

# THE PUPIL

Oxford University Bar Society Magazine



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# Editor's Note

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**Welcome to the first issue of The Pupil magazine; an exciting new addition to the Bar Society's offering.** The Pupil seeks to present unique perspectives on the legal world as written by Oxford students, as well as engaging and informative insights into life at the Bar as told by silks and juniors at the country's most preeminent sets.

Of course, it cannot go without mentioning that, at the time of writing, the UK and the world is suffering greatly with the COVID-19 pandemic. I hope that you and your families are safe and well during this difficult time. I would also like to wish good luck to all finalists and other students with exams who have endured significant disruption during what is already an incredibly stressful time in their lives.

On a more positive note, thank you to all those who submitted articles. They were all of a very high standard, but, unfortunately, we could not include them all. I would also like to extend my thanks to last term's executive committee for organising, and to Mr. Justice Fordham for judging, the Introduction to Law Essay Competition. Congratulations to Nicholas U Jin for his winning submission. Finally, I must thank Kimberley Ziya of Landmark Chambers, and Ronit Kreisberger QC of Monckton Chambers, for kindly allowing me to interview them. Their insights are a must-read.

Thanks for reading.

JAMES COX  
**Editor**

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## IN CONVERSATION WITH KIMBERLEY ZIYA

**Kimberley Ziya was called to Bar in 2018, completed her pupillage at Landmark Chambers in 2019, and is now in her first year as a Landmark tennant. She is a graduate of Lady Margaret Hall, where she studied Law with French Law.**

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**Q: To begin, when and why did you first decide to pursue a career at the bar?**

A: When I was studying law at university I was pretty sure I wanted to be a lawyer and from the outset the barrister route appealed to me more than becoming a

solicitor. Both my parents are self-employed and I liked the flexibility that this afforded them. I was also attracted by the idea of having more time in court. However, as I started to research a career at the Bar, I heard a lot of “reality checks”: it was almost impossible to get in, you had to have a top First Class degree, you have to have done the most amazing extra-curricular activities and, you have to support yourself through the BPTC (unless you are extra-brilliant enough to get a scholarship). As someone who had just landed at Oxford and felt like a very small fish in a very big pond full of very brilliant people this was all quite daunting. By contrast, big



city firms were wining and dining us and telling of a nice secure route to a well-paid career and a more than comfortable lifestyle. The solicitor route started to look more appealing. So I applied for vacation schemes to find out more and ended up completing one at Pinsent Masons. They were a great firm and it was an enjoyable couple of weeks. I could start to picture myself working there even though the work was much more commercial than I had imagined myself doing. I was offered a training contract which I accepted. Nonetheless, going into my final year I started to have doubts about whether this was really the career I wanted to pursue or if I was just opting for what now felt like the “safe” route as I had been fortunate enough to have been offered a TC before the end of my studies. I experienced the uncertainty that I think many final year students do as to exactly what I wanted to do with my life after I graduated.

Thankfully, I was gifted a bit more time to think in the form of an opportunity to go and work at a law firm in Los Angeles for nine months on the Howarth & Smith Fellowship (when I applied this was only open to LMH students but I think it is now offered more widely). This was a fantastic opportunity both because I got to travel to and live in an exciting new place but also because the nature of the work as an intern in a specialist trial firm was a mix of what a pupil barrister and trainee litigation solicitor would do here in the UK. My time there reminded me that what drove me to study law in the first place was the idea of being in court and that what I enjoyed most about my studies was spending time getting to grips with and solving difficult legal problems. A career at the Bar seemed to offer greater prospects of both. I also decided that this was a stage in my life where I could afford to take some risks and, having gotten out of the university bubble, that it wasn't necessary to have the perfect career path lined up the minute you graduate. It was worth taking a few years to get to where I really wanted to be. So I wrote to Pinsent Masons politely explaining that I had had a change of heart and would no longer be taking up my training contract offer.

**Q: You were recently taken on as a tenant at Landmark Chambers, could you tell us a little bit about your route to this point?**

A: Once my mind was made up that I was going to give the barrister route a go, I set to work applying for mini-pupillages and seeking advice from contacts that I had made through university as to how I could hone my skillset ready for pupillage applications. I ended up with a “routes to the Bar” spreadsheet (Excel being my preferred and slightly neurotic way of dealing with uncertainty) detailing how I could build up the necessary experience, fund the BPTC and get a pupillage. I decided that the ideal for me financially, and as someone relatively risk-averse, was to obtain pupillage before investing in the BPTC. That way, even if I didn't get a scholarship, I would hopefully be able to use a draw down from my pupillage award to help fund my studies. Shortly afterwards I received an email from my old personal tutor from university informing me that the Law Commission was about to commence its annual recruitment of Research Assistants and that I should consider applying. It was perfect timing as the role would fit into my “Plan A” which was to obtain a paid role which would bolster my bar-CV and apply for pupillage. Plus, I loved the idea of working on law reform.

I was fortunate enough to be offered a Research Assistant role in the Law Commission's Property, Family and Trusts team and used the rest of my time in the US and the summer of my return researching chambers, applying for and doing mini-pupillages, and working out what kind of law I wanted to practice and which sets I wanted to apply to for pupillage. I reached the conclusion that I wanted to go somewhere that did property work but as part of a mix of practice areas so that I wouldn't have to specialise too early on. While property law was an area of particular interest to me I have always been more of a generalist and wanted to be able to reflect this in my future practice. The reality of pupillage applications, however, is that you have to cast the net relatively wide, so I considered a range of sets, making another handy spreadsheet to keep track of where I wanted to apply and why.

The Law Commission is a great base for an aspiring barrister. A lot of the Research Assistants are going through the same process and many of the more senior members of my team had come from careers at the Bar themselves. This made for a great support network. Further, the work I did at the Commission was not only



really interesting, but gave me great content for application forms and interviews.

I decided to apply for pupillage that year, to test the water and see whether this was a complete pipe dream or not. In the autumn before applications opened I attended the Bar Council Pupillage Fair to man the Law Commission's stand. It ended up being right next to Landmark's. I had come across Landmark in my chambers research but thought of them as a predominantly public law/planning set, which I wasn't best suited to apply for. However, it just so happened that they were using the Pupillage Fair to promote their new "Property Pupillage" whereby they were seeking to recruit one pupil with a particular interest in property law. It sounded perfect. On top of that, the people I spoke to (barristers and staff) were exceptionally friendly and down-to-earth and gave the impression of a modern set of chambers which did things a little differently to some of the more traditional sets I had been looking at previously. The applications for the property pupillage opened the next month so I worked on my application form and submitted it. I also submitted around 10 other applications to property and chancery sets in the same period (many property sets then recruited outside of the central Pupillage Gateway system and the application period was much earlier than for other sets). I ended up with three first-round interviews and two invitations back to final rounds which were to take place the same week. The Landmark final round was first up and I was very lucky to be offered a pupillage that same day (I vividly remember receiving the phone call on the train home – there were lots of tears!). I felt confident at that point that this was my top choice set and accepted the offer straightaway.

