

‘Striking Back’ and ‘Clamping Down’. An Alternative Perspective on Judicial Review

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A judge? You don't want to make a *judge* a doctor of laws! Politicians are the ones who make the laws, and pass the laws!

Jim Hacker MP in ‘Yes Minister’ (1981)

Introduction

This paper deals with a practice that we have called ‘striking back’, a phenomenon all too often glossed over in the literature of judicial review. By ‘striking back’ we mean official responses to court rulings that are deliberately negative in the sense that government or administration sets out to rid itself of a judicial decision that it finds inconvenient or otherwise dislikes. Striking back is essentially a backward-looking or ‘fire-fighting’ activity designed to remove or minimise the effects of a specific decision. In its impact it may nonetheless be purely forward-looking, eg, regulations may be redrafted or a new statutory definition substituted with prospective effect. Occasionally, however, the action taken is retrospective - a dubious practice that we shall nonetheless encounter on several occasions in this paper. Also, government may adopt a ‘fire-watching’ stance, taking steps to protect itself against the threat of future judicial ‘interference’ by changing the rules of the game in restrictive fashion, a variant on striking back that we call ‘clamping down’. There are many forms of pre-emptive action, ranging from structural or procedural changes to the judicial review process with a view to blunting substantive legal action, to changes made to the general funding regime with a view to inhibiting it. At this pragmatic level, striking back is to be read as an element in a broader literature of impact theory, though this is typically more concerned with evaluating the positive effects of judicial review on bureaucratic decision-making and its impact on officialdom.¹

At a higher, constitutional level, striking back forms an intrinsic part of the ‘law and democracy’ debate, challenging the complacent assumption that courts ‘control’ government or ‘secure’ the rights of citizens.² Courts in the UK constitution are classically seen as exercising the twin functions of protecting individuals and controlling misuse of power by the

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¹ See eg, D. Feldman, ‘Judicial Review: A Way of Controlling Government?’ (1988) 66 *Public Administration* 21; M Hertogh and S Halliday (eds.), *Judicial Review and Bureaucratic Impact* (Cambridge: Cambridge University Press, 2004).

² See P Cane, ‘Understanding judicial review and its impact’ in Hertogh and Halliday above at 16-17.

executive. The ability to secure compliance with judicial rulings is therefore inevitably a measure of ‘how effective judicial review is at protecting individual rights and reducing government lawlessness’.³ For a period of almost forty years, the Application for Judicial Review (AJR) – the procedural machinery of judicial review - has been refined and there has been steady expansion of its ambit. At every stage of the process it is infused with considerable judicial discretion.⁴ Predicated at one level on vibrant common law principles, at another on many applications of EU law and Convention rights, judicial review has been transformed.⁵ A court-centred literature has mushroomed. By looking at judicial review other than through judicial eyes this paper is a modest attempt to redress the balance.

Striking back is hardly new, nor is it confined to the Westminster model of parliamentary government (though this obviously offers great potential). We need only look back to Paris in the 1960s to find that the highly prestigious French *Conseil d'Etat* – at that time considered the acme of administrative jurisdictions – was experiencing considerable difficulty in implementing its rulings and had installed a special section, the *Commission du Rapport*, dedicated to tackling the problem. Guy Braibant, then *commissaire du gouvernement*, highlighted three main tactics whereby recalcitrant public authorities could avoid implementing bothersome judgments: (i) they could utilise delaying tactics, involving appeals, judicial delays and the jurisdictional complexities of the dual French jurisdictions; (ii) they could retake annulled decisions by proper procedures; or (iii) they could resort to validatory legislation.⁶ Harlow, in a follow-up article,⁷ added the possibility (iv) that ‘government would simply disobey’. Citing as exceptional the case of *Madzimbamuto v Lardner-Burke*⁸ - where the Privy Council had to proceed to judgment in the face of a clear statement that the Rhodesian regime would not respect it - the author felt justified in remarking that it was ‘assumed in England that administrative law judgments will be implemented’.⁹ There is indeed a general perception that domestic judges operate within a mandatory model of judicial review in which powerful mandatory public law orders, injunctions and interdicts can be directed at all public authorities.¹⁰

Our interest in striking back arose in an era when UK ministers could count on the powerful weapon of parliamentary sovereignty. Part I of this paper, which looks more closely at the tools and techniques at the disposal of central government to achieve its ends,¹¹ is ‘domestic’ in the sense that it focuses on examples in which this historic constitutional model is directly in play. But ratification of the European Convention on Human Rights (ECHR) in 1951 and concession of the right of individual petition to the Court of Human Rights (ECtHR) in 1966,

³ Ibid at 30.

⁴ C Harlow and R Rawlings, *Law and Administration*, 3rd edn (Cambridge: Cambridge University Press, 2009) (hereafter *Law and Administration 3*), ch. 15.

⁵ R Rawlings, ‘Modelling Judicial Review’ (2008) 61 *Current Legal Problems* 95.

⁶ G Braibant, ‘Remarques sur l’efficacité des annulations pour excès de pouvoir’ [1961] *EDCE* 53.

⁷ C Harlow, ‘Administrative Reaction to Judicial Review’ [1976] *PL* 116.

⁸ [1969] 1 *AC* 645.

⁹ ‘Administrative Reaction’ at 117.

¹⁰ See *M v Home Office* [1994] *AC* 377 (Lord Woolf).

¹¹ The positions of the devolved governments lie beyond the scope of the paper.

accession to the then European Communities in 1973 and passage of the Human Rights Act 1998, set in motion changes to the constitutional framework with consequential displacement in the balance of power between legislature, executive and judiciary.¹² More prosaically, each in its own way changed the rules of the litigation game in expansive fashion. Thus Part II of the paper considers the limitations on striking back after the introduction into the legal order of the two powerful European courts sitting in Luxembourg and Strasbourg. Under these regimes, striking back has in some ways become harder and the steps taken to counter judicial decisions may have to be different: in terms of Braibant's classification, there is less scope for validatory legislation but more room for delaying tactics. Nonetheless, a recurring theme of the paper is continuity; the objectives of striking back and often the tactics – though not always the targets - remain, we shall suggest, broadly the same.

Our research for *Pressure Through Law* (1992),¹³ where we set out to evaluate the 'success' of litigation strategies by interest groups, taught us that pre-emptive action is not always a question of government versus judiciary. The aim may be to stack the cards against (classes of) individual litigants and/or to target strategic forms of litigation or even particular campaigning groups. We ventured to prophesy that the UK government might one day take major steps to clamp down on judicial review. We identified various possibilities. Government might (v) take direct and drastic steps: for example, by inserting an ouster clause into a statute governing a substantial area of government activity. It might restrict the competence of the courts or render justice less effective: for example, by moving all immigration cases out of courts into immigration tribunals without giving them power to order injunctive relief. Appeal rights might be curtailed or very short time limits for legal action imposed. Less directly, government might (vi) take action to undercut the judicial review process itself. One option was stricter rules of standing – something of a temptation at a time when the statutory test of 'sufficient interest' had been opened up in a way that would greatly facilitate public interest litigation.¹⁴ Funding was an obvious target; (vii) the cost of judicial review could be made prohibitive by changing the right to legal aid or ramping up court fees. These tactics are the subject of extended discussion in Part I of the paper where two such general forays by UK governments are documented: the first when in 2003-4 Labour Home Secretary David Blunkett led retaliatory action against the judges in immigration and asylum cases; the second when under the 2010-2015 Coalition Government of Conservatives and Liberal Democrats a raft of restrictions on the judicial review process was launched.

We pick up a second theme from *Pressure Through Law* in Part II of the paper. In 1992, we documented the start at domestic level of the use of arguments based on European law and of the growth of public interest litigation at Strasbourg and Luxembourg. Here we note the rise of a movement for thoroughgoing retaliatory action against these two courts in response to events described briefly in Part II of the paper. At the time of writing, threats are being made of recourse to (viii) the 'nuclear option' of legislating against international legal obligations.

¹² V Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009).

¹³ C Harlow and R Rawlings, *Pressure Through Law* (London: Routledge, 1992) (hereafter PtL) ch. 7.

¹⁴ *IRC v National Federation of Self-Employed and Small Businesses* [1982] AC 617.

As we shall see, the suggestion has openly been made in the House of Commons of introducing a Canadian-style ‘notwithstanding clause’ into legislation,¹⁵ while the Manifesto on which the Conservatives won the 2015 election, promised to ‘scrap Labour’s Human Rights Act and introduce a British Bill of Rights.’¹⁶

Part I: Westminster at Home

Flying high

In the uncodified UK constitution, where Parliament is legally sovereign, compliance with judicial rulings must ultimately be a matter of expectation - but an expectation strongly underpinned by appeal to the rule of law.¹⁷ Although it may theoretically always be open to government to legislate, even retrospectively, to reverse a judicial decision, ministers may be subject to criticism and pressed to play fair. If a government departs too far from the expectation, judicial retaliation and a breakdown of the usually harmonious relations between executive and judiciary may be provoked. A game of legislative and adjudicative ‘ping pong’ between judges and ministers may ensue.

The sequels to particular cases illustrate the different ways in which government may choose to strike back. The first edition of our textbook, *Law and Administration* in 1984,¹⁸ included a trio of examples from the domestic pantheon of great cases. In *Burmah Oil*,¹⁹ a paradigm case of striking back, the government used legislation both retrospectively to annul a House of Lords decision so as to deprive *Burmah Oil* of any damages that might be awarded and prospectively to clamp down on future claims. Professor HWR Wade excoriated the ‘unusual measure of retaliation’ as a demonstration that Parliament ‘can, when it wishes, expropriate without compensation and in violation of existing legal right, in a manner not permitted in some other countries which enjoy the protection of written constitutions and bills of rights’.²⁰ Our case study presented both sides of the argument, remaining studiously neutral. On the one hand, retrospective legislation was dangerous because it overstepped the essential boundary between executive and judiciary; on the other hand, it was justifiable in this case to restore parity between the many victims of war damage who had accepted limited

¹⁵ A ‘notwithstanding clause’ takes its name from s 33 of the Canadian Charter of Rights, under which legislation may provide that it shall operate notwithstanding the provisions of the Charter.

