How to Reform Judicial Review

Richard Ekins

Foreword by Rt Hon Lord Howard of Lympne CH QC

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Policy Exchange

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Foreword

Rt Hon Lord Howard of Lympne CH QC
Formerly Home Secretary and Leader of the Opposition

For more than half a decade, Policy Exchange's Judicial Power project has been pointing out the dangers posed by what it described as the inflation of judicial power and proposing remedies to deal with this regrettable trend. This work has had considerable influence. It helped to raise the profile of an issue of fundamental importance to the way in which we are governed leading to the inclusion in the Conservative manifesto at the last General Election of a pledge to ensure that judicial review is "not abused to conduct politics by another means or to create endless delays."

In pursuance of that pledge the Government last year launched an independent review to examine whether there is a need to reform the judicial review process. A panel, chaired by Lord Faulks QC, was set up to make recommendations. The Panel has now reported and the Government has issued its preliminary response on which it is now consulting. This paper is the response by Professor Richard Ekins, Professor of Law and Constitutional Government at the University of Oxford, to that consultation.

The significance of the contribution made by Policy Exchange's Judicial Power Project is evident from the extent to which its submissions, by Professor Ekins and Sir Stephen Laws, are quoted in the Panel's report. But the Government in its response to the report has proposed reforms that go further than the Panel's recommendations. In this paper, Professor Ekins supports the ambition of the Government to introduce more far-reaching reform and makes several suggestions as to how this can best be achieved.

In doing so he faces up to the fundamental question at the heart of this debate which is whether the final say on the laws which govern us should rest with Parliament, the traditional repository of sovereignty and, at least as far as the House of Commons is concerned, democratically elected and so accountable to the people, or the judges of the Supreme Court, unelected and the product of a process which resembles a self-perpetuating oligarchy. Professor Ekins maintains that while the Panel is robust in asserting Parliament's authority to legislate about judicial review, it avoids addressing squarely the phenomenon of judicial scepticism about parliamentary sovereignty. He says, and I agree, the likelihood of judicial resistance to Parliament's legislative will is a constitutional problem that should be addressed and the fact that it is controversial should not in itself be a reason in principle to refrain from legislating.

To this end the paper contains a number of specific proposals including a list of cases recently decided by the Supreme Court which should be reversed by legislation.

It is possible to appreciate the significance of this contribution to the debate which will inevitably follow the Government's final proposals without necessarily agreeing with each and every one of the recommendations made. In that spirit I have no hesitation in warmly recommending this work which will deservedly influence that debate.

Introduction

1. This paper is the text of Policy Exchange's response to the Government's Consultation on Judicial Review Reform. It builds on submissions made by Policy Exchange's Judicial Power Project to the Independent Review on Administrative Law (one written by me, the other by Sir Stephen Laws),[1] which were quoted in the Panel's report and in the Government's Response.
2. The Consultation responds to the Panel's report, but proposes reforms that go further than the Panel's recommendations. In section I below, I argue that there is nothing in the least improper about the Government adopting a more ambitious programme of reform than the Panel was able to agree. On the contrary, it would be an abdication of constitutional responsibility for the Government to take itself to be disabled from acting otherwise.
3. Relatedly, it would be a mistake simply to wait on judges to choose to exercise restraint. Judicial self-discipline is very important and, like the Panel and the Government, I hope our highest courts will exercise self-discipline, respecting the role of Parliament and Government in our constitution. However, the political authorities have a part to play in helping judicial attitudes to change, by restating their understanding of the balance of the constitution and legislating in targeted ways to uphold that balance. Sections II-VII address the merits of the Government's proposals to this end and set out supplementary measures.
4. In section II, I argue that the Government is right to propose to legislate to reverse *Cart*,[2] ousting judicial review of the Upper Tribunal. I also welcome the Government's intention to address the efficacy of ouster clauses more generally and I argue for legislation to reverse *Privacy International*.[3] In section III, I consider further how the Government's intention can be made more effective, including by amending the Interpretation Act 1978.
5. In section IV, I argue that as part of a response to *Privacy International*, the Government should propose legislation to amend section 1 of the Constitutional Reform Act 2005, which would help prevent courts from misusing the principle of the rule of law. The Government should also propose legislation to protect the political constitution from political litigation, the risk of which is confirmed by ongoing litigation about the Ministerial Code.

1. Later published as R Ekins, *The Case for Reforming Judicial Review* (Policy Exchange, 2019) and S Laws, *How to Address the Breakdown of Trust Between Government and Courts* (Policy Exchange, 2020).
2. *R (Cart) v The Upper Tribunal* [2011] UKSC 28; I recommended legislative reversal of *Cart* in my submission at [27] and [38(g)] and in an earlier paper, *Protecting the Constitution: How and why Parliament should limit judicial power* (Policy Exchange, 2019), p.18.
3. *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22

6. In section V, I argue that the Government should propose legislation to address the misuse of the principle of legality and constitutional principle, including by reversing significant judgments, including *Evans*,[4] *Unison*,[5] *Cherry/Miller (No 2)*[6] and *AXA*.[7] In section VI, I argue that the Government should also propose legislation to reverse other significant judgments that are premised on an unsound understanding of the judicial role.
7. In section VII, I argue that while the Government's proposal to legislate about nullity is attractive in principle, it is difficult to legislate about concepts and it might be best to focus on the practical consequences of various types of error. There is a strong case for legislation to specify that certain types of error made in the course of making a statutory instrument, including procedural errors or incompatibility with convention rights, should not result in the instrument being quashed with retrospective effect.

