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Abstract

The legality of decisions made for political purposes is a recurring issue in administrative law. In this article, it will be argued that generalisations should not be made about ‘political’ decisions as a single category. Instead, there are different types of political consideration, which raise different issues when assessing the legality of a decision. This article singles out a particular type of political decision for condemnation: decisions made to gain a political advantage by deliberately changing the systems of democratic accountability. Examples include the engineering of the electoral system to produce favourable results, the use of public power to punish critics and the use of public resources to publish partisan propaganda. The article will argue that the legality of such political decisions should not be assessed solely within the ordinary administrative law framework, but under a constitutional principle of anti-entrenchment and process protection.

Keywords: judicial review, democracy, improper purpose, political purpose, entrenchment

1. Introduction

When, if ever, is it wrong for a public official to act for a political purpose? To describe a decision as ‘political’ is sometimes used pejoratively, to suggest that the decision is the product of a cynical calculation to maximise professional or partisan interests and with little regard for the broader public interest. The term ‘political’ can, however, be used in another sense, which does not have a negative connotation. The description of a decision as political

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can mean that it is a matter most appropriately taken by a democratically accountable person or institution. These different uses of the term show that political decision making cannot be condemned across the board. Whether a political decision should be regarded as unlawful will depend on what is meant by a 'political' consideration or purpose, what role the political considerations played in the decision and the nature of the decision in question. A central aim of this article is to move beyond general references to 'political' decisions and provide a framework that identifies the wrongs that should make certain decisions unlawful.

To differentiate the various types of political decision and to identify standards for assessing legality, section 2 of this article will look at the grounds of administrative law that are usually relied upon to challenge such decisions. Those grounds are predetermination, improper purpose and irrelevant considerations. Predetermination is typically relied on when a decision maker has placed too much weight on party loyalties or previously stated positions. As will be shown, the courts are generally reluctant to intervene on such a ground and will give the official considerable leeway to consider party matters. Greater attention will be given to the purposes and considerations doctrines, which will be taken together. In relation to those doctrines, the question is whether political factors provide permissible reasons for a decision. When assessing the permissibility of purposes and considerations, the courts can be asked to examine decisions that are political in very different ways. Sometimes a decision is thought to be based on political considerations insofar as the official responds to existing public support for a particular measure or anticipates that a measure will generate a level of public approval. The article will argue that the legality of this type of political factor will depend on the nature of the power and the empowering statute.

This article will single out for condemnation the use of public power to change or manipulate systems of political accountability for the purpose of generating a political

advantage. Such uses of power include attempts to deliberately engineer the electoral system to produce favourable results, to close down channels of accountability, to use public resources to publish partisan propaganda and to use public power to punish critics. Drawing on the wider literature on the law of democracy, section 3 of this article will explain how the principles of anti-entrenchment and ‘process protection’ provide a stronger basis on which to challenge such abuses of power. By focusing on these principles, the discussion will move away from the administrative law analysis of the cases and explain judicial intervention in terms of the wider constitutional issues. The article will argue that this type of political decision is unlawful not simply because it exceeds the terms of an empowering statute, but because the misuse of power represents a more fundamental constitutional wrong in undermining the functioning of the democratic system.

The later sections of the article will show how the principles of anti-entrenchment and process protection are served beyond the purposes and considerations doctrines. The protection of political rights under the European Convention on Human Rights (ECHR) provides a guard against abuses of public power that limit the channels of electoral and political accountability. The Supreme Court’s decision in *Miller and Cherry* will also be explained in terms of process protection, showing how courts can play a necessary role when the self-correcting aspects of a democracy are less likely to work.¹ Section 4 of the article will follow from the discussion of *Miller and Cherry* to consider whether the principle of process protection could provide support for judicial intervention in cases where there is no evidence of an unlawful purpose, but where the decision has the effect of disturbing the channels of democratic accountability. The need for caution will be noted, given the risk of

¹ *R (on the application of Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41, [2020] AC 373 (*Miller and Cherry*).

an expansive doctrine, and it will be argued that only certain types of effect should trigger heightened judicial scrutiny. Finally, section 4 will recognise the limits of judicial review in guarding against abuses of power. That section will briefly look to other processes and institutions to provide non-judicial checks to ensure that the system of representation is not short-circuited. It will then be argued that the combination of judicial and non-judicial checks can work together to maintain the overall integrity of the democratic system.

The arguments in this article will be made with reference to democratically accountable decision makers. Such decision makers have the strongest incentive to exercise power in order to maintain an elected position (or make re-election more likely). The considerations discussed in this article can, however, apply to a wider range of decision makers. For example, an unelected official could make a decision as a result of pressure from an elected official, to win favour from a politician or to promote a favoured party. More broadly, an unelected official may still be subject to forms of public accountability, which can be undermined through the misuse of public power. Such a wrong can occur where an official exercises a power to make public scrutiny of his or her actions harder. The principle of process protection that will be outlined is therefore not restricted to the review of decisions made by elected officials (though such decisions will be the primary focus of the discussion).

2. Judicial Review of Political Decisions in Administrative Law

Decisions made for political reasons can be challenged on a number of grounds in administrative law. The discussion below will first consider judicial review on the grounds of predetermination and then on the grounds of improper purpose and irrelevant considerations. A review of the doctrines and the leading cases will show how the courts face a challenge in determining which political considerations are to be expected in a healthy democratic system and which should render a decision unlawful. To address this question, the discussion will

identify various ways that a decision can be considered to be political. This section will finally distinguish decisions made with the purpose of changing or manipulating the processes of representation and accountability for political advantage, which poses a particular type of constitutional wrong.

A. Predetermination

A challenge can be made to a decision when a political consideration amounts to an unlawful predetermination. In a case of predetermination, the central objection is that an official approached the decision with a closed mind. As a result, the decision will not be based on the merits of the specific case or on the information acquired during the formal decision-making process. While the ground of review has been treated as subspecies of bias,² it is connected with the fettering of discretion, as the decision maker's prior view works to preclude the full consideration of the specifics of the case.³ The ground of predetermination is also related to procedural fairness, as a closed mind can render the representations made by affected parties redundant.⁴

There are several ways political considerations can arguably amount to a predetermination. Sometimes a public official will have made public statements on a particular matter, for example in an election campaign or in a meeting with constituents, and that prior statement is argued to have predetermined the decision. That decision can be considered 'political' insofar as the official needs to act consistently with the public statement or be seen to deliver the electoral promise. Another form of arguable predetermination arises where an official follows a party policy or instructions from party whips. In such a case the

² *R (Lewis) v Redcar and Cleveland* [2008] EWCA Civ 746, [2009] 1 WLR 83.

³ *R v Waltham Forest LBC ex p Baxter* [1988] QB 419.

⁴ *R v Amber Valley DC ex p Jackson* [1985] 1 WLR 298.

objection is not just that the decision maker surrendered his or her judgment in advance, but that the decision was determined by the policies and statements of an external organisation.

The courts apply a high threshold to establish a political predetermination and such challenges are largely unsuccessful. For example, in *Baxter*, the applicant complained that a decision to set local authority rates was unlawful because a group of councillors followed the party line, rather than their own personal view.⁵ Donaldson MR stated that a councillor could lawfully consider party policy and the views of other councillors, and a decision would be unlawful only if 'he abdicates his personal responsibility'.⁶ Party whips would render a decision unlawful if the councillor had 'no option' but to follow the party line⁷ and the councillor had become a mere delegate of a party committee.⁸ On the facts of the case, Donaldson MR found that the whips did not compel a particular vote and the councillors had a free choice whether to follow the party line (although such a choice might have had political consequences). In other cases, the courts have drawn a similar distinction between a predisposition and predetermination.⁹ Elected figures are expected to have a predisposition based on party policy and past statements, and the objection arises only where such considerations lead the decision maker to come to a conclusion in advance.¹⁰

Under other grounds of review, the courts have similarly sought to preserve a representative's freedom to make public statements. Where a decision is made by a

⁵ In *Baxter* (n 3), the argument was framed in terms of a fettering of discretion rather than predetermination, but the same principles apply.

⁶ *ibid* 427.

⁷ *ibid* 423.

⁸ *ibid* 426.

⁹ *Jackson* (n 4); *R (on the application of Island Farm Development Ltd) v Bridgend CBC* [2006] EWHC 2189 (Admin), [2007] BLGR 60.

