The need for a better understanding of our judiciary has never been greater

Judges sometimes disagree. What if the Supreme Court is split in its judgment on the appeal hearing on the prorogation of Parliament? With 11 Supreme Court Justices sitting in this case, that could easily happen. Will Justices who find that the Prime Minister acted unlawfully in procuring the suspension of Parliament be labelled as 'Remainers' or even 'Enemies of the People', language which the Daily Mail notoriously resorted to in 2016? Could those who reach the opposite conclusion perhaps be portrayed as 'Leavers' who prefer to stand aside while the government pursues its Brexit policy without parliamentary scrutiny for five weeks? We should not divide the Supreme Court into Leavers and Remainers, argues **Jan van Zyl Smit**. *The need for a better public understanding of our judiciary has never been greater.*

Press outside the Supreme Court, 2016. Picture: David Holt London/ (CC BY 2.0) licence

Tempting though such criticisms of judges may be when passions are running high, they represent ways of thinking about the judiciary that not only are inaccurate but also threaten to undermine trust in our independent court system, a cornerstone of the Rule of Law. The need for better public understanding of how UK judges are appointed and how they decide cases has rarely been greater. Accusations of political bias do occur elsewhere, notably in the US, where appointments are much more politicised and the Supreme Court itself may have fuelled that narrative with its often bitterly worded disagreements, typically in 5:4 split decisions. However, the basic role of US judges in upholding a written Constitution is relatively well understood. In the UK, the degree of confusion about the role of courts and the judiciary – witness the many media reports that still find it necessary to explain what the UK Supreme Court is – means that greater harm could be done by influential figures who exploit the drama of Brexit to attack the judiciary.

We have already seen the anti-judge fall-out from contrasting court decisions on prorogation in the English and Scottish courts, with Downing Street sources briefing *The Sun* on 11 September that 'The legal activists choose the Scottish courts for a reason.' A government minister, Kwasi Kwarteng, later declared that 'The extent to which lawyers and judges are interfering in politics is something that concerns many people,' and that 'many people… are saying that the judges are biased.' He specifically claimed that 'many Leave voters…are beginning to question the partiality of the judges,' while stating that he personally believed that judges were impartial. Brexit Party leader Nigel Farage went further, complaining that the Scottish decision 'smells of judicial interference' and alleging that judges were part of an establishment that was 'Remain almost to the last man and woman'.

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What is an effective way of counteracting such comments? The Lord Chancellor, Robert Buckland QC, tweeted that 'Our judges are renowned around the world for their excellence and impartiality and I have total confidence in their independence in every case', while the Prime Minister spoke of the 'awe and admiration' for UK judges around the world. Their affirmation was strong, and swiftly issued, but expressed in fairly general terms. Leave supporters swayed by the remarks I have quoted might need a more detailed rebuttal. A good place to start is the notion of judges 'interfering' in politics. Judges have no ability to interfere in anything unless someone brings a case to court. Once presented with a case, they have a duty to decide it in accordance with the law – which may be a difficult task, as the law on some of the constitutional issues raised by Brexit is a complex web of Acts of Parliament, prerogative powers and common law precedents laid down over centuries. Judges should be judged not on the outcome of their decisions but on whether the reasoning is sound. Regrettably, the critique voiced with varying degrees of explicit or implicit endorsement by Kwarteng, Farage and the 'Downing Street sources' came before the Scottish Court of Session had released its full judgment. Remarks by Lady Hale at the close of the appeal hearing have been taken as suggesting that the Supreme Court will give a detailed judgment when it announces its decision. That is probably a good thing. Particularly if a majority of the Supreme Court were to find that the prorogation was unlawfully procured, it would be desirable if they could explain in accessible language why, as my colleague Jack Simson Caird has argued, it is not undemocratic for an independent court to decide on the legality of this Executive action.

Looking beyond Brexit, I would argue that UK judges are far from complacent about what judicial independence means and how to live up to it. Since the 1990s, senior judges have played their part in a series of largely unsung reforms that aim to build on historic strengths of the UK judiciary while enhancing its independence and accountability. One of the main areas of reform relates to judicial appointments. Since the Act of Settlement 1700, judges have been appointed with security of tenure, a crucial guarantee of judicial independence since it prevented the monarch or ministers threatening a judge with arbitrary dismissal. However, tenured judges can still be corrupt or incompetent (and sadly this remains a problem in many countries). Judicial independence is most valuable when it encourages judges to strive for impartiality and justice in the interpretation and application of law. Such behavioural norms cannot simply be legislated, but have to develop organically over time. Some of the credit for the standards that UK judges have achieved must go to the fact that for centuries the Lord Chancellor recruited judges from the Bar, which evolved its own ethical traditions and competitive approach to legal excellence. A serious shortcoming of this system was that it tended to perpetuate a judiciary that was predominantly male, white and socially privileged. The Constitutional Reform Act 2005 transferred most judicial recruitment functions to a Judicial Appointments Commission (JAC) and related bodies, which bring together judges, lawyers and lay people to oversee the selection of judges. The JAC has developed a process which aims to attract a more diverse body of applicants in terms of gender and racial or ethnic background, using selection criteria that have been reviewed and revised to consider the full range of ways in which candidates can demonstrate their ability to judge impartially, fairly and with legal and intellectual rigour.

When the Prime Minister and the Lord Chancellor spoke last week about the world-wide renown of the UK judiciary, it is important to understand that this reputation is not sustained by romantic views of the British legal system and its history. Every year, international businesses make hard-nosed decision to refer their disputes to UK courts, and they rely on the impartiality and legal excellence of the current UK judiciary in doing so.

Much more could be said in support of the independence and quality of the UK judiciary. Why then, should we worry about ill-informed criticisms? John Stuart Mill famously argued that freedom of speech should extend to opinions that are demonstrably wrong, on the ground that a society's progress towards truth discovery is better served if wrong views are vigorously challenged rather than suppressed. That argument explains why it should not be a crime to call into question the independence or impartiality of the judiciary. But it does not take away the moral duty of those who have political influence – in this case 'Downing Street sources', Kwarteng and Farage – to act responsibly when they speak about the judiciary and court decisions. Their statements contribute to normalising a crude scepticism that ignores the legally complex and personally demanding work that judges have dedicated themselves to performing, and instead implies that political motives determine their decisions. Such scepticism thrives in an environment of limited public understanding of the courts, and it erodes the Rule of Law. Judges can do something about this by producing judgments that are accessibly written, but no single judgment can provide readers with the necessary background understanding of the institutional role of the courts in the UK constitution. In the fevered era of Brexit, our judiciary needs all the help it can get.

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