JUDICIAL REVIEW REFORM - THE GOVERNMENT RESPONSE TO THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

Response to Consultation by Lord Carnwath CVO[1]

Introduction

1. The Faulks panel are to be congratulated for completing, in a remarkably short time, and after wide-ranging consultation, a thorough and objective account of the modern practice of judicial review. I generally welcome their findings and their main recommendation, which accord in many respects with my own lecture to the Bar Reform Group in December 2020.[2] I also welcome the response paper in so far as it adopts their proposals.

2. To the extent that it pursues ideas for law reform going beyond those recommended or identified by the panel, it is much more questionable. If the Lord Chancellor has serious practical concerns on law reform issues

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[2] Now available online: https://www.tandfonline.com/eprint/SSDESSXSQRZNYETUZZQD/full?target=10.1080/10854681.2020.1871713

not adequately addressed by the Faulks review, then the obvious course is to refer them to the Law Commission, which (unlike the Ministry) has the independence, authority and legal expertise to carry out a proper study and propose appropriate solutions.

3. In the remainder of this submission I will attempt to address the points of significance in the response paper. The subjects covered by the questions can be grouped under four headings:

i) Reversing *Cart* (Question 1)

ii) Flexible remedies (Questions 1-2, 4-7)[3]

iii) Ouster clauses (Question 8)

iv) Miscellaneous procedural reforms (Questions 9-17)

4. I do not propose to comment on the detailed points raised under heading (iv). They are best dealt by the Civil Justice Rules Committee in the normal way, in co-operation with the judges most experienced in the practicalities.

[3] Question 3 asks whether the proposals should be limited to England and Wales only. I would only observe that, if the proposals are regarded as well-founded, and within the competence of the Westminster Parliament, I see no reason to limit their benefit to England and Wales.

(i) Reversing Cart

5. As already noted, the proposal to reverse the effect of *Cart* was foreshadowed in my lecture. As I said, this would restore the position to that originally intended:

> "Having been closely involved in the preparation of the relevant legislation, I can confirm that our intention was that the Upper Tribunal should, within in its specialist sphere, have the status of the High Court and thus be immune from review by the High Court. Our expectation, on the basis of the modern textbooks and authorities, was that designation as a Superior Court of Record would have that effect… I would welcome legislative amendment to re-establish the status of the Upper Tribunal as it was intended to be."

6. My observation on the intended status of the Upper Tribunal is echoed in the Response paper (para 51):

> … the Upper Tribunal was originally intended to be broadly equal to the High Court. As stated in the explanatory notes to the Tribunals, Courts and Enforcement Act 2007, 'the Upper Tribunal is a superior court of record, like the High Court.' In declaring Upper Tribunal decisions amenable to Judicial Review, the Supreme Court effectively downgraded the intended status of the Upper Tribunal."[4]

7. There is no reason to think that a clear ouster clause to this effect would not be respected by the courts. Although there has been some criticism of

[4] It is perhaps unfortunate that in the Supreme Court the government abandoned the argument that designation as a superior court of record was sufficient to indicate Parliament's intention to preclude judicial review.

the statistics used by the IRAL panel to support this proposal, they are not essential to the argument. This turns primarily on the status of the Upper Tribunal, and the standing of its judges (who may include High Court and Court of Appeal judges), as well as the flexibility[5] within the Upper tribunal system to provide whatever protection is necessary to satisfy the requirements of the rule of law, without the need for recourse to the High Court.[6] It is much more efficient for all parties for this to be done within the Upper Tribunal rather than by a separate procedure in the High Court. Legislation to reverse the effect of *Cart* could, if thought desirable be linked to revision of the Upper Tribunal rules, in consultation with the Senior President.

8. In that connection, I hope that thought will be given to the proposal in my lecture for the creation of a new office of Head of Administrative Law. As I said:

> "… the office of Senior President of Tribunals, presently held by a Court of Appeal judge with powers comparable to those of the Lord Chief Justice, could be developed and expanded into a new office of Head of Administrative Justice. That would allow for effective and unified judicial leadership of administrative courts and tribunal of all kinds,

[5] It would be possible for example to provide a further right of review by judges of suitable seniority within the Upper Tribunal: cf Upper Tribunal Rules rule 22(3)(4)

[6] It is right to note Lady Hale's concern (*Cart* para 43) as to the "real risk of the Upper Tribunal becoming in reality the final arbiter of the law…" and that "serious questions of law might never be 'channelled into the legal system'" That comment seems with respect to do less than justice to the expertise and experience of the Upper Tribunal judges, who are no less able than the High Court to spot legal issues of wider significance. In any system there is of course the possibility that different judges will take different views, but that is no less true of the High Court than of the Upper Tribunal.

