

The Limits of Judicial Power

A programme of constitutional reform

Richard Ekins

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Contents

About the Author	4
Introduction	7
The context	8
Human rights law	10
Membership of the ECHR and the UK's relationship to the ECtHR	10
Reform of domestic human rights law	14
Judicial review	16
General changes to the law of judicial review	16
Clarifying the limits on judicial review in particular contexts	17
Procedural changes to the law of judicial review	19
Future legislative change	20
Judicial appointments	21

Introduction

Parliament and Government have a responsibility to maintain the balance of powers within our constitution. The Government should adopt a programme of constitutional reform that will restate and buttress the traditional limits on judicial power. This short paper outlines such a programme of action. It begins by noting the broad context in which questions about the scope of judicial power now fall to be considered, before setting out changes that should be made in relation to human rights law, judicial review, and judicial appointments.

The context

In the 2019 General Election, the Conservative Party campaigned on a manifesto commitment 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. We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays. In our first year we will set up a Constitution, Democracy & Rights Commission that will examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates.

The Constitution, Democracy & Rights Commission was never set up, but the Government did establish the Independent Review of Administrative Law (IRAL), led by Lord Faulks KC, former Minister of State for Justice, and the Independent Human Rights Act Review (IHRAR), led by Sir Peter Gross, a former Lord Justice of Appeal. This was a mistaken approach. By outsourcing its thinking about reform of judicial review and human rights law to arm's-length bodies, the Government provided ample opportunity to the legal establishment to dilute or stymie proposals for constitutional reform. It also needlessly delayed the introduction of legislation that might more urgently have addressed some of the problems in question.

The IRAL report was a mixed bag, but did at least affirm that there was a problem with the scope of justiciability and with the judicial assertion of underspecified constitutional principle in leading cases. The report also affirmed the legitimacy of Parliament legislating to overturn specific judgments of which it disapproved, recommending two Supreme Court judgments in particular for reversal. The Judicial Review and Courts Act took up this recommendation. The Act has made two intelligent changes to the law of judicial review but could – and should – have gone further.

The IHRAR report was positively harmful to the cause of reform, with the majority of the panel concluding, in line with what many public lawyers and academics – but not necessarily everyone else – think, that the Human Rights Act 1998 has been working well. The report did make some minor recommendations for change but its main line of argument was that major change was unnecessary. Some of the report's main claims about the Act were undercut by the Supreme Court itself, which in a number of judgments in late 2021 began to correct earlier expansive readings of the Act.¹

In any case, the Government quietly and rightly shelved the IHRAR's

1. See *R (Elan Cane) v Home Secretary* [2021] UKSC 56 and *Re McQuillan* [2021] UKSC 55

report, instead announcing a new Bill of Rights, which was introduced into Parliament in June but is now to be withdrawn. The Bill of Rights would have replaced the Human Rights Act but would not have removed the UK from the European Convention on Human Rights (ECHR). The previous Government had consistently said that it was committed to ECHR membership, although it bears noting that the Rt Hon Suella Braverman KC MP (then Attorney General, now Home Secretary), proposed withdrawal from the ECHR in the course of her recent campaign to become the leader of the Conservative Party. The Attorney's remarks partly concerned the question of how to address the Channel crossings crisis. The Government's plan to send some asylum-seekers to Rwanda is being challenged in the UK courts on ECHR grounds. On 14 June, hours after the Supreme Court denied the claimants interim relief, the European Court of Human Rights (ECtHR) indicated "interim measures" which purport to require that asylum-seekers should not be deported to Rwanda pending the resolution of the domestic litigation challenging their deportation. The Government has subsequently seemed to act as if these measures had domestic legal effect - despite the fact that the Human Rights Act does not give domestic effect to Article 35 on which the ECtHR purports to ground its jurisdiction to provide interim relief.²

Parliament will not now debate the Bill of Rights Bill. But in the last six months, in addition to the Judicial Review and Courts Act, Parliament has enacted the Dissolution and Calling of Parliament Act, section 3 of which ousts judicial review in relation to the newly restored prerogative of dissolution. This enactment was needed in order to address the obvious risk to which the Supreme Court's September 2019 prorogation judgment gave rise,³ viz. the likelihood of political litigation challenging dissolution when the Fixed-term Parliaments Act was repealed.

