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Submission to the Independent Review of Administrative Law

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Introduction

1. This submission is made on behalf of Policy Exchange's Judicial Power Project and is intended to complement related submissions made by my colleagues Sir Stephen Laws, Christopher Forsyth and Jason Varuhas. Since its foundation, a little over five years ago, Policy Exchange's Judicial Power Project has argued that the inflation of judicial power unsettles the balance of our constitution and threatens to compromise parliamentary democracy, the rule of law, and effective government. While the inflation has in part been a function of human rights law and European integration, the Project has consistently argued that it also arises in the context of "ordinary" judicial review and statutory interpretation – a number of high-profile cases decided between 2015 and 2020 confirm the point.

2. The Panel should affirm that Parliament is constitutionally entitled to evaluate the law of judicial review and to intervene to correct it. In recent years, judicial review has been extended widely and deployed aggressively – there are strong reasons to legislate to address its reach, restoring the principled limits that earlier generations of judges recognised. This submission outlines legislation that would help realise this end. Legislation to this effect is almost certain to be unfairly attacked as a breach of the rule of law, and courts will be invited to misinterpret the legislation to rob it of effect. This predictable but unreasonable reaction itself confirms the need to legislate, and the imperative of legislating carefully.

Judicial initiative and parliamentary responsibility

3. It is true and important that the expansion of judicial power in our constitution is in part a function of Parliament's legislative choices, including its decision to enact the European Communities Act 1972 and the Human Rights Act 1998. However, the same cannot be said of the expansion or intensification of "ordinary" judicial review in recent decades, which has been driven by the courts. In a parliamentary democracy, it must be legitimate for government and Parliament, first, to question the way in which our judges have developed the law of judicial review and the way they have interpreted statutory powers, and second, to enact legislation to correct, reverse, or otherwise change the law the judges have made. Whether any particular legislative intervention is justified is of course open to question. However, the Panel should accept neither that all that courts are now doing is upholding the law that Parliament has enacted nor that it is somehow constitutionally improper for Parliament to legislate to change the grounds on which courts may act.

4. That it is legitimate for Parliament to intervene in this domain was acknowledged, in effect, by Lord Reed, the President of the Supreme Court in, evidence to the Constitution Committee of the House of Lords on 4 March this year, when he said (Q5):

> Clearly, the subjects of judicial review and human rights are much in the air at the moment and they are perfectly proper matters for the Government and Parliament to consider.

5. The Lord Chief Justice of England and Wales went further, in answer to a question from Owen Bowcott of the Guardian at a press conference held on 28 February this year:

> To the extent that any body – that is body or committee, or commission, whatever it is called – comes along to look at the parameters of judicial review, I think there are some quite important founding principles. Of course, the rule of law and the independence of the judiciary underpin everything, but judicial review is something which is an entirely common law construct. So again, no law lectures but in the mid-60s, long before my time I hasten to add, people did not really think that we had a system of administrative law in this country.
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> Then there was a handful of decisions in the mid-60s and the 70s and the very early 80s which established the overall scheme of judicial review and thereafter, it has evolved and developed as a result of judicial decision making, and in that, it is no different from the early development of commercial and insurance law in the 18th Century of criminal law before and after the 18th Century and things like negligence and nuisance and so on.
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> Now as it happens, parliament has never yet legislated on any substantive issue of public law, of judicial review. It has intervened occasionally in procedural matters, and so I think, this is why I talk about calm interaction, one has to understand that in a parliamentary democracy where parliament is sovereign, it is entitled to and it is, from time to time, entirely appropriate that Parliament should look at these issues, and so I do not think it is something that people should get hysterical about to be quite honest.

