How to Address the Breakdown of Trust Between Government and Courts

Sir Stephen Laws KCB, QC (Hon)

Foreword by The Rt Hon Sir Geoffrey Cox QC MP

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Policy Exchange

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Contents

Foreword

Rt Hon Sir Geoffrey Cox QC MP
Former Attorney General for England and Wales

In 1926, Learned Hand wrote of the United States Supreme Court Justice, Oliver Wendell Holmes Jr., "Whatever it was, the capaciousness of his learning, the acumen of his mind or his freedom from convention, forbade him to interject the judge into heated controversies best settled by political impacts. This must in the end be to the laymen the most significant result of his service."[1]

Twenty years later, in his eulogy to a different Supreme Court judge, Chief Justice Stone, he wrote of future legislative attempts to resolve the complex problems of the post war world, "Such solutions as will arrive, like all human solutions, will be likely to be inadequate and unfair placebos. But nevertheless, they will be compromises, as government almost always must be in a free country; and if they are to be upset under cover of the majestic sententiousness of the Bill of Rights, they are likely to become centres of frictions undreamed of by those who avail themselves of this facile opportunity to enforce their will."[2]

Sir Stephen Laws' thought-provoking paper, his submission to the Independent Review of Administrative Law, reminds us that those controversies about the proper scope of judicial power in a democratic state are still alive and current and have been brought into dramatic prominence by recent events. The prorogation of Parliament in September 2019 evoked an apparent appetite in the Supreme Court to assume the role of "Guardian of the Constitution".

The problem with this ambition is that, in an unwritten constitution such as ours, many of its most important rules and principles are matters of evolving constitutional political convention and morality, which admit of genuine disagreement and do not have hard legal boundaries. The Supreme Court, however, imposed its own view of the requirements of our constitution on the Government's decision to request Her Majesty to prorogue Parliament by inventing new legal limits to its power to do so. That was a highly significant departure from the traditional approach of the courts in abstaining from "heated controversies best settled by political impacts" and, for my part, I am quite sure Sir Stephen is right to conclude that corrective legislation is necessary.

Sir Stephen, a former First Parliamentary Counsel, takes as his starting point, the assumption that there has been a deterioration in trust between the political and democratic and the legal and judicial institutions. I suspect

1. Learned Hand, "Mr. Justice Holmes at Eighty-Five" (1926), reproduced in *The Spirit of Liberty* (New York, Alfred A. Knopf, 1952) at pp.28-29.
2. Learned Hand, "Chief Justice Stone's Concept of the Judicial Function" (1946), *ibid* at p.207.

that some of those who deny it would be inclined to observe, what does it matter if politicians entertain an erroneous view of the function of the judiciary?

But that would be a simplistic response. The indispensable conditions for the successful discharge of the judiciary's duties are a widespread confidence among elected representatives, and those they represent, that it is predisposed neither to enter into the political fray nor to provide a cloak of moral finality and certainty to one side or another in those controversies save where it must to vindicate the clearly established law, and that it has an appropriate understanding of the balance between the limits of its own role and the functions of the other constitutional institutions. The more it enters into realms hitherto thought to belong to the political sphere, the more Learned Hand's admonitions are deserved. It matters acutely if that confidence is undermined.

I do not believe for a moment that judges are taking decisions they do not believe to be warranted by a legitimate interpretation of the law. The questions are, how far the law should go in resolving matters that were previously settled by political means, according to the conventions and rules of our political constitution, including the accountability of the executive within and to Parliament, and if they are at risk of going too far, how, consistent with the rule of law, can that effectively be redressed?

Sir Stephen takes as his primary evidence that the courts are moving ineluctably beyond the traditionally understood scope of their powers, the Supreme Court's decisions in *Miller* (No 1) and *Cherry/Miller* (No 2). He mentions others such as *Wightman* (a decision of the Scottish Inner Court of Session), *Jackson*, the *Privacy International* case and *Adams*, which are certainly pertinent in their various ways, but I think he is right to regard these two Supreme Court decisions, and particularly the latter, as uniquely troubling to those with a traditional understanding of our constitutional arrangements.

In each case, the Court chose to reach novel and controversial conclusions as to the limits of the executive's prerogative powers by innovative and unorthodox means in acutely political contexts. In each case, it would seem to have adopted the view, expressly or impliedly, that it was justified in doing so partly at least because of a belief it was acting in protection of "constitutional principles", such as parliamentary sovereignty and ministerial accountability.

But once the Court, based on the "majestic sententiousness" and noble imprecision of general principles and conventions of that kind, starts to construct for itself powers to place precise new legal limits on the government's actions in highly politically contested circumstances, particularly where the government is accountable directly within and to the House of Commons for those actions and must retain its confidence, it is open to the charge that it is arrogating to itself the right to place itself over and above the other constitutional institutions in determining where and how power should be situated between them and how democratic accountability should be exercised; it is converting the political nature of

the rules and parliamentary conventions that have determined these things into a judicially created legal constitution, of which it is the only arbiter.

Many would welcome such a step, and want it to go further, seeing it as progressive, but in my view it would lack legitimacy. Everyone can acknowledge the validity of the general principles, but "In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied."[3] On this, there is likely to be far less agreement.

In the *Cherry/Miller* (No 2) case, the boundary related to the very rules by which the parliamentary and political battle itself was conducted, matters always thought for good reason not to be justiciable and to be outside the control of judges, regulated by public and parliamentary opinion and, in the last resort, perhaps, by the private views of the Monarch. In marking out that boundary in the relationship between Parliament and the executive, Sir Stephen argues, it cannot be the courts which have the final word.

Such decisions do, I think, raise fundamental questions and Sir Stephen touches on them in his paper. Judicial intervention in political disputes is not an unqualified good. For example, it creates winners and losers, characterising one side's actions as "unlawful" and beyond the pale of acceptable conduct. These are not conditions conducive to compromise of complex and very profound divisions.

For generations, judges have felt instinctively the need for caution and self-restraint in extending the boundaries of judicial power by innovative reasoning into fields that traditionally have been left to other means of resolution. They have practised the tradition of detachment and aloofness without which Learned Hand was persuaded "courts and judges will fail." They have neither sought celebrity status nor have they aspired to be anything as grand as guardians of constitutional principle, not least because what those principles are and certainly the inferences to be drawn from them about their practical operation and enforcement, are not remotely the subject of universal agreement and the judges lack democratic legitimacy to impose them.

They have understood that, in the absence of a written constitution, the authority of the courts to innovate in questions concerning the most fundamental constitutional rules does not simply rest upon the fact that they can. It rests, as Hart observed, on the "prestige gathered by courts from their unquestionably rule-governed operations over the vast, central areas of the law."[4] But that prestige is not an inexhaustible commodity.

The growth of judicial intervention into matters of policy previously thought to belong to the sphere of politics and the democratically elected arms of our constitution has principally taken place over the last thirty years and has been supercharged by our membership of the EU and the passage of the Human Rights Act 1998. For the reasons given by Sir Stephen, and other recent learned commentators, while it has brought benefits, that

3. *Matadeen v Pointou* (1999) AC 9, per Lord Hoffmann at p109F
4. H.L.A. Hart, *The Concept of Law* (OUP, Clarendon Law Series, 2nd ed., 1994) at p.154.

cannot be seen as an unequivocally healthy development.

Furthermore, it has been accompanied by a growing readiness on the part of some senior judges to articulate their rejection of traditional notions of parliamentary sovereignty. It would not be wholly surprising, therefore, if politicians are mistrustful, particularly when, freshly attired as a general constitutional principle, it is deployed to intervene in the very workings of Parliament itself.

I think Sir Stephen is right, however, to warn that the restoration of trust must cut both ways. If there has been a deterioration in the trust and comity that should exist between the component elements of our constitutional arrangements, it may at least partly be due to the sense that, in language if not in practice, the accountability and mature restraint to be expected of politicians in taking care not to act arbitrarily or unfairly in dealing with individual rights have not inspired confidence.

It seems to me that there is a fine judgment to be made about whether statutory prohibitions, in some of the areas he proposes, are necessary or might indeed be less effective in the achievement of his purpose, even now, than the judicial taboo that surrounds, for example, the House's control of its privileges or ministerial appointments. However, as I have said, I believe he is right that some legislative correction is required and that in regard to the prerogatives of summoning, dissolving and proroguing Parliament the position should be made clear.

I cannot go into here the other principal suggestions Sir Stephen makes for changes in the manner in which the courts now exercise their function of judicial review of secondary legislation and administrative decisions, for example, a discretion to withhold retrospective invalidation of secondary legislation when the courts rule it has been vitiated by legal error, a stronger presumption of regularity, and amendments to the rules of statutory interpretation to focus more closely on the "real intention" of Parliament in passing legislation in the context of the time of its enactment. These are never less than interesting and, as he says, they are proposals that would require a good deal of further detailed thought and working out.

I recognise, too, that there are disadvantages in the statutory codification of judicial review, a proposal Sir Stephen eschews. My own view, however, is that this might be worth attempting, as indeed, other countries have done. By setting out a comprehensive statutory scheme, manifestly intended to replace and supersede the common law, Parliament could make plain the balance it intends to strike between political and judicial accountability of the government for its actions, providing for alternative remedies and opportunities for resolution where appropriate. That would be a perfectly legitimate democratic choice, which ought to be enforced by the courts.

Whatever the outcome, it is essential that the Independent Panel should not have been deflected from its essential work of fundamental examination of the scope and operation of judicial review by the cruder characterisations of its purpose emanating from some opponents of change.

It is perhaps naive to suppose, given the steady and almost unchecked growth of what Professor Vernon Bogdanor has called "liberal constitutionalism"[5] within our judicial and legal culture over the past thirty years, that the challenge its setting up represents to that ideology could have been met from some quarters with anything other than denial of the legitimacy of the inquiry and impugning of its motives.

But Sir Stephens's submission to the Independent Panel is rooted in a profound knowledge of the workings of Parliament and Government and the subtle understandings and processes by which political business is done there. His instincts are honed by his experience of that world, in which our constitutional conventions must do so much of the work, often beneath the surface, in allowing it to function. He knows their critical importance and both their resilience and their fragility. I suspect his will be a minority voice, but still and small though by that measure it might appear, it deserves our close attention.

5. Vernon Bogdanor, *The New British Constitution* (Hart, 2009) at pp.271–276.

Executive Summary

The Independent Review of Administrative Law has been established because of a breakdown of trust between the political institutions of the constitution, namely Parliament and Her Majesty's Government, on the hand, and the judiciary on the other. This is a serious situation that must be addressed. What is needed is better mutual understanding and clarity, and practical measures that provide reassurance and restore confidence. This paper, the lightly edited text of a submission to the Review, sets out principles that should be upheld and measures that should be adopted.

The modern expansion of judicial review relies on a fashionable perception that the operation of our political institutions is dysfunctional, or that Parliament is impotent. This is a false idea, especially in view of the last four years.

Proponents of the expansion of judicial review overlook the impact that judicial review has on government. The claim that judicial review has little impact because the government wins more cases than it loses is simply a non sequitur. The impact of judicial review expansion must be measured with reference to its impact on the majority of government transactions that do not end up in court. The expansion of judicial review has encouraged "defensive" policy-making and legislating, which has adversely affected the policy process.

My own professional experience at the intersection of law and politics has convinced me that the diagnosis of a dysfunctional political system is misconceived. Attempts to remedy it do more harm than good. The judicial arrogation of the supervision of the political institutions risks creating a tendency in the political institutions to become more "irresponsible", and to adopt a "compliance culture" in which sound judgement is regarded as irrelevant. The practice of politics in the UK is not perfect. Few human enterprises are. But the cynical assumption that politicians are invariably venal, untruthful or incompetent fools, or all three, is just wrong. The overt reliance on the assumption by the courts indisputably feeds a reciprocal mistrust of the courts within the political institutions.

The relationship between Parliament and government

Courts have no constitutional function entitling them to intervene in the relationship between Parliament and government. That is incompatible with Parliamentary sovereignty, supplants the democratic accountability that both the political institutions have to the electorate, and is a threat to the practice of civilised and responsible politics. Political imperatives, not judges, are the more effective regulator of politics. Judicial regulation

of the relationship would also oust the personal constitutional role of the Monarch, which attracts greater respect and acceptance from the public, and from politicians.

The three EU withdrawal cases, *Miller* (No. 1), *Cherry/Miller* (No. 2), and *Wightman*, have put the foundations of our constitutional structure at risk. Collectively, the three decisions demonstrate a preference in the courts for minimising constraints on their intervention in high politics, and an increased willingness in the courts to circumvent pre-existing inhibitions on their participation in the battles in the political arena. All three cases were decided in ways that most lawyers would not have predicted on the basis of how the law was widely thought to stand before 2016. All three cases were clearly, in practice, brought principally for the purpose of influencing the Parliamentary proceedings connected with UK withdrawal from the EU. However, in retrospect, none of the three cases had a substantive effect on the outcome of the Brexit battle, which rightly was settled by the views of the electorate in two elections, the second of which was arguably unnecessarily delayed by *Cherry/Miller* (No. 2).

All three decisions should be statutorily overturned to restore trust between the courts and political institutions. The reasoning in those cases threatens the effective working of the UK's Westminster-style Parliamentary constitution. If it is conceded that courts are allowed to regulate and enforce Parliament's influence over government, that influence would necessarily be limited to what the courts are willing to enforce, and no more. The only way to repair the damage caused by these three cases is to send a clear legislative message that they are not to form the basis of a new constitutional order, in which the courts will dominate the political arena. Reversing them will also protect the courts from being further drawn into political controversy.

It is necessary to make it absolutely clear in new legislation that matters relating to the conduct of the relationship between Parliament and Government, including all proceedings in Parliament, are "non justiciable", just as they have, until very recently, been assumed to be. The recent attempts by the courts to erode the practical operation of this established and essential principle demands its immediate statutory reinforcement.

Existing legislation, such as the Bill of Rights, is inadequate to the task: it is antiquated and liable to be dismissed as of purely historical relevance. What is needed is legislation vindicating the wider principles at stake. It may be, in the light of the EU withdrawal cases, that only a "sledgehammer" will provide the necessary reassurance. Any new articulation of non-justiciability for the purposes of this constitutional principle needs to amount to a comprehensive and unmistakable re-assertion that Parliament comes above the courts in the constitutional hierarchy, not vice versa.

Statutory provision should impose a duty on the courts to stay proceedings, on an application by the Attorney General, if the proceedings relate directly or indirectly to matters that are, or are to be, the subject of proceedings in Parliament the outcome of which would be relevant to

issues in the proceedings or to the remedies (if any) that it would be appropriate for the court to grant when it has resolved those issues.

Any restatement of the non-justiciability of matters that are for the relationship between Parliament and the government, and not for review in legal proceedings, should set that as the default position in the case of both the conduct of foreign affairs and the use by the Crown of military force outside the United Kingdom - or in its defence from attacks launched from outside. When the stakes are very high, as they will be when the vital national interests in foreign relations and the defence of the realm are involved, it is vital that responsibility for decisions should rest wholly with democratically accountable politicians.

The unedifying forum-shopping around the UK for litigation on UK reserved/excepted matters that marred the legal approach to UK withdrawal from the EU needs to be discouraged, and ideally eliminated. It is divisive. Reforms of the sort suggested here for the way the courts consider judicial review relating to reserved or excepted matters needs to be extended to the whole United Kingdom. Any changes that the Panel proposes for England and Wales should apply throughout the United Kingdom whenever, in a devolved jurisdiction, they involve matters that are not devolved. That must include cases where questions arise about the parameters of what is or is not devolved, and also where the exercise of devolved powers impinges on non-devolved matters, (including in so far as it does so under devolved competency allowing devolved legislation to have such an effect incidentally).

Primary and secondary legislation

There is a strong case for:

- A curb on retrospective invalidating remedies in respect of legislation affected by judicial review proceedings; and
- A more robust presumption of regularity in the case of all legislation (primary and secondary).

There is a mismatch between the retrospective application to legislation by the courts, on the basis of the so-called "principle of legality", of unpredictable "values-based tests" (the operation of which is even more difficult for legislators to predict than in the case of the principles contained in the ECHR) and the rationale for section 4 of the Human Rights Act 1998. It would be fairer and more consistent with constitutional principle for the courts to be restricted to a non-invalidating declaratory remedy wherever such tests are applied to primary legislation and when they are applied to secondary legislation. The dividing line between the approaches in section 4 of the 1998 Act and in section 6 is relatively arbitrary, so far as legislation is concerned. The matter needs to be looked at on the basis of the substance of what is happening and not by reference to any supposed, but obviously unentrenched, analysis of the courts' present rationale for exercising the jurisdiction in the way they do.

It is not and should not be possible for the courts to go behind statements on the face of a statutory instrument and to allow challenges e.g. to the processes of laying before Parliament and passing resolutions about it. This is all secured by Article IX of the Bill of Rights 1688, etc. - or at least has, hitherto, always been assumed to be - but this, as I have argued, should now be clarified and reiterated in a new restatement of the non-justiciability of proceedings in Parliament. The need to do this has been reinforced by the doubts that have been cast on the supposed incapacity of the courts to question the process and contents of primary legislation by dicta in the *Jackson* and the *Privacy International* cases, by the invalidation of Royal assent in *Cherry/Miller* (No. 2) and by *Adams*.

There should be legislation specifying a presumption of regularity in respect of all pre-conditions for the making of subordinate legislation. Furthermore, there is also a case for saying that the presumption should be conclusive in the case of procedural formalities where the decision to make the instrument is ratified by a decision of Parliament through its statutory instrument procedures - either in advance under the affirmative procedure or implicitly in retrospect by the absence of a successful prayer against it under the negative resolution procedure.

I recommend the enactment of some general principles of statutory interpretation that make clear that the objective of statutory interpretation is to arrive at the meaning that comes closest, so far as the wording allows, to what most plausibly was really intended by the legislators - having regard to the extent to which the legislative process involves the overt adoption by legislators of the intentions of the person proposing the legislation, and to the rule that the context in which legislative provisions are to be construed is the context that existed at the time when they were made.

