not the future of judicial education will move beyond acknowledging the need for “greater IT capability” and into more specific and social media tailor-made measures that will encourage “good” engagement online. It is likely that the speed with which the Judiciary has had to adapt to online litigation as a result of the COVID-19 pandemic will have placed the need to improve the technical competence of judges at all levels at the forefront of the Judicial College’s agenda.

If the current restrictions in place on professional engagement with social networks are to be disregarded, then the Judicial College must overhaul their current curriculum for judicial education. The College are undoubtedly in the best position to provide this training, given that they already provide a syllabus to equip judges with some skills necessary to fulfil their role as judicial officeholders. The existing module format may be integrated as an optional course for judges to take who may either, *(1)* wish to engage with the Fifth Estate in their professional capacity and seek advice on doing so, *(2)* may be curious about the relationship between the Judiciary and the Fifth Estate and wish to learn more about it, or *(3)* those who are wary or against judicial use of social media and wish to discover ways in which the potential risks and hazards may be mitigated.

It is certainly not the purpose of this thesis to suggest that lifting the restrictions on professional social media use ought to result in all judges immediately setting out to "tweet", "post" and "share." It may be that some judges are averse to the idea or wish to stay off social media altogether. However, it is only when this restriction is lifted that judges will be afforded the opportunity to learn, to try engaging online and discover the ways in which it might benefit themselves, the institution on the whole and the public in whose name they serve.

7.0. Conclusion

The current approach taken to social media by the judicial institution to engagement by its individual office holders is currently incapable of preventing bad behaviour online, mitigating the risks that come with social media engagement and denies the potential benefits that come with good use of social media platforms.

Current guidelines discourage engagement, fail to acknowledge that medium specific guidance is necessary to achieve good practice online and often regulate online communication using offline standards and norms. This failure to provide adequate guidance for online conduct is not remedied at the point of judicial education, wherein technological advancement and use of Web 2.0 and social networks is largely neglected.

Therefore, if the Judiciary truly wishes to avoid the risks that come with social media use, they must focus current guidelines away from restriction and towards effective education. As Jackson comments, every effort to understand new technology should be made and the Judiciary "should take into account the possibility that developing technology may have important societal implications that will become apparent only in time."[882] This view is particularly relevant given the ongoing global COVID-19 pandemic, as workplaces begin moving their task force online and

[882] Jackson, B A. "The Brave New World of Social Media" at p.15

pressure mounts with respect to court closures.[883] The COVID-19 crisis, and hyper-dependence placed on technological progression, has presented an opportunity to reimagine the way in which the Judiciary views technology, and in this instance, engagement with social networks.

[883]Cross, M. "COVID-19 Lockdown: Supreme Court goes Virtual" Law Gazette (24 March 2020), *https://www.lawgazette.co.uk/practice/covid-19-lockdown-supreme-court-goes-virtual/5103603.article#.XnnQ-DkBTl4.twitter*

Conclusion

There have been two key conclusions reached in this thesis. The first of these conclusions is that the current restrictions on social media use by judicial office holders under the GtJC are both unjustified and useless, given that this decision denies the reality of social media permeation in society and use by legal professionals. In addition, it does little to combat the inevitable risks that come with social media use in the digital age. As a result, this thesis argues that judges should not be prohibited from using social media in their professional capacity and focus should instead be shifted away from restriction towards effective education.

The second conclusion of this thesis follows on from the first. The current reluctance to allow judges to engage with social media reveals the dependence placed on the perception of judicial independence to maintain the legitimacy of the Judiciary as a constitutional actor in the UK and this in turn reveals the fragility of some of the constitutional structures discussed in the first two chapters of this thesis. A change in attitude towards social media by the judicial institution should be part of a wider shift in the judicial role that moves away from the model of judicial legitimacy derived from perceived independence towards an institution that, at its foundation, depends upon public engagement, awareness, and participation in order to gain legitimacy as a constitutional actor in the UK.

1.0. Judges should not be prohibited from engaging with social media in their professional capacity

The foremost of these conclusions was reached in a number of ways. The current restrictions on professional social media engagement by judges, as they currently stand in the GtJC (amended 2020), (1) do not fit with international standards of conduct, (2) consider the risk of social media

platforms but do not discuss the potential benefits, and (3) do not prevent harm in the first place. This ultimately makes this restriction unsuitable for managing a judicial office holders' professional engagement with the Fifth Estate.

This thesis has shown throughout that the conduct of individual judges is measured against the way in which it may be perceived by the public. Outside of the context of social media, as demonstrated in cases like *Locabail* and the infamous *Pinochet* case, discussion surrounding potential partisanship, bias, or misconduct of judges is framed in terms of the ways in which conduct may be *perceived* as being improper or partisan in the eyes of the *public.* Focusing the discussion on perception in this way prevents the Judiciary as an institution from engaging with the reality or actuality of bias, partisanship, or misconduct, and in this way, perception acts as a barrier that protects the Judiciary and its individual judicial office holders from public scrutiny.

However, this approach is complicated when we consider the addition of the Fifth Estate of power in the UK. As we discussed in Chapter II of this thesis, the Fifth Estate can reveal information in new and unpredictable ways to the public, and in turn, the Fifth Estate provides new channels and avenues for the public to scrutinise the conduct of the Judiciary and individual judicial office holders. Thus far the judicial response to this has been twofold. Firstly, they engage with the Fifth Estate in the same way as they do the Fourth, by taking an institutional rather than individual approach and relying on media panels or communications teams to participate online. Secondly, the Judiciary restrict the professional use of social media by individual judges.