4. *R (Evans) v Attorney General* [2015] UKSC 21
5. *R (UNISON) v Lord Chancellor* [2017] UKSC 51
6. *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41
7. *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46

I. Constitutional responsibility for judicial review reform

8. The Panel's report is a valuable outline of some constitutional principles and practical considerations relevant to deliberating about judicial review reform. In particular, the report helps clarify the changing scope of justiciability over the past four decades and rightly affirms the constitutional legitimacy of Parliament legislating about judicial review, both in general (even if the Panel questions the likely efficacy of such legislation) and in response to particular cases. However, it seems clear that the Panel was divided on some important questions, including the merits of some of the most significant judgments in recent years, which is why its recommendations were relatively limited.
9. Relatedly, I suggest that the Panel's evaluative conclusions, while intelligent and instructive, are relatively cautious in part because of the need to maintain agreement amongst a divided membership. For example, the Panel is robust in asserting Parliament's authority to legislate about judicial review, but avoids addressing squarely the phenomenon of judicial scepticism about parliamentary sovereignty. The Panel notes the "debate" but then says that it will assume that Parliament remains sovereign.[8] The point is that the Panel held back from pursuing its own logic and denouncing the judicial scepticism in question, scepticism which does inform some problematic lines of legal reasoning.
10. It is no surprise that the Panel expressed caution about the effectiveness of legislative intervention. This is a reasonable default position and I agree, in any case, that there are strong reasons for caution about wholesale legislative reform in this domain. However, the Panel did not consider in detail the case for more targeted reforming legislation, perhaps in response to the misuse of the principle of legality and its deployment as a means to weaponise novel constitutional principle. The Panel moved too quickly to dismiss legislation on point, suggesting that it would be difficult to frame, would be controversial, and/or would encounter judicial resistance. With respect, the likelihood of judicial resistance to Parliament's legislative will is a constitutional problem that should be addressed and the fact of controversy is not itself a reason in principle to refrain from legislating.
11. The Panel's report risks conceding that in practice it is for courts

8. Independent Review of Administrative Law [IRAL], March 2021, CP 407, 2.88-2.89

to determine the limits of judicial review, whereas the logic of the principles that the Panel rightly affirms is that Parliament is free authoritatively to set (settle) the limits of judicial review. If parliamentary sovereignty is to remain good law, Parliament should not tolerate assertions on the part of some judges and lawyers that it is not free to legislate about judicial review. Parliament is responsible for guarding the constitution, which is a reason for it to legislate to restore limits on judicial power, exercising and thus affirming its continuing sovereignty.

12. The Government should take the Panel's analysis seriously, but should also form its own view, taking constitutional responsibility for measures to reform judicial review and thus maintain the balance of the constitution. In responding to the Panel's report and formulating proposals for legislative action, the Government is perfectly entitled to go beyond its recommendations. The same is obviously true for Parliament. That said, I note that in one sense the Government's proposals do not develop adequately the Panel's important conclusions (a) that it is always open, and rightly so, for Government to invite Parliament to enact legislation to reverse particular judgments,[9] and (b) that it would be entirely legitimate for legislation to specify that some power that has always been understood to be non-justiciable should not be capable of being made justiciable without primary legislation to that effect.[10]
13. It will be difficult for the law of judicial review to be in good order without a change in judicial attitudes, with judges exercising self-discipline and hewing close to the limits of judicial power. The Panel has done important work in studying developments in judicial review, including the erosion of non-justiciability,[11] and in articulating principles that should govern it. Likewise, the Government has rightly outlined its understanding of the rule of law and constitutional government, to which parliamentary sovereignty is central, making clear that while judicial review is an indispensable institution it has important limits. In addressing its attention to the balance of the constitution in this way, the Government may help encourage a change in judicial attitudes and in public culture. But more is needed.
14. It would not be prudent for the Government to rely on judicial self-correction, assuming that with a change in the Supreme Court's bench and a change in political circumstances, the high-point of judicial self-assertion is over. I welcome recent changes in the Supreme Court's membership[12] and am encouraged by the Court's recent *Begum* judgment.[13] However, it is difficult for courts to unwind past mistakes, not least since judges should not understand themselves to be legislators, free to improve the law by fiat.
15. It would be a mistake to take the *Miller* (No 1) and *Cherry/Miller* (No 2) judgments somehow to be confined to their facts.[14] It is true and important that they arose in the context of political controversies

9. IRAL, 2.91-2.92
10. IRAL, 2.81-2.83
11. IRAL, chapter 2
12. R Ekins and S Laws, "What new appointments mean for the Supreme Court – and the rule of law", Prospect, 7 August 2019 and R Ekins, "What the most recent appointments mean for the future of the Supreme Court", Conservative Home, 26 July 2019.
13. *R (Begum) v Home Secretary* [2021] UKSC 7; see R Ekins, "The significance of the Supreme Court's Begum judgment", Policy Exchange, 3 March 2021
14. Cf. IRAL, 2.37 and 2.76

which are unlikely to be repeated in the immediate future. However, both judgments were the fruits of political litigation, in which repeat litigants (and some disaffected parliamentarians) applied to the courts for support in a wider political controversy. The cases are dangerous precedents that if left unchallenged may well be applied in unsatisfactory ways in the future. In the meantime, they have obviously created considerable and undesirable legal uncertainty about their potential impact. The narrative on which the litigation relied, that the courts needed to protect Parliament from an overbearing government, is a stock argument in contemporary academic and lawyerly discourse. It has not run its course. Likewise, the techniques deployed in both judgments, especially the second, remain available to judges and lawyers alike. The Panel effectively notes this in its discussion of the rise (and misuse) of the principle of legality, in which courts have expanded the principle well beyond its original judicial articulation.[15]

