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The rule of law after the Supreme Court's UNISON judgment

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Introduction

The main judgment by Lord Reed in the unanimous decision of the Supreme Court in *R (UNISON) v Lord Chancellor* [2017] UKSC 51 ("the UNISON case") represents a significant expansion of the concept of the rule of law: from a set of principles about how policy should be implemented, into a doctrine that operates, in practical terms, for regulating the content of public policy.[1] The incontrovertible and sound principle that the executive must comply with the law transforms itself, in the reasoning of the judgment, into the idea that there are at least some areas of policy (the financial management of the justice system, it seems, is one) that are to be subjected to a judicial "success test" under which the judiciary is able, with the benefit of hindsight, to second-guess and overturn political policy decisions by reference not to how they were made or implemented, but rather by reference to what, it turns out, has been their effect in practice.

The judgment also raises important issues about what constitutional assumptions should be made about the functions and role of Parliament in the UK constitution, and about the relevance of those assumptions to statutory interpretation. This involves issues about the proper demarcation between matters that should be resolved by political processes subject to political accountability and questions to which, ultimately, the only legitimate answer is to be the one prescribed by law and determined by the courts.

This paper is not about the merits or otherwise of imposing employment tribunal fees or (if they are imposed) about the level at which they should be set. There are strong pragmatic and political arguments against the detail of the policy implemented by the Order overturned in the UNISON case; and even before the decision, the Government had identified, and was proposing to address, at least some of those

[1] There were also other grounds for the decision involving ECHR and EU jurisprudence and discrimination issues. These are not discussed here. Aspects of them can be subjected to some of the same criticisms as are set out in this paper in relation to the "rule of law" reasoning of Lord Reed, but clearly the Supreme Court had less freedom of manoeuvre in relation to the other grounds.

arguments. All of that, though, is only incidental to the broader constitutional issues to which Lord Reed's judgment gives rise.

There are several elements of the reasoning in the judgment that give cause for concern. It is appropriate to question and challenge them with a view, hopefully, to contributing to a better understanding[2] between the different branches of government of their respective constitutional roles. This is something which judges sometimes claim (including, implicitly, in Lord Reed's judgment) is necessary, in the case of Parliament and the executive, so far as the justice system is concerned;[3] and it is possible to infer from the judgment that there is also an urgent need for it, in the case of the judiciary, so far as the constitutional roles of Parliament and the executive, and the relationship between the two of them, is concerned.

[2] The need for better mutual understanding in the light of the decision has also been argued by another commentator: https://lawandgoodadministration.com/2017/07/26/the-uk-supreme-courts-ruling-in-unison-casting-judicial-shadows-on-the-design-of-justice-systems/

[3] See e.g. Lord Thomas of Cwmgiedd LCJ, "The Judiciary Within the State – The Relationship Between the Branches of the State", Michael Ryle Memorial Lecture, 15th June 2017, para. 7ff: https://www.judiciary.gov.uk/wp-content/uploads/2017/06/lcj-michael-ryle-memorial-lecture-20170616.pdf & para. 66 of Lord Reed's judgment.

How the Judgment Went Wrong

The Fees Order and its background

The Supreme Court case was about the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) ("the Fees Order"). The order provided for the levying of fees on applicants to employment tribunals and the Employment Appeal Tribunal. It was made under section 42(1)(d) of the Tribunals, Courts and Enforcement Act 2007, which authorised the Lord Chancellor to "prescribe fees in respect of … anything dealt with by an added tribunal"[4]. Another order coming into force on the same day, the Added Tribunals (Employment Tribunals and Employment Appeal Tribunal) Order 2013 (SI 2013/1892) ("the Added Tribunals Order"), had provided for employment tribunals and the Employment Appeal Tribunal to be "added tribunals" for the purposes of section 42(1)(d). In accordance with section 49(6) of the 2007 Act, the power to make each of the orders was subject to the affirmative resolution procedure: in the case of the Fees Order, this was because it was providing "for fees to be payable in respect of things for which fees have never been payable". Accordingly, each of the orders had been approved by a resolution of each House of Parliament.

The litigation that resulted in the Supreme Court decision was only one way in which the Fees Order had been challenged.[5] The Order had also come under challenge politically and in Parliament. The Government had been required by political pressure to commit itself to carrying out a review of the practical impact of the Fees Order

[4] This adopted the usual, and accepted, common form for an express power to charge fees for things done by government where the intention is that the amount charged should not exceed the cost of providing whatever is charged for. This formulation has regard to, and is intended to plead into, the distinction for the purposes of House of Commons financial procedures between, on the one hand, "fees" to cover costs and, on the other, "charges" that are not so limited and are therefore subject to other procedures applicable to the imposition of taxation. Express power to charge, one way or the other, for services provided by government is always necessary because of Article 4 of the Bill of Rights 1689. See *Wilts Utd. Dairies Ltd* (1922) 38 TLR 781 (HL).

[5] The full background is helpfully explained in a House of Commons Library briefing paper: http://researchbriefings.files.parliament.uk/documents/SN07081/SN07081.pdf. This is a link to an updated version, following the Supreme Court decision, of a paper originally produced in April 2017.

following its implementation; and the start of the review was announced in June 2015. In July 2015, the Justice Select Committee of the House of Commons announced its own review of tribunal fees more generally, and that led to the publication of a critical report in June 2016 dealing with the Fees Order. The Government responded to the report in November 2016 by saying that the matters subjected to criticism by the Select Committee would be covered by the Government's own impact review, which was then published in January 2017. That review also initiated a consultation on proposals for modifications of the Order to address the fact that the result of the original order had given rise to what the Government's review report described as a "troubling" fall in the number of tribunal cases: viz. by more than had been estimated at the time of the making of the Order.[6]

That Parliamentary story and consultation has now been overtaken by the conclusions of the Supreme Court in the UNISON case. The outcome of the case was that the Fees Order was declared to be illegal and therefore *ultra vires* and void *ab initio*. At the time of writing, it is not clear whether the Government is considering a renewed attempt to impose employment tribunal fees. In the light of what I say below, and the inevitable effect of the Supreme Court decision on the political climate as respects the whole issue, it would be unsurprising if they decided not to.

In the UNISON case, the Supreme Court was also troubled, as the Government and the Commons Select Committee had been, by the higher than estimated fall in the number of tribunal cases. It was concerned that this was the result of the inability of potential claimants to afford the fees, and it relied on research evidence (viz. that claimants were giving the non-affordability of the fees as their reason for not pursuing their claims), as well as on an analysis of hypothetical cases. Lord Reed concluded that the rights enforceable in the employment tribunal were being undermined if those entitled to them could not afford to enforce them. The Fees Order was preventing access to justice and should be set aside as incompatible with

[6] See the *Review of the introduction of fees in the Employment Tribunals: Consultation on proposals for reform* (Ministry of Justice, January 2017): https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/587649/Review-of-introduction-of-fees-in-employment-tribunals.pdf , paras. 336-340.

the rule of law, which confers an entitlement to access to justice. The Court, understandably, felt it had a special interest and expertise in relation to those matters and that the situation required immediate rectification.

The question of statutory construction

Lord Reed's conclusions, so far as they rely on the relevance of "the rule of law" and the entitlement it confers to "access to justice", have to be understood as depending on a question of statutory construction of the power in primary legislation under which the Fees Order was made.[7]

The illegality of the Fees Order, Lord Reed said, arose because, quite simply, "it *has the effect of* preventing access to justice",[8] or because it, in practice, created, "a real risk that persons will effectively be prevented from having access to justice".[9] Whichever of these tests is the main basis for the judgment,[10] it is absolutely clear[11] that substantial reliance was being placed on retrospectively testing the legality of the Fees Order (as at the time it was made) by reference to what turned out to be its subsequent effect in practice. The outcome of the case, it is made clear, does not depend on the identification of any failure by the Lord Chancellor, at or before the time of the making of the Fees Order, to consider its likely or foreseeable effect.

