

JUSTICE Tom Sargant memorial annual lecture 2006

Politics and the Law

Constitutional Balance or Institutional Confusion?

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Tuesday 17 October 2006

The Law Society, London



JUSTICE

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Delivered as the JUSTICE Tom Sargant Memorial Annual Lecture at the Law Society, 17 October 2006

In the recent film, *The Queen*, the newly-elected Prime Minister refers to the British Constitution and his wife ripostes: 'We don't have a constitution'. The real Cherie Booth QC would of course not say that in real life as she knows, as do we all, and as we have been reminded by our Chair in important judgments, that it is not true that our unwritten constitution is not worth the paper it is not written on. It contains implied principles that are rooted in the fact that our system of government is democratic. Its unwritten status may have disadvantages (such as incoherence and inaccessibility – I'll touch on some of those later), but at least it allows relationships within our democracy to evolve and respond flexibly to new conditions, expectations and moral claims.

One set of relationships in our democracy that has been subject to the most dramatic alteration in recent years is between politics and the law; the appropriate balance between those decisions which are the province of politicians and those which belong to the law is one of the most fundamental question in all of all constitutional theory and has great practical importance. It is that balance which I want to consider this evening.

I shall start with a brief account of the principal controversies surrounding politics and the law over the past few decades, then consider the current balance between Parliament and the judiciary, including some of the misunderstandings surrounding the Human Rights Act, then end with some of the administrative arrangements which underpin the relationship between the different branches of government, focussing in particular upon the government office situated at the precise junction of politics and the law, namely, that of the Attorney General.

When I joined the University of London in the 1970s a lively debate was taking place on the question whether recipients of discretionary welfare payments (known as Supplementary Benefit) should have entitlements (they were called 'welfare rights'). At that time decisions were given on the basis of a secret code, the A Code, with few opportunities for appeal or review of the case-worker's decision. Professor Titmuss of the LSE, himself one of the architects of the social security system, was strongly of the opinion that the administration of welfare benefits should be carried out under the benevolent and expert discretion of civil servants and he warned of a 'pathology of legalism' that would occur if the advocates of 'welfare rights' had their way. Titmuss' view was widely shared at that time by politicians, lawyers and even judges, all of whom agreed that Parliament's power to drive public policy, and the executive's power to implement it, should be largely unconstrained, and certainly not limited by the law. During the development of the welfare state discretionary power was increasingly conferred upon ministers and other public officials, but was relatively untroubled by any judicial oversight or review. Aneurin Bevan, architect of the National Health Service, was explicit that he wished to avoid what he called "judicial sabotage of socialist legislation".

And the judges did not dissent from this view. As Professor John Griffith said, judges had been 'leaning over backwards almost to the point of falling off the Bench to avoid the appearance of hostility to the government'.

Chief Justice Parker said that law should be the mere 'handmaiden' of administration, rather than its 'governor'.

It is often said that Dicey set the course for constitutional arrangements in this country and it is true that his primary constitutional principle, the sovereignty of Parliament has obstinately held sway. However, his secondary principle, the rule of law, which sought to place some restraint upon the unfettered use or exercise of Parliament's powers, was by no means as enthusiastically accepted. From the mid-twentieth century powerful voices, such as those of Professors Jennings and even Maynard Keynes, felt that Dicey's rule of law was a device to stand in the way of government intervention for the purpose of rectifying social injustice. Insofar as the rule of law was accepted, it was transmuted into an obligation, on the part of the courts and all officials, to secure the smooth implementation of Parliament's designs. That obligation was reinforced by a trusting faith in the career civil service to get things as right as they could be, coupled, it must also be recognised, with a longstanding suspicion of legal techniques of dispute-resolution which went back to Jeremy Bentham who opposed not only a bill rights, but also 'the licentiousness of

interpretation' of legislation by judges. Bentham's disciple, Chadwick, sought to exclude judicial review of immigration and customs officers on the ground that they would lead to legal proceedings 'upon such simple questions as whether a cask of biscuits was good or bad'.

