Save our constitution

Geoffrey Bindman QC warns against attempts to alter longstanding constitutional arrangements & undermining the role & independence of the judiciary

It is understandable that the Lord Chief Justice, Lord Burnett, chose to avoid controversy when speaking at the swearing in of the new Attorney General, Suella Braverman MP (pictured) last month. He claimed that commentators enjoy speaking of conflict when discussing the Conservative plans for a constitutional commission, but he advised caution, calling for 'a period of calm reflection'. He is likely to be disappointed. One source of conflict is the Attorney General herself, following other senior figures in her party, who now seek to alter longstanding constitutional arrangements in favour of an increasingly dominant executive.

Our constitution has evolved over the centuries from an autocracy ruled by an all-powerful king to what we call democracy to-day. Since the 'Glorious Revolution' of 1689 and the Bill of Rights which followed it, our form of democracy has been a system of checks and balances between parliament, the executive (ie prime minister and cabinet) and the judiciary. These are the three sources of power. Parliament is at the top of the tree. Its legislative power is supreme, but it and the executive must comply with the law. It is for the courts to interpret the law.

Democratic legitimacy

Democratic legitimacy comes from the election of members of the House of Commons. The executive derives its legitimacy less directly from the same source. The appointment of judges is more problematic. I consider it later in this article. The system has worked well, enabling government to be carried on effectively by competent people, and with sufficient popular influence to justify the democratic label.

Inevitably there are flaws and inconsistencies, and attempts from each power base to shift the balance in its favour. One obvious anomaly was the role of the Lord Chancellor. As a member of the Cabinet, speaker of the House of Lords and most senior judge he had a foot in all three camps. The Constitutional Reform Act 2005 (CRA 2005) ended this by effectively relegating the Lord Chancellor to a mere title. It downgraded the judicial voice at the highest level of government.

The status of the judiciary is now threatened with yet further diminution in favour of the executive by a concerted campaign to accuse it of exceeding its constitutional authority. Two recent decisions of the Supreme Court (*R v. Secretary of State for Exiting the European Union* (2017) UKSC 5; and *R v. Prime Minister* (2019) UKSC 41) have been the main focus of the accusation but earlier decisions also attracted the criticism that judges were wrongly stepping outside their interpretive role. Lord Sumption (before he joined the Supreme Court) claimed this in relation to judicial review in his F.A. Mann lecture in 2012. The evidence he relied on was demolished in a devastating rebuttal in the *London Review of Books* (vol 34, no.4; 23 February 20112) by Sir Stephen Sedley, retired judge of the Court of Appeal. However, Sumption has publicly supported the propriety of the recent Supreme Court rulings.

Boris Johnson (pictured) was openly angry and dismissive of the Supreme Court's conclusion that his prorogation of Parliament for about three weeks in September 2019 was unlawful. His dissatisfaction was reflected in the promise in the Conservative Party's 2019 election manifesto and in the Queen's Speech after the election to establish a 'Constitution, Democracy, and Rights Commission'. (see my article 'What Next?'in *NLJ* 3 & 10 January 2020, p7). His approach has been echoed in attacks on alleged judicial interference in politics by senior Tories, including the former party leader Lord Howard, and by the right-wing think tank Policy Exchange. More recently the newly appointed Attorney General has added her voice to the campaign.

Under review

A review of our constitutional arrangements conducted by a balanced body of experts may be unobjectionable, but it is disturbing that the likely remit of the proposed commission will include the restriction of judicial review of government decisions and the role of government in the selection of judges. The latter is an obvious challenge to their independence.

Judicial appointments used to be shockingly random. At the highest level they came from word of mouth recommendation through the 'old boy network'. The Constitutional Reform Act 2005 tried to put matters right by establishing the Judicial Appointments Commission (JAC), with largely independent membership, to make judicial appointments at all levels below the Supreme Court. The recommendations of the selection panels formed by the JAC are made to the Lord Chancellor who then makes the appointments or submits them to the prime minister for the appointment to be made nominally by the Queen.

Appointments to the Supreme Court are also made on the recommendation of a selection commission. This must include at least one member of the JACs for Scotland and Northern Ireland as well as England and Wales, together with at least one judge of the Court and at least one non-lawyer. The prime minister must adopt the commission's recommendation and advise the Queen to make the appointment.

These new provisions were designed to ensure appointment on merit and independence, excluding political and other improper influence. This was a particular source of anxiety when the legislation was debated in Parliament. Lord Woolf,

then Lord Chief Justice, stood up firmly for the preservation of independence, and Parliament agreed. Section 3 of CRA 2005 is headed 'Guarantee of continued judicial independence'. It goes on to enact that: 'The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.'

Recent statements by the Attorney General—admittedly before her appointment—are barely compatible with this clear instruction. On 27 January, two weeks before her appointment, she wrote on the Conservative Home website: 'Decisions of an executive, legislative, and democratic nature have been assumed by our courts. Prorogation and the triggering of article 50 were merely the latest examples of a chronic and steady encroachment by the judges.' This is not a fair assessment of the careful opinions of the judges in either case. She relies on the support of Lord Sumption but he has expressly approved the Supreme Court decisions in these two cases. As to earlier decisions criticised by Lord Sumption, readers can make up their own minds by reading the Sumption–Sedley debate mentioned earlier.

Across the pond

The danger of executive attempts to curb the independence of judges is well illustrated by what happens in the US. The tripartite separation of powers is, of course, a key feature of the US Constitution but with the difference that its Supreme Court can nullify legislation which it rules incompatible with the constitution. The US Constitution provides for nomination of Supreme Court and other federal judges to be made by the president subject to confirmation by the senate. The duty to police the constitutionality of legislation necessarily draws the court into what can be perceived as political questions, such as whether abortion should be permitted and if so in what circumstances. The intense politicisation of the appointment process is well illustrated by the recent battle in the Senate over Brett Kavanaugh, nominated by President Trump following lobbying by those who believed Kavanagh would cast his vote in favour of the causes favoured by the president and his party. The vote in favour of his confirmation was almost entirely determined by political allegiance.

Anyone attracted by the suggestion that a similar vetting process should be adopted here is recommended to read the account of the Kavanaugh saga by Ruth Marcus ('Supreme Ambition—Brett Kavanaugh and the Conservative Takeover', Simon & Schuster, New York, 2019). The attraction will rapidly disappear.

The desire of Conservative politicians to alter the constitutional balance by limiting the role of the judiciary is counter-intuitive. The Conservative party has traditionally been the protector of constitutional tradition. This includes the common law, which for centuries has allowed the judges to apply established principles to new and developing situations. We do not expect judges to sit on their hands when a problem demands a solution which the legislation has ignored or failed to anticipate. We want them to deal with it in a principled but practical way. The prorogation case may be an illustration of this. A review of the power of prorogation would certainly be a proper subject for the consideration of the government's constitutional commission, but judges have to deal with the matter in front of them, and they did. Undermining their role and independence must be strongly opposed. If that creates the conflict which the Lord Chief Justice deplores, we must not shrink from it. **NLJ**

Sir Geoffrey Bindman QC, *NLJ* columnist & senior consultant, Bindmans LLP.