

Don't blame the judges! Too quick to judge?

Geoffrey Bindman considers the relationship between Parliamentary and judicial power and advances the case for an independent judiciary



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I applaud the title of Dr Michael Arnheim's article—'Don't Blame the Judges', *NLJ*, 3 July 2020. Unfortunately, the content of the article does the exact opposite. The author says our judges are exceeding their powers by usurping those of Parliament. They are accused of 'straying into areas beyond its proper domain'. 'Unelected' judges, he tells us, are making decisions that 'should be made by a democratically elected Parliament or government'. 'The plight of English law is indeed dire', he proclaims. Dr Arnheim's alarmist and unfounded thesis, echoes—perhaps unwittingly—the dangerous mission of some politicians to undermine the role and independence of our cherished judiciary, which is a necessary safeguard of our democracy (see my article 'Save our Constitution', *NLJ*, 13 March 2020, p7).

Sovereignty

Dr Arnheim is of course entirely correct to assert the sovereignty of Parliament in our constitutional system. The democratic authority of a popularly elected legislature is final when exercised in accordance with the law. But the judiciary also has its own independent constitutional role. Its vital functions are to interpret and apply the law and to ensure that the law is upheld, not least by the government and Parliament itself.

The complaint that the judges make political decisions which should be left to Parliament was forcefully articulated by Lord Sumption in his *F A Mann* lecture in 2012. He cited examples of government decisions which the court had declared unlawful which in his view the court should have declined to address. In the *London Review of Books* (23 February 2012), Sir Stephen Sedley, former Lord Justice of Appeal, strongly contested this view. My firm acted for the successful parties in two of the cases relied on by Lord Sumption. In *R v Lord Chancellor ex p Witham* [1997] EWHC 237, the court declared ultra vires the fee imposed by the government on litigants seeking to issue defamation proceedings because it denied those without

means, like Mr Witham, access to the courts. The other was *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement* [1995] 1 All ER 611, in which the government's use of the aid budget to fund the Pergau dam in Malaysia in return for an arms purchase was also declared ultra vires. In neither case had the conduct challenged by the claimants been authorised by Parliament. And in both a fundamental principle had been offended: in *Witham* that of unimpeded access to the court and in *Pergau* that public funds could not be used for an improper or unintended purpose.

As the court considered that the government's actions were unlawful, was it not its duty to rule accordingly and hold the government to account? That is precisely what it did.

Debate

The Sumption-Sedley debate occurred before Sumption joined the Supreme Court and his Reith Lectures 'Trials of the State' were delivered and published in 2017 after his term of office had ended. It was in his lectures that he expressed the concern alluded to by Dr Arnheim at 'our persistent habit of looking for legal solutions to what are really political problems'. This is not what happened in the two cases mentioned above.

Dr Arnheim chooses three recent cases to support his argument but all of them can be interpreted, like Sumption's cases, more credibly as proper exercises of judicial adjudication. In all of them, the court carried out that function conscientiously, regardless of any political implications or consequences. In one of these three cases, my firm also happened to be solicitors for the successful party in the Supreme Court. This was *R v Secretary of State for Communities and Local Government ex parte Palestine Solidarity Campaign* [2020] UKSC 16. The issue was whether the trustees of the local government pension scheme could properly exclude (ie boycott) investment of its funds in companies trading in the occupied Palestinian territories

or were precluded from doing so by the terms of the regulations issued by the government under the authority of the Public Service Pensions Act 2013. There was no question that the trustees were acting in accordance with the predominant wishes of the pensioners whose money they were managing. Boycotts are a political hot potato but there is no ground for claiming that the courts exercised a political choice. Their task was to establish the meaning of the relevant provisions—a classic example of judicial interpretation.

The Supreme Court voted 3 to 2 to allow the trustees the freedom they wanted. Dr Arnheim points out that adding the views of the lower court judges to those of the Supreme Court, you have a majority for the opposite result. He makes this point three times. Yes, it was a narrow decision. But that is immaterial: in our system the final appeal is what counts.

Parliament could, of course, in all these cases have pre-ordained a different result. They could change the law to prescribe a different outcome in future similar cases. The government has announced its intention to seek to reverse the effect of the *Palestine Solidarity* case. Personally, I hope Parliament does not agree. But its power to do so is not in doubt.

Allegations

The loudest allegations of judicial excess have targeted the recent Supreme Court decisions requiring Parliamentary authority to leave the EU and quashing the prorogation of Parliament for an improper purpose (*R v Secretary of State for Exiting the European Union* [2017] UKSC 5, and *R v Prime Minister* [2019] UKSC 41). They impinged directly on the role of Parliament, so it is surprising that Dr Arnheim did not refer to them. But they are in fact excellent examples of what we owe to our independent judiciary and must preserve.

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