

Judicial Power, the Judicial Power Project and the UK

*Paul Craig**

1 Introduction

It is axiomatic that all power requires justification, and that is equally true for judicial power as for other species thereof. This article is primarily concerned with judicial power in the UK. The subject will be approached through consideration of the Judicial Power Project, which has been critical of the courts, much of this being sharp-edged, and fierce. There is repeated talk of judicial overreach and consequent legitimacy crisis, as the courts are said to encroach on terrain that is properly the preserve of the political branch of government.¹

It is by the same token important that the critics are properly scrutinized. This is a fortiori so the more far-reaching the critique, especially when the project has a ‘political dimension’, informing governmental views about judicial power. The article begins by setting out the principal argument of the Judicial Power Project, henceforth JPP. It then assesses the JPP’s claims from four perspectives: individual cases, judicial review doctrine, judicial practice and the theory of adjudication.

I should at the outset clarify my own position: academics should critically assess all exercise of power, including judicial power and have always done so; courts should show respect for other branches of government on constitutional, epistemic and institutional

* Professor of English Law, St John’s College, Oxford. An earlier version of this paper was given at the ALBA Meeting 23 July 2016. The general theme of the conference was ‘Is it Time to Rein in the Judges?’. I am grateful for comments from those at the ALBA conference, and from Eirik Bjorge, Mark Freedland, Aileen Kavanagh, Jeff King, Sir Stephen Sedley and Alison Young.

¹ <http://judicialpowerproject.org.uk/about/>.

grounds, and in general terms have done so.² I do not believe that the JPP's claims are supported by evidence flowing from the positive law, and they rest on normative assumptions concerning the limits of what common law courts should be able to do that are highly contestable.

It should be acknowledged that the JPP site accepts responses that take a contrary view to publications it has posted. It is open, and this is to be commended.³ While there are responses to particular papers, there has, to my knowledge, not been a more general assessment of the project, and the evidence on which it rests. That is the objective of the present article.

2 The Judicial Power Project: The Central Argument

The detailed claims made by the Judicial Power Project will be examined in due course. It is nonetheless important to be clear at the outset about the general nature of the thesis.

The focus of this project is on the proper scope of the judicial power within the constitution. Judicial overreach increasingly threatens the rule of law and effective, democratic government. The project aims to address this problem – restoring balance to the Westminster constitution – by articulating the good sense of separating judicial and political authority. In other words, the project aims to understand and correct the undue rise in judicial power by restating, for modern times and in relation to modern problems, the nature and limits of the judicial power within our tradition and the related scope of sound legislative and executive authority.⁴

² For a statement of my detailed arguments in this respect, see P Craig, *UK, EU and Global Administrative Law, Foundations and Challenges* (Cambridge: Cambridge University Press, 2015), Ch.2.

³ I can attest to this on a personal level. Richard Ekins encouraged me to post my views on the JPP site after the ALBA conference that we both attended, even though he knew that I was critical of the JPP. I did not have time to complete the paper at that stage. Richard Ekins once again encouraged me to participate in this symposium on judicial power.

⁴ <http://judicialpowerproject.org.uk/about/>.

The Judicial Power Project acknowledges that ‘judicial power has a central, strategic place in any well-ordered constitutional arrangement’ and it is accepted that there is a role for courts ‘in securing the rule of law, by fairly adjudicating disputes in accordance with settled law’.⁵ This is, however, subject to the caveat that such judicial power has not generally involved ‘oversight of the justice or prudence of the laws that fall to be applied’, with the consequence that ‘the courts have a limited capacity to develop the common law’.⁶

For the JPP, Parliament is the body principally charged with protecting human rights, as attested to by its role in abolishing slavery, extending the franchise, establishing the National Health Service, protecting workers who form unions, abolishing capital punishment, and decriminalizing homosexual acts. It is Parliament that has the principal responsibility for overseeing the content of the law and changing it when required. The supremacy of Parliament within the constitution does not therefore constitute ‘a departure from the rule of law or a failure to recognize the importance of human rights’.⁷ For the JPP,⁸

[T]he good sense of this separation of powers is now increasingly doubted, within Britain and, in different ways, in other common law countries. Many in the academy and legal profession now share an expansive, adventurous understanding of judicial power and the willingness and authority of the courts to oversee Parliament’s lawmaking actions or to overrule the executive’s exercise of its lawful powers has sharply expanded.

The adherents to the JPP do not contend that the expansion of judicial power is the result of any single development. To the contrary, they regard it as a complex phenomenon, which is driven in part by a wider global trend, influenced by US thought, and in part by ‘the

⁵ <http://judicialpowerproject.org.uk/about/>.

⁶ <http://judicialpowerproject.org.uk/about/>.

⁷ <http://judicialpowerproject.org.uk/about> .

⁸ <http://judicialpowerproject.org.uk/about>.

increasing self-confidence of the legal community and a corresponding failure of confidence in the adequacy of parliamentary government or democratic politics'⁹.

There is, by parity of reason, said to be no single political or legal decision, including the Human Rights Act 1998, which explains the rise of judicial power within the United Kingdom, and the expansion of judicial authority is not limited to the field of human rights law. It is, moreover, argued that the rise in judicial power within the United Kingdom has taken place without sustained public debate, the critique being that the constitution 'should not be fundamentally unsettled in so haphazard or surreptitious a way'.¹⁰ The self-avowed aim of the JPP is to address this problem by making clear 'the ways in which the judiciary's place in the constitution has been changing, and might well change in the future, and then giving these developments and possibilities the close attention that they deserve'.¹¹

The project's concern is with how and by whom public power is exercised. Doubts about the wisdom of an expansive, adventurous understanding of judicial power have been, are and should be shared by people and groups who otherwise have very different political commitments. The project's central idea is that the decisions of Parliament ought not to be called into question by the courts and that the executive ought to be free from undue judicial interference, which fails to respect political judgment and discretion. These are broad propositions – the devil will often be in the details – but nonetheless they warrant restatement and application to new problems in our law and practice. They are open to adoption by all who share a commitment to parliamentary democracy and the rule of law.¹²

These are powerful and important claims. They must perforce be sustained. The more far-reaching the claim, the better must be the empirical and normative grounding for the argument.¹³ The remainder of this article unpacks these claims and subjects them to close scrutiny.

⁹ <http://judicialpowerproject.org.uk/about> .

¹⁰ <http://judicialpowerproject.org.uk/about>.

¹¹ <http://judicialpowerproject.org.uk/about>

¹² <http://judicialpowerproject.org.uk/about>.

¹³ See also, A Kavanagh, 'Constitutional Review, the Courts and Democratic Scepticism' (2009) 62 CLP 102.

3 JPP Evidence: Problematic Cases

The concerns voiced by the JPP are predicated on certain data, as is evident from the website. A prominent part of this is the listing of 50 problematic cases, which are said to exemplify the infirmities that beset exercise of judicial power.¹⁴ Analysis and critique of individual decisions is part of what we academics do; no problem with that. There will inevitably be judicial decisions that receive a critical reception, but this is to say no more than that all institutions, including the political branch of government, are imperfect. There are, however, significant problems with this ‘rap sheet’ of judicial infirmity.

First, there is no clear rationale for inclusion on the list. The adjectival form ‘problematic’ is protean. It is clearly intended by the JPP to cover a range of ‘judicial sins’, including excessive judicial activism, poor judicial reasoning, insufficient deference to the primary decision-maker, and lack of fidelity to text.¹⁵ It is, however, often unclear which infirmity is said to attach to a particular case on the list. This difficulty is exacerbated because the explanation/justification for inclusion on the list is exiguous in the extreme. Complex judicial decisions are condemned on the basis of a three to five-line summation of the alleged infirmity in the reasoning and result. This comes dangerously close to CNN sound-bite commentary, where there is no warrant for this form of assessment, more especially because the critic can thereby avoid meaningful scrutiny of his or her own reasoning by the very brevity of the summation on the charge sheet.