I would be very sceptical about any attempt to produce a general and supposedly limiting restatement of the principles on which judicial review is obtainable, whether in relation to legislation or more generally. That approach seems to me to be a recipe for unintended consequences and I would advise against it. It might well be seen by the political institutions and - even more dangerously by the courts - as a set of new generalisations on which the courts could, if they chose, build an even more expansive interventionist role in the conduct of government, and could claim they were doing so with the authority of Parliament. That would further undermine trust, not restore it.

I suggest that some more specific legislative remedy is required for the conceptual problems caused by the application of discrimination principles to legislation and for the extent to which "proportionality" may become more frequently used for testing legislative provisions. This overlaps with matters relating to the ECHR. However, I suggest that it would nonetheless be useful for the panel to point up the difficulty and to consider if there are means of addressing it.

One limited approach might be, in the case of legislation, to make express statutory provision reinforcing a restated presumption of regularity

for legislation, ensuring that legislators' policy decisions on issues engaging questions relating to indirect discrimination or proportionality are assumed to be legitimate if made in good faith in the interests of the efficient and economic management of the public service and the public finances. There is a strong case for enshrining the "manifestly without reasonable foundation" test in statute to ensure, so far as possible, that it does not undergo judicial relaxation.

The proposals in this submission are, it seems to me, relatively modest proposals that would help to restore lost trust, something I strongly believe to be essential to the maintenance of effective, democratic, and stable national governance.

A. Introduction

1. The panel has been asked to consider how "the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts can properly be balanced with the role of the executive to govern effectively under the law."

The need to address a breakdown of trust

2. It is clear that the occasion of the establishment of the panel has been a breakdown of trust, seemingly on both sides, between —
   - on the one hand, the two "political institutions" of the constitution that have democratic legitimacy, viz. Parliament (so far as it consists of the elected House of Commons operating subject to the challenge provided by the House of Lords[6]) and HM Government (so far as it holds office, in accordance with the confidence principle, subject to the acquiescence of the House of Commons, is accountable to both Houses and can legislate only in collaboration with them), and
   - on the other, the courts and the judiciary.
3. The appointment of the panel is itself powerful evidence that this breakdown has occurred[7], and it is a situation that must be taken seriously and addressed. It otherwise has the capacity to create a permanent state of constitutional conflict going far beyond the sort of "creative tension" that is capable of enhancing national governance. An unresolved and dangerously divisive conflict would be - is - damaging both to the respect in which the courts, the judiciary and the "rule of law" are held by the public, and also to the faith of the electorate in the operation and value of democratic politics. Doing nothing to mitigate this situation should not be regarded as a viable option.
4. Also, quite apart from the urgent need to mitigate what have become structural risks to the UK constitutional settlement, it is wholly appropriate that the dynamic nature of the constitutional relationship between the judiciary and the political institutions is kept under review, and that adjustments are made to it, from time to time, to keep things in balance. I am pleased the panel has been appointed to address these issues.
5. It has already become obvious, however, since its appointment, that the work of the panel will be challenged by arguments questioning the propriety or value of anyone other than the judiciary themselves considering the need for adjustments to what is in fact a short-

6. The institution in which Parliamentary Sovereignty is vested is traditionally more properly described as "the Queen in Parliament" and so comprises the executive working with the two Houses. It is certainly the case that that is the practical reality; and it is the practical reality (rather than the label) that more persuasively makes the collaborative nature of Parliamentary Sovereignty an accurate description of the UK's constitutional arrangements. However, for the purposes of the discussion in this submission of the relationship between Parliament and government, my references to Parliament are confined, where the context requires it, to the two Houses.
7. Originating, as it does, in the commitment in the manifesto on which the present government was elected to seek proposals to "restore trust in our institutions": Get Brexit done. Unleash Britain's Potential (2019), p.48.

lived "status quo", newly minted by the judiciary themselves. It is argued that any loss of trust (at least by the political institutions in the courts) is unjustified in practice, or is founded in malice, a desire for "revenge" or authoritarian instincts and "zealotry", and so should be disregarded[8]. Alternatively, it is said, the newly-minted status quo is the inevitable product of legal developments that the political institutions themselves initiated, and so (for unarticulated reasons) must not now be undone, even if found to have had unintended or undesirable consequences.

6. These specious arguments have even been supplemented with a more disreputable, and potentially self-defeating assertion: that resistance to the expanding reach of administrative law is futile, because the courts will, in practice, be astute to negate the effectiveness of whatever changes for that purpose are proposed by government, even if they are legitimately enacted by Parliament.[9]

7. These arguments assert that the extent to which the courts should intervene in the business of government is a matter for the exclusive determination of the courts themselves, and that the government and Parliament should have no say in the matter. This suggestion, and the arguments to support it, are wholly incompatible with the fundamental doctrine of the United Kingdom constitution, the doctrine of Parliamentary sovereignty. The final say in the United Kingdom constitution must be given to the political institutions - the institutions that have democratic legitimacy, because they alone are accountable to the electorate.

8. At a more practical level too, these arguments fail to address the real problem. The real problem is that the breakdown of trust between the institutions does in fact exist and will continue to poison our national governance until trust is restored. As with most breakdowns of trust in working or human relationships, there is no cure in the forceful assertion that the other party's perceptions are false or evilly motivated, or that the other side "started it", or must accept the situation produced by the breakdown as a *fait accompli*. What is needed is better mutual understanding and clarity, and practical measures that provide reassurance and so restore confidence.

9. On the other hand, in so far as any adjustment to repair the situation must lie in changes of the law and its processes, it also has to be accepted that the constitutional function of changing the law is firmly and exclusively that of government and Parliament, working together - not that of the courts. [10] Assuming that the courts could rectify the situation on their own, if left the room to do so, would not only be over-optimistic, but would require a remedy that is problematic in a significant number of respects.[11]

10. An assumption that the status quo should be the default is never sustainable or convincing, but particularly not when it is a status quo resulting from very recent changes and is clearly damaging, having apparently been built on the misconception that the courts,

8. See e.g. "Government zealots fix their sights on judicial review" Alex Dean, Prospect Magazine, 28 August 2020.

9. This argument is sometimes disguised as the assertion that too much tinkering with judicial review might risk a confrontation with the judiciary that could result in their defying Parliamentary sovereignty, but its implications are clear despite the unconvincing attempt to suggest that the government, not the courts, would be to blame if the latter chose to behave undemocratically and unconstitutionally. (see e.g. "The Judicial Review Review I" and "The Judicial Review Review II", Public Law for Everyone, Prof. Mark Elliott). The argument is reminiscent of the one which, without apparently any consciousness of the irony, seeks to bolster arguments that suggestions of a lack of impartiality in the judiciary are totally unjustified with the assertion that they are also "counter-productive".

10. See further para. 84 below on the acceptable role of the courts in developing new law.

11. Even commentators who accept that the reach of judicial review has been extended by the courts, perhaps too far, suggest that the remedy may lie in the judiciary's own hands. "The inexorable rise of judicial review" Dr Paul Daly, Prospect Magazine, 28th September 2020. But it is necessary, if that is the case, to ascertain what reassurance there is for the political institutions that it would be a remedy the courts can be expected to apply and to adhere to, and to explain how its acceptance as a suitable remedy would not actually reinforce and vindicate the reasoning that justified the expansion in the first place - and could do so again.

as supposedly impartial institutions, can be better at law-making than the political institutions.

11. It is an important premise for any discussion of these matters, and also an obvious one, that the process of law-making is inherently incapable of being carried out with impartiality. No new law can produce only winners. Changing the law means making political choices about who should win from change and who should lose; and it also requires the exercise of leadership - and not just authority - to reconcile those who may be adversely affected by change to its impacts on them.[12] When judges participate in making new law, they necessarily put their reputation for impartiality at risk, while their desire to behave impartially also disqualifies them from exercising the leadership that effective law-making requires.

12. There is a detectable thread of reasoning in the modern expansion of judicial review that relies on a perception – or rather a fashionable and popular prejudice - that the operation of our political institutions is dysfunctional[13]: so that the courts need to step in to make good the deficit. A simplistic version of this inference includes the demonstrably false assumption that Parliament has only very limited (if any) influence over government. That is an idea that, even at first glance, looks pretty thin after the last four years; and a close examination of the evidence clearly shows it to be false - even where a government has a large majority.[14] Moreover, quite apart from the fallacy in the premise, it is just not the constitutional function of the courts to assess, still less to manage, how much influence Parliament should be exercising over government, or how. Passing judgment on those matters is a job they are unequipped and unqualified to carry out, and falls properly to the electorate.

13. As well as underestimating the influence of Parliament on government, those who argue in favour of the past, and maybe future, expansion of judicial review also frequently under-estimate the influence of the judicial review jurisdiction itself on government. It is often argued that judicial review has relatively little impact on government, with government winning many more cases than it loses, or that the number of cases is diminishing. This argument is a glaring non sequitur. It applies the same false reasoning that infers that a criminal offence must be having no effect on conduct if there are no prosecutions. The test of the value of a law (including the law that is applied in the judicial review jurisdiction) cannot rest on what happens in the tiny minority of cases that are litigated. It must depend on its impact in the overwhelming majority of transactions on which the law has an effect without giving rise to litigable disputes.

14. It is essential for the panel to have regard to the chilling effect of judicial review on policy-making, and on one particularly damaging consequence of that, viz. a growing adoption of "defensive" policy-making and "defensive" legislating.[15] The practical question

12. See Sir Stephen Laws, *The future for Constitutional Reform - Some lessons from the UK's withdrawal from the EU*, (Policy Exchange 2020).

13. "Our Politics is Broken" is the tag line for the Good Law Project, which of course backed much of the litigation discussed later in this submission.

14. See the comprehensive demolition of this premise, using detailed quantitative research, by Prof. Meg Russell and Daniel Gover, *Legislation at Westminster - Parliamentary Actors and Influence in the Making of British Law* (OUP, 2017) and *pace* Lord Hope (so far as the single chamber Scottish Parliament is concerned) in *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46.

15. See Sir Stephen Laws, *Policies for change – the role of the Courts* (Policy Exchange 2016). See also on the subject of defensive legislating, Sir Stephen Laws, *Legislating for the Relaxation of the Lockdown* (Policy Exchange, 2020). Perhaps another example of defensive legislation, although unsuccessful as such, can be found in the legislation that sought to substitute the exercise of an executive discretion with a points scoring system for the award of "personal independence payments" (see https://www.gov.uk/government/publications/personal-independence-payment-assessment-guide-for assessment-providers/pip-assessment-guide-part-2-the-assessment-criteria). Also, a further example of understandably defensive drafting (in response to the operation of the hostile, judicial approach to ouster clauses affecting the jurisdiction of the courts) can be found in the controversial attempt in Clause 47(4) of the current government's United Kingdom UK Internal Market Bill (Lords introduction version) to exclude the courts' jurisdiction in relation to certain regulation-making powers. As I said in evidence to the House of Lords Constitution Committee, this is a sledgehammer - but it is a sledgehammer because the courts have indicated that only a sledgehammer will work to exclude their jurisdiction. The law of unintended consequences applies to secure that any attempt at nuancing or subtle distinctions for hitting only the intended target of an "ouster" would be regarded by legislators as bound to fail. They would be unable to rely on the judiciary to respect them.

that arises is "to what extent does government adopt sub-optimal solutions, with sub-optimal outcomes, as a result of an over-cautious approach to legal risk that has been generated by the growth and increasingly unpredictable reach of the judicial review jurisdiction?" It is very difficult to assess just how much damage this does – and caution about legal risk is wholly appropriate within the public sector – but anyone familiar with policy-making from the inside is likely to have formed the impression that a very significant amount of policy-making these days is adversely affected by this factor.

15. My own lengthy, professional experience, working closely at the interface between the law and the political institutions, has convinced me that the diagnosis of a dysfunctional political system is misconceived. It is also obvious to me that attempts by the courts to make good the supposed deficit are in fact more likely to aggravate any dysfunctionality than to repair it. By arrogating to themselves the task of supervising how the proper responsibilities of the political institutions are discharged, the courts only risk creating a tendency in the political institutions to become more "irresponsible", and to adopt a "compliance culture", in which sound judgement is regarded as irrelevant. As usual in life, low expectations tend to generate inadequate performance.
16. The practice of politics in the UK is not perfect. Few human enterprises are, and politics is inherently "messier" than law; but the casual and cynical assumption that politicians are invariably venal, untruthful or incompetent fools, or probably all three, is just wrong.
17. Whether the diagnosis of dysfunction is faulty or not, though, the overt reliance on it by the courts indisputably feeds a reciprocal mistrust of the courts within the political institutions. The diagnosis (which the political institutions - I think correctly - believe to be unjust and based on fundamental misunderstandings about how politics works in practice) reinforces, in politicians, an expectation of a lack of fairness and understanding in the judicial assessment of the political decisions they make about the complex difficulties of national governance.
18. It would be folly to pretend that there is not a widespread belief within the political institutions that the courts have become over-enthusiastic about demonstrating their independence by catching the government out whenever the opportunity arises, or to pretend that this perception does not have damaging effects that make it essential to address it.
19. There appear to be mistaken perceptions on both sides. But dispelling them requires more than robust and seemingly self-interested contradiction (however authoritative) by each side of the debate. The necessary changes of perception are unachievable without substantive legal changes that address the causes, not just the

symptoms, of mistrust, and that avoid aggravating it further. That means both more clearly identifying the parameters of the spheres of law and of politics and imposing more reliable inhibitions on those who might feel tempted to disregard them or stray beyond them and on the ways in which the carrying out of proper functions within one sphere can impact on the other.

20. In the discussion that follows, suggestions for practical changes and specific responses to questions put to the panel in their terms of reference will appear in bold italics. I should also say that the suggestions for changes that I am making are intended only to represent outlines for working up more detailed solutions, and to identify potentially profitable areas for further consideration by the panel. Some may be capable of standing on their own feet. Others might prove acceptable only if qualified or accompanied by further safeguards.

21. Much of the reasoning to support my suggestions relies on points I have made, over several years, in other more detailed writings, many (but not all) published by Policy Exchange's Judicial Power Project. Much of the more detailed analysis is not repeated here. The panel is asked, where they think further elaboration would help, to consider the detail I have set out elsewhere. My forthcoming commentary on statutory interpretation and the Supreme Court, due to be published in the Supreme Court Year Book 2020, supports my submissions here about statutory interpretation and elaborates upon them.

Breakdown of trust involves both Parliament and government

22. It is important to recognise that the breakdown of trust in the courts and the judiciary that exists within the political institutions involves both Parliament and HM Government. It is not confined to the executive, and any attempt to pretend that it is would be disingenuous.

23. The two political institutions overlap, of course, and are themselves linked, via the confidence principle, in a symbiotic relationship that involves both collaboration and a line of accountability between the two. Many issues that affect HM government (e.g. in relation to legislation) also, inevitably, have an impact on Parliament's freedom of action and on its constitutional autonomy. The confidence principle means that the government and Parliament (and specifically a majority in the elected House) will share many perceptions about the work on which they collaborate, at least in normal times - just as they also share the democratic legitimacy conferred by the electorate in relation to their respective functions. Also, most parliamentarians, whether supporting the government or not, do regard the work of Parliament as of national importance,

and its independence from judicial interference as essential.

24. For this reason, there is a fallacy in the distinction that sometimes seems to inform the judicial approach to judicial review: that Parliament is a body entitled to the respect due to an institution with democratic legitimacy and sovereignty, but that the government, the executive (which is accountable to Parliament and requires the confidence of the House of Commons to remain in office) should be treated as if it were a 17th century monarch with an absolutist view of regal sovereignty, independent of Parliament and possessed of unchecked power. Ministers are in practice intensely conscious of the inhibitions imposed on them by their accountabilities to Parliament and, ultimately, to the electorate. To them, the use of the otherwise "unchecked executive power" narrative to de-legitimise their actions seems obviously bogus, and it is understandable for them to develop a lack of trust in any analysis that they see as relying on what, to them, is obviously a myth.

25. The underlying premise that the natural state of the relationship between Parliament and HM Government is one of conflict is also quite simply and manifestly untrue. It is just as preposterous to assume that Parliament is only working properly when it disagrees with government as it is to make the same assumption about judicial independence (viz. that courts demonstrate their independence only by ruling against the government). In the case of Parliament, that ignores over 200 years of constitutional history.

26. It is paying no more than lip service to Parliamentary sovereignty to uphold it only so far as government is not - as it always is - inextricably involved in its exercise. Government's involvement in the business of Parliament should not be seen as a practical inconvenience or obstacle to Parliament's proper functioning. Government's involvement in Parliamentary business is a constitutionally essential element of how the UK constitutional settlement secures democratic accountability for national governance.[16] It is a basic error to think that the UK constitution has a doctrine of separation of powers that treats Parliament and government as necessarily discrete, separate and competing branches of government, with Parliament confined to legislative functions and government excluded from them and accountable only for the exercise of executive functions.[17] Legislative initiatives by government in Parliament are the source and context for almost all executive functions.

27. Issues relating to judicial review have an impact on both Parliament and government - even if the courts often choose to frame them as issues confined to the actions of the executive alone. Considering the effect of judicial review on the executive has to involve its effect on Parliament, because Parliament too has functions in relation to "executive action". But the impacts on the government and on Parliament may vary in degree as between different sorts of issue.

28. So, there is, first, a category of issues that have a direct impact on

16. See Sir Stephen Laws, *Second-Guessing Policy Choices: The rule of law after the Supreme Court's UNISON judgment* (Policy Exchange, 2018) and in "What is Parliamentary Scrutiny of Legislation for?", chapter 2 in A Horne and A LeSueur (eds.), *Parliament: Legislation and Accountability* (Hart Publishing, 2016).