Today that situation has been virtually reversed. Judges have increasingly required discretionary power to be in conformity with standards of legality, procedural fairness and rationality – the so called 'grounds' of judicial review. In so doing, they have been chipping away at an essentially 'political constitution' and have confounded allegations of their inherent conservatism by managing, with majestic equality, to provoke the ire of politicians of all political persuasions whose decisions they have overturned. Procedural rights have been ceded to welfare recipients, and in all corners of public administration. In 1998 the Human Rights Act required all public officials to accord the procedural and substantive protections of the European Convention on Human Rights to all. Under European Community Law, and under the Human Rights Act, Parliament has conceded that judges can review Acts of the UK Parliament. Under European Community Law such legislation can be disapplied (a polite term for struck down). Under the Human Rights Act, the courts may merely declare the legislation incompatible with the European Convention on Human Rights, but the government will normally accept that ruling.

This is all a remarkable turnaround. Is democracy diluted as a result? Is our hard-won representative democracy seriously threatened by legal hegemony, the overreaching of unelected judges and an indulgent and selfish human rights culture?

The answer in my view is clearly no, but myths to that effect abound. Let me dispose of a few of them: The first is that these changes – this limitation of government and the extension of law and legal techniques - were driven by the Bench, by activist individual judges - beginning with Lords Denning and Reid and followed by a flock of judicial sheep in the clothing of Woolf et al- not to mention Steyn, Lord Tom Bingham and all.

We need to recollect, however, that the first nudge in the direction of the need for procedural justice came from Parliament, readily implementing the proposals of the Franks Committee which recommended that the tribunals and inquiries of the welfare state should no longer be seen to be located in the realm of policy, but in the realm of justice. Aneurin Bevan would not have been pleased. Yet in the 1960s it was

Parliament that enacted the Tribunals Act to judicialise Bevan's and other schemes. Laws promoting equality in matters of race and gender in this country all have their origin not in activist judicial decisions but in Parliament's laws.

The Human Rights Act is similarly awash in myth and misrepresentation. The Lord Chancellor in a speech a fortnight ago rightly debunked some of the myths about that Act in the popular press (such as rumours that it would prevent the filming of school nativity plays). Even today we see a Minister seeking to lay the errors of public administration upon the licentiousness of the judicial interpretation of the Act. The greatest myth, however, and one initially perpetrated by some academic lawyers, is that the principal effect of the Human Rights Act is to transfers power from our elected Parliament to unelected judges. This too is rhetoric calculated to mislead. The Act seeks first and foremost to ensure that the rights and respect for the individual, procedural and substantive, which are enshrined in the European Convention permeate all our public decisions. Although the judiciary are the ultimate arbiters of whether or not Convention rights have been respected by public officials, cases that reach the courts are the tip of the iceberg and the real impact of the Act can be assessed not through the decisions of judges alone, but by looking at the wide variety of our institutions, from regulatory bodies through to universities, where past practices have been systematically audited and adjusted in order to ensure conformity with Convention rights. It may be that some of those rights have been too broadly or defensively interpreted, but the overall the result has been to ensure that the core values reflected in the Convention – core British values – permeate all our decision-making institutions.

If we look at Parliament's record alone over the past few years we again see that there has been no wholesale reallocation of power from the elected legislature to the unelected judiciary. The majority of Parliament's statutes scarcely impinge on any Convention right. Of those that do, only a fraction end up in litigation, of which only a small percentage again are declared incompatible with convention rights. Any empirical investigation will show that there is still a considerable area of socio-economic choice untouched by the Convention. When the courts do review legislation for conformity to the Convention they are fast developing a sensible modesty about the limits of their own institutional capacity to decide certain matters – displaying due deference (some would say undue) on questions in which they have no expertise, or matters which are essentially managerial or involve the allocation of resources. Of course there are issues on which the judges rightly declare

Convention rights to have been infringed, and which will not please everyone, but what has been so notable is the fact that increasingly the initiative for Convention-compatible legislation has come not from the courts – these so-called usurping judges – but from Parliament itself. Three examples of this are the introduction of civil partnerships, the outlawing of age discrimination and the Constitutional Reform Act which reinforced the separation of powers and independence of the judiciary in this country by removing the judicial powers of the Lord Chancellor, transferring the House of Lords appellate committee to a new Supreme Court and establishing the Judicial Appointments Committee. There has not been any conscious ‘partnership’ between the courts and Parliament. Some say that there is or should be. I say there should not be, in the separation of powers. But there has been an indentity of aim.

What is the aim, and what has been going on? How do we explain this rapid conversion to regulation of and limitation of power and the notion of rights against a state?