The prorogation judgment invented new law, putting the rule of law and the integrity of the political constitution in doubt.⁴ It made the problem of judicial overreach strikingly clear.⁵ Happily, in the three years since that judgment, the trend has begun to improve. In early 2020, Lord Reed succeeded Lady Hale as President of the Supreme Court and there has been further change in the membership of the Court since then. In a succession of judgments,⁶ the new Supreme Court has adopted a more disciplined disposition than in past years, correcting some wrong turns in human rights law and the law of judicial review. This welcome change in disposition on the part of the Court has been heavily criticised by some academic and activist lawyers, including Professor Conor Gearty KC (Hon) and Jolyon Maugham KC of the Good Law Project.⁷ Nonetheless, the Court has continued to hand down occasional but significant problematic judgments in this period, including (a) its decision to allow Gerry Adams' appeal against his 1975 conviction for escaping from custody,⁸ accepting an extraordinarily unmeritorious technical argument on premises that put in doubt a fundamental presupposition of our constitution and (b) its decision in the Ziegler case,⁹ which has significantly compromised the criminal law and the policing of public protest.

2. See further R Ekins et al, "The Strasbourg Court's disgraceful Rwanda intervention", *The Law Society Gazette*, 15 June 2022
3. *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41
4. J Finnis, *The unconstitutionality of the Supreme Court's prorogation judgment* (Policy Exchange, 28 September 2019), M Loughlin, *The Case of Prorogation* (Policy Exchange, 15 October 2019)
5. R Ekins, *Protecting the Constitution: How and why Parliament should limit judicial power* (Policy Exchange, 28 December 2019), R Ekins, *The Case for Reforming Judicial Review* (Policy Exchange, 27 December 2020)
6. In addition to *Elan Cane and Re McQuillan*, see also *R (Begum) v Home Secretary* [2021] UKSC 7, *R (SC) v Work and Pensions Secretary* [2021] UKSC 26, and *R (AB) v Justice Secretary* [2021] UKSC 28
7. See for example C Gearty, "In the Shallow End", *The London Review of Books*, 27 January 2022
8. *R v Adams* [2020] UKSC 19; for criticism, see R Ekins and S Laws, *Mishandling the Law: Gerry Adams and the Supreme Court* (Policy Exchange, 30 May 2022)
9. *Director of Public Prosecutions v Ziegler* [2021] UKSC 23; for criticism, see R Ekins, "The law is not fit to stop Extinction Rebellion's street protests" *Spectator*, 28 August 2021 and C Wide, *Did the Colston trial go wrong? Protest and the criminal law* (Policy Exchange, 15 April 2022)

Human rights law

Two main questions that face the new Government concern reform of domestic human rights law and the UK's relationship to European human rights law. The two questions are related, but it is a mistake to think that they entirely collapse into one another – reform of domestic human rights law is possible without withdrawing from the ECHR. In thinking about human rights law reform, the Government's aim should be to restore the traditional British model of rights protection,¹⁰ in which it is for Parliament first and foremost to decide what our laws should be and it is not for courts, whether domestic or European, to supervise what Parliament does or how it does it.

Membership of the ECHR and the UK's relationship to the ECtHR

The Government should be willing to withdraw from the ECHR and should give serious and ongoing consideration to whether - and how or when - to withdraw. Withdrawal from the ECHR would of course be a significant decision. It would free the UK from the jurisdiction of the ECtHR, a court that routinely subverts the terms of the Convention which the UK and other member states agreed in 1950 (and in successive Protocols). The ECtHR has done so by taking the ECHR to be a "living instrument", with the effect that the Court reshapes the meaning and effect of the Convention as it pleases. Withdrawal from the ECHR would not involve a breach of human rights. On the contrary, it would revert to the legal arrangements by which the UK has long protected human rights – arrangements so effective that the Convention was essentially a codification of the rights then protected in Britain. It would restore more fully the self-government of the British people and make Parliament and domestic politics once again pivotal in determining the laws by which we live.

It bears repeating: the UK respected and protected human rights long before the ECHR was ever conceived, as well as during the decades before individuals began directly to petition the ECtHR and before the court invented the living instrument doctrine. If the UK were to leave the ECHR, it would be in good company with Australia, Canada and New Zealand, each of which protects human rights without relying on supranational litigation.¹¹

Besides the predictable misrepresentation of withdrawal from the ECHR as a breach of or imminent threat to human rights in itself, particular objections would be raised. The Scottish Government would object that

10. R Ekins, "Models of (and Myths About) Rights Protection" in L Crawford et al (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing, 2019) 224

11. There are important differences between these three states; the domestic courts in Canada exercise far too much power within that country's modern constitution, on which see further *ibid*.