I am conscious that this all sounds a bit like fate and that everything fell into place very smoothly. I was certainly very lucky in how everything worked out but I am also definitely looking back on that time with a significantly rose-tinted view. What I have not mentioned are the many, many rejections be they for other internships/traineeships/research assistant positions before I got the Law Commission role, for mini-pupillages and for eight of the other nine pupillages I applied for. There were also moments of huge doubt that I was doing the right thing, difficult conversations with my family as to why I had

abandoned the financial security of my training contract, lots of late nights and weekends spent working on applications, and concerns that I was falling behind my peers who had started on career paths straight out of university. But cheesy as it sounds it all felt worth it when I got the pupillage offer.

Fortunately, Landmark's pupillage award is very generous and allowed me to draw down enough money to fund the BPTC (add to the failure list – my application for a BPTC scholarship from Lincoln's Inn). The Law Commission also allowed me to stay on part time which meant that I had sufficient income to cover my rent and living expenses while studying. This made for a busy year (I was doing the full-time BPTC while working part time) but it was certainly doable and having a pupillage to start at the end of the course was a huge motivator. Nonetheless I decided to give myself a few months off once the course was over to travel and get some rest before pupillage started. Thankfully, during this time off I found out that I had passed all the exams and was ready to be called to the Bar!

Pupillage is probably the stage of becoming a barrister most shrouded in rumours and horror stories. Getting it is one thing, but even once you surmount that hurdle, people are quick to tell you a long list of what to do and not to do if you want any chance of getting tenancy. This is another area where I would advise taking what you hear with a large pinch of salt. Yes, it is a tough year and it is important to be aware of that and be prepared. Yes, you want to work hard and put your best foot forward. But, if you are in a good set which properly supports its pupils then this is not some herculean feat, it is just, as my co-pupil put it, a job, with a one year fixed-term contract at the end of which chambers decides whether or not to bring you onboard permanently. I found this a much more comforting way to think about it than a "year-long interview". I had had jobs before, I had generally gotten good reviews, I just had to do the same again.

The work itself was challenging but for the most part really interesting and engaging. It reassured me that I had made the right decision choosing to come to the Bar. While of course I put a lot of pressure on myself to do well and felt a certain level of paranoia as to whether I was saying and doing the right things, for the most



part I enjoyed my pupillage year. I had incredibly supportive supervisors, who did lots of interesting work and I really liked the vibe in chambers generally. It felt like somewhere I could fit in and build a successful practice. Thankfully, it seems they felt the same way!

**Q: Landmark is renowned for its planning and property practises, but is highly regarded in many other areas, such as public law. Do you have a particular area of practise that interests you?**

A: As I have said, I came to Landmark as the property pupil, with a particular interest in property work, but wanting to build a relatively mixed practice. Pupillage was great for this as I did seats in each of chambers' main practice areas: property, planning & environment and public law. I enjoyed all of my seats and it was great to experience such a range and variety of types of work. When I started tenancy I had a conversation with one of the practice managers as to what areas, if any, I wanted to specialise in. I explained that I wanted to keep my practice as broad as possible at least for the first few years, so that is what I have been doing so far. I still really enjoy the property work, but found planning more interesting than I had anticipated (having had no experience of it prior to starting pupillage) and I love the variety of public law work. Plus, one of the things that attracted me to Landmark in the first place are the interesting overlaps between these practice areas which I hope to explore further as my practice develops.

**Q: Related to this, what advice would you have for students who are interested in a career at the bar, but cannot decide which area of practise they would like to pursue?**

A: A good starting point, if you studied law at university, is to think about which subjects you enjoyed most and why. These won't necessarily always translate into practice areas (in the way property law did for me) but will give you an idea of the kinds of problems you like to solve and what about the law particularly interests you. If you don't study law then a similar exercise can probably be carried out with other degree subjects – think about whether there are any overlaps between the aspects of your subject that you enjoy most and legal practice areas. I found the Chambers Student website

invaluable when I was thinking about this. It provides an overview of the different practice areas out there (some of which I had never even heard of), describes the types of work involved and the skills that you need to practise in that area.

Once you have narrowed it down a bit, mini-pupillages can be a good way to get more insight into areas which appeal. It can be hard to find time to do lots of minis, and the applications can be as fiercely competitive as actual pupillage, so it is worth targeting the ones you think you will learn most from. Rather than doing three in the same area, try and get some variety. This can help you to explain in a pupillage application why you ultimately chose that area of law.

Going to events such as pupillage fairs and speaking to barristers can also be a helpful way to find out more about certain areas. Just do a bit of research first to make sure you are asking the right sets about the right areas.

**Q: How would you describe your practise in your first year as a tenant? How does your week look?**

A: Junior practice, at least for me, has been exceptionally varied. However, on average I would say that (before the current health crisis hit) I am in court between 1 and 3 times a week with the rest of the time spent preparing for those hearings and completing anywhere between 1 and 5 other pieces of paper work. The work I get in my own right tends to be smaller, self-contained pieces with quite short turn around times (between two days and two weeks on average) so my diary can often look empty a few weeks in advance and then fill up very quickly. This can mean that my week can go from being quite quiet to very busy quite quickly.

I think it is worth noting that life at the baby junior end is not necessarily as glamorous as an aspiring barrister might imagine. My hearings are almost exclusively in the County Courts or First-tier Tribunal and often involve travelling some distance. I appear in front of District Judges who are addressed as Sir or Madam and there are no wigs or gowns in sight (much to the disappointment of my friends and family!). I am often appearing against litigants in person which can carry its own complexities and often the solicitor instructing me does not attend



court, but the lay client sometimes will. While the cases rarely involve complex legal submissions as you might make in a moot, these hearings have taught me a huge amount about addressing a judge, dealing with practical issues as they arise, and the people skills required to interact with clients and other litigants who are often, understandably, extremely stressed and anxious. Further, alongside these hearings I am often doing written work such as advices and pleadings which do involve grappling with more complex legal issues. I enjoy this balance.

In addition to this work in my own right, I would say that about a third of my time is spent on “junior” work where I am led by a more senior barrister. I enjoy this work as it often involves researching complex or unclear points of law and allows for a bit more creativity in formulating legal arguments. It also enables me to continue getting feedback from people with more experience.

**Q: Your career at the bar has just begun: where do you hope to be in 20 years?**

A: One of the things that always appealed to me about becoming a barrister was the flexibility that it offers as a career path. I have always liked the idea of becoming a judge and that is certainly a route that I will continue to research and think about in the years to come. But I also see returning to the Law Commission in a more senior role as an option, as I think they do very important and interesting work.

Alternatively, a role as in-house counsel somewhere is not out of the question. I also haven't written off retiring early to a tropical island and becoming a dive-master! However, my experience getting to this point has taught me that priorities can change and I imagine that what I decide to do career wise will probably be heavily influenced by other life decisions I make, such as having a family, so I am keeping an open mind. Ultimately, the great benefit of tenancy being effectively a career for life is that I don't feel rushed to decide what the next step is.

