

Protecting the Constitution

How and why Parliament should limit judicial
power

Richard Ekins

Foreword by Rt Hon Lord Howard of Lympne CH QC



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Protecting the Constitution:

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Foreword

*Rt Hon Lord Howard of Lympne CH QC
Formerly Home Secretary and Leader of the Opposition*

Our country has been blessed with the rule of law for centuries – it is not a recent innovation and long predates the European Convention on Human Rights and the Human Rights Act. But the question is: who should make the law by which we are ruled? Should it be made by elected, accountable politicians, answerable to their constituents and vulnerable to summary dismissal at elections or by unaccountable, unelected judges who cannot be removed?

Judges are rightly secure against removal – the independence of courts is a pillar of the British constitution – and their scrupulous fidelity to law helps make a free society possible. Under the rule of law as it was classically understood, and at least since the Glorious Revolution, it has been Parliament’s responsibility to make the law and the judicial duty to adjudicate disputes about the law. Ministers of the Crown are subject to the will of Parliament and the law of judicial review, but judges should recognise that ministers have a duty to govern in the public interest and should not disarm them from exercising powers that Parliament has chosen to confer.

This constitutional scheme has been under strain for some time. The enactment of the Human Rights Act was significant, for it encouraged judges to shrug off traditional limits on their jurisdiction, to second-guess Parliament and confidently assert a general entitlement to address political questions. In the Gina Miller Article 50 case and its recent prorogation judgment, the Supreme Court purports to take up a new place in the constitutional hierarchy, able to intervene in parliamentary politics and boldly make new law in the process. This is not a happy state of affairs; it is a constitutional problem which must be tackled by our new Parliament and Government.

The difficulty for parliamentarians has often been that while many sense uneasily that an ascendant judiciary is bad news for democracy and the rule of law, they have not been readily able to identify the problem or to articulate policy proposals in response. Policy Exchange’s Judicial Power Project has for the past five years been doing vital work in exposing this far-reaching change in how we are governed and in authoritatively and incisively critiquing judicial excess. In this paper, the Project’s head, Professor Richard Ekins, outlines a coherent, thoughtful programme of action which, if adopted by Parliament, promises to restore the balance of the constitution.

The Government should work with other European countries to address

the problem that the European Court of Human Rights often interprets the Convention in surprising ways. If this proves impossible, the Government should certainly consider not complying with judgments of the Strasbourg Court which brazenly go beyond the Convention's terms. Likewise, the Government and Parliament should not meekly outsource responsibility for balancing rights and freedoms, for securing the common good or protecting national security, to the courts. Parliament may need to legislate to reverse judgments that unsettle constitutional fundamentals, including parliamentary sovereignty. It should certainly amend the Human Rights Act to minimise the damage it does.

This paper is a powerful argument for how and why parliamentarians should act to limit judicial power and vindicate parliamentary democracy and the rule of law. It hardly needs saying that most of its recommendations are highly controversial and I do not agree with all of them. But I strongly recommend it as an important contribution to the necessary debate on this most fundamental of issues.

Rt Hon Lord Howard of Lympne CH QC, formerly Home Secretary and Leader of the Opposition

Executive summary

The rise of judicial power in the UK in recent years is a striking change in our constitutional arrangements – in how we are governed – a change that threatens good government, parliamentary democracy, and the rule of law. The expansion of judicial power is a function both of Parliament’s decision to confer new powers on courts, most notably by enacting the Human Rights Act 1998, and of the changing ways in which many judges, lawyers and scholars now understand the idea of judicial power. Parliament is responsible for maintaining the balance of the constitution and should restate limits on judicial power, restoring the political constitution and the common law tradition.

The Government has been elected on a manifesto commitment “to look at the broader aspects of our constitution: the relationship between the Government, Parliament and the courts”, to “update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government” and to “ensure that judicial review ... is not abused to conduct politics by another means or to create needless delays.” The Government intends to set up a Constitution, Democracy & Rights Commission to “examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates”. This reform agenda is underspecified but perfectly proper.

This short report, which was conceived and almost entirely written before the 2019 General Election campaign, outlines measures that the Government, with the support of Parliament, should consider taking to restore the proper constitutional role of the courts.

Working closely with Parliament, the Government should:

- Legislate to reverse the effects of the Supreme Court’s recent prorogation judgment, restoring the non-justiciability of key prerogatives and vindicating the political constitution.
- Affirm parliamentary sovereignty and stand ready to respond to attempts to undermine it.
- Review the scope of judicial review and legislate to limit it where appropriate, reversing the effects of particular judgments by legislation when necessary.
- Exercise existing ministerial powers in relation to judicial appointments, rejecting or requesting reconsideration of candidates where there are doubts about their suitability.

