

The Journey To Legal Capability: Challenges for Public Law from Public Legal

Education

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Introduction

Citizens whose rights are infringed by a public authority are often unable to attain a court judgment to challenge those adverse decisions. The trite explanation is the most compelling; judicial review is a prohibitively expensive process.² This high cost of litigation combined with the fees charged by public lawyers can make fighting for one's legal rights inaccessible to those without independent means or publicly funded legal representation. There is no question that this is a complete explanation for many instances of unmet legal need, but this paper seeks to raise another important barrier to access to justice that is seldom discussed in the recent literature.

Legal capability is defined as the knowledge, skills and confidence required to participate in legal systems and to deal with one's legal issues. It is thought to be improved through

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² Sarah Nason, "Justice Outside London? An Update on 'Regional' Judicial Review" (UK Constitutional Law Association, November 16 2016) <https://ukconstitutionallaw.org/2016/11/16/sarah-nason-justice-outside-london-an-update-on-regional-judicial-review/> accessed 25th July 2022

programmes of Public Legal Education (PLE).³ Whilst the author reiterates that legal education is no replacement for state-funded legal advice for the poor, PLE is a crucial tool in helping people to challenge public decision making.

The UN, amongst others, has suggested that governments can prevent civil legal problems from spiralling out of control by giving those affected the tools to self-diagnose and, where appropriate, act with support to enable them to intervene.⁴

The author is both an academic representing pedagogical ideas to the government and a civil society activist working to implement programmes of PLE in varied settings. These experiences will be used to examine the (minimal) effectiveness of initiatives such as the placement of human rights into the National Curriculum for Citizenship Education in 2013 and the requirement that all English schools promote the 'fundamental British value' of the Rule of Law.

This article further argues that the state can provide meaningful information about public authorities' duties and citizens' entitlements through public legal information, and that there is a moral impetus for it to do so. A concrete plan for doing so would work to ensure

³ Genn et al, "Developing capable citizens: the role of public legal education The report of the PLEAS Task Force" <https://lawforlife.org.uk/wp-content/uploads/2013/05/pleas-task-force-report-14.pdf> accessed 25th July 2022

⁴ United Nations General Assembly, "Legal Empowerment of the poor and eradication of poverty Report of the Secretary-General" (July 2009) <https://www.un.org/esa/socdev/documents/reports/Legal%20empowerment%20of%20the%20poor.pdf> accessed 25th July 2022

that those subject to unlawful administrative decision making have the legal capability to mitigate further damage to their interests and pursue the correct decision.

Access to justice and the rule of law are broader than legal aid

Access to justice has underpinned English notions of fairness in the legal system since Magna Carta stated that “to no one will we sell, to no one deny or delay right or justice.”⁵

This was echoed some 800 years later by British judge Lord Bingham of Cornhill, who laid out a definition of the rule of law that is striking in its clarity. He described two hallmarks of the rule of law which are of major relevance to this paper; the first that “the law must be accessible and so far as possible, intelligible, clear and practicable.”⁶ The second principle is that “means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties are themselves unable to resolve.”⁷

The practical significance of these principles is that the law should be comprehensible in order to justify its binding role on the actions of citizens, and that the state should provide opportunities to resolve incorrect decisions made about those citizens; there should be access to justice. This line of thinking was key to the reasoning of the Supreme Court in

⁵ Magna Carta Article 40

⁶ Tom Bingham, “The Rule of Law” (Penguin 2010)Pp 37

⁷ Ibid, Pp 85

Unison where Lord Reed goes so far as to say that access to the courts is “inherent in the rule of law.⁸”

The idea that the government has a necessary role to play in ensuring access to justice is baked into the psyche of the British state. How did it come to be so pivotal? As a welfarist political consensus emerged after the Second World War, the Atlee government enacted the Legal Aid and Advice Act 1949. This Act created the Legal Aid Board which would provide those of “small or moderate means” with the necessary funding to secure legal representation for their civil legal problems.⁹

Legal aid has been largely viewed as a welcome achievement, but its operation has not been without criticism. Eligibility for legal aid has always been targeted at the most hard-pressed, and as such decisions to grant funding are subject to a means test.¹⁰ This means test has the potential to leave lower-middle class individuals subject to a legal problem undercompensated if they take a party to court, as they are unlikely to recover all of the costs of representation even if successful.¹¹

This was exacerbated by a change of policy by the UK government as the country entered the second decade of the 21st century. Conservative Party Chancellor of the Exchequer

⁸ R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51

⁹ Joint Committee on Human Rights, The Implications for Access to Justice of the Government’s Proposals to Reform Legal Aid, 13 December 2013, HL Paper 100 of session 2013–14, p 7.

