From: Michael [redacted] >
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Independent Review of Administrative Law

I am not an administrative lawyer and have hardly written a word about administrative law. However, I am a student of the judicial process. My book, *The Law-Making Process* was first published in 1980, forty years ago. The 8th edition was published earlier this year. There is one short passage in the book (attached) that I thought I would submit for the consideration of the IRAL.

It deals with the question whether the role of the Supreme Court is political, a question that I think is central to the Inquiry's remit.

Michael Zander QC

Emeritus Professor, LSE

Michael Zander, *The Law-Making Process*, 8th edn.2020 (Hart) pp.435-438 – the last section of ch.7 ('The Nature of the Judicial Role in Law-Making')

7.15.1. Is the Court ' s Role Political ?

The proper role of the Supreme Court will likely come under review by the Constitution, Democracy and Rights Commission, the establishment of which was promised in the Conservative Party's December 2019 Election Manifesto. The Commission will no doubt be invited to consider radical suggestions such as those made in *Protecting the Constitution, How and Why Parliament should Limit Judicial Power*, a pamphlet published in December 2019 by Policy Exchange, a right-wing think-tank. The pamphlet, written by Richard Ekins, a young Oxford academic, [1] suggests that the role of the Court should be significantly diminished:

> The report recommends enactment of legislation – which might be termed a Constitutional Restoration Act – to wind back the Supreme Court' s prorogation judgment, restore other limits on the scope of judicial review, restore a measure of political control over senior judicial appointments, and reform the Supreme Court' s institutional structure to minimise the risks of judicial overreach …[2]
>
> … Parliament should enact a Constitutional Restoration Act that would:
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> - Rename the Supreme Court the Upper Court of Appeal in order better to indicate the Court ' s function and to address the symbolism of constitutional primacy;
> - Specify that the Upper Court of Appeal's responsibility is to adjudicate disputes in accordance with law and that the guardians of the constitution are Parliament and the electorate; and
> - Limit the Upper Court of Appeal's jurisdiction to questions involving matters of general legal importance rather than public importance simpliciter. (p 19)

I n his Foreword, introducing the pamphlet, Lord Howard of Lympne, former Conservative Home Secretary, wrote:

> The enactment of the Human Rights Act was signifi cant, for it encouraged judges to shrug off traditional limits on their jurisdiction, to second-guess Parliament and confi dently assert a general entitlement to address political questions. In the Gina Miller Article 50 case and its recent prorogation judgment, the Supreme Court purports to take up a new place in the constitutional hierarchy, able to intervene in parliamentary politics and boldly make new law in the process. This is not a happy state of affairs; it is a constitutional problem which must be tackled by our new Parliament and Government. The difficulty for parliamentarians has often been that while many sense uneasily that an ascendant judiciary is bad news for democracy and the rule of law, they have not been readily able to identify the problem or to articulate policy proposals in response. Policy Exchange' s Judicial Power Project has for the past fi ve years been doing vital work in exposing this far-reaching change in how we are governed and in authoritatively and incisively critiquing judicial excess. In this paper, the Project's head, Professor Richard Ekins, outlines a coherent, thoughtful programme of action which, if adopted by Parliament, promises to restore the balance of the constitution.

Whether a judicial decision is 'legal' and therefore proper or ' political' and therefore improper is one on which people may disagree. Lord Sumption, retired Supreme Court Justice, warned before the decision that if the Supreme Court held that the Prime Minister 's prorogation of parliament was illegal it would be a political act: ' I have my own view, which is that the courts are not entitled to interfere in what is essentially a political issue and not a legal one … The Supreme Court would really have to turn itself into an arbiter of the political and not just the legal aspects of our constitution.' [3] But writing on the day after the unanimous decision of the eleven justices, [351] Lord Sumption explained why he thought it was correct:

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[1] Richard Ekins is Tutorial Fellow in Law at St John ' s College and an Associate Professor in the University of Oxford.

[2] Introduction, p 10.

[3] Quoted in *Prospect Magazine* , 10 September 2019: www.prospectmagazine.co.uk/politics/jonathansumption-boris-johnson-is-putting-forward-ideas-which-are-essentially-those-of-a-fanatic. On 16 September Lord Sumption said on BBC ' s Newsnight programme: ' if they are wise ' the Hale Court would ' take the same view as the Divisional Court ' – ie uphold the government ' s case. He said they might take another view because the government had behaved so badly, but that ' " serve you right " is not a good juridical principle ' . (about 15 minutes in www.bbc.co.uk/iplayer/episode/m0008lff /newsnight-16092019) [351] *R (Miller) v The Prime Minister* [2019] UKSC 41 . [352] *The Times* , 25 September 2019.

