Procedural Innovation and the Surreptitious Creation of Judicial Supremacy in the United Kingdom

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In *Re an Application by the Northern Ireland Human Rights Commission for Judicial Review*, the Supreme Court made unfavourable comments about Northern Irish abortion legislation in a way which showed complete disregard for elements of civil procedure which are a foundation of proper adjudication within the context of respect for democracy. This was but the latest of a number of cases in which the senior judiciary has made unaccountable procedural innovations furthering judicial supremacy in defiance of the

sovereignty of Parliament. In addition to *Re Northern Ireland Human Rights Commission*, two other of these cases, *Simmons* v. *Castle* and *R (Miller and another)* v. *The Secretary of State for Exiting the European Union*, will be discussed. These cases reveal an effort to create judicial supremacy by means which we are obliged to call surreptitious.

INTRODUCTION

The immediate importance of *Re an Application by the Northern Ireland Human Rights Commission for Judicial Review*[1] of course lies in its implications for the law of abortion in Northern Ireland, that law having been described in the Supreme Court (UKSC) as incompatible with the Human Rights Act 1998 (HRA). We have used the word 'described' because, for reasons which will emerge, this description was put forward as a result of a procedural innovation which was so extraordinary that it would make it quite wrong to say that the Northern Irish law was 'found' to be incompatible. *Re Northern Ireland Human Rights Commission* was the latest of a number of such innovations which, we submit, are the means by which judicial supremacy is now being surreptitiously created in the United Kingdom.

Though *Re Northern Ireland Human Rights Commission* is a paradigm case of a political character, analysis of it must begin by stating that much recent criticism of the United Kingdom judiciary for undermining the sovereignty of Parliament in order to take political decisions has been framed very poorly or even outright wrongly. The barrage of criticism which the House of Lords received for what turned out to be the protracted delay of the deportation of Abu Qatada failed to appreciate that, in the initial litigation at least, the Lords acted in a procedurally impeccable manner.[2] The primary legislation under which the deportation was to take place was declared incompatible (and secondary legislation struck down). But this was merely the exercise of powers granted to the senior courts by Parliament under s. 4 of the HRA and it cannot be procedurally criticised as an assertion of judicial supremacy, though it is open to a more sophisticated criticism that the UKSC failed to give nearly sufficient weight to the intention of

[1] [2018] UKSC 27; [2019] All E.R. 173.
[2] *A* v. *Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 A.C. 68.

Parliament expressed in the legislation found to be incompatible.[3] The principal significance of this is that s. 4's expansion of judicial competence benefits from input legitimacy;[4] it rests on an Act of Parliament, one that, of course, was the occasion of very extensive debate, and much of the failure adequately to respond to the consequences of s. 4, or even to repeal it, are also acts (including omissions) of Parliament.

The situation is significantly different regarding HRA s. 3.[5] The operation of s. 3 has been authoritatively described as allowing statutory interpretation to be turned into the 'remoulding' of statute in defiance of the intention of Parliament, a judicial power 'more extreme' than the strike down power under the United States Constitution,[6] even though the HRA was enacted on the basis that Parliament would remain sovereign. Section 3 has given rise to an already enormous and still growing element of confusion and opacity as it is continually denied that merits review is being conducted under its influence when indeed it is. These denials have been a long way away from the forthrightness of Lord Hoffmann's refusal to agree with the Government even that there was a state of emergency obtaining in the *Qatada* case, and so the

[3] D. Campbell, 'The Threat of Terror and the Plausibility of Positivism' [2009] *Public Law* 501. The simultaneously extremely expensive and ineffective changes to deportation law, procedure and practice which have followed from this decision exemplify what the authors believe is the futility, and worse, of attempting to create a 'dialogue' between the courts and Government (and Parliament): id., at 510-11 and D. Campbell, 'The Threat of Terrorism: David Campbell Responds to Clive Walker' [2010] *Public Law* 459.
[4] The argument can, indeed, cogently be made that Parliament's intention requires a greater use of s. 4: S. Wilson Stark, 'Facing Facts: Judicial Approaches to Section 4 of the Human Rights Act 1998' (2017) 133 *Law Q. Rev.* 631, at 633.
[5] J. Allan, 'Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky' in *The Legal Protection of Human Rights: Sceptical Essays*, eds. T. Campbell et al. (2011) 108.
[6] J.D. Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (2014) 130 *Law Q. Rev.* 392, at 402.

claim of input legitimacy for s. 3 is markedly less convincing than for s. 4. Nevertheless, both the passage of s. 3 and the failure to do much about it or to repeal it are decisions of Parliament.

However, a number of recent cases,[7] of which *R (Miller and another)* v. *The Secretary of State for Exiting the European Union* [8] is the most important and *Re Northern Ireland Human Rights Commission* is the most recent, have much advanced the creation of judicial supremacy in the United Kingdom in a way which enjoys no input legitimacy at all because these cases have done their work in an opaque manner, amounting to an abuse of civil procedure, which has not generally been understood because the vast preponderance of the United Kingdom electorate could not possibly have understood it. The modern history of the appellate courts of the United Kingdom shows those courts, though having something of a reputation for employing what Llewellyn called the 'formal style' of adjudication,[9] to be wholly capable of departing from that style and embarking upon judicial legislation. Nor has the manner in which this has been done always been confined merely to judicial activism in reasoning.[10] This is true even in relation to

