IS THERE TOO MUCH JUDICIAL REVIEW?

THE BOUNDARIES OF JUDICIAL SCRUTINY

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2017 Annual Lecture to the Association of London Welsh Lawyers given on 25 April 2017

1. The purpose of the lecture this evening is to consider the way in which the courts, through judicial review, scrutinise the exercise of power by government and other public bodies. Judicial review is concerned with Public Law, that is the law that governs relations between the individual and the state and also between different organs of the state. The courts have developed a body of substantive principles of public law to ensure that public bodies properly understand and apply the law, that they do not exceed the powers allocated to them and that they act in a way which is procedurally fair. Judicial review is the process by which the courts seek to ensure that public bodies – organs of the state if you like – observe those principles.
2. The question in the title is whether there is too much judicial review – and what are the boundaries of judicial control over the acts of the executive. That is a topic on which, of course, there are many different views. Over recent months, we have seen the press comment on the *Miller* case, that is the decision of first the Divisional Court and then the Supreme Court on whether the government or Parliament had the legal authority to give notice under Article 50 of the Treaty of Lisbon of the United Kingdom’s intention to withdraw from the European Union. There was considerable press coverage. The coverage appeared not merely to criticise the decision, but even to question whether the courts had any business to be considering the question in the first place. A more measured analysis of judicial decision-making has been has been carried out by a group of academic lawyers called the Judicial Power Project. They too question whether the courts, in some of their decisions have exceeded their proper constitutional role. They have identified a list of 50 well-known cases which they regard as problematic in this regard.
3. I propose to explore the topic in the following stages.

Firstly by considering the constitutional constraints within which the courts and judicial review operate.

Secondly, by reviewing the traditional principles of public law and judicial review with a view to measuring whether those principles are capable of reflecting the proper institutional balance within the constitution.

Finally, against that background, I will look again at the *Miller* case - to consider how the principles worked out in practice in that case and whether there really is evidence of excessive use of judicial review.

What follows is an essentially personal view. Others may disagree with my analysis or with my reading of the case law. They are, of course, free to do so. One of the themes underlying this talk is things, including the law, are not always black and white – there are many shades of grey.

1. I begin with a consideration of the constitutional constraints within which the courts, and judicial review operate. I would, for present purposes, identify three critical constitutional principles or concepts.
2. The first is the concept of parliamentary sovereignty This is the bedrock of modern British constitutional law. The underlying principle is that the United Kingdom Parliament, as the elected representative of the people, is the supreme law making body. It can make any law that it wishes and that law prevails over all other laws. The role of the court is to give effect to the latest expression of the will of the sovereign legislature, that is the latest Act of Parliament.
3. The second concept is the separation of powers. This is less commented upon in the United Kingdom than other countries, probably because we have a Parliamentary executive. The government is drawn from the legislature and its members remain members of the legislature. The division between the legislative and the executive branch of government in the United Kingdom can therefore be blurred or obscured. The concept is, however, of great significance in relation to the courts and the practice of judicial review. The courts are separate from other bodies within the states. Their function is different. They are not responsible for exercising the power conferred by the legislature on the government or on another public body. The courts are there simply to ensure that that those bodies observe the relevant principles of law. This is often translated into a statement that the courts are not there to determine the merits of the underlying decision that the public body has reached and to which the individual has reached. The courts do not decide if a decision is a good decision, or the preferable decision. The courts are simply there as legal auditors, checking that the process of decision-making has been properly followed.
4. This in practice is one of the most significant constraints on judicial review. Individuals often turn to the courts objecting to a particular course of action. They do not want their children’s primary school to be closed or they object to the grant of a particular planning permission. They often invite the court, by a subtle use of the principles of public law, to set aside a decision with which they fundamentally disagree on policy grounds. The courts, and judicial review, are not however responsible for taking the decisions on such matters. Under the constitutional arrangements in place in this country, other bodies, local or central government, the Welsh Ministers, or other public bodies, have that responsibility. The courts are well aware that, in the language of judicial review, the merits of the decision are for the public body – the courts are concerned with the process by which the decision is taken. That often leads to disgruntled litigants asking what judicial review is for – if a decision that they think is so obviously objectionable on policy grounds is allowed by the courts to stand, what are the courts there for? The answer is, to ensure that the right body takes the decision, in accordance with the law and proper process.
