Speeches on Administrative Law

TONIO BORG
IVAN MIFSUD
JOHN STANTON

This article reproduces the text of three speeches on administrative law delivered at the book launch of Dr Tonio Borg's book titled *Maltese Administrative Law*, held at the Chamber of Advocates Conference Hall on the 10 November 2021. They are being reproduced in the Online Law Journal as a matter of public record. In order to preserve their original context as speeches, references are kept to a minimum.

TAGS: Administrative Law; Law Reform; Ouster clauses

1. Speech by Dr Tonio Borg

Dr Tonio Borg is a resident senior lecturer in public law at the University of Malta. He is a former European Commissioner, and former Deputy Prime Minister and Cabinet Minister. He is the author of *A Commentary on the Constitution of Malta* (2016), *Leading cases in Maltese Constitutional Law* (2019), *Leading cases in Maltese Administrative Law* (2020), *Judicial Review of Administrative Action in Malta* (2020) and *Administrative Law* (2021).

First of all a word of thanks to my friends and panellists; namely, the Dean of the Faculty of Laws, Dr Ivan Mifsud, and my friend, the Erasmus scholar, Dr John Stanton, senior lecturer at London City University, who graciously and kindly accepted to allocate some time to attend and address this gathering even though he is currently on holiday in Malta!

My strong attachment to the subject of administrative law in general and judicial review of administrative action in particular dates back to a peculiar incident during the Christmas holidays of 1975.

We law students, in the 1974-79 law course, had just started being lectured on administrative law. Our lecturer was Professor Wallace Gulia, a poet, lecturer, and later judge. As is usual, in introducing students to Administrative law he started off with such unexciting matters as the structure of the administration, delegated legislation, and positive and negative resolutions to block such legislation. I took an immediate dislike to the subject. Gulia had studied at Manchester under Professor Harry Street who had co-authored *Principles of Administrative Law* with Griffiths.

In those distant Christmas holidays of 1975, I happened to come across HWR Wade's *Administrative Law*, 3rd Edition. Browsing through the book, which incidentally then contained only 345 pages (today Wade and Forsythe's *Administrative Law* contains 837), I came across the fascinating subject of judicial review (which we had not yet started with Professor Gulia): how the English courts have reviewed the reasonableness of government action, and improper purposes, according to the scope of the statute. This the courts did reading between the lines, without there being any express provision of the law. The courts held that when Parliament grants a power it expects and presumes that such power be exercised reasonably. I have traced the *first ultra vires* case to ***Rooke*** (1598), where sewage commissioners distributed equally – in poll tax fashion – the rates imposed on properties bordering the River Thames, irrespective of the size of the properties, because they had the power to impose such rates 'as they deemed fit'. Lord Coke annulled their decision

because it was arbitrary. Their proceedings, he said, '*ought to be limited and bound with the rule of reason and law*'.

But what caught my eye and fascinated me even at that young age of 18 was the ***Ansiminic*** case which had been decided six years earlier in 1969 by the House of Lords: ouster clauses blocking court scrutiny of administrative action would be resisted by the law courts. Rather than the clause ousting them, the courts started ousting the clause itself through ingenious methods. In ***Anisminic*** it was decided that such ouster clauses applied only to errors within jurisdiction; if a Commission established by statute was in breach of the law no ouster clause could block scrutiny.

This case turned out to be useful years later in the mid-eighties when the Public Service Commission, which decides disciplinary cases against public officers, was accused of political discrimination in one case. It brazenly and arrogantly pleaded that the Constitution did not allow a court of law to review the validity of its actions. Surely, the Constitutional Court held in the ***Galea*** case, in early 1987, this did not apply to breaches of human rights by the PSC! No one was above human rights. This ruling was extended to cover cases of breaches of regulations by the PSC itself and to review on the basis of rules of natural justice and reasonableness.