- Legislate to increase ministerial involvement in judicial appointments.
- Amend the Constitutional Reform Act 2005 to rename the Supreme Court the Upper Court of Appeal and, more importantly, to specify that the Court's function is to adjudicate disputes about law and not to serve as the guardian of the constitution.
- Recognise that modern European human rights law is not necessary to protect rights, but may in fact endanger good government and the rule of law.
- Aim to take back control from the European Court of Human Rights by:
 - i. Proposing a new protocol to the European Convention on Human Rights permitting member states to make reservations to interpretations of the Convention by the European Court of Human Rights; and
 - ii. Unless and until such a protocol is agreed, considering not complying with select judgments of the European Court of Human Rights that brazenly depart from the terms of the European Convention on Human Rights.
- Decline to accept that it is unconstitutional to act in ways that are lawful in domestic law and yet are inconsistent with judgments of the European Court of Human Rights.
- Amend the Human Rights Act 1998 to address and to limit its misuse by UK judges, which would involve amendments to:
 - i. Limit its application to events that arose after 1 October 2000 and to limit its extra-territorial application;
 - ii. Forbid UK courts from finding legislation or government action incompatible with the Act if or when the case would fall within the UK's margin of appreciation or if the European Court of Human Rights has not found an incompatibility in closely analogous circumstances;
 - iii. Protect secondary legislation as well as primary legislation from invalidation by reason of alleged rights-incompatibility; and
 - iv. Prevent misinterpretation of other legislation.
- Reject the idea that there is or should be a constitutional convention that obliges Parliament to change any law declared to be rights-incompatible.
- Review and reform retained EU laws that may confer too much power on domestic judges, and make ministers and Parliament, not courts, responsible for changing retained EU law.

Introduction

The courts have a vital place in the UK's constitutional order. We rely on independent judges to apply the law impartially in adjudicating disputes, including disputes between government and citizen. However, in the last three decades the power of courts has grown inexorably. In 2019, Lord Sumption traced the rise of judicial power in the BBC Reith lectures, entitled "Law and the Decline of Politics" (now published as *Trials of the State* (Profile Books, 2019)). Since its foundation in early 2015, Policy Exchange's Judicial Power Project has drawn attention to this trend, and has argued that it puts the balance of the Westminster constitution in doubt, threatening democracy, good government and the rule of law. The Project has argued further that judges should resist the twin temptations to depart from settled law and to address political questions. And that matters have reached the point where Parliament has a responsibility to step in to restore the constitutional balance.

The rise of judicial power in the UK has been a function in part of political choices to confer new powers and responsibilities on domestic courts and to accept the jurisdiction of foreign courts and in part of the way in which many judges, lawyers and scholars have come to understand the idea of judicial power itself. The problem is not confined to European courts. Even after the UK leaves the EU the problem of over-mighty courts will remain. The UK will remain a signatory to the European Convention on Human Rights (ECHR) and thus subject to the jurisdiction of the European Court of Human Rights. The Human Rights Act 1998 introduces the ECHR, and the case law of the European Court of Human Rights, into our domestic law and also implicates our own courts in political controversy. Parliament must confront squarely, and take responsibility for, the consequences of this legislative choice.

Restoring the constitutional limits on judicial power requires reform of our human rights law. But the problem is clearly wider than human rights law alone, as the Supreme Court's recent prorogation judgment illustrates. The wider problem is a loss of confidence in our traditional political constitution and a resulting willingness on the part of some judges – not all – to abandon settled law and to take over political questions. This is sometimes rationalised on the ground that the Supreme Court is the guardian of the constitution and should act to prevent executive dominance and protect democracy. This line of reasoning is badly mistaken. The courts have the duty to uphold the law, including constitutional law. But the constitution's guardians are not the courts. Its guardians, as Blackstone said several centuries ago, are parliamentarians, who should

act now to guard the constitution from judicial overreach, and from the instabilities and threats to good governance that result from that overreach. Parliament's duty is to depoliticise the courts, to prevent litigation from becoming politics by other means, and to protect the courts from political controversy.

This short report outlines how Parliament and the Government should act to restore the constitution, restating the traditional limits on judicial power and in this way vindicating the rule of law and parliamentary democracy. The first part of the report considers challenges that arise in the context of "ordinary" public law and sketches legislation and policy that might help to restore the traditional understanding of the constitutional role of the judge, an understanding that is a combination of the common law with the constitutional settlement established in 1689, a settlement that included express limitation of the power of the courts. The report recommends enactment of legislation – which might be termed a Constitutional Restoration Act – to wind back the Supreme Court's prorogation judgment, restore other limits on the scope of judicial review, restore a measure of political control over senior judicial appointments, and reform the Supreme Court's institutional structure to minimise the risks of judicial overreach. The final part of the report considers the related problem of human rights law reform, as well as the problem of retained EU law. The report recommends a series of legislative changes to the Human Rights Act and policy changes in relation to membership of the ECHR which would help restore the balance of the constitution. It also briefly addresses how and by whom retained EU law should be changed.