withdrawal would expand the competence of the Scottish Parliament without its consent, in breach of the Sewel Convention. And others would argue that withdrawal from the ECHR would breach the Good Friday Agreement, in which the UK undertook to give effect to the ECHR within the law of Northern Ireland. These objections are misconceived. The UK's relevant obligations under the Good Friday Agreement were discharged by enactment of the Northern Ireland Act 1998.¹² Note that Article 692 of the UK-EU Trade and Cooperation Agreement envisages that the UK or an EU member state may denounce the ECHR, which is a ground for terminating the application of Part 3 of the Agreement. This postdates the Withdrawal Agreement and the Northern Ireland Protocol, which expressly aim to protect the Good Friday Agreement in all its parts. Thus, Article 692 implies that neither the UK nor the EU (including Ireland) consider UK withdrawal from the ECHR to constitute a breach of the Good Friday Agreement.

It would be open to Parliament to maintain the existing disability on the Scottish Parliament – or the Northern Ireland Assembly – in the event of withdrawal from the ECHR. In any case, the point of the disability, in relation to Scotland, is to avoid the Scottish Parliament inadvertently (or deliberately) placing the UK in breach of its international obligations. Lifting the disability, and expanding the competence of that Parliament (and thus of the Scottish electorate) is scarcely a failure of respect for devolution. In addition, the Sewel Convention is non-justiciable, and concerns what shall “normally” be the case – and, as with termination of the UK's membership of the EU Treaties (after a nation-wide referendum), withdrawal from the ECHR would not be a normal course of events.

Withdrawal from the ECHR would have foreign policy implications that require careful thought. While leaving the ECHR would not be a rejection of human rights – like many friendly nations outside Europe, the UK outside the ECHR system would remain a decent polity and a force for good in the world – withdrawal would be unfairly attacked in these terms, at home and abroad, a reaction that needs to be anticipated and answered effectively.

There is a respectable small-c conservative argument against (immediate) withdrawal from the ECHR on the grounds that withdrawal would place more stress on the Union and that the UK has been through enough constitutional change in recent times, in view of withdrawal from the EU. The force of these arguments is a question of political judgment. They are serious considerations, which should inform reasoning about whether the Government should aim to leave the ECHR as soon as possible, should aim first to attempt to reform the ECHR system from within, or should simply aim to challenge the ECtHR's misuse of its jurisdiction without leaving the ECHR.

Another objection that will be made to any decision to leave the ECHR is the decision's implications for the UK-EU Trade and Cooperation Agreement. As noted above, UK withdrawal from the ECHR would give the EU the option of terminating the application of Part Three

12. R Ekins and J Larkin, *Human Rights Law Reform: How and why to amend the Human Rights Act 1998* (Policy Exchange, 11 December 2021), paragraph 13

(Law Enforcement and Judicial Cooperation in Criminal Matters) of the Agreement – but this must be seen relative to the general right of either party to collapse all or part of the agreement for any reason whatsoever. In this context, one should never forget that the EU itself is not a party to the ECHR and that the Court of Justice of the EU in Opinion 2/13 rejected accession to the ECHR on the grounds that it would have an “adverse effect on the autonomy of EU law”. Thus, the risk of termination of Part Three is not an insoluble problem, even if it would require negotiation with the EU to maintain the relevant treaty provisions. This might require the UK to give particular assurances about specific future legal arrangements, as opposed to any general commitment to membership of the ECHR, a commitment which again the EU itself has not undertaken.

Strictly speaking, exercising Article 58 of the ECHR and thus (after the year’s notice period) terminating the UK’s membership would only require exercise of the prerogative to conduct foreign policy rather than new empowering legislation. However, this analysis is arguably put in doubt by the Supreme Court’s judgment in *Miller (No 1)*,¹³ its 2017 judgment concerning the lawfulness of triggering Article 50 without fresh legislation. That case does not directly entail that legislation would be needed to authorise withdrawal from the ECHR but litigation would be inevitable if the Government attempted to proceed without legislation.¹⁴ In any case, it would be constitutionally improper (although in my view still lawful) for the Government to proceed without making known its plans to the House of Commons and either seeking its support by way of a resolution or at least providing an opportunity for confidence in the Government to be withdrawn before Article 58 was triggered. If the Government were to press ahead without a resolution in support, this would increase the risk that the Supreme Court would rule that legislation was first required.