[7] Prof Mark Elliott points this out in his blog on the case. In that blog, he also expresses the hope that primary legislation would not be used to challenge the effect of the judgment, and so open up just how far the principle set out in the case goes.
https://publiclawforeveryone.com/2017/07/26/UNISON-in-the-supreme-court-employment-fees-constitutional-rights-and-the-rule-of-law/

[8] Paras.118-119 of the judgment; emphasis added.

[9] Para. 87 of the judgment.

[10] It is not clear from the judgment which test has priority. The first is more apt for the research evidence. The second for the hypothetical cases. It is also clear, though, that the hypothetical cases mentioned in para. 94 of the judgment are posited as at a time after the making of the order, not as something the Lord Chancellor should have considered in advance; and they use premises that could not be relied on to remain constant throughout the lifetime of the Order.

[11] See again para. 119 of the judgment, as well as the reliance placed on evidence collected by the Government and others about the actual effect of the Fees Order after it had come into force - even though, it must be said, the evidence includes research that is unlikely to be wholly reliable: because it is likely to have been coloured by the social science equivalent of the "observer effect".

It follows that the rule of construction that was being applied involves a presumption that Parliament does not, in the absence of express words, intend to confer a power to do something which (when implemented) indirectly prevents access to justice in the way found to have occurred in the case of the Fees Order. Paragraph 87 of the judgment does set out the assumption – the only one capable of being made consistently with the fundamental constitutional principle of Parliamentary sovereignty – that section 42 of the 2007 Act could have authorised fees that would have that effect, but only, it is said, if it had contained express words for the purpose. So, the presumption applied by the Court about what Parliament intended is a rebuttable one; but the Court, it must be inferred, concluded that it had not been rebutted.[12]

That raises a question about what exactly would have been sufficient to rebut the presumption. It is Parliamentary sovereignty that requires that the sole purpose of statutory interpretation by the courts is to determine and give effect to the intentions of Parliament, so far as that is possible using the text of the legislation. It would be incompatible with that sovereignty to hold that Parliament had failed to displace the presumption if the text of the legislation clearly indicated that Parliament had intended the power to be exercised with the effect that it had. Furthermore, such an indication would exist if the only way in which the power conferred by the statutory words could be exercised for the purposes authorised by Parliament would be with that effect, or with the risk of creating it. The presumption that Parliament does not confer powers that it is impossible to exercise for their intended purpose would have to trump any other presumption.

[12] The Court relied principally on precedents where a general power to regulate a variety of matters had been construed so as not to allow them to be regulated by the imposition of requirements that directly inhibited "access to justice". In those cases, the form in which the inhibition was imposed was not specifically contemplated in the power. Here the inferred limitation of the power related to the indirect effect of an exercise of the power in the only manner in which that power could ever have been exercised: viz. by the imposition of fees. Furthermore, the purpose for which the power was exercised was one the Court found to be legitimate and was also within the implicit limitation which normal practice suggests Parliament always intends when conferring a power to fix "fees" (see footnote 4 of this paper): that it may not be exercised for a financial purpose that goes beyond the recovery of costs. See also footnote 30 of this paper on the *Witham* decision in the Court of Appeal, which did not, of course, bind the Supreme Court.

The operation of a retrospectively applied "success test"

In this case, Lord Reed stated in paragraph 86 of the judgment that there was no dispute that "the purposes which underlay the making of the Fees Order are legitimate" (viz. they were purposes that had been authorised by Parliament[13]). It is clear that he implicitly accepted[14] that the underlying purposes he was referring to were those mentioned in paragraph 9 of the judgment, which sets out what the Government had said were its reasons for making the Order:

> *"First, and most importantly, fees would help to transfer some of the cost burden from general taxpayers to those that used the system, or caused the system to be used. Secondly, a price mechanism could incentivise earlier settlements. Thirdly, it could dis-incentivise unreasonable behaviour, such as pursuing weak or vexatious claims."*

Was it possible for any order to be made under section 42 that fulfilled those purposes and yet also ensured compliance with the tests that were retrospectively applied by the Supreme Court judgment to the "real-world" effect of the order?[15] I suggest that it was not.

It is inherent in all law-making that those subject to a law are identified by generally described categories and a rule applied equally, and in the same way, to everyone who is put into the same category because of factors that are common to them all. That is something that the rule of law certainly requires.[16] However, where a legal

[13] But see footnotes 19 and 211 for a potential source of confusion in the judgment about the use of the concepts of legitimate purpose and justification in relation to the Fees Order.
[14] Note that the purpose of incentivising earlier settlement is not reiterated in para. 86, but it is clearly included in the Court's analysis.
[15] It is incontestable in the light of section 49(6)(c) of the 2007 Act that Parliament did intend to allow the imposition of fees in the case of tribunals for which they had not been imposed before. So, there is no justification for distinguishing between employment tribunals and, say, other added tribunals; and if there had been, the objection should have been made to the Added Tribunals Order, not to the Fees Order.
[16] See e.g. Lon Fuller's first test for the failure of law: it must be sufficiently general. There is a further discussion to be had at another time (but with some relevance to Lady Hale's judgment in the UNISON case) about the way discrimination law has developed, and about its application of retrospective tests

provision imposes an obligation to pay a court fee, it is obvious that the necessarily generalised form of the provision cannot allow for every factor capable of being produced by the infinite variability of circumstances. It is impossible to eliminate all risk of circumstances occurring that might result in someone's liability to pay the fee preventing their access to justice, or in the creation of a risk that they would be prevented from having such access. Only a provision that dealt differently with every possible distinction between the cases of different individuals could eliminate that possibility.

There is a suggestion in the judgment that a Fees Order would have been lawful while retaining the characteristics of legal rule - and so defining those subject to its different provisions in a generalised way - if its provisions managed to hit the bulls-eye of identifying the "optimal price".[17] But any assumption that the optimal pricing level was capable of accurate determination in advance would be absurd. Even an approximation of it depends on factors that are incapable of being accurately predicted in advance; and it is a concept the definition of which is problematic and depends on questions of judgement. Moreover, even if it had been hit at the time of the making of the Fees Order, its nature is such that it cannot stay hit.

The effect of all legal change "in the real world"[18] is inherently unpredictable. Every form of legal or social change involves a risk that it will not perfectly produce "the real-world" effect that is intended. The level of risk is part of the political decision whether to legislate at all, or at least it always should be; but, still, no policy can be risk free and very few indeed hit the bulls-eye of producing exactly the intended effect in a necessarily unpredictable future real world, or are ever expected to. The notion that it was Parliament's intention, when conferring the power, that the Lord Chancellor should fix the fee only at the optimal pricing level, and should achieve that

(particularly in EU and ECHR law) that use the benefit of hindsight to test policy by reference to its subsequent effects in practice. These developments appear to make it increasingly difficult to define the categories used when identifying those subject to or benefiting from a law (e.g. about welfare benefits) in a way that is predictably lawful, and to create insoluble dilemmas for legislators.

[17] Para. 100 of the judgment.

[18] An analytical yardstick that is given especial prominence and approval in Lord Reed's judgment: see para. 93 of the judgment.

at the first attempt is totally implausible. Indeed, the fact that the power to fix the fee took the form it did suggests the contrary.

In practice, political and legal changes frequently involve a process of trial and error. A change is made and then refined in the light of experience. The process of refinement can remain incomplete if practical political considerations, as they often do, put a limit on the number of different occasions on which the same change is capable of being refined. That, of course, is more of a problem for primary legislation than for secondary legislation.

