Integrity of Law

Introduction

1. 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. Currently a significant amount of legislative and administrative activity does nothing more than try and mitigate the ill-effects caused by fundamental laws that have either become derelict (where the circumstances which originally justified them no longer apply) or were never adequate in the first place.

2. When the courts uphold laws which are manifestly unjust or out-of-date, the legitimacy of the whole framework of law is undermined. If the mechanisms for identifying and remedying derelict law are inadequate, reformers are placed in the invidious position of having to step outside the law in order to get their concerns heard.

3. The existing convention is that the courts must enforce statute law – 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[i]. 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[ii], but in today's world it is an anachronism which leads significant numbers of people to conclude that the whole system is utterly corrupt.

Concerns

Legislative Processes

4. There are a number of reasons why existing laws are not routinely brought into harmony with deeper principles. In some cases, of course, they deal with genuinely intractable problems for which it is very difficult to see workable solutions. In other cases the underlying issue has always been regarded as essentially political rather than legal, and a shift in perspective is needed to recognise when the political component of it ceases to be relevant.

5. In many cases, however, the main reason is that the operational processes of the law do not encourage, and to some extent actually work against, the scrutiny that is required. This happens both at the high level – the interface between the courts and Parliament – and on the ground, where the effects of the law are encountered. The result is a general perception of the law as a tangle of thorns which any one with any sense steers clear of – which in turn puts many people off even thinking about how laws could be improved.

Court and Parliament

6. At the high level, a large part of the problem is the inherent conflict between the courts' roles as guardian of the constitution and interpreter of laws promulgated by Parliament – coupled with the political sensitivity of important areas of law and a lack of appreciation within Parliament (and society at large) of the importance of coherent law.

7. When legislation creates injustice which only becomes clear with analysis, politicians can easily neglect putting it right – particularly where the beneficiaries of the flawed legislation are well organised, but the losers are dispersed and may not understand how specific legislation is unfair to them. In such circumstances, where reform would upset an identifiable group, politicians commonly avoid tackling problems unless the public are agitating about them. This can apply to freshly minted legislation but it also applies to long-established laws which shape society at the most fundamental level.

8. If it needs a vigorous expression of public dissatisfaction for Parliament to address unsatisfactory legislation, then the only wrongs that will be redressed will be those that are either uncontroversial or obviously detrimental to a significant part of the electorate. What is needed is a mechanism to identify areas where the law is incoherent in less obvious ways and ensure that potentially controversial reform is not neglected.

9. As things stand, when the courts recognise an incompatibility between a statute and a fundamental principle of law, they regard themselves as being obliged to uphold the statute. However, unless it is beyond all reasonable doubt that it was the conscious intention of Parliament that the principle in question should be overridden, such a policy is incompatible with the presumption of integrity which should be one of the cornerstones of a mature legal system – and it is incompatible with the courts' responsibilities as guardian of the constitution.

10. The courts are surely well aware of the difficulties of drafting legislation in a way which truly gives effect to Parliament's intentions without unwanted side-effects. For them to assume, when they encounter an incompatibility between a statute and a fundamental principle, that it was intentional, is entirely unnecessary (and positively absurd if the point in question is one which simply codified established common law). It ascribes to Parliament both infallibility and a wilful disregard for the integrity of law.

11. It might perhaps be justifiable if Parliament had no means of clarifying the point – but clearly it does. If it truly intends that a well-established legal principle should be set aside, it is quite capable of making that intention explicit. Indeed, in a mature society, it should have a constitutional responsibility to make it unmistakeably clear – and the court should expect it to exercise that responsibility. Since Parliament is also quite capable of responding quickly to a court ruling (and tardily to a request), there is no reason at all why the court should automatically uphold any statute which appears to be contrary to the court's understanding of Parliament's own will.

12. The courts' inhibitions about trespassing on the role of Parliament are commendable in many ways 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. As long as the courts do not demand respect for the deeper principles of law, the public will regard law as primarily an instrument of power – and government will be tempted to use it as such.

Entanglement in law

13. The knowledge that statute law cannot be challenged in court, no matter how perverse it may be, constitutes a major barrier to coherent law. However, another major barrier lies in the general rule that, outside the political arena, the validity of established law can only be examined in the context of a dispute.

14. If a primary purpose of law is to pre-empt conflict, it is perverse that the courts are apparently incapable of amending out-dated common law – or even correcting their own mistakes – except when it has led to an actionable dispute. The fact that anyone who is a victim of incoherent law, and wants to see it amended, must take a huge financial risk to do so – even if the shortcomings of the particular law are widely acknowledged – is wholly unreasonable.