¹⁶ See Conservative Party Manifesto 2015 and *Protecting Human Rights in the United Kingdom, The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (2014).

¹⁷ Perhaps increasingly so: T Bingham, *The Rule of Law* (London: Allen Lane, 2010).

¹⁸ C Harlow and R Rawlings, *Law and Administration* (London: Weidenfeld and Nicolson, 1984) (*Law and Administration I*).

¹⁹ *Burmah Oil v Lord Advocate* [1965] AC 75 was annulled by the War Damage Act 1965.

²⁰ See latterly, HWR Wade and C Forsyth, *Administrative Law*, 11th edn, (Oxford: OUP, 2014) at 000.

compensation and the few able to claim redress through the courts on a (supposedly) preferential scale.²¹

Our second illustration was *Padfield*,²² the archetypal example of striking back by taking the same decision twice (Braibant's second category). The House of Lords having moved decisively to control ministerial discretionary power, the minister implemented the judgement by referring the impugned decision to an investigatory committee for consideration; he then declined to follow its advice. This outcome illustrates the 'halfway-house' nature of quashing orders (formerly certiorari), which allow the administration to revisit a matter following correct procedures. Today, this is a well-established and usually lawful practice, as illustrated in *R(Greenpeace) v Secretary of State for Trade and Industry*,²³ where a consultation exercise concerning government policy on 'nuclear new build' was quashed as 'very seriously flawed'. Having 'reviewed the evidence' and 'carefully re-examined the impact of excluding nuclear power from our future energy mix', the government maintained its position and policy.

Anisminic,²⁴ arguably the most significant of all twentieth-century judicial review cases in England, was our third example. It concerned that emblematic device of 'striking back' and/or 'clamping down', a preclusive clause. The statute plainly stated that a 'determination' of the Foreign Compensation Commission 'shall not be called in question in any court of law'. The Commission duly made an error of law in making a decision; in the face of the ouster, the House of Lords duly ruled the decision a nullity. Lord Reid's famous speech listing the many factors that might render a decision a nullity - bad faith, jurisdictional error, breach of natural justice, irrelevant considerations, etc. - was sufficient to render preclusive clauses virtually ineffective. Yet the immediate effects of *Anisminic* were quickly mitigated by new legislation, which introduced limited appeal rights but otherwise expanded the statutory formula such that a Commission determination including 'anything which purports to be a determination' was protected. We suggested that 'control' models of administrative law, in which courts controlled abuse of power and successfully defended citizens' rights against erosion by the state, needed 'some modification'.²⁵

Though obviously atypical when viewed in terms of the great bulk of routine or 'bureaucratic' judicial review, striking back had thus been identified as a significant feature of the working constitution. Later high profile examples of government manoeuvring would confirm the element of continuity. Take the subterfuge by which Whitehall tried to by-pass the provisions of the Criminal Justice Act 1988, which unexpectedly and against the wishes of the government placed on a statutory basis the existing *ex gratia* criminal injuries compensation scheme. In *Fire Brigades Union*,²⁶ a much cited authority on separation of

²¹ *Law and Administration I* at 377-382.

²² *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; *Law and Administration I* at 327-329.

²³ [2007] EWHC 311 at [116-120] (Sullivan J). And see *Meeting the Energy Challenge: A White Paper on Energy*, Cm 7124 (2007); *Meeting the Energy Challenge: A White Paper on Nuclear Power*, Cm 7296 (2008).

²⁴ *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

²⁵ *Law and Administration I* at 102-107, 282.

²⁶ *R v Secretary of State for the Home Department, ex p. Fire Brigades Union* [1995] 2 AC 513.

powers, the Law Lords narrowly upheld a challenge to the Home Secretary's decision to substitute a new, less generous, tariff scheme on the ground of inconsistency with the continuing power to bring the statutory scheme into force. The victory was quickly reversed when the Criminal Compensation Act 1995 introduced the tariff system albeit with some concessions. Or take the executive machinations surrounding the shocking affair of the Chagos islanders, expelled from their homeland in the interests of establishing an American air base. When the High Court quashed the expulsion orders,²⁷ the UK Government indicated that the islanders would be allowed to return. Instead, it invoked an antiquated prerogative power to legislate by Order in Council in colonial territories to reverse the decision and make unauthorised presence on the islands a criminal offence. Game, set and match went to the Government in the domestic courts when in *Bancoult (No. 2)*²⁸ the House of Lords by a 3-2 majority upheld this course of action.

Ground level

At the time of *Pressure Through Law*, studies of the impact of judicial review on British administration were rare and we had to depend on American studies, mainly authored by sociologists and political scientists and aimed at evaluating (as we ourselves were doing) the contribution of public interest litigation. The American literature taught us that striking back was not always a high-visibility activity involving ministers and legislation. We recorded the discouragement of a leading American welfare lawyer as he realised that 'victory for one class of welfare client leads inevitably to losses for another, less privileged, section of the community'.²⁹

Law and Administration presented an analysis of *Malloch v Aberdeen Corporation*,³⁰ a largely-forgotten affair where the individual's rights were expunged by the validating statutory formula that the minister's power to make regulations 'shall be deemed always to have included power' to prescribe the employment only of registered teachers. We observed that 'recognised techniques exist for the circumvention of court orders' and that judicial decisions often 'entailed no genuine reconsideration of policy', though we stressed the need to 'beware generalisation'.³¹ Tony Prosser's impact study of the fate of welfare test-cases - the first of its kind in the UK³² - took matters a step further. His conclusion was stark: 'successful test cases which threaten established policy, especially by increasing expenditure, will meet with quick nullification by legislative or administrative action'.³³ Prosser noted three main categories of negative response: action through primary legislation, sometimes retrospective

²⁷ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 1)* [2001] QB 1067.

²⁸ *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61. Following an unsuccessful application by the islanders to the ECtHR (*Chagos Islanders v UK*, App 35622/04, 11 December 2012), the saga has reached the Permanent Court of Arbitration (*Republic of Mauritius v UK*).

²⁹ E Sparer, 'Gordian Knots: The Situation of Health Care Advocacy for the Poor Today' (1981) *Clearinghouse Review* (May), 1 at 1.

³⁰ *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578; Education (Scotland) Act 1973.

³¹ *Law and Administration 1* at 274-282.

³² T Prosser, *Test Cases for the Poor* (London: CPAG, 1983).

³³ *Ibid* at 74.

in character; action through regulations, which given the cursory nature of the parliamentary procedures lessened the opportunity for open debate; and informal administrative practices, including furtive and underhand activity or deliberate disobedience. A celebrated Child Poverty Action Group victory in *ex p Simper*³⁴ was, for example, virtually expunged by means of a secret circular that refused to implement some elements of the decision and unlawfully modified others. The justification given was that it would be ‘administratively impracticable’ to implement the decision, which failed to explain why the government did not proceed to legislation, as ultimately it was forced to do.³⁵ Prosser also noted a dubious new trend to use legislative technique to anticipate or interrupt the judicial decision-making process. The touchstone is *Atkinson*,³⁶ a case about student rights to welfare benefits, where the government pushed through retrospective statutory provision ahead of the relevant appeal, arguing that, were the department to lose, it would result in a substantial burden on public funds, serious administrative disruption and widespread abuse. Noting these practices in *Pressure through Law*, the authors were forceful, claiming that departmental technique was improving all the time in ‘heartlessly depriving’ claimants of the fruits of litigation and ‘cynically expunging’ court victories.³⁷

This early case law introduces a persistent phenomenon. Two decades after *Simper*, the House of Lords was faced in *Bate*³⁸ with complex statutory provision specifically designed to bar the re-opening of social security claims affected by subsequent contrary rulings - the so-called ‘anti-test case’ clause.³⁹ By the time the House of Lords overturned it, the Court of Appeal judgment circumventing the restriction had already been obliterated by the rapid use of delegated legislation. Providing against unfavourable judicial rulings had become a standard part of social security administration that we shall meet again in Part II.

This is not to deny that government action to counter the effects of judicial rulings is often legitimate or even necessary. As well as being expensive and time-consuming, the litigation process is classically two-dimensional; issues of resources are not primarily the affair of judges.⁴⁰ The test of legitimacy is not only what is done but how it is done. Prefiguring the voluminous contemporary debate over constitutional ‘dialogue’ between the legislature and executive and the judiciary,⁴¹ Prosser suggested three basic criteria: (i) the response must be made publicly; (ii) there should be opportunity for adequate informed debate; (iii) a properly reasoned justification must be presented by government. Tested against these standards, many routine administrative practices must surely fail. The vices inherent in secret administrative

³⁴ *R v Greater Birmingham Appeal Tribunal ex p Simper* [1974] QB 543.

³⁵ Prosser at 61-2; National Insurance and Supplementary Benefit Act 1973.

³⁶ *R v Barnsley SBAT ex p Atkinson* [1976] 1 WLR 1047 (DC), [1977] 1 WLR 917 (CA); Supplementary Benefits (Miscellaneous Provisions) Act 1977; Prosser at 45-6, 63-5.

³⁷ *PtL* at 301.

³⁸ *Bate v Chief Adjudication Officer* [1996] 1 WLR 814; Income Related Benefits Schemes (Miscellaneous Amendments) (No 6) Regulations 1994, SI 1994/3061.

³⁹ Latterly, s. 27 of the Social Security Act 1998.

⁴⁰ But see *Law and Administration 3* at 717-722.

