Challenging Misrule

Introduction

The evolution of democratic government in Britain has reached a point where its original foundations no longer support further development but are instead underpinning rampant misgovernment.

Attempts to address the obvious flaws in our political constitution through normal political processes have failed, time after time. However, the existing system does depend on the support of the courts, and they have it in their power to insist on constitutional reform. This paper outlines the kind of arguments that would be needed to persuade them to do so.

Summary

The judiciary have recognised for many years that the UK's constitution is incoherent and that many laws are fundamentally unjust. However, they also recognise that they themselves have no democratic mandate and they are adamant that the courts must be subordinate to some higher authority. Therefore, they will not step outside the current constitutional settlement unless they are fully satisfied that:

a) The system as it currently operates is irredeemably flawed and works against the public interest in important ways;

b) There are possible reforms, that would be acceptable to the general public, which could reasonably be expected to fix the flaws;

c) All reasonable avenues to get those reforms introduced through normal political processes have been tried and have failed;

d) There is a pathway to reform which will not itself be a cause of unacceptable turmoil; and

e) It would be constitutionally legitimate for the courts to order that path to be taken.

In addition, they will only consider whether those criteria have been met in the context of a case which has been brought to court within the current rules: that could be a dispute in which the constitutional validity of some law can be called into question, or perhaps an application for judicial review of a particular government decision. (Alternatively, it's possible the courts might be persuaded that the current rules on justiciability are themselves an unacceptable obstacle to good government and coherent law.)

Outline Arguments

Irredeemably Flawed System

Arguments here can be split into two classes – policy flaws (which include persistent failure to address entrenched injustices) and constitutional flaws:

- Policy Flaws: There are a huge number of issues that could be raised here, but it would probably be best to focus on a small number that can't easily be disputed (the more potential there is for debate, the more likely it is that the whole argument gets side-tracked). The safest are injustices which rest on glaring incompatibilities between current law and generally-accepted, uncontroversial principles.

  There are also more contentious issues such as government's negligence in taking hugely disruptive decisions (on EU membership and the Covid-19 pandemic) without the care and attention the public has a right to expect. Regardless of whether the decisions taken were right or wrong (or had worthwhile silver linings), it would be fairly easy to show that, in both cases, the decision processes were grossly inadequate for the magnitude of the issue:

  - On EU membership, a majority voted for the only change on offer in the referendum, but nobody knows how many were primarily giving vent to rage and hostility they feel towards the system as a whole – from a governance perspective, government's failure to explore whether less disruptive reforms might satisfy the public's hunger for change constitutes gross negligence;
  - On Covid-19, the government instituted policies that could clearly have catastrophic consequences, on the basis of a report that had glaring inadequacies, without any analysis of the potential negative impacts of the measures they were mandating.

- Constitutional Flaws include:

  a) The dominance of nationally-elected representatives over locally-elected ones, which disempowers the levels of government closest to the public;

  b) The fact that members of the House of Lords have neither democratic accountability nor an independent power base ;

  c) The fact that the Head of State is not democratically accountable and has no independent power base, which effectively leaves a void at the heart of government;

  d) The blatant conflict of interest inherent in Members of the Commons determining how and when they themselves are elected and can be recalled;

  e) The blatant conflict of interest inherent in Members of the Commons determining how and when the constitutional framework within which they operate can be reviewed and amended;

  f) The lack of any effective mechanism by which the public can spontaneously initiate reform and/or change of government;

  g) The lack of any effective mechanism for ensuring that the framework of law is coherent, and that bad laws can easily be challenged;

h) The lack of any effective mechanism by which the public can challenge parliamentary procedures and conventions (such as whipping and nodding through of ministerial appointments and dismissals) which, for practical purposes, make the public interest subordinate to the interests of the dominant political party;

Possible Reforms

Suggested reforms will need to be specific enough, and uncontentious enough, for the courts to recognise that there are no reasonable grounds for government not to implement them.