[7] No attempt has been made to identify all of the relevant cases. We have picked the three which are the major staging posts in the process of procedural innovation we seek to describe. A fuller account would, for example, place *Re Northern Ireland Human Rights Commission* in the context of the unnecessary declaration of incompatibility in *R (Johnson) v Secretary of State for the Home Department* [2016] UKSC 56; [2017] A.C. 365. Such an account would also, of course, point out that the process has not been uniform: see, for example, the caution displayed in *R (Black) v Secretary of State for Justice* [2017] UKSC 81; [2018] A.C. 215.
[8] [2016] EWHC 2768 (Admin); [2017] 2 W.L.R. 583 and [2017] UKSC 5; [2017] 2 W.L.R. 621.
[9] K.N. Llewellyn, *The Common Law Tradition* (1960) p. 38.
[10] One of the current authors has sought to show that *Hedley Byrne and Co Ltd* v. *Heller and Partners Ltd* [1964] A.C. 465 (H.L.) was the result of judicial legislation which involved a sacrifice of respect for the facts of the case to what was dogmatically conceived to be a virtuous reform of the law: D. Campbell, ''The Curious Incident of the Dog that Did Bark in the Night-time: What Mischief Does *Hedley Byrne and Co Ltd v Heller and Partners* Correct?' in *The Law of Misstatements: 50 years on from Hedley Byrne v Heller*, eds. K. Barker et al. (2015) 111; D. Campbell, 'The Absence of Negligence in *Hedley Byrne v Heller*' (2016) 132 *Law Q. Rev.* 266 and D. Campbell, 'The Consequences of Defying the System of Natural Liberty: The Absurdity of the Misrepresentation Act 1967' in *Contract Law and the Legislature: Autonomy,*

the degree of activism which the current authors believe was an all but inevitable unwelcome consequence of the passage of the HRA.[11] But the cases discussed in this article are, it is submitted, of a different nature. They are wholly questionable, not merely because they have given effect to a wish of the senior judiciary to create judicial supremacy over matters which the United Kingdom constitution had until recently (as a great democratic achievement) generally sought to make the province of Parliament, but also because what has been done has been done in so deplorable a way that we most reluctantly are obliged to call it surreptitious.

SIMMONS V. *CASTLE*

Before turning to *Miller* and *Re Northern Ireland Human Rights Commission*, it is very instructive to consider an earlier case which is of an unusual sort to include in a discussion of constitutional law: *Simmons* v. *Castle*, a case on damages for personal injury handed down by the Court of Appeal in 2012.[12] One of the current authors has discussed this case at length elsewhere and here we will give only a very brief account of it, referring readers to that previous discussion for further detail and authority.[13] It is first necessary to inform readers of the background to the case.

Expectations, and the Making of the Legal Doctrine, eds. TT. Arvind and J. Steele (forthcoming 2020).

[11] An unacceptably excessive number of asylum and immigration cases have, in the authors' opinion, interpreted art. 8 so as to give tantamount to no weight to the public interest manifestly expressed in the relevant legislation: D. Campbell, '"Catgate" and the Challenge to Parliamentary Sovereignty in Immigration Law' [2015] *Public Law* 426. In one recent sentencing matter, the court simply refused to impose what it acknowledged was the statutorily required sentence on the basis of an art. 8 argument the court raised itself which gave no weight to the public interest: D. Campbell, 'Decency, Disobedience and Democracy in Immigration Law' [2018] *Public Law* 413.

[12] [2012] EWCA Civ 1039 and [2012] EWCA Civ 1288; [2013] 1 W.L.R. 1239.

[13] D. Campbell, 'The *Heil* v. *Rankin* Approach to Law-making: Who Needs a Legislature?' (2016) 46 *Common Law World Rev.* 340.

Fundamental reform of civil procedure at the turn of the twentieth century allowed civil litigation to be funded by variants of contingency fee previously unknown or prohibited in the United Kingdom. This led to an explosion in personal injury claims and litigation which even those in favour of the personal injury system and of this way of funding litigation, including the author of the reform himself, found to be of great concern. The conduct of the legal profession which lost, and still has not regained, a defensible balance between the pursuit of the public interest and pursuit of fee income drew particular criticism. A most authoritative review of the funding of civil litigation, which the Government had commissioned an eminent member of the senior judiciary to undertake, confirmed the undesirability of a situation which the legal profession's conduct had played a substantial part in creating, and made two recommendations to deal with that situation. These were: first, under what we will call a 'reducing' recommendation, that the fee arrangements which had been brought into disrepute be abolished or radically modified; but secondly, under what we will call an 'increasing' recommendation, that the damages for personal injury be increased so as to ensure that the funding for litigation was not overall reduced. Though this increase could therefore be described, and was described in *Simmons* v. *Castle*, as an increase in compensation of the claimant, there can be no doubt that its purpose was to maintain the level of funding of personal injury litigation. This is to say, the bulk of the increase was intended to end up in the hands of the legal profession, the same lawyers who had brought about the state of affairs necessitating the review of civil litigation in the first place.

It is our opinion that whilst there was public support for the reducing recommendation, there would have been no such support for the increasing recommendation designed to give back to the legal profession what the reducing recommendation had taken away. It was always intended, and ultimately became the case, that the reducing recommendation would be brought

about by an Act of primary legislation. By contrast, the increasing recommendation would have been seriously in jeopardy were it to have had to encounter the hazards of Parliamentary debate, which it did not since it was brought about in a way which allowed these hazards to be circumvented.

In *Simmons* v. *Castle*, Court of Appeal approval of a personal injury damages settlement of a sort which would normally be dealt with by a single Lord Justice of Appeal on papers alone was used as the occasion to uplift the relevant damages in every case across England and Wales. It is not really possible to regard this case as civil litigation at all. The case was in a most important sense not even actually heard because the interests of the nominal parties played no role in it and there was no argument whatsoever before the court. A most impressive bench, comprised of the Lord Chief Justice, the Master of the Rolls and a particularly distinguished Lord Justice of Appeal, was nevertheless assembled, not so much to hear this case, but to use the pretext of doing so to engage in an act of judicial legislation by passing the increasing recommendation. The court prescribed a 10 per cent uplift in damages for non-pecuniary loss. In effect, this amounted to convening a legislative panel for the purpose of passing a change to personal injury law, and therefore also to insurance law, which was of greater consequence than most primary legislation. One is simply at a loss to explain on normal constitutional understandings how this legitimately could have happened.