6. While Lord Burnett arguably overstates the extent to which judicial review is a modern phenomenon or a common law construct, he is obviously right to say that the law of judicial review has changed significantly in recent decades and that Parliament must be free to change this law if it wishes. He is also right that in reasoning about whether and how to change the law of judicial review, the rule of law and judicial independence are fundamental considerations. The problem which has arisen, both in some judicial review cases but also in how many jurists react to the prospect of legislation responding to that case law, is that the rule of law is much misunderstood. It does not require that every public action should be subject to judicial review, let alone review on every ground.[1] Nor does the rule of law somehow entitle judges to exercise a supervisory jurisdiction regardless of the terms of the statutes Parliament enacts: this would substitute the rule of courts for the rule of law.[2]

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[1] Timothy Endicott, "The Reason of the Law" (2003) 48 *American Journal of Jurisprudence* 103

[2] *R (Evans) v Attorney General* [2015] UKSC 21 at [154], per Lord Hughes (dissenting): "The rule of law is of the first importance. But it is an integral part of the rule of law that courts give effect to Parliamentary intention. The rule of law is not the same as a rule that courts must always prevail, no matter what the statute says." See also Richard Ekins and Christopher Forsyth, *Judging the Public Interest: The rule of law vs. the rule of courts* (Policy Exchange, 2015).

7. It is clear that the reach and intensity of judicial review has expanded considerably in recent decades. Consider the distance travelled from these opening words of the 1973 edition of De Smith's *Judicial Review of Administrative Action*:

> Judicial review of administrative action is inevitably sporadic and peripheral. The administrative process is not, and cannot be, a succession of justiciable controversies. Public authorities are set up to govern and administer, and if their every act or decision were to be reviewable on unrestricted grounds by an independent judicial body the business of administration could be brought to a standstill. The prospect of judicial relief cannot be held out to every person whose interests may be adversely affected by administrative action.[3]

In 2008, Professor Mike Taggart noted that this passage had been "quietly dropped" from subsequent editions of the text.[4]

8. In January 2018, Sir Patrick Elias QC, a Lord Justice of Appeal from 2009-2017, noted the extent to which courts have developed the law of judicial review and said that this judicial lawmaking was arguably illegitimate.[5] Having denied that it was fair to criticise judges for usurping a legislative role in relation to the common law in general, he went on to say:

> Where I think a case can be made for asserting that the courts are at least at risk of expanding their power illegitimately is in the development of the common law principles of judicial review. In part as a consequence of the impact of Convention jurisprudence, the courts have virtually adopted the concept of proportionality as a principle of the common law which might possibly be engaged even where no human rights are engaged.[6] This is part of a general trend to expand the circumstances in which the courts are willing to review the substantive merits of the decision of a public body, with the degree of scrutiny depending upon the nature of the decision in question. To the extent that the principle of proportionality, at least as developed by the courts, is itself an inappropriate tool for judges to employ in the Convention context, its incorporation as a general doctrine of the common law would likewise risk improper interference with executive and legislative decisions.

I return to the question of proportionality and substantive review below.

9. It is clear that the law of judicial review has been much extended across the last few decades, as Supreme Court judges routinely observe in extra-judicial speeches, with many speaking about an "explosion in judicial review" across the last half century.[7] Addressing a Malaysian audience in 2015, Lord Dyson MR said: "There is no doubt that in my country in the past few decades there has been a massive increase in the number of applications for judicial review."[8] Some commentators argue that concerns about the rise of judicial review,

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[3] SA De Smith, *Judicial Review of Administrative Action* (Stevens, 1973), 3

[4] Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36(1) *Federal Law Review* 1, 3; see further Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017)

[5] Sir Patrick Elias QC, "Comment" in Richard Ekins (ed.), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018), 67, 72-73

[6] See *Pham v Secretary of State for the Home Department* [2015] UKSC 19; [2015] 1 WLR 1591 and *Kennedy v Information Commissioner* [2014] UKSC 20; [2015] AC 455

[7] See speeches by Lady Hale, Lord Neuberger and Lord Clarke each of whom use this phrase.

[8] "Is Judicial Review a Threat to Democracy?" The Sultan Azlan Shah Lecture, 2 December 2015 at pp.2-3

including concerns that it is at times politics by another means, are misplaced in view of the number of judicial review applications, which may now be stable or falling (and/or arise overwhelmingly in the immigration context), and the high cost of litigation, which doubtless deters many claimants. The latter claim is important but risks missing the point that the modern law of judicial review increasingly involves and invites judicial intervention in matters that ought not to be the subject of legal proceedings. Only some judicial review proceedings involve an unconstitutional interference in government. This is a reason to legislate in a way that limits the extension of judicial review into domains or to decisions that should not be the subject of legal proceedings, or should not be subject to challenge on certain grounds; it is not a reason to conclude that there is no problem.