> and at all levels; and close and continuing co-operation between the judges and the administrative departments and practitioners most directly concerned."

It was a weakness of the Faulks terms of reference that they were asked to look at judicial review in isolation, without regards to other forms of statutory challenge, nor to the central part now played in administrative law by the reformed tribunal system.

(ii) Flexible remedies

9. This proposal was also foreshadowed in my lecture. Commenting on the *Unison* decision (in which the employment tribunal fees order was declared unlawful), I said:

> "…as a former Senior President responsible for helping to regulate business in the employment tribunals, I might have asked for submissions on the possibility of a form of order which allowed time to work out the consequences and limit uncertainty, pending the development of a new and acceptable structure."

I contrasted the approach of the Privy Council in a Trinidad case, in which the Board upheld a challenge to regulations fixing fees for licences under the Control of Pollution policy:[7]

[7] *Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment (Trinidad and Tobago)* [2017] UKPC 37 (27 November 2017).

> "We accepted that simply to quash the regulations could create great uncertainty as to the status of the permits issued since the Rules were first applied ten years before and any enforcement action taken in respect of them. Accordingly, without objection, we made an order requiring new regulations to be made within a defined period but indicating that our declaration of illegality was 'without prejudice to the validity of anything previously done or fees collected under the Water Pollution Rules 2001, or to their continuing operation pending the taking effect of amended Regulations…'"

Whether or not the same or a similar result could have been achieved within English law as it stands, I see considerable advantage, and no objection in principle, to a legislative amendment to put it beyond doubt.

10. I agree also with the IRAL Panel's recommendation that it should be left to the courts to develop principles to guide them in determining in what circumstances the new power should be exercised. The response paper proposes that there should be set out in legislation "factors or criteria that the court should take into account". However, no reason is given for differing from the panel, or for questioning the ability of the courts, given the necessary powers, to use them appropriately. It is very difficult for a legislator to predict in advance the range of factors which may be appropriate in different cases.

11. I note also a section on the doctrine of "nullity" (response paper para 71-84), the application of which is said to be "of concern to the Government". There follows a somewhat abstract discussion of some of the academic

literature, leading to a series of suggested "principles" said to be under consideration by government. Question 7 asks whether legislation to this effect would provide clarity as to when the courts can or should make a declaration that a decision or use of a power was a nullity.

12. This is a difficult subject which has attracted much academic debate. A particular theoretical problem, not addressed in this paper, is that of collateral challenge[8]. However, there is no reason to think that the concept of nullity gives rise to significant practical problems which cannot be addressed by the courts as they arise, nor that a legislative solution (if it could be devised) would make things better rather than worse. If concerns remain, they are unlikely to be resolved by a limited consultation of this kind, nor within the legal resources of the Ministry, but could be an appropriate subject for reference to the Law Commission (as suggested above).

(iv) Ouster clauses

13. This is the least satisfactory section of the response. The government's apparent wish to increase its power to "oust" the jurisdiction of the courts might have been a cause for concern, if the discussion were not so muddled and inconclusive. Although this is described in the Lord

[8] See eg *Boddington v British Transport Police* [1999] AC 143

Chancellor's foreword as one of the most "pressing" problems, the ensuing discussion fails wholly to explain, or to give practical examples of, the perceived problem or its urgency, nor to show how legislative intervention would improve matters. It also seems to be based on the wholly unsupported premise that the courts' "doctrine" has led to "many ouster clauses not being given effect to" (para 39).

14. The discussion starts badly, with a misquotation. One of the purposes of these proposals, it is said in the Foreword, is to "affirm the role of the courts as "servants of Parliament". The reference to the courts as "servants of Parliament" is later attributed to Lady Hale (para 18, 26). Unfortunately it is not what she said. What she actually said (in her IRAL submission) was:

> "In the vast majority of cases, judicial review is the servant of Parliament. It is there to ensure that public authorities at all levels act in accordance with the law which Parliament has laid down…."