The Government should make clear that UK withdrawal from the ECHR is an immediately live option, should articulate the reasons for its concerns about the ECtHR’s record and disposition, and should consolidate support in the House of Commons, and across the country, for withdrawal if need be. Before deciding to withdraw, it may be reasonable for the Government to attempt to work with other member states to reform the ECHR, amending the treaties in order to correct some of the ECtHR’s missteps (say in relation to migration) or, more ambitiously, to require the Court to abandon the living instrument doctrine and to uphold the terms agreed by the states. It may be unlikely that diplomatic efforts to this effect will succeed, but it may be desirable to attempt them, even if only to demonstrate more fully the irreformability of the ECHR system as it now stands.

Whether or not the UK attempts such reforms, the Government should also firmly maintain that Parliament is not obliged, either as a matter of law or more importantly as a matter of constitutional convention, to change the law to comply with ECtHR case law. Membership of the ECHR is constitutionally intolerable insofar as Parliament and Government act

13. *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5

14. R Ekins and G Gee, “Miller, Constitutional Realism and the Politics of Brexit” in M Elliott, J Williams and A Young (eds), *The UK Constitution After Miller: Brexit and Beyond* (Hart Publishing, 2018), 249

as if decisions of the ECtHR are tantamount to domestic legal obligations that cannot be reversed by legislation. The Human Rights Act 1998 was enacted on the premise that the Act reserved to Parliament decisions about whether to change the law in the event of incompatibility with the ECtHR's case law. The de facto abandonment of that premise gives the ECtHR an inflated role in our public life, outsourcing responsibility for fundamental questions about how we should be governed.

The problem is starkly visible in the recent Rwanda litigation. The ECtHR, acting by way of one anonymous judge without the benefit of argument from the UK, directed the UK to suspend its Rwanda plan, notwithstanding the Supreme Court's considered view that interim relief should not be granted and was unnecessary. The ECHR nowhere confers on the ECtHR jurisdiction to grant interim relief. Yet the Government has thus far acted as if it had an obligation in international law to comply with such "decisions" of the Court. It should instead firmly maintain that the ECtHR is limited by the terms of the ECHR and that its "interim measures" cannot impose a legal obligation. It is no answer to say that the ECtHR has been asserting the power in question for some time. The failure of past governments to question or challenge the ECtHR's lawless expansion of its jurisdiction is no reason for the Government now to acquiesce. The Government should make clear that the UK does not accept that it has an obligation in international law to comply with interim measures. It should also make clear that it does not accept the legitimacy of the ECtHR's abandonment of the intended meaning of the ECHR itself. This course of action and ongoing policy stance of the ECtHR qualifies the UK's obligation to comply with judgments of the Court. As happened in effect in relation to the controversy about prisoner voting, neither Government nor Parliament should accept that the UK must comply with judgments that brazenly misinterpret the ECHR. This position will continue to come under much criticism, domestic and European, but should be strongly defended.

In short, there is a powerful case for withdrawal from the ECHR, which would free the UK from the ECtHR's misuse of its jurisdiction. It is arguable that the Government should first attempt to reform the ECHR from within. If or when such attempts fail, the Government should adopt a policy of withdrawal. As noted above, withdrawal is not a simple option in view of the stress it may place on the integrity of the Union and the complications that it will cause for the UK's ongoing relationship with the EU. In anticipation of adopting a policy of ECHR withdrawal, the Government should work now to address these technical and political objections. Importantly, if the Government decides not to seek to withdraw the UK from the ECHR, or during such time as it deliberates about whether to withdraw, the Government must firmly resist the assertion that Government and Parliament simply have no option save to comply with whatever the ECtHR asserts. If the UK is to remain a member of the ECHR, then the Government must (a) challenge and resist the ECtHR's subversion of the terms the member states agreed and (b)

defend the premise on which the Human Rights Act was enacted, which is that Parliament remains free to decide what our law should be.

Reform of domestic human rights law

The Bill of Rights Bill introduced to Parliament in June, but now to be withdrawn, did address some real problems with the Human Rights Act and was, thus far, to be welcomed. However, it also risked introducing some other problems,¹⁵ notably imprecision in relation to the rights that Parliament intended to be protected and the extent to which it would open to domestic judges to decide this for themselves. The Bill also risked providing cross-party support for domestic human rights litigation, which would henceforth have been grounded in the Conservative Party's chosen replacement for the Human Rights Act, which was of course the brainchild of a Labour government. The better course of action has always been – and is now – for the Government to aim to restore the traditional British model of rights protection by repealing the Human Rights Act altogether, without replacing it, or by sharply amending the Act, with a view to eventual repeal. That is, the new Government is right to withdraw the Bill of Rights Bill and should replace it with a Bill that simply repeals but does not replace the Human Rights Act. This would not leave human rights unprotected in our law. It would simply restore the constitutional position as it stood until the 1998 Act came into force (in October 2000). In that position, human rights are protected by ordinary statute and common law, with Parliament trusted to change the law when appropriate.

