

**SCL** SOCIETY OF  
CONSERVATIVE LAWYERS



# REFORMING THE SUPREME COURT

Jonathan Fisher QC

### **About the author**

Jonathan Fisher QC is a practising barrister in dual capacity practice at Bright Line Law and Red Lion Chambers in London. He was Chairman of Research at the Society of Conservative Lawyers between 2006 and 2010, and a Commissioner on the Commission for a UK Bill of Rights between 2010 and 2011.

The Author writes in a purely personal capacity. The views expressed in this paper are his alone, and do not represent a corporate opinion of the Society.

London, 26 September 2020

---

The Society of Conservative Lawyers, an association of lawyers who support or are sympathetic to the aims of the Conservative Party. Members held a range of different views within those parameters and the views expressed in its publications are only those of their authors, and not necessarily held by all members of the Society or by the Conservative Party.

The purpose of this paper is to provide some thoughts in response to a document published by Policy Exchange entitled *Reforming the Supreme Court* containing contributions from Derrick Wyatt QC (Emeritus professor of Law, Oxford University) and Richard Ekins (Professor of Law and Constitutional Government, Oxford University), with a forward by Lord Thomas of Cwmgiedd (former Lord Chief Justice, 2013–2017).

Derrick Wyatt's headline proposal is that the UK Supreme Court should be abolished and replaced with panels of five or more judges assigned on a case by case basis from judges in the Court of Appeal in England and Wales, the Court of Appeal in Northern Ireland, and the Inner House of the Court of Session. Richard Ekins prefers to maintain the appellate architecture but change the name of the Supreme Court to the Final Court of Appeal.

## JUDICIAL ACTIVISM

The reason for promoting reform is a concern that since the Supreme Court replaced the Appellate Committee of the House of Lords in October 2009 as the highest court in the United Kingdom the Supreme Court has been said to be guilty of “creative legal accounting”. To quote Derrick Wyatt, “It has taken upon itself the role of policy-driven law reformer rather than analyst and legal interpreter, and in so doing, it has distorted the balance which should be maintained between Government and Parliament on the one hand, and the court system on the other”.

There is a division of opinion amongst practising and academic lawyers as to whether the Supreme Court has been an activist court. Suffice it to note that both Derrick Wyatt and Richard Ekins sustain the assertion with examples of Supreme Court judgments which have drifted into political waters, with a particular contemporary focus on the *Miller/Cherry* case [2019] UKSC 41 involving the timing of the decision to prorogue Parliament over the period of the UK's departure from the European Union. As an example of a case drawn from judicial history, Derrick Whyatt gives a much earlier decision in the *Anisminic* case [1969] 2 AC 147 as a “textbook example of a policy decision lacking a convincing legal basis”. Richard Ekins broadly agrees, taking “a dim view” of the judicial reasoning in the *Anisminic* case.

The fact that the discussants identified a sixty-year-old judgment of the Judicial Committee of the House of Lords as a paradigm case of judicial activism suggests that concerns about jurisdictional overreach pre-date the establishment of the

Supreme Court. This is an important point since it strikes at the heart of the appropriateness of the reforms which the discussants have put forward.

The discussants do not delve deeply into history, but the law reports are replete with examples of cases where the Courts have quashed executive action in circumstances where politicians have accused the judges of exceeding their mandate. Even today, the extent of the judicial mandate at its outer limit is unclear. In 2006, sitting in the Judicial Committee of the House of Lords, Lord Hope opined that “it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law” (*Jackson v Attorney-General* [2006] 1 AC 267). It is unclear exactly what Lord Hope meant to convey. It is one thing for the courts to strike down the administrative actions of the executive; it is another to set aside a provision in primary legislation. Either way, some clarification over the boundaries of judicial intervention is required.

A ‘strike down’ power for the courts is an extremely controversial proposition, and in recent years several senior judges have placed on record, albeit extra-judicially, their belief that a ‘strike down’ power is already embedded in the common law by operation of the fundamental principles underlying the Rule of Law (Lord Justice Laws, *Law & Democracy* [1995] PL 72; Lord Justice Sedley, *Human Rights: a Twenty First Century Agenda* [1995] PL 386; Lord Woolf, *Droit Public-English*

style [1995] Public Law 57; Lord Steyn, Democracy, the rule of law and the role of judges [2006] EHRLR 243; Lord Justice Elias, Annual Lord Renton Lecture, Statute Law Society, 24 November 2009; Lord Phillips, interview with BBC News, 2 August 2010. See also Professor Bogdanor's Magna Carta Lecture, The Sovereignty of Parliament or the Rule of Law, 15 June 2006).