This programme of constitutional reform and restoration will be welcomed by many judges, who recognise the risks to judicial independence and the integrity of the judicial process that arise when courts are invited or required to address political questions which should not be for them to decide. Parliament should protect our judges – and the vital contribution they make to the rule of law – by legislating responsibly to affirm traditional limits on judicial power. In acting in this way, far from imperilling judicial independence, Parliament would be supporting their constitutional role.

Nonetheless, any exercise of parliamentary responsibility in this domain will inevitably be criticised as an attack on judicial independence, as the reception of the relevant part of the Conservative Party's manifesto, and Queen's Speech, confirms. The criticism is unwarranted and must be firmly resisted. Disagreeing with a judgment is not an attack on judicial independence; neither is there anything at all improper about Parliament deciding to unwind the recent expansion of judicial power. It must be open to Parliament to reconsider those past political choices that have conferred new responsibilities on courts or permitted them to address political questions. Likewise, it must be open to Parliament, without personal criticism or rancour, to consider how some judges have come to understand their constitutional role and, in some cases, to choose to legislate in response.

Parliament should take seriously its responsibility for maintaining the balance of the constitution. This report outlines ways in which parliamentarians should act to limit judicial power and thereby help to restore the political constitution and the common law constitutional tradition. This restoration will not be complete without changes in legal culture, until judges and lawyers recognise the proper constitutional role of courts. Many judges still adhere to the traditional understanding. Part of the point of parliamentary scrutiny and, where appropriate, action would be to encourage and strengthen this judicial self-understanding and to frame how other judges understand their role. Judges and parliamentarians are not and should not be rivals. In considering when and whether to act, Parliament should strive to avoid encouraging, or provoking, judges to think otherwise. Likewise, parliamentary action to vindicate the political constitution should strive to be bipartisan. Scepticism about political litigation and confidence in parliamentary government has long spanned the political divide and parliamentarians should aim to keep this shared tradition alive or to revive it.

The rise of political litigation and the Case of Prorogation

Many in public life are increasingly willing to turn to the courts in order to seek political advantage. In some cases, litigation amounts to politics by other means. This is routinely the case in the human rights law context where claimants invite the courts to second-guess the merits of primary or secondary legislation or government policy and then to misinterpret or denounce legislation or to quash policy as unlawful. But it is also increasingly the case outside the human rights law context, with courts invited to extend the law of judicial review or to interpret legislation in surprising ways in order to extend the authority of courts in relation to questions otherwise left to politics.

In the first Gina Miller case, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, the Supreme Court ruled that fresh legislation had to be enacted before the Government could trigger Article 50 and begin the process of the UK leaving the EU. The Court reasoned that the decision to trigger Article 50 was simply too important not to be made by way of Act of Parliament, rather than by a Government which enjoyed the confidence of the House of Commons and acted with support of a resolution of the House of Commons (not to mention the support of a clear majority in a referendum authorised by an Act of Parliament enacted by overwhelming majorities in both Houses of Parliament). In this way, the Supreme Court simply enforced its own view of what good constitutional practice consisted in, introducing a new legal obstacle to exiting the EU. The obstacle thus created by the Court, without real support in pre-existing law and against the logical structure of the European Communities Act 1972, was easily cleared by Parliament. But it was not for the Court to introduce such an obstacle. Lord Reed in dissent rightly warned the majority that “the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary”. The silver lining of the *Miller (No 1)* judgment was that the Supreme Court refused to rule that triggering Article 50 engaged or breached the Sewel Convention, despite its recognition in the Scotland Act 2016. The Supreme Court held that courts were “neither the parents nor the guardians of constitutional convention”.

But the Supreme Court shrugged off this limitation in *Miller (No 2)* [2019] UKSC 41, inventing a radically new legal control on the prerogative power to prorogue Parliament. The Court sought to obscure that it had made new law, asserting, quite misleadingly, that it was simply

applying settled principle and policing the boundaries of the prerogative power, rather than reviewing how it had been exercised. But the Court's central reason for intervening was that the prorogation had an "extreme effect upon the fundamentals of our democracy". This was nothing but a political evaluation. It was highly contestable, and overstated, but more to the point it provided no legal ground whatsoever for judicial action. The judgment invites further litigation in response to any future prorogation – and to a wide range of governmental ("executive") action not fully authorised in advance and in detail by statute – which will require courts to decide whether the Prime Minister has a good enough reason for advising Her Majesty to prorogue Parliament – or take other action. This is obviously not a legal test.

