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Justice

The legal system of England and Wales is a national asset but it must be respected and nurtured

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Executive summary

The legal system of England and Wales is a major asset, whose strengths will be even more essential in the post-Brexit world.

However, severe cuts have run down the courts and legal aid systems. Funds must be provided to repair this damage.

Some recent judicial decisions have provoked complaints that the judges have unduly interfered with political processes. Tensions have also been raised by decisions under the European Human Rights Convention, now incorporated into domestic law by the Human Rights Act 1998.

The Government has now appointed the Independent Review of Administrative Law (IRAL), under the chairmanship of Lord Faulks, to inquire into these issues and report by next Christmas.

The Review should be advised to avoid general restrictions on the scope of judicial review. If individual decisions are unacceptable, they should be specifically reversed by legislation. On balance, we should stay with the European Convention and the Human Rights Act 1998.

Judicial appointments should be kept clear of party politics. There is however a clear need to rebalance the process of appointing senior judges by strengthening the 'political' element, in the wider and proper sense of participation by the other branches of government. Otherwise there are longer-term risks to the quality and independence of the judicial branch.

The Justice Secretary should always be given a choice of 3-5 qualified candidates. 'Political' involvement should also be reinforced in other ways. They should not include Parliamentary confirmation hearings, though some form of Parliamentary involvement should not be ruled out forever.

The Government should also re-consider the role of the Ministry of Justice. The case is strong to return responsibility for prisons and probation to the Home Office, leaving the Ministry of Justice to concentrate on its core functions. Such a reorganisation would strengthen the need for the Justice Secretary to be a lawyer; but it would make that easier by giving the Prime Minister the option of putting him or her in the House of Lords.

Introduction

Justice is one of the most fundamental functions of government, together with defence and security. The legal system of England and Wales has a high reputation, and has been copied across the English-speaking world. We thus share a legal culture with the United States, with India, and with the old Dominions and many former colonies. In the post-Brexit world, this is an asset to be treasured.

Our legal system performs a wide range of functions: the trial and sentencing of criminal offenders; the adjudication of disputes about contracts, property, and compensation for accidents and injuries; and the regulation of family life and inheritance; and others as well. English commercial law is widely chosen internationally and, with our respected judiciary and legal profession, amounts to an important export industry.

Not least, the judiciary is one of the three branches of government, and has a long-established role to play in controlling acts of the executive government, both central and local. The rule of law means above all that the executive government is subject to the law, just like the citizens.

Against that, in this country, unlike (say) the United States, Parliament has legislative sovereignty, and is not subject to the courts' jurisdiction. The courts' decisions can therefore always be overturned by legislation, if Parliament thinks fit.

Our justice system has abiding strengths, which must be upheld. But it needs to be kept up to date and efficient, and true to the right values. If the country is to be 'match-fit' in a post-Brexit world, we need to fortify the strengths and reform the weaknesses in this field as in others.

Courts and access to justice

We have adequate, if sometimes slow, mechanisms, for keeping the laws up to date. However, the courts which administer these laws have suffered woundingly deep cuts in the last decade. The difficult challenges brought by the current pandemic have aggravated the damage. So too with the legal aid system, which is now failing in its purpose of enabling the citizens to have adequate access to justice.

Policy proposal

- *The Courts and Tribunals Service and the Legal Aid Agency should be given the substantial funding increases they need to restore them to previous levels.*

Judicial review

Meanwhile, two factors have brought the higher courts into increasing tension with the executive and the political class.

These are judicial review and human rights.

Judicial review is the modern version of the old prerogative writs which for centuries have empowered the courts to ensure that governmental action remains within the law. From the 1960s onwards, it has grown apace. Its influence has been generally beneficial, and the judges have in the main been careful not to trench on the political power of elected Ministers.

However, the recent struggles of a minority Government to implement a referendum-backed Brexit against a reluctant Parliament inflamed relations between all three branches, and not least between the Executive and the Judiciary.

Two recent decisions of the Supreme Court especially aroused political hackles. One was that the decision to trigger Article 50 required an Act of Parliament *(R. (Miller)* v. *Secretary of State for Exiting the European Union* [2017] UKSC 5). Another was that there were legal limits on the acceptable duration of prorogations of Parliament *(R. (Miller)* v. *Prime Minister et al* [2019] UKSC 41).

That period of political stalemate is now over. But at the time, some Ministers and other politicians complained that these decisions amounted to improper interference by the courts in the political and governmental process. This echoed increasing concerns over previous years about the expansion of judicial power. They have led in turn to calls for restrictions on the scope of judicial review, and/or more political involvement in the appointment of senior judges, to ensure that they are not motivated to interfere inappropriately with the government.

Human rights

Tension has also been raised between the executive and the judiciary by the increasing influence of the European Human Rights Convention 1950 and its dynamic development by its court in Strasbourg.

Britain was a leading founder-member of the Convention, and was the first to ratify it. But over the years, decisions of the Strasbourg court about such matters as voting rights of prisoners and the immigration rights of suspected terrorists and their families have provoked serious objections by British Ministers and Parliamentarians.

