A Shift in Political Identity and its Impact on the Rule of Law

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A recent study in the United States indicated that the rate of Americans identifying themselves using political terms has almost doubled in the past five years.[1] This article considers whether this shift towards stronger political identities is indicative of a wider polarisation in Western politics which is, in turn, creating a space for more autocratic decision-making.

The study, carried out by Nick Rogers and Jason Jones, analysed a random sample of Twitter bios (ie the 160 characters you use to describe yourself) for explicit and implicit political keywords. Explicit words included the terms 'conservative', 'Democrat', and 'socialist' and implicit political terms included 'woke' and 'blue lives matter'. The aim of the study was to measure the extent to which Americans are defining themselves by political affiliations and whether they are changing their identity in a way that saliently incorporates their politics.

According to Rogers and Jones, an individual's identity goes beyond mere attitudes and behaviour: it is the all-encompassing sense of self that *informs* attitudes and behaviour.

Whilst identity politics may be slightly less prevalent in the UK than in the US, the rise of political engagement throughout the Western world is undeniable. Despite the restrictions imposed on the Presidential campaigns as a result of COVID-19, the US elections saw the highest rate of voter turnout for 120 years. Similarly, for the 2019 UK elections, voter turnout was at its second highest rate since the landslide 1997 election of Tony Blair.

Arguably, this rise in political engagement has brought with it a shift towards increasingly polarised political groups. Jones and Rogers explain this as tribalism: fostering ingroup pride and outgroup animosity. In a political context, studies show that 'deliberation tends to move groups, and the individuals who compose them, towards a more extreme point in the direction indicated by their own predeliberation'.[2] It was certainly true that in the aftermath of the US election, which saw a swathe of Republican devotees (accompanied by a number of alt-right political activists) march on the Capitol, they demonstrated an almost cultish commitment to their political ideals. Their actions marked an unprecedented assault on modern US democracy and were indicative of the strength of support held across America for its former autocratic leader.

As Jones and Rogers point out, if people define themselves increasingly by their political allegiances, 'their feelings towards political "others" can be expected to become more negative, and debate on matters of policy will become more emotional and intractable'. Traditional methods of political persuasion may cease to be of use as changing someone's mind on a particular issue requires 'an adjustment to an entire sense of group identity'.[3]

The rise in autocratic leadership

COVID-19

Arguably the polarisation of political views, most marked recently in the US but also of course seen in the UK in relation to Brexit, enables autocratic leadership to flourish.

The model of representative politics, adopted by liberal democracies, generally requires the government of the day to place legislation before an elected body of representatives for debate. In this way, legislation has the opportunity to be shaped by representatives of the broader electorate rather than purely the Party in power. This model facilitates political oversight and encourages moderation

1 Nick Rogers and Jason J Jones, 'Using Twitter Bios to Measure Changes in Self-Identity: Are Americans Defining Themselves More Politically Over Time?' (2021) 2(1) Journal of Social Computing <https://ieeexplore.ieee.org/document/9355032>.

2 Cass R Sunstein, 'The law of group polarization' (2002) 10(2) Journal of Political Philosophy 175 (as cited in ibid).

3 Rogers and Jones (n 1).

through compromise. Political parties in the UK have often been accused of all seeking to occupy the centre ground: all endeavouring to strike the perfect balance between conservatism and liberalism. This is no coincidence. Decision-making, in a liberal democracy underpinned by representative politics, requires consensus.

As Lord Sumption notes elsewhere in this issue, there has been a shift away from liberal democracy towards authoritarian government. He identified the Brexit referendum as a turning point for modern representative politics in the UK. Noting the use of referendums by some of the notorious autocracts (including Putin, Mussolini and Hitler) he explains that they undermine the system of representative politics on which a liberal democracy is based by preventing it from accommodating differences among the electorate on incredibly divisive issues. The natural consequence of this, according to Lord Sumption, is the election of a government with a strong authoritarian streak.