Secondly, the JPP architects of the list eschew claims as to methodological robustness and express the wish that it will prompt further debate.¹⁶ This is, however, problematic from

¹⁴ <http://judicialpowerproject.org.uk/50-problematic-cases/>.

¹⁵ <http://judicialpowerproject.org.uk/judicial-power-50-problematic-cases/>.

¹⁶ <http://judicialpowerproject.org.uk/judicial-power-50-problematic-cases/>.

both a legal and political perspective. Thus, while there has been some exchange in this respect,¹⁷ the relative paucity is readily explicable, legally and politically. In legal terms, the choices for engagement are limited. The commentator can engage in tit for tat soundbites, but then most academics rightly think that this is wasted time. The alternative strategy is to write a longer memo, three to four pages, explaining why the initial characterization of the case is misplaced. This, however, lends credibility to a mode of argumentation that is not academically sound: a three-line soundbite does not create the onus to produce a three-page defence, and we are diminished academically if we believe it to be so. The same conclusion emerges from a political perspective, albeit for very different reasons. The JPP seeks to exert political influence. That is readily apparent from its placing within the larger Policy Exchange network,¹⁸ from the fact that the Minister of Justice does not just happen to turn up when the leading JPP theorist is giving a lecture and from multiple other sources on the site. This is not, I should hasten to add, illegitimate. There is, nonetheless, a certain naïveté about the JPP in this respect. The salient point is that some in the political forum who are antagonistic to courts welcome the idea that major decisions can be eviscerated in three lines. They will not seek further explication. They will not look for contestation. Truth to tell, the three-line critique plays into a tabloid view of the courts. Claims by JPP proponents that they never meant the material to be taken in this way will come as scant comfort. They would do well to remember the Faustian lesson, viz that those who believe themselves in control may in reality end up being ‘played’ by the very forces they seek to influence.

¹⁷ See, e.g., Simon Lee, ‘A Problematic Manifesto?’, <https://judicialpowerproject.org.uk/simon-lee-a-problematic-manifesto/> ; Aileen McHarg, ‘50 Problematic Cases: A Comment’, <https://judicialpowerproject.org.uk/aileen-mcharg-50-problematic-cases-a-comment/> .

¹⁸ <https://policyexchange.org.uk/> .

Thirdly, if we assume that the critic is operating ‘rationally’ the three to six lines should embody the most potent critique of the decision. There were, nonetheless, many occasions when such critiques misconstrued the reasoning, policy or result in the case.¹⁹ There were other instances where the brief appraisal ignored the complexity of the issues the court had to resolve, fastening critically on one ‘issue’, while ignoring other textual and normative considerations that informed the court’s reasoning.²⁰

Fourthly, the difficulty in this respect is exacerbated by the fact that a case can be criticised for being problematic in certain respects, while it might also be regarded as being a good decision as judged by other desiderata valued by the JPP. Consider by way of example the inclusion of *Cart* on the list,²¹ the reason being that it involves too much judicial discretion in deciding whether to review for error of law. Leaving aside whether this critique is correct or not, it is clearly in tension with another prominent JPP objective, which is to accord greater deference to the primary decision-maker, which the Supreme Court’s decision clearly does.

Fifthly, the list is asymmetrical between judicial over-reach and judicial under-reach. To be sure, the JPP can in principle criticize courts for being excessively reticent, as exemplified by the inclusion of *Liversidge*²² on the list. The reality is, nonetheless, that the predominant focus is on judicial over-reach. This impression is reinforced by the detailed studies on the website, all of which have this focus. This asymmetry is a serious problem with the project. There is no pragmatic or normative argument presented as to why judicial over-

¹⁹ This is true of pretty much all the EU cases on the list, and of many of the domestic cases.

²⁰ See, just by way of example, *Benkharbouche v Republic of Sudan* [2015] EWCA Civ 33, upheld on appeal, [2017] UKSC 62; *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45.

²¹ *R (Cart) v The Upper Tribunal* [2011] UKSC 28.

²² *Liversidge v Anderson* [1942] AC 206.

reach, insofar as it exists, is more serious than judicial under-reach. Thus why not include cases such as *Nakkuda Ali*,²³ *Duncan*,²⁴ and *Church Assembly*²⁵ as instances where the courts placed undue limitations on judicial review; why not criticise earlier case law as being insufficiently supportive of rights, including fundamental rights based on gender and race? This asymmetry between judicial over-reach and judicial under-reach is further evident in the ‘double jeopardy’ faced by the courts, damned if they do too much, damned if they do too little. The tensions in this respect are readily apparent in the case law on process rights in contexts where statutory closed material procedures apply.²⁶

Sixthly, the preceding difficulties are exemplified by the critical treatment of the decision in *Miller*,²⁷ where the Supreme Court decided that the executive could not trigger Article 50 TEU without securing statutory approval from Parliament. The decision was contestable, as attested to by Lord Reed’s strident dissent. The salient point is, however, why the decision was felt to be problematic from the JPP perspective. It might be argued that this was another instance of judicial usurpation of political power. This does not, however, withstand examination, since the case was not about accretion of judicial power at the expense of the political. The contestation was as to whether the power to trigger Article 50 TEU should reside with the legislature or the executive. This was the zero-sum issue in the *Miller* litigation, and the result either way did not augment judicial power. It might be

²³ *Nakkuda Ali v Jayaratne* [1951] AC 66. See also, *R. v Metropolitan Police Commissioner, ex. p Parker* [1953] 1 WLR 1150 QBD; *R v Leman Street Police Station Inspector, ex. p Venicoff* [1920] 3 KB 72.

²⁴ *Duncan v Cammell, Laird & Co Ltd* [1942] AC 6.

²⁵ *Church Assembly* [1928] 1 KB 41.

²⁶ *Secretary of State for the Home Department v AF* [2010] 2 AC 269; *Secretary of State for the Home Department v AF* [2010] 2 AC 269; *Al Rawi v Security Service (Justice and others intervening)* [2011] UKSC 34.

²⁷ *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

contended by way of response that the decision was problematic in a different way, viz that the Supreme Court's reasoning was defective in certain respects. This is indeed the nub of many of the critical postings. This reveals the protean meanings of the term 'problematic' within the JPP agenda, since insofar as it includes decisions where the reasoning was felt to be defective it would thereby encompass all academic commentary on case law, with the consequence that the JPP project would cease to serve any independent function. The very attribution of the label defective to the Supreme Court's reasoning is itself highly contestable. I believe that the majority decision was correct,²⁸ and I also believe that the answer one way or another requires close attention to complex argumentation of a kind that cannot be done in short blogs on the decision.

