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Aspects of Law Reform: An Insider's Perspective, by JACK STRAW.

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This book provides a fascinating, and at times uncomfortable, politico-legal insight into the views of the former Lord Chancellor, Jack Straw, on some of the most recent reforms to the United Kingdom's justice system. In this trilogy of papers, originally presented in 2012 for the 64th Hamlyn lecture series, Straw focuses on the future of the criminal courts, the Human Rights Act 1998, including Britain's relationship with the European Court of Human Rights, and, finally, judicial appointments. In all three lectures he argues that the justice system is now in a healthier state than it has been in his lifetime, but that there remains much room –and need – for improvement. While some of the lectures contain inevitable levels of party politics, the collection is frank in its assessment that more needs to be done to improve diversity for the justice system to better reflect the society it serves. For example, Straw does make some, albeit controversial, contributions to the arguments favouring positive discrimination in the appointment of ethnic minorities and women to the bench, as well as 'proposals' to shift the boundaries in the use of juries in certain criminal trials (although most of these have now been ousted by the current coalition administration). Within all three lectures there is an underlying human rights theme, whereby he continuously reasserts the success of the Human Rights Act 1998. In relation to the Council of Europe, Straw is critical of the role of Strasbourg and sees its 'self-proclaimed' authority as something that needs to be curtailed,¹ although he is emphatic throughout in stating that the UK should not leave the European Convention on Human Rights.²

Aspects of Law Reform will appeal to public, human rights and criminal lawyers with an interest in the practicalities of constitutional legal theory from a political perspective. Within all three papers there is continuous reference to the role of the State.³ In relation to the rule of law, Straw presents somewhat confused discussions pertaining to the future of juries and magistrates as mechanisms for upholding democracy, and reflecting the widest possible consent from society for the criminal justice system's decisions. On the one hand he argues that critics should have more faith in the value and abilities of lay people, as they act as the last line of defence against arbitrary Government.⁴ In direct contradiction to this, however, Straw later argues that juries should be removed from more complex trials such as those pertaining to fraud, the Government should revisit the dormant section 43 of the Criminal Justice Act 2003.⁵ Straw also discusses the rule of law as a 'two way street in democracy' that the European Courts of Human Rights is not adhering to through its own judgments.⁶ In relation to the sovereignty of Parliament, he discusses how his legislative programme strengthened the UK's

¹ Page 25

² Page 49

³ Page 49

⁴ Page 12 and HL Debates, 15 July 2003, cols. 779-80.

⁵ Section 43 was to allow non-jury trials in serious and complex fraud cases where the complexity of the trial, or the length of the trial, or both, was likely to make the case too burdensome for ordinary lay people. However attempts to bring the section into force were unsuccessful in the House of Lords. Under the current administration such proposals have since been repealed by the Protection of Freedoms Act 2012 Part 7 s 113

⁶ Page 49

constitution, with the Human Rights Act 1998 ‘work(ing) with the grain of our constitutional arrangements’ through declarations of incompatibility.⁷

Of particular interest will be Straw’s discussions relating to separation of powers, namely his insights into the relationship between the executive and the judiciary. Straw starts the lectures by stating that no matter how inconvenient Government may find the interference of judges, a relationship between the two institutions, founded on acknowledgement of sovereignty and respect, must be maintained.⁸ However it would not be surprising if lawyers felt particularly uncomfortable with Straw’s suggestion that this mutual respect has not always been adhered to, and that some reforms were scuppered by the House of Lords as a consequence of the legal profession being overrepresented within the Upper House.⁹ In particular he cites the Mode of Trial Bill of 1999, and how ‘asking barristers to comment on trial by jury is like asking pigs what they think of troughs.’¹⁰ At one point Straw concedes that ‘the judiciary (i.e. the Supreme Court) is, rightly so, jealous of its own independence’ when deciding matters of Constitutional importance.¹¹ Here one may have expected further analysis of the Constitutional Reform Act 2005 than that which is provided. Furthermore readers who believe in strict definitions of the doctrine of separation of powers may struggle with Straw’s omission that there were areas of concern during his term in office that he wanted the judiciary to resolve rather than his office through complex and time-consuming legislative reform, such as those following *R v Davies*.¹² Unsurprisingly, throughout all of Straw’s discussions, the underlying message is that the doctrines work when they favour the supremacy of Parliament.