17. Ibid. This misconception appears, with some prominence in Lord Sumption's evidence to the House of Commons Public Administration and Constitutional Affairs Select Committee on 6 October 2020.

both Parliament and government together and in the same way. Those concern cases involving attempts to review things that happen in the course of the relationship between the two of them, and so to regulate the conduct of that relationship. These issues raise questions about "justiciability", and some of them also raise questions about the constitutional role of the Monarch, as the ultimate constitutional arbiter in that relationship.

29. Then, secondly, there is the much wider category of issues that involve the use of executive powers for the exercise of which the government is, to a greater or lesser extent, accountable to Parliament and, in some cases, also subject to prior parliamentary scrutiny. These have their principal, direct effect on government. But they also involve Parliament indirectly: because legal accountability to the courts (via judicial review) has the capacity to compete with, and to displace, parliamentary scrutiny and the government's political accountability to Parliament and, ultimately, to the electorate. These raise more difficult questions about the correct balance of the different accountabilities, and about the effect of whatever balance is struck on the practical effectiveness of national governance and on its democratic credentials.

30. The parameters of the different categories of matters in which both Parliament and government are involved are far from clear-cut, though. Issues relating to legislation overlap both the categories described above.

31. The enactment of primary legislation has traditionally been seen by the courts as falling within the first category. Increasingly, though, it appears to be at risk of being equated with issues in the second category.[18] Secondary legislation is very often seen as exclusively within the second category, despite the fact that much secondary legislation differs from primary legislation only by reference to a decision by Parliament itself to subject it to formalities which involve a lower level of pre-enactment scrutiny, with fewer formal stages, but are otherwise comparable to those for primary legislation.

32. The process of making secondary legislation has much more in common with primary legislation than with executive decision-making in individual cases. Both are initiated by government, both involve procedures requiring their acceptance by Parliament and both, of course, are legislative - and therefore political - in their fundamental characteristics. So, in both cases they involve making rules for hypothetical future cases, rather than decisions about present or past circumstances. I shall argue below that these are factors that make it appropriate for the courts to exercise particular restraint so far as the judicial review of both varieties of legislation (primary and secondary) are concerned.

33. On the other hand, there is also another category of executive action that has much less impact on Parliament, because it involves the actions of public bodies that are more or less at arm's length

18. See e.g. the dicta of Lady Hale & Lords Carnwath and Kerr in *R (Privacy International) v Regulatory Powers Tribunal* [2019] UKSC 22 and the speculation in obiter dicta by Lords Steyn and Hope and Lady Hale in *R (Jackson) v Attorney General* [2005] UKHL 56.

from government, and so from Parliamentary and democratic accountability, although some of them - such as the devolved institutions and local government - may have their own alternative mechanisms for democratic accountability. ***In my submission, the panel's work needs to take account of the different levels of political accountability attached to different categories of executive action.***

B. Justiciability of Constitutional Issues

Regulating the relationship between Parliament and government

a. General principles

34. It is, rightly, a fundamental principle of UK constitutionalism that the courts have no constitutional function entitling them to intervene in Parliament's affairs. The principle, I suggest, necessarily extends to all aspects of the relationship between Parliament and government. That relationship has, in modern times, become the context for the vast bulk of the day-to-day business of both Houses, which involves the scrutiny of proposals by government for legislation and executive action, as well as holding the government to account for the manner in which national affairs have been managed, and, in the House of Commons, also the provision of "supply".
35. This fundamental principle is an important buttress for the doctrine of Parliamentary Sovereignty. It is captured in Article IX of the Bill of Rights 1688 (and in its Scottish equivalent the Petition of Right), in the Parliamentary concept of "exclusive cognisance" and in the wider assertion of Parliamentary privileges by both Houses. It is also exemplified, for example, in the policy rationale for section 4 of the Human Rights Act 1998 (under which the courts' remedies in respect of incompatible primary legislation are confined to the making of a declaration). But those sources should more properly be seen as illustrations of a wider and necessary, but established, constitutional principle, rather than as its exhaustive articulation.
36. The principle is fully vindicated by a conceptual analysis of the UK constitution and by pragmatism, and does not rely just on considerations of historical continuity or specific, now ancient, enactments. It is an essential component of the constitution for securing the practice of responsible politics – ultimately the only guarantee of freedom and democracy.
37. For the courts to seek to regulate, or to supervise, how Parliament conducts its affairs - and, in particular, how its relationship with government is conducted - would clearly be to put themselves above both political institutions in the constitutional hierarchy. That would be incompatible with Parliamentary sovereignty, and

would also tend to supplant the accountability that both the political institutions have to the electorate, which is what makes the UK a democratic state.

38. Moreover, an assertion of a dominant regulatory role for the courts in the relationship between government and Parliament is unnecessary as well as both incompatible with established, fundamental principles and undesirable, because of the threat to the practice of civilised and responsible politics that is posed by the transfer of responsibility for outcomes from elected politicians to judges. It is unnecessary because of the inherent weakness of the contribution law is capable of making as a tool for regulating politics. It is political imperatives that, in practice, are the more effective regulator of politics, and, indeed, determine all the power law itself has to regulate politics. In addition, that factor also explains why a regulatory role for the courts is both unnecessary and undesirable to the extent that it would oust the personal constitutional role of the Monarch, and so displace a more reliable existing dynamic of the relationship that necessarily attracts greater respect and acceptance from the public, and from politicians.

39. There is a fallacy, to which lawyers (including, it seems, some judges) are particularly susceptible. The mistake is to think that it is only legal constraints that are effective to secure constitutionally acceptable behaviour, and that they are necessarily more effective than other constraints. In constitutional matters in the UK, and maybe elsewhere too, that is just not true. The most important factor in determining whether rules (legal or otherwise) are effective and respected is the extent to which they are accepted by a consensus of those required to comply with them. That applies with extra special force to constitutional constraints, (including those in legal form). In constitutional matters, it is political imperatives that secure adherence to the applicable legal rules, constitutional conventions and other accepted norms and standards.[19]

40. Nor are the rules governing judicial review exempt from this reality. They cannot be effective or stable if respect for them depends exclusively on their imposition by judicial authority. There also needs to be a consensus of reciprocal trust in the way institutions operate (including I would argue the courts) to reinforce the political imperative to respect them, and that is not something the law itself can order up.[20] That is why the breakdown of trust I have described is so corrosive.

41. The practical truth - uncomfortable though it may be - is that legal, constitutional constraints can be effective to hold politics in check only so far as the political imperative to adhere to them is perceived to outweigh the political risks of changing them, and the invariably greater political risks of circumventing or disregarding them. There is no incentive or need to circumvent or disregard legal rules when you have the capacity - at less political risk - to change them; and

19. See my written evidence to the House of Commons Select Committee on Parliamentary and Constitutional Reform 2015, (AMC0150), para. 54.

20. Applying the argument used by e.g. Lord Lisvane in evidence to the House of Commons Public Administration and Constitutional Affairs Select Committee on 6 October 2020 Q. 33.

there is a powerful reason to prefer changing rules to disregarding or circumventing them, if your influence over others depends on their not disregarding or circumventing the rules you make yourself.

42. This proposition about political practicalities is only partly a consequence of the fact that Parliamentary sovereignty always confers a capacity on the political institutions to change or remove constraints they do not accept. If rules need to be adhered to only to the extent that changing them does not carry greater political risks, any attempt to impose legal constraints on changing the law would dangerously put that logic at risk. Not being able to change rules would be unlikely to enhance their practical effectiveness. It would be more likely, in practice, to provoke a culture in the political institutions of trying, where they would currently make the case for a change, to make the same case for "gaming" or circumventing - or even (if there were a political imperative to do so) of accepting the political cost that breaking legal constraints that cannot be changed would involve. That would all be damaging, not enhancing, for the "rule of law". Tendencies in this direction may already be emerging from the recent growth of judicial review, suggestions that the courts are capable of blocking some sorts of democratic change, and the culture of mistrust in the law that all that has engendered.

43. On the other hand, the fact that the political risk of non-adherence to a legal rule is, in practice, the principal incentive for respecting the rule means that a similar political risk attached to a non-legal norm or standard is no less effective than law for creating a political imperative to adhere to it. It may even be more effective – e.g. if the political imperative is sufficient to inhibit changing the norm or standard in circumstances where, by contrast, changing a legal rule might be seen as a commonplace exercise of legislative power.

44. Ultimately, law cannot guarantee individual liberties or good governance unless it is supported by a culture of responsible politics which fosters collaboration, rather than the polarisation of political opinions. The risk of too much intervention by the law in politics is that it can undermine the culture on which law itself depends for its effectiveness in relation to other matters as well. Responsible politics requires incentives to listen to other points of view and to conduct civilised debate to convince others. None of that is necessary if the authority of the law can be enlisted to force the views of one side on the other.

45. So, there is no need to put legal constraints on the conduct of the relationship between Parliament and the government. Recent political events can easily be seen to reinforce this point.[21] The political imperatives created independently of the law within that relationship are a more reliable means of securing that political conflicts are resolved with political solutions; and political solutions - even if they are not necessarily the ones the law would regard as

21. I realise that this would benefit from more elaboration - but space and relevance make it impracticable to do so here and why I think this is true is clear, I believe, from what I say elsewhere in this submission and in other relevant writings referenced in the footnotes.

best in an ideal world - are the ones that are most likely command the widest acceptance in the real one. The argument is not that political mechanisms of control are effective in producing the same political outcomes as the law. It is that they produce outcomes that, in terms of public acceptance and respect, and of facilitating essential change, are likely to be better.

46. In this context, it is the confidence principle – preferably (as the current government proposes) unconstrained by the Fixed-term Parliaments Act 2011 – together with other political facts of life[22] - that is all that is needed in practice for the efficient and democratic regulation of the relationship between Parliament and government. There are plenty of other powerful political imperatives[23] that inhibit government from falling out with Parliament on individual issues, and that incentivise a culture of consensus-building and compromise within the political institutions. Parliament is more influential than supposed.[24] It really can look after itself and it does not need the assistance of the courts.[25]

47. If an impasse is reached, however, a Commons vote of no confidence is the ultimate means of resolving any otherwise irreconcilable problem in the relationship. The "nuclear option"[26] of the withdrawal of confidence in the government by the House of Commons does not exclude the factors that facilitate effective Parliamentary influence over minor matters as part of a collaborative culture; but it is a useful guarantee that the business of government is acknowledged on all sides to require "polycentric" decision-making,[27] and should not be allowed descend into chaotic deadlock.

48. The law, on the other hand, if allowed to intervene in politics, is inherently and culturally hostile to the mechanisms that facilitate the compromise and consensus-building that makes a collaborative culture possible. Not only does it try to identify the winners and losers on every individual issue, and to award a complete victory to the former, all of which necessarily excludes compromise. It also applies a logic that reinforces that compartmentalising effect, by applying a broader legal principle that assumes that a function conferred by law for a particular purpose must be exercised only for that purpose.

49. So, for example, the reasoning of the law would not think it legitimate for a parliamentarian with a constitutional role on two separate and unrelated matters to act in relation to one matter for reasons unconnected with the merits of that matter (e.g. by hindering its progress in order to secure a concession on the other, unrelated matter). Parliament and politics more generally cannot work without such deals; and incentivising such deals is how the confidence principle produces stable and coherent government and minimises unnecessary conflict.

50. The central importance of the confidence principle, and of the collaborative culture in Parliament that it supports, is that they ensure

22. See my written evidence to the House of Commons Select Committee on Parliamentary and Constitutional Reform 2015, (AMC0150).

23. Ibid.

24. See Russell and Gover above.

25. See Sir Stephen Laws, *Parliament should have been left to look after itself* (Policy Exchange, 2016).

26. It is clear that I differ on this from Lord Sumption in his evidence to the Public Administration and Constitutional Affairs Committee on 6 October 2020 Q32. Neither the Government nor the House of Commons should have the power to deny the other the right to appeal to the electorate in the event of an irreconcilable difference between them. It is not an appeal either is likely, in practice, to make lightly.

27. For the importance of the concept of "polycentric" decision-making to the process of judicial review of government actions see Lon Fuller "The Forms and Limits of Adjudication" Harvard Law Review (vol. 92) No 2 (Dec 1978) p353. This important work is of more general relevance to the matters the panel is considering.

that government is not reduced to the chaotic outcome of resolving an accumulation of separate issues in potentially inconsistent ways or, as the law does and judicial intervention in the relationship would require, as discrete problems that must be resolved without reference to each other. Everything in government, and so too in the working collaboration between government and Parliament, is and must be allowed to be interconnected[28] - not least because national governance is impossible without a budgetary settlement that reconciles the tensions between all the responsibilities of government.

51. This becomes a particularly important feature of the UK constitution when the decisions of the electorate produce a "hung Parliament". In those circumstances, it is essential that government should be capable of being carried on coherently for so long as there is a political consensus in favour of the compromises and co-ordination of policy brokered by whoever is allowed – in accordance with the confidence principle - to take or to retain office. It would be a recipe for incoherence, deadlock and entropic decline to allow a competing, opposition executive in Parliament - a Parliament (or House of Commons) with an agenda different from that of government – or a perpetual, giddying rotation of policies and personnel within government. It would give rise to a need to revisit difficult constitutional issues hitherto thought to have been overtaken by history.[29] Moreover, a constitutional "reboot" in the form of a comprehensive legislative enactment of the constitution (which is what a reboot would require) is impossible in practice - for reasons I have set out at length elsewhere.[30]

b. The EU withdrawal cases

52. Three recent cases[31] decided in connection with the withdrawal of the UK from the European Union have put the foundations of this subtle, constitutional structure at risk. They have made a significant further contribution to undermining the political institutions' belief in the commitment by the courts to abstain from intervention in the relationship between Parliament and government and so to support the Parliamentary culture that fosters responsible and civilised, democratic politics. The decisions in those cases collectively demonstrate a preference in the courts for minimising constraints on their intervention in high politics, and they suggest an increased willingness in the courts to circumvent pre-existing inhibitions on their participation in the battles in the political arena.

53. The three decisions are, of course, *Miller (No. 1)*[32], *Wightman*[33] and *Cherry/Miller (No 2)*.[34] All three cases were decided in ways that most lawyers would not have predicted on the basis of how the law was widely thought to stand before 2016. All three cases were clearly, in practice, brought principally for the purpose of influencing the Parliamentary proceedings connected with UK withdrawal from

28. See Professor Richard Ekins and Sir Stephen Laws, *Endangering Constitutional Government - The risks of the House of Commons taking control* (Policy Exchange, 2019).

29. Perhaps now that the dust has settled on the live issue, it is possible - without this time attracting too much intemperate abuse from legal academics - to point out again, by way of example, that competing agendas in Parliament and in government would revive the question that has to be answered in those systems where that is a practical possibility, namely, whether there should be a usable or qualified veto for the executive over legislation passed in "the legislature" against "the executive's" wishes. It would be much better if that question did not have to be asked or answered. It does not, while the current relationship makes that a practical impossibility. It would need to be answered if the courts had jurisdiction to arbitrate in the relationship in a way that created a need for ways to resolve irreconcilable differences otherwise than with a general election.

30. See my written evidence to the House of Commons Select Committee on Parliamentary and Constitutional Reform 2015, (AMC0150).

31. There were other unsuccessful cases brought on both sides of the debate in which the courts chose not to intervene, but their effect cannot outweigh the effect of the successful ones.

32. [2017] UKSC 5

33. [2018] CSIH 62

34. [2019] UKSC 41

the EU.

54. Although the proceedings and judgments in those cases did succeed, initially, in creating a considerable amount of political "noise", and of having the intended effect of influencing the context of Parliamentary debate and of doing some political damage to the political opponents of the applicants, it is clear (in retrospect) that neither the litigation itself nor the remedies granted had any significant, substantive effect on the eventual outcome of the political battles that the applicants sought to influence. Instead, that eventual political outcome depended entirely, and rightly, on the views expressed on two separate occasions in 2016 and 2019 by the electorate - the 2019 general election having been unnecessarily and pointlessly delayed partly, it can be argued, as a result of the decision in the *Cherry/Miller* (No. 2) case (see below).

55. The *Wightman* case is, in one sense, the most startling of these three cases. It represented a particularly blatant and indefensible defiance of the principle that excludes Parliamentary proceedings from the jurisdiction of the courts. It was directed specifically at obtaining information, in the form of a legal opinion from the CJEU about a wholly hypothetical set of circumstances, on the exclusively political grounds that it was thought that the opinion would be relevant, and could be called into aid, in a Parliamentary debate. The court specifically rejected arguments that it concerned "executive power".[35]

56. The other two cases were at least nominally directed at exercises of the Royal prerogative, and so technically about "executive power", although the *Cherry/Miller* (No. 2) case was the more shocking: departing as it did from all previous understandings of the role of the Monarch, the courts and the non-justiciability of proceedings in Parliament. Nevertheless it is very difficult to see, in either case, how the vindication of whatever legal principle was – irrelevantly - vindicated by those two decisions was really worth involving the courts in their immediate and inevitable impact on the politics. Nor is it clear that vindicating the supposed principle outweighed the risk (created by the novelty in the court's reasoning) that damage to the reputation of the judiciary for political neutrality would be done - whether fairly or not – in the eyes of what (it turned out) was a significant majority of the electorate. If it was not worth it but the decisions were nevertheless legally correct (which I think they were not), could or should this situation have been avoided? I shall return to that question in paragraphs 93 to 97 below.

57. As I have said, none of these EU withdrawal cases can be vindicated by the value of any practical effect they had on the resolution of the political dispute in question, even assuming that could be a proper vindication for litigation. Nor can the practical irrelevance of the cases to the political outcome be used for arguing that they, therefore, do not matter. That would be the case only if they had

35. See Sir Stephen Laws, *Judicial Intervention in Parliamentary Proceedings* (Policy Exchange, 2018).

had no downside, and had done no damage to trust in, and respect for, our constitutional settlement and the impartiality of the rule of law. We are where we are because they did.

