

JUDICIAL TIMIDITY AND RETREAT IN BRITAIN

When Deference Becomes Constitutional Surrender

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Introduction - The Institution That Must Be Prepared to Say “No”

A constitutional democracy does not depend upon the wisdom of those who exercise power. It depends upon limits.

Government governs. Parliament legislates. Public authorities exercise the powers entrusted to them. The courts, when properly engaged, determine what the law permits.

That division is neither ceremonial nor academic. It is one of the mechanisms by which a society governed by law distinguishes itself from a society governed by only authority.

The British constitution is unusual because much of it is not contained within a single written constitutional instrument.

Its stability therefore depends heavily upon institutions properly understanding not only the existence of their powers, but the boundaries separating one constitutional function from another.

Within that architecture, the judiciary occupies, or at least should occupy an indispensable position.

A court does not govern the country. It does not formulate public policy. It does not determine whether a political decision was wise.

Where the legality of governmental action is properly brought before it, the court ought to perform a function which no Minister, police chief, regulator, civil servant or administrative body can legitimately perform for itself - it determines what the law requires.

Judicial review exists precisely because the Executive cannot properly be the final judge of the legality of its own conduct.

The constitutional difficulty begins when judicial restraint ceases to mean respect for the legitimate functions of other institutions and begins instead to resemble reluctance to examine those institutions at all.

There is an important difference between judicial restraint and judicial timidity.

The former is constitutional discipline.

The latter risks becoming constitutional retreat.

This paper asks whether Britain is approaching, or has perhaps already crossed that boundary.

1. THE CONSTITUTIONAL BARGAIN

The rule of law contains an extraordinarily simple proposition: Power is subject to law.

That proposition means little unless some institution possesses both the authority and willingness to determine whether the boundary has been crossed.

In Britain, that responsibility should ultimately rest with an independent judiciary.

Judicial review is therefore sometimes misunderstood when it is described merely as a mechanism through which an individual can “challenge the Government.”

Its constitutional significance is considerably greater.

Judicial review asks whether public power has been exercised lawfully.

A judge considering governmental action is not ordinarily being invited to decide whether he or she would have made the same decision. The actual question is whether the

decision-maker possessed the power exercised; whether legally mandatory considerations were addressed; whether irrelevant matters contaminated the decision; whether procedural requirements were observed; whether fundamental rights were respected; and whether the decision otherwise remained within the boundaries imposed by law.

The Government itself acknowledged the centrality of this jurisdiction during the 2021 review of judicial review.

The then Lord Chancellor told Parliament that judicial review performs a vital function in upholding the rule of law and operates as a check upon executive power.

That is constitutional orthodoxy, but an inherent tension remains.

Governments naturally wish to govern.

Administrative institutions naturally prefer operational freedom.

Courts naturally recognise that elected governments possess democratic legitimacy which judges do not.

None of those propositions is fundamentally objectionable.

The danger arises when respect for democratic decision-making gradually becomes something different, which can be, institutional reluctance to interrogate executive power.

2. DEFERENCE HAS A PROPER PLACE

Not every dispute is judicial. Nor should some become one.

Questions concerning taxation, public expenditure, military priorities, healthcare policy or the allocation of finite resources frequently involve judgments which elected government is institutionally better placed to make.

Courts appropriately recognise this.

That recognition is commonly described as judicial deference, although the precise doctrinal language varies according to context.

There is nothing constitutionally weak about it. Indeed, judicial overreach can present its own danger.

A judiciary which routinely substitutes its preferred policies for those of elected government would itself distort the constitutional settlement.

The opposite danger, however, deserves equal attention.

Deference concerns the legitimate exercise of lawful power. It cannot logically determine whether the power was lawful in the first place.

A government cannot answer an allegation of illegality merely by saying, “this was a difficult policy decision”. Nor should institutional complexity become a shield.