Repealing legislation should make careful provision for transitional arrangements, avoiding legal uncertainty that might otherwise arise. Repealing the 1998 Act would change the role of domestic courts, terminating the main ground of domestic human rights litigation, a change which would be a major victory for the rule of law and parliamentary democracy. Some of this litigious energy would be displaced into arguments about common law rights and many claimants would apply to the ECtHR – but only after they had exhausted other domestic remedies. However, there is an important constitutional and practical difference between exposure to litigation before a supra-national court and exposure to litigation in domestic courts. Returning to the 1998/2000 position would help restore the integrity of our constitution. It would not, of course, end the UK's problem with the ECtHR – no change in domestic law alone could have this effect – which makes it all the more imperative that if the UK does not withdraw from the ECHR, or until such time as it does withdraw, the Government must firmly challenge the ECtHR's misuse of its jurisdiction and not simply concede that Government and Parliament are obliged to comply with whatever that Court asserts. The example of prisoner voting shows what can be achieved in the Council of Ministers.

If outright repeal of the Human Rights Act is viewed as too bold a move, the Government should instead propose legislation that would amend the Act.¹⁶ Some of the changes that the Bill of Rights Bill would

15. R Ekins, *Thoughts on a Modern Bill of Rights* (Policy Exchange, 15 June 2022) and R Ekins, "The UK now faces a new human rights trap", *Telegraph*, 22 June 2022

16. See further, R Ekins and J Larkin, *Human Rights Law Reform: How and Why to Amend the Human Rights Act 1998* (Policy Exchange, 11 December 2021)

have introduced could and should be repurposed in this context. That is, the Human Rights Act should be amended to limit the freedom of courts to misinterpret other legislation to avoid rights-incompatibility, to require the courts to respect Parliament's decision that some limit on (or specification of) rights is justifiable, to remove the requirement that ministers must certify whether proposed legislation is rights-compatible, and to remove the power of ministers to make Remedial Orders amending legislation that courts declare to be rights-incompatible. In addition, the Human Rights Act should be amended to give statutory force to the interpretation that the Supreme Court has (rightly) adopted in some important recent cases, including in relation to the Act's application to events that took place before it came into force (most notably in the course of the Troubles in Northern Ireland) and in relation to the freedom of British judges to go beyond the ECtHR's case law and to impose even more strictures on Parliament and Government. The advantage of making such changes by way of amendment to the Human Rights Act, rather than replacing that Act with a new Bill of Rights, is that it would minimise the risk of legal uncertainty and would avoid inadvertently establishing the appearance of a cross-party consensus in support of human rights litigation for political purposes.

The Government should aim to restore the traditional constitution. Repealing the Human Rights Act (without replacing it) would be ideal. In the alternative, it should amend the Act rather than replace it with a Bill of Rights or equivalent. Note that the main work of protecting human rights in our constitution takes place by way of ordinary legislation.¹⁷ If and when the Government believes that further human rights protection is required, the solution should not be to amend the Human Rights Act (or a Bill of Rights) but to enact legislation that addresses the specific problem, as for example with legislation to protect academic freedom, or, perhaps, to protect freedom of speech or conscience. Relatedly, if and when the Government invites Parliament to legislate to address some social problem, the legislation in question should determine how best rights are to be protected. The meaning and application of legislation enacted or approved by Parliament should not turn on the vagaries of future litigation. This may require Parliament to make provision that its enactments – or at least particular specified provisions in them – are intended to apply notwithstanding the terms of the ECHR or of the Human Rights Act. Legislation addressing the Channel crisis, for example, should be protected from litigation in this way.¹⁸ The alternative is that Parliament's decisions are effectively provisional and contingent on approval by the courts.