58. The decision in *Cherry/Miller* (No. 2) illustrates the point. The only immediate and obvious practical effect of the decision was to inflict temporary political damage on the government and to trigger an angry scene in Parliament that was more divisive and ill-tempered than any that had previously been generated by the politics of UK withdrawal from the EU. This was hardly surprising given the Supreme Court's use of judicial authority to decide the winner and the loser in an intensely political dispute.

59. Arguably, it also in practice contributed to obstructing, and so postponing, the holding of a general election at a time when one was essential. On the other hand, the decision cannot be shown to have facilitated any practical exercise of Parliamentary sovereignty (however defined) that would have been frustrated without it. In the run up to an inevitable election, the decision undoubtedly influenced the ground on which the election was to be fought. It contributed (even if unintentionally) to a narrative for the purposes of the election that the Government (whose actions had conformed to Parliament's statutory requirements imposed in relation to an anticipated, imminent prorogation), was ignoring Parliament and had misled the Monarch (things for which there was no evidence and seem to have been untrue). The Supreme Court's intervention on that matter was unnecessary and bound to bring its political impartiality into question. It was very unwise.

60. I have argued elsewhere that each of the three decisions was wrongly decided as a matter of law.[36] I am not going to repeat those arguments here, nor is it relevant to do so. ***The relevant question now is whether, if rightly decided (as it is necessary for the law now to assume they were), the reasoning in the three EU withdrawal cases and the judicial law-making they represent should be statutorily overturned and reversed, with the aim of restoring a higher level of mutual trust and respect to the relationship between the courts and the political institutions. I submit strongly that that should happen.***

61. My reasons are that, in the ways I have described, the reasoning in those cases threatens the effective working of the UK's Westminster-style Parliamentary constitution. Once it were conceded that the courts are needed to regulate and enforce Parliament's influence over government, that would mean that the courts would be setting the parameters of allowable influence. In that way that influence would necessarily become limited to what the courts would be willing to enforce. The government would be able to claim an entitlement to disregard anything outside those parameters. The disciplines of the law (which compartmentalise the resolution of different issues) are not apt for the regulation of the way in which influence is exercised in Parliament. The *Cherry/Miller* (No. 2) case is,

36. See. Sir Stephen Laws, *Parliament should have been left to look after itself*, (Policy Exchange, 2016); *Judicial Intervention in Parliamentary Proceedings* (Policy Exchange, 2018); *The Supreme Court's unjustified lawmaking* (Policy Exchange, 2019). See also the section of Sir Stephen Laws, "Parliamentary Sovereignty, Statutory Interpretation, and the UK Supreme Court" in D. Clarry (ed.), *The UK Supreme Court Yearbook: Volume 10* (Appellate Press, 2021, forthcoming), relating to *Miller (No. 1)*. What seems to me an overwhelming case against the Court's legal reasoning in the *Cherry/Miller (No. 2)* case is made by Prof. John Finnis in *The Law of the Constitution Before the Court: Supplementary notes on* The unconstitutionality of the Supreme Court's prorogation judgment (Policy Exchange, 2020).

in fact, a perfect illustration of how, as I have explained, lawmakers need more than just authority alone – even unanimous judicial authority - to produce new law that will be stable and respected, and thereby to sustain the respect in which the lawmaker is held.

62. Allowing the courts to maintain a right to regulate the exercise of political influence in Parliament would inevitably involve the courts in political events. The only way to repair the damage that has already been done by these cases is to legislate to send a clear legislative message that these precedents are not to form the basis of a new constitutional order, in which the courts will dominate the political arena. It is essential to protect the judiciary from further attempts to put them at the centre of political controversy at times when the constitutional settlement comes most under strain. There is an urgent need to reassert and strengthen the right of the political institutions to have the final say, and the resulting political imperative for them to resolve political controversies politically and on their own.

c. Clarifying the "non justiciability" of the Parliament/government relationship

63. ***It follows that it is necessary to make it absolutely clear in new legislation that matters relating to the conduct of the relationship between Parliament and Government, including all proceedings in Parliament, are to be outside the jurisdiction of the courts and incapable of being called into question in litigation – viz. they should be made "non justiciable", just as they have, until very recently, been assumed to be. The recent attempts by the courts to erode the practical operation of this established and essential principle demands its immediate statutory reinforcement.***

64. The existing legislation supporting the principle is antiquated, predating the union of England and Wales with Scotland, and with Ireland, and also the development of our current constitutional arrangements based on the confidence principle. It is captured in the Bill of Rights in language that the courts have managed to construe as of limited application in other contexts[37] It is generally too easily capable of creative disapplication and of being distinguished as a limited historical curiosity confined to a 17th century mischief requiring the protection of "freedom of speech" in Parliament from interference by a monarch with Stuart-like tendencies.

65. Instead, for the reasons I have explained, there is a wider principle at stake that is fundamental to the operation of a Westminster-style constitution and ensures that political accountability is democratic and that national politics is conducted responsibly; and that principle needs to be captured in a modern and comprehensive restatement for the whole United Kingdom. Provision needs to be made that is unequivocally intended to forbid any interference by the courts with the relationship between Parliament and government, and so with national politics. It may be, in the light of the EU withdrawal

37. The wording of the provision to which the *Privacy International* case relates clearly contains echoes of Art IX of the Bill of Rights but was still construed in ways that allowed judicial intervention in matters it seems likely it was intended to take outside the scope of review – as described in Sir Stephen Laws, "Parliamentary Sovereignty, Statutory Interpretation, and the UK Supreme Court" in D. Clarry (ed.), *The UK Supreme Court Yearbook: Volume 10* (Appellate Press, 2021, forthcoming), 1-47.

cases, that only a "sledgehammer" will provide the necessary reassurance.[38]

66. ***Any new provision would need to apply to all the structural elements of the relationship between Parliament and government, and of the confidence principle that supports it—***

- ***It must include all those matters in which the Monarch is directly involved in Her constitutional role —***
  - ***the summoning, dissolution[39] and prorogation of Parliament; and***
  - ***the appointment, formation, dismissal and resignation of UK governments and individual Ministers of the Crown and (in that connection but only so far as it is carried out administratively as part the internal management of government, rather than provided for by or under statute) the distribution to Ministers and departments of their functions and responsibilities.***
- ***It should apply to all testing for legal purposes of any proceedings or statements in Parliamentary proceedings, including all evidence to Parliament or its committees and of Parliament's control of its jurisdiction in relation to breaches of privilege.***
- ***It should ensure that there can be no judicial interference with the decisions made and ratified in the course of House of Commons supply procedure and with the supervision of those decisions by the Public Accounts Committee - the issues relating to public expenditure being at the heart of the relationship between the House of Commons and government.[40]***
- ***It should apply to the operation of the conventions relating to the "purdah" principle in the run up to Parliamentary elections.[41]***
- ***There is also, perhaps, a need (as a result of the recent developments increasing the involvement of Parliament in certain public appointments) for it specifically to protect actions taken in accordance with recommendations by Parliament when expressing a view on a proposed public appointment e.g. at a statutory or other pre-appointment hearing- at least so far as that would involve questioning the recommendation.***
- ***It should, of course, apply to decisions of the Speakers etc. of both Houses and of other appointees to Parliamentary offices (including decisions made under statute, e.g. the certificates for the purposes of the Parliament Acts).***
- ***It should apply to the completeness and manner of compliance with other statutory requirements as to Parliamentary proceedings and reporting to Parliament and to the validity of all primary legislation enacted by Parliament.***
- ***It should confirm the non-justiciability of the granting of Royal Assent to Bills to ensure that the earlier stages of the legislative process cannot be called into question.[42]***

67. I say more below about secondary legislation and, in discussing statutory interpretation, about securing that the courts give effect to legislation (including, of course, any legislation imposing a non-justiciability rule) in the way that Parliament truly intends.

38. See fn. 10.

39. Assuming a discretion to dissolve is restored by whatever replaces the Fixed-term Parliaments Act 2011.

40. See Sir Stephen Laws, *Second-Guessing Policy Choices: The rule of law after the Supreme Court's UNISON judgment* (Policy Exchange, 2018).

41. See Sir Stephen Laws, *The Fixed-term Parliaments Act and the Next Election* (Policy Exchange, 2019).

42. The Royal Assent to a Bill was thought to have been wrongly and unconstitutionally set aside - perhaps because of an oversight by the Supreme Court - when the order made in the *Cherry/Miller (No. 2)* case invalidated the prorogation in the course of which it was granted, and was re-granted subsequently.

68. Any new articulation of non-justiciability for the purposes of this constitutional principle needs to amount to an unmistakable re-assertion that Parliament comes above the courts in the constitutional hierarchy, not vice versa.

d. Prorogation etc. and the constitutional role of the Monarch

69. Something further also needs to be said, in this context, specifically about prorogation, and about the constitutional role of the Monarch more generally.

70. A number of the matters I have suggested should be included in the new non- justiciability rule for the relationship between government and Parliament are related to the exercise (in ways that may be constrained, to a greater or lesser extent, by convention) of the Monarch's personal constitutional role: specifically those relating to prorogation, dissolution, government formation and the appointment etc. of Ministers.

71. As I have said, I think *Cherry/Miller* (No. 2) was wrongly decided. In my view, the prorogation that was actually attempted in 2019 was carefully calibrated and not extreme, although it may or may not have been politically wise (depending, perhaps, on what view you take of the impact, if any, that it had on the subsequent election). It complied with all statutory requirements imposed by Parliament. The situation was one in which the Speaker was making decisions that were rightly non-justiciable (even though they appeared to be both partial and wrong) and in which those decisions had produced a deadlock in Parliament to which the only realistic and practical solution was a general election. It was wrong of the Supreme Court, in that situation, to block what all the circumstantial evidence suggests was most probably (at least in part) an attempt to provoke the House of Commons into voting for the election that was needed and, for that purpose, to use an available political mechanism that has regularly been used by government for political purposes and the management of Parliamentary busines, and had always, reasonably been thought to be non-justiciable. The situation was a paradigm for the way in which, as I have described, political influence and the powers on which it depends have to be allowed to be exercised in Parliament politically and without inhibitions inferred from the purposes for which they nominally exist. Subjecting prorogation to judicial regulation was as absurd as it would be judicially to review the activities of the government's whips.

72. The Supreme Court was also wrong to interfere in a matter in which it was the constitutional role of the Monarch privately to encourage moderation, not least because there was, as there was bound to be, no shred of evidence that She had failed to do so.

73. If the Monarch's personal constitutional role and responsibilities are to be changed and subjected to supervision in Her courts, or transferred from Her to them[43]- and I do not think they should be -

43. See Professor Anne Twomey in evidence to the House of Commons Public Administration and Constitutional Affairs Committee, 9 October 2019 Q14.

it certainly should not be on the initiative of the Supreme Court and in the absence of any legislative authority for the courts to initiate such a change. There is nothing in the remit of the Supreme Court in the Constitutional Reform Act 2005 (which is the legal foundation for its existence and sole source of its functions) that justifies the assumption by the Supreme Court of the Monarch's role, or the arrogation to itself of the functions of a constitutional court entitled to regulate how the Monarch's constitutional responsibilities are discharged. The identification of the Court as a constitutional court has no basis in law. Rather it appears to have its origins exclusively in the constitutional role the Court claims for itself on its website.

74. I believe that it is essential for legislation to contradict the dicta in the *Cherry/Miller* (No. 2) case that suggest that it is the function of the courts to intervene to protect, and therefore to regulate, the ways in which Parliament carries out its function of calling government to account (quite apart from the academic argument about whether the Court was right - which I, with others, very firmly believe it was not - to describe that role in terms of "Parliamentary Sovereignty"). ***It is also necessary to contradict the reasoning that requires the government to be under an obligation to the court to provide it with a political justification for anything that is essentially a political act.***

75. *For the purposes of the proper management of Parliamentary business, the traditional and normal practice of all governments of using prorogation e.g. to tidy away unfinished Parliamentary business at the end of a session needs to be protected from becoming open to legal question - as it now would be if no legislative correction were made.*

76. Nevertheless, it is the case that in 2019 a use for prorogation that would rightly have been considered constitutionally improper had been canvassed in public debate, not least in various attempts, with rhetorical sleight of hand, to equate every possible prorogation with the option that would have been objectionable.[44] It is possible to imagine, in theory at least, a case where a government might seek to use a prorogation to hang on to office: by perhaps persuading the Monarch to concede a prorogation timed to prevent the holding of a vote of no-confidence that (were the government defeated) would require either its resignation or a dissolution of Parliament followed by a general election. It is clear that that was not the purpose of the 2019 prorogation. On the contrary, the government's motives most probably included, as I have explained, an attempt to demonstrate that a general election was the only solution to the otherwise irreconcilable Parliamentary deadlock.

77. It is very difficult to imagine a scenario in which a prorogation to frustrate the calling of a general election could really occur in practice - except perhaps to produce a very short delay (as in the Canadian precedent).[45] Various political factors would militate against it (the private influence of the Monarch, the political imperative for the PM not to embarrass the Monarch, the political

44. See Professor Richard Ekins & Sir Stephen Laws, "John Major is wrong to threaten legal action over prorogation", Spectator, Coffee House, 12 July 2019.

45. This is a reference to the prorogation of the Canadian Parliament and resulting political crisis in 2008-09.

costs of being seen to have denied or postponed the electorate's say - costs arguably paid in full in 2019 by the Opposition – and the practical impossibility of carrying on government for any length of time without Parliament).

78. However, it seems clear that the fact that that scenario was a theoretical possibility and had been the subject of speculation may well have been an influence on the Supreme Court in 2019, and may, more generally, have fuelled suspicions about the motives of government. The theoretical possibility that this might have been what the government was contemplating was maybe just about still plausible when the "pre-emptive" Scottish (Cherry) limb of the proceedings had been launched against what was then only a hypothetical prorogation – even though it had become incontrovertibly clear, before the Supreme Court made its decision, that that was not the sort of prorogation that had in fact been granted.

79. I have said that I think there has been a breakdown of confidence, on both sides, between the courts and the political institutions. So, it is necessary to do what is possible to restore the confidence of the courts in the political institutions, as well as to restore confidence by the political institutions in the courts - although the limited remit of the panel obviously requires more concentration on the latter.

80. One way to reassure legal opinion about the proposed restoration of non-justiciability for prorogation might be to legislate in a way that would guarantee - without offending against principle or prejudicing the established, conventional uses of prorogation - that prorogation cannot be used to frustrate the confidence principle. In that way, those with misconceptions about how politics operates in practice could be reassured that the non-justiciability of prorogation could not be abused to produce a prorogation in circumstances a consensus already accepts would make a prorogation improper. A similar reassurance on a similar topic might be thought to exist in the way the Parliament Act 1911 prevents the extension of a Parliament by an Act passed against the wishes of the House of Lords.

81. ***Adequate reassurance could be provided, without triggering any need for justiciability, by a statutory provision that a prorogation for more than a short specified period (say, 14 days) would end with an automatic dissolution of Parliament unless the longer period had been approved by a resolution of the House of Commons/each House.***

82. In that way, government could not use a prorogation to avoid a reckoning with the electorate. Any other supposed misuse of prorogation could still be remedied, if Parliament objected, by a vote of no confidence (which would trigger an election). The House of Commons too should not be able to avoid a reckoning with the electorate while denying government the capacity to govern.

83. This is a practical suggestion for restoring mutual trust between

the political institutions and the courts in relation to prorogation. It is not an endorsement of what I continue to consider to be the unconstitutionally "legislative" approach by the Supreme Court in *Cherry/Miller (No. 2)*.

84. The proper role of the courts in developing the law is in elucidating existing principles by their application to new circumstances that come before them, but that is not a legislative function. It does not comprise devising new rules for hypothetical cases that are not before them (e.g. a prorogation to block a confidence vote), and then deciding how to apply or adapt that new rule to the case that is in fact before them. Making rules for application in future hypothetical cases is the essence of what legislating is.[46] It is a usurpation of the constitutional role of the political institutions (in whom legislative functions are vested) for courts to do that. Courts may indeed produce new law incidentally when deciding cases. But they do so legitimately only via the operation of the doctrine of *stare decisis*, and not (despite disturbing recent dicta suggesting the contrary[47]) by a process of policy formulation and its implementation through the exploitation of a case before it for the articulation of abstract legal rules for hypothetical future cases.

85. Finally, before moving on from *Cherry/Miller (No. 2)*, I need to mention two matters to which I shall return below, because that case provides examples of each.

86. The first is the capacity of the existing law to allow a "domino effect" for errors of process and other errors – using an analysis that gives rise, in some cases, to what have been called "second actor" issues[48]. Under this understanding of the law, an applicant can scour through the procedural and other steps taken in the run-up to a decision and successfully argue that a misstep at an earlier stage taints everything that follows - however independently of that misstep the making of the final decision in the chain may actually be.

87. This analysis was used in the *Cherry/Miller (No. 2)* case (in imitation of the medieval expedient of blaming the King's advisers for his mistakes) to circumvent the proposition (one might have thought the unarguably correct proposition) that the prorogation was non-justiciable as a proceeding in Parliament, as well as because it was an exercise of the non-justiciable personal, constitutional prerogatives of the Crown. The device employed was to target the challenge on the advice that, it was inferred, had been given by the Prime Minister to the Monarch about how She should respond to the advice to grant the prorogation subsequently given by others in Her Privy Council, and then to decide the case on the absence of a justification for the PM's advice. ***Whatever rule is made for removing justiciability from aspects of the relationship between government and Parliament, it needs to ensure that an action to which non-justiciability attaches is treated as breaking the chain of causation for the purposes of allowing an earlier misstep to taint***

46. See Sir Stephen Laws, *Judicial Intervention in Parliamentary Proceedings* (Policy Exchange, 2018).

47. *Barton & Booth v R* [2020] EWCA (Crim) 575.