The answer lies not in some developing subjective notion of fairness or justice or reasonableness – the answer is surely that we have over the past forty or so years steadily been redefining and reshaping the necessary content of democracy. The likes of Jennings and Titmuss were not venting their subconscious antagonism against lawyers but were rejoicing in the triumph of representative democracy. Parliament was finally elected by all the people, men and women, landowners and workers, whose will should be respected. The representatives of those people should therefore be free to decide what was in the people’s interest. This was the democracy of that time.

The moment when that conception of democracy was questioned is well described by Isaiah Berlin in his book of essays, *The Crooked Timber of Humanity*. He refers to the ‘ideological storms’ of the twentieth century, which not one among the most perceptive thinkers of the nineneenth century had ever predicted. He was recalling the aftermath of the Russian revolution and the tyrannies of the right and left in Germany and elsewhere. He felt that those tyrannies, created with clear popular support, had, as he put it, ‘altered the lives and viewpoints of virtually all mankind’. They showed simply that democracy and majority rule could no longer be regarded as synonymous.

It was surely the lessons of that period that convinced even the most ardent majoritarian or utilitarian that democracy goes beyond representative government. Popular will is important, but should not invade certain fundamental rights and liberties. Seen in that context, the claim for our attention of administrative justice is, similarly, not based upon ungrounded and well-meaning notions of 'good' or 'fair' administration but upon an insistence that all decision-makers acting on behalf of the state respect a person's sense of individual worth and dignity and not close their ears to legitimate claims. It was the lessons of that period that of history that persuaded Parliament to begin to protect minorities from discrimination, and to abolish capital punishment, even in the face of strong popular opinion to the contrary.

This new dispensation is still often misunderstood by those who insist upon viewing democracy as exclusively confined to majority rule and berate the 'culture of human rights' (as did the Lord Chancellor, Lord Falconer, some months ago). However, he appears to have changed his mind in a talk two weeks ago to the Bar Human Rights Group when he said, rightly:

'Democracy is not just a process for intermittently selecting a government. It is an acceptance of the values of equality, tolerance and freedom. We can only safeguard our democracy and our freedoms by the rule of law.'

Now that we seem to have reached an acceptance of the fact that human rights are inherent in democracy and not an optional accessory, is the balance between the branches of government perfectly calibrated?

In two respects it seems unstable and in need of correction. First, Convention rights are not entrenched. They can be amended by any simple statute without any special majority. The expectations of the Convention's entitlements may therefore be too easily disappointed in response to a perceived threat of the moment and populist opportunism. Governments should have the freedom to respond to public pressure in order to change most social policy, but by definition the opportunity should not easily be available to subvert what Lord Steyn has called the 'new constitutional hypothesis' – an hypothesis which, by definition, seeks to protect unpopular causes or minorities from the dominance of the majority. A written constitution, with a higher status than ordinary law, has the advantage of preventing such easy amendment. Some countries achieve this short of a written constitution by a set of entrenched 'basic laws' with express or implied prior constitutional status.

The second imbalance in the Human Rights Act is that it only permits the courts to declare a statute incompatible with Convention rights, but not to disapply or strike down such legislation. The reason for this is well known as a political compromise based upon an earlier bill drafted by Lord Lester – a compromise which probably made the enactment of the Act possible. But now that we have realised that the Act embodies not a mere set of entitlements but the basis of a new constitutional order, is it not time for express authority to be conferred on the courts to disapply the offending legislation? Such a power would both firmly endorse the significance of the new order and also dispel common confusion on the matter.

The confusion, I'm afraid, exists not only on the part of the public. The confusion was demonstrated graphically in a fascinating correspondence in the Observer last April on the question of the Human Rights Act between Henry Porter and the Prime Minister. The Prime Minister stated in week one of the correspondence that courts now have the power to 'strike down' as he put it, Parliaments' laws, under the Human Rights Act. In week two Henry Porter pointed out the error. But in week three the Prime Minister still insisted that the strike down power existed and Henry Porter was wrong.

Perhaps, although I doubt it, the Prime Minister was alluding to the fact that the government routinely do accede to the courts' declarations of incompatibility. And, to their credit, they have done so. But the confusion is deeper than that because the courts can disapply legislation which offends European Union Law. If Parliament permits the courts to possess the capacity to have the last word over an area dominated by commerce and the objective of free trade, surely it should be acknowledged that the courts are even better equipped to adjudicate on the issue of whether there has been a trespass on the necessary elements of our domestic democratic order.