It is clear that she was simply discussing the function of judicial review, in serving Parliament by giving effect to the law made there, rather than making any general statement about the constitutional relationship of Parliament and the courts. As to that, Lady Hale has made her position quite clear, for example, in a recent judicial statement (adopting words of Laws LJ):

> "The rule of law requires that statute law be interpreted by an authoritative and independent judicial source: '. . . the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it . . .'"[9]

The courts are not mere servants of Parliament but essential partners in the constitutional balance[10] that underlies the rule of law. This is consistent with the press release setting up the IRAL review, which spoke of -

> "… the Lord Chancellor's duty to defend our world-class and independent courts and judiciary that lie at the heart of British justice and the rule of law."

In an annexe to this submission, I have attempted with some difficulty to extract the relevant points made in the paper and to respond in more detail. In the light of that review I can respond briefly to the consultation question:

8 Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?

15. The simple answer is that the government has failed to identify a problem requiring legislative intervention. No case has been made for pursuing

[9] *Cart v Upper Tribunal* [2012] 1 AC 663 para 30

[10] The "Constitutional Balance" is the title of the recent collection of essays by (the late) Sir John Laws, which should be required reading for anyone contemplating reform in this area.

any “aim” of giving effect to ouster clauses, beyond the principles already established by the case-law. Nor have any suitable legislative “methods” been identified for doing so. In the rare cases where a need to limit the ordinary jurisdiction of the courts can be made out, and provided the extent of the necessary limitation is clearly identified and the purpose understood, there should be no difficulty in drafting an appropriate clause, and no reason to think that the courts will do other than give it effect.

Annexe to RC Response – Ouster Clauses

16. In this Annexe I have attempted to extract the main points from the Response paper's discussion of ouster clauses, and to give my comments.

17. The Response paper starts, after the introduction, with an extended section entitled "The Constitution and Judicial Review" (paras 18-32). This appears intended to set the scene for "the debate around the role and function of Judicial Review in the UK Constitution", which it is said " is one that we must have" (para 19). There follows a loose outline of the development of judicial review since the seventeenth century. It includes a quotation from Professor Ekins, observing that the "rule of law does not mean the rule of judges", and emphasising the need for "judicial discipline", rather than "invocation of abstract or novel principles as a ground to depart from or to gloss settled law…" This leads (para 26) to the assertion (misquoting Lady Hale):

> "It cannot be emphasised enough that Parliament is the primary decision-maker here and that the courts should ensure they remain, as Lady Hale put it, the servant of Parliament."

18. The only specific area in which it is suggested that the courts may have gone beyond their proper role is in respect of the "principle of legality", raising the question "how to ensure that the doctrine… remains within the appropriate bounds of Judicial Review". However, no modern examples

are given of the courts overstepping the "appropriate bounds". It seems that the only two cases which could be found to illustrate this point date from 1925 and 1983[11]. Both were interventions by the courts relating to socially progressive measures by local government, not central government, and both were highly controversial and have been heavily criticised. I doubt if any serious observer would suggest that these are in any way typical of the approach of the modern courts,[12] or a guide to necessary reform of judicial review. The paper does not explain their relevance, other than to comment, somewhat mysteriously, that while "this line of cases is no longer part of the law… it is an important cautionary tale". More relevantly, the only modern case cited in this section[13] is one in which the Supreme Court, far from extending its role, thought it appropriate to limit the standard grounds by reference to the special democratic position of the body under review (the Scottish Parliament). One assumes, although this is not stated, that this would be regarded by the Lord Chancellor as an appropriate use of judicial power.[14]

[11] *Roberts v Hopwood* [1925] AC 578 (the Poplar equal wages case); *Bromley LBC v GLC* [1983] 1 AC 768 (the GLC Fares Fair case)
[12] See eg *Clarke, R (On the Application Of) v Birmingham City Council (Rev 1)* [2020] EWCA Civ 1466.
URL: http://www.bailii.org/ew/cases/EWCA/Civ/2020/1466.html
Cite as: [2020] EWCA Civ 1466
[13] Para 25, citing *Axa General Insurance v Lord Advocate* [2011] UKSC 46.
[14] It is cited in the paper as indicating acceptance by the courts that Parliament "has created a body which can act unreasonably". This comment seems to miss the point that the result was achieved, not by any form of ouster clause, but by the ordinary interpretative process.