In quashing the Prime Minister's advice to Her Majesty and the prorogation that followed, the Supreme Court breached Article 9 of the Bill of Rights 1689. The Court evaded this statutory prohibition by reasoning that prorogation was not a proceeding in Parliament – despite it literally being a proceeding carried out in Parliament, which each House of Parliament records. The consequence of the judgment was that the parliamentary authorities retrospectively amended their records and even ruled, prematurely, that the Parliamentary Buildings (Restoration and Renewal) Bill which had received royal assent at the time of prorogation and had thereby become an Act was not after all an Act of Parliament. The Supreme Court's judgment will be relied on to challenge other acts of the Crown, including in relation to Parliament, and will be relied upon to extend judicial power over other prerogatives. If or when the Fixed-term Parliaments Act 2011 is repealed, and if the prerogative power of dissolution of Parliament is restored, the exercise of this prerogative would certainly be vulnerable to judicial challenge. Further, the Supreme Court's reasoning encourages later courts to treat vague constitutional principles as grounds for bold new judicial intervention into the political domain. The Court's complete failure to justify overthrowing the distinction between political convention and justiciable law that it had reaffirmed in *Miller (No 1)* destabilises both the constitution and the discipline essential to adjudication. The whole judgment is an affront to the political constitution; it promises to do considerable further damage to the rule of law.

Some jurists say that the recent judgment cannot be an objectionable assertion of judicial power because it aims to vindicate the rights of Parliament. But in fact the judgment simply hands victory to one side of a political controversy, the proper forum for the resolution of which, in our tradition, has always been Parliament and the electorate. The Supreme Court's intervention was a landmark victory for political litigation in which the Court yielded to the temptation to superintend the political process, to make new law to quash what was otherwise a perfectly lawful – if politically controversial – action on the part of the Government. In so doing, the Court made bad law, which is unclear and not fit to be applied by subsequent courts, and overruled the courts below – the Divisional Court in England and the Outer House of the Court of Session in first

instance in Scotland – that had faithfully upheld the law and refused to address a political question not for courts.

The Case of Prorogation is a watershed. Parliamentarians should not quietly tolerate the Supreme Court’s invention of new law and rupture of the political constitution, not least since the Court’s reasoning threatens to unsettle our constitutional law more generally. The Attorney General and Prime Minister, amongst others, were quite right to make clear that while they respected the Court and its Justices they disagreed strongly with the Court’s reasoning. Likewise, it is encouraging that the Public Administration and Constitutional Affairs Committee moved swiftly to hold an inquiry into the judgment and its implications for our constitution. Parliament should act to minimise, or unwind, the damage the judgment risks inflicting on our law and constitution. Parliament may also consider imposing legal limitations on prorogation, but it should not yield to judicial fiat. Importantly, unwinding the judgment requires more than legislating about prorogation, for the judgment’s wider reasoning – about justiciability, constitutional principle, and prerogative – is the problem. Therefore, it is important for legislation to overturn this reasoning.

Parliament should enact legislation, either in the course of repealing and replacing the Fixed-term Parliaments Act or in the form of a separate Constitutional Restoration Act, in order to:

- Make clear that Article 9 of the Bill of Rights applies to acts of the Crown in relation to Parliament, including prorogation and dissolution, and including ministerial advice to Her Majesty in relation to such action.
- Reverse the Supreme Court’s judgment (and the judgment of the Inner House of the Court of Session), providing that the judgment is of no authority and cannot be relied upon in any UK court of law (thereby restoring the limits on justiciability upheld by the Divisional Court in England and the Lord Ordinary in Scotland), and setting out a (non-exhaustive) list of prerogative powers (including dissolution when the Fixed-term Parliaments Act is repealed) that are non-justiciable and cannot be questioned or quashed in any court.
- Deem the 2017-2019 parliamentary session to have begun and finished on dates specified in this legislation, rather than by reason of judicial order, and deem the Parliamentary Buildings (Restoration and Renewal) Bill to have received royal assent on 10 September, 2019.

The threat to parliamentary sovereignty

Parliamentary sovereignty is the fundamental legal rule of our constitution – the Queen-in-Parliament may enact any law, save that it may not bind its successors. The Divisional Court and the Supreme Court rightly affirmed the rule in strong terms in *Miller (No 1)*. While the Supreme Court did likewise in *Miller (No 2)*, in fact it adopted and applied a highly unorthodox understanding of parliamentary sovereignty, which was a device (as the Divisional Court clearly saw) to rationalise unprecedented judicial intervention into the relationship between the Crown and the Houses of Parliament. This account of parliamentary sovereignty did not in *Miller (No 2)* displace the traditional, venerable understanding of the doctrine, but it introduces a destabilising confusion about fundamentals.

More worrying still, there are reasons to doubt judicial fealty to parliamentary sovereignty. Lady Hale, the President of the Supreme Court, has at times relied on the continuing force of parliamentary sovereignty to fend off criticism about the ongoing expansion of judicial power. But she and other senior judges have also openly questioned parliamentary sovereignty in high-profile judgments and in extra-judicial speeches. In a judgment handed down on 15 May this year, *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, three judges, including Lady Hale, asserted that in a future case they might openly refuse to uphold and to give binding legal effect to an Act of Parliament that was clearly intended to limit or to prevent judicial review. This course of action would be revolutionary – it would be an attempt by judges to unravel or to overturn the legal foundation of our parliamentary democracy – and should not be tolerated.

