Lechmere Essay Prize 2019 – Abby Buttle

In an interview published on 19 July 2020, the Prime Minister said "What we are looking at is whether there are some ways in which judicial review does indeed go too far or does indeed have perverse consequences that were not perhaps envisaged when the tradition of judicial review began". Evaluate this proposition and explain your preferred view.

Introduction

1. Judicial review ("JR") is the 'mechanism by which the courts hold public authorities to account for the legality of their conduct'.[1] The courts have provided an independent oversight function for centuries but, for the purposes of this essay, the focus will be on modern JR from 1977, when the Supreme Court (Amendment No 3) replaced a complex array of remedies under the single term 'judicial review'.[2]

2. This essay will draw on arguments advanced by politicians, academics, former judges and thinktanks who together form an increasingly loud chorus concerned about the rise of 'judicial power'.[3] The 'perverse consequences' which these critics point to broadly fall into three categories: (i) the frustration of the will of the people; (ii) the displacement of parliamentary sovereignty; and (iii) the hinderance of effective government. Cumulatively, they argue, these consequences signal a fundamental and unwelcome shift in the United Kingdom's (UK) traditional constitutional foundations. Contrary to these three claims, it will be argued in respect of each that JR in its current form is vital for the protection of constitutional principles, constitutive of democracy and assistive of effective government.

3. These arguments are not merely of academic importance. In July 2020, the Government announced the establishment of the Independent Review of Administrative Law.[4] The

[1] Michael Fordham QC, Martin Chamberlain QC, Iain Steele, Zahra Al-Rikabi, 'Streamlining Judicial Review in a Manner Consistent with the Rule of Law', Bingham Centre for the Rule of Law (February 2014), para 1.
[2] Rules of the Supreme Court (Amendment No 3)1977, rule 5, Order 53 – 'An application… for an order of mandamus, prohibition or certiorari… shall be made by way of an application for judicial review'. Cited in Joshua Rozenberg, *Enemies of the People? How Judges Shape Society* (2020), p 17.
[3] As evidenced by name of thinktank leading much of the criticism: the Judicial Power Project. See https://judicialpowerproject.org.uk/.
[4] Ministry of Justice, 'Government launches independent panel to look at judicial review', 31 July 2020 https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review#:~:text=justice%20and%20law-,Government%20launches%20independent%20panel%20to%20look%20at%20judicial%20review,government%20today%20(31%20July)> accessed 25 September 2020.

Review's expansive terms of reference include the consideration of reforms to the very substance and procedure of JR.[5] It is therefore more important than ever to advance robust defences of JR to avoid the undoubtedly perverse consequences of fettering independent judicial oversight of those in power.

Judges v. the People

5. In the high-profile litigation concerning the UK's exit from the European Union (EU) in 2017 and 2019, judges were portrayed as illegitimately frustrating the will of the people by usurping quintessentially political decisions. In *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* ("Miller I"),[6] a majority of the Supreme Court ruled that the Government could not lawfully give notice of its intention to leave the EU, as required by Article 50 of the Treaty of the European Union (TEU), by relying on its prerogative powers; triggering Article 50 required an Act of Parliament. When the High Court came to this conclusion earlier in the case's journey, the Daily Mail launched a full frontal attack on judicial independence, denouncing the judges as 'Enemies of the People'.[7] Similar inflammatory rhetoric was employed two years later after *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* ("Miller II")[8] when the Supreme Court unanimously decided that the Prime Minister's attempt to prorogue Parliament had been unlawful. The Leader of the House of Commons decried 'a constitutional coup',[9] while the then-Attorney General lamented the 'expansionary tendencies' of the Supreme Court which had resulted in what he viewed as the 'judicialisation of politics'.[10] In light of these comments, it is perhaps unsurprising that the Conservative Party Manifesto pledged a few weeks later to 'ensure that judicial review…

