Talk to Judicial Institute

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Blaming the Judges

What is our problem with politicians when it comes to the Law?

INTRODUCTION

It is a great pleasure to have been invited here this evening to give this talk. This is all the more so as it takes its name from Sir Brian Leveson - a fellow bencher of Middle Temple. In his judicial career he has epitomised, sometimes in the face of the poor behaviour of politicians, the highest standards of conduct that we too often take for granted in judges, but politicians too often neglect to openly support.

When it was first proposed to me to come this evening, the idea was that I should talk about the Government's new Bill of Rights and its likely impact both domestically and internationally. This issue is of course something of an "old song" for me, because the first time I came to give a talk at UCL was shortly after being dismissed from office as Attorney General in 2014 over this issue. David Cameron, as Prime Minister, had decided that the Conservative Party manifesto of 2015

would contain a commitment to "scrapping" the Human Rights Act and replacing it with a British Bill of Rights that sought to limit the scope of how the European Convention on Human Rights was interpreted in our domestic courts. As I disagreed with this policy he dispensed with my services. But eight years and three Prime Ministers later, each of whom has expressed similar irritation and hostility to the operation of the Human Rights Act, we still have it and the latest proposals for change were brought in under Boris Johnson and dropped by Liz Truss when she became PM as a "complete mess". But the threat of change - including, if we listen to the Home Secretary, pulling out of the Convention altogether remains; and the "complete mess" has now returned with Dominic Raab as Secretary of State for Justice.

This instability made me think that I might better leave it to others to analyse the proposed Bill of Rights. It might be opportunity instead for a more personal reflection on the phenomenon that has given rise to this long running saga over the Human Rights Act, as well as other areas of tension between politicians and the Law; a tension which has certainly affected my career in politics. I want to examine why some politicians and their linked circle of supporters (which includes policy makers, party members and journalists) have become irritated by and critical of the operation of the rule of Law as we currently have it and of judicial decisions that underpin it. I also want to look at the consequences that have flowed from this and what, if anything might be done about it.

POLITICIANS AND THE LAW

In the course of twenty two years in the House of Commons I can't recall any politician or indeed law abiding member of the public who did not believe in the principal of judicial independence and the Rule of Law as an abstract concept. The United Kingdom's judiciary is rightly held in high esteem for its lack of corruption and its independence from the other branches of government. There is also, almost universal, pride in the existence of a legal system that has a good global reputation for seeking to deliver justice and the Rule of Law. The presence of retired UK judges on the benches of international commercial courts is viewed favourably. Successive governments have used our judiciary and legal system to promote U.K. soft power. As Attorney General I travelled to the Gulf and to the Occupied Palestinian Territories as part of such programmes, in which former judges also helped. In 2015 the then government supported financially the Global Law Conference in London that both promoted the Rule of Law and showcased our own contribution to it.

Nevertheless, such appreciation does not mean that all judicial decision making is universally applauded. The interpretation and application of the Law may be the preserve of the courts, but Parliament is the lawmaking body and the executive which is bound by the Law has an entirely legitimate interest in its operation. As judges know and have to accept, the decisions they make are open to comment and criticism. But while criticism ought to be tempered by an awareness of the need to show respect for the separation of powers, the reality is that politicians find it hard to do this if a particular judicial decision appears adverse to their own opinion and that of sections of the electorate or the media to

whom they look for approval and support. This has become much more so in an age when politicians come under growing pressure from social media to comment and take sides daily on a myriad of controversial topics.

A good example of this trend can be seen in the history of what have come to be known as super-injunctions. These have actually been used very sparingly by the courts as interim measures to restrain the publishing of information which is being plausibly alleged_to be confidential and private and, further to prohibit the publication of the existence of the order, on the ground that otherwise its purpose would be undermined. It has always been recognised that they are exceptional. Unsurprisingly, however, the orders have also been objected to by sections of the Press and public as they have prevented the reporting of the names of litigants and the background of cases often of legitimate public interest. In 2011 this led to an MP, John Hemming, using and abusing parliamentary privilege to circumvent an anonymised injunction. It happened two years after the decision in the Trafigura case which had encouraged the incorrect belief amongst some MPs and journalists that the courts were trying to gag Parliament in breach of the Bill of Rights of 1689, notwithstanding an intervention from Lord Judge explaining that this was not the case. The senior judiciary then responded promptly by setting up an inquiry by Lord Neuberger to report on the use of such injunctions. The publication of his findings largely brought that controversy to an end. But the episode illustrates the serious problem that can arise if judicial decisions are seen as flawed or objectionable by parliamentarians. The consequent potential for confrontation, the loss of comity between Parliament and the courts and the temptation to abuse parliamentary privilege, can lead to the undermining of the Rule of Law.