16. The development of the common law turns on how judges decide particular cases *and*, especially, on how those decisions are received by later lawyers and judges, whether as landmarks or historic mistakes or otherwise. It is very important that the Government responds promptly to judgments it thinks wrongly decided, which manifest an unsound legal philosophy or judicial technique, with legislation reversing their legal effects, at least for the future. This is especially important if or when a judgment misconceives (more or less brazenly) Parliament's exercise of its legislative authority. In legislating to reverse such judgments, Parliament is able to contribute to the development of the common law, making clear by its legislative intervention that some decision is not to stand. Retrospective legislative rectification, in response to a problematic judgment, will often be a legitimate response, as the relevant provisions of the devolution settlements confirm.[16]

17. It is not straightforward for Parliament to change judicial attitudes by reversing particular judgments. While Parliament clearly has authority to change the law, reversing the legal effect of a judgment, it is more difficult for Parliament to establish that the premises of a judgment, or the judicial techniques deployed therein, are unsound. Still, if the Government proposes, and Parliament enacts, legislation that is clearly intended to reverse a judgment that misconceives the judicial role or misinterprets legislation, this is likely to inform how judges act in future cases, helping make clear that the earlier court has acted wrongly. Legislation should be enacted to reverse particular judgments that will otherwise serve as foundations for later courts, leading them astray, and the practice of reversing judgments that Parliament concludes are wrongly decided will itself be instructive, helping encourage judges take more care in inferring Parliament's intended meaning, for example.

15. IRAL, 3.29-3.30

16. See sections 107 and 114(3) of the Scotland Act 1998 and their equivalents for Wales and Northern Ireland

II. Ousting review: the case for reversing *Cart* and *Privacy International*

18. In legislating to reverse *Cart*, Parliament will be ousting the supervisory jurisdiction of the High Court in respect of decisions of the Upper Tribunal. This ouster of judicial review is warranted for reasons I have given in more length elsewhere. The Government is right to say that the Supreme Court in *Cart* misunderstood the Tribunals, Courts and Enforcement Act 2007. While the Act did not contain an express ouster clause, Parliament intended the Upper Tribunal to be a body equivalent to the High Court and thus not to be subject to judicial review. However, the Supreme Court has held that decisions of the Upper Tribunal that cannot be appealed to the Court of Appeal, refusing permission to appeal, are subject to judicial review. It follows that legislation to reverse *Cart* will require or consist in a provision ousting judicial review in respect of decisions of the Upper Tribunal.
19. The Panel makes its case for legislation to reverse *Cart* in part on the basis of statistical analysis of *Cart* applications to the High Court and their relative success rate, analysis which has since been questioned. I have argued for legislative correction quite apart from the relevant statistics and there is a strong case for legislative reversal even if the Panel's statistical analysis is flawed. With respect, the Government should not concede that reversing *Cart* would cause injustice to the few applicants who might in the end persuade a High Court judge that the Upper Tribunal has acted wrongly. Justice does not require an endless series of opportunities for judicial consideration of one's case. In deciding to limit the scope for challenge to the Upper Tribunal's decisions, Parliament would be choosing to calibrate how and by whom its decisions should be questioned.
20. The Government is right to propose legislative reversal of *Cart*. Reversing the judgment would vindicate Parliament's intention in 2007. It would also help to vindicate the more general proposition, which the Panel rightly affirms but which some lawyers and judges sometimes doubt, that Parliament is free to choose to oust judicial review and that the duty of the court is to give effect to its lawmaking choice to this effect.

21. The Supreme Court's judgment in *Cart* betrayed a lawmaking disposition, with the Court openly choosing to allow judicial review in some cases rather than others in order to manage its docket. The judgment has been subject to considerable academic and lawyerly criticism, not least on the grounds that it is likely to have caused a great deal of pointless litigation. Legislation ousting judicial review in this context is likely to be recognised widely to be constitutionally legitimate and thus not to encounter the judicial resistance that might arise in some other contexts. In any case, it would be very difficult for the Supreme Court to rationalise misinterpreting an ouster clause reversing *Cart* insofar as it was obvious, not least by reason of the Panel's report and the Government's response, that Parliament had considered the law the Supreme Court made in *Cart* and had chosen to reject and replace it. Reversing *Cart* is thus a very helpful confirmation of Parliament's authority.
22. However, it would be a mistake to reverse only *Cart*. In responding to the Panel's report, and bringing forward proposals for judicial review reform, it is imperative that the Government should propose legislation to reverse a number of significant judgments that the Government considers to be constitutionally unsound. For the reasons noted above, legislating in this way is an important way to change judicial attitudes more generally, helping reform the common law. It would be a mistake to reverse only one or two judgments, which are not amongst the most egregious, and to forgo an opportunity to correct judgments that have a wider impact on the law of judicial review and have put the rule of law, constitutional government and parliamentary sovereignty in doubt.
23. The Government has proposed legislating about the efficacy of ouster clauses. In this context, in addition to legislating to reverse *Cart*, the obvious judgment that should be reversed by legislation is *Privacy International*, now the leading Supreme Court judgment on the interpretation of ouster clauses. It is a judgment that misinterprets legislation ousting judicial review of decisions of the Investigatory Powers Tribunal, putting in doubt other ouster clauses[17] and departing from earlier judicial discussion.[18] The leading majority judgment, by Lord Carnwath, openly asserts that ouster clauses are *not* to be interpreted consistently with the intention of the enacting Parliament.[19] Lord Carnwath went even further in asserting, in dicta, that it would arguably be open to a future court to refuse to give effect to an ouster clause that was expressed in unmistakably clear language.[20]
24. There is a strong case for Parliament to legislate to reverse *Privacy International*, in effect reinstating the original intended meaning of the ouster clause, giving effect to the way in which it was interpreted by three of seven judges in dissent in the Supreme Court (including Lord Reed, who is now President of the Court) and by a unanimous Court of Appeal (including Lord Justice Sales, now Lord Sales of