[5] Terms of Reference for the Independent Review of Administrative Law <https://assets.publishing.service.gov.uk/media/5f27d3128fa8f57ac14f693e/independent-review-of-administrative-law-tor.pdf> accessed 25 September 2020.
[6] [2017] UKSC 5.
[7] James Slack, 'Enemies of the people: Fury over 'out of touch' judges who have 'declared war on democracy' by defying 17.5m Brexit voters and who could trigger constitutional crisis' (November 2016, *Daily Mail*). <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html> accessed 25 September 2020.
[8] [2019] UKSC 41.
[9] Kevin Schofield, 'Jacob Rees-Mogg brands Supreme Court ruling a 'constitutional coup' as MPs prepare to grill Boris Johnson', (25 September 2019, *Politics Home*).
[10] Catherine Baski, 'Geoffrey Cox: The Supreme Court does have expansionary tendencies', (20 February 2020, The Times) <https://www.thetimes.co.uk/article/geoffrey-cox-the-supreme-court-does-have-expansionary-tendencies-fvt6j6nv6> accessed 25 September 2020; BBC, 'Concerns about judges' powers must be heeded, says Attorney General', (12 February 2020, BBC) < https://www.bbc.co.uk/news/uk-politics-51474169> accessed 25 September 2020.

is not abused to conduct politics by other means'.[11] More recently, the Independent Review terms of reference include the 'justiciability of the prerogative' as a matter for the panel to consider.[12]

6. Despite the backlash, the *Miller* judgments do not demonstrate the claim that JR now involves judges acting politically and frustrating the will of the people. The fact that JR can concern a divisive political issue like Brexit does not automatically mean the judges are acting politically.[13] As Lord Neuberger recently remarked, "the mere fact that the decisions involve politics can't possibly mean that the courts can't get involved; otherwise, there'd be hardly any issues which the court could decide".[14] In fact, the *Miller* judgments display three ways in which JR upheld constitutional tradition and supported democracy. Firstly, both cases fortified the cardinal constitutional principle of parliamentary sovereignty by ensuring that the Government was prevented from going 'too far' in preventing parliamentary oversight of its actions.[15] The second constitutional principle promoted in both the *Miller* cases was that of open justice – the principle that justice must be done, and seen to be done – the foundations of which date back to before Magna Carta.[16] Holding cases in public is a form of accountability.[17] Lord Reed's remarks in the wake of *Miller I* demonstrate the importance of this: 'people had seen that what we were discussing was not politics. There was no discussion of whether Brexit was a good idea or a bad idea. What we were discussing was the limits of the prerogative power to change the law'.[18]

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[11] The Conservative and Unionist Party Manifesto 2019, Get Brexit Done Unleash Britain's Potential, p 48. < https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf> accessed 25 September 2020.

[12] Terms of Reference for the Independent Review of Administrative Law (n 5), p 2.

[13] This point was raised by Professor Alison Young at an event hosted by the Public Law Project as part of the Young Lawyers Making Change Festival, 'Revenge or Reform? A critical appraisal of the Government's "Constitution, Democracy and Rights Commission" (August 2020).

[14] Reported by Joshua Rozenberg following a recent webinar, 'Ousting the courts won't work' (17 September 2020, *A Lawyer Writes*) <https://rozenberg.substack.com/p/ousting-the-courts-wont-work?token=eyJ1c2VyX2lkIjoxNDgwNjUzOCwicG9zdF9pZCI6MjQ0MDgxNSwiXyI6IkIxdHllFIiwiaWF0IjoxNjAwOTgyMjU3LCJleHAiOjE2MDA5ODU4NTcsImlzcyI6InB1Yi03OTUzMCIsInN1YiI6InBvc3QtcmVhY3Rpb24ifQ.reqeR6km-Q00teDGGDOBVe4CMYiU4RPvmucryA_uDWE> accessed 25 September 2020.

