Judicial Review Trends and Forecasts 2021: Accountability and the Constitution

Introduction

The story of our constitution is much like the story of the United Kingdom itself: 'an everlasting animal stretching into the future and the past, and, like all living things, having the power to change out of recognition and yet remain the same'(1) , to borrow a line from Orwell, one of my favourite authors. Professor AV Dicey refers to it as 'the most flexible polity in existence'(2).

The value of our legal system has been long held in high regard: in the 18th century Blackstone wrote about 'our laws and liberties' and constitution, 'this noble pile', as 'the best birthright and noblest inheritance of mankind'(3). Indeed, this assessment resonates in the 21st century: the predictability, certainty, and flexibility of our legal system, the world-class expertise and integrity of our legal profession make English law one of the most popular choices of governing law for international contracts; and make UK courts one of the most popular jurisdictions.

But this flexibility, this resilience, should not obscure the central principle embedded in the very heart of our constitution, of fundamental importance since at least 1689. That principle is Parliamentary Sovereignty – it both underpins and anchors our constitutional settlement. I agree with the position as advanced by Lord Bingham in Jackson v Attorney General: 'The bedrock of the British constitution is, and in 1911 was, the supremacy of the Crown in Parliament . . . Then, as now, the Crown in Parliament was unconstrained by any entrenched or codified constitution. It could make or unmake any law it wished. Statutes, formally enacted as Acts of Parliament, properly interpreted, enjoyed the highest legal authority.(4)'

Given the unwritten nature of our constitution, there will always be disputes as to the proper role of the Courts in interpreting Parliament's legislative supremacy, but recent years have tested our shared understanding in unprecedented ways.

The cases of Adams(5), the two Miller cases (67), Evans (8) / UNISON (9) and Privacy International(10), to name but a few, have strained the principle of Parliamentary sovereignty and introduced uncertainty into the constitutional balance between Parliament, the Government, and the Courts.

I accept that there are debates as to the proper scope of Parliamentary Sovereignty, and how and when the Courts should intervene. However, it is crucially important that we neither permit, facilitate nor encourage judicial review to be used as a political tool by those who have already lost the arguments.

Because what we have seen is a huge increase in political litigation, that is to say, litigation seeking to use the court system, and judicial review, to achieve political ends. To take one example, the attempted judicial review of former Prime Minister Theresa May's triggering of Article 50 in the case of Wilson & Others v Prime Minister(11). In that case, judicial review was refused at the permission stage, because it was on the basis of both delay and want of merit, with a costs order against the applicants of over £17,000. The court commented 'that the applicants were inappropriately pursuing what was effectively a political campaign through the courts' – and a 48-page skeleton was dismissed as 'particularly weak'. Of course, the government has to spend time and money responding to such challenges – and often the full economic cost of doing so is never recoverable. Even though the Government remains successful in nearly 65% of the judicial reviews against it, it is vital that judicial review does not become the vehicle of choice for failed political campaigners. Referenda, elections and political fora are the appropriate settings for such arguments. To paraphrase Clausewitz, litigation must not be the continuation of politics by other means (12). The taxpayer frequently ends up footing the bill, especially now that campaigning organisations use crowd-funded litigation to achieve political aims. To acquiesce in the face of such activity undermines the Rule of Law, and creates endless uncertainty as to what the law is.

It is properly open to Parliament to respond to that trend.

Recent jurisprudence

Let me explore then, briefly, some cases that fall into this category and the contradictions and confusions inherent in them. I raise these examples, not to undermine the judges or their judgments – which are of course both entitled to the greatest respect, and in our system are beyond reproach, and rightly so. Rather, I am engaging in a tradition that is just as important, the back and forth testing and challenging of legal reasoning, which goes back to the old inns of court. I accept their decisions, even if I disagree with them. We also see in the litigation some trends in judicial review that are worth reflecting on, and that is an increasing tendency for judges to be called to answer complex political or policy questions. Writing in a similar vein in 2016 – reflecting on the decision in Evans– Professor Christopher Forsyth put it well. And forgive me for quoting one of my erstwhile lecturers.

