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The Independent Review of Administrative Law
The Government's Response –
Government Reform Proposals (2)

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Additional proposals in Government Response

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- The Government has expressed "agreement" with the three reform proposals it says are contained in the IRAL Report, which it summarises at §9 of its "Response"

- It also sets out a number of further reforms at §11.

- This paper will focus on three of those (substantive) reforms:
  - Legislating to reverse *Cart* [2012] 1 AC 663 and prevent judicial review of permission decisions of the Upper Tribunal (recommended by IRAL at §8(g) of its Conclusions)
  - Legislating to "clarify" the effect of ouster clauses
  - Legislating on the "principles" which lead to a decision which lead to a decision being a nullity by operation of law

REVERSAL OF *CART* (1)

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- In *Cart,* the Supreme Court held that decisions of the Upper Tribunal to refuse permission to appeal to itself were amenable to judicial review, but that the High Court should only grant permission for such claims if they satisfied a "second appeal" test, either (a) arguable point of general principle or (b) other compelling reason. The following may be noted:
  - There was no "ouster clause" excluding JR of the UT
  - The government argued that the status of the UT as a "superior court of record" was sufficient to oust JR, but lost this argument in the Div Court and did not renew it. No one has ever suggested that DC was wrong on that issue.
  - Applying first principles, as a statutory tribunal decisions of the UT were therefore amenable to JR like any other tribunal
  - Long history of JR of permission decisions of predecessor to UT (Social Sec Commissioner and Immigration Appeal Tribunal), no limitation
  - Briefly interrupted by "statutory review" of AIT which was held to *generally* but not always exclude JR
  - Some recent case law (notably *Sivasubramaniam* [2003] 1 WLR 475) restricting JR of county court permission decisions essentially because disproportionate

REVERSAL OF *CART* (2)

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- *Cart* not within IRAL's terms of reference but they agreed to look at it on request of some judges (see §10). Dealt with in § §3.35 to 3.46. Thrust of reasoning is that analysis of the 5000+ *Cart* JRs decided since 2012 shows that very few succeed, and even fewer changed the final outcome. But:
  - Since not in terms of reference, consultees did not respond, leaving IRAL to do its own homework
  - Methodology used by IRAL (to look for reported cases which showed ultimate success of claimant) *highly* problematic. Will not capture vast majority of cases
  - Conclusions presented ambiguously – implication that tiny number of cases succeed not supported by figures. 12 "successes" out of 45 "transcripts" or 5,502 cases
  - No doubt they missed many cases. For example, I have pursued 3 *Cart* JRs, all of which succeeded and all of which changed final outcome for my client on issues of fundamental importance to them.
  - Some of the underlying data clearly wrong. EG *JD (Congo)* [2012] 1 WLR 3273 presented (fn 55) as a *Cart* "failure", in fact 3 of 4 claimants succeeded and it was not a *Cart* case at all.

REVERSAL OF *CART* (3)

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- Response says as follows:

  51. ... The Review analysed 5,502 Cart Judicial Reviews (all the Cart Judicial Reviews since this avenue became available) and found that in only 12 instances (ranging between 0-3 per year) had an error of law been found – a rate of only 0.22%. ... Further, the Government considers that rendering Upper Tribunal decisions justiciable by Judicial Review is contrary to the intention of Parliament. This is because 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."

- So (a) tiny number of cases succeed and (b) *Cart* wrongly decided by SC. (a) is not justified by IRAL report and (b) is simply wrong.

- This does not show that *Cart* should not be overturned, but it does show clearly that the basis for doing so has not been established.

- Begs question of how *how* Cart can be reversed given that would appear to have to by way of statutory ouster

Legislating to "clarify" the effect of ouster clauses: (1) The problem with ouster clauses

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- Fundamental principle that High Court's jurisdiction to test the legality of public body action by judicial review cannot be "ousted" by statute:
  - *Anisminic Ltd v FCC* [1969] 2 AC 147
  - *R (Privacy International) v IPT* [2020] AC 491

- Two possible bases:
  - That Parliament is presumed not to intend to oust judicial review, and that words purporting to do so should be interpreted as relating to errors which fall short of those which would found judicial review. Leaves open that ouster could be achieved by exceptionally clear wording (4 of the judges decide *PI* on this basis by a bare majority)
  - That Parliament does not have power to exclude JR because to do so is unconstitutional and would undermine the principle of the rule of law. Correctness of this view (3 of the judges would *likely* have decided *PI* on this basis)

Legislating to "clarify" the effect of ouster clauses: (2) *Sivasubramaniam*

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- *Sivasbramaniam* concerns whether High Court has jurisdiction to consider judicial review of County Court permission decisions (CC is a tribunal of limited jurisdiction)
  - Not an ouster case
  - Court of Appeal held that it does have jurisdiction but should only be exercised on wholly exceptional basis
- Note also *Cart,* where judicial review jurisdiction to be exercised more rarely (second appeals test) albeit not in unlimited number of cases

