



JUDGING THE PUBLIC INTEREST

THE RULE OF LAW VS.
THE RULE OF COURTS

RICHARD EKINS and
CHRISTOPHER FORSYTH

JUDICIAL
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Exchange



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Executive Summary

Six days after the general election in May this year, the Cabinet Office released the Prince of Wales's correspondence with ministers, a course of action which was required by the Supreme Court judgment in *Evans v Attorney General*.¹ The content of the letters has attracted much public attention. But what has largely escaped notice is the remarkable nature of the judgment itself, which is a striking instance of judicial overreach. This paper shows how the judgment compromises the rule of law by undercutting the Freedom of Information Act 2000 (FOIA) and recommends that Parliament act swiftly to overturn the judgment.

The dispute in *Evans v Attorney General* did not concern the content of the Prince of Wales's letters. Instead, the question for the Supreme Court was whether it was lawful for the Attorney General to block their disclosure. Ten years ago, Rob Evans of *The Guardian* requested release of the Prince's letters under the FOIA. The departments who held the letters refused on the grounds that it would not be in the public interest to release them. The Information Commissioner agreed but on appeal the Upper Tribunal disagreed and ordered their disclosure. The then Attorney General, Dominic Grieve QC, exercised his statutory power – sometimes called the ministerial veto – to override the Tribunal and block disclosure. His exercise of this power was challenged in the courts and eventually quashed by the Supreme Court.

The Attorney General took a different view of the public interest to that of the Tribunal. Section 53 of the FOIA clearly authorises the Attorney General (or a Cabinet Minister) to override a decision of the Information Commissioner or Tribunal ordering disclosure; in effect, it provides that the Attorney General's view of the public interest is to prevail. How then could a majority of the unelected Supreme Court (five of seven judges) quash the Attorney General's exercise of a power granted by our sovereign, representative Parliament, a Parliament to whom the Attorney General was accountable for the exercise of the power?

Lords Neuberger, Kerr and Reed imposed a strained and implausible interpretation on section 53, ruling that it did not authorise the Attorney General to override the Tribunal. This interpretation would effectively have excised the section from the statute book. The other four judges rejected this misinterpretation. But, Lord Mance and Lady Hale nonetheless joined Lords Neuberger, Kerr and Reed in quashing the Attorney General's action, holding that it was unreasonable and hence unlawful for him to depart from the Tribunal's findings, including findings about the scope and relevance of constitutional conventions and about the risks of public misperception. This line of reasoning also sharply limited the scope of the section 53 power and was not consistent with – indeed, it frustrated – the scheme that Parliament chose in enacting the FOIA.

The two majority judgments illustrate the two main ways in which some judges – but certainly not all – undercut the decisions of the executive and Parliament, privileging their own views about what should be done. The first is the

¹ [2015] 2 WLR 813; [2015] UKSC 21.

misinterpretation of legislation, in which courts impose on a statute an artificial reading that departs from Parliament's intention, misunderstanding the statute or even in some cases rewriting it. The second is excessively intrusive judicial review, in which the courts override the executive's decision about how best to exercise the powers that Parliament chose to vest in it. These modes of action are judicial overreach and they compromise the fundamentals of our constitution.

The problematic nature of the majority judgments is made clear by Lord Hughes and Lord Wilson in dissent. They each rejected flatly any interpretation of section 53 that was inconsistent with Parliament's intention and rejected also an approach to judicial review that in effect undermined the Attorney General's statutory power and responsibility.

This paper explains the changes in legal culture that made quashing the Attorney General's exercise of the power, and so maintaining the supremacy of the Tribunal, seem an open judicial option, rather than a temptation to be resisted, as Lord Wilson put it.² The basic problem with the majority judgments is that they confuse the rule of law with the rule of courts and discount the constitutional importance of political accountability. It is not contrary to the rule of law to authorise a minister to overrule a tribunal's decision about the public interest in disclosing official information, for which view he or she is responsible to Parliament. In any case, suppressing the Minister's statutory power and undercutting the scheme Parliament enacted is itself forbidden by the rule of law.

Neither the Human Rights Act 1998 nor the European Convention on Human Rights require or permit the judicial overreach one sees in *Evans v Attorney General*. So even if Parliament were to repeal the Human Rights Act and the UK were to withdraw from the Convention this kind of judicial overreach would remain a problem. Indeed, whatever the merits or demerits of the Human Rights Act, it was enacted by Parliament and not adopted by judicial fiat. By contrast, the expansion of judicial power that this paper considers has never been chosen by Parliament and is inconsistent with the authority of Parliament in our constitution.

This wayward judgment should be answered. If the general election had not made the timing impossible, it would have been entirely proper for Parliament to have reinstated the Attorney General's decision to block disclosure or at least to have authorised a new Attorney General to reconsider the matter. Legislation to this effect would have warranted support no matter what one thinks about the Prince of Wales's correspondence. For, to be clear, this paper takes no view on (a) the content or propriety of the Prince's letters or (b) whether the public interest did or did not warrant disclosure of the letters. Likewise, the paper's concern is not with the merits of the FOIA. Whatever one thinks of the Act's merits, it should have been – but was not – faithfully applied by the Supreme Court.

After *Evans v Attorney General*, the ministerial exercise of the power to block disclosure remains vulnerable to legal challenge. This state of affairs is inconsistent with the lawmaking choice that Parliament made in enacting the FOIA, a choice that in our constitution should not be undermined by judicial action. For this reason, we recommend that Parliament enact legislation to restore the legal rule that was enacted fifteen years ago. We propose a bill to this effect, which is attached to this paper as an appendix. In enacting legislation of this kind, and in standing ready to reverse other judgments that overstep the mark, Parliament affirms both the rule of law and its continuing authority to legislate.

² *Evans v Attorney General* [2015] UKSC 21 at [168], per Lord Wilson.

1

An Overview of *Evans v Attorney General*

In April 2005, Rob Evans, a journalist working for The Guardian, wrote to seven government departments seeking disclosure under the Freedom of Information Act 2000 (FOIA) of correspondence between the Prince of Wales and Government Ministers over the period from 1 September 2004 to 1 April 2005. The departments refused to release the letters on the grounds that their disclosure would not be in the public interest. Mr Evans sought to challenge this decision and so started the long train of litigation that culminated, on 26 March 2015, in the Supreme Court requiring the release of the correspondence. This paper addresses the profound constitutional issues that arise from this litigation. But to explain these we need first to outline the FOIA.

The Freedom of Information Act 2000

Part I of the FOIA entitles individuals to request information held by a public authority, which the authority is then required to disclose. Section 1(1) provides:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

These entitlements are qualified by exemptions set out in Part II of the Act (sections 21–44). Section 2 of the Act explains the effect of these exemptions, which are either absolute or qualified. Absolute exemptions include, for example, information supplied by, or relating to, bodies dealing with security matters (section 23) and information provided in confidence (section 41).³ Where an absolute exemption applies, there is no duty to disclose.⁴ Where a qualified exemption applies, the duty to disclose does not arise if ‘in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information’ (section 2(2)(b)).

Thus, deciding whether a public authority must disclose information that falls within a qualified exemption requires one to consider two competing elements in the overall public interest: the public interest in maintaining the exemption and the public interest in disclosure. The relative weight of the two competing public interests will vary with the circumstances and the weighing of the two interests will require determination of past and present facts about those circumstances but also

³ The full list of absolute exemptions is found in Part II of the Act but includes, in addition to the matters just mentioned, information accessible by other means (section 21), court records (section 32), parliamentary privilege (section 34), prejudice to the effective conduct of public affairs (section 36), personal information (section 40) and specified prohibitions on disclosure (section 44). Qualified exemptions, where release is subject to a public interest test, are also found in Part II. These include information about international relations, defence, the economy, the formation of government policy and communications with Her Majesty. At the time of enactment, communications with Her Majesty or other members of the royal family were subject to a qualified exemption (section 37), but now, since the Constitutional Reform and Governance Act 2010, are subject to an absolute exemption.

⁴ For simplicity, in what follows we set aside the section 1(1)(a) duty to ‘confirm or deny’ and focus simply on the section 1(1)(b) duty to disclose.

speculation about future circumstances and, above all, *evaluation*. As will be seen below, it is crucial to decide whether Parliament in enacting the Freedom of Information Act intended that the courts should make the final decision about this public interest or whether Parliament intended instead that this decision be made by a senior Minister accountable to Parliament for his or her decision – a decision formed about a matter on which, self-evidently, reasonable opinions may and often will differ.