Lastly, there is something 'mildly Kafkaesque' about the list, if that is not an oxymoron, which it probably is. Picture the scenario: the somnolent law reports, disturbed by the midnight click on the internet link to the database; the sturdy JPP messenger revealing those on the charge sheet, '*Cart, Bancoult, Hirst*, step forward'; scant explanation for being placed on the list of problematic cases, bad reasoning, bad result, bad judgment, take your pick, tick a box; no explanation concerning the informer that 'fingered' the particular case for inclusion in the list; no due process, no apparent way of being removed from the charge sheet; a sound dose of judicial re-education to prevent future infirmity, with compulsory daily readings of set texts on the limits to the judicial role; and of course special treatment reserved for the judicial recidivists, the repeat offenders, who must be purged in some more dramatic manner. To adopt a Kantian perspective, one cannot but wonder how the academic organizers of the JPP would react if their scholarship were to be treated in analogous fashion. We could construct a rap sheet of academic infirmity, in which complex arguments were condemned

²⁸ P Craig, 'Miller, Structural Constitutional Review and the Limits to Prerogative Power' [2017] PL Special Issue 48.

through a three or four-line statement appended to the article. The howls of indignation at such unjust treatment would echo through the academic corridors and beyond.

4 JPP Evidence: Legislation, Courts and Doctrine

The discussion thus far has been on individual cases. The focus now shifts from the specific to the more general. A recurring feature in the JPP literature is the idea that we are facing a legitimacy crisis, or something akin thereto. It features as a headline on the website and informs many of the policy papers placed thereon. Good news is rarely as gripping as bad news, at least insofar as it relates to the courts. A conclusion expressed as crisis will therefore pay commensurate publicity dividends, even more so if the crisis can be cast in terms of legitimacy and judicial over-reach. The power of criticism nonetheless comes with attendant responsibility: the more far-reaching the critique, the better must be the ammunition to sustain it; and the more far-reaching the criticism, the more searching should be the evaluation thereof. There are three related points that are relevant in this respect.

(a) Conflation of Different Rationales for Alleged Judicial Over-reach

The JPP site and the contributions thereto conflate two very different rationales for the judicial over-reach, which they claim to identify. There is the contention that the judiciary is over-reaching in ordinary judicial review cases by exercising such review in a manner that is too intrusive, and hence trespasses on the role of the legislature/executive. There is also the claim that the judiciary are making judgments of a kind for which they are ill-suited under the HRA, or which should be the preserve of the legislature, even though when doing so they are fulfilling an express constitutional or legislative obligation cast on them. The conflation of

these issues is evident in the descriptive brief of the JPP mission,²⁹ and permeates many contributions to the JPP site. Where the distinction is noted, it tends to be oblique and in passing, as evident in the contributions from Jeffrey Goldsworthy³⁰ and John Finnis.³¹ This is problematic for the following reason.

There is a mountain of literature on the legitimacy of constitutional review, more especially the hard-edged variety, whereby courts invalidate primary legislation for constitutional infirmity.³² The JPP project adds nothing new in this respect, nor is it the purpose of this article to revisit this terrain. What is apposite to the present inquiry is the following. While this debate is commonly conducted with US literature as the backdrop, it is distinctive insofar as the US Constitution provides no express authority for the courts to review primary legislation. The reality, by way of contrast, is that many constitutions make

²⁹ <http://judicialpowerproject.org.uk/about/>.

³⁰ Jeffrey Goldsworthy, 'Losing Faith in Democracy: Why Judicial Supremacy is Rising and What to do About it', <http://judicialpowerproject.org.uk/jeffrey-goldsworthy-losing-faith-in-democracy-why-judicial-supremacy-is-rising-and-what-to-do-about-it/>. Compare, however, J Goldsworthy, 'Judicial Review, Legislative Override, and Democracy' (2003) 38 Wake Forest Law Review 451, 457.

³¹ See, e.g., John Finnis, *Judicial Power: Past, Present and Future*, Judicial Power Project, 2015, <http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/>.

³² See, e.g., J Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) and 'The Core Case against Judicial Review', 115 Yale LJ 1346 (2006); R Bellamy, *Political Constitutionalism, A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); M Tushnet, *Taking the Constitution away from the Courts* (Princeton: Princeton University Press, 1999); R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996); C Eisgruber, *Constitutional Self-Government* (Cambridge, Mass: Harvard University Press, 2001); L Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven: Yale University Press, 2004).

express provision for such review, and so too does the UK, albeit through statute in the form of the Human Rights Act 1998.³³

There is a tension, to say the very least, between a core precept of the JPP, which is respect for political choice, and dislike of this choice insofar as it invests courts with authority to engage in rights-based review that some believe that they should not have. There is something markedly ironic about a project that extols the virtue of deliberative political choice, while deprecating the result thus made by countless nations, including the UK, which have expressly opted for rights-based review in a constitution or statute. This is seeking to play both sides of the street at the same time.

The elliptical use of terminology is dangerous, more especially when it is politically laden. There is the world of difference between a ‘legitimacy crisis’ cast in terms of courts allegedly trespassing on the legislature’s terrain; and such a crisis that connotes the difficulties said to flow from the discharge of a constitutional or legislative mandate expressly accorded to the courts. The reality is that the JPP elides the two, notwithstanding the fact that the normative considerations that underpin them are very different.

The use of the term legitimacy in the former context connotes the idea that the courts are thereby intruding on terrain where they have no authority to do so; the use of the term in the latter context is quite different, capturing the idea that even if the courts have an obligation to undertake rights-based adjudication flowing from a constitution or a statute there are legitimacy problems because the court is forced to, for example, balance variables that are said to be incommensurable.

The complex issues raised by this latter type of claim cannot be analysed in detail here.³⁴ Suffice it to say the following: there is little in the JPP that addresses this latter issue;

³³ For analysis of the numbers, see, T Ginsburg and M Versteeg, ‘Why do Countries Adopt Constitutional Review?’ (2013) *Journal of Law, Economics and Organization* 1.

the general JPP discourse on the topic is shot through by assumptions concerning the existence of balancing in public law, and its alleged absence in private law that are contestable; and it is also shot through by contestable presuppositions as to whether judicial creativity manifest in the creation of a doctrinal rule that involves the admixture of two or more foundational values is any less significant than ad hoc balancing in individual cases.

(b) Conflation of the Particular and the General

It might be argued by way of response that the courts have exceeded their mandate in ordinary judicial review actions and thus trespassed on legislative terrain, and/or that they have gone beyond their brief under the HRA 1998. There is no doubt that some particular cases might be criticised. That is inevitable in any such regime. This does not, however, show systemic failure, legitimacy crisis, or anything akin thereto.

The legal reality is that UK judicial review doctrine is shot through with discussion of the deference/respect/weight that courts do and should accord to primary decision-makers. It informs judicial³⁵ and academic discourse.³⁶ There is debate concerning the circumstances in

³⁴ See on these issues, eg, J Raz, *The Morality of Freedom* (Oxford: Clarendon Press 1988), Ch. 13; E Anderson, *Value in Ethics and Economics* (Cambridge, Mass: Harvard University Press 1993); R Chang (ed.), *Incommensurability, Incomparability, and Practical Reason* (Cambridge, Mass: Harvard University Press 1997); 'Incommensurable Values', Stanford Encyclopedia of Philosophy (2007), <http://plato.stanford.edu/entries/value-incommensurable/>; C Sunstein, 'Incommensurability and Valuation in Law' (1993-94) 92 Mich. L. Rev. 779; Symposium on Law and Incommensurability (1998) 146 U. Pa. L. Rev. 1169; P Craig, 'Limits of Law: Reflections from Private and Public Law', in N Barber, R Ekins and P Yowell (eds), *Lord Sumption and the Limits of Law* (Oxford: Hart, 2016) 175-192

³⁵ See, e.g., *R v DPP, ex p. Kebilene* [2000] 2 AC 326; *R (Begum) v Denbigh High School Governors* [2007] 1 AC 100; *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420; *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719; *R (Animal Defenders International) v Secretary of State for Culture, Media and*

which such deference/respect/weight should be accorded, but this is to be expected. The reality is that there is significant commonality in the judicial and academic discussion as to when such respect should be shown, notwithstanding differences concerning nomenclature

Sport [2008] 1 AC 1312; *Bank Mellat v HM Treasury* [2013] UKSC 39; *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60; *Michalak v General Medical Council* [2017] UKSC 71.