This is not the first time such assertions have been made: see also a number of dicta in *R (Jackson) v Attorney General* [2005] UKHL 56 and extra-judicial speeches by a number of other senior judges. The rationale put forward in *Privacy International* and *Jackson* (in each case by a minority of judges) is that “the rule of law” is now the foundation of the constitution and displaces parliamentary sovereignty. This is not a legal argument, as the late Lord Bingham (the leading judge of his generation) firmly recognised. In defying the settled law of the constitution, judicial action of this kind would turn the rule of law on its head.

Open judicial defiance of Parliament should be resisted forcefully. However, it is much more likely that some judges will pay lip service to parliamentary sovereignty while failing in practice to give effect to

legislation, deliberately misinterpreting Parliament's enactments to mean something that Parliament clearly did not intend. Three judges of the Supreme Court did exactly this in *R (Evans) v Attorney General* [2015] UKSC 21, misinterpreting the ministerial override power carefully and explicitly enacted in the Freedom of Information Act 2000 in such a way that it became almost impossible to exercise. Only some judges are willing to interpret statutes in this way – many judges rightly take this to be unlawful. When a majority of a Supreme Court panel next misuses its authority to undermine an Act of Parliament, the Government should respond by criticising the Court's reasoning and taking steps to prevent this reasoning from undermining the rule of law and Parliament's lawful authority.

The Government and Parliament should:

- Make clear that they understand that parliamentary sovereignty remains legally fundamental and that the courts have no lawful authority to question it.
- Commit to responding decisively to any refusal by a court to give binding effect to legislation, including by legislating to quash any purported judgment to this effect.
- Take note of judgments in which the courts clearly misinterpret statutes to mean something that Parliament did not intend, including *R (Evans) v Attorney General*, and legislate to reverse such misinterpretation (for example, restoring the ministerial veto in section 53 of the Freedom of Information Act).

The grounds and limits of judicial review

In the last thirty years, as Lord Sumption's Reith lectures make clear, the scope of judicial review has been sharply extended so that many questions that would formerly have been for ministers to decide, and for which they would be accountable to Parliament, are now open to challenge by way of litigation. Recent examples include *Miller (No 2)*, in which as noted the Supreme Court quashed the government's advice to Her Majesty to prorogue Parliament and all the effects of that advice, *R (UNISON) v Lord Chancellor* [2017] UKSC 51, in which the Supreme Court quashed the government's exercise of its statutory power to set employment tribunal fees, *Miller (No 1)*, in which the Court invented a limit on the government's power to exit from a treaty and thus the government's conduct of foreign policy, and, again, *R (Evans) v Attorney General* [2015] UKSC 21, in which two other judges chose to quash the Attorney General's exercise of his statutory power to decide whether disclosure of information was in the public interest, displacing the statute's scheme for political responsibility and parliamentary accountability.

None of these examples involve human rights law. The development and elaboration of the "ordinary" law of judicial review has been led by judges rather than chosen by Parliament. In developing the law of judicial review, judges have at times been influenced by the model of European courts, which departs from our traditions of parliamentary government and common law reasoning. The Government must of course comply fully with any judgment of our courts. However, neither Parliament nor the Government should accept the constitutional legitimacy of the wider trend of subjecting policy-formation to judicial rule, especially in relation to domains that are essential to maintaining the UK as an independent state, domains which include foreign policy, military action, border control, and immigration. Parliament should stand ready to legislate to restore the limits of judicial review understood by judges in past generations.

Parliament should consider whether to legislate to put the law of judicial review on a statutory footing, specifying the grounds of judicial review and its limits. Other common law countries, including Australia and the United States, have legislation to similar effect. Such legislation is no panacea, for of course much turns on how it is framed and, especially, how it is received. Still, legislation – general or particular – may be necessary precisely because courts may otherwise continue to expand the grounds of review and second-guess otherwise lawful decisions. In a series of cases,

the Supreme Court has openly mooted introducing proportionality as a general ground of review. This would transform the law of judicial review and has been heavily criticised by some leading judges and scholars. It would be wrong for the Court to make law in this way. It would be perfectly proper for Parliament to make this clear in advance.

The Supreme Court's judgment in *R (Cart) v Upper Tribunal* [2011] UKSC 28 departed from the terms of the Tribunals, Courts and Enforcement Act 2007 and invited much judicial review of decisions of the Upper Tribunal, which is a superior court of record. This judgment was unjustified in principle and has generated a great deal of otherwise unnecessary litigation; it should be reversed by statute. Likewise, the Supreme Court's prorogation judgment collapses long-standing limits on the idea of justiciability in general and of the exercise of prerogative powers in particular. It also relies on constitutional principles such as parliamentary accountability, which had never otherwise been grounds for judicial review, as grounds for judicial intervention in high politics. The judgment should be reversed by statute in order that the pre-existing limits on judicial power may be restored.

