CB edited, LB edited

On Tuesday 11 August 2020, Young Lawyers Making Change hosted ‘*Revenge or Reform: a critical appraisal of the Government’s “Constitution, Democracy and Rights Commission”’.* The session was hosted by YLAL committee member Adam Riley and featured talks from Michael Olatokun, Professor Alison Young, Dr Sam Fowles and Professor Meg Russell.

By way of background, page 48 of the 2019 Conservative party manifesto promised to establish a ‘Constitution, Democracy and Rights Commission’ with the purported aims of protecting democracy by restoring public trust and balancing the rights, duties and entitlements of all UK citizens. The Commission’s work has not yet commenced.

The first speaker, Dr Sam Fowles, a barrister at Cornerstone Barristers, gave a practitioner’s perspective on the ‘politicisation’ of the judiciary by drawing on several cases he has been involved in. Firstly, he argued that any decision a court makes will, in some way, be political because the court’s role is to regulate using a set of norms and values. Equally, he thought that ‘political’ could be an unhelpful term as it suggests the courts are involved in making public policy, which they are not. Dr Fowles’s experience is that, as a result of a ‘campaign of intimidation’, the courts are more reluctant than ever to enforce legal rights for fear of appearing to interfere unduly in the political sphere.

Dr Fowles spoke of the [*Miller* and *Cherry* Supreme Court cases](https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf), which arose out of the Government’s decision to prorogue Parliament in September 2019. The High Court in England and Wales had held that the matter was non justiciable i.e. that the judiciary did not have jurisdiction to decide whether the Government had acted unlawfully. The Supreme Court found, however, that, in the absence of any explicit justification by the Government for the prorogation, it had the effect of silencing and excluding Parliament, and that was unlawful because it ran contrary to the core principles of parliamentary sovereignty and ministerial accountability. This case is a clear example of a court balancing two competing principles. The Supreme Court was asked to determine whether to favour the principle of parliamentary sovereignty over the right of the executive to govern conveniently. Either outcome would have been considered ‘political’.

Secondly, Dr Fowles discussed the [*Vince v Advocate General case*](https://www.lawandreligionuk.com/2019/10/09/breaking-news-inner-house-delays-ruling-in-vince-ors/). This concerned the Benn Act which required the Government to seek an extension to the Brexit withdrawal date if no deal had been reached by 31 October 2019. Despite this instruction, the Government had declared on 43 occasions that, even if a deal had not been agreed, the UK would leave the EU on 31 October. The Scottish court deferred its decision and Parliament stayed in session until the Government complied with the Act.

Dr Fowles spoke of the obstacles for lawyers acting against the Government in matters of purported ‘national security’. He gave the example of the Russia report which, once disclosed, did not contain any material which might threaten national security when published. The problem is that the Government is not required to prove that issues of national security exist, even when there clearly are none. Once the Government uses the ‘national security argument’, it is almost impossible to counteract.

Finally, Dr Fowles spoke of an anonymous case which never proceeded to court as a result of the above issues. It concerned the decision of the Leader of the House of Commons to hold a vote about parliamentary business during the pandemic. The vote was held after the lockdown measures were imposed, meaning around 200 MPs were unable to attend. The argument was that the executive had effectively frustrated Parliament by holding the vote in the manner it did. Dr Fowles and his colleagues advised their clients not to proceed with the case due to the likelihood that many judges would be unwilling to decide the matter following *Miller and* *Cherry*. Although the courts are properly entitled to determine such issues, Dr Fowles observed that they are becoming increasingly reluctant to do so.

The second speaker was Professor Alison Young, the Sir David Williams Professor of Public Law at the University of Cambridge, and a Fellow of Robinson College. Professor Young currently co-edits the UKCLA blog on constitutional law and is a trustee of The Constitution Society. Professor Young considered the topic from a broader perspective and drew attention to several issues, starting first by echoing Dr Fowles in questioning how exactly the courts were supposed to avoid political policy decisions.

Secondly, she was cautious about the chosen wording. What does it mean to protect individuals from the state? What rights are they referring to? Rights are derived from both legislation and developed through the common law. Equally, the word ‘individual’ seems to exclude communal rights such as environmental rights or the ability of the courts to consider the wider impact of decisions on members of the public.

Too much focus on ‘individual rights’ creates the risk that basic constitutional rights such as the rule of law or the ability of individuals to access the courts might be ignored. Professor Young argued that the narrower the definition of ‘rights’, the easier it is for a state to be overbearing and restrict individuals from obtaining remedies when their rights have been breached.

Professor Young considered the distinction between the concepts of law and politics, drawing particular attention to the constitutional, institutional and epistemically dimensions of both terms. She argued that the separation between the two is not clear cut. For example, whilst the legislature may have expertise in creating legislation, the courts have an unparalleled understanding of long standing constitutional principles that may influence legislation. This constitutional history should not be ignored.

The third speaker was Professor Meg Russell, Professor of British and Comparative Politics and Director of the Constitution Unit. Professor Russell began by discussing the comment on page 47 of the Conversative manifesto about the destabilising rift between politicians and the people as a result of Parliament’s perceived failure to ‘get Brexit done’, which is both negative and inflammatory. Professor Russell questioned which MPs the comment is referring to. Politicians such as Boris Johnson, Priti Patel and Dominic Raab, who had voted against Theresa May’s deal, are now in the Cabinet.

On the role of the Government during the COVID-19 pandemic, Professor Russell talked about the legislation surrounding the use of face masks and the speed at which legislation was passed without parliamentary oversight, in less than 24 hours. Professor Russell fears this may shape a long term executive mindset to avoid parliamentary involvement in some policy areas. Law that is subject to extensive scrutiny is, as a consequence of that scrutiny, generally more effective.

Similarly, Professor Russell commented on the prospect of the parliamentary chamber relocating to York. She expressed concern that separating the chamber from Government would make scrutiny and communication more difficult, which may lead to an acrimonious relationship between the two. Equally, the location of Parliament should be one *it* decides, not the executive.

She concluded by drawing attention to the disappointing advancements in the peerage list. There had been great efforts to reduce the size of the Lords from 800 to about 650 members. However, the recent list of appointments was lengthy and tilted towards the Conservatives.

The final speaker was Michael Olatokun, who leads the Bingham Centre's strategic area of focus on Citizenship and the Rule of Law and is the Head of Public and Youth Engagement. Olatokun opened with four key concepts. Firstly, judicial review is a vital practical realisation of the rule of law. Secondly, the current state of judicial review and its enforcement is not sufficient in compelling compliance with public duties. Thirdly, judicial review needs to be considered from a citizen’s perspective, as this is who it needs to protect. Finally, from the perspective of activists and community representatives, the current stance on judicial review is where they estimated it would be.

Olatokun stated that the current legal aid regime was insufficient for the vast majority of claims. As a result, public authorities regularly get away with acting unlawfully. One example is [*R (on the application of G) v Southwark London Borough Council*](https://nearlylegal.co.uk/2009/05/child-requires-accommodation/). This case concerned section 20 of the Children Act 1989 which provides that a local authority must accommodate any child in need who requires accommodation. G had left home and was temporarily given hostel accommodation, but Southwark’s Children Services department denied any ongoing duty to provide housing.

The House of Lords allowed the appeal and many local authorities amended their policies and practices in line with the judgment. In Nottingham, however, many children were still not being accommodated under section 20. Instead, the local authority was defensive and dismissive of applications, even when representations were made using the judgment. This is one example of judicial review falling short. Instead, Olatokun and other campaigners held strategic meetings, marches and amplified stories in order to make the problem visible. As a result, the local authority vowed that no young person would be homeless through Christmas.