17. The decision thus undermines other similarly-worded ousters clauses too: see, for example, Security Service Act 1989, section 5(4) ("The decisions of the Tribunal and the Commissioner under that Schedule (including decisions as to their jurisdictions) shall not be subject to appeal or liable to be questioned in any court"), quoted in *Esbester v United Kingdom* - 18601/91 [1993] ECHR 64; Intelligence Services Act 1994, section 9(4) ("(4) The decisions of the Tribunal and the Commissioner under Schedule 1 to this Act (including decisions as to their jurisdictions) shall not be subject to appeal or liable to be questioned in any court"); Police Act 1997 (revised in 2000), Part III, section 91(10) ("The decisions of the Chief Commissioner or, subject to sections 104 and 106, any other Commissioner (including decisions as to his jurisdiction) shall not be subject to appeal or liable to be questioned in any court"), discussed in *R v GS* [2005] EWCA Crim 887 at [17], [26]-[28], [32].
18. The clause at issue in *Privacy International* was previously described as being clear: see *R (A) v B* [2009] UKSC 12 at [23] ("True it is that section 67(8) of RIPA constitutes an ouster (and, indeed, unlike that in Anisminic, an unambiguous ouster) of any jurisdiction of the courts over the IPT"); *A v B* [2008] EWHC 1512 (Admin) at [5] ("This ouster provision is only applicable to proceedings pursuant to s.65(2)(a) and (b) (s.67(9)").
19. *Privacy International* at [107], see also [111]
20. *Privacy International* at [144], see also [131]

the Supreme Court). In this way, Parliament would reverse a misinterpretation of an Act of Parliament, restoring an ouster clause that had otherwise been rendered ineffective by judicial resistance. The legislation in question would be restating an interpretation adopted by some of the UK's leading judges. The legislation would establish that decisions of the Investigatory Powers Tribunal, which is itself a judicial body, could not be challenged by way of judicial review proceedings and that errors of law could only be challenged by exercise of a statutory right of appeal to the Court of Appeal. Again, this would help confirm what should be an obvious constitutional proposition, but which some judges have doubted in this case and others, viz. that Parliament is free to prevent courts from having jurisdiction to question and quash the actions of a public body.

25. Reversing *Privacy International* should be central to any measures the Government takes forward to address the effectiveness of ouster clauses more generally. Unless and until reversed, the judgment will be relied upon as authority to misinterpret other ouster clauses. More generally, reforming legislation should amend the Interpretation Act 1978, specifying that for the removal of doubt introduced by Lord Carnwath's judgment, a provision that purports to oust judicial review is to be interpreted consistently with the intention of the Parliament that enacted it. In enacting legislation to reverse the judgment, and to specify that ouster clauses are not to be interpreted artificially and otherwise than in accordance with legislative intent, Parliament would be reasserting its authority. The Government should emphatically deny the assertion made by a minority of judges and lawyers to the effect that Parliament has, or will soon have, no such authority.

III. Legislating about ouster clauses

26. The Government should review the statute book, considering the ouster clauses that Parliament has enacted across the past decades and determining whether they are effective and/or whether they remain necessary.[21] It might recast each of them in turn, if or when it concludes an ouster should remain in force. Alternatively, the Government might propose legislation that frames how ouster clauses in general are to be interpreted. One option, noted in the previous paragraph, is to legislate, pace *Privacy International*, to restate the fundamental proposition that legislative intent is authoritative. The Government has proposed legislation about ouster clauses that would be more general still, which might help frame how courts interpret particular clauses. However, such legislation risks being misrepresented as a sweeping ouster, undercutting judicial review in general. Relatedly, there is no substitute, if or when the Government thinks it necessary to limit judicial review in some context, for inviting Parliament to make a clear decision that the decisions of some public body are not to be subject to challenge by way of judicial review.
27. In its discussion of legislating about justiciability, the Panel notes that legislation establishing that some power or question was non-justiciable on certain grounds would be likely to fail because the courts might simply repackage the grounds of review and/or the legislation would amount to an ouster clause and would be interpreted away.[22] This should be an alarming prospect. Only some judges, one must hope, would repackage the grounds of review in order to evade (flout) a statutory prohibition. Further, while the courts might well respond to legislation calibrating the grounds of review as if it were a blanket ouster clause, this would be an unreasonable reaction, which Parliament should forestall by very clear drafting and/or the Government should help avoid by making very clear its intention to introduce corrective legislation if or when necessary to make the point clear.
28. It is true and important that legislation specifying the available grounds of review may be open to judicial evasion. This is part of the reason why ouster clauses such as clause 3 of the Fixed-term Parliaments Act 2011 (Repeal) Bill are drafted in sweeping terms, to avoid their subversion. The Panel says that clause 3 is not a true

21. See examples noted in n17 above; see further *London Borough of Hillingdon v Secretary of State for Transport* [2017] EWHC 121 (Admin) at [39-49] for an excellent discussion of the various types of "quasi"-ouster or "partial" ouster clauses.
22. IRAL, 3.15-3.16

ouster because it secures existing limits on justiciability from judicial erosion.[23] That is an important point, but the same should hold if or when Parliament attempts to restore limits on justiciability that have (recently) been swept away, as for example in *Cherry/Miller* (No 2).