⁴¹ For a recent overview, see M Cohn, ‘Sovereignty, Constitutional Dialogues, and Political Networks: A Comparative and Conceptual Study’ in R Rawlings, P Leyland and A Young (eds), *Sovereignty and the Law* (Oxford: OUP, 2013).

instructions are neatly underscored in *Anufrijeva*,⁴² where the Home Office sought to justify a policy of not notifying asylum seekers of withdrawal of income support under the regulations on grounds of expense and administrative inconvenience. By a majority, the House of Lords outlawed this way of proceeding as a violation of the fundamental right of access to justice and the rule of law. It was a ‘peep into contemporary standards of public administration’ of which transparency was not a hallmark.⁴³

Shifting sands

By 2009 we were sufficiently confident to say that ‘transforming judicial review ... has a dual effect: not only biting more deeply on the policy-making sinews of government, but also limiting its capacity for a muscular response’.⁴⁴ Beyond the protective cloak of parliamentary sovereignty, regulation-making looked increasingly vulnerable to legal challenge. In the period immediately prior to the Human Rights Act, the judicial review context was changing. Well-known cases such as *ex p Witham*,⁴⁵ where the ‘constitutional right’ of access to court was used to block increased court fees for poor persons other than through specific statutory provision, and *Simms*,⁴⁶ where the judges’ interpretative power in protection of ‘the basic rights of the individual’⁴⁷ was underlined as an aspect of the principle of legality, marked a growth in rights-based jurisprudence at common law. Today, these developments also appear as precursor to a new wave of constitutional case-law in the Supreme Court premised on the common law’s vibrant potential.⁴⁸

As the recent case of *R(Public Law Project) v Secretary of State for Justice*⁴⁹ reminds us, different judicial review methodologies can produce a similar effect. An attempt to introduce a residence test for civil legal aid, a forerunner of the Coalition Government’s more general attack on judicial review, was held unlawful on the standard basis that regulations must be consistent with the policy and object of the empowering statute. The High Court read Parliament’s intention in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’) as being to allocate civil legal aid to those in greatest need.⁵⁰ For good measure, the court held that, in light of the overarching constitutional principle that all are equally subject to the law and entitled to its protection, the residence test as formulated involved discrimination that could not be justified.⁵¹ Since Parliament was still in the process of approving the regulations, this avowedly public interest challenge constituted an effective

⁴² *R v Secretary of State for the Home Department, ex p Anufrijeva* [2003] UKHL 36.

⁴³ *Ibid* at [24] (Lord Steyn).

⁴⁴ *Law and Administration* 3 at 730.

⁴⁵ *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.

⁴⁶ *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115.

⁴⁷ *Ibid* at 131 (Lord Hoffmann).

⁴⁸ Exemplified by *Osborn v Parole Board* [2014] AC 1115; *Kennedy v Charity Commission* [2014] UKSC 20; and *R (Evans) v Attorney General* [2015] UKSC 21.

⁴⁹ [2014] EWHC 2365 (Admin). The case, which is one of a slew of recent challenges to restrictions on legal aid, is currently under appeal.

⁵⁰ *Ibid* at [45].

⁵¹ *Ibid* at [84].

pre-emptive strike. Business had to be hastily re-arranged to avoid the unhappy prospect of the House of Lords debating the merits of provisions already declared unlawful!

With a view to minimising legal risk, an extra premium has been placed on the use of statute, leading directly to ‘fast-track legislation’, another significant feature of the working constitution that is currently proliferating as a means of minimising the extra work, disruption and delay for government associated with the standard primary legislative process. Indeed, a successful call by the House of Lords Constitution Committee for reasoned justification of reductions of the primary legislative process to a matter of days has arguably had the perverse effect of normalising the technique by the establishment of guidelines.⁵²

Read against a background of increasing judicial resistance, the evident propensity for striking back translates into elongated forms of ‘ping pong’. Take the case of welfare support for asylum seekers. Regulations designed to exclude many asylum seekers from benefit were ruled *ultra vires* on the basis that condemning people to ‘a life so destitute that no civilised nation could tolerate it’ needed clear statutory authorisation.⁵³ But primary legislation in the guise of the Asylum and Immigration Act 1996 promptly reinstated the regulations from the date of the statute and removed the right to assistance in respect of homelessness. The Court of Appeal found a way round via the National Assistance Act 1948⁵⁴ but ministers struck back again with the Immigration and Asylum Act 1999, which excluded the operation of the 1948 Act in similar cases. The later Nationality, Immigration and Asylum Act 2002 removed support for those making ‘late’ asylum claims save where it was necessary to avoid a breach of Convention rights. After further twists and turns, judicial guidance on a modicum of entitlement was eventually forthcoming in *Limbuela*.⁵⁵ ‘Far from the happy idea of “partnership”’, we noted ‘sharp conflict between the executive and the judiciary in the context of draconian legislation directed at a vulnerable group’.⁵⁶

As Lord Steyn was once at pains to emphasise, never say never in judicial review. Posed as the proverbial ‘nuclear deterrent’, and so redolent of a period of heightened constitutional tensions, the remarkable obiter dicta in the *Jackson case*⁵⁷ are today just about visible on the Westminster radar screen. According to Lord Steyn, ministers should understand that if Parliament were to introduce ‘oppressive and wholly undemocratic legislation’ - as for example by moving to abolish judicial review - then the judges, who (according to Lord Steyn) had created the principle of parliamentary sovereignty, might have to qualify it. In other words, faced with an attempt to clamp down by statute, they might have to consider

⁵² Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (15th Report, 2008–09, HL 116).

⁵³ *R v. Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants I* [1996] 4 All ER 385 (Simon Brown LJ).

⁵⁴ *R v Westminster City Council ex p M* (1997) 1 CCLR 85.

⁵⁵ *R(Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66.

⁵⁶ *Law and Administration* 3 at 738-747.

⁵⁷ *Jackson v Attorney General* [2005] UKHL 56. For similar dicta, see [See also](#) *AXA General Insurance v Lord Advocate* [2011] UKSC 46 (Lord Hope), and *Moohan v Lord Advocate* [2014] UKSC 67 [35] (Lord Hodge) .

whether judicial review ‘is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish’.⁵⁸

The First Foray

Judicial review is too important to be the exclusive concern of the judges. In particular, we disagree with the view, expressed by an ex Law Lord,⁵⁹ that judicial review is not a matter for Parliament. After all, in the long view, Parliament has not only flanked the inherent common law jurisdiction with major roles for the national courts in respect of the ECHR and EU, but also helped free the courts from their own historical legacy of arcane and restrictive procedural rules by grounding in section 31 of the Senior Courts Act 1981 the more generous and holistic modalities of AJR procedure. Given the twin-hatted position of the executive as chief defendant and chief legislative architect, however, a healthy scepticism is in order when considering government proposals to clamp down on judicial review.

The conflict over benefits culminating in *Limbuela* was part of a wider political and legal struggle over decision-making in immigration and asylum taking place under the Labour Government and later extending, as we shall see, under the subsequent Coalition. Glossing over glaring defects in the quality of departmental administration, Prime Minister Tony Blair spoke of cutting back a ‘ludicrously complicated appeal process’ and of removing failed applicants ‘without further judicial interference’. Giving vent to populist ideas of majoritarian democracy, the Home Secretary, David Blunkett, bluntly declared that it was ‘time for judges to learn their place’. Through the Bill which eventually became the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, the Government looked to the three techniques of squeezing legal services, reducing appeal rights, and ousting Dicey’s prized ‘ordinary courts’. For Rawlings, this was nothing less than ‘a revenge package’ designed ‘to pre-empt or drastically reduce a whole activity of formal legal challenge’ and thus ‘neuter the judicial role in the constitution’.⁶⁰

The proposed ouster clause was designed to turn Lord Reid’s speech in *Anisminic*⁶¹ on its head, so knocking out his listed grounds of review one by one. Referencing the aftermath of that iconic case, this was the language of ‘prevent[ing] a court, in particular, from entertaining proceedings to determine whether a purported determination ... was a nullity’ by reason of lack of jurisdiction, etc. The clause aimed to immunise both the administrative tribunal (responsible for adjudicating status determination decisions) and Home Office enforcement measures.⁶² Claims under the Human Rights Act were likewise attacked; linkage to the ordinary courts would essentially be confined to requests from the tribunal president for non-binding opinions on points of law. Using the informal and time-honoured ‘usual

⁵⁸ Ibid at [102].

⁵⁹ Lord Brown of Eaton-under-Heywood, HL Deb, vol 755 col 1440 (28 July 2014).

⁶⁰ R. Rawlings, ‘Review, Revenge and Retreat’ (2005) 68 MLR 378, 379.

⁶¹ Above, n. 24.