Such tensions are going at times to be inevitable. The workings of Parliamentary democracy are always going to have a chaotic fringe. Freedom of expression can come into conflict with rules that underpin the operation of the courts. But the majority of parliamentarians have normally refrained from jumping on such bandwagons and successive Speakers of the Commons have sought to prevent abuses of parliamentary privilege. As long as those parliamentarians who are also members of the Executive support the Rule of Law and are capable of mediating and resolving such issues, the problem is in the long term a relatively minor one; just as is intemperate criticism of judicial decisions from the same source. I have always been struck by the fact that members of the judiciary, who weigh words carefully, can continue to be concerned about the comments of politicians long after the politicians have forgotten they ever made them.

THE EXECUTIVE AND THE LAW

The issue however is different if it is the politicians who are members of the Government who take the lead in attacking judges and the legal framework within which they operate. Although Ministers and other political leaders may in past generations have had reason to be irritated with the way the law was interpreted and applied, it is only more recently that there has emerged amongst them a persistent, almost endemic frustration with legal constraints. It is now claimed that such constraints now impinge so as to make it difficult for governments to govern in what is claimed to be the widest public interest. This claim

centres in particular on a belief that there is an overemphasis on individual rights at the expense of the rights of the majority, whose views are therefore being ignored, thus undermining democratic legitimacy. There is almost an assumption that what is not "democratic" has no value.

With a few exceptions, the basis for the expressed concerns is not rooted in stand alone judicial decisions. Rather they are the result of the choices of successive democratic governments since the end of the Second World War to accept the constraints on how a government should behave towards those subject to its authority imposed by the multiple international legal obligations voluntarily entered into. Some of these have then become expressly incorporated by legislation into our domestic law and thus become directly enforceable through our courts. This effect is a consequence that was both predictable and predicted. When the United Kingdom signed up to the ECHR, the ten key rights originally protected under the Convention were, with the exception of Article 8 on privacy and family life, a classic exposition of the "liberties" which successive generations of British politicians and the British public have claimed as our shared and exceptional inheritance. Those rights fitted with a romanticised national narrative traceable back through the Bill of Rights of 1689 via Habeas Corpus to Magna Carta. But there is a big difference between that tradition and the effect of signing up to an international legal obligation that has to be interpreted as a last resort by an international tribunal. The then Labour Lord Chancellor Lord Jowitt feared that the "*real vice of the document ...consists in its lack of precision".* Contemporary FCO advice to Ministers on the ECHR was against signing, arguing that to "*allow governments to become the object of such potentially vague*

charges by individuals is to invite Communists, crooks and cranks of every type to bring actions".

Over seventy years on it is striking how the same themes keep on repeating themselves. Early adverse decisions of the ECtHR were tolerated even if not welcomed by some politicians - an example is the judgment in Campbell v Couzens [1982] 4 EHHR 982 that effectively triggered the end of corporal punishment in schools. But by the early 1990s there was a significant change in political attitudes. Michael Howard, as Home Secretary, complained of the decision of the ECtHR in Chahal v UK [1996] 23 EHHR 413 to prevent the deportation of a suspected Sikh terrorist to India on the grounds of the risk of torture and despite the assurances he had secured. He alleged that it usurped a decision that ought to have been left to the Executive. This attitude coloured the Conservative Party's approach to incorporation of the ECHR through the Human Rights Act, even if at the end of the legislative process the Party's policy was not to vote against it at Third Reading in the Commons in 1998.