It is not that *Simmons* v. *Castle* was entirely without precedent, if this is the right word. In 2001 in *Heil* v. *Rankin*,[14] the Court of Appeal had prescribed an earlier uplift for damages for non-pecuniary loss. As the interests of the nominal parties did not feature in it, *Heil* v. *Rankin*, like *Simmons* v. *Castle*, was a masquerade of a judgment proper, although it had a number of

[14] [2001] Q.B. 272 (C.A.).

detailed procedural differences from *Simmons* v. *Castle*, most notably a large number of intervening parties engaged in what was in reality a policy argument about levels of damages. Perhaps the major driver of *Heil* v. *Rankin* was Professor Andrew Burrows who, as common law Law Commissioner between 1994-1999, had overseen the production of a series of *Reports* on damages which recommended something like the step taken in *Heil* v. *Rankin*. The Commission explicitly considered using the courts (in the circumstances this meant the Court of Appeal) to uplift damages because it seemed unlikely such a measure could be taken through Parliament. Hence the Commission decided not to try to overcome the obstacles this Parliamentary route would have presented but instead arranged for the bringing of *Heil* v. *Rankin* – which it did with great success by means Burrows afterwards characterised as 'a close working relationship between the Law Commission and the judiciary'.[15]

Looking back on *Heil* v. *Rankin* some years later, Professor Burrows made what he believed was its justification extraordinarily clear:

> Perhaps oddly for a former Law Commissioner, I have never been a great fan of legislative reform of the non-criminal common law. Indeed, my years at the Law Commission merely served to reinforce my legislative scepticism … the vagaries of the legislative process mean that whether time is found for legislation depends almost entirely on whether one can fit one's law reform within the political imperatives of the day and has little, or no, relationship to the quality of, or necessity for, the reform proposed … At root my approach may rest on a belief that our judges are to be trusted on developments in the common law in a way that our politicians should not be.
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> This legislative scepticism means that, for example, I think judges should be very wary of leaving possible reform of the common law to the legislature. [I am very critical of] arguments that, because the legislature has not enacted some reform, it is the intention of Parliament that there should be no reform of [the relevant common law]. The truth is that there is a myriad of reasons why Parliament may not have legislated on a matter and it is incorrect to regard [this] as necessarily reflecting a considered choice.
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> The upshot of this is that, while we at the Law Commission did not achieve fully what we had hoped in terms of the precise level of increase, the decision in *Heil* v. *Rankin*

[15] A. Burrows, 'Alternatives to Legislation: Restatements and Judicial Law Reform' in *English and European Perspectives on Contract and Commercial Law*, eds. L. Gullifer and S. Vogenauer (2015) p. 47.

> was a triumph in terms of the methodology of law reform. It showed what could be achieved by a close working relationship between the Law Commission and the judiciary. I am convinced that, had we waited for legislation, we would still be waiting … if like me, you trust judges and have some scepticism about legislation in relation to English private law, there are alternatives … reform of the common law can be achieved by the judges, even in areas where it might at first sight seem that legislation is the only way forward.[16]

Were we to seek to criticise what was done in (*Heil* v. *Rankin* and) *Simmons* v. *Castle* – and we mean criticise in terms of the constitutional propriety of *how* it was done, saying nothing about the substance of the matter – then we would say only exactly what Professor Burrows has said, but append the question 'who needs a legislature'?

Miller

Of course it is not publicly known – one supposes, despite Professor Burrows' frank comments, that it will never be adequately known by the public – just how the arrangements made for *Heil* v. *Rankin* and *Simmons* v. *Castle* were arrived at. What is certain is that the then Master of the Rolls, Lord Neuberger, not only sat on the bench in *Simmons* v. *Castle* but also will have been involved in making those arrangements in his capacity as the Head of the Civil Division. Lord Neuberger provides a link to the second case it is necessary to consider, *Miller*, for when *Miller* came before the courts, Lord Neuberger was, of course, President of the UKSC. The current authors have considered the constitutional implications of this case elsewhere,[17] one of them

[16] id., pp. 43, 47, 50.
[17] J. Allan, 'Democracy, Liberalism and Brexit' (2018) 39 *Cardozo Law Rev.* 879 and D. Campbell, '*Marbury* v. *Madison* in the UK: Brexit and the Creation of Judicial Supremacy' (2018) 39 *Cardozo Law Rev.* 921. M. Elliot et al. (eds.) *The UK Constitution After Miller* (2018) appeared after these articles were published and, though it would be desirable to do so, need not be considered here. In the authors' opinion, none of the contributions to this collection, not even that of Sir John Laws, requires basic changes to the views expressed here, in the articles just mentioned, and in D. Campbell and J. Young, 'The Metric Martyrs and the Entrenchment Jurisprudence of Lord Justice Laws' [2002] *Public Law* 399.

focusing upon the procedural aspects of *Miller*,[18] to which we now turn in more detail. The discussion of the case will again be kept as brief as possible, and for a fuller account supported by reference to authority readers are again referred to that procedural article.

Miller could not have been heard in a more politically contested atmosphere. This led to most unfortunate claims about the influence of the personal views of those deciding the case *vis-à-vis* the desirability of membership of the European Union, and we wish to dissociate ourselves from such claims. *Miller's* principal constitutional significance lay, not in its implications for membership of the European Union, but in its judicial confirmation that the United Kingdom constitution recognised the existence of constitutional statutes. Such higher status statutes are diametrically opposed to the very basis of Diceyan Parliamentary sovereignty and were formerly entirely unknown to the positive law of England and Wales. They were first recognised (we would say invented) in the 2002 decision of the Divisional Court in *Thoburn* v. *Sunderland City Council*,[19] the significance of which was that it elevated The European Communities Act 1972 to the status of a constitutional statute; which status it certainly has if there are such things as constitutional statutes at all. Though *Thoburn* had previously been approved by the UKSC, and a preliminary list of constitutional statutes including the 1972 Act had been put forward,[20] *Miller* absolutely turned on affirming that the 1972 Act had constitutional status; and since it has that status, then a list of such statutes, though its precise membership may be disputed, must follow. As constitutional statutes are to some degree entrenched, their recognition incontrovertibly increases the power of the judiciary because what must effectively be a constitutional court is

[18] Campbell, id.
[19] [2002] EWHC 195 (Admin); [2003] Q.B. 151 (D.C.).
[20] *R (Buckinghamshire County Council and others)* v. *Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324.

necessary to decide on the relationship of constitutional statutes to ordinary law, as is precisely what happened regarding the 1972 Act in *Miller*. Of course, as things stand at present the status of these judicially denominated constitutional statutes shields them only from implied repeal. Yet even that alone replaces Diceyan sovereignty with a form of judicial supremacy administered by a constitutional court. But it would only be in line with the growth of judicial power since the passage of the HRA, and we submit it is to be expected, for this to lead to the judicial development of further protection for constitutional statutes, ultimately to the point of protection against incompatible primary Acts of legislation. This would create what might be called full judicial supremacy.[21]