29. There is good sense in the common law's traditional scepticism about ouster clauses, grounding a justified presumption that Parliament does not intend to oust judicial review. But the presumption is and must remain defeasible and Government and Parliament should make clear that it will sometimes be defeated (partly by enacting legislation like clause 3 or legislation reversing *Cart* or *Privacy International*), and making clear further that it will be constitutionally legitimate for it to be beaten back when the point of legislation is to restore traditional limits or when alternative tribunals or mechanisms for accountability are preferred by Parliament.[24] In developing proposals for judicial review reform, it is imperative the Government make the constitutional narrative clear, lest its proposals, even if or when endorsed by a sovereign Parliament, be unjustly caricatured as authoritarian.

30. Judicial scepticism about ouster clauses is motivated in part by a reasonable concern that the same legal materials may be interpreted and applied differently by general courts and by some specialist tribunal, giving rise to two separate streams of inconsistent law, each representing itself to be the law of the land. This state of affairs would be difficult to square with the rule of law, which helps ground the (defeasible) presumption that Parliament does not intend to oust the jurisdiction of the courts. If or when Parliament nonetheless concludes that there is good reason to enact an ouster clause, the solution for any legal inconsistencies that arise should be legislative intervention rather than judicial evasion of the ouster clause. The Government should commit itself to taking responsibility for avoiding or managing such inconsistency and introducing corrective legislation if need be.

31. The Government intends to enact general legislation about ouster clauses that would set out a kind of safety-valve for outrageous cases.[25] There must be a risk such legislation would be misunderstood, especially if it implies that the Government accepts that there should never be an absolute ouster of judicial review. In fact, there must be contexts in which such an absolute ouster is legitimate, even if only to affirm traditional limits, as with dissolution or other exercises of prerogative, or parliamentary practice, in relation to which judicial review has never otherwise been available and should not now be available.

32. If the Government is resolved to legislate about ouster clauses in general, one option is to amend the Interpretation Act 1978 to address how one should read a provision that says that a decision may not be questioned or challenged in a court of law (or other formulae to similar effect). The Interpretation Act might be amended

23. IRAL, 2.84

24. M Chamberlain, "Immigration Appeals and the Rule of Law: A Very *Dicey* Argument" (2009) 9 *Judicial Review* 112; the author is now Mr Justice Chamberlain.

25. I note the Panel's sound observation that courts sometimes reason from the perceived need for judicial review to be available in some extreme, hypothetical case to their conclusion that judicial review is available in the case before them, which is not an extreme case: see IRAL, 2.21-2.22.

to specify that unless the context otherwise provides (that is, unless Parliament's intention to the contrary is open to be inferred), the provision in question should be read nonetheless to permit judicial review in certain limited circumstances which the Interpretation Act would stipulate.

33. The legislation might be modelled on the approach adopted in section 193 of the Employment Relations Act 2000 (NZ), which provides:

> (1) Except on the ground of lack of jurisdiction or as provided in sections 213, 214, 217, and 218, no decision, order, or proceedings of the [Employment Court] are removable to any court by certiorari or otherwise, or are liable to be challenged, appealed against, reviewed, quashed, or called in question in any court.
>
> (2) For the purposes of subsection (1), the [Employment Court] suffers from lack of jurisdiction only where, —
>
> (a) in the narrow and original sense of the term jurisdiction, it has no entitlement to enter upon the inquiry in question; or
>
> (b) the decision or order is outside the classes of decisions or orders which the court is authorised to make; or
>
> (c) the court acts in bad faith.

(Sections 213, 214, 217 and 218 make provision for certain decisions of the Employment Court to be appealed directly to the Court of Appeal.) Like their UK counterparts, the NZ courts tend to interpret ouster clauses very restrictively. However, they have accepted that section 193 excludes judicial review save to the extent specified:[26] that is, the Employment Court has jurisdiction to make error of laws or procedural errors that are not open to correction by way of judicial review proceedings.

34. However, rather than enact legislation about ouster clauses in general, in the hopes of changing judicial attitudes, the more effective option might be for Parliament, in the course of enacting (or consolidating) a particular ouster clause, to specify narrowly the grounds, if any, on which the public body's decisions or proceedings would be open to challenge in judicial review proceedings. For example, in line with the approach adopted in the NZ legislation considered above, Parliament might specify that judicial review will be available only in relation to lack of jurisdiction (in the narrow or original sense) or bad faith.

26. *Parker v Silver Fern Farms* [2012] 1 NZLR 256; see also *NZ Rail Ltd v Employment Court* [1995] 3 NZLR 179 (CA), per Cooke P, interpreting the equivalent section 104 of the Employment Contracts Act 1991 (NZ).

