Requirement for coherent law

The following was originally written as a contribution to a London School of Economics project to crowdsource a proposed new constitution for the UK. The clauses I drafted once the proposal had been accepted are at the top, followed by the analysis I posted when I first proposed it. The LSE project can be found at https://constitutionuk.com/

Draft clauses:

Parliament and the courts shall endeavour to keep all laws consistent with each other, and with the values and principles explicitly enshrined in this constitution or taken for granted, without significant dissent, by the general public.

When it encounters an incompatibility between a statute and higher laws or generally accepted uncontentious principles, or between different provisions of the constitution, the Supreme Court shall either issue a Declaration of Incompatibility or refer the matter to the Constitution Commission, as approporiate.

If Parliament declares unequivocally that the incompatibility was intended or disputes the Court's judgement that the incompatibility exists, the Court may

- either withdraw its Declaration and continue to apply the law as it stands;
- or seek authority from the Head of State to order a referendum on the issue.

If Parliament fails to take timely action to resolve or unequivocally deny the declared incompatibility then the Court shall (as appropriate)

- treat the statutory provision in question as having been abandoned by Parliament and resolve the incompatibility itself under common law;
- order a referendum on the question of which constitutional provision should be upheld.

Analysis:

Without any obvious democratic mandate of their own, and with no-one to defer to who is politically impartial, the courts are at present unable to defend the integrity of law with the robustness which is required.

The existing constitutional practice is that the courts must blindly enforce certain laws – even when they know that those laws are at odds with the public utterances of politicians of all parties; even when they have reason to believe that a particular effect of the law was not intended by Parliament; even when they believe that a statute violates Parliament's mandate. This might have been appropriate in the past, when the institutions of government were still being established and the importance of not undermining the ultimate authority outweighed other considerations, but in today's world it is an anachronism which leads many people to conclude that the whole system is utterly corrupt.

Currently, when the courts recognise an incompatibility between a statute and a fundamental principle of law, they consider themselves obliged to uphold the statute. To my mind, unless it is beyond all reasonable doubt that it was the conscious intention of Parliament that the principle in question should be over-ridden, such a policy is incompatible with the established principle (of legal Equity) that 'what ought to be done has been done' and with the presumption of integrity which I believe should be one of the cornerstones of a mature legal system.

If it truly intends that a well-established legal principle should be set aside, Parliament is quite

capable of making that intention explicit. In fact, I would say that it has a positive responsibility to make it unmistakeably clear – and the courts should expect it to exercise that responsibility. Since Parliament is also quite capable of responding quickly to a court ruling, I can see no reason at all why the courts should uphold any statute which appears to be contrary to their understanding of Parliament's own will. Nor can I see any reason at all why the courts should assume, without clear evidence, that Parliament's will is in conflict with generally accepted principles, even with newly enacted legislation.

The courts are undoubtedly well aware of the difficulties of drafting legislation in a way which truly gives effect to Parliament's intentions without unwanted side-effects. There is no reason for them to assume, when they encounter an incompatibility between a statute and a fundamental principle, that it was intentional. To do so ascribes to Parliament both infallibility and a wilful disregard for the integrity of law.

The judiciary's inhibitions about trespassing on the role of Parliament are commendable but become pernicious if they lead them to abdicate their own responsibilities. That leaves gaps in the law which allow important injustices to be ignored, which in turn undermines the rule of law.

I propose that, when they encounter an incompatibility with fundamental principles, the courts should assume that it is inadvertent and should make a declaration of incompatibility, inviting Parliament to clarify its position. If Parliament declares unequivocally that the incompatibility was intended, then the courts would continue to enforce the law as they do today (but should be able to ask the Head of State to put the matter to the people). If Parliament ignores the issue, however, then the courts should be empowered to change the law themselves.

Such a reform would not violate the principle of parliamentary supremacy – it would merely open the legislative process to a bit more light – and, in my opinion, the courts could reasonably implement such a reform unilaterally (though it would avoid undesirable conflict if Parliament were to authorise it explicitly).

A society which does not take proper care of the laws which shape it at the most fundamental level condemns itself to a broad range of difficulties and disputes which would otherwise not occur. As far as I can see, a significant amount of legislative and administrative activity does nothing more than mitigate (inadequately) the effects and consequences of the poverty and inequality which result from more fundamental laws. Requiring the courts to blindly uphold laws which are manifestly unjust causes far more problems than it avoids and creates numerous potential disputes in which the legitimacy of the constitution might be challenged in court.

(Most of the above is reproduced, with some reformatting, from a submission I made to the Commons Select Committee for Political and Constitutional Reform for their 'New Magna Carta' consultation.)

From what I've seen, debate on the doctrine of Parliamentary Sovereignty often centres on the possibility of Parliament bringing in new legislation which is incompatible with the Rule of Law – but commentators seem to ignore the long-established laws which lock in ancient injustices.

The roots of our existing constitution stretch back to a time when a central function of law was to establish and maintain a stratified society – a society in which the bulk of the population was explicitly made subservient to a minority. Modern society has rejected that subservience and any laws which derive from that time need to be examined closely to ensure both that they are consistent with principles which have been established subsequently (obviously laws intended to benefit one section of society are not appropriate in a society where everyone is considered equal), and that they remain consistent with the principles which gave rise to them.

As far as I can see, our whole social and economic landscape is in fact shaped by derelict law – law which has become detached from the circumstances which gave rise to it. (In the Rights and Duties section, I'll be discussing the most glaring example, the inheritance of land.) Such law

persists only because there is no requirement for the law to be internally consistent or compatible with generally accepted principles and values.

The reform proposed above would establish the courts' right to demand a coherent framework of law, but I believe the constitution should go further than that; it should impose on the courts (and Ministers) a positive duty to actively maintain the integrity of the law. I'll discuss how that might operate in another post in this section.

Responses to comments:

1) If Parliament declares that it is their intention that inheritance law should massively benefit one small section of society to the detriment of the majority, or if it declares that the current situation is compatible with the principle of fairness, or if it declares that it doesn't regard the principle of fairness as particularly important, then the courts would regard it as a purely political matter. Parliament would have made its position clear and reform would be up to the electorate.

Unequivocal statements, like the ones above, bring the issue into the open and make it easy for the public to judge Parliament. But if the legislature is able to simply ignore issues it doesn't want to get to grips with, as it can at the moment, it makes it very much harder for the public to know what Parliament's position really is.

Basically, my point is that it doesn't matter if there are overlaps in legislative responsibility, as long as it's clear whose view should prevail in the event of a clash. It is important, however, that there should not be any gaps, because that allows pernicious laws to persist simply because the political will to reform them is too weak to overcome the interests which want to retain them.

2) I suspect governments frequently *dream* of breaching rights but often daren't do so openly. A problem my proposal is concerned with is breaches which *aren't* open; where some apparently reasonable legislation has the effect of breaching a right in ways which only become clear with analysis, particularly where the beneficiaries of the breach are easily identified and may be organised but the losers are dispersed and may not understand their loss. In those circumstances, governments would very likely neglect reforming the law because doing so would upset an identifiable group but there wouldn't be any public agitation about it.