The Act outlines a scheme for the enforcement of the duty to disclose. Individuals who request information may apply to the Information Commissioner for a decision about whether the public authority has conformed to its duties under Part I of the Act.⁵ The Information Commissioner makes a decision by issuing a ‘decision notice’, which is subject to appeal, in the first instance, to the First Tier Tribunal.⁶ If the Information Commissioner is satisfied that the public authority has failed to comply with requirements of the Act he may issue an ‘enforcement notice’, requiring certain steps be taken so as to comply.⁷

The enforcement and appeal provisions of the Act are subject to section 53. Sections 50 and 52, which authorise the Information Commissioner to issue a decision notice or enforcement notice, are both expressly subject to section 53. What section 53 does is to authorise a Minister to cancel the duty to disclose which otherwise arises because of the Information Commissioner’s decision or because the Tribunal on appeal upholds that earlier decision or substitutes some alternative decision. Section 53(2) says that:

A decision notice or enforcement notice to which this section applies shall cease to have effect if, not later than the twentieth working day following the effective date, the accountable person in relation to that authority gives the Commissioner a certificate signed by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b).

The ‘accountable person’ is defined in section 53(8) as a Minister of the Crown who is a member of the Cabinet, or the Attorney General.⁸ The ‘effective date’ is defined in s 53(4) as the day on which the decision notice or enforcement notice was given to the public authority or the day on which the appeal under section 57 (or any further appeal arising out of it) is determined or withdrawn. What this means is that the Minister has twenty days from the Tribunal’s determination of an appeal – whether upholding the Information Commissioner’s decision notice or allowing an appeal and substituting a decision notice that the Commissioner could have served – to cancel the decision notice in question.

Where a certificate is issued, section 53(3)(a) requires the Minister to lay, as soon as practicable, a copy before each House of Parliament. The Information Commissioner has a duty to lay before each House of Parliament a report each year on the discharge of his functions and has a power also to lay before each House such further reports as he thinks fit (section 49). The Information Commissioner has exercised this power to comment on the exercise of the section 53 power in a number of cases.⁹ Section 53(6) also requires the Minister to inform the individual who made the initial request for information as soon as reasonably practicable of the reasons for his decision to issue a certificate.

Section 53 is similar to provisions in freedom of information legislation in other Westminster parliamentary democracies, including Australia, Ireland and

5 Section 50.

6 Section 57 provides for either the applicant or the public authority to appeal to the Tribunal against a decision notice, and for the public authority to appeal against an information notice or enforcement notice. Section 58 provides that the Tribunal may review any finding of fact on which a notice is based. If the Tribunal considers that the notice in question was not in accordance with the law or that it involved the exercise of discretion by the Information Commissioner that the Tribunal considers ought to have been exercised differently, then the Tribunal may allow the appeal or substitute such other notice as the Information Commissioner could have served. (Section 59 had made provision for appeal from a decision of the Tribunal, on a point of law, to the High Court, but this section has not been operative since 18 January 2010 when the functions of the Information Tribunal were transferred to the First Tier Tribunal and Upper Tribunal.)

7 Section 52.

8 In this paper, for convenience, we often talk of ‘the Minister’ or ‘the Attorney General’ instead of ‘the accountable person’.

9 For instance, the Information Commissioner has twice reported to Parliament on the use of section 53 to prevent the disclosure of Cabinet Minutes on Devolution: Information Commissioner’s report to Parliament HC 218 2009–10 (Minutes of the 10th December 2009) and Information Commissioner’s report to Parliament 2012 HC 1860 April 2012 (Minutes of the 8th February 2012).

New Zealand. In Australia and New Zealand, the scope of the ministerial veto, or executive override, has changed over time – but changed as a result of the respective Parliament’s choice to amend the legislation, not because of judicial action. Appendix 2 outlines the position in more detail.

Note also that Scottish legislation contains a power similar to section 53 of the FOIA. Section 52 of the Freedom of Information (Scotland) Act 2002, authorises the First Minister of Scotland to issue a certificate, after consultation with other members of the Executive, overriding a decision notice or enforcement notice in relation to certain categories of exempt information.¹⁰ The exercise of the power requires the First Minister to form the opinion, on ‘reasonable grounds’, that the information in question is of ‘exceptional sensitivity’.

The road to the Supreme Court

As we have seen, the relevant departments refused to disclose the Prince of Wales’s correspondence to Evans. So he applied to the Information Commissioner under section 50. The Information Commissioner considered the matter and upheld the refusal of disclosure in a decision in December 2009.

On 13 January 2010, Evans exercised his section 57 right to appeal to the Tribunal.¹¹ The Upper Tribunal released its decision on 18 September 2012, allowing Evans’s appeal and indicating that it would soon issue substituted decision notices. The relevant departments did not seek to appeal the decision of the Upper Tribunal, which in any case could only be appealed (to the Court of Appeal) on a question of law and then only with the Upper Tribunal’s permission. Instead, on 16 October 2012, then Attorney General Dominic Grieve QC issued a certificate under section 53 and thereby overrode the disclosure ordered by the Upper Tribunal.

Evans applied for judicial review, arguing that Grieve’s certificate was invalid. He argued first that section 53 did not allow for a certificate to be issued merely because, on the basis of the same facts, the Minister took a different view to the Upper Tribunal in relation to the balance of the public interest in disclosure. His second argument concerned the framework for disclosure of environmental information imposed by EU law,¹² maintaining that – in relation to any elements in the letters that might involve “environmental information” – the ability for the Attorney General to overrule the determination of the Upper Tribunal breached Article 6 of European Parliament and Council Directive 2003/4/EC¹³ (and Article 47 of the Charter of Fundamental Rights of the European Union). But the concern of this paper is with the UK constitutional issues not with the EU law question; it is on the UK law that we focus.

On 9 July 2013, the Divisional Court rejected Evans’s application for judicial review,¹⁴ finding that the “reasonable grounds” required by section 53(2) required only that the Minister have “cogent” reasons, even if his or her position differed from the findings of the Information Commissioner or Tribunal. On the second argument, the Divisional Court found that the use of section 53 did not breach the 2003 Directive or the EU Charter in the present case. The Court of Appeal subsequently allowed Evans’s appeal on both grounds.¹⁵ In light of the unique circumstances, the Court of Appeal granted the Attorney General permission to appeal to the Supreme Court.

By majority, the Supreme Court upheld the decision of the Court of Appeal, quashing the certificate issued by the Attorney General under section 53. The

10 The categories of exempt information are set out in section 52(1)(b) of the Freedom of Information (Scotland) Act 2002.

11 The actual route to the Upper Tribunal, which later heard and decided the appeal was as follows: although the appeal from the Information Commissioner lay originally to the Information Tribunal, article 2(3) of the Transfer of Tribunal Functions Order 2010 (SI 2010/22) transferred the functions of the Information Tribunal to the First Tier Tribunal and the Upper Tribunal, with the question of which of them was to hear any particular case to be determined by or under the Tribunal Procedure Rules. Thus, Evans’s appeal to the Information Tribunal was first transferred to the First Tier Tribunal, on 18 January 2010, and transferred again on 13 September 2010 to the Upper Tribunal, with the agreement of the parties.

12 The Environmental Information Regulations 2004 were introduced to give effect to UK obligations emanating from European Parliament and Council Directive 2003/4/EC, which in turn was designed to align EU Community law with the UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).

13 European Union, *Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC*, 28 January 2003, 2003/4/EC. For discussion on point see: *Evans v Attorney General* [2015] UKSC 21 at [108], per Lord Neuberger, at [150], per Lord Mance and at [184] et seq., per Lord Wilson.

14 [2013] EWHC 1960 (Admin); judgment was given by Davis LJ. Lord Judge CJ concurred and Globe J agreed.

15 [2014] EWCA Civ 254; judgment was given by Lord Dyson MR with Richards and Pitchford LJ in agreement.

matter reverted to the Upper Tribunal for the clarification of disclosure orders relating to release of the letters. Twenty-seven redacted letters were subsequently released by the Cabinet Office on 13 May 2015.

Section 53 would seem clearly to authorise a Minister to override a decision of the Commissioner or Tribunal ordering disclosure. In view of the clarity of the section, why did a majority of the Supreme Court quash the Attorney General's veto?

The overall majority in the Supreme Court was formed of two different majority judgments. Lord Neuberger, with whom Lord Kerr and Lord Reed agreed, interpreted section 53 so that it did not confer power on the Attorney General to overrule the Tribunal, which meant that his decision to issue the certificate was outside the scope of the statutory power and unlawful. Lord Mance, with whom Lady Hale agreed, rejected Lord Neuberger's interpretation, but held nonetheless that it was unreasonable for the Attorney General to depart from the Tribunal's factual findings. In dissent, Lord Hughes and Lord Wilson held that the only plausible way to read section 53 was as authorising the Attorney General to override the Tribunal when he took a different view of the public interest in disclosure and that his decision in this case was not unreasonable and ought not therefore to be quashed by the courts.