Now there are, of course, strong and well-known arguments for entrenchment and, indeed for judicial supremacy and a concomitant constitutional court. But if such a major constitutional change were to be brought about in the United Kingdom, surely its legitimacy would depend on this being done in a democratically acceptable and transparent way, and we shall return to this. At this point in our argument we wish to show only that 'open and transparent' is the last description that should be given to the transformation now taking place in the United Kingdom. The public does not remotely grasp the significance of these judicially created constitutional statutes, and this is inextricably linked to the procedural steps taken to make *Miller* possible, which could not possibly be understood by the public.[22]

[21] The reader is reminded that it is our view that the remoulding of statute under HRA s. 3 conveys a greater power to the courts than the strike down power under the United States Constitution. It is also the case that, whereas the result of *Miller* was that the Supreme Court told Government, and therefore Parliament, that what became The European Union (Notification of Withdrawal Act) 2017 had to be passed, the United States Supreme Court has never contemplated telling the Executive and the Congress what legislation they had to pass.

[22] This is rather poignantly expressed in a 'self-help' book Mrs Miller published which, amongst other things, looks back on her litigation and shows a complete failure to understand it: G.

The basic structure of the senior domestic courts of England and Wales, and thus for our purposes the United Kingdom, remains as it was established by the immense reform of the fusion of the common law and equity jurisdictions under the nineteenth century Judicature Acts, with the creation of the UKSC in 2009 not changing this in a way of relevance to us. That basic structure encompasses three levels of court. The High Court, which also is a court of appeal from inferior courts and tribunals, is the court of first instance for more 'complex and difficult' matters. From the High Court there is appeal to the Court of Appeal, from which there is final domestic appeal to the UKSC. The general jurisdiction of the High Court has three Divisions: the Chancery Division, the Queen's Bench Division and the Family Division. There are specialist courts within these Divisions, and the Administrative Court, which hears most judicial review applications, is a specialist court of the Queen's Bench Division.

Now, the first instance hearing of *Miller* did indeed take place in the London seat of the Administrative Court in the Royal Courts of Justice, and the official transcript of this judgment does indeed tell us that it was a matter 'In the High Court of Justice, Queen's Bench Division'. It bears the Neutral Citation Number [2016] EWHC 2768 (Admin) and almost all the public debate about *Miller* has been based on the belief that it began as a 'High Court' case. This belief is mistaken in a very important way.

The High Court judiciary is mainly composed of up to eighty *puisne* Justices of the High Court, plus some Deputy High Court judges who sit in inferior courts as well as in the High Court whilst in the process of being elevated to the High Court. In normal High Court proceedings, one of these judges sits alone. These judges are highly distinguished, almost always

Miller, *Rise* (2018). See D. Campbell, 'Review', *Critical Inquiry,* 24 April 2019, https://criticalinquiry.uchicago.edu/david_campbell_reviews_rise/.

having had considerable experience of judging in the inferior courts and tribunals from which they are recruited, as well, of course, as having experience of highly successful legal practice – academic entry to the senior judiciary being vestigial. A few senior judges are also members of the High Court, the most important of whom is the Lord Chief Justice, the Head of the Judiciary of England and Wales. The Lord Chief Justice's duties are predominantly administrative, and (putting to one side the exceptional occasions when he[23] has sat as an 'acting' judge of the UKSC) his own duties as a judge sitting in the Court of Appeal or the High Court are of course focused upon matters of particular gravity. He therefore predominantly sits in the Court of Appeal and his normal role in the High Court is as a member of the Divisional Court, which will be described below. We are aware of only three reported cases in which the Lord Chief Justice sat as sole judge in the High Court,[24] all of which were cases of exceptional public importance.

When certain matters which are required to be heard by the High Court but are of a particular complexity or gravity, the bench may be of two or more judges, and this specially constituted bench is called a Divisional Court. A three member bench is, however, rare and a Divisional Court is usually composed of a High Court judge and a more senior judge drawn from the Court of Appeal. *Thoburn* was a paradigm instance of the Administrative Court sitting as a Divisional Court, being a judicial review matter in which Crane J., a High Court judge, simply agreed with the senior Laws L.J., who was no doubt asked to sit because of his particular interest in constitutional matters.

[23] There has never been a female Lord Chief Justice.
[24] *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd* [1952] 2 Q.B. 795 (Q.B.D.) (Lord Goddard C.J.); *Smith* v. *Leech Brain and Co. Ltd* [1962] 2 Q.B. 405 (Q.B.D.) (Lord Parker C.J.); *Attorney General* v. *Jonathan Cape Ltd* [1976] Q.B. 752 (Q.B.D.) (Lord Widgery C.J.).

The official transcript of the first instance judgment in *Miller* tells us that the court was a Divisional Court, and more legally sophisticated comment has referred to the case, not as a matter before the High Court, but as a matter before the Divisional Court. The bench that heard *Miller* at first instance was, however, composed of Lord Thomas of Cwmgeidd C.J., then Lord Chief Justice, Sir Terence Etherington M.R., the Master of the Rolls, and Sir Philip Sales L.J., then a Lord Justice of Appeal. In other words, no *puisne* justice of the High Court was involved. Hence, not only is it misleading to describe this as a 'High Court bench', but we are unaware of any previous Divisional Court ever having been composed in this way.[25] In truth, this was a first instance hearing by the Court of Appeal, and indeed by a bench of that court which was as distinguished as one can really conceive, not only because of the eminence of the Lord Chief Justice and the Master of the Rolls, but because Sales L.J., whose previous career included distinguished service as the senior legal representative of the Crown, was particularly qualified to hear the case. We believe this way of handling an application for judicial review, indeed of any civil matter, is unique in post-war English legal history, differences with earlier legal procedure making any wider ranging claim unhelpful.