This two-fold approach to social media is the Judiciary's way of maintaining the constitutional status quo as it was considered in Chapter I of this thesis. Professional withdrawal from the Fifth Estate maintains the traditional structures of the constitution as it protects the appearance of independence and thus the legitimacy of the Judiciary as an independent governmental institution is maintained. The approach that the Judiciary are currently taking to the Fifth Estate suggests that only through restriction can the appearance of independence be

maintained and therefore, social media is seen as an estate of power capable of disrupting or compromising the appearance of an independent judicial branch in the UK.

However, the Judiciary's current approach to social media; to restrict its individual office holders from engaging professionally, is flawed. As Chapter IV of this thesis considers, although there are risks that come with social media use, such as risks to privacy, the combative nature of social media and the complexity surrounding friendships, these risks are not negated by restricting access to social media. In other words, preventing professional use of social media by individual judicial office holders does very little to prevent these risks from materializing or from harming social media users. Indeed, restrictions may in fact increase the chances of these risks occurring given that an inexperienced social media user has an increased likelihood of making mistakes online that may result in harm.

So, not only do the current restrictions on social media use under the GtJC fail to prevent harm from occurring to individual judges online, but they may also amplify the concerns that are used to justify the restrictions in the first place.

As a result of this, this thesis recommends moving away from restricting professional use of social media, towards a comprehensive and evolving framework of education. In Chapter V, the potential benefits that social media may have for the judicial population are considered. The ways in which an educational framework that is both online and platform specific, promotes good use of social media, and can provide both clarity and malleability, ought to be adopted is unpacked in the final sections of this chapter. This thesis therefore recommends that the current restrictions in place under the GtJC that restrict professional use of social media should be lifted and replaced by an educational framework that provides up-to-date and comprehensive guidance for both current judges and prospective judicial candidates as to the ways in which they may, if they choose to do so, effectively, and safely use social media.

2.0. Reimagining judicial use of social media as an opportunity to reimagine the judicial role

The latter conclusion follows on from the first; the prohibition on judges engaging online in their professional capacity results from the potential social media has to damage the perception of judicial independence. This reveals the fragility of the UK's current constitutional structures, in that legitimacy of the Judiciary in the UK is founded upon the perception of independence. Withdrawal from digital mediums is seen as being necessary in order to maintain these traditional constitutional structures and thus maintain the legitimacy of the Judiciary as a governmental institution in the UK. The traditional constitutional structures in place are such that the Judiciary is tasked with protecting the appearance of their independence to maintain their legitimacy as both capable of passing judgments in individual disputes and acting as a check or balance on governmental powers. To the Judiciary, social media is a tool capable of compromising this appearance of independence and so it is something to be feared and is thus withdrawn from. Withdrawal from social media allows the Judiciary to continue their claim to neutrality and thus maintain the traditional constitutional order that depends upon judges being *perceived* to be independent and impartial.

This thesis began with a quote from JAG Griffith, that "it is when the claim to neutrality is seen, as it must be, as a sham that damage is done to the judicial system."[884] Across Griffith's five editions of his famous work, The Politics of the Judiciary, the sentiment remained the same. Judges are the protectors and conservators of what has been, of the relationships and interests on which *in their view* our society is founded, and, in this regard, they act politically despite persistent assertions to the contrary.[885]

[884] Griffith J A G. *The Politics of the Judiciary*, 1997 at p.57
[885] Ibid.

Griffith, were he to write today about judicial decision making, would find himself greeted by a very different world, and an equally changed Judiciary? As we have seen in Chapter I of this thesis, the last two decades have seen judicial officeholders, of all levels and seniority, grapple with the parameters and constraints upon their constitutional role. In an increasingly polarized political society, the courts have become, perhaps unwittingly, a prominent battleground for moral, controversial, and political debates to be played out.

Yet, the assertions of Griffith are no less relevant today than they were before the existence of Web 2.0. Damage to the Judiciary comes when, at all costs, partiality is denied. As we have explored in Chapter I, the constitutional foundations of the Judiciary are founded upon this assertion and denial. It is believed that in order for judges to fulfil their obligations as arbiters of the law, that they must be seen as independent, impartial, and entirely neutral thinkers and decision makers. But this has never been the case. Behind judicial decision making "lies a unifying attitude of mind, a political position."[886] As our society increasingly demands that they consider problematic moral and ethical concerns, this political position becomes both integral to the decision itself and obvious to public onlookers. The denial of partisanship becomes harder to maintain.

Amidst the Judiciary's struggle to maintain their conventional constitutional role, comes the rise of the internet and the proliferation of social media as a tool for social connectivity. Alongside the growing importance and prevalence of judicial review, and the increasing moral and political questions requiring answers in courts, judges are faced by a new potential foe. The very fabric that makes social media such a success, its ability to break down social barriers and offer transparency, becomes the very thing that the judicial institution fears. The heightened sense of connectivity, visibility and transparency social media offers its users, is also capable of pushing and straining against the barriers put in place designed to protect the *appearance* of

[886] Ibid, at p.52

independence, impartiality, and integrity. But, as we have known all along, this appearance is indeed as Griffith claims, “a sham”, and social media presents unlimited resources for revealing this pretence to public.