**Q: thought we might now turn to a critical issue for many students: finances. Often, students are pushed towards law firms that offer to pay GDL/LPC fees. What advice do you have for a student who is interested in a career at the bar,**

**but concerned about how they will finance it?**

A: is definitely a pressure that I felt and financial considerations were a key part of my decision as to whether or not to try and become a barrister. As I've said, the answer for me was to get pupillage first, so that I knew that my investment in the BPTC was not going to be wasted. I was lucky that the area of law I wanted to practice in is well funded, it would obviously have been more difficult if I had wanted to do a criminal or family pupillage. However, there are a lot of scholarships and funding available both from the Inns and the BPTC providers themselves. While I didn't get an Inn scholarship, I got a prize from the University of Law which knocked about £2,500 off the course fees – which is a start. There was also a discount for accepting your place early. So do your research and look for ways to reduce the cost. I know the Inns of Court are trying to bring more teaching in-house now, which is a positive step, and will hopefully start to reduce entry costs.

If you are used to working alongside your studies, then that is still an option during the GDL and BPTC. As I hope my experience will have illustrated, there is not necessarily any rush to apply for pupillage straight out of university. There is time to work and save some money to fund your path to the Bar if you need to. This includes doing the GDL and BPTC part time while working. It may take you a few more years to get to the end goal but honestly I felt much more prepared for pupillage and tenancy having worked for a couple of years first. Being a barrister can be a tough job, with a lot more responsibility from the get go than you would have in most careers. It doesn't hurt to have a bit of life experience under your belt.

Ultimately, I think you need to be pretty confident that a career at the bar is something you want to try (you can never know for sure until you're in it). Something which helped me was weighing up the comparative benefits of a career at the bar versus being a solicitor. For me, the benefits of the solicitor route were predominantly security and a comfortable lifestyle. Those are both important benefits but at that stage in my life I was in a position where I could afford to take a risk in order to potentially get what for me would be a more rewarding career. Then you just need to budget like you would for anything else: calculate the costs in the worst case



and make a plan for how you will cover them.

**Q: Finally, the bar often receives criticism for being a profession with a diversity problem. What do you see as the root of this problem, and how might it be improved?**

I think that that is a fair criticism of both the bar and the legal profession as a whole. One of the roots of the problem at the bar, in my view, is the financial uncertainty discussed above. There is no doubt that it is easier to choose to become a barrister if you are from a wealthier background. The more support that can be offered to those from under-represented backgrounds to overcome these obstacles the better. That is because I think another key issue is perception. The fact that the bar is seen as having a diversity problem itself perpetuates the problem. Women are increasingly well-represented especially at the junior end of the bar, however, I was told early on by a careers advisor that I would find it more difficult making a success of this career as a woman. That can be off-putting. I know a friend, who would have made a fantastic barrister but who was put off by the fact that the bar seemed stuffy and posh and full of men and why would she choose to put herself in that environment. And I am sure that there are lots of other exceptionally talented candidates who are put off when they look at websites of chambers full of people who they just don't see themselves fitting in with. So I think one of the keys to better diversity is to recruit a more diverse range of people into the profession. This needs to be done through a range of measures including: greater financial support, mentoring schemes, ensuring that application processes aren't designed to unconsciously favour a particular kind of applicant, and recruitment drives targeting those who have previously been under-represented.

That's at the recruitment stage. The second step is to retain those people from under-represented backgrounds who have made it into the profession. I think all chambers should have an Equality & Diversity Committee (or equivalent) and a way of monitoring that work is fairly distributed amongst members regardless of background. I also think that those who instruct barristers should undergo training to ensure that there is no unconscious bias in their decision-making.

## *An Overview of:*

# Landmark Chambers

- Landmark Chambers was founded in 2002 and has since grown to become one of the UK's preeminent planning, environmental and public law sets.
- Located on Fleet Street near the Royal Courts of Justice, with an office in Birmingham, the set has around 60 juniors and 35 silks. It offers 2 to 3 pupillages each year.
- Their barristers have been involved in high profile cases and inquiries concerning issues such as Crossrail, HS2 and Heathrow's third runway.
- On the public law side, the set was involved in *Jones v Attorney General for Trinidad*. The case, heard in the High Court of Trinidad and Tobago, resulted in a ruling which upheld a challenge to laws criminalising homosexual activity and granting declarations that they contravened the country's constitution.



Landmark Chambers

For more information about Landmark Chambers and how to apply for pupillage or mini-pupillage Visit: <https://www.landmarkchambers.co.uk/>





## IN CONVERSATION WITH RONIT KREISBERGER QC

**Ronit Kreisberger QC is a barrister at Monckton Chambers specialising in competition, regulatory and EU law. She took silk in 2019. She is on the W@'s '40 in their 40's' list of Notable Women Competition Professionals in Europe, and was one of five 'most highly regarded' competition juniors in the WWL UK Bar 2018.**

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**Q: To start with, could you tell us a little bit about how you came to be a barrister and how you came to be at Monckton?**

A: Well, I had a slightly circuitous route, because I qualified as a solicitor first, despite having been to Bar School. My original plan had been practise competition law at the Bar, having thoroughly enjoyed studying it on the BCL. So, as a student, I was quite set on becoming a competition law barrister. It was something of a blow when I didn't get pupillage, first time around, at the competition law sets I had applied to. By that stage, I had spent some time working at Herbert Smith Freehills and so I decided to pursue a training contract there instead, especially given the excellent reputation of their EU & competition law department (as it then was). I spent a very happy 7 years at HSF until I was 5 years



PQE. But I continued to feel the pull of the Bar as I had the itch to do advocacy. I decided to make an ad hoc application to Monckton Chambers and, fortunately for me, they were receptive. They offered me an abbreviated pupillage in 2005 and I was taken on as a tenant in 2006.

**Q: Having practised as both a solicitor and a barrister, how do they compare?**

A: As I said, I had a very happy experience at HSF and I think I've been quite lucky to have cut my teeth there, so I definitely wouldn't say it's a binary case of one branch being better than the other. They each have pros and cons. Ultimately my choice of the Bar was driven by the desire to practise as an advocate, which I still find thrilling and challenging to this day. And there is much else to be lauded at the Bar: the independence, the freedom of being self-employed, the intellectual challenges, working with colleagues and clients who are at the top of their game – all things I value greatly. That said, at HSF I worked with formidable lawyers and learned the ropes from the best. It is also true that in a law firm you have an immediate support network as you form part of a team. Whereas at the Bar, I will often find myself on different sides of the same case from my fellow tenants given that, in the competition field, we tend to work on large-scale, multi-party litigation. That means that there are often Chinese walls in place, whereas in a law firm you're generally all on the same side which can produce a collegiate atmosphere. But while the Bar is perhaps more individualistic, you do form some very deep, long-lasting relationships with mentors and peers alike. I have found that network critical, and happy to say I no longer feel like the cuckoo in the nest. I also don't have anyone setting financial targets for me [laughs]!

**Q: You've spoken a bit about your practice. Could you tell us about it in a bit more detail?**

A: I'm a specialist competition litigator. Broadly speaking, competition law covers monopolies, mergers and cartels. It has traditionally been modelled on and incorporated EU competition law, so there are a number of very interesting issues arising out of Brexit for people in my field. Typically, my cases involve either

stand alone allegations of infringement, where I may be acting for, say, a dominant undertaking that's been accused of charging excessive prices, or large-scale damages actions which follow on from infringement decisions by competition authorities. For instance, there might be Commission decision finding that there has been a cartel amongst truck manufacturers, which is a recent one, or that there was exchange of commercially sensitive information in FX (Foreign Exchange) markets, which is another one I am working on. Following an infringement decision by the Commission or the UK Competition and Markets Authority (CMA), other businesses or consumers can sue on the back of the infringement decision. These claims tend to lead to very large-scale damages actions, some of which take the form of consumer opt-out actions which we're beginning to see in the Competition Appeal Tribunal. I appear regularly in the Competition Appeal Tribunal and the High Court, both of which are fora for these large-scale competition claims, and obviously the higher courts like the Court of Appeal. Until now, I would also regularly appear in the Luxembourg Courts. For example, I acted for Cathay Pacific in its appeal against an infringement decision in relation to air cargo surcharges.