Any decision of this court would be bound to be regarded as extremely authoritative, but the power of this decision was increased by it being, still uncommonly, handed down as a single judgment. Nevertheless, from the outset there was never any doubt on the part of any legally informed commentator that that judgment, whatever it was, would be appealed to the UKSC. The reader will immediately see that the normal three level court system was thereby reduced to two

[25] One of the earlier attempts to review issues arising from membership of what is now the European Union was heard by an extremely distinguished Divisional Court composed of, in addition to a High Court Judge, two Lords Justice of Appeal: *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex p Rees-Mogg* [1994] Q.B. 552 (D.C.).

levels (or even, in reality, one level). In the very first Practice Direction it issued, the UKSC retained the longstanding practice of 'exceptionally' allowing 'leapfrog' appeals in civil matters from the High Court direct to itself, the statutory power enabling this specifying that the appeal may be from either 'proceedings before a single judge of the High Court … or … a Divisional Court'. The nature of the bench which heard *Miller* at first instance surely strains this conception of a leapfrog appeal. The leapfrog is, of course, intended to be over the Court of Appeal, as is emphasised by a later practice direction stipulating that when leave to make such an appeal is sought because 'the proceedings entail a decision relating to a matter of national importance or consideration of such a matter', then leave should be granted 'only … where … it does not appear likely that any additional assistance could be derived from a judgment of the Court of Appeal'. This would not, of course, be likely in *Miller*, as the first instance court effectively was, as we have said, a Court of Appeal bench, and one as distinguished as one could conceive. Any other Court of Appeal would be of less standing, making it in fact impossible for the Court of Appeal as such to hear a *Miller* appeal.

There were further extraordinary procedural features about *Miller* when it reached the UKSC. The UKSC is currently composed of eleven Justices, though it may have as many as twelve. Of course, the UKSC normally sits as a bench of five, though seven is by no means unknown. *Miller* was heard by all eleven Justices. This was the sole occasion so far on which the Court has sat *en banc*, and in addition was also the largest bench ever assembled in modern times to be the United Kingdom's domestic court of final appeal. The then recently entirely refurbished premises of the UKSC struggled to accommodate, not just the public, but also those participating in the hearing. The latter group included (leaving aside those concerned with a specifically Northern Irish issue) the Appellant, two Respondents, one interested party and five interveners,

all of whom had the benefit of over fifty legal representatives, including twenty two Q.C.s! Over 20,000 pages of documents supported the arguments of this multitude, with additional academic arguments also playing a part. What is more, the physical bench itself had to be extended so as to allow all the Justices themselves just to have a comfortable seat! The proceedings were in various ways televised with an extent of coverage that was unprecedented, though it should be said that television broadcasting has become a quite common feature of UKSC proceedings. As emerges even more clearly from the written arguments of the parties and from the full transcript of the hearing which have been made publicly available than from the judgment itself, this multitude did not really hear an appeal so much as just go through the entire matter again *ab initio*.

These absolutely unprecedented court arrangements are the spectacles which constitute an attempt by the senior judiciary to create a United Kingdom constitutional court.[26] Now, it may be said that the magnificence of the arrangements made for hearing *Miller* were entirely appropriate to a constitutional court. But who decided there should be a constitutional court? The arrangements for the conduct of the business of the senior courts are rightly left very flexible in the hands of the senior judiciary. But this flexibility imposes a serious duty – we submit it amounts to a constitutional convention – on the senior judiciary to manage the business of the courts in the public interest. Yet by arranging the hearings of *Miller* in such a way as to create the trappings and appearance of a constitutional court, without any public discussion whatsoever

[26] Because its proper treatment would require treatment at a length which cannot be accommodated, because as a statutory measure it does not fall within an article on judicial procedure, and because, as this was drafted it was impossible to say what the fate of this legislation would be, we will not comment on the way the HRA is accorded the status of a constitutional statute in the European Union (Withdrawal Act) 2018, s. 9(3)(e), though this legislative entrenchment of the HRA obviously would constitute an even greater, indeed a qualitatively different, step in the process of creating judicial supremacy.

of whether a constitutional court should be created in the United Kingdom, the senior judiciary momentously failed in the performance of that duty. The public ignorance of what has been done is nowhere better evidenced than in the way that the first hearing of *Miller* continues to be understood to have been a hearing in the High Court when it really was nothing of the sort.

Some inkling that a sort of constitutional court has been created has, of course, begun to dawn amongst our political leaders, and one interesting example of this coincidentally occurred on the day the United Kingdom gave notice of its then intention to leave the European Union, 29 March 2017. The readers of this journal will be aware that the House of Lords Select Committee on the Constitution has annual discussions, called 'evidence sessions', with the Cabinet Ministers of Government responsible for the legal system and with the senior judiciary. During the 29 March session, one of the members of the Committee, Lord Morgan, fulsomely congratulated Lord Neuberger, then President of the UKSC, and Lady Hale, then Deputy President, on having in *Miller* 'effectively' created a 'constitutional court', an arrangement which Lord Morgan proposed might be put on a 'more formal' basis. Addressing the then President, he asked:

> We had a series of very significant statements by the Supreme Court about the question of legal certainty in the case of Mrs. Miller, in which my colleague Lord Pannick was involved, which in a way was fortuitous. Mrs. Miller was a lone protester who won her point in the courts. It is fortunate that this was done, because we benefited from it hugely, and I hope the Government benefited from the wisdom of the Supreme Court. Would you think there was any merit in having a more formal arrangement on that? In effect, the Supreme Court, by pronouncing the eternal verities on the sovereignty of Parliament, acted as a constitutional court, as they have in France and other countries. Would you feel that a more formal structural relationship for that could be created?[27]

[27] H.L. Select Committee on the Constitution, *Corrected Oral Evidence with the President and Deputy President of the Supreme Court* (20 April 2017) Q3 at https://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/publications/?session=28&sort=true

Kenneth Morgan is a retired academic historian of distinction who has held important administrative posts in British higher education, including the Vice-chancellorship of the University of Aberystwyth. He was elevated to the Labour benches of the House of Lords by Mr. Blair in 2000, shortly after Mr. Blair's Government had passed its reform of that House. Lord Morgan's views may be regarded as representative of informed and influential left-liberal, lay opinion on constitutional matters. We fear, nevertheless, that the naïve Lord Morgan's intendedly helpful question was something of a *faux pas*. The creation, not to mention the formal creation, of a constitutional court was a matter not publicly to be discussed by the true cognoscenti. The then President's reply, far from seizing the opportunity the question obviously offered, was most equivocal, eschewing anything concrete about what should be done in the United Kingdom and instead vaguely reviewing the various constitutional systems of the world. Neither did the then Deputy President comment on the point. Lord Pannick, to whom Lord Morgan refers, a person who has been central to the developments discussed here, not least in his capacity as Mrs Miller's counsel, who was present as a member of the Committee, also did not take up this opportunity.