Legislating to "clarify" the effect of ouster clauses: (3) Government Proposals

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- Para 91 of the Response:

  The Government considers it most appropriate to legislate for a 'safety valve' provision in how ouster clauses are interpreted. This could work in a multitude of ways, but essentially would allow the courts to not give effect to an ouster clause in certain exceptional circumstances. An example of this would be, if there had been a wholly exceptional collapse of fair procedure,81 the court could ask whether Parliament intended for this to be covered by the ouster. This 'denial of procedural justice' would, we propose, be a threshold far higher than the current ground of procedural impropriety. Another possibility is the sort of exceptional circumstances contemplated in Sivasubramaniam v Wandsworth County Court & Ors.82 If a court determines that the impugned conduct of the body fell within that category then, as a general principle of interpretation, it would not interpret the ouster clause as covering that conduct. The decision would therefore be reviewable. The Government hopes that such a high threshold would defend against matters of outright injustice, while preserving the effect of ouster clauses and the certainty they can bring.

- Government also keen for suggestions of how else this ouster could be achieved

Legislating to "clarify" the effect of ouster clauses (4): Legal effectiveness of government proposals

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- Seems like a strong case that a proposal of the kind given in para 91 would be effective, precisely because it provides for a safety valve:
  - It would appear to be possible to devise clear wording which would have the effect described in para 91, and the rulings in *Sivasubramaniam* and *Cart* would appear to weaken or undermine any presumption against legal effectiveness. If the court can reach that position without an ouster, it is difficult to see why Parliament must be presumed not to intend it
  - Important safety valve in that court is left free to interpret "exceptional circumstances" in line with its own view of what the rule of law requires
  - The "constitutional" objection to ouster would therefore be greatly weakened if not removed.
- Contextual point here is ouster of review of *legal tribunal*. Completely different when considering ouster (even limited ouster) of JR of administrative body or legislation

Legislating to “clarify” the effect of ouster clauses (5): Final thoughts

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- Limited ouster of JR of appropriately qualified *legal tribunal* (which itself satisfied Article 6 ECHR as an independent etc tribunal) may well be legally effective
- Early test may be ouster which seeks to reverse *Cart.* May be a propitious context for government to test the issue
- If government goes further and seeks *absolute* ouster of JR of UT, much more problematic
- *Cart* aside, debate here begs question of *why* ouster is thought desirable. It will matter only where *appeal* is also excluded. Should surely be wholly exceptional to create a situation where all routes of challenge to tribunal decision, determining legal questions, is shut down.
- Will this be achieved by general legislation or by specific ouster?

LEGISLATING ON "PRINCIPLES" GOVERNING NULLITY (1)

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- This is not a topic on which IRAL made any recommendation for change. More than any of the other proposals for reform, this does not appear to relate in any very clear way to any practical issue. It is an abstract question.

- According to *De Smith* et al:

  Behind the simple dichotomy of void acts (void ab initio, invalid, without legal effect) and voidable acts (valid until held by a court to be invalid) lurk terminological and conceptual problems of excruciating complexity.

- The issue has considerable importance for other proposals relating to suspended quashing orders and prospective only remedies. But government also makes proposals which are free-standing from that debate, concerning distinction between:
  - Decisions which are *voidable* (valid until quashed / declared unlawful, but then *void* from the start so as to never have any legal effect)
  - Decisions which are a nullity (never valid, no court order required)

- How real is the problem? *De Smith:*

  Again, although an ultra vires decision was ineffective against the party aggrieved, he might need, for his own protection, a formal pronouncement of a courtsetting the decision aside or declaring it to be void. Meanwhile, he could be enjoined from disregarding the decision until its validity had been finally determined. If he took no judicial proceedings at all within a prescribed statutory time limit, the void decision could become as impregnable as if it had been valid in the first place.And until he obtained such a judicial pronouncement in an appropriate form of proceedings, third parties (unable to impugn the invalid decision) would be obliged to treat it as if it were valid

LEGISLATING ON "PRINCIPLES" GOVERNING NULLITY (2): PROPOSALS

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- Para 81 of the Response:
  - Only lack of competence or power leads to nullity;
  - Presumption against nullity
  - Legislating to further clarify what is outside competence as opposed to error of law within jurisdiction
    - Breach of principle of legality does not go to competence or jurisdiction
    - Standard public law grounds do not do so
    - If there is power, it cannot be taken away even by egregious error

LEGISLATING ON "PRINCIPLES" GOVERNING NULLITY (3): FINAL THOUGHTS

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- Far from clear how this is to be achieved. By a generic statute (perhaps amendment of SCA 1981) laying down general principles of judicial review

- Appears to suffer from all the dangers of any exercise of codification, that the problem (such as it is) is shifted rather than removed. The debate will continue, focussed on the language of the statute and the underlying constitutional principles which limit what such a statute might achieve

- In so far as government is seeking to reverse *R (Unison) v LC* [2020] AC 869, [2017] 3 WLR 409, it will be disappointed!

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Thank you for listening

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