This need for revisions in the light of experience arises because the evidence available to be used for the formulation of a policy, as well as the evidence on which its success is subsequently capable of being assessed, can produce only an approximation of what is happening on the ground in the real world. Furthermore, evidence of what is happening is inherently incapable of providing certainty about what will happen in future, and is often incomplete so far as the present is concerned. This is especially true of evidence that is confined to cases where there has been some engagement between the legal system and the real world. Those cases are bound to be a self-selecting and small minority of the cases any law is intended to affect. Even a provision for tribunal fees, if it is intended to incentivise amicable settlements, must be intended to have an effect - reliable evidence of which is likely to be unavailable - on disputes that never come near a tribunal. Evidence available for policy development is always incomplete and can only be used for predicting the future by the application of stochastic reasoning. As an approximation, it is also necessarily subject to all the potential for unexpected outcomes that chaos theory predicts.

In short, the Court applied a retrospective test to the Fees Order which, it was impossible, in practical terms, for the person making the Order to have been sure of satisfying when doing so, because to have been sure would have required an infallible capacity to predict the future.

A significant element of the criticism made by this paper of Lord Reed's reasoning depends on this analysis of what the Court decided. I have not sought to speculate on whether there is a test which could have been applied in advance of the making of the Order with an outcome that would have been predictable to the person making the Order. Nor do I know whether, if there were such a test, it is one the Court could plausibly have attributed to the intention of Parliament. The Court does not specify such a test, and that suggests that there is none.[19]

Furthermore, irrespective of when any test of what would have been a lawful fee is applied, could any fee with the effect of incentivising earlier settlements be devised that does not work by providing a disincentive e.g. to proceeding to a hearing? That seems to be more than too difficult to determine in practice. It is impossible as a matter of straightforward logic.

Even if logic did not make a test with that effect impossible, it would still have been too difficult to be practicable to design a test, in advance, that would have fixed the fees at a rate that would have had the effect of incentivising settlements only in cases where that would be consistent with justice, and of not incentivising them in cases where it would not. Any such test would require the quantification, on a case by case basis, of the benefits (both to the public and to the parties) of, respectively, the settlement of a dispute and its authoritative determination at a hearing.

[19] I am grateful to Martin Chamberlain QC for suggesting to me that a possible explanation for the court's adoption of this retrospective analysis – though not, it seems to me, a justification – lies in the fact that the case had been argued at previous stages in terms of a breach of EU law. That approach depended on demonstrating a contravention of a free-standing EU obligation to provide a remedy. Such an obligation would prevail over all forms of domestic law, and the temporal point of reference for determining whether it had been contravened, would have had to be when the remedy was denied. Furthermore, once a contravention of such an EU obligation had been established, it would then have been for the Government to justify the provisions resulting in the contravention. When the Supreme Court reframed the matter, instead, as a question of statutory construction about whether the Fees Order had been ultra vires, established authority, as well as rule of law requirements of fairness and justice, required a different temporal point of reference (viz. the time of the making of the Fees Order) and a different burden; and the way the matter had been analysed at earlier stages was no longer relevant.

It is difficult to see how it would be practicable for such a test to be applied even in retrospect by a court, and Lord Reed does not try. Such a test, if not absurd for circularity, would have to be so dynamic it could not possibly satisfy the rule of law requirements of certainty and predictability. Instead, Lord Reed's preference appears to be for a test that requires the avoidance of all risk that incentivising settlements will inhibit "access to justice". For the reasons given above, that is inherently impracticable when making policy.

This all follows from the fact that the judgment casts the burden of establishing the level of fee that incentivises appropriate settlements on the Government and holds that the Government had failed to discharge it.[20] It is not clear what factor or legislative provision casts the burden on the Lord Chancellor of proving the effectiveness of the policy of the Fees Order for achieving just one of the supplementary purposes for its exercise that was authorised by Parliament when it conferred the power.[21]

There can be no doubt that the principal purpose which Parliament intended for the power to impose fees was to shift some of the burden of the costs of the system from the general taxpayer to those using the system or causing it to be used; and there can be no doubt that the Fees Order achieved that purpose. There is no suggestion in the enabling Act that achieving the "legitimate" purpose of incentivising settlements was intended by Parliament to be a condition precedent that qualified the way in which the Lord Chancellor fulfilled the principal purpose. On the contrary, it must be regarded as legitimate only as an incidental and supplementary purpose to which the Lord Chancellor was entitled to have regard, but not to pursue beyond full

[20] See para. 101 of the judgment.

[21] See also footnote 19 of this paper for what is, perhaps, an explanation for the failure to apply the presumption of regularity to cast the burden on the applicant of showing that the Fees Order was ultra vires – as established authority would lead you to expect in a case in which it was being challenged on the grounds that it exceeded the authority granted by Parliament. Incidentally, in the context of EU and ECHR law, it is the elements of discrimination law that cast the burden on the legislator of justifying unpredictable adverse effects of policy implemented by legislation that contributes to the insoluble dilemmas mentioned in footnote 16 of this paper, and suggest that it would be inappropriate and unhelpful, as well as a very radical piece of judicial law-making, to introduce a similar approach into the common law.

cost recovery.[22] The implication of the judgment is, perhaps, that a higher level of cost recovery would have been possible, despite its effect on access to justice, if it could be shown to incentivise settlements. But there is no explanation of how such a hierarchy of objectives was incorporated into the law, or how it could have operated or been assessed in practice.

The judgment may imply that, if there is a lawful fee that could have been set under the Order, it would have to have been the one at the rate which the Lord Chancellor could prove to the Court was neither too high nor too low - but "just right". If the Parliamentary intention had been that the only fees that would be possible were those at specific rates prescribed by a test only the courts could apply, is it plausible that the 2007 Act would nevertheless have conferred a discretionary power on the Lord Chancellor to fix the fees by statutory instrument?

Making the fees more lawful by making them more discretionary?

The decision of the Supreme Court in the UNISON case would be incompatible with Parliamentary sovereignty unless there is some way in which the power in the 2007 Act could be lawfully exercised. If, as it seems, it is impossible to identify in advance the different ranges of fees that the Court would have regarded as legal in different circumstances, could the difficulties with the tests suggested by Lord Reed's judgment have been overcome by a supplementary power to dispense with a fee? In rule of law terms, would it have been preferable, or even acceptable, to create a general power of dispensation (with no rules as to how it was to be exercised): so that the power to charge a fee became a power to charge only those whom you choose to charge on a case by case basis?

In paragraph 95 of Lord Reed's judgment, he dismisses the relevance of the more limited power of remission that did exist for fees under the Fees Order. He does so partly on the grounds that its existence did not prevent the adverse effects of the Order that occurred after it was made. Even an unlimited power of remission (assuming that could be acceptable in rule of law terms) might have had that effect.

[22] See footnote 4 of this paper.

The only power of remission that, it seems, would have satisfied the Supreme Court was one that could have been shown in practice, and in retrospect, to have prevented those effects from occurring.[23] Presumably, it would also have had to continue to prevent them from occurring indefinitely into the future. Even a hypothetically unlimited power of remission, it seems would not have been enough. The Supreme Court was clear that the unlawfulness of the Fees Order could not be deflected on to the way in which, on a case by case basis, the power of remission was exercised.

Achieving "rule of law" certainty for the exercise of the power

It is the rule of law that, rightly, requires a Minister with a power to make a statutory instrument to exercise the power according to law. The irony is that, in three important respects, the law the Supreme Court has laid down for the making of the Fees Order denied the person making the order their rule of law entitlements in respect of the exercise of the power. The law applied for the making of the Order was, in practice (and, in some cases, also in theory), impossible to comply with - except by not exercising the power at all. It was so uncertain in its operation as to make the lawfulness of any particular fee chosen by that person totally unpredictable. It applied retrospectively to invalidate, from the start, things done in good faith for what was accepted to be a legitimate purpose.

The funding of access to justice

Lord Reed's judgment raises further concerns in its approach to the management of the public finances as they apply to the justice system.