By 2015, the widely celebrated 800th anniversary of Magna Carta, David Cameron, who was Howard's special adviser at the time of Chahal, was happy to praise both the Charter and the principles underpinning the Convention. Yet he had, in the preceding months, published a Conservative Party position paper that asserted that "*both the practice of the European Court and the domestic legislation passed by Labour (the Human Rights Act) has damaged the credibility of rights at home*". The European Court was accused of subverting the intentions of the Convention's draftsmen by developing its jurisprudence outside the alleged scope of its remit. There was talk of

fundamental change, with, at its heart, an intention to repeal the Human Rights Act and replace it by a British Bill of Rights which would "clarify" rights (particularly those under Articles 3 and 8) so as to prevent their abuse in deportation challenges by changing the tests to be applied. The Convention rights were to be confined to "*cases that involve criminal law and the liberty of the individual and other serious matters*", with Parliament setting a threshold below which no Convention right would be enforceable. It also sought to break the link between the jurisprudence of Strasbourg and our own so that no account need be taken in this jurisdiction of that court's rulings. The United Kingdom was to demand a special status, where judgments of the ECtHR were merely advisory or else, if this could not be achieved, leave the Convention. That would then leave us with a domestic Bill of Rights with all potential areas of irritation for the Executive removed.

As was pointed out by many at the time, this proposal contained serious factual errors and consequential defects in argument. It was widely criticised. But it still featured in the 2015 Conservative Manifesto, but never went anywhere until substantially revived with some minor variations by the Justice Secretary, Dominic Raab, in his current British Bill of Rights. This Bill, and the minor changes brought in to the operation of judicial review through the Judicial Review and Courts Act is I think driven much more by recent events than past sources of hostility to the Convention. In 2015 the Conservative Party had found, to its surprise, that in private polling only 16% of the electorate considered that repealing the Human Rights Act was even in their top ten priorities. They should not have been surprised. After the Brighton Declaration of 2012 there was a significant diminution in the number of UK cases before the ECtHR and, perhaps consequently, much less media comment about its operation. The prisoner voting stand off was

resolved by David Lidington as Lord Chancellor without the need for primary legislation and without any domestic political fallout at all. Whilst leaving some continuing friction over deportation and asylum and the impact of the ECHR on military operations there were far fewer complaints about judicial activism.

However, the Conservative Manifesto of 2019, written in the aftermath of the two decisions of the Supreme Court in the Miller cases, was directed at the new sources of political grievance that sprang directly from the Brexit process. It focussed on "*the relationship between, parliament, government and the courts, the functioning of the Royal Prerogative; the role of the House of Lords…"* and (somewhat bizarrely in the circumstances) *"access to justice for ordinary people*". It pledged to update "*the HRA and administrative law to ensure there is proper balance between the rights of individuals, our vital national security and effective government*". It went on "*We will ensure that judicial review is available to protect the rights of the individuals (sic) against an overbearing state, while ensuring this is not abused to conduct politics by another means and to create endless delays*". There was no hint of recognition by the Government then or since that the Supreme Court, in ruling that the initiation of the Brexit process must be by primary legislation rather than under Prerogative power and by checking the Executive's abuse of the Prerogative to prorogue Parliament for six weeks in the middle of a political crisis for the express purpose of avoiding parliamentary scrutiny, might have been protecting those very rights referred to in the 2019 Manifesto and parliamentary democracy itself.

Instead, the 2019 Manifesto and the Government's attitude to the Miller decisions seem to mark the development of a novel constitutional principle: that governments enjoying the confidence of a parliamentary majority have essentially a popular mandate to do whatever they like and that any obstruction of this is unacceptable.