- On the policy front, this is another reason for focusing tightly on a small core of laws and policies which clearly cause widespread injustice.
- On the constitutional front, proposed reforms should ideally be non-partisan and should seek to accommodate as wide a range of opinions/idealogical positions as possible:

  a) Integration of different levels of democratic accountability through, for example, having members of the Lords appointed by locally-elected authorities (with votes in both houses having equal weight in determining what level of government should be sovereign on particular issues);

  b) The above reform would also resolve the problem of the House of Lords having no democratic mandate;

  c) No reform of the monarchy will satisfy both ardent monarchists and committed republicans, but a compromise that makes the monarch democratically accountable, through a spontaneous recall mechanism, should be acceptable to both camps;

  d) The primary objective of the electoral process has to be determined at a political level but decisions on how that process operates (i.e. what voting system should be used etc) should be delegated to an independent body whose decisions are subject to judicial review, rather than being taken by MPs whose chances of re-election are directly affected, and whose decisions cannot be challenged except through that very same process;

  e) Laws determining how the framework of governance operates should be given special status and any change to them should be approved by a Parliament elected specifically for that purpose, using an electoral system that maximises the public's ability to express their wishes;

  f) Jury-moderated petitions, where a petition which has reached a threshold in signatures has to be approved by a randomly-selected sample of the electorate (to keep vexatious petitions at bay), could provide an adequate mechanism both for recalling elected officials (or dismissing appointed ones) and for forcing particular issues onto the political agenda;

  g) A requirement that the framework of law be coherent, and that all laws should be consistent with generally-accepted, uncontroversial principles, would allow the courts to

insist on bad laws being amended, instead of being required to enforce them regardless of any injustice they cause;

h) Appointments, and dismissals, of ministers and parliamentary officials (including those who decide parliamentary timetables and processes) should be explicitly approved by Members of Parliament, by secret ballot, using a voting system that maximises their ability to express their wishes.

Previous Attempts at Reform

There have been many attempts, over the years, to introduce reform on most of these issues and it should be relatively easy to satisfy the courts that enough efforts have been made to bring about reform through normal political channels. However, most attempts have either focused on specific reforms to one area (e.g. proportional representation) or have called for a general review of the whole constitution (through an advisory constitutional convention or Citizens' Assembly) without advocating specific reforms. Therefore, before any court action is instigated or provoked, it would be advisable to put a list of specific demands to the authorities – if they refuse to implement them, that refusal could be the basis for an application for judicial review.

Pathway to Reform

The courts cannot themselves impose constitutional reforms, and they have no power to order Parliament to do so. However, if they are satisfied that the current constitutional settlement is irredeemably flawed, they do have the power to order the Government to convene a specially-elected Constitutional Parliament to legislate on specific constitutional issues that undermine the legitimacy of the current system.

This specially-elected Parliament could simply be asked to amend the current system; however, it could instead be asked to endorse a constitution approved by the courts, modified in whatever way the Parliament sees fit. Either way, there would of course need to be time for public debate before the election.

Legitimacy of Court Intervention

For the courts to intervene in that way, they would have to be satisfied that the current constitution allows them to do so. The main obstacle to this is the doctrine of parliamentary sovereignty. This can be challenged with a number of arguments:

- That doctrine originally had solid foundations – it emerged at a time when the Lords were local rulers and Parliament was recognised as supreme because it was the place where all the different vectors of power came together. That is clearly no longer the case and the doctrine has become an arbitrary convention whose strength rests almost entirely on a negative: the fact that no other body can claim to be the ultimate decision-making authority;
- The concept of the Rule of Law has emerged, in recent years, as a possible alternative central pillar of the constitution. In the words of the late Lord Bingham (in his book, The

Rule of Law) "respected and authoritative voices now question whether parliamentary sovereignty can coexist with the rule of law";

- It can be argued that, since the 2016 referendum, the doctrine of parliamentary sovereignty has been superseded by a doctrine of wilful popular sovereignty: MPs quite openly voted for a course of action that they believed would bring considerable harm, and that they expected the country to regret – which they justified on the basis that the will of the people, as expressed in the referendum, was sacrosanct;
- Despite embracing the 'Will of the People', however, Parliament took no steps to ensure that the people could express their will, other than once every five years through the crude mechanism of parliamentary elections (using a voting system widely regarded as totally inadequate) or, at MPs' discretion, through occasional referendums;
- Parliament has, for several years, allowed itself to be dominated by the agenda of whichever political party was currently dominant, through the patronage inherent in the Prime Minister's ability to dismiss and appoint MPs as ministers, without proper scrutiny, and through the integration into parliamentary processes of the whipping system;
- In allowing the provisions of a clearly constitutional law (the Fixed Term Parliament Act) to be over-ridden by a clearly *ad hoc* Act (the Early Parliamentary General Election Act 2019), Parliament demonstrated contempt for the very concept of constitutional stability.

The over-riding question for the courts, I think, is whether they are properly fulfilling their responsibilities to the general public if they continue to treat Parliament, as it is currently constituted, as a satisfactory ultimate source of law. I believe that, presented with the full arguments that I've outlined above, they will recognise that it would be wholly appropriate for them to insist on constitutional reform through the path suggested.

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