> What ' s revolutionary about the Supreme Court ' s decision is that it makes the courts the ultimate arbiters of what political reason for doing this are good enough. Yet the judgment should be welcomed even by those who believe, as I do, that politics is not the business of courts of law. The objection to judicial intervention in politics is that it undermines the democratic legitimacy of public decision-making. The court ' s judgment, however, is concerned not with the political issues of Brexit but with the process by which those issues are to be resolved. Its eff ect is to reinstate parliament at the heart of that process. [352]

H ow to analyse these issues was addressed by Dr Jack Caird, Senior Research Fellow at the Bingham Centre for the Rule of Law, in an article with which the writer agrees:

> [A]ll exercises of constitutional interpretation, when undertaken by a constitutional actor, are political … I do not think it is possible to regard such questions as being purely ' legal' and to be entirely divorced from political judgments. For example, whether or not you believe that parliamentary sovereignty is relevant to the question of prorogation is likely to be informed by broader constitutional perspectives which are inherently political. One should not single out the Supreme Court ' s judgment as unusually political. The High Court ' s judgment in *Miller (No 2)* , [4] and the way it approached the key questions of constitutional interpretation, was just as political as the Supreme Court' s judgment [354] insofar as it relied on, and set out, a clear view on how the constitution should operate. In a sense, this reveals that the problem with characterising a judgment as ' political ' is that there is no agreed defi nition of what the term means in this context. More often than not this accusation is used as a proxy for: ' I do not agree with the conclusions reached by the Court ' … The independence of the judiciary does not mean that judges cannot take political positions on the meaning of the constitution. On the contrary, this is part of the core constitutional role of the courts as constitutional interpretation necessarily involves political judgments on the meaning of constitutional principles and the nature of institutional relationships … One of the few positives of the Brexit process is that it has served to expose the myth that party politics is the only political arena in our constitution. Contestable constitutional decisions, which are by defi nition political, are a routine and necessary part of any constitutional system based on checks and balances. [5]

Postscript

Shortly before this book went to press, Boris Johnson' s ministerial reshuffle included the appointment of Suella Braverman as the new Attorney General. Ms Braverman was described the next morning by *The Guardian* (14 February 2020) as ' a Brexiteer who has threatened to " take back control " from an interfering judiciary ' . Two weeks earlier, in an article on the Conservative Party Home website, she wrote:

> Restoring sovereignty to Parliament after Brexit is one of the greatest prizes that awaits us. But not just from the EU. As we start this new chapter of our democratic story, our parliament must retrieve power ceded to another place – the courts … . The political has been captured by the legal. Decisions of an executive, legislative and democratic nature have been assumed by our courts. Prorogation and the triggering of Article 50 were merely the latest examples of chronic and steady encroachment by the judges. The catalyst for this proliferation [of judicial review challenges] was the Human Rights Act. Parliament' s legitimacy is unrivalled and the reason why we must take back control, not just from the EU, but from the judiciary.

Commenting on Suella Braverman's appointment as Attorney-General, Lord Sumption (*Sunday Times*, 15 February 2020) said she would have to deal with the most controversial idea in the government ' s cupboard, namely its plan ' to clip the wings of the judiciary ' : 'Judges are famously resistant to having their wings clipped. They have much public goodwill and a formidable public platform. They are irremovable. They are the one part of the British state that is immune from pressure to conform'. Lord Sumption said he had sympathy for government's wish to stop the use of judicial review as ' politics by another means ' , but he doubted whether it could be done by legislation: ' The problem is one of judicial attitude. And you cannot change judicial attitudes by act of parliament. '

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[4] *R (Miller) v The Prime Minister* [2019] EWHC 2381 QB in which the three judges in the Divisional Court, the Lord Chief Justice, the Master of the Rolls and the President of the Family Division, held that the seven-week prorogation of parliament was lawful. [354] *R (Miller) v The Prime Minister* [2019] UKSC 41 .

[5] JS Caird , ' Miller 2, the Supreme Court and the Politics of Constitutional Interpretation ' , *Counsel,* November 2019 , 28 – 29 .