The more complicated governmental structures become, the greater, not lesser, the need for identifiable responsibility. Otherwise complexity itself becomes an accountability mechanism operating in reverse.

- Responsibility becomes distributed.
- Decision-making becomes collective.
- Documents pass between institutions.
- Advice becomes guidance.
- Guidance becomes operational practice.
- Operational practice becomes institutional convention.

Eventually, when the question is asked - Who decided this? The answer becomes remarkably difficult to obtain.

Courts must remain capable of penetrating that fog.

3. THE EMERGENCY PROBLEM

Emergencies create particularly difficult constitutional conditions.

Government must sometimes act quickly. Information may be incomplete. Consequences may be enormous. Ministers

and officials cannot always enjoy the luxury of leisurely decision-making.

The Covid-19 pandemic is claimed by some to have genuinely represented precisely such circumstances.

However, emergency government creates a constitutional paradox.

The moment at which government requires its greatest operational freedom may simultaneously be the moment at which constitutional safeguards become most important.

History repeatedly demonstrates why.

Emergency measures have a tendency to normalise exceptional governmental behaviour.

Processes designed for extraordinary circumstances can survive the circumstances which justified them.

- Centralised command structures become administratively convenient.
- Information-sharing networks expand.
- Institutional coordination intensifies.
- The language of necessity becomes culturally embedded.

None of this necessarily proves wrongdoing, but it creates precisely the environment in which scrutiny becomes most indispensable.

The fundamental proposition must therefore remain: An emergency may explain governmental conduct. It does not however, place governmental conduct beyond law.

If anything, and this is crucial, the greater the power exercised, the more important the constitutional mechanisms capable of examining it become.

4. THE LANGUAGE OF JUDICIAL RETREAT

Constitutional retreat rarely announces itself. No judgment is likely to declare overtly, “This matter is too politically uncomfortable for the Court.”

Retreat is more subtle - It can appear through language.

- “This is principally a matter for the decision-maker.”
- “The authority was entitled to reach that conclusion.”
- “The Court should be slow to interfere.”
- “The issue involves matters of policy.”
- “The decision-maker possessed specialist expertise.”
- “The Court's jurisdiction is supervisory.”

Every one of those propositions may be perfectly correct.

The constitutional question is what happens when several such propositions accumulate around a serious allegation concerning the exercise of public power.

There comes a point at which restraint can cease to operate as a principled recognition of institutional boundaries and instead become a reason why those boundaries are never examined.

That distinction deserves far greater public discussion.

The question is not, did the court disagree with government?

The question is, did the court sufficiently examine whether government acted lawfully?

These are profoundly different inquiries.

5. JUDICIAL REVIEW MUST REMAIN REAL

The importance of judicial review has itself produced political tension.

The Independent Review of Administrative Law was established in 2020 to examine whether the correct balance existed between allowing citizens to challenge executive decisions and permitting effective government.

That debate subsequently contributed to legislative reform.

The Judicial Review and Courts Act 2022 introduced changes including new provisions concerning the operation of quashing orders and restrictions upon judicial review in a particular tribunal context.

Whatever position one adopts concerning those reforms, they demonstrate something constitutionally significant.

The boundaries of judicial supervision are themselves politically contested territory.

That makes judicial independence more, not less important.

A government is entitled to argue for reform and Parliament is entitled to legislate, but the judiciary must remain conscious that its constitutional authority does not exist as a favour granted by whichever administration presently exercises executive power.

The courts are not an inconvenient department of government. They are, or certainly should be, an independent constitutional institution.

Judicial review consequently cannot become merely a theoretical remedy.

A right to challenge government which exists formally but cannot effectively penetrate governmental decision-making is a constitutional right on paper only.

The citizen must be capable of placing evidence before a court and receiving genuine judicial examination of the legality complained of.

Not agreement, not guaranteed success, but examination.

6. THE DANGER OF THE CLOSED CONSTITUTIONAL CIRCLE

There is a broader danger when institutional deference occurs across several parts of the State simultaneously.

