

Impact case study (REF3)

Institution: University of Oxford		
Unit of Assessment: 18 - Law		
Title of case study: Informing deliberation and decision about the limits of judicial power and human rights law		
Period when the underpinning research was undertaken: 2012 – December 2020		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Professor Richard Ekins	Titular CUF, St Johns College Professor of Law and Constitutional Government	01/09/2012 – 30/09/2013 01/10/2013 – present
Period when the claimed impact occurred: 2015 – July 2020		
Is this case study continued from a case study submitted in 2014? N		
<p>1. Summary of the impact (indicative maximum 100 words)</p> <p>Professor Richard Ekins's research addresses the nature of legislative authority, the balance of powers that characterises the Westminster constitution, and the way in which political and legal institutions should secure human rights. His work on legislative authority and human rights has been taken up by judges around the common law world. In the UK, Ekins has worked with the leading think-tank Policy Exchange to set up the Judicial Power Project, which has had a far-reaching impact on public deliberation about constitutional government and the role of the courts, especially in relation to human rights law and the problem of lawfare.</p>		
<p>2. Underpinning research (indicative maximum 500 words)</p> <p>Ekins studies the common law constitutional tradition, examining how the Westminster constitution realises parliamentary democracy and the rule of law. His research considers the principles that frame the relative authority of Parliament, government and courts and aims to explain how and why the traditional balance of legal and political authority has come under pressure. Thus, he examines ideas about judicial power, human rights, and the relationship between domestic and international law and considers critically their implications for the rule of law, good government, and self-government.</p> <p>The foundation of Ekins's study of the constitution is his research into the nature of legislative authority and its exercise. Ekins has developed the most sophisticated account in the literature of the philosophical grounding of the idea of legislative intent. Working with Jeffrey Goldsworthy (Monash), he has rehabilitated the idea as a coherent, intelligible foundation of statutory interpretation (R1).</p> <p>His research has explored the doctrine of parliamentary sovereignty and its place in the constitution, critiquing the attempts by some judges and lawyers to assert a novel power to quash statutes that a court thinks unjust (R2). This line of research has elucidated the workings of the Parliament Acts 1911 and 1949 and the European Communities Act 1972, and thus has helped to explain how exactly the UK received and applied EU law.</p> <p>Ekins's research shows how the legislature is capable of responding to reasons and enacting statutes that realise human rights. He has helped defend an account of human rights as secured principally in and through legislation rather than by way of judicial action (R3). This forms part of a wider body of work on the capacity of a self-governing people, by way of its representative institutions, to exercise reasoned self-rule. This body of work is attentive to the constitutional importance of the ways in which, and extent to which, international law is received into domestic</p>		

law and the relationships between international tribunals and domestic courts and political authorities.

Complementing his study of the idea of human rights, and the capacity of legislatures to secure human rights, Ekins has developed an extended critique of modern human rights adjudication, outlining the ways in which it compromises the separation of powers and the rule of law (R4). More generally, Ekins has traced the rise of judicial power in the common law world, especially in the UK, examining its intellectual, political and social causes and consequences (R5). This study builds on his analysis of the misuse of judicial power over several years, an analysis informed in turn by his long-standing study of legislative intent, parliamentary democracy, human rights, and sound legal reasoning.

Ekins has explored the constitutional relations between government, Parliament, the people and the courts in the context of the UK's decision to leave the EU and the fraught implementation of that decision (R6). This line of work defends the integrity of the UK's distinctive political constitution, outlining the dynamics of constitutional government and the proper relationship between law and politics.

3. References to the research (indicative maximum of six references)

R1: (Journal article) Richard Ekins and Jeffrey Goldsworthy, "The Reality and Indispensability of Legislative Intentions" (2014) 36 *Sydney Law Review* 39-68

<http://classic.austlii.edu.au/au/journals/SydLawRw/2014/2.pdf>

R2: (Journal article) Richard Ekins, "Legislative Freedom in the United Kingdom" (2017) 133 *Law Quarterly Review* 582-605 <https://ora.ox.ac.uk/objects/uuid:c1751ba3-3cc5-4041-baed-b802629e3c67>

R3: (Book chapter) Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley W. Miller, and Francisco J. Urbina, *Legislated Rights: Securing Human Rights through Legislation* (New York: Cambridge University Press, 2018) (Available upon request)

