Electorally Challenged: Protecting Democracy through the Creation of a Public Petitioner

"The Petition system is obsolete and unfit for purpose."[1]

- Richard Mawrey QC, *Erlam v Rahman*

INTRODUCTION

On 23 April 2015, the 2014 mayoral election in Tower Hamlets was invalidated. Media coverage focussed inevitably on the corrupt practices employed by the team of the ousted Lutfur Rahman. Yet for lawyers, the most important section of the judgment is buried deep at paragraph 662, where the specially appointed Election Commissioner addresses the state of the law on legal challenges to election results. Highlighting the undue burden the petition system places on members of the public, he continued:

> "We do not leave it to the victim of burglary or fraud (*a fortiori* the victim of rape) to bring civil proceedings against the perpetrator as the only way of achieving justice. Why do we leave it to the victims of electoral fraud to go it alone?"[2]

Mawrey is right that this area of law should not be reduced to disputes between private individuals. After all, there is no single 'victim' of electoral fraud. Where there is suspicion of an undemocratic outcome, the consequences will always be of interest to the wider public.

The best way to serve that interest is to have an independent public body bringing challenges in the courts. This will protect individuals from the brunt of a costly and risky process, funnelling their concerns through an impartial and

[1] *Erlam & Others v Rahman & Another* [2015] EWHC 1215 [665]
[2] Ibid.

well-resourced agent. It is therefore time for a long overdue reform of the law on election petitions and – in the interests of pragmatism – of the role and constitution of the Electoral Commission ('the Commission'). Such a reform would be a dramatic departure from a centuries-old approach, yet it will become clear that it is the best means to preserve electoral justice and, consequently, democracy itself.

I. THE CURRENT LAW

The relevant law for parliamentary and local elections is found in Part III of the Representation of the People Act 1983 ('the Act'). Other elections are dealt with in various regulations and statutory instruments, but they mirror the provisions of the Act. Filing a petition is the only way to commence a legal challenge (ss.120 and 127). Petitioners must be either: a person who voted as an elector at the election or who had a right to a vote; a person claiming to have had a right to be elected or returned at the election; or a person alleging to have been a candidate at the election (ss.121 and 128). In the case of local government elections there must be four petitioners, whereas parliamentary elections require only one.

Other rules around the filing of petitions are contained in the Act and the Rules made under s.182. It is not necessary to outline all of these, but it is worth noting that the process is relatively strict. The petition must be issued within 21 days of the return of the writ (ss.122 and 129), followed by an application to give security to costs within a further 3 days (s.136) and service of the petition on Respondents within another 5 days (Election Petition Rules

1960 r5). These are considered “peremptory” rules, so the petition is void if they are not obeyed. This is intended to avoid uncertainty, so that “the petition shall not be kept long hanging over the heads” of elected officials.[3]

The burden on the petitioner is therefore significant, even before considering the costs incurred. In their 2012 report, the Electoral Commission outlined in detail the financial burden facing petitioners. The security for costs will be between £1,500 and £5000 depending on the type of election, as well as a £45 fee for applying to fix the amount.[4] There is also a fee of £465 payable upon issue of the petition.[5] Additionally, legal representation appears essential considering the complexity of the law, but legal aid is available only for a solicitor’s advice, not for representation in court.[6] The Commission claims obtaining legal aid even for advice is difficult, referring to one petition in 2005 that was withdrawn after failing to do so.[7]

The possibility of recovering costs provides little consolation. As Mawrey points out, where a defeated Respondent is turned out of office and subsequently prosecuted to conviction, recouping costs from them is unlikely.[8] Moreover, petitioners face the threat of paying the Respondent’s costs, which could add tens of thousands to the petitioner’s bill. The petitioners in *Erlam* claim the Respondent even threatened costs of over £450,000.[9]

[3] *Williams v The Mayor of Tenby and Others* [1879-80] LR 5 CPD 135
[4] Electoral Commission, ‘Challenging Elections in the UK’ [2012] [105]
[5] Ibid. [104]
[6] Ibid. [108]
[7] Ibid.
[8] *Erlam* [666]
[9] See <http://towerhamletselectionpetition.org/background.php> accessed 4 October 2015.

II. THE CASE FOR REFORM

The purpose of a system of electoral challenge is to ensure that the results of elections are democratically valid. Challenges provide a check on the electoral system, a means to prevent improperly elected candidates from entering office. However, the legal regime around those challenges is evidently frustrating that purpose in two inter-related ways.

Firstly, the law is excessively restrictive by requiring petitioners to be members of the electorate or other candidates. This renders the check on elections unjustifiably reliant on the willingness of members of the public to file a petition. However, any election outcome is by its very nature of interest to the public. It affects all the voters in that election and even – in the case of UK or EU elections – the entire British public, for we are all affected by the choice of the country's legislators. Election law should therefore be treated more akin to criminal law, for the potential public interest of a challenge – like that of a prosecution – means it is appropriate for a public body to conduct proceedings. This is particularly so considering the nature of some of the challenges, which could see petitioners subject to community pressure or even threats.