What even drew me closer to this area of law was the variety of the subjects covered by judicial review case-law. This is borne out by both this book which we are launching today and *Judicial Review of Administrative Action*, which is my Ph.D. thesis published in March 2020 and never formally launched owing to the Covid-19 crisis. A cursory look at our chequered case-law on judicial review reveals the valiant attempts made by one and sundry challenging executive actions. They range from such mundane issues as to whether a circus should be set up during the festive season at the parking space for shoppers at the Granaries in Floriana outside Valletta, to whether Gozitan taxi drivers should be allowed to operate in Malta, or whether a permit for letting off light fireworks from the Citadel in Gozo should be abruptly refused, after years of being allowed. Other cases dealt with the transfer of pharmacy licences, the transfer of personnel within the public sector, the recognition of tenants in government property, and, the jewel in the crown of Maltese case-law on judicial review, the ***Blue Sisters*** case.

I have an emotional attachment to this case of 41 years ago. I had just graduated and started practising law in January 1980. In May 1980 the Blue Sisters case erupted. I remember Dr Giovanni Bonello, counsel to the Blue Sisters, sending me to all law libraries to find everything there was on reasonableness in the exercise of government power. He argued the case in the most eloquent and effective way, persuading the judge, Mr Justice Herrera, to annul the condition attached to the hospital licence of the private Blue Sisters Hospital that at least half the beds and facilities had to be made available to the Government of Malta.

The tussle between the executive and the judiciary following the Blue Sisters case culminated in Act No. VIII of 1981 which, conveniently for the government, excluded judicial review unless there was a breach of an express provision of the law. The then-Attorney General, as stated by Chief Justice Emeritus DeGaetano in the Foreword to this book, went on air to state that nothing had changed; in fact much had been altered; namely, the suppression of review on grounds where Parliament presumed that power given to a public authority be exercised according to the natural justice rules or reasonableness.

The Courts resisted the law in ingenious ways. In ***Ellul Sullivan*** (1983), Judge Caruana Curran, whom I have elsewhere dubbed the 'Lord Denning of Malta', interpreted the legal provision to the effect that Government had to give 'adequate opportunity' for a ship-owner to make representations prior to cancellation of his ship from the shipping register as meaning that reasons had to be given for the cancellation, otherwise the opportunity given would not be 'adequate'. Other judgments established that where there was no discretion to be exercised by a public authority, the law ousting judicial review was not applicable. And so on. Indeed, for eight years after a change of administration in 1987 the law was simply not applied even if the Court could have raised the plea of lack of jurisdiction under Act No. VIII on an *ex officio* basis.

The struggle between Executive and judiciary from the times of ***Marbury v Madison*** in the United States in 1803 is based on the assertion that the executive cannot have its actions interfered with and annulled, because it is ultimately responsible to the people who elected it, not to the courts. This was the official statement made in February 1981 by Government when the bill introducing Act VIII was published, and I quote;

> *Government is elected by the people and accountable to them. Therefore, it has to be adjudicated above all by them and not by the courts. The practice that when anything which the government does and is disagreed with by someone, even by a single citizen, the court is made to intervene, should come to an end.*

The words of Lord Diplock spring to mind in response to such assertion. In ***National Association of Self Employed*** in 1982 Lord Diplock stated;

> *Government Ministers are accountable to Parliament for what they do as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do and of that the court is the only judge.*

This book is intended to fill a void. There is no Maltese textbook for students and scholars on Maltese administrative law. I am sure that this work will be a beginning not an end. It is up to others now to come forward and enrich the legal literature on the subject. If this book serves only that purpose it would have achieved its end.

2. Speech by Dr Ivan Mifsud

Dr Ivan Mifsud is the current Dean, Faculty of Laws, University of Malta, He graduated LL.D. (1999, University of Malta) and Ph.D. in Administrative Law (2008, University of Malta). His publications include two monographs: *Judicial Review of Administrative Action in Malta* and *The Ombudsman Remedy in Malta: Too Soft a Take on the Public Administration?* (BDL publications).