Recent efforts by the government to expand the remits of executive power can be viewed as a manifestation of this trait. It is widely recognised that during periods of uncertainty the electorate looks for strength and stability from its leadership. Indeed, a US study in 2016—in the run up to Donald Trump's election—showed that 40% of Americans favoured authority, obedience and uniformity over freedom, independence and diversity.[4] Similar trends are visible in relation to the handling of Brexit and the pandemic in the UK. The 2019 Conservative Party manifesto depicted the UK as 'paralysed by a broken Parliament' and one of the most commonly cited reasons for supporting the Conservative Party was the promise that, by hook or by crook, Boris Johnson would 'Get Brexit Done'.[5] Until recently (with the rise of protests concerning the ongoing restrictions), the public have willingly ceded their individual rights in favour of decisive leadership and the government's autocratic tactics for handling this pandemic have largely gone unchallenged.

Since March 2020, the government has laid approximately 415 pieces of coronavirus-related legislation at an average rate of seven statutory instruments per week.[6] Only 26 of these statutory instruments have been laid before Parliament in draft form.[7] The government has relied on the use of statutory instruments (rather than primary legislation) to govern by Ministerial decree. The primary legislation underpinning the coronavirus regulations is the Public Health (Control of Disease) Act 1984. Under section 45R of this Act, Government can dispense with the obligation to obtain Parliamentary approval for regulations if the regulations 'contain a declaration that the person making it is of the opinion that, by reason of urgency, it is necessary to make the order without a draft being so laid and approved'.[8] The advantage of this method of legislating is that the regulations can be enacted without delay. In the early days of the pandemic, Government scrambled to enact the Coronavirus Act 2020. The legislation passed through Parliament at breakneck speed but there was, at least, a forum for debate. The same does not apply to the social distancing or lockdown regulations which have, to date, been governed by statutory instruments. Whilst the section 45R urgency justification was entirely plausible at the outset of the pandemic, its continued use undermines Parliamentary sovereignty.

Despite the fact that a number of these statutory instruments have imposed unprecedented restrictions on our personal freedom, with criminal sanctions for breaching the restrictions, the legislation has regularly been published only hours before coming into force.[9] On at least one occasion, legislation was laid after Parliament was no longer in session, despite having been announced in the media several weeks earlier. Legally curious fans of Channel 4's *It's a Sin* might have noted that the same primary legislation used by that government to issue decrees for the detention of young AIDS sufferers is now enabling the imposition of urgent legislation authorising our detention. Whilst generally the UK population seems to accept the need for such unprecedented restrictions on their freedoms given the health crisis, there remains significant unease regarding Government's dismissive attitude towards Parliament. The Coronavirus regulations are detailed and complex statutory instruments that warrant considered analysis and parliamentary scrutiny. Parliamentary scrutiny has the dual advantage of requiring the relevant Ministers to prepare for a debate, and in doing so often alerting them to potential shortcomings with the legislation, as well as providing Members of Parliament with the opportunity to point out loopholes or potential consequences that were not immediately apparent to the Minister responsible for drafting the legislation. This process is widely believed to enhance legislation.

Curbing judicial powers

The barrister Adam Wagner recently noted that, 'the easier it is for freedoms to be taken away, the greater the temptation to limit them again in the future'.[10] This observation may in part explain the gathering momentum behind the expansion of executive power beyond pandemic related legislation.

During the course of the past six months, the government has launched the Independent Review of Administrative Law (IRAL), to conduct a review into the workings of judicial review, the Independent Human Rights Act Review (IHRAR), to consider whether the Act is working in practice and has also now hinted that it will consider reviewing the judicial appointments process. Whilst the decision to commission both the IRAL and IHRAR already constituted red flags as to the government's direction of travel regarding constitutional law reform, its response to the IRAL panel's report (the Faulks Report) is even more concerning. It was notable that Robert Buckland described the consultation launched in response to the Faulks Report as a 'once in a generation opportunity' to broaden the conversation.[11] This explanation seems a little far-fetched given that the last government consultation of judicial review was conducted in 2013. A more plausible explanation is that the government is seeking to capitalise on the political momentum it has gathered through its recent spate of autocratic decision-making. Although both reviews were alluded to in the Conservative Party's

4 Matthew C MacWilliams, 'Trump Is an Authoritarian. So Are Millions of Americans' (*Politico*, 23 September 2020) <https://www.politico.com/news/magazine/2020/09/23/trump-america-authoritarianism-420681>.