19. The subject of ouster clauses as such is first raised in a passage (para 39) under the section headed "Targeted incremental change". The proposals in respect of *Cart* are said to bring into question the use of ouster clauses more generally. It is noted that the IRAL Panel considered them "a legitimate instrument for Parliament to use to delineate the bounds of the courts' jurisdiction". The paper continues:

> "The Government considers that the doctrine followed by the courts since the *Anisminic* decision, which has *led to many ouster clauses not being given effect* to, is detrimental to the effective conduct of public affairs as it makes the law as set out by Parliament far less predictable, especially when the courts have not been reluctant to use some stretching logic and hypothetical scenarios to reduce or eliminate the effect of ouster clauses. *Some of the reasoning set out in Privacy International illustrates this very point*. The danger of an approach to interpreting clauses in a way that does not respect Parliamentary sovereignty is, we believe, a real one…." (emphasis added)

The government, it is said, does not think that the courts' approach is "totally incorrect", but further clarity is needed to set out how the courts should interpret such clauses and the circumstances in which they must be upheld.

20. This passage is puzzling on a number of grounds. Whatever the government thinks of the "correctness" of the reasoning in *Anisminic* it has stood unchallenged for over 50 years, and must be regarded as definitive, unless and until successfully challenged in later proceedings or altered by Parliament. The majority decision in *Privacy International* was

an application of the same reasoning to a clause in very similar terms. Nor is it explained what particular aspect of "the reasoning set out in *Privacy International*" is thought to be open to criticism, or how it is said to illustrate "stretching logic and hypothetical scenarios"[15]. In any event, the assertion that the courts' "doctrine" has led to led to "many ouster clauses not being given effect" is not supported by any examples in the paper, and (as far as I are aware) is wholly unfounded.

21. The discussion of this issue is continued later in a separate section under the heading "Ouster Clauses" (paras 85-95). It begins (para 85) by recognising (on the basis of *Anisminic* (1969) and *Privacy International* (2019)) the "norm" that the courts are likely to give effect to "partial" ouster clauses, but "tend not to give effect to ouster clauses which purport to oust their jurisdiction entirely". No other cases are cited.

22. The section goes on to assert (para 86) that ouster clauses are "not a way of avoiding scrutiny", but rather a "reassertion of Parliamentary Sovereignty", enabling Parliament to determine "areas which are better for political rather than legal accountability" (through "collaborative and conciliatory political means", as opposed to "the zero-sum, adversarial

[15] There is a footnote reference to para 84. This may be intended to refer to para 90 (see below), which criticises the use of arguments based on a "worst-case-scenario"; but it is not clear why this is thought to be a relevant criticism of the majority reasoning in *Privacy International.*

means of the courts"). Again no examples are given; nor is it explained why one form of accountability should exclude the other.

23. The next paragraph (para 87) refers to a suggestion by Professor Ekins' that "the intensification of Judicial Review" is due to a "loss of confidence the competence of other (political) institutions and in the political process more widely", which according to the Professor "cannot be squared with… a proper understanding of our constitution, its historical record, or the institutional dynamics in which it consists". The relevance of this is difficult to understand. As already recognised in the paper, the strong presumption against ouster clauses dates back to *Anisminic* (1969) and indeed long before, and owes nothing to any supposed "intensification" of judicial review in more recent years. Nor is it explained how it has anything to do with lack of confidence in the parliamentary processes, at least as far as the courts are concerned. Indeed the two *Miller* cases can be seen as the clear affirmation by the Supreme Court of the importance of Parliamentary accountability.

24. The same paragraph seeks to draw support from the scrutiny which Parliament is said to give to proposed ouster clauses, illustrated by the "saga" of the Asylum and Immigration Bill 2003 showing that "even a government with a majority of 167 cannot get a broad ouster clause through Parliament". Again the relevance is difficult to understand. The

example was noted in the leading judgment in *Privacy International* (para 101) with a reference to the comment of the Constitutional Affairs Committee:

> "An ouster clause as extensive as the one suggested in the Bill is without precedent. As a matter of constitutional principle some form of higher judicial oversight of lower Tribunals and executive decisions should be retained." (Second Report of the 2003-2004 Session para 708)

One may assume that the clause was rejected because Parliament took the same view. The example throws no light on the circumstances in which it might be appropriate to dispense with any form of judicial oversight.