There was also, more reasonably, the promise of a "*Constitution, Democracy and Rights Commission" to look in depth at all these issues*" and come up with proposals "*to restore trust in our institutions*". This might have been of considerable interest. But, like most Johnson promises, such a Commission has never materialised. It has been replaced instead by piecemeal reviews of Human Rights and Judicial Review; followed, in the case of Judicial Review, by very minor reform and in the case of Human Rights, legislation which disregards the cautious and well reasoned ideas of the independent panel chaired by Sir Peter Gross. In regard to the Nation's security the Overseas Operations (Service Personnel and Veterans) Act 2021 which was intended to end vexatious claims against UK Armed Forces personnel can also be counted as a consequence of the 2019 Manifesto promises. Denounced by a former Chief of the General Staff as contrary to all the principles for which the Armed Forces stand, it was extensively amended during its passage through Parliament to remove glaring incompatibilities with international legal obligations that the UK claims to support as a champion of global human rights. The end result is still a two tier limitation period for bringing civil claims that discriminates in favour of Armed Forces personnel and a presumption against prosecution of personnel for many lesser offences after five years. Both look open to legal challenge under the Human Rights Act and it is difficult to see how the Overseas Operations Act creates any greater certainty or improves the law.

But it would be a mistake to assume that this politically generated irritation as being solely confined to the conservative end of the political spectrum. Labour and the SNP, as parties of government, have shown at times a marked reluctance to support the Strasbourg Court and the Convention on issues that might be electorally unpopular. The political silence on the part of both these parties in response to the judgment in Hirst v UK (2006) EHRR41 on prisoner voting was illuminating in this respect. Indeed, the Labour government, which enacted the Human Rights Act in 1998 as a reasoned response to the need for individuals to be able to assert Convention rights domestically, seemed to lose its enthusiasm for the consequences under the growing threat of terrorism post 9/11/ 2001. That world event started a period of turbulent relations between the UK government and judiciary initiated by the passage of the Anti-Terrorism and Security Act 2001. Part IV of the Act provided for the indefinite detention of foreign nationals designated as terrorism suspects and thus required derogation from Article 5(1) of the Convention. Litigation resulting from the derogation including the House of Lords' judgment in A v Home Secretary [2004] UKHL56 declaring the legislation to be discriminatory and incompatible with Article 14 led to estrangement between the executive and judiciary. The then Home Secretary, Charles Clarke, wanted a meeting with senior judges so as to ascertain what might be acceptable to them and this suggestion was understandably rebuffed as compromising judicial independence. Labour back benchers were then emboldened to rebel over 90 and 42 day pre charge detention and the government saw its policies under sustained criticism. Worse still for the Labour government, the progressive emergence of allegations of United Kingdom involvement in serious human rights breaches by the USA and the litigation that ensued led to a breakdown in judicial trust

in governmental standards of propriety and integrity in relation to that litigation. The decision of the Court of Appeal in Binyam Mohammed v Foreign Secretary [2010] EWCACiv 65 to order the disclosure of documents containing information that had been provided by the USA under the "Control Principle" (previously upheld in our courts) guaranteeing their confidentiality marked a definite low. The basis of the judicial decision was that the material was already available to the public through US litigation and disclosure was required in the interests of justice. The then government saw it, not unreasonably, as a disastrous blow to our reputation in the USA as a reliable partner; maintenance of which was vital to our national security and protection from terrorism.

Some level of tension between the executive and the judiciary may be viewed as healthy, particularly if it reinforces public confidence in judicial independence and the open debate on law that underpins parliamentary democracy. But as the judiciary is made up of human beings, such tension, especially if allowed to escalate, can induce feelings of being beleaguered and thus is corrosive of the mutual respect each branch of the State should have of the other. This was certainly the case after the Miller 1 case and the complete failure of the then Lord Chancellor, Liz Truss, to speak out against those newspapers who had branded the judges involved as "*Enemies of the People*" notwithstanding their entirely reasoned and reasonable judgment on an important point of law and constitutional practice. The understandable instinct when under such pressure is to push back. This in turn reinforces the belief of some politicians that, in a constitutional system that has been made increasingly rights based, the judiciary might look for opportunities to overrule the principles of parliamentary sovereignty on which they see their power to govern as depending.

Most lawyers see this fear as far fetched. But there are just enough examples of judicial statements in recent times to give this political concern some legs. In Jackson v the Attorney General [2005] UKHL 56, Lord Steyn suggested that "*in exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this a constitutional fundamental which even a sovereign parliament acting at the behest of a complaisant House of Commons cannot abolish*". Another in the same genre was the obiter comment of Lord Kerr in R(JS) v Work and Pensions Secretary [2015] 1WLR concerning the lawfulness of the benefit cap, when in a dissenting judgment he suggested that he could see no reason why the UN Convention on the Rights of the Child, an unincorporated international legal obligation, should not be directly enforceable in domestic law on the basis that, as the UK had chosen to subscribe to its standards by entering into a treaty, its government should be held to account in the domestic courts for its actual compliance.