5 Conservative Party, 'Get Brexit Done: Unleash Britain's Potential' (2019) <5dda924905da587992a064ba_Conservative 2019 Manifesto.pdf (website-files.com)>.

6 Hansard Society, 'Coronavirus Statutory Instruments Dashboard' <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>.

7 ibid.

8 Public Health (Control of Disease) Act 1984 s 45R.

9 Meg Russell and Lisa James, 'MPs Are Right: Parliament Has Been Sidelined' (*UK in a Changing Europe*, 28 September 2020) <https://ukandeu.ac.uk/mps-are-right-parliament-has-been-sidelined/>.

10 Adam Wagner, 'Taking Liberties: Covid-19 and the Anatomy of a Constitutional Catastrophe' (*Prospect Magazine*, 26 March 2021) <https://www.prospectmagazine.co.uk/essays/adam-wagner-covid-lockdown-law-democracy-essay>.

11 Eduardo Reyes, 'Buckland's Judicial Power Project' (*Law Gazette*, 29 March 2021) <https://www.lawgazette.co.uk/analysis/bucklands-judicial-power-project/5107951.article>.

election manifesto for the 2019 election, the government's efforts to push through reform at 'breakneck speed' have been widely remarked upon.

The Foreword to the government's consultation stated that '[t]he Panel's analysis identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction' and that 'the panel found courts were increasingly considering the merits of government decisions themselves, instead of how those decisions were made—moving beyond the remit of judicial review.'[12] Panel members have vocalised their concerns regarding the government interpretation of the Faulks Report with Lord Faulks himself confirming, on the Law in Action podcast, that he did not believe this was an accurate representation of the panel's findings. He explained, 'I think we found that there were one or two cases which we particularly pointed out where there was considerable tension between what was legitimate to be considered by the courts and what was really a matter of politics. But those were particular cases. We do not think that there was an overall trend that you could extract from those cases'.[13] The government consultation goes well beyond the Faulks Report's recommendations, proposing reforms to the use of ouster clauses (to broaden their use and thereby limit the justiciability of decisions by the courts) and mandatory remedies that would significantly restrict the court's ability to declare a government decision null and void.

The IHRAR panel has been tasked with considering the application of the European Convention of Human Rights (the Convention Rights) under UK law and, amongst other things, whether the courts should retain the power to interpret legislation compatibly with Convention Rights under section 3 of the Human Rights Act 1998 (the HRA). The government's position is that the courts have a tendency to interpret legislation in a manner inconsistent with the intentions of Parliament in enacting the legislation. If section 4 declarations of incompatibility were a first instance consideration, rather than the interpretative powers used by the courts under section 3 of the HRA, it would severely hamper an individual's access to a remedy. Mishcon de Reya's data analysis of cases involving the HRA indicates that the average lag between a declaration of incompatibility being issued and the relevant legislation being amended or repealed is 17 months.[14] Any amendment, following a declaration under section 4 of the HRA, relies on Government making time for the issue to be considered in the legislative agenda. This would impose a significant legislative burden whilst hamstringing the court's ability to provide individuals with a timely remedy.

Whilst, as yet, no consultation has been officially announced, Robert Buckland's speech at Queen Mary University on 25 March 2021 gave some insight into the next administrative law issue on the government's agenda. In February, the think tank Policy Exchange published a report titled 'Reforming the Lord Chancellor's Role in Senior Judicial Appointments' which proposes reforms to the current judicial appointments system so as to grant the Lord Chancellor a greater role in determining senior judicial appointments.[15] In his speech, Robert Buckland expressed his intent to examine the role of Lord Chancellor in the context of the Constitutional Reform Act 2005. He referred to strands of reform surrounding judicial appointments that are worth examining to ensure that they 'continue to provide the appropriate framework for the Lord Chancellor to exercise their duties in respect of our constitutional arrangements.'[16] This topic has been hotly debated in the UK in the past, not least because of the very real fear of moving towards a more political US-style system.