⁶² Contemporary developments in Australia provided a source of inspiration: see M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* 3rd edn (Pyrmont: Lawbook, 2004), ch 17.

channels’, senior judges had naturally tried to stop the clause at an early stage; perversely, however, their technical analysis was used to tighten the drafting.⁶³

Armed with a huge majority, the Government had reason to be confident of definitively changing the rules of the game. Yet paradoxically the resulting imbroglio highlights the key role of Parliament – or more precisely, the House of Lords – in reinforcing expectations over judicial review. Despite much rhetoric along the lines of ‘unnecessary, vexatious and useless judicial reviews’, a failure publicly to document the scale and incidence of ‘abuse’ put ministers on the back foot in an increasingly forensic examination.⁶⁴ The policy became messy as ministers were pressurised into making concessions or ‘clarifications’, for example over the continued availability of that common law hallmark, *habeas corpus*. Ministers could not wish away the prospect of successful challenge in Strasbourg⁶⁵ or Luxembourg⁶⁶ even though there would be an administrative tribunal in operation. However the Government’s eventual withdrawal of the ouster clause most clearly points up how domestic - common law - developments can not only produce a whiplash effect but also strengthen the judicial lines of defence in the political and legal processes. Confronted by the threat of such a radical departure from constitutional expectation, a line of senior legal figures summoned up, first, model precepts of government under law, equal protection, and access to the established legal system; and, second, the spectre of head-on constitutional conflict. In Lord Woolf’s terms, prefiguring *Jackson*, the courts might be ‘required to act in a manner which would be without precedent’ if Parliament ‘did the unthinkable’.⁶⁷

Though it was ministers who blinked first, they were not completely routed. The 2004 Act contained some additional restrictions on funding, made structural reforms to the tribunal system, and grounded a streamlined form of statutory review. Not, it must be said, that this did much to stem the tide of asylum and immigration litigation, which continued to dominate the caseload of the Administrative Court into the next decade.⁶⁸

The Second Foray

In seeking to clamp down, the Coalition Government approached matters somewhat differently to their Labour counterparts. The policy involved a rebalancing of the internal dynamics of the judicial review process in favour of public authorities. It can also be read as attempting to turn the clock back towards a narrower conception of judicial review historically associated with a more restrained constitutional role for the courts and centred on individual redress of grievance and defence of private interest.⁶⁹ Perhaps some element of institutional memory was in play. As against the hammer blow suggested by Labour’s ouster

⁶³ Lord Woolf, ‘The Rule of Law and a Change in the Constitution’ (Cambridge University: Squire Centenary Lecture, 2004) at 8. See also, A Le Sueur, ‘Three strikes and it’s out?’ (2004) PL 225.

⁶⁴ For an informed view, see R Thomas, ‘The Impact of Judicial Review on Asylum’ (2003) PL 479.

⁶⁵ Notwithstanding a restrictive jurisprudence in asylum: *Maaouia v France* [2000] 33 EHRR 42.

⁶⁶ Especially in view of cases like *Johnston* on access to judicial process (see below).

⁶⁷ Lord Woolf, ‘Droit Public - English Style’ [1995] PL 57 at 69.

⁶⁸ For the later history, see R Thomas, ‘Immigration judicial reviews’ UK Const L Blog (12 September 2013).

⁶⁹ Associated with what we call the ‘drainpipe model’ of judicial review: *PtL* at 310-314.

clause, a whole series of screws would be tightened – harder to mobilise against.⁷⁰ Unlike Mr Blunkett, Chris Grayling, the Secretary of State for Justice and Lord Chancellor, avoided ruffling feathers by direct criticism of the domestic judiciary. The official documentation suitably rehearsed the theme of judicial review as ‘the rule of law in action’.⁷¹

The Coalition Government gave numerous reasons for clamping down. Some are classic concerns about the scale and nature of the caseload, as in the opening salvo that judicial review has ‘expanded massively’ and is ‘open to abuse’.⁷² Others speak to broader impacts on government and people; for which read negative effects of expensive and time-consuming litigation on schemes for economic growth and on the taxpayers’ purse in a period of austerity. Others again provide glimpses of constitutional theory, to the effect of buttressing the ‘separate identity’ of the judicial process from the normal rough-and-tumble of the political process. The evident concern that, in the words of the House of Lords Constitution Committee, ‘judicial review has become too much of a political tool of opposition to government policy’,⁷³ also shows a revengeful element: witness Mr Grayling’s declared interest in restricting ‘a promotional tool for countless Left-wing campaigners’.⁷⁴

As under Labour, the scale of the rhetoric is in inverse proportion to the strength of the evidence base. In blunting government claims of sharp growth⁷⁵ and few tangible results, critics had a field day in the statistics,⁷⁶ underlining the important role of settlement, limited growth outside asylum and immigration, and of course infinitesimal numbers of cases when compared with the scale of government decision-making. Likewise, when considering the caseload pressures on the Administrative Court, a recent transfer of most immigration reviews to the Upper Tribunal by the Lord Chief Justice⁷⁷ can scarcely be ignored.

The policy was rolled out in successive rounds of law-making. Published in December 2012, the consultation paper *Judicial Review: proposals for reform* zeroed in on procedural changes that could be quickly introduced. Given that only a small minority of cases proceed beyond the distinctive permission (‘leave’) stage of AJR procedure to full hearing,⁷⁸ this was the natural target. The Government proposed a package consisting of shorter time limits for bringing claims, most notably in planning cases, a new court fee and restriction of the right to renew a claim dismissed on the papers, duly implemented via changes to the Civil Procedure

⁷⁰ For the attempted spoiler, see M Fordham et al, *Streamlining Judicial Review in a Manner Consistent with the Rule of Law* (London: Bingham Centre, 2014).

⁷¹ Ministry of Justice, *Judicial Review: proposals for reform* Cm 8515, 2012 at [11].

⁷² Cm 8703, foreword.

⁷³ Constitution Committee, *Criminal Justice and Courts Bill*, HL 18 (2014-15) at [6].

⁷⁴ Reported in *The Daily Mail*, 6 September 2013.

⁷⁵ From 4500+ applications for permission in 1998 to 12,400 in 2012: Cm 8703 at [9].

⁷⁶ V Bondy and M Sunkin, ‘Who is afraid of judicial review? Debunking the myths of growth and abuse’ UK Const L Blog (10 January 2013).

⁷⁷ Practice Direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 and s 18 of the Tribunals, Courts and Enforcement Act 2007 (21 August 2013).

⁷⁸ In 2011, there were 11,360 applications for, and 1276 grants of, permission to proceed: Ministry of Justice, *Judicial Review: proposals for further reform* Cm 8703, 2013 at 9.

Rules operative from July 2013.⁷⁹ In an important flanking development, regulations were used to make the payment of legal aid fees conditional on success at the permission stage, with only limited exception for ‘meritorious cases’ settled by public authorities.⁸⁰

Published in September 2013, a second consultation paper, *Judicial Review: proposals for further reform*, outlined a series of possible statutory reforms. One major piece in the jigsaw was however quickly lost in the pre-legislative process. The idea of rationing judicial review and hitting at strategic forms of litigation by rewinding the test of standing towards ‘direct interest’⁸¹ was effectively vetoed by the senior judiciary. Having at first stood on the key principle from representative democracy that ‘Parliament and the elected Government are best placed to determine what is in the public interest’,⁸² ministers seemingly had no answer to the liberal judicial orthodoxy that ‘unlawful use of executive power should not persist because of the absence of an available challenger with a sufficient interest’.⁸³ By corroborating this key constitutional expectation grounded in the rule of law, their own evidence of relatively high rates of success for public interest litigants⁸⁴ hardly helped the Government.

Other restrictive proposals eventually made it to the statute book in Part 4 of the Criminal Justice and Courts Act 2015. Relevant sections deal with such matters as permission (leave) and third party intervention, costs orders⁸⁵ and information about financial backing⁸⁶ (an historical echo surely of the extinct common law torts of maintenance and champerty⁸⁷). Two overlapping features command attention. First, there is repeated use of financial disincentives to litigate, a redeployment of risk. A chief target is public interest litigation as commonly practised by expert ‘repeat players’; and, more particularly, procedural techniques like protective costs orders⁸⁸ which have been developed in recent years to facilitate the activity. Secondly, judicial discretion, which we identified earlier as a key ingredient in the domestic process of ‘transforming judicial review’, is targeted. In seeking to codify existing judicial powers to craft and discipline the shape of judicial review proceedings, Mr Grayling has preferred ‘must’ to the ‘may’ word. Not that ministers had it all their own way in the formal legislative process; some limited concessions were extracted by the House of Lords via the

⁷⁹ Civil Procedure (Amendment No 4) Rules 2013, SI No 2013/1412.

⁸⁰ Civil Legal Aid (Remuneration) (Amendment) (No. 3) Regulations 2014, SI No 2014/607. The subject of ‘a regret motion’: see HL Deb vol 753 cols 1540-1568 (7 May 2014).

⁸¹ Closer that is to the ‘victim test’ for Convention rights claims: Human Rights Act 1998, s. 7.

⁸² Cm 8703 at [80].

⁸³ Senior Judiciary, *Response to the consultation entitled ‘Judicial Review: Proposals for Further Reform’* (2014) at [15].

⁸⁴ Cm 8703 at [78].

⁸⁵ Criminal Justice and Courts Act 2015, ss 88-90. There is however special provision for environmental cases in light of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

⁸⁶ Criminal Justice and Courts Act 2015, ss 85-86.

⁸⁷ *PtL* at 48-50.

⁸⁸ *R(Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

process of parliamentary ‘ping pong’ with (the executive seat of power in) the Commons.⁸⁹ Neatly demonstrating the sense of continuity, senior legal figures headed by Lord Woolf once again took a leading role against the Government, trumpeting the rule of law in ministers’ ears.

Two provisions serve for illustration. The first⁹⁰ hits directly at public interest intervention, which became established as a means of bolstering judicial decision-making in the 1990s⁹¹ and has seen a step change in usage in the wake of the HRA.⁹² It imposes a duty on the High Court and Court of Appeal to levy the consequential costs on those choosing to intervene if any one of four conditions is met: the intervener acts ‘in substance’ as a principal party; their intervention is not of ‘significant assistance’; a ‘significant part’ of it is ‘not necessary’ for resolution of the issues; ‘the intervener has behaved unreasonably’. Since intervention has been pre-eminently a matter of permission on terms, lack of trust in the judges is the not-so-subliminal message.