If Lord Steyn's comment concerns a doomsday scenario which one might reasonably hope will never occur, Lord Kerr's proposition would be revolutionary in our dualist system if it were ever to be applied. Welcome as his comments may have been to some campaigning groups highlighting the gulf between virtue signalling political aspiration on the international stage and the domestic legal reality, the truth is that many such otherwise influential treaties would never have been signed in the first place if any direct judicial enforcement had been envisaged or likely.

Finally in this list of examples of judicial goads to government is Evans v the Attorney General [2015] UKSC 21. The Supreme Court there struck down my own decision to exercise the veto provided for in clear terms in the Freedom of Information Act 2000, to overrule a decision of the Upper Tribunal. This was the "black spider letters" case in which the question was whether the then Prince of Wales' correspondence with government should be disclosed. I decided to exercise that veto as my own conclusion on the balance of public interest after a review of the issues differed completely from that of the Tribunal. The Supreme Court did not strike my decision down because it was unreasonable, but because the majority of the justices considered that Parliament could not have intended to give a minister the power to overrule a superior court of record and that in the absence of the statute spelling out the power in terms that were crystal clear they would interpret the statute to confine the ministerial discretion within boundaries so narrow that it made that part of the Act unworkable. The judgment revealed sharp differences within the court. A minority were satisfied that the power I had exercised was clear. But a majority of the Court were plainly deeply concerned at what they saw as a power improperly given by Parliament to ministers to overrule a court contrary to theoretical principles of the Rule of Law. They then engaged in some highly creative statutory interpretation to find a way of negating it.

The oddity of the issue is that the history of the Freedom of Information Act shows no such intention subversive of the Rule of Law was ever intended by either the executive or Parliament. The original intention was to make the Upper Tribunal's decision merely advisory for ministers. It was only during the passage of the bill that the government agreed to make the powers of the Tribunal determinative with a judicially reviewable executive override. The truth is that, rather

typically, the consequences of the eventual legislative proposal had not been properly thought through. Using the Upper Tribunal in this way, whether in the original or amended form, was unsatisfactory. But whether this justified the Supreme Court decision is debatable. Equally, it is worth noting that, in response, the government chose to do nothing to reverse the effects of the judgment.

Looking at these three examples, now often cited as evidence of deliberate encroachment by judicial power, I am left wondering whether the obiter comments of either Lord Steyn or Lord Kerr or, indeed, the decision in Evans would have occurred if there had been a greater relationship of understanding and, therefore, confidence between the judiciary and the executive in the first place. The sense of judicial concern at possible future if not present executive misbehaviour is palpable in each of them; just as was the breakdown in trust that saw the "control principle" undermined in the Binyam Mohammed case. The more government (or individual ministers) are perceived to neglect or even to undermine the Rule of Law by actions or words the greater the temptation and therefore risk of judicial pre-emptive words and decisions.

THE PRESS AND THINK TANKS

The Government's current rhetoric against "rights culture" and its current legislative proposals on judicial review and human rights is being actively promoted by sections of the printed Press and some think tanks. The Judicial Power Project run by Policy Exchange for example

is intimately linked to a sectional interest of the Conservative Party that comes across at times as almost cultish in tone.

In the case of sections of the Press an important driver is the impact of the way in which privacy law has been developed by the application of Article 8 of the Convention by the courts. This has then been translated into outright hostility to the operation of the Human Rights Act more generally. This enmity to any restrictions on their freedom was also clear in the resistance to the investigation of malpractices including the revelations of serious breaches of the criminal and civil law by a number of media organisations over phone hacking and invasions of privacy. It led to the originally promised second part of the Leveson Inquiry being abandoned by the government, in response to pressure from sections of the Press from whom it needed support. As a politician on the front bench and in government, I saw at first hand the pressure and power that was exercised over Prime Ministers and party leaders to conform to what the owners and/or editors of certain newspapers wanted.