These proposals may seem unduly provocative at a time when some of the media seem to have succeeded in convincing the public that the rule of law and the maintenance of national security are inherently contradictory goals. This is of course another myth and indeed a false dichotomy. There is scope in the Convention to adjust our rights in a case of stress and where necessary in a democratic society. But an independent arbiter should be in place to ensure that the rule of law, if it is indeed to bend, does not break, for this would in turn cause the collapse of a central pillar of our democracy and make a mockery of our claims to

liberty. As a matter of principle, Parliament should not be permitted to make that judgment in its own cause.

Be that as it may, the issue may well be out of Parliament's hands, because the courts are beginning to realise that they in any event possess the authority to disapply legislation. Now this claim was almost unthinkable even at the end of the twentieth century, when no judge and hardly any academics questioned Dicey's sovereignty of Parliament (although Lord Woolf and Lord Justice Laws had, extrajudicially, reminded us that the sovereignty of Parliament is a judicial construct, and therefore would be open to revision by the courts in extreme circumstances, such as if judicial review were to be abolished).

The issue raised itself in a most unlikely case, decided by the House of Lords in late 2005, and brought by Mr. Jackson, the Chair of the Countryside Alliance, to challenge the Hunting Act which banned the hunting of most wild mammals with dogs. The case questioned the validity of the Parliament Acts, which were invoked to ensure the bill's passage in the absence of the approval of the House of Lords. The Parliament Acts were upheld, and thus the Hunting Act survives, and the fact that huntmen with red jackets still populate the English landscape has to do with the loopholes in the Act, or its lack of enforcement, rather than its legal validity.

The *Jackson* case is famous for the fact that at least three of the judges in that case, albeit obiter, suggested that in certain circumstances judges might have the authority to disapply legislation, even outside of the Parliament Acts and Human Rights Act. It is true that the senior Law Lord, Lord Bingham firmly endorsed the sovereignty of Parliament. But Lord Steyn said that

‘in exceptional circumstances involving an attempt to abolish judicial review or the ordinary courts [the courts] may have to consider whether this is a constitutional fundamental which even a complaisant House of Commons cannot abolish’.

Lady Hale said:

‘The courts will treat with particular suspicion (and might even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial powers’

And Lord Hope, even more forthrightly, said that:

‘It is no longer right to say that [Parliament’s] freedom to legislate admits of no qualification’, and

‘The rule of law enforced by the courts is the controlling principle upon which our constitution is based’.

It may be that it will take some time and considerable political courage for the courts to ever strike down Parliamentary legislation outside of European law (as is commonplace in other democracies, whose skies do not fall as a result) but the intellectual route to that position has been sketched, albeit lightly, in *Jackson* and it is by no means as revolutionary as it may have appeared even just a few years ago. In fact, it is based on simple first principles which are these:

First, as Lord Steyn said in *Jackson*, the sovereignty of Parliament is a construct of the common law. If that is the case, it can be revised or abolished by the common law. Or, to put that another way, the common law would have no difficulty in theory reversing Dicey’s priorities by elevating his second principle, rule of law, to a status above his first (the sovereignty of Parliament). Lord Hope said that this is already the case.

Secondly, the sovereignty of Parliament is predicated not upon mere assertion, nor even upon longstanding practice, but upon principle. The principle is clear: Parliament prevails because it most perfectly represents the will of the people. If therefore Parliament were to postpone elections for 5 or 10 years, or create a one-party state, or prohibit criticism of the government’s record, it forfeits the condition upon which its sovereignty is based. The legitimacy of Parliament’s claim to absolute sovereignty collapses because it is seeking to undermine its representative nature – to cut off the bough on which Parliamentary sovereignty sits.

But what if Parliament were to abolish judicial review? Or introduce torture for terrorist suspects? Or indefinite detention without trial in solitary confinement for foreigners? Here the issue is more complex. It cannot be said that such legislation questions Parliament’s representative status – the status on which its sovereignty is predicated. But the legislation would be regarded as undermining those values and ‘fundamentals’ of the new, rights-based democratic order that we now inhabit and which require respect for human dignity, equality and the rule of law. By disapplying such laws the courts would be acting as guardians of that new order.