2

Misinterpreting the Scope of Section 53

In argument before the Supreme Court, the Attorney General maintained that section 53 was clearly intended to authorise an ‘accountable person’ to overrule a decision notice whether it was issued by the Information Commissioner or whether it was upheld or substituted by the Tribunal on appeal. Lord Neuberger rejected this argument, holding that properly interpreted section 53 did not authorise the Minister to take a different view from a tribunal or court. The Attorney General’s interpretation, Lord Neuberger reasoned, took section 53 to be ‘[a] statutory provision which entitles a member of the executive (whether a Government Minister or the Attorney General) to overrule a decision of the judiciary merely because he does not agree with it’. The basic problem with this interpretation, he maintained, was that ‘such a provision would be unique in the laws of the UK [and] would cut across two constitutional principles which are also fundamental components of the rule of law.’¹⁶

The two constitutional principles in question were:

First, subject to being overruled by a higher court or (given Parliamentary sovereignty) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive.¹⁷ Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen.¹⁸

These principles Lord Neuberger took to cut against the Attorney General’s interpretation because:

Section 53, as interpreted by the Attorney-General’s argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it. And the fact that the member of the executive can put forward cogent and/or strongly held reasons for disagreeing with the court is, in this context, nothing to the point: many court decisions are on points of controversy where opinions (even individual judicial opinions) may reasonably differ, but that does not affect the applicability of these principles.¹⁹

¹⁶ *Evans v Attorney General* [2015] UKSC 21 at [51], per Lord Neuberger. In assessing the assertion ‘that such a provision would be unique in the laws of the UK’ recall (a) the similar provision in Scottish legislation and (b) the similar provisions in freedom of legislation in other Westminster democracies, outlined further in Appendix 2 to this paper. See also n17 below.

¹⁷ We interject to note that while it is, of course, unusual that an executive authority should overrule a judicial authority it is not unprecedented. The grant of a pardon under the prerogative is a clear example. The exercise of that prerogative is subject to judicial review but the grant of the pardon remains an executive judgment.

¹⁸ *Evans v Attorney General* [2015] UKSC 21 at [52], per Lord Neuberger.

¹⁹ *Ibid.*

While Lord Neuberger nominally conceded that Parliament had authority to enact such a provision, he held that the statutory language had to be crystal clear if it was to flout fundamental principle in this way. There was no such clarity in the statutory language here he held, for:

The only reference to a court or tribunal in the section is in subsection (4)(b) which provides that the time for issuing a certificate is to be effectively extended where an appeal is brought under section 57. It is accepted in these proceedings that that provision, coupled with the way that the tribunal’s powers are expressed in sections 57 and 58, has the effect of extending the power to issue a section 53 certificate to a decision notice issued or confirmed by a tribunal or confirmed by an appellate court or tribunal. But that is a very long way away indeed from making it “crystal clear” that that power can be implemented so as to enable a member of the executive effectively to reverse, or overrule, a decision of a court or a judicial tribunal, simply because he does not agree with it.²⁰

Lord Neuberger concluded that ‘there is a very strong case for saying that the accountable person cannot justify issuing a section 53 certificate simply on the ground that, having considered the issue with the benefit of the same facts and arguments as the Upper Tribunal, he has reached a different conclusion from that of the Upper Tribunal on a section 57 appeal.’²¹ His grounds for this conclusion were, first, his analysis of the two constitutional principles discussed above, and, second, his view that the Tribunal was much better placed than the accountable person to reach a good decision.²²

In Chapter 4 below, we dispute Lord Neuberger’s argument that authorising the Minister to override the Tribunal’s decision as to the balance of public interests in disclosure is contrary to fundamental principle. But in this chapter, we show how Lord Neuberger misinterprets section 53, and in the chapter that follows we explain why he misinterprets it – addressing the general question of how constitutional principle should inform statutory interpretation, and contending that his interpretation is itself contrary to the fundamental principle that the rule of law requires the courts to heed the clear law laid down by Parliament.

Lord Neuberger’s interpretation of the provision seems effectively to excise section 53 from the statute book. His judgment is careful not to challenge parliamentary sovereignty expressly. Anxious to avoid the charge that his interpretation amounts to invalidation of an Act of Parliament, Lord Neuberger aims to explain that on his interpretation section 53 is not wholly without application. That is, he aimed to show how the section retains some meaning, and has not simply been excised.

Specifically, Lord Neuberger followed the Court of Appeal in confining section 53 to cases where there has been a material change in circumstances following the issuing of the decision notice or where the decision in question was demonstrably wrong in law or fact. He acknowledged ‘that this conclusion results in (i) section 53 having a very narrow range of potential application... and (ii) the position of the exercise of the section 53 power being somewhat unsatisfactory following a determination of the Commissioner’.²³ In relation to (ii), the problem is that it would now seem rational to exercise the section 53 power before any appeal to the Tribunal was decided. Lord Neuberger maintained that there was no obvious way to resolve the anomaly, but ‘[t]here must, however be a powerful case for saying that it would at least often be a misuse of the section 53 power to issue a

²⁰ *Evans v Attorney General* [2015] UKSC 21 at [58], per Lord Neuberger.

²¹ *Evans v Attorney General* [2015] UKSC 21 at [68], per Lord Neuberger.

²² Lord Neuberger at [69]: “Secondly, (i) the fact that the earlier conclusion was reached by a tribunal (a) whose decision could be appealed by the departments, (b) which had particular relevant expertise and experience, (c) which conducted a full hearing with witnesses who could be cross-examined, (d) which sat in public, and had full adversarial argument, and (e) whose members produced a closely reasoned decision, coupled with (ii) the fact that the later conclusion was reached by an individual who, while personally and ex officio deserving of the highest respect, (a) consulted people who had been involved on at least one side of the correspondence whose disclosure was sought, (b) received no argument on behalf of the person seeking disclosure, (c) received no fresh facts or evidence, and (d) simply took a different view from the tribunal.”

²³ *Evans v Attorney General* [2015] UKSC 21 at [86], per Lord Neuberger.

certificate on certain grounds when it would be possible to appeal to the tribunal under section 57 on the same grounds.’²⁴

Pause for a moment to note just how narrow, on Lord Neuberger’s view, the section 53 power is. What could conceivably have been the intent of Parliament in enacting such a narrow and unworkable provision? The implausibility of Lord Neuberger’s interpretation of section 53 demonstrates its artificiality and confirms that it undermines Parliament’s clearly promulgated lawmaking choice. The provision sets out a specific statutory power to set aside any decision notice – whether issued by the Information Commissioner or the Tribunal – where the Minister takes a different view about whether the public interest in maintaining the exemption outweighs the public interest in disclosure. There is not a hint in the statutory language or in the context in which that language was chosen to suggest the qualifications that the judgment imposes on section 53. On the contrary, the qualifications Lord Neuberger imposes on section 53 rob it of legal meaning and effect and would have been recognised by any legislator involved in the passage of the FOIA as distortions, not clarifications, of the intended meaning.

Lord Hughes makes this point in his dissenting judgment:

155. In the end this issue does not admit of much elaboration; it seems to me to be a matter of the plain words of the statute. The alternative postulated is simply too highly strained a construction of the section. Section 53(2) could, no doubt, have said that a certificate could be issued only if fresh material came to light after the decision of the Commissioner or the First-tier Tribunal, but it did not. Likewise, it could have said that a certificate could be issued if the decision of the Commissioner or court could be shown to be demonstrably flawed in law or fact, but it did not. If Parliament had wished to limit the power to issue a certificate to these two situations that is undoubtedly what the subsection would have said. If anyone had suggested at the time of the passage of the bill which became the Act that either of these things was what was meant, it seems to me that that suggestion would have received a decisive and negative response. The second possibility is, moreover, one which would afford clear grounds for appeal, so that a certificate would not be necessary. Even if it were a second appeal, a demonstrably flawed decision upon a topic of public significance would be one for which there would nearly always be a compelling reason for leave to appeal to be given.

156. In the end, the very fact that it is necessary to postulate so vestigial an extent for a generally expressed power if it is to be given any content at all is a potent demonstration that it does indeed mean what it says. The reality is that the section 53(2) provision for exceptional executive override was the Parliamentary price of moving from an advisory power for the Commissioner (and thus for the court on appeal) to an enforceable decision.²⁵

It also bears noting, as a side issue, that Parliament simply did not enact the proviso that Lord Neuberger contemplates. This was to the effect that it would usually be improper to exercise section 53 to overrule the Information Commissioner without first appealing to the Tribunal (whose decision one could almost never overrule by way of section 53). If Parliament is taken at its word, there is no asymmetry in section 53’s application to the Information Commissioner and Tribunal, and no anomaly to explain away. The statutory power applies in the same way to decisions of the Information Commissioner and to decisions of the Tribunal.