The contribution from Policy Exchange is far wider ranging and has been at times more nuanced. Its criticism of judicial power includes a list and analysis of 50 “cases of concern” (some of which date back to the early 20th century). Cases such as Liversidge v Anderson 1941 are cited as examples of the Judicial Committee of the House of Lords wrongly sanctioning executive discretion rather than carrying out proper statutory interpretation and considering the reasonableness of the ministerial decision. Along with Lord Sumption’s separate critique in his Reith Lectures, the Policy Exchange list has produced some valuable commentary on trends initiated in recent decades by

Parliament itself; trends that have facilitated the extension of judicial power further into choices inherent in administrative decisions, that ought perhaps better to have been left to politicians. But, whereas Lord Sumption's conclusion was to caution judges to exercise self restraint together with an acknowledgement that this restraint was indeed already happening more than previously, the most recent product of Policy Exchange's labours is a paper by Professor Richard Ekins, it's prime academic mover, which advocates something far more radical.

In "The Limits of Judicial Power", apparently published to coincide with the start of the Truss administration, Professor Ekins demands complete withdrawal of the UK from the ECHR, the reform of domestic human rights law through the repeal of the Human Rights Act leaving this country to rely on statute and common law as it was pre1998. This proposal is intended to give us back our "*traditional constitution*". It requires making sweeping changes to principles of judicial review – including, predictably, a prohibition on the courts being able to review matters relating to the "*political constitution*" or to interpreting "*ouster*" clauses and also imposing limits on judicial review in other contexts. But, perhaps most tellingly, at the end of his paper, this legal academic invites Government and Parliament to abandon the process of independent judicial appointments derived from the Constitutional Reform Act 2005. He argues that the Lord Chancellor/Justice Secretary should be given the discretionary power to veto the appointment of any individual as a senior judge who might personally be minded to "*undercut settled constitutional fundamentals, including parliamentary sovereignty*" and in the meantime says that use should be made of existing powers "*to refuse to appoint candidates who have cast doubt on Parliament's authority to make or unmake any law*".

Short of posthumously refusing to appoint Lord Steyn to judicial office for his obiter reflections in Jackson or for that matter Sir Edward Coke for his judgment in Dr Bonham's Case in 1610, it is hard to see who this is specifically aimed at, as no current judge has questioned the sovereignty of Parliament to make or repeal laws. But the general intent is clear; to control the judiciary by removing one of their key roles in our modern constitution of being able to interpret statutes in line with evolving general legal principles (a power which is quintessentially consistent with the way the Common Law system works) and to scrutinise the extensive powers used by ministers and public officials which affect the liberties and rights of citizens. As these executive powers have grown massively in the last century so has the importance of there being an independent check on their use. The future offered by Professor Ekins looks rather dystopian.

I have often spoken about the benefits of the Human Rights Act and our adherence to the Convention. This talk is not the place to repeat them in detail. But even Professor Ekins acknowledges that leaving the ECHR would have foreign affairs implications in relation to the Trade and Co-operation Agreement with the EU. The TCA underpins our continuing relationship in combatting crime and delivering national security and data sharing. He sees the problem of the Belfast/Good Friday agreement as solved by the expedient of leaving the Northern Ireland Assembly and Executive with a duty to comply with Convention rights. He leaves entirely unexplained how this could conceivably work either politically or legally if the UK has, as he proposes, left the jurisdiction of the ECtHR.

What he also chooses to ignore are the more general advantages that have come from our national adherence to and support for the Convention; including the transformation of standards of behaviour in adherent states, particularly those more recently subject to tyrannies. It has been a major achievement of British soft power on the international stage. This benefit has extended outside of signatory countries. Our willingness to follow the ECtHR judgements scrupulously in the case of the deportation of Abu Qatada to Jordan, despite the fury of the tabloid press and the understandable frustration of the then Home Secretary, helped ensure permanent statutory reforms to the Jordanian criminal justice system which were both much needed and welcomed as well as success in having him deported from the United Kingdom to stand a fair trial in that country.