So far, the institution’s immediate response has been to isolate its individual office holders from social media in an attempt to protect them, and ultimately the institution as a whole, from the perceived risks social media presents. Isolation, to the mind of the Judiciary, prevents social media breaking down the appearance of impartiality to reveal what lies underneath, a human-being, with thoughts, beliefs, morals, values, and connections that impact on decision-making. Isolation or withdrawal from social media attempts to maintain the perception of independence in the eyes of the public and so the constitutional structures, such as the inverted pyramid considered in Chapter I of this thesis, are also maintained.

If the Judiciary intends to continue denying the partiality of its individuals, focusing its energy on maintaining the appearance of independence, impartiality, and integrity in order to assure its legitimacy, then social media is and will continue to be a threat to that goal. No engagement with social networks, educated user and uneducated user alike, will undermine the potential that social media has to compromise the appearance of independence, impartiality, and integrity. The nature of social media, as something entirely new and distinct from its media predecessor, will enhance transparency, increase visibility, and ultimately bolster public scrutiny in new and unpredictable ways. However, even by withdrawing from these networks and placing a dependence on stoic isolationism, as we saw in Chapter IV, the perception of independence will be broken down, nonetheless.

But what if there is an alternative to maintaining the appearance of judicial independence? What if the rise of social media presents us with an opportunity to reimagine the Judiciary’s constitutional role, where the legitimacy of the Judiciary in the UK is not gained through maintaining the perception of independence but is instead striven for through public engagement? This is the crux of the second conclusion of this thesis, that it is possible or indeed *desirable*, that

through embracing education and transparency in the context of social media engagement, the Judiciary in the UK may find a renewed constitutional identity. Social media presents one opportunity for the Judiciary to derive legitimacy through public participation, to become capable of meeting the demands expected of it in the 21st Century and ultimately function as a modern institution in the UK's constitution.

So, in this regard, encouraging the informed use of social media by judicial officeholders is one of many ways that the Judiciary will become equipped to function as a modern governmental branch, capable of administering justice in a way that represents society. This thesis has focused on the use of social media and the relationship that the Judiciary has with the Fifth Estate, as opposed to the number of other challenges that the Judiciary will face, because it is currently unexplored in a UK context. Although there has been much debate surrounding the use of social media by judges in the US, no doubt as a result of the hybrid status of US-judges who run political campaigns for re-election into office, there is currently no parallel discussion taking place in the UK. It is not enough to argue that this is because no comparisons can be made between the US Judiciary and the judicial institution in the UK. This would be simply untrue. At the extreme, some commentators noted post-*Cherry/Miller (No.2)* that the UK's Supreme Court was becoming increasingly like their American counterparts, with elements of the *Miller (No.2)* judgment resembling the *Bush v Gore* judgment,[887] wherein the United States Supreme Court resettled a dispute of vote recounting in the 2000 presidential election.[888]

Outside of the role that the Supreme Court has played in recent political events, it is clear that the legal profession and administration of justice is a changing landscape, where the roles of legal professionals within the justice system are currently undergoing changes, such as the rise

[887] *Bush v Gore* 531 U.S 98

[888] See for example, Caldwell, C. "Britain now has a politicised Supreme Court, too" (Sept 25, 2019) New York Times, accessed via https://www.nytimes.com/2019/09/25/opinion/boris-johnson-supreme-court.html

in solicitor advocates and the blurring of the distinction between the traditional branches of the profession (solicitors/barristers) to resemble a role similar to that of a US attorney.

The lack of a codified constitution in the UK is one of the key differences between the US Judiciary and the role of judges in the UK. It is clear that this distinguishes between the two judicial systems on a wider level, in that the former is able to strike down legislation as being unconstitutional, whereas the latter is not.[889] On the ground, where individual judicial office holders interact with users of the judicial system and the public, whether this be at very peak of the court hierarchy in the Supreme Court or in the Magistrates Courts, judges in the UK, like their counterparts in the US, must maintain the dignity of judicial office and are expected to uphold standards of independence, impartiality and integrity.[890] This means that much of the debate taking place in the US surrounding judicial use of social networks is transferable to the UK, and will be integral to understanding the challenges judges encounter and the ways in which the Fifth Estate can provide benefits for judicial users and the public in whose name they administer justice.

Irrespective of election campaigns or the codified nature of the US Constitution, judges in the UK will encounter the same concerns and will benefit from the same advantages of social media as their US counterparts. As this thesis has asserted throughout, there is an inevitability to judicial participation online, and it is essential that we begin to look at the ways in which the relationship between judges and social media has been considered in other jurisdictions and refrain from seeing the UK as a "special case" or as detached from this concern. It is this insistence of isolationism and individualism that causes the Judiciary to be accused of being "out

[889] HRA s.4 DOI's certainly expanded the scope of the Judiciary to challenge the compatibility of primary legislation but this does not compare in enforceability to the US's striking down power.
[890] The Model Code of Judicial Conduct was adopted by the House of Delegates of the American Bar Association on August 7, 1990, and amended on August 6, 1997, August 10, 1999, August 12, 2003, February 12, 2007, and August 10, 2010. (2020 Edition)

of touch." Afterall, as the BBC reported, in the wake of the *Cherry/Miller (No.2)* decision, one of the most commonly asked questions was: "What is the UK Supreme Court?"[891]

It would appear that in an attempt to disengage from party politics or through a deep routed fear of revealing bias, judges have "done more than just disengage from political life. They also have felt compelled to entirely withdraw from the public eye."[892] Therefore, this thesis has asserted that, amongst other challenges that the UK Judiciary will face, the way in which individual judicial officeholders engage with the Fifth Estate ought to be of paramount importance to the UK Judiciary. The current conversations taking place on this topic in the US foreshadow the risks that social media will pose to judicial users and the way in which a judge may go about using social media in an informed and capable way. The inevitability to judicial engagement online tells us that this may not be on the radar of the Judiciary at present, but that it should be, and it certainly will be in the future.