Bearing directly on the exercise of the supervisory jurisdiction, the second provision⁹³ takes the process of instructing the judges to another level. It expands on the so-called ‘no difference’ doctrine, whereby the court exercises discretion to refuse permission or a final remedy because the public authority would surely have made the same decision if it had acted lawfully.⁹⁴ The Act substitutes the (somewhat arcane) test of ‘highly likely that the outcome for the applicant would not have been substantially different’ and is drafted in mandatory terms: if the court considers the test made out, it ‘must refuse’ to grant permission or relief. Viewed through ministerial spectacles, the formula has the considerable attraction of reducing the scope for administrative disruption, not least in view of the recently burgeoning common law jurisprudence on consultation requirements.⁹⁵ The approach is rightly criticised however as being a get out card for unlawful conduct and a likely driver of argument at the permission – supposedly filter – stage.⁹⁶ Only thanks to the House of Lords is there now a special judicial trump whereby the restriction may be disregarded if the court considers and certifies that ‘it is appropriate to do so for reasons of exceptional public interest’. We recall the firm words of *The Judge Over Your Shoulder*, the guidance for civil servants issued by the Treasury Solicitor’s Department: ‘the principle is that only a fair procedure will enable the merits to be determined with confidence’.⁹⁷ Time will tell how the serving judiciary responds.

⁸⁹ For the twists and turns, see HC Deb, vol 589 cols 70-100 (1 December 2014); HL Deb, vol 757 cols 1737-1785 (9 December 2014); HC Deb, vol 590 cols 808-833 (13 January 2015); HL Deb, vol 759 cols 1341-1351 (21 January 2015).

⁹⁰ Criminal Justice and Courts Act 2015, s. 87.

⁹¹ See R Rawlings, ‘Courts and Interests’ in I Loveland (ed), *A Special Relationship? American Influences on Public Law in the UK* (Oxford: Clarendon Press, 1995).

⁹² S Shah, T Poole and M Blackwell, ‘Rights, Interveners and the Law Lords’ (2014) 34 OJLS 295.

⁹³ Criminal Justice and Courts Act 2015, s. 84.

⁹⁴ *R(Core Issues Trust) v Transport for London* [2014] EWCA Civ 34 at [42-44] (Lord Dyson MR). See further, *R(Champion) v North Norfolk District Council* [2015] UKSC 52.

⁹⁵ *R(Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662.

⁹⁶ JCHR, *The implications for access to justice of the Government’s proposals to reform judicial review* (13th Report, 2013-14, HC 868) at [38-56].

⁹⁷ Treasury Solicitor’s Department, *The Judge Over Your Shoulder* 4th edn (2006) at [2.46].

Part II: Westminster in Europe

Belated realisation

Although this was not well understood at the time, the constitutional situation changed radically with passage of the European Communities Act 1972, which limited the freedom of the UK Parliament to legislate in a manner contrary to EC law. Westminster, which under Dicey's classic theory of parliamentary sovereignty could make or unmake any law, was no longer in that comfortable position.⁹⁸ A significant factor in the new dispensation was section 3 of the 1972 Act, which rendered British courts effectively subservient to the European Court of Justice (ECJ, now CoJ) by providing that all questions as to the meaning or effect of EC law must be determined in accordance with its jurisprudence. As this jurisprudence developed, it transpired that national legislation must be interpreted so far as possible to comply with EC law or, if clearly non-compliant, must be 'disapplied'.⁹⁹ Moreover, the EC institutions gradually acquired sanctions. The Commission power to bring infringement proceedings was reinforced at Maastricht by the possibility of substantial fines,¹⁰⁰ while the concept of member state liability in damages was introduced by the COJ in its controversial *Francovich* decision.¹⁰¹ The power in section 2(2) of the 1972 Act to implement an obligation under EC law by Order in Council and the thoroughgoing 'Henry VIII clause' in section 2(4) also contributed to an erosion of parliamentary power since they greatly reduced the opportunity for parliamentary debate. It took some time for the House of Commons¹⁰² - and latterly the Courts¹⁰³ - to claw back the position by stages.

It was not until the *Factortame* affair that Parliament and public became aware of the magnitude of constitutional change.¹⁰⁴ The UK had sailed too close to the wind in the Merchant Shipping Act 1988 which, while purporting to implement Community fisheries policy, effectively limited ownership of fishing vessels to UK nationals for purposes of national fisheries quotas. When the Act was ruled incompatible with EC law,¹⁰⁵ the UK faced actions in damages for losses caused to fishing companies¹⁰⁶ said to be settled by payments in the region of £55 million. The high costs of non-compliance with EC law had become very apparent and the 'shock of the new' led the UK Government to attempt a strike-back. It took steps – though these were ultimately

⁹⁸ See D Nicol, *EC Membership and the Judicialization of British Politics* (Oxford: Oxford University Press, 2001) ch 6.

⁹⁹ See respectively Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135; *R v Secretary of State for Transport, ex p. Equal Opportunities Commission* [1995] 1 AC 1.

¹⁰⁰ TEC Art 228, now TFEU Art 260; the UK has not in practice been subject to fines.

¹⁰¹ Joined Cases 6, 9/90 *Francovich and Bonafaci v Italy* [1991] ECR I-5357.

¹⁰² See notably s.6 of the European Assembly Elections Act 1978 and the European Union Act 2011.

¹⁰³ See *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) and, for the position of the Supreme Court, *R (on the application of HS2 Action Alliance Limited)* [2014] UKSC 3.

¹⁰⁴ Nicol, 'EC Membership' ch 7.

¹⁰⁵ Case C 221/89 *R v Secretary of State for Transport ex p Factortame* [1991] ECR I-3905.

¹⁰⁶ Joined Cases C 46/93, C 48/93 *Brasserie du Pêcheur SA v Germany, R v Secretary of State for Transport ex p Factortame* [1996] ECR I-1029; *R v Secretary of State for Transport ex parte Factortame* (No 5) [2000] 1 AC 524.

unsuccessful - to gain support at the next Intergovernmental Conference for action to curb the expansive interpretations of the COJ and provide a limited appeals procedure,¹⁰⁷ a defeat that further underscored the realities of the constitutional framework. Pointing to future reactions, a Private Member's Bill introduced in the House of Commons but defeated at second reading would have allowed the House to 'disapply' specific COJ judgments where Parliament decided they were not in the national interest.¹⁰⁸

From our limited perspective, a warning bell had been rung when the COJ ruled in *Johnston v Royal Ulster Constabulary*¹⁰⁹ that a ministerial certificate - effectively an ouster - could not under EC law bar review for legality by an employment tribunal. The reasoning was significant: first, the procedure inhibited the effectiveness of an EC Directive; secondly, access to judicial process was a 'general principle of law' reflecting the common constitutional traditions of the Member States and recognised by ECHR Articles 6(1) and 13. This left ouster clauses in an ambiguous position; we inferred in *Pressure Through Law* that they might be precluded by both EC law and the ECHR.¹¹⁰ There is equal uncertainty over retrospectivity, an issue that arose in a set of cases concerning changes to the law of unjust enrichment based on EC law.¹¹¹ To deal with the problem, the Government enacted legislation that curtailed the limitation period for certain tax claims. Unsure about the validity of this retrospective element, the Supreme Court asked the COJ whether it was 'compatible with the principles of effectiveness, legal certainty and legitimate expectations' to bar claims in this manner 'without notice and retrospectively'? The reply from the Court of Justice was conditional: retroactive change to the limitation period was permissible provided that adequate transitional arrangements were made; otherwise national legislation retroactively curtailing the period within which repayment could be claimed 'infringes the principles of legal certainty and the protection of legitimate expectations'.¹¹² This left the wider question open.

Whether government reaction to the Court of Justice decision in *Digital Rights Ireland*¹¹³ was a case of striking back is largely a matter of opinion. The Court had invalidated the EC Data Retention Directive, which imposed on electronic communications businesses an obligation to retain and make available certain data for purposes of 'investigation, detection and prosecution of serious crime and terrorism'. In the UK, where the Directive had been implemented by codes

¹⁰⁷ See *A Partnership of Nations: The British Approach to the European Union Intergovernmental Conference 1996*, Cm 3181 (1996); J. Tallberg, 'Supranational influence in EU enforcement: the COJ and the principle of state liability' (2000) 7 JEPP 104, 114-5.

¹⁰⁸ HC Deb, vol 276, col 198 (23 April 1996) (Iain Duncan Smith MP).

¹⁰⁹ Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651 at [13].

¹¹⁰ *PtL* at 318.

¹¹¹ *Woolwich Equitable Building Society v IRC* [1993] AC 70; *Kleinwort Benson v Lincoln City Council* [1999] 2AC 349; *Deutsche Morgan Grenfell Group plc v IRC* [2006] 3 WLR 781. The foundational case was Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595; Case C-446/04 *Test Claimants in the F11 Group Litigation v IRC* [2006] ECR I-11753.

¹¹² Case C-362/12 *Test Claimants in the F11 Group Litigation v IRC* (judgment of 12 December 2013) at [44-49].

¹¹³ Joined Cases C-293/12, C-594/12 *Digital Rights Ireland and Seitlinger and Others* (judgement of 8 April 2014); Directive 2006/24/EC, OJ L 105/54 (13.4.2006).

of practice reinforced by Order in Council in terms of the European Communities Act,¹¹⁴ the legal situation was unclear; the Order was based on an invalid directive, which could hardly create an ‘EU obligation’ for the purposes of section 2(2). Purportedly to give effect to the three-month old judgment, the Government suddenly announced the Data Retention and Investigatory Powers Bill, emergency legislation to be ‘fast tracked’ through Parliament in four days.