The judgment seems to have been influenced by a sentiment that, in my experience, is sadly all too commonly to be found in the public sector.[24] Those on the front line of a public service very often develop the impression that the thinking behind the

[23] See also what is said in para. 100 of the judgment about powers of remission.
[24] See para. 102 of the judgment. Although Lord Reed says that this (possibly misunderstood) factor indicates that the Fees Order was always destined to infringe constitutional rights, this element of allegedly predictable illegality is not part of his reasons for setting it aside. (see para. 119 of the judgment).

funding decisions that affect them is giving undue weight to a market-based, commercial analysis that disregards the public benefit of a public service, and so also undervalues their contribution to it. Sometimes, regrettably, this feeling is a justified reflection of the fact that the service and their contribution to it has been misunderstood and under-appreciated. More often, though, it is the result of a misguided attempt by those with responsibility for the finances to seek out "evidence-based" reasons - or excuses - that can be presented as providing a scientific justification for decisions about a public service that can only be made and justified as matters of political judgement.[25]

In this case, though, Lord Reed's view that insufficient consideration was given, in the making of the Fees Order, to the public benefit of providing access to justice in individual cases, and that the premise of the Fees Order was that "the administration of justice is merely a public service like any other", appears to be based on a misreading (in paragraph 66 of the judgment) of a footnote in an impact statement.[26]

The footnote in question relates to the assessment of the "deadweight-loss" to the public of providing for fees that fall short of full recovery. It seems much more likely that this footnote was intended to indicate no more than that the only possible assessment of the amount of that loss (in the absence of any methodology for establishing a quantifiable monetary value for the public benefit of access to justice), involved what the footnote was itself conceding had to be recognised as a questionable assumption. That more generous reading is certainly more consistent

[25] See John Locke "The faculty which God has given man to supply the want of clear and certain knowledge, in cases where that cannot be had, is judgment", *An Essay Concerning Human Understanding*, Book IV Chapter XIV. There is bit of false reasoning to which the modern concept – and advocacy – of "evidence-based policymaking" gives rise, namely that the obligation to take account of any evidence that is relevant to policy formulation means that it is always going to be possible to find and use evidence that tells you precisely what the best policy is. Almost always there will still be judgements that need to be made where there is and can be no evidence that would lead to a particular conclusion: e.g. about the likely effects of any proposed policy, about which effects should be regarded as beneficial and which would be adverse, about whether the risk of adverse effects is outweighed by the potential for beneficial ones, and about the knock-on financial consequences for other unrelated areas of policy.

[26] Para. 66 of the judgment picks up the reference to the footnote that appears in para. 13 of the judgment.

with the Government paper in 2011 that introduced the intention to provide for employment tribunal fees, *Resolving workplace disputes: a consultation*.[27] That paper contained an express acknowledgement on page 50 that "Providing access to justice is not the same as providing access to other 'goods' or 'services'" – a contradiction, it seems, in the main part of the policy document, of what Lord Reed inferred from an "aside" in a footnote in the related impact assessment.

In any event, in practice, a public benefit from the enforcement of rights was in fact allowed for in the Fees Order: to the extent that the Order did not provide for full cost recovery, and was always intended to shift only "some" of the burden of the full costs from the general taxpayer to users etc. The intention was that two thirds of the costs should continue to be borne by the taxpayer. In that context, it would be absurd to make anything of a distinction between, on the one hand, an acceptance – as there was – that there is an unspecified justification for asking the general taxpayer to meet a substantial proportion of the costs provisionally identified as a theoretical deadweight loss from, on the other, a clear decision that costs should be met out of general taxation to the extent that they represent the monetary value of a benefit that, it has to be accepted, is unquantifiable in monetary terms.

There is, though, a more general truth relating to public expenditure decisions on services (like the justice system) the existence of which inherently benefit the public; and it applies also to the decisions on how the money is raised to fund them. All decisions on public expenditure and on raising money to fund it are interdependent and have to be made by reference to judgements about the relative importance of different, often otherwise unconnected, objectives. They are part of an extremely complex system involving the balancing of multiple, competing claims. There is invariably a necessity for the sort of compromises that cannot be accommodated by legal rules. Ultimately, the decisions all need to be made as matters of political judgment in a context where each affects the others. Neither law nor economics can prescribe the final answers.

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[27] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31435/11-511-resolving-workplace-disputes-consultation.pdf

The interdependent character, in the management of the public finances, of all expenditure and revenue decisions involves the principle – currently much in use in another context – that "nothing can be settled until everything is settled". That principle, though, is also sometimes mitigated by the "ring-fencing" of specific areas of expenditure. Promises to ring-fence specific expenditure categories often form a significant feature of electoral politics; and in that context, an intervention by the courts to impose their own ring-fencing for particular services in selected areas of policy (even – or perhaps especially – the financial management of the justice system of which they form a part) is neither helpful nor appropriate.

Parliament has not provided in primary legislation - as it has for the National Health Service - for the principle that the employment tribunal system, or indeed any other part of the justice system, should be free at the point of use. Is it right that a rule for which legislation is required in the case of the National Health Service should be created for employment tribunals by judge-made law alone? [28]

Another question to which Lord Reed's judgment gives rise relates to the extent to which it will result in the exposure to judicial review proceedings (with all the unpredictability and retrospection of the test applied in the UNISON case) of every budget-related decision about HM Courts and Tribunal Service that is made by the Ministry of Justice or HM Treasury. Many decisions, e.g. about the location, opening hours or staffing of courts and tribunals, have the potential to affect "access to justice" and, what is more, are made (unlike the Fees Order) without any reliance on the exercise of statutory powers or express Parliamentary approval. Subjecting the budgeting and day-to-day management of HM Courts and Tribunal Service to regular and time-consuming judicial challenge could, in practical terms, lead only to administrative chaos. It would also disrupt and unbalance the budget settlements across government.

Furthermore, in this connection, it needs to be recognised that, in the context of the complex system of managing the public finances, the reason why cost recovery

[28] The statutory rule for the National Health Service can be found in what is now section 1(4) of the National Health Service Act 2006 (as amended by section 1 of the Health and Social Care Act 2012).

systems tend to find favour is that a calculation comparable to the "optimal price" assessment mentioned by Lord Reed[29] puts a practical limit on the level of general taxation that is politically acceptable. That is not an absolute, mathematically quantifiable limit, but one the determination of which involves a political judgment. Cost-recovery systems provide a way of increasing total government income for certain services beyond what would otherwise be politically possible for those services. In crude terms, this is because a fee for something you are getting yourself is more likely to be politically acceptable than a charge to taxation for something someone else is getting. This is clearly not a matter on which it would be appropriate for the Supreme Court to adjudicate or on which it has any competence. On the other hand, it is also clearly relevant to the decisions implemented by the Fees Order on which the Supreme Court did decide to adjudicate, and so is something that it would have been unfair to disregard in determining those issues.

These points about the public finances all reinforce the argument made by Lord Sumption in 2013 that policy issues about the imposition of court fees are more appropriate for political resolution than for review by the judiciary.[30] I am not saying that government should disregard "access to justice" considerations when managing HM Courts and Tribunals Service, or indeed throughout the carrying out of all its functions. They are very important. Rather, I suggest, like Lord Sumption, that the extent to which it does so should be a matter for political accountability not for judicial review.

Meaning of "access to justice"

There is, though, another aspect of the Supreme Court judgment that is more specifically legal than the appropriateness of its intrusion into the management of

[29] Para. 100 of his judgment.

[30] It was in Lord Sumption's speech, "Limits of the Law", given on 20th November 2013 (since published in N.W. Barber, R. Ekins and P. Yowell (eds.), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016)) that he set out his criticism of the decision *R v Lord Chancellor, ex parte Witham* [1998] QB 575 (an earlier Divisional Court case on court fees on which Lord Reed partly relied) as an inappropriate intrusion by the courts into the political realm (with its inevitable reduction to binary questions of issues that cannot properly be decided independently of their wider political and fiscal context): https://www.supremecourt.uk/docs/speech-131120.pdf .

public finances and the day-to-day management of public services. That is the question of what "access to justice", as an element of the rule of law, should be understood to mean.