¹⁰ *Lewis* (n 2).

democratically accountable official and is not quasi-judicial, the courts have held that the ‘notional observer’ element of the test for bias will be applied less stringently.¹¹ The permissive approach is also reflected in section 25 of the Localism Act 2011, which provides that a decision maker does not have a closed mind ‘just because’ he or she ‘had previously done anything that directly or indirectly indicated what view the decision maker took, or would or might take, in relation to a matter’.¹² Under these various standards, the courts give decision makers considerable leeway.

The reluctance of the courts to intervene on the grounds of a political predetermination reflects a recognition of the political realities. In *Kirkstall*, Sedley J stated that in ‘the case of an elected body the law recognises that members will take up office with publicly stated views on a variety of policy issues’.¹³ Public statements on major local authority decisions will be expected from a candidate for council to provide the voters with some basis for evaluation. Under a system of political accountability, an elected councillor is expected to discuss major decisions with the public and explain the likely basis for action. Similarly, the courts accept the need for party loyalty. In *Jackson*, Woolf J stated that it was ‘almost inevitable’ that the council ‘would decide on the party line’ and that attempting to remove party discipline from a major question of local development would ‘be almost impossible to achieve in practice’.¹⁴ Such loyalties can also be desirable in principle. Party discipline can ensure that the policies people voted for are implemented and provide a level

¹¹ See *R (on the application of Condon) v National Assembly for Wales* [2006] EWCA Civ 1573, [2007] BLGR 87; *Lewis* (n 2).

¹² See *IM Properties Development Limited v Lichfield District Council v Taylor Wimpey (UK) Limited* [2014] EWHC 2440 (Admin), [2014] PTSR 1484 following the approach in *Baxter* (n 3), considering an email from a whip instructing councillors how to vote.

¹³ *R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304.

¹⁴ In *Jackson* (n 4), a council’s decision to approve a proposed theme park was challenged on the grounds that the matter had already been determined by the local Labour Party policy.

of clarity that can aid the public evaluation of the elected body. The realities and benefits of party discipline have been recognised at both the local and national level.¹⁵

Courts may also be reluctant to intervene as the predetermination doctrine asks whether the decision maker placed excessive weight on a political factor.¹⁶ Deciding what weight should be given to various factors is normally a task for the official, so courts will intervene only in the extreme cases where the weight placed on the political factor excluded other considerations and bypassed the ordinary process of reasoning.¹⁷ The general approach taken by the courts thereby places considerable trust in the elected official.¹⁸ As was noted in *Wilson*, in most cases ‘the guarantee of propriety must be found not in legal sanctions but in the wisdom, judgment and sense of civic responsibility of the individual office-holder’.¹⁹ If it is felt that a particular official has placed too much weight on party loyalty or that party whips have been too strict, then he or she can be held to account at a subsequent election.

B. Improper Purposes and Irrelevant Considerations

Decisions taken for political reasons can be challenged under the improper purpose or irrelevant considerations doctrines.²⁰ Under these grounds of review, the court considers

¹⁵ At national level, see *R (HS2 Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 WLR 324 [61]–[66]; *R (on the application of McClean) v First Secretary of State* [2017] EWHC 3174 (Admin).

¹⁶ See *Bovis Homes Ltd v New Forest plc* [2002] EWHC 483 (Admin) [112], stating that the predetermination doctrine goes beyond requirements to have regard to relevant considerations. In *R v Local Commissioner for Administration in North and North East England, ex p Liverpool* [2001] 1 All ER 462 [58]–[59], Chadwick LJ stated that the appropriate weight given to a political consideration can vary according to the nature of the decision.

¹⁷ *Bovis Homes* (n 16).

¹⁸ See *Island Farm Development* (n 9) [35].

¹⁹ *R v Bradford City Council, ex p Wilson* [1990] 2 QB 375, 383.

²⁰ For the present discussion, I use the purposes and considerations doctrines largely interchangeably as similar considerations will arise. For the sake of ease, some examples will be discussed with reference to either the considerations or purposes doctrine only. The ground of bad faith is sometimes referred to in the case law, but will not be given separate consideration here, as it adds little to the analysis of the other grounds of review.

whether the political factor is a permissible or impermissible reason for a decision. In various cases, the courts have stated that political purposes and considerations can render a decision unlawful. In 1910, in *R v Board of Education*, Farwell LJ described political considerations as ‘pre-eminently’ extraneous and stated that ‘no political consequence can justify the Board [of Education] in allowing their judgment and discretion to be influenced’.²¹ Farwell LJ’s reasoning was relied upon by Lord Upjohn in *Padfield*, finding that a refusal to refer a matter for investigation ‘can never validly turn on purely political considerations’.²² In the same case, Lord Reid stated that refusing to refer a complaint purely to avoid embarrassment would ‘plainly be a bad reason’.²³

The purposes and considerations doctrines impose a necessary boundary on executive power, which prevents its misuse for an extraneous reason. However, the doctrine is also a source of controversy insofar as the courts’ determination of what counts as a proper purpose or consideration can sometimes be seen to touch on the merits of an official’s decision.²⁴ The term ‘political purpose’ is not helpful in identifying those cases where the court’s intervention will be warranted. Not all political purposes and considerations are extraneous.²⁵ To explain this further, the discussion below will differentiate several different ways a political purpose can be pursued. It will be shown that the particular means through which the decision serves the political goal is of crucial importance in differentiating the cases.

²¹ *R v Board of Education* [1910] 2 KB 165, 181.

²² *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1061.

²³ *ibid* 1032.

²⁴ See JAG Griffiths, ‘The Brave New World of Sir John Laws’ (2000) 63 MLR 159, warning of judges being ‘led astray through distaste of official activity’; Rodney Austin, ‘Judicial Review of Subjective Discretion—At the Rubicon; Whither Now’ (1975) CLP 150, 172; Jonathan Sumption, ‘Judicial and Political Decision-Making: The Uncertain Boundary’ (The FA Mann Lecture, 2011).

²⁵ The earlier discussion shows that for some decisions, officials are permitted to take into account the party line.

Before examining those issues more closely, two preliminary points will be made. The first is to distinguish potentially improper or irrelevant political factors from the general background political pressures faced by any elected official. Electoral pressures incentivize a level of competence and good behaviour. A politician may pursue an economic policy in the belief that it will improve the country's economic prospects, which in turn will put the politician in a positive light and thereby improve electability.²⁶ That is the least controversial form of political influence, insofar as the public interest (for which the power is granted) and the electoral interest of the politician are aligned. Moreover, this type of political pressure might play on the official's mind, but is not specific enough to be the purpose of the decision or a consideration taken into account.

The second preliminary point is that the discussion will focus on decisions that are 'political' in the sense of affecting the official's position in the channels of electoral and political accountability. The discussion does not consider decisions that are political in the sense of reflecting the official's own ideological or moral beliefs. This type of political decision has been the focus of some of the controversial cases. In the well-known decision of *Roberts v Hopwood*, Lord Sumner reasoned that the relevant statute did not authorise local authorities 'to be guided by their personal opinions on political, economic or social questions in administering the funds which they derive from levying rates'.²⁷ The reasoning provoked the suspicion that the judges excluded such considerations because they disapproved of the official's political opinion.²⁸ The criticism of that reasoning runs that a councillor takes office

²⁶ See eg *Gillian Chandler v The London Borough of Camden* [2009] EWHC 219 (Admin), [2009] BLGR 417, [105].

²⁷ *Roberts v Hopwood* [1925] AC 578. In that case, a policy of paying men and women an equal minimum wage was found to be unlawful primarily on the grounds of unreasonableness and breach of fiduciary duty. For similar dicta, see *Bromley LBC v GLC* [1983] 1 AC 768, 775 (Lord Denning).

²⁸ Harold Laski, 'Judicial Review of Social Policy in England' (1926) 39 Harv L Rev 832, 842.

because his or her personal opinions have been approved through the electoral process.²⁹ If the public disagrees with those opinions, then that official can be voted out of office.

The focus in this section will be on purposes and considerations that are political in the sense of aiming to achieve success in the channels of accountability. The following sections will separate various ways that decisions may aim to secure political success. The first will be where the official takes into account the existing views of the public when making a decision. The second is where a decision is made to maximise political support, for example by gaining approval from the electorate. The final type of decision seeks to secure political success by deliberately changing the processes of accountability or altering the conditions in which the performance of the public body or official is evaluated. It will be argued that this latter category poses a more significant threat to the workings of a democracy and is distinct from the ordinary administrative law cases on purposes and considerations.