Straw’s first lecture, *The future of the criminal courts*, is more reflective than suggestive of proposals to reform the criminal justice system. He starts his account by reminiscing over the elitism of the legal profession when he first started reading law in 1964. In doing so he notes how the legal profession was then quarter of the size it is today, with only 2,500 practising barristers and 32,000 practising solicitors in England and Wales.¹³ His reflection continues by painting a picture of a statistically less crime-ridden UK in the 1960s (in terms of official records), but one which was thwarted by ‘noble cause corruption.’¹⁴ In reference to crime statistics, and the different labels and categories for offences, he draws difficult comparisons in the official criminal activity reports in 1961 and 2012. He also refers to how the police force was just 75,000 strong in the 1960s in England and Wales, compared with 134,000 members today.¹⁵ By Straw’s own admission these figures are not ‘strictly comparable’;¹⁶ however he nevertheless underestimates the flaws in these comparators. His observations undervalue changes in the classifications of crime, for example, in 1961 consensual gay sex would have been included in the figures for sexual offences; he does not account for changes in the way

⁷ Page 11

⁸ Page 19 as supported by earlier literature such as C. Campbell-Holt (ed) *Lord Woolf: The Pursuit of Justice* (OUP 2008) pp 131-143

⁹ Page 14

¹⁰ *Ibid*

¹¹ *Ibid*

¹² [2006] EWCA Crim 1155

¹³ Figures are from the early 1970s. There were 122,000 solicitors in practice 2011 and 15,000 barristers in 2010.

¹⁴ Page 6

¹⁵ Page 2

¹⁶ Page 4

crime is reported, such as those highlighted by the Berry report;¹⁷ nor does he account for the expansion of criminal activity into more sophisticated emerging areas, such as cybercrime, which would affect some of the categories he compares.¹⁸

Furthermore throughout the first paper Straw focuses on the perceived advantages of the Human Rights Act 1998 in relation to criminal cases and reporting. He neglects other arguably more substantive institutional reforms, such as Police and Criminal Evidence Act of 1984. PACE would have undoubtedly had a positive effect on explaining the difference between the 1961 hallowed ‘golden day’ Dixon of Dock Green bobby on the beat image, compared with the 2012 expansion of criminal reporting that he documents. While Straw later acknowledges that there are fundamental differences in the criminal justice system of his youth compared to today, with such changes including the technical revolution that has led to the introduction of new types evidence such as CCTV and DNA to aide prosecutions (for example in the poignant case of Stephen Lawrence),¹⁹ such points are made in passing, and are at odds with his initial comparative statistical analysis.

The rest of his first paper focuses on changes to the role of the police, juries and the lower tier Courts. Here Straw focuses on three areas of concern: jury nobbling,²⁰ the UK’s ‘unique’ approach to either-way offences;²¹ and the use of juries in fraud trials.²² Discussions relating to jury nobbling are on the whole self-congratulatory of reforms introduced by Straw during his term in office (for example the removal of juries from sensitive cases, as happened in *Twomey and Others*).²³ In relation to proposals for reform at the lower levels, favourable reference is made to Auld’s 2001 recommendations for a streamlined Magistrates Courts, District Courts and Crown Court systems,²⁴ and Runcimen’s 1993 Royal Commission Report.²⁵ In reality, Straw concedes that Auld’s streamlining proposals will never happen in practice, for fear of ‘hollowing’ the criminal justice system. However he suggests that the current administration is achieving the recommendations by other, ‘quieter’ means, such as by removing legal aid in either-way offences when the defendant later pleads guilty in the Crown Court.²⁶

In his concluding remarks Straw also touches upon two further areas for reform. First, and in support of the proposals of the Philips Royal Commission,²⁷ he suggests reforming the CPS into autonomous regional prosecution services, so as to better reflect the aspirations of the

¹⁷ Berry, ‘Reducing Bureaucracy in Policing’ (October 2010) available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117162/reduce-bureaucracy-police.pdf

¹⁸ See further A. Reynolds, ‘Fear of cyber crime on the rise...’ (2013) 15 *Legal World* 4, and S. Pancholi, ‘Fighting cybercrime’ (2014) 28 *Lawyer* 19 available at: <http://digitaledition.thelawyer.com/tl-270114/offline/download.pdf>

¹⁹ This is coupled with the removal of *ne bis in idem* whereby individuals cannot be charged with the same offence twice.

²⁰ Page 12

²¹ Page 13

²² Page 17

²³ [2011] EWCA Crim 8

²⁴ Rt Hon. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (London: Stationary Office, October 2001).