In this way, a change in judicial attitude towards social media also allows for a reimagination of the judicial role that is going to be needed for the future. The current restrictions placed on judicial use of social media and their suitability or desirability may be seen as a proxy for a wider debate surrounding the way in which the judicial institution ought to maintain legitimacy in our current society. Judicial engagement with social networks can therefore be seen alongside a number of other challenges that the Judiciary are facing and will face in the future. Some of these challenges include, *(1)* the impact of the COVID-19 pandemic and dependence placed on digitization in the justice system, *(2)* cuts to legal aid and the increasingly interventionist role of the judge in proceedings, *(3)* calls to enhance the transparency of judicial disciplinary procedures, and *(4)* the need to enhance diversity and promote inclusion at all levels of the judicial institution.

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[891] Casciani, D. "What is the UK Supreme Court?" (Jan 13, 2020) BBC News accessed via https://www.bbc.co.uk/news/uk-49663001

[892] Dillard, S A. "#Engage: it's Time for Judges to Tweet, Like, and Share" at p.11

2.1. Dependence on technology as a result of the COVID-19 pandemic

March 2020 and the national lockdown resulting from the ongoing COVID-19 pandemic catalysed the ways in which technology was and is now being used in the legal sector. The pandemic has "necessitated a significant increase in the role of technology in the justice system in England and Wales."[893] Despite the HMCTS reform programme, "Transforming our Justice System" which was launched in 2016, when the COVID-19 pandemic struck in 2020, the "court system was still, in terms of the use of technology, 'virtually below sea level', according to Professor Dame Hazel Genn of UCL."[894]

The implementation of technology in courtrooms across the UK, that may have originally taken years to implement, was required to be up and running in weeks. As Kelly noted recently in the Law Gazette, institutions that:

> "Might once have hesitated at the idea of changing their on-premises system have had to do so with little time to consider it, ushering in a more technologically advanced and flexible future."[895]

Current data suggests that as of April 2020, around 3,200 hearings a day are taking place through audio or video enabled technology.[896] Despite these large numbers, currently the backlog of cases in the England and Wales has "reached crisis levels."[897]

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[893] Kelly, F. "How tech will impact the legal sector following the pandemic" (21 October 2020) The Law Society Gazette, accessed via https://www.lawgazette.co.uk/practice-points/how-tech-will-impact-the-legal-sector-following-the-pandemic/5106078.article

[894] Justice Committee, "Coronavirus (COVID-19): The impact on courts" (30 July 2020) para.38, accessed via, https://publications.parliament.uk/pa/cm5801/cmselect/cmjust/519/51902.htm

[895] Kelly, F. "How tech will impact the legal sector following the pandemic" (21 October 2020) The Law Society Gazette

[896] HM Courts & Tribunals Service, "Courts and tribunals data on audio and video technology use during coronavirus outbreak" (14 April 2020) accessed via, https://www.gov.uk/guidance/courts-and-tribunals-data-on-audio-and-video-technology-use-during-coronavirus-outbreak

[897] Siddique, H. "Crown court backlog has reached 'crisis levels', report warns" (30 March 2021) The Guardian, accessed via https://www.theguardian.com/law/2021/mar/30/crown-court-backlog-has-reached-crisis-levels-report-warns

In February 2021, the Law Gazette reported that the Crown Court's backlog had reached 56,951, but that even prior to COVID-19, the baseline for the Court's backlog sat at 39,331.[898] Although "the court system was not well prepared for disruption on the scale caused by the pandemic", it is clear that significant funding cuts across the whole sector and "over the preceding decade" alongside a programme to modernise court technology that has been struggling to deliver the improvements needed, was putting pressure on the courts to provide effective services prior to March 2020.[899]

It is too early to say what the prolonged impact of COVID-19 will be on the justice system and whether this dependence placed on technology will be here to stay or indeed whether it ought to be. Whilst the increased use of technology in courts and tribunals has been a necessity during a global pandemic and has been hailed largely as a success, most notably from the perspective of lawyers and legal professionals,[900] there are very legitimate concerns as to the desirability and feasibility of a digitized justice system. This is especially true of family courts "where there are a lot of litigants in person…[who] are often living in fairly deprived circumstances" and it is "unreal to suppose that they have good broadband connections, computers and so on to be able to attend a hearing remotely."[901]

As Siddique claims in the Guardian, "there is much work to be done to address the constitutional consequences of the pandemic for the courts."[902] Concerns over access for vulnerable users of the justice system and apparent failure of the reform programs in place to modernise court proceedings will play a role in determining the future of the Judiciary and the