The judiciary, being independent, will not be swayed in the slightest by this criticism in the making of decisions. But those of us who defend the judiciary in general and judicial independence in particular must hope sincerely that the judiciary stay true to their vital task of simply applying and interpreting the law. Giving themselves grandiloquent tasks – guardians of constitutional principle, etc – as a mask for the arrogation of power properly that of the legislature or the executive lends credence to the criticism of judges as unelected officials who stray too readily into the realm of the demos (13).

It seems that Professor Forsyth's comment was prescient, because over the next few years we saw significant decisions on highly charged issues: most

notably the Miller litigation. Although I might easily discuss either Miller judgment here, it is on the second Miller case I will focus now.

The second Miller case is a stark warning of how far jurisprudence has moved. Of course that was at a time of unusually high political tensions. Yet, in concluding that the decision to advise Her Majesty to prorogue Parliament for five weeks was unlawful, the Supreme Court stepped into matters of high policy in which the UK courts have historically held themselves to have no constitutional role.

Questions around the prorogation and dissolution of Parliament fit squarely within Article IX of the Bill of Rights, and are in any case not justiciable as exercises of prerogative powers. Generations of judges and jurisprudence have agreed, despite innumerable upheavals and crises (14). However the Supreme Court creatively circumvented this consensus. In my opinion, it is clear that, on a plain reading of Article IX, the conclusion of the Court is not supported. As such, those questions are not properly amenable to judicial review (15).

The categorisation of the decision to prorogue Parliament as justiciable by reference to a hypothetical example where a Government might seek to prevent Parliament exercising its legislative functions indefinitely was inapt.

The Supreme Court used this as justification to invent a legal test, albeit not, as it was claimed, one concerned with the mode of exercise of a prerogative power within its lawful limits.

The Court held that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive.

But the questions at the heart of that test are inherently and deeply political. They are not, as was suggested, questions of fact. The Court reached its own conclusions on the importance of the political matters then being resolved. The judgment recast previously clear divisions between the justiciable and the non-justiciable, between convention and law.

The Wightman case (16), in which the Inner House of the Court of Session was prepared to accept jurisdiction in a case in which, in my opinion, it was being used tactically to influence ongoing proceedings in Parliament was another stark example. The claimant raised an abstract legal question (whether the government could withdraw the triggering of Article 50), seeking to constrain future possible government action. The use of Court proceedings to constrain ongoing political and Parliamentary debates set a dangerous precedent (17).

One of the reasons for the long-term health of the constitutional arrangements of this nation has been admirable restraint shown by the Courts when it comes to matters of high political controversy. But the radical departure from orthodox constitutional norms severely threatens the delicate

balance inherent in those arrangements.

Privacy International

The Supreme Court's judgment in the case of Privacy International was also profoundly troubling for a number of reasons. A decision by Parliament to limit the judicial review jurisdiction of the Courts should only be taken after the most serious consideration by the legislature. And there may well be circumstances where Parliament does consider that to be appropriate.

In such circumstances, the Court should be very slow to deprive legislation of its proper meaning, particularly when, as with s.68(7) of the Regulation of Investigatory Powers Act 2000, as it was, the language, and thus the intention of Parliament, is evidently clear.

But the judgment in Privacy International even contained suggestions, albeit obiter, that, for nebulous reasons attributable to the Rule of Law, the Courts may on occasion wholly disregard properly enacted Acts of Parliament (18).

One corollary of the principle of Parliamentary sovereignty, at least as traditionally understood (19), is that it is not for the Courts to question primary legislation properly enacted by Parliament, or to interfere more broadly in Parliamentary proceedings. Again, this is clear from Article IX of the Bill of Rights and, until recently, has been almost universally unquestioned. In 1974, in British Railways Board v Pickin (20), the House of Lords was invited to do so, and robustly dismissed the invitation:

The idea that a Court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our Constitution, but a detailed argument has been submitted to your Lordships and I must deal with it.

I must make it plain that there has been no attempt to question the general supremacy of Parliament. In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete (21).

Once again, the Courts appear to have moved, or at least, in this case, been thinking about their next steps, in ways that generations of judges and lawyers wouldn't have countenanced. And for sound constitutional and democratic reason.