¹⁰ Catherine Jennings, “Accessing Justice: Civil Legal Aid, the Public Interest and Judicial Action” (January 30, 2018). <https://ssrn.com/abstract=3396591> accessed 25th July 2022

¹¹ Duncan Watts, “AQA Government and Politics AS” (AQA 2014)

George Osborne announced an ‘emergency’ budget in June 2010 that significantly reduced the Ministry of Justice budget. This was wrought by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which paved the way for the legal aid budget to be cut by over 1 billion over the next ten years,¹² creating a situation described by the Law Society as ‘a wide[r] and detrimental effect on society’.¹³

Drilling down to the regional level, there are whole areas of the United Kingdom in which there are no qualified legal aid solicitors specialising in given areas of law. This problem has become so pronounced that industry estimates suggest that in 2021, 40% of the population of England & Wales did not have a local legal aid provider working in the area of housing law.¹⁴ More worryingly for present purposes, these ‘advice deserts’ are most stark in the public law jurisdiction, where approximately 80% of judicial reviews between 2018-2020 were heard in London, despite the region containing approximately 7% of the UK population.¹⁵ Thomas argues that this “large but largely hidden and ignored landscape” operates “outside the main political agenda” and is thus not a prominent or

¹² Statista, “Resource department expenditure limit (RDEL) of criminal and civil legal aid in England and Wales from 2005/06 to 2020/21” <https://www.statista.com/statistics/1098628/legal-aid-spending-in-england-and-wales/> accessed 25th July 2022

¹³ Law Society, “Access Denied? LASPO Four Years On: A Law Society Review”

¹⁴ Law Society, “Housing – legal aid deserts” <https://www.lawsociety.org.uk/en/campaigns/legal-aid-deserts> accessed 25th July 2022

¹⁵ Sarah Nason and Liam Edwards, “Reviewing Judicial Review in Wales” (April 2021) pg 11 Figure 1 [https://research.bangor.ac.uk/portal/en/researchoutputs/reviewing-judicial-review-in-wales\(60911944-778a-47a9-8159-872534c22bb5\).html](https://research.bangor.ac.uk/portal/en/researchoutputs/reviewing-judicial-review-in-wales(60911944-778a-47a9-8159-872534c22bb5).html) accessed 25th July 2022

oft-discussed public policy issue.¹⁶ It is clear that there is unmet legal need for judicial review in most parts of the country; if you live outside the capital, your ability to challenge public decision making is severely limited.

It is worth reminding ourselves of the importance of legally aided litigation. Cases of central importance to our democracy have arisen from legally aided claimants who would otherwise have been unable to bring these cases, of which *Donoghue v Stephenson* is the most infamous. Had Ms Donoghue not been able to bring her case, she would not have been compensated for the harm that she suffered, but more crucially the principle that we owe each other a duty of care to prevent reasonably foreseeable harms would not have resulted. It is uncontroversial to say that legal aid, and the legal assistance that it facilitates, is much needed in realising rights.

Legal aid is irreplaceable and serves an important role, but its apotheosis as the main element of the post-Atlee welfare state is highly problematic. As the replacement of the Legal Aid Board with the Legal Services Commission and later the Legal Aid Agency would show, the body was prone to severe disruption by changing political priorities. Legal aid was born in an era of post-war political consensus in which Conservative politicians were more comfortable with supporting social welfare programmes.¹⁷ This

¹⁶ Frances Gibb, “Administrative Justice and Tribunals Service comes out of the shadows” <https://www.thetimes.co.uk/article/administrative-justice-and-tribunals-service-comes-out-of-the-shadows-bqfpjjzsv5p> accessed 25th July 2022

¹⁷ Andrew Marr, “The Making of Modern Britain” (Macmillan 2010)

would not last into the Thatcher administration.¹⁸ By contrast the rather tentative establishment of PLE has been a more politically palatable concept accepted by both Labour and Conservative MPs.¹⁹

The practical significance of this point is that in a situation where the justice sector is at loggerheads with the government over the funding of legal representation, PLE may be an easier tactical target for public interest campaigns than legal aid.