Introducing the Bill, the Home Secretary expressed confidence that the Regulations remained in force but emphasised the need ‘to act now to remove any doubt about their legal basis and give effect to the COJ judgment’.¹¹⁵ Similarly, the Minister of State asserted that the regulations remained ‘extant and in full force and effect’ but because they had been questioned, it was essential ‘to deal with the risk and put the matter beyond doubt’.¹¹⁶ More robustly, the Chairman of the EU Scrutiny Committee said:

The only way in which we can avoid running into difficulties with European Court judgments that we do not want—which, clearly, is what the Bill is about—is by using primary legislation, such as this Bill, to disapply the provisions of European law that come through sections 2 and 3 of the European Communities Act, and that it has to be notwithstanding those provisions.¹¹⁷

Yet the use of fast track procedure points to ulterior motives. It was suggested, for example, that DRIPA was ‘far more than an administrative necessity; it [was] a serious expansion of the British surveillance state’ requiring ‘full and proper parliamentary scrutiny’.¹¹⁸ Equally, the aim may have been a wish to ‘clamp down’ on a pending judicial review application that challenged the 2009 Regulations in terms of EU law.¹¹⁹ If so, this was simply to postpone the evil. Liberty, acting in the names of two MPs, set down a judicial review application questioning the compatibility of DRIPA with Articles 7 and 8 of the EU Charter of Fundamental Rights and with *Digital Rights Ireland*.¹²⁰

Without referring to Luxembourg, the High Court interpreted *Digital Rights Ireland* generously to mean that legislation (such as DRIPA) that establishes a general retention regime for communications data must include an access regime (laid down at national level), which provides adequate safeguards for those rights. Applying this principle to DRIPA, the

¹¹⁴ Retention of Communications (Code of Practice) Order 2003, SI No. 2003/3175; Data Retention (EC Directive) Regulations 2007, SI No. 2007/2199, superseded by the Data Retention (EC Directive) Regulations 2009, SI No. 2009/859.

¹¹⁵ HC Deb vol 584, col 456 (10 July 2014) (Theresa May). The Bill is now the Data Retention and Investigatory Powers Act 2014. And see for later amendment by further fast track legislation, the Counter-Terrorism and Security Bill 2014 and JCHR, *Legislative Scrutiny: the Counter-Terrorism and Security Bill*, HC 859 (2014/15) at [5.4] to [5.6].

¹¹⁶ HC Deb, vol 584, col 763 (15 July 2014) (James Brokenshire).

¹¹⁷ HC Deb, vol 584, col 765 (15 July 2014) (Sir William Cash MP).

¹¹⁸ Open letter from fifteen technology-law academics, *The Guardian*, 15 July 2014.

¹¹⁹ *Cosgrove v Secretary of State for the Home Department* CO/7701/2011 had been stayed pending the judgment of the Court of Justice.

¹²⁰ *R (Davis and ors) v Home Secretary* [2015] EWHC 2092 (Admin). As a fall back argument, the applicants pleaded their right of privacy under Article 8 ECHR but the Court virtually ignored the point.

Court granted a declaration that it infringed EU legal requirements because it neither laid down clear and precise rules providing for access to and use of retained communications data nor did it provide for prior review by a court or independent administrative body to set the conditions of the access.¹²¹ Returning the ball hard to the baseline, the Court made an order disapplying s.1 of DRIPA in respect of the inconsistencies, while suspending it for eight months to allow the Government to pass new legislation.¹²² It added the rider:

The courts do not presume to tell Parliament for how long and in what detail Bills should be scrutinised, but it is right to say (to put it no higher) that legislation enacted in haste is more prone to error, and it would be highly desirable to allow the opportunity of thorough scrutiny in both Houses.¹²³

Other less final ways to strike back effectively at the European Courts exist through appeals, judicial delays and the jurisdictional complexities (Braibant's category (i)) that afford multiple opportunities for manoeuvre in transnational jurisdictions. Delay has become an endemic problem in both European Courts: the epic *Factortame* saga, for example, took more than a decade to resolve while the backlog of cases awaiting decision by the ECtHR is notorious.¹²⁴ The convoluted nature of EU decision-making procedures also lends itself to relentless 'cat-and-mouse' games played by governments at the expense of individuals. When, for example, the Iranian Organisation des Modjahedines (OMPI) was proscribed as a terrorist organisation in the UK and its assets frozen in 2001, it appealed successfully to the appropriate security tribunal (POAC). When this decision was upheld by the Court of Appeal in May 2008¹²⁵ the Home Secretary duly made a delisting order, approved by Parliament in June. But OMPI was immediately re-listed by the Council of Ministers,¹²⁶ necessitating renewed applications to the EU courts and it took six judicial hearings over ten years to get OMPI delisted in the EU.¹²⁷ Again, after the assets of Sheikh Kadi were frozen in late 2001, the freeze was annulled by the General Court in 2010¹²⁸ and the appeal against the decision was finally heard in 2013- in all, twelve costly and fruitless years of litigation.¹²⁹

Bringing rights home

¹²¹ *Davis* at [89-90].

¹²² *Davis* at [121-2]. s. 8 of DRIPA contained a 'sunset clause' providing for the operative provisions to expire at the end of 2016. In the meantime the Independent Reviewer of Terrorism Legislation had considered the legality of DRIPA and recommended amending legislation: see David Anderson Q.C., Question Of Trust Report Of The Investigatory Powers Review (June, 2015), Ch.5

¹²³ *Davis* at [122].

¹²⁴ In 2013, a direct action in the CoJ averaged 20 months and, more significantly, a reference for a preliminary ruling added 15 months on average to the duration of proceedings in a national court: Court of Justice, Annual Report for 2014 at 9. Efforts to reduce the backlog led to the Council of Europe High Level Conference on the Future of the European Court of Human Rights and the 'Brighton Declaration' adopted in April 2012. .

¹²⁵ POAC Appeal No PC/02/2006; *Home Secretary v Lord Alton of Liverpool* [2008] EWCA Civ 443.

¹²⁶ Council Decision 2008/583/EC of 15 July 2008.

¹²⁷ The last being Case C-27/09P *French Republic v People's Mojahedin Organization of Iran* [2011] ECR I-13427. In the meantime, Sheikh Kadi had been delisted at the recommendation of the UN Ombudsperson.

¹²⁸ Case T-85/09 *Yassin Abdullah Kadi v Commission* [2010] ECR II-5177.

¹²⁹ Joined Cases C-584/10, C-593/10, C-595/10, *Council, Commission and United Kingdom v Kadi* [2013] ECR I-518. Kadi was in fact delisted at UN level prior to this hearing after the intervention of the UN ombudsperson.

The impact of the ECHR and its Court of Human Rights (ECtHR) was gradual. The ECHR was never legally enforceable within the UK and the domestic courts held back from judicial incorporation of what successive governments chose not to incorporate.¹³⁰ Although the UK had also ratified ECHR Article 46, under which it is obliged to comply with any judgment of the Court in any case to which it is party, ECtHR judgements are not technically binding in the UK, and the only external control over implementation is through the highly political Committee of Ministers, whose resolutions –as we shall see - lack legal force. Nonetheless, in *Pressure Through Law*, we recorded a steady drip of public interest litigation by pressure groups based on the Convention and looked in detail at the 38 UK violations found by the ECtHR to 1989.¹³¹ Our conclusion was that implementation by the UK Government was usually forthcoming but not always in a whole-hearted fashion. There was the notorious ‘Asian wives case’, involving the right of immigrant Asian women to bring their husbands into the country. When the ECtHR found a discriminatory violation of the Article 8 right to family life, the Conservative Government ‘levelled down’ by administrative instruction, reducing men’s rights to bring in their wives, a response that the Joint Council for the Welfare of Immigrants, which had sponsored the case, called ‘negative, grudging, cynical and opportunist’.¹³² Again, after *Campbell and Cosans*,¹³³ a key victory in the ECtHR for the campaign to stop corporal punishment in schools, the UK took only minimum steps to implement the decision by administrative direction, applying it to Scottish but not English or Welsh schools and then only if parents actively refused consent to corporal punishment.

The changes introduced by the Human Rights Act 1998 were substantial and are the subject of a rich though often legalistic literature. All that is necessary for our purposes is to know that, in stark contrast to the COJ, ECtHR jurisprudence does not bind the domestic courts. Section 2(1) of the HRA requires the UK courts simply to ‘take account’ of decisions of the ECtHR insofar as they are relevant; section 3 requires the courts ‘so far as possible’ to interpret and apply domestic legislation in a manner compatible with the Convention rights and, where this is impossible, section 4 enables the court to make a declaration of incompatibility, the effect of which is not to invalidate the statutory provision but to invite Parliament to reconsider the issue. In this way, the principle of parliamentary sovereignty is said to be preserved.

Responsibility for ensuring compatibility of statute law with human rights law is actually shared: section 10 of the HRA allows a minister where necessary to amend statute by means of statutory instrument but Schedule 2 subjects such orders to affirmative resolution of both Houses. Section 19 obliges a minister when introducing a bill into Parliament to make a declaration as to its compatibility with the ECHR or, if unable to do so, to explain why action is necessary, leaving the final decision to Parliament and its committees. Implementation of ECtHR judgments is a government responsibility but is systematically monitored by the Joint

¹³⁰ *R v Home Secretary ex p Brind* [1991] 1 AC 696. And see Sir Thomas Bingham, ‘The European ECHR on Human Rights, Time to Incorporate’ (1993) 109 LQR 390.

¹³¹ PtL at 254-5. By 1989, 52 complaints against the UK had reached the ECtHR.

¹³² *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471; JCWI, AR 1984/5 at 3.

¹³³ *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293; PtL at 262-3.