This tendency was reinforced when the Convention rights were incorporated into English law by the Human Rights Act 1998 (effective 2000). This requires British courts to apply these rights in domestic law, though not so as to override Parliamentary statutes. (The separate EU Human Rights Charter will, of course, cease to apply to Britain once we leave the EU.)

The Government's Manifesto

In its recent Election Manifesto, the Government pledged to "*update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government*". The Manifesto further stated that "*we will ensure that judicial review is available to protect the rights of individuals against an overbearing state, while ensuring that it is not abused to conduct politics by other means or to create needless delays*". And it promised to set up a "*Constitution, Democracy and Rights Commission*" in its first year "*to examine these issues in depth and come up with proposals to restore trust in our institutions and in how our democracy operates*".

The Government has now appointed the Independent Review of Administrative Law (IRAL) under the chairmanship of Lord Faulks, to inquire into these issues and report by next Christmas.

Way forward on judicial review

It will therefore be for the IRAL to recommend what changes, if any, it thinks desirable. For now, only provisional approaches can be outlined.

It has always been clear that, as the courts increasingly developed judicial control of executive action, a boundary-line would loom ahead. There must come a point on this trajectory when judicial decisions become so 'political' that Parliament and government will be tempted to move to limit the extent of judicial review generally, and/or ensure that senior judges are not appointed without some public process of political approval.

Arguably none of the recent Supreme Court decisions have in fact brought us to that point. Nevertheless, they have brought the underlying issues to the surface.

Hopefully, the IRAL will not opt for general legislative restrictions on the scope of judicial review. Any such restrictions would actually or potentially breach the rule of law. Much better, if government and Parliament cannot accept a judicial review decision, to legislate specifically to reverse it.

Thus, if the 'prorogation' decision is found unacceptable, Parliament should pass an Act making it clear that there are no (or stated) limits on the executive power to prorogue Parliament. (Or, more subtly, that prorogation shall be deemed to be a proceeding within Parliament, and so exempted from judicial control by the Bill of Rights.) Of course whether Parliament would approve such a Bill would be for it to decide.

Governments must always remember that constitutional changes may one day be used against them by their successors.

Policy proposal:

- *Parliament should not impose general restrictions on the scope of judicial review. If court decisions are unacceptable, they should be reversed specifically.*

Way forward on Human Rights

There are arguments both ways on whether we should continue our membership of the European Convention on Human Rights.

The Strasbourg court has undoubtedly built up a large and intrusive structure on the foundations of a Convention which was made in a different time and arguably for more limited, though fundamental, purposes.

On the other hand, for Britain to leave the Convention, and arguably to reject its values, would cause us serious reputational damage, and encourage more recusant member-States to ignore its letter and principles. Moreover, it would widen the gap between the human rights regimes of the two parts of Ireland.

This is a political decision for the government. On balance I would contend that the case for leaving the Convention has not yet been made out. The more so since, if and when we leave it, there will be strong pressure to replace it with a British Bill of Rights; and it is already clear that this would not be straightforward, not least because of the devolutionary dimension.

Policy proposal:

- *The government should not leave or diminish the European Convention on Human Rights. Nor should it repeal the 1998 Act.*

Judicial appointments

This country formerly had a long tradition of party political involvement in senior judicial appointments. But that ended soon after the Second World War, and since then judicial appointments have been entirely non-political. Moreover, the cultures of the legal profession and the political world have grown apart. This is both a strength and a weakness. Our modern judiciary is genuinely non-political. But it has less knowledge of politics and government; and there are fewer senior lawyers in politics to fill Ministerial posts.

The more the courts become involved in decisions affecting government, the more there will be calls for pre-appointment assurance that the judges are politically 'sound'. In the United States, the Supreme Court has plenary powers to strike down legislation or executive acts which it holds contrary to the Constitution. It is therefore inevitable, and arguably legitimate, that Supreme Court judges are appointed by the President, with political considerations never far away, and are confirmed by the Judiciary Committee of the US Senate, after lengthy and intrusive interrogation of the candidates.

Last year, the outgoing President of our own Supreme Court, Lady Hale, said, "*We do not want to turn into the Supreme Court of the United States, whether in powers or in process of appointment*". And our recent Attorney-General Geoffrey Cox resiled from his earlier suggestion that the time might have come to require Parliamentary approval of judicial candidates.

There thus seems a strong consensus in the legal world, and reasonably wide agreement in the political world, that we should not bring back any element of party politics into the appointment of our judges.

The need for a proper 'political' element

There is, however, a strong case for restoring more 'political' involvement, in the wider and proper sense of participation by the executive and the legislature.

Senior judges were formerly appointed, in effect, by the Lord Chancellor in close consultation with the senior judiciary. But then the Lord Chancellor was always himself a senior judge or lawyer, and was also both a senior Cabinet Minister and the head of the Judiciary. Although party politics had long been cleared from the system, this gave at least adequate 'political' involvement in the wider sense, coupled with a degree of expert outside appraisal.