The Government and Parliament should:

- Review the extent and consequences of judicial interference with policy-formation, effective government and political responsibility and its changing scope over time.
- Consider legislating to put the law of judicial review on a statutory footing, restoring the principled limits on judicial review understood by an earlier generation of judges (and thus protecting political responsibility and policy-making freedom) and specifying inter alia that proportionality is not a general ground of review.
- Reverse particular Supreme Court judgments that distort the law of judicial review, including *Cart* (bringing to an end the liability of decisions of the Upper Tribunal to judicial review) and *Miller (No 2)* (restoring the non-justiciability of prerogatives, including prorogation and dissolution, which may be restored if or when the Fixed-term Parliaments Act is repealed, that are central to the operation of the political constitution).

Judicial appointments and Supreme Court structure

The judiciary is divided in its enthusiasm for a new, expansive judicial role. The membership of the Supreme Court is changing radically in the next few years and the dispositions and philosophy of senior judges will be very important in determining the future of our constitution. It would be a bad mistake to politicise judicial appointments. The answer to the expansion of judicial power is to restore principled limits not tacitly to legitimate and encourage that expansion by selecting judges on overtly political grounds. However, the Government, accountable to Parliament, has a responsibility to attempt to secure sound appointments to senior judicial office. There is now too much judicial influence over senior judicial appointments – it is only a slight exaggeration to say that senior judges are appointing other senior judges. The Lord Chancellor should be more actively involved in judicial appointments: meaningful ministerial involvement in the selection of senior judges will inject – or rather, restore – an important measure of accountability and legitimacy.

The Lord Chancellor has the final say over whether to appoint the candidate for a top senior vacancy recommended to him by a selection commission. Previous Lord Chancellors have been reluctant to exercise their right to reject or request reconsideration of a candidate where there have been doubts about whether that person is the best for the post.

The Government should:

- Stand by a Lord Chancellor who is confident in exercising his or her right to reject or request reconsideration of candidates recommended by a commission.
- Introduce legislation requiring the relevant selection commissions to provide the Lord Chancellor with a short-list of three names for senior judicial vacancies.

There are reasons to fear that the Supreme Court has begun to understand itself to be a constitutional court, with a responsibility to serve as the guardian of the constitution. The Court has been invited to play this role and to some extent has accepted the invitation, with damaging consequences for the rule of law and the integrity of the political constitution. In *Privacy International*, the three Supreme Court Justices who questioned parliamentary sovereignty reasoned partly from section 1 of

the Constitutional Reform Act 2005 (the Act that established the Supreme Court), which provides that nothing in the Act is intended to detract from the existing constitutional principle of the rule of law. This line of reasoning is unpersuasive but revealing. Taken together with the Miller (No 2) judgment it suggests that there is now good reason to consider more comprehensive institutional reform, in addition to the legislative changes suggested elsewhere in this report.

Until 2009, our highest court was the Appellate Committee of the House of Lords. The Supreme Court is its successor and there is much continuity between the two institutions. However, the Supreme Court's institutional separation from Parliament and the symbolism of its name and developing public profile may be significant. There is a case to be made for repealing Part 3 of the 2005 Act and restoring the jurisdiction of the Appellate Committee of the House of Lords. If appeals against judgments were reviewed, in the words of section 4 of the Appellate Jurisdiction Act 1876, before Her Majesty the Queen in her Court of Parliament, it might be much less likely that the UK's apex appellate court would mistake its position in relation to the Houses of Parliament. However, it would in practice be difficult to restore what has been lost. While Parliament might reasonably consider such a thorough-going restoration, a more practical alternative may be to amend the 2005 Act in order to temper the Supreme Court's emerging sense of mission.

Parliament should enact a Constitutional Restoration Act that would:

- Rename the Supreme Court the Upper Court of Appeal in order better to indicate the Court's function and to address the symbolism of constitutional primacy;
- Specify that the Upper Court of Appeal's responsibility is to adjudicate disputes in accordance with law and that the guardians of the constitution are Parliament and the electorate; and
- Limit the Upper Court of Appeal's jurisdiction to questions involving matters of general *legal* importance rather than public importance *simpliciter*.

Human rights law reform

The human rights law complex is an engine driving judicial interference with parliamentary democracy and responsible government. The complex consists of the European Convention on Human Rights (ECHR), which is overseen by the European Court of Human Rights (ECtHR), and the Human Rights Act 1998 (HRA), which incorporates the ECHR into our domestic law. The UK's subjection to the jurisdiction of the ECtHR distorts our system of parliamentary government; the enactment of the HRA distorts our ordinary law, inviting litigation to become politics by another means.

The problem is not the ECHR as adopted by the states in 1950, but the ECHR as it has been remade by the ECtHR over recent decades – the Court openly asserts a power to change and update rights over time. The ECtHR's lawmaking jurisprudence has distorted policy-formation and armed claimants to obstruct state action including in relation to immigration, border control and military action.