(i) Public opinion

A politician will sometimes be motivated to act in response to the strength of public feeling (as opposed to being persuaded by the reasons expressed by the public), even if it goes against his or her initial instincts. For example, a council may choose not to put up a statue of a controversial figure because of the strength of public feeling against it. Where a public body opens a consultation with the general public in relation to a particular issue, the decision maker will take into account the strength of feeling and number of responses. Such a consideration is political insofar as it is about the relationship between the official and the electorate, and the official may be swayed by this factor in a bid for public approval. To some degree, such considerations are to be expected with elected officials, as the system of

²⁹ *ibid*, 843–4.

political accountability seeks to incentivise responsiveness to public opinion. Members of the public will often attempt to apply pressure on officials between elections, for example through letter-writing campaigns, petitions and protests.

Despite the role of public pressure in systems of democratic accountability, there are hazards in relying on the strength of public feeling. First of all, there are difficulties in measuring public opinion. The voices that are heard by an official may simply be better organised, financed and connected, rather than representative of the public. The representativeness of the activity will normally be a matter for the official to evaluate. A further concern is that the public may be ill-informed or express views with little merit. For example, government authorisation for a particular drug or medical treatment that is proven to be effective should not be withheld due to strong public opposition based on a conspiracy theory. More generally, while public support can be relevant to certain exercises of discretion, it cannot justify an unlawful attempt to act in excess of powers.³⁰

The basic question is whether the official should be responsive to the public in relation to the particular decision and whether public opinion is a relevant consideration.³¹ Where there is no statutory guidance, much will depend on the nature of the decision and the power. For certain decisions that involve no expert opinion (such as whether to erect a statue of a particular person), public opinion will often be as good a guide as any other factor. As will be explained in the following section, there is also greater scope to consider public

³⁰ *Bromley LBC v GLC* [1983] 1 AC 768.

³¹ A challenge is more likely to be made under the considerations doctrine, as such a factor is unlikely to be the dominant purpose for a decision. For discussion of these issues, see Yossi Nehushtan and Megan Davidson, 'The UK 14-Day Quarantine Policy: Is Public Opinion a Relevant Consideration?' (*UK Constitutional Law Blog*, 30 June 2020) <<https://ukconstitutionallaw.org/2020/06/30/yossi-nehushtan-and-megan-davidson-the-uk-14-day-quarantine-policy-is-public-opinion-a-relevant-consideration/>> accessed 21 October 2020.

opinion when setting policy priorities and devising general policies.³² Along such lines, a local authority can be expected to refer electoral commitments and public feeling when deciding its policy agenda. Once a general policy decision has been made, a narrower range of factors will be considered when making more detailed decisions to flesh out and apply the policy. On questions of application, public opinion is more likely to be extraneous if it is not part of the published criteria for the exercise of the discretion.³³ As with many principles in administrative law, much will depend on the context and specificity of the decision.

The role of public opinion will be particularly limited for exercises of discretion that are said to be quasi-judicial. In *Venables*, the House of Lords found that the Home Secretary was not entitled to consider public petitions and a media campaign calling for a longer tariff period for two convicted murderers.³⁴ Lord Goff said that ‘public clamour’ for a particular offender to be ‘singled out for severe punishment’ should not be taken into account.³⁵ Similarly, Lord Steyn stated that with judicial or quasi-judicial decisions, the minister must ‘ignore the high-voltage atmosphere of a newspaper campaign’, just as a judge would.³⁶ However, the position is complicated given that it was accepted that the Home Secretary could consider general public concern about the prevalence of certain crimes and the need for strong punishments.³⁷ The minority in *Venables* argued that the public petition could be

³² Such an approach broadly reflects the distinction drawn in political theory between decisions relating to ends (which should generally be responsive to citizens) and those relating to means (which call for greater expertise), see Thomas Christiano, *The Rule of the Many* (Westview Press 1996) ch 5.

³³ See *R (on the application of McMorn) v Natural England* [2015] EWHC 3297 (Admin), [2016] PTSR 750, where public opinion could not be taken into account when applying the published criteria to decide whether to grant a licence to shoot certain wild birds.

³⁴ *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407.

³⁵ *ibid* 491.

³⁶ *ibid* 526. See also 537 (Lord Hope).

³⁷ *ibid* 491 (Lord Goff).

relevant in assessing the public concern about crime levels, and that it would be difficult to distinguish the permissible and impermissible aspects of public opinion.³⁸

It is submitted that the minority's objections are not convincing. A difference lies between the desire for public confidence in a system and in giving the public some input into a specific decision affecting a specific person. General considerations such as public confidence look to the long-term consequences flowing from a number of decisions. Moreover, the decision maker should seek to inspire confidence in the reasonable person, rather than attempt to meet the actual demands expressed through public anger. The example shows that for some specific exercises of discretion, the scope for public opinion to be taken into account is at best minimal.

(ii) Voter-pleasing policies

Another type of political purpose arises where a policy is pursued because it will maximise the chance of electoral success and public approval. While the previous section considered public opinion as an input into a decision, here the official is influenced by the public's expected positive response to a policy output. For example, the government may offer a tax break in the year prior to an election. While such a policy may be called a 'bribe' by critics, the political strategy is to improve the voters' material position, so the electorate will be more likely to assess the politician's actions positively. This can be described as a 'voter-pleasing' policy. By contrast, a true bribe is a financial arrangement that does not attempt to engineer a positive evaluation of the politician, but is a direct exchange of support for money.³⁹ The

³⁸ Dissented on this point, see *ibid* 518 (Lord Lloyd). Lord Browne-Wilkinson added the point as a word of caution, 503.

³⁹ In the United States, see *Brown v Hartlage* (1982) 456 US 45, distinguishing 'private' arrangements with voters from benefits that are provided 'through the normal processes of government'.

voter-pleasing policy is also distinct from an attempt to manufacture undeserved public approval by deceiving the public or suppressing inconvenient facts. Instead, the approval is a result of the public's informed evaluation of the policy or decision.

The 'voter-pleasing' political consideration will normally be taken in account when formulating the legislative agenda and enacting legislation. For example, imagine that the government decides to establish a scheme to grant public funds to stimulate economic activity in areas of deprivation. The scheme may be a priority for the government because elected officials believe it will be popular with voters, even though the officials are not convinced of the merits of the policy. At such an early stage of policy development, there is limited scope for the purposes and considerations doctrines to constrain the government and the voter-pleasing strategy can be pursued. Where the policy is enacted through primary legislation, the issue will not even arise as such legislative acts are not reviewable.⁴⁰ Putting that point aside, the lack of judicial intervention at that stage is supported in principle. When fixing the policy agenda, the government is supposed to be responsive to the public and its choices are not constrained by a set of pre-defined purposes. The point can be seen in relation to the devolved legislatures. In *AXA*, Lord Reed stated that where

a public authority's powers are such that it is free to decide for itself for what purposes they should be exercised, the courts cannot then review its decisions on the basis that the powers were used arbitrarily or for an improper purpose, except again to the limited extent to which any constraints might be implied.⁴¹

⁴⁰ The issue could arise where the policy is not set up through primary legislation, but through other powers that are reviewable.

⁴¹ *AXA General Insurance Ltd, Petitioners* [2011] UKSC 46, [2012] 1 AC 868 [143]. Lord Hope [52] stated that the Scottish Parliament is not subject to judicial review on the grounds of irrationality, unreasonableness or arbitrariness, as it would be 'quite wrong for the judges to substitute their views on these issues for the considered judgment of a democratically elected legislature'.

The argument therefore runs that as a democratic body, it is for the legislature to choose what purposes its powers should be used for and what considerations to take into account, and the appropriateness of any decisions should normally be a matter of political accountability.⁴² Accordingly, a devolved legislature can make general policy decisions with the political purpose of winning over voters. The point can apply to other democratically elected institutions that have broad powers. For example, section 1 of the Localism Act 2011 gives local authorities a general power of competence, which does not set specific purposes or policy goals for the local authority. Accordingly, a local authority should have considerable leeway to use such powers to devise policies that are likely to win public support.⁴³

While public bodies have scope to take public approval into account in the earlier stages of the policy agenda, once a policy has been formulated and its framework rules have been enacted, then any discretion granted to implement the policy will be subject to express and implied limitations. On the example of funding economic projects given earlier, the minister will have to allocate money in conformity with the purpose of the legislation, primarily on the basis of economic need.⁴⁴ There will be some scope for political considerations to play a role in the allocation of funds, as the minister will have to think

⁴² *ibid* [146].