25. The next paragraph (para 88) refers to the Panel's conclusions that to exclude judicial review generally would be contrary to the Rule of Law, but that "Parliament could oust or limit the jurisdiction of the courts in particular circumstances if there is 'sufficient justification for doing so'". These conclusions, it is said, were reached "on the basis of affirming Parliamentary Sovereignty while simultaneously qualifying it with the Rule of Law." They are said to present "a marked distinction from the status quo".

The latter comment is difficult to understand. The objective of "affirming Parliamentary Sovereignty while simultaneously qualifying it with the Rule of Law", and the proposition that Parliament could oust or limit the

jurisdiction of the courts where there is "sufficient justification", are not in themselves controversial or contrary to any "status quo" (in terms of existing case-law). The issues are the extent of any limit on the jurisdiction of the court, and the nature of the supposed justification.

26. The following paragraph (para 89) notes that the Panel has left unanswered the questions how ouster clauses can be made to work, or what constitutes a "sufficient justification" for doing so. The Government, it is said, wishes to look in more detail at "how ouster clauses could be made more effective in those specific and limited instances where there is sufficient justification", the "core principle" being that "ouster clauses legislated for by Parliament should not be rendered as of no effect". It suggests that this should be achieved by "setting out principles of interpretation", examples of which, it is said, are "set out below".

This seems to be like the tail wagging the dog. If the Lord Chancellor (unlike the Review panel) regards ouster clauses as a "pressing" issue, he presumably has some views as to the sort of cases or classes of cases which might justify their use. The first step should be to identify those cases. It would then be possible to consider the extent of any limitation required of the court's jurisdiction, and how in legislative terms to achieve

it consistently with the rule of law. The latter question cannot sensibly be considered in the abstract.

27. The next paragraph (para 90) criticises what is said to be the approach of some courts (and of some academics) of taking a "worst-case-scenario", considering the ouster clause –

> "… not in relation to the specific circumstances of the case before it, but in relation to whether the ouster clause would be appropriate in a hypothetical and clearly unjust circumstance".

The only judicial example given is a decision of the Divisional Court dating from 1994, relating to the prerogative of mercy (*R v Secretary of State for the Home Department, ex p Bentley* [1994] QB 349). It is not clear why this particular example has been selected[16], nor even whether the decision is regarded as objectionable in itself. It was not apparently challenged at the time in the higher courts, nor was any attempt made to reverse it by legislation. A suitable ouster clause would not have been difficult to draft, and there is no reason to think that the courts would not have given effect to it. But in the modern law, review of the prerogative of mercy can hardly be seen as a "pressing" issue.

[16] It is not apparently suggested that the same criticism can be made of the leading House of Lords or Supreme Court authorities, such as *Anisminic* or *Privacy International.*.

28. The second half of paragraph 90 is the nearest the paper comes to identifying specific instances. It states:

> "The Government does not wish to uphold instances of injustice, of course, but to exclude ouster clauses on this principle in instances where there is already judicial oversight of a matter (for example, *the Investigatory Powers Tribunal*) or in areas of *high policy (such as foreign affairs*) seems to the Government to be inappropriate. (sic) The Government is therefore considering methods by which the court can be invited to construe any such worst-case scenarios narrowly, and instead consider what is required by the case at hand." (emphasis added)

29. However, it is not easy to understand why either of these examples has been selected or what point it is thought to support:

i) *Investigatory Powers Tribunal* This tribunal was the subject of the *Privacy International* case. It is true that there was appropriate judicial oversight at first instance, but there was no mechanism for taking cases of legal importance to the higher courts, in circumstances where there was a potential overlap with the ordinary civil jurisdiction of the courts (for example, in respect of interference with property or breach of the Human Rights Act: see per Lord Carnwath para 14). The need of such a mechanism was implicitly acknowledged by Parliament by creating a right of appeal on points of law to the Court of Appeal (Investigatory Powers Act 2016 s 242, brought into force at the end of 2018). There appears to be no suggestion that this position is objectionable or should now be reversed. The general importance of the legal issues in the *Privacy*

International case was apply demonstrated by the recent treatment of the case by the Divisional Court (upholding the challenge in part)[17].

ii) *Foreign policy* The approach of the courts to the justiciability of matters of foreign policy was fully considered by the Court of Appeal in *Abbasi*[18] and its approach was adopted as uncontroversial by the Supreme Court in *Sandiford*[19] (without challenge on behalf of the Secretary of State). No reason is given in the present paper for now questioning that approach, or requiring legislative intervention.

