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.

Most recent Prime Ministers have had their brushes with the judiciary. David Cameron, during his eleven years at the helm of the Conservative Party, sporadically slashed at 'unaccountable judges'.[1] His successor, Theresa May, did much the same whilst at the Home Office.[2] Even Tony Blair, whose former pupil-master orchestrated the passage of the Human Rights Act 1998, flirted with amending the legislation in 2006, following a string of controversial pro-asylum seeker judgments.[3]

Those clashes were sharp. Yet they were short-lived – and infrequent. They represented momentary pauses in a relationship rooted in a general ethic of cooperation. Since the current Prime Minister's ascent to office last year, that relationship has moved out of kilter. Within three months of entering Number 10, Boris Johnson's attempt to prorogue Parliament had been unanimously blocked by the Supreme Court.[4] Within six months, he had won an election, having pledged to radically reform judicial review.[5] His Home Secretary has condemned 'activist lawyers'.[6] His Secretary of State for Northern Ireland has introduced legislation expressly contravening international law.[7] It is fair, then, to contend that this is a Government unusually willing to disrupt

---

[1] David Cameron, 'Fixing Broken Politics' speech, 26 May 2009, quoted in Peter Munce, 'Profoundly Un-Conservative? David Cameron and the UK Bill of Rights Debate', *The Political Quarterly,* 83:1 (2012), pp.60-68, at p.65.
[2] https://www.theguardian.com/politics/2013/feb/17/theresa-may-attacks-judges-deportation, accessed 24 September 2020.
[3] https://www.theguardian.com/politics/2006/may/14/humanrights.ukcrime, accessed 24 September 2020.
[4] *R (Miller) v. Prime Minister* [2019] UKSC 41.
[5] Conservative Election Manifesto 2019, p.48.
[6] https://www.standard.co.uk/news/politics/priti-patel-complains-activist-lawyer-criticism-a4539896.html, accessed 25 September 2020.
[7] The Rt. Hon. Brandon Lewis, MP, *Hansard* HC Deb. Vol. 679 col. 509, 8 September 2020.

fundamental norms underlying the executive-judicial relationship – both rhetorically and in practice.

The Prime Minister's 19 July statement – delivered in response to a question on the mooted judicial review reforms – needs to be viewed within this broader context. This essay will start by doing exactly that, by exploring the intellectual arguments and functional motivations underlying Boris Johnson's 'theory' of judicial review. I then probe, in turn, the two propositions he advances.

The first focus is on the latter half of his statement – the contention that judicial review has had perverse consequences that were not envisaged 'when the tradition of review began'. It is unclear **why** we should assess the consequences of review against some unbending 'tradition' of practice. The legislature and executive have changed radically over the past few centuries. It would be odd to argue that judicial review should not shift with those changes in the other branches. Further, even if we do concede there to be a broad tradition of review, worth working within – playing Johnson's game – any such tradition of judicial review, when cast in broad terms, promotes the exact kind of consequences which the Prime Minister deems to be 'perverse'.

My final section explores the first part of the Prime Minister's remarks. I argue, pushing against Johnson, that judicial review has not 'gone too far'. Indeed, it needs to go further to right a constitutional settlement which has become dangerously imbalanced.

Boris Johnson's 'Theory' of Judicial Review

There is a tendency, when thinking about the Conservative Party, to downplay ideology and 'play up' pragmatism. Boris Johnson, in that reading of British conservatism, is often deployed as 'Exhibit A'. His political career can easily be presented as a story of opportunistic transformation - the Bohemian Mayor of London morphing into a tub-thumping critic of the European Union,

so as to match the predilections of the British electorate.[8] There is some truth in that account of Johnson viz. the Conservative Party. But it is far from the full picture. Johnson's ideas and the ideas of the conservatism he works within are flexible. But there is still some intellectual basis to them. This section places Johnson's ideas on judicial review – ideas which explain what he means by its 'perverse consequences' and overreach - within that compound space (some pragmatism, some ideology).

