



ALL PARTY PARLIAMENTARY GROUP ON DEMOCRACY AND THE CONSTITUTION

AN INDEPENDENT JUDICIARY - CHALLENGES SINCE 2016

**An Inquiry into the impact of the actions and
rhetoric of the Executive since 2016 on the
constitutional role of the Judiciary.**

Funded by the Joseph Rowntree Reform Trust

8 June 2022

EXECUTIVE SUMMARY



All Party Parliamentary Groups are informal groups of Members of both Houses with a common interest in particular issues. The views expressed in this report are those of the group. This is not an official publication of the House of Commons or the House of Lords. It has not been approved by either House or its committees. The report was prepared with funding from the Joseph Rowntree Reform Trust. Members were assisted by independent counsel and the Institute for Constitutional and Democratic Research.

EXECUTIVE SUMMARY

1. Since 2016 (or arguably for some years before) the judiciary has been subject to intense political scrutiny. This inquiry has examined the extent to which this has impacted on the judiciary's performance of its constitutional role.
2. The inquiry is limited to the "public law" role of the judiciary. This is, *inter alia*, to arbitrate disputes between citizens and the state and ensure that the executive obeys the law. To do this, the judiciary must be able to exercise its functions independently of the executive. The respective constitutional roles of the judiciary and executive inevitably cause tension between the two. Sometimes the judiciary will have to tell the executive that it is acting unlawfully. The executive's own guidance suggests that losses in court should be used as a guide to improve future performance. Nevertheless, no minister will be happy about this. In recent years ministers have reacted to losing cases by accusing judges of bias or incompetence.
3. The executive has certain constitutional duties towards the judiciary. Ministers must uphold the independence of the judiciary and the Lord Chancellor must have regard to defending it. A constitutional convention traditionally required ministers to refrain from criticising judicial decisions, save in measured terms within parliament itself. Moreover, ministers are in a uniquely powerful position to communicate with the public about the judiciary, shape its perceptions, and influence public confidence towards it.
4. Recent years have seen the judiciary accused, by both politicians and the media, of "interfering in politics". Two independent reviews (the Independent Review of Administrative Law and the Independent Review of the Human Rights Act) found no persuasive evidence of this.
5. By contrast, the behaviour of the executive towards the judiciary may be considered constitutionally problematic. Although we have only seen evidence of one direct attempt by a minister to influence a particular judicial decision, ministers have generally acted in a manner that may be considered improper or unhelpful given their constitutional role. This includes making public statements which misrepresent judicial decisions, launching ad-hominem attacks on judges who decide against them, responding to adverse decisions with threats to "reform" the judiciary (including to bring it under

political control), and conflating “decisions with political consequences” with “political decisions”, thereby giving the misleading impression that judges are stepping outside their constitutional bounds. This behaviour can, in extremis, be constitutionally improper because it erodes public confidence in the judiciary and implies that ministers are better able to decide on matters of law than judges. Rather than the judiciary trespassing on the territory of the executive, therefore, ministers overstep onto constitutional ground properly reserved for judges. Ministers lack both the expertise and the constitutional right to take judicial decisions.

6. The actions of the executive have had a concerning impact on the judiciary. A significant majority of judges report low morale and serious concern about the respect in which they are held by ministers. Judges may be subject to a context of soft pressure, in which the constant threat of political reform hangs over them if they decide against the executive. Several commentators have suggested that this may influence judicial decisions.
7. The witnesses before this inquiry were split on that possibility so the APPG examined the recent decisions of the Supreme Court itself (it should be noted that the APPG does not assume any authority to determine whether these decisions were “right” or “wrong” on the law or the facts). Seven decisions were identified, since 2020, in which the Supreme Court has departed from its previous authority and assumed a position more palatable to the executive. In some of these, the Court appears to adopt similar language to that used in the executive’s political talking points. The Court has decided fewer than 40 public law matters since in this time, so this represents a notable portion.
8. Correlation does not necessarily equate to causation and the APPG has not had sufficient evidence (or time) to reach a definitive conclusion. Nonetheless, the mere appearance of the Supreme Court departing from its previous interpretations of the law and, instead, adopting positions favoured by the executive, is worthy of note if not of concern.
9. In the light of the evidence considered the APPG has drawn four conclusions:
 - i Ministers have, in attacking judges, sometimes failed to act in a constitutionally proper or in a helpful manner.

- ii The constitutional safeguards which should ensure a proper relationship between the executive and the judiciary are not sufficiently effective. In particular, the politicisation of the offices of Lord Chancellor and Attorney General, and the appointment of politicians with little or no legal experience or standing, has left the executive without a strong figure to assist ministers' understanding of their constitutional duties. Moreover, the possibility that politicians may see the offices of Lord Chancellor and Attorney General as "stepping stones" to subsequent promotions may conflict with their constitutional duties to safeguard the independence of the judiciary.
- iii This has caused significant concerns amongst the judiciary.
- iv It may also have created the impression that the Supreme Court has been influenced by ministerial pressure (even if indirect).

10. Accordingly, we offer three recommendations:

- i Foreground the independence of the judiciary in the forthcoming independent review of the Constitutional Reform Act/Supreme Court.
- ii Provide statutory guidance for ministers on their constitutional duties towards the judiciary.
- iii Provide statutory guidance on the appointment and conduct of Law Ministers.

THE APPG ON DEMOCRACY AND THE CONSTITUTION

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