⁴³ Though in some controversial cases, courts have shown little regard for the freedom of local authorities to choose their own purposes even in relation to general policies. For example, the criticism of *Bromley LBC v GLC* (n 30) is that the court gave insufficient weight to the democratic status of the body and drew the legal boundary of the statute too narrowly.

⁴⁴ In another example, the Court of Appeal in *R (on the application of Core Issues Trust) v Transport for London* [2014] EWCA Civ 34, [2014] PTSR 785 [34] accepted that gaining public approval with a view to a future election would be an improper purpose for exercising a statutory discretion whether to accept a particular advertisement. In that case, the discretion was constrained by the statute and also by the policy on advertising.

about how decisions can be defended in Parliament.⁴⁵ However, the scope for such considerations to enter the equation at this stage is more limited.

A difficult question arises where a policy is pursued not to please all voters, but to please a particular section of the electorate that the party in power wishes to win favour with. For example, a policy to issue grants to stimulate economic activity in deprived areas could result in funds being selectively allocated to marginal constituencies in order to generate electoral support. The legality of such a consideration will partly depend on the stage at which the political consideration is taken into account. If the government adopts the general policy to establish the scheme knowing that marginal constituencies are likely to benefit under its terms, the political goal alone will not provide a basis for judicial intervention at the early stage of policy formation.⁴⁶ While the use of power in this way is controversial and runs contrary to certain theories of democracy, such a political purpose or consideration will not be unlawful.⁴⁷ However, if the funds are selectively allocated through powers delegated to an official under a scheme established to promote genuine economic interests, then the decision is likely to be unlawful because the electoral purpose is extraneous to the purpose of the scheme. The selective nature of the decision would also provide a basis for comparison in the treatment of the various areas, which is more likely to reveal the lack of merit in the allocation of funds.

⁴⁵ In *R (Core Issues Trust) v Transport for London* [2014] EWHC 2628 (Admin), [2014] PTSR D26 [127], Lang J noted that an elected mayor ‘would have had an eye to public opinion with every step he took while in office’, and that to find such broad political considerations to be unlawful would depart from the realities of elected office. That, however, does not permit the political purpose to be the dominant purpose.

⁴⁶ As noted earlier, if the measure is enacted through primary legislation, the decision will not be reviewable in any event.

⁴⁷ For criticism of government responsiveness to preferences and interest group pluralism in the United States, see Cass Sunstein, *The Partial Constitution* (Harvard UP 1993).

The previous two sections have looked at related political considerations, taking into account public opinion and the likelihood of approval in the forums of accountability. The legality of such considerations is determined through the ordinary administrative law framework, looking at the potential excess of power and the principles of good administration. A broad distinction was drawn between general policy considerations, where choices have to be made on which there are no objective criteria. In relation to such decisions, public support and subsequent approval are likely to play a bigger role. Once the policy is fixed, detailed decisions need to be made to implement and apply the policy. At this stage, political considerations will be expected to play a smaller role. The implementation and application decisions will be constrained by terms of reference (whether in statute or policy documents) and will be more likely to involve matters of expertise. When a policy is applied, there is also a risk that political considerations will result in inconsistency or unfairness to those concerned, which could provide further grounds for an administrative law challenge.

(iii) Changing and manipulating the political process

The final type of political purpose to be considered is where the official uses public power to change, subvert or manipulate the channels of political accountability to secure a political advantage. It will be argued here that such a purpose is improper in relation to any reviewable power as a matter of general principle. In such a case, the political advantage is not secured through a positive evaluation of the decision, but through the deliberate alteration of the conditions and processes through which voters evaluate decisions and express their approval or disapproval. For example, the introduction of voter identification requirements to reduce turnout among groups less likely to vote for the governing party would amount to an

improper use of power.⁴⁸ Gerrymandering provides another example of such a decision. The manipulation of electoral boundaries does not generate an advantage by manufacturing high approval ratings for the public official, but instead changes the system for aggregating votes in a way that is more likely to generate the official's desired outcome. In such a case the problem can be understood as one of incumbent entrenchment, so those in power change electoral geography in order to stay in power.

A related issue arose in *Porter v Magill*, in which the leaders of Westminster City Council devised a policy to sell council properties in eight marginal wards under a statutory power.⁴⁹ The policy was adopted with the purpose of improving the prospects of electoral success, based on the belief that owner-occupiers would be more likely to vote Conservative.⁵⁰ The legal question was whether the councillors had committed wilful misconduct, but the reasoning and substantive issues were the same as those for the purposes doctrine. The House of Lords found the policy to be unlawful. In reaching that conclusion, Lord Bingham stated that 'a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party'.⁵¹ Lord Scott distinguished policies pursued for 'naked

⁴⁸ In *R (on the application of Neil Coughlan) v The Minister for the Cabinet Office* [2020] EWCA Civ 723, a legal challenge was made to a pilot for voter identification requirements in local elections. The challenge was partly based on the purposes doctrine, but did not allege an improper *political* purpose of electoral advantage. The challenge was therefore not framed in terms of the abuse of power identified in this article. The closest argument in *Coughlan* was that the pilot scheme would have the *effect* of reducing turnout, particularly among disadvantaged groups. The potential for certain effects to trigger heightened judicial scrutiny is considered in s 4 below.

⁴⁹ [2001] UKHL 67, [2002] 2 AC 357.

⁵⁰ The electoral advantage was not to be achieved by changing the existing electorate's assessment of the council, as with a voter-pleasing policy. Instead, the advantage would have arisen through the sale of council properties as they became vacant. As a result, council tenants would be replaced by new residents who would own the property. The electoral advantage was therefore to be achieved through the movement of people to change the composition of the electorate in the marginal wards, which explains the analogy with a gerrymander.

⁵¹ *Porter* (n 49) [21].

political advantage' from legitimate policies that bring political benefits.⁵² Lord Scott explained the abuse of power in the case as a form of corruption:

The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a clear form of political corruption. So, too, would be any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage.⁵³

The characterisation of the decision as corrupt is important, as it underlines the distinct constitutional nature of the wrong. Not every decision exercised for an improper purpose will amount to a form of political corruption. Instead, the wrong in this category of case is graver as it amounts to a self-interested deviation from accepted standards in order to gain a political benefit.⁵⁴

The ruling in *Porter* reflects a general principle that public power should not be used to entrench the position of an incumbent and undermine a competitive electoral system.⁵⁵ The method of entrenchment in *Porter* was different from a gerrymander, because the officials did not formally change electoral boundaries to produce the desired result. Instead, the council pursued a policy for 'functional' entrenchment in which substantive housing policy was used to engineer the movement of residents within existing electoral boundaries.⁵⁶ The case therefore shows that the wrong can arise not only through changes to the formal

⁵² *ibid* [144].

⁵³ *ibid* [132].

⁵⁴ Along such lines, Rose-Ackerman defines corruption as the 'misuse of public power for private gain', Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (CUP 1999).

⁵⁵ On anti-entrenchment as a rationale for judicial intervention in election law in the United States, see Samuel Issacharoff and Richard Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stan L Rev* 643; in US constitutional law more broadly, see Richard Pildes, 'The Constitutionalization of Democratic Politics' (2003) 118 *Harv L Rev* 28.

⁵⁶ On functional entrenchment, see Daryl Levinson and Benjamin Sachs, 'Political Entrenchment and Public Law' (2015) 125 *Yale LJ* 400.

constitutional framework and rules governing the system of representation, but also through ordinary policy decisions (in that case, housing policy) that are taken in order to subvert the channels of political and democratic accountability.

There are other cases where the courts have found the use of public resources to aid one particular party in an election campaign to be unlawful. In *ex parte Jones*, preferential treatment for a councillor in relation to an offer of council housing, so that she could ‘establish her presence’ in the ward in time for the next election, was found to be unlawful.⁵⁷ The court reasoned that the council was not permitted to allocate a house to the councillor to enable her to be better able to fight an election and was not permitted to make the allocation ‘without regard to the needs of others who were on the list for housing’.⁵⁸ Such a case clearly falls within the anti-entrenchment principle outlined above, insofar as a public resource was selectively granted to give one candidate an advantage in an election campaign. Similarly, providing public funds solely to finance the campaign of the governing political party would fall foul of the same principle.