[898] Fouzder, M. "MPs have 'limited confidence' in MOJ's plans to clear court backlog" (24 March 2021) The Law Gazette, accessed via https://www.lawgazette.co.uk/news/mps-have-limited-confidence-in-mojs-plans-to-clear-court-backlog/5107914.article
[899] Siddique, H. "Crown court backlog has reached 'crisis levels', report warns" (30 March 2021) The Guardian
[900] Justice Committee, "Coronavirus (COVID-19): The impact on courts" (30 July 2020) at para.[40]
[901] Ibid, para.[44]
[902] Siddique, H. "Crown court backlog has reached 'crisis levels', report warns" (30 March 2021) The Guardian

provision of legal services more widely. The coronavirus pandemic will bring about many unforeseen changes in society and the Judiciary and justice system will not be immune from this, nor should they be. The COVID-19 outbreak shone a light on the failings of the HMCTS's ongoing reform programme to "transform" justice, and the glacial pace with which technological reform was progressing in the judicial branch. The dependence placed on technology as a result of the coronavirus pandemic tells us that, *(1)* the Judiciary had been hesitant to embrace technology reform prior to 2020, *(2)* technology will play an integral role in the way that courts and judges conduct proceedings in the future, and that *(3)* this offers a timely opportunity for the Judiciary to reflect upon the experiences of lay users of the justice system more widely, as we shall now discuss below.

2.2. Cuts to Legal Aid and the Rising Rates of Litigant in Person

The role that judges play in legal disputes has been undergoing change prior to the outbreak of a global pandemic in 2020. The coalition governments passing of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) left only 25% of the UK's population eligible for some form of legal aid in 2016.[903] These cuts to the provision of legal aid and the impact that this has had on the volume of litigants who cannot afford legal representation (litigants in person) pose new and difficult challenges for judges as *independent* legal arbiters.

One of the fundamental characteristics of the Anglo-American trial is the "adversarial system."[904] The traditional expectation is that judges play an "inactive, passive and non-interventionist role" in proceedings."[905] The judge traditionally has "no power or duty to determine

[903] "Spending of the Ministry of Justice on legal aid" (21 October 2020) CDP 2020/0115 at para.1.1
[904] Jacob, J I H. *The Fabric of English Civil Justice*, (Stevens, 1987) The Hamlyn Lectures Thirty-Eighth Series, at p.5
[905] Ibid.

what are the issues or questions in dispute between the parties…[and] the court has no investigative process of its own."[906] The question of how or whether judges should adapt this traditional approach to accommodate the relative lack of knowledge and skill of litigants in person, especially when the opposing party is represented by a trained lawyer, is an increasingly important and necessary one.

The courts have expressed reluctance to adapt their current low-interventionist role in order to assist individuals who have no formal legal training but who are nevertheless faced with the prospect of representing their own case. The limits to judicial intervention for litigant in person was recently discussed in the Supreme Court case *Barton v Wright Hassall LLP*,[907] where the judge showed very little tolerance towards a litigant in person failing to meet the required procedural standards. In this case the appellant failed to serve a claim form in the appropriate format prior to the statutory expiration date. Upon appeal the question as to whether the trial judge should have been lenient with regards to the fact that the appellant was a litigant in person was considered. Lord Sumption acknowledges that the appropriateness of the actions of the judge in this instance "mutated into an allegation of bias."[908] In this case the conversation of whether or not the judge should intervene on the LiP's behalf also became a conversation as to the potential that judicial intervention might have to amount to displaying partisanship.

The need for flexibility and adaptation in light of rising numbers of LiP's is certainly a question the Judiciary are going to come up against time and again. The changing landscape of legal aid and the addition of both LiP's and *McKenzie* friends into the legal marketplace will challenge the reconciliation of strict procedural court rules, with the reality being that parties cannot afford experienced legal representation and are therefore at a severe disadvantage in our adversarial system. The role that the judge might play to remedy this concern will test the

[906] Ibid, at p.10-11
[907] *Barton v Wright Hassall LLP* [2018] UKSC 12
[908] Ibid, at para. [24]

boundaries of the judge as a mere umpire, perhaps seeing the judge transgress into the realm of the European approach, where the judge acts as active investigator able to remedy potential imbalances in power between parties.[909] Conversations surrounding the independence and impartiality of the judge will inevitably accompany any move towards a more active or interventionist role within court procedure. Like judicial engagement with social media, the current reluctance to create a more active role for the judge in the courtroom goes hand-in-hand with a reluctance to compromise the appearance of independence and impartiality of the individual judge.

The increasing need for judges to remedy the imbalance brought about by cuts to legal aid and the disadvantages that litigants in person face in the UK's adversarial trial provides an opportunity, much like potential engagement with social media, to reimagine the constitutional significance of judicial independence. As the *Barton* case demonstrates, the questions surrounding the future of the judicial role when faced with LiP's are also tied to questions regarding the impartiality of the individual judge and the appropriateness of individual conduct. Therefore, this provides another opportunity for the Judiciary to consider reframing the importance placed on perceived impartiality and independence, in favour of active participation and social outreach. The role of the judge in this instance need not be legitimized through perceived independence but through active engagement and the process of assisting litigants who are dependent on the justice system to provide them with a legal remedy. Judges *ought* to be tasked with ensuring that all litigants receive access to justice and are able to meaningfully engage with the legal system, irrespective of their financial ability, or indeed inability, to pay for legal representation.