[15] See Mark Elliott, 'Analysis/The Supreme Court's Judgment in *Miller*' (25 January 2017, *Public Law for Everyone*) https://publiclawforeveryone.com/2017/01/25/analysis-the-supreme-courts-judgment-in-miller/> accessed 25 September 2020; Mark Elliott, 'A new approach to constitutional adjudication? Miller II in the Supreme Court' (24 September 2019, *Public Law for Everyone*) <https://publiclawforeveryone.com/2019/09/24/the-supreme-courts-judgment-in-cherry-miller-no-2-a-new-approach-to-constitutional-adjudication/> accessed 25 September 2020.

[16] Joshua Rozenberg, 'Magna Carta in the modern age' (13 March 2015, *British Library*) < https://www.bl.uk/magna-carta/articles/magna-carta-in-the-modern-age#:~:text=Some%20examples%20from%20recent%20judgments,back%20to%20before%20Magna%20Carta.> accessed 25 September 2020.

[17] This point was made by Professor Alison Young, as reported by Joshua Rozenberg (n 14).

[18] Lord Reed, interviewed 29 January 2019 for *Law in Action*, BBC Radio 4, cited in Rozenberg (n 2), p 24.

Finally, far from representing an embrace of the 'rule of judges',[19] by protecting parliament's function, the Supreme Court also safeguarded the balance of powers upon which the UK's democracy rests. Joshua Rozenberg has written that the stability of the UK's unwritten constitution depends on 'the powers that be to make use of the powers they have'.[20] If Parliament is denied its role in ensuring executive accountability, then this balance is thrown off and, as Lady Hale stated in *Miller II*, an 'unaccountable government' is the 'antithesis of the democratic model'.[21] In Lord Neuberger's words, "the courts were standing up for parliament; standing up for democracy" and, crucially in light of the incendiary headlines, "standing up for the people against an over-mighty executive."[22]

Judges v. Parliament

7. The second claim that judges have gone 'too far' is that JR has been used to thwart Parliament's legislative intentions by reliance on principles such as 'legality' and the rule of law. One of the most frequently cited cases to demonstrate this is the 2015 decision of the majority of the Supreme Court in *R(Evans) v Attorney General*.[23] Indeed, in Lord Sumption's view, 'no other modern case reveals so clearly the judges' expansive view of the rule of law'.[24]

8. *Evans* involved a freedom of information request by a Guardian journalist for the disclosure of correspondence between Prince Charles and senior figures in the New Labour government. Disclosure was ordered by the Upper Tribunal but overturned by the Attorney General who resorted to an effective veto power under section 53 of the Freedom of Information Act 2000. By a majority of 5-2, the Supreme Court overturned the Attorney General's use of the power. Lord Neuberger reasoned that the power under s.53 'cut across' two constitutional principles fundamental to the rule of law: that decisions of the court are binding on the parties, including the executive, and the individual's right to approach the court to review potentially unlawful executive action.[25] The majority

[19] See Richard Ekins, 'Constitutional Lessons from America' (12 June 2019, *UK Constitutional Law Association*) , https://ukconstitutionallaw.org/2019/06/12/richard-ekins-constitutional-lessons-from-america/> accessed 25 September 2020.
[20] Rozenberg (n 14), p 189.
[21] [2019] UKSC 41, [48].
[22] This point was made by Professor Alison Young, as reported by Joshua Rozenberg (n 14).
[23] [2015] UKSC 21.
[24] Jonathan Sumption, *In Praise of* Politics, BBC Reith Lectures 2019 , http://downloads.bbc.co.uk/radio4/reith2019/Reith_2019_Sumption_lecture_2.pdf > accessed 25 September 2020, cited in Rozenberg (n 14), p 147.
[25] [2015] UKSC 21, [51].

agreed that the 'clearest possible justification' was needed to circumvent the court's authority in this way in this case.[26] Such precision was found wanting, and the Attorney General's appeal was dismissed.