5. The third constitutional concept is the rule of law. This concept brings together a number of ideas, perhaps ideals, reflecting how individuals are to be treated in a modern, liberal democratic society. There is not always agreement on what principles make up, or form part of, the rule of law, nor how the rule of law operates in a particular case. The best description of the content of the rule of law is still, in my view, Lord Bingham’s analysis in his book the Rule of Law. He described the core principle as being that all persons and authorities within the state should be bound by and entitled to the benefit of laws publicly made and publicly administered in the courts. He then broke that core principle down into eight essential ideas.
6. For present purposes, I would refer three of the eight ideas. The first is that ministers and public officials at all levels must act within the scope of the powers conferred on them, that is they must exercise the powers for the purpose for which they were conferred, fairly, and without exceeding the limits of the power. The second is that the law in a modern, liberal democratic society, must provide adequate protection for fundamental human rights. The third is that there must be a system giving access to courts to resolve disputes between parties – the individual and the state.
7. The three principles I have described – the supremacy of parliament, the separation of powers and respect for the rule of law – are all critical to the functioning of a modern, liberal democracy. There are, however, a number of problems with this, relatively high level, description of the constitutional constraints on the courts. First, none of the three principles I have identified are clear cut or necessarily easy to apply. Secondly, the principles are capable of clashing against each other, like great tectonic plates, and it is not always easy in the maelstrom that ensues to see how the particular principles point towards the resolution of a dispute.
8. Take first Parliamentary sovereignty. That sounds straightforward – the elected legislature is the supreme body for making laws within the state. The courts simply give effect to the law. But laws are often not clear. The language used is often ambiguous. The legislation inevitably leaves scope for argument as to its true meaning and as whether the law does, or does not, apply to a particular situation.
9. More fundamentally, legislation is enacted against a background of understanding or convention. For example, law is presumed not to be retrospective and not to change rights already acquired Even if the words of an act appear clear, when read against a particular backcloth of long understood principle, doubt may well arise as to whether the legislation was intended to apply to a particular set of facts. Was the legislation, for example, intended to apply retrospectively? Other constitutional consideration - derived for example from the rule of law – may indicate, therefore, how any ambiguity or lack of clarity in the interpretation or application of legislation should be resolved.
10. It is also right to note that there is now more than one elected legislature in the United Kingdom. There is the National Assembly for Wales – and its Scottish and northern Irish equivalents. Only the United Kingdom Parliament is sovereign. Only it can make and unmake any law. But within its legislative competence the Assembly too can make any law that Parliament can make. Questions of the appropriate institutional respect to be accorded to Acts made by the elected Assembly inevitably arise. In the *AXA* case for example, the Supreme Court had to consider whether the common law grounds of judicial review – in particular irrationality – applied to acts of a devolved legislature so such Acts could be set aside if a court considered that they were irrational. The Supreme Court held that the legislative acts of a devolved legislature could not be challenged in the courts on such grounds as that in essence was incompatible with respect owed to an elected legislature. But some of the members of the Supreme Court expressly left open the prospect that legislation could be challenged if, in some way, it violated the rule of law.
11. The third concept– respect for the rule of law is perhaps even more difficult to define and its content and requirements may not always be readily identified. It embodies concepts that are recognised as constitutionally important – but how these manifest themselves in concrete terms is often difficult. There is also the potential clash between parliamentary sovereignty and the rule of law.
12. In short, therefore, when a court is faced with a particular case, the constitutional constraints may be critical factors affecting how that case is decided. The particular constraints may be obvious – a court ought not to interfere with the planning judgment made by a local planning authority, as that is not the role of the court. There may more difficult cases. The constitutional principles often ultimately provide a clear default position, indicating whether a court should, or should not, intervene in a particular case. But the task is not easy and one should not assume there is a right answer or that, if there is, it is readily and immediately apparent.\
13. Against that background, the principles of public law developed by the courts are, in my view, capable of reflecting the proper constitutional balance between respecting the sovereignty of parliament and the role of the executive and the role of the court in supervising the exercise of power and ensuring respect for the rule of law.