[909] See Langbein's discussion on the European trial process at Langbein, J H. "The German Advantage in Civil Procedure" (1985) *University of Chicago Law Review*, Vol. 52, no. 4, pp.823-866

2.3. Calls for Transparency in Disciplinary Proceedings

In Chapter I, this thesis referred to criticism surrounding the transparency of the JCIO's disciplinary procedures. Rozenberg's noteworthy critique of the JCIO's lack of transparency brings questions as to the ways in which judges are punished, and sacked, into the spotlight. As Rozenberg notes, sacking and disciplining "bad judges has been a tricky thing to do for more than 300 years."[910]

The Lord Chancellor and Lord Chief Justice have joint responsibility for the discipline of judges, but before any action can take place, the JCIO must hold an investigation and it is up to the panel, consisting of two judges (who may be retired, one of the same rank and one of a higher rank than the disciplined judge) and two lay people. Currently, "statements about sanctions below removal from office will be deleted after one year" and "statements about removal from office will be deleted after five years."[911] The Lord Chief Justice and Lord Chancellor may decide jointly to "decline to issue a statement, or delete statements, based on the individual circumstances of a case."[912] This can lead to the scenario seen with the disciplinary proceedings against Smith, a senior judge of the Hight Court Chancery Division. Prior to Smith's JCIO investigation, Rozenberg reported that "an unlisted tribunal is planning to sit at an undisclosed location…the [unnamed] panel will consider allegations that have not been published and make findings of fact that will not be revealed."[913] As was noted in Chapter I of this thesis, Smith's disciplinary proceedings ended in retirement, and the full details of the investigation were not made publicly available.

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[910] Rozenberg, J. "We need to be more open about punishing badly-behaved judges." (23 Nov 2017) Legal Cheek, accessed via https://www.legalcheek.com/lc-journal-posts/joshua-rozenberg-we-need-to-be-more-open-about-punishing-badly-behaved-judges/

[911] JCIO, "Disciplinary Statements: Publication Policy" accessed via, https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/

[912] Ibid.

[913] Rozenberg, J. "Open justice for judges" (2 Oct 2017) The Law Society Gazette, accessed via, https://www.lawgazette.co.uk/commentary-and-opinion/open-justice-for-judges/5063036.article

The JCIO's handling of disciplinary procedures is another example of the need to protect the perception of independence and impartiality by limiting or restricting the information that the public receives. Of course, as Rozenberg notes, "judicial independence means that judges must be insulated against ill-founded complaints by aggrieved litigants."[914] However, like with the restrictions on judicial access to social media, withholding the individual conduct of judges from the public eye becomes a way of protecting the perception of independence and impartiality of the judge. Restricting the information that the public receive regarding possible misconduct is one way of attempting to protect the appearance of independence, impartiality, and integrity from being compromised. However, when the public is left "almost completely in the dark"[915] regarding the discipline of a judge, the perception of this independence and impartiality may be in fact be compromised to a greater extent than if the proceedings had been made publicly accessible in the first place. As Rozenberg argues, the blanket of secrecy covering judicial disciplinary hearings creates "the impression that the rules and regulations…are designed to protect the judges rather than the public they serve."[916]

Restrictions on the disclosure of information in disciplinary proceedings, like with restrictions on access to social media, do more harm than good to the appearance of independence and impartiality in the eyes of the public. Like with social media, a call for "effective reform of the judicial complaints process"[917] might provide an opportunity to reassess the dependence placed on the perception of independence as a mechanism to legitimize the judicial role. The desire to protect the appearance of independence in this instance may be disregarded in favour of a transparent and visible disciplinary procedure. What form this enhanced transparency might take is uncertain, however, extending the amount of time that proceedings

[914] Ibid.
[915] Ibid.
[916] Ibid.
[917] Ibid.

against a judge are available to the public (for longer than one year) might be a good place for the JCIO to start.

2.4. Diversity and Inclusion in the Judicial Institution

The need to enhance diversity and inclusion on the bench and promote transparency in the appointments process is perhaps one of the most significant areas that is currently being critiqued and will impact on the Judiciary in the future. As the JUSTICE Strategy 2021-2024 states, "the lack of diversity in our senior Judiciary is not acceptable. There are few women in our senior Judiciary and even fewer BAME (Black, Asian and minority ethnic) people."[918] Growing social movements, such as the #BlackLivesMatter, call for an "urgent addressal of increasing racial and ethnic discrimination, inequalities and disproportionality in the justice system and for greater inclusivity and diversity within the system."[919] It is clear that now more than ever, that the Judiciary ought to represent the people for whom they make decisions every day.

This call to enhance diversity and inclusion has recently been acknowledged by the Judicial Office in their *Judicial Diversity and Inclusion Strategy 2020-2025*, where it is stated that "more needs to be done" to "ensure that those from diverse backgrounds feel welcome and comfortable as members of the Judiciary."[920] The judicial institution aim to:

> "Increase the personal and professional diversity of the Judiciary at all levels over the next five years by increasing the number of well qualified applications for judicial appointment from diverse backgrounds and by supporting their inclusion, retention and progress in the Judiciary."[921]

[918] JUSTICE Strategy: 2021-2024 accessed via, https://justice.org.uk/about-us/our-strategy/
[919] Ibid.
[920] Judicial Office, "Judicial Diversity and Inclusion Strategy 2020-2025" (2020) accessed via https://www.Judiciary.uk/wp-content/uploads/2020/11/Judicial-Diversity-and-Inclsuion-Strategy-2020-2025.pdf at p.4
[921] Ibid, at p.10

The call to enhance the diversity of the judicial bench speaks to discussions currently taking place in wider Critical Legal Theory, and areas of Feminist Legal Theory, wherein the idea that legal decision making should be demystified and that the institutions of governance should aim for transparency is considered.