48. See Professor Christopher Forsyth, "The unlawful effect of administrative acts: the theory of the second actor explained and developed", (2001) 35 *Amicus Curiae* 20

that action.[49]

88. The second issue is another feature of the Supreme Court's analysis that also tends to undermine what was traditionally thought to be a "presumption of regularity" for constitutional instruments executed in correct form. A relatively recent development in administrative law has resulted in the courts setting thresholds for triggering what becomes, effectively, a "presumption of irregularity" by shifting the burden of justifying executive action to the actor. The need for a reasonable justification – a justification culture - is undoubtedly capable of being applied to the determination of how the executive should act in some individual cases, at least where a quasi-judicial approach is required.[50] It cannot sensibly be applied to political judgments, which will have political justifications and will be inherently incapable of satisfying any test a court is capable of applying: because, for example, they are likely, in the nature of politics, to lack impartiality or to have regard to extraneous considerations or the demands of leadership and to derive from a political perspective of what is or is not a beneficial outcome for society as a whole.

e. Pre-empting Parliament

89. There is one further relevant matter that arises out of the *Miller (No. 1)* case which also involves questions about whether and how aspects of the relationship between government and Parliament should be capable of being litigated.

90. In the run up to that case, I argued[51] that existing practice already provided an appropriate analogy for the principles that should apply for deciding what Parliamentary authority (if any) was needed for the giving of an Art 50 notice. The correct analogy, I argued, was with the principles applicable to certain other situations that commonly arise in practice where government wishes to commit itself to expenditure towards implementing a policy project before Parliament has passed the legislation to authorise its full implementation. The typical case is where the government - so as to facilitate its speedier implementation once an Act has been passed - uses inherent "third source" powers to incur expenditure (authorised by Parliament under the normal supply procedures) to e.g. acquire premises, have computer programs written or make provisional appointments before the Bill for the Act has completed its Parliamentary stages.[52]

91. In such a case, the convention insisted on by Parliament (through the Public Accounts Committee), and accepted and enforced by the Treasury, is that the expenditure should not be incurred before the second reading in the House of Commons of the relevant Bill. Government is rightly expected to exercise restraint in "pre-empting Parliament" because the expenditure, though lawful, will be wasted if Parliament fails to pass the Bill. The possibility of

49. See Sir Stephen Laws, *The future for Constitutional Reform - Some lessons from the UK's withdrawal from the EU* (Policy Exchange, 2020).

50. See the discussion of recent developments in administrative law in Canada (which may be of more general interest to the panel in its consideration of judicial review for case by case executive decisions): Professor Paul Daly, "Vavilov and the culture of justification in contemporary administrative law" (2020) Supreme Court Law Review (forthcoming).

51. See Sir Stephen Laws, "Article 50 and the Political Constitution", UK Constitutional Law Association Blog, 18 July 2016.

52. See the 13th Report for the 2012-13 Session of the House of Lords Constitution Committee "The Pre-emption of Parliament".

money being wasted, though, is made much less likely once the Commons has agreed in principle to the legislation needed for full implementation. So, the pre-emptive expenditure is permitted after the second reading condition has been fulfilled, but not before. A practical distinction is drawn between the Parliamentary decision at second reading that the project should in principle go ahead and the working out of the detail of that decision, which may involve issues that remain to be settled as the Bill passes through its other stages.

92. The analogy, as I saw it, was that once the House of Commons had agreed the second reading of a Bill equivalent to what eventually became the European Union (Withdrawal) Act 2018, it was highly improbable (even if it had not been before) that the Art 50 notice would expire without Parliament having enacted rules (which would have been in that Bill) to say what was to happen about rights affected by that expiry. It is on this basis that I thought, and continue to think, that the appropriate constitutional trigger for the giving of the Art 50 notice would have been the second reading of such a Bill. The government, in then giving the notice, would have been using an executive power available to it to anticipate a decision of Parliament, while respecting Parliament's role by waiting until Parliament had committed itself to the principle of what the government wished to do. It is this reasoning that explains why I continue to think that the decision of the majority in the *Miller (No. 1)* case was itself a premature intervention to grant a pre-emptive remedy against a situation that was highly unlikely to arise, could have been demonstrated to be even more unlikely by getting a relevant Bill to second reading and would have been remediable subsequently even if it had arisen after that.[53]

93. This analysis is relevant to an issue of principle that I have already discussed. I have suggested that none of the three EU withdrawal cases should have been allowed to proceed, because they were each, in substance, attempts to interfere in Parliament's relationship with government (which, I say, can and should be managed between the two institutions themselves, without outside intervention). But it is said, by some, that that cannot be a relevant consideration. If it is possible to analyse an aspect of that relationship into a legal question about an executive action, then - it is said - that legal question has to be answerable in the courts, and the legal principle has to be capable of being vindicated by litigation. It has to be irrelevant whether the legal issue is in substance only an ingenious device to bring what is really a political issue before the court, and so to bypass the constitutional principle and the constraints of e.g. Art IX of the Bill of Rights 1688. There is no legal rule, it is argued, that forbids using a small, incidental and ultimately irrelevant legal point to land a large political objective. The tail should not be stopped from wagging the dog, however undesirable or damaging

53. See also Sir Stephen Laws, *The future for Constitutional Reform - Some lessons from the UK's withdrawal from the EU* (Policy Exchange, 2020).

to the reputation of the law the judiciary or the operation of Parliamentary government it might be to let the proceedings go ahead.

94. I accept that this argument does have some technical, legal validity; but it seems to me to be a comparable validity - accompanied by the same complete absence of merits - as the arguments used to excuse tax avoidance. The courts need to be inhibited from pre-empting Parliament just as, by convention, the government is inhibited from wasting public money by the sensible rules about pre-emptive expenditure. There is a way of doing this without excluding the vindication of legal principles in cases where that truly turns out to be needed, and is really of practical relevance.

95. *I suggest that statutory provision is made to impose a duty on the courts to stay proceedings, on an application by the Attorney General, if the proceedings relate directly or indirectly to matters that are, or are to be, the subject of proceedings in Parliament the outcome of which would be relevant to issues in the proceedings or to the remedies (if any) that it would be appropriate for the court to grant when it has resolved those issues.*

96. Of course, there is a problem with this suggestion. The cynics amongst the lawyers will say that the politicians would manufacture Parliamentary proceedings to avoid judicial scrutiny; and the politicians will say that the lawyers would be bound to use their ingenuity to circumvent the spirit of a provision to deny Parliament its rightful constitutional priority in the determination of matters in political dispute.

97. That mutual mistrust is, as I have said, the underlying source of the problem with which the panel is confronted. My only answer, though, is to suggest that it is worth trying the proposal to see what happens - on the understanding that a political imperative for further change is likely to develop if it fails, in either respect, to achieve the balance it is intended to achieve. I leave it to others to consider if my basic proposal could be improved to provide further reassurance to both sides with additional formalities.

Foreign affairs and war powers

98. I have argued above that there should be non-justiciability for issues involving the exercise of the personal, constitutional prerogatives of the Monarch. I do not think that the extent of this proposition should depend on the extent to which Her exercise of a particular prerogative might be confined by a convention requiring Her to follow Ministerial advice. That is not a precise test. I make the argument on the inherent merits of giving the Monarch a role in relation to the issues in question, as the ultimate restraining voice, and of keeping the courts out of the relationship between government and Parliament. The extent to which it is possible for Her, in practice, to reinforce advice with a formal denial is so hypothetical as to be irrelevant.

99. On the other hand, I put no particular weight on the concept of a "prerogative" as requiring a particular answer to the "judicial review" question. The fact that something is done "under the prerogative" is an indication that something was, historically, thought of to be a matter inherently and exclusively within the capacity of the Crown. It is of interest for that reason; but that need not be conclusive as to its justiciability.

100. I accept that there are executive "prerogative" powers that are exercisable in relation to individuals that should be subject to the same or similar general principles as apply to executive powers conferred by statute, and are judicially reviewable accordingly.

101. However, in this context, it is important to draw a proper distinction between what are truly prerogative powers - powers exercisable only because they are inherent to the role of the state - and "third source" powers[54] comprising the capacity that an emanation of the state shares with any other legal person and cannot (subject to any specific, statutorily imposed constraints) be more limited because they belong to an emanation of the state than they are when vested in any other legal person. The improper use of such powers may well, in practice, be legally challengeable, but that cannot be on the basis that the inherent capacities of a legal person are more limited and exercisable only for specific purposes when the exist in an emanation of the state.[55]

102. There are, however, two other features of the traditional ambit of the Royal prerogative that are worth considering as matters that should give rise to accountability to Parliament alone, and not to the courts (except, of course, so far as Parliament otherwise provides by statute). They are closely related.

103. *I propose that any restatement of the non-justiciability of matters that are for the relationship between Parliament and the government, and not for review in legal proceedings, should set that as the default position in the case of both the conduct of foreign affairs and the use by the Crown of military force outside the United Kingdom - or in its defence from attacks launched from outside.*

104. I have no strong views on precisely where the parameters of any restatement of this principle should be drawn - and so none on what the exceptions should be. But I do think the default position should be clear, and that the only exceptions should be made by a decision of Parliament enshrined in statute. My preference would always be for Parliament to find ways (of which there are plenty) to exercise influence over the conduct of these matters without seeking to engage the assistance of the law, and so to avoid the risk of involving the courts in policy matter, which is what legislating about it would necessarily involve.

105. My argument is that this has to be the default position because these matters are central to national welfare, directly engage the most fundamental functions of the state and the interests of the whole electorate and would require the courts, if they were to become

54. See *Shrewsbury & Atcham BC v Secretary of State [2008] EWCA Civ. 148*, as regards which I differ from the obiter dicta of Carnwath LJ (as he then was). See also Professor Mark Elliott, "Muddled thinking in the Supreme Court on the "third source" of government power", Public Law for Everyone, 17 July 2013 for a general discussion and cross references to other sources relevant to the "third source powers". The original "Ram" memorandum is the best starting point - but only a starting point - for a discussion of "third source" powers and it was published in 2003. Although not everything in the Ram memorandum remains true of current practice, it remains the case that the use of third source powers cannot be considered separately from the management of supply procedure in the House of Commons and of the Parliamentary conventions that relate to that.

55. See also fn.59 below.

involved, to resolve disputes between UK actors and foreign states and other entities necessarily outside the jurisdiction and reach of the UK courts. With a dualist analysis of the place of international law in the UK, the courts have no proper function in determining these matters and, one way or another, they would be drawn into the heat of the political battle if they sought to assert one. When the stakes are very high, as they will be when the vital national interests in foreign relations and the defence of the realm are involved, it is vital that responsibility for decisions should rest wholly with democratically accountable politicians.

UK and devolution considerations

106. The terms of reference of the panel extend beyond the law of England and Wales, and would, in some respects, cover matters within devolved competence. Parliament, the Crown and the structure of the UK government are topics that have not been devolved in any part of the United Kingdom. It is undesirable that the rules relating to common institutions, particularly those with a primary responsibility for securing the Union, should differ in different parts of the United Kingdom.

107. The unedifying forum-shopping around the UK for litigation on UK reserved/excepted matters that marred the legal approach to UK withdrawal from the EU needs to be discouraged, and ideally eliminated. It is divisive. It follows that reforms of the sort suggested here for the way the courts consider judicial review relating to reserved or excepted matters needs to be extended to the whole United Kingdom.

108. My suggestion is that any changes that the panel proposes for England and Wales should apply throughout the United Kingdom whenever, in a devolved jurisdiction, they involve matters that are not devolved. I submit that that must include cases where questions arise about the parameters of what is or is not devolved, and also where the exercise of devolved powers impinges on non-devolved matters, (including in so far as it does so under devolved competency allowing devolved legislation to have such an effect incidentally).

109. There is also another question about whether the proposals I have made above about the relationship between Parliament and the government should be applied, in whole or in part, to the relationship between the devolved "legislatures" and the "devolved governments". The same goes for the issues about legislation in the next section.

110. This raises complex issues, some of which are outside the panel's remit and all of which would make this submission even longer, and would need input from the devolveds themselves. Suffice it to say that I do believe that there is a good case for some degree of equivalence, so long as it can be devised to accommodate the fact that the devolved legislatures have limited legislative competence. Some of these issues were addressed in the AXA v Lord Advocate[56] case, and a plausible case can be made for seeking to codify that in any provision reasserting the non-justiciability of the government/Parliament relationship at Westminster. My own, perhaps minority, view, is that it is worth consideration being given

56. [2011] UKSC 46

to a more political institution to regulate the parameters of devolution, along the lines of the French Constitutional Council; but that, I infer, is outside the remit of the panel.[57]

57. See Jack Airey, Gabriel Elefteriu, Sir Stephen Laws, Warwick Lightfoot, Benedict McAleenan, Rupert Reid and Jan Zeber, *Modernising the United Kingdom* (Policy Exchange, 2019), 27. But I do need to make clear that this idea is about providing a political mechanism, instead of a legal one, for resolving tensions within the devolution settlements and is entirely different from Lord Sumption's proposal (with which I strongly disagree) which - or so it seems to me - amounts to a suggestion that HM should be given an apolitical and non-accountable Privy Council committee (possibly chaired by a judge) to advise Her on how to respond to advice from within the Privy Council committee that consists of Ministers accountable to the Parliament and the electorate. See Jonathan Sumption, "Brexit, the Queen and proroguing parliament: how to solve this constitutional conundrum", The Times, Wednesday 17 July 2019.

C. Primary and Secondary Legislation

111. The approach of the courts to both primary and secondary legislation is an important component of the way in which they exercise their judicial review jurisdiction. Legislation of one sort or another is the source, directly or indirectly, of the vast majority of executive powers the exercise of which is capable of being judicially reviewed. Moreover, the exercise of powers to make secondary legislation is regarded by the courts as itself an exercise of executive powers, and therefore as susceptible itself to judicial review.

112. Issues relating to legislation may be relevant to an application for judicial review in different ways.

- An exercise of an executive power conferred by primary legislation may be challenged on grounds relating to the correct interpretation of that primary legislation, but not (according to orthodox doctrine at least) by reviewing the exercise of the legislative power under which the primary legislation itself was made.
- Secondary legislation may be challenged in its own right on grounds relating to the correct interpretation of the enabling power in the primary legislation under which it was made (as mentioned in the first bullet), or on grounds relating to defects that relate to procedural requirements (imposed by that primary legislation or otherwise) as regards the making of the secondary legislation.
- An exercise of an executive power conferred by secondary legislation may be challenged on grounds relating to the proper interpretation of the secondary legislation or on the grounds that the secondary legislation itself is challengeable in its own right on grounds mentioned in the previous bullet.

(For this purpose I treat "grounds relating to the correct interpretation of legislation" as including grounds involving the application of section 3 of the Human Rights Act 1998 (compatible construction) and, in the case of anything except primary legislation, as also including the gloss on all executive powers, including those to make subordinate legislation, that is imposed by section 6 of that Act.).

113. The political elements of decision-making in the process of producing all descriptions of legislation mean that policy decisions

in the course of that process (whether by the government - as the institution that initiates the process - or by those in Parliament who scrutinise and validate it) are fundamentally different in character from decisions made by executive decision-makers when they exercise executive powers on a case by case basis. This distinction, though, does not always appear to be respected in the way they are subjected to judicial review.

114. Legislating is fundamentally different from applying the law while carrying out a managerial or enforcement responsibility, or a quasi-judicial function of dispute resolution. The processes for making legislation are political processes directed at regulating a political activity that looks to the future, not a process of impartial fact finding followed by the application of the law, or the exercise of a discretion, in relation to the facts found or agreed.[58]

115. Policy-making for legislation is about determining what rules should be used in hypothetical situations arising in the future, and of categorising the permutations of future possibilities for the purpose of making different rules for different cases. It is almost invariably designed with the ultimate objective of producing a desired behavioural change in society as a whole, and on the basis of a political judgement about what would constitute a beneficial effect and what sort of behavioural change and related legal change would be likely to bring it about. Only incidentally is it about how disputes about the law's effect in individual cases need to be resolved.[59]

116. Legislation is forward-looking in time in a way that executive decision-making in individual cases just is not - not even when it appears to contain some prospective elements e.g. as where it involves licensing issues or other grants of permission in respect of specific proposals for individual future action.

117. *My suggestion is that the issues relating to primary or secondary legislation in judicial review proceedings need to be considered entirely separately from those relating to executive action - on known, admitted or provable facts - on a case by case basis. Similar solutions may be appropriate for problems that exist with both - but the case for some solutions may be stronger in the case of legislation than they are for case-by-case decision-making - and they should not be rejected just because they may seem not to fit in the latter case. Just as the principles applied for the purposes of judicial review in individual cases can be inappropriate when extrapolated to be applied to legislative acts, so the solutions to the problem caused by the application of those principles to legislative acts may have to be different from solutions to problems caused by the application of the same principles in individual cases.*

118. It is inherent in anything of a legislative nature (whether primary or secondary) that, once it is in place, it will be relied on, and assumed to be valid, by those subject to it, maybe over a long period. The law generally, and specifically in relation to judicial review, needs to recognise this. If a court subsequently invalidates

58. I acknowledge, with thanks, the debt I owe to Prof. J Finnis for the insights he led me to in my understanding of the "temporal" aspects of the different functions of the different branches of government. See Professor John Finnis FBA at the relaunch of Policy Exchange's Judicial Power Project, "Judicial Power: Past present and future" 20 October 2015 republished in R Ekins (ed), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018).

59. See Sir Stephen Laws, "Parliamentary Sovereignty, Statutory Interpretation, and the UK Supreme Court" in D. Clarry (ed.), *The UK Supreme Court Yearbook: Volume 10* (Appellate Press, 2021, forthcoming), 1-47; "Giving effect to Policy in Legislation: How to avoid missing the point" (2011) 32 *Statute Law Review* 1, a modified version of which was published in *The Loophole* (2011); "Legislation and Politics", chapter 5 in D Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2011).

legislation from the time of its making - or, at a later time, gives it a meaning which it had previously and reasonably been assumed not to have had - that is likely to have very serious implications for those (including the legislators) who, in the meantime, may have relied on what the legislation was thought to do, and who arranged their affairs accordingly.