**Q: I think you've touched on a few of them, but is there a particular case in your career that sticks out in your mind?**

A: There are a couple that spring to mind. One outing in the Court of Appeal that I particularly enjoyed was for the European Commission. I acted for the Commission in its first oral intervention in UK proceedings. The case was about interchange fees charged in credit card schemes, which are the fees that merchants pay the 'acquirer' bank. Large retailers such as Sainsbury's brought multi-billion pound damages actions to recover the fees paid. The Commission's intervention related to the analysis of these interchange fees under European competition law. It felt like a privilege to take on what is an essentially amicus curiae brief, albeit in a highly contentious context. That was good fun.

Another core area for me is pharmaceutical antitrust, which is the application of competition law in



pharmaceutical cases. Some years ago, I was instructed by a major pharmaceutical company to work over the weekend to fight off an injunction. And this practice area just burgeoned from there for me. It is also an area that the CMA is very interested in, and has made a number of decisions finding that pharmaceutical companies were breaching competition law. A recent case called paroxetine 'pay-for-delay' is intellectually one of the most fascinating cases I have worked on. It concerns patent settlement agreements between pharmaceutical companies: an originator which has the patent for say a big blockbuster drug, and a generic company which wants to market a generic version of that drug. The two parties end up in litigation with the originator alleging patent infringement and the two companies settle with a payment to the generic company. The CMA said that even though the parties were settling litigation, the settlement is fundamentally anti-competitive in its purpose, as you have a patent holder paying-off a generic rival not to come onto the market. Traditionally one might have said that they're allowed to do that because they've got a patent, but the competition authorities have waged a war against these types of settlements.

**Q: Could you briefly describe a week of typical practice?**

A: As I tend to work on these large-scale cases, I am not the type of barrister that is in court every week. When I get to court for a trial, it will often be a long one – one or two months typically. There are of course interlocutory skirmishes along the way, so you'll have a number of hearings leading up to trial, and they can be quite substantial too. So, a typical week may see me working on papers (at home or in Chambers pre-lock down) or preparing for / attending court. It's very variable. But my type of practice doesn't involve receiving papers the night before court.

**Q: You've mentioned your work in the European courts, how will your practice change after Brexit? How will it impact this area of law more generally?**

Good question. Clearly, there is going to be a plethora of litigation arising out of Brexit, and some very interesting

questions as to how one treats EU law, such as which rules constitute retained law going forward. In terms of my practice, I took the step of being called to the Bar in Dublin. So, I hope to mitigate any detrimental impact by acting as an Irish barrister. That said, all signs are that the litigation markets in which I operate are very healthy. A number of competition claims are funded (e.g. a class representative bringing an action on behalf of all consumers who say they have paid an overcharge because of an infringement such as anti-competitive interchange fees) and so rely on litigation funders investing in the action. My experience at the moment is that funders continue to be willing to invest in bringing these claims in the English courts. So, for now, I haven't had any sense that Brexit is dampening the appetite for English litigation. Of course when I opted over 2 decades ago to specialise in EU law, on the BCL, I hadn't envisaged tackling issues arising out of our departure from the European Union. But it will certainly be interesting times.

**Q: You have achieved a significant amount in your careers so far. Where do you hope to go from here?**

A: That's a good question. I took silk a year ago and, as a barrister, that's the only promotion you get! I'm keen to enjoy a flourishing career as a silk, which poses its own challenges and has its own great advantages, including working with brilliant juniors. I'd like to continue working on cases I find interesting and on a sufficient breadth of topics within my specialist field. My ambition at the moment is to do a good job bearing the QC brand. I am also keen to support / act as a mentor for more junior members of the Bar and those aspiring to become barristers to the extent that I can.

**Q: What is one piece of advice you have for someone at university keen to pursue a career at the bar?**

It's difficult not to give a trite answer. But my single piece of advice would be don't worry if you don't make it to the Bar straight out of university. There is no need to adopt a single prescribed path. I didn't make it first time around. And that turns out to have been a great boon for me: my experience as someone who has been on both



sides of the profession has been invaluable and has given me particular insight as to the client's needs. Be dogged in pursuing your goals - I came back to the Bar after a 7 year diversion - but also remain open-minded.

**Q: The bar is a profession that is regularly criticised for its diversity problem. What do you think the issue is here, and how can the problems be solved?**

A: Let me preface this by saying that I can only speak about my experience in the fields in which I operate. I am certainly not able to speak to life as a criminal barrister, which I think is extremely tough, particularly for women.

There are undeniably diversity issues at the Bar, both as regards gender diversity and ethnicity, as well as social mobility. The issues are widely acknowledged, everyone appreciates that diversity is to be encouraged and work is being done.

But to strike a more positive note, as a female junior and now silk, I have had a very positive overall experience. I have seen the progress which has been made since my earlier days (when one judge who shall not be named thought it appropriate to refer to me as 'that little blonde thing!') Working from home has been a great benefit (now shared by many). These days, far from encountering prejudice, I'm aware that a lot of law firms are looking carefully at the number of female barristers they instruct and taking steps to ensure that the right balance is achieved. Courts also are giving thought to measures like a 4 day working week (in place in the Commercial Court) which means that working parents can take their children to school at least one day a week during trial.



## *An Overview of:*



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## CRIME: ARE REMOTE COURTS CAPABLE OF ADMINISTERING JUSTICE?

**SUSHRUT ROYYURU**

The prospect of virtualising the courts has long appealed to budget-conscious policy makers. Several attempts have been made to date to integrate the largely analogue trial system with modern technology by the Ministry of Justice; a notable example being the 2010 Virtual Court Pilot during which first hearings were conducted via video link between courts and police stations. In the report produced upon the program's completion, the evaluation team noted that the measure had potential in increasing the efficiency of the courts. However, the report also noted that the impact of the virtual court upon justice outcomes was complex and in need of further exploration.

Courts have been forced into adopting virtual procedure by the disruptive Covid-19 pandemic. The increased use of remote technology in courts was authorised explicitly by the passing of the Coronavirus Act 2020 for, among others, "eligible criminal proceedings", a term defined by the legislation to include a range of criminal matters include summary trials, bail hearings and

some types of proceedings in the Court of Appeal.

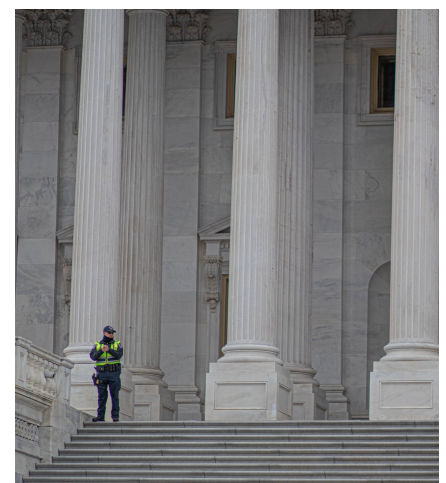
Operating the justice system in the uncertain landscape of social distancing and emergency measures is certainly a difficult feat. However, with the structure of the trial process being altered to meet the needs of this trying time, the importance of preserving the aims of the justice system has never been greater. The effects of the virtual platform are significant and beg the question as to whether they can adequately do justice in criminal cases.