I've been fascinated by Administrative Law since 1994. I could never explain why; I just was. I was just taken in by Professor Ian Refalo describing, in those days, the 'new bill' which was going to introduce article 469A of the COCP auguring a restoration of judicial powers of review, though never to pre-Act 8 of 1981 levels: the judicial fallacy ***Paolo Busuttil vs Clement La Primaudaye*** which, questionable as it was, had such a profound effect for so many ensuing decades. Goodness knows how many times I closed my eyes and imagined, in the olden days, the police carrying out a raid, noticing something black (black dust) and throwing it away, and the owner of the shop saying "oh my gold dust!" (most probably in Italian, or in Maltese back in the day). I have wondered why, why, why Judge Baron Chappelle took the approach he did, adopting the doctrine of Dual Personality which should never have been, and even more why Sir Adriano Dingli accepted it and confirmed it on appeal in such a short judgement. That is to say, IF Sir Adriano Dingli accepted it at all: there is a theory that Dingli's silence is to be interpreted as a complete disregard of this theory, and yet in time it was taken to be confirmed and was applied in so many later judgments, until Judge Caruana Curran put it to a definite end in ***Lowell vs Caruana***.

Did I recognise, in those early days, the importance of Administrative Law? I always reasoned that while other areas might increase and decrease in significance with the passage of time, there will always be government, there will always be a public administration, there will always be decisions taken by people paid from our taxes, which decisions could be of particular consequence to our lives. I always recognised the power which the government enjoys over our lives; the importance of such power being wielded correctly and in accordance with the law. The importance of there being a balance between the government which enjoys such wide powers, the government which can make or break peoples' lives, and the individual.

Make or break peoples' lives? I'm not joking here. I'll give you a practical example. Once I met a small contractor who was doing well in their small way; they won government tenders for public works, employed people to do the work. Then there was a government investigation because foul play was

suspected between the government architects and the private contractors; the government halted all contracts and all payments 'pending investigations'. These investigations took years, and, in the meantime, this individual was not paid for their work, and went bust, literally bankrupt; no money coming in, could not pay his debts, could not pay his employees' wages, and could not keep up with the overdraft. That is the extent, a real example, of how the government can break people. Make people: obviously, there are many ways this is done e.g. through the University, by giving opportunity to people to study and financing their education, thus giving them a future which perhaps they would have otherwise not afforded.

The powers the government enjoys: the government truly does enjoy a lot of power. One example: powers to expropriate property, powers not only to pass laws but to enforce them too. Power to give a permit for a restaurant to open, for a high rise project to go ahead, to grant a person a professional warrant, or not to. Obviously this is justified, because governments must govern; we have laws, and such powers are to be exercised in accordance with these laws.

Which takes me to the question of control. So, this immense power which the government wields has to be controlled. Who does this control? My answer is: the Courts of Justice. I always refer to the Courts of Justice as 'the ultimate bastions of legality'. We have many other safeguards of course, not least the Press, NGOs, the Parliamentary Ombudsman and other ombudsman-like bodies too. However, when everything else fails, we go to court. Remember that even the Parliamentary Ombudsman sought court protection when the Government refused to collaborate in an investigation. The Courts which are, and must always remain, independent and impartial, must never be under the influence and control of any government, or in any way subsidiary to any other of the three organs of the state. They are the ones entrusted with curbing abuse on the powerful government's part. They declare an administrative act to be legal or illegal, depending on the circumstances. This is the very heart of the subject of Administrative Law: judicial review of administrative action. We know that this originally was a judge-made doctrine, un-legislated, built by our Courts, largely based on UK Law, from case to case. This all changed when the government passed Act 8 of 1981, largely restricting judicial review of administrative action, which law remained in force until the COCP was amended in 1995, passing what we now know as article 469A. A good step, but not enough. We know for a fact that the legislator of the day took a restrained approach, torn between wanting to restore the powers of judicial review and fear of having to suffer the consequences. Caution was advised, and this advice was heeded. We have a situation which is undoubtedly improved from Act 8 of 1981; however 469A COCP in my opinion still restricts the judicial freedom which our courts enjoyed pre-1981. It also established too close links with UK case-law, the end result being that our judgments quote over and over again the age-old judgments like ***Wednesbury***, and do not thread far off the beaten path, seem averse to risk, or perhaps are

compelled to this approach by the wording of 469A COCP. I would like to see the courts enjoy full powers of review, unlimited, unrestricted by the absence of links with UK doctrine, with the now ancient case-law and British doctrines, embracing modern concepts and daring to look at other case-law, such as continental, and expand and enrich the doctrine of judicial review of administrative action.