²⁴ *Evans v Attorney General* [2015] UKSC 21 at [80], per Lord Neuberger.

²⁵ Lord Wilson’s account at [170] of how section 53 became part of the Act is instructive: “...The version of the Bill printed on 10 February 2000 included nothing analogous to [section 53]. But under that version the applicant had no *right* to disclosure of such information as was subject to qualified exemptions. Clause 13(4) of it merely conferred a *discretion* on the public authority to disclose such information and clause 13(5) required that, in exercising the discretion, it should have regard to the desirability of disclosing it wherever the public interest in doing so outweighed the public interest in not doing so. In the event that disclosure was refused, clause 48 empowered the Commissioner only to *recommend* that it be given. He could not overrule the authority by *ordering* disclosure. At the Commons Report stage, however, the text of the Bill came, instead, to impose enforceable obligations on public authorities to disclose such information as was subject to qualified exemptions ... But, if the discretion of public authorities in this respect was to be eliminated, there needed, so Parliament decided, to be a closely circumscribed power of public authorities at the highest level to override the evaluation of public interests by the Commissioner or by tribunals or courts in ensuing appeals. This was [what became clause 53]...” A workable executive override (the ministerial veto) thus emerged as a crucial part of the scheme of the FOIA.

Likewise, there is no anomaly in the relationship between section 53 (the ministerial veto) and section 57 (the appeals provision) if one takes Parliament to mean what it said. The power to appeal is exercised by the relevant public authority, whether on the personal direction of the Minister or otherwise, and is not tabled before Parliament. By contrast, the power to override is (i) exercised only by the Minister, in practice only after a collective decision of Cabinet, and (ii) is tabled before Parliament. The scheme of the FOIA is to authorise the Information Commissioner in the first instance and then a Tribunal on appeal to apply the terms of the Act. But central to the scheme of the Act is the reservation to ministers of the authority to depart from the decisions of the Information Commissioner or Tribunal when they take a different view about what the public interest requires in relation to some exempt information, for which ministers are responsible to Parliament.

One perverse effect of Lord Neuberger's interpretation is that it will certainly make it rational for the Government to reason that section 53 should be exercised after the Information Commissioner has made his decision rather than risk appeal. It is no answer to say that Lord Neuberger signals his further intention to quash any such action in any later case. This would only compound the unconstitutional departure from the terms of the Act.

The point of section 53 is to authorise the Minister to take a different view of the public interest to the Information Commissioner or Tribunal and to that extent to override their decisions about the duty to disclose exempt information. This reading of the provision follows from the scheme of the Act and does not make section 53 an anomaly to be explained away. Enacting the power in question may or may not have been a good idea – this is a point on which reasonable persons differ – but the provision is not so absurd or vicious as to suggest that Parliament is unlikely to have intended to enact such a power.

That Parliament intended to create precisely such a power is confirmed by the persons in whom the power is vested and the conditions under which the power is to be exercised. The power is to be exercised by senior ministers who answer to Parliament for its exercise, with the terms of the section expressly making provision for responsibility to Parliament, which is further reinforced by the Commissioner's statutory power to lay reports before Parliament. It is worth noting also that ministers gave an assurance to the Houses of Parliament during the passage of the FOIA that the power would normally only be exercised after a joint decision of Cabinet,²⁶ an assurance reflected in subsequent Government practice.²⁷ Lord Wilson perhaps overstates the case when he says that this amounted to the announcement of a constitutional convention,²⁸ but nonetheless the understanding that the power would in practice be exercised only after a joint decision of Cabinet is relevant to the question of what Parliament likely intended to enact. On Lord Neuberger's interpretation, section 53 is a strange, limited, incoherent provision, whereas for the enacting Parliament section 53 conferred an important power, the responsible exercise of which it intended to safeguard by way of political accountability.

²⁶ HC Deb 4 April 2000 c922; see also HL Deb 25 October 2000 c441–443.

²⁷ Statement of *HMG Policy: Use of the executive override under the Freedom of Information Act 2000* as it relates to information falling within the scope of section 35(1); noted in *Evans v Attorney General* [2015] UKSC 21 at [19–20], per Lord Neuberger.

²⁸ *Evans v Attorney General* [2015] UKSC 21 at [172].

3

Constitutional Principle and Legislative Intent

The first majority judgment does not attend properly to the reasoning and choice of the enacting Parliament, which in our constitution has authority to make the law it chooses to make, law that the Supreme Court has no authority to unmake. Lord Neuberger is not much moved by the evident disconnect between the meaning he imposes on the statute and any meaning that there is reason to think Parliament intended to convey. Yet the fundamental aim of statutory interpretation is to find and give effect to the intention of Parliament in enacting the statute, reading the statutory language in the context of enactment to determine how Parliament chose to change the law. This focus on what Parliament has chosen and promulgated is required by the constitutional principles of the rule of law and parliamentary sovereignty which here, as often, march hand in hand. The rule of law forbids anyone, Supreme Court judges included, from departing from the law and parliamentary sovereignty provides that what Parliament enacts is law.

The courts have, of course, for centuries tended to adopt narrow interpretations of statutes that would restrict liberty if read more broadly (including ouster clauses that restrict access to the courts). And in recent years this has been extended to provisions that restrict fundamental rights. This is the root of the idea that provisions such as section 53 should be “crystal clear” in providing that a Minister might overrule a court. Such restrictive interpretations are adopted on the assumption that ‘Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law’.²⁹ But the search is always for the true intent of Parliament and where Parliament’s intent is clear the assumption must give way.³⁰

The controlling question, which Lord Hughes and Lord Wilson each answer squarely and rightly, is what rule did Parliament choose to promulgate in enacting section 53? It is readily apparent that Parliament did not choose the rule that Lord Neuberger invents, a rule that in truth robs section 53 of its intended force.

There is good reason to presume that Parliament does not intend to depart from constitutional principle and hence to require clear language before concluding that such is its intention. In this way, constitutional principles form a significant part of the context of enactment and help people determine what propositions Parliament chose to enact. Importantly, however, these constitutional principles do not float free from the fundamental object of the interpretive exercise: the will of Parliament promulgated in the statute. It is a mistake then to consider

²⁹ *R v Secretary of State for the Home Department, Ex Parte Pierson* [1998] AC 539, 587.

³⁰ As Lord Hughes put it at [159]: “...I agree that Parliament will not be taken to have empowered a member of the executive to override a decision of a court unless it has made such an intention explicit. I agree that courts are entitled to act on the basis that only the clearest language will do this. In my view, however, Parliament has plainly shown such an intention in the present instance.”

constitutional principle quite apart from the statutory text. One looks to the detail of the statutory language to help make clear what Parliament has decided, rather than to see if that detail makes it too awkward to ignore what was certainly intended. The absurdity or awkwardness of a proposed reading of a statute suggests that it was not intended. The judge should not aim to give the statutory provision *some* meaning, but rather to give the provision its intended meaning whether he or she likes it or not.

The prospect that the proposed interpretation will undercut Parliament's decision should stop the judge in his or her tracks. For the meaning of the statute is not invented by the court at its pleasure, but is there to be found in what Parliament has already done. This truth about our constitutional arrangements is consistent with the recognition of presumptions about what Parliament is likely to have intended. One such presumption, the principle of legality, justifies caution against prematurely concluding that Parliament has by some general words authorised a breach of fundamental rights. For example, the conferral of a general power to make rules for the regulation of a prison should not be understood to authorise the making of rules to permit the torture of prisoners. However, when cut adrift from legislative intent, the principle is apt to be misused, as in this case, to rationalise misreading.

The first majority judgment reads much more like an argument for not enacting section 53 than an argument about what Parliament intended to convey in enacting section 53. That is, the judgment is precisely what Lord Wilson in his dissent resists: a rewriting not an interpretation.³¹ Perhaps Lord Neuberger is right about the merits of section 53 – although we question his analysis of the relevant principles in Chapter 4 below – but this is at best irrelevant. Yes, one should be hesitant to conclude Parliament has acted badly, but still in our constitution Parliament has the authority to choose – and reasonable people will often disagree about whether this or that legislative proposal is wise or foolish. Lord Neuberger assumes that the Supreme Court is guardian of the constitution, whereas in truth Parliament does not stand beneath the Court in need of tutelage.