IV. Legislating about the rule of law and the political constitution

35. Lord Carnwath's judgment in *Privacy International* relies in part on section 1 of the Constitutional Reform Act 2005,[27] which provides that the 2005 Act does not adversely affect the existing constitutional principle of the rule of law. In my submission to the Independent Review of Administrative Law, I argued that this provision was a failure of legislative craft and should be amended to avoid misuse.[28] In legislating about judicial review reform, whether in the course of reversing *Privacy International* or otherwise, Parliament should specify that neither section 1 of the 2005 Act nor the constitutional principle of the rule of law qualifies or limits Parliament's continuing sovereignty. Parliament might even give legislative force to Lord Hughes's dictum that "it is an integral part of the rule of law that courts give effect to Parliamentary intention. The rule of law is not the same as a rule that courts must always prevail, no matter what the statute says."[29]
36. In the wake of *Cherry/Miller (No 2)*, there is good reason for legislation to prevent further judicial review of the inner workings of the political constitution. The Panel reasons that legislation to prevent judicial review of dissolution does not constitute an ouster clause as such. It does not say in terms whether legislation to prevent future judicial review of prorogation would constitute an ouster clause. I say that there would be no difference in principle between the two and that in both cases constitutional commentators should recognise the legitimacy of Parliament legislating in this domain and the courts should not interpret narrowly or artificially a clause forbidding judicial review of prorogation. Amending Article 9 of the Bill of Rights 1689 to make clear that a purported prorogation of Parliament constitutes a proceeding of Parliament would help reach the same end.[30]
37. For the reasons noted above, it would be rash to presume that political litigation has run its course or that the precedents established in the Brexit years will not be deployed in later cases. The Government should consider proposing legislation to protect the political constitution – the central relationships between Crown, Ministers and Houses of Parliament – from distortion by judicial review proceedings. Legislation to this effect might develop clause 3 of the Fixed-term Parliaments Act 2011 (Repeal) Bill or Article 9 of the Bill

27. *Privacy International* at [131], per Lord Carnwath
28. At paragraph 44; cf. IRAL, 27
29. *Evans* at [154], per Lord Hughes
30. Any amendment to Article 9 should make clear that it applies across the UK.

of Rights. (Note that the scope of "parliamentary proceedings" in Article 9 has been narrowed in a series of cases; Parliament should consider whether to legislate to widen its scope.) The same legal result, maintaining and protecting the political constitution, might also be secured by reversing some recent pivotal judgments.

38. Legislation about the political constitution should secure the proposition, articulated in *Miller (No 1)*,[31] that the courts are neither the parents nor the guardians of constitutional convention. This sound statement of principle was not upheld in *Cherry/Miller (No 2)*, with the Court enforcing a principle of parliamentary accountability, a principle which has not otherwise been a ground for judicial review but does help explain and justify various constitutional conventions. Litigation has also arisen in relation to the Ministerial Code, which sets out the Prime Minister's expectations for the Government he leads and restates many constitutional conventions. Neither the Prime Minister's actions in relation to the Ministerial Code nor the question of whether (other) ministers have breached the Code should be the subject of legal proceedings. On 26 April 2021, it was reported that permission had been granted for an application for judicial review challenging the Prime Minister's decision that the Home Secretary had not breached the Code. Legislation should make clear that compliance with constitutional convention, including the Ministerial Code, is not to be questioned in judicial review proceedings.

31. *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5

V. Legislating about the principle of legality and the misuse of constitutional principle

39. The principle of legality has a kernel of good sense: the courts should be slow to infer that Parliament intends to depart from settled constitutional rules and practice. But the principle is increasingly deployed as a ground for departure from Parliament's intention, as in *Privacy International*, but so too in *Evans*, where three judges interpreted a statutory provision in an entirely implausible way, and *Unison*, where a unanimous court attributed to Parliament an implausible intention, which authorised judges to second-guess policy.
40. The Panel's report says that a new ground of review is emerging, in which courts quash decisions of public bodies that they conclude are unjustifiable or disproportionate interferences with constitutional rights or principles, a category the bounds of which remain elusive. The Supreme Court's judgment in *Cherry/Miller* (No 2) would seem an obvious example,[32] with novel conceptions of the principles of parliamentary sovereignty and parliamentary accountability wrongly deployed to impugn the lawfulness of ministerial advice to the Crown in relation to prorogation, advice that (so far as it was known to the Court at all) was fully lawful by all previously articulated rules of law.
41. I argued in my submission to the Independent Review of Administrative Law that Parliament should legislate to discipline the misuse of the principle of legality, affirming the priority of legislative intent in statutory interpretation. I also argued for general legislation to forbid the courts from introducing proportionality as a general ground of judicial review. That is, legislation should provide that outside the context of the Human Rights Act, or retained EU law, it would not be open to courts to quash a public body's act and certainly not a legislative act on the grounds that it was a disproportionate interference with a right or principle. Such legislation would be a rational response to the Panel's report.
42. The Government should also propose legislation reversing the most significant judgments that in recent years have misused the principle of legality and deployed constitutional principle, including the rule of law, as a ground on which to put the lawfulness of otherwise

32. See IRAL, 3.30.

obviously lawful acts in doubt. I set out below the key cases that warrant reversal.

43. The first case is *Evans*, in which three Supreme Court judges, including Lord Reed, interpreted section 53 of the Freedom of Information Act 2000 in such a way as to deprive it of its clearly intended meaning and effect. The grounds for the misinterpretation were the principle of legality taken together with the rule of law and the separation of powers, with each of the latter principles pitched at a high level of abstraction and deployed without attention to the statutory context in which Parliament's intention should have been inferred.

44. The Government should propose legislation to restore the ministerial override, making it clear that it is open to ministers, accountable to Parliament, to override a decision of the Information Commissioner or the Upper Tribunal to order disclosure of relevant information.[33] The Panel says that Parliament chose not to amend the Act after the Court's judgment.[34] It would be more accurate to note that the Government set up an Independent Commission in response to the judgment, which recommended legislation, a recommendation the Government did not carry forward, instead attempting to modify its practice to avoid litigation.

45. The second case is *AXA*, in which the Supreme Court refused to apply the full range of ordinary grounds of judicial review to Acts of the Scottish Parliament and yet held out the prospect that such Acts might nonetheless lie outside the competence of the Scottish Parliament if they impugn the principle of the rule of law, despite not otherwise constituting breaches of convention rights or trespassing on a matter reserved to Westminster. This turns the rule of law on its head. Parliament should legislate to restore the legislative competence of the Scottish Parliament which should be limited only by the limitations set out clearly in the Scotland Act itself.