The courts in Scotland and Northern Ireland have been afforded power to 'strike down' legislation passed by the devolved assemblies if it is considered to contravene the European Convention on Human Rights, and in England the same power exists with regard to delegated legislation.

## A FLAWED PROPOSAL

Changing the judicial architecture or nomenclature will not impact on a much deeper problem regarding the perceived judicial activism of the senior judiciary which needs to be addressed. If there is a strain of judicial activism running through the veins of the senior echelons of the judiciary, a more nuanced solution is required. Further, the proposed reforms are flawed in other respects. Abolishing the Supreme Court would undermine the Union with Scotland and the devolution settlement. The line of precedent would be weakened if decisions of the Final or Upper Court of Appeal were made by judges of the same standing as those sitting in the court below.

The continuity of a permanent bench of Supreme Court justices would also be lost. A small number of Supreme Court justices, such as the President

This is not to foreshadow an argument either for or against the existence of a 'strike down' power in the UK Supreme Court, but rather to emphasise the width of judicial power as perceived by a small group of senior judges in the UK and to stress the need for judicial restraint in these circumstances. As it happens, there is some evidence to suggest that experience in jurisdictions where domestic courts have a 'strike down' power, a Supreme Court is more reluctant to exercise the power where it has immediate effect, than where a declaration of incompatibility is issued and the matter is referred back to a democratically elected Parliament for re-consideration.

and Deputy President, develop a high profile within the legal profession which assists in providing a focal point at the pinnacle of the judicial ladder and building public confidence in the wider community. The proposals put forward by the discussants will devalue the significance of the highest appeal court, and the clue lies in the language which is used. The language of supremacy (Supreme Court) connotes superiority, whereas finality (Final or Upper Court of Appeal) suggests the end of a process.

The answer to the challenge of judicial activism lies not in an act of constitutional dismantlement but in the adequate articulation of the core principles by which the courts, to include the Supreme Court, are obliged to discharge their functions.

## IMPORTANCE OF A STRONG SUPREME COURT

A strong Supreme Court does not mean a judicially activist court. With the expansion of government powers and the influence of international corporations, the protection of a citizens' fundamental liberties is a paramount consideration. Historically, there have been countless occasions when the courts at common law have been required to protect the individual citizen against abuse of government power, and concerns about abuse of power continue to resonate today.

A strong Supreme Court is required to hold overbearing governments and international corporations to account, and any attempt to weaken or neuter the Supreme Court in its role as the pre-eminent protector of fundamental liberties is to be deprecated. The United Kingdom requires a Supreme Court which has no need to look in the direction of the European Court of Human Rights to perform this task on its behalf.

But this is not to say that the courts, especially the Supreme Court, should distort this function and trespass into the political arena. Subject to the

preservation of fundamental liberties, the balance of power between Parliament and the courts must always be respected and maintained.

## JUDICIAL RESTRAINT

The key question is how to articulate this balance to assist the Supreme Court in the proper discharge of its judicial obligations. The task is challenging, and since judges are appointed to act independently of the executive, it does not behove the executive to instruct the judges how to perform their task. By the same token, it does not fall to the senior judges to re-write legislation which has been enacted after debate in a democratically elected legislature. Traditionally, there has been an understanding that judges in the UK will act with judicial restraint and the notion of judicial activism sits very uncomfortably in a modern state in which politicians are democratically elected to sit in a sovereign Parliament. It is time for this implicit understanding to become explicit.

Instead of abolishing the Supreme Court and/or changing its nomenclature, the importance attached to the doctrine of judicial restraint needs to be accorded a higher profile. To be clear, the doctrine of judicial restraint is a theory of judicial interpretation that encourages judges to limit the exercise of their own power, especially in cases where the substance of an issue strays into the exercise of political judgment. The doctrine acknowledges the importance of remembering the significance of the tripartite separation of powers between the courts, the executive, and Parliament in the UK's constitutional arrangements.

There is good reason for insulating the courts from any requirement to adjudicate on matters involving political judgment. Judges need to be insulated from public pressure which might compromise or undermine their independence. Also, where policymaking is involved and assessing whether certain action or distribution of financial resource is reasonable and proportionate, the court's ability to ascertain the facts is limited. Ultimately, a court's understanding of the facts will be entirely dependent on the evidence presented to the court by the parties who have their own agenda to serve.

### Amicus curiae

The easiest, simplest and swiftest way to raise the profile of the doctrine of judicial restraint is to enable the Supreme Court to receive submissions to this effect in all cases where there is a risk that the Court might be straying into political areas.

