Taming a troublesome priest

David Greene reviews government attempts to reset the balance of power & right some judicial 'wrongs'

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The Judicial Review and Courts Bill introduced by the Lord Chancellor last week was awaited with trepidation. How far would the government go in lashing out at the courts for the 'wrongs' of the Article 50 and prorogation judgments and the continuing judicial criticism of the application of Home Office immigration policy. The promise building up since the November 2019 election was much, but the product was far from revolutionary. But this is Part 1 and one element of the changes may spell problems for the future. This Bill may be limited but it seems pregnant with potential unintended consequences.

To recap. The government did not like the Supreme Court decisions in Article 50 or the Proroguing litigation. Much maligned as the courts' interference in politics, the decisions asserted the constitutional rights of Parliament and, in the process, the role of the courts in protecting those rights. Government reaction, however, painted the judiciary as a 'troublesome priest'. But this is not the first time governments of both hues have been critical of the judiciary. The grating between the courts and the executive might indeed be seen as an indication of a dynamic constitution.

Roll forward to the November 2019 election and the Conservative manifesto promised change, with a review of 'the relationship between the government, Parliament and the courts' while seeking to 'ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays'.

This review was billed to take place within a wide ranging review of the constitution but that did not happen. Instead Lord Faulks QC was appointed in July 2020 to head up a small panel to look specifically at judicial review with terms of reference to examine the balance between 'the role of the executive to govern effectively under the law' and the 'legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts'.

Fast forward to March 2021 and the Faulks Report is published. The commissioners complained of lack of time to review a fundamental tool of the constitution but concluded generally that the current balance between courts and the executive worked appropriately. It notably concluded that 'the government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action'.

It did propose two broad changes, first, to forestall judicial review from Upper Tribunal decisions on permission to appeal from First Tier Tribunals in immigration cases, known as *Cart* reviews, second to introduce suspended quashing orders (see Professor Zander's article on p10).

This appeared not to the government's liking. It still saw a problem with the troublesome priest and in a consultation that followed the report, proposed: toughening up on legislative *ouster clauses*, ie clauses seeking to exclude judicial review of Executive decisions made under the relevant statute; that discretionary remedies may have prospective, and not retrospective, effect; and codifying the principles used by the courts to declare decisions null and void.

In introducing the product of all this in the Judicial Review and Courts Bill the Lord Chancellor repeated much of the language now redolent in this debate; expressing the government's aim to assist the courts to leave politics to the politicians and to resume their proper role as 'servants of Parliament'. But while the message remained, albeit somewhat nuanced, the proposals had altered and did not reflect the messaging. Indeed, some regard the proposals in the Bill as a damp squib. The Lord Chancellor said that nothing more dramatic was needed because the judiciary were now heeding the government's message.

In the event the Bill introduces just two changes.

- First to give the court discretion when making a quashing order as to the timing when it will take effect and removing or limiting the order's retrospective effect.
- Second to remove the *Cart* route for judicial review by way of an ouster clause inserted into the Tribunals, Court and Enforcement Act 2007.

Under s 1 of the Bill, thus, the court when making a quashing order will be able to limit both its retrospective and prospective effect. Looking back, the court can determine that the order should only apply from the making of the order. The government justifies this added discretion to 'allow any concerned parties to make transitional arrangements to manage the impact of the order'. Looking forward the court may suspend the effect of its order for a set period 'to mitigate any detrimental effects on concerned parties whose affairs had relied on the decision until that point'.

Controversially the discretion is not wholly unfettered or, as the government might put it—'unguided'. Under subs 8 the court must consider 'any detriment to good administration that would result from exercising or failing to exercise the power', ie the court must consider both the interests of the applicant and those of the administration. Subsection 9 provides that the court has to suspend effect and/or limit retrospectivity unless it sees good reason not to do so if 'it appears to the court that an order including provision under subsection (1) would, as a matter of substance, offer adequate redress in relation to the relevant defect'.

Section 2 of the Bill deals solely with the *Cart* issue. Some have questioned the statistical basis for the expressed need to deal with this issue but the government continues. The method of exclusion of this route is perhaps more controversial to the end being achieved. The court has been resistant to statutory provision that seeks to limit its jurisdiction. Parliament is being asked to have another go at this and to oust the supervisory function of the administration court over the relevant tribunals. The ouster is put in plain terms.

The concern is that this relatively uncontroversial effect of the ouster is a Trojan Horse for ouster clauses more generally. This fear largely comes from the historical background to this Bill, related above. Suspicions abound. On the other hand adding an ouster clause to any legislation is a serious issue and will be questioned by Parliament. A court will need persuading that its jurisdiction is ousted altogether. We shall see.

In the meantime the independent inquiry into the Human Rights Act continues, due to report in the autumn. This is part 2 of the 'rebalancing' exercise. Many thought the two should have been done together and it remains to be seen how the overall exercise will result. NLJ

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