The Administrative Court gave *Porter* a narrower interpretation in *McClean*, in which a challenge was made to the May government’s confidence and supply agreement with the Democratic Unionist Party (DUP).⁵⁹ The applicant argued that the promise of spending in Northern Ireland in return for support from DUP MPs was unlawful under the purposes doctrine. In rejecting that challenge, Sales LJ found that *Porter* does not support a general common law principle that it is unlawful to use public funds to support party political

⁵⁷ *R v Port Talbot Borough Council, ex p Jones* [1988] 2 All ER 207.

⁵⁸ *ibid.*

⁵⁹ *McClean* (n 15). The applicant argued that the confidence and supply agreement would result in an improper use of s 58 of the Northern Ireland Act 1998.

purposes.⁶⁰ Instead, Sales LJ concluded that the policy in *Porter* was unlawful because the council's purpose was not authorised by the statute in question.

The reasoning in *Porter*, it is submitted, does not support such a narrow reading. The terms of the statute in *Porter* did not expressly preclude party advantage as a purpose for which the power could be used. In finding that the relevant statute did not permit the disposal of property 'for the purpose of promoting the electoral advantage of any party represented on the council',⁶¹ Lord Bingham drew on other cases involving political goals and explained the issue in terms of a general principle.⁶² The reasoning in *Porter* suggests that it would be highly likely that the use of any statutory power to manipulate electoral geography for political advantage would be unlawful (unless the statute specifically permitted such a use). Lord Scott's description of the issue as one of corruption also indicates that the case was not solely concerned with statutory interpretation, but was about a deviation from standards of conduct generally expected from public officials.⁶³

In parts of his reasoning in *McClean*, Sales LJ refers to political purposes generally and does not distinguish political considerations that are permissible from those that can undermine the system of representation. For example, Sales LJ argued that it is proper for Conservative MPs to make decisions in the belief that 'it is in the interests of the country and their constituents to have a stable and Conservative government'.⁶⁴ If this means that elected

⁶⁰ *ibid* [16].

⁶¹ *Porter* (n 49) [21]. Nor did the auditor's statutory powers in relation to 'wilful misconduct' specify when such conduct meets that standard.

⁶² *ibid* [19] and [22].

⁶³ Philp refers to corruption as a deviation from the 'naturally sound condition of politics', Mark Philp, 'Defining Political Corruption' (1997) 45 *Political Studies* 436, 445. Similarly, Lord Bingham's reasoning drew on general standards of propriety, noting that the ambition to be re-elected is 'the life blood of democracy', *Porter* (n 49) [21].

⁶⁴ *McClean* (n 15) [18].

representatives are free to vote according to the party line or make decisions that will meet with voter approval, then that much is correct. However, if Sales LJ means that it is proper for a politician to conclude that it is in the public interest for his or her party to remain in office and that it is therefore permissible to take any steps to prolong the party's time in office, then the argument would permit a range of practices that undermine the functioning of democratic accountability. If such a view were taken, then a politician could provide state funds to the governing political party or use state resources to publish overtly partisan propaganda.

Nonetheless, the rejection of the application in *McClean* can be defended by distinguishing the mechanism used to secure the political advantage from that used in *Porter*.⁶⁵ The confidence and supply agreement with the DUP did not subvert the democratic process, but was a deal agreed within that process. Part of the ordinary course of politics is for MPs to make deals on particular votes. For example, whips may agree to drop one clause in legislation if it will gain support for another. The support of an MP can be secured through an offer of ministerial office. By devising a package of policies that would appeal to a particular political group in the Commons, the confidence and supply agreement was comparable to a 'voter-pleasing' policy (though it sought to win the support of a group of MPs rather than voters). There are still strong objections to such bargaining, where trade-offs and deals produce results that neither serve the public interest nor track majority preferences. Moreover, such bargains (where reviewable) could fall foul of ordinary administrative law principles, for example where the policy is devoid of any merit and is irrational. However, as the confidence and supply agreement sought to win the support of the DUP MPs within the

⁶⁵ The decision can also be defended on the grounds of parliamentary privilege, *ibid* [22]. For present purposes, however, the discussion is concerned with the point of principle about the permissibility of political considerations.

ordinary political processes, the political purpose in *McClean* was different from the broader constitutional wrong in *Porter*. Once distinguished in this way, the decision in *McClean* does not undermine the recognition of a general principle against the subversion of mechanisms of electoral and political accountability.

3. *The Law of Democracy: Anti-entrenchment and Process Protection*

The reading of *Porter* given above locates the ruling outside of ordinary administrative law principles and within the broader law of democracy. The political purpose in *Porter* was unlawful for reasons that were independent of the empowering statute, and instead rooted on certain principles that support the workings of the UK's representative democracy. The following discussion will focus on two of those principles: anti-entrenchment and process protection. The problem of anti-entrenchment has already been identified and is particularly pressing where officials seek to secure an electoral advantage in cases such as *Porter*. The concern with anti-entrenchment can, however, arise in relation to decisions that do not directly pursue an *electoral* advantage. In *Padfield*, the court stated that it is an improper purpose to withhold official information from the public simply to avoid political embarrassment.⁶⁶ That conclusion can be connected to anti-entrenchment, as the withholding of information will prevent the public from making a full assessment of the official's performance in office and thereby artificially sustain high levels of approval.⁶⁷ The avoidance of criticism therefore means the politician is less likely to pay a political cost for the embarrassing decision, and the withholding of information may entrench the decision itself

⁶⁶ *Padfield* (n 22).

⁶⁷ Such a decision is distinct from a voter-pleasing policy, as the decision is not made because the public would approve of the withholding of information.

and make its revision less likely.⁶⁸ Along similar lines, the courts have held that it is an improper purpose to use public power to punish a political opponent or critic. For example, a local authority's decision to stop advertising with a particular newspaper company that had published critical articles was found to be unlawful.⁶⁹ Rewarding favourable media coverage with publicly funded advertising would be equally objectionable. The principle is of particular importance today, given the increasing concerns about government using certain powers to boycott or punish critical media outlets.⁷⁰ Applying the principle, a refusal to grant a journalist access to official press briefings on the basis of that journalist's past critical coverage would be unlawful.

The concern with entrenchment is focused on measures that maintain the status quo, with officials retaining office and decisions being protected from revision. The point has much in common with the 'distrust' aspect of John Hart Ely's classic work on judicial review in the United States, which emphasised the strong vested interest of officials to shield themselves from accountability and keep outsiders on the outside.⁷¹ Ely argued that judicial intervention was therefore warranted as a means to keep the channels for political change open.⁷²

⁶⁸ While the entrenchment in the example is not directly tampering with the electoral process, it may still improve the official's long-term prospects of re-election.

⁶⁹ *R v Derbyshire County Council, ex p The Times Supplements Ltd* *The Times* (19 July 1990). The court based its conclusion on bad faith and vindictiveness, but the underlying issue is the same as for the purposes doctrine. That ruling can be distinguished from the improper purpose in *R v Lewisham LBC, ex p Shell* [1988] 1 All ER 938, where public power was not used to punish a company for criticising the council.

⁷⁰ For example, in late 2019 and early 2020, government representatives refused to appear on BBC Radio 4's flagship *Today* programme as a way to signal disapproval of its coverage. On how government pressure on the media is a common tactic to erode democratic institutions, see Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 *Journal of Democracy* 5, 11.

⁷¹ John Hart Ely, *Democracy and Distrust* (Harvard UP 1980).

⁷² On distinguishing the focus on entrenchment from Ely's broader theory, see Issacharoff and Pildes (n 55) 710; Michael Klarman, 'Majoritarian Judicial Review: The Entrenchment Problem' (1997) 85 *Geo LJ* 491, 498, fn 38.

Anti-entrenchment is, however, just one aspect of a broader principle that seeks to ensure that democratically accountable bodies are responsive to the public. The integrity of the system of responsive and accountable government can be eroded where public resources are used to deliberately alter the political process to secure a *change* to the status quo. The problem lies with officials using public resources to reach their preferred outcome without it being fairly tested in the political process. Accordingly, an improper purpose arises not just where a public body seeks to stay in office or chill criticism, but also where it seeks to condition the public to accept future policies or generate public demand for decisions that fit with the governing party's priorities. To give a stark example, government should not use public resources to pay a lobbying firm to write multiple responses to an official consultation in support of a proposed policy. Similarly, constraints can be imposed on communications by public bodies. For example, in *Inner London Education Authority*, a public body's advertising campaign promoting its opposition to a cap on local taxes was found to be *ultra vires*.⁷³ Glidewell J reasoned that a statutory power to publish 'information on matters relating to local government' could be used for the purpose of informing the public, but not for the purpose of persuading the public to agree with the authority's viewpoint. The decision can be explained by the view that the public body is supposed to be responsive and accountable to public opinion, so it is not for government to use state machinery to steer public opinion on a matter of political debate in a particular direction.⁷⁴

⁷³ *R v Inner London Education Authority, ex p Westminster City Council* [1986] 1 WLR 28. The court found the purpose of the authority was both to inform (lawful) and to persuade (unlawful). The court held that where there was a mixed purpose, the use of funds was unlawful as the unauthorised purposes 'materially influenced' the authority.