9. Writing in the minority, Lord Wilson disapproved of the majority's approach in clear terms. In his view, the Court of Appeal's decision to overturn the Attorney General's decision was not an act of statutory interpretation but of re-writing inconsistent with parliamentary sovereignty.[27] For Richard Ekins and Graham Gee, *Evans* represents an apotheosis of judicial activism:

> *…the judgment was not just a mistake. It was the conjunction of two damaging trends in legal and judicial practice: deliberate misinterpretation of statutes by way of the principle of 'legality' and overly intrusive judicial review that does not make space for the political accountability for which the statute provides.*[28]

10. However, as the split in the court's judgment shows, this was a hard case on which reasonable people could disagree. While the words of the statute regarding the Attorney General's power may have showed the parliamentary intention to create that power, it was not the only intention at play. Reflecting on this case in light of Lord Sumption's criticism cited above, Lady Hale reflected that there was 'no obviously right answer' to whether the decision on the public interest in disclosure was ultimately a legal or political question 'in the context of a right to information for which Parliament has legislated'.[29]

11. A broader point is that, even if one concludes that the majority in *Evans* surpassed the limits of interpretation, the decision does not necessarily represent a trend of self-aggrandising judicial power. The fundamental weakness of the judiciary in the UK prevents this so-called 'activism' from posing an existential threat to the make-up of the constitution. In short, judges do not have the final say, Parliament does. British Judges cannot strike down laws which means that, if Parliament disagrees with a judicial decision, then it can legislate or 'strike back' to remedy this and face the political consequences of

[26] [2015] UKSC 21, [95].
[27] [2015] UKSC 21, [168].
[28] Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place', University of Queensland Law Journal (2017) 36(2) 375, 396.
[29] Lady Hale, 'Law and Politics: A Reply to Reith', Dame Frances Patterson Memorial Lecture (8 October 2019), p 7 https://www.supremecourt.uk/docs/speech-191008.pdf accessed 25 September 2020.

doing so.[30] Rather than shutting down debate, this sort of relationship can be viewed as *contributing* to democracy. Mark Elliott describes this 'iterative process':

> '*…a constitutional dance in which the courts either pull Parliament back from a perceived constitutional brink by interpretively neutralising the relevant provision, or force Parliament to confront the political cost of retaliation by requiring the use of yet-starker terms if the court's construction is to be successfully displaced through legislative amendment*'.[31]

Judges v. effective government

12. The Conservative Party manifesto pledged 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'. More recently, Lord Faulks, Chair of the Independent Review of Administrative Law, stated that the Review would 'examine judicial review and the need to strike a balance between the right of citizens to challenge government through the courts and the elected government's right to govern'.[32]

13. These statements place government in opposition to the right of individuals to approach the courts to challenge the lawfulness of executive action. They also betray a position adopted by many critics of JR in which an 'idealised' electoral process is deemed to give near total legitimacy to the elected party.[33] In a democracy, it does not make sense to talk about a government having a 'right to govern'. Governments are only empowered to act in a way that is lawful, and JR exists, in part, to protect the boundaries of these powers laid down by Parliament. In light of the Government's recent startling admission that the UK Internal Market Bill would break international law, this function is going to be more important than ever.[34]

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[30] Carol Harlow and Richard Rawlings, "'Striking Back' and 'Clamping Down': An Alternative Perspective on Judicial Review" in J. Bell, M. Elliott, J.N.E. Varuhas, P, Murray (eds) Public Law Adjudication in Common Law Systems: Process and Substance (Oxford: Hart, 2016).
[31] Mark Elliott, 'A tangled constitutional web: the black-spider memos and the British constitution's relational architecture' (2015), University of Cambridge Faculty of Law Research Paper No. 34/2015.
[32] Ministry of Justice (n 4).
[33] Helena Kennedy and Jonathan Sumption, 'Helena Kennedy vs Jonathan Sumption: Are our human rights laws working?' (12 July 2019, *Prospect*) https://www.prospectmagazine.co.uk/magazine/helena-kennedy-vs-jonathan-sumption-are-our-human-rights-laws-working> accessed 25 September 2020.
[34] BBC, 'Northern Ireland Secretary admits new bill will 'break international law' (8 September 2020, *BBC*). <https://www.bbc.co.uk/news/uk-politics-54073836> accessed 25 September 2020.