Beyond this further support for PLE is a sustainable investment for creating active, knowledgeable citizens. Some of the greatest gains in legal rights are achieved by using the law outside of the courtroom. Civic participation in Scotland, the so-called ‘Snowdrop campaign’ saw the UK Government pass the Firearms (Amendment) Act 1997 to prohibit the possession of small firearms. The National Farmers’ Union organised blockades in order to argue for a reduction in fuel tax. Though unsuccessful in this aim, they succeeded in securing a freeze of fuel prices.²⁰ These were sophisticated operations in which professional activists used their knowledge of the different ‘levers’ that could be pulled in order to achieve societal change. Such an assessment requires the knowledge, skills

¹⁸ Harrison, “The Rise, Fall and Rise of Political Consensus in Britain since 1940” (Vol. 84, No. 274 April 1999) pp. 301-324

¹⁹ There are numerous indicators of this cross-party appreciation for PLE including the All-Party Parliamentary Group on PLE and Pro Bono, which has been chaired by a Conservative MP in successive Parliamentary sessions: <https://publications.parliament.uk/pa/cm/cmallparty/220722/public-legal-education-and-pro-bono.htm> accessed 25th July 2022

²⁰ Firearms (Amendment) Act 1997

and confidence to deal with law related issues in one's life; in other words, 'legal capability'.²¹

We don't currently have a legal obligation to teach about the law

It has been established above that widespread legal capability is crucial to the achievement of access to justice through the rule of law. As the Public Legal Education and Advice Service task force stated, PLE is the tool needed to achieve legal capability.²²

One might then ask the question, what levers does the UK government pull in order to ensure provision of PLE?

The political geography of the UK makes this question more complex. Education is a devolved competence in the UK, meaning that the devolved administrations of Northern Ireland, Scotland and Wales maintain their own national approaches. There is an awkwardness in the fact that we wish to teach students about the English and Welsh legal system, yet England and Wales pursue different approaches to education. The author is a product of the English education system and this chapter focuses explicitly on the English context.

²¹ Wintersteiger, "Legal Needs, Legal Capability and the Role of Public Legal Education A Report by Law for Life: the Foundation for Public Legal Education" (Law for Life 2015)

<https://www.lawforlife.org.uk/wp-content/uploads/Legal-needs-Legal-capability-and-the-role-of-Public-Legal-Education.pdf> accessed 25th July 2022

²² PLEAS Taskforce Report cited above at footnote 2

There is currently no effective legal obligation requiring the UK government to ensure that every English citizen has legal capability; nor is there an obligation to implement PLE across England. PLE has not been the subject of litigation in the United Kingdom, and so the common law does not provide any assistance in this area. Similarly, there are several international treaties that reference PLE's cognate concepts (especially citizenship education) but these are not directly effective in the UK; the UK is a 'dualist' system in which international law and treaties need further national legislation in order to confer real rights.

The major treaties calling on the UK government to implement aspects of PLE are:

- UN Declaration Human Rights Education and Training ('UDHRET')²³
- UN Convention on the Rights of the Child
- Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education ('the Charter')²⁴

Despite a clear thread throughout these instruments that young people should be taught about their rights, these treaties are seldom referred to in the work of Parliament.²⁵ The inability of these instruments to encourage action from politicians was illustrated in an

²³ UNGA, Res 66/137 Declaration on Human Rights Education and Training (19 December 2011)

²⁴ Council of Europe, Recommendation CM/Rec(2010)7 of the Committee of Ministers to member states on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education

²⁵ Searches for these instruments in Hansard suggest that the Charter and Declaration have never been referred to in proceedings of the Commons or the Lords.

almost two-hour-long Westminster Hall Debate in which members failed to reference any of these obligations.²⁶

Domestic legislation involving PLE has also been threadbare. The most compelling provision is s1(g) of the Legal Services Act 2007 (LSA 2007) which imposes an obligation upon the Legal Services Board (LSB) to “increasing public understanding of the citizen's legal rights and duties.”

Though the placement of this obligation in statute is novel, and of relevance to the current discussion it is deficient in several respects. Put simply, imposing the obligation on the LSB doesn't guarantee any PLE activity. Legal professionals are not best placed to provide such an onerous duty alongside their core role, representing clients. The LSB itself is not a ‘front-line regulator’ but instead a ‘regulator of regulators’ in essence acting through regulators such as the Bar Standards Board and Solicitors Regulatory Authority to influence lawyers. This means that the LSB has made a modest number of PLE interventions (such as running the collaborative [‘Justice Week’](#) campaign) and the impact of the LSA 2007 has been limited in respect of legal capability.