Committee on Human Rights, which is often highly critical. From the standpoint of the domestic courts, the effect of the HRA was to shift responsibility to them for ‘form[ing] a judgment whether a ECHR right has been breached and, so far as permissible under the Act, grant[ing] an effective remedy’¹³⁴ thus making them a potential target for striking back. This may help to explain the adoption of the so-called ‘mirror principle’ enunciated by Lord Bingham in *Ullah*,¹³⁵ which transferred responsibility to the ECtHR by providing that the domestic courts would go as far as but no farther than Strasbourg in interpreting the ECHR. It may also help to explain why, as hostility to Strasbourg has grown, the domestic courts are keen to increase their room for manoeuvre and are cautiously beginning to draw back.¹³⁶

A rising crescendo

In *Pressure Through Law* we noted the start of long-lasting struggles with Strasbourg over prisoners’ rights. *Golder v UK*,¹³⁷ which concerned the right of prisoners to correspond with a lawyer, saw the start of problems with Articles 6(1) and 8, while the conformity of procedures in mandatory life and indeterminate sentences with ECHR Article 5 was initiated by *Weeks v United Kingdom*.¹³⁸ Prisoners’ rights cases were defended with spirit; along the way indefensible cases were fought and predictably lost in Strasbourg and were implemented according to the letter and not the spirit of the rulings. The flames of resentment were stoked by *Hirst*,¹³⁹ where the Grand Chamber held that the automatic disenfranchisement of prisoners at parliamentary or local government elections as mandated by section 3 of the Representation of the People Act 1983 was disproportionate and violated ECHR Protocol 1, Article 3. The margin of appreciation accorded to states under the ECHR was wide but not all-embracing and this ‘blanket restriction’ fell outside any acceptable margin of appreciation, ‘however wide that margin might be’.¹⁴⁰ The majority judgment took Westminster on directly, remarking that there was no evidence that Parliament had, since 1968, ‘ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote’.¹⁴¹

The House of Commons struck back with a Westminster Hall debate set down by a Euroseptic backbencher, who called for a ‘proper parliamentary debate on the issue, so that colleagues can debate the pros and cons and be given the opportunity to vote to maintain the

¹³⁴ *R(Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at [23] (Lord Bingham).

¹³⁵ *R (Ullah) v Special Adjudicator* [2004] 2AC 976 at [20] (Lord Bingham)..

¹³⁶ See *R v Horncastle and others* [2009] UKSC 14; *Manchester City Corporation v Pinnock* [2010] UKSC 45; *Osborn v The Parole Board* [2013] UKSC 61; *R(Robinson and others) v Justice Secretary and Governor of HMP Whatton* [2014] UKSC 66 at [17]-[21]; *Moohan v Lord Advocate* [2014] UKSC 67 at [104]-[105].

¹³⁷ (1975) 1 EHRR 524.

¹³⁸ (1987) 10 EHRR 293; *Thynne, Wilson and Gunnell v UK* (1991) 13 EHRR 666; *Stafford v UK* (2002) 35 EHRR 32. See latterly, *Hutchinson v UK* (Application no 57592/08) (judgment of 3 February 2015).

¹³⁹ *Hirst v UK (No 2)* (2006) 42 EHRR 41. There was a 12 to 5 majority. For a detailed account of the voting rights affair, see I White and A Horne, *Prisoners’ Voting Rights*, House of Commons Standard Note, SN/PC/01764.

¹⁴⁰ *Hirst* at [83].

¹⁴¹ *Hirst* at [79].

status quo'; the *Hirst* affair was 'a golden opportunity' for the then Coalition Government 'to put Britain first' and consider 'pulling out of the Convention'.¹⁴² There was no government response. A more moderate, cross-party, backbench motion followed asserting that 'legislative decisions of this nature should be a matter for democratically-elected lawmakers' and supporting 'the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand'. It passed by 234 to 22 votes.¹⁴³

Initially, the ECtHR had asked for legislation within six months. The previous Labour Government had made gestures at compliance with a two-stage consultation on policy options, which remained unimplemented at the time of the UK General Election in 2010. Left to clear up the mess, the Coalition announced legislation which would provide for offenders sentenced to a custodial sentence of less than four years to vote in UK Westminster Parliamentary and European Parliament elections, unless the judge considered this inappropriate when making the sentence.¹⁴⁴ In the same year, the Court, treating *Greens and MT* as a 'pilot case' imposed a further six-month deadline.¹⁴⁵ By 2013, when no timetable had been announced for legislation, the Government intervened in the *Scoppola* case¹⁴⁶ to ask the ECtHR to reconsider *Hirst*. The Court firmly declined. Caught between the ECtHR and Parliament, the Supreme Court manoeuvred skilfully in *Chester*, holding itself bound to follow the law as repeatedly confirmed by Strasbourg but declining to grant a further declaration of invalidity.¹⁴⁷ Perhaps thankfully, Lord Mance declared that it was 'now for Parliament as the democratically elected legislature to complete its consideration of the position'.¹⁴⁸

In fact, the Ministry of Justice had in November 2012 submitted to a Committee of both Houses a draft bill with three options: a ban on prisoners sentenced to four or more years; a ban on prisoners sentenced to six months or more; a restatement of the existing ban. The Committee recommended that prisoners serving sentences of 12 months or less should have the vote.¹⁴⁹ No mention was made of the Bill in the government legislative programme for 2014 or indeed in the 2015 legislative programme of the newly elected Conservative Government and no legislation has been forthcoming.

If prisoners' voting is – as Lady Hale remarked in *Chester* – an emotive subject on which people seem to hold strong views then immigration is a high-visibility political issue on which the outcome of elections may turn. As the ECtHR began to interpret the ECHR as a 'living instrument', to expand its ambit by opening up the area of security that government

¹⁴² HC Deb, vol 521 cols 5-6WH (11 January 2011) (Philip Hollobone MP).

¹⁴³ HC Deb vol 523, col 493 (10 February 2011).

¹⁴⁴ HC Deb vol 520 col 151WS (20 December 2010) (Mark Harper, Minister of State).

¹⁴⁵ *Greens and M.T. v United Kingdom* (2010) ECHR 1826 at [97]. A further extension was negotiated with the Committee of Ministers in 2014.

¹⁴⁶ *Scoppola v Italy No 3* (2013) 56 EHRR 19.

¹⁴⁷ *R(Chester) v Secretary of State for Justice* [2013] UKSC 63. And see now *Moohan v Lord Advocate* [2014] SC 67. A declaration of invalidity was granted by the Scottish Election Appeal Court in *Smith v Scott* (2007) SC 345.

¹⁴⁸ *Chester* at [42].

¹⁴⁹ Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, HC 924 (2013-14).

tends to regard as peculiarly its own territory, and extend its protection to immigrants, hostility to the Strasbourg Court began to grow. Less than ten years after the HRA had been adopted, Tony Blair had called for possible amendments to the HRA to compel judges to balance the rights of the individual with public safety, which they 'do not always do'; David Cameron, then in Opposition, was promising to 'reform or repeal' the Act.¹⁵⁰ Events came to a head in the case of Abu Qatada, a radical Muslim cleric. Lawfully in the country as a refugee, Abu Qatada was arrested in October 2002, detained under the governing anti-terrorism legislation and served with notice of intention to deport while his appeal against his control order was still pending. It took nearly a decade of litigation before Abu Qatada was finally deported,¹⁵¹ fuelling resentment at the Strasbourg case law, which limited the power to deport or extradite suspected terrorists if they were likely to be tortured. It is, however, noteworthy that the Government made no attempt to strike back.

Tensions have undoubtedly been rising with the target of animosity shifting to the use – or misuse according to one's viewpoint – of ECHR Article 8 to protect convicted criminals against deportation for family reasons, an area now attracting a multiplicity of immigration appeals. Until recently, the question whether deportation was in the public interest was very much a matter of discretion, in the first instance for the Home Secretary who made the deportation order, afterwards for the courts who reviewed the decision. The factors to be taken into consideration were later incorporated into non-statutory Immigration Rules, which were laid before Parliament.¹⁵² It was the effect of the 'mirror principle' that changed the rules of the game by substituting for the ministerial view of the public interest a two-stage test to be applied by the courts with reference to the Strasbourg jurisprudence and the proportionality principle that this enjoined.¹⁵³ By 2010, the impact on deportation of suspected terrorists and convicted criminals was so considerable¹⁵⁴ as to persuade the Home Secretary, Theresa May, into announcing changes to the rules 'to ensure that the misinterpretation of Article Eight of the ECHR – the right to a family life – no longer prevents the deportation of people who shouldn't be here'.¹⁵⁵ It now fell to the courts to consider whether the 'new Rules' created a 'complete code' as the Government argued, rolling up Article 8 proportionality testing into a single determination conducted in the framework of the Rules. Both the Upper Tribunal and Court of Appeal disagreed. The primary decision-makers were as much bound by section 6 of the Human Rights Act as the judges and the new rules 'maintain[ed] the obligation on primary decision-makers to act "in compliance with" all the provisions of the Convention'.¹⁵⁶

¹⁵⁰ See *The Guardian* (15 May 2006).

¹⁵¹ *Othman (Abu Qatada) v United Kingdom* (2012) 55 EHRR 1; HC Deb vol 565, col 23 (8 July 2014).

¹⁵² Rules 398 and 399 of the Immigration Rules HC 395 as amended in 2012.

¹⁵³ *R (Razgar) v SSHD* [2004] UKHL 27

¹⁵⁴ See *MF(Nigeria) v SHHD* [2013] EWCA Civ 1192 where it is stated that of 602 appeals allowed by the immigration tribunals in 2013, 324 involved convicted criminals who succeeded under ECHR Article 8.

¹⁵⁵ Speech to the Conservative Party Conference (4 October 2011).

¹⁵⁶ *MF(Nigeria) v SHHD* [2013] EWCA Civ 1192 at [46]; *MF (Article 8–new rules) Nigeria* [2012] UKUT 00393 (IAC); *Izuazu (Article 8 – new rules) Nigeria* [2013] UKUT 45 (IAC).