Conducting court appearances on a remote basis has a myriad of effects on criminal defendants which are generally exacerbated by the anxiety and stress associated with the criminal process. The broad impact of the process can be considered two-fold, acting upon the defendant and also on their perception by the court and jury members.

Considering the first issue, a report by the NGO Transform Justice on the subject of virtual courts makes a number of things plain. First, remote participation has an isolating effect on defendants. A survey conducted by NGO Transform Justice of 300 court users found that 58% of respondents believed video appearances made hearings harder

for defendants to understand and participate in. In our adversarial trial system, this is a key issue. A further 70% believed that disability was harder to identify and understand during video communication, and 74% believed that appearing on video as a litigant-in-person gave defendants a disadvantage during trial. In her book "The Pixelated Prisoner: Prison Video Links, Court 'Appearance' and the Justice Matrix", Carolyn McKay reports some defendants going so far as to report disorientation by the virtual process.

Virtual presence can also have a detrimental effect on the perception of defendants by court officials and jury members. In its nature, virtual communication removes many of the aspects of ordinary human interaction. The subtle behaviours and mannerisms that constitute are lost, and this can have a dehumanising effect leading to a loss of empathy. Transform Justice report magistrates describing defendants tried remotely as appearing "disengaged and remote", leading to inferences that they are "disrespectful of the court". This lack of empathy goes on to have greater consequences. In the evaluation of the Virtual Pilot, it was found that those who appeared virtually in court were more likely to be given custodial sentences over community orders and higher bail, as well as being more likely to plead guilty.





A distortion of justice outcomes is an especially grave issue that must be kept in mind. Research conducted by the University of California, Los Angeles also extended the frame of reference to asylum hearings, finding that remotely adjudged asylum seekers were less likely to participate in proceedings and, more critically, more likely to be deported.

This lack of empathy also has the additional effect of reducing the quality of witness evidence in general. The need to assess a witness during spoken evidence is integral to the construction of the trial process. The removal of this opportunity increases the pressure on magistrates, juries and judges, and as a result further obscures the fairness of outcomes from these virtual trials. The examination process is deeply human and is acutely affected by the disconnection created by the virtual courtroom.

As a further corollary to the above, Transform Justice found that remote hearings also reduce respect for the justice system among defendants, a development that likely will have broad societal ramifications. The report noted an increased propensity to shout or walk out, along with the possibility of mental disconnection entirely. The importance of respecting justice for preserving our social fabric, deterring crime and legitimising the actions of courts is evident. Protracted use of remote courts could diminish the positive perception of the justice system through these consistent negative associations.

The virtual courts also have an impact on the interaction between counsel and their defendants. The pilot report reflected findings of difficulty in communication between CPS and defence advocates.

Furthermore, there was difficulty in ensuring effective communication between defendants and their solicitors in the absence of face to face meetings. This can be attributed to a number of factors; the lack of parity between the virtual and orthodox process estimated by defendants, and the lack of awareness of the importance of counsel from the defendant side. The final outcome is bleak; the rate of defence representation reported in the pilot was significantly lower than the comparable real court area.

Virtual courts, therefore, raise a number of significant issues with regard to the administration of justice. In the context of the right to fair trial provided by the European Convention of Human Rights, it seems as though the myriad inadequacies of the remote approach to justice jeopardise this guarantee. However, these are extraordinary times. The impact of the pandemic and the responses to it have extended to all sectors, and the justice system cannot be seen to stop. Therefore, it is imperative that all parties proceed with an awareness of the issues and that, after the crisis has passed, the measures used in the name of practicality are examined once again.

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## **CORONAVIRUS ACT 2020: A CONTRAVENTION OF THE RULE OF LAW?**

**ATHENA KAM**

### **Introduction:**

There is no doubt that the nation is currently facing an unprecedented situation in the face of a global healthcare crisis as the death toll for coronavirus continues to shoot up. A scramble to pass legislation conferring more powers upon the



government resulted in the Coronavirus Act 2020 ('the 2020 Act'), a lengthy 348 page-long statute that created flexibility for the government to respond to the emergency as they saw fit. It was first published on March 19th, received its second reading in the House of Commons merely days after on March 23rd, and had completed all stages in both Houses and received royal assent on March 25th.

While it is helpful that the government has the ability to derogate from normal legal standards in order to protect public health during this time, it would be inappropriate for them to do so at the cost of a crucial and inherent principle of the British constitution, namely the rule of law. Initial concerns about the statute's brief passage in Parliament and the level of scrutiny involved subsequently raised the question of the legality of the 2020 Act, with legality being a requirement that must be adhered to in order to uphold the rule of law. Additionally, the need for certainty under the rule of law is also contentious in the 2020 Act, with ambiguous clauses that make arguably unwarranted intrusions into personal liberty. I argue that the legislation as it stands does neglect the rule of law, and so ought to be revised to satisfy all of the obligations



under the principle and maintain constitutional propriety.

### **The question of legality:**

The legality requirement under the rule of law has been challenged by the 2020 Act in concerns regarding scrutiny of the legislation and about the proportionality of the extraordinary powers granted to the government. The passing of the 2020 Act was unusually swift, especially given the size of the legislation, going through both Houses of Parliament in a matter of days. While the urgency of the situation can provide a justification for the brief passage through Parliament, it nevertheless raises some serious and well-founded criticisms that there was insufficient consideration given to the 2020 Act before it received royal assent.

Scrutiny has the purpose of ensuring that the legislation in question is legal, and if not, it can be remedied by the courts and Parliament. Therefore, insufficient scrutiny creates an opportunity for contentious clauses to go unnoticed. There are uncertainties over future judicial and Parliamentary review of the 2020 Act in light of social distancing measures. Tierney and King were concerned that physical restrictions on Parliamentary sittings

would inhibit the legislature's scrutinising ability, and this extends to judicial review as courts are similarly prevented from having in-person hearings. Furthermore, Tierney and King noted that the 2020 Act contain many broadly framed delegated powers, which "are often subject to limited or no form of parliamentary scrutiny". This challenges the legality requirement of the rule of law by taking away the very basis upon which to judge the lawfulness of the 2020 Act.

Parliamentary scrutiny over the 2020 Act is further limited by the fact that they will only be able to review the continuing validity of the Act every six months. Although it could be argued that this explicit provision within the legislation for Parliamentary review upholds the rule of law by ensuring a regular systemic scrutiny over the continuing validity and legality of the 2020 Act, the review takes a stringent approach where Parliament either has to accept the whole 2020 Act, or reject it completely. This all-or-nothing approach could lead to a breach of the rule of law by forcing Parliament to compromise for some infringements upon legality for a greater overall good of public protection. As summarised by the Bingham Centre for the Rule of Law,

"it is unlikely that Parliament will reject all provisions just in case some of them are still necessary", and so the legality of the 2020 Act is strained as Parliament may be forced to turn a blind eye to any potential shortcomings to enjoy the advantages and protection offered by the 2020 Act. Such a brusque approach therefore contravenes the legality requirement of the rule of law by severely curtailing Parliament's ability to effectively scrutinise the 2020 Act.