RE NORTHERN IRELAND HUMAN RIGHTS COMMISSION

There is a very strong case that Lord Neuberger, who must look upon what was done in *Simmons* v. *Castle* whilst he was Master of the Rolls as a very ordinary procedural achievement compared to what was done in *Miller* whilst he was President of the UKSC, should now be regarded as the United Kingdom's John Marshall, with *Miller* his *Marbury* v. *Madison*.[28] And this *Marbury* has

[28] 5 U.S. 137 (1803).

not had to wait half a century for its *Dredd Scott*.[29] Very shortly after Lord Neuberger's retirement, the UKSC handed down another case in which procedural innovation signally advanced the creation of a supreme judicial power. In *Re Northern Ireland Human Rights Commission*, not only were there no parties whose particular interests were being adjudicated upon, but having itself decided that for this reason it could not hear the matter, the UKSC nevertheless went on to describe the legislation at issue in the case as incompatible. In the most sweeping way imaginable, a general power of human rights review unlimited by the most rudimentary requirement of standing was thereby created. In *Re Northern Ireland Human Rights Commission*, the UKSC abandoned the tedious necessity of adjudication completely, at least the pretence of which had been, however implausibly, maintained even in *Simmons* v. *Castle*, in order to pass a judicial verdict of sorts on a statute which did not find favour.

By way of background, the Good Friday Agreement required that a Northern Irish Human Rights Commission should be created as an 'independent' agency charged with promoting and monitoring respect for human rights. This was done under the Northern Ireland Act 1998 s. 68. The Commission's main function is to advise Government on desirable changes to legislation, but it may also, under s. 69 of the 1998 Act, bring court proceedings or assist individuals doing so in human rights matters. In 2015, the Commission was granted judicial review of the legislation specific to Northern Ireland under which abortion is available on a more restricted basis than in the rest of the United Kingdom. Crucially, and although the Commission naturally referred to actual abortion experiences in its argument, it brought this case as a wholly abstract matter. No interests of any specific litigant were involved. What the Commission sought was 'general relief, unrelated to any

[29] *Dredd Scott* v. *Sandford* 60 U.S. 393 (1857). On its facts, *Re Northern Ireland Human Rights Commission* obviously first calls *Roe v Wade* 410 U.S. 113 (1973) to mind.

particular sets of facts';[30] in other words an abstract declaration that the Northern Irish legislation was incompatible with various sections of the HRA.

Though the Commission undoubtedly has the power to bring proceedings, whether it has the power to bring a case in this abstract way is a different issue. It is in the first instance a matter of statutory interpretation of the powers the Commission was given. In the course of discussion of this specific question, the UKSC made comments of a more general nature on the possible review of HRA compatibility in Northern Ireland and in the United Kingdom as a whole. A majority of the expanded, seven member UKSC, composed of Lord Mance, Lord Reed, Lady Black and Lord Lloyd Jones, found that the Commission did not have the necessary powers. The specific and general points made are, of course, in themselves of great importance as they bear on how litigants might in future bring human rights arguments.[31] For reasons of space we can, however, ignore them here as their significance for the concept of standing and its implications for human rights review, indeed for the very concept of adjudication in human rights cases,[32] was eclipsed by what a 'shadow' majority, if it can be put this way, went on to do.

The minority which had decided that the Commission had standing, Lady Hale, Lord Kerr and Lord Wilson, were joined by Lord Mance and in part by Lady Black in describing the Northern Ireland legislation as incompatible with art. 8, while Lord Kerr and Lord Wilson further described it as incompatible with art. 3. One cannot really say that they *found* the legislation to be incompatible because their descriptions were categorically and deliberately *obiter*. Put as bluntly as the matter requires, a shadow majority of the UKSC described legislation as incompatible when it was not merely questionable whether the party bringing the action had standing to do so, but after the UKSC itself had already found the party did not have standing. This, of course, should have ended the

[30] *Re Northern Ireland Human Rights Commission* [2018] UKSC 27; [2019] All E.R. 173 at [43].
[31] id., at [18].
[32] See n. 38 below.

matter.[33] It did not. The substance of the description of incompatibility is irrelevant to the procedural issues arising from this deliberate production of *obiter* conclusions which undermine the actual finding in the case, which opens up the question whether parties can review any such legislation as they think fit and on such abstract human rights grounds as they choose. This is a radical expansion of HRA s. 4 which it was, with respect, completely wrong of Lady Hale to conflate with what previously had been understood of declarations of incompatibility.[34] The direction of travel that has been taken is indicated in a representative lay comment in an article in *The Times* that in *Re Northern Ireland Human Rights Commission* the UKSC 'had found that Northern Ireland's [abortion law] was incompatible with human rights law but rejected a legal challenge against it on a technicality'.[35] The readers of this journal may be forgiven a smile at the legal crudeness of this claim, but surely it is the case that the UKSC has reduced the basis of legitimate adjudicative interpretation of statute to a technicality; or indeed to nothing. This potentially huge expansion of human rights review greatly increases judicial power, and it is surely highly objectionable that it has been brought about by the judges themselves in a way which – it having been found that the Commission had not been granted the necessary powers – enjoys no democratic legitimacy whatsoever.