Having said that, I would like to mention crucial administrative law issues; two in particular. The first is an Administrative Code. We have a Civil Code, a Commercial Code, and a Criminal Code. All well and good but we are lacking an Administrative Code. This, I believe, would make all the difference to Administrative Law. The fact that it is collected in one code, not spread all over the place would, if nothing else, make it more accessible. It would also, no doubt, introduce new principles which exist and are mentioned in case-law, such as Good Administrative Behaviour, the Duty of Care, the third principle of Natural Justice (Duty to Give Reasons), etc. It would consolidate Administrative Law and put a renewed focus on it, on a subject which as Tonio points out in the book we are marking today, is a subject which only relatively recently is acknowledged as a subject in its own right. This Code already exists in draft form, because it was actually drafted a few years ago, but never became law. It should be revived, revisited, modernised, and made into law. With it, very important here, an Administrative Court should be created. I have been saying this over and over and over again but nobody so far has acted on this proposal. I have approached every Minister for Justice in recent memory over the issue, but no action has been taken. They have listened to me, asked me to write memos (which I actually did), but that is as far as it got. My proposal is simple; upgrade the Administrative Review Tribunal (ART) to a Court as a first step, obviously transfer 469A COCP powers to it. When it was being passed, the author of the Administrative Justice Act tried to do this, but it was shot down, and rightly so. The courts cannot abdicate their powers of review in favour of a tribunal. Yet, I say, the idea was good but premature given that parliament in those days was creating an ad hoc tribunal, not a branch of the courts of justice. Next step: give this branch of the courts sufficient resources to work, be it human power, sufficient adjudicators, office space, budgets. I use the term ‘adjudicators’ because I am envisaging a system with tiers, a ‘lower’ court presided by a Magistrate, and an ‘upper’ court by Judges. The step after that: eliminate, over a period of time obviously, the plethora of ad hoc appeals tribunals which exist, which at this stage are created by the executive and which are for all intents and purposes part of the executive branch of government. I am not in any way trying to cast a doubt on the integrity of anybody who sits on any of these ad hoc appeals tribunals. I am, however, saying that if we had a proper system of administrative courts, then Administrative Law would really take off. I am also saying that certain issues which arise would be resolved, such as the dilemma which exists: when to appeal, when to use 469A COCP, when not to use 469A COCP because the action does not concern an administrative act, when to resort to the ART and

when not to, etc. There is a certain amount of confusion in the current system, which confusion can easily be eliminated through consolidation. My concern is that such confusion potentially leads to aggrieved individuals losing their actions against the government. In other words the government benefits from such confusion and I find this extremely worrying! Other problems would be solved too; for example, we have all heard of the ***Federation of Estate Agents*** case (right to be tried by a court for a criminal offence, in accordance with Article 39 sub-article 1 of our Constitution, which offers more protection than Article 6 ECHR). This is an issue which still exists today, but has not yet been resolved. It could easily be resolved if we had an Administrative Court, properly set up with sufficient jurisdiction. All this would benefit the individual; a more streamlined system would definitely benefit the individual in their hour of need when faced with a grievance involving the Government. More problems would be resolved by a system of Administrative Courts presided by members of the Judiciary: we would eliminate the current and real problem that these ad hoc tribunals are presided by part-time practitioners, which means that in the morning I might have a case against you, and in the afternoon I have to bow my head and address you '*Sur Chairman*' or '*Sur President*'. It is a farce, which extends beyond Administrative Law, for example to the Small Claims Tribunal which deals with cases of value up to 5,000 Euro, hardly a small claim and in any case, big or small, the rules of natural justice, Article 39 Constitution and 6 ECHR should prevail. There are no shortcuts in Justice, including but not limited to administrative justice! Going back to the creation of Administrative Courts, their creation would also lead to a new era in Administrative Law. Maybe I am thinking big, but just imagine Administrative Law in France without the *Conseil d'État*. Now truth be said: the *Conseil d'État* took off thanks to activism on its members' part. I very much doubt that Napoleon intended things to pan out this way, but that is beside the point. The fact is that the French administrative courts created and culminated in the *Conseil d'État*. Anybody who loves Administrative Law, and who takes the time to look at some of the *Conseil d'État* judgments and the doctrines that have been created over time will know this; e.g. ***Blanco*** (1873), a case instituted by the father of a girl who was run over by a cart which transported tobacco (the tobacco company was government owned). The *Tribunal des Conflits* established beyond question the responsibility of the State for damages caused by public services, bringing to an end an era of state irresponsibility (Brown and Bell: *French Administrative Law*). This is what I dream about for my country, for Malta: a well-versed independent administrative court system manned by experts in administrative law, creating judge-made law from which the individual benefits, albeit at the expense of the State. However, it is probably the very same reason why no Minister for Justice has gone for it, and has taken the plunge to create such a court or system of courts. It would make the life of the State Advocate's Office much harder and that is where the concern lies; giving the people more power means governing is much more tricky. Now, let me make it clear: this has always been the government's concern. Whoever was in government and whichever