A test that measures the success of a legal system by reference to how many cases are brought to a hearing is a very curious notion of success for someone, like me, who has spent a career producing legislation. I have always worked on the basis that a major measure of success in producing a law is whether it so well satisfies the rule of law requirements of certainty, consistency, clarity and predictability that it has its desired effect "in the real world" – viz. beyond the narrow focus of the justice system – with the need for litigation kept to a minimum.[31]

Surely, a proper understanding of access to justice should not be confined to the right to bring proceedings, or to take them to a hearing. A right of access to justice is not the same as a right of access to litigation. Justice is necessarily a good thing. Litigation is not. A right of access to justice would be better articulated in terms of the need for all sides of a dispute to have the opportunity to have the dispute resolved in a way that is fair to them, as inexpensively as possible and not prejudiced by financial or other factors unconnected with the merits of the case. If so, that involves a more complex balance than maximising the opportunities for claimants to proceed to a hearing and removing financial inhibitions on their doing so.

Financial inhibitions on access to justice (understood in this way) come in many forms. They are not confined to court or tribunal fees and are certainly not all capable of being regulated by the courts. In many parts of the justice system, it is assumed that a satisfactory balance on these issues is struck by the rule that costs follow success. Where that principle applies, "access to justice" is still potentially obstructed,

[31] In the same way, I find it difficult to accept that the value of access to justice is in any way proportionate to the volume of authorities clarifying the law to which the authorities relate (c.f. para. 70 of the judgment, which seeks to refute the mistaken inference drawn from the impact statement footnote discussed above). Of course, the public do benefit from the clarification of the law in the courts; but the public benefits even more if clarification is unnecessary. All a large volume of authorities clarifying a law demonstrates to me is a failure by someone (the drafter or the judiciary) to ensure that the law is made, and is and can be construed, in a way that does not require repeated returns to the courts for further clarification. That is what best serves the rule of law.

in practice, to the extent that a party to a dispute may be deterred from either bringing or defending proceedings by elements of the system that suggest that success might result in only a partial recovery of the costs of doing so. That situation is less than ideal; but I think it has to be accepted that it would be absurd if the potential obstruction to access to justice by the operation of costs recovery mechanisms in that way in other parts of the justice system were now to be treated as illegal, or as potentially so. So, in what ways are the employment tribunals different?

Things were previously different in the employment tribunals, because an award of costs to either side in employment tribunal proceedings was exceptional. Nevertheless, changes made in conjunction with the introduction of fees by the Fees Order meant that the logic that applies in other parts of the system became capable of being applied to the new fees.[32] Nevertheless, Lord Reed rejected its relevance without any convincing justification.[33]

It is well known that part of the context for the Fees Order was a feeling amongst some employers that the absence of sufficient financial jeopardy for those bringing proceedings in employment tribunals resulted in commercial pressures to settle unjustified claims on adverse terms. In their eyes, this sometimes involved requiring them to succumb to a form of legal extortion.[34] The context of this was the extent to which employers needed to incur costs, and also to commit other resources, in order to defend employment claims when, added to the normal risks and uncertainties of litigation, there was only a very limited opportunity for the recovery of any of the costs of doing so, even where the employer was successful.

[32] In para. 27 of his judgment, Lord Reed explains that, although the normal rules that costs should follow success does not generally apply to employment tribunals (which are intended to be an inexpensive forum), an exception had been made (to coincide with the making of the Fees Order) to allow a successful applicant to be awarded the fees they had paid. The practice had developed that such an award should normally be made.

[33] One reason he gives in para. 28 of his judgment is the difficulty for the claimant of predicting success; but he does not explain why that is more significant in the case of employment tribunal cases. Another reason is the one dealt with in paras. 52 to 56 of this paper.

[34] See the Times leading article "Facing Charges" 27th July 2017.

This feeling may or may not have been justified, and it is likely to have been exaggerated – but its extent and validity are also inherently unmeasurable. The fact that, though well known, it was not addressed at all in Lord Reed's judgment does suggest that the concept of access to justice, and the policy problem addressed by the Fees Order, should have been treated as more complex than is indicated by the focus in the judgment on the one single issue of access to litigation for claimants.

Lord Reed does partly address the issue as one of the factors that might motivate early settlement, as does Lady Hale, but only on the basis that the employer is necessarily in the superior bargaining position.[35] At that point, reliance on evidence seems to have given way to speculative theorising. Certainly, no attempt is made seriously to balance any incentive against proceeding to a hearing resulting from the fees regime against any incentive not to commit money and resources to defending an unjustified application in a case were the costs of doing so are unlikely to be recoverable even if the defence succeeds.

One of Lord Reed's arguments for why it is essential for access to a tribunal to be guaranteed to claimants is that it constitutes a necessary part of the legislative incentive to employers to respect the employee rights that are made enforceable in that way. But that is only true to the extent that employers do not think (whether rightly or wrongly) that the lack of jeopardy for applicants makes it more sensible, if only in commercial terms, to settle cases even when they believe themselves to have a good defence. If they do think that - and there is evidence that that is what they did think – then, respecting employment rights becomes irrelevant, and the incentive is all the other way. There is no incentive to respect rights if you think you will have to settle claims relating to them on adverse terms even where, were you willing to bear the costs and other incidental expenses of doing so, you could show you had respected them. But this is all just as speculative as the Supreme Court's own inferences about what works to incentivise compliance with the law. Assessing the likely effectiveness of new law to influence future behaviour is not something the courts are equipped to do, and it should not be part of their function.

[35] See para. 72 of the judgment. This is also expressly stated in Lady Hale's supplementary judgment on discrimination: para. 129

What is less speculative, though, is that those involved in the preparation of legislation do always assume that civil litigation is a very unreliable way of securing compliance with statutory duties, and that the volume of civil litigation or lack of it, where it has been used for that purpose, is an extremely unreliable measure of whether the duty in question is being complied with or is being effectively enforced. This is largely because of the expectation that the amount of litigation and of compliance, and what can be learned from them, will all be distorted by the commercial calculation potential parties to civil litigation always have to make about whether the potential financial advantages of bringing proceedings, or of defending them, will outweigh the financial risks of doing so, and by individual extraneous factors in different cases that affect how that calculation is made.

Incapacity of the Court to address the whole problem

There are other questionable elements to the arguments in Lord Reed's judgment about access to justice. One superficially related, but bizarre, reason he gives for justifying the maximisation of access to tribunals for claimants is the evidence that only about half of those who proceed to a hearing and succeed can expect to be paid in full, and that around a third of them receive nothing at all.[36]

This seems to me perfectly to illustrate why judicial involvement in policy-making is a bad idea; and the reason is one that underlies several of the other points made in this paper.

The figures quoted by Lord Reed are, of course, very disturbing. They need to be researched, as do the effectiveness of the methods already adopted by the

[36] See para. 96 of the judgment. The evidence for this situation is set out in para. 36 of the judgment, but there is no explanation for why it is the case. Steps already taken to address the situation with new procedures are described in para. 37 of the judgment. No evidence of their effectiveness, one way or the other, appears to have been available; but it is inferred that they have been ineffective from the number of cases to which the new procedures have been applied. This, however, is potentially only another example of the non-sequitur (to which courts it seems are prone) that assumes that the effectiveness of law can be determined exclusively by reference to the application of formal procedures. That apparently disregards, for example, the influence on behaviour that e.g. the mere existence of more effective procedures can have.

Government to change them. If there is a better way to improve them, it needs to be adopted.

When judges become involved in policy issues, their functional constraints prevent them from adopting a system-based approach: from identifying the point of most effective leverage for resolving the underlying problem, and of addressing that. They are inevitably required to approach the problem by treating many of the elements of the problem as fixed points, and to pick the best way to resolve the issue that is left available through those bits of the system that are unfixed, because they are the ones being presented to them for consideration.