30. Paragraph 91 suggests that it would be appropriate to legislate for a "safety valve" provision in how ouster clauses are interpreted, allowing the courts "to not give effect to an ouster clause in certain exceptional circumstances… (for example)… if there had been a wholly exceptional collapse of fair procedure"; or "the sort of exceptional circumstances contemplated in *Sivasubramaniam v Wandsworth County Court & Ors*.[20]" This suggestion, as the paper indicates, is consistent with existing authority. No case has been made out for legislative intervention.

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[17] *Privacy International v Investigatory Powers Tribunal* [2021] EWHC 27 (Admin) (08 January 2021)

[18] *Abbasi & Anor, R (on the application of) v Secretary Of State For Foreign & Commonwealth Office & Ors* [2002] EWCA Civ 1598 paras 83-5

[19] *Sandiford, R (on the application of) v The Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44 [2014] WLR 2697,

[20] [2002] EWCA Civ 1738 at [56]: "very rare cases where a litigant challenges the jurisdiction of a Circuit Judge giving or refusing permission to appeal on the ground of jurisdictional error in the

31. The second part of paragraph 91 is much more difficult. It states:

> "In their dissenting judgment in *Privacy International*, Lords Sumption and Reed[21] said that it would ordinarily be Parliament's intention, when creating a body of limited competence, that this body is subject to Judicial Review on the ground of lack of competence (in the narrow sense) unless Parliament made it clear that it intended for that body to have "unlimited discretionary power to determine its own jurisdiction". *We would propose to enact this as principle of interpretation for future ouster clauses.*" (emphasis added)

32. This makes very little sense. In the passage cited (para 210) Lord Sumption was not putting forward a "principle of interpretation", nor was he giving any support to an ouster in these extreme terms. As he said in the following sentence:

> "… it would be a strange thing for Parliament to intend, and although conceptually possible, it has never been done."

No reason is given by the authors of the paper for thinking that Parliament might now wish to adopt such a "strange" and unprecedented approach, nor do they suggest any circumstances in which the government might think it appropriate to ask it to do so.

narrow, pre-*Anisminic* sense, or procedural irregularity of such a kind as to constitute a denial of the applicant's right to a fair hearing" (para 56)

[21] Para 210 is cited

33. In the following passage, the paper purports to "respond" to the majority judgments of the Supreme Court in *Privacy International*:

> "In *Privacy International*, the core underlying issue was the interpretation of s. 5 Intelligence Services Act 1994. The concern, which led the majority to construe the ouster clause as they did, was that if Judicial Review was not available this would run the risk of creating a 'local law', and that this was contrary to the Rule of Law. There are a number of points to make in response to this. First, 'local laws' do already exist and have been upheld by the courts. Second, 'local laws' did exist in the past prior to the Judicature Acts: the common law courts had no jurisdiction over matters of Equity and vice-versa. It would be an odd thing to do, but Parliament could, consistently with the Rule of Law, re-create separate courts of law and Equity. Third, it is the case that the widespread use of arbitration in certain legal fields, such as maritime salvage, has de facto created 'local laws' and while this situation has been deplored by some, no one has suggested that arbitration agreements should not be upheld by the courts as a result.
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> 94.Nonetheless, the Government agrees that the creation of 'local laws' in a way which is not intended by Parliament is undesirable. The Government is therefore interested in consultees' thoughts on how the 'unintended local law' problem could be resolved while still giving effect to ouster clauses. One possible solution might be to clarify that the High Court retains the power to issue, in appropriate cases, a declaration about the correct interpretation of the law."

34. As a commentary on the leading Supreme Court authority on the issue, I find this frankly bizarre. The judgments in that case (of one of which I was the author) must of course stand on their own merits. However this section appears to have been written without any serious attempt to understand the issues in the case or the reasoning of the court. Concerns about "local laws" were not a significant aspect of the reasoning of the

majority. That turned on the construction of the relevant ouster clause, against the background of the binding authority of *Anisminic* on a very similar clause.[22] not on any more general concern about "unintended local laws".[23] Equally bizarre is the reference to examples of "local laws" in other fields (university regulations, arbitration[24], common law/equity). As far as I am aware, no serious commentator has suggested that such examples have any conceivable bearing on the subject matter of judicial review, concerned as it is, not with relations between private parties or institutions, but with the relationship between citizens and the state.