119. Retrospective invalidation of legislation will, in almost all cases, impose injustice and unfairness on those who have reasonably relied on its validity in the past. The injustice and unfairness are capable of being imposed over a very long period - with the scale of both increasing the longer that period is. It is a form of injustice and unfairness that is wholly incompatible with even the narrowest versions of the concept of the rule of law.

120. In so far as the retrospective invalidation of legislation will impose additional requirements for public expenditure in respect of how the law was previously understood, it may also divert funds away from political projects to solve today's problems, and to improve the lot of individuals in future, in order to redirect them to the provision of compensation for past losses.

121. Retrospective invalidation may also, in this way, provide compensation for losses even if they have already been written off or passed on to someone else in a commercial train of transactions. It may even, perversely (as in the UNISON case[60]), end up with compensating those who were not affected by the defect or error that allegedly justified invalidation, while failing to compensate those who were. The cost to the public purse, and so to the taxpayer, may be quite disproportionate. Any supposed justification in a need to punish government and deter it from future *ultra vires* actions fails to stand up to analysis. The burden of the punishment falls most harshly on the taxpayer and on those who would have benefited from a more constructive use of the funds. As usual, the law operates to protect the interests of those who already benefit from the law over the interests of those who hope to have legal benefits conferred upon them. It creates a bias in favour of the status quo by favouring the interests of the potential losers from legislative reform over the potential winners.

122. ***This all makes the case for the following—***

- ***a curb on retrospective invalidating remedies in respect of legislation affected by judicial review proceedings; and***
- ***A more robust presumption of regularity in the case of all legislation (primary and secondary).***

Remedies in judicial review proceedings in respect of legislation

123. ***It is only legal tradition and the historical features of how "ultra vires" concepts are used to justify judicial intervention in government decision-making that makes retrospective invalidation the norm; but Parliament is free to change that, and I am suggesting that it needs to. There is a logic to the way the law***

60. *R (UNISON) v Lord Chancellor* [2017] UKSC 51; see also Sir Stephen Laws, *Second-Guessing Policy Choices: The rule of law after the Supreme Court's UNISON judgment* (Policy Exchange, 2018).

has developed, but it is not immutable.

124. It is noteworthy that when Parliament itself is given a power to annul a statutory instrument, the exercise of that power has effect only prospectively, and things done, etc. under an annulled instrument before its annulment are saved and protected (see e.g. the final words of section 5(1) of the Statutory Instruments Act 1946).

125. There is no reason for not applying the same rule to the annulment of a statutory instrument by a court. The fact that, in the case of a court annulment, much more time may have passed between the making of a statutory instrument and its annulment reinforces, rather than weakens, the case for "saving" things done under it to the same extent as they would be saved if Parliament had annulled the instrument. Not only is the injustice of trying to unravel actions over a very long period greater, so are the consequential complications. There is an increased likelihood that any rectifying conduct will benefit someone other than the person on whom the loss really fell in practice, or that the financial and political cost of the annulment will be borne by someone who carries no responsibility for what went wrong or received no advantage from it.

126. The case for dispensing with retrospective annulment is further reinforced by the fact that the courts increasingly apply unpredictable "values-based" tests (including those mandated by the ECHR) in deciding whether to annul statutory instruments. That has the effect, in practice, that the precise operation of those tests in the case of a particular policy proposal is something no legislator could reasonably be expected to have foreseen accurately when the instrument was made. The unpredictability is increased by the nature of the tests even disregarding the fact that the legislator lacks the benefit of the hindsight that is always available to the court. If the operation of the rules for annulment are unpredictable to legislators, that increases the injustice and unfairness of having arbitrary and extreme consequences for a failure to predict it.

127. Ideally too, a rule that required only prospective invalidation would also allow for the grant of a short stay on invalidation taking effect across the board: to allow government to work through the detail of remedying the situation for the future, perhaps on the basis of an undertaking by government to secure that, in the meantime, no one would suffer any detriment from the delay in providing a remedy.

128. There is also a mismatch between the retrospective application to legislation by the courts, on the basis of the so-called "principle of legality", of unpredictable "values-based tests" (the operation of which is even more difficult for legislators to predict than in the case of the principles contained in the ECHR) [61] ***and the rationale for section 4 of the Human Rights Act 1998. It would be fairer - and also more consistent with constitutional principle - for the courts to be restricted to a non-invalidating declaratory remedy wherever such tests are applied to primary legislation and also, I would suggest, when they are applied to secondary legislation. The dividing line between the approaches***

61. See Sir Stephen Laws, "Parliamentary Sovereignty, Statutory Interpretation, and the UK Supreme Court" in D. Clarry (ed.), *The UK Supreme Court Yearbook: Volume 10* (Appellate Press, 2021, forthcoming), 1-47

in section 4 of the 1998 Act and in section 6 is relatively arbitrary, so far as legislation is concerned. The matter needs to be looked at on the basis of the substance of what is happening and not by reference to any supposed, but obviously unentrenched, analysis of the courts' present rationale for exercising the jurisdiction in the way they do.[62]

129. A balance needs to be struck between the interests of litigants and the public interest in ensuring that the law does not create perverse incentives to defensive legislation or a "chilling" or paralysing effect on policy-making for change. That can happen either through deterring legislators from necessary and beneficial change or through the monopolisation of the resources that would otherwise be available for implementing radical but beneficial change. The different burdens that litigation inflicts on the public purse, and therefore on the taxpayer and the market economy, do need to be regarded as relevant factors.

130. It is also worth remembering that the practical difficulties, unfairness and other inadequacies of a remedy of retrospective invalidation founded on the *ultra vires* doctrine are not unique to legislation. They caused considerable problems and injustice when applied to the legal capacity of local authorities[63] and had to be dealt with by the provision of a statutory remedy in the form of an all embracing capacity, now to be found in the Localism Act 2011.[64]

131. Of course, in the atmosphere of mistrust that now exists between the courts and the political institutions, there will be objections to any proposal to confine remedies to an inhibition on future actions. It will be claimed, perhaps, that government would take the opportunity to make *ultra vires* instruments in bad faith, with a view to waiting to see if they will be overturned, while remaining content that they will be effective in the meantime.

132. This would be absurdly alarmist and highly improbable in practice. The executive, which has a major and decisive role in creating the powers it exercises, and so knows from the start what it thinks they were supposed to allow, tends to act outside them only inadvertently. The reason is obvious and set out above. There is less political as well as practical risk in changing the law to meet a new need than in consciously breaching it. The executive would still be effectively deterred from acting deliberately outside its powers by the political damage it would be likely to incur from being found to have done so.

133. Nevertheless, there may be something to be said, for providing an (albeit - in my view - unnecessary) reassurance that there is a formal deterrent to any attempt to exploit a new rule allowing only prospective annulment. There could be an exception, say, for when the applicant shows that the secondary legislation must have been made in bad faith (viz. knowing it to be unlawful), or perhaps also if it is shown that a retrospective invalidation would be harmless because there had not been any [significant] reliance placed by anyone on the lawfulness of the regulations and that the effect of invalidation on the

62. At this point I become conscious that, as a legislative drafter, I work from the premise that there are no fixed points in any legal analysis. Everything is capable of change. Other lawyers, who are used using the law as a fixed point on a day to day basis, are usually too willing, when it comes to legislation, to assume that there are elements of the status quo and of the analysis that supports it that have to be left in place. When I imagine myself defending these suggestions to legal practitioners, I hear them saying "You cannot change that because that is the way it works". My reply is "Parliamentary Sovereignty does enable you to change the way it works without confining yourself to existing concepts". See the discussion of the Unison case in Sir Stephen Laws, "Parliamentary Sovereignty, Statutory Interpretation, and the UK Supreme Court" in D. Clarry (ed.), *The UK Supreme Court Yearbook: Volume 10* (Appellate Press, 2021, forthcoming). I recognise that there is a tension between the unfairness of the retrospective application of the "principle of legality" in the way it has come to be applied and its foundation on a legal fiction as to Parliament's "real" intentions.

63. In the local authority "loan swap cases", *Hazell v Hammersmith & Fulham LBC* [1992] 2 AC 1, and subsequent litigation.

64. These cases, and the need to find a legislative solution for them, also provide a powerful demonstration of why any imposition of functional inhibitions on the use of third source powers (beyond those imposed by statute) should be resisted and, if necessary, legislated against. Nothing would be gained by recreating for central government the problems that those cases created for local government, so as then to require a similar solution in the form of a statutory and all-embracing rule of general competence.

public finances and public administration would not be [disproportionately] [damaging/disruptive].

134. The mistrust, of course, would flow in the opposite direction in relation to such a proposal, particularly in the light of the way the courts appear to the political institutions to have side-lined the proposal enacted in section 84 of the Criminal Justice and Courts Act 2015[65] (the provision denying a remedy when there would have been no substantial difference in the outcome for the applicant) and apparently thwarted it from itself making any substantial difference to the way applications for judicial review are decided, at least in relation to legislation.

135. It seems to me that, in the light of the experience provided by s. 84 of the 2015 Act, any exception to a "prospective invalidation only" rule would have to cast the burden on the applicant of displacing that rule. That would be consistent with the presumption against retrospection that applies for the purposes of statutory interpretation. There is, of course, room for argument about the right test for displacement and, e.g. about the concepts articulated by options in square brackets in the formulation in paragraph 133. There is also a case for preventing retrospective invalidation even where the practical consequences on past cases are relatively insignificant: because of the disruption to the proper balance between law and politics of the politically inhibiting effect of a retrospective invalidation on the freedom of government to decide to ratify its previous decisions**.** Certainly, retrospective invalidation of legislation should be at the very least no easier for the courts than retrospective ratification of invalid legislation is for the political institutions.

136. The mischief with retrospective remedies is that they are capable of producing unfair and disproportionate consequences - cures that are worse than the disease. That suggests that a restriction on retrospective invalidation is an essential component of any solution. Clearly, such a restriction itself has the potential, in some cases, to produce effects that might appear unfair. But a balance does have to be struck; and, looking at the matter overall, any such unfairness is likely to be much less severe and widespread than the adverse consequences of reversing the effects of a justifiable reliance on the effectiveness of published law.

137. *On that basis I would also prefer the two suggestions of restricting retrospective invalidation of legislation and providing a more robust presumption of regularity to be implemented cumulatively, rather than treated as alternative solutions to the problems caused by the application of the "ultra vires" concept to legislation. An established presumption of regularity would be a more harmonious fit with a conceptual structure that treated all law as valid until it is found not to be. It would also be more compatible with the practicalities of political decision-making.*

138. Legislation is used, in the vast majority of cases, for implementing

65. See e.g. *R (Law Society) v Lord Chancellor* [2018] EWHC (Admin) 2094

projects for change designed to honour an electoral mandate. In practice, political change usually has to be "ratcheted" to be successful. So long as a change is contingent and capable of being delayed or stopped by means that do not require changing the minds of those who have promoted it, it is unlikely to receive the level of commitment and acceptance needed to make it successful. A legal conceptual structure that treats legal change as contingent and stoppable until litigation has confirmed that it is allowed imposes too stringent an inhibition on the operation of democratically authorised change. In that way, it unnecessarily contributes to the frustration of the political institutions with the judicial review jurisdiction and to the perception that the political institutions are powerless to fulfil their promises. In that way, it aggravates the related mistrust of the courts. ***"Enabling the executive to govern effectively under the law" necessarily requires systems that can provide relatively prompt finality to political decision-making about change.*** A clearer presumption of regularity would go some way towards restoring a better balance on these matters.

139. As I set out above, applications for judicial review that involve challenges to primary or secondary legislation can engage one of two separate issues: process and interpretation. I shall now deal with each of those in turn.

Process issues relating to legislation

140. *As discussed above, the passing of primary legislation, in a collaborative process between Parliament and government, is a process that has hitherto rightly been thought to be non-justiciable. It is governed by Art IX of the Bill of Rights and is within the exclusive cognisance of Parliament. For the reasons given above, primary legislation should not be open to question on process grounds and the restatement suggested above should expressly disallow any such challenge either to the process or to steps taken in advance of Parliamentary proceedings. There should be a conclusive presumption of regularity in the case of the legislative processes in Parliament for primary legislation, and such proceedings should break any chain of causation from pre-Parliamentary missteps. No one would have doubted this until recently.*

141. *The same is, or at least ought to be true, as regards the questioning of the Parliamentary procedures that apply to secondary legislation. It is not and should not be possible for the courts to go behind statements on the face of a statutory instrument and to allow challenges e.g. to the processes of laying before Parliament and passing resolutions about it. This is all secured by Article IX of the Bill of Rights 1688, etc. - or at least has, hitherto, always been assumed to be - but this, as I have argued, should now be clarified and reiterated in a new restatement of the non-justiciability of proceedings in Parliament.*

142. The need to do this has been reinforced by the doubts that have been cast on the supposed incapacity of the courts to question the process and contents of primary legislation by dicta in the *Jackson* and the *Privacy International* cases[66], and of course by the invalidation

66. See fn. 13 above.

of a Royal Assent in the *Cherry/Miller (No. 2)* case. Moreover, the decision in the *Adams*[67] case also suggests (although it was not specifically about secondary legislation), that the courts might be prepared to look behind a Ministerial signature on an executive instrument, including presumably a piece of secondary legislation, to determine which Minister had actually addressed his or her mind to its making.

143. As I have already noted, the differences between the processes for making primary legislation and those for making secondary legislation are, in most cases, ones of form and degree, rather than of substance. In both cases the initiative for producing a proposal for the legislation lies with government. In the case of a statutory instrument, the proposal is then subject to Parliamentary scrutiny, which (with very limited exceptions) will include consideration by the Joint Committee on Statutory Instruments (or the equivalent House of Commons committee, if it covers matters within the Commons' financial privileges). That committee will consider, amongst other things, whether the instrument is *ultra vires* or represents an "unexpected or unusual use of the power"). There may also be consideration by the House of Lords Secondary Legislation Committee and the policy for the instrument, or the instrument itself, may also be the subject of consideration by a departmental select committee and maybe also by one or more other interested committees in the two Houses. There are then the formal procedures in Parliament for Parliamentary approval and subsequent veto in the case of affirmative and negative procedure instruments, respectively. The formal proceedings may, by this stage, amount to mere formalities but they should not be seen as all there is.

144. These procedures are, of course, not as lengthy or often as detailed - or indeed as obvious to outsiders - as those for primary legislation, (which involve a second reading, a committee stage, possibly a report stage and then a third reading in each House). Often statutory instruments become law without debate or discussion on the floor of either House, and Parliament's formal powers are confined to the options of acceptance or rejection, with no power of amendment - although it is by no means uncommon for an instrument to be remade or a draft resubmitted in response to comments from a technical committee. More significant, though, is that these are the procedures Parliament has chosen for these instruments itself. Parliament has the remedy if it thinks they are inadequate, or are being abused. Large parts of primary legislation too may not receive close attention during its passage through both Houses, but it would be a complete mistake to assume that they have not therefore been appropriately scrutinised.[68] The absence of debates or divisions does not imply the absence of Parliamentary influence over the contents of a legislative proposal. Moreover, even a statutory instrument that

67. *R v Adams* [2020] UKSC 19. See also Sir Stephen Laws and Professor Richard Ekins, *Mishandling the Law* (Policy Exchange, 2020).

68. See generally what I say about the function of Parliamentary scrutiny of legislation in Sir Stephen Laws, "What is Parliamentary Scrutiny of Legislation for?", chapter 2 in A Horne and A LeSueur (eds), *Parliament: Legislation and Accountability* (Hart Publishing, 2016).

is subject to the most cursory formalities in Parliament involves more scrutiny and democratic accountability than any piece of judicial law-making.

145. There is, therefore, no rational justification for treating secondary legislation differently from primary legislation when it comes to presuming the regularity of the Parliamentary processes that apply to them. The exemption from justiciability for Parliamentary proceedings is one that is, in any event, attached to Parliament, not to the maker of the instrument.

146. I am aware that the controversy around emergency statutory instruments for the Covid emergency has provided what, to some, will appear to be a topical illustration of how Parliament fails to provide adequate scrutiny for statutory instruments. However, it is becoming clear that Parliament is both willing and able to assert the need for closer scrutiny. It seems likely that the ordinary and proper working of political forces will repair the situation, at least to Parliament's own satisfaction - just as the similar controversy around the statutory instruments for EU withdrawal led to better organised scrutiny, including the introduction of a triaging system.

147. This illustrates a more general truth that contradicts the "dysfunctional politics" excuse for judicial intervention in politics. The fact that there is a political controversy about something not happening is, as often as not, a sign that a healthy political system is working towards ensuring that what it is generally thought should happen does in fact happen - rather than evidence of some permanent and irremediable failure in the system. As Jeremy Waldron has pointed out, "Machiavelli warned us, almost five hundred years ago, not to be fooled into thinking that calmness and solemnity are the mark of a good polity, and noise and conflict a symptom of political pathology".[69]

148. Outside critics of Parliament's effectiveness, who often lament the absence of evidence of surrenders by government to Parliamentary opinion, are disregarding what most parliamentarians know: that influence exercised quietly and without triumphalism about its successes is, in practice, a great deal more effective than a few high profile victories. No one can expect Parliament to engage in a level of scrutiny that it does not think necessary or to formalise channels of influence that work better when they are informal. Nor should anyone expect scrutiny for form's sake alone to serve any useful purpose.

149. Nevertheless, it would, in the current context, be wise for the government, with a view to restoring the confidence of the courts in the processes for the Parliamentary scrutiny of secondary legislation, to encourage Parliament to develop more transparent and robustly structured procedures for all statutory instruments. That would be a sensible approach to accompany any request by government to Parliament to enact a more robust presumption of

69. *The Dignity of Legislation* (1999), p 34

regularity for subordinate legislation and a rule against retrospective invalidation. Detailed proposals about Parliamentary procedure for statutory instruments are, however, outside the panel's remit, and the question whether Parliament's scrutiny of legislation is adequate must, ultimately, be a question for the electorate, not for the courts.