In this case, this leads to an outcome under which the weaknesses of the system are not cured but, instead, treated themselves as fixed points and potentially reinforced. For this reason, the effect of the judgment is likely to be that more public resources will need to be committed to a system that is already inherently inefficient. Any continuing ineffectiveness of the existing system will just manifest itself in even more cases. An obvious, wholly different and potentially better paradigm could be produced by making the enforcement of tribunal decisions more efficient; but that can only be achieved by political policy-making. If it is the perceived inefficiency of enforcement in the existing system that is providing the real obstruction of access for claimants to "justice" (rather than to tribunals), the effect of abolishing fees on the extent to which justice is provided by employment tribunals is irrelevant.

Criticism of practical effects of the remedy granted by the Court

This failure to be able to adopt a systems-based approach to policy problems, and the solutions to them, also leads on to a consideration of the unsatisfactory nature of the practical effect of the remedy granted by the Supreme Court in the UNISON case.

The Fees Order was declared void. The practical consequence of this was a requirement for the Government to reimburse all the fees collected under the Order that had been found to be unlawful. This means that those applicants who did not suffer from the illegality (because, by definition, they were not deterred by the fees

from pursuing claims) receive a windfall repayment. The Government's scheme to give effect to the Supreme Court judgment also provides - necessarily in the light of the terms of the judgment - that there is also a windfall entitlement to a repayment both for trade unions who funded proceedings by their members and for unsuccessful respondent employers from whom applicants recovered their fees by means of an award by the tribunal.[37] As for those whose rights the Supreme Court decided were affected by illegality (because for them the fees were an effective deterrent to asserting their rights), they will receive nothing. The principal financial beneficiaries of the substantial public expenditure mandated by the Supreme Court will be unsuccessful applicants and their trade unions, and unsuccessful respondents. The Supreme Court, though, is not subject to the same "value for money" disciplines that apply to other public servants responsible for committing funds to public expenditure.

In addition, the Ministry of Justice will have to find the funds to make the repayments and that, with the inability to collect the same or indeed any fees in future, is very likely to put further strain on the budget for the justice system. What makes a financial penalty of tens of millions of pounds on the budget for the justice system, or on the taxpayer, a sensible or proportionate response to the failure of the Ministry of Justice accurately to estimate in advance the full effects of the Fees Order?[38]

[37] See footnote 32 of this paper.

[38] To be clear, this paper is not criticising the Supreme Court decision on the grounds that it failed to devise a prospective remedy for what it found to be unlawful. The only way in which secondary legislation should be challenged is by reference to whether it falls within the powers granted by Parliament to the person who makes it. If the Order was unlawful it had to be void. The criticism is that the fact that the only available remedy for the defect in the legislation that the court detected was its retrospective invalidation is something that provides reinforcement for the argument that the more appropriate form of accountability for that defect would have been in a political forum.

How the Judgment Makes Questionable Assumptions about the Constitutional Role of Parliament

Parliament is not just, or primarily, a legislature

Lord Reed's reasoning raises a further, more general issue of constitutional importance. His reasoning appears to involve a highly questionable assumption about the role of Parliament in our constitution. In a passage setting out the constitutional premises for his reasoning, he says "Parliament exists primarily in order to make laws for society in this country".

This, in the context in which it is said, reinforces a common but serious misunderstanding of Parliament's role in the constitution, of the nature of its sovereignty and of the manner in which its effectiveness can be assessed. The assumption that Parliament's place in the constitution, and its relationship with Government, derives from its status as "the legislature" is borrowed, inappropriately, from the theory and written constitutions of other states – as is the idea that usually goes with it: the supposed separation of powers that distinguishes and separates a Parliament (with primarily legislative functions) from the other branches of government, including the executive.

The conceptual model for the constitution that separates legislative from executive functions in this way may, for some, be an ideal to which they would like our constitution to conform; and in fairness, it is also a relatively common, text book oversimplification of the UK constitution, with some historical validity in the 17th century and the period before the establishment of the confidence principle in the first half of the 19th. However, as many leading constitutionalists have pointed out, as an accurate description of how the UK constitution works "in the real world", today, it is wildly wide of the mark. It totally disregards the significance both of the executive's role in legislation and of Parliament's functions of scrutinising the non-

legislative policies and actions of government and of calling Ministers to account for the carrying out of executive functions.[39]

The analysis of Parliament as the repository of legislative power, with legislation as its primary function, proposes a conceptual model for our constitution which, at best, can only partly explain some aspects of a much more complex set of arrangements. In our unwritten constitution, it is a model that has no authority in any founding document; and, because of Parliamentary sovereignty, it cannot be prescribed, and then imposed on Parliament, by the courts. Any conceptual model for the UK's unwritten constitution can only be valid to the extent that it can be inferred empirically from the substance of what happens in practice. Legal theory and form are largely irrelevant.

Nevertheless, even the form of legislation makes it clear that primary legislation is not exclusively for Parliament; instead, it is a collaboration between the executive and Parliament. Primary legislation is made and is given its authority by "the Queen in Parliament". The usual enactment formula specifies that the enactment is "*by* the Queen's Most Excellent Majesty". She personifies the executive. The role of Parliament's two Houses is acknowledged to be the provision of "advice and consent"; but it is the advice of Her Ministers on which the Sovereign acts when She grants Royal Assent to Bills.

[39] A selection of the literature relating to whether Parliament should properly be regarded as a legislature (including literature advancing a "legitimation" theory of Parliament's function) can be found – and is discussed – in Meg Russell and Daniel Gover, *Legislation at Westminster: Parliamentary Actors and Influence in the Making of British Law* (OUP, 2017), pp. 3-6. It is important, though, to emphasise that the argument in this paper for suggesting that it is misleading to identify Parliament primarily as a legislature is not, in any way, intended to suggest a lack of influence for Parliament over legislation. On the contrary, I wholly accept the inferences drawn from the research described in that book: that Parliament has very significant influence over legislation. That is wholly consistent with my own professional experience. My argument, rather, is that the substantial influence Parliament exercises in practice over legislation, and over the other policies of government too, neither derives from nor is restricted by a functional definition of Parliament that confines its constitutional role to the exercise of legislative power. That argument is wholly consistent with the final conclusions in that book about the perceptions and reality of whether Parliament is a legislator: op cit. pp. 282-284. Indeed, I gratefully rely on those conclusions.

Historically, Parliament's influence over the creation of new law began with the control of "supply", both on the income and on the expenditure side. Supply was granted on condition of the redress of grievances, which the Crown provided by making new laws. The history of Parliament has "supply" at its centre: it is a story about the establishment, defence and democratisation of popular, political control over the State's finances, from the development of Parliament in the 13th and 14th centuries, through the crises of the 17th and the development of supply as a crucial element of the confidence principle in the 19th, to the House of Lords Budget crises in the early 20th.

In practice, most political questions still begin or end with issues about public money. Legislation is often only an incidental part of the process of resolving other questions about how public money will be spent and how the money needed for public expenditure will be raised. In the light of the central importance of supply issues to the relationship between Parliament and the executive, and to Parliament's influence over the executive, it might be expected that the courts would be very reluctant to intervene in those issues. The more practical reasons set out in paragraphs 36 to 41 of this paper for the courts to leave the management of public finances to the sphere of political accountability are reinforced by constitutional history and principles. The management of public finances is central to why we have democratic, political decision-making processes in the first place.

The misleading analysis of Parliament's constitutional function as primarily that of a legislature, or as deriving exclusively from its status as a legislative body, has some unfortunate effects. I have discussed elsewhere its potential to lead to erroneous inferences in the consideration of what Parliamentary scrutiny of legislation is for.[40]

It can also, it is now clear from Lord Reed's judgment, lead the courts into a mistaken approach to statutory construction and to what should be the limits of judicial review.