31 Lord Wilson at [168]: “How tempting it must have been for the Court of Appeal (indeed how tempting it has proved even for the majority in this court) to seek to maintain the supremacy of the astonishingly detailed, and inevitably unappealed, decision of the Upper Tribunal in favour of disclosure of the Prince’s correspondence! But the Court of Appeal ought (as, with respect, ought this court) to have resisted the temptation. For, in reaching its decision, the Court of Appeal did not in my view interpret section 53 of FOIA. It re-wrote it. It invoked precious constitutional principles but among the most precious is that of parliamentary sovereignty, emblematic of our democracy.”

4

Judging the Public Interest

The premise of Lord Neuberger’s judgment is that it would be contrary to fundamental principle and the rule of law for a minister to set aside a decision of a court, which would otherwise bind the parties. Is he right about the question of principle in *Evans*?

It is of course contrary to the rule of law for a minister to set aside a judicial decision without statutory authority. However, the relevant question is whether a statutory grant of authority to a Cabinet Minister to set aside a judicial decision is also contrary to the rule of law.³² Lord Neuberger takes for granted that such a power would be inconsistent with the rule of law and that the principle of the rule of law justifies misinterpreting the statute to suppress the power, notwithstanding that Parliament clearly intended to enact it. Lord Hughes’ reply is decisive: the rule of law does not mean the rule of courts irrespective of what the statute says.³³ The rule of law binds the Supreme Court at least as much as anyone else and in our tradition, in which Parliament has authority to legislate as it sees fit, to act contrary to the will of Parliament is to depart from the rule of law.

In any case, section 53, properly interpreted, does not flout the rule of law. Whether the power is consistent with the rule of law cannot be answered at the level of abstraction at which Lord Neuberger approaches the question. Much turns on the detailed statutory context and what precisely ministers are being authorised to overrule, on what terms and for what reasons. Here, the central question for decision – by the Minister exercising his section 53 power, but also by the Information Commissioner and Tribunal – was whether the public interest in disclosure outweighed the public interest in maintaining the exemption. Apart from the enactment of the Freedom of Information Act, the general principle is that the public interest is a matter for public authorities, including ministers, to decide. The FOIA reverses this principle to the extent that it gives priority to the decisions of the Information Commissioner and, on appeal, the Tribunal about the balance of the public interest. Which is to say: Parliament judged it wise, in ordinary cases at least, to bind public authorities to the Information Commissioner and Tribunal’s assessment of the public interest. The effect of section 53 is to temper this new arrangement, making decision about the balance of public interests in play again a matter for responsible ministers rather than for the Commissioner or Tribunal.

There is, as Lord Wilson notes, a very great difference between a court’s assessment of the balance of public interests and its reasoning about the meaning and application of law. The scheme of the FOIA is to make the general legal right of access to information turn on the assessment of the balance of the competing

³² We note here that the whole framing of section 53 as a power to override a judicial decision is somewhat artificial. Lord Neuberger aims to protect the Upper Tribunal, which is a court of record, from executive override. He does note that in other cases the Attorney General might seek to override the First Tier Tribunal, which is not a court of record, but he takes the Tribunals, Courts and Enforcement Act 2007 (which established the First Tier and Upper Tribunals) to make that body also part of the judiciary and so also to be protected from override. But this analysis misses an important point. The FOIA predates the 2007 Act and the Tribunal in the scheme of the FOIA was the Information Tribunal, which was not a judicial body. The First Tier Tribunal and Upper Tribunal only come to exercise the function of the Information Tribunal by reason of a ministerial order, under the terms of the 2007 Act, in January 2010 (see n11 above). This ministerial order did not amend section 53. The transfer of the Information Tribunal’s function to a new Tribunal, which is a court, does not change what Parliament intended in enacting the FOIA ten years earlier. It follows that presuming that Parliament does not intend to authorise the executive to override a court does not support the conclusion that in enacting the FOIA in 2000 Parliament did not intend to authorise the Minister to override the Tribunal.

³³ *Evans v Attorney General* [2015] UKSC 21 at [154], per Lord Hughes.

public interests in disclosure and non-disclosure. The sequence of decisions of Information Commissioner, Tribunal and then Minister all involve assessments about the competing public interests in play. Thus, the statutory power to cancel the duty otherwise created by the Information Commissioner or Tribunal's decision is not a power to flout the law or to free the executive from its legal obligations,³⁴ as Lord Neuberger suggests, but is instead a reservation of final authority to determine what the public interest requires. And to be clear, the point is not that the executive here has a power to override the law when it judges the public interest so demands. Rather, the law in question calls for an assessment not (in the end) of any question of law, nor indeed of any matter of plain fact, but of the (balance of) public interest, an assessment which it is right, Parliament judged, to reserve to responsible ministers.

Lord Neuberger responds to Lord Wilson by saying that Parliament determined the public interest in enacting the FOIA, which it is now for the courts to interpret.³⁵ This is no answer. Decisions about the impact of disclosure of the letters on public opinion and thence on the sustainability of the Prince's or the monarchy's position in the coming years and decades are as far as anything could be from the interpretation of a statute or any other question of law. Lord Wilson's analysis makes clear the sharp difference between a statutory power that makes it possible for the executive to act on its own assessment of the public interest and a statutory power to overturn a judicial decision about the application of legal rules. Further, Lord Neuberger's stress at this point on what Parliament did in 2000 jars with his willingness elsewhere in his judgment to impose on the statute a meaning that was plainly not intended by Parliament.³⁶ It may or may not be a good idea to authorise responsible ministers to override the Tribunal's assessment of the public interest but it is not contrary to the rule of law, or otherwise unintelligible, for Parliament to choose as much. It follows that Lord Neuberger overstates the extent to which constitutional principle requires that the decisions of all judicial bodies be free from statutory override.

What is also striking about Lord Neuberger's discussion is its failure to confront the central role envisaged by the statutory scheme for political mechanisms of accountability. Lord Neuberger's stress is entirely on the rule of law and the importance of judicial action in maintaining the rule of law. This neglects the centrality to our constitutional arrangements of ministerial accountability to Parliament and the conventions that sustain responsible government. It is highly relevant that Parliament vests the section 53 power only in members of Cabinet (and the Attorney General) and that the enactment of the provision is partly to be explained by the assurance that in practice the exercise of the power would involve a corporate act of the whole Cabinet. Similarly, it is of considerable importance that any exercise of section 53 must be reported to each House of Parliament as soon as practicable. The statute's concern to enable immediate democratic accountability, taken together with the independent check of the Information Commissioner's reports to Parliament, confirms that the power is not arbitrary and that Parliament

“It may or may not be a good idea to authorise responsible ministers to override the Tribunal's assessment of the public interest but it is not contrary to the rule of law, or otherwise unintelligible, for Parliament to choose as much”

³⁴ Such a power – for example, a statutory power to override a judicial ruling that a minister has committed a tortious wrong, such as trespass or false imprisonment – would be constitutionally problematic.

³⁵ *Evans v Attorney General* [2015] UKSC 21 at [92], per Lord Neuberger.

³⁶ See also n32 above.

sought to integrate this legal power within the political constitution, due regard for which is simply absent from the majority judgments.

The courts have a vital place in our scheme of constitutional government, adjudicating cases fairly in accordance with positive law and thus doing their part to uphold the rule of law. The courts fundamentally mistake their place in that scheme, with the regrettable consequences one sees in *Evans*, if they overlook the political constitution. In relation to section 53, the rule of law requires the courts to recognise and follow Parliament's clear lawmaking choice and to refrain from taking over the power, or effectively quashing it, by way of judicial review.

The question at the heart of *Evans* is simply whether the Attorney General's view of the public interest should prevail over the Upper Tribunal's view of the public interest. But section 53 of the FOIA clearly provides that the Attorney General view of the public interest is to prevail. That this should be so was the choice of the elected and supreme Parliament to whom the Attorney General was accountable for the exercise of the section 53 power. It was a clear example of judicial overreach for a majority of the unelected Supreme Court (five of seven judges) to quash the Attorney General's exercise of this power – three judges by flatly misinterpreting the section, as we argue in Chapters 2 and 3 above, and two judges by excessively intrusive review of the exercise of the power, as we argue in Chapter 5 below.

5

Overruling the Exercise of Section 53

The first majority judgment undermines section 53 by fundamentally misconstruing its scope. The second majority judgment rejects this serious misinterpretation but undermines section 53 in a different, but related, way by granting an application for judicial review that overrules the reasonable exercise of the statutory power. Lord Mance (with whom Lady Hale agrees) follows Lord Wilson in taking section 53 to make it possible for the Minister to disagree with the Information Commissioner and Tribunal about how to assess the public interest in disclosure. However, Lord Mance joins Lord Neuberger in the final result, ruling that the Attorney General nonetheless erred in law by departing from the Tribunal's findings of fact.