²⁶ HC Deb 15 May 2018, vol 641 col 80WH



LSB Justice Week Events

The most authoritative and influential obligation to deliver PLE is the framework surrounding the Education Act 2002. S78 of the Act states that maintained schools should provide a 'balanced and broadly based curriculum' which 'promotes the spiritual, moral, cultural, mental and physical development of pupils at the school and of society'. This obligation would go on to be known as 'SMSC' by the teaching profession. The Department for Education modified this requirement in September 2014 to require SMSC to include promotion of the 'Fundamental British Values'. These 'FBVs' comprise:

1. democracy,
2. the rule of law,
3. individual liberty and
4. mutual respect and tolerance for those of different and no faiths.

This new requirement was complemented by the Department for Education guidance, 'Promoting fundamental British values through SMSC'. This document sets out a highly

rigid and conformist notion of law with the rather regrettable expression that “The school’s ethos and teaching, which schools should make parents aware of, should support the rule of English civil and criminal law and schools should not teach anything that undermines it.”²⁷

These highly individualised forms of legal education focus specifically around the individual’s responsibility to shape their family life and home affairs in such a way as to avoid criminal liability. This is important, but incomplete; these incentives do not encourage students to consider how they might campaign collectively to achieve societal justice or how they might pursue law reform or how they might act with others to create political change. They encourage the idea that the status quo is optimal without consideration of alternatives.²⁸

The Attorney General’s Office would make another significant intervention in this area in 2017 in the formation of the Solicitor General’s ‘PLE Panel’,²⁹ which would later be renamed the ‘Solicitor General’s PLE Committee’. This group comprised a group of experts who would work with the minister to produce a PLE action plan over the next 18

²⁷ Department for Education, “Promoting fundamental British values as part of SMSC in schools Departmental advice for maintained schools” (November 2014)

<https://www.gov.uk/government/publications/promoting-fundamental-british-values-through-smsc> accessed 25th July 2022 pg 4

²⁸ Hugh Starkey “Human rights, cosmopolitanism and utopias: implications for citizenship education” (2012) Cambridge Journal of Education

²⁹ UK Government, “New Panel Launched To Drive Public Legal Education” <https://www.gov.uk/government/news/new-panel-launched-to-drive-legal-education>

months.³⁰ The author worked with then-Solicitor General Robert Buckland QC MP to launch a government vision statement at a combined meeting of the All-Party Parliamentary Group (APPG) on the Rule of Law and the APPG on PLE and Pro Bono.³¹ The action plan³² stated that seven goals should be pursued in order to correct deficiencies in the delivery of PLE:

1. PLE will be supported by a robust evidence base, showing what the need is and what works best,
2. PLE will be of high quality, maintained to ensure that it remains accurate and accessible and useful for the people who need it,
3. PLE will be universal and reach across all demographics, prioritising children, young adults and vulnerable groups,
4. PLE will be scaled up through delivery by the legal community,
5. PLE will harness technology and be delivered through innovative methods, both on and offline,
6. PLE will be embedded into public services and government departments
7. PLE will be understood as beneficial and utilised by other sectors.

³⁰ Members included Young Citizens, Law for Life, the Law Society, the Bar Council, Inns of Court, the Bingham Centre for the Rule of Law, the Magistrates' Association, the Legal Services Board, the National Justice Museum and others.

³¹ The Solicitor General's Public Legal Education Committee, "10 Year Vision for PLE"
<https://www.lawworks.org.uk/sites/default/files/files/10YearVisionForPLE-web.pdf> accessed 25th July 2022

³² Attorney General's Office, "Press release Our vision for legal education' Solicitor General Robert Buckland QC MP launches a new PLE vision statement" (October 2018)

Although this launch was enthusiastically attended by the justice sector, and overtures were made to PLE in the Attorney General's Business Plan for 2020-2021, the action plan has so far resulted in minimal activity at the time of writing this piece some three years later.³³ This could be in part due to the de facto role the Solicitor General has assumed in representing PLE within government. The Solicitor General post suffered from the politically unstable zeitgeist as six appointments were made to the role between July 2019 and September 2022. This period also saw the longest-running minister in this period, Michael Ellis QC MP, given additional responsibility for the government's response to the COVID-19 pandemic.