Up to this point, the Government had stopped short at attempting draconian measures such as ouster, thought likely to violate the ECHR or international law. Now it struck back with legislation that hit at Article 8 adjudication in two slightly different ways. First, it allowed the Secretary of State to prevent a person bringing an appeal from the UK when the Secretary of State certified that removal would be in the interests of national security – a technique redolent of that outlawed by the CoJ in *Johnston*.¹⁵⁷ Secondly, it gave the force of primary legislation to the Rules by ‘requiring a court or tribunal, when determining whether a decision is in breach of Article 8 ECHR, to have regard to the public interest considerations as set out in the Act’.¹⁵⁸ The Act specifies in very considerable detail the criteria to be applied by judges when determining the public interest and the weight that should be given to them. This provision, which sought to guide courts and tribunals in their determination of Article 8 claims in immigration cases, was drawn to the attention of the House of Lords by its Constitution Committee, which called it ‘a significant innovation’.¹⁵⁹ The JCHR concern was greater; it saw the provision as a significant legislative trespass into the judicial function¹⁶⁰ and recommended amendment, which was not conceded. The tenor of some of the speeches in the legislative debates hinted at a changing climate of opinion. Critics targeted both the Strasbourg Court for ‘steadily eroding’ UK powers of deportation and the UK courts, responsible for tightening the fetters as a consequence ‘rightly or wrongly’ of the Human Rights Act. Parliament, it was argued, must ‘make it clear which, ultimately, is the supreme court for British law’; ‘the final word should stay in this country’.¹⁶¹

In the different policy area of benefits entitlement, *Reilly and Wilson*¹⁶² bit more deeply into political autonomy. The case concerned a package of welfare reforms supposedly designed to assist the unemployed in finding employment. As an element in this package, certain jobseekers were required to participate when instructed to do so in a specified, work-related scheme; further, a claimant who refused unreasonably to do so could be sanctioned by loss of benefit. In *Reilly and Wilson*, the package was challenged on the ground that the Regulations made under the Act¹⁶³ were insufficiently specific; that the general notice required by the statute was inadequate and that, in the case of one of the claimants, no notification had been given. The Court of Appeal ruled the Regulations *ultra vires*; they did not contain an appropriate description of the scheme and the notices sent to claimants did not comply with the statutory requirements.¹⁶⁴ The Government struck back immediately, using the package tried and tested in social security cases as described in Part I. The 2011 Regulations were revoked and replaced by new prospective Regulations, which came into effect on the date of

¹⁵⁷ Above, n. 109.

¹⁵⁸ Explanatory notes to s. 15 of the Immigration Act 2014.

¹⁵⁹ Constitution Committee, *Immigration Bill*, HL 148 (2013-14) at [9]-[18]. Clause 14 became s.19 of the Immigration Act 2014.

¹⁶⁰ JCHR, *Legislative Scrutiny: Immigration Bill*, HL 102 HC 935 (2013-14), Recommendation 9. See similarly Constitution Committee, HL 148 at [9]-[18].

¹⁶¹ HC Deb, vol 574, col 1092 (Julian Brazier MP).

¹⁶² *R(Reilly) v Work and Pensions Secretary* [2012] EWHC 2292 (Admin).

¹⁶³ The Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011, SI 2011/917. The draft Regulations had been severely criticised by the House of Lords Select Committee on the Merits of Statutory Instruments, HL 137 (2011-12) at [10], [11].

¹⁶⁴ *R(Reilly) v Work and Pensions Secretary* [2013] EWCA Civ 66.

the Court of Appeal judgment.¹⁶⁵ This was followed up with retrospective legislation. The Jobseekers (Back to Work Schemes) Bill introduced into the Commons on 14 March 2013 under ‘fast-track procedure’,¹⁶⁶ provided that notices served under the 2011 Regulations informing claimants about participation requirements and the consequences of failing to meet them, were effective. The Bill was in short designed to strike back at the Court of Appeal judgment and to provide against future appeals.

The Bill did not escape parliamentary censure. There were two main accusations: there was an abuse of emergency procedures to fix the consequences of losing an appeal and the Bill was suspect on the grounds of retrospectivity. The government response to the Commons was unconvincing: the judgments had been ‘about a technicality’; the system was robust and would stand up to scrutiny by the courts, as the Government hoped to show by continuing an appeal before the Supreme Court; emergency legislation was the only way to insure against substantial sums in sanction repayments if the appeal were to succeed.¹⁶⁷ The House of Lords Constitution Committee took both points; in particular, the Bill offended:

the cardinal rule of law principle that individuals may be punished or penalised only for contravening what was at the time a valid legal requirement. According to the doctrine of the sovereignty of Parliament, retrospective legislation is lawful. Nonetheless, from a constitutional point of view it should wherever possible be avoided, since the law should so far as possible be clear, accessible and predictable.¹⁶⁸

Unusually, despite the fact that their judgment would be hypothetical, the Supreme Court chose to press on. It was, they explained, ‘rather unattractive for the executive to be taking up court time and public money to establish that a regulation is valid, when it has already taken up Parliamentary time to enact legislation which retrospectively validates the regulation’; nonetheless the issue could be of some significance to the drafting of regulations generally.¹⁶⁹ It confirmed the Court of Appeal reasoning while allowing the appeal by reason of the 2013 Act.

But the HRA had provided the claimants with further arguments. In *Reilly and Hewstone*,¹⁷⁰ aggrieved claimants returned to the High Court to challenge the 2013 Act on the ground that the claimants’ right to a fair trial under ECHR Article 6(1) had been violated. This brought the Strasbourg jurisprudence squarely into the frame. The Convention argument was that retrospective legislation when used to affect the outcome of a judicial determination where

¹⁶⁵ The Jobseeker’s Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013, SI 2013/276.

¹⁶⁶ See for explanation, Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards*, HL 116-I (2008/09).

¹⁶⁷ HC Deb, vol 560, cols 827-8 (Mark Hogan, Minister of State). The cost of refunding sanctions unlawfully imposed for refusal to comply with an administrative direction was said to be around £130 million, a sum challenged in the litigation.

¹⁶⁸ Constitution Committee, *Jobseekers (Back to Work Schemes) Bill*, HL 155 (2013) at [22].

¹⁶⁹ *R(Reilly & another) v Secretary of State for Work and Pensions* [2013] UKSC 68 at [40]-[41].

¹⁷⁰ *Reilly (No 2) and Hewstone v Secretary of State for Work and Pensions* [2014] EWHC 2182. The case is currently under appeal.

the state itself was a party was justifiable only on ‘compelling grounds of the public interest’. Perhaps surprisingly, the judge granted a declaration of invalidity that the 2013 Act was incompatible with the principle of the rule of law and the notion of a fair trial protected by ECHR Article 6(1). This ruling reworks the constitutional position. As correctly stated by the Constitution Committee, retrospective legislation is lawful subject to an understanding in the nature of convention that it is highly undesirable; *Reilly and Hewstone* elevates this to a serious legal obstacle to the practice. Moreover the judge carried the war on to parliamentary territory, raking through the parliamentary proceedings with a nit-comb, discovering a number of ‘misconceptions’ and ‘inaccuracies’.¹⁷¹ This type of approach strengthens the argument for ‘notwithstanding’ clauses and heightens the danger that government may strike back with a more general attack on the Human Rights Act.

Conclusion

Our objective in this paper has been to examine negative responses from government to unfavourable judicial decisions and the techniques available for striking back at the judiciary and clamping down on judicial review. We have considered two classes of case; retrospective, where government expunges the effects of a particular decision, and prospective, where it seeks to prevent or inhibit unwanted challenges or decisions, often by changing the rules of the game. We have looked at these practices in two different constitutional contexts: first, in the framework of the classical British constitution, where Parliament is sovereign and secondly in the more restrictive framework of the post-European constitution. And, with a wish to avoid the court-centred literature that is a particular feature of the law and democracy debate, we have deliberately side-stepped the question of judicial techniques used to respond in kind. This paper is, as we remarked in our Introduction, a modest attempt to redress the balance.

We have in fact uncovered a considerable degree of continuity. Part I of the paper dealt with striking back in the domestic context; in other words, in a modified framework of Westminster government predicated on the day-to-day working of parliamentary sovereignty. Here we saw in the context of social security law a regular practice of retrospective legislation coupled with pre-emptive strikes. It was somewhat surprising to find identical techniques used in the Jobseekers’ affair, nearly fifteen years after the HRA became law. In both cases, the legitimacy of this type of activity is in issue and, although we have chosen not to dwell at length on these questions, we have quoted instances where there is a clear violation of the rule of law. In our view, retrospective legislation striking down an unpopular decision in the course of the appeal process is - though emphatically not illegal - a dubious practice, especially when it is carried out by regulations or ‘fast track’ procedure that escape proper debate in Parliament. We support in this context Prosser’s suggestion that retrospective legislation should, if it is to be legitimate, measure up to the three basic good governance principles of openness, participation and accountability, which requires that government must

¹⁷¹ *Reilly and Hewstone* at [92]-[114].

publicly present a properly reasoned justification for its actions and provide the opportunity for adequate informed debate.

It is generally supposed that the UK's latter-day relationships with Europe and more particularly the establishment of powerful transnational courts in Strasbourg and Luxembourg have brought about a fundamental shift in power away from Parliament and the doctrine of parliamentary sovereignty as propounded by Dicey. Our case studies in Part II suggest that this is not entirely true. Yes, limitations have in principle been imposed on government action and we may think that the restrictions are likely to tighten. Yet, as indicated earlier, we have registered a considerable degree of consistency. All the main techniques for striking back, whether directly through ouster, validating legislation, delaying tactics or the retaking of annulled decisions by proper procedures, are still in play. Recently too, there has been resort to indirect measures such as changing the rules of judicial review procedure and upping its cost so as to undercut the judicial review process and clamp-down on targeted litigants. In short traditional techniques are still in use, though their weight and value may have changed. Perhaps more importantly, there is little evidence of a decisive change in the mindset of successive governments. At the time of writing indeed a Conservative Government is in power with a manifesto commitment to support a general strike-back at judicial power through replacement of the HRA and perhaps, in the event of a No vote in the promised referendum, to engineer a 'Brexit' from the EU. But these 'nuclear options' raise questions better left for discussion in the context of a full-scale law and democracy debate that we prefer to reserve for another occasion.