And we have benefitted domestically as well. It has enabled either in Strasbourg or at home landmark decisions which have challenged or halted practices which were once considered acceptable but would now be seen as unacceptable by the overwhelming majority of the British public ranging from not separating elderly couples by forcing them to reside in separate care homes to the abolition of the practice of the blanket retention of DNA obtained by the police from persons neither charged nor convicted and the inclusion of opposite sex couples in the new relationship of civil partnerships. One can of course argue that these matters should be dealt with by an elected parliament alone. But equally our country shows maturity in the willingness of its elected representatives to think globally and to maintain a dialogue domestically and internationally with courts over standards of human rights in governance and to commit itself to respond to them. The sovereignty remains with Parliament. Any assessment of the irritations both the Convention and the Human Rights Act may at times have

caused to UK politicians and government, needs to factor in the advantages we derive from adherence as well. Moreover, in the last twelve months there have only been five findings against the United Kingdom out of 1100 judgements issued by the ECtHR and we attract the fewest complaints per capita of any adherent state.

But, in fairness to Policy Exchange, at least Professor Ekins' goals are clear. In contrast the proposals put forward by the Justice Secretary for a British Bill of Rights, which have now been revived, are not.

I remain mystified by what in practice Dominic Raab, is trying to achieve; unless it is a Machiavellian plot to create such variance between the interpretation of the Convention rights by our domestic courts and that of the ECtHR that the Government is able to throw its metaphorical hands up in horror at the frequency of appeals to and adverse judgments from Strasbourg and claim popular support to withdraw entirely from the Convention. But this is something which is insistently disclaimed by the Justice Secretary. For, leaving aside the unnecessary window dressing for the media on a new balance between privacy and freedom of expression and a right to trial by jury In England and Wales, most of the proposals for reform are about fettering the ability of our domestic courts to interpret the Convention in accordance with its jurisprudence. The present Bill also includes setting thresholds for access to our courts to bring a claim at all and removing the power in Section 3 of the Human Rights Act for a court to seek to read a statute compatibly with Convention rights. Gone would be the judicial dialogue between our Supreme Court and the European Court that has done so much in influencing the views of the European Court in the way the Government would approve – examples include cases

ranging from Horncastle on hearsay evidence to Hutchinson on whole life sentences. Gone too the ideas of Sir Peter Gross on the importance of developing greater civic and constitutional education in schools. In would come a ponderous system guaranteed to create conflict with the ECtHR so leading to more cases going there for final resolution As Lord Mance has explained in great detail in his excoriating critique of the proposed Bill of Rights, in his recent Thomas More Lecture, what we will get if it is enacted is just a recipe for further conflicts between the executive and both domestic and international courts. His lecture ought to be compulsory reading for every MP.

UNDERLYING CAUSES

That most MPs won't know Lord Mance's lecture even exists let alone read it is part of the problem. Sixty years ago the Commons was full (some argue far too full) of practising lawyers who were familiar both with the role of the judiciary and the operation of the law. They could, when needed, defend and explain the legal system even when critical of an individual decision. Then there was the Lord Chancellor who, not only a lawyer but as the most senior member of the judiciary, was accorded a high status at the heart of government. The office was key to ensuring both a respect for the Law and an informal dialogue between the government and the judiciary that served the Rule of Law well.

Today, despite the oath provided for in the Constitutional Reform Act 2005, the duty on the Lord Chancellor to respect the Rule of Law, defend the independence of the judiciary and ensure the provision of resources for the efficient and effective support of the courts has been treated as optional when it has clashed with the political views and ambitions of the office holder. Some ridicule was heaped on those in the House of Lords who, when the Act was passed, sought to amend it so that the office holder should remain in the Lords and be a lawyer. But they were right. Central to the Lord Chancellor's standing was that the office was not a route for the furtherance of careerist political ambition or, once gained, for further judicial advancement. This has now entirely changed with successive Lord Chancellors gratuitously offering up cuts to their already overstretched budgets and sitting mute over proposals to deliberately breach international law.