The foundation of Lord Mance's judgment is his reflection on the terms of section 53(2), which require the Minister to 'stat[e] that he has on reasonable grounds formed the opinion that' there was no breach of section 1(1)(b). Lord Mance asserts that this formulation requires more than mere rationality in the exercise of the power: instead it requires an elevated standard of reasonableness, which the court will make a condition of the power's lawful exercise. But why require more than that the Minister act rationally? Lord Mance does not say. However, it seems likely that he shares Lord Neuberger's view about the wrongness in principle of the executive overriding a judicial decision.

The judgment distinguishes between two types of disagreement between the Tribunal and a Minister.³⁷ The first type of disagreement concerns findings of fact or law made in a reasoned decision of the Tribunal. Lord Mance considered that such disagreement would 'require the clearest possible justification' on the part of the accountable person. 'This is particularly so', he went on, 'when the Upper Tribunal heard evidence, called and cross-examined in public, as well as submissions on both sides. In contrast, the Attorney General, with all due respect to his public role, did not. He consulted in private, took into account the views of Cabinet, former Ministers and the Information Commissioner and formed his own view without inter partes representations'.³⁸ Thus Lord Mance accepted that that 'clearest possible justification' may only be able to be shown 'in the sort of unusual situation in which Lord Neuberger contemplates that a certificate may validly be given'.³⁹

The second type relates to different views as to the weight that should be ascribed to various interests identified by the Tribunal. Lord Mance considered this form of disagreement to fall within the ambit of the section. It could therefore legitimately be addressed by a statutory certificate issued with proper reasons in support.

³⁷ *Evans v Attorney General* [2015] UKSC 21 at [130], per Lord Mance.

³⁸ *Ibid.*

³⁹ *Ibid.*

In this particular case, Lord Mance compared the Attorney General’s reasons for issuing the certificate against the Upper Tribunal’s decision and identified, as the key difference, the diverging approaches taken to interpretation of the relevant constitutional conventions,⁴⁰ which in turn underpinned the assessment of the balance of the public interest.⁴¹ Lord Mance held that the Attorney General had engaged in a ‘redetermination of the relevant background circumstances’,⁴² which he was not entitled to do. That is, the Attorney General was not entitled to take a different view from the Tribunal of the relevant constitutional conventions or the public risk of misperception, amongst other things, without expressly answering the Tribunal’s reasoning.

The potential for this mode of judicial review to frustrate the effective exercise of the statutory power is made clear by Lord Neuberger who comments:

*[Lord Mance’s] approach will normally yield the same outcome as mine. We have very similar views in practice as to the ability of [the Minister] to differ from a tribunal decision on an issue of fact and law, and in reality it will, I think, normally be very hard for [the Minister] to justify differing from a tribunal decision on the balancing exercise on Lord Mance’s analysis.*⁴³

The reason for this is partly that it is unclear ‘where, on Lord Mance’s analysis, the boundary lies between reasoning which satisfies, and reasoning which does not satisfy, the requirement for the “clearest possible justification” before [the Minister] is to be entitled to disagree with the tribunal on an issue of fact.’ [95] Lord Neuberger, Lord Hughes and Lord Wilson each noted that it was problematic to require the Minister to respond to the Tribunal’s decision in the way that an appellate court might do. Better to say, Lord Hughes maintained, that ‘Section 53(2) allows the issuer of a certificate to take a different view of the facts from the Commissioner or court so long as the conclusion reached is a rational one.’⁴⁴ On the facts of *Evans*, Lord Hughes and Lord Wilson thought Lord Mance had wrongly taken the Attorney General to be disagreeing with the Tribunal about the scope of the relevant conventions, whereas in fact he had taken a reasonable view about the public interest whatever may have been the precise scope of the conventions.

In enacting section 53 Parliament authorised the Minister to overrule the decision of Commissioner or Tribunal as to whether ‘in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information’ (section 2(2)(b)). Weighing up these competing elements of the public interest requires assessment and evaluation of ‘all the circumstances’, which includes matters of past and present fact and predictions or speculation about the future. Lord Mance’s assertion that the Minister acts unlawfully if he or she departs from the Tribunal’s findings of fact – including findings about the nature and relevance of constitutional conventions and about the risks of public misperception and the consequences of such – wrongly deprives the Minister of the responsibility that Parliament entrusted to him or her.

Again, Lord Mance’s judgment does not attend to the importance of the political constitution. Yet one cannot understand the intended point of the statutory power, or what its responsible exercise consists in, without noting that it is nested within the larger framework of responsible government. That the statute makes provision for immediate democratic accountability is an important guide to what

40 Constitutional conventions are ‘non-legal constitutional rules established by custom and practice, precedent and prescription’ (qv, *New Oxford Companion to Law*). They are particularly important in the Westminster constitution where they ‘...govern the relationships between most constitutional actors including the Queen and the government...’ (ibid). They are not rules of law (and so not enforceable by the courts although the courts sometime take account of them). In *Evans v Attorney General* [2012] UKUT 313 (AAC) the Upper Tribunal heard much argument about the extent of the tripartite and the education conventions – and particularly the scope of the education convention governing the Prince’s correspondence with ministers and under which such correspondence formed part of the Prince’s preparation for kingship.

41 Lord Mance considered that: ‘Central to the Attorney General’s disagreement with the Upper Tribunal was his view that the “advocacy correspondence” in which the Prince of Wales engaged was “part of his preparation for kingship”, or part of an “education” or “apprenticeship convention”, as the Departments put it before the Upper Tribunal’ (*Evans v Attorney General* [2015] UKSC 21). To illustrate this point, Lord Mance quoted extensively from the decision of the Upper Tribunal and engaged in a lengthy discussion of the contrasting understandings expressed by the Attorney General and the Upper Tribunal in relation to the nature, scope and application of the constitutional conventions at issue (see [137]).

42 *Evans v Attorney General* [2015] UKSC 21 at [131], per Lord Mance.

43 *Evans v Attorney General* [2015] UKSC 21 at [93], per Lord Neuberger.

44 *Evans v Attorney General* [2015] UKSC 21 at [161], per Lord Hughes.

Parliament intended in enacting section 53. It makes it plain that the Minister was to be primarily accountable to Parliament for the exercise of the override power. This does not place the Minister above the law. If the Minister makes an error of law or acts in bad faith or irrationally his or her decision may be subject to judicial review. But the Minister's immediate accountability to Parliament is a very powerful reason for the courts not to adopt an intrusive standard of review that takes over the decision. It seems to us that this is exactly what Lord Mance does: he leaves little space for the Minister to make his or her own decision.

All the judges in the Supreme Court took the view that the Attorney General had cogent reasons for taking a different view to the Tribunal – unsurprisingly given that he was agreeing with the Information Commissioner, whose grounds the Tribunal itself had accepted were cogent!⁴⁵ He made a reasonable decision about where the public interest lay, a decision which Parliament entrusted to him and for which he should answer to Parliament.

45 Evans v Attorney General
[2015] UKSC 21 at [181], per Lord
Wilson; see also *Evans v Attorney
General* [2012] UKUT 313 (AAC)
at [4].

6

The Rule of Law and the Rule of Courts

The difference between the two majority judgments and the dissenting judgments in the Supreme Court is well captured in Lord Hughes’s remark that ‘The rule of law is not the same as a rule that courts must always prevail, no matter what the statute says.’⁴⁶ The first majority judgment rewrote the statutory provision to protect the Tribunal’s decision from executive override; the second quashed the executive override by forbidding the Attorney General from departing from the Tribunal’s findings. These courses of action, especially the first, bespeak a conflation of the rule of law and the rule of courts. The premise of both judgments is that the rule of law warrants protecting judicial decisions (including decisions of the Tribunal) from override, notwithstanding a clear statutory direction to the contrary.

For some judges and scholars, the rule of law is an ideal that requires all public power – including that of Parliament – to be subject to judicial oversight and correction, to force the power in question to be exercised in accordance with sound principles.⁴⁷ This view undercuts the traditional understanding of the rule of law, whereby the focus of judicial power is on the fair adjudication of disputes in accordance with clear, coherent and settled law. The rule of law on this new view is a ground for far-reaching judicial action, unconstrained by settled legal rules, in which the legality of executive action is readily called into question and Parliament’s choices are displaced by judicial interpretation.⁴⁸ The trend towards this expansion of judicial power beyond its traditional bounds is rationalised by asserting that Parliament is incapable of holding the executive to account and, in any case, is itself almost as much in need of judicial oversight as the executive. On this view the courts should strive to compensate for the weakness and inconstancy of Parliament.