46. The third case is *Unison*, in which the Supreme Court glossed the Lord Chancellor's statutory power to set tribunal fees, ruling that the power was limited by the principle of access to justice, such that the power was exercised unlawfully if it turned out that one consequence of its use was too many persons failing to bring tribunal proceedings. While the judgment has been widely feted as a vindication of the rule of law, in fact it puts the rule of law in doubt by introducing an unstated (and unintended) limitation on the statutory power, a limitation which makes the Court responsible for judging the reasonableness of the power's exercise. Parliament should legislate to restore the validity of the Fees Order (while not requiring repayment of any sums already refunded) and to make clear that the question of what level of fee should be imposed is for the Lord Chancellor, accountable to Parliament, to decide. That is, the court has no jurisdiction to quash a (purported) Fees Order on the grounds that it interferes with a constitutional principle of access to justice.

33. For a draft bill to this effect, see R Ekins and C Forsyth, *Judging the Public Interest: The rule of law vs. the rule of courts* (Policy Exchange, 2015), pp.26-27.

34. IRAL, 3.52

47. The fourth case is *Cherry/Miller (No 2)*, in which the Supreme Court quashed a prorogation of Parliament. The Court reasoned that the purported prorogation interfered with the principles of parliamentary sovereignty and parliamentary accountability and could not be lawful (was not an exercise of the prerogative at all) because the Prime Minister had no (good) reason for advising Her Majesty to prorogue Parliament for five weeks. The case for legislating to reverse this judgment is overwhelming. It would be easy enough to rule out judicial review of (purported) prorogation in the future. The Fixed-term Parliaments Act 2011 (Repeal) Bill might be amended to this end and/or the Bill of Rights 1689 amended to make crystal clear that prorogation is a proceeding of Parliament. But it would be advisable also for Parliament to reverse the judgment more directly still, providing that Parliament was prorogued on 11 September 2019, correcting amendment of parliamentary records otherwise carried out in consequence on the judgment, and deeming royal assent otherwise called into question in reliance on the judgment to be valid.[35]
48. Parliament should also enact legislation providing that no court may hold an act of a public body unlawful on the grounds that it interferes either with the principle of parliamentary sovereignty, as articulated in *Cherry/Miller (No 2)*, or the principle of parliamentary accountability. The legislation should provide further, for the removal of doubt, that nothing in this Act limits the duty of any person or public body, including a court, to comply with Acts of Parliament. The point is to depose the Supreme Court's entirely novel and dangerous conception of parliamentary sovereignty, which is unmoored from legislation itself. Likewise, the principle of parliamentary accountability has never been a ground for invalidating the acts of a public body and legislation should provide as much. This would go a long way to disarming the harm the judgment does and may do in future.
49. The corrective legislation outlined across paragraphs 41-48 would help address the misuse of the principle of legality in judicial review. It would also be entirely consistent with the Government's stated concerns in paragraphs 27-29 of the Consultation. However, in its subsequent discussion of nullity,[36] the Government takes a different line, proposing to legislate to provide that breach of the principle of legality would go to the lawfulness of the exercise of a power rather than to the scope of the power. With respect, this proposal is misconceived. It tacitly accepts what should be flatly rejected – namely, that the principle of legality is a free-standing ground of judicial review, permitting courts to gloss statute and to decide whether statutory powers have been exercised consistently with constitutional principle, regardless of the intentions of the enacting Parliament.
50. The Government relies on the Supreme Court's *Cherry/Miller (No 2)*

35. See Y Zhu, *Putting Royal Assent in Doubt? One implication of the Supreme Court's prorogation judgment* (Policy Exchange, 2019); see also Ekins, *Protecting the Constitution*, pp.13-14

36. Consultation, [81]

judgment for the proposition that the principle of legality concerns exercise of a power rather than its scope.[37] I would caution the Government against relying on that judgment for any proposition, but in any case, one should recall that the judgment simply collapses scope and exercise, precisely in order to avoid having to address the question of justiciability. In proposing reforms in this domain, the Government's aim should be to restore the principle of legality as it should be understood, which does go to the scope of *statutory* power.

51. Properly understood, the principle of legality is not a principle that anyone can *breach*. Instead, the principle is a way of articulating the true proposition that Parliament should be presumed to intend to legislate consistently with the existing constitutional order. The principle reasonably informs inference about Parliament's lawmaking intent and thus goes to the scope of powers Parliament intends to create or confer. What needs to be made clear is that in introducing a statutory power (say, to set tribunal fees) Parliament does not intend to empower the courts to judge the reasonableness of a public body's interference with abstract constitutional principle or rights other than convention rights. Reversing the judgments noted above is one way to begin to make this clear.

37. Consultation, n71

VI. Reversing other significant judgments

52. The Government should also propose legislation to reverse other significant (problematic) judgments, including *Adams*,[38] in which the Supreme Court unsettled (displaced) the *Carltona* principle and badly misinterpreted legislation authorising detention. The judgment's interpretation of the legislation in question departs from the intention of the legislator.[39] Reversing the judgment, and validating the detention orders made in reliance on the legislation, would make clear the Court's mistake, as well as vindicating the rule of law and avoiding requiring unfair compensation.
53. More generally, legislation to reverse *Adams* should amend the Interpretation Act to make clear that the *Carltona* principle is a sound presumption about legislative intent, which applies unless the contrary intention is made out. This would stabilise the statute book (and avoid needlessly calling into question the validity of countless official acts) and would signal clearly to the courts that Parliament will not allow a judgment to stand which mishandles settled constitutional law and puts the workings of government in doubt.
54. The Government should also propose legislation to reverse *Palestine Solidarity Campaign*,[40] in which the Supreme Court quashed the Secretary of State's guidance to those administering pension schemes not to act in accordance with UK foreign policy or defence policy. The majority of the Court misconceived the Secretary of State's role within the statutory scheme, interpreting the Act as making out a policy that limited his freedom to decide the grounds on which to issue guidance for scheme administrators, and in particular making it unlawful for him to act to prevent foreign policy from being undermined. The judgment is a recent example of the Court reading unintended restrictions into a statutory scheme and the Government should propose legislation to correct it, giving effect to the dissenting minority's interpretation of the scheme.