Johnson's observations on judicial review, undoubtedly, have a functional tinge. As Mark Elliott has noted, 'it is no secret that the Government regards the courts, and their judicial review function in particular, as a thorn in its side'.[9] The courts, through judicial review, stop the executive branch from doing some things which it wants to do (from deportations to grants of planning permission). The executive – especially when backed by a supportive Parliament – has a suite of measures it can use to combat such restrictions.

Conservative criticism of judicial review, however, is propelled forward by a strong intellectual current. We have seen, above, its appearance in the anti-HRA/Eurosceptic speeches of Cameron and May. It goes back beyond them. In part, it follows from the Party's long-standing commitment to deregulation and market freedoms, initiated by Heath and embodied by Thatcher. The sternest modern Conservative critics of judicial review tend to be the firmest advocates of such economic logic. The likes of Sir John Redwood see expansive judicial review as a fetter on the ability of economic actors to move decisively (if government decisions, viz. licensing for example, can be readily overturned, the vitality of the free market will be hampered). If, as E. H. H. Green argues,

[8] https://www.theatlantic.com/international/archive/2019/09/conservative-party-survive-brexit/599050/, accessed 24 September 2020; for a contrasting historical analysis, see E. H. H. Green, 'Thatcherism: An Historical Perspective', *Transactions of the Royal Historical Society,* Vol. 9 (1999), pp.17-42.
[9] https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/, accessed 24 September 2020.

that commitment to free market economics is one of the core intellectual planks of contemporary conservatism, one can readily see where Johnson-style argument comes from.

These economic arguments have, increasingly, been complemented by a cultural critique (a mode of critique spotted – and exploited – by Blair). Over the last fifty years, across the West, political behaviour has been rebuilt along educational lines. In the early Sixties, the more educated a person was, the more likely they were to side with the Conservative Party. The exact reverse applies today. Judges, by definition, are highly educated. Most are based in urban centres. In the early twentieth century, there was a sense that judges would share the broad socio-cultural views of supporters of and leaders in the Conservative Party.[10] Nowadays – though the judicial aversion to party political languages remains as acute as it has ever been – judges, demographically, are precisely the type of people least likely to profess socially conservative views. The 'Hanging Judge', in his black cap, has been replaced by a wishy-washy bench of liberals in the conservative imagination. Hence Johnson's 'girly swot' jab at Baroness Hale and the infamous *Daily Mail* 'enemies of the people' front-page. Hence also, however, the development of a coherent, US-inflected corpus of judicial restraint writing, arguing that the decisions of unelected judges should not be allowed to overcome the preferences of the electorate (as expressed through the ballot box).[11]

Johnson's remarks, therefore, like the broader approach of his Conservative Party, straddle the pragmatic and the ideological. Any reforming Government is faced with challenges to what it wants to do. Judicial review, seemingly, is a far more surmountable obstacle than the vagaries of international and domestic politics. That functional tinge, however, is supported – in Johnson's case – by two strands of ideology: an economic critique of 'red-tape' and a cultural critique of

[10] *Roberts v. Hopwood* [1925] All ER 24.
[11] See, for example, Robert Bork, *Coercing Virtue: the Worldwide Rule of Judges,* (Washington, D.C., 2003).

judicial elitism/anti-democracy. That combination of ideology and functionalism informs what Johnson means by 'perverse consequences' and 'going too far'.

'What we are looking at is whether… [judicial review] does indeed have perverse consequences that were perhaps not envisaged when the tradition of judicial review began'.

Having placed the overarching statement, this essay pivots now to consider each part of it in turn – starting with the section quoted immediately above.

Johnson, in his remarks, invokes a 'tradition' of judicial review, which began at some undefined point in time – a tradition which judges have, foolhardily, departed from, leading to consequences unanticipated when judicial review was devised. Some of those consequences, for Johnson, are perverse.

This analysis relies on two assumptions. The first is that the principles developed at the inception of judicial review **should continue** to govern it. This logic is shaky. But even if we do accept it, Johnson's second assumption – that there has been departure from those initial principles – does not hold water.

Judges, since at least 1688, have had the authority to police the actions of executive bodies.[12] Those executive bodies have transformed beyond all recognition in the three hundred years following the Bill of Rights. It would be constitutionally improper for judicial review to remain bound by the consequences imagined by the architects of the Glorious Revolution.

[12] *Entick v. Carrington* [1765] 19 St Tr 1030.

The British state of the late 1600s had very little power, beyond indirect taxation and conscription. The Industrial Revolution concentrated people in towns and cities – posing significant infrastructure, hygiene, and political challenges to creaking, unprepared systems of government. British elites responded by enlarging the franchise – and by beginning to offer services (education, workplace inspections). Those services were staffed by a growing executive branch. As Sir Stephen Sedley has observed, the emergence of municipal government in the late nineteenth century – complemented by the professionalisation of the civil service – led to a surge in the number of decisions made by administrative bodies.[13] The first major judicial review rulings sought to impose some structure on those decisions.

Fast-forward seventy years, and one encounters a second radical remaking of the British state, under Attlee's post-war government. The introduction of the NHS, wage-bargaining, and extensive nationalisations again arrogated power to unelected, burgeoning executive departments. The 1960s 'foundation' of modern administrative law was a direct consequence of that revolution in governance.

This historical sojourn illustrates one crucial point. British government has changed beyond all recognition since the sketching of the contemporary constitutional settlement three centuries ago. It would make no sense to assess the **consequences** of modern judicial review decisions against the boundaries outlined by Stuart-era politicians. Indeed, those boundaries were left quite deliberately undefined. The British constitutional system is flexible and reactive, able to adjust to fit new socio-political realities. The executive branch has to do that. The judicial branch should be permitted to move with it.

[13] Sir Stephen Sedley, 'The Long Sleep', in *Tom Bingham and the Transformation of the Law* (ed. Mads Andenas and Duncan Fairgrieve), (Oxford, 2009), pp.183-191.

Even so, we can argue against the Prime Minister on his own terms. Say that there **was** a definite moment at which the tradition of judicial review began. When was that moment, and have we deviated significantly from the review **principles** outlined at that point in time?

From the above account, there are two clear candidates.

The first is 1688, where the **longue duree** tradition of holding the executive in account 'began'. As discussed above – and as will be discussed below – the 1688 settlement, when viewed in broad brush terms, sought to establish a meaningful separation of powers. The Bill of Rights was designed to constrain the executive. Judges, clearly, had a part to play in that exercise.

The second is the 1960s, where the **modern** tradition of judicial review began, during Lord Reid's stewardship of the House of Lords.[14] That modern tradition was a direct, classically liberal response to the unchecked expansion of the state under Attlee. The judges sought to protect the little man from the faceless power of the new social democratic bureaucracy. T.T. Arvind and Lindsay Stirton have observed that, in the Sixties, 'judicial review expanded dramatically… but based on a far narrower approach to judicial oversight of the exercise of administrative discretion than any of the other approaches that were suggested in the 1960s'.[15] The ultimate contours of judicial review, settled on by judges and politicians in the 1960s, remained fairly conventional, rooted in *ultra vires*. Yet they were forged in a radical moment, in a bid to keep the executive in line.

[14] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Ridge v Baldwin* [1964] AC 40; *Conway v. Rimmer* [1968] AC 910; Padfield v Minister of Agriculture, Fisheries and Food [1968] UKHL 1.
[15] T.T. Arvind and Lindsay Stirton, 'The Curious Origins of Judicial Review', in *Law Quarterly Review* (2017), pp.91-117, p.112.

What annoys Boris Johnson about judicial review? As discussed, it prevents him from doing what he wants through the executive branch (functional argument), and by doing so thwarts the seamless operation of the market. In that thin sense, it is anti-democratic.

Those 'annoying' things are what he described as 'perverse consequences', out of step with an imagined tradition of judicial review. We have seen that there is a powerful argument against fixation on tradition when it comes to the British constitutional settlement (which is forever changing). Even if we play Johnson's game on his terms, however, his point still falls away. Both the 'modern' tradition and the 'longue duree' tradition of judicial review were based on one core objective: the checking of executive authority.

'What we are looking at is whether there are some ways in which judicial review does indeed go too far…'

This is a different point, requiring an altogether different mode of analysis. The last section has traced the historical development of judicial review, exposing the weakness of Johnson's conception of the evolution of the doctrine. This final part demands reflection on the current state of judicial review powers.

At least ostensibly, Johnson appears on firmer ground here. Some recent judicial decisions seem to stand at odds with the general thrust of public opinion.[16] And, in a mature democracy, surely public opinion is king.

[16] *Begum v. Secretary of State for the Home Department* [2020] EWCA Civ. 918; *R v. Adams* (2020) UKSC 19.

This, really, is the nub of the cultural critique of judicial review. In democracy, government should be responsive to the general viewpoints of the citizenry. Should an unelected body of intellectuals be able to wield near-exclusive power over particular policy areas, there is a real risk of democracy being hollowed out from within.

That argument, however, relies on a threadbare conception of democracy – and a dangerously thin account of the modern state.

It is worth, at this stage, pivoting back to think about the 1688 settlement – the husk of which we continue to operate within. T.R.S. Allan has emphasised the delicate balance of the constitutional order forged through the Glorious Revolution.[17] British constitutional battles before that point had been between Parliament and the Crown. The Bill of Rights weakened the Crown substantially – shifting power to Parliament through the doctrine of Parliamentary sovereignty. The system was in balance. Independent Parliamentarians – in two powerful chambers - would meet to pass legislation, empowering the Crown to do certain things. The judges would make sure that the Crown worked only with the powers which had been granted to it.

Over time, however, with the emergence of formal political parties, the decline of the Lords, and the rise of the Prime Minister, that balance has been cast dangerously askew. Sir John Laws puts it well: 'What has in crude terms happened since the seventeenth century is that there has been a trade-off between two ideals: one is the notion that Parliament should be sovereign; the other is that the executive government should be democratically accountable. It has been done by clothing the executive, previously autocratic and unaccountable, with the legitimacy of Parliament'.[18] In a world of parliamentary sovereignty, should an executive government, staffed by Members of the

[17] TRS Allan, 'The Limits of Parliamentary Sovereignty', in *Public Law* (1985), pp.614-629.
[18] Sir John Laws, 'Law and Democracy', in *Public Law* (1995), pp.72-93, at p.92.

House of Commons, settle on a particular power which they want to exercise, they can exercise it (through the mechanics of party discipline). Per Laws, 'most of the time, the Executive can bend Parliament to its will'.[19] The judiciary, per the current model of review, can try some interpretative tricks.[20] But a well-worded, express provision can defeat those.

This system is completely at odds with the balanced designs of the Glorious Revolutionaries. It is also at odds with an effective, rich version of modern democratic politics.

In the absence of any real prospects for change elsewhere, judicial review may be the only space in which that vitality may be rediscovered. Judges should, of course, defer to the bulk of legislation passed through Parliament.[21] If not, there **would** be a significant fraying of the democratic basis of the British state. Democracy is, at least in part, about majoritarian voting. It is, however, about more than just that. The right to vote carries with it essential preconditions – the right to freedom of speech, the right to freedom of assembly, the right to freedom of belief. A majoritarian vote to undercut one of those preconditions should be reviewable – and rejectable – by the courts.[22] The courts already flirt with much of this, hiding revanchist moves, designed to safeguard the rule of law, behind the *vires* fig-leaf (strong interpretation of HRA provisions, the strained reading of express ousters). As argued by Lord Woolf and Sir John Laws in the late 1990s, removing those fig-leaves would encourage a franker discussion of British constitutionalism – and a sharper appreciation of separation of powers in British context.

Judicial review, therefore, does not go too far. Rather, it must begin to go further, moderating – in appropriate, infrequent situations – the occasional harshness of Parliamentary sovereignty.

---

[19] Ibid, p.91.
[20] *Anisminic; R (on the application of Privacy International) (Appellant) v Investigatory Powers Tribunal and others (Respondents)* [2019] UKSC 22.
[21] Mark Elliott, *The Constitutional Foundations of Judicial Review,* (London, 2001).
[22] Kyle G. Volk, *Moral Minorities and the Making of American Democracy,* (Oxford, 2014).