Imagine the following constitutional sequence.

- A governmental body adopts a policy.
- Another public institution relies upon it.
- A regulator treats the resulting institutional position as authoritative.
- A policing body regards the matter as belonging elsewhere.
- An oversight institution declines intervention because another institution possesses responsibility.
- A court subsequently approaches the resulting dispute cautiously because the subject matter involves policy, specialist judgment or operational discretion.

Every institution can individually provide a respectable explanation for its conduct, yet collectively something remarkable may have happened.

No institution has actually examined the original question.

That is the closed constitutional circle.

Everyone possesses a reason to defer to somebody else and responsibility travels around the system until eventually returning to the institution whose conduct required examination in the first place.

Such a system may remain outwardly lawful. It may possess sophisticated complaints procedures, independent regulators, judicial remedies, parliamentary committees and professional oversight bodies, but if each mechanism habitually assumes that another mechanism has adequately examined the underlying issue, then accountability becomes an illusion produced by institutional architecture.

The existence of oversight is not proof that oversight occurred. The existence of a remedy is not proof that the remedy was effective and the existence of courts is not, by itself, proof that executive power has been subjected to meaningful judicial scrutiny.

7. COURAGE IS A CONSTITUTIONAL REQUIREMENT

Judicial independence is normally discussed in structural terms.

- Security of tenure.
- Institutional separation.
- Protection from political interference.

Those safeguards are essential, but independence has another dimension which receives less attention – that is the willingness to exercise it.

A judge may be completely independent institutionally and nevertheless exercise extraordinary caution when confronted by politically explosive subject matter.

That caution is understandable.

Judicial legitimacy matters. Courts should not become political protagonists. However, constitutional legitimacy does not arise from avoiding difficult questions. It arises from answering legal questions without fear or favour.

Sometimes the correct judicial answer will favour government.

Sometimes it will not.

Neither outcome demonstrates courage or weakness by itself.

The constitutional test lies in the method:

- Was the evidence examined?
- Were competing propositions tested?
- Was the governmental account scrutinised?
- Were legally material documents available?
- Were relevant decisions properly identified?

- Was the court given a sufficiently complete account of what occurred?

And, ultimately:

- was legality actually determined?

Those questions matter particularly where governmental activity is distributed between departments, agencies, regulators, police organisations and other public institutions.

Modern government operates through networks.

Modern judicial scrutiny must be capable of examining those networks properly, otherwise the State can become more sophisticated than the constitutional machinery designed to hold it accountable.

8. THE COURTS HAVE NOT ALWAYS RETREATED

Any fair analysis must acknowledge an important counterweight.

British courts have repeatedly demonstrated that they are capable of confronting executive power. Recent constitutional history contains major examples of courts determining highly sensitive disputes concerning the limits of governmental authority.

That matters because the thesis of this paper should not be misunderstood.

Britain does not possess a uniformly submissive judiciary. Nor would it be accurate to suggest that judges routinely capitulate before government.

The concern is more nuanced.

The most constitutionally dramatic cases sometimes produce the strongest judicial responses precisely because the constitutional issue is unmistakable.

The greater danger may lie elsewhere:

- in ordinary administrative litigation;
- in permission decisions;
- in factually complicated cases;
- in cases involving specialist institutions;
- in disputes whose constitutional importance is concealed beneath thousands of pages of administrative material;
- and in cases where the claimant cannot initially know what government itself knows.

There the imbalance between citizen and State can become enormous.

- The State possesses the documents.
- The State knows the decision-making chain.

- The State knows who communicated with whom.
- The State understands the institutional architecture.
- The claimant frequently sees only the resulting decision.

This is why candour in public law is so important.

A court cannot effectively supervise governmental legality if the evidential landscape placed before it is incomplete.

Judicial courage therefore depends partly upon something even more elementary, which is, judicial knowledge.

The court must first be permitted to see the constitutional landscape before it can police its boundaries.