Though it is perfectly clear what will happen in respect of the Northern Irish legislation,[36] it is completely unclear how the new power will generally be exercised. *Re Northern Ireland Human Rights Commission* makes it necessary to belabour the obvious and state that the whole justification of judicial interpretation of legislation is that, whilst legislators have the democratic legitimacy initially to pass general legislation, it is necessary for the courts to hone the meaning of that

[33] id., at [334], [365].
[34] id., at [40]. Lady Hale believed that the UKSC left Parliament with three alternatives: id., at [39].
[35] M. Moore, 'Radio 4's News Quiz is Censured for Anti-Tory Bias' *The Times*, 1 November 2018, 11.
[36] We have left this as it was drafted, prior to the developments described in the text associated with n. 39 below.

legislation when it is applied to concrete sets of facts which it is impossible that legislators could completely anticipate. The job of judges is to determine the meaning in specific circumstances of the general legislation that was passed by the legislature. It is true that judges, like a referee in a sporting competition, have the final authoritative say in the application of the rules. But as Hart famously made clear, 'the scoring *rule* remains what it was and it is the scorer's duty to apply it as best he can'.[37] The scoring rule, in other words, is not whatever the referee says it is. The power of review that is developed in *Re Northern Ireland Human Rights Commission* has indefinite and potentially infinite scope because it departs from the previously understood basic sense of the adjudicative interpretation of legislation which tied it to concrete sets of facts.

One cannot speak of a *ratio* or precedent with regard to the description of incompatibility, but what of the example that proceeding in this way has provided for future human rights challenges to potentially all legislation? [38] There is no point speaking of possible legal limits because the example set by *Re Northern Ireland Human Rights Commission* is to ignore legal limits even when acknowledged. We are in absolutely uncharted procedural waters in which the very distinction between Parliamentary legislation and adjudication has been broken down, for what does the Assent mean if it can immediately be challenged? It is submitted that it is impossible for any court to develop a coherent and consistent policy towards review on this potentially infinite basis, and towards the reviews which will inevitably now be brought. Such reviews will be brought in an *ad hoc* basis that will inevitably be unacceptably shaped by applicants' political and financial resources.

[37] H.L.A. Hart, *The Concept of Law* (2012, 3rd edn.) p. 142.
[38] Though we shall not discuss it further here, whilst it very well may have been the intention of the judicial creators of this new situation that applications will be confined to challenges based on the Convention grounds, it is not the case that there is anything in *Re Northern Ireland Human Rights Commission* to give effect even to that limitation.

The first indication of the future will,[39] as a practical matter, emerge in respect of the Northern Irish abortion law itself. Lady Hale was surely right to argue that the issue of standing to challenge that law was an 'arid question'.[40] *Re Northern Ireland Human Rights Commission* obviously left it open to the Commission (and to any other body that roused itself to action) to find a party concerned in the way required and in one way or another to bring the case under the standing of that party.[41] What is more, the Commission (and conceivably any other party) will be very much encouraged to take the effort to locate such a party because the matter has now already been argued in a way which will be highly instructive to anyone wanting to argue for incompatibility. After all, those judges who reached the conclusion the legislation was incompatible have already laid out the necessary

[39] See n. 36 above.

[40] *Re Northern Ireland Human Rights Commission* [2018] UKSC 27; [2019] All E.R. 173 at [11]. Lady Hale strangely spoke in the past tense, of what the Commission might have done to 'have found women' themselves with standing, leaving one wondering why the Commission had not proceeded in this way.

[41] After this was drafted, a successful attempt to do exactly this was made. Ms Sarah Ewart, who, with the support of Amnesty International, was an important force behind bringing *Re Northern Ireland Human Rights Commission* and was an intervener in the case, was on 24 October 2018 given leave to seek judicial review in her own capacity: *Ewart, Re Judicial Review* [2018] NIQB 85 (available on BAILLI).

Whilst it is not central to the argument of this article, it is significant that the ground on which Ms Ewart was given leave was, in the opinion of the current authors, who have considered their language very carefully, preposterous, though it was not challenged by the Northern Irish Departments of Justice and Health (id., at [10]) and in the court's view 'It is clear (and indeed uncontentious) that … leave … is appropriate' (id., at [6]). In 2013, Ms Ewart conceived a child who was diagnosed at 12 weeks with a grave foetal abnormality which condemned her or him to being stillborn or to a very early death. Deciding to terminate her pregnancy, Ms Ewart had to go to England to do so. She has since had a successful pregnancy and intends to have more children, though she is not now pregnant, and is undergoing treatment to minimise the risk of a repetition of her loss. The ground on which she sought to challenge the Northern Ireland legislation was that 'if I become pregnant there is an increased risk that I will be in an identical position that I faced in 2013': id., at [3].

As it effects the argument of this article, comment on this submission is perhaps supererogatory as, on the facts as reported in the press, the necessity of circumlocution does not seem to have been entirely grasped by those framing Ms Ewart's case. A person working for Amnesty said of the leave application that 'Sarah is taking this case not just for herself, but for all the women in these circumstances': A. Erwin and D. Young, 'Woman Cleared to Challenge North's Termination Ban', *The Times*, 25 October 2018, 8.

arguments, and even those who did not do so were not entirely able to avoid being drawn into the substantive argument. Lady Black, for example, has to be counted amongst the shadow majority that put forward the description of incompatibility because she felt she 'should express [her] view as to the substance of the Commission's appeal, as other members of the court have done'.[42]

In making these comments we hope we should not be thought unmindful of the role of precedent, or of the possibility of finding instruction in reported arguments, or even of not recognising that the formal and informal correction of mistakes in the procedural or even substantial pleading of a case before a court is common in inferior courts and tribunals and is not unknown in senior, and even the appeal,[43] courts.[44] This is wholly different from telling those who might wish to litigate a matter which has never been properly brought before the court what they would be wise to plead should they bring such a matter in future. Readers will find it hard to accept but it is the case that the UKSC has told parties *in advance* what is very likely to be the result of future litigation of matters never properly brought before the court! Having found that a claimant had no standing to seek a ruling about the compatibility of particular legislation, the UKSC nevertheless went on to identify the arguments by which it might in future be established that the very same legislation

[42] *Re Northern Ireland Human Rights Commission* [2018] UKSC 27; [2019] All E.R. 173 at [366]. Even Lord Reed, with whom Lord Lloyd-Jones agreed, felt obliged to offer a substantive opinion that the legislation was not incompatible, although he was sure it was inappropriate to offer any such opinion: id., at [335].

[43] A remarkable example, which can, it is submitted, be coherently distinguished from *Re Northern Ireland Human Rights Commission*, is *R. (on the application of Buckinghamshire C.C. and others)* v. *Secretary of State for Transport* [2014] UKSC 3; [2014] 1 W.L.R. 324 at [93]-[97]. It is, however, conceivable that some their Justices who agreed with Lord Reid's judgment did not see it this way.