14. The principles can, broadly, be defined into three categories. First, the courts will intervene to ensure that the public body properly understands the relevant law. If the public body misunderstands the law, and that misunderstanding is material to the decision, the courts will quash the measure or declare it to be unlawful.
15. The second set of principles are those designed to ensure that power is used for the purposes conferred by Parliament, that the decision-maker takes into account only considerations that are relevant to that exercise and is not irrational Expressed in that way, the principles reflect Parliamentary sovereignty. Take the first category – that power may only be used for a purpose authorised by Parliament. All students will remember the example of the *Padfield* case. When Parliament conferred power upon a particular minister to refer complaints about milk prices to a committee of investigation, the power could only be used for a purpose authorised by statute. If a minister refused to exercise the power because it might cause political difficulties or embarrassment, that would be acting for an unauthorised purpose and would be unlawful. The purpose for which power may be used, however, is identified by a consideration of the Act of Parliament itself. Provided the courts remember the essential need is to interpret the Act of Parliament, and to identify the permissible statutory purposes – that is the purposes that Parliament allows power to be used for, - there should be no difficulty in constitutional terms between judicial review and the sovereignty of Parliament.
16. Similarly, ensuring that only relevant considerations are taken into account when deciding how to exercise of power involves a consideration of the terms of the Act of Parliament conferring the power. Relevant considerations fall into two groups. There are those consideration which, on a proper construction of the Act, must be taken into account. There are those matters which may be taken into account if drawn to the decision-maker’s attention.
17. To give two examples – in field of community care, House of Lords have held that, on the proper construction of the relevant statute, local authorities may take financial considerations into account in deciding which needs for social services should be met. By contrast, on a proper consideration of the different provisions in the education legislation, cost was not an issue that could be taken into account in deciding what special educational needs of a child should be met. I am not saying that either of those decisions was easy – both went to the highest courts and, in relation to the decision in community care, later cases have indicated that there may be a need to reconsider whether the statute was properly construed. But in essence, they demonstrate the process of judicial review – although difficult – does not of itself involve any violation of the constitutional constraints on the court. Providing the courts keep in mind the proper role of the court – to review the decision-making process by which power is exercised – not to substitute the decision of the court for that of the properly constituted authority there is, in constitutional terms, no difficulty.
18. I would add one postcript. As circumstances change, and as the way in which power is exercised changes, the techniques of appropriate judicial control may also change. Nowadays it is common for statute to confer power on public bodies in very broad terms. Bodies frequently adopt policies to structure the exercise of discretion and to guide officials on the way in which they should exercise the discretion.
19. The courts have responded to this. There was an issue as to whether the policy was a matter of law for the courts to interpret – or whether the policy was merely a guide to what the policy maker intended so that it meant what the policy maker wanted it to mean, not what the reader would, objectively, expect it to mean.
20. The courts have now held that he interpretation of policy is a matter of law for the court to interpret. Thus, when a policy sets out the circumstances in which an immigrant with mental health issues, or who has been subjected to torture, may be detained, it is the courts who determine how, as a matter of law, the criteria, are to be interpreted. It is still, of course, for the decision-maker to apply those criteria to the particular case.
21. The courts have developed other principles to reflect the growth in the use of policy to determine the exercise of power. Policies must be published and it would be unlawful to apply an unpublished policy, which the individual did not know about, to determine that individual’s case. Furthermore, a public body is generally obliged to act in accordance with its policies unless it can articulate good reasons for departing from the policy in the particular case.
22. The discussion on policy to my mind again provides a good example of how, within the constitutional constraints, power can be properly controlled. The complexity of the modern state may well mean it is not possible in primary or secondary legislation to set out rules dealing with all the cases that might arise. But unstructured discretion, giving little guidance to the individual officials deciding cases, is also unlikely to be desirable. The flexibility of policy guidance may be the administrator’s solution. But the respect for the rule of law – that laws and policies are publicly accessible and properly interpreted – also needs to be protected. If the position of an individual is to be affected by a policy, then it is right that the policy be known and properly interpreted so that individuals can adjust their behaviour in accordance with the policy – as they do in cases of legislation.