The system since the Constitutional Reform Act 2005 requires Supreme Court judges to be appointed on the advice of a selection commission chaired by the President of the Supreme Court, and composed of another UK Judge not on the Supreme Court, and one lay member each from the three United Kingdom appointment commissions. The Justice Secretary has a much narrower role than the Lord Chancellor did previously: he or she can only reject or request reconsideration of the single name proposed by the Commission. Of course the Justice Secretary nowadays may not be a senior lawyer or even a lawyer at all.

This strikes the balance of roles and powers too far towards the judges and too far away from the executive. This balance needs to be restored.

Failure to do so carries two long-term risks. It makes the judiciary too much a self-perpetuating elite. And, by excluding the other branches of government, it gives those branches too little involvement or responsibility for the judges who will have the power and duty to control some acts of the Executive.

This in turn heightens the risks to the quality and independence of the judges. Our senior judges themselves, coming as they do from a non-political professional background, may not be fully aware of the extent of these risks.

How should this 'political' (in the proper sense) involvement be restored? I would argue that the Justice Secretary should in any event be given a real choice between at least 3-5 candidates. A junior Justice Minister could be included on the selection commission, who could also be given the general task of supporting the Lord Chancellor on appointments.

In addition to this increased (or restored) role for the Executive, there remains a case for some wider form of Parliamentary involvement, in which judicial candidates are interviewed, and possibly approved, by MPs and/or peers. This idea has never been welcome to our judicial and legal communities, and recent developments in the United States (the Kavanaugh hearings, etc) and here have made it even more controversial.

Accordingly, the time does not seem ripe for such a system, if indeed it ever will be. While accepting this, I would suggest that it should not be ruled out forever. In spite of the objections, a carefully devised form of Parliamentary involvement in Supreme Court appointments could help strengthen a judicial security and independence whose foundations may be more fragile than is fully understood.

Policy proposals:

- *A greater 'political' element (in the proper sense) should be restored to the appointment of senior judges.*
- *The Justice Secretary should be given a real choice between 3-5 qualified candidates.*
- *Other means should also be considered, including the addition of a Minister to the selection commission.*
- *Wider Parliamentary involvement is not appropriate now, but in some form should not be ruled out forever.*

Ministry of Justice

There is another, and potentially connected, set of issues about the best way to organise the justice function within the executive government. The old office of Lord Chancellor was in effect abolished in 2003, and the present Ministry of Justice was established in 2008. It subsumes the functions of the old Lord Chancellor's Department, together with certain constitutional responsibilities, and (above all) the prison and probation services, taken over from the old Home Office. The new Ministry thus has a staff of some 80,000. After only 12 years, these changes are still bedding in. But the government may be considering further changes in this area.

There is of course a case for avoiding the upheaval of further change. But there are other options. Brigading the penal with the justice services was always arguably inappropriate, both in principle and in practice. The penal services are always intensely politically sensitive, and drain the time and attention of Justice Ministers and officials away from the usually less critical, but always vitally important, justice functions. Moreover, the penal services are quintessentially appropriate for the interior ministry, i.e. the Home Office.

We certainly need a Ministry of Justice, and there is no way we could go back to the old pre-2003 regime. But there is a good case for restoring the penal services to what would have to be a revivified Home Office. This would leave the Ministry of Justice to concentrate on its core functions of the legal system, including courts and tribunals and judges, law reform, and its other existing constitutional responsibilities. This might carry a mild risk of reducing the Ministry's heft with the Treasury, but that seems acceptable in the context.

Such a reorganisation would strengthen the need for an effective convention that the Justice Secretary should always be a qualified and experienced lawyer (as the current one happens to be).

Policy proposal:

- *Responsibility for the Prison and Probation Services should be restored to the Home Office, leaving the Justice Ministry to concentrate on its core functions.*

Without the penal responsibilities, which must always be represented in the House of Commons, such a reorganisation would at least give the Prime Minister the option of putting the Justice Secretary in the House of Lords, which in turn would widen his choice.

It would also free the Justice Secretary's time and attention for closer and more continual relations with the judges; which in turn would enable the minister and team to play a more effective role in senior judicial appointments.

Such changes will presumably not be for the IRAL. They will be for executive decision by the Prime Minister, and they need not necessarily await the Commission's report.■

Sir Thomas Legg is a former legal civil servant. After being called to the Bar, his main career was in the Lord Chancellor's Department (now the Ministry of Justice), where his work included law reform, international legal relations, courts administration and judicial appointments. He served as Permanent Secretary and Clerk of the Crown in Chancery from 1989 to 1998. Thereafter he served on a variety of committees, boards and inquiries until 2014. These included the Sierra Leone Arms Investigation (1998), the Audit Commission (2005-11), and the MPs Expenses Review (2009-10). He was appointed QC in 1990 and knighted (KCB) in 1993.