As a leading member of the group it is my view that the Solicitor General's PLE Committee has not been able to achieve the radical promise set out in its vision.

The curriculum operationalised PLE through citizenship education

Another major attempt to place PLE at the heart of the English learning experience has been through the curriculum. The Crick Report in 1999 facilitated the creation of a new national curriculum subject, Citizenship Education.³⁴ It set out the following as essential

³³ Attorney General's Office, "AGO Business Plan 2020-2021"
(https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/906162/2020-21_AGO_Business_Plan.pdf) accessed 25th July 2022

³⁴ The Advisory Group for Citizenship, "Education for citizenship and the teaching of democracy in schools: Final report of the Advisory Group on Citizenship" (Qualifications and Curriculum Authority 1998) <https://dera.ioe.ac.uk/4385/1/crickreport1998.pdf> accessed 25th July 2022

concepts: 'fairness, justice, the rule of law, rules, law and human rights'. It stated that 'civility and respect for the rule of law' were essential values and dispositions. Essential elements of knowledge and understanding were 'legal and moral rights and responsibilities of individuals and communities' and also encouraged teaching 'Britain's parliamentary political and legal systems at local, national, European, Commonwealth and international level, including how they function and change'. All of these areas of knowledge were meant to lead to the development of skills and aptitudes that would provide the 'ability to identify, respond to and influence social, moral and political challenges and situations'.

There is an international consensus that citizenship education should include teaching about law and politics, and that it is the appropriate place in the English student's experience during which they should learn about the rule of law.³⁵ Though not all schoolteachers include PLE in their citizenship education lesson plans, English/European Citizenship Education frameworks have been designed to make law a crucial part. For this reason Citizenship Education and PLE will be used interchangeably throughout this paper.

The placement of this subject as a compulsory element of the curriculum was a welcome boost to legal capability. Educational awarding bodies created GCSE (secondary school

³⁵ Council of Europe, "Knowledge for Critical Understanding, Education for Democratic Citizenship" Figure 20A. Knowledge and critical understanding of politics, law and human rights

leaver exams) and A Levels (exams typically taken prior to higher education) based on the principles above. University graduates trained specifically to teach citizenship on specialist teaching courses. Though we should not think that these years saw perfect provision of PLE throughout the country, this was certainly its heyday, because over the subsequent twenty five years there would be significant decline in this subject.

The early days of the 2010 coalition government saw the Department for Education introduce the Academies Act 2010, which facilitated the transformation in legal status of schools formerly attached to their local authority that would now become 'academies' without an obligation to follow the curriculum. It was at this point that teaching Citizenship became a voluntary, rather than compulsory subject for many academised schools.³⁶

Citizenship allowed to degrade to a parlous state

Several members of the House of Lords who had been involved in the creation of Citizenship Education were concerned about its lack of universality across England. Reacting to this concern, Lord Blunkett (who had been the Secretary of State for Education presiding over its introduction) and others set up an 'ad hoc' select committee

³⁶ Commons Library, "House of Commons Briefing Paper Number 06798: The school curriculum in England" (26 March 2021) pg 5 para 1.3
<https://researchbriefings.files.parliament.uk/documents/SN06798/SN06798.pdf>

in 2017, an accountability and oversight mechanism designed to enable short-term inquiries into specific issues of interest to members of the Lords.

Their educational concerns ran in parallel with wider social issues, such as a downward trend in election turnout over the post-war period.³⁷ The ‘Ad hoc select committee on Citizenship and Civic Engagement’ heard from an extensive network of experts and reported its findings in 2018. Its report produced damning findings of the operation of Citizenship Education in England and Wales. They concluded that citizenship education in England had been allowed “to degrade to a “parlous state”³⁸ where it was essentially unclear whether a random young person leaving the compulsory school system had experienced high quality citizenship education at all.