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[40] See my "What is the Parliamentary Scrutiny of Legislation for?" in A. Horne and A. Le Sueur (eds.) *Parliament: Legislation and Accountability* (Hart Publishing, 2016), Ch. 1. In that chapter, I also say more about the nature of the "legislature myth" of Parliament's function and more about the difference between the role of Parliament as a critic, rather than as the author, of legislation.

Parliament's role in relation to primary legislation

Developments from the first half of the 19th century onwards[41] – especially the acceptance mentioned above of the need for governments to maintain the confidence of the House of Commons – secured that the initiative for legislation in Parliament became vested for all practical purposes in the government.

The executive's initiative in legislative matters continues to be founded on the confidence principle. It is reinforced by the custom and practice of the two Houses and by the practical effect of the Standing Orders and conventions about the arrangement of business. In relation to financial matters, those matters are reinforced by specific rules of financial procedure in the House of Commons and by the financial privileges that the Commons asserts in its relations with the House of Lords. The practical effect of the way Parliament works (and, in the case of financial matters, the direct effect of specific rules) is that, when it comes to legislation, the executive has a power of veto that is no less real than the power of each House to deny a Bill a second or third reading.

The House of Lords has long been regarded as a "revising Chamber", and what it is revising is legislation proposed by government. The fact that its designation as a revising Chamber is not primarily a description of its relationship with the Commons is clear from the fact that it is still a revising Chamber when it is considering a Bill as the first House - something that frequently happens. Furthermore, in its day to day handling of legislative proposals, the House of Commons in practice performs a very similar function. It too revises proposals from government; but the Commons' revising function is generally carried out from a more political perspective: testing the proposals principally against their political acceptability. In practice the role of both Houses, even in relation to primary legislation, is that of critic, not author.

[41] See generally Chapter 1 of Part 2 of vol. XI of the *Oxford History of the Laws of England* (OUP, 2010).

Parliament confers constitutional legitimacy on government policy

As a result, in the real-world constitution, the main function of Parliament is to bestow constitutional legitimacy on the policy and other actions of the executive. That is not to diminish its role, or to suggest that it is a junior partner of the executive, in relation to legislation. As the principal source of constitutional legitimacy, Parliament has an essential and, ultimately, a determinative role at the centre of our national life, and in the enactment of legislation. What is misleading is to suggest that its role is narrower than that and should be respected within the constitution and by the courts only to the extent that it is consistent with the exercise of the functions of a legislature.

The principal way in which Parliament confers constitutional legitimacy on actions of the executive[42] is through the scrutiny of the government's policies for change and by calling the executive to political account for the consequences of its actions – including the implementation of proposals previously subjected to Parliament's scrutiny. The supervision by the House of Commons of the levying and spending of public money is central to that. The dominance of scrutiny and accountability, as Parliament's primary means of conferring legitimacy on the actions of government, has also been further reinforced by more recent constitutional changes, particularly those affecting the constitution and operation of Commons Select Committees.

Legislation, then, is best seen as part of all that. When Parliament passes primary legislation, it is very seldom (if ever) doing so as part of an abstract exercise in setting a legal framework for "society", e.g. for a hypothetical system in which better decision-making will be possible. Rather, the overwhelming majority of legislation is introduced and passed to provide the mechanism that will allow specific policies and other decisions of the executive to be implemented to produce specific, intended outcomes – or quite often only to provide the missing part of the mechanism for that.

[42] Of course, it also bestows constitutional legitimacy by reason of the "confidence principle": the very important role of the House of Commons in determining who is in government. In reality that is the ultimate source of Parliamentary influence, including over the matters in which it also has more detailed procedural powers.

This is true not only when legislation (as it more often does) deals with the machinery of government and interactions between government and others. It is also true where the policy of the executive takes the form of incentives to behavioural change in wider society.

The incidental effect of policy implementation may be to set a legal framework which will then continue for all purposes until changed. However, from the Parliamentary perspective, the function of a legal framework for policy, so far as it applies to government, is seldom (if ever) to enlist the assistance of the courts in regulating government in carrying out that policy. Rather, it is about legitimising what government wants to do and confirming its understanding of what that is. From a Parliamentary perspective, the constraints on government that are provided for by legislation are created primarily to set the parameters for when further Parliamentary scrutiny and accountability will be needed in respect of future changes.

Parliament has ample powers of its own, without the need to seek the assistance of the courts, when it comes to regulating government and ensuring that government does not exceed what Parliament has agreed to authorise and that government continues to respect Parliament's developing understanding of what that is and of how it should be done.

Construing the output from Parliament's collaboration with Government

The initiative and veto that the executive enjoys in practice in relation to legislation mean that a rule for the construction of statutes would not accord with constitutional reality if it relied on an assumption that Parliament, as a separate branch of government, imposes statutory obligations or restrictions on the executive against its will, or expects the courts to supplement or improve on the legislative restraints it imposes. The concept of Parliamentary intention in relation to legislation can only be properly understood in that light.

Statute law, so far as it regulates government, is always and necessarily the result of a collaboration, or agreement, between the executive and Parliament in which the final Act will almost always have originated in proposals from the executive itself, and in which the legislation always takes a final form for which the executive has, and accepts, a large share of the responsibility.

Were it not for a misunderstanding of the collaborative nature of the relationship between the executive and Parliament in the production of legislation, could the Supreme Court have concluded that it was really the intention of Parliament to confer a power on the executive to fix fees that it was either impossible to exercise or, at least, so difficult to exercise that its exercise was impracticable?

The construction and review of delegated legislation

The misleading constitutional analysis that defines Parliament as primarily a legislature concerned with the enactment of primary legislation can also lead to the adoption of a distinction between primary legislation and secondary legislation that is misleading and does not reflect reality. Primary legislation is initiated by government and scrutinised by Parliament using the procedure of the two Houses for Bills. Secondary legislation – at least when it is subject to some form of Parliamentary control (as it usually is) – is initiated by government but subject to Parliamentary scrutiny and influence in other ways. The differences of form are, as indicated above, more differences of degree than of nature. In both cases, both Parliament and the executive have a veto power. Secondary legislation is made under "delegated powers". It is a mistake to treat the delegated powers as if they had been transferred. As, in law, with any delegation, the person – in this case Parliament – who makes the delegation retains responsibility and control over the exercise of the delegated powers.

It is an oversimplification, and artificial, to treat primary legislation as an exercise of sovereignty by Parliament in discharge of its legislative function, but to treat secondary legislation subject e.g. to affirmative resolution procedure as an executive act without any of the constitutional legitimacy that can be conferred by Parliament.

Were it not for this misunderstanding of the nature of the distinction between primary legislation and secondary legislation, would the Supreme Court have attached so little importance to the affirmative resolutions that were passed in respect of both the Fees Order and the Added Tribunals Order?[43]

[43] None of this should be read as denying the requirement that secondary legislation can be lawful to the extent only that it is within the powers Parliament conferred to make it (see footnote 38 of this paper); but it should be read as suggesting factors that affect the way in which powers to make secondary legislation are to be understood.

Furthermore, whenever an Act of Parliament provides for a decision to be implemented by secondary legislation subject to affirmative approval by one[44] or both Houses Parliament, it should be acknowledged that that constitutes a clear use of legislative power to signal, by primary legislation, that the decision to which it relates is one for which, in Parliament's view, scrutiny and accountability in a political forum is more apt than judicial review. Parliament clearly has the sovereign right to give that signal and to expect it to be recognised by the courts.

Incidentally, this point is not about the distinction between what is legislative and what is not. It is a point that ought to be taken into account irrespective of any distinction that it is possible to draw between secondary legislation of an inherently legislative character (like the Added Tribunals Order and the Fees Order) and secondary legislation on matters that appear more executive in nature (as, perhaps, was the case in *Bank Mellat v HMT* [2013] UKSC 39).[45] It is Parliament that has the right to determine whether decisions for which it makes provision by Act of Parliament are to be regarded as legislative or executive in character.