14. JR does not permit effective government if the definition of 'effectiveness' includes pursuing unlawful action. However, if effectiveness is confined, as it must be in a democracy, to lawful activities, then it is argued that JR can, in a limited way, support this aim in at least two ways. Firstly, as Lord Reed explained in *R(on the application of UNISON) v Lord Chancellor*,[35] by hearing disputes over the meaning of statutory provisions, the courts ensure that the law does not become a 'dead letter' rendering the work of Parliament 'nugatory' and the election of Members of Parliament 'a meaningless charade'. For the courts to perform this function, 'unimpeded access' to the courts was essential.[36] The recent case of *Secretary of State for Work and Pensions v Johnson & Ors*[37] demonstrates this point. *Johnson* involved regulations on the payment of Universal Credit which failed to take into account variances in monthly earnings, resulting in fluctuations in welfare payments and serious hardship to tens of thousands of claimants. The Court of Appeal found that this policy met the very high threshold of irrationality. As Alison Young argues, JR can assist policy to be effective and fair. Far from representing judicial activism, *Johnson* shows the vital role that JR can play in highlighting individual injustices. The court rightly did not dictate to Parliament *how* to legislate in this area of socio-economic policy,[38] but it did reveal an oversight in the policy-making process which Parliament can now rectify, making the law more effective.

15. Again, the role that JR plays in assisting the effectiveness of legislation is a democratic one. Writing in the US context, John Hart Ely argued that the courts can help to remedy the deficits of majoritarian forms of democracy by providing a space for individuals in the minority to be heard. Sandra Fredman explains how the 'representation reinforcement' role gives the court 'legitimacy' because it is supportive of democracy, while ensuring that it does not overstep its limits.[39] In a society which purports to value the dignity of every individual, democracy must mean more than the will of the majority. In Lady Hale's words, '[d]emocracy values everyone equally, even if the majority does not'.[40] Fredman goes further than Ely on the democratic role of JR, arguing that the process is not merely about remedying a deficit in electoral politics but improving outcomes based on the quality of

[35] [2017] UKSC 51.
[36] [2017] UKSC 51, [68], cited in Rozenberg (n 14), p 163.
[37] [2020] EWCA Civ 778.
[38] This point was raised by Professor Alison Young (n 13).
[39] JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980), 103, cited in Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008), p 109.
[40] *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [132].

debate. She writes that that 'aim of judicial review' is to '[take] minority arguments as seriously as majority perspectives and coming to a deliberative resolution based on the power to convince rather than the power to overwhelm.'[41] When viewed in this light, the purported opposition between individual rights and effective government collapses.

Conclusion

16. This essay has sought to show that, far from having the 'perverse consequences' of frustrating the will of the people, displacing parliamentary sovereignty and hindering effective policy-making, JR is essential to the maintenance of the constitutional principle, democracy and good government. In reality, the importance of JR may not be fully appreciated beyond the legal community[42] and it is therefore incumbent upon us to change this, making JR as accessible as possible before it is too late.[43] The social, economic and political upheaval resulting from Brexit and the pandemic make this a particularly dangerous time to consider restricting judicial oversight of executive action.

[41] *Ibid*, 113.
[42] The 'schism' between lawyers and the public on this issue was recently highlighted by Michael Olatokun (n 13).
[43] See Tom Hickman, 'Public Law's Disgrace', (9 February 2017, UK Constitutional Law Association) < https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/> accessed 25 September 2020.