³⁶ D Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy', in M Taggart (ed), *The Province of Administrative Law* (Oxford: Hart, 1997) Chap.13; P Craig, 'The Courts, the Human Rights Act and Judicial Review' (2001) 117 LQR 589; R Edwards, 'Judicial Deference and the Human Rights Act' (2002) 65 MLR 859; Lord Hoffmann, 'Separation of Powers' [2002] JR 137; J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity' [2003] PL 592; M Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford: Oxford University Press, 2003) Ch. 13; TRS Allan, 'Common Law Reason and the Limits of Judicial Deference', in D Dyzenhaus (ed), *The Unity of Public Law* (Oxford: Hart, 2004) Ch. 11; L Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures' (2005) 3 I-CON 617; R Clayton, 'Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention under the Human Rights Act' [2004] PL 33; Lord Steyn, 'Deference: A Tangled Story' [2005] PL 346; T Hickman, 'Constitutional Dialogue, Constitutional Theories and the Human Rights Act' [2005] PL 306; TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' [2006] CLJ 671; Lord Justice Dyson, 'Some Thoughts on Judicial Deference' [2006] JR 103; R Clayton, 'Principles for Judicial Deference' [2006] JR 109; T Hickman, 'The Courts and Politics after the Human Rights Act: A Comment' [2008] PL 84; J King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409; A Young, 'In Defence of Due Deference' (2009) 72 MLR 554; A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 LQR 222; A Brady, *Proportionality and Deference under the Human Rights Act 1998: An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012); P Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012); M Elliott, 'Proportionality and Deference: The Importance of a Structured Approach', University of Cambridge, Legal Studies Research Paper Series, 32/2013; Craig (n 2) 236-55; A Young, *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press).

and taxonomy. Thus few doubt the epistemic and institutional rationales for giving respect, with admittedly more debate as to whether it should be afforded on constitutional grounds.

The relevant point for present purposes is that we in the UK do not inhabit a world in which the judiciary routinely substitute judgment on discretionary choices for that of the administration. To the contrary, our jurisprudence is permeated by judicial recognition of the need for caution, and this plays out time and again in HRA and non-HRA case law. There are to be sure controversial cases where it can be argued that the courts went too far,³⁷ or indeed that they did not go far enough.³⁸ This is inevitable, but provides nothing like the requisite empirical foundation for claims concerning legitimacy crisis, or systemic failure manifest in judicial over-reach. The temptation to regard questionable individual decisions as evidence of some more general malaise within the system is an impulse that should be resisted, whether the decisions are judicial or political in nature. If you wish to make the more general claim, then there is an obligation to provide the empirical grounding for it, which must be balanced and objective.

It is, in similar vein, important to consider carefully arguments that courts have made mistakes, more especially so when it is said that the error concerns not merely an individual case, but has wider implications. Consider in this respect Richard Ekins' claim that the 'courts are responsible for extending the [Human Rights] Act beyond its intended scope'.³⁹ Ekins regards judicial interpretation of HRA section 3 as a particularly egregious instance of this, arguing that it has been wrongly understood to create a judicial power to change the

³⁷ See, e.g., *R (Evans) v Attorney General* [2015] UKSC 21.

³⁸ See, e.g., *Secretary of State for the Home Department, ex. p Rehman* [2002] 1 All ER 122.

³⁹ R Ekins, *The Dynamics of Power in the New British Constitution*, Judicial Power Project, 2017, <http://judicialpowerproject.org.uk/richard-ekins-the-dynamics-of-judicial-power/>, 9.

meaning of legislation, whereas it merely imposed a duty on all parties to read legislation to be in conformity with Convention rights.

There are doubtless various ways in which the injunction in section 3 could be read, and the line between interpretation and legislation can be difficult.⁴⁰ The argument that the interpretation of section 3 in *Ghaidan*⁴¹ constitutes some radical judicial misconstruction of the HRA does not, however, withstand examination. The injunction in section 3 to read and give effect to primary and secondary legislation so as to conform to Convention rights, insofar as it is possible to do so, clearly accords a power and a duty to courts. They are to fulfil this duty within the limits of interpretation, the boundaries of which were delineated in *Ghaidan*. The House of Lords did not, as Ekins maintains,⁴² say that the statutory words and intended meaning were to be disregarded. It held that the words might be qualified and modified. This would in turn depend, inter alia, on whether the suggested interpretation was in accord with fundamental features of the statute; and on whether the change had broader implications, such that it should be left to the legislature,⁴³ and not be done by the courts pursuant to section 3.⁴⁴ It should, moreover, be noted that the case law post-*Ghaidan* does not reveal judicial re-writing of legislation in the manner suggested by Ekins. There are numerous instances where the courts held that it was not possible to interpret the legislation

⁴⁰ A Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 OJLS 259.

⁴¹ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

⁴² Ekins (n 39) 10.

⁴³ *Ghaidan* (n 41) [33], [34], [49], [114]. These limits were said to be exemplified by earlier decisions in *Re S* [2002] 2 AC 291 and *Bellinger v Bellinger* [2003] 2 AC 467.

⁴⁴ A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), Chap. 3.

consistently with Convention rights, and therefore issued a declaration of incompatibility under section 4 HRA.⁴⁵

(c) Empirical Foundation for JPP Claims: Case Studies

It might be argued that the judicial excess of authority is evident in particular doctrinal studies written for the JPP, which are highly critical of the courts. Such critiques must, however, be sustained, more especially because many such studies make far-reaching claims. Space precludes examination of all such papers. A couple of examples will suffice in this respect.

Jason Varuhas' paper, entitled *Judicial Capture of Political Accountability*, concerns judicial review of the Ombudsman, which he regards as illegitimate and symptomatic of some broader legitimacy malaise that besets the courts.⁴⁶ He contends that the PCA is an officer of the House of Commons, responsible to the Public Administration and Constitutional Affairs Select Committee. For Varuhas, the lawmaker's intention was that the PCA should answer only to the House of Commons. The PCA system was, in his view, intended as an alternative and autonomous system for dispute resolution running parallel to and independent of courts.

⁴⁵ See, e.g., *A v Secretary of State for the Home Department* [2005] 2 AC 68; *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718; *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484; *AS (Somalia) v Entry Clearance Officer (Addis Ababa)* [2009] UKHL 32; *R (Wright) v Secretary of State for Health* [2009] 1 AC 739; *R(F) v Secretary of State for the Home Department* [2011] 1 AC 331.

⁴⁶ Jason Varuhas, *Judicial Capture of Political Accountability*, Policy Exchange, 2016, <http://judicialpowerproject.org.uk/jason-varuhas-judicial-capture-of-political-accountability/> .