²⁵ Royal Commission on Criminal Justice 1993, Cm 2263

²⁶ Page 16

²⁷ Report of the Royal Commission on Criminal Procedure, 1981, Cmnd 8092, para.7.24.

people within each area.²⁸ In making such assertions he cites Wales as an example of how such autonomy is already working satisfactorily in areas such as family law with Cafcass,²⁹ and how such benefits could be replicated within the CPS. Second, Straw cites the need to introduce advocacy quality assurance safeguards to ensure adequate standards are maintained.³⁰ However, again these discussions are largely outdated, with the reforms already having been introduced.³¹

In Straw's second paper, *The Human Rights Act and Europe*, he criticises expanded interpretations of the European Convention of Human Rights as carrying neither authority nor popular consent. While adamant that the UK should remain part of the Council of Europe, Straw concedes that Strasbourg needs to heed the 'Gypsy warnings'³² and revert to its founding principles at the end of World War Two.³³ Here brief international comparisons are drawn with other jurisdictions, such as America and *Dred v Scott*,³⁴ insofar as he believes that no Court enjoys supremacy quite like Strasbourg. With no overriding power over the Court's decisions, he cites Lord Rodger's Latin epigram that the Court has gratuitously self-proclaimed itself the 'Supreme Court of Europe.'³⁵ He also draws references to Baroness Hale's lecture 'Argentorum Locutum: Is the Supreme Court Supreme?',³⁶ and *AF (No 3)*.³⁷

The two core themes of the second lecture are, first the relationship between the Human Rights Act 1998 and the UK Courts, and second the relationships between the European Court of Human Rights and the Council of Europe. Straw starts by reasserting the purposes of the Human Rights Act as part of the solution to fundamental impediments in the operation of democratic politics across Europe. In responses to critics of the 1998 Act, he refers to how the majority of the controversies stem not from the Human Rights Act, but human rights in general, as can be seen in *Chahal*³⁸ and *McCann*,³⁹ both examples of pre-2000 polemics.⁴⁰ In relation to the UK, he discusses how we need to have greater confidence in our higher Courts to arrive at their own interpretations of the European Convention, and that, following the cases of *Alconbury*⁴¹ and *Ullah*,⁴² the UK should reject the mirror principle.⁴³ It is evident that he does not subscribe to the argument that giving the Courts this autonomy, and departing from the mirror principle, invites the judiciary to stray into new political areas. In support of such a

²⁸ Page 22

²⁹ See further: <http://wales.gov.uk/cafcasscymru/home/?lang=en>

³⁰ Page 23

³¹ The Quality Assurance Scheme for Advocates (QASA) was in place by 2013, see further:

<http://www.qasa.org.uk/>

³² While Straw does not define his use of the term 'Gypsy warnings', one can reasonably infer that he is referring to the need for Strasbourg to cautiously acknowledge critics of the current human rights system.

³³ Page 25

³⁴ (1857) 60 US 393

³⁵ Page 41

³⁶ B. Hale, 'Argentorum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) 12 HRLR 65

³⁷ Page 40, *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28.

³⁸ *Chahal v United Kingdom* no 70/1995/576/662

³⁹ *McCann v United Kingdom* (1996) 21 EHRR 97

⁴⁰ Page 30

⁴¹ *R (Alconbury) v Secretary of State for Environment, Transport and the Regions* [2003] 2 AC 295

⁴² *R (Ullah) v Special Adjudicator* [2004] UKHL 26

⁴³ Page 25

development he cites *Marper*,⁴⁴ *Hirst*,⁴⁵ and *Al-Khawaya*⁴⁶ as evidence that our judiciary are already sensitive to cultural and political norms when interpreting human rights principles.

Here one would expect Straw to comment upon what resolutions are needed to achieve these changes. The second paper offers little in the way of further analysis as to what can be implemented within the existing boundaries to resolve these ‘Gypsy warnings’. Here one might have expected further discussions pertaining to scope of the margin of appreciation granted by the European Court to each State, as well as indications as to how the Court can achieve culture change. However, Straw simply states that the problem was caused by ‘them’ and is therefore ‘theirs’ to fix.⁴⁷ In doing so his conclusion, (i.e. that Strasbourg should address the issue of their own overstretched legitimacy) is an oversimplification of the complexities of reassessing and reforming the relationship between the UK and Strasbourg.