Adams

Finally, the case of Adams (22). This case considered Gerry Adams' historic convictions for escaping custody, but introduced significant uncertainty into a core constitutional principle while straining legislative language. The Supreme Court found that the Detention of Terrorists (Northern Ireland) Order 1972 did not permit the delegation of decision making under Carltona principles.

The Carltona principle provides, in effect, that the powers and duties exercisable by a senior minister may generally be exercised by those junior ministers and civil servants for whom he or she is constitutionally responsible. It is rare indeed that legislation requires that authority exercised under Carltona be delegated explicitly or formally. Reading the 1972 Order alongside the Carltona principle, there is little, if any, doubt as to the real meaning of the law.

But, in caveating and declining to apply Carltona principles, in particular in applying a political judgment as to the gravity of the consequences flowing from the exercise of the power, the Supreme Court introduced significant uncertainty into a matter that had previously been widely understood.

It was also forced to adopt a deeply strained, if not implausible, approach to statutory interpretation. I know that Ministers and officials routinely rely on Carltona doctrine to make decisions. Without Carltona, senior ministers would spend all their time making routine decisions and would not have time to devote to things like giving speeches on important matters to eminent audiences such as this one! (23)

More recent judgments

There are some who argue that the Miller, Adams and others were exceptional and that we are now witnessing a return to a more orthodox approach (24). It is true, and to my mind welcome, that in at least one recent decision the Court seemed keen to reassert a more traditional approach to judicial review.

Paragraph 162 of the recent case of SC and others, is important. The Court considered that:

challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process.(25)

I agree wholeheartedly with Lord Reed that the Courts must be alive to the risk of undue interference in matters which are properly political, and which should be resolved through political discussion and democratic Parliamentary process. The Supreme Court judgment in Begum (26) was another example whereby the Court recognised the importance of the statutory scheme enacted by Parliament, and for which the Home Secretary was democratically accountable

to Parliament, and gave it due weight. Professor Ekins rightly lauded the decision affirming the Home Secretary's statutory power, and restating wider limits on the judicial function, as the Supreme Court panel doing its bit to vindicate the rule of law (27).

However, we also see an increased readiness to import HRA-style proportionality into judicial review. The judicial 'habits' learned over the years have obviously influenced other areas of law (28) – with the Supreme Court entertaining the idea of proportionality as a general ground of judicial review. Senior judges, including Sir Philip Sales (29) (as he then was) have rightly said this would be an 'illegitimate legislative act', and is not something courts should countenance.

But I would say that there will be perfectly legitimate instances where the Government could decide that it is nevertheless worthwhile and important to invite Parliament to legislate to overturn individual decisions. Indeed, this point was made very clearly in the Independent Review of Administrative Law – which recommended the legislative 'overturning' of the decision in Cart, an immigration case. Even if we think the pendulum has returned to a more traditional balance, with courts taking a more prudent approach to the determination of political issues, the fact remains that the mould has been broken. There can be no guarantee that in a future case the Supreme Court might again choose to intrude upon territory well beyond its scope and in doing so usurp the power that should be the sole preserve of those directly answerable to the people. Power that is held by virtue of a mandate that can only be expressed through the democratic process.

So where does that leave us?

The Queen's Speech in 2021 included a commitment to restoring "the balance of power between the executive, legislature and the courts" (30). Let me be clear, I wholeheartedly support that intention.

The Judicial Review and Courts Bill received its first reading in July 2021 (31). That Bill includes a number of reforms. While I do not propose to review those in any great detail during this speech, it is instructive how the Bill has been received. There has been little, if any, suggestion that it is not Parliament's right, or that Parliament is not empowered, to overturn decisions of the Supreme Court (for example that of the Cart judicial review jurisdiction). The principle would thus appear to be broadly accepted. Indeed, several academics have suggested the Bill could go further – the most consistent contributions on this front have been from Policy Exchange's Judicial Power Project, which have put forward several papers on this topic, sparking constructive debate (32).

To suggest that Parliament might intervene to overturn jurisprudence that it considers to be wrongly decided is not to suggest that the Courts should not be independent. To the contrary, an independent, apolitical, judiciary is crucial to upholding the Rule of Law. But in our system, the framework that those judges should apply is a matter apposite for Parliamentary scrutiny.