Let me turn now from these heady issues which have so recently burst into life to the more prosaic matter of institutional arrangements to achieve the new constitutional balance. We here enter matters of public administration, the inner workings of government, questions about powers of ministers and ministries, how most rationally to achieve policy objectives and so on. The detail of public administration does not excite everyone, although in her newly-published wonderful biography of Leonard Woolf by Victoria Glendinning etc. she writes about Woolf that, 'anything to do with administration fascinated him'. [Leonard Woolf, husband of Virginia, was also the close friend of Professor William Robson of the LSE, one of the fathers of administrative law and one of the few voices in the mid-twentieth century who did espouse the control of official discretion]. Glendinning writes of Woolf that:

' . . . He wrote, with startling lyricism: 'Administration must be regarded as the most precious flower and fruit, the essential mark and prerogative of the independent, sovereign state'. He enjoyed, in the course of the tribunals [on which he sat] learning about different worlds of work – from prison officers and the women who clean out the government offices in Whitehall, foresters in the north of Scotland, the men to talk down aeroplanes in fog, and a small and peculiar class of men in the secret service'

One area that has been the subject of much recent attention and which involves a 'small' but not necessarily 'peculiar' class of men is the office of the Lord Chancellor. The story of the demise of the fulsome powers of the previous Lord Chancellors is well known to this audience. His simultaneous roles of Head of the Judiciary, cabinet minister, appointee of judges and speaker of the House of Lords in its legislative capacity broke all the rules about the separation of powers. Professor Eric Jurgens of the Council of Europe came on a mission to this country to tell us that the new states of the former Soviet Union often sought in their new constitutions to have their justice ministers sit as judges and to appoint other judges. When told by the Council of Europe or Venice Commission that this violated the spirit of democracy, they would say that the model was inspired by our came from the Lord High Chancellor. Shortly after Jurgens' visit, although I'm not sure it was directly caused by it, the Constitutional Reform Act was passed, removing the Lord Chancellor's judicial status, creating an independent Judicial Appointments Commission and arranging to have our highest court separated from the House of Lords and called the Supreme Court of the United Kingdom.

Meanwhile, there is another ministerial post which on its face may also offend the separation of powers, namely, that of the Attorney General, described by Francis Bacon, who was one of them, as “the painfulest task in the realm”. He has multifarious roles. He is of course legal adviser to the government. Yet he is also a politician who takes the party whip and a Minister who nowadays attends all cabinet meetings. He superintends various offices, such as the Crown Prosecution Service and a number of judicial and quasi-judicial proceedings where he must decide in the public interest. He may decide himself to bring civil actions and prosecutions or refuse to prosecute and whether or not to bring relator actions. He is also Leader of the English Bar.

If the Lord Chancellor’s office offended the separation of powers, surely the Attorney’s does as well? This point has been made a number of times, by Lord Woolf in his Hamlyn lectures, by Lord Steyn in a lecture to the Administrative Law Bar Association, by Joshua Rozenberg in his book and indeed by former Attorney General Hartley Shawcross following a number of incidents in the late 1970’s, where the then Attorney, Sam Silkin, failed to prosecute the Clay Cross Councillors or the Post Office Union for its unlawful boycott of mail to South Africa during the apartheid era. No doubt then, as nowadays, the allegations of actual bias were false but the issue is not the reality of bias but its appearance: does the Attorney’s action or inaction leave a doubt in the public mind about whether his opinion was driven by law or political convenience?

I have recently argued, in relation to the Attorney’s advice on the legality of the war in Iraq, the substance of which I did not then join, nor will I now, that his office contains an inherent tension and that the dual political and legal role of the Attorney inevitably lends itself to charges of political bias in legal decisions and that the time had come to appoint an independent Attorney, as in other countries. Some few Commonwealth countries do have Attorneys who combine the legal and political roles but others (such as Ireland, South Africa and India) do not.

This question may resolve itself in the end due to lack of qualified lawyers in Parliament. As Lord Rodgers of Quarry Bank pointed out when he initiated a debate on this question in the Lords last December 15th, in 1964 there were 100 barristers elected to the House of Commons. In 2005 there were only 34. During that time the profession increased its numbers 5 fold. Attorneys may perforce have in the future to be outsourced, or recruited to the House of Lords (if it continues to exist in its present form).