10. Those who argue that there is no need for corrective legislation often take aim at a straw man, defending the merits of judicial review at large or in principle. However, in truth there is no contradiction in affirming that the institution of judicial review makes an indispensable contribution to our constitutional arrangements – and therefore ought not lightly to be limited – *and* in concluding that the law of judicial review as it has developed in some ways or been deployed in some contexts invites criticism and correction.

Doctrinal developments and intellectual foundations

11. This section briefly notes some main trends in the development of the modern law and practice of judicial review, as well as related intellectual and political trends, that have encouraged or accelerated this doctrinal development and have helped in some cases to transform litigation into "politics by another means", to use Lord Justice Singh's pithy phrase.[9] The section that follows considers a number of problematic high-profile cases.

12. Relevant trends in doctrine include:

    a. The courts have held that all errors of law are jurisdictional and thus in effect presume that Parliament never intends to empower a decision-maker, including an inferior judicial body, to make an error of law. It follows that any error of law is open to challenge on judicial review and will invalidate the decision, for courts do not defer on questions of law. As is well known, the proposition that all errors of law are jurisdictional was not established in *Anisminic* itself,[10] but by its reception and extension in subsequent cases. The proposition is qualified in practice by the exceptions set out in *Page* and by the Supreme Court's pragmatic (unprincipled) distinction between questions of law and questions of fact in *Jones*.[11]
    b. The courts have intensified substantive review,[12] with judges willing in many cases to second-guess the public body's exercise of discretion, applying a standard of review

[9] "Judicial review is not an appeal against governmental decisions on their merits. The wisdom of governmental policy is not a matter for the courts and, in a democratic society, must be a matter for the elected government alone … Judicial review is not, and should not be regarded as, politics by another means": *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) at [326], per Singh LJ and Carr J, quoted approvingly in *R (Campaign Against Arms Trade) v The Secretary of State for International Trade* [2019] EWCA Civ 1020 at [54] and *R (Wilson) v Prime Minister* [2019] EWCA Civ 304 at [56].

[10] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL)

[11] *R. v. Lord Chancellor ex parte Page* [1993] AC 682 and *Jones v First Tier Tribunal* [2013] UKSC 19

[12] Lord Dyson MR, "Is Judicial Review a Threat to Democracy?" The Sultan Azlan Shah Lecture, 2 December 2015 at pp.2-3: "There is no doubt that in my country in the past few decades there has been a massive

that is at times close to correctness and/or which requires the court to reconsider and challenge each step in the public body's reasoning.

c. In a number of cases, courts have begun openly and directly to question (high) policy and to entertaining proceedings that are designed to uncover and quash perceived systemic unfairness, even when no claimant before the court is able to establish that he or she (or it) has been wrongly treated.
d. The principle of legality is increasingly deployed to narrow artificially the scope of statutory powers, such that the public body is held to be acting ultra vires, notwithstanding that the reading of the statute cannot be squared with legislative intent. That is, the principle is deployed not as a sound presumption that Parliament is unlikely to intend to displace existing constitutional principle, but as a device to rationalise ignoring what Parliament truly and clearly intended.
e. The courts at times display a legislative disposition, understanding themselves to be free to calibrate the law of judicial review in order to improve public administration or better handle their caseload. The disposition stresses the pragmatism of judicial reasoning, in contrast to limits required by constitutional principle, and results in assertions that courts may freely choose the standard of review.
f. In a number of cases, as Sir Patrick Elias QC noted above, the courts have come close to introducing proportionality as a general ground of review, or have declared that in a suitable future case they will do so.[13] Relatedly, the courts have increasingly begun to conjure up common law rights, which then serve as a focal point for more intense review. The methodology by which courts assert common law rights is not clear and their relationship to convention rights is likewise uncertain.
g. It is obvious that there are fewer and fewer domains or decisions that courts are willing to recognise to be non-justiciable. The historic limitations on judicial review of the prerogative, which were insisted upon in *GCHQ*,[14] have been cast aside. It is plausible, as Sir Patrick noted and as others have argued,[15] that the expansion of what is thought to be justiciable owes much to the changes in judicial culture wrought by the Human Rights Act 1998, which have required judges to consider questions they would otherwise have thought not suitable for adjudication.