Another challenge to legality arises from the vagueness of various provisions within the 2020 Act. For example, the Secretary of State has been granted wide powers including the ability to suspend port operations upon "a real and significant risk" under Schedule 20 of the 2020 Act. The meaning of "a real and significant risk" is subjective, and it is unsatisfactory that this can provide the criteria to halt port operations and curtail the freedom of movement. The legality of any decisions made under this power would be difficult to challenge, as the discretion given to the Secretary of State allows a range of justifications can be accepted, even if unacceptable by the wider public.

One last challenge on the front of the legality requirement is raised by the proportionality of the 2020 Act especially in light of the lockdown measures implemented. Lockdown inhibits the human right of freedom of movement, as captured in Article 5 of the European Convention on Human Rights (the right to liberty and security). Although derogation from human right obligations are permitted in exceptional circumstances, they are only "to the extent strictly required by the exigencies of the situation" as provided in Article 15. This emphasis





on proportionality is also reinforced in the Siracusa Principles, a set of international law principles that the UK must adhere to in order to fulfil the legality requirement of the rule of law. Under the Siracusa Principles, any restrictions imposed must be “the least intrusive and restrictive”, and implementation of lockdown under the 2020 Act arguably breaches this principle, especially when compared with measures taken by other countries such as Sweden, who face a similar crisis yet has not chosen to restrict the movement of people.

Against this challenge, King defends the 2020 Act on the grounds that the power to implement a lockdown is derived from existing legislation, and so would not be in breach of human rights obligations. King points to the Public Health (Control of Disease) Act 1984 and the Health and Social Care Act 2008, and particularly to S.45C(3) (c) of the 1984 Act which permits “the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health”. Coronavirus is undoubtedly a public health threat and so King concludes that the 2020 Act “does not confer new powers on UK and Welsh ministers to impose a lockdown”. Whilst King’s defence of the legality of the 2020 Act is convincing upon initial consideration, Craig makes a counter-argument that the ‘persons’ in question in the 1984 Act is to be interpreted as infected persons, as opposed to the whole population when read in context of the whole legislation. If construed in this manner, then there is no legal basis for the implementation of lockdown on the general public from existing laws. Therefore, the 2020 Act contravenes the legality requirement under the rule of law by not only

failing to demonstrate that there is existing precedent for implementing a lockdown action, but also fails to show that the response is proportional and justifies a derogation from normal standards of human rights.

#### **The question of certainty:**

Certainty is another requirement under the rule of law and is necessary for citizens to be able to follow the law. The 2020 Act contravenes the rule of law on this aspect because of the vagueness of the clauses within the legislation, with the subsequent effect of a wider public misunderstanding about its substance. Given the implications of the 2020 Act on the freedom of citizens, Lord Anderson QC argues that “one would have expected to find clear words” yet this expectation fails in the legislation. The 2020 Act restricts movement “without reasonable excuse”, yet what is included under “reasonable excuse” is contentious and the examples provided are non-exhaustive. The ambiguity around what could class as a reasonable excuse creates confusion for members of the public as it could be interpreted in a variety of ways, with the result that they could inadvertently break the law.

King has objected that a degree of vagueness is inevitable because of the unpredictable nature of the situation. He defends the ambiguity of the legislation on the basis that “the very nature of new or unknown pandemic diseases [...] make complete parliamentary foresight almost impossible to achieve”. While this is a strong counter-argument for a lack of clarity, it would be an undesirable conclusion to accept as it could set a precedent for ambiguous legislating in the future on the basis that Parliament cannot predict the future. Especially



Especially considering the impact of coronavirus on the livelihood of citizens and the public health, it is important that citizens should be certain about which of their actions is legally permissible so that they do not place others in a position of risk, and so this particular contravention of the rule of law cannot be justified by the fact that the situation itself is uncertain.

Lack of clarity by what is permitted under the 2020 Act is further exacerbated by the widely publicised claim from the government that exercise is a reasonable excuse, but only if undertaken once a day. In both oral addresses and written guidance, the government has declared that only one form of exercise a day is permitted, but this limitation is not contained within the 2020 Act which permits “exercise either alone or with other members of the household”. Faced with this conflicting authority from governmental guidance, the certainty of the 2020 Act is greatly undermined with the result that the ordinary citizen would not know which advice to follow. Additionally, it is more likely that the public would have engaged with the governmental guidance than with the primary legislation of the 2020 Act, and so the misleading advice from the government is detrimental to the certainty requirement under the rule of law, on top of what is an already uncertain piece of legislation.



### Conclusion:

Although the current situation has undoubtedly caused great strain upon legislating bodies to draw up the 2020 Coronavirus Act with haste, the constitutional principle of the rule of law should not be sacrificed as a trade-off. The rule of law is a fundamental protection of the liberty of citizens, and so the contravention of it by the 2020 Act in its failure to meet the features of legality and certainty should not be ignored.

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## THERE IS A TUNNEL AT THE END OF ALL THESE LIGHTS: PRIVACY INTERNATIONAL

**KWOK CHEUNG**

### Introduction:

In May 2019, the Supreme Court ruled that the Investigatory Powers Tribunal's (IPT) decisions were amenable to judicial review, despite a powerfully drawn 'ouster clause' preventing those decision from being questioned by a court. Privacy International is captivating not least because it concerns the lawfulness of mass surveillance by the state, but also because it clarifies the ever-elusive balance between upholding the rule of law and deference to Parliament's intentions.

In this case note, I examine how Privacy International contributes to the growing case law on ouster clauses, and offer some thoughts on how the decision shapes the constitutional debate in a wider public law context, especially given judges' marked commitment to keeping public authorities within their statutory vires.

### Background:

IPT was set up by the Regulation of Investigatory Powers Act 2000 ('the 2000 Act'), which includes a clause

purporting to 'oust' judicial review of IPT's decisions: "determinations... other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court."

In 2016, IPT made a decision that the Government Communications Headquarters (GCHQ) could lawfully hack computers, mobiles, and networks in the UK, as long as the Secretary of State issued warrants to that effect. It held that the Secretary of State was empowered to make these warrants under s.5 of the Intelligence Services Act 1994. Privacy International sought judicial review of this decision, arguing that IPT had incorrectly interpreted the scope of s.5.

There were two issues before the Supreme Court: the first concerned whether the ouster in the 2000 Act successfully precluded the decisions of IPT from being challenged in court (the 'statutory interpretation' issue). The second was whether – and, if so, following which principles – Parliament could use a statute to oust the supervisory jurisdiction of the courts (the 'constitutional' issue).

### The Decision:

The Supreme Court allowed Privacy International's appeal: the ouster clause did not preclude judicial review. On the interpretation issue, the Supreme Court held that the ouster clause was ineffective, only in respect of errors of law made by a tribunal (as opposed to errors of fact). On the second issue, there were remarks obiter that Parliament lacked the power to exclude judicial review at all. It would ultimately fall to the courts to determine the Parliament's limits to exclude review.