9. THE CITIZEN SHOULD NOT HAVE TO PROVE THE STATE'S CASE FOR IT

There is an inherent evidential asymmetry in public-law litigation.

A citizen challenging governmental action frequently begins outside of the administrative machine.

- He or she does not necessarily possess internal emails.
- He or she does not necessarily possess meeting minutes.
- He or she does not necessarily possess decision logs.
- He or she may not necessarily know which department actually originated the policy.

- He or she may not necessarily know which officials participated.
- He or she may not even necessarily know that another institution was involved.

Still however, those matters can determine whether a decision was lawful.

That is why public-law litigation cannot simply be treated as an ordinary contest between two equally informed adversaries.

Government possesses a distinctive and vital responsibility to assist the court in understanding how the decision under challenge was actually reached.

Where subsequent disclosure reveals a materially different institutional picture from that originally placed before a court, serious constitutional questions inevitably and necessarily, reasonably arise.

They are not necessarily because anyone acted dishonestly, but because judicial review depends upon an accurate evidential foundation.

A judge cannot review what a judge has never been shown and judicial timidity becomes especially dangerous when combined with informational asymmetry.

A cautious court plus an incomplete governmental account can produce a result which appears constitutionally authoritative whilst resting upon only part of the relevant landscape. It can lead to a decision 'built on sand'. The decision stands, but remains in constant peril and at the mercy of any institutional failure in a duty of candour to the Court.

10. FROM RESTRAINT TO RETREAT

There is therefore a boundary which Britain must recognise.

Judicial restraint says:

“This decision belongs to government, provided government acted within the law.”

Judicial retreat says:

“Because this decision belongs to government, the Court should hesitate to determine whether government acted within the law.”

The first preserves constitutional separation.

The second risks destroying it.

That distinction may be the central constitutional question of the coming years.

- Government is becoming more complex.

- Administrative structures increasingly overlap.
- Police forces coordinate nationally.
- Regulators communicate across institutional boundaries.
- Departments share information.
- Strategic command structures can span organisations.
- Technology permits unprecedented administrative integration.

The State is therefore becoming institutionally more capable of acting as a coordinated whole.

The constitutional response cannot be for oversight to become more fragmented.

A twenty-first century administrative State cannot safely be supervised by a constitutional mentality which examines each institution in isolation and assumes that responsibility must exist somewhere else.

CONCLUDING STATEMENT

Britain does not require activist judges. It requires independent ones.

It does not require courts to govern. It requires courts prepared to determine whether those who govern have remained within the law.

It does not require judges to substitute their political judgment for that of Ministers. It requires judges who understand that declining to examine legality is not political neutrality where legality is the very issue placed before them.

The judiciary possesses neither armies nor police forces.

It controls no Treasury.

It commands no civil service.

Its authority ultimately rests upon something far more fragile: Public confidence that when power encounters law, law still matters.

That confidence cannot be maintained through ceremony. It must be demonstrated.

There will always be pressure upon courts to defer and there will always be arguments that a matter is politically sensitive, administratively complicated, nationally important or operationally exceptional.

Sometimes those considerations properly affect the intensity of judicial scrutiny, but they must never extinguish it, because the final danger is not a judiciary which occasionally tells government that it has exceeded its powers. That is constitutional government functioning exactly as intended. The greater danger is a judiciary which

becomes so concerned about entering political territory that it gradually abandons the legal territory with it.

At that point, the Executive does not need to defeat the judiciary. The judiciary has already withdrawn. It has surrendered its constitutional duty and abdicated its responsibility.

History teaches a simple lesson about vacated constitutional ground - Power rarely leaves it empty.

The British judiciary therefore faces a choice which is institutional rather than ideological.

Restraint must remain restraint.

Deference must remain conditional upon legality.

Judicial review must remain genuine review.

When the evidence requires the question to be asked, the court must possess both the independence and constitutional confidence to ask it.