In a similar vein, I will always support lawyers who take on difficult cases,

and it is of crucial importance that they are free to do so. It has to be right in a free society that everyone should be able to seek legal advice to understand their rights and put their case to one of those independent judges. The recent criticism of Dinah Rose QC by students at the University of Oxford (33) for acting, entirely appropriately, for a Sovereign Government is completely wrong. But, in other circumstances, when lawyers cloak themselves in a political cause, it is difficult to take them seriously when they complain about criticism. While abuse or intimidation has no place in our society, as I know better than many, if you step into the political arena, your political motivations and beliefs become fair game for criticism.

Sir Stephen Laws wrote in his submission to the Independent Review of Administrative Law (34) that:

Ultimately, law cannot guarantee individual liberties or good governance unless it is supported by a culture of responsible politics which fosters collaboration, rather than the polarisation of political opinions. The risk of too much intervention by the law in politics is that it can undermine the culture on which law itself depends for its effectiveness in relation to other matters as well. Responsible politics requires incentives to listen to other points of view and to conduct civilised debate to convince others. None of that is necessary if the authority of the law can be enlisted to force the views of one side on the other (35).

For the reasons I have outlined briefly, it is my view that the last decade or so has demonstrated an increased appetite for political litigation, and, more worryingly, an appetite for putting judges in an invidious position, by asking them to decide essentially political matters on applications for judicial review.

Whether or not there is indeed a new direction of travel – or a return to a more conventional approach – it is important that we recast the mould. The ramifications of not doing so are profound. We should not dismiss them lightly. The legitimacy and reputation of our judiciary, which is inextricably linked to its political neutrality, is at stake. The authority of the judiciary must never again be pitched against the authority of the people. The confidence upon which our judiciary depend for their authority will be diminished. The rule of law itself will be weakened. The excellent speakers and panels lined up over the next days will of course have their own views, based on a range of their experience in different parts of our legal and political system. I'm pleased to be followed by David Gauke, the Rt Hon David Lammy MP, and Sir Jonathan Jones QC, who are well placed to comment on these tricky issues.

But I'd like to finish near to where I started, on the fundamental place of parliamentary sovereignty. As Lord Sumption has reminded us, while the courts have a vital role, it is Parliament that has ended up supreme for a reason. I will end with a comment he made in his Reith lecture – and even if he is not so complimentary of politicians, I can't help but agree with him!

It is the proper function of the courts to stop Government exceeding or abusing their legal powers. Allowing judges to circumvent parliamentary

legislation, or review the merits of policy decisions for which Ministers are answerable to Parliament, raises quite different issues. It confers vast discretionary powers on a body of people who are not constitutionally accountable for what they do. It also undermines the single biggest advantage of the political process, which is to accommodate the divergent interests and opinions of citizens. It is true, politicians do not always perform that function very well. But judges will never be able to perform it (36).

To conclude, if we keep asking judges to answer inherently political questions, we are ignoring the single most important decision maker in our system: the British people.