There are two points I wish to draw out from the Court's treatment of the

ouster clause. The first is how the majority and dissenting opinions dealt with *Anisminic*, and how each reconciled their decision with the principle of the rule of law (under which courts' interpretation of legislation must be consistent with legality). The second is the constancy of the judicial attitude towards protecting fundamental rights (in this instance, the right of access to court).

### 1. Development from *Anisminic*:

The landmark decision in *Anisminic* has been interpreted by later cases as establishing the general presumption that public decision-making bodies, such as tribunals, do not have the jurisdiction to commit errors of law. Any decisions tainted by errors of law are nullities, to which ouster clauses cannot apply. Re-affirmations of the presumption against ouster appeared again in the *Cart* litigation, where Lady Hale said that 'judicial review can only be excluded by the most clear and explicit words'.

Notable additions to this dialogue are feature on both sides of the Supreme Court's judgment.

The majority took a contextual approach. Lord Carnwath was unimpressed by the analysis based on errors of law: 'the discussion needs to move beyond the legal framework established by *Anisminic*' seeing as it was 'highly artificial'. *Anisminic* was no longer of any assistance in determining the scope of an ouster clause.

Instead, Lord Carnwath preferred a more nuanced approach, balancing constitutional principles: '...so as to ensure respect on the one hand for... the inferred intention of the legislature, and on the other for the fundamental principles of the rule of law'.





Here, the rule of law could only be vindicated by allowing judicial review. Given how the jurisdictions of IPT and the ordinary courts overlapped considerably, it was important that a specialist tribunal did not develop a 'local law', but instead conformed to the 'law of the land'. By shifting the debate away from the technicalities of statutory wording and onto the rule of law, Lord Carnwath's approach avoids downgrading 'the critical importance of the common law presumption against ouster'.

Yet there is tension between this contextual approach and Lord Carnwath's unwillingness to analyse IPT's function. It's unclear how the function of IPT as a convener of 'closed hearings' can be upheld, whilst also allowing the level of judicial scrutiny required by the rule of law. This is one respect in which the judgment raises an unresolved issue, which will benefit from clarification in cases to come.

The dissent took a 'permitted field' approach. Lord Sumption's dissent involved the same emphasis on the rule of law – though he differed in what he thought was actually required by the rule of law in this context: IPT was acting as a court, so

its judicial character sufficiently vindicated the rule of law.

Lord Sumption's view departs drastically from Anisminic. In effect, His Lordship argues that if we take a looser approach to ultra vires, a Tribunal which makes an error of law can still be protected from judicial review. Does this mean that that ouster clauses do not, as Anisminic is taken to suggest, always offend the rule of law?

## **2. Wider constitutional implications of Privacy International:**

Courts may decline to enforce ouster clauses for two reasons. First, ousters weaken the courts' ability to check the actions of public bodies. Secondly, ousters also threaten the fundamental right of access to a court – what Wade calls 'the critical right'. This is why Lord Hoffmann stated in *Simms* that only the most express language would be taken to override fundamental rights: 'Parliament must squarely confront what it is doing and accept the political cost.' Moreover, as Lord Woolf has conjectured, 'if Parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which was without precedent'.

Lord Steyn echoed these views in *Jackson*: if Parliament was to introduce 'oppressive and wholly undemocratic legislation' such as abolishing judicial review, the court might have to 'consider whether there is a constitutional fundamental which even a sovereign Parliament... cannot abolish'.

Subsequently, Lord Hope in *AXA* observed that 'judges must retain the power to insist that legislation of that extreme kind is not law which the judges will recognise'. The power to decline to apply abhorrent legislation has always been a crucial force behind judges' reasoning on judicial review.

Lord Carnwath was careful to distinguish the facts at hand from the extreme 'morally abhorrent legislation' example in *Jackson*: here, there is no doubt as to whether the relationship between Parliament and courts is governed by the rule of law – it undoubtedly is. Thus, he was not concerned with what might happen if Parliament were to pass unconstitutional legislation.

Avoiding the difficult constitutional issues from 'striking down' (impliedly) negotiates away around an earlier reading of the exact same clause in *A v B*, where Lord Brown called it 'an unambiguous ouster'. This seems a tactical manoeuvre, designed to blunt the force of a fairly radical decision.

## **Conclusion: Is Parliamentary sovereignty threatened?**

Privacy International once again throws into sharp relief the clash between parliamentary sovereignty and the rule of law. Some of their Lordships observed that Parliament probably lacked the power to oust judicial review at all, and that the final say on ouster clauses lies with the courts. But would courts then be



moving from 'interpreting' legislation into making laws themselves? As Hooper notes, this level of judicial supremacy looks a lot like 'judicial radicalism'. Indeed, Gordon argues the Supreme court's approach necessarily rejects parliamentary sovereignty, which 'functions to establish exactly the opposite state of affairs.

But I think the silver lining of the majority's contextual approach lies in that it allows restrictions to judicial review, insofar as they are 'principled and proportionate'. The judgment recognises that the courts are committed, in line with Simms, Jackson, and AXA, to protecting the right of access to courts. And it reaffirms, afresh, the strong presumption that Parliament intends to legislate in line with the rule of law, and that 'fundamental rights cannot be overridden by general or ambiguous words'.

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# HOW RADICAL WAS THE SUPREME COURT JUDGMENT IN THE MILLER PROROGATION CASE?

INTRODUCTION TO LAW ESSAY  
COMPETITION WINNER: NICHOLAS U JIN

**Nicholas U Jin is the winner of the Bar Society's 'Introduction to Law' essay competition. This term, the competition was judged by Mr. Justice Fordham, previously at Blackstone Chambers, and Nicholas received a £150 grand prize.**

## **Approach:**

It should be stated at the outset that “radical” is an imprecise term, more suited for the headlines of a press release, than that of analysis from rigorous legal principles. As a matter of precision, this essay will instead investigate the extent to which the Miller case has departed from the courts role within the wider constitutional context, as well as the implications which this decision has for the future. The approach of this commentator will first begin with introducing the political and legal context surrounding the exercise of the prerogative in the case at hand, and its control by the courts respectively, before examining the legal reasoning employed by the Supreme Court.

It is submitted that *prima facie*, the Supreme Court judgment demonstrated a novel and surprising

expansion of policing the prerogative through what may be termed “creative” legal reasoning, as well as a novel application of the principle of legality beyond statutory interpretation. Seen in the wider constitutional context however, the decision is part of a new constitutional reality enforcing common law constitutionalism over unfettered executive power. Further, taking into account the judicial politics of the decision – the Miller prorogation has perhaps solidified this reality.

## **The “Prorogation”:**

The foundations of the prorogation case may be found in Boris Johnson’s loss of confidence in the Commons at the time, along with staunch opposition to his proposed Brexit strategy. Speaking plainly, the prorogation then, was a mechanism through which Boris Johnson felt these political difficulties might be overcome. Prorogation involved the use of the royal prerogative to suspend Parliament at the end of a session, typically for a few days before the announcement of a Queen’s Speech. Boris Johnson requested a whopping five-weeks, which unsurprisingly



raised eyebrows and created impetus for a case to answer.