However, on further reflection I do believe that the matter is more complex than I had realised – or has become more complex in the light of recent events. I mentioned the advantages of an unwritten constitution earlier, but one of its defects is that one cannot at a glance view the constitutional map. Successive statutes and other laws alter the constitutional equilibrium so that the interacting points of influence may so easily be lost and the bigger picture missed. In this case the constitutional balance has been radically altered by the Constitutional Reform Act and the new role of the Lord Chancellor. The Lord Chancellor remains in name, but he is no longer the Head of the Judiciary and the constraints associated with that role therefore disappear. He is in practice the Secretary of State for Constitutional Affairs, heading a massive department of over 23 thousand and spending more than £3 billion. Most important perhaps, he need not even be a lawyer and could therefore be unconcerned with the disciplines of that vocation.

The result may be therefore that if the Attorney General is an employed practitioner, worthy as he or she may be, there may not be a lawyer at the heart of government. Does that matter? We do not necessarily want an economist to be Lord Chancellor or a doctor to head up the Department of Health. Such advice that is given to the Health Ministers is provided by an independent civil servant known as the Chief Medical Officer who is not a political appointment and does not change with a change in government.

On the other hand, the judiciary is a branch of government and the law permeates all government departments. And would the appointment of an outsider necessarily ensure that that person were less 'political'? In those countries that do appoint outsiders, they are often still seen to be predisposed to the aims of the government. They may be appointed from the outside, but when appointed assume the hue of the in-house lawyers of the familiar kind.

One question we would have to ask is: If we did have a skilled 'objective' non-political lawyer, are we sure that he could assess the 'public interest' as well as a political attorney? I refer here to the role of the Attorney in bringing prosecutions, entering a plea of *nolle prosequi* to prevent a prosecution, or bringing or refusing to bring a relator action. In the *Gouriet* case Lord Wilberforce pointed out the political delicacy which was required of the Attorney's judgment in these matters. In that case, the House of Lords preserved the Attorney's absolute discretion to refuse a

relator action on the ground that the Attorney has to be free to take into account matters of 'policy', such as whether the prosecution would exacerbate an already sensitive industrial situation; would it be effective or futile? Would it be lead to political martyrdom? Would it provoke a national strike? These, he said are not questions for judges. Are they questions for non-political outsiders?

Above all, is there not an advantage in having at the heart of government an Attorney of high quality, who embodies the traditions of an independent profession and who embraces the values of legality and the rule of law? I have in mind Lord Goldsmith's clear criticism of Guantanamo Bay and his advocacy in favour of human rights. When he expresses these values as a Minister of the Crown, rather than a mere detached outside adviser, they are articulated not as mere expressions of the law but of government policy. Surely ministers are more likely to accept such advice because it comes from 'one of them', someone essentially on their side, rather than from some externally contracted technocrat?

There is much to be said on both sides of this argument, but is there a way we could ensure the best of both models of Attorney General? A force for the rule of law at the centre of government while reducing or removing any appearance of political bias?

The Constitutional Reform Act may provide an interesting way forward. Section 2 of the Act provides the qualifications of the Lord Chancellor. These qualifications include senior political or legal experience but the Lord Chancellor does not have to have had either. A similar statute setting out the Attorney's experience could however specify carefully qualifications that ensure a lawyer of competence, steeped in the highest legal traditions.

Section 3 of the Constitutional Reform Act then imposes a duty to respect the independence of the judiciary. This duty is imposed upon the Lord Chancellor, and all other ministers of the Crown with responsibility for the judiciary or the administration of justice. And the Lord Chancellor must 'have regard to' matters such as 'the need for the judiciary to have the support necessary to enable them to exercise their functions'.

What about the duty to protect and promote the rule of law? Part I of the CRA does take us closer to the rule of law, albeit in obtuse fashion. It says that: 'This Act does

not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle.'

That provision is encouraging in two respects: it reminds us that, although our constitution is unwritten, there is an existing principle called the rule of law. And it reminds us that the Lord Chancellor has had a constitutional role in relation to the constitutional principle of the rule of law. But it does not spell out the precise nature of that role is and how it should be fulfilled (contrary to some of the defeated amendments to the Bill in the Lords that sought to do that with greater clarity). A duty upon the Attorney General could be more specific in that regard.

The Chancellor's duty in respect of the rule of law is however endorsed by another device, his oath of office. Section 17 of the Constitutional Reform Act amends the former oath of office of the Lord Chancellor and provides an oath as follows:

I swear that in the office of the Lord High Chancellor of Great Britain I will respect the rule of law, defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible.