The question as to what a "good judge", or a "good judgment", might be is often contextualised in feminist legal theory, wherein the fact that the "legal system was constructed, and until recently, interpreted and administered by and for men" is critiqued.[922] Feminist jurisprudence may reaffirm the conclusions of the legal realists or critical legal theory movement, in that the law and those who administer it are "neither neutral nor objective" but instead serve to "reinforce the dominant power structure."[923] Much feminist legal theory contends that judges who are women "are likely to bring a different perspective to the law, to employ a different set of methods, and to seek different results that the (male) legal tradition would seem to mandate."[924] The work of psychological Carol Gilligan is often cited, providing a framework as to the ways in which female judges may impact on legal decision making, given that "males and females understand themselves and their environment" differently, and this impacts on the way in which "they resolve moral problems."[925]

As the UNODC note, women judges are strengthening the Judiciary and helping to gain the public's trust:

> "The entry of women judges into spaces from which they had historically been excluded has been a positive step in the direction of judiciaries being perceived as being more transparent, inclusive, and representative of the people whose lives they affect. By their mere presence, women judges enhance the legitimacy of

[922] Davis, S. "Do Women Judges Speak in a Different Voice – Carol Gilligan, Feminist Legal Theory, and the Ninth Circuit." (1992-1993) *Wisconsin Women's Law Journal* 8, pp.143-174
[923] Ibid, at p.143
[924] Ibid, at p.144
[925] Gilligan, C. *In a Different Voice* (1982) as Davis (at p.145) notes, Gilligan's work has sparked intense debate and has been "severely criticized on methodological grounds" and "questions about the existence and nature of sex-related differences are at the centre of the debates among various versions of feminism."

> courts, sending a powerful signal that they are open and accessible to those who seek recourse to justice."[926]

Female judges do not simply enhance the appearance of a fair justice system, but they contribute significantly to "the quality of decision making, and thus to the quality of justice itself."[927] This tells us that gender, background, and the way in which judges think can affect the outcomes of legal decisions, not as per a natural law theory wherein law is intertwined with morality, or the converse of legal positivism that propagates their separation. Judges, as human beings with a range of backgrounds, experiences and thought processes create a complexity for the analysis of legal decision making that far exceeds this clear-cut distinction. Female judges, for example, enhance the appearance of representation, but they do more than this, they bring about different ways of thinking from their male counterparts, that may lead to *better* legal decision making. Females bring "lived experiences to their judicial actions" that tend towards an "empathetic perspective – one that encompasses not only the legal basis for judicial action, but also awareness of consequences on the people affected."[928]

Some of these arguments furthered by feminist legal theory are transferable when we consider the way in which good engagement with social media may also lead to improved judicial decision making. Certainly, the reputation of the judicial institution as a representative branch of government, capable of communicating with the public via digital mediums and shirking off their perception as being "out of touch" digital dinosaurs, could be enhanced by active participation online. But it is more than this. Judges who connect with the public online, who have access to wider demographics, and who are capable of engaging with the digital community may also bring about *better* judgments. We are indeed, "all plagued by unconscious or implicit biases unknown

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[926] Ruiz, Judge. "The Role of Women Judges and a Gender Perspective in Ensuring Judicial Independence and Integrity." UNODC, The Doha Declaration: Promoting a Culture of Lawfulness, accessed via https://www.unodc.org/dohadeclaration/en/news/2019/01/the-role-of-women-judges-and-a-gender-perspective-in-ensuring-judicial-independence-and-integrity.html
[927] Ibid.
[928] Ibid.

even to ourselves," and whilst there is "no antidote to this problem with regards to the Judiciary" if social media can be used to diversify the "life experiences of those who adjudicate cases" then the way in which legal decision making is carried out in the UK can also be improved.[929]

This thesis does not offer empirical evidence indicating that active engagement with social media will provide *better* outcomes for parties involved in legal disputes. Indeed, what can be considered a "better" outcome is unquantifiable and fluid depending on who you ask. Instead, this thesis asserts that the Fifth Estate provides judges with the opportunity to demonstrate their awareness of the consequences of their decision making to the public, and in turn, build and develop their lived experiences in order to make better legal decisions that better shape outcomes for the public in whose name they administer justice.

The need to encourage and enhance diversity in all levels of the Judiciary will permeate much of the commentary surrounding the public's confidence in "the legitimacy of the Judiciary…that reflects the broad composition of the society it serves" in the coming years.[930] This need to build an inclusive and representative Judiciary will also require a reconfiguration of their tech-competence and the relationship that both the institution and its individual judicial office holders currently have with the Fifth Estate.

Interestingly, one of the key objectives of the 2020-2025 strategy is to make "use of online platforms and resources to support and build outreach within schools, local communities and within the legal profession."[931] It will be interesting to see the ways in which the Judiciary plan on enhancing their current, limited, use of online platforms in order to do this, and this is certainly an area in which the argument for extending professional access to social media may be made.

All of these current challenges that the Judiciary is facing, and will face in the future, ultimately speak to two wider themes. Firstly, the way in which these challenges might be

[929] Ibid.
[930] Ibid.
[931] Judicial Diversity and Inclusion Strategy 2020-2025, at p.17

approached in order to result in “better” judicial decision making. And secondly, the ways in which transparency, diversity and accountability may replace judicial independence as a way of the Judiciary maintaining the legitimacy of their constitutional role. It is here that the current approach to social media becomes significant given the potential that social media has to inform judges about wider aspects of society and thus enhance their ability to make “better” decisions. In addition, informed and educated social media use may enhance transparency, encourage diversity, and promote accountability. A permissive and educated response to the Fifth Estate is therefore one of the many identifiable ways in which the Judiciary may strive for legitimacy in the digital age.