The government response to this was unsatisfactory and did not engage with the major challenges involved. The (then) Department for Housing, Community and Local Government wrote a response that reiterated the importance of Citizenship as a subject on the curriculum, spoke of the role that FBVs serve(d) in promoting the rule of law and stated that the varying coverage of citizenship education was not a problem because it

³⁷ The Commons Library, “Turnout” <https://researchbriefings.files.parliament.uk/documents/CBP-8060/CBP-8060.pdf> accessed July 15th 2022

³⁸ Ad Hoc Select Committee on Citizenship and Civic Engagement, “The Ties that Bind: Citizenship and Civic Engagement in the 21st Century” (2018) House of Lords pg 147 para 162

represented a parochial kind of autonomy in which individual schools could make choices on the basis of what would be most appropriate.³⁹

The upshot of this is that the government prioritises local selection of curriculum content over the imposition of compulsory parameters. Whilst this gives schools additional flexibility, it introduces a much lower common denominator in terms of legal capability.

In a system where there is no true ‘national’ curriculum requiring Citizenship Education, a child can go through the entire system without developing any measure of legal capability. The author argues that this contributes at least in part to major challenges for access to justice, such as the Legal Services Board suggestion that up to 36% of the British public possess low legal confidence, leading 52% of those to worse legal outcomes than others with high legal confidence.⁴⁰

Challenges from a parlous state

The fragile state of PLE in England was put to the test as the constitution strained under the weight of a febrile atmosphere in which national politics became increasingly polarised and tribal. Following the UK’s decision to withdraw from the EU (‘Brexit’), the

³⁹ Ministry of Housing, Communities and Local Government, “Government response to the Lords Select Committee on Citizenship and Civic Engagement” (June 2018) accessed 25th July 2022

⁴⁰ Legal Services Board, “PLE research insights: How access to justice and outcomes vary by legal capability”, pg 5 <https://legalservicesboard.org.uk/wp-content/uploads/2020/02/LSB-PLE-event-Feb-2020-for-web.pdf> accessed 25th July 2022

UK government entered into extensive negotiations with the EU about the future relationship between the nation and the bloc.

The EU placed a longstop on those negotiations; existing obligations would expire on 31st December 2020 and the UK would ‘crash out’ of the provisional arrangements if no deal had been reached by that point. UK Prime Minister Johnson tried unsuccessfully to persuade Parliament to pass the EU Withdrawal Agreement Bill, a legislative instrument that would give effect to his negotiated settlement.

In a widely criticised move, Johnson sought to end the session of Parliament, reducing the number of opportunities MPs would have to scrutinise the legislation. The Supreme Court ruled that this was an unlawful act as its effect was to stymie the ability of Parliament to hold the executive to account.⁴¹ ‘Miller 2’ suggested that the operation of the checks and balances in the UK constitution were operating effectively; the judicial branch of government acted effectively to restrain the executive branch from acting outside of its powers.

But in the words of Ms Miller’s counsel, she is extraordinary; a combative democrat and an immensely wealthy woman with high legal and political capability. Where were the normal citizens standing up for their rights?⁴² This raises a question about how PLE can contribute to the breadth of engagement in our democracy. Should there have been

⁴¹ R (Miller and others) v Prime Minister 2019 UKSC 41

⁴² The Bingham Centre, “The Article 50 ‘Brexit’ Appeal: The Rule of Law After Miller” <https://youtu.be/F1CKnGRSSvA?t=3467> accessed at 25th July 2022

greater social pressure from the public, and a more widespread section of it, upon their elected representative to resist this? Must a citizen be well-advised and wealthy to bring a major constitutional challenge?

This point struck most resonantly in the wake of the ‘Miller 2’ case. A YouGov instant response poll asked, “the Supreme Court has said that Prime Minister Boris Johnson acted unlawfully in proroguing Parliament. Do you agree or disagree with the ruling?”⁴³

Up to 30 percent of the public disagreed with the court’s orthodox decision, and another 21 percent stated that they did not know how they felt. These figures partially illustrate the widespread deficiency in legal capability as well as the complex tribalism effected by the referendum and the post-2019 Johnson administration.

Irrespective of the merits of the decision, enforcement of the constitutional order by citizens is a contemporary challenge described by the Bingham Centre as an urgent need to ‘democratise’ the rule of law. This is an area in which PLE is better placed than judicial review representation orders in improving the quality of democratic participation. The executive can only be held accountable for breaches of its obligations if individuals are able and prepared to challenge public decision making.