Varuhas is particularly excised by the type of reasonableness review used in *Bradley*⁴⁷ and *EMAG*,⁴⁸ which he regards as beyond the legitimate judicial remit. Varuhas contends that the scope of review was enlarged, and that the ‘courts adopted an exceptionally aggressive approach’ to such review.⁴⁹ The cases are said to be beset by a double infirmity: the courts had the temerity to review not just the PCA decision, but the ministerial response thereto; and the courts subjected the Minister’s views ‘to searching scrutiny, effectively intervening because the court disagreed with or was not itself convinced by the Minister’s reasoning or view’.⁵⁰ Varuhas castigates the courts for departing from classic *Wednesbury* reasoning, said to be a ‘totem of non-intervention’. The decision in *Bradley* is said to entail a radical departure from *Wednesbury* orthodoxy, since the court required ministerial rejection of the PCA’s findings to be based on cogent reasons, which ‘effectively involves the court asking for itself whether the Minister’s reasons stack up or are convincing’,⁵¹ with the consequence that there is ‘very little light between such approach and the court intervening simply because it disagrees with the Minister’s view’.⁵²

There is much in Varuhas’ paper that turns on wider assumptions concerning the nature of public law, and the role of the courts therein. They cannot be addressed here, since that would take us beyond the scope of the present paper.⁵³ The analysis will, therefore, focus more directly on the arguments concerning the ombudsman regime. The JPP deserves credit

⁴⁷ *R (on the application of Bradley) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116.

⁴⁸ *R (on the application of Equitable Members Action Group) v HM Treasury* [2009] EWHC (Admin) 2495.

⁴⁹ Varuhas (n 46) 12.

⁵⁰ *Ibid* 13.

⁵¹ *Ibid* 16.

⁵² *Ibid* 16.

⁵³ For discussion, see, P Craig, ‘Taxonomy and Public Law: A Response’, forthcoming.

for hosting responses to its publications by those who take different views. It is, therefore, fitting to give voice to such views on Varuhas' paper.

Richard Kirkham concluded that while the judiciary sometimes made mistakes, they performed a powerful service in retaining the integrity of the PCA model created by Parliament. He is, moreover, skeptical as to conclusions of a legitimacy crisis, stating that a more balanced assessment of the case law 'on the ombudsman sector would have been that not only does it provide little evidence of a legitimacy crisis, but arguably it provides model guidance for how a judge should demonstrate institutional restraint to avoid all the concerns that Varuhas raises'.⁵⁴

Consider in the same vein Carol Harlow's response to Varuhas' paper, more especially given that she regards balance between courts and Parliament as particularly important. She expresses some sympathy with Varuhas' general line of argument, and accepts that there have been cases where the courts strayed too far, but contends that the position in relation to the PCA is more nuanced than is apparent from Varuhas' argument.

Her starting point is that while the PCA is an officer of the House of Commons, the office is largely independent and autonomous, and the 'PCA is not and was never envisaged as a political actor'.⁵⁵ She rejects Varuhas' conceptualization of the PCA as a parallel and autonomous justice system. For Carol Harlow, the Parliamentary and Health Service Ombudsman 'is a member of our oversized family of public ombudsmen and an inherent part of our fragmented administrative justice system', but 'this does not mean, however, that the PCA operates as a parallel and autonomous justice system'.⁵⁶ While supportive of the PCA, Harlow also accepts that mistakes can be made, and that the PCA must therefore be amenable

⁵⁴ <https://judicialpowerproject.org.uk/richard-kirkham-a-reply-to-judicial-capture-of-political-accountability/> .

⁵⁵ <http://judicialpowerproject.org.uk/carol-harlow-a-reply-to-judicial-capture-of-political-accountability/> .

⁵⁶ <http://judicialpowerproject.org.uk/carol-harlow-a-reply-to-judicial-capture-of-political-accountability/> .

to judicial review. The ombudsmen were, as she argues, either carrying out administrative functions as investigators, in which case their decisions were clearly reviewable; or if they were adjudicators, they could be classified with subordinate jurisdictions. The judicial review should, however, be sensitive to the PCA's expertise, and she draws an analogy with *Cart*.⁵⁷

Carol Harlow also takes a different view concerning the second limb of the argument, the standard of review used in *Bradley*. The ministerial decision was, as she rightly notes, clearly reviewable, and there were decisions going back to *Padfield*⁵⁸ and beyond that required ministers to give reasons for decisions. For Harlow, such review was 'surely unexceptional by the standards of every contemporary judicial review system'.⁵⁹ In terms of the intensity of review, she states that the court might have asked whether the ministerial decision to reject the PCA's findings was so unreasonable that no reasonable decision-maker would have made it, but that it was also open to the court to hold, in the light of the statutory schema, that the 'findings of fact in an ombudsman investigation are presumptively binding in the sense that they can only be rejected for good reason'.⁶⁰ As Harlow states,⁶¹

What is the point of setting up a fact-finding body be it an ombudsman investigation, a tribunal, a public inquiry or parliamentary committee, if its findings are simply ignored? There is no statutory avenue of appeal and Parliament is not the place for a parallel fact-finding inquiry. And, as Wall LJ stressed, the decision is 'procedural rather than substantial. The decision is quashed as unlawful, and the Minister must think again' (*Bradley* at [138]). This does not seem unduly onerous.

Similar caution is required in relation to an earlier report entitled *Clearing the Fog of Law: Saving our Armed Forces from Defeat by Judicial Diktat*, by Richard Ekins, Jonathan Morgan, and Tom Tugendhat. There are two principal lines of criticism voiced against the

⁵⁷ *R (Cart) v Upper Tribunal* [2011] UKSC 28.

⁵⁸ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

⁵⁹ <http://judicialpowerproject.org.uk/carol-harlow-a-reply-to-judicial-capture-of-political-accountability/> .

⁶⁰ <http://judicialpowerproject.org.uk/carol-harlow-a-reply-to-judicial-capture-of-political-accountability/> .

⁶¹ <http://judicialpowerproject.org.uk/carol-harlow-a-reply-to-judicial-capture-of-political-accountability/> .

Strasbourg Court: failure to disapply Convention rights in cases where British troops act abroad, the claim being that it was only intended to apply in times of peace; and that human rights law supplanted and undermined the older and more suitable body of International Humanitarian Law, viz the four Geneva Conventions. The report castigates the Strasbourg Court for unwarranted judicial activism, lack of sound legal method and overbearing judicial power, the argument being predicated on the general understanding that the ECHR should not apply extraterritorially. These views are, as is common with JPP reports, expressed strongly and with conviction. The report is critical and hard-hitting, on a politically sensitive issue. The twin foundations of the critique are, however, highly contestable to say the very least.

The idea that the ECHR was inapplicable during war is, as Judge Greenwood⁶² and Eirik Bjorge have pointed out,⁶³ impossible to square with Article 15 ECHR, which provides that a state may derogate from the ECHR in times of war, not that the entire ECHR was ipso facto inapplicable in such circumstances. Extraterritorial application of the ECHR Convention was, moreover, not unheard of, or novel, when the Human Rights Act was enacted, nor was the idea that the Convention applied in armed conflict. The other limb of the argument, viz the JPP's critique of the way in which the ECtHR treated the inter-relationship between human rights law and international humanitarian law, has also been subject to critical analysis, with Andrew Clapham⁶⁴ and Eirik Bjorge⁶⁵ pointing out that the critique of

⁶² C Greenwood, 'Rights at the Frontier – Protecting the Individual in Times of War', in B Rider (ed), *The Law at the Centre – The Institute of Advanced Legal Studies at Fifty* (Hague: Kluwer Law, 1999), Chap. 17.

⁶³ <https://ukconstitutionallaw.org/2015/04/15/eirik-bjorge-manning-the-fogmachine-of-war-a-comment-on-the-report-clearing-the-fog-of-law/>.

⁶⁴ A Clapham, 'The Complex Relationship between the 1949 Geneva Conventions and International Human Rights Law', in A Clapham, P Gaeta and M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015), Chap. 35.

⁶⁵ Bjorge (n 63).

the relevant Strasbourg decisions was based on a misreading of the facts and legal reasoning in the instant cases.