The HRA has made the case law of the ECtHR loom large in our domestic law and has changed judicial culture. The risk that human rights litigation will become politics by another means is made clear by the recent case of *R (Joint Council for the Welfare of Immigrants) v Home Secretary* [2019] EWHC 452 (Admin). The High Court accepted the application by a coalition of landlords and immigration activists for an order denouncing the government's "right to rent" policy, which had legislative force by way of the Immigration Act 2014, as incompatible with convention rights. The point of the litigation was to put political pressure on the government to abandon its policy, the merits of which should be for the political process to decide. Extraordinarily, the High Court (of England and Wales no less) also chose to prevent the government from exercising its statutory power to bring the legislation into force in Scotland and Northern Ireland.

Human rights litigation can result in the misinterpretation of primary legislation or in its denunciation on political grounds. In other cases, courts simply quash secondary legislation, such as statutory instruments. The risk that secondary legislation will be quashed, because a court concludes it is unjustified, undermines legal certainty. In *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57 a majority of the Supreme Court simply quashed rules linking entitlements to student loans to lawful residence in the United Kingdom. In this ruling the Supreme Court went beyond what the ECtHR would itself have required, with the majority misusing the HRA to force the government to adopt a more generous policy of student loan entitlement for non-citizens.

The Government should propose, and Parliament should support and require, a programme of human rights law reform, the point of which would be to address the damage that the UK's subjection to the jurisdiction of the ECtHR and the enactment of the HRA has done, and risks doing, to the balance of our constitution. Parliament should recognise that the UK's parliamentary democracy and common law tradition as it existed right down until 2000 (when the HRA came into force) proved very capable of protecting rights and freedoms – modern (European) human rights law is not necessary to this end and is often a hindrance to good government and a danger to the rule of law. Any reforms ought to be judged by the extent to which they restore principled limits on judicial power and thereby serve to vindicate parliamentary democracy and the rule of law.

- 1. Parliament should commit to taking back control not only from the Court of Justice of the EU (CJEU) but also from the ECtHR.** This commitment would not necessarily entail withdrawal from the ECHR, but would not foreclose withdrawal as an option if it does not otherwise prove possible adequately to restore our law and democracy.
- 2. Before moving to withdraw from the ECHR, the Government should propose a new protocol to the ECHR, which would permit member states to make reservations in relation to particular ECtHR interpretations.** The UK, like other member states, has undertaken to abide by decisions of the ECtHR to which it is a party (Article 46, ECHR). This undertaking is vitiated by the ECtHR's willingness to treat the ECHR as a "living instrument" and thus to transform its meaning over time. A new protocol, permitting reservations to particular interpretations, would reconcile submission to the ECtHR's jurisdiction, and duty to compensate successful parties, with the member state's right to be free from interpretations of the ECHR that depart from its original public meaning.
- 3. Unless and until such a protocol is agreed, at least in cases where important UK interests are in play, the next government should consider not complying with the ECtHR's misinterpretation of the ECHR.** Neither the Government nor Parliament should accept that as a matter of domestic constitutional law or principle it is obliged to change the law to conform to judgments of the ECtHR that brazenly depart from the agreed terms of the ECHR. Whether to conform to such judgments is a question of foreign policy. The UK should be willing not to comply with such judgments, especially judgments that compromise important freedoms that UK authorities (and the British people) ought to be able to exercise. The UK has done this, in effect, in relation to prisoner voting (defying

Hirst v United Kingdom [2005] ECHR 681); there is good reason to do the same in relation to military action (defying *Al-Skeini v United Kingdom* [2011] 53 EHRR 18) and perhaps other domains too. This course of action would risk political conflict, although as with prisoner voting the Government should strive vigorously to defend the UK's position before the Committee of Ministers. It would be justified on the grounds articulated in judgments of some of our most senior judges, before the Brexit referendum, in the context of the CJEU's misuse of jurisdiction. (In *R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport* [2014] and *Pham v Home Secretary* [2015] UKSC 19, Lord Mance outlined grounds on which the Court might refuse to give effect to judgments of the CJEU that either (a) compromised fundamentals of the UK constitution or (b) flouted the Treaties of the EU, such that the CJEU was acting outside its jurisdiction.) This is now largely of historic importance only, but it provides a sound template for engagement with the ECtHR, which it is easier, as a legal and practical matter, to resist. The risk of UK non-compliance might well temper the willingness of the ECtHR, a highly political court, to overreach.