⁴³ YouGov, “By 49% to 30%, Britons agree with the Supreme Court’s ruling that proroguing Parliament was unlawful” <https://yougov.co.uk/topics/politics/articles-reports/2019/09/24/49-30-britons-agree-supreme-courts-ruling-prorogui> accessed 25th July 2022

The UK Government can successfully deliver PLE by reference to similar initiatives

There is clear evidence that the UK government can educate and influence the public where it desires to do so. During the COVID-19 pandemic, the UK government increased its advertising spend on public health messaging by almost 800%.⁴⁴ Similarly the document 'Why the Government believes that voting to remain in the European Union is the best decision for the UK' (the leaflet) was issued to every household in the UK.⁴⁵ This was a requirement of the European Union Referendum Act 2015, and because it was placed in legislation this secured sufficient resources for this document.

In unpublished research (2016) for the Cabinet Office, I found that the leaflet was an effective means of encouraging both private renters and home owners to engage with politics, even if the arguments in the leaflet themselves did not ultimately convince them. This example has not been followed in a major election or referendum but it provides insights that may assist with the current constitutional furore.

Amidst the turmoil of Brexit the reigning Conservative Government fought the 2019 General Election Campaign on a manifesto (the manifesto) that heralded an extensive

⁴⁴ The Media Leader, "Nielsen confirms £164 million government ad spend for 2020" <https://the-media-leader.com/nielsen-confirms-164-million-government-ad-spend-for-2020/> accessed 25th July 2022

⁴⁵ Cabinet Office, "Why the Government Believes That Voting To Remain In The European Union Is The Best Decision For The UK" Accessed 25th July 2022
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/515068/why-the-government-believes-that-voting-to-remain-in-the-european-union-is-the-best-decision-for-the-uk.pdf

programme of constitutional reform including repeal of the Fixed Term Parliaments Act, a review of Parliamentary Constituency boundaries, introducing requirements for identification to vote at polling stations and a Constitution, Democracy and Rights Commission (CDRC) to ‘rebalance’ the UK constitution.⁴⁶ This programme of reform was described by Unlock Democracy as a “new interventionist role” that “puts our fragile rights and liberties in the firing line.”⁴⁷ Political theorist Aitchinson has described the CRDC as an attempt to “remove the checks and balances of our constitution.”⁴⁸ More than two years after the eventual Conservative victory in the 2019 election, the CRDC has not resulted in its full form. Despite this it is clear at the time of writing that the manifesto established sky-high stakes for constitutional reform. The CDRC has been split up into smaller elements that have not been afforded the column inches that an omnibus process might have received. In relation to human rights, the government ran two consultations.

The first, the ‘Independent Human Rights Act Review’ was led by Sir Peter Gross, with a final report that emphasised the crucial importance of broadening awareness about

⁴⁶ Conservative and Unionist Party, “Get Brexit Done: Unleash Britain’s Potential The Conservative and Unionist Party Manifesto 2019” Accessed 25th July 2022 pg 48 https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conervative%202019%20Manifesto.pdf

⁴⁷ Open Democracy, “This Tory manifesto is chilling - liberals must vote tactically to protect democracy” <https://www.opendemocracy.net/en/opendemocracyuk/tory-manifesto-chilling-liberals-must-vote-tactically-protect-democracy/> Accessed 25th July 2022

⁴⁸ Aitchinson, ‘This Tory manifesto is chilling - liberals must vote tactically to protect democracy’

human rights in order for the public to ‘own’ their rights and to be able to use them.⁴⁹ The second consultation led by Justice Secretary Dominic Raab invited experts to respond to a series of proposals which included substantive amendment of human rights law, making little reference to Sir Peter Gross’ review.⁵⁰

It is worth reflecting on this process as it is instructive of the fragility of such ‘asks’ in an adverse political environment. The gravitas and expertise of the Independent Human Rights Review commissioners could not prevent the government from dropping the vast majority of their recommendations, including legal education about human rights. In an online event discussing this exchange Sir Gross remarked that the review of human rights law should not be premised on the government’s scepticism of a small number of high-profile cases, but should be based on a more widespread ownership of rights by citizens.⁵¹ I have argued elsewhere that the CDRC could represent a pivotal opportunity to facilitate a society-wide discussion about the future direction of our politics.⁵² It is not too late for the government to conduct a nationwide CDRC that represents the best of the principles

⁴⁹ The Independent Human Rights Act Review available at:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrra-final-report.pdf

⁵⁰ Ministry of Justice, “Human Rights Act Reform: A Modern Bill Of Rights A consultation to reform the Human Rights Act 1998” (2019)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf Accessed 25th July 2022

⁵¹ UCL, “The Human Rights Act- Reviewed” (2022) <https://www.youtube.com/watch?v=uKe10pYbQXA> Accessed 25th July 2022

⁵² M A Olatokun, “Consult beyond the usual suspects to renew the constitution” Times Red Box

above; an opportunity for constitutional education accompanied with a concrete opportunity to feed back into current government proposals.