R4: (Journal article) Richard Ekins, "Human Rights and the Separation of Powers" (2015) 34 *University of Queensland Law Journal* 217-238

<http://www.austlii.edu.au/au/journals/UQLJ/2015/10.pdf>

R5: (Journal article) Richard Ekins and Graham Gee, "Putting Judicial Power in its Place" (2017) 36 *University of Queensland Law Journal* 375-398 <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/journals/UQLJ/2018/11.html>

<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/journals/UQLJ/2018/11.html>

R6: (Journal article) Richard Ekins, "Restoring Parliamentary Democracy" (2018) 39 *Cardozo Law Review* 997-1017 <http://cardozolawreview.com/wp-content/uploads/2018/08/EKINS.39.3.pdf>

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4. Details of the impact (indicative maximum 750 words)

Defining limits of judicial power

Ekins' research has been instrumental in shaping government policy defining the boundaries of judicial power via his work as the founder of the Judicial Power Project, part of Policy Exchange, one of the UK's leading think-tanks.

Building on his research into the central importance of legislative intent in statutory interpretation [R1], in his 2015 paper for Policy Exchange, *Judging the Public Interest* [E1] Ekins and co-author Forsyth argue, that the Supreme Court wrongly undercut the government's powers to block disclosures under the Freedom of Information Act. The paper recommends legislation to reinstate Parliament's enacting intentions. This paper formed part of the evidence Ekins and Forsyth provided to the Independent Commission on Freedom of Information in January 2016

[E2b] as part of the 10 year review of the Freedom of Information Act 2000. The subsequent report [E2a] echoed both this recommendation that government *'should legislate to put beyond doubt that it has the power to exercise a veto over the release of information under the Act'* [E2a, recommendation 13] and much of Ekins' underpinning rationale. Responding to these recommendations, the government declined to commit to new legislation but agreed with the report's findings that *'Parliament intended the executive to be able to have the final say as to whether information should be released under the Act'* [E3].

Ekins' scholarship on parliamentary sovereignty [R2] and constitutional government [R6] has also influenced government policy following the Supreme Court's decision to quash the government's attempt to prorogue Parliament in September 2019. In October 2019 he was asked to present evidence to the Public Administration and Constitutional Affairs Committee's inquiry into the prorogation, in which he described the ruling as *'depart[ing] radically from established law and [doing] serious damage to the integrity of the political constitution'* and that legislation was required *'to resist the judicialisation of politics by restoring the limits on the Court's jurisdiction'* [E4a]. This argument was developed in Ekins' paper for Policy Exchange, *Protecting the Constitution*, which criticised the Supreme Court's ruling as a judicial over-reach and argued for legislation to *'restate limits on judicial power'* [E5]. The influence of these arguments on government policy can be seen in the commitment in both the Conservative manifesto and subsequent Queen's Speech *'to consider the relationship between Government, Parliament and the courts and to explore whether the checks and balances in our constitution are working for everyone'* [E6a and E6b]. Speaking in the House of Lords debate on the Queen's Speech, Lord Thomas of Gresford described Ekins' Policy Exchange paper, *Protecting the Constitution*, as *'the basis of Tory policy'* in this area [E7].

Influence on parliamentary debate and government policy on human rights legislation

Ekins' study of human rights law [R3 and R4] and constitutional government [R5 and R6] has informed his contribution to public deliberation about human rights legislation, which has been repeatedly consulted by parliamentarians regarding Brexit. He was asked in 2017 to provide evidence to the House of Commons Exiting the European Union Committee's scrutiny of the draft European Union (Withdrawal) Bill. His evidence [E8a, E8b], recommending that the withdrawal bill should exclude the EU Charter of Fundamental Rights (CFR) from being converted into domestic law and that it should terminate the Court of Justice of the European Union's (CJEU) jurisdiction in the UK, is referred to at length by the committee's report [E8c]. Ekins' evidence to the committee was also referred to by multiple MPs during the bill's debate in the House of Commons to support the need for these provisions in the withdrawal bill, including Sir William Cash MP who quoted Ekins' evidence to the committee that *'It would be much better, and safer, to remove the Charter from our law on exit day'*; the bill subsequently became law in June 2018, including provisions withdrawing the CFR and CJEU from UK law after Brexit [E9].