While the second paper presents some valuable insights into the historical development of human rights protection in the UK, Straw fails to explain, beyond superficial observations pertaining to the mirror principle, how the Human Rights Act would survive and continue to protect human rights in the UK in the absence of Strasbourg jurisprudence. Here one would expect greater, more jurisprudential, discussions pertaining to section 2 of the Act that are omitted from his lectures. While he does not support the idea of leaving the Council of Europe, the departing thought in his second paper can be précised as follows: the European Court of Human Rights is not the be all or end all of fundamental rights, liberties and freedoms.⁴⁸ This not only presents another contradiction and ambiguity, but also poses more questions relating to possible human rights reform than it addresses.

Straw’s third paper, *Judicial Appointments*, is set against the political backdrop of the time it was written in 2012 (namely the Leveson Inquiry into press regulation,⁴⁹ Egyptian President Morsi’s decree preventing the judiciary from reviewing his decisions, and calls for greater gender equality within the Church of England). This third lecture is divided into three themes. First, a historical review of how the system for appointing members of the judiciary has evolved.⁵⁰ Second, reflection on what the role of Parliament should be in these appointments.⁵¹ Finally, consideration of what more needs to be done to speed up progress towards a judiciary that is more reflective of society at every level.⁵²

Discussions start by looking at changes to the role of the Lord Chancellor who was, prior to the Constitutional Reform Act (CRA) in 2005, an out-dated ‘holy trinity’ and entirely at odds with any Montesquieu-style notion of the separation of powers.⁵³ Straw concedes that following the CRA, the role of the Lord Chancellor has been excessively limited and that more should be done to reconsider the working relationships (both political and jurisprudential) between the Lord Chancellor, the Lord Chief Justice and the UK Supreme Court.⁵⁴ In aiding

⁴⁴ *S. and Marper v United Kingdom*, no. 30562/04

⁴⁵ *Hirst v United Kingdom (No 2)* (2004) no. 74025/01, 38 EHRR 40

⁴⁶ *Al-Khawaja and Tahery v United Kingdom*, no. 26766/05, [2011] ECHR 2127

⁴⁷ Page 49

⁴⁸ *Ibid*

⁴⁹ See further: <http://www.levesoninquiry.org.uk>

⁵⁰ Page 52

⁵¹ Page 55

⁵² Page 60

⁵³ Page 53

⁵⁴ Page 56

such discussions Straw cites the Crime and Court Bill 2013, and changes introduced by the subsequent Lord Chancellor Clarke that could have been a positive step forward, but which Lord Chancellor Grayling has more recently abandoned.⁵⁵ Frustratingly he again offers little more in the way of how the relationships between the judicial leaders could be reformed.

In Straw's final paper he presents three arguments that seek to justify the need to diversify the judiciary (in terms of gender and minority representation). He starts by arguing that if judges are to exercise democratic power, we 'need a judiciary that looks like 'Britain' rather than looking like us.'⁵⁶ Second, that a diverse Court can address a greater range of perspectives, life experience and backgrounds, thereby making it 'better equipped to carry out the role of adjudicating.'⁵⁷ Finally, that if we accept that talent is randomly and widely distributed amongst the population, then the under-representation of 'well-qualified women, black...and...Asian judges, gay and lesbian judges, disabled judges, suggests that we are missing out on the best' talent.⁵⁸ In applying such arguments, Straw makes comparisons with attempts to diversify the Civil Service.

Straw proceeds by exploring how the merit tests for judicial appointments should operate alongside positive discrimination considerations. In clarifying his position he states 'to be clear...(appointing)...a woman over an equally meritorious man, or a black candidate over an equally meritorious white candidate.'⁵⁹ However such discussions appear superficial in presuming the current merit tests are tangible in identifying candidates of equal worth and standing. Straw furthers such discussions by stating how he is 'wholly in favour...of appointing a candidate who comes from an underrepresented group over one who does not.'⁶⁰ In doing so he draws comparisons between judicial appointments and the use of all-women shortlists to select parliamentary candidates for the 1997 general election that in turn diversified the House of Commons.⁶¹ He justifies such analogies as 'reasonable' by referring to MPs as lawmakers.⁶² However such remarks appear inconsistent with the concept that the UK will only afford judicial appointments to the most capable jurists. In this sense the role of the judiciary is idiosyncratic when compared with the legislative or executive arms of the State: judges have to navigate their way around complex legal rules and linguistic challenges, ultimately to arrive at just judgement. The idea that such responsibilities should fall upon anyone other than the most qualified and experienced, irrespective of diversity or background, is irrational. Society's views have already been accounted for within the system, insofar as it is our elected officials, who we vote for, who make the law. Furthermore, the Judicial Appointments Commission, which Straw himself established, was introduced for the very reason of limiting perceived prejudice considerations, such as those based on personal characteristics, in the appointment of judges.⁶³

⁵⁵ Page 59

⁵⁶ Page 61, here Straw does not give any indication as to whether 'us' is in reference to the legal profession, politicians, or alternatively State officials as a whole.