The response by Eirik Bjorge generated a counter-response from Richard Ekins,⁶⁶ to the effect that the argument of the original paper had been misunderstood; that Article 15 ECHR had not been ignored therein; that this provision for derogation rendered it problematic as to whether the ECHR should continue to apply in times of war; and that Strasbourg jurisprudence concerning the jurisdictional reach of the ECHR was open to question.

This is not the place to engage in further deliberation as to these issues. Suffice it to say the following: the fiercer the critique, the better must be the substantive foundation of the argument, more especially so in relation to a topic that is sensitive and highly-charged. The impulse for those involved in the JPP is to castigate courts fiercely for what they regard as unwarranted usurpation of power. This impulse should be tempered insofar as the critique is predicated on assumptions as to the positive law, and its normative underpinnings, which are highly contestable.

5 JPP Evidence: Legislation, Courts and Practice

There is a further evidential component in relation to claims made by the JPP. It is less obvious than the issues addressed in the previous sections, but equally important. The ‘back story’ to the present discourse reads something like this. Judicial review must be kept within proper bounds, which from the JPP’s perspective means that it should be narrowly drawn. This preference is informed in part by its vision of the proper line between courts and the political branch of government. It is also informed by a perception of judicial review as

⁶⁶ Richard Ekins, ‘The Reach of the ECHR: A Reply to Eirik Bjorge’, <https://ohrh.law.ox.ac.uk/the-reach-of-the-echr-a-reply-to-eirik-bjorge/>.

predominantly red-light in its orientation, whereby the judicial focus is exclusively on control of the administration, the assumption being that the courts ignore the virtues of the legislation that is being reviewed and hence show scant regard for what is known as the green-light perspective. This then reinforces the demand for review to be narrowly confined.

This does not represent an accurate picture of judicial review at any time in its history. Judicial review has always possessed a Janus-like quality. It is the mechanism through which judicial doctrine is used when an individual contests the legality of a decision or regulatory norm made by a public or quasi-public body. This is the face that we perceive. Judicial review is, however, also the legal mechanism through which the courts routinely effectuate the regulatory schema challenged before them. The claimant challenges the legality of a decision and loses, because the court does not agree that there is such an illegality judged by the terms and purposes of the legislation. In reaching this conclusion the courts interpret the statute to attain the specified objectives, and often fill gaps to render the legislation more efficacious. This face is not hidden, but is largely ignored in our evaluation of what administrative law is 'about'. It is clear from a reading of the case law over circa 400 years that the courts were generally fully cognizant of the value of the regulatory schema that they were interpreting, and strove to ensure that they were properly effectuated. There were performance instances where the courts got things wrong, proof once again that all institutions are imperfect.

This does not, however, alter the point being made here. Judicial review should not be viewed solely in terms of being a constraint on legislative or executive power. This did not represent judicial reality in 1616 or any date thereafter. There were as many, or more, decisions in which judicial power in the context of actions for judicial review was used to ensure that the legislative or executive purpose was properly effectuated.⁶⁷

⁶⁷ Craig (n 2).

6 JPP Evidence: Legislation, Courts and Theory

The discussion thus far has assessed the evidence used to support JPP claims. There is, however, a normative foundation underpinning the Judicial Power Project, a vision as to the legitimate scope of adjudication, with consequential implications for the relationship between courts and legislature. This is unsurprising. Views concerning the legitimacy of judicial decisions will inevitably be informed by some normative theory concerning the nature of adjudication and its limits. The JPP is no different in this respect, the principal intellectual contribution coming from John Finnis.⁶⁸ He articulates a vision of the judicial role, and defends it with characteristic vigour. The essence of the thesis can be presented as follows.

(a) Thesis

First, courts adjudicate on the existing legal commitments that pertain between the relevant parties when the matter is adjudicated. The focus is in that sense essentially backward looking. The legislature, by way of contrast, has the responsibility to make ‘new or amended public commitments about private rights (and public powers) for the future’,⁶⁹ and in that sense it is forward looking. The executive is obliged to carry out commitments as defined by the legislature and as adjudged enforceable by the courts.

Secondly, for Finnis, the declaratory theory of the common law is not fiction, but a statement of judicial responsibility, capturing the idea that courts identify the ‘rights of the contending parties now by identifying what were, in law, the rights and wrongs, or validity or

⁶⁸ Finnis (n 31).

⁶⁹ Ibid 5.

invalidity, of their actions and transactions when entered upon and done'.⁷⁰ The declaratory theory is, says Finnis, a statement of the judge's vocation and responsibility.⁷¹ Courts, especially a supreme court, may exceptionally depart from the accepted body of positive law, because it is so out of step with principles or policies that it should be regarded as mistaken.⁷² In doing so, this should not, says Finnis, be seen as akin to an act of legislation, even though it is 'new in relation to the subject-matter and area of law directly in issue between the parties'.⁷³ Finnis acknowledges that lawyers can disagree as to when such criteria are met, admitting that they are 'subtle and elusive'.⁷⁴

Thirdly, courts should in general refrain from reforming or changing the common law because their efforts are normally unproductive or counter-productive. The judiciary commonly lacked the information from which to decide on the best reform. They were, moreover, subject to time constraints and procedural limits inherent in the adjudicative process.⁷⁵ Courts were therefore ill-suited and lacked competence for anything more than incremental law reform.⁷⁶

Fourthly, courts should recognize and accept certain legal precepts as embedded in the law. For Finnis, this included the idea that courts do not and should not review the manner of exercise of an admitted prerogative, and attempts to change such matters should be

⁷⁰ Ibid 5.

⁷¹ J Finnis, 'Judicial Law-Making and the "Living" Instrumentalisation of the ECHR', in Barber, Ekins and Yowell (n 34) 76.

⁷² J Finnis, 'The Fairy Tale's Moral' (1999) 115 LQR 170.

⁷³ Finnis (n 31) 5.

⁷⁴ Ibid 5-6.

⁷⁵ Ibid 7-9.

⁷⁶ Ibid 10.

viewed as contrary to the rule of law.⁷⁷ An analogous sin is said to beset the *Belmarsh Prison* case, the reasoning in which was said to be fallacious and manifestly erroneous.⁷⁸

Fifthly, ‘in maturely self-determined polities with a discursively deliberative legislature, it is not wise to require or permit judges to exercise the essentially non-judicial responsibility of overriding or even of condemning legislation for its not being “necessary”, or for its “disproportionality”, relative to open-ended rights and the needs of a democratic society’.⁷⁹ Finnis regards such determinations as not properly within the judicial realm, entailing balancing of the kind to which courts are ill-suited, and intruding on determinations that were the preserve of the legislature.

Sixthly, there should be strict limits on the extent to which courts can update doctrine through recourse to concepts such as the living instrument doctrine. It was legitimate for courts to apply statutes or constitutions to new situations, provided they fell within the ‘categories picked out by the propositions expressed in the statute or other instrument, even if the new instances of those categories were not envisaged at the time of enactment’.⁸⁰ But a court should not apply current values, ideas about right and wrong, to ensure that an old situation ‘would now be dealt with in a way that is new and incompatibly different’⁸¹ from that originally intended.

(b) Comment

⁷⁷ Ibid 12.

⁷⁸ Ibid 13-18.

⁷⁹ Ibid 20.

⁸⁰ Ibid 23.

⁸¹ Ibid 23.

John Finnis' thesis provides the theoretical backdrop for those engaged in the JPP project. His argument raises important issues that cannot be fully addressed within the confines of this article, concerning matters such as the proper approach to treaty interpretation, and broader issues of law and democracy.⁸² There are, nonetheless, comments that are especially pertinent, since they have direct implications for the JPP.