Following the 2018 Supreme Court decision concerning the incompatibility of Northern Irish abortion laws with Convention Rights, it was proposed that a parliamentary committee should play a role in the appointment process for the Supreme Court. Under the current judicial appointment process, judicial appointments are made by a commission, chaired by the President of the Supreme Court and including representatives of the Judicial Appointments Commissions of England and Wales, Scotland and Northern Ireland, at least one of whom must be a lay member. In fact, the Judicial Appointments Commission for England and Wales comprises a 50/50 balance of judicial members and lay members. Rightly, according to Lord Pannick, whilst '[s]ome candidates for Supreme Court appointment take (in broad terms) a more expansive approach to judicial protection of human rights, and others less so' these factors are not 'the subject of public discussion'.[17] The constitution of the commission does, however, mean that those responsible for approving appointments to our high courts have a diverse professional background. Lord Pannick notes the potential perils of a political system, reflected by the experiences of the US: 'The unsurprising reality, as Senate experience over the past 30 years has shown, is that the involvement of politicians in the appointment of Supreme Court judges results in political motives and considerations playing the primary role in the process'.[18] Any efforts to incorporate a political element into this decision-making process has the potential to disrupt the balance of the entire British constitution: removing the guarantee of judicial political independence that is essential to maintaining the separation of powers that protects the rule of law.

What can be learnt from the current political situation in Poland?

Since the fall of Communism in Poland in 1989, the country has shown impressive economic growth, record lows of unemployment and strong wages. As a result, it has become an increasingly popular prospect for international investment, with a number of US companies establishing headquarters there during the past decade. However, since the return to power of the Law and Justice party (PiS) in 2015, the Polish judiciary has been the target of policy and legislative amendments leaving it vulnerable to political influence.

12 Ministry of Justice, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law' (2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf>.

13 Joshua Rozenberg, Interview with Lord Faulks (*BBC*, 23 March 2021) <https://www.bbc.co.uk/programmes/m000td1g>.

14 Mishcon de Reya, 'Response to IHRAR' <https://www.mishcon.com/assets/managed/docs/downloads/doc_3246/Response%20to%20IHRAR.pdf>.

15 Richard Ekins and Graham Gee, 'Reforming the Lord Chancellor's Role in Senior Judicial Appointments' (*Policy Exchange*, 2021) <https://policyexchange.org.uk/wp-content/uploads/Reforming-the-Lord-Chancellor's-Role-in-Senior-Judicial-Appointments.pdf>.

16 Robert Buckland, 'Law and Politics – the Nightmare and the Noble Dream' (Queen Mary University Conference, London, 25 March 2021) <https://www.gov.uk/government/speeches/lord-chancellors-speech-law-and-politics-the-nightmare-and-the-noble-dream>.

17 David Pannick, 'Brett Kavanaugh Scandal: a Supreme Case of Why Politics Must Stay Out of Judicial Appointments' *The Times* (London, 27 September 2018) <https://www.thetimes.co.uk/article/brett-kavanaugh-scandal-a-supreme-case-of-why-politics-must-stay-out-of-judicial-appointments-bdz8m67k6>.

18 ibid.

Reforms include politicising the appointment of the First President of the Supreme Court (the equivalent of our President of the Supreme Court) and restrictions on legal challenges to judicial and constitutional bodies as well as law enforcement agencies. The Index of Economic Freedom showed that judicial effectiveness had dropped to 42.8 points in 2020 which places it in the 'repressed' category, over 15 points lower than its score in 2017.[19] This is severely impacting on the country's ability to attract foreign investment.