One example of this model was run by the UCL Constitution Unit in 2021. The Unit convened a stratified sample of citizens from across the country and presented them with a series of informational presentations by legal and political experts. After these presentations the citizens were asked for their views on matters at the heart of the UK democracy such as strengthening the role of Parliament in holding the executive to account, maintaining the role of the courts in limiting the actions of governments and strengthening the code of conduct for MPs and peers.⁵³ These recommendations are very different from the aims of the CDRC and thus represent a very important potential contribution of citizens to the political discourse.

Poor legal capability is undermining Parliamentary intention

The most compelling argument in favour of mainstreaming legal capability through PLE is that the present situation has the potential to undermine the implementation of rights that Parliament confers upon citizens. The Windrush Lessons Learnt Review, an inquiry into the mistreatment of Caribbean Britons by the immigration system, recommended extensive training for civil servants on the Human Rights Act 1998 and Equality Act 2010,

⁵³ Alan Renwick, "People want politicians to act with integrity, says citizens' assembly" (UCL Constitution Unit) <https://www.ucl.ac.uk/constitution-unit/news/2022/jan/people-want-politicians-act-integrity-says-citizens-assembly> Accessed 25th July 2022

finding that senior civil servants were making decisions otherwise than in accordance with these legislative instruments despite the existence of a well-known legal framework AND adverse court judgements in which their departments had been unsuccessful defendants.⁵⁴

Throughout 2020, I convened a series of roundtables with senior politicians and civil servants to hear from them about how the law could have better protected those affected. The closed 'Windrush Roundtables' made clear that the complexity of the rules around immigration made it very difficult for those affected to understand their legal position; another area in which the government has not provided sufficient clarity as to citizens' rights on the one hand, and has made those rights inscrutable on the other.

In a literature review of PLE evaluations the author and others found that high-quality interventions that combine case work principles with a PLE approach can work well for claimants in the social care setting.⁵⁵ The application of PLE to real-life legal issues involving public authorities is somewhat underexplored, but if done successfully it could prove transformative in improving access to justice in the public law space and could encourage further engagement in developing a rule of law culture across England.⁵⁶

⁵⁴ Wendy Williams, "Windrush Lessons Learned Review"

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/87402/2/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf Accessed 25th July 2022

⁵⁵ Wintersteiger et al, "Effectiveness of Public Legal Education Initiatives A literature review" (2021) <https://legalservicesboard.org.uk/wp-content/uploads/2021/02/PLE-systematic-review-report-Feb-2021.pdf> Accessed 25th July 2022

⁵⁶ UNESCO, "Strengthening the rule of law through education: a guide for policymakers" (2018) <https://unesdoc.unesco.org/ark:/48223/pf0000366771> Accessed 25/7/2022

Conclusion

English PLE is at an early point in its implementation. There have been a number of highly promising governmental initiatives that have not received sufficient political will or resources in order to make legal capability stick. The information distributed to influence citizens during the referendum and public health campaigns (e.g. smoking and coronavirus) show that the government is capable of disseminating compelling messages; choices about resources prevent it from exercising that ability.

This knowing choice to baulk at recent opportunities to accompany major moments of constitutional reform with PLE is distressing. It is problematic because of the scale of proposed reform, which will likely take place without most citizens being aware of its stark consequences.

Although superficial, the author has observed clear cross-party popularity for PLE initiatives. Advocates of access to justice can and should continue to pursue increasing the legal aid budget in order to assist people with resolving disputes they cannot resolve themselves. However PLE should always be on the table whenever we make any argument about legal aid funding due to its invigorating effect on the democracy as well as the role it serves in bridging warring political ideologies.

Our advocacy of PLE should be passionate but not uncritical. There is a possibility that PLE becomes a neo-liberal political vehicle for the laissez-faire state providing nothing.

This is an undercurrent I am aware of from my several years advising ministers in this area and such an ideology ought to be resisted; we call for increased support and expansion of PLE to complement a fully functioning, properly funded legal system.