The rule of law is better understood to ground the separation of legal and political authority. It does not license free-wheeling judicial oversight of the merits of executive or legislative action unbound by clear, settled law. The principle of the rule of law is consistent with the centrality to our constitutional arrangements of parliamentary sovereignty, not least since Parliament is well-placed to make laws fit for the rule of law – laws that are clear, prospective, coherent, and publicly accessible – which should bind judges.⁴⁹ The courts are central to maintaining the rule of law, which is a vital constitutional role. However, it does not follow that the courts have the main responsibility for upholding the constitution. The main function of the judiciary is to settle disputes fairly and in accordance with law, which does not entail a supervisory jurisdiction over the content of the law. The

46 *Evans v Attorney General* [2015] UKSC 21 at [154], per Lord Hughes.

47 See for example Jeffrey Jowell, ‘The Rule of Law’, chapter 1 in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution* (8th ed) (OUP, Oxford 2015), 13–37; and TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, Oxford 2003). In a recent case-note, TRS Allan takes Lord Neuberger to have decided *Evans v Attorney-General* rightly, effectively limiting parliamentary sovereignty by reference to the rule of law: see ‘The Rule of Law, Parliamentary Sovereignty and a Ministerial Veto over Judicial Decisions’ (2015) 74 *Cambridge Law Journal* 385.

48 See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, Oxford 2000) and Ran Hirshl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (HUP, Cambridge 2007) for descriptions and criticisms of this trend.

49 Richard Ekins, ‘Judicial Supremacy and the Rule of Law’ (2003) 119 *Law Quarterly Review* 127.

extensive judicial discretion which any such jurisdiction would require is itself inconsistent with the rule of law.

The temptation to conflate the rule of law with the rule of courts predates the enactment of the Human Rights Act 1998 (HRA). Legal elites in Britain, as elsewhere in the common law world, have come to doubt the virtues of the political process and have increasingly sought to make political questions into legal questions, to be resolved in court: hence the continuing expansion in the reach and intensity of ordinary judicial review of executive action. These changes in our legal culture have been accelerated by the introduction of the HRA, which has required judges to consider questions about the merits of our laws, questions which would have previously been thought entirely unsuited for judicial consideration. The Act has also authorised judges to some extent to privilege their own view of what should be done (or the view of the European Court of Human Rights in Strasbourg) over the will of Parliament, as expressed in other statutes, or the decisions of ministers responsible to Parliament. Thus, the new responsibilities conferred by the HRA, and the new techniques adopted to discharge these responsibilities, have encouraged a wider shift in judicial self-understanding.⁵⁰

The effect of this new judicial disposition can be seen in the increasing openness of our superior courts to techniques of statutory interpretation that depart from the intention of the enacting Parliament and instead impose on the statute the meaning which the court thinks ought to have been enacted. The effect can be seen also in an increasingly intrusive approach to judicial review of executive action, which at times discounts the expertise and responsibility of ministers and their accountability to Parliament. These two general trends in our public law come together in striking form in the *Evans* case.

Parliament is of course responsible for enacting the HRA. The Act to some extent undermines the separation of powers and compromises the rule of law.⁵¹ These may be costs worth paying to make British law conform more closely to the rulings of the European Court of Human Rights. This is a difficult question about which reasonable people disagree. However, it is clearly a question that should be decided by our Parliament, not settled by judicial fiat. Unlike the application of the HRA, the mode of judicial action one sees in the majority judgments in *Evans* has in no way been chosen by Parliament: on the contrary, the judgments frustrate what Parliament has chosen. Thus, whatever one thinks about the HRA, the problematic judicial action on display in *Evans* should be resisted.

Not all judges are willing to rewrite statutes – indeed a majority of the Supreme Court rejected the attempt by Lords Neuberger, Kerr and Reed to do just that. And many judges take care to avoid frustrating statutory powers by way of overly intrusive judicial review – the dissents by Lord Hughes and Wilson make this clear. It would seem that there is a division in the judiciary. For some judges, the rule of law does seem to amount to the rule of the courts whatever the statute may say; for others, the rule of law requires Supreme Court judges to follow the will of Parliament just like everyone else. Judicial independence requires judges to exercise considerable self-discipline. Still, there is much that Parliament can do to help uphold the rule of law and to affirm its authority to legislate.

⁵⁰ See for example: Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, Cambridge 2009); Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart, Oxford 2009); Mary Arden *Human Rights and European Law: Building New Legal Orders* (OUP, Oxford 2015).

⁵¹ Sir Philip Sales and Richard Ekins, 'Rights-consistent Interpretation and the Human Rights Act 1998' (2011) 127 *Law Quarterly Review* 217.

7

Affirming Parliament's Authority

The immediate effect of the Supreme Court judgment in *Evans* is that the Prince of Wales's letters have now been released. The longer term effects are of wider significance:

- First, the use of the section 53 power is at best in some doubt or at worst has effectively been undercut: either way, ministers should no longer have confidence that they may rely on the power to overrule a decision of the Information Commissioner or Tribunal ordering disclosure. Future use of section 53 is now subject to a very real risk of successful legal challenge.
- Second, the case demonstrates that some senior judges are willing to rewrite statutes or to frustrate their exercise by overly intrusive judicial review.

This wayward judgment and the problematic modes of judicial action which it involves should be decisively answered. The way to answer it is for Parliament to make clear that it will not stand idly by while its statutes are rewritten under the guise of interpretation or frustrated by overly intrusive judicial review. Therefore, Parliament should act now to overturn the Supreme Court's decision.

The timing of the general election made it impossible for Parliament to consider or respond to the judgment prior to the release of the letters. But if the timing had been otherwise, there would have been good reason for Parliament to reverse the judgment with immediate effect, either (a) reinstating the Attorney General's decision to overrule the Tribunal or (b) authorising the new Attorney General to reconsider the question of whether the Prince of Wales's correspondence should be disclosed. We say this without taking any view on the propriety of the Prince's letters or on the question of whether the public interest in fact required disclosure. The point of reversing the judgment's immediate effect would emphatically not have been to secure the privacy of the Prince's correspondence, but rather to uphold the rule of law and parliamentary sovereignty by giving effect to the power that Parliament enacted in 2000 and which the Attorney General reasonably exercised.

The letters have now been released and so the question is instead what Parliament should do about the longer term effects of the judgment, especially its implications for further use of section 53. We recommend that Parliament enact legislation that clearly restores the intended meaning and effect of section 53 and which protects that power from being undermined by judicial review. In this way, Parliament would affirm its authority, not permitting section 53 to be rewritten or to be undercut by judicial review.

In the first appendix to this paper, we set out our draft bill which we recommend Parliament enacts. The bill specifies (i) that the decision notice ceases to have effect when the Minister forms the opinion, and issues a certificate to the effect, that the disclosure of the relevant information would not be in the public interest, (ii) that the power applies as much to decisions of the Tribunal (including upholding or substituting a decision on appeal) as to decisions of the Information Commissioner, (iii) and that the power may be exercised to cancel the Information Commissioner's decision notice irrespective of whether the public body appeals that decision to the Tribunal. It would still be open to apply for judicial review of the issue of a certificate but only on narrow grounds, specifically error of law (say, in mistakenly taking some information to fall within a qualified exemption in Part II of the FOIA) and bad faith. The courts would not be at liberty to quash the issue of a certificate merely because the Minister disagreed with the Tribunal.

It is unlikely that subsequent courts would attempt to rewrite, or otherwise frustrate, legislation to restore the law Parliament enacted in 2000. However, we note that Professor Mark Elliott of Cambridge University, one of Britain's leading public law commentators, has speculated that a legislative response to *Evans* might well prompt the courts to assert the authority to invalidate the legislation, which they might consider contrary to the rule of law.⁵² (A handful of judges in some recent cases have suggested that such a power might exist.⁵³) The speculation seems to us ungrounded. If the Supreme Court were to act thus it would be asserting an authority over Parliament that is flatly ruled out by our constitutional tradition: an assertion of judicial supremacy of this kind would be a coup not a judgment.

The Supreme Court judgment in *Evans* is a clear example of judicial overreach. If left unanswered, it may very well be taken by later judges, and lawyers and scholars, to support fresh attempts to rewrite statutes or to undermine them by way of judicial review. There are very good reasons why Parliament enjoys the authority to legislate: its lawmaking authority makes democracy possible, and it is much better placed than the courts to make good law that is fit for the rule of law. The new judicial self-understanding, which one sees at work in *Evans*, does not adequately respect that authority, and should be resisted accordingly.

“We recommend that Parliament enact legislation that clearly restores the intended meaning and effect of section 53 and which protects that power from being undermined by judicial review”

52 Mark Elliott, 'Of Black Spiders and Constitutional Bedrock: The Supreme Court's Judgment in *Evans*' Public Law for Everyone Blog (March 26, 2015) (available at: <http://publiclawforeveryone.com/2015/03/26/of-black-spiders-and-constitutional-bedrock-the-supreme-courts-judgment-in-evans/>).