This reframing of the Judiciary’s attitude towards the use of social media by individual judicial office holders in a professional capacity provides them with the opportunity to reframe the way in which the Judiciary operates as a constitutional actor in the UK. Changing the way in which individual judicial office holders engage with the Fifth Estate provides one area in which we may see a shift away from the perception of independence and impartiality as the justification for the judicial role and see the Judiciary take up a public-facing role that promotes transparency and active participation with the public.

This will no doubt be a challenging and controversial notion for the Judiciary. The concept and promotion of judicial independence is deeply rooted in the way that the Judiciary functions in the UK, and as we have seen, the perception of a judge’s independence and impartiality is placed above all else, often at the expense of the actuality or factuality of their partisanship or bias. It is this attitude that must change if the Judiciary are to maintain the legitimacy of their function in the digital age.

3.0. The Future of the Judiciary

So, what might the future of the Judiciary look like? It might be difficult to envisage judge's commenting and posting online, perhaps even in a witty, funny, and engaging way. But this doesn't mean that they should be denied the opportunity to do so. This thesis has revealed that through the lens of understanding the relationship between the Judiciary and the Fifth Estate, that the judicial institution is focused on the idea of protecting the appearance of the Judiciary as an independent and impartial branch of government. One of the ways in which this is achieved is by withdrawing individual office holders from the public's "online" eye.

However, with a suitable educational framework in place, we might wonder whether our Judiciary *ought* to be focused on protecting the appearance of independence and impartiality – not in terms of their independence from Parliament and the Executive – but from the people in whose name they administer justice? Judges are after all accountable to the people who are impacted on by judicial decisions, and as a result judges ought to be *accessible* to the people. Embracing the opportunity social media provides for connectivity and accessibility presents an opportunity to re-evaluate the priorities of the Judiciary, moving away from the idea of protecting appearance, towards social engagement, civic awareness, and societal embeddedness.

The recent Government's Response to the Independent Review of Administrative Law (IRAL) presents us with an auspicious time for a re-evaluation of the way in which the Judiciary interacts with the Fifth Estate and proves the timeliness of this potential shift in the judicial role. The spotlight is currently on the Supreme Court, not least as a result of the *Cherry/Miller (No.2)* case and the role that the court has played in the Brexit debate. The review, addressed:

> "Fundamental issues concerning the appropriate constitutional place of judicial review, including whether appropriate tests of justiciability are being adopted and

> most fundamentally of all whether judicial review should be placed on a statutory footing and the grounds codified."[932]

This report came in response to the fear of "unaccountable and unelected judges usurping the role of parliament, setting the wishes of the people at naught and pursuing a liberal politically correct agenda of their own."[933] In short, "IRAL and its terms of reference form a small part of a debate that has smouldered, and sometimes burst into flames, over many years."[934] The IRAL panel fundamentally acknowledged that the review had been undertaken "in the middle of a pandemic" and was therefore limited, but did express "some" current concerns about judicial review.[935] The fact that 'difficult' cases attract different views is "rarely justification for radical reform", but, it was acknowledged that there "have been occasions when…the courts may be thought to have gone beyond a supervisory approach and employed standards of scrutiny that exceed what is legitimate within a supervisory jurisdiction."[936] Rather than acknowledge the often-political nature of this decision making, the panel put this down to the fact that largely speaking Parliament has "left it to the judges to define the boundaries of judicial review."[937] Despite this and given the important role that judicial review plays in the UK's constitutional arrangement; it was the panels view that any changes ought to be made only after "the most careful consideration."[938]

This Government's response to the IRAL seems to focus on the need to "create and uphold a system which avoids drawing the courts into deciding on merit or moral values issues which lie more appropriately with the Executive or parliament."[939] Whilst the Government's

[932] The Independent Review of Administrative Law (IRAL), (March 2021) at p.5
[933] IRAL at para.21 refers the reader to Rawlings, "Review, revenge and retreat" (2005) 68 *Modern Law Review*, 378
[934] IRAL, at p.11
[935] IRAL, Conclusions at p.129
[936] Ibid, at p.130
[937] Ibid.
[938] Ibid, at p.129
[939] Ministry of Justice, "Judicial Review Reform. The Government Response to the Independent Review of Administrative Law" (March 2021) CP 408, at p.8

response acknowledges that IRAL Panels proposed reforms, it is also "interested in exploring proposals beyond these."[940]

Clearly the government are pushing back on the politicization of the judicial role and the way in which this has frustrated the current Government's aims and ambitions. The Government's desire to push back and move beyond the IRAL Panel's recommendations only confirms the political role that judges currently play in the administration of justice. The deadline for responses has passed (29th April 2021), yet it remains to be seen whether the government will indeed give any potential changes to judicial review *the most careful consideration*.

Ultimately social media is here, it is here to stay, and it need not be the monster under the bed that the Judiciary currently believe it to be. The presence of judges online presents us with the possibility of modernizing, diversifying, and spurring a wider change, that in my opinion, is long overdue. How this change might look is uncertain, but one thing is not - social media will play a role in the future of the Judiciary, whether they want it to or not. The only question left now, is whether they will attempt to harness the Fifth Estate's power for good.

[940] Ibid.

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