⁷⁴ See Jacob Rowbottom, 'Government Speech and Public Opinion: Democracy by the Bootstraps' (2017) 25 *Journal of Political Philosophy* 22.

By contrast, in a case concerning a non-statutory power, the Conservative government's decision to publish and distribute a leaflet about the controversial 'poll tax' to every house in England in 1989 was found to be lawful.⁷⁵ Without guidance from a statute, Woolf J stated that the court should only intervene where the information is misleading or inaccurate. Woolf J found that the channels of political accountability are the 'primary safeguard' to check government's communicative power. That standard is more permissive than the information/persuasion distinction given in *Inner London Education Authority*. Given the difficulties in differentiating information from persuasion, there is good reason for the courts to be cautious before intervening. However, the difficulty with Woolf J's more permissive standard is that it would allow the lawful use of government resources to publish accurate yet highly partisan propaganda. Of course, it is an aspect of political accountability that an official should explain and justify his or her actions to the public, which will necessarily include an element of persuasion. However, where public resources are used to promote or defend the government's favoured policy, similar resources should be provided to opposing politicians or at the very least provision should be made for government statements to be publicly challenged.⁷⁶

The discussion so far has extended the concern with anti-entrenchment to a wider principle protecting the integrity of the system of accountability and responsiveness, which can be labelled as a principle of process protection. The basic problem is that instead of playing by the rules to win (such as the voter-pleasing policy), public power is used to either change the rules or skew the process for the purpose of making the win more likely. The

⁷⁵ *R v Secretary of State for the Environment, ex p London Borough of Greenwich* (1989) CO/731/89.

⁷⁶ Such conditions do not attach to public communications generally. For example, government health messages do not have to give space to opposing views. The point relates to communications on matters of political debate to be contested in the democratic forums.

principle can justify judicial intervention in relation to a wide range of practices, such as electoral manipulation, punishing political critics, withholding information and disseminating propaganda. The principle is not limited to any particular statutory context and should apply equally to non-statutory powers.

The principle of process protection is also related to wider constitutional principles that prevent government using its power to shield itself from potential criticism in the channels of legal accountability. In *R (Evans) v Lord Chancellor*, Laws LJ stated that public funding could not be denied in judicial review cases simply on the grounds that a court's ruling in a case would be 'unwelcome or apparently damaging'.⁷⁷ While that decision concerned the protection of the rule of law, the ruling reflects the principle that the government cannot use its power to limit access to a channel of accountability simply as it may lead to outcomes that are embarrassing for government or in opposition to its preferred outcome. The principle of process protection therefore fits within a broader constitutional scheme that protects both access to the courts and the rule of law, along with the integrity of elections and the system of political accountability.

One question is whether a process protection principle will draw the courts into questions that are most appropriately left to the political branches. While characterised as a type of process theory, there are inevitably questions of substance for the courts to consider.⁷⁸ For example, earlier *McClean* was distinguished from *Porter*, on the grounds that deal making for parliamentary support is an accepted part of the political process, whereas selling houses to manipulate electoral geography is not. In a borderline case, the court may have to

⁷⁷ *R (on the application of Evans) v Lord Chancellor* [2011] EWHC 1146 (Admin), [2012] 1 WLR 838 [25].

⁷⁸ Much of the criticism of Ely's theory focused on the extent to which courts would have to engage with substantive questions under a process theory. See discussion in Paul Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (OUP 1990) 97–9.

determine whether a particular practice is an accepted part of the system or not. That raises normative questions about the permissible practices in the system of representative democracy. However, the justification for judicial intervention does not lie in any supposed neutrality or value-free nature of the process, but on courts lacking the vested interest of the elected decision makers.⁷⁹ For the court to evaluate such matters is the lesser of two evils, when considered against leaving the decision in the hands of a political body with a vested interest. Moreover, in the examples discussed so far, judicial intervention is based on the purpose of the decision maker or the considerations taken into account, and therefore does not preclude a particular substantive outcome.

To summarise, the discussion so far has identified an objection to the use of public power specifically to gain an advantage in the channels of political accountability, which does not flow from an independent and fair assessment of the merits of the decision. That can arise through formal changes to the system of representation, or through decisions in ordinary areas of policy that nonetheless produce a political advantage. That objection applies to measures taken to entrench an official or a decision. The same objection also extends to the use of public power to generate the approval or acceptance of changes to the status quo. The account is narrower than some forms of process theory, as it does not require the correction of a wider range of flaws in the democratic system.⁸⁰ Instead, the principle is focused on the abuse of power for political advantage. Having provided a foundation for process protection in the purposes doctrine, the discussion will now consider other areas of law that offer similar protection.

⁷⁹ For a similar defence of process theories, see Michael Klarman, 'The Puzzling Resistance to Political Process Theory' (1991) 77 Va L Rev 747, 784.

⁸⁰ See Stephen Gardbaum, 'Comparative Political Process Theory' (2020) 18 ICON 1429.

A. Human Rights and Process Protection

Some decisions that subvert or undermine the democratic process may engage political rights. For example, a restriction on the criticism of government could be challenged under article 10, which offers heightened protection to political speech.⁸¹ A selective denial of access to information or to a government briefing based on a reporter's past criticisms of government may amount to a violation of the right to freedom of expression.⁸² A decision to deny a non-speech-related benefit (such as a tax break) based on a potential recipient's viewpoint would also be likely to fall foul of article 10. Similarly, attempts to engage in a partisan gerrymander or skew the distribution of any public funds for election campaigns may violate the protection of free elections under article 3 of Protocol 1 of the ECHR.⁸³ The protection of political rights will therefore provide a guard against certain misuses of power for political advantage. The presence of an unlawful purpose to secure a political advantage can also guide the application of rights-based standards. Where such a purpose can be shown, the court may be able to quickly dispose of the matter at an earlier stage of the enquiry when considering a legitimate aim, without having to go through the full proportionality analysis.

The rights protected under the ECHR will not, however, guard against the full range of decisions that can undermine the integrity of the democratic process. A power could be exercised to promote the party in government or deflect criticism without it affecting a

⁸¹ *Lingens v Austria* (1986) 8 EHRR 407 [42]; *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] AC 457 [148].

⁸² A 'discriminatory, arbitrary or unreasonable' condition on access to such a briefing could engage the protection of free speech, see *R (on the application of Prolife Alliance) v BBC* [2003] UKHL 23, [2004] 1 AC 185 [8] and [59].

⁸³ On the need for bodies administering elections to be free from political manipulation, see *Georgian Labour Party v Georgia* (2009) 48 EHRR 14 [101]. The state is under a positive obligation to secure some basic conditions for a fair election campaign, such as ensuring the media is open to diverse viewpoints, see *Communist Party of Russia v Russia* (2015) 61 EHRR 28 [126]. The Venice Commission, *Code of Good Practice in Electoral Matters* (2002) [2.3] refers to a 'neutral attitude' by state authorities in relation to elections, media coverage and the distribution of political resources.

specific individual with standing to make a challenge under the Human Rights Act 1998. Such a case could arise where the government decides not to publish an official report for fear of embarrassment, but in circumstances where no rights of access under article 10 are engaged.⁸⁴ A public body may spend large amounts of money to convince the public to approve the governing party's policies and performance in office, which would not raise an article 10 issue. The ECHR will offer limited scope to prevent the government interfering with or influencing other public bodies which do not hold Conventions rights.⁸⁵ A decision to cut the funding of an audit agency solely because it provided a critical report will not violate a fundamental right. In short, political rights go some way to securing the conditions of a fair political process, but do not comprehensively cover all aspects of a well-functioning democratic system.