53 See for example: *Jackson v Attorney General* [2006] 1 AC 262 at [102], per Lord Steyn and at [104]-[105], per Lord Hope and *Axa General Insurance Ltd v Lord Advocate* [2011] UKSC 46 at [42]-[52], per Lord Hope. For criticism, see: Richard Ekins, 'Acts of Parliament and the Parliament Acts' (2007) 123 *Law Quarterly Review* 91, Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP, Cambridge 2010), and Tom Bingham, *The Rule of Law* (Penguin, 2011).

Appendix 1: The Freedom of Information (Restoration of Executive Override) Act 2015

A BILL TO

Ensure that the power, subject to Parliamentary accountability, to override the requirements of a decision notice or enforcement notice under the Freedom of Information Act 2000 is exercisable whenever it appears to the accountable person that it would not be in the public interest for the notice to be complied with.

BE IT ENACTED

1. Amendment of s. 53 of the Freedom of Information Act 2000

- (1) Section 53 of the Freedom of Information Act 2000 (exemption from duty to comply with decision notice or enforcement notice) is amended as follows.
 - (2) For subsection (2) substitute—
 - “(2) A decision notice or enforcement notice to which this section applies has no effect if the accountable person in relation to the authority in question issues a certificate stating that there are grounds on which that person has formed the opinion that compliance with the notice would not be in the public interest.
 - (2A) The grounds on which the certificate may be issued may consist of, include or involve any factor that appears to the accountable person to be relevant, even if it is inconsistent with a determination already made (whether by the Commissioner or on an appeal or further appeal arising from a decision of the Commissioner) as to one or both of the following—
 - (a) how the balance between the public interest in the disclosure of the information and the public interest in maintaining an exemption is to be struck in the case in question;
 - (b) the existence, nature or relevance of the factors that are to be taken into account, or have been left out of account, in the striking of that balance.”
 - (3) In subsections (3) and (6), for “gives a certificate to the Commissioner” substitute “issues a certificate”.
 - (4) After subsection (3) insert—
 - “(3A) A certificate under subsection (2) must be signed by the accountable person and is issued by being given to the Commissioner no later than the twentieth working day following the effective date.”
 - (5) In subsection (4), for “subsection (2)” substitute “subsection (3A)”.
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2. Short title and commencement

- (1) This Act may be cited as the Freedom of Information (Restoration of Executive Override) Act 2015.
- (2) This Act applies in relation to any decision notice or enforcement notice made after the passing of this Act.

Appendix 2: Ministerial Vetoes in Comparable Jurisdictions

54 John Wadham, Kelly Harris and Eric Metcalfe, *Blackstone's Guide to the Freedom of Information Act 2000* (5th edition), (Oxford OUP 2013), 32.

55 Freedom of Information Act 1997 (Ireland), section 25(7).

56 The process is set out at sections 32–32C of the Official Information Act 1982 (New Zealand), which replaced the former section 32 (through section 18 of the Official Information Amendment Act 1987).

57 John Wadham, Kelly Harris and Eric Metcalfe, *Blackstone's Guide to the Freedom of Information Act 2000* (5th edition), (Oxford OUP 2013), 31.

58 Section 32A, Official Information Act 1982.

59 Sections 32B and 32C, Official Information Act 1982.

60 See the New Zealand Law Commission's *Review of the Official Information Act 1982* (R40) (Wellington, 1997), 118. For further discussion of the situation in New Zealand see: David Banisar, 'Freedom of Information and Access to Government Records Around the World', *Privacy International* (July 2002), 28–29.

61 New Zealand Law Commission, *Review of the Official Information Act 1982* (NZLC R40, 1997) at 353.

62 In most cases costs of review will lie with the Crown, a fact which may operate deter use of the veto (see section 32B).

63 Freedom of Information (Removal of Conclusive Certificates and other Measures) Act 2009 (Cth).

64 John Wadham, Kelly Harris and Eric Metcalfe, *Blackstone's Guide to the Freedom of Information Act 2000* (5th edition), (Oxford OUP 2013), 31.

65 See the Campaign for Freedom of Information paper, 'The Ministerial Veto Overseas: Further evidence to the Justice 1 Committee on the Freedom of Information (Scotland) Bill' (December, 2001), available at: www.cfoi.org.uk/pdf/vetopaper.pdf.

In Ireland, a ministerial veto power was introduced by section 25 of the Freedom of Information Act 1997 (Ireland). The majority of exemptions from disclosure obligations are subject to a weighing of the public interest. A government department's decision that information should not be disclosed is subject to appeal to the Information Commissioner. A decision of the Information Commissioner is binding, but Ministers are granted a statutory power to issue a certificate ensuring non-disclosure of sensitive information (relating to law enforcement, security or international relations).⁵⁴ Certificates must be reviewed by the Taoiseach (Prime Minister) every six to twelve months.⁵⁵

The freedom of information regime in New Zealand is directed by the Official Information Act 1982. Most statutory exemptions involve a public interest test. The Act provides for the Office of the Ombudsman to review a public body's decision not to disclose information. The Governor-General by Order in Council may override a recommendation made by the Ombudsman,⁵⁶ which in effect constitutes a collective ministerial veto.⁵⁷ The Order in Council must be published in the Gazette and laid before the House of Representatives. It must include reasons and grounds in support of such reasons, which are to correspond to the reasons issued by, or set before, the Ombudsman.⁵⁸ The person making the request may apply to the High Court for review of the Order in Council on certain grounds and may appeal further to the Court of Appeal.⁵⁹ Prior to statutory amendment in 1987, the responsible Minister possessed a wider veto power. This was designed to be used only in rare cases,⁶⁰ however, between 1 July 1983 and 1 April 1987 fourteen vetoes were issued by respective relevant ministers.⁶¹ Use of the power has since declined.⁶²

Under Australian federal legislation – the Freedom of Information Act 1982 – a ministerial certificate could be issued to ensure certain decisions refusing disclosure were not questioned by the Administrative Appeals Tribunal. This veto power was used frequently, with fourteen certificates issued between 1996 and 2007. Following legislative overhaul in 2010, the ministerial veto power was eliminated.⁶³ All exemptions under the 1982 Act are discretionary, however a number of exemptions are class based and information is exempt on this basis without reference to public interest or harm tests (for example, where information falls within the class of Cabinet documents).⁶⁴

Canada did not initially include a veto power in the Access to Information Act 1983. However, the Act was amended by the Anti-Terrorism Act 2001. The amendment allowed the Attorney General to issue a certificate preventing the release of information on grounds of national defence or national security where the Information Commissioner had ordered disclosure. Limited grounds for judicial review are available,⁶⁵ but Cabinet confidences do not fall within the disclosure regime.



The Supreme Court judgment of *Evans v Attorney General* [2015] UKSC 21 is a striking instance of judicial overreach. This paper shows how the judgment compromises the rule of law by undercutting section 53 of the Freedom of Information Act 2000, the ministerial veto. The first majority judgment misinterprets the Act, effectively excising section 53, while the second wrongly override the executive's decision about how best to exercise the powers that Parliament chose to vest in responsible ministers. Whatever one thinks about the merits of the Act – on which this paper takes no view – Parliament's law making choice should have been faithfully applied by the Supreme Court. It was not. After *Evans*, the exercise of the ministerial veto remains vulnerable to legal challenge. This paper recommends that Parliament act swiftly to overturn this wayward judgment and, in so doing, to affirm both the rule of law and its continuing authority to legislate.

“This compelling paper is rigorous and robust in its analysis and expressed in fair and measured terms. My own view is that both majority judgments in *Evans* are not merely mistaken but give rise to a worrying impression of a tendency towards judicial supremacy. I should certainly have joined with Lord Hughes and Lord Wilson in their dissent.”

Lord Brown of Eaton-under-Heywood, former Supreme Court Justice

“This is a brilliant exposure of a quiet but revolutionary change in our constitution: the rise and rise of judicial power.”

Lord Faulks QC, Minister of State for Civil Justice

“This is a stimulating paper describing how a dry exercise on the proper construction of a statutory provision (section 53 of the Freedom of Information Act) has been determined by judicial perceptions – and the authors would say in some cases judicial misconceptions – of the proper relationship between the courts and Parliament under the rule of law.”

Lord Justice Elias, Court of Appeal

“I entirely agree with this excellent paper. In *Evans*, the Supreme Court appears to have invented a constitutional principle by which Parliament cannot confer upon an executive officer, even on a question which concerns the public interest, a power to differ from the decision of a judicial body, or at least not without persuading another court that he is right. It is hard to see how Parliament could have made clearer its intention to confer just such a power or why it should be constitutionally improper to do so.”

Lord Hoffmann, former Law Lord