



By: *Harvey Morris*

# Legal challenges rock British government's boats plan



The essence of Britain's unwritten constitution is that the law is whatever the majority in Parliament says it is.

In practice, parliamentary supremacy is hedged around by numerous constraints, including judicial review, precedent, time-tested conventions and binding international treaties that guard against the emergence of a majoritarian autocracy.

That gives a key role to the courts and legal profession to ensure that government and politicians, as well as the general population, obey the largely undefined Rule of Law.

Since the 2019 Conservative landslide re-election victory, however, the ruling party and its media partisans have expressed mounting irritation with judges and lawyers accused of frustrating the business of government.

“Out of touch” judges and “woke” lawyers are increasingly fingered for opposing the will of the people, which would perhaps be better expressed as the will of Downing Street.

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The law v. politics tension was already apparent in the aftermath of the 2016 Brexit referendum and was exacerbated by the Covid crisis in which legal experts criticised the government's allegedly muddled legislative response.

Attacks from sections of the ruling party have reached a crescendo over legal tactics deployed in response to the government's “stop the boats” agenda.

Among 5 pledges announced at the start of the year, Prime Minister Rishi Sunak promised to pass new laws to allow for the detention and removal of would-be migrants arriving across the Channel in their thousands.

In its impatience to institute a potentially vote-winning policy, the government forged ahead with its repatriation plans before new legislation was in place.

In June, Court of Appeal judges ruled that a proposal to send asylum seekers to Rwanda to have their claims processed was illegal, while lawyers for migrants continued to rely on existing law to prevent their forced removal.

The government's Illegal Migration Act came into force the following month and the government continues to appeal the Rwanda judgment in the Supreme Court.

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During the passage of the bill, leading Conservatives, including Sunak and Home Secretary Suella Braverman, accused ideologically motivated lawyers of blocking its plans.

In the House of Commons, Sunak accused the opposition Labour leader Keir Starmer, a former Director of Public Prosecutions, of being “just another lefty lawyer standing in our way”.

The Bar Council, which represents barristers, said the attacks by government ministers reflected “a startling and regrettable ignorance” of the role of lawyers representing clients within the legal framework created by parliament.

The government campaign did not ease up with the passage of the bill. In August, a Home Office task force was set up to track down alleged “crooked” lawyers accused of coaching migrants to lie in support of their appeals to remain in the UK.

Legal experts trace the growth of so-called judicial activism in the UK to at least the 1980s when courts sought to strengthen checks on the diktats of ministers and government bodies.

In a notable case in 1999 the High Court ruled against the Home Office's practice of prosecuting and jailing asylum seekers who had used false documents to travel to the UK. The judgment was delivered against a Labour government, an indication such constitutional tensions are not confined to the current ruling party.

More notable still were court rulings that stymied the progress of the Theresa May and Boris Johnson governments in securing a Brexit deal following the 2016 referendum vote to leave the European Union.

In the first of two cases brought by anti-Brexit activist Gina Miller, the High Court ruled that the government could not begin the process of leaving the EU without the consent of Parliament.

In the second, the Supreme Court ruled the Johnson government's decision to prorogue Parliament to break a post-Brexit deadlock was illegal.

The first judgment in 2016 prompted the pro-Conservative Daily Mail to brand the judges responsible as "enemies of the people", setting the tone for the more extreme attacks on the judiciary.

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One way to resolve tensions between parliament and the courts might be to have a written constitution in which the roles of the twin pillars of British democracy would be more rigidly ascribed.

In 2015, the House of Commons' Political and Constitutional Reform Committee reported that its extensive consultations indicated the public broadly favoured the adoption of a written constitution.

The committee was wound up ahead of a general election the same year and has not

subsequently been reconstituted. In the interim, the reported enthusiasm of the public for such a major change may have waned in the light of the constitutional wrangling that followed Brexit.

In an era in which a number of elected governments elsewhere seek to loosen the constraints that the judiciary places upon them, written constitutions are not automatically a protection against an overbearing executive.

Hungary and Poland, both with written constitutions, have been sanctioned by the European Union for offences that amount to manipulation of the legal system to their advantage.

Israel, one of a handful of states without a written constitution, has meanwhile faced widespread protests against the government's move to curb the Supreme Court's ability to strike down government decisions it deems "unreasonable".

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In Britain, where Parliament is resuming and a General Election is due in little over a year's time, the next potential confrontation is already looming.

The immigration minister, Robert Jenrick, recently indicated that the government would be prepared to leave the legally binding European Convention on Human Rights (ECHR) to prevent its Strasbourg Court from hindering the "small boats" crackdown. It was a sentiment echoed this week by Braverman.

Although the ECHR is not a European Union convention, withdrawal from this major international human rights agreement might complicate the terms of the Good Friday settlement in Northern Ireland and Britain's post-Brexit deals with the EU.

Politicians - and lawyers - will be looking to the King's Speech in November and to the Conservatives' pre-election manifesto to see how far the government might go in its efforts to limit the bothersome opposition of courts, both foreign and domestic, to the will of the executive.