It is impossible not to note here that PiS was founded under the banner of nationalism, populism and Euroscepticism: these are of course all themes that have featured, to varying degrees, in recent Conservative manifestos in the UK (and formed the basis of 2016's Leave campaign).

According to the European Commission, 'effective judicial institutions that uphold the rule of law have been identified as having a positive economic impact. Where judicial systems guarantee the enforcement of rights, creditors are more likely to lend, businesses are dissuaded from opportunistic behaviour, transaction costs are reduced and innovative businesses are more likely to invest'.[20] Interestingly, this sentiment has been expressed repeatedly in response to the IHRAR consultation. Respondents have expressed concern in relation to the government's efforts to row back from its commitments to Convention Rights and limit the powers of the UK judiciary, which is widely respected across the world, to interpret legislation and provide adequate protection for Convention Rights.

The expansion of executive power in Poland has seen a surge in the number of protests in the country, recently resulting in the enactment of laws restricting freedom of assembly. Advocacy groups have identified a trend amongst governments with authoritarian tendencies using the pandemic to weaken democratic standards: in particular, in relation to freedom of association and the independence of the courts. According to a 2020 survey, only 34% of the public and 27% of businesses trust the independence of the Polish judiciary.[21]

Indeed, only last year it was noted that 'the surge of populist far-right in central and eastern Europe has meant repression which seemed unlikely just a few years ago is slowly appearing'.[22] In Poland, this has taken the form of the imposition of an outright ban on abortion and political harassment of LGBTQ groups and individuals. In a deeply concerning move towards the end of last year, the Polish state-run oil company, PKN Orlen, purchased one of the country's private media outlets—Polska Press—with a readership of 11 million Poles per day.

Clearly, the expansion of executive power, partly through proposed judicial reforms, in the UK does not exactly align with the situation in Poland. The UK remains politically and democratically stable. However, the political situation in Poland gives cause to consider the possible consequences of constitutional reforms. Over the past year we have accepted unprecedented restrictions on our personal freedom and the current proposals, which seek to limit an individual's ability to challenge Government decisions, should be viewed through this lens and with extreme caution.

Conclusion

The division fostered by autocratic decision-making has been particularly evident in Poland, the US and the UK. Indeed, Mikołaj Łoziński, a Polish author, observed last year that 'No one is surprised anymore by the sight of nationalists marching with torches, throwing flares on the main streets of major Polish cities'.[23] The same is true in many cities across the US, and in recent months the UK has seen a sharp rise in the number of violent protests, primarily in relation to the ongoing lockdown restrictions.

The political situation in Poland demonstrates how quickly a liberal democracy can slip towards authoritarian rule and the impact that this instability has on foreign investment and the protection of individual rights.

However, PiS's transition towards autocratic governance has not passed unnoticed. Concerns regarding the protection of LGBTQ rights and the independence of its judiciary have been the subject of significant media attention and the European Union is considering steps to restrict Poland's access to European funds until an independent judiciary is restored. With a moderate President in the White House, PiS (which counted Trump as an ally) will doubtless be feeling more vulnerable in the face of the criticism of its European neighbours. Equally, Trump's appointment of two Supreme Court justices during his single Presidential term shows the potential peril in allowing too much political influence over judicial appointments. In light of this we must all view attempts to tinker with the constitutional arrangements here in the UK with caution—particularly those aimed at providing more power to the executive at the expense of the judiciary.

19 'Index of Economic Freedom' (*heritage.org*) <https://www.heritage.org/index/visualize?cnts=poland&type=11>.

20 Commission, '2020 EU Justice Scoreboard' COM(2020) 306 final 5 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0306&from=EN>.

21 Economist Intelligence Unit (EIU) Country Forecasts, 'Outlook for 2021-2025: Political Stability' (2021).

22 Rima Marrouch, 'Going Nowhere: Europe's Right-wing Populists Will Survive the End of Trump' *The Independent* (29 December 2020) <https://www.independent.co.uk/news/world/europe-trump-populism-poland-hungary-b1780027.html>.

23 ibid.