23. The third area is procedural fairness. The courts require that, before particular types of decisions are taken, a fair procedure is followed giving the person affected by the decision the opportunity to comment before a decision is taken. What is necessary to ensure fairness will vary depending on the context and the nature of the interest in question.
24. Statute itself frequently provides for a fair procedure. I can take one recent example from the Administrative Court in Wales, the decision in *R (Woolcock) v Bridgend Magistrates’ Court.* The secondary legislation governing the payment of the council tax provides that, in certain circumstances, a person can be imprisoned for non-payment. Imprisonment as a means of enforcing a civil debt is now unusual in Wales. The relevant regulations provide that, before committing a person to prison, the magistrates must conduct a means inquiry, in the presence of the debtor, and may only commit if the failure to pay was the result of wilful refusal or culpable neglect.
25. In this context, the courts have held that the means inquiry must encompass two matters. First, it must consider the means of the individual in relation to each period of debt to ascertain if the person could have paid. If not, it is difficult to see that the person was refusing willfully or out of culpable neglect. Secondly, it must consider the current means of the individual to see if the person has the means to pay. There is no doubt that the courts, including the court in *Woolcock,* apply those restrictions strictly and ensure that there has been a proper means inquiry. In my view, the courts are right to do so – applying and interpreting the legislation, in the unusual context of imprisonment for civil debt.
26. The statute may provide for a power which, if exercised, will affect the rights or interests of an individual. The legislation may be silent on the question of what, if any procedure should be followed. Again, the courts have been prepared to require the necessary requirements of fair process. In the words of the 19th court in *Cooper v Wandsworth Board of Works*, the law will supply the omission of the legislature. Here again, in my opinion, there is no conflict between the supremacy of parliament, or the separation of powers. Rather, the rule of law would require a person to have a fair hearing before powers are exercised affecting his rights. The courts apply those principles. The body concerned still has the power to take the decision. It, not the courts, will ultimately determine whether the power should be exercised. The courts control the process – the individual has the opportunity to comment and his or her views taken into account. It is an example of how the different principles can be harnessed to work in harmony. It is a demonstration that it is not necessarily enough to read legislation literally. There may be gradations of meaning, or ambiguities in the interpretation and the application of legislation
27. The other matter that is worth bearing in mind are that there are a number of other principles governing when the courts may properly decide not to hear a claim for judicial review. Some matters are seen as not justiciable, that is as not giving rise to claims enforceable in the domestic courts or suitable for adjudication in the domestic courts. Rights derived solely from international treaties for example or decisions on national security are not generally regarded as suitable for adjudication by a court. Other principles are more procedural. A court may decline to hear a case because there are as yet no real issues that need to be resolved between the parties. The claim may be premature – that is, the relevant facts may not yet have occurred and any judgment would be hypothetical or premature. That occurred in the second Brexit case, *R (Yalland) v Secretary of State for Exiting the European Union,* where the claimants were seeking to challenge the decision to leave the European Economic Area (“the EEA”). The claimants contended that that required authorisation by Parliament and the government could not itself give notice of the intention to leave the EEA. The Divisional Court held the challenge was premature essentially for two reasons – 1. Whilst the decision to leave the EEA had been taken, the precise mechanism by which that would be done had not yet been decided upon. 2. The situation would be likely to be affected or influenced by the terms of the legislation on withdrawal of the EU or the terms of what is described as the Great Repeal Bill. Until those matters were known, any ruling by the court would depend on hypothetical assumptions – if the government did this, and if the Act said that, then the law would be this. And the courts do not generally engage in hypothetical disputes of that nature.
28. These, and other, principles are generally aimed at ensuring that the courts perform its role of adjudicating on real disputes between parties, on the basis of concrete facts. The courts, generally, are not there to give general opinions on matters of law that do not need to be decided in a particular case.
29. So far, I have not dealt with issues of claims based on human rights. The common law went about this by recognising presumption governing The interpretation of legislation. Legislation would not be applied retrospectively for example, or would not remove access to a court unless clear, unambiguous words were used which left no doubt that that was the result that Parliament intended. Criminal law was narrowly construed – legislation was presumed not to criminalise behaviour unless it was clear that that was Parliament intended.