political party was in power. It is the reason why 469A COCP was drafted the way it is, it was the reason why the Ombudsman's proposal to include the Right to Good Administration in the Constitution of Malta was not taken up either (to name but two instances).

Yet, we need these bold steps to be taken, in the interest of the individual, who after all funds the system as a taxpayer. In the meantime, on a positive note, at least we can lecture and read about it, and inspire our students so that in the future they might do better than the current and previous decision takers. Hopefully a bright young spark will one day implement that which his lecturers inspired him with. These things do happen; I remember the person behind the creation of the ART saying 'this has been a dream of mine since my student days'. We need books like the one we are marking today, we need people who not only lecture, but put their knowledge in writing, casting light on the topics. When I was a student, the only book on Administrative Law which existed, was published in 1972 by the late Judge Wallace Gulia on Governmental Liability. Thankfully this has now changed, and Tonio is at the forefront of this change with the book we are celebrating today, apart from the earlier books he has already published.

Well done Tonio.

Thank you.

3. Speech by Dr John Stanton

Dr John Stanton is a Senior Lecturer in Law at City, University of London, specialising in constitutional law. He writes on local government, devolution and the Constitution of Malta, as well as the field more generally. His leading textbook, *Public Law*, (co-authored with Dr Craig Prescott) is published by Oxford University Press; the 3rd edition will be released in spring 2022.

Thank you for having me here, and for giving me the honour of saying a few words. I have known Tonio for just a few years, but count him as a dear friend and colleague who has always been immensely generous with his time and who has greatly enriched my own interest in Malta and its constitutional system.

Today, I wish to speak with you on a particular theme that is prevalent throughout Tonio's book and, indeed, throughout Administrative Law generally. Namely, it is the lengths that the courts go to in entertaining challenges to the use of executive power in both a legal and political context. In respect of ouster clauses, for example, a legal limitation on executive power, Tonio notes the manner in which both English and Maltese courts have sought restrictive interpretation of provisions designed to limit the scope of judicial review, on occasion bypassing such clauses altogether. And, strikingly, he identifies, in the political context, and I quote, 'an interesting jurisprudence which reveals an ever-increasing audacity of the courts to interfere even in highly politically sensitive cases' (p 181). In this vein, I am going to begin by noting the development of this theme within UK law, which, as Tonio himself notes, has strongly influenced Maltese law in this field.

The principle that the courts possess the power to assess the lawfulness of government action is deeply rooted within the English legal tradition. From the unlawful warrant issued by the Earl of Halifax in 1765, permitting Nathan Carrington and friends to enter and search John Entick's house to seize allegedly seditious papers, to MP Kenneth Baker's 1994 contempt of court for ignoring an order that halted the deportation of a Zairean teacher, the courts have always been ready and prepared to step in when government officials have erred from their legal authority and undermined the rule of law.

Examination of the wealth of case-law in this area reveals, amongst other things, one key question: how far are the courts willing to go in upholding this principle? This is a question that presents both legal and political constitutional considerations. The legal facet of the issue concerns the extent to which the courts protect the rule of law in potential conflict with supreme

legal authority. The political aspect ponders the extent to which, in assessing the lawfulness of government action, the courts stray from the legal sphere and involve themselves in ostensibly political matters and permit themselves to experiment with upholding constitutional convention. Two important cases exemplify the dilemma that courts face.