While mistrust of government and the self-interested abuse of power by officials is a well-established reason for protecting political rights, the ECHR rights guard against a wider range of government actions. For example, a decision to prohibit protests in a certain zone may violate article 10, but may have been taken for the legitimate purpose of protecting public order. Such a decision is not an intrinsically corrupt or self-interested exercise of power, and the issue for the court is whether the measure strikes a proportionate balance between the right and the competing interest. The process protection principle therefore overlaps with the democratic justifications for free speech and other political rights but

⁸⁴ Under art 10, rights of access to government-held information arise in limited circumstances, see *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR, 8 November 2016); *Centre for Democracy and the Rule of Law v Ukraine* App no 10090/16 (ECtHR, 26 March 2020).

⁸⁵ Unless the measure in question impacts on a person's ECHR rights.

covers different ground.⁸⁶ As a result, the protection of the political process cannot be secured through human rights law alone.

B. Miller and Cherry as a Process Protecting Decision

The constitutional principle of process protection can be seen in the Supreme Court's decision in *Miller and Cherry*.⁸⁷ The facts of *Miller and Cherry* concerned the government's decision to prorogue Parliament for a period of five weeks shortly before the UK was scheduled to leave the EU. The Court found that the decision to prorogue was unlawful as it had the 'effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive'.⁸⁸ The ruling did not prohibit an extended prorogation, but required some justification for the decision. While the Supreme Court's reasoning partly relied on parliamentary sovereignty, another strand of the reasoning concluded that an extended prorogation posed a risk that 'responsible government may be replaced by unaccountable government: the antithesis of the democratic model'.⁸⁹

The Supreme Court's reasoning looked at the *effect* of prorogation, rather than the *purpose*. The effect on the functioning of Parliament acted as a trigger, which put the burden on the government to justify its decision. That approach fits with the principles outlined earlier, as without some justification, the prorogation could be assumed to be for an improper purpose. Had the government provided a justification for the extended prorogation, the Court would then have considered whether that was the true purpose (as opposed to a sham) and

⁸⁶ So the account given here is narrower than the classic democratic justification for protecting speech, see discussion in Klarman (n 79) 753–4.

⁸⁷ *Miller and Cherry*, (n 1).

⁸⁸ *ibid* [50].

⁸⁹ *ibid* [48].

whether that purpose was proper or not.⁹⁰ However, no justification for the five-week prorogation was provided, so the Court did not have to explore such questions.

The effect of the prorogation on the system of representative democracy was to some degree obvious, as it made a formal change to the process (when Parliament sits). Nonetheless, the reasoning has been subject to criticism on the grounds that the measure did not stop government from being held to account before and after the prorogation. Such a criticism is unconvincing. The prorogation stopped Parliament from acting during the period in which it was not sitting. Parliament was prevented not just from enacting legislation, but also from committee work, parliamentary questions and other channels of scrutiny and accountability. The fact there was scope for *some* accountability or scrutiny does not mean that the government should be able to call time for its own convenience. While there would be opportunities to hold government to account after the event, the Supreme Court found that those opportunities might be too late to influence the government's decisions in relation to Brexit. As Lady Hale stated, 'the most that Parliament could do would amount to closing the stable door after the horse had bolted'.⁹¹

In a variation of the criticism of *Miller and Cherry*, Timothy Endicott has argued that the prorogation did not truly subvert the channels of political accountability and Parliament had the chance to reverse the prorogation.⁹² For example, Parliament could have added a clause to an existing Bill keeping Parliament in session until a specified date.⁹³ The line of argument runs that there was no deficiency in the channels of political accountability, so

⁹⁰ See the discussion in Paul Craig, 'The Supreme Court, Prorogation and Constitutional Principle' (2020) PL 248, 261.

⁹¹ *Miller and Cherry* (n 1) [33].

⁹² Timothy Endicott, 'Making Constitutional Principles into Laws' (2020) 136 LQR 175.

⁹³ *ibid.*

judicial intervention was not needed to protect the system of representative democracy. Such an argument, however, overlooks the political realities. The prorogation was announced on 28 August 2019, Parliament returned from the summer recess on 3 September and the prorogation took effect in the early hours of 10 September. Parliament had a range of issues to deal with in a short space of time. Many MPs were most concerned to ensure that any Brexit deal had parliamentary approval. To achieve that, the House of Commons passed the European Union (Withdrawal) (No 2) Act 2019 on 4 September (the day after the return), and the House of Lords had to change its rules to allow the legislation to pass in time for Royal Assent on 9 September.⁹⁴ Such legislation had to be enacted at breakneck speed. It may well be that MPs focused their energies on that legislation as it tracked earlier legislation requiring a parliamentary vote on a deal, and an existing coalition of support could be relied upon to enact the measure in the short time frame. That Parliament did not insert a clause into legislation within a day of returning from recess (on 4 September) to reverse the prorogation should not be taken as tacit approval of the measure and does not mean that the chances for accountability were not curtailed.

Aside from the political realities, there are reasons why majority approval alone should not preclude judicial intervention. For example, the use of executive power to give money to the majority political party (and no other party) may well be supported by a majority in Parliament. Such a decision would nonetheless be unlawful for reasons explained earlier. While such a decision could be democratically scrutinised, the conditions in which the electorate evaluate and express approval or disapproval of the decision would be tainted by giving one political party an advantage in resources.

⁹⁴ *Miller and Cherry* (n 1) [22].

While the decision in *Miller and Cherry* generated much political controversy, the Supreme Court's decision is important in identifying and relying on principles of representative democracy. The protection of the channels of accountability outlined earlier is therefore not limited to the purposes and considerations doctrine in administrative law, and has recognition as a constitutional principle. The decision also shows how that principle applies with equal force to non-statutory powers.⁹⁵ The ruling illustrates how process protection extends beyond the integrity of elections and applies to other parts of the democratic system. The decision in *Miller and Cherry* is important as the reasoning brings the principle out from its origins in administrative law and sets out the wider constitutional implications.

4. *Beyond Political Purposes*

The discussion so far has identified a distinct constitutional justification for judicial intervention in relation to certain types of decision that are tainted with political self-interest. The discussion that follows will consider whether process protection and anti-entrenchment demand further restraints beyond purposes-based judicial review. The following sections will discuss two possible paths for the broader application of those principles. The first is judicial intervention where a decision is deemed to have *effects* that undermine the democratic process. The second is the use of institutional design and decision-making procedures to supplement judicial review as a safeguard against the abuse of power for political advantage.

A. *Looking at Effects*

⁹⁵ As the impropriety is identified with reference to a constitutional principle rather than the terms of statute, there is no reason why it should not apply to a non-statutory power. See also *Re Downes' Application for Judicial Review* [2009] NICA 26 [14].

The decision in *Miller and Cherry* could point the way to a more expansive approach to process-based review, in which heightened judicial scrutiny is triggered by the *effect* of a decision on the democratic process, rather than the *purpose*. Such a move has considerable appeal, given the challenges of establishing political advantage as a primary purpose for a decision. In any event, an argument can be made that a decision that hinders the fair workings of a democratic system is objectionable whether or not the effect is intentional. Despite the controversy, *Miller and Cherry* was an easy case, where an adverse effect on the system of political accountability was obvious, as the change was made to the formal processes of Parliament and the extended prorogation was a clear departure from the normal practices. The approach could be developed so that there are certain rules of thumb where the effect of a decision triggers an inference of an improper purpose and places a burden on government to justify its actions. Such an approach can already be seen in various areas. An interference with political speech raises a risk of self-interested censorship by government, so courts will demand a stronger justification for any restriction.⁹⁶ In *Evans*, the Supreme Court held that where an independent tribunal has decided that the public interest warrants disclosure of information under the Freedom of Information Act 2000, then a particularly compelling reason is required by government to exercise a power to veto the decision.⁹⁷ Both examples are anchored in a specific trigger where there is a departure from normal expectations.⁹⁸ The difficulty arises if an effects-based standard is applied more widely where there is no

⁹⁶ On the mistrust of government rationales for freedom of expression, see Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2005). Elena Kagan has argued that the content neutrality rule under the US First Amendment serves as a proxy to identify cases where there is a higher risk of a bad purpose, see Elena Kagan 'Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine' (1996) 63 U Chi L Rev 413. For discussion of this point in relation to impermissible reasons in constitutional law more generally, see Richard Fallon, 'Constitutionally Forbidden Legislative Intent' (2016) 130 Harv L Rev 523.

⁹⁷ *R (on the application of Evans) v Attorney General* [2015] UKSC 21, [2015] AC 1787.

