

PANEL DISCUSSION OF JUDICIAL POWER AND BREXIT

Judicial Power Project, Policy Exchange

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Comments from Professor Simon Lee:

Constitutional Culture in an Ebbing Tide

'when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back.'

'the flowing tide of Community law is coming in fast. It has not stopped at high-water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water'.

(Lord Denning MR, 1970s)

'A long low gurgle down the strand,
The sputtering of the drying wrack
The tide is slowly ebbing back
With listless murmuring from the land ...'

(William Sharp, *The Ebbing Tide*, 1880s)

Academic impact at a low ebb?

Words and images, tone and attitude, all matter in our constitutional culture (see [here](#)). There is a role for judicial power, a bigger role for politicians' power, a smaller niche for academic power and much more space for people power. So before the UK undoes the European Communities Act 1972, I want to take us back to some personal highlights of the 1970s in order to prepare us for the 2020s and beyond.

In my first tutorial as a law student in 1976, I was taught in reading a case to identify the facts, the issue, the decision and the reasons for the decision. The advice applies to reading a constitutional moment or drama or tragedy. It is good practice for everyone (including politicians and the media) to read cases before citing them, to read manifestos before voting for them, or standing on them, to read bills before voting for them to become statutes and to read referendum results in a measured way. We also need to develop the nous to know *which* cases and which statutory sections to read.

Although I voted to remain in the European Community in 1975 and to remain in the European Union in 2016, I was not surprised by the result, thanks to the privilege of attending a British Academy/Royal Irish Academy symposium on Brexit and Northern Ireland, held on 1 March, at which true experts who themselves wanted the UK to remain in the EU predicted the majority

for leaving. Nor am I one of those academic bloggers who is suffering from 'out-rage' (see for example [here](#), [here](#) and [here](#)) or blaming those who voted for Brexit or accusing them of being racist, ignorant, or blaming those who voted for Brexit or accusing them of being racist, ignorant, confused or easily fooled. I prefer David Runciman's approach in the London Review of Books:

'So who is to blame? Please don't say the voters: 17,410,742 is an awful lot of people to be wrong on a question of this magnitude. They are not simply suckers and/or closet racists – in fact, relatively few of them are – and they are not plain ignorant. You can't fool that many people, even for a relatively short period of time. And yes it was close, but it wasn't that close. The margin between the two sides – 3.8 per cent – was roughly the same as the margin by which Obama defeated Romney in the 2012 presidential election (3.9 per cent), and you don't hear a lot of people complaining about the legitimacy of that ...

I read the Pro-Brexit voters as having plumped *for* what they regard as control, sovereignty, subsidiarity, elections, votes, debate and *against* perceived arrogance, remoteness, anonymity, bureaucracy, lack of empathy, experts, elites and bubbles. All this applies to the Human Rights Act/European Convention on Human Rights debate as well as to Brexit. It applies to judicial power at home as well as abroad and to executive power as well as to judicial power. It should therefore be salutary for leadership in politics, in the judiciary and in academe. There has been a skirmish in the last couple of days over the appointment of the new Lord Chancellor and it will come to a head before Brexit in the appointment of the next President of the UK's Supreme Court.

Chris McCrudden, that first tutor of mine, described, ahead of the referendum, a vote for Brexit as 'an unmitigated disaster'. I trust he would agree, however, that it is part of the role of all of us, if we think something is a disaster, to mitigate it. Even post-referendum gurgling and sputtering 'down the Strand' by academics and lawyers on blogs will soon be followed by academics presenting case studies for the Research Excellence Framework in 2020 or REF 2021 to claim that their research has had 'impact'. I would like the rules changed for this next exercise, including to allow marks to be subtracted for having had no impact on the outcome of this referendum.

Our constitutional culture will ebb away if we are not careful

Vigilance is needed to guard against the erosion of meaning even in passing references to our culture. In the major set-piece parliamentary debate on the referendum, on 22 February, the Brexiteer who stole the show was Jacob Rees-Mogg, a Conservative back-bench MP, who asked David Cameron, the Prime Minister,

'Is the Government's policy basically,
"And always keep a-hold of Nurse
For fear of finding something worse."?'