The first dates from the 1960s. A case was brought in 1968 by a mining company, Anisminic Ltd, against the Foreign Compensation Commission. In the throes of the Suez crisis in the 1950s, various British-owned companies and properties were seized by the Egyptian Government. Compensation was later paid by the Egyptian authorities through the Foreign Compensation Commission. When Anisminic applied for a portion of the compensation, however, the application was denied because the company's successors in title were not British. The case was then brought in challenge at the denied application. The problem was, however, that the legislation creating the Foreign Compensation Commission explicitly provided that '*the determination by the Commission of any application made to them under this Act shall not be called in question in any court of law*'. A strict reading of that provision effectively prohibited the courts from reviewing or scrutinising decisions of the Commission. This is, in effect, an ouster clause; it ousted the scope of judicial review, rendering a public body beyond the jurisdiction of the courts and potentially subjecting people and businesses to decisions that were unchallengeable, regardless of their propriety. The House of Lords' judgement in the ***Anisminic*** case remains one of the most important for any student or scholar of UK Administrative Law. In a widely cited judgement, the court found a way round the clause and succeeded in holding fast the jurisdiction of the courts to review the acts and decisions of public bodies.

Their lordships said that the clauses did not debar any inquiry into whether the commission had acted within its authority or jurisdiction. They only debar, they said, decisions made by the commission that, whilst acting within its jurisdiction, it has reached wrong or erroneous conclusions. In other words, the ouster clause served to prevent challenges to the Commission's decisions where it did not err from its jurisdiction. Where the Commission acted outside its jurisdiction, the court must be able to step in, said the Law Lords. Wade and Forsyth stress the value of this finding in suggesting that it represents a 'judicial insistence […] that administrative agencies and tribunals must at all costs be prevented from being sole judges of the validity of their own acts. If this were allowed, to quote Lord Denning […] "the rule of law would be at an end"', they said.[1]

This is a judgement that has been followed on numerous occasions, including, most recently in 2019, when Lord Carnwath explained that Parliament could, in theory, legislate to oust the scope of judicial review. It would, however, be '*for the courts, not the legislature, to determine the limits*

[1] HWR Wade and CF Forsyth, *Administrative Law* (OUP, 10th edn, 2009), 614 – 5.

set by the rule of law to the power to exclude review'.[2] In other words, the courts must ask themselves, said Carnwath, '*what scope of* […] *review* […] *is required to maintain the rule of law*'.[3]

It is a similar story here in Malta. A general ouster clause, found in Article 115 of the Constitution, for instance, applying as that does to the Public Service Commission, has received interesting treatment by the Constitutional Court, which in the ***Galea*** case explained that;

> *If one were to accept that a decision of the* […] [Commission] *is never subject to court review* […] *that would amount to an assertation that for the* […] [Commission] *the Constitution of Malta starts with article 110 and ends with article 115.*

In this, and subsequent cases, the ouster clause in Article 115 has been subject to narrow interpretation by the Maltese courts, who have emphasised the importance both of the Constitution and of the rules of natural justice as being of a superior importance than any attempted limitation. The Commission for the Administration of Justice has also received similar treatment. Though Article 101A purports to oust the scope of review in respect of this body, the Constitutional Court in ***Depasquale vs Prime Minister*** stressed the importance of the rule of law and, on this foundation, emphasised that an ouster clause cannot operate to permit the Commission free licence to act contrary to law and in breach of the Constitution.

The effectiveness and application of ouster clauses, therefore, must be balanced against the role of the courts in upholding and protecting the rule of law and other constitutional principles. Cases in the UK, as well as here in Malta, demonstrate that the courts seek restrictive interpretations of ouster clauses and, in so doing, cling earnestly to their responsibility to the rule of law.

The second UK case I wish to look at, and which illustrates the political aspect of my question into how far the courts go in checking the use of government power, is that challenging UK Prime Minister Boris Johnson's attempted 5-week prorogation of Parliament in October 2019.