150. The case for a more robust presumption of regularity for secondary legislation is not confined to the Parliamentary processes, however. It also applies to other aspects of statutory instrument procedure, including (as mentioned above) the formalities for making and signing it, and also e.g. for public consultation.

151. The mischief that results from the consequences of retrospective invalidation of legislation is aggravated where the courts choose to apply the "domino effect" mentioned above, by which some failure in the process leading up to the making of an instrument can be made to poison the whole process that follows. Although it did not apply to a legislative instrument, the uncontested logic in the *Adams* case was that the detention order made by a Commissioner was tainted by the fact that the Secretary of State could not be shown to have considered the interim order that preceded it. This was despite the fact that the Commissioner, when making the detention order, had, in the discharge of a quasi-judicial role, to make an independent determination of the substance of the justification for detention.

152. The same questionable reasoning has been applied to e.g. public consultation requirements for the making of statutory instruments and even to a consultation not specifically required by legislation that was undertaken as part of the policy-formulation process leading up to the making of an instrument.[70]

153. There seems to be little prospect, these days, of anyone being able successfully to argue that a legislative requirement imposed on the process for making a statutory instrument is "directory", rather than "mandatory". The courts, it seems, are also unlikely to be willing to save the instrument on the basis of the operation of section 84 of the 2015 Act[71]. Nor it seems can the "domino effect" be avoided by the logic that would suggest that a legislator ought to be treated as having made an instrument independently of any previous failures of process and so in compliance with the obligation not to fetter the discretion exercisable in making it.

154. This unforgiving approach by the courts to the conditions provided by statute for the exercise of a discretion to make secondary legislation takes insufficient account of the fact that conditions imposed by statute as preconditions for the making of a statutory instrument are invariably imposed in a context that accepts that lawmaking is an inherently political process.

155. When prescribing the process for making a statutory instrument, Parliament is prescribing a political process and expects it to be carried out in a political way. It is a mistake for the courts to assume

70. *R (Law Society) v Lord Chancellor*, fn. 60 above. See also *R (Article 39) v Secretary of State for Education* [2020] EWCA Civ) 1577, in which the Court of Appeal clearly applied its own test rather of what would constitute an appropriate consultation even in in the absence of a duty to consult, rather than testing the reasonableness of the Secretary of State's assessment.

71. Ibid.

that the political process of deciding if the instrument is justified (and, for example of consulting on its proposed contents) can be equated with resolving a dispute fairly in a quasi-judicial way, requiring all sides to be given a fair hearing.

156. Pre-legislative consultation, as part of the process of legislating is not, in practice, required or undertaken as a fact-finding and dispute resolution process directed at ascertaining the objectively provable "best" policy – as if that were ever possible. Rather, it is part of the process of establishing how to build the widest consensus in favour of the eventual policy; and it is used as a tool of leadership in order to help build it. At times, the courts have appeared to acknowledge this in theory, while seemingly disregarding it in practice.[72]

157. The same argument can also be said to apply where a power to make a statutory instrument is subject to conditions requiring a purportedly subjective determination by a Minister (e.g. considering or being satisfied on any matter). These are supposed to be, and in practice have to be, decisions about whether the Minister is able politically to justify the judgement that he or she is required to make. They should not be treated, in the absence of a clear legislative intention to the contrary, as constituting or even including findings of fact on which the Minister is expected to arrive at objectively correct conclusions after a quasi-judicial search for the truth. Nevertheless, the opposite presumption often appears to be the mistaken default position for the courts. It is very common in practice for these pre-conditions to imply, either expressly or impliedly, only the need for a political judgement on some aspect of the issue. They are intended to express the conditions that would satisfy Parliament, as a political forum, that the exercise of the power is legitimate. The courts should afford more deference to this aspect of the statutory design of legislative powers.

158. *For these reasons, I suggest that there should be legislation specifying a presumption of regularity in respect of all pre-conditions for the making of subordinate legislation. Furthermore, I suggest that there is also a case for saying that the presumption should be conclusive in the case of procedural formalities where the decision to make the instrument is ratified by a decision of Parliament through its statutory instrument procedures - either in advance under the affirmative procedure or (I would say, but others may disagree) implicitly in retrospect by the absence of a successful prayer against it under the negative resolution procedure.*

159. The rationale for this would, of course, include the idea that the Parliamentary decision breaks the chain of causation in any application of the "domino effect" to the pre-Parliamentary processes. It also avoids any possibility that that effect could be used as a device for circumventing the prohibition on questioning proceedings in Parliament (cf *British Railways Board v Pickin*[73]).

160. *I am not, though, proposing that these issues relating to pre- Parliamentary processes for statutory instruments should be totally non-justiciable (except so*

72. See Sir Stephen Laws, "Legislation and Politics", chapter 5 in D Feldman (ed), *Law in Politics, Politics in Law* (Hart Publishing, 2011), pp. 100-102.

73. [1974] AC 765

far as questioning the Parliamentary processes themselves - as later "dominos" - is concerned). I am proposing, instead, that where the pre-Parliamentary processes are litigated after a statutory instrument has been made, the only remedy - if the presumption of regularity is displaced - should be a declaration that there was a failure in the pre-Parliamentary process leading up to the making of the instrument. In circumstances where such a declaration was given, the government should adopt a convention of re-running the process with a view to making a further instrument, which could then revoke the instrument to which the declaration relates, or amend it or ratify it in its original form.

Issues involving statutory interpretation

161. As I mention above, issues about statutory interpretation are often central to the question whether a piece of subordinate legislation is or is not *ultra vires* and so, as things stand, to the question whether that legislation can be retrospectively invalidated.
162. The proposals above for limiting the scope for the retrospective invalidation of secondary legislation would therefore go some way to remedying the impact on the judicial review jurisdiction of any defects in the courts' methodology for construing statutes and statutory instruments. However, they would not cure one element of the mistrust between the political institutions and the courts that derives from a perception in the political institutions that the courts, when construing legislation, cannot always be relied on to give effect to what legislators really intended.
163. Nor would they address the issue that arises when the courts give a meaning to a power under which a non-legislative executive action has been taken that is different from the meaning that has been used in practice for operating that power over a long period. Such cases may call into question multiple individual, past exercises of the power and the government may be exposed, by the emergence of a new, unexpected interpretation, to multiple claims reopening past cases. Even if it is not, and remedies are no longer available in past cases, government will often regard itself under a political or ethical obligation to remedy the mistakes exposed by the novel re-interpretation to have been made in past cases.[74]

Giving effect to the true intentions of the legislator

164. My forthcoming commentary in the Supreme Court Yearbook 2020 on the practice of the Supreme Court deals at length with statutory interpretation.[75]
165. It makes some important points about the methodology currently used by the courts for the purposes of judicial review. It also, importantly, demonstrates that a situation exists that I believe is a major contributor to the breakdown of trust between the courts and the political institutions.
166. As I make clear and as Lord Burrows SCJ demonstrated in the lecture to which my commentary refers, the courts (generally - and not

74. This is very often thought to be the right thing to do, although not always - as is demonstrated by the government's approach in the late 1990s (which was approved by the House of Lords) to the finding that it should not have denied widowers the benefits that legislation conferred on widows. See *Hooper v Secretary of State fir Work and Pensions* [2005] UKHL 2005. The government confined the reparation it provided to those who had been parties to litigation in the ECHR but denied it to other widowers who had made unsuccessful claims for benefit.
75. Sir Stephen Laws, "Parliamentary Sovereignty, Statutory Interpretation, and the UK Supreme Court" in D. Clarry (ed.), *The UK Supreme Court Yearbook: Volume 10* (Appellate Press, 2021, forthcoming), 1-47

just for the purposes of judicial review) are very often adopting a methodology for construing legislation that appears to assume that the legislators' intention is an abstract concept unconnected with what the legislators might have really intended (which - it is assumed - is unknowable). It appears for this purpose to be irrelevant whether the legislators are assumed to be Parliament or, in the case of secondary legislation, the Minister on whom the power to make it is conferred.

167. This approach is objectionable, I argue - not least because it involves abandoning a proper consideration of the chronological context in the interpretation of legislation. Under this methodology, what the legislators might have been expected to have known, at the time of enactment, about how the legislation being enacted was likely to be judicially construed is regarded as irrelevant.

168. It can hardly be surprising if the adoption of this approach has contributed to undermining the political institutions' trust in the judiciary. We only have to imagine how each of us would feel, individually, if the same analysis were applied to our own utterances: that they must be understood without reference to what we might really have meant by them.

169. The analysis in my Supreme Court Yearbook commentary also leads on to another point about the use of statutory interpretation in judicial review cases that is very important and relates to a theme of this submission that has already arisen in other contexts. Very often, where the courts are considering the interpretation of a power to take executive action or to make secondary legislation, they are doing so retrospectively by reference to a particular exercise of the power to take executive action or of a power exercisable under that secondary legislation.

170. The failure to have regard to the relevant context at the time of enactment - and to answer the question from that perspective - means that courts ask themselves the wrong question by eliding a step in the reasoning. They ask themselves "Did Parliament/ the legislators intend their words to cover this case, viz. the one before us?". At one level, the answer to that question always has to be "no", because the details of the case itself were necessarily unknown to the legislators, even though they may or may not have had similar cases in mind. But that logic should not be allowed to let the courts then have a free hand about how to apply the law to the case in hand.

171. The correct question is "What class of cases does the wording of the legislation intend to cover and are the facts of the case before us such as to bring it within that class?". The first way of asking the question too often leads to a conclusion that is arrived at by trying to hypothesise what the legislators would have decided if they could have postponed their law-making decision until the facts were known. The question then transforms itself into "Is it

right that the class of cases this legislation covers should include this case?" That is the completely wrong approach.

172. Courts should consider whether a law applies, not what the law should have provided. "Hard cases make bad law" and extrapolating a current case backwards to ascertain what the legislation should have said turns that aphorism into the dominant methodology for all lawmaking. Not only is it obviously wrong to think that it is possible to infer what rule should apply to the generality of cases from a single example, it is particularly likely to lead to the wrong result when the single example is atypical of the generality - which it is bound to be if it is one that has given rise to litigation. Courts should be deciding cases while acknowledging that a balance has to be struck when legislating between the need for the level of certainty that the rule of law requires and the fair resolution of disputes in individual cases. It needs to be acknowledged too that it is the legislators that have the constitutional function of determining how that balance needs to be struck, and are politically accountable for it.

Indirect discrimination and "proportionality" requirements applied to legislation

173. In this connection, the inherent differences between
    - legislating prospectively for hypothetical future circumstances, and
    - exercising executive powers or deciding disputes on the basis of agreed or proved facts in individual cases,

    means that two specific values-based tests that courts have developed for application to the second process are difficult, maybe impossible, to apply to the first, and (if they are applied) become tests of what are essentially political judgements. Indeed, the inappropriate application to legislative policy decisions of tests adopted from the standards developed by the courts for testing the fairness and lawfulness of case-by-case determinations seems to me, more generally, to be a significant contributor to the perception that judicial review is being used to regulate politics. These two tests are perhaps only particularly startling examples of a more widespread mischief.

174. The two values-based tests that cause particular problems involve the application to legislation of the concepts of "indirect discrimination" and "proportionality".

175. In one sense legislation is always inherently discriminatory. It creates rules that are applied to individuals according to whether or not they fall within a general description of a class of persons, not according to their individual characteristics. It necessarily "discriminates" between people by reference to whether or not they fall within the specified classifying description. If the classification is expressly defined by reference to a protected characteristic, then

it may seem obvious that the discrimination is wrong. But the concept of indirect discrimination, as it has been developed, creates a "Catch 22" for the legislator, particularly where the protected characteristics overlap or can include differences of degree (as in the case, say, of disablement).

176. The concept of indirect discrimination, as it has been developed by the courts, requires the effect of what is done to be that those who differ according only to protected characteristics are treated the same. But it also requires that those who differ according to protected characteristics must be treated differently to the extent that the differences require different treatment. [76] Establishing a rule that will satisfy both those tests for the possible infinite variety of permutations of future circumstances is intellectually quite impossible. Nevertheless, the courts[77] have set that task for legislators, while allowing themselves to wait to decide if it has been met until they have a case before them to illustrate one of the infinite number of permutations - and then requiring the legislator to justify the operation of the provision in that case.

177. It is true that, hitherto, they have applied a test ("manifestly without reasonable foundation") setting a high barrier for dismissing a justification if one is proffered.[78] However, that approach is not guaranteed for the future and has been questioned by some judges[79]. That leaves the legislator in a state of unavoidable uncertainty - which is incompatible with the rule of law - about what will and what will not work in future. It is damaging that it is a state of uncertainty that is bound to incentivise adherence by legislators to the status quo and to other forms of defensive legislation, which are not in the public interest.

178. Secondly, there are the risks involved in any application of the concept of proportionality[80] to legislation. That concept, if applied to legislating (in contrast with operating on how to respond, within legislatively prescribed parameters, to a specific case) would apply a test that has no basis or relevance whatsoever to the practical business of legislating. In the abstract, the concept assumes the application to a set of hypothetical circumstances of a level of perceived seriousness that then requires the legal consequences chosen to flow from those circumstances to be balanced to produce effects that are no more serious for the persons affected by them than are merited by the seriousness of the circumstances for which the provision is made.

179. This balance is indeed always a consideration to be taken into account for political purposes when making law. It is part of the process of deciding whether the proposed rule can be made acceptable, as fair, to the people who need to be persuaded to respect it. But for that purpose, both assessments of "seriousness" - and, in most cases also any decisions about how wide the range of potential consequences should be drawn - are inherently political judgements that relate

76. See *Burnip v Birmingham City Council & Anor* [2012] EWCA Civ 629; *R (on the application of MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; R *(DA & DS) v Secretary of State for Work and Pensions* [2019] UKSC 19 (the benefit cap case).

77. Not without encouragement from decisions of the European Court of Human Rights relating to Article 14 of the convention and provisions of the Equality Act 2010.

78. See the majority judgments in the benefit cap case; but c.f. the minority judgments.

79. E.g. ibid. per Lady Hale.

80. See Professor Richard Ekins, Legislating Proportionately. In G. Huscroft, B. Miller, & G. Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014), pp. 343-369; see also Professor Richard Ekins 'A Modest Proposal: prudence, proportionality and (forced) prostitution' UK Constitutional Law Association Blog, 12 February 2014.

to and are affected by striking a balance between different political priorities for government. This is necessarily so because of the hypothetical and contingent nature of the circumstances to which they are applied. How those assessments are balanced can only ever be just a part of the process of deciding the legislative policy; and they should not be allowed to determine conclusively the effect or validity of the legislation. The legislative policy will have to take account of other more important, relevant considerations. The principal one will always be whether the proposed new law will be effective to produce the outcome for which the rule is being made. A perception of fairness is an important factor in determining effectiveness, but so too are, for example, the resources available for securing enforcement, the costs of doing so and the incentives for avoidance.

180. Proportionality, when it comes to legislation, is a political issue. It cannot sensibly be made a legal one. In addition, where parameters are set for a discretion to set the legal consequences in a particular situation, the proper construction of how that discretion may be used has to assume that everything within those parameters is potentially available to be used where a situation covered by the discretion demands it. If proportionality is used as a concept capable of amending the legislation to narrow those parameters, it is being used to contradict the intentions of the legislators.

Proposals for issues relating to the courts' methodology for statutory interpretation

181. I argue in my Supreme Court Yearbook commentary that a statutory provision is necessary to remedy the mischief created by the modern, judicial approach to statutory interpretation, and so to mitigate its corrosive effect on trust by the political institutions in the judiciary. It is more difficult to decide what provision could be made that would be effective for that purpose.

182. All that seems possible to me is a statutory provision that would point the courts in a new direction. But it would work only so far as it is accepted by the courts in performance of their duty to decide cases in accordance with law. The political institutions, of course, will need to be convinced, in practice, that any provision would not become one to which the courts could pay mere lip service, while allowing it to make little (if any) practical difference to the operation of the judicial review jurisdiction. That, in relation to legislation, is what appears to have happened in the case of section 84 of the 2015 Act. Words alone will not guarantee success and it is difficult to see what would, but that is not a reason to shrink from the attempt.

183. ***On that basis, I recommend the enactment of some general principles of statutory interpretation that make clear that the objective of statutory interpretation is to arrive at the meaning that comes closest, so far as the wording allows, to what***

most plausibly was really intended by the legislators - having regard to the extent to which the legislative process involves the overt adoption by legislators of the intentions of the person proposing the legislation and to the rule that the context in which legislative provisions are to be construed is the context that existed at the time when they were made.

184. ***In addition, I think it might help to make express provision clarifying that the meaning or validity of a provision of primary or secondary legislation cannot be affected or modified, after its enactment or making, except by or under subsequent legislation - and of course subject to the jurisdiction allowing for instruments to be annulled with only prospective effect.***

185. There is a great deal more that could be said about these suggestions and in anticipated response to potential objections to them; but this submission is long enough. If the formulation is not ideal, there remains, in my submission, a very strong case for a general statement of the principles of statutory interpretation that could provide a trigger for an approach to it that is more conducive to trust between the political institutions and the courts. Again, doubts about the extent to which it would succeed should not be a reason for failing to make the attempt.