35. If the Lord Chancellor wants a more informed discussion, there is plenty of academic commentary on *Privacy International*, on both sides of the debate. However, it is hard to see anything in those judgments, properly understood, which would exclude effect being given to a suitably drafted ouster clause, provided its purpose and effect are justified and understood.

The elephant in the room

[22] See per Lord Lloyd-Jones para 164-5

[23] The reference to "local laws" arose only incidentally, in a citation from the judgment of Lady Hale in Cart (Privacy International per Lord Carnwath paras 90, 112). As already noted, the problem was not so much of a "local law" but of the exclusive jurisdiction of the IPT overlapping with that of the ordinary courts on identical legal issues.

[24] It is observed, for example, that "the widespread use of arbitration in certain legal fields, such as maritime salvage, has de facto created 'local laws' (but) … no one has suggested that arbitration agreements should not be upheld by the courts as a result". What this has to do with judicial review of public actions or decisions is not explained.

36. One subject which, perhaps surprisingly, is not touched on in this extended discussion is the case which is thought to have given rise, at least indirectly, to the IRAL review in the first place. That is the decision of the Supreme Court in *Miller 2*. The government's dissatisfaction with this decision was generally assumed to have led to the manifesto commitment to look at judicial review.

37. The case undoubtedly raised some novel and important constitutional issues relating to the relationship of the central organs of the state: the Crown, Parliament, the Executive and the Courts. Understandably the IRAL panel did not see it as part of their task to tackle them, not being of any general significance to the law of judicial review, and unlikely to arise again in the same form in the foreseeable future. However that does not necessarily mean that the issues can be ignored. Indeed, issues of such constitutional importance may be best addressed when they are off the immediate political agenda, and can be looked at objectively on a cross-party basis.

38. These issues were not fully resolved by the Supreme Court. Rather, as I observed in my lecture, the more difficult issues were in effect "side-stepped" by the way in which the case was presented:

> "Contrary to some of the commentaries, the main challenge was directed not to any 'proceeding' in Parliament, as such, but to the Prime Minister's prior advice to Her Majesty. No-

> one argued that this itself involved any issue under Article 9 of the Bill of Rights. Another agreed assumption was that the Monarch was constitutionally bound to accept the Prime Minister's advice. That avoided potentially controversial issues about the extent of any independent role for the Monarch and her relationship with Parliament… Viewed in that way, it was the familiar judicial task of ensuring that ministerial power was used for the purpose for which it was conferred."

39. The powers of the Crown in such a situation are not necessarily academic. They may have become so under the present Monarch, but future monarchs may not be so restrained.[25] These powers have been subject to some valuable academic study in relation to other Westminster systems, in some of which the position is governed by legislation, in differing forms.[26] The court's conclusion in *Miller 2* that, at least on the material and arguments before it, it was not precluded from ruling on the validity of the prorogation, was not without its critics. It is unsatisfactory that the boundary between the responsibilities of Parliament and the courts in the modern state is governed by somewhat obscure statutes now more than 300 years old, and passed in wholly different constitutional conditions.[27] Had there been in existence a simple statutory provision making clear the extent to which decisions relating to Parliament were justiciable or non-justiciable, there would have been no reason for the courts to go behind

[25] See for example recent press comment on the possibly more interventionist approach of a future King William: https://www.telegraph.co.uk/royal-family/2021/03/22/king-william-would-robustly-challenge-advice-prime-ministers/
[26] See e.g. Ann Twomey *The Veiled Sceptre Reserve Powers of Heads of State in Westminster Systems*
[27] In England and Wales, article 9 of the Bill of Rights 1688; in Scotland the Claim of Right 1689; see also *R v Chaytor* [2010] UKSC 52; [2011] 1 AC 684

it, and it would have saved a great deal of political and judicial energy. Now that these issues have been raised, there may well be a case for an open and independent study, perhaps by the Law Commissions, or by another suitably authoritative and independent body. This would of course need to involve representatives of all parties, the judiciary, and the Crown, as well as interested members of the public.

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