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increase in the number of applications for judicial review. There have been several reasons for this. These include first that, as I shall explain, the standard of review has been relaxed. This may in part be because our judges are no longer as executive-minded as they once were" (emphasis added). And at p.5: "The edges of 'irrationality' have, however, undoubtedly been softened during the past 30 years and a far more nuanced approach has emerged. This has not been the direct result of any legislation. It has been the product of judicial activity in developing the common law."

[13] For criticism, see Sir Philip Sales, "Rationality, Proportionality and the Development of the Law" (2013) 129 LQR 223. Note also *Browne v The Parole Board of England & Wales* [2018] EWCA Civ 2024 at [58], where Lord Justice Singh concludes "these authorities spell out the simple proposition that, for now at any rate, the common law test for judicial review is based on the underlying principle of rationality. Whilst there is some support for adopting a proportionality test in particular cases concerned with fundamental rights (see for example *Kennedy*), there is a recognition that a more widespread change would require a major review by the Supreme Court and the necessary overruling of *Brind* and *Smith*" (emphasis added).

[14] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9; for discussion, see John Finnis, *The Law of the Constitution Before the Court: Supplementary Notes on* The unconstitutionality of the Supreme Court's prorogation judgment (Policy Exchange, 2020), pp.14-17.

[15] Lord Neuberger, "The Supreme Court and the Rule of Law", The Conkerton Lecture 2014, Liverpool Law Society, 9 October 2014 at [26]: "In my view, and in agreement with Dame Sian, there is a strong case for JR and Convention review coalescing or at least cross-fertilising, and I think that that is starting almost imperceptibly to happen in the UK." See also Ekins and Forsyth, *Judging the Public Interest*, p.23 and Lord Justice Elias, "Are Judges Becoming Too Political?" (2014) 3 *Cambridge Journal of International and Comparative Law* 1, 25.

Relatedly, there has been a discernible increase in judicial self-confidence, with judges less likely to take the court to be incompetent to consider adequately questions of policy.

h. There has been a notable increase in judicial consideration of complex, contested evidence, including in the context of challenges to systemic fairness and wide policy. Relatedly, initiating judicial proceedings is a means to generate disclosure from the government, which, taken together with the demise of non-justiciability, includes problematic disclosure of records of government deliberations.[16] This encourages more intensive substantive review and more extensive judicial consideration (evaluation) of the adequacy of the public body's reasoning.
i. In many complex cases, especially those that are politically salient, the court permits a range of interveners to address the court, resulting in an imbalance in arms and encouraging the perception that the case is more a commission of inquiry or a select committee than an adjudication of a discrete legal challenge.[17]

13. The intellectual foundations of the expansion and intensification of judicial review include:

a. A loss of confidence in the competence of other (political) institutions and in the political process more widely, and hence a rise in judicial self-confidence.[18] It is clear that at least some judges take parliamentary accountability largely to be inadequate and/or view Parliament's accountability to the people as a reason to view enactments as a standing threat to human rights and the rule of law. Judicial review has been expanded in some cases in an attempt to compensate for the presumed limitations of parliamentary accountability and statutes are read down in order to make parliamentary democracy "safe" for the rule of law.
b. Adoption of a new idea of the rule of law,[19] in which it is assumed that courts must exercise general responsibility to correct abuses of power on the part of other institutions and in which the rule of law is a principle justifying and warranting the

[16] Lord Sumption, "Foreign Affairs in the English Courts since 9/11", Lecture at the Department of Government, London School of Economics, 14 May 2012 at p.2: "the growing emphasis in English public law on transparency, combined with the wide scope of the English rules of disclosure in litigation and the diminishing role of public interest immunity has exposed the workings of government in an area of human activity which has for centuries depended on the confidentiality of communications and the secrecy of intelligence-gathering operations."

[17] Ibid at pp.2-3: "Just about any one can apply for judicial review if he has either a personal or an institutional concern which the outcome. This approach necessarily exposes the courts to a great deal of litigation which is essentially politics by other means. It opens the government to challenge in the courts by pressure groups, often concerned with a single issue, which have no interest in the process of accommodation between opposing interests and values that is fundamental to the ability of nations to live in peace."

[18] See Jeffrey Goldsworthy, "Losing faith in democracy: Why judicial supremacy is rising and what to do about it" (2015) 59(5) *Quadrant* 9-17. Jