ARTICLES

CONSTITUTIONAL LAW

The rule of law in modern times: not a Priti sight

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Introduction

> 'In the United States, anything that is unconstitutional is illegal, however moral it might be; in the United Kingdom, anything immoral is unconstitutional, however legal it may be.'

Many students embarking on, or indeed completing a Constitutional Law course, are adamant that the subject is nothing more than political studies, a continuation of their study of government and politics at school or college and lacking in any substantive law. As a consequence, they are often frustrated that constitutional law, if it exists at all, admits of no correct legal resolution, the answer to the issue in question being entirely dependent on one's political opinion. Thus, you agree that the government has acted *constitutionally* if you agree with the *political* outcome (raised taxes, restrictions on free movement during Covid-19), and disagree if you are against those policies. Of course, Constitutional Law is, more than any other core legal subject, informed by politics, and we must expect that our own constitutional law, operating under an un-entrenched and flexible constitution, will be shaped by the politics of the present government, and its opposition by the politics of anyone opposing those laws.

Yet, however the subject is taught, there is no denying that Constitutional Law has *law*, and that many constitutional principles are contained in the law and must be followed as such.[1] At the heart of this is the idea of the *rule of law*: that government and public bodies are bound to act within and by the law.[2] That principle, it is argued, is not invalidated by the fact that much control over government and public bodies is exerted via non-legal mechanisms, such as constitutional conventions, parliamentary scrutiny and the power of the populace to vote out unpopular governments. Ultimately, the organs of government must be subject to the law, and, as we shall see, in the absence of an entrenched constitution, the rule of law has added significance in the UK.[3] Whatever one's politics, one can justifiably challenge the government and its policies by holding them up to the law and the rule of law. This allows for an objective, although not completely impartial, challenge to such actions, whether it be in private law, judicial review, or via human rights law.

The author makes this point to contextualize what is to follow - a rather scathing attack on the present government's constitutional misbehavior in recent years, and in particular its disregard and contempt for the rule of law and the law itself. Such criticism is not levelled solely at the government's policies and is not based on any *political* disagreement with such (although the author disagrees with those as

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[1] In the UK constitution, our legal sources include statutes (e.g. the Human Rights Act 1998), case law (e.g. the recent *Miller* cases: *R (Miller) v Secretary of State for Exiting the European Union* [2018] UKSC 5*; R (Miller) v Prime Minister* [2019] UKSC 41), and enforceable international treaties (e.g. the European Convention on Human Rights and Fundamental Freedoms 1950). These sources allocate and regulate state power and identify and enforce fundamental rights, matters normally covered in a written, codified constitution; although these sources are not passed in a different 'constitutional' manner than regular law.

[2] See Joseph Raz, *The Rule of Law and its Virtue* (1977) 93 LQR 195, and A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan 1915), Part II.

[3] See Lord Bingham, *The Rule of Law* (Allen Lane 2000); and Stephen Sedley, *Freedom Law and Justice* (Sweet and Maxwell 1999).

well), but on a *legal* insistence of adherence to the rule of law. In that way, it is hoped to illustrate that challenges to the government, and other public bodies are not based (solely) on political point scoring, but an insistence that government follow established principles embedded in the rule of law and constitutionalism. In turn, this can illustrate that the United Kingdom constitution is grounded in legal constitutionalism, and does indeed exist.

This article examines the role of the rule of law within the UK constitution, and how it has been threatened by recent government decisions and tactics, including proposals for reform of various aspects of legal accountability. It argues that such behavior has threatened our notion of constitutionalism, and warns that the UK Constitution has been opened up to ridicule and challenge as a consequence. The article also attempts to provide the reader with an outline and critical examination of our constitution's main principles and frailties, thereby to assess its legitimacy and its very existence.

The rule of law and the United Kingdom constitution

The United Kingdom constitution often draws wide-eyed amazement from those who live under a written, formal and entrenched constitution, where governmental power and its limits are clearly identified, and breaches of the constitution are enforced, legally, by a constitutional court.[4] As the quote at the beginning shows, we have traditionally judged the constitutionality of our government's actions by standards of morality rather than by strict law. Thus, we expect government to use its theoretically unlimited legal powers (via parliamentary (executive) sovereignty) within restrictions imposed by constitutional convention and principles of constitutional fair play,[5] shouting 'unconstitutional' whenever we witness what we regard as an abuse of power by the government of the day. This situation obviously gives rise to concern about the UK's constitutional legitimacy: the doctrine of parliamentary sovereignty, which determines that there is no higher constitutional authority than Acts of Parliament,[6] means that the courts have no constitutional power to challenge or ignore an Act that transgresses our feelings of constitutional propriety.[7]

This concern, of course, is exacerbated by the fact that the so-called doctrine of parliamentary sovereignty is, in reality, the doctrine of *executive* sovereignty, the constitution adopting a loose form of separation of powers and allowing the government of the day to sit in, and dominate, the main legislative chamber.[8] There appears, on the face of it at least, to be no end to this sovereignty and the use and abuse of government's legal powers; no effective and ultimate legal control of this power by an independent judiciary charged with defending the constitution. Government, therefore, can act 'unconstitutionally' – secure in the knowledge that they are untouchable in terms of binding judicial reprimand and remedy.

This, of course, represents an incomplete and misleading picture of our constitution and the presence of constitutionalism, including *legal* constitutionalism, in the UK constitution. It gives the impression that the UK constitution lacks any legal enforcement mechanism to control the actions of government, and that the courts have no power whatsoever to ensure that government follows the law. This would be to

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[4] Indeed, most countries adopt this form of constitutionalism, although the most of-cited examples are the United States of America and France.

[5] Some examples are that no executive power should be unlimited (*Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 977); that decision-making bodies must follow the rules of natural justice (*Ridge v Baldwin* [1964] AC 40; that no one should be denied access to the courts *Chester v Bateson* [1920] 829; and that law and state power should not be retrospective (*Waddington v Miah* [1974] 2 All ER 377.

[6] See A.V. Dicey, *The Law of the Constitution,* n. 2, Part 1.

[7] See, for example, the Privy Council Decision in *Madzimabuto v Lardner-Burke* [1969] 1 AC 645, where it was held that an Act of Parliament that restored the legislative powers of the Southern Rhodesia government to Westminster was legal despite it breaking a constitutional convention.

[8] Lord Hailsham, the former Lord Chancellor, used the phrase 'The Elective Dictatorship' to describe our constitution. See Rod Taylor, 'We are still perilously close to Hailsham's 'Elective Dictatorship'https://blogs.lse.ac.uk/brexit/2019/09/30/we-are-closer-than-ever-to-hailshams-elective-dictatorship/

ignore Dicey's second pillar of the UK constitution: the rule of law.[9] Thus, in the absence of formal legal constraint, the domestic courts will insist that government acts within, and by the law.[10] The procedure of judicial review (and the application of private law to public bodies),[11] will ensure that government, along with other public bodies, act within the legal powers granted to them, either under statute or by the common law.[12] In addition, those powers must be exercised fairly and reasonably,[13] after following appropriate procedures,[14] and with due regard to human rights or other fundamental principles of the constitution.[15]

The UK constitution is now beginning to resemble a true constitution, based on the rule of law and legal accountability of the government, together with the ability to impose legal remedies on those in office who abuse their legal, and constitutional, powers.[16] Yet the operation of the rule of law in the UK Constitution is, inevitably, restricted by the other twin pillar of our constitution: the doctrine of parliamentary sovereignty.[17] Thus, although a court can review an executive act that exceeds the legal powers bestowed by the law;[18] if that same action is sanctioned expressly by an Act of Parliament (passed of course by a Parliament dominated by the government in power), the courts are powerless to intervene.[19] This factor, at least for the time being, has to be accepted as part of our constitution, but this article examines other potential restrictions on the notion of government within and by the law that arise from the nature of the UK constitution.

The first of these factors relates to the question of justiciability: whether a decision or action of government is susceptible to *legal* review or challenge in a court of law. Obviously, Acts of Parliament are not reviewable, save when Parliament itself has decreed that they should be.[20] Acts of government,

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[9] See Albert Venn Dicey, *The Law of the Constitution,* n. 2.
[10] See for example *Chester v Bateson*, n. 5 above, *A v Secretary of State for the Home Department* [2004] UKHL 56, and *M v Home Office* [1994] 1 AC 377, considered below
[11] The government and other public bodies can generally sue and be sued in private law. See *Entick v Carrington* (1765) 19 St. Tr. 1030, where the plaintiff was allowed to sue the Secretary of State in trespass for an unlawful interference with his real and personal property.
[12] Common law powers consist of residual royal prerogative powers, formerly exercised by the Monarch, but now carried out by the government of the day, and have in recent years been subject to judicial review. The decision of the House of Lords in *Council of Civil Service Unions v Minister for Minister of State for the Civil Service* (the 'GCHQ' Case) [1985] 1 AC 374 made most exercises of prerogative powers justiciable.
[13] See the principles of *Wednesbury* reasonableness (*Associated Provincial Picture House Ltd. v Wednesbury* Corporation [1948] 1 KB 223. and the rules of natural justice: *Ridge v Baldwin*, n. 5, above. These principles have been augmented by 'European' principles of proportionality and necessity, incorporated or given effect to into English Law from both European Union Law and the law of the European Convention of Human Rights (1950).
[14] These procedures may be laid out in the empowering statute itself, or derive from the common law, known as the rules of natural justice, See *Ridge v Baldwin*, n. 5 above
[15] See the Human Rights Act 1998, which gives effect to the rights contained in the ECHR, as supported by 'British' principles such as access to the courts, the independence of the judiciary, the presumption of innocence, legal accountability, and the control of unfettered discretion and power.
[16] The Human Rights Act 1998, which allows Convention rights claims to be brought in any legal proceedings, and for the courts to award remedies for breach of such rights (see ss. 7-8 HRA). See also, *M v Home Office*, n. 10, above, establishing that Ministers must obey the law and legal orders as a matter of law and not of grace or polite convention.
[17] See Dicey, n.2 above, Part I; Lord Bingham, 'Dicey Revisited' [2002] *Public Law* 39, and Jeffrey Jowell, 'Parliamentary sovereignty under the new constitutional hypothesis' [2006] *Public Law* 562.
[18] Traditionally, on grounds of illegality, irrationality and procedural impropriety (Lord Diplock in 'the GCHQ' case, n. 12, above).
[19] See *IRC v Rossminster* [1980] I AC 952, although now a court might declare such legislation as incompatible with the Human Rights Act 1998; see *A v Secretary of State of the Home Department*, n. 10, above.
[20] Thus, the European Communities Act 1972 specifically (in s.2(4) of the Act) stated that Acts of Parliament and other provisions had to be interpreted and given effect to subject to applicable European (Community) Law. In addition, the Human Rights Act 1998 provides the courts with greater powers of review and interpretation of

of course, are, as government must act within a higher authority: parliamentary legislation or the common law. Yet, the more decisions of government are labelled political rather than legal, the less opportunity the courts have to use their legal powers to control government behaviour. In this sense, the recent decisions of the Supreme Court with respect to both the decision to leave Europe,[21] and to suspend Parliament in order to frustrate democratic debate on the withdrawal agreement,[22] are welcome in terms of maintaining the rule of law and supporting a legitimate constitution. This is despite the decision being criticised, by the government and the popular press, as an attack on democracy and the parliamentary process.[23] Equally, the more recent challenge to the Prime Minister's interpretation of the code of practice on ministerial behaviour (and his subsequent refusal to sanction the Home Secretary, Priti Patel, for alleged bullying), provided an opportunity to restore our belief in legal accountability and the rule of law.[24]

The second factor relates to the situation where the government or public official simply ignore the law, or more specifically ignore a court order demanding that they abide by the law. Recently the government, and the Home Secretary in particular, were reminded that judicial directions to assist with judicial proceedings are legally binding and not followed as a matter of governmental discretion or polite constitutional convention.[25] Judicial deference to the government in challenging policies and actions is one thing, but the idea that judicial orders can be ignored is a dangerous practice, and needs to be 'nipped in the bud' clearly and emphatically.[26]

The third factor is the current government's failure, or refusal, to embrace international and European principles of human rights, justice and accountability in its legal and constitutional order.[27] Buoyed by its recent withdrawal from the EU, and its willingness to isolate itself from Europe and European ideals, the government is now embarking on several proposals to reduce opportunities for legal challenge.[28] This includes watering down the effect of human rights legislation,[29] specifically to derogate from the European Convention on Human Rights and the Human Rights Act 1998 with respect to human rights violations committed by our armed forces overseas) - and to circumvent the availability and effectiveness of judicial review.[30] Free, in domestic law at least, from the constraints imposed by international law and standards, government is tempted even more to disregard the rules of justice and human rights. This makes judicial intervention from the domestic courts, using the limited powers it

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legislative and administrative measures, including the power to declare legislation incompatible with ECHR rights, under s.4.

[21] *R (Miller) v Secretary of State for Exiting the European Union* [2018] UKSC 5.

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

[23] See Owen Boycott and Heather Stewart, 'MPs condemn newspaper attacks on judges after Brexit ruling' The Guardian 4 November 2016.

[24] This is considered below when discussing justiciability. In December 2021, the High Court ruled that the matter was justiciable, but found that the Prime Minister had not misinterpreted the code: *R (on the application of the FDA) v Prime Minister and Minister of the Civil* Service [2021] EWHC 3279 (Admin)

[25] This is considered below when discussing the enforceability of court orders.

[26] This was highlighted nearly thirty years ago in the case of *M v Home Office,* n. 10, above.

[27] Notably under the European Convention on Human Rights and Fundamental Freedoms 1950 , as members of the Council of Europe, and what remains of European Union law after its withdrawal.

[28] See the proposed Judicial Review and Courts Bill 2021: A Bill to Make provision about the provision that may be made by, and the effects of, quashing orders; to make provision restricting judicial review of certain decisions of the Upper Tribunal; to make provision about the use of written and electronic procedures in courts and tribunals; to make other provision about procedure in, and the organisation of, courts and tribunals; and for connected purposes. At the time of writing, it is in its second reading in the House of Commons.

[29] On 7 December 2020, the Justice Secretary, Robert Buckland, announced that Sir Peter Gross, a former Lord Justice of Appeal, would chair a panel tasked with reviewing the operation of the Human Rights Act 1998. See Steve Foster, 'Long in the making: the 'Gross Review' and Conservative Party Policy on the reform of human rights law' (2021) 26(1) *Coventry Law Journal* 17.

[30] See the decision of the Supreme Court in *Smith v Ministry of Defence* [2013] UKSC 41, where it was held that the government was liable for any unlawful deaths committed by British armed forces during its occupancy of Iraq.

has at its disposal, more fundamental; and the fight against further proposals to provide legal immunity to the government more important.

Court orders, Home Secretaries and the rule of law

The first of our case studies on the rule of law and current government practice concerns the question of whether the government is legally bound to follow a legal order intended to facilitate justice, and whether the courts can legally sanction those who refuse to follow those orders. Earlier, this year, in what was described as a landmark court ruling,[31] it was held that the Home Secretary, Priti Patel, was legally accountable for failures in ensuring that deaths in immigration detention centres were properly investigated. The court found that three of the Home Secretary's detention policies breached human rights rules and, importantly, that she could not frustrate or undermine inquiries into these deaths by ignoring a previous court ruling and attempting to deport a key witness to the investigation.[32]

The facts were that two friends, Ahmed Lawal and Oscar Lucky Okwurime, both from Nigeria, were in Harmondsworth immigration removal centre when on 12 September 2019 Okwurime was found dead in his cell. Under Article 2 of the European Convention on Human Rights (1950), the Secretary has a legal duty to assist the coronial inquest by identifying and securing evidence from potential witnesses.[33] Instead, she elected to continue with her plans to remove a number of potential witnesses, including Mr Lawal, by charter flight on 17 September 2019. Lawal and a handful of others were able to instruct lawyers through last minute referrals from frontline organisations such as Medical Justice and Movement for Justice. Lawal requested that his removal be deferred to enable a proper investigation into whether he would be a relevant witness for the forthcoming investigation, but the Secretary refused this request. He was thus compelled to issue last minute judicial review proceedings challenging the lawfulness of his removal in circumstances where the Secretary was removing potential witnesses to a death in her custody that was due to be investigated. . On 17 September 2019, the High Court ordered an injunction on Mr Lawal's removal on the basis that there was a serious issue that there should not be any removal of persons for whom there are grounds to believe that they may have material evidence to give in relation to the death of Okwurime. On 21 October 2020, the Area Coroner for West London informed the Secretary and Mr Lawal that he was an 'important witness of fact' as the only live witness who can speak to certain parts of the evidence, particularly the presentation of the deceased in the days before his unfortunate death. Mr Lawal gave evidence in person, as directed by the Coroner. Following the hearing that took place in November 2020, the jury found that Mr Okwurime had died unnaturally, as a result of neglect.

Lawal's legal challenge, focused on the question whether the Home Secretary can remove a potential witness to a death in custody before it is clear whether they will be needed as a witness. In particular, the questions were:

> whether the Secretary can lawfully remove a potential material witness to a death in custody, in circumstances where their evidence has not been secured and a coroner has not made a decision as to whether they are required to give evidence at the final inquest hearing; and
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> whether her failure to have in place a policy framework, which makes clear provision for a proper investigation into witnesses to a death in custody prior to any enforcement action being taken, is lawful.[34]

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[31] See Diane Taylor 'Priti Patel's detention policies found to be unlawful', *The Guardian*, 14 April 2021.
[32] *R (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)).
[33] Article 2 provides that everyone's right to life shall be protected by law and the European Court of Human Rights has established that this includes a procedural obligation on the state to investigate deaths that might be in breach of Article 2: *Jordan v United Kingdom* (2003) 37 EHRR 3.
[34] *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 22

The case was heard by the President of the Upper Tribunal, Mr Justice Lane and Upper Tribunal Judge Canavan, and the court granted Mr Lawal's application for judicial review on both grounds. First, the judges found that the policy in place at the time of the death of Okwurime created an unacceptable risk that the Home Secretary would fail to comply with her Article 2 procedural duties of securing relevant evidence, following a death in immigration detention.[35] Second, her decision to remove the applicant to Nigeria was unlawful, as she had failed to take reasonable steps to secure his evidence and take other minimum steps contrary to her procedural obligations under Article 2.[36] Thirdly, the replacement DSO policy of 2020 was found to be unlawful as it failed to direct individuals within the immigration detention estate to identify and take steps to secure the evidence of those who may have relevant information concerning the death in detention.[37] Fourthly, the present policy framework concerning removals of foreign nationals (*J*udicial Reviews and Injunctions – Version 20.0 (10 October 2019)) was found to be 'legally deficient' as it failed to make any reference to her Article 2 procedural requirements following a death in detention.[38] Accordingly, the judges held that the absence of a policy to govern the position following a death in immigration detention was unlawful and concluded that there needed to be such a policy.[39]

It is important to stress that this is not simply a case where the government has been found to have broken the *law*. All successful judicial review cases are based on the finding that the relevant body has not followed the law in some sense: substantively or procedurally. All unsuccessful parties to legal actions discover, in retrospect, that they have broken the law, and judicial review proceedings are no different in that respect. Rather, the case is an example of the government challenging, and being prepared to flout the *rule of law*, to set themselves above the law (in this case a court order and the requirement to secure relevant witnesses). It is not simply a question of not knowing the rules on securing witnesses and ensuring an effective investigation, but ignoring those rules in the belief that they cannot be accountable, or sanctioned for breach. The act of deportation in this case, which had the effect of frustrating the giving of evidence, has thus all the features of the Prime Minister's attempts to suspend Parliament so as to frustrate its attempts to discuss the government's Brexit plans.[40] Jamie Bell, Lawal's solicitor, stated:

> …the case demonstrates the cavalier attitude of the Home Office when enforcing removals. Despite a tragic death within a detention centre, the Home Secretary did not hesitate to maintain her plan to remove potential witnesses by charter flight, ignoring anyone who wished to come forward to give evidence.

The Guardian noted that the case was the first time that a Home Secretary has been found to have breached a detainee's human rights by refusing to allow them to give evidence at an inquest.[41] In its defence, the Home Office spokesperson said that it had noted the judgment and will be refreshing its current processes, such as introducing a new checklist to ensure that all potential witness are identified.

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[35] Further, the court found that the inadequacy of this policy was confirmed and illustrated by the failings of the Home Secretary after the death of Mr Okwurime *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 77

[36] *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 84, applying *Jordan v United Kingdom*, n. 33.

[37] *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 84

[38] *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 85

[39] Finally, the judges found that that the Secretary seriously breached her duty of candour in judicial review proceedings by failing to disclose correspondence sent by the Coroner following the inquest into the unnatural death of Carlington Spencer in IRC Morton Hall in which the Coroner had expressed severe criticism of the Secretary for attempting to remove relevant witnesses. *R. (on the application of Lawal) v Secretary of State for the Home Department* (JR/626/2020(V)), 58-63.

[40] See the Supreme Court's decision in *R (Miller) v Prime Minister* [2019] UKSC 41, considered below.

[41] Jonathan Ames, 'Home Secretary broke law over death of detainee' *The Times*, 15 April 2021, 2.

An apology too late to hide the fact that the government had no intention of following the law or the legal edicts of the judiciary.

Despite the novelty of the case, there have been previous incidents of government ministers ignoring court orders in the belief that they should be followed by political politeness and convention rather than out of legal obligation. In the infamous case of *M v Home Office*,[42] the House of Lords held that a minister or other officer of the Crown is amenable to the contempt jurisdiction of the court even when acting in his official capacity, and that injunctions could be granted against ministers and other officers under s.31 of the Senior Courts Act 1981. In that case, A, a citizen of Zaire, came to the UK seeking political asylum, but his application was rejected, as was his application for judicial review. He was notified that he would be returned to Zaire, but made a renewed application for review, and in those proceedings the judge indicated that he wished A's departure to be delayed and understood counsel for the Secretary of State to have given that undertaking. In fact, A was then removed, counsel not conceding that he had given any such undertaking. The court ordered A's return forthwith, but the Secretary of State, on legal advice that the mandatory injunction had been made against the Crown without jurisdiction, cancelled the return. Contempt proceedings were brought against the Minister, but at first instance, Simon Brown J. held that the Crown's immunity from injunction was preserved by s.21 of the Crown Proceedings Act 1947.[43]

Both the Court of Appeal and the House of Lords' rejection of the Minister's claim for legal immunity in *M* re-iterated the courts' powers to subject the government to the rule of law.[44] Equally, in the present case, the judges' decision that the Home Secretary had acted unlawfully in frustrating the inquest into a death in detention serves as a potent reminder that governments and Home Secretaries act within the law and have to abide by lawful court orders. Any other finding would be detrimental to legal accountability, the rule of law and basic principles of constitutionalism. It would further leave our Constitution with little or no mechanism for ensuring that the constitution and our principles of constitutional fair play are upheld; fuelling the belief that we do not truly have a constitution, and that our constitutional law is based on no more than being politically right or wrong.[45]

Brexit plans, ministerial codes, justiciability and the rule of law

As stated above, the issue of justiciability is at the heart of enforcing the rule of law in any constitution, particularly the UK's. If government decisions or actions are not justiciable, then strong governments will be able to ride the waves of political or public disapproval and are thus free from effective control. Although certain practices and actions are correctly labelled as political and thus not susceptible to legal challenge,[46] it is crucial that in a constitution that lacks legal entrenchment and strong judicial supremacy, that as many acts of the government as possible are subject to judicial review (in the widest sense). This has been achieved over the years by the expansion of the doctrine of judicial review (in its narrow sense) to cover acts which are not simply *ultra vires* the government's statutory and common law powers. Thus, the courts can now question the exercise of powers and discretion that are activated by improper purpose or abuse of discretion,[47] and the principles of irrationality and proportionality ensure that the courts can question unreasonable use of power where previously this was thought to be

[42] [1904] 1 AC 377.
[43] [1991] 7 WLUK 352
[44] For commentary, see Mark Gould '*M v Home Office*: government and the judges' [1995] *Public Law* 568; Carol Harlow 'Accidental Loss of an Asylum Seeker' (1994) 57(4) *Modern Law Review* 620; Rodney Brazier 'Ministers in Court: the personal legal liability of Ministers [1994] 44(4) *Northern Ireland Legal Quarterly* 317.
[45] See Frank F. Ridley, 'There is no British Constitution; a dangerous case of the Emperor's new clothes' (1988) 41 (3) *Parliamentary Affairs*, 340.
[46] Such as the rules and procedure of Parliament, including, more controversially, that the courts cannot question how an Act of Parliament proceeded through Parliament: *Pickin v BRB* [1974] AC 765.
[47] *Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 997

beyond the courts' constitutional role.[48] Further, our constitutional law has developed so as to make certain issues, traditionally thought of as inappropriate for judicial determination, justiciable, particularly in the area of prerogative powers.[49]

Brexit and justiciability

The issue of justiciability in our constitutional law was raised most strikingly in the Brexit saga concerning our withdrawal from the European Union after the 2016 referendum, where a (small) minority voted in favour of withdrawal. Once the government set its sight on a withdrawal plan, legal questions were raised as to whether that could be done without the approval of Parliament. For the government, the people had spoken, and any political or judicial attempts to overturn or question that withdrawal would be considered unconstitutional and undemocratic. The counter argument was that that a withdrawal without appropriate parliamentary discussion and approval would provide government with an unlimited power to decide the fate of the county's international position, alongside the rights of citizens to continue enjoying the raft of their acquired European individual rights. With respect to government within the law, and the rule of law, the question was fundamental. Should government be allowed to take such a momentous decision without parliamentary and legal regulation; and if the answer was no, what would that tell us about the state or existence of our constitution as a legal restraint on government?

In the end, both the decision to withdraw from the EU, by triggering Article 51 of the Treaty without Parliamentary involvement,[50] and the decision of the Prime Minister to suspend Parliament in an attempt to frustrate Parliamentary debate on the government's withdrawal plans,[51] were held to be justiciable and then unlawful. Both decisions caused great political, public and indeed legal debate, with the courts being accused of undermining the democratic process and acting beyond their constitutional powers.[52] However, given the fact that the government eventually succeeded in pushing their proposal through, and the initial majority vote won out, does it matter that the law, and the rule of law, was initially flouted?

It is argued here that it matters very much. The first government decision was to ignore Parliament's contribution to the process and treat the decision to withdraw as an entirely executive decision governed by the royal prerogative. This was not only *democratically* and *politically unconstitutional*, but ignored the fact that *legal* rights, established by virtue of the European Communities Act 1972 and the resultant membership of the European Union, would be detrimentally affected by withdrawal. The government's wish of course was to side-step this process and deal with the legal consequences (if any) after; but the decision of the Supreme Court insisted that that process be carried out before the triggering of Article 51 was affected. True, this required a good deal of judicial guile on the part of the Supreme Court with respect to justiciability,[53] but as with its other decision on the prorogation of Parliament, below, without such a decision, government could change the fundamental legal landscape by executive action. That

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[48] Proportionality (balancing the aims of the law with the enjoyment of rights) is part of European human rights law, as given effect to by the Human Rights Act 1998. Previously, the courts could not use the doctrine, as it was felt that it allowed the courts to judge the merits of actions and policies: *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

[49] See the 'GCHQ' case, n. 12 (prerogative powers generally reviewable), *R v Secretary of State for the Home Department, ex parte Fire Brigade Union* [1995] 2 All ER 244 (decision to bring legislation into effect reviewable on grounds of abuse and fettering of discretion), and *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 349 (prerogative power to pardon reviewable on some grounds).

[50] *R (Miller) v Secretary of State for Exiting the European Union* [2018] UKSC 5.

[51] *R (Miller) v Secretary of State for Exiting the European Union* [2019] UKSC 41.

[52] See Chris Monaghan, *'The Prorogation Litigation: 'which was as if the Commissioners had walked into Parliament with a blank piece of paper' (2019) 24 (2) Coventry Law Journal 7.*

[53] See Sir Philip Sales, 'Legalism in Constitutional Law: judging in a democracy [2018] *Public Law* 687. Mark Elliot, 'Constitutional adjudication and constitutional politics in the United Kingdom: the Miller II case in legal and political context' (2020) 16 (4) *European Constitutional Law Review* 625, and Paul Craig, 'The Supreme Court, prorogation and constitutional principle [2020] *Public Law* 248.

would have been contrary to the fundamental feature of the UK's democratic constitution and, of course, the rule of law. Simply, something had to be done to prevent this, and the Supreme Court's decision salvaged the constitution from the government's unconstitutional (and as it turned out illegal) behavior.

Once the government were forced to use Parliament to approve its withdrawal package – now via the EU Withdrawal Bill 2019 – it turned its attention to forcing its plans through Parliament with as little debate and opposition as possible. Hence the Prime Minister decided to ask the Queen to prorogue (suspend) Parliament early, which would have the effect desired by the government and the Prime Minister, as the deadline for triggering Article 51 would have passed by the time Parliament sat again. Neat trick if you can get away with it, but was this potentially *unlawful* (justiciable), or merely *politically unconstitutional* (and non-justiciable)? The Supreme Court held that the Constitution was built on the separation of powers and democratic accountability, including the power and duty of Parliament to control the executive. Hence, the Prime Minister's actions had frustrated those fundamental purposes and thus acted unlawfully: the prorogation was, thus, invalid.[54] Once again, the Prime Minister was forced to act within the law, and the rule of law; he was not allowed to simply plead that this was a politically legitimate (albeit fraudulent) way to achieve a political aim; *the law* of the constitution has to be followed.[55]

It is argued that both decisions, although contentious, were vital to the maintenance of our fragile constitution and the role of the rule of law within it. The UK constitution is, of course, heavily dependent on who holds the political power at any given time – the dominant executive in an essentially democratic Parliament. But, without some *legal* control of the government, Parliament is simply bulldozed into accepting government policy, particularly where that policy is given effect through residual prerogative powers. That situation would question the very nature or existence of any UK constitution, and the Supreme Court rescued us from that scenario; at least for the time being.

Ministerial codes on bullying and justiciability

It is important to constantly remind government, dare we say *this* government in particular, that its actions and decisions have consequences, including *legal* consequences, and they can be held legally (and politically) to account for them. This is raised by the Prime Minister's decision not to sanction his Home Secretary for alleged bullying, which was claimed to be in breach of the Ministerial Code.[56] Should we have to accept the Prime Minister's finding on this matter, that her conduct did not on 'proper' interpretation, breach the code, or is this a decision that can and should be reviewed by the courts?

The Prime Minister decided to keep Patel in post last year after he found that she had not breached the Ministerial Code, which sets behavioural standards. This followed an investigation in November 2020, via an inquiry carried out by the Prime Minister's head of standards, Sir Alex Allan, who found that she had 'unintentionally' broken the ministerial code; her approach to staff, on occasions, amounting to behaviour that can be described as bullying in terms of the impact felt by individuals.[57]

On its website, the Association of First Division Civil Servants (FDA) explained why it was bringing the action.[58] This was because, despite the evidence of the report, the Prime Minister sought to give

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[54] *R (Miller) v Secretary of State for Exiting the European Union* [2019] UKSC 41, 38-52.
[55] See Mark Elliot, 'Constitutional adjudication and constitutional politics in the United Kingdom: the Miller II case in legal and political context' (2020) 16 (4) *European Constitutional Law Review* 625, and Paul Craig, 'The Supreme Court, prorogation and constitutional principle [2020] *Public Law* 248.
[56] Dominic Casciani, 'High Court to look at PM's Patel 'bullying' decision' BBC News, 28 April
[57] 'Findings of the Independent Adviser': https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/937010/Findings_of_the_Independent_Adviser.pdf. The report also stated that Patel – who had offered a fulsome apology - had sometimes 'legitimately, not always felt supported' by others within the Home Office.
[58] See 'Why we've launched a judicial review of the Home Secretary's breach of the Ministerial Code', fda: the union for managers and professionals in public service: https://www.fda.org.uk/.

weight to the Home Secretary's assertion that any behaviour was unintentional and therefore concluded that she had not breached the code.

> Our challenge in the court is essentially that the Prime Minister's decision was irrational given the obligations of the Code, and indeed his own words in its foreword that "there will be no bullying and no harassment". It is entirely a matter for the Prime Minister to consider the factors he feels appropriate in determining any sanction following a breach, and that is not a matter on which we seek to intervene. Our contention, however, is that given the clear obligations under the Ministerial Code in relation to bullying and harassment, the Prime Minister's decision effectively concludes that the Home Secretary did not bully civil servants as she states this was not her intent.

In particular, the FDA pointed out that the Home Office itself deals with the issue of intent in its definition of bullying: 'Bullying is not about whether the perpetrator of the acts intended them or not, but about the impact on the recipient and how it makes them feel'. The FDA's argument is that the elements of the code on bullying - and a judgement on whether someone has been victimised - must be open to scrutiny under employment law. Thus, it has been pointed out that if the FDA wins the case it would mean that some of the Prime Minister's conduct might be open to scrutiny under employment law, as if he were any other kind of boss.[59] That in turn would be a massive constitutional question for the Supreme Court, which could be asked to redefine the boundary between politics and the law.

Thus, although the application and interpretation of the code should, at least initially, be a matter for politicians and not the courts, given the constitutional importance of this issue with respect to accountability and ministerial standards, it cannot be right that the interpretation of the code is left to one person, who might have political reasons for his determination. This is a further example of politicians, and the existing government, taking action in the (hopefully mistaken) belief that as we have spoken and that will be the end of the matter. Such an attitude is damaging to a healthy democracy and the rule of law, despite the possibility of political and electoral accountability for such behaviour.[60]

When the case went to trial it was held that the Prime Minister had not misinterpreted paragraph 1.2 of the Ministerial Code and had not, therefore, acted unlawfully in failing to take action against the Home Secretary.[61] Positively, the court noted that the issue raised by the claim was the proper interpretation of the words 'harassing, bullying or other inappropriate or discriminating behaviour' contained in paragraph 1.2 of the Code, and accordingly that those words were capable of interpretation by a court of law. Thus, in the Court's view, as a matter of principle, the question of whether the Code excluded offensive conduct from the paragraph 1.2 definition of bullying if the perpetrator was unaware of, or did not intend, the harm caused, was justiciable; and the fact that the Code had no statutory basis did not, of itself, render that question non-justiciable.

Less encouragingly, however, the court made it clear that the scope for review in such cases was limited to pure questions of legal interpretation, and that the Prime Minister's decision to use his powers to discipline a Minister was not reviewable. The ruling on the Prime Minister's *application* of the code to the Home Secretary is, thus, disappointing. Under the rules of administrative law, decisions should be supported by evidence and even the most political of decisions should be subject to some review, including basic rationality. The review of that decision does not have to be robust, and can give the decision maker a certain element of discretion, but to say that a decision maker must appreciate the legal boundaries of its jurisdiction, but then to give absolute discretion as to how that legal power is

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[59] Dominic Casciani, n. 56.

[60] A further example of the government's indifference and hostility to regulation and accountability was seen in the recent Owen Patterson affair. In order to thwart an investigation into the Conservative MP's alleged breach of lobbying rules, the government instead called for an overhaul of the MPs standards watchdog instead. Later the government backed down and abandoned the overhaul and the MP resigned: Jennifer Scott, 'Owen Patterson quits as MP over lobbying row 'nightmare, BBC News, 4 November 2021.

[61] *R (on the application of the FDA) v Prime Minister and Minister of the Civil Service* [2021] EWHC 3279 (Admin).

applied, makes the initial finding of justiciability fruitless. [62] Further, it again exposes the frailty of our constitution in controlling instances excess of power.

Further attacks on the rule of law: reforming human rights law and judicial review

This section of the article will focus on the government's most recent plans to reform both the Human Rights Act 1998 and the scope of the remedy of judicial review. In the absence of an entrenched constitution, a bill of rights and supreme constitutional court, our constitution relies heavily on adherence to international and European human rights' standards and the common law power of the courts to review the legality and reasonableness of government acts and decisions. These remedies are, of course, subject to parliamentary sovereignty, but in order to comply with basic principles of liberty and constitutionalism, it is essential that our constitution provides an adequate framework for protecting fundamental human rights and holding government legally to account. This article will not detail these plans, but merely highlight some of the proposals in the context of the discussion and concern over the current government's record on accountability and the rule of law.[63]

In the UK, the absence of an entrenched Bill of Rights and formal constitutional review by our courts, the common law protection of rights and liberties, together with the legal remedy of judicial review of administrative action, ensures that the government's powers are legally curtailed, particularly with respect to what other constitutions regard as fundamental human rights.[64] This system has been built up over the years: by the courts in their development of constitutional rights and judicial review,[65] and by Parliament itself, primarily with the passing of the Human Right Act 1998, which ensures as far as possible that our system complies with the European Convention on Human Rights 1950.

Yet for this system to operate effectively, and to allow it to compare favourably with other constitutions, it is essential that government accept the courts' role in enforcing the rule of law, and does not via legislative or other change seek to limit the proper enforcement of human rights and executive review. Thus, our system is particularly vulnerable to the doctrine of parliamentary sovereignty and legislative change inspired by government policy, and several recent government proposals are threatening to restrict or nullify the courts role in both areas.

Reform of human rights law

Since the passing of the Human Rights Act 1998, there have been many attempts by consecutive governments to reform or repeal the Act and to return to the common law system of rights protection.[66] These proposals have been spurred either by landmark decisions of the domestic courts or the European Court of Human Rights,[67] or the more general desire to free the state and society from the strict

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[62] For a criticism of the High Court' decision, see See Steve Foster 'Interpreting ministerial codes, justiciability and the rule of law' (2021) 26(2) Cov. Law J *

[63] See Steve Foster 'Should it go or should it stay? The coming of age of the Human Rights Act 1998, or time to say goodbye? (2021) 26(2) Cov. Law J 23

[64] See Helen Fenwick, *Civil Liberties and Human Rights,* 4th edn. Routledge 2017, chapter 2, and Steve Foster, *Human Rights and Civil Liberties,* 3rd edn. Longman 2011, chapter 3.

[65] Sir John Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' (1992) 18 (4) *Commonwealth Law Bulletin* 1385.

[66] For example, proposals were included in both the 2010 general election manifesto and the Coalition Agreement, which committed the government to establish a Commission to investigate the creation of a British Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights. The Commission commenced work on 18 March 2011 under the chairmanship of Sir Leigh Lewis. Its final report entitled *A UK Bill of Rights? - the Choice Before Us*, was published on 18 December 2012.

[67] Most notably the decision of the House of Lords in *A v Secretary of State for the Home Department*, n. 10. (Detention without trial), and the European Court's decisions in *Othman v United Kingdom* (2012) 55 EHRR 1 (deportation and fair trials) and *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41 (prisoner voting rights).

principles and supervision of the European Convention and the European Court.[68] In either case, the proposals desired to give power back to our courts, and of course, to the government, to devise and maintain our own human rights principles based on traditional British notions of justice.[69]

The system used under the Human Rights Act has never threatened the doctrine of parliamentary (and executive) sovereignty; certainly not to the extent that the European Communities Act 1972 did. Nevertheless, the power of the domestic courts to employ Convention principles, and their duty to at least take into account the decisions of the European Court of Human Rights,70 caused concern that the Act was disturbing our traditional separation of powers and the proper constitutional role of our judges. More specifically, it was feared that the Act had replaced our own notions of rights and justice with those imposed by the European order. In any case, the reform of the Human Rights Act, and in particular the freeing of domestic law and judges from the case law of the European Court, is clearly back on the political table. Thus, unveiling details of planned reform to the Act, the Justice Secretary has said British soldiers and institutions such as the police and NHS should not be "dictated to" by the European Court of Human Rights (ECtHR), and that he was planning a "mechanism" to allow the Government to introduce ad hoc legislation to correct judgments that ministers believe are incorrect.71

Before examining the most recent plans to challenge the 1998 Act, let us consider the rationale behind the wish to return to our own common law system. Before the Act was passed our common law method of rights' protection was found wanting because there were insufficient means to challenge government acts and parliamentary legislation.[72] This was largely due to the feeling that it would be unconstitutional for our courts to question parliamentary legislation or government autonomy beyond asking whether it was within the relevant legal powers.[73] The Act allowed the courts to consider the proportionality of administrative action,[74] and to declare legislation incompatible with Convention rights,[75] and thus the *balance* between rights and state power had altered. Now, rights were to be given an enhanced status and it was more difficult to justify any interference with these rights;[76] and often impossible to do so without breaching international law.[77] Thus, a return to a system where rights are enjoyed alongside appropriate duties of rights holders to obey the law and respect the rights of others, and where the courts were to pay more respect to parliament and government, has been welcomed by those who felt that the balance had swung too far in favour of individual rights.[78]

Turning to the latest government proposals, an independent review panel has been tasked with examining the relationship between domestic courts and the European Court, and the impact of the HRA on the relationship between the judiciary, the executive and the legislature.[79] As a result, it is

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[68] In particular, to allow the domestic courts to ignore European ideals of proportionality and necessity and decisions of the European Court, and instead to apply 'British' standards of justice.
[69] Steve Foster, 'Repealing the Human Rights Act: no not delay, just don't do it' (2015) 20 (1) *Coventry Law Journal* 9.
[70] Under s.2 of the Act.
[71] See Michael Cross, 'HR reform: Raab plans mechanism to correct "incorrect" judgments' *Law Society Gazette* 17 October 2021.
[72] Steve Foster 'The Protection of Human Rights in Domestic Law: Learning Lessons from the European Court of Human Rights' [2002] 53 (2) NIQL 232.
[73] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.
[74] This was effected by s.2 of the Act, which states that the domestic courts must take into account the decisions of the European Court of Human Rights, which, of course, employs the doctrine of proportionality when assessing whether an interference is 'necessary in a democratic society'.
[75] Section 4 of the Human Rights Act 1998.
[76] See Lord Steyn in *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL26
[77] This is the case where the right in question is absolute, such as the right to be free from torture and inhuman or degrading treatment or punishment, in Article 3 of the Convention.
[78] The government often referred to this switch as the 'mission creep' of the Human Rights Act and the case law of the European Court of Human Rights.
[79] Launched by the Ministry of Justice to consider how the Human Rights Act is working in practice and whether any change is needed: https://www.gov.uk/guidance/independent-human-rights-act-review

feared that domestic courts could be encouraged to diverge more from European Court of Human Right's rulings and the Act's central provisions.[80] In particular, the review is considering whether to update the law to remind judges that they are not bound by the European Court's rulings; Lord Pannick suggesting to the Review Panel that s.2 of the Act be amended so that after the words 'must take into account', the words 'but shall not be bound by' be inserted. This, of course assumes that the domestic courts will be more willing to defer to Parliament and the government than the European Court,[81] but in any case it attracts the possibility that UK human rights law would fall short of the standards laid down in the Convention and by the European Court of Human Rights. This was the situation before the Act was passed,[82] and the proposals present a further risk that government is allowed to act outside the constraints imposed by international standards of human rights and the notion of the rule of law. Lord Pannick attempts to argue that often decisions of the European Court are followed despite them having little relevance on matters in the UK. However, the government is more concerned with cases that *do* have relevance, but where the European Court imposes liability on the state where Parliament and the courts, if left to its own devices, would, or might, choose not to impose such liability.[83]

The independent review reported in December 2021, and was accompanied by the Ministry of Justice's consultation paper on the reform of the Act and its replacement with a modern Bill of Rights.[84] The review courted strong criticism from a coalition of charities, trade unions and other groups, who fear that it is a threat to freedom and justice,[85] and the Ministry's plans have attracted similar criticisms.[86] Defending the Act, the group claimed that while every system could be improved, and protecting rights and freedoms for all is a balancing act, the Act is a proportionate and well-drafted protection for the fundamental liberties and responsibilities of everyone in this country. At the same time as the release of the consultation paper, the Policy Exchange released its findings on the Act's reform, outlining why the Act needed to be reformed and the best methods by which to achieve this.[87]

It is clear, therefore, that the present government is hell bent on tilting that balance back in favour of parliamentary and government autonomy, and we should all be concerned with the impact of that on human rights and the rule of law. This is made more worrying by further attempts to restrict or abolish judicial and legal review of certain executive action. For example, the Overseas Operations (Service Personnel and Veterans) Act 2021 makes provision about legal proceedings in connection with operations of the armed forces outside the British Islands, creating a presumption against prosecution of armed service personnel with respect to alleged conduct during overseas operations.[88] The provision

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[80] Henry Zeffman, 'UK judges not bound by human rights rulings' *The Times*, 21 June 2021, 6.
[81] See Steve Foster, 'Finally, a Bill of Rights for the UK?' (2008) 13(2) *Coventry Law Journal* 8.
[82] Foster n. 68.
[83] One example cited in minutes of a meeting between police chiefs and the panel on 13 April is the Supreme Court ruling in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC where it was held that the police were liable under Article 3 of the Convention for not investigating allegations of rape made by two women. A long line of domestic authority had provided immunity to the police with respect to the investigation of crime, but such authority had to be re-examined in the light of European Court case law: *Osman v United Kingdom* (1998) 29 EHRR 245.
[84] Ministry of Justice, 'Human Rights Act Reform: A Modern Bill of Rights – a consultation to reform the Human Rights Act 1998, December 2021.
[85] Haroon Siddique 'More than 220 groups criticise UK review of Human Rights Act' The Guardian, 22 July 2021.
[86] Rajeev Syal, 'Raab's human rights proposals condemned as 'blatant power grab'' The Guardian, 14 December 2021. In the article, Martha Spurrier, the director of the human rights group Liberty, is reported as saying that the was a blatant, unashamed power grab from a government that wants to put themselves above the law.
[87] Policy Exchange: Richard Ekins and John Larkin QC, 'How and Why to Amend the Human Rights Act 1998' December 11 2021.
[88] Sections 1-5 of the Act.

is in conflict with decisions of the domestic courts in this area,[89] and will lead to a clash with the European Court of Human Rights.[90] Further, the recent Judicial Review Bill, considered below, limits the ability of migrants to challenge decisions of public bodies, in clear breach of the separation of powers and the courts' duty to ensure that public bodies have acted legally, fairly and in conformity with any human rights engaged in the case.[91] This, it should be pointed out, is different from the need for judicial deference, where the courts are expected to show due respect to Parliament and government when questioning acts and decisions in sensitive areas such as national security.[92]

A further concern is that now Brexit has been achieved, the government feels that it is now free from the constraints and principles of the European Union, and indeed the remainder of the international arena. This will leave the UK isolated on many human rights and justice issues, adding credence to the argument that the UK constitution is incapable of maintaining the rule of law and acceptable standards of rights protection. Thus, it has been reported that not one European country has decided to support the UK government's controversial asylum plans, with the UN criticising the proposals as so damaging that they risked Britain's "global credibility".[93] Despite the government's membership of the Council of Europe, there is clear evidence that the government is prepared to stand alone on many fundamental issues. The recent ratification of Protocol No. 15 of the European Convention (recognising the subsidiarity of the Convention machinery to domestic enforcement), gives rise to further concern that the UK government in particular will welcome and apply a wide margin of appreciation in the recognition and enforcement of human rights.[94] Together with the proposed reform of the Human Rights Act, above, and the reform of judicial review, below, the government's *modus operandi* with respect to following legal and other advice and following international law and the rule of law in general is casting severe doubts as to the fitness for purpose of our constitutional arrangements.

Reform of judicial review

Turning now to the government's recent proposals for reform of the remedy of judicial review. The Judicial Review and Courts Bill, published in July 2021, introduces further restrictions on how we challenges government decision-making in the courts.[95] As stated earlier, the development and extension of judicial review has been a shining example of constitutionalism at play in the UK constitution. Under this procedure, government and other public bodies have to act within their legal powers, must follow any statutory or common law procedures, and must arrive at decisions that are rational (or at least not irrational) and, where the decision impacts on human rights, necessary and

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[89] *Smith v Ministry of Defence* [2013] UKSC 41.
[90] See the European Court's decision in *Al-Skeini and others v United Kingdom* (20110 53 EHRR 18.
[91] A similar provision already exists with respect to the court's challenge of deportation orders that impact on the individual's family law rights under Article 8 of the European Convention: s. 19 of the Immigration Act 2014 amended the Nationality, Immigration and Asylum Act 2002, so that the courts must take into account, and give weight to, certain factors when making a decision to uphold a deportation of a foreign criminal. In R (Kiarie and Byndloss) v Secretary of State for the Home Department [2017] UKSC 42, the Supreme Court held that the Home Secretary had not established that 'deport first, appeal later' struck a fair balance between the rights of the appellants and the interests of the wider community.
[92] See the decision of the Supreme Court in *R (Begum) v* Special Immigration and Appals Tribunal [2020] UKSC 7, noted by Stevie Martin, 'Deference, fairness and accountability in the national security context' [2021] *Cambridge Law Journal* 209.
[93] Mark Townsend*, '*EU countries snub Priti Patel's plans to return asylum seekers'*, The Guardian,* 9 May 2021
[94] Council of Europe, Treaty Series 213, Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms. The Protocol, which entered into force on August 1, 2021, stresses (in Article 1) that the Convention machinery is subservient to the national system of protecting human rights by inserting after the existing preamble: "…the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention," Also, article 4 reduces the time limit for applications from 6 to 4 months.
[95] See Michael Zander, 'Reform of Judicial Review' (2021) 171 *New Law Journal* 10.

proportionate. Despite the presence of parliamentary (executive) sovereignty, it has achieved much of what other constitutional courts do under a written and entrenched constitution, and has enabled us to follow the fundamental rules of constitutionalism. Thus, a coalition of charities, trade unions and belief groups has described judicial review in the following terms:

> Judicial review is an indispensable mechanism for individuals to assert those rights and freedoms against the power of the state. Any government that cares about freedom and justice should celebrate and protect these vital institutions and never demean or threaten them.[96]

In July 2020, the UK government commissioned former minister Lord Faulks QC to conduct an independent review of the judicial review process in England and Wales, inviting the review to consider restricting the grounds for bringing judicial review claims and the remedies available for successful claims; and using the costs regime to discourage weak judicial review claims.[97] The review was published on 18 March 2021, concluding that judicial review is, in general, working well, but the government response was to launch a consultation on a number of reform proposals, suggesting a number of reforms that would both streamline the process but make it more difficult to judicially review government actions. A full account of the Faulk's Review, and the government response,[98] is available elsewhere,[99] but we shall examine some of the desired reforms in the context of our examination of the rule of law and constitutionalism in the UK constitution.

With respect to remedies for judicial review, the review suggested that in relation to quashing orders (formerly *certiorari*) the courts could be given a power to suspend such an order, giving the body an opportunity to correct any illegality or failure. Alternatively, a court could give such an order a prospective effect only, allowing previous unlawful actions to remain valid and lawful. It is suggested that given the Home Secretary's behaviour in the migrants' case, above, this would provide dangerous encouragement to the government or other public bodies. Thus, a Law Society parliamentary briefing on the Bill strongly opposes both the introduction of prospective-only quashing orders and the inclusion of the statutory presumption, asserting that these proposals will: weaken judicial discretion; deny remedy to those affected by unlawful acts, and have a chilling effect on judicial review.[100]

More specifically, there are proposals relating to 'ouster' clauses (provisions that seek to exclude any jurisdiction for the courts to review a particular matter). Generally, although these clauses are usually worded in plain and clear language to prohibit the courts reviewing the decision, the courts have in general, succeeded in nullifying them. This they have done by assuming that Parliament did not want an illegal decision to escape review, and thus the courts can carry out their essential constitutional function of upholding the rule of law.[101] No government has fully responded to this judicial ingenuity,

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[96] Haroon Saddique, 'More than 200 groups criticise UK review of Human Rights Act', n. 80. In addition, it is proposed that there would be a presumption or even a requirement that a quashing order will be suspended or prospective only. For suspension, this would apply to all acts or decisions that are challenged; for prospection, it would apply only to statutory instruments. In both cases, a mandatory approach would include an "exceptional public interest" exception.

[97] Haroon Sadique 'Plans to restrict judicial review weaken the rule of law, say MPs' *The Guardian*, 2 June 2021.

[98] Judicial Review Reform, the Government Response to the Independent Review of Administrative Law CP408.

[99] The terms of reference for the Independent Review is available at: https://www.gov.uk/government/groups/independent-review-of-administrative-law. See Martin Carter, 'Proposed Reform of Judicial Review: the Conservative Manifesto to the Judicial Review and Courts Bill [2021] *Encyclopedia of Local Government Law Bulletin* 4.

[100] The Law Society, Parliamentary briefing: Judicial Review and Courts Bill – House of Commons second reading, 18 October 2021.

[101] For example in Anisminic v FCC [1968] 2 AC 147, the House of Lords held that an attempt to stop any appeal or review of a determination of the FCC was not effective to prevent judicial review, because determination meant a valid determination, in other words one that was intra vires.

but given the present government's record it would not be beyond the realms of fantasy to imagine it initiating such legislation. The review points out that such clauses would be justified in certain circumstances; although it stressed the lack of wisdom in Parliament taking such an action because of the threat to the rule of law.[102] Although the Faulk's Review proposes some welcome reforms to the procedural aspects of judicial review,[103] if the above substantive proposals, are accepted, this will severely curtail the ability of citizens to challenge the actions of administrative bodies, including the government. Together with the proposals on the reform of human rights law, and examples of the government's disregard for the law and the rule of law in recent years, the changes to judicial review give rise to further concern about accountability and the constitution's ability to impose adequate control on government power. [104]

The Bill has received wide criticism,[105] but specifically has resulted in a paper written by Richard Edkins, Head of Policy Exchange's Judicial Power Project, entitled *How to Improve the Judicial Review and Courts Bill*.[106] The paper responds to the two main clauses of the Bill that deal specifically with judicial review with a view to improving those clauses, but makes a number of proposals for further reform, which support the recent views in restricting the courts role in adjudicating on many legal and constitutional matters. In the introduction it is explained that the paper (which draws on submissions to the Independent Review of Administrative Law (IRAL) and the Government Consultation on Judicial Review Reform), sets out a number of amendments that Parliament may wish to consider making to the Bill. The first two amendments concern the Bill's first two clauses, whereas other amendments would introduce new clauses to the Bill - some reversing particular judgments, and others making general (but targeted) changes to the procedures and grounds of judicial review.

In your author's view, some, or indeed most of these proposals provide unnecessary and dangerous support to the government's desire to free itself from judicial control, and will seriously limit the role of the domestic courts in enforcing our already fragile constitution and its increasingly weak association with the rule of law. In the introduction, the recent Bill is described as a welcome, if modest, first step in the wider project of restoring the balance of the constitution, referring to the Lord Chancellor's keynote lecture at Policy Exchange where he reasoned that the Supreme Court, under the leadership of Lord Reed, had begun to correct some of the excesses of recent years. It then states that while there are reasons to hope that the Supreme Court is beginning to mend its ways, the Bill's modesty with respect to its proposals is excessive. Specifically, Parliament enjoys primary responsibility for legal change, and the Bill provides an opportunity to make some corrections to recent legal developments, thus helping to restore principled limits on judicial power.

The main thrust of the paper, therefore, is to allow government to identify and rectify what is seen as a general trend for the courts to go beyond their traditional constitutional role, and to restore the

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[102] More specifically, the government's agree with the review's recommendation to abolish the judicial review, appeals on errors of law, which is available when the Upper Tribunal has refused to grant someone permission to appeal against a decision of a First-tier Tribunal in cases on immigration and social security. Under the government's proposal, the Upper Tribunal will revert to having the final say on whether First-tier Tribunal decisions can be appealed, as it did before the 2011 Supreme Court decision in *R (Cart) v Upper Tribunal* [2011] UKSC 28. But see *R (Privacy International) v Investigatory Appeals Tribunal* [2020] UKSC 22.

[103] They include, removing the requirement for a claim to be issued "promptly" and replacing it with a simple time limit of three months applies; allowing parties to agree between themselves extensions to the three-month time limit; establishing formal multi-track procedural timetables according to the complexity of cases; and establishing a clear right for a claimant to issue a reply to a defendant's acknowledgement of service

[104] Haroon Siddique 'Judicial review changes will make government 'untouchable' warns Law Society' *The Guardian* 30 April 2021.

[105] See the Law Society's briefing paper, n. 95, above. See also Aubrey Allegretti, 'Ex-Ministers says judicial review plan is assault on the legal system', *The Guardian*, 26 October 2021, reporting on David Davies' plans for a Conservative rebellion against the Bill.

[106] The paper was published in October 2021 and is available on: https://judicialpowerproject.org.uk/how-to-address-the-breakdown-of-trust-between-government-and-courts-2/

supremacy of Parliament, and of course, parliamentary government, within the UK constitution.[107] Specifically, it proposes clauses that would reverse the effect of several Supreme Court decisions that have challenged the government on issues such as legal aid and access to the courts,[108] prorogation of Parliament, parliamentary accountability and constitutional conventions,[109] delegation or devolution of ministerial powers,[110] freedom of information,[111] ministerial responses to the reports of the Ombudsman,[112] the review of legislation from the devolved legislatures,[113] the review of the application of foreign or defence policy,[114] and the review of ministerial decisions to hold, or not to hold, a public inquiry.[115] Further, it suggests including clauses in the Bill that would re-inforce the importance of parliamentary sovereignty and exclude the courts' power to adopt proportionality as a ground of review beyond its application under the Human Rights Act 1998 and EU Law.[116] These proposals were followed by an announcement, in December 2021, that the PM was planning to introduce measures whereby unpopular judicial decisions would automatically lapse after a one-year period.[117]

In effect, this would restore the constitutional role of the courts to a situation that reflects what many thought (wrongly) to be the traditional and limited role of the judiciary, both in the legal system generally and the constitution specifically: to uphold the strict meaning of parliamentary legislation and to refrain from ruling, directly or indirectly, on the constitutionality of government behavior. The paper seems to accept that such judicial behavior is inevitable, and acceptable, when specifically authorised by Parliament, but that otherwise any attempt to introduce limitations to the powers of government and government is tantamount to judicial legislation or a breach of the separation of powers.

This would leave Parliament and government free to act within their own powers, with a presumption that they are acting lawfully (and that legislation is unexceptional in terms of its constitutional propriety). As stated above, this ignores the fact that the legitimacy of the UK constitution has always been dependent on the courts interpreting the constitution and in limiting government power in line with fundamental constitutional values. These values are expressly recognised and protected in most constitutions, and our constitution exists on the assumption that the courts will restrict official power; not on the assumption that such power is lawful and cannot be questioned. So too, although the reversal of unpopular judicial decisions are an inevitable consequence of our democratic constitution,[118] wholesale reversal of decisions from our domestic courts that are viewed as unpopular and inappropriate would set a dangerous trend and signal a serious attack on the independence of the judiciary. These concerns are reflected in the Joint committee's response,[119] who called on the Government to amend

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[107] This 'judicial overreach' is denied by Paul Craig who finds little evidence of it in the period following the Human Rights Act: Paul Craig 'Judicial Review, Methodology and Reform' [2022] Public Law 19.
[108] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
[109] *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, discussed above.
[110] *R (Adams) v Attorney-General* [2020] UKSC 19.
[111] *R (Evans) v Attorney General* [2015] UKSC 21.
[112] *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.
[113] *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46
[114] *R (Palestine Solidarity Campaign) v Secretary of State for Communities and Local Government* [2020] UKSC 16.
[115] *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194. The paper does not clarify whether this would be the case where such a refusal would be in breach of Article 2 of the European Convention on Human Rights, as given effect to in the Human Rights Act 1998.
[116] *How to Improve the Judicial Review and Courts Bill*, 18.
[117] Tom Newton Dunn and Jonathan Ames, 'Yearly Bill to strike out judicial findings being considered' *The Times,* 6 December 2021, 1, 2 and 4
[118] See the reversal of the House of Lords' decision in *Burmah Oil Ltd v Lord Advocate* [1965] AC 75 by the War Damage Act 1965.
[119] Legislative Scrutiny: Judicial Review and Courts Bill: Tenth Report of Session 2021-22, December 10, 2021 HC 884, HL 120.

its proposals, saying that they have the potential to deny effective judicial remedies and, in particular, to remove safeguards against flawed asylum decisions.[120]

In the meantime, we have seen several instances of the courts challenging government action, and raising severe questions about the government's constitutional behaviour.[121] As stated above, there is nothing unusual in this, provided the government is prepared to accept the court's ruling and to generally abide by the rule of law. Yet some recent cases are not simply examples of inadvertent unlawful behaviour waiting to be challenged, but rather represent the current government's intention to deliberately depart from acceptable standards of behaviour, most notably those imposed by, and generally accepted by European Law and other European countries.

An extraordinary example of the government's attitude to the notion of government within and by the law was evident when Home Secretary, Priti Patel, was accused in the High Court of attempting to unlawfully evict thousands of migrants during the pandemic.[122] The judge, Garnham J, said he found it "extremely troubling" after one of her Home Office officials admitted the Home Office might have acted unlawfully in changing its asylum accommodation policy during the pandemic. The judge also raised concerns that she could have been distributing public funds without legal authority. Hearing four linked cases from asylum seekers challenging the lawfulness of the Home Secretary's policy to evict some refused asylum seekers during the pandemic, a witness statement admitted that at the relevant time 'we did not consider what power, or whether we had the power, to implement what we saw as administrative changes'. The judge noted that the secretary is saying that she was acting without lawful authority, a most serious submission to be making in court, adding that it was "extremely troubling" if she was acknowledging that she was acting without power when she set up this system for distribution of public funds she did so without legal authority. Thus, this is not simply a case of being caught out after the courts have revisited and interpreted the appropriate legal power; rather it is a case of a flagrant and deliberate or at least reckless disregard of the law and its character and scope.[123]

Conclusions

The issues highlighted in this article regarding the UK constitution and the rule of law are of particular concern with respect to governments who feel that they are beyond the law and judicial control, in addition to political or public opposition. The present government is not, of course the first to flout the law or to treat it with disdain. Judicial review of the government (in its widest sense) is a common practice, and it is natural that governments will attempt to carry out their business in breach of the law until they are found out in judicial proceedings. Having said that, the present government is, perhaps,

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[120] In relation to courts' powers to make quashing orders, it calls on the Government to remove the requirement for them to be used in certain circumstances as it would place an unnecessary limit on the courts' freedom to decide on the appropriate remedy. It further calls for the Bill to be amended so that when courts consider whether to make a suspended or prospective-only quashing order they must have regard for the human rights of any individual affected. It also warns the Government to exercise great caution in the use of ouster clauses to ensure that accountability is maintained and human rights protected

[121] See, for example *Mahabir v Secretary of State for the Home Department* [2021] EWHC 1177 (Admin), where it was held that the refusal by the Secretary of State to waive entry application fees for the family of a victim of the Windrush scandal breached the victim's rights under both article 8 (family life) and 14 (right to enjoyment of rights free from discrimination); and *R (NB) v Secretary of State for the Home Department* [2021] 1489 (Admin), where the decision by the Home Secretary to accommodate asylum seekers in former army barracks was unlawful. The court found that the accommodation, which was basic, run down and required the residents to sleep in dormitories, was unsuitable particularly in light of the COVID-19 pandemic.

[122] Diane Taylor, 'Judge criticises Priti Patel over policy for asylum seekers in pandemic' *The Guardian,* 6 May 2021.

[123] Further, despite being told by Public Health England that it could not advise that anyone "should be enabled to become homeless from a public health perspective" during the pandemic, the Home Office was planning to resume the evictions process "with immediate effect". The legal challenge to the evictions had been paused for almost a year due to the pandemic and focused on the public health risks attached to evicting asylum seekers who were likely to end up rough sleeping or sofa surfing during the Covid-19 pandemic.

more than any other before it, testing the frailty of our constitutional arrangements, relying on its, astonishingly, public popularity, and in particular the deference it has been given by the courts, politicians and the public during the period of the pandemic.[124] Indeed some of the examples used in this article suggest that the present government are not necessarily concerned with whether they are properly invested with legal power. And now, as if the present government needs any further encouragement to ignore the law and the legal constitution, the Policy Exchange is proposing further restrictions on the courts' review powers, including the reversing of decisions felt to be unfair or incorrect, and thus labelled unconstitutional.

The article has featured examples where government actions have threatened democratic accountability and in particular the rule of law. Fortunately, in most cases the courts have been willing and able to fight back and regard certain issues as justiciable, thus restoring a belief in the rule of law and constitutional decency. Further proposals to dilute human rights law and judicial review are even more worrying, and there may in these cases be no opportunity for the courts to impose their will. This will leave the UK isolated from international and European law, and our constitution and constitutional law in an even more precarious position.

It is now time to re-instate the importance of the rule of law, the constitutional role of the courts, and insist that government cannot ignore fundamental notions of justice, human rights and general principles of government accountability. Government is, of course, ultimately responsible to the electorate, and this government, as with any other, will survive or fall on its ability to maintain political power; that is the nature of parliamentary sovereignty in its political and democratic sense. However, political sovereignty must co-exist with legal accountability, and governments need a constant and robust reminder of this. It is suggested therefore, that recent efforts by the judiciary to make constitutional impropriety justiciable should not be thwarted or reversed on the spurious grounds that the courts are exceeding their democratic and constitutional powers. Indeed, there may be good reason to extend those judicial powers if our constitution is to survive and be taken seriously.

Further, with respect to the UK constitution, recent events and proposals for reform have highlighted the frailty of our constitutional arrangements and its ability to impose and maintain acceptable standards of constitutionalism. Those who believe that the UK has a workable constitution because it possesses sufficient political and legal mechanisms for controlling executive power are now revisiting their assessment; your author included. The success of the UK constitution depends fundamentally on government and Parliament accepting legal and other restraints on its strict *de jure* powers. In other words, if government and Parliament do not follow the conventions of constitutional behaviour, including the acceptance of the courts' role in enforcing the rule of law, then we are left without a true constitution, but, simply, a mechanism to ensure the will of the current government. That would be damaging to our international reputation and to the basic notions of constitutionalism. Further, it will fuel the argument among students of the UK constitution, that constitutional law, and the UK constitution, are myths.

[124] See Steve Foster and Ben Stanford, 'Human rights in times of emergency: COVID-19 taking the United Kingdom into uncharted territory', in Steve Foster, Ben Stanford and Carlos Espaliu Berdud, Global Pandemic, Security and Human Rights: Comparative Explorations of COVID-19 and the Law (Routledge 2022), (forthcoming). See also, Lord Sumption, 'Covid-19 and the courts' [2021] 137 LQR 353, criticising the Court of Appeal's decision in R (Dolan) v Secretary of State for Health and Social Care [2020] EWCA Civ. 1605.