Conclusion

We can now bring the threads together. We should not assess the **consequences** of modern judicial review against outcomes anticipated in the Stuart period. The nature of the British state is ever-changing. Judicial review should be permitted to move with it. We can, however, assess whether judicial review remains within the broad constitutional principles outlined at its inception – an approach recommended by the Prime Minister. No matter where we locate that inception point – the Glorious Revolution or the 1960s – those constitutional principles are the same, fixed around the core objective of the checking of executive power. That checking is exactly what Johnson presents as perverse overreach – judges stepping in to block governmental decisions and, in doing so, restrict the free flow of the market. Judicial review is and has always been all about maintaining effective separation of powers. Johnson's appeal to tradition does not and cannot work. The tradition of judicial review supports the exact consequences which the Prime Minister rails against.

To fully realise the constitutional principles intrinsic in that tradition would require a more muscular version of judicial review than the one we have today – one capable of maintaining a majoritarian democratic core, but also capable of sustaining the rights which underpin democracy through reviewability of some primary legislation. Judicial review should, hence, go further, to achieve that balanced constitutional settlement. Judges have been unwilling to grasp that particular nettle, deploying verbal tricks and interpretative techniques to preserve fundamental aspects of the rule of law. Johnson's planned reforms, by restricting judicial power, may require those shadowy tricks and techniques to be replaced with more forthright defences of the separation of powers. We will have to see.

BIBLIOGRAPHY

Cases Cited

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147.

Begum v. Secretary of State for the Home Department [2020] EWCA Civ. 918.

Conway v. Rimmer [1968] AC 910.

Entick v. Carrington [1765] 19 St Tr 1030

Padfield v Minister of Agriculture, Fisheries and Food [1968] UKHL 1.

R (Miller) v. Prime Minister [2019] UKSC 41.

R v. Adams (2020) UKSC 19.

Ridge v Baldwin [1964] AC 40.

Roberts v. Hopwood [1925] All ER 24.

Secondary Works

Allan, T.R.S., 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory', *Law Quarterly Review* (2011), 96-117.

Arvind, T.T. and Lindsay Stirton, 'The Curious Origins of Judicial Review', in *Law Quarterly Review* (2017), pp.91-117.

Bingham, Lord, 'The Judge as Lawmaker: An English Perspective', in Lord Bingham, 'The Business of Judging'. Oxford: Oxford University Press, 2000, pp.25-34.

Bork, Robert, *Coercing Virtue: the Worldwide Rule of Judges.* Washington, D.C.: the AEI Press, 2003.

Craig, Paul, 'The Supreme Court, Prorogation, and Constitutional Principle', *Public Law* (2020), pp.248-277.

Elliott, Mark, *The Constitutional Foundations of Judicial Review.* London: Bloomsbury, 2001.

Green, E.H.H. 'Thatcherism: An Historical Perspective', *Transactions of the Royal Historical Society,* Vol. 9 (1999), pp.17-42

Laws, Sir John, 'Law and Democracy', in *Public Law* (1995), pp.72-93,

Munce, Peter, 'Profoundly Un-Conservative? David Cameron and the UK Bill of Rights Debate', *The Political Quarterly,* 83:1 (2012), pp.60-68

Reid, Lord, 'The Judge as Law Maker', *Journal of the Society of Public Teachers of Law,* 12:1 (1972), pp.22-29.

Sedley, Sir Stephen, 'The Long Sleep', in *Tom Bingham and the Transformation of the Law* (ed. Mads Andenas and Duncan Fairgrieve). Oxford: Oxford University Press, 2009, pp.183-191.

Volk, Kyle G., *Moral Minorities and the Making of American Democracy*. Oxford: Oxford University Press, 2014.

Woolf, Lord, 'Droit Public – English Style', *Public Law* (1995), pp.57-71.

Weblinks

https://www.standard.co.uk/news/politics/priti-patel-complains-activist-lawyer-criticism-a4539896.html, accessed 25 September 2020.

https://www.theatlantic.com/international/archive/2019/09/conservative-party-survive-brexit/599050/, accessed 24 September 2020

https://www.theguardian.com/politics/2006/may/14/humanrights.ukcrime, accessed 24 September 2020.

https://www.theguardian.com/politics/2013/feb/17/theresa-may-attacks-judges-deportation, accessed 24 September 2020.

https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/, accessed 24 September 2020.