⁹⁸ Writing in the United States, Issacharoff and Morrison call for more intensive judicial review where an official departs from settled institutional practices, Samuel Issacharoff and Trevor Morrison, 'Constitution by Convention' (2020) 108 CLR 1913.

identifiable trigger for heightened scrutiny. Many decisions will have political consequences but will be taken for legitimate reasons, so a mere effect on the democratic system alone will not be enough. For example, a sale of council houses can have political effects by changing the population in certain electoral wards, but that effect may be the by-product of legitimate housing policy. Without a focus on purpose as a control mechanism, the difficulty lies in distinguishing the subversion of the political system from the political effects of legitimate policy choices.⁹⁹ Similarly, there are some changes to the system of representation that are necessary. The challenge for an effects-based doctrine is therefore to identify which type of effect on the democratic process should trigger a presumption of a questionable purpose.

B. Safeguarding the Process through Institutional Design

Rather than relying on an expanded effects doctrine for judicial review, an alternative is to develop systems and processes for decision making that reduce the risk of abuse, particularly where the decision maker has a vested interest.¹⁰⁰ The restrictions on certain government activities in the period shortly before an election, known as *purdah*, provide one example.¹⁰¹ During the *purdah* period, government ministers are, by convention, expected not to announce major policy decisions. Such a non-legal practice has been described as a ‘self-denying ordinance’,¹⁰² which aims to reduce the risk of power being exercised for electoral advantage at a time when the incentives for such action are strongest. Another strategy is for independent bodies to make or play a key role in decisions that are most vulnerable to abuse.

⁹⁹ See Levinson and Sachs (n 56) 409–10 and 474–5; Pildes, ‘The Constitutionalization of Democratic Politics’ (n 55) 130–8.

¹⁰⁰ Gardbaum (n 80).

¹⁰¹ The practice also involves special guidance to civil servants in the pre-election period, with equivalent rules applying in local government elections and referendums.

¹⁰² *R (on the Application of Clientearth) v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 1618 (Admin).

Along such lines, Bruce Ackerman has argued that assigning such functions to independent bodies is a key element in a modern version of the separation of powers.¹⁰³ One example is the UK Statistics Authority, which has a duty to oversee the production and publication of official statistics. The Authority's Code of Practice requires that data 'should be presented impartially and objectively', and that the release of data should be scheduled.¹⁰⁴ There are many good reasons for an independent check on official statistics, but one such function is to provide a safeguard against the strategic or misleading use of official data by public officials. The Freedom of Information Act 2000 also reduces the scope for government control over the release of official data for political advantage. Any refusals to release information can be challenged before a regulatory body, the Information Commissioner, and a tribunal. Following Ackerman's argument, Michael Pal stresses the importance of an independent body to oversee the workings of the electoral system and to operate at arm's length from political actors.¹⁰⁵ Pal notes that where such bodies are the product of statute and dependent on the government for funding, as in the UK, there is still scope for political pressure.¹⁰⁶ However, with the lack of direct political control, the scope for capture by political interests is at least reduced. These are limited examples, but show how institutional safeguards can play an important role.

Decisions relating to the funding of political parties provide another example where the government has a clear vested interest and where there is a risk of electoral

¹⁰³ Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harv L Rev 633, particularly 718.

¹⁰⁴ UK Statistics Authority, *Code of Practice for Statistics* (2018).

¹⁰⁵ Michael Pal, 'Electoral Management Bodies as a Fourth Branch of Government' (2016) 21 Review of Constitutional Studies 85.

¹⁰⁶ Pal (*ibid*) goes a stage further in arguing that the independence of election regulators should be enshrined in a constitution.

entrenchment.¹⁰⁷ Again, an established decision-making process to reduce risks of abuse of power will be important. Major changes in relation to party funding should be considered and reviewed by an independent body, be subject to consultation and ideally attract cross-party support. Where such a process is used to reduce the risk of abuse, there is less need for stringent judicial oversight.¹⁰⁸ Such an approach can be seen in *Animal Defenders International*, where the court took into account the process used to decide that a ban on political advertising should be maintained.¹⁰⁹ The fact that the ban had cross-party support and had been considered by the Committee on Standards in Public Life provided a stronger reason to give greater respect for the legislative judgment. Such processes can thereby interact with judicial review, so that a more deferential standard is taken for decisions where significant procedural safeguards are present. By contrast, if a decision is taken unilaterally by the governing party, then a stronger justification will be demanded by the court in subsequent proceedings.

5. Conclusion

The discussion began with an examination of judicial review of political decisions. Some types of political consideration are unproblematic and even expected as part of a responsive democratic system. Decision makers can take into account party policy and, for many decisions, will be expected to consider public approval. An objection should not be made to ‘political decisions’ in general. Instead, the discussion has identified a type of political decision that should be considered an abuse of power: where power is exercised specifically

¹⁰⁷ See Issacharoff and Pildes (n 55).

¹⁰⁸ Pildes, ‘The Constitutionalization of Democratic Politics’ (n 55) 137–8.

¹⁰⁹ *R (on the application of Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [2008] 1 AC 1312. Lord Bingham at [33] was perhaps too deferential towards Parliament in suggesting that weight should be given to the expertise of MPs in designing a fair democratic process, without also noting the presence of the vested interest.

to gain an advantage in the political process and that advantage does not flow from the assessment of the merits of the decision, but through some change to the system of political accountability or alteration of the conditions in which officials and decisions are evaluated. In such cases, power can be exercised to entrench the public official, skew elections, reduce exposure to political scrutiny and condition the public to accept policy proposals. Such purposes will be improper regardless of the statutory context. As a result of the vested interest to exploit such power, this type of political question should not be left to the political branches and there is a case for stronger judicial supervision. Such an argument is not one asserting legal over political constitutionalism, but one that recognises the necessity of certain legal checks to ensure that the political parts of the constitution can work.

The discussion has shown how such measures can be challenged under administrative law standards, such as improper purpose. However, it has been argued that the constitutional aspects of such legal checks should be more clearly identified under a principle of process protection. That will direct judicial attention away from the usual questions of statutory context and make clear when a political decision calls for close scrutiny. While recognising that a process protection principle brings the issue out of the administrative law framework and underlines the constitutional dimension, there are limits to what judicial oversight can achieve. The most obvious cases where such a purpose is evident will be few and far between, and a determined political actor will be more subtle in seeking a political advantage. The underlying principle therefore requires support from other parts of the political framework, such as administrative procedures and checks from independent institutions.

The recognition of process protection as a constitutional principle and a basis for judicial intervention is an important step. The erosion of representative systems of government and moves toward authoritarian government seem unlikely in a stable

democracy. However, there are smaller steps that can undermine the checks and mechanisms of accountability. In her discussion of ‘democratic backsliding’, Nancy Bermeo refers to a range of measures that can contribute to ‘the state-led debilitation or elimination of any of the political institutions that sustain an existing democracy’, including decisions designed to undermine the independence of the judiciary and the media, and to manipulate election laws and campaign resources.¹¹⁰ The potential for such democratic erosion in the UK can be seen in reports of proposals to limit judicial review of executive action,¹¹¹ to call the future of the BBC into question,¹¹² to query the existence of the regulator of election campaigns,¹¹³ to develop more aggressive strategies for government communications¹¹⁴ and so on. No such measure alone signals an end to democratic government. However, each calls for careful scrutiny as the aggregate effect in hampering the democratic process can be significant. Developing a doctrine of process protection will provide an important guard against such incremental attacks on democratic institutions and help to uphold the integrity of the democratic system.

¹¹⁰ Bermeo (n 70) 5.

¹¹¹ Ministry of Justice, *Terms of Reference for the Independent Review of Administrative Law* (31 July 2020); Ministry of Justice, *The Government Response to the Independent Review of Administrative Law* (CP 408, March 2021). On a related area, the Government also launched The Independent Human Rights Act Review in December 2020.

¹¹² See eg Department for Digital, Culture, Media and Sport, *Consultation on Decriminalising TV Licence Evasion* (2020), which has been viewed as a possible first step towards abandoning the licence fee. While the government response to the consultation did not propose any immediate changes, the issue of decriminalisation will be kept under review, see *Government Response to the Consultation on Decriminalising TV Licence Fee Evasion* (January 2021).

¹¹³ See Conservative Party Response, Submission 31 to the Committee on Standards in Public Life Review of Electoral Regulation (20 August 2020) [12], stating that one option ‘would be to abolish the Electoral Commission’.

¹¹⁴ In 2020, Downing Street was reportedly planning to overhaul its system of communications and introduce daily press briefings. The plans have reportedly been abandoned. The use of government communications can be combined with other strategies to manage the media, such as boycotting critical programmes and outlets.