

Countdown to the future

At the start of the new legal year, **David Greene** reflects on the challenges & opportunities ahead



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Party conference time. A united public display of open democratic party politics. At least for the Liberals united around the Brexit message. For Labour and the Conservatives, on the other hand, Brexit continues to divide and drive the political classes.

Law also has its party conference at this time of year when the great and good from round the globe gather in the Autumn mists at Westminster Abbey to herald in the new legal year.

This year we all celebrated the especial event of the enthronement of the first female President of the Supreme Court; Brenda Hale, Baroness Hale of Richmond. I cannot but remember that wonderful exchange between her and David Pannick in the Art 50 litigation over the pronouncement of the words *de Kuyser*. It will be but a short reign but while we very much welcome the first female to the position she is there because she is an outstanding lawyer and judge of the highest status and deserves her elevation for that reason alone.

It will now be fascinating to watch the politics of the Supreme Court. It is the heart of democracy that there should be a dynamic between the courts and the executive and Parliament. The Art 50 litigation was an exemplar of how that dynamic might work. Lawyers and judges should step out to protect human rights and the rule of law and when governments seek to abuse those rights the courts must be accessible to forestall that abuse. The recent judgment of the Supreme Court in Kenya in relation to the election was

a brave step for judges in asserting the rule of law. These are not enemies of the people but brave souls asserting the rights of the people.

“Our job in this process is to meet politics with reality &, of course, the rule of law”

The mists of obfuscation

Brexit looms large as we seek to establish some certainty through the mists of obfuscation that has marked the progress towards withdrawal. Since I participate in many discussions and conferences with civil servants, parliamentarians and other lawyers round Europe on the Brexit issues I might be thought to have some idea of a likely outcome but while there are some shapes forming in the mist they could quite easily disappear and other shapes will come into the fore. Negotiations may be all about smoke and mirrors—there are so many players in this process it is difficult to get any clarity out of the continued obfuscation.

One certainty I have picked up on is that while Brexit looms large and all-encompassing in our own politics and law it is not of huge importance to our colleagues in other jurisdictions. I attended the Milan Bar recently to speak about Brexit. The discussion

was lively but it was just one issue taken rather late in the day and stood between the audience and their Friday aperitivo. The main discussion for them in relation to Brexit is what will happen to the Unified Patent Court standing empty at Aldgate. Will it stay there and open or, importantly for one or two jurisdictions, will it move within the EU? Its future may well be decided by the German courts currently considering the constitutionality of the Convention establishing it. Otherwise lawyers' discussion about the EU and Brexit is about the conjoined EU's future in law. This is a discussion in which it is difficult to participate since that is not our future. For good or bad we are starting to look like outsiders.

At events surrounding the Opening of the Legal Year our post Brexit interaction was very much core to the discussion. As far as the EU is concerned the ability for British lawyers to practise in the EU after Brexit remains a key issue. On this subject the two sides have set out their stalls and at least there is some certainty as to the proposals. It is not so much the obfuscation that is causing practitioners difficulty but the complete lack of certainty as to what will be the outcome in March 2019.

On this issue like many others in professional and other services practitioners have to prepare for the worst, which equates to the EU Council's proposals for the future. They are doing so; evidence the burgeoning applications to requalify in Ireland. This debate, however, is not just one for the politicians. We need to be persuading our colleagues in the EU (who will influence their own politicians) that, as far as possible, the maintenance of the status quo is good for them and us. Unfortunately some see the exclusion of British lawyers and law firms (rather like the Patent Court argument) as a competitive opportunity. We need to dissuade them from that myopic view and persuade them that the status quo makes sense commercially but more importantly that it serves the rule of law in all our jurisdictions.

One thing is clear; out of this quagmire something will emerge. It could be a cliff edge Brexit; it could be an EEA Brexit or something in between. At least the UK's position is that we should have an interim period in which the status quo will be maintained as far as possible. The politicians have at least realised that ending 45 years of integration will take some time. Even then some serious and urgent work needs to be done on what the picture will be in the interim period. Our job in this process is to meet politics with reality and, of course, the rule of law.

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