The context for this case is, of course, the politically contentious and legally challenging departure from the European Union. Between 2016 and 2020, the deadline at which the UK's departure from the EU would become finalised was subject to various extensions. Initially, Brexit was to take effect in March, and then April, 2019. The agreements reached between the UK Government and the EU to that point, though, had been rejected by Parliament. The UK Government was struggling to get its Brexit approved; a no-deal departure was looking like a possible, albeit feared, reality. A further extension, though, was granted with Brexit set to take effect at the end of October 2019. In the

[2] R (Privacy International) v Investigatory Powers Tribunal and others [2019 UKSC 22 [131] – [132]
[3] Ibid., [132].

meantime, new Prime Minister, Boris Johnson, took office and pledged that there would be no more delays; Brexit would take effect, deal, or no-deal, on 31 October 2019. To prevent Parliament from interfering in and potentially frustrating the realisation of this goal through a vote of no confidence, the Prime Minister mooted the possibility of, and eventually gave effect to, a prorogation of Parliament. Prorogation is an exercise of the royal prerogative power and, therefore, whilst determined by the Government, is given effect by the Queen on the advice of her government. The Queen gave her consent for Parliament to be suspended on the 9th of September 2019, it being scheduled to end on the 14th October of 2019.

Prorogation is not by itself an unusual occurrence. Ahead of the State Opening of Parliament at the beginning of each session, for example, prorogation occurs for a period of just a few days. A 5-week prorogation, however, was unprecedented and was widely criticised for the manner in which it served as a barrier to parliamentary democracy. On the strength of these concerns, the prorogation was subject to legal challenge in the courts, the High Court and, later, the Supreme Court being faced with two questions. First, whether prorogation was a justiciable question. Secondly, whether a 5-week prorogation was lawful. The Supreme Court answered the first question in the affirmative and the second in the negative. In so doing, the Court affirmed a principle that runs through UK constitutional history; namely, that the exercise of government power must be founded upon lawful authority. The prorogation, however, was unlawful, said the Court. It was unlawful because it reflected an exercise of the prerogative that frustrated the work of the sovereign Parliament. Citing centuries of case-law, the Supreme Court said that Boris Johnson's 5-week prorogation prevented Parliament from passing laws and prevented it from holding the Government to account in the traditional fashion, something that is a fundamental feature of the UK's parliamentary executive system. The prorogation was held to be void and of no effect.

The notion that prorogation could be deemed a justiciable question, though, is a contentious view. This is chiefly because prorogation is an act of the executive that is inherently political in nature. Historically, the courts have tended to err on the side of caution in reviewing and scrutinising exercise of the prerogative where the power at issue is of a particularly political hue.

In ***Miller***, though, that appeared to change, where the questions facing the court were very much at the intersection of legal and political constitutionalism. Though some argued that the judgement amounted to a 'wholly improper judicial interference in the political arena', I think it can be more accurately seen as a restatement of fundamental constitutional principle: Parliament is sovereign and the Government cannot act to frustrate or challenge that. '[A]*ll exercises of constitutional interpretation, when undertaken by a constitutional actor* [such as that which occurred in ***Miller***], *are political*'. As Baroness Hale said early on in delivering the ***Miller***

judgement, whilst '*the courts cannot decide political questions* […] *all important decisions made by the executive have a political hue to them* […] *the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries*'.

Even putting aside, though, the politically adventurous musings of the Court, it was also bold for the manner in which it appeared arguably to create legal principle from established convention. It is a well-acknowledged constitutional convention that Government ministers are accountable to Parliament for carrying out their myriad duties and functions; the convention of ministerial responsibility. But it has always been just that – a convention. Not a law, and not a rule that the courts have ever been minded to enforce as any legal principle. Until now, it would seem. The Supreme Court stated in ***Miller*** that;

> *Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make. By these means, the policies of the executive are subjected to consideration by the representatives of the electorate, the executive is required to report, explain and defend its actions, and citizens are protected from the arbitrary exercise of executive power … the longer that Parliament stands prorogued, the greater the risk that responsible government may be replaced by unaccountable government: the antithesis of the democratic model.*[4]

By articulating the notion of parliamentary accountability in these terms, and subsequently going on to justify its findings partly on this basis, the Supreme Court is arguably treading a new path and elevating the constitutional convention of ministerial responsibility to legal principle, capable of potential enforcement, and adequate to justify the courts' limitations of executive power.