17. G Webber et al, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2018)

18. Stopping the Small Boats: a "Plan B". A Policy Exchange proposal for addressing the crisis (Policy Exchange, 16 February 2022)

Judicial review

The scope and intensity of judicial review has expanded significantly across recent decades. Parliament should review and respond to this expansion. Section 3 of the Dissolution and Calling of Parliament Act is a welcome, if narrow, exercise of Parliament's responsibility to foreclose political litigation. Likewise, sections 1 and 2 of the Judicial Review and Courts Act make intelligent, but limited, changes to the law of judicial review. The Government should introduce new legislation, going beyond these enactments, which would make further targeted changes to the law of judicial review and thus enforce important constitutional limits on judicial power. While the Supreme Court's apparent new disposition is welcome, Parliament should not – indeed cannot – leave to the Court alone responsibility for restoring the balance of the constitution. Parliament should reverse particular judgments, which the Court may be either unable or unwilling to correct, and should give statutory force to propositions which later courts might otherwise undo. Policy Exchange has drafted a series of legislative provisions fit for enactment,¹⁹ some of which have been raised in Parliament. The provisions are summarised below. In addition, the Government should review case law as it develops and stand ready to respond with further legislative proposals.

General changes to the law of judicial review

1. Acting on behalf of the Secretary of State

The Supreme Court's judgment in *Adams* puts in doubt the *Carltona* principle (named after the 1943 case),²⁰ which otherwise frames the relationship between the Secretary of State and the persons for whom he takes constitutional responsibility, viz. civil servants acting under his direction and others ministers in his department. Legislation should reverse this aspect of the judgment, making clear that the presumption is that Parliament intends powers conferred upon the Secretary of State to be exercised on his behalf.

2. Primacy of legislative intent

In its 2019 judgment, *Privacy International*,²¹ a majority of the Supreme Court misinterpreted an important ouster clause. This judgment is constitutionally significant and warrants express reversal. Parliament should enact legislation that addresses the judges' assertion that ouster clauses are not to be read in the way that other enactments are to be read, that is with a view to ascertaining Parliament's intended meaning.

19. R Ekins, *How to Improve the Judicial Review and Courts Bill* (Policy Exchange, 26 October 2021)

20. *Carltona v Commissioner of Works* [1943] 2 All ER 560

21. *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22

3. Primacy of parliamentary sovereignty

Section 1 of the Constitutional Reform Act 2005 provides that nothing in the Act adversely affects the existing constitutional principle of the rule of law or the Lord Chancellor's existing constitutional role in relation to that principle. Parliament should legislate to address the misuse of section 1 in the *Privacy International* case to cast doubt on parliamentary sovereignty and to conjure up a jurisdiction to quash Acts of Parliament. Legislation should make clear that Parliament firmly rejects attempts to leverage the 2005 Act into a ground of challenge to Parliament's intentions or parliamentary sovereignty.

4. Non-justiciability of parliamentary accountability

The Supreme Court's prorogation judgment, *Cherry/Miller (No 2)*,²² weaponises parliamentary accountability in order to expand judicial review to supervise the political relationship between Parliament and government. In our constitution, this is not, and never has been, a matter for the courts. Legislation should restore the previous law, making clear that parliamentary accountability is not a ground for judicial review and that the extent to which ministers give an account to Parliament is not for courts to consider.

5. Non-justiciability of the political constitution

Parliament should legislate to specify that no court has jurisdiction to decide whether a constitutional convention exists, what conduct a convention requires or forbids, or whether a person has complied with (or failed to comply with) a convention. This legislation is necessary to respond to the Supreme Court's decision to consider whether the Prime Minister acted properly (constitutionally) in advising Her Majesty to prorogue Parliament. It is also needed to foreclose litigation about the Ministerial Code, which like other rules of our political constitution should not be enforced by the courts.

6. Proportionality

Legislation should specify that proportionality is not a general ground of review. This would shut down the possibility of the Supreme Court expanding the scope of judicial review in this way, a possibility that the Supreme Court has entertained in a number of judgments but which other senior judges have rightly said would be an illegitimate legislative act, which a court should not contemplate.

Clarifying the limits on judicial review in particular contexts

7. Exclusion of review of the Investigatory Powers Tribunal

Parliament should reinstate the ouster clause in section 67 of the Regulation of Investigatory Powers Act 2000, which the majority of the Supreme Court misinterpreted in *Privacy International*. This legislation would restore

²² *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41

Parliament's decision in enacting the section, which would help protect the jurisdiction of the Investigatory Powers Tribunal – a specialist court – from challenge by way of judicial review proceedings.