### **Constitutional Control over the Prerogative:**

The justiciability that the courts may exercise over the royal prerogative can be understood through the wider constitutional context. Nick Barber's two-factor model of control is instructive here: The case of *Proclamations* and *Prohibitions Del Roy* have demonstrated that as a matter of fact, not only is the prerogative limited in its scope, but it is for the judges to determine the limits of the prerogative, and the existence of a prerogative power.

In the *GCHQ* case, the second level of control was demonstrated as Lord Diplock asserted that the courts reserved the ability to review the manner of exercise of certain prerogative powers, with Lord Roskill setting out certain exceptions such as dissolution, foreign affairs and defence of the realm. Finally in *Miller*, the court had shown a willingness to review the rationality and fairness of the exercise of the prerogative in bringing about Brexit, where it was stated that the court "could not accept that major changes be affected by ministers alone... Must be effected in the only way the constitution recognizes. Parliamentary legislation.

In *Miller*, the Supreme Court considered appeals from the English High Court, as well as the Scottish Inner House, where the prorogation had been upheld and struck down respectively. In a unanimous judgement, the Supreme Court declared the prorogation unlawful and hence nugatory – Parliament had plainly not been prorogued. Before interrogating the reasoning of the Supreme Court, the ratio in the High Court as well as the Inner Courts may first be examined. The High Court relied on the fact that prorogation fell within the political sphere, hence it was unreviewable as it stood as within the unreviewable exceptions outlined in the *GCHQ* case, while the Scottish disagreed, finding that the prerogative was reviewable and when reviewed, its manner of exercise as a consolidation of political power from Boris Johnson was found to be illegal.

### **No more Prohibitions in Policing the Prerogative:**

Intuitively, given the competing ratios in the High Court and the Scottish Courts, one would consider the issue of law at this point to be whether or not the Courts had



jurisdiction over the prerogative – or simply, whether the power to prorogue Parliament would fall into one of the exceptions outlined in the *GCHQ* case. The Supreme Court elected to take a different approach, falling back onto the first level of control established by the 17th century cases of *Proclamations* and *Prohibitions Del Roy*.

"The relevant limit upon the power to prorogue can be expressed in this way: that a decision to prorogue Parliament (or to advise the monarch to prorogue Parliament) will be unlawful if the prorogation has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of the executive. In such a situation, the court will intervene if the effect is sufficiently serious to justify such an exceptional course".

This does not sound like an exercise in identification, and marks our first "radical" departure. The court has suggested that the existence of the prerogative power



to prorogue is conditional on its compatibility with Parliamentary Sovereignty and Parliamentary Accountability. Had the court plainly declared that it would be presiding over the manner of exercise of the prerogative, that would have been more consistent with the role of the courts in policing the royal prerogative. Taken together with the Miller case, where the court had explicitly reviewed the prerogative powers relating to the UK's foreign treaty obligations, which incidentally appeared to preclude review based on Lord Roskill's comments relating to exceptions where the prerogative power may not be reviewed in the GCHQ case, we must now accept that the courts have shown an increasing willingness to intervene in all instances where the royal prerogative has been exercised unjustifiably, by applying Proclamations-esque reasoning,

### **The Principle of Legality's Unexpected Appearance:**

Having confirmed, albeit awkwardly, the justiciability of the issue at hand by framing it as an issue of identifying whether the prerogative power as exercised by Boris Johnson existed, the Supreme Court then invoked Parliamentary Sovereignty and the accountability of ministers to Parliament to address this issue. At this stage, as Professor Mark Elliot notes, the principle of legality was invoked. This marks another awkward departure from constitutional norms, as the principle of legality in the courts has historically been used to determine questions of statutory interpretation – “where background constitutional principles are strong, there is a presumption that Parliament intended to legislate in conformity with them and not undermine them.” (Miller No.1) In this case, the principle of legality was used in respect of the prerogative power of prorogation, and it was determined that if the effect of prorogation was to frustrate Parliamentary function, in terms of its sovereign law-making function as well as its ability to hold the government of the day to account, the prorogation would be unlawful, unless there was a good reason for this.

This form of reasoning departs from the traditional role of the courts, in extending the principle of legality towards determining the existence of prerogative powers. When combined with the aforementioned novel eagerness and capacity with which the courts

towards determining the existence of prerogative powers. When combined with the aforementioned novel eagerness and capacity with which the courts appear to display in policing the royal prerogative, this significantly increases the power of the courts to control the exercise of the prerogative power, by allowing them to use “background constitutional principles” as a yardstick from which to adjudge the existence of the prerogative power.

Once the authority to determine the existence of the prerogative as per Proclamations/Prohibitions as well as the principle of legality had been invoked, the court deployed a simple reasoning – Firstly, that the prorogation for an extended period of five weeks had effectively frustrated the ability of Parliament to exercise its power as sovereign law making body, and that the government's claims of preparing the Queen's speech was held to be incapable of justifying its actions in any capacity. Accordingly, the prerogative power to prorogue Parliament for said 5 week duration did not exist, and the prorogation never happened.

### **Parliamentary Privilege & Harry Potter:**

In defending the prorogation, the government sought to rely on the Bill of Rights 1689, pointing towards the process of prorogation as a proceeding in Parliament covered under Parliamentary Privilege, thus precluding judicial intervention. The courts rejected this reasoning, not by a rigorous reading of the Bill of Rights, or indeed determining whether the prorogation was in fact covered by Parliamentary Privilege as a proceeding in Parliament, but by applying the principle of legality – Parliamentary privilege exists to facilitate the







constitutional function of the Commons and the Lords, while prorogation effectively brought that function to a close. As such, the boundaries of Parliamentary Privilege were qualified.

Once again, the extension of the principle of legality beyond statutory interpretation is observed. It should be noted that this rejection of a side argument employed by the government appears to endorse the court's increasing role in investigating Parliamentary Privilege, one notable and entertaining instance involving Green J in *R(Justice for Health Ltd) v Secretary of State for Health* rejecting the proposition that an executive decision could be insulated from challenge merely because a Minister announced it in Parliament: there was no "Harry Potter Invisibility Cloak" (151-165).

### **Beyond Privilege or Prerogative: A New Constitutional Reality?**

The Supreme Court judgement in the Miller prorogation case has extended the court's review of the prerogative through creative judicial reasoning, in overcoming the issue of justiciability over the prerogative through framing it as a question of identification – well established within the court's jurisdiction. Further, the principle of legality, taking into account broader constitutional principles has been applied beyond statutory interpretation, towards the determination of the prerogative's existence, as well as Parliamentary Privilege.

While these developments could not have been

confidently predicted by constitutional lawyers, one will be less surprised upon considering the new constitutional reality which the courts have been forging slowly but surely. Parliamentary Privilege & the Royal Prerogative have been concerned in the Miller prorogation case, however we have seen even Parliamentary Sovereignty be called into question by the courts, with Lord Hope stating in *Jackson* that "The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based." While brevity prevents discussion of that case in this essay, it is submitted that the courts have taken on a new role of upholding the rule of law through application of the principle of legality, qualifying the executive's powers in the domain of Parliamentary Privilege, the Royal Prerogative and Parliamentary Sovereignty. Considering that the Miller prorogation judgement was a televised unanimous product of the maximum 11 justices, and that the leading judgement was given by the outgoing Baroness Hale to the incoming Lord Reed – the message is clear. This new and radical constitutional reality is here to stay.

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