Secondly, the practical parameters of the system mean that those who can file a petition are unjustifiably dissuaded or prevented from doing so. Evidently the demands on a petitioner are numerous and onerous. Although in some cases, as in *Miller v Bull*, slight breaches of the peremptory rules may be

permitted on human rights grounds,[10] the Commission lists 4 petitions between 2007 and 2012 that fell due to a failure to provide security for costs.[11] Petitioners must also be prepared to shoulder the various fees and the threats of costs orders as outlined above. Some financial barrier is a valid means to avoid spurious petitions, but, especially in the absence of a public petitioner, in this case it may well have halted genuine challenges from those not willing or able to pay. It is little wonder that half the petitioners between 2007 and 2012 were candidates from large, well-resourced political parties.[12] The scrutiny of democracy should not be dependent on the will of the parties that operate within it.

III. OPTIONS FOR REFORM

A partial solution would be to reduce the practical obstacles to petitioners. The procedural requirements could easily be more straightforward and less likely to trip up petitioners. Yet the financial obstacles are more entrenched. The fees can be reduced, but without widening the availability of legal aid a petition will always bear a high price tag. Nonetheless, even if petitions were less financially daunting, this would not overcome the central matter of principle: it should not be left to members of the public to shoulder the burden of legal challenge. As a matter of public interest, the law should be set up so that where an election appears invalid, that election is always challenged.

The introduction of a public petitioner would achieve this. It would not only remove the burden on individuals, but through an effective complaints

[10] *Miller v Bull & Others* [2009] EWHC 2640
[11] Electoral Commission [2012] Appendix C
[12] Ibid.

procedure it could still allow members of the public to manifest their concerns, without the financial and mental strain that doing so currently involves.

The Law Commission is in fact considering the introduction of a public petitioner.[13] However, this is intended only as a safety net, where "a person is unable to bring or fund a formal legal challenge."[14] This will catch those petitions that fall away for lack of funding, but it does not go far enough to minimise reliance on private motives in what is an inherently public matter. It still places considerable burden on individual members of the public. A more effective proposal would see a public body becoming the default petitioner, required to file all petitions that are independently deemed worthwhile. The system could then be set up to translate any concerns about an election's validity into a challenge to that election's outcome, rather than only the concerns of those who are willing to litigate on the back of them.

The Law Commission's other proposal, to give Returning Officers ('ROs') standing to file petitions, would also be only a partial solution. As well as bringing a petition where they suspect foul play, ROs would bring preliminary applications to test whether an acknowledged breach affected the result. Yet a well-resourced public petitioner, taking into account complaints by anyone involved or affected, would do this more effectively and comprehensively. Empowering the RO burdens them with the risks that result from litigation and would not account for those instances where it is their behaviour that is in question.

[13] Law Commission, 'Electoral Law: A Joint Consultation Paper' [2014] pp. 312-6
[14] Ibid. [13.178]

IV. THE REFORM PROPOSAL IN DETAIL

The Electoral Commission is arguably the most appropriate body to take on the responsibilities of public petitioner, due to its existing expertise in electoral law. Unlike ROs, it is also independent from individual elections. Such independence would need to be reinforced, though, if the Commission's powers are to be increased. Four current Commissioners have previously been MPs and it would be unwise for an election result to be challenged by an institution overseen in part by individuals with clear political allegiances. This would open them up to accusations of bias towards one party or another. So as not to lose the expertise of these former ministers and career politicians, it is not necessary to require all top positions to be entirely neutral. Instead, the powers for legal challenge can be ring-fenced, separate from other responsibilities and overseen only by the neutral members of the Commission.

Those neutral Commissioners will have ultimate responsibility for filing petitions on behalf of the electorate. Members of the public will be encouraged to file any complaints about the electoral process immediately with the Commission. This should be as easy as possible, with simple forms via different mediums – online, in person, by telephone and on paper. Officers of the Commission will then conduct preliminary investigations of those complaints. If these make it appear likely that breaches occurred and may have affected the result, they will file a petition. This adds an extra stage to the process, so the time limit of 21 days should be increased. However, bearing in mind the need for certainty in elections, such an increase should

not be too extreme. A limit of 30 days would be appropriate, mirroring the law on judicial review applications in public procurement – an area where certainty is similarly required.[15] Australia's petition system currently allows 40 days,[16] so the limit could arguably be extended further.

This would still leave the Commission under considerable time pressure, particularly given that all challenges in any given election will be made at the same time. The strain on resources will therefore be considerable. One way to alleviate that strain would be to consider the initial petition a preliminary application, to be followed by a full application within 3 months. Otherwise, where the Commission's further investigation overturns its preliminary conclusion, the petition could be withdrawn cost-free. Thus the threshold to be met upon initial investigation would be relatively low – officials would only need to establish that the available evidence reasonably indicates the election may be invalid.