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1. G Orwell, 'England Your England' (1941), Part VI
2. Professor AV Dicey, 'Introduction to the Study of the Law of the Constitution' 8th ed. (1915), p 87
3. Sir W. Blackstone, 'Commentaries on the Laws of England a Facsimile of the First Edition of 1765-1769', Vol. IV (1979), p 435-6
4. [2005] UKHL 56 [2006] 1 AC 262, at para 9; see further Professor R Ekins, "Acts of Parliament and the Parliament Acts" (2007) 123 LQR 91 and Tom Bingham, The Rule of Law (Penguin, 2011), chapter 12.
5. [2020] UKSC 19
6. [2017] UKSC 5
7. [2019] UKSC 41
8. [2015] UKSC 21
9. [2017] UKSC 51
10. [2019] UKSC 22
11. [2019] EWCA Civ 304
12. C von Clausewitz 'On War' Vol 1 (1918), Chapter 1
13. Professor C Forsyth 'Who is the ultimate guardian of the constitution?' (2016), available at: https://judicialpowerproject.org.uk/christopher-forsyth-who-is-the-ultimate-guardian-of-the-constitution/; see also Professor R Ekins and Professor C Forsyth, Judging the Public Interest: The rule of law vs. the rule of courts (Policy Exchange, 2015), available at https://policyexchange.org.uk/publication/judging-the-public-interest-the-rule-of-law-vs-the-rule-of-courts/
14. Professor J Finnis, The Law of the Constitution Before the Court: Supplementary Notes on The unconstitutionality of the Supreme Court's prorogation judgment (Policy Exchange, 2020), with a foreword by Lord Faulks QC, available at https://policyexchange.org.uk/publication/the-law-of-the-constitution-before-the-court/
15. Professor T Endicott, 'Making Constitutional Principles into Laws' (2020) 136 LQR 175
16. [2018] CSIH 62
17. Sir S Laws, Judicial Intervention in Parliamentary Proceedings (Policy Exchange, 2018), available at https://policyexchange.org.uk/publication/judicial-intervention-in-parliamentary-proceedings/

18. See further Professor R Ekins, “Do our Supreme Court judges have too much power?” Spectator 15 May 2019, available at https://www.spectator.co.uk/article/do-our-supreme-court-judges-have-too-much-power-
19. Professor J Goldsworthy, The Sovereignty of Parliament (Oxford University Press, 1999) and Professor R Ekins, “Legislative Freedom in the United Kingdom” (2017) 133 LQR 582
20. [1974] UKHL 1
21. Ibid. at p 2
22. [2018] NICA 8
23. See Professor R Ekins and Sir S Laws, Mishandling the Law, (Policy Exchange, 2020), available at: https://policyexchange.org.uk/publication/mishandling-the-law/
24. Tomkins
25. [2021] UKSC 26
26. [2021] UKSC 7
27. Professor R Ekins ‘The significance of the Supreme Court’s Begum judgement’ Policy Exchange (2021), available at: https://policyexchange.org.uk/the-significance-of-the-supreme-courts-begum-judgment/
28. As Sir Patrick Elias, a former Lord Justice of Appeal, noted several years ago: see his “Comment” in Professor R Ekins (ed.) Judicial Power and the Balance of Our Constitution (Policy Exchange, 2018), 67
29. Sir Philip Sales, “Rationality, Proportionality and the Development of the Law” (2013) 129 LQR 223; see further Professor T Endicott, “Why Proportionality is not a General Ground of Judicial Review” (2020) 1 Keele Law Review 1 and contrast Professor P Craig, “Reasonableness, Proportionality and General Grounds of Judicial Review: A Response” (2021) 2 Keele Law Review 1.
30. Conservative and Unionist Party Manifesto 2019, p 48, available at: https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf and Queen’s Speech 2021, available at: https://www.gov.uk/government/speeches/queens-speech-2021
31. Judicial Review and Courts Bill as introduced: https://publications.parliament.uk/pa/bills/cbill/58-02/0152/210152.pdf
32. See Professor R Ekins, How to Reform Judicial Review’ (Policy Exchange, 2021), available at: https://policyexchange.org.uk/wp-content/uploads/How-to-Reform-Judicial-Review.pdf
33. See J. Ames ‘University of Oxford studens fury over Dinah Rose’s same sex marriage case’ The Times (2021), available at: https://www.thetimes.co.uk/article/university-of-oxford-students-fury-over-dinah-roses-same-sex-marriage-case-h33ms5722
34. Referenced at para 30 of the Report, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970797/IRAL-report.pdf
35. Sir S Laws, How to address the Breakdown of Trust between Government and Courts (Policy Exchange, 2021), para 44, available at: https://policyexchange.org.uk/wp-content/uploads/How-to-Address-the-Breakdown-of-Trust-Between-Government-and-Courts.pdf

36. Lord Sumption Second Reith Lecture ‘In Praise of Politics’ (2019), available at: https://www.bbc.co.uk/programmes/m0005f05 see further Professor R Ekins, “Representative Politics and the Limits of Law”, U.K. Const. L. Blog (29th May 2019), available at https://ukconstitutionallaw.org/”