It is currently fashionable[46] to argue that Parliamentary scrutiny of secondary legislation is perfunctory and inadequate. Even if this were true, the level of scrutiny afforded to government proposals for secondary legislation is ultimately a question for Parliament itself, and not for the courts. The fact is, though, that the fashionable view is not true; and it can only be made to appear true if Parliament's influence over proposals contained in subordinate legislation is, wrongly, assumed to be confined to what happens in the formal procedures on those instruments.[47] In any event, any

[44] Only the House of Commons is involved when the matter in question falls within the financial privileges of that House.

[45] See e.g. Lord Sumption's reasoning in paras. 39 to 41 of his judgment in relation to the secondary legislation under consideration in that case. It is difficult to see how a distinction based on a difference between the subject-matter of different instruments subjected to identical procedures by Parliament can be explained as consistent with what Parliament must have intended. The *Bank Mellat* case is also a case parts of which are difficult to reconcile with Article 9 of the Bill of Rights 1689.

[46] Amongst the reasons for this are some highly political issues relating to the European Union (Withdrawal) Bill that is currently before Parliament.

[47] The erroneous assumption, in relation to all matters (not only legislation), that the measure of Parliament's influence over government is confined to the extent to which it can be seen to be

suggestion that the level of Parliamentary scrutiny and accountability to which the proposals in the Fees Order were subjected was perfunctory or inadequate is quite unsustainable in the light of the background described in the House of Commons Library paper mentioned in footnote 5 of this paper.

Usurpation by judicial review of Parliamentary scrutiny and accountability

The understanding of Parliament that treats it as primarily a legislature also creates a tendency to undervalue the extent to which the actions of the executive more generally are given constitutional legitimacy by Parliamentary scrutiny and accountability, and by the democratic authority given to Parliamentary scrutiny and accountability by elections to the House of Commons and the confidence principle.

Were it not for this misunderstanding of Parliament's role and functions would the Supreme Court have so easily arrogated to itself the post-legislative scrutiny role of Parliament in relation to the Fees Order?

The review by the Justice Select Committee mentioned in paragraph 5 of this paper and the Impact Review, which was (in substance, but admittedly not in form) the Government's detailed response to the Committee's report, covered almost all the same ground as the evidential foundation for Lord Reed's judgment.[48]

The premise of this paper is that a better understanding by the judiciary of the way Parliament works and of the political process would facilitate a better, more purposive and less confrontational approach to when issues should be left to be

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exercised, confrontationally, in formal proceedings in which the government is seen to have been forced to change its mind is comprehensively exploded, for primary legislation, by the research conclusions in Meg Russell and Daniel Gover, *Legislation at Westminster; Parliamentary Actors and Influence in the Making of British Law* (OUP, 2017).

[48] The Government was allowed to use evidence from its own review to support its arguments in the case – something that would arguably have conflicted with Article 9 of the Bill of Rights 1689 had the evidence been contained in a direct response to the Justice Committee, rather than in a consultation paper presented to Parliament.

resolved in the political forum. In the UNISON case, the necessary incompleteness of the analysis by the Supreme Court of the policy, and the unsatisfactory nature of the available remedy provided by the courts, together with the fact that both Parliament and the courts were relying on the same evidence, is what suggests that it was inappropriate for the courts to compete with Parliament to resolve the matter, or for the courts' view to prevail.

The existence of a clear overlap of the issues with which both the Supreme Court and Parliament were dealing in relation to the Fees Order also gives rise to a more fundamental constitutional question about the constitutional propriety of adjudications by the courts on issues of policy with which Parliament is already seized – as here – in exercise of its scrutiny and accountability functions.

To what extent should our constitution allow and encourage politics to be done in the courts, rather than in Parliament? Is it wise or sensible, or indeed consistent with our constitutional history and conventions, further to encourage the idea that litigation, rather than political engagement, is the better and more effective way of challenging or, indeed, thwarting political decisions?

Should the courts be embarking, either implicitly or explicitly, on the process of deciding, whether conclusions reached by a Commons Select Committee are right or wrong, or just futile? Duplicating, and therefore questioning, the work of the Select Committee is precisely what the decision in the Supreme Court decision necessarily involves.

These questions do raise an extremely difficult, but nevertheless very important, issue. The mere fact that the courts and Parliament are considering different aspects of the same issue does not, in itself, mean that something constitutionally inappropriate is going on. Courts should be able to decide what is legal, and an illegality by government is obviously a matter on which Parliament may wish to call Ministers to account.

On the other hand, the *sub judice* rule in Parliament and Article 9 of the Bill of Rights 1689 do, together, suggest that the courts and Parliament should not compete with each other to find different solutions to the same problem. The Bill of Rights and Parliamentary sovereignty also suggest that, in the case where they do, the political forum should take precedence. Difficulties arise because legal reasoning finds it easy to isolate one element of a problem and to claim ownership of it as a legal issue, even when it controls the determination of much broader issues, and even when it is being used solely as a device to produce a politically more desirable resolution of those broader issues.

For those politically opposed to the Fees Order engagement with the work of the Justice Committee was unnecessary. The work of the Committee was superseded

and rendered futile by the decision of the Supreme Court. In that context, it would be disingenuous not to accept that the decision of the Supreme Court dealt not only with what had happened, but also established the political context for what is politically possible going forward. The question is no longer what the best policy is for funding the tribunals. Instead it is now not only what is legally possible, but also what is politically practical, following the Supreme Court judgment.

Is that an outcome that is desirable either for promoting trust in the practice of democratic politics through the Parliamentary process, or indeed for protecting the reputation of an independent and impartial judiciary?[49]

[49] Some readers will recognise that this paragraph echoes some of the concerns which I expressed about *R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017]* UKSC 5, and which (in the case of the impact on the judiciary) were shared by the minority in that case in the Supreme Court, including Lord Reed.

Conclusions

The decision in the UNISON case raises some very difficult legal and constitutional issues, which are neither clear-cut nor easy to resolve. It leads to a potential for greater tension and misunderstanding between the courts on the one hand and Parliament and the executive on the other. In so far as it extends the reach of the courts into policy formulation and the management of the public finances, it creates a challenge for political and democratic decision-making. In so far as it imposes a "success test" for determining the legality of policy made and implemented by government and Parliament, it is objectionable for lack of certainty and predictability.

What is needed is a pragmatic and conceptually sound set of principles that can be used to determine what is more appropriately subjected to political accountability than to judicial review. That should not depend on whether there is a part of a policy issue that can be isolated and turned into a legal question. It should not be possible, in that way, for the courts to be required to determine the entire policy solution and set the political context for any future policy decisions.

It should not be assumed that the rule of law requires all policy to be vulnerable to being second-guessed in the courts unless it is mandated by primary legislation. The principles for determining where Parliamentary accountability should take precedence over judicial decision-making need to recognise that there are circumstances when the former has real advantages over the latter, and is objectively preferable; and it also has to recognise that Parliament has a relevant role beyond its role in relation to primary legislation (including in relation to delegated legislation and the scrutiny of executive action), where the advantages of political accountability over judicial decision-making also need to be respected.

More generally, the UNISON case reinforces what is already an urgent need for better communication, a dialogue, between the different branches of government about the nature and value of their respective functions.

Finally, the case raises another more general question which (although I think it can have only a political answer) needs serious consideration by all branches of government. It is also, I believe something for which, a generally acceptable approach is also urgently needed for the future.

That question (which seems to me to be central to many of the tensions and misunderstandings that can currently be observed between politics and the law) is how decisions should be made about priorities when it comes to the allocation of limited resources between, on the one hand, correcting and remedying the errors of the past and, on the other, securing improvements in things for the future.