

What next?

The Government's legal programme does not answer the concerns of the profession's leaders & may threaten judicial independence, says **Geoffrey Bindman**

The crushing victory of the Conservatives in the general election means that the government can seek confidently to implement legal and constitutional changes. A preliminary indication of the changes it will be seeking appeared in the Conservative Party election manifesto but this lacked detail. The party's election strategy astutely placed Brexit first and foremost among its election promises, rightly judging that it would be enough to win majority support without undue reliance on other issues. It promised to protect victims of crime and of domestic abuse, to defend freedom of expression, and to strengthen employment law, but specific reforms were not identified.

The Queen's speech, delivered on 19 December, promised a fuller legislative programme but important gaps and uncertainties remain. Most notable is the absence of any substantive response to the forceful demands of both the Bar Council and the Law Society for urgent government action to repair the gaping holes in the legal system.

The Bar Council's '2019 manifesto' is entitled 'Urgent Action Required'. Stressing that the rule of law and the independence of the judiciary are fundamental pillars of our democracy, the then chair of the Bar, Richard Atkins QC, points out that 'today's justice system is widely acknowledged to be suffering from years of under-investment.... Too many people are unable to access justice quickly or effectively....Urgent action is needed to remedy this'.

The day after the election the Law Society published its views under the heading 'the new government should use mandate to fix a justice system in crisis'. Vice-president David Greene called for 'an immediate and sustained boost in funding if Britain is to retain its world-wide reputation for justice and fairness'. In making their pleas for new funding, neither of our leaders advanced the most powerful argument in their favour—that money spent on access to justice actually saves public expenditure—by reducing the financial burden on other public services. The striking lessons of the recent International Bar Association and World Bank report 'A Tool for Justice' need to be hammered home (169 *NLJ* 7864, p22).

There is some reason for optimism. A 'one

nation' government may want to respond positively to these demands as a means of rewarding its new-found supporters in former Labour constituencies, many of whom are likely victims of the failures of the justice system. If there is such a response the way forward has been well charted in the study led by the Labour peer Lord Bach and the late Sir Henry Brooke (see 'Opportunity Knocks', 168 *NLJ* 7781, p20). Their recommendations need not be seen as politically controversial.

The programme set out in the Queen's speech lists more than 30 Bills to be introduced in the new Parliament. Of these, several are consequential on the planned withdrawal from the EU. Others are described as 'proposals to invest in and support our public services'. These focus on the National Health Service, mental health and education funding. There is to be an Employment Bill which 'will enhance workers' rights'. There will be greater protection for the security and safety of tenants of housing accommodation. There will be pensions reform and an increase in the National Living Wage.

The programme re-affirms the government's commitment to strengthening the criminal justice system—including a new Royal Commission—but the emphasis is firmly on enforcement and public safety rather than on the practical concerns about the current situation so vigorously expressed by the leaders of the legal profession.

Constitutional reform

Contrasting with its near silence on the mechanics of the justice system, however, are plans to examine constitutional reform. The Conservative manifesto under the heading 'Protect our Democracy' condemns 'the failure of Parliament to deliver Brexit—the way so many MPs have devoted themselves to thwarting the decision of the British people in the 2016 referendum has opened up a destabilising and potentially damaging rift between politicians and people'.

This contentious reference to the Brexit debate is followed by the claim that by ending the supremacy of European law 'we will be free to craft legislation and regulations which maintain high standards but which work best for the

UK'. Unexceptionable as that sounds, it has a disturbing ring when read with the promise 'to look at the broader aspects of our constitution, the relationship between the Government, Parliament and the courts, the functioning of the Royal Prerogative, the role of the House of Lords, and access to justice for ordinary people'. It goes on: 'We will update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals and vital national security and effective government.' There follows an undertaking to 'ensure that judicial review is available to protect the rights of the individual against an overbearing state, while ensuring that it is not abused to conduct politics by another means...'

A threat to judicial independence?

The last clause in particular has obvious echoes of the constitutional controversies of the past year when the government was indeed thwarted by the Supreme Court in two notable cases: *R v. Secretary of State for Exiting the European Union* (2017) UKSC 5; and *R v Prime Minister* (2019) UKSC 41. The court was accused by some commentators of overstepping the boundary between legal and political responsibility when it rightly recognised legal limits on the power of the government to implement Brexit without Parliamentary authority and on the scope of the Royal Prerogative. Is the prime minister bent on revenge? We now face the alarming prospect of a struggle for supremacy between the government, Parliament and the judiciary, the three pillars of our democratic constitution.

The Conservative manifesto and the Queen's speech tell us that we may not have to wait long for battle to commence. They announce that a 'Constitution, Democracy and Rights Commission' will be set up in the first year of the new government which will 'examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates...' The last such commission—the Commission on a Bill of Rights which reported in December 2012—failed to reach a consensus. That was perhaps inevitable because its membership was chosen fairly to represent different expert views. The choice of members for the Commission now proposed must be equally impartial. All of us who believe in parliamentary supremacy, the rule of law, and an independent judiciary must keep a very watchful eye on these fundamentally important developments. **NLJ**

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