Compare that spanking modern oath with that of the Attorney, which is presently as follows:

I do declare that well and truly I will serve the Queen as Her (Attorney/Solicitor) General in all Her Courts of Record within Great Britain, and truly counsel The Queen in Her Matters, when I shall be called, and duly and truly minister the Queen's matters and sue The Queen's process after the course of the Law, and after my cunning. For any matter against The Queen where The Queen is party I will take no wages or fee of any man. I will duly in convenient time speed such matters as any person shall have to do in the Law against the Queen, as I may lawfully do, without long delay, trecting or tarrying the Party of his lawful process in that that to me belongeth, and I will be attendant to The Queen's matters when I shall be called thereto.

Not exactly an oath for our millennium, you may think. Contrast the duties set out in that oath of the Attorney General to the Queen with the statement of Professor Zamir [the famous public law scholar and later an Israeli Supreme Court Judge, writing about his experience as Attorney General of Israel]:

‘The real client of the Attorney General is not the government but the public. He owes it to the public, on trust, to see to it that the law is observed by the government’.

Zamir then points out that the Attorney as a watchdog must be ready not only when necessary to bark, but also to bite. His teeth are provided by the fact that not only is the Israeli government required to follow his opinion (which in practice is what happens in the UK) but (and this is different from the UK) if the government does not do so the Attorney may institute criminal proceedings against the government, or refuse to provide them with a legal defence to any challenge in court.

By looking at examples such as these it may be possible to get the best of all worlds: A highly qualified lawyer (with specified qualifications that ensure that he is steeped in the independent values of the legal profession) at the heart of government, yet with duties to serve the public interest above party political interest, and to promote and enforce the rule of law and other values of a constitutional democracy – such duties set out clearly in a statute or constitutional form, and backed up by a revised oath of office. In those circumstances, in the words of Sir Hartley Shawcross,

‘The rule of law would then be given not only the reality (which I hope it still has) but also the appearance (which it now lacks) of complete detachment from party politics.’

At the same time other grey areas of the Attorney’s role could be sorted out. We know that he has the responsibility of advising government, but his role in advising Parliament is much less clear. The Attorney now does advise in respect to Parliamentary discipline and conduct (although the Speaker of the House of Commons has his own counsel) and occasionally advises on certain bills. Select committees such as the Joint Committee on Human Rights provide advice as well, but to be a well-informed legislature Parliament does require clearer access to independent legal advice than is now available.

Further reforms might also be provided to strengthen the rule of law on the part of government generally. We have seen that, despite the reference in the Constitutional Reform Act to the ‘existing constitutional principle of the Rule of Law’, and the reference to the rule of law in the Lord Chancellor’s oath, there is no specific statutory duty upon any minister to protect or promote the rule of law in any specific way. The Ministerial Code of Ethics (which does not have statutory force) sails quite

close, but without really reaching the rule of law in any meaningful way. Section 1.1 states that

Ministers of the Crown are expected to behave according to the highest standards of constitutional and personal conduct in the performance of their duties.

The notion of 'constitutional conduct' is not defined although section 1.5 states that

The Code should be read against the background of the overarching duty on Ministers to comply with the law, including international law and treaty obligations.

Section 6.22 of the Code then requires Ministers to consult the Law Officers in good time where the law is in doubt or disagreement within or between departments and before the government is committed to 'critical decisions involving legal considerations'.

The Code also requires Ministers to 'uphold the administration of justice' and to 'protect the integrity of public life' and observe the seven Principles of Public Life set out in the first report of Lord Knowland's Committee on Standards in Public Life. These principles are selflessness, integrity, objectivity, accountability, openness, honesty and leadership. Surprisingly, the core principle of 'legality' is not included in that list.

There is much talk these days of human capital and social capital. But what of democratic capital? This country has in the recent past not neglected its democratic capital, which has been significantly maintained and renewed. We have moved with rapid speed to a constitution which now supplements the values of representative democracy with a high concern for the rule of law, and which limits the opportunity for political intrusion on fundamental rights and liberties. Alterations to some of the structures of government seek to support and supplement these trends and more are needed.

These developments will never please those who mistrust legality or who regret the demise of a merely political constitution. Overall, however, these changes do not impair democracy, but constitute its fuller realisation.



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