8. Exclusion of review of prorogation

Legislation should specify that the courts may not question the scope or exercise of His Majesty's prerogative power to prorogue Parliament, any decision or purported decision relating to that power, or ministerial advice or action relating to that power. It should also specify that prorogation is a proceeding of Parliament, protected by Article IX of the Bill of Rights 1689. The Supreme Court's judgment in *Cherry/Miller (No 2)* effectively changed the law so that prorogation is only lawful if the courts agree that the Prime Minister has a good reason for seeking a prorogation. In our constitution, this has never been for courts to decide. Parliament should restore the law as it stood until the Supreme Court changed it.

9. Limitation of review of the power to set tribunal fees

In a landmark judgment, *R (UNISON) v Lord Chancellor*,²³ the Supreme Court expanded the law of judicial review by reading narrowly the Tribunal, Courts and Enforcement Act 2007 in such a way as to sharply limit the Lord Chancellor's statutory power to decide on tribunal fees. Legislation should restore the Fees Order quashed in *UNISON*, not permitting recovery of fees repaid in reliance on the Court's judgment but making it clear that the Court misinterpreted the 2007 Act. Legislation should limit future judicial review of the Lord Chancellor's power to set tribunal fees, making clear that a challenge against a fees order may proceed only on limited, traditional grounds.

10. Finality of certificates by accountable persons under the Freedom of Information Act 2000

Parliament should respond to the Supreme Court's judgment in *R (Evans) v Attorney General*,²⁴ which involved judicial review of the Attorney General's exercise of his power under section 53 of the Freedom of Information Act 2000 to prevent disclosure of information on public interest grounds. The judgment brazenly misconstrues section 53, effectively forbidding the accountable person from disagreeing with the Upper Tribunal and introducing significant legal risk if the accountable person takes a different view from the Information Commissioner. Legislation should restore the intended meaning and effect of section 53, making clear by implication that the Supreme Court's judgment in *Evans* was wrong, and sharply limiting future judicial review.

11. Exclusion of review of ombudsman reports

In enacting the Parliamentary Commissioner Act 1967, Parliament did not intend to impose legal duties on Ministers or others to respond to the Commissioner's report – on the contrary, the Act clearly contemplates and makes provision for the reception of the Commissioner's report to

23. *R (UNISON) v Lord Chancellor* [2017] UKSC 51; for criticism, see S Laws, *Second-Guessing Policy Choices: The rule of law after the Supreme Court's UNISON judgment* (Policy Exchange, 14 March 2018)

24. [2015] UKSC 21; for criticism see R Ekins and C Forsyth, *Judging the Public Interest: The rule of law vs. the rule of courts* (Policy Exchange, 2015). The clause set out in the main text is Appendix 1 to that paper.

be a political question. However, in the *Bradley and Equitable Management Action Group* judgments²⁵ the courts superintended the political reaction to a report of the Parliamentary Commissioner for Administration. Parliament should legislate to restore the intended meaning and effect of the 1967 Act, making clear that it is not open to courts to police the political response to the Commissioner’s report.

12. Limitation of review of devolved legislatures

Legislation is needed in response to the Supreme Court’s judgment in *AXA*,²⁶ in which the Court introduced the risk that Acts of the Scottish Parliament might be quashed even if not breaching the express terms of the Scotland Act (which incorporate Convention rights and EU law limitations). The judgment holds open the prospect that Acts of the Scottish Parliament might be quashed by reference to the principle of the rule of law. Legislation should remove this litigation risk, thus vindicating Parliament’s intention in empowering the Scottish Parliament. Similar provision should be made in relation to the Welsh Parliament (the Senedd) and the Northern Ireland Assembly.

13. Exclusion of review of decisions about inquiries

In the *Litvinenko* judgment,²⁷ the High Court held the Home Secretary’s decision not to order an inquiry was unlawful (because unreasonable, which in context simply meant the court thought the decision was wrong) and then ordered an inquiry to be held. Legislation should restore ministerial discretion to cause an inquiry to be held, or not to be held, which is obviously a political judgment for which ministers should answer to Parliament not the court.

Procedural changes to the law of judicial review

14. Prohibition of abstract review

The trend in judicial review proceedings is for courts to be open to argument even when there is no particular dispute. Legislation should be enacted in order to discourage such “systemic challenge”, helping to restore the more traditional focus of judicial review proceedings on some particular act. If extended to Scotland, this legislation would address the Inner House of the Court of Session’s *Wightman* judgment,²⁸ in which the Court took it upon itself to serve as Parliament’s legal advisor. This legislation should also make clear, in partial answer to *Cherry/Miller (No 2)* and the ombudsman cases noted above, that judicial review proceedings are a means to challenge legal acts – the exercise of public power – not a free-ranging means to question reasoning or action, or inaction, at large.