30. Since the enactment of the Human Rights Act 1998, a different model has been adopted for by Parliament. That Act incorporates certain Convention rights and provides that a public body cannot act incompatibly with a Convention right. So far as legislation is concerned, the courts may seek to interpret it, if possible, to avoid the legislation breaching a person’s Convention rights or grant a declaration that it is incompatible with a person’s Convention rights. The question of human rights, and the present method of ensuring adequate protection, is a topic that requires a lecture, or a series of lectures, in its own right.
31. So against that background, I turn to the *Miller* case. That involved the question of whether the executive government or the legislature had the power to give notification of the intention of the United Kingdom to withdraw from the European Union.
32. First, as a matter of general principle, there was nothing extraordinary or unusual about the fact that the courts considered this question. It involved a straight forward matter of constitutional law. Which of two bodies within the state had the power to take a particular course of action – was it Parliament, as legislature or the government, using the prerogative powers retained by the monarch and exercised by her government in, in this case, the field of foreign affairs?
33. Secondly, historically, the courts have been adjudicating on the scope of the royal prerogative since at least the early 1600s. I am sure lawyers will remember from their studies of constitutional law the Shipmoney case involving the question of whether the Crown alone could levy taxation on foreign trade, or whether the Crown required the consent of Parliament, or the Case of Proclamations in 1610 when Sir Edward Coke held that the King could not by royal proclamation change any party of the common law or statute.
34. Thirdly, in modern times, there is nothing unusual about the courts adjudicating on which body within the state has responsibility over a particular matter. If one thinks of the current devolution settlement, the Assembly has legislative competence to enact primary legislation in some areas but not others. The Supreme Court has – on three occasions – had to rule on whether legislation was within the competence of the Assembly. Twice ruled that legislation was within competence and once that it was not and the legislation was of no legal effect. There is nothing unusual – indeed it is inevitable – on a court ruling on where the boundaries lie even when dealing with the competing claims of two elected legislatures.
35. On the actual issue in the *Miller* case, the decision of the High Court was unanimous. The Supreme Court divided eight to three. The majority concluded that as a matter of law, the power to give notice under Article 50 of the Treaty lay with Parliament not the executive. To my mind, the truly persuasive reasons came in paragraph 62. The Supreme Court analysed the terms of the European Communities Act 1972. First, that Act of Parliament provided for rights and duties created in EU law to have effect in the United Kingdom. Secondly, the Act itself also created a new process for making law in the United Kingdom, that is through the machinery of the European Union. If rights were to be altered, and if the process of law making provided for by the 1972 Act of Parliament were to be changed – then it was Parliament not the executive – which had to bring about that change.
36. It does not matter, for present purposes, whether you agree with the majority or the minority. To my mind, the lessons of *Miller* are twofold. First, it was right and proper for the courts to consider the question of which body had the requisite legal powers. The question of which body in the state is given particular powers under the constitution is a matter of constitutional law suitable for adjudication by the courts. Secondly, the majority decision is fully in accordance with the constitutional principles outlined at the start of this lecture. It reflects – not abrogates – the supremacy of Parliament. It considers the question of which body – the legislature or the executive – is to take a particular decision. It does not, contrary to the publicity at the time, involve the courts substituting its view for that of the proper constitutional authority on the underlying political question.
37. Standing back from the details then, I consider the question in the title of this lecture. Is there too much judicial review?
38. I would answer the question in this way.
39. First, judicial adjudication on matters of public law is a necessary part of any liberal democracy based on the rule of law. Any system which provides for power to be exercised according to rules – both as to who is to exercise the power and what process must be followed when power is exercised – requires that there be a method of impartial adjudication on whether those rules have been followed.
40. Secondly, the current constitutional framework is one that is capable of ensuring that judicial control over exercises of public power is conducted according to principle and without undue judicial intervention.
41. Thirdly, there is no real evidence in my view of any conscious attempt by courts to disregard core constitutional principles or to engage in undue judicial activism. The reality is that the constitutional principles themselves are not monolithic, self-defining requirements but, rather, reflect concepts of appropriate allocation of power and responsibility. The principles require interpretation and sensitive application. Individual decisions may, on occasions, come to be seen to have strayed on to the wrong side of the border. But, in general, the system of judicial review has over the decades delivered the appropriate level of judicial scrutiny within a liberal democratic state.