Similar issues have arisen with the Law Officers. Their role as legal advisers to government should be underpinned by observance of their professional standards as lawyers and a ministerial code that emphasises the need for the entire government to be acting and be seen to act with propriety even when faced with complex challenges. How then does this standard compare with the conduct of Suella Braverman, who appeared to have had no qualms whatever in endorsing an interpretation of international legal obligations that allowed the Internal Markets Bill to be introduced, when that interpretation was almost universally regarded as untenable and led to the resignation of the Treasury Solicitor and the Advocate General for Scotland? Another example has been the propensity to refer sentences of imprisonment for review by the Court of Appeal, under pressure from parts of the Press, when it was clear, on any objective assessment, that the sentences being questioned were not unduly lenient. Such cases were easily attributable

to a desire for populist appeal. Such conduct then undermines the trust of the judiciary in the government's standards of behaviour generally and it makes any dialogue between the two much harder.

The lack of knowledge and understanding can also be seen in the progressive starvation of the Ministry of Justice of the funds needed to discharge its functions- now including not just the courts but also the prisons and the probation services. The gulf between the Lord Chancellor's oath to ensure the provision of adequate resources for the courts and the current actual state of court buildings and facilities including staffing or the amounts paid to practitioners for Legal Aid who work in those courts, is now startling. The days when the provision of justice was seen as a key social service of the State seem long past. A reduction in Legal Aid provision from £2.2bn in 2010 to £1.7bn by 2019 on top of the decisions by previous governments to restrict the growth of its budget to well below the average of other departments has led to remuneration rates for practitioners remaining almost static for 25 years. While the quality of justice available in our highest courts may be unimpaired, the sense of our justice system being a whited sepulchre grows and this too contributes to a reduction in respect for the Rule of Law amongst both the public and their representative politicians, as the system becomes slower and more dysfunctional.

SOLUTIONS

But this litany of problems perhaps also points to where solutions may be found. I don't subscribe to the view that a growing gulf of incomprehension between government and legal practitioners and

between political practice and the law is rooted in unbridgeably divergent interests. Rather it comes across as the product of ignorance and a longterm neglect of the rationale underpinning the phrase the "Rule of Law" that trips off so many legal and political tongues. This is the result of taking its existence for granted and being complacent about it. As I have tried to illustrate, government by its legislative activity in trying to alter or get round legal obligations or fettering the work of the courts, is usually engaging in activity counterproductive to good governance. In trying to circumvent legal principles the executive is far more likely to create new obstacles than to remove old ones and its lack of progress so far, or of any evidence it has helped improve matters even to its own satisfaction, is obvious.

A wise Prime Minister would abandon these schemes and take sensible steps to bring these two essential branches of government in a civilised society back into harmony. Restoring the traditional role of the Lord Chancellor in government would be good start. It does not require him to sit again as a judge, which would be impossible, but to return the office to being responsible solely for the good administration of the justice system and, importantly, to remove the inconsistent burdens of prisons and penal policy. Restoration of the centrality of the principles of observance of the Ministerial Code and of international legal obligations would be another; as would ensuring that the Government both through its departments and the Government Legal Service is seen as an exemplar of probity in how contentious litigation is handled so as to rebuild levels of trust with the judiciary.

The judiciary for its part has come a long way in its senior members being willing to appear before parliamentary committees to explain

their role and their concerns at how justice can be delivered within the budget provided for the courts. It was clear to me when I was Attorney General that there was a willingness to engage informally with Government to create greater mutual understanding.

If these things were to be done and be seen to to inform how government functions, then I am convinced that many of the government's frustrations in this area would disappear. Those occasional frictions that inevitably will remain would be seen for what they are an entirely healthy manifestation of the interplay of the law, the courts and the work of the executive. A lot of time, money and effort currently being expended on pointless and counterproductive political projects for change would be saved. The government might also find itself the beneficiary of a calmer environment for decision making.

But to achieve this requires getting out of the echo chamber of demands for action, which politicians too often choose as their comfort zone, and giving time and effort to reaching some objectively reasonable assessment to what is in our national interest. Sadly, on the evidence of the imminent return of the current Bill of Rights to the Commons and the most recent comments of the Home Secretary (in breach I would add of collective cabinet responsibility) that she favours pulling out of the ECHR altogether, this is not about to happen any time soon. We must hope for better.

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