15. Evidence in judicial review proceedings

Legislation should be enacted limiting the discretion of courts to permit oral evidence to be elicited in judicial review proceedings or to order public bodies to disclose evidence. This would help avoid judicial review

25. *R (Bradley) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116; *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC (Admin) 2495; for criticism, see J Varuhas, *Judicial Capture of Political Accountability* (Policy Exchange, 2016).

26. *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46

27. *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194; for criticism, see J Varuhas, *Judicial Capture of Political Accountability* (Policy Exchange, 2016).

28. *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62; for criticism, see S Laws, *Judicial Intervention in Parliamentary Proceedings* (Policy Exchange, 2018).

departing from a narrow focus on particular public acts and becoming a free-ranging inquiry into government decision-making. The trend to this effect arises partly from the slippage of traditional limits on the use of evidence in judicial review proceedings.²⁹ Legislation is needed to restore those limits. In particular, legislation should avoid the situation in which the launch, or even the threat, of judicial review proceedings forces public bodies to disclose information, or to give evidence, in relation to matters that the public body argues are non-justiciable or are excluded from liability to judicial review by an ouster clause. If the matter is non-justiciable or if legislation excludes review, the public body should not have to disclose information or give evidence in relation to it. Provision of information or evidence in such a case may be inimical to the public interest and may distort the court's consideration of whether the matter is justiciable or excluded by legislation. Disclosure should only arise if a court has concluded – likely as a preliminary matter – the matter is justiciable and that legislation does not exclude review.

16. The onus in judicial review proceedings

Parliament should specify that a party challenging the lawfulness of public action bears the legal and evidential onus of establishing unlawfulness and bears it throughout the proceedings. This legislation would address the emerging practice in some judgments effectively to make the government defend the lawfulness of its action, rather than require the claimant to establish its unlawfulness.

17. Interveners in judicial review proceedings

Major public law cases routinely feature many interveners, some of whom are repeat players, such that the government is routinely outnumbered and outgunned. This practice risks encouraging the idea – and the public perception – that final appellate litigation involves an exercise of pseudo-legislative power, which is why it is important to allow a range of groups to address the court. Legislation should be enacted requiring courts to justify publicly their decision to permit interventions and framing how and on what grounds courts are to grant or refuse permission.

Future legislative change

In addition to proposing the legislative changes noted above, the Government should also establish a non-statutory working group, led by the Lord Chancellor, which would undertake to review case law and to propose (primary) legislation from time to time when necessary to correct problematic judgments and restate the proper limits of judicial power. Reviewing the case law and proposing corrective legislation is constitutionally unimpeachable, although of course legislation should ordinarily avoid retrospective change or stripping a successful party of the fruits of litigation.

29. See further, J Varuhas, "Evidence, Facts and the Changing Nature of Judicial Review", UK Constitutional Law Blog, 15 June 2020.

Judicial appointments

Prior to 2005, senior judicial appointments were premised upon a ministerial model that mixed both political and judicial influences, where judges enjoyed considerable influence, but where the final say about who to appoint was made by or on the advice of the Lord Chancellor. The Constitutional Reform Act 2005 introduced a much more formal, open and bureaucratic approach to senior appointments built around various selection panels. But this approach is unbalanced, insofar as it confers decisive influence over senior appointments to senior judges themselves whilst blocking meaningful ministerial input.

The Government should invite Parliament to amend the 2005 Act to enable the Lord Chancellor to exercise a real discretion in making senior judicial appointments, selecting from a shortlist of well-qualified candidates.³⁰ In exercising his discretion in relation to roles such as the Lord Chief Justice of England and Wales and Heads of Division, the Lord Chancellor should consider whether the person recommended has the requisite range of management and administration skills to enable them to discharge the leadership role effectively. In relation to all senior appointments, but especially appointments to the Supreme Court, the Lord Chancellor should consider the risk that a particular candidate for judicial office may undercut settled constitutional fundamentals, including parliamentary sovereignty.

Even in the absence of legislative reform, the Lord Chancellor should make clear that he will use his existing powers to refuse to appoint candidates who have cast doubt on Parliament's authority to make or unmake any law.

30. See further R Ekins and G Gee, *Reforming the Lord Chancellor's Role in Senior Judicial Appointments* (Policy Exchange, 9 February 2021).



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