(i) Declaratory Theory of Adjudication: Tensions

It is central to Finnis' theory that adjudication must be seen as declaratory and backward looking. For Finnis, it must be so regarded as a matter of stipulation, since it is only by doing so that the requisite sense of judicial responsibility can be secured. If it were not so then a crucial factor in the divide between adjudication and legislation would crumble, since the former would be forward looking, in certain instances at least.⁸³

There is, however, a tension running throughout this reasoning: Finnis contends that the instances in which change can be legitimately secured through the common law should be closely confined, so as to ensure that courts really are declaring pre-existing rights and

⁸² See, for responses on the JPP site, A Stone, 'Judicial Power, Past, Present and Future, A Response', <https://judicialpowerproject.org.uk/judicial-power-past-present-and-future-a-comment-on-professor-finnis/> ; G Webber, 'Past, Present and Justice in the Exercise of Judicial Power, A Response to Professor Finnis', <https://judicialpowerproject.org.uk/gregoire-webber-past-present-and-justice-in-the-exercise-of-judicial-power/> ; M Elliott, 'Judicial Power in Normative, Institutional and Doctrinal Perspective, A Response to Professor Finnis', <https://judicialpowerproject.org.uk/mark-elliott-judicial-power-in-normative-institutional-and-doctrinal-perspective-a-response-to-professor-finnis/> . See, also, 'S Fredman, 'Living Trees or Deadwood: The Interpretive Challenge of the European Convention on Human Rights', in Barber, Ekins and Yowell (n 34) Chap. 4; J King, 'Three Wrong Turns in Lord Sumption's Conception of Law and Democracy', *ibid*, Chap. 8.

⁸³ Finnis (n 71) 76-8; Finnis (n 72) 173-5.

obligations and not legislating;⁸⁴ however his thesis as to what the declaratory theory really means cuts the ground from under this conservative premise, since it could be used to legitimate much change in common law doctrine.

This tension becomes apparent from Finnis' view as to the true meaning of the declaratory theory. He notes the argument that courts make law, and that to pretend the contrary is a fiction. He nonetheless rejects this view, sticking firmly to the belief that the declaratory thesis, properly understood, accurately captures judicial responsibility and preserves the line between adjudication and legislation.

The central tenet of his argument is that it is sound to say 'both that a settled rule of common law existed [for many years], *and* that all those years the settled view that the presupposed rule is part of our law was an error awaiting correction by better legal reasoning and sound adjudication'.⁸⁵ It is therefore open to a court to hold that a rule contrary to that understood to be currently applicable should apply 'as having been at all relevant times legally correct and an authentic legal rule', with the consequence that 'the newly declared rule would not, in the last analysis, be retroactive--would, in the last analysis, abrogate no part of our law's substantive content'.⁸⁶ There are three difficulties with this reasoning, which are especially salient for the Judicial Power Project.

First, while the whole thrust of the JPP is, as seen, towards the circumscription of judicial power, the declaratory theory, as articulated above, would legitimate far-reaching judicial change. Pretty much any incremental change through analogical reasoning could be regarded as legitimate on the preceding criterion. More far-reaching change could also be legitimate, provided that the shift could be seen as 'an error awaiting correction by better

⁸⁴ Finnis (n 31) 5-6.

⁸⁵ Finnis (n 72) 174, italics in the original.

⁸⁶ Ibid 174-5.

legal reasoning and sound adjudication'. It might be argued by way of response that there are certain changes that judges and commentators alike agree should not be made by courts, but should instead be left to the legislature. This is undoubtedly true, but the truth does not flow from, nor does it have any especial connection with, the declaratory theory as advanced by Finnis, which *prima facie* legitimates change in accord with the broad criterion set out above.

Secondly, this vision of the declaratory theory is grounded on problematic normative and empirical foundations. The core of the argument is captured in the following quotation.⁸⁷

[A]djudication involves the duty not to declare and apply a rule unless it can fairly be said to have been all along a legally appropriate standard, more appropriate than alternatives, for assessing the validity and propriety of the parties' transactions. When that can fairly be said, the same rule, having been declared and applied, is clearly the only legally appropriate standard for assessing the *correctness* of the parties' belief in the legal validity and propriety of their transactions.

The core premise is thus that adjudication is only legitimate if the rule now applied to the parties before the court can be regarded 'all along' to be a legal standard that is more appropriate than alternatives. When discovered this is then the 'only' legally appropriate standard for assessing the correctness of the parties' belief in the validity of their transactions, even if it is different from that previously applicable.

This reasoning is, however, problematic from both a temporal and a static perspective. The temporal problem is that values and assumptions change over time. There is no necessary reason why parties in the eighteenth century would, for example, have the same view as to the most legally appropriate standard to judge unfair contract terms as would their twenty-first century counterparts, and to pretend the contrary is fiction. The idea that common law doctrine that changes to accord greater protection for consumers can be deemed to have always been the law, on the ground that parties would, all along, have regarded it as a legally appropriate standard, does not withstand examination. The reasoning is also difficult from a

⁸⁷ Ibid 175, italics in the original.

static perspective, since there is often considerable contestation as to what the best or most appropriate rule is in the modern day. The court will perforce make the choice that it believes to be optimal in this respect, but insofar as it is different from the previous law, that will be constitutive for the parties to the instant case, and others who planned their lives on the pre-existing legal regime.

Thirdly, John Finnis' version of the declaratory theory elides the legitimacy of change, with the characterization of the rights that people have always had. They are two sides of the same coin. When change can be viewed as legitimate, as determined by the previous criterion, the altered rule should be seen as the rule that always existed; there has, therefore, been no retroactive alteration in the rights of those before the court; and therefore we can preserve the veneer that adjudication is backward-looking.

This elision is problematic from the perspective of the parties before the court. Adjudication that establishes a new rule where none existed will, by definition, alter the parties' relevant legal rights and obligations before they came to court. From the perspective of those parties, so too will incremental change, since the party that is caught by this shift was not within the remit of the relevant rule hitherto, and thus the court could not be said to be adjudicating on rights and obligations that such a party possessed prior to the judicial decision. To reason from the assumption that because change or legal development is legitimate, as adjudged from the holistic perspective of the legal system, to the conclusion that the parties before the court in the instant case should accept with equanimity that their pre-existing rights have not changed, does not follow. To reason from the premise that change in the rules is warranted, to the conclusion that the parties should acknowledge that the new rule is the only legal basis for assessing the correctness of their belief in the validity of their transactions, when they had bona fide relied on the pre-existing legal rule, does a disservice to those engaged in litigation. It is a theory designed to preserve the pretence that

courts do not make law, achieved at the expense of the very people engaged in litigation from which the law emerges.

(ii) Adjudicative Change: Limits

Tensions are also apparent when the conservative dimension to the thesis assumes prominence, with the consequence that change must be left to Parliament. The argument, at certain points, resembles a form of common law originalism, such that if a proposition has been embedded in the common law for some time it can presumptively only be altered by legislation, not by judicial decision. Thus John Finnis believes that case law on the prerogative dating from the seventeenth century could not legitimately be changed so as to render the manner of exercise of such power reviewable.⁸⁸ There are two difficulties with this view.