186. ***I would be in favour of such a general provision - but in anticipation of points that may be made by others and having regard to the panel's terms of reference - I would, by contrast, be very sceptical about any attempt to produce a general and supposedly limiting restatement of the principles on which judicial review is obtainable, whether in relation to legislation or more generally. That approach seems to me to be a recipe for unintended consequences and I would advise against it. It might well be seen by the political institutions and - even more dangerously by the courts - as a set of new generalisations on which the courts could, if they chose, build an even more expansive interventionist role in the conduct of government, and could claim they were doing so with the authority of Parliament. That would further undermine trust, not restore it.***

187. ***I do though suggest that some more specific legislative remedy is required for the conceptual problems caused by the application of discrimination principles to legislation and for the extent to which "proportionality" may become more frequently used for testing legislative provisions. This overlaps with matters relating to the ECHR. However, I suggest that it would nonetheless be useful for the panel to point up the difficulty and to consider if there are means of addressing it.***

188. ***One limited approach (which is, I think, practical) might be, <u>in the case of legislation,</u> to make express statutory provision (reinforcing a restated presumption of regularity for legislation) ensuring that legislators' policy decisions on issues engaging questions relating to <u>indirect</u> discrimination or proportionality are assumed to be legitimate if made in good faith in the interests of the efficient and economic management of the public service and the public finances.***

189. ***There is, in my view, a strong case for enshrining the "manifestly without reasonable foundation" test in statute to ensure, so far as possible, that it does not undergo judicial relaxation.***

Further proposals about legislation -

190. My proposals in relation to primary and secondary legislation are directed at two main issues.

191. First, there is how to prevent the courts from making determinations on legislative provisions that effectively amount themselves to legislation about cases not before the court and then to its retrospective application. I discuss in my Supreme Court Yearbook commentary why it is so difficult, both legally and politically, for the political institutions to reverse such a legislative effect produced by the judiciary, even if Parliamentary Sovereignty makes that possible in theory. I explain above why retrospective law-making by the courts is undesirable and corrosive for the capacity of the political institutions to trust the courts to keep out of politics, particularly where the courts themselves impose, in practice, some very stringent inhibitions on retrospective legislation by Parliament.

192. Secondly there are proposals for securing that the courts are better at assessing the true intentions of Parliament and more overtly are required to recognise that giving effect to those true intentions is what their constitutional duty requires.

193. *I want, finally, to propose how something might be done for the case where the courts give a meaning to primary or secondary legislation which, without invalidating any legislation, casts doubt on a history of past practice - when a judgment about a single case produces an interpretation of a provision that has a quasi-legislative and retrospective effect by undermining, in a systematic way, the previous operation of that provision.*

194. *It seems to me that, in those cases, it is important - for all the reasons I have given against retrospectively invalidating legislation - that it should be made clear that limitation periods on individuals seeking remedies for past failures in the system should be rigid, short and incapable of discretionary extension.*

195. *On the other hand, I also think a case can be made for a balancing provision to be made, for situations like that, and indeed also for situations where statutory instruments are found to have been made in excess of the powers that authorised their making but are invalidated, in accordance with my proposals, only prospectively.*

196. *I suggest a general power to enable the government, by statutory instrument, to be able to make a scheme for providing compensation to those who have suffered loss as a result of conduct that a subsequent decision of the courts suggests was not in accordance with the legislation, but for which they are denied a remedy e.g. by the operation of limitation provisions.*

197. *My reasoning is that the extent to which rectifying action or compensation is appropriate when legislation has been found to have been misapplied in good faith over a period raises political issues that need competing public interests to be balanced. The appropriate forum for that is political, not the court that reinterpreted the provision to meet the situation in a single case that came before it. The decision as to what happens in other cases should be a political one and taken after the collection and assessment of evidence about the other cases.*

198. It would need to be clear, in order to reassure the political institutions, that there should be no judicially reviewable duty to make a scheme (which would enable the judiciary to reinsert themselves into the process) and that the decisions whether to make one and its terms need to balance the public interest in ensuring that those who have suffered loss are compensated against the wider public interest. That wider public interest would need to be capable of including any effect on the public finances and on the provision of public services and the conduct of government more generally.[81] I appreciate that this suggestion will fall on stony ground if it is seen to be opening a new front which could be exploited by the courts to undermine the other proposals I have made. And I have little I can say to provide reassurance on that front.

199. ***I also recognise that the proposal may also be criticised by those who will think it gives the government too much freedom to ignore its past mistakes - or those of its predecessors. One way around this might be to set up an independent but non-judicial body with the remit to consider mistakes emerging in litigation that are found to have been made in the administration of the law by government, and to make proposals to government about how to rectify them. It is a role that would overlap to some extent with ombudsman jurisdictions and more work would be needed to work out the detail. Anybody given the task of making such proposals would need to be given a remit that identifies the factors (including competing public and individual interests) that need to be balanced out.***

Concluding thoughts on issues relating to legislation

200. I am conscious that my analysis so far of the operation of judicial review in relation to legislation has taken at face value the judicial justification for its intervention in issues relating to legislation: that it is the unavoidable consequence of the discharge of their function to resolve disputes in individual cases in accordance with the law as it now stands.

201. I have assumed that the tensions with the political institutions are the product of genuine misunderstandings about what legislators intend when they legislate and about how politics works. I have assumed that it is only adherence to long-established legal rules that confines the courts to granting retrospective remedies that are capable of having disproportionately adverse effects on government, result in injustice and unfairness and give quasi-legislative effect to decisions made in individual cases.

202. I assume that it cannot be disputed that - for the reasons explained in my Supreme Court Yearbook commentary - there are considerable, sometimes insurmountable, political and practical obstacles to the use by the political institutions of the theoretical licence provided by Parliamentary Sovereignty to rectify matters when things go awry in this way. But I assume that it is also accepted that Parliament has, and should have, that right, and needs to be put back in a

81. There is also a strong case for endorsing more generally a judicial approach to executive decision-making that better recognises that budgetary considerations are a necessary and important political factor that does in fact affect executive decision-making. See the majority *in R v Gloucestershire County Council (ex parte Barry)* [1997] AC 584 & *McDonald, R (on the application of) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33; *Oakley v Birmingham City Council* [2000] UKHL 59 per Lord Hoffmann. These cases do tend to show that this is not a new claim for more executive or Parliamentary power. It is an assertion that more respect should be paid to an established line of judicial thinking on the line between judicial and political power. Of course legislators may confer duties that should be construed as requiring budgetary considerations to be ignored, but more deference is owed to the fact that most discretions are conferred in the realistic expectation that those exercising them will always be operating within financial constraints - and they should be construed accordingly.

position where its freedom to act in accordance with that doctrine is incapable of being thwarted, in practice, by the way the courts choose to exercise their jurisdiction.

203. Accordingly, my proposed solutions have been to legislate in various ways to mitigate the risk of misunderstandings about what legislators intend and to remove some of the more unacceptable consequences of the remedies to which the courts currently seem to be confined.

204. However, the mistrust felt by the political institutions towards the courts produces other possible and maybe exaggerated explanations for the tensions between them; and those cannot just be ignored. They need to be addressed because, even if they are mistaken (as I would imagine they are, at least so far as most judges are concerned), it is obvious that they may have contributed to the growth of mistrust. Remedies to provide reassurance and remove distrust will only work if they are seen to address perceptions, as well as any technical defects in the system.

205. To some, it may seem that the courts have developed a vision of their constitutional role that requires them to be regulators of the policy-making process in ways that go beyond determining whether policy is made and implemented in accordance with the constraints that legislators actually intend to impose. There are fundamental objections of principle to the courts having a role in policy-making; but some certainly suspect that they have sought to claim such a role and that suspicion needs to be dispelled.

206. Elected politicians can only be properly and democratically accountable for policy decisions to the electorate if they themselves are wholly responsible for the policies they make, and know they are. If they can share that responsibility with the courts, or think they must, the courts are drawn into politics, while lacking any political accountability for the respects in which politicians have ceased to be accountable for matters the law has put beyond political control.

207. The notion that policy-making is subject to the application of overriding legal principles for the application of which no-one is politically accountable moves all politics into the courts. It is a guaranteed recipe for the courts to become a forum for "politics by other means". It converts all political arguments into questions of right and wrong, to which the law will - indeed must - give authoritative answers one way or the other. The incentive to collaborate to achieve a peaceful consensus or compromise is destroyed by the prospect that a court may decide in your favour and serve up total victory in circumstances where compromise or consensus-building would provide only a qualified success.

208. I believe the proposals I have made would not only relieve the technical tensions I have described, but also reduce the risk that this more pessimistic suspicion (viz. that courts are actually seeking to claim a more prominent role in politics) will continue to feed

mistrust. The proposals would reduce the incentives to seek total victory in the courts in political conflicts.

209. They would reduce, and hopefully eliminate, the use of the courts for politics by other means, because they would ensure that litigation, as it should be, is for the litigant alone and not a quasi-legislative process that can be embarked on for the benefit of others in future hypothetical situations. They would reduce the improper inhibitions on the exercise of legislative power in relation to those situations by those in whom it is vested. They would also put a break on the over-dominant effect on policy-making of the retrospective extrapolation of atypical "hard cases".

D. Executive Powers for case by case determination

210. I turn now briefly to the application of the judicial review jurisdiction, and "administrative law", in the cases for which the jurisdiction originally developed – that is executive decision-making in individual cases.

211. This is not an area in which I have any special expertise - except so far as it has a "blow back" effect on the major constitutional issues and issues relating to legislation that I have already discussed above. Those issues apart, does administrative law in its operation in individual cases have any relevance to what I see as the major mischief in need of a remedy - the diminishing level of trust between the courts and the political institutions? In many ways, I think it does not, and I am broadly happy to leave it to others to make submissions to the panel about that side of things.

212. However, it is important to recognise that the "blow back" on the constitutional and legislative issues is a very big exception. The suggestions I have made in that connection would have a significant impact on the operation of the judicial review jurisdiction in individual cases - because individual cases are the route by which the issues about legislation arrive in the courts.

213. ***So, it seems to me that a reform focussed on the constitutional and legislative issues would go a very long way to inhibiting the use of the law for "politics by other means", which I see as a major source of the mischief that needs a remedy. My view is that those suggestions would be more effective than changes to the rules of "standing".*** They would remove the incentive to establish "standing" in the first place from those with no real interest in the case in question - apart from the potential (which would be removed) for a case to produce a quasi-legislative effect. Changes to rules about standing would only attack the problem indirectly and would be unlikely to work so long as the remedies available in judicial review proceedings give those with only tenuous interests in the case in question an interest in seeking them.

214. ***On the other hand, the reforms I have suggested would not totally eliminate the use of law for politics by other means. It has to be recognised that tackling the constitutional and legislative issues does not exhaust the areas in which the administrative law is in practice invoked for essentially political ends. The judgement that I think needs to be made by the panel is how much more needs to be done to take the courts out of politics, in order to restore the trust of the***

political institutions in the courts and to protect the courts from further damage to their reputation for impartiality.

215. The use of law for politics by other means seems to me to manifest itself, and be objectionable, mainly in two specific areas. The first is where it seeks to challenge the fundamentally political function of making policy for the future and implementing it to produce change in society. The second is where it is used as a tool for the obstruction of political decisions for change with delays that, in practice, are often sufficient to thwart it, even if the litigation is unsuccessful.

216. Much policy-making and political change requires legislation, but not all of it. In addition political change may also, in practice, be initiated and implemented without the constraints of a detailed legislative framework, but through the ways in which the public sector is managed or the ways in which public money is spent or major infrastructure projects authorised and carried out. Political change of this sort gives rise to issues that are comparable to those that arise in the case of legislation, but without that factor providing an easy way of identifying them. As I have explained elsewhere, legislation is usually used only as a tool for implementing the aspects of a policy project that do not already have legal cover.[82]

217. Comparable issues also arise where policy-making and the management of public expenditure and major projects are delegated, e.g. to local government or to other bodies at arm's length from government. A particular example of a delegation of policy-making can arise where a regulator or enforcement authority, as is very common, is given a quasi-managerial, rather than a quasi-judicial role, in relation to the regulation of a business or industrial sector or in relation to the enforcement of the law.

218. These cases all require consideration as to the proper test to be applied on an application for judicial review, and of what can be done to discourage the misuse of the opportunity to produce a delay capable of thwarting it, maybe even if it is ultimately unsuccessful. There is also a perception that these sorts of decisions are frequently subjected in judicial review proceedings to a "correctness" test, or at least to a standard of justification that is more appropriate for a quasi-judicial dispute resolution process than for decisions of the sort they are, which may be managerial or about enforcement.

219. *Some of the suggestions I have made for legislation about a presumption of regularity and about retrospective remedies - and about disapplying the domino effect - could be usefully applied specifically to some other categories of decision. I have no suggestions that are any more specific than those I have already made about what those categories should be. I suspect though that a more nuanced and sophisticated approach is required in the case of individual decision-making on a case by case basis whenever what is needed, when exercising an executive discretion is to strike the right balance between the interests of the individual and the public purpose for which legislators intended the discretion to be used.*

82. See Sir Stephen Laws, "Giving effect to Policy in Legislation: How to avoid missing the point" (2011) 32 *Statute Law Review* 1, a modified version of which was published in *The Loophole* (2011).

220. The Court of Appeal judgment *Heathrow case*[83] cast doubt on whether the legislation intended to protect national infrastructure decisions from prolonged and disruptive delay will work entirely as it was supposed to. The legislation was intended to provide political finality to major national infrastructure decisions. The Court of Appeal left the door open, via an operation of the domino principle, to challenges to the grounds for the Ministerial decisions subsequently approved by Parliament - whatever the grounds on which Parliament subsequently gave its approval.[84]

221. That legislation may need to be reinforced by something along the lines I have suggested for the pre-Parliamentary processes of secondary legislation. That case, however, may also point the way to dealing with non-legislative decisions on major political issues that risk obstruction via political litigation – viz to provide for their Parliamentary endorsement and for that to produce finality so far as decision-making is concerned.

222. If what I have suggested is implemented for secondary legislation it would be available - where Parliament so decides and there is the political case for doing so - to be applied to other forms of Parliamentary endorsement of policy decisions with significant widespread effects about which securing finality in the decision-making is essential. In that way the use of law for politics so as to frustrate major changes for which there is a democratic mandate could be legitimately reduced.

223. *In the light of the way it appears, as mentioned above, to have been construed in a restrictive way, there may also well be a case, more generally, for reversing the burden of proof for the test created by section 84 of the 2015 Act, and for casting it on the applicant, so that it becomes more effective for deterring the use of trivial missteps as the basis for judicial review. Modifying or glossing the public interest test in that case is another possibility for more accurately producing what it seems likely was really the intended impact of that section.*

83. *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214.

84. The subsequent Supreme Court decision in that case - *R (Friends of the Earth) v Heathrow Airport [2020] UKSC 52* (which was handed down after this submission had been made to the Independent Review of Administrative Law) does not, unfortunately, completely shut that door: the Supreme Court disagreeing with the Court of Appeal only on whether, in the case in question, the grounds for invalidating the "Airports National Policy Statement" had been made out, while still leaving open the question whether a national policy statement approved by Parliament under the infrastructure planning legislation could be invalidated on the grounds of the Secretary of State having failed to consider a particular matter in preparing the statement submitted to Parliament (see para 134 of the judgment). However, it is fair to say that the deference to and better understanding of the process of government policy-making manifested by the Supreme Court in that case (albeit, and regrettably so far as restoring trust is concerned, only in a context in which the government was not itself defending what was done) is very much to be welcomed (see para. 106) - as also, incidentally, and particularly in current circumstances, is the reinforcement of the orthodox "dualist" approach to international law in UK jurisprudence (see para 108).

E. Final

224. The panel's terms of reference mean that the focus of its consideration of the problems of judicial review has to be on changes to the ways the courts operate and on restoring the faith of the political institutions in the courts. There is another reciprocal and perhaps more difficult question about how trust in the political institutions can be restored to the courts. I have concentrated my suggestions on the matters within the panel's remit; but in closing I want to re-emphasise that, in implementing them, the government would be well advised to seek ways to help restore trust in the opposite direction as well.

225. Part of what is required is for there to be a clear recognition by the political institutions of the important, but, limited, role of the courts in fairly settling disputes between individuals and between individuals and government in accordance with existing law. In addition, government also needs to commit itself to "owning" its decisions on matters that cannot and should not be answered by the law. It needs to accept that it is responsible for those decisions and demonstrate that it does not expect the courts to answer them on its behalf but, instead, fully accepts its political accountability to Parliament in respect of them.

226. I recently gave evidence to the House of Lords Constitution Committee on the controversial provisions in the Government's UK Internal Market Bill[85]. In the course of my evidence I explained that, as a Parliamentary Counsel, I was often in the position that does not coincide with the experience of other government lawyers. I was never able to say to Ministers who ask if they can do something that they cannot do it because it is illegal. Parliamentary Sovereignty would make that an untrue answer to any question about what can be legislated for.

227. I always accepted that "speaking truth to power", for me, meant accepting that I had to say that something was legally possible - as it always was - even if the consequence of doing so would be a more difficult discussion about whether it was wise or from a constitutional point of view appropriate to do it - a discussion in which my qualification as the lawyer in the room no longer gave me the right to be deferred to. The demands of professional and intellectual integrity required me to reject the temptation to use my legal ingenuity to find a rule that would make it illegal to do something I might think it unwise or inappropriate to do - however

85. Oral Evidence to the House of Lords Select Committee on the Constitution Corrected oral evidence: UK Internal Market Bill, Virtual meeting with examination of witnesses Sir Franklin Berman, Professor Mark Elliott and Sir Stephen Laws, 23 September 2020.

welcome advice to that effect might be.

228. There was also a pragmatic reason for resisting what was sometimes a temptation to do that. Resisting it was essential to maintaining the trust of Ministers, and so to securing that any advice from me on what was wise and appropriate would be listened to - even if I could not guarantee that it would be deferred to.

229. It is no doubt this background that makes me intensely unsympathetic to the approach of the courts - particularly in the EU withdrawal cases, but also more widely - when they develop new legal principles for regulating government actions that might well have been unwise but would always previously have been regarded as lawful. Just as I thought the approach I needed to adopt was the right one for building trust, I consider the different approach of the courts to have been a major contributor (if perhaps not the only one) to the breakdown of trust between the political institutions and the judiciary. The mistrust, as is its way, has spilled over beyond the immediate circumstances that gave rise to it - and so the remedies that are now needed also have to go beyond those circumstances.

230. The proposals in this submission are, it seems to me, relatively modest proposals that would help to restore lost trust, something I strongly believe to be essential to the maintenance of effective, democratic, and stable national governance.

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