Perhaps Jacob Rees-Mogg had forgotten that in Belloc's cautionary verse for children, Jim, the little boy who let go of nurse's hand, did indeed experience something worse: he was eaten by a lion. Instead of pointing that out, the then Prime Minister David Cameron said that a vote to leave the EU would be 'a leap in the dark'. In its parliamentary setting, this echoes the phrase used by another Tory Prime Minister, the Earl of Derby, in 1867 during the passage of the Second Reform Bill. The crucial difference is that Lord Derby was *advocating* a leap in the dark

and it was one which worked out well. Both sides, in other words, prayed in aid cultural references which better suited their opponents.

Meanwhile, other politicians are not so much forgetting our shared vocabulary as our syntax. Theresa May in her 2014 Conservative Party conference speech adopted the Blairite rhetoric of 'sentences' without verbs, praising, "British values and institutions. The rule of law. Democracy. Equality. Free speech. And respect for minorities." The issue is, of course, what do those principles mean when they are teased out into proper sentences and then applied to practical dilemmas of contemporary politics?

With James Lee, I raised some questions last year about Theresa May's preference, backed by the Supreme Court majority, for a view of security prevailing over that free speech she had mentioned in denying Parliamentarians (led by the government-appointed independent reviewer of terrorism legislation, Lord Carlile) the opportunity to listen to an anti-Isis Iranian dissident, Mrs Rajavi. Baroness Hale at least called for some humility on the part of judges, which gave us the opportunity to call our case-note *Humility in the Supreme Court*, enabling me to say the topic required only a short article. Personally, not binding my co-author, I preferred the lone dissent of Lord Kerr, the only judge who knew much about balancing freedom of expression and security from his days as a terrorist target when he was Lord Chief Justice of Northern Ireland.

Our new Prime Minister has shown that she is willing to change her mind, for instance on the ECHR (from which she advocated in April withdrawal, as making more of a difference than withdrawing from the European Union, but in which she now accepts we will stay). So I would like to suggest another change, that she reflects, along with all of us, on a neglected case from the summer of the previous UK referendum on Europe, 1975, rather than on what she has called 'the stories' we all 'know' when it comes to the next great constitutional debate, one of particular interest to this Judicial Power Project, on the manifesto pledge to 'scrap' the Human Rights Act in favour of a British Bill of Rights, which might be called HRAXit (HR Axe It?).

For Theresa May assured her party conference in 2011 that she was not making it up when she said judges had stopped her department (before she was there, in 2008) deporting someone because of their cat. Human rights bloggers, cat rights enthusiasts, the Judicial Office and Ken Clarke QC (then briefly the Lord Chancellor) rushed to say they thought she was indeed making it up (although he soon regretted some of his more colourful language, which perhaps explains his colourful language about Theresa May more recently). For what it is worth, reading the two judgments in this case gives some support for and against the May (or Maya) interpretation. The reconsideration by Senior Immigration Judge Gleeson protected the identity of the cat in one of those amusingly/annoyingly anonymised judgments (see my blog on the celebrity injunction case for this Judicial Power Project) but the redacted name is out of the bag and you can remember it as being close to the Prime Minister's surname.

Senior immigration judge Gleeson explained that, 'The grant of reconsideration refers to the inappropriate weight placed on the appellant having to leave behind not only his partner but also their joint cat, [] More significantly, the Secretary of State argued that the Immigration Judge had erred in law in applying a withdrawn policy, DP3/96, which no longer applied at the date of decision ... The Immigration Judge's determination is upheld and the cat, [], need no longer fear having to adapt to Bolivian mice.' The original immigration judge, James Devittie, had said in his ruling: "The evidence concerning the joint acquisition of Maya by the appellant and his partner reinforces my conclusion on the strength and quality of the family life that appellant and his partner enjoy". Nevertheless, the Home Office might have won this

immigration case (under Theresa May's Labour predecessor) if they had not applied the policy which they had themselves already withdrawn.