4. **Relatedly, neither the Government nor Parliament should accept that it is unconstitutional for ministers or civil servants to act in ways that would place the UK in breach of its international obligations, including treaty obligations to conform to EU law (including any post-Brexit treaty with the EU), to the ECHR, or to any other treaty.** It would often be wrong for the UK to act in this way but the question of when and whether this is the case requires and permits political judgement and responsibility, for which ministers need confidential advice constrained only by basic ethics and by domestic law and settled constitutional conventions as distinct from international law, and are then accountable to Parliament and the people. Without a commitment to this end, the UK will inadvertently have surrendered its constitutional tradition – especially the legislative freedom which parliamentary sovereignty is intended to secure – by abdicating self-rule to international bodies.
5. There is a strong case for repealing the HRA altogether, which Parliament ought to recognise. However, it may well be prudent to delay repeal, for the time being, in view of recent constitutional instability and, in particular, in order to avoid placing further stress on the territorial constitution. In the meantime, **Parliament should amend the HRA to limit the extent to which it undermines the constitutional balance.** Some of these changes address problems in the original scheme of the Act, whereas others are required to reverse some ways in which our courts have misconstrued the Act over the twenty years since its enactment.

- In particular, **the HRA should be amended to restore its temporal scope** – making clear that it does not apply to events that pre-date the Act – **and its spatial scope** – making clear that it does not generally apply outside the UK. This would restore the intended scope of the Act, long recognised by our senior judges but undone in recent judgments. Both changes are necessary to help protect UK forces from abuse in the courts.
- **The HRA should also be amended to prevent its misuse as a vehicle for expanding the power of domestic courts, as distinct from the ECtHR.** The Act should be amended to specify that it does not apply if and to the extent that it concerns matters that fall within the UK’s margin of appreciation. In cases and domains where, by reason of that “margin of appreciation”, the ECtHR would not find government policy or parliamentary enactment in breach of the ECHR, it should be impossible for our courts to find that policy or enactment rights-incompatible and to quash, denounce or distort it accordingly. Relatedly, the Act should be amended to specify that UK courts cannot find an incompatibility with convention rights unless the ECtHR has found such an incompatibility in closely analogous circumstances.
- **The HRA should be amended to protect subordinate legislation, as well as primary legislation, from invalidation on the grounds of incompatibility with convention rights.** This would discourage political litigation retrospectively to impugn the lawmaking choices of responsible authorities, helping uphold settled law and protecting the rule of law.
- **The HRA should be amended to prevent its misuse to misinterpret other legislation** – section 3 should be amended to specify that it does not authorise courts, or anyone else, to read and give effect to legislation in ways that depart from the intention of the enacting Parliament. This would help restore the stability of the statute book and avoid litigation being a means to unsettle the legal meaning and effect of legislation.
- **The HRA might also be amended to make clear, on the face of the Act, that a judicial declaration of incompatibility, per section 4, does not require, de facto, amendment of the law in question.** In addition, and in any case, both the Government and Parliament should make it clear that they do not accept that there is a constitutional convention that either the Government or Parliament ought to respond to a judicial declaration that legislation is rights-incompatible by changing the law in order to avoid the alleged rights-incompatibility. **Whether legislation ought to be amended or repealed must remain a question for Parliament itself freely to decide.**

Retained EU law

The European Union (Withdrawal) Act 2018 retains most EU law after Brexit, with the welcome exception of the EU Charter of Fundamental Rights. However, the penetration of UK law by EU law has been decades long in the making and has resulted in some serious inroads into the rule of law, both directly, by way of the content of EU law and the role it requires judges to perform, and indirectly, by encouraging problematic common law developments. Reforming retained EU law, by way of primary and secondary lawmaking powers, would help restore the common law tradition and the rule of law.

The Government and Parliament should:

- Review the detail of retained EU law (and the terms of the 2018 Act) and commit to amending it where necessary to limit judicial power, including to avoid the prospect of litigation that would require judges to decide effectively political questions.
- Legislate to reverse any judicial attempts to replicate problematic EU law doctrines in the common law, including attempts to introduce a general principle of proportionality in judicial review.

Section 6(4) and (5) of the 2018 Act authorise the Supreme Court and the High Court of Justiciary, but not other courts, to depart from retained EU case law by applying the same test as they would apply in deciding to depart from their own case law. This section was intended to empower domestic institutions in the wake of the UK's departure from the EU. However, it may undermine the rule of law by encouraging the Supreme Court to choose to change retained EU law, choices which should be for ministers and Parliament themselves to make.

Clause 26 of the European Union (Withdrawal Agreement) Bill, introduced to the House of Commons on 19 December 2019, would amend section 6 of the 2018 Act to authorise ministers by regulation to make provision for other courts not to be bound by retained EU case law and to specify considerations relevant to when courts, including the Supreme Court, should depart from retained EU case law. If this lawmaking power is intelligently exercised, it might result in a minimisation of the extent to which UK courts exercise a free-wheeling lawmaking power. However, there is a strong risk of provoking conflict with the courts about the scope of their authority to depart from retained EU law. It would arguably be better to repeal section 6(4) of the 2018 Act and thus to prevent any

UK court, including the Supreme Court, departing from retained EU law, which would restore to ministers and Parliament responsibility for deciding whether to change the law.

Parliament should:

- Consider carefully whether clause 26 of the Bill is justified and consider in the alternative whether simple repeal of section 6(4) of the 2018 Act is preferable.



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