⁵⁷ *Ibid*

⁵⁸ *Ibid*

⁵⁹ Page 72

⁶⁰ *Ibid*

⁶¹ Page 68

⁶² Page 71

⁶³ See further: <http://jac.judiciary.gov.uk/>

The underlying question that flows from Straw's discussion is that of how do we achieve diversity, and is there a need to introduce a diversity/equal opportunity criterion as part of the judicial appointments process? In response to such one may turn to the thoughts of Lord Sumption when he called for an 'honest public debate about the hitherto unmentionable subject of positive discrimination' within judicial appointments.⁶⁴ He classified such proposals as 'patronising' on two grounds. Firstly on the basis that if you dilute the principle of selecting only the most talented candidates by introducing criteria other than individual merit, the result will be a bench with fewer outstanding judges. Secondly, if a criteria pertaining to positive discrimination was to be introduced, such may lead to an adverse effect on the groups of people who would be inclined to make applications. Adopting these thoughts, it is instead argued that Straw's proposals should have focused on the current opportunities available to ethnic minorities and females, in terms of education and career progression.

However, this is not to suggest that Straw's arguments are completely without merit. The House of Lords recognises that 'justice, fairness and equality are central values in the law which should be reflected in the composition of the judiciary itself,'⁶⁵ and currently slow progress is being made to diversify the bench.⁶⁶ Furthermore, in support of Straw's arguments, Maleson has disproved some of Lord Sumption's concerns by noting that, at Supreme Court level, the fact that two judges must come from Scotland and one from Northern Ireland is evidence that such positive discrimination can exist within the boundaries of the merit tests.⁶⁷ For her, taking into account diversity considerations no further limits the pool of potential candidates than these requirements that are already in place.

Throughout this book the underlying theme is that historically the UK is resistant to law reform. When PACE was first introduced there were fears that it would infringe the rights of the individual.⁶⁸ Similarly when the Human Rights Act was first being drafted there were public concerns that more law would actually amount to less freedom, despite the laudable aims of the Act.⁶⁹ As Straw puts it, there is always 'sound and fury,'⁷⁰ however once the legislation has been passed the public have been able to see the reforms for what they are: sensible and measured. Consequently, 'the very same pressure groups that have been making their extravagant predictions abandon their campaign and move onto the next thing.'⁷¹ One possible reason for this is that as a nation we perceive ourselves as so 'obviously compliant' with the rule of law, democracy requirements, and our fundamental human rights obligations

⁶⁴ Lord Sumption, 'Home Truths about Judicial Diversity', Bar Council Law Reform Lecture, 15 November 2012, available at www.supremecourt.gov.uk/docs/speech-121115-lord-sumption.pdf

⁶⁵ House of Lords Select Committee on the Constitution, Judicial Appointments, 28 March 2012.

⁶⁶ See further E Rackley, *Women, Judging and Judiciary: From Difference to Diversity* (Routledge, Oxon 2013) and K Maleson 'Diversity in the judiciary: The case for Positive Action' (2009) 36 *Journal of Law and Society* 376 and

⁶⁷ See further K Maleson, 'The case for gender quotas for appointments to the Supreme Court', UK Supreme Court Blog, 23 May 2014, available at <http://ukscblog.com/case-gender-quotas-appointments-supreme-court> and Constitutional Reform Act 2005 s 27 (8)

⁶⁸ Equality and Human Rights Commission, Review of the Use of Stop and Search Powers in England and Wales (London, March 2010) available at <http://www.equalityhumanrights.com>

⁶⁹ See further J. Donnelly, *Universal Human Rights: In Theory and Practice* (2nd edn Cornell University Press NYC 2003) and P. Gready, *Fighting for Human Rights* (Routledge, Oxon 2004)

⁷⁰ Page 9

⁷¹ *Ibid*

that we see increased legal regulation as an attack on freedom. Such is indicative of the underlying UK culture towards law reform that Jack Straw explores in a book that is interesting historical record of his time in government.

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