First, it begs the question as to why the early decision should be invested with such authority. There is a large body of literature concerning originalism as a form of constitutional interpretation. The difficulties of this mode of reasoning are considerably greater when applied to the common law. It is not self-evident why a judicial decision given at a particular time should be invested with some special authority, such that judicial change or alteration of the rule should be castigated as contrary to the rule of law, or as acting contrary to the authority of established law.⁸⁹

We need to tread carefully here. There may, as noted above, be good reasons why courts think that certain changes can only be brought about by legislation. There may also be good normative reasons why it is felt that the older rule should be retained, because it is

⁸⁸ Finnis (n 31) 12.

⁸⁹ Ibid 12.

preferable to the suggested alternative. This can be readily accepted, but does not meet the point being made here.

It remains unclear why a particular common law rule at a particular point in time is invested with such authority. It is also unclear as to why it is illegitimate for the courts to modify such a rule, where the change is not of a kind requiring the imprimatur of the legislature, and where there are good normative reasons for preferring the alternative.

It is important when reflecting on this to recognize that the initial rule, whatsoever it might be, became the 'law' because of an admixture of values, normative argument and practice that led the earlier court to imbue a certain set of facts with a particular legal status. This is true for any common law rule. It did not just 'happen'. It should not, therefore, be regarded as beyond the judicial remit for a later court to re-think an aspect of the pre-existing common law rule and modify it, provided that there are sound normative arguments for doing so, and accepting that values may well have changed in the intervening period.

Thus, the shift whereby the courts recognized that the manner of exercise of prerogative power should be reviewable, subject to limits of justiciability, was entirely legitimate, since there was no principled reason why the executive should fare better when exercising discretionary power pursuant to the prerogative as opposed to statute. If limits were to be placed on such review they should, as the House of Lords stated, be grounded in the subject matter, not the source of the power.⁹⁰

Secondly, the Finnis thesis begs difficult questions about when change in judicial review doctrine is to be regarded as legitimate. Does it mean that the shift from the collateral fact doctrine to *Anisminic*⁹¹ and thence to *Page*⁹² was illegitimate judicial legislation, given

⁹⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

⁹¹ *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

⁹² *R v Hull University Visitor, ex p. Page* [1993] AC 682.

that the former doctrine had existed for over 300 hundred years? No one claims that the collateral fact doctrine was wrong when expounded, simply that the courts believed that there was a better criterion for review for error of law. What of the subsequent shift from *Page* to *Cart*⁹³ and *Jones*,⁹⁴ with the limitation of review for error of law in relation to tribunals? What of the expansion in review for error of fact? Or the recognition of new heads of review such as legitimate expectation? If such developments are regarded as illegitimate judicial legislation, being outside the bounds of incremental change, and offensive to the idea that courts declare the law on the basis of pre-existing rights and obligations, then this has significant consequences for legal development in this area. If, by way of contrast, such jurisprudence is perceived as a legitimate exercise of judicial authority then it throws into doubt how far the declaratory nature of adjudication, as articulated by Finnis, places constraints on judicial change.

(iii) Adjudication: Rights and Proportionality

It is evident from the foregoing summation that John Finnis is opposed to rights-based adjudication and proportionality. There is a wealth of literature on this issue. Suffice it to repeat for present purposes: the UK legislature chose to accord courts this power and hence its exercise is legitimate as determined by Parliament; and the critique that this type of power is wholly different from exercised by courts in other contexts is based on a plethora of assumptions that are implicit, and contestable. There is, however, another dimension to this inquiry, which is that the problems said to exist would be obviated if the HRA were repealed. This argument is, however, far more contestable than its proponents acknowledge.

⁹³ *Cart* (n 21).

⁹⁴ *R (Jones) v First-tier Tribunal* [2013] UKSC 19.

Let us imagine a world with no HRA. Let us make two bare normative assumptions: not all interests are equally important, and some interests are sufficiently important to be regarded as rights. Disavowal of the first would be morally arbitrary; refusal to accept the second is equally implausible in the UK in the present day. It follows from the first proposition that there would have to be variable intensity of review. It follows from the second that the courts would have to determine the meaning of the contested right. They would have to decide the qualifications to such rights, given that many are not absolute. They would have to devise a test for determining whether the qualification could be invoked in a particular case, which might be cast in terms of proportionality or reasonableness. They would, moreover, have to devise rules for the interpretation of legislation/executive action that impinged on a particular right. These determinations would be made taking full account of any relevant statute. This is, of course, much like the common law that pre-dated the HRA.

For the avoidance of doubt, I am making no general claim concerning what might happen if the HRA were to be repealed. I am not saying that the rights recognized at common law would necessarily be the same as those in the ECHR. I am making no claim that the courts should be able to override legislation. I also accept that the legislature is very important in terms of rights' protection, and thus nothing in the preceding paragraph is premised on the idea that courts are the only site for the protection of rights.

My point is more modest. It is to test the assumptions underlying the JPP's desired promised-land. If you accept the two bare normative assumptions then the 'problems' concerning the judicial role with which JPP advocates are concerned will not disappear, and it is misleading to pretend the contrary. If you do not accept these assumptions, then you have to explain this to many people, who would not accept such disavowal with equanimity.

There is a further dimension to this line of inquiry, which is equally important. The JPP concern as to judicial power is targeted at review of legislation and executive power.

Review of the latter is clearly different from the former, more especially so given that such review can encompass oversight not just of ministers, but also agencies, local authorities, educational bodies and health authorities. The consequences of the desired diminution of judicial control are unclear from the JPP, and there is equivocation in this regard. For some, the desired outcome is that the contested executive action should simply be allowed to stand, subject to exiguous controls in terms of *Wednesbury* irrationality as configured by Lord Greene, which are in practical terms impossible to satisfy. For others, there is talk of alternative modes of accountability, in which case some details must be provided over and beyond vague statements that recourse should be had to ministerial accountability or the Ombudsman.

7 Conclusion

It is, as noted at the outset, important to subject all forms of power to critical scrutiny, including that exercised by the judiciary. It is equally important for the critique to be objective, balanced and measured. I do not, for the reasons set out above, believe that there is a crisis of judicial legitimacy in the UK, nor do I believe that the courts have in some systemic and unwarranted manner encroached on terrain that is beyond their remit. There are perforce legal decisions that are open to criticism, but this does not constitute a legitimacy crisis, any more than instances in which Parliament strays from a deliberative ideal, or the executive constrains the opportunity for legislative input, betokens a deep crisis in the functioning of our political institutions.

Judicial power has doubtless increased in large part due to the enactment of the HRA 1998. This was, however, a conscious decision of Parliament, and the courts have in general shown sensitivity on epistemic, institutional and constitutional grounds in the exercise of their authority under that legislation. Space precludes detailed consideration of JPP papers

and blogs attacking the CJEU and the Strasbourg Court. Suffice it to say the following. The jurisprudence of those courts should be subject to critical scrutiny, in the same manner as domestic courts. There are decisions from both courts that warrant such criticism. There is, nonetheless, much in the JPP archive concerning these courts that is intemperate, where the severely critical language is not borne out by the substance of the argument being made and where it is predicated on theories of how, for example, the CJEU does and should reason that do not withstand scrutiny.⁹⁵

⁹⁵ Thus, for example, Gunnar Beck's highly critical posts concerning the CJEU are predicated on his views concerning a theory of adjudication, G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart, 2013). For criticism of that theory, see, M Bobek, 'Legal Reasoning of the Court of Justice of the EU; (2014) 39 ELRev. 418; P Craig, 'Pringle and the Nature of Legal Reasoning' (2014) 21 MJ 205; M Lester, 'The "Rogue" European Court in the Campaign for Brexit', <http://judicialpowerproject.org.uk/maya-lester-the-rogue-european-court-in-the-campaign-for-brexit/> .