38. *R v Adams (Northern Ireland)* [2020] UKSC 19
39. See further R Ekins and S Laws, *Mishandling the Law: Gerry Adams and the Supreme Court* (Policy Exchange, 2020)
40. *R (Palestine Solidarity Campaign) v Secretary of State for Communities and Local Government* [2020] UKSC 16

VII. Legislating about nullity and statutory instruments

55. The Government's proposal to legislate about nullity is attractive in principle. It would be useful, for example, to reverse *Anisminic*[41] and to make clear that a public body does not exceed its powers (act outside its jurisdiction) simply because it makes an error of law in the course of deciding some question that Parliament has required it to answer. Of course, if or when a public body purports to exercise a power which it lacks, the logic of the law is that it has simply failed to act – "nullity" is thus a state of affairs that the court recognises rather than one it brings about by exercise of remedial discretion. It would be surprising if legislation were to save such acts, conferring legal validity on acts not otherwise made by exercise of legal power. There may be some cases in which this is appropriate, but it should be considered anomalous and exceptional and avoided if possible.
56. The Government outlines three principles which legislation might introduce. It is not clear whether the principles are intended to be alternatives or to complement one another. I assume the latter, but think the former is possible also. The first principle is "[t]hat only lack of competence, power or jurisdiction leads to the power being null and void". Strictly, this should mean that lack of competence etc. would lead to the *act* (the purported exercise of a power) being null and void. This is a sound principle but it would be vulnerable in practice, as in effect in *Anisminic* and its progeny, to judges reading all errors of law as going to competence, power or jurisdiction. The second and third principles arguably address this problem, outlining a "[p]resumption against the use of nullity" and "[l]egislating to state which other issues can be considered as going outside the scope of executive power, and others that are focused on the wrongful exercise of that legitimately held power."
57. The presumption might be effective on the margins, but again the risk would remain that courts would continue to take most errors, or errors of law in particular, to go to the scope of competence, power and jurisdiction. The presumption might be more effective insofar as it was framed with a view to the *consequences* of error, viz. that a public body's act is to be presumed to be voidable rather than null and void, rather than *classification* of error. I agree that specifying that various types of error go to exercise (thus making an act voidable) rather than scope (in which case the act would be a nullity) would

41. *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147

help minimise the extent to which the first and second principles could be manipulated in practice.

58. I noted above (paragraph 49) my concern that the Government should not concede, let alone recognise in legislation, a misconceived understanding of the principle of legality. Properly understood the principle frames inference about legislative intent and must go to scope. I would recommend that legislation avoid in any way suggesting that Parliament accepts the new, misconceived understanding of the principle of legality. It is an open question whether the proposed legislation needs to address the concepts of scope or exercise at all. It might be better simply to address consequences rather than classification, providing, for example, that a *Wednesbury* unreasonable action is to be taken to be voidable rather than null and void.

59. Legislating about nullity might help encourage courts to give faithful effect to ouster clauses, making it more practical for Parliament to enact a limited, targeted ouster rather than a sweeping ouster. That is, if legislation can make clear that at least in some contexts (in relation to some types of power, such as making statutory instruments) procedural errors or errors of law do not automatically take a public body outside its jurisdiction, courts might more readily accept that an ouster clause limits judicial review in relation to these grounds of review, which do not go to power or competence.

60. I note that legislating about concepts is never straightforward, especially in a context like this where the conceptual distinctions are to some extent unavoidably elastic and are likely to prove difficult to pin down in clarificatory legislation. It might be more prudent for corrective legislation to specify more narrowly that procedural errors or errors of law other than those that clearly go to competence, power or jurisdiction render a decision voidable rather than null and void. Or, corrective legislation might focus more narrowly still on the relevance of such errors to the validity of statutory instruments. I agree that finding that a statutory instrument is void ab initio has problematic consequences for the rule of law and should be avoided if possible, which is to say unless the legislator clearly acted outside the scope of the power conferred by Parliament to make legislation.

61. There is good reason to legislate in relation to statutory instruments, to prevent legislative acts from being quashed with retrospective effect on grounds that do not clearly go to the scope of the legislator's lawmaking power. This holds ever more so in relation to statutory instruments affirmed by Parliament. One might specify that legislation should not be retrospectively quashed unless (a) the legislator's assumption, at the time the legislation was made, that the legislation was within the scope of its lawmaking power was manifestly without reasonable foundation or (b) the legislator's decision to rely upon some particular consideration when making the legislation was obviously flawed.

62. If or when a statutory instrument would otherwise be quashed for incompatibility with convention rights, per the Human Rights Act, and especially when the finding of incompatibility turns on application of the doctrine of proportionality, the case for requiring a prospective remedy only is strong. The Human Rights Act's application to statutory instruments might reasonably be corrected to this effect, extending equivalent provisions of devolution legislation. Likewise, procedural errors, including mistakes in relation to consultation, should not ordinarily be grounds to quash a statutory instrument with retrospective effect. It would be reasonable to make legislative provision that in this type of case only a prospective remedy should be awarded.

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