If we are to have a sensible debate about judicial power, executive power and immigration, I suggest reflecting instead on a story most of us do not know, a neglected case from exactly the time of our first European referendum, the summer of 1975. For it shows why migration has long been contentious, that sometimes it is executive power which needs to be countered by judicial power and that Magna Carta can still rule OK. It was a Labour government, reforming the law on sex and race discrimination, which was in the wrong. Roy Jenkins was the Home Secretary, Anthony Lester QC was his special adviser, Harry Woolf was the Home Office's barrister and yet the Home Office was arguing that women asserting patrial rights had to wait in a queue in India or Bangladesh for 14 months when they were entitled to come into the UK. I wrote at length last year about *R v Home Secretary, ex p Phansopkar & Begum* on its 40th anniversary. The Court of Appeal invoked Magna Carta to rule that justice delayed was justice denied. I have pointed out that the creative arguments about the rule of law were run by barristers who had themselves been refugees, Sibghat Kadri QC and Eugene Cotran. There is much to learn from this case about the immigrants themselves, the judges, the barristers, the dangers of executive power and the vibrancy which migrant lawyers have brought to our legal systems. Measured judicial power is needed. Although Lord Justice Scarman floated the relevance of the European Convention, Magna Carta was sufficient for all three Court of Appeal judges (the others being Lord Denning MR and Lord Justice Lawton) to call the powerful to account on behalf of the vulnerable. This case is a great part of our constitutional heritage and deserves its place in the sun. Incidentally, if the government were to wait too long before triggering Article 50, that ruling on Magna Carta and delay might come into play once more.

A balanced understanding of our constitution is not just about which *cases* to read but also which sections to study of much invoked but seldom read *statutes*, such as s12 and s13 of the Human Rights Act 1998. The latter broadens out the opening clause of Magna Carta, itself still itself part of our law guaranteeing that 'the church of England shall be free', to encompass all religious organisations and insist that this freedom of religion is worthy of 'particular regard':

'If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.'

This owes much to Cardinal Basil Hume, Archbishop of Westminster in 1998 so I call it the cardinal rule but most diehard advocates of the Human Rights Act in its current form ignore the plain meaning of this section of the statute and of the similar 'particular regard' clause in s12 on freedom of expression. Yet the Bill would not have passed through the Lords without these clauses and it is perfectly reasonable to have a debate about whether to fine tune the Act as a British Bill of Rights, including whether to jettison or give effect to such terms as 'take into account' and 'must have particular regard to', in interpreting, balancing and applying the sometimes conflicting rights set out in the European Convention. 'Particular regard' need not mean that those rights always prevail but a court might, for instance, appoint an *amicus curiae* if it takes seriously its duty to have particular regard to a right or indeed, under the Constitution Reform Act 2005, s44(1) 'If the Supreme Court thinks it expedient in any proceedings, it may hear and dispose of the proceedings wholly or partly with the assistance of one or more specially qualified advisers appointed by it.'

Talking of which, we await judgment from the Northern Ireland Court of Appeal in the 'gay cake' case, where the afore-mentioned Christopher McCrudden has joined the bakery's legal team and where the Attorney-General of Northern Ireland made a late but telling intervention. It would be good to witness some particular regard being shown for what we mean by freedom of expression (which might encompass freedom not to be forced into expression against one's conscience) and freedom of religion when this case reaches the Supreme Court.

The tide will turn

Despite the gloom being voiced in some academic lawyer blogs about the referendum result, there is a sense of freshness verging on the winds of change as Theresa May, Liz Truss and perhaps in due course Brenda Hale take on enhanced leadership roles in our constitution. For, in addition to our second female Prime Minister, we now have our first female Lord Chancellor in Liz Truss. Extraordinarily, in the last few days, her appointment has been lambasted by Lord Falconer for lack of relevant experience and perceived ability to stand up for the independence of the judiciary. Yet Lord Falconer is the very person who as Labour's Lord Chancellor in 2005 master-minded the Constitution Reform Act 2005 which allows such appointment of non-lawyers, focusing instead on 'experience'. I was delighted to see that 'The Prime Minister may take into account ... '(d) experience as a teacher of law in a university' in appointing a Lord Chancellor although since (e) is any 'other experience that the Prime Minister considers relevant', perhaps our role as teachers is not being accorded such a special status.