Ekins' co-authored 2015 paper for Policy Exchange, *Clearing the Fog of Law*, develops his scholarly critique of human rights law [R3 and R4] in the context of criticism of the extension of European human rights law to UK military operations abroad, after landmark cases in both the UK Supreme Court and the European Court of Human Rights, and recommended a derogation from the European Convention on Human Rights (ECHR) and reform of the Human Rights Act in favour of a new and more appropriate UK legislative framework for regulating military personnel based on the Geneva Conventions [E10]. Ekins' evidence to the Commons Defence Committees in 2017 regarding historical legal claims against military personnel in Iraq [E11] and in Northern Ireland [E12] and in 2019 regarding a potential statute of limitations protecting veterans from historical legal claims [E13] built on lines of argument articulated in the 2015 paper. In each of these three inquiries, the committee's findings and recommendations have echoed Ekins' proposals regarding ECHR derogation and UK legislation to reform the liability of military personnel, and the government has responded positively to the recommendations. The result can be seen in the Conservative manifesto and subsequent Queen's Speech in December 2019 which made reform *'to seek better ways of dealing with legacy issues that provide better outcomes for victims and survivors'* and prevent *'repeated investigations and potential*

prosecution arising from historical military operations a legislative priority for the government [E6].

5. Sources to corroborate the impact (indicative maximum of 10 references)

E1: Ekins and Forsyth, *Judging The Public Interest: The rule of law vs. the rule of courts*, Policy Exchange, 2015

E2a: Independent Freedom of Information Commission, Report, March 2016

E2b: Independent Freedom of Information Commission; responses to call for evidence

E3: Cabinet Office, *Open and transparent government*, March 2016

E4a: Public Administration and Constitutional Affairs Committee, *Prorogation and the Constitutional implications of the Supreme Court's Judgment inquiry*. Ekins written evidence, 8 October 2019

E4b: Public Administration and Constitutional Affairs Committee, *Prorogation and the Constitutional implications of the Supreme Court's Judgment inquiry*. Ekins oral evidence, 11 October 2019

E5: Ekins, *Protecting the Constitution: How and why Parliament should limit judicial power*, Policy Exchange, 2019

E6a: Conservative and Unionist Party manifesto, December 2019

E6b: Prime Minister's Office, Queen's Speech 2019 and background briefing notes, December 2019

E7: Lord Thomas of Gresford, House of Lords Debate 8 January 2020 volume 801 column 224 <https://hansard.parliament.uk/lords/2020-01-08/debates/85320472-1F49-424F-81FE-691B0D3BF1F3/Queen%E2%80%99SSpeech>

E8: House of Commons Exiting the European Union Committee, *European Union (Withdrawal) Bill, First Report of Session 2017–19*;

- a. Ekins written evidence, November 2017;
- b. Ekins oral evidence, October 2017
- c. Committee report 2017

E9: House of Commons Debate 21 November 2017 vol 631, cols 916-917 (Sir William Cash MP), 934 (Jonathan Djanogly MP), 984-985 (Simon Clarke MP); European Union (Withdrawal) Act 2018 Available at [https://hansard.parliament.uk/commons/2017-11-21/debates/4BD8BD60-F424-4132-871D-D26E6E326DE9/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/commons/2017-11-21/debates/4BD8BD60-F424-4132-871D-D26E6E326DE9/EuropeanUnion(Withdrawal)Bill)

E10: Ekins, Morgan and Tugendhat, *Clearing the Fog of Law: Saving our armed forces from defeat by judicial diktat*, Policy Exchange, 2015

E11: House of Commons Defence Sub-Committee, *Who guards the guardians? MoD support for former and serving personnel*, February 2017; Ekins oral evidence, October 2016; Ekins written evidence, October 2016; Government response, April 2017

E12: House of Commons Defence Committee, *Investigations into fatalities in Northern Ireland involving British military personnel*, April 2017; Ekins oral evidence, March 2017; Government response, November 2017

E13: House of Commons Defence Committee, *Drawing a line: Protecting veterans by a Statute of Limitations*, July 2019; Ekins written evidence, February 2019; Ekins supplementary written evidence, May 2019; Ekins oral evidence, December 2018; Government response, April 2020