Here, in Malta, the codified nature of the Constitution and the reduced emphasis that this consequently places on conventional rules, as compared with the UK system, the inclination of courts to involve themselves in ostensibly political affairs occurs in a different fashion and upon a much clearer legal foundation. Some relevant cases here involve assessment of the use of executive discretion, which – most notably in the context of the ***Blue Sisters*** case – is rooted in the common law grounds for judicial review prevalent in the UK. In recent years and decades, for example, the Maltese courts have explored questions of unreasonableness, arbitrary use of power, the factors considered relevant to executive decision-making, and legitimate

[4] *R (Miller) v Prime Minister* [2019] UKSC 41 [46] and [48].

expectations. Points that, whilst undoubtedly rooted in established legal principle – whether English or Maltese – have empowered the courts, on occasion, to flex their judicial muscles in examining more freely government activity. A case, though, that perhaps gets closest to the audaciousness of ***Miller*** is the ***Church Schools*** case from 1984. In the preliminary stages of the case's progression through the courts, various judges had either abstained from sitting or had been challenged by the government. In the end, only 3 judges remained. When the Government sought to challenge one of the 3 remaining judges, the Constitutional Court refused the challenge on the grounds that '*when there were only three judges left*', further challenge to the composition of the Court must be automatically refused to safeguard the continuity of the Court and to ensure it is always constituted and operative.

And so, returning to the question with which I opened: how far are the courts willing to go in preserving and protecting their scrutiny of government action? They are willing, it would seem, to develop existing and potentially new principles that enable them to preserve prevailing constitutional norms at the same time as accommodating the ever-changing behaviours of our governmental institutions. In ***Anisminic***, the House of Lords may have sought a bold, yet careful, interpretation of the Foreign Compensation Act, thereby limiting the circumstances in which the court's supervisory jurisdiction could be ousted, but it did so in a manner that did not upset the sovereignty of Parliament. And, in ***Miller***, erring as it did into particularly political waters, and there not being afraid, arguably, to develop legal principle upon a foundation of constitutional convention, the Supreme Court was cautious to set out – from the very beginning – the parameters of its judgement and the appropriate territory into which it felt it could venture. These two cases are notable but important declarations of the rule of law and the careful adjudication of executive action. And similar values seem prevalent in examples of Maltese case-law, where the courts have similarly been minded to preserve the right of judicial review, even in the face of ouster clauses, and even resorting to UK law to permit investigation of certain features of government behaviour.

It is worth highlighting, at this point, the potential for change. Reform of judicial review is currently being explored in the UK. It is being considered, for example, that the precise effect of ouster clauses be clarified by legislation, this potentially serving as a parliamentary statement of what is and what is not an acceptable judicial reaction to such provisions. And, with regards to the propensity of the courts to err into the political or conventional realm, a Bill, that will potentially see repeal of legislation fixing parliamentary terms, provides that the prorogation powers, and the advice provided to the Queen with regards to potential prorogation, '*may not be impeached or questioned in any court of law*'. An ouster clause, therefore, potentially invoked to ensure that the political boldness of ***Miller 2*** is not repeated again. It would be interesting to see, however, what the courts would make of this clause. On the strength of prevailing authority, already explored, it is not unthinkable that

the courts would interpret this provision as meaning that the prorogation power cannot be questioned in any court of law, unless it is exercised in a manner that can be deemed unlawful, perhaps unconstitutional, and an affront to the rule of law, whereupon the courts might understandably get involved. And, finally, what of the future in Malta? Well, I shall leave you with the words with which Tonio finishes this fine book: 'It remains to be seen to what extent Maltese administrative law […] continues to develop its own laws, rules and practises […] buttressed by an active Constitutional Court and ordinary courts which are adamant in allowing the democratically elected Government to govern the country, but subjecting it to court scrutiny as to the legal validity of its actions' (p 212).

Thank you.


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