In such cases, the Attorney General should be permitted to instruct counsel as *amicus curiae* to present submissions on the reasons applying the doctrine of judicial restraint in the circumstances of the case under consideration. An *amicus curiae* (literally, 'friend of the court') is not a party to a case but whose submissions assist a court by offering information, expertise, or insight that has a bearing on the issues in the case. Typically, these submissions do not replicate the arguments of the disputing parties; instead, they address the wider interests which are raised by the issues in the case.

The process for the instruction of an *amicus curiae* is well established. Rule 26 of the Supreme Court Rules provides that an application to intervene in a Supreme Court appeal can be made by (a) any official body or non-governmental organization seeking to make submissions in the public interest, (b) any person with an interest in proceedings by way of judicial review, or (c) any person who was an intervener in the court below or whose submissions were taken into account in the court below. The Supreme Court is required to grant permission where the application for an intervention is made by the Crown under section 5 of the Human Rights Act 1998, or (b) for an intervention by the relevant officer in a case where the Court is exercising its devolution jurisdiction.

Consideration should be given to widening the automatic gateway to enable the Attorney-General to intervene in any case where an issue regarding the exercise of judicial restraint may arise.

In several cases where the Supreme Court has taken a judicially activist approach, the

Government has been a party to the proceedings, and arguments in favour of a policy of judicial restraint will have been presented. This occurred, for example, in the *Miller/Cherry* case. Accordingly, there is a further change which needs to be made, and in this instance the sanction of Parliament is required. When it comes to the jurisdiction of the Supreme Court, it is critical that Parliament's voice should be heard.

### **Amending the Constitutional Reform Act 2005**

Conferring a higher profile on the doctrine of judicial restraint could be achieved by an amendment to the terms of the Constitutional Reform Act 2005 and the Judicial Oath which Supreme Court justices are required to take upon their appointment. The Supreme Court is required under section 40 to act as a "superior court of record" in the United Kingdom, but nothing more is said about the extent of its jurisdiction. It would not be difficult to insert an amendment which expanded on the nature of its appellate role and

## **CONCLUSION**

None of these suggestions involve making any change to the judicial architecture. However, they would be highly emblematic and remind judges of the need to act with restraint and eschew an activist agenda in the discharge of their judicial duties.

As John Glover Roberts, now Chief Justice of the United States Supreme Court, explained when he was a special assistant to the Attorney General in 1981–82:

"The greatest threat to judicial independence occurs when the courts flout the basis for their independence by exceeding their constitutionally limited role and the bounds of their expertise by engaging in policymaking committed to the elected branches or the states. When courts fail to exercise self-restraint and instead enter the political realms reserved to the elected branches, they subject themselves to the political pressure endemic to that arena and invite popular attack. Recently, Judge Malcolm Wilkey of the United States Court of

directed the court to apply a policy of judicial restraint.

As for the requirement to take the Judicial Oath, this contained in section 32 of the Act. The text of the oath is set out in section 4 of the Promissory Oaths Act 1868. By the oath, a judge swears to "do right to all manner of people after the laws and usages of this realm". This language could be modernised, and more significantly the reference to "the laws and usages" of this realm could be amplified to reference the importance of preserving the balance of power between Parliament and the Courts in the exercise of political judgment. The judicial oath could explicitly allude to the judicial function which is to interpret and apply the laws made by the Queen in Parliament. Moreover, there is no reason why this expanded oath should be confined to justices of the Supreme Court. All judges, from Lay Magistrates and the President of the Supreme Court, could take the same oath on appointment.

Appeals for the District of Columbia Circuit expressed a 'sense of relief' upon learning that the federal government would raise arguments designed to limit courts to their proper role rather than thrust them further into the domains of the elected branches. As Judge Wilkey put it:

"When we judges act within our constitutional competence, we are supported; when we act outside that competence, then distrust, disrespect, and active dislike of the courts set in, impairing our ability to perform with the confidence of the people even unquestioned judicial tasks."

By urging courts to observe appropriate self-restraint and avoid intrusions into the domain of the other branches, we will be taking significant steps to secure their independence."

These are important words. If the senior judiciary overlook them, it will be at our peril. The fact that the discussants are proposing the abolition, or degrading, of the Supreme Court in order to curtail its judicial activism testifies to the point.



For further information on the Society of Conservative Lawyers contact:  
The Administrative Secretary, The Lodge, Deaks Lane, Cuckfield RH17 5JB  
[administrator@conservativelawyers.com](mailto:administrator@conservativelawyers.com)  
[www.conservativelawyers.com](http://www.conservativelawyers.com)

© Society of Conservative Lawyers  
Rights to be identified as publisher have been asserted by the in accordance  
with the Copyright, Designs and Patents Act 1988

September 2020