[44] The applicant's identification of respondents in *Ewart, Re Judicial Review* [2018] NIQB 85 was based on a 'scattergun tactic' (id. at [5]), and her application was able to be 'clearly and coherently formulated' only by a 'quite disproportionate investment of judicial resource' (id., at [91]). This case was, to remind readers, brought by an applicant assisted by arguably the world's most prominent legal charity concerning a matter which had already substantially been heard by the UKSC! It is important to ask what, as a practical matter, are now the effective controls over such decisions about considerable public expenditure.

was incompatible! This is nothing more nor less than telling potential parties how a case they may bring in future regarding that legislation will be decided. It will encourage those who have been told they will win (unsurprisingly) to bring such a case. This is not adjudication as adjudication has previously been understood in the constitutional theory and practice of the United Kingdom, nor in the common law generally. It is adjudication in advance; that is, it is not adjudication at all.

We wish to emphasise that our comments do not pertain to the substance of the abortion legislation. Nor are they focused on the desirability or otherwise of the courts actively seeking to involve themselves in undeniably 'political' cases – though we would not wish to dissimulate over our intense opposition to the latter. Fundamentally we have nothing to add to what Lord Reed (with whom Lord Lloyd-Jones agreed) himself said of the 'legalisation of political issues' in *Miller*[45] and in *Re Northern Ireland Human Rights Commission*.[46] Our focus here is not on the unsatisfactory nature of what was done but rather on the far more unsatisfactory nature of how it was done. This raises different issues to which we now return by way of conclusion.

CONCLUSION

That influential currents of legal opinion are currently seeking to establish judicial supremacy in the United Kingdom is not a point which can be disputed. No doubt this is in part because, as we

[45] *Miller* [2017] UKSC 5; [2017] 2 W.L.R. 621 at [240]: '[i]t is important for courts to understand that the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary'.
[46] *Re Northern Ireland Human Rights Commission* [2018] UKSC 27; [2019] All E.R. 173 at [362]: 'These are highly sensitive and contentious questions of moral judgement, on which views will vary from person to person, and from judge to judge [and so] are pre-eminently matters to be settled by democratically elected and accountable institutions'.

have acknowledged, important arguments for it can be, and over the years have been, made.[47] The current authors make no pretence to disinterest, and wish to be frank about their opposition to judicial supremacy as an extremely undesirable alternative to sovereignty of Parliament (and to other forms of electoral sovereignty appropriate to other jurisdictions).[48] Our position with regard to the specific argument of this article is, however, that stated by Goldsworthy in his magisterial book. In the United Kingdom:

> Judicial review of the validity of legislation would require a fundamental constitutional change … which should be brought about by consensus, rather than judicial fiat. That is surely a requirement of democracy itself.[49]

We believe this article describes the attempt surreptitiously to exercise such a judicial fiat.

We have approached the question of the extension of judicial power from an unusual direction. We have focused on the way that three recent cases show the United Kingdom's senior judiciary to be intent on increasing its own supreme power at the expense of that of the elected Parliament. All three cases have advanced this power in a procedurally opaque manner which has not been understood by the United Kingdom electorate for the very good reason that it could not possibly be understood by it. Indeed, we very regrettably are obliged to submit that all three cases must be described as surreptitious abuses of judicial control over civil procedure as part of an attempt to advance judicial supremacy.

[47] On the economic and social context of the legal and political movement away from the Diceyan constitution see D. Campbell, 'Gathering the Water: Abuse of Rights after the Recognition of Government Failure' (2010) 7 *J. Jurisprudence* 487, at 507-34 and D. Campbell, 'Dicey in the Age of Globalisation' (2011) 17 *European Public Law* 571-98

[48] See, for example, J. Allan, 'Do Judges Know Best?' (2017) 32 *Constitutional Commentary* 479; J. Allan, 'Against Written Constitutionalism' (2015) 14 *Otago Law Rev.* 191 and J. Allan, 'Why Politics Matters' (2018) 9 *Jurisprudence* 132.

[49] J. Goldsworthy, *The Sovereignty of Parliament* (1999) p. 279.

We repeat, however, that it is no part of our intention to argue that the senior judiciary is being crudely political in the way it was widely alleged it had been in *Miller*. The problem is the opposite of this. We have no doubt that the senior judiciary criticised here sees the expansion of judicial last-word power as enormously valuable and is motivated by virtue when seeking to create it. Unfortunately, the criticism of the untrammelled pursuit of virtue as having dire political consequences that has played a crucial part in modern political philosophy[50] seems to have played no part in the thinking behind the measures described in this article. What is perhaps more telling against the senior judiciary than a lack of familiarity with political philosophy is a lack of knowledge of the intersection between political philosophy and jurisprudence which, in a strong sense, is the foundation of its powers. Such knowledge would reveal that, even more than license, excess of virtue was the mischief against which Montesquieu believed the separation of powers to be the necessary 'arrangement of things':

> Political liberty is found only in moderate governments … It is present only when power is not abused, but it has eternally been observed that any man who has power is led to abuse it; he continues until he finds limits. Who would think it? Even virtue has need of limits.[51]

The astounding and commendable – it is a great constitutional achievement – extent of public confidence which the United Kingdom judiciary enjoys involves a very great degree of autonomy in making procedural arrangements for the conduct of the business of the courts. Now regarding itself as increasingly unbound from the constitutional confinements of the sovereignty of Parliament in its pursuit of a constitutional end of judicial supremacy, which we have no doubt it sees as a public good, the senior judiciary has made arrangements which the public does not understand, much less consent to, and those arrangements are therefore democratically

[50] G.W.F. Hegel, *The Philosophy of History* (1956) p. 450: 'Robespierre set up the principle of Virtue as supreme, and it may be said that with this man Virtue was an earnest matter'.
[51] C. de Montesquieu, *The Spirit of the Laws* (1989) p. 155.

unjustifiable. So few checks and balances does the senior judiciary at present encounter that it has been able to do this surreptitiously because, having freed itself of the conventions of sovereignty of Parliament, it is at the moment, we are obliged to submit, out of control.