It is widely assumed that the favoured candidate to be the next President of the UK Supreme Court will be Baroness Hale, the present Deputy President, who would become our first female senior judge. Or we might have diversity in the sense of the Union through a Scottish or Northern Irish President of the Supreme Court of the United Kingdom. We might also expect diversity to be promoted in the highest courts more generally through encouraging more people to apply from different patterns of experience or in bold moves, in the style respectively of Baroness Hale coming from academe via the Law Commission and Lord Sumption going straight to the Supreme Court from the Bar.

As I have been arguing for decades (see eg University of Pittsburgh Law Review, Vol 49, Spring 1988, Number 3, pp777-821 Bicentennial Bork, Tercentennial Spycatcher: Do the British need a Bill of Rights?), there will be greater scrutiny of our senior judges as their constitutional significance as judicial barons and baronesses increases. Jonathan Sumption (not technically a baron because his designation as 'Lord' is a courtesy title on becoming a Supreme Court Justice) has sneered at the Magna Carta barons in one of his many lectures: 'Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative millionaires from the north of England, who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not.' This could be described as a bit rich from someone whose own robust approach could itself count as 'muscular' and 'conservative' and whose success at the Bar has been widely reported to have made him a millionaire, albeit not one from the north, unless you mean only as far north of Westminster as St John's Wood. We do not *derive* our beliefs in democracy and the rule of law from today's judicial barons but the judges do influence our constitutional culture. It matters how they think, not only in court. Apart from Lord Sumption's well-known strictures against what he regards as the dangers of too rapid promotions for women, again a bit rich given his own fast track elevation, he has also counselled against law degrees as an education for future lawyers. A mere law teacher might respond by asking what do they know of law degrees who only history degrees know?

For example, it was quite an education for me to be tutored as an undergraduate at Balliol College, Oxford (1976-9) by the world's leading legal philosopher, Jo Raz, in four subjects, not only Jurisprudence but also Constitutional Law, Administrative Law and, yes, European Law. The standard European (Economic Community) Law problem question was of the liability of the institutions for any damage caused to you when skiing down a skimmed milk powder mountain. The standard essay question, of course, was to discuss Lord Denning's famous quote about the Treaty of Rome being like an incoming tide. So I have been thinking for 40 years about the rule of recognition and the effect in domestic law of withdrawal from the legal system established by the European Treaties. Tides come and go, the law changes, but the spirit of critical engagement endures.

Incidentally, while Jo Raz and I were learning European law, the college's political spectrum ranged from the soft right's interest in the Oxford Union, typified by Damian Green, then President of the Union and now Secretary of State for Work and Pensions, through to the hard left's preoccupation with international, national and Junior Common Room politics, exemplified by Seumas Milne, now the Labour Party's Executive Director of Strategy and Communications. Meanwhile, in the college law library with its 24 hour access, a doctoral student and our University Challenge quiz captain reigned supreme, namely Robert Reed, now Lord Reed, previously Lord Advocate and now one of our Supreme Court Justices from Scotland.

Politics and law recruit from wider pools nowadays, thank goodness, than could (what was then) an all-male college with 8 law students a year. The Open University Law School has 8,000 (yes, eight thousand) undergraduates at any one time, based in the legal systems of England & Wales, Scotland, Northern Ireland and further afield, while the Open University as a whole has 250,000 students. They deserve to be engaged in the fruits of our research on citizenship and governance, as well as on the cognate research area of migration. For we remain touched, individually and collectively, by our education which is in turn informed by our teachers' research and by our community engagement (see for my time in Northern Ireland eg Marianne Elliott, [The Role of Civil Society in Conflict Resolution](#)). The people of Northern Ireland suffered one 'unmitigated disaster' after another with dire consequences including the murders of one of my law students, someone I taught in a small group, of a law teacher, of judges and politicians, but the constitutional tide did turn. Brexit is not something which I wanted (and it is a challenge especially for Northern Ireland and Scotland). Still, Brexit means not only Brexit (whatever that might prove to mean) but also that we must ponder the ripple effects of this ebb tide as they relate to academic, political and judicial power.