15. Perversely, if a dispute is necessary to get a flawed point of law changed through the courts, the only ones which *can* be changed that way are the ones which are in fact disputable. The more clearly derelict a law is, when properly scrutinised, the less chance there is that it will actually come before a court: if one party demonstrates, in preliminary exchanges, that it will clearly be overturned, the dispute will evaporate; the law will then remain unchanged and anybody who does not see the flaws in it will still be bound by it.

16. If laws were expected to be rooted in principle, and legal practitioners were expected to understand the basis of any laws they encounter, that might not matter too much. But when the law is treated as a set of arbitrary rulings, the dependencies between different aspects of the law become invisible. The rationale behind particular points of law can rest on prior points of law and if those prior laws change then the consequential laws become unreliable and need to be reconsidered. A mature legal system has to have some mechanism for addressing that need.

17. Bizarrely, the gatekeepers of the legal system (whose livelihoods come from guiding people through its complexities) seem to be under no obligation to seek improvements in the law even when they recognise its faults. Legal practitioners are in a privileged position with regard to the law, and the benefit that accrues to them from its complexity needs to be balanced by a responsibility to help keep it as simple as possible. They are also uniquely placed to fulfil that responsibility; they encounter the problems within it in a way that legislators don't and many of them will have useful insights into how those problems can be resolved.

18. By contrast, if the legal system relies on Parliament to maintain the integrity of law the flexibility of common law is lost, the minor details of the law become hostage to political timetables, and political energies get diverted from the broader principles and end up mired in minutiae.

Proposed Reforms

19. The reforms proposed below are intended to both simplify reform of relatively minor law and close the gaps in legislative responsibility which currently allow pernicious laws to persist when the political will to reform them is too weak to overcome the interests which want to retain them.

20. To ensure that laws are kept consistent with fundamental principles, I suggest the following reforms are needed:

20.1 That every officer of the court should be expected to recognise incompatibilities or inconsistencies within the law which they encounter in the course of their duties, and be required to report them.

20.2 That the courts should establish a body to:

a) collate and consider such reports;

b) provide and manage a semi-formal pro bono forum where such problems, and possible solutions, can be discussed;

c) authorise public funding for disputes on points of law which are recognised as being unsatisfactory; and

d) submit uncontentious amendments for the approval of the court.

20.3 That, when they encounter an incompatibility between statute law and fundamental principles, the courts should:

a) assume that the incompatibility is inadvertent;

b) ask Parliament to clarify its position; and

c) declare a timetable for issuing a judgment (upholding the fundamental principle) if such clarification is not forthcoming;

d) if necessary, seek approval from a Sovereign Jury[iii] for an elected Constitutional Assembly to be convened to resolve any conflict between Parliament and the courts.

The core of this analysis and proposed reform was originally put forward in 2013 as part of a submission to the Law Commission. They declined to take it up on the grounds that the reforms were constitutionally revolutionary and therefore not a matter for them.

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i A discussion of Parliament's mandate can be found in my paper, A Trust of Sovereignty.

ii Critics of the courts often overlook the fact that, without a framework of law, justice is at the discretion of whoever wields power; and the existing framework of law only developed (in the face of significant hostility from a relatively self-sufficient populace) with the active cooperation of powerful people, who often saw themselves as being above it. Historically, the courts have always had to temper their administration of the law to accommodate political realities, and have always had to consider the effect their rulings might have on public trust in the institutions of government and in the law itself.

In my opinion that is no longer the case. Trust in government is now entrenched in the collective unconscious and few people today regard the concepts of government and laws as dispensible – even while technological and organisational developments have hugely increased government's power and the potential for misrule. The courts no longer need to be concerned that their decisions might fatally undermine public trust in executive government; the greater danger now is that public trust in the judiciary will be undermined if the courts are not diligent in constraining misgovernment.

iii The jury is sometimes described as the last bastion of our civil liberties but, although many proposals have been put forward for extending its role – whether by selecting members of the House of Lords by lot, or summoning Citizen's Juries – so far it has always been at best a semi-detached part of our constitution.

Currently the only part the jury system plays in the British system of government is in the judicial sphere, where it is restricted to the role of delivering a verdict on the case in hand. This role is in fact quite separate from what gives it its special status; the essential function of jurors is to act as witnesses to the exercise of power. Through their complicity in a trial the jurors confirm the public's acceptance of authority, and in principle they have the power to withhold that confirmation by insisting that the court demonstrate the source of its authority. This power exists whether it is acknowledged or not because if it happened – if a jury demanded that it demonstrate the validity of its authority – no court in Britain would be willing to either ignore it or treat it as contempt.

If that power were acknowledged explicitly, however – if the jury were recognised as sovereign within the court system – that would provide the courts with a mandate of their own which would make them properly independent. It wouldn't have the breadth and depth that Parliament's mandate has, but it would have a topicality which theirs lacks and it would be constantly being renewed each time a new jury is empanelled.