The Law Commission's consultation addresses other procedural issues, such as the out-dated rules of procedure, where the case is heard and who by. These are also in need of reform, but are not the focus here. For these purposes, suffice to say that the petition will go to court and a relevantly competent judge will be appointed to hear the challenge.

Upon the result, the rules on costs orders can remain relatively unchanged. It is fair, in many cases, to expect the Commission to pay the costs of a

[15] The Public Contracts Regulations 2015 s.92
[16] Electoral Commission [2012] [71]

successful Respondent, who should not pay in order to demonstrate they were properly elected. It is also fair to recoup some of the costs to the public purse from a Respondent who has acted unlawfully (although arguably not where the election is invalid due to a third party's actions). Where the judge finds that a party has acted criminally, the matter should be automatically referred to the Director of Public Prosecutions.

If a complainant wishes to challenge an election but the Commission has considered their complaint and chosen not to, the law should allow for them to bring a private petition, or to take over a petition the Commission wishes to drop. The public body should by no means have a monopoly on legal challenges, so individuals can still pursue claims they consider worthy.

V. POTENTIAL ISSUES

There are two plausible grounds for opposition to this proposal. Firstly, on principle, some may object to the idea of unelected officials bringing a claim, to be heard by an unelected judge, with the potential result of unseating an elected official. Arguably the status quo is already controversial enough, with some branding the *Erlam* judgment a "democratic outrage".[17] So to add to this a public petitioner run by bureaucrats, the risk is that controversial rulings would be described not as a victory for the public but against it, as unaccountable officials and judges negate the will of the electorate.

[17] Letters, 'Lutfur Rahman ruling is a democratic outrage' (*The Guardian,* 26 April 2015) <http://www.theguardian.com/politics/2015/apr/26/lutfur-rahman-ruling-democratic-outrage> accessed 4 October 2015.

However, where it is genuinely the case that a politician has not been properly elected, they lack any democratic legitimacy. For them to be unseated would not be a blemish on democracy but a crucial means of preserving it. Thus this concern boils down to a desire for the outcome of any public petition to be the right one, for if the Commission and the judge get it wrong, the consequence would be the exact opposite of the law's intentions. The answer is not then to do away with the public petition system, for it is still the best way to ensure democratic validity. Instead, this objection simply underlines the need to safeguard the proper functioning of the Commission and the courts. This could be achieved in part through oversight by a parliamentary select committee, such as the Speaker's Committee to which the Commission currently reports. Moreover, to prevent less wealthy Respondents being outgunned by a publically funded body, they would ideally be eligible for legal aid, so that the court process is as fair and the correct outcome as likely as possible.

Secondly, some may reasonably object to the practical implications of this reform. Not only would it be expensive, but after each election the Commission could be flooded with dubious complaints and required to file hundreds of petitions, creating chaos in the court system and uncertainty for the newly elected officials. Whilst a petition against their election is outstanding, politicians may face questions on their legitimacy as they begin their time in office. In the event of unsuccessful petitions, reputations may also remain undeservedly tarnished.

To some extent, these negative consequences would be inevitable. Yet they should be outweighed by the vital objective of ensuring that every elected official has been duly elected according to the law. It is simply important to minimise the disadvantages. The time parameters outlined above would go some way to obviate excessive burdening of the legal system, particularly if the petition process itself is simplified and streamlined. The Commission would also be expected, as far as possible, to prevent unfounded challenges being pursued longer than necessary. Moreover, the law should make it clear that, during the process, disputed outcomes will still stand and the returned candidates should be treated as elected. Only where the Commission has strong concerns over the validity of an election could they apply to suspend the result. Finally, there would indeed be a greater cost to taxpayers, but this can be minimised by drawing on the Commission's existing resources. This cost is also justifiable, for the preservation of democracy affects us all and should not be paid for by a handful of individuals.

CONCLUSION

Electoral law in the UK is antiquated and overly complex. Reform is essential and the Law Commission's project should be welcomed. However, it would be a wasted opportunity not to fully reform the law on legal challenges. The current proposals will go some way to reducing the obstacles to petitioners, but they will not achieve the comprehensive safeguarding of democracy that is required. This can best be achieved through the introduction of a public petitioner and a complaints system that allows the public to voice concerns without shouldering the burden of litigation. Done properly, this will increase

the likelihood that, where the breach of an election rule has affected a result, that result will be challenged in court. It will also remove party politics from the process, as rather than a candidate's legitimacy being challenged by a rival – as is often the case – it would always be by an independent, impartial public body. This is the correct approach to an area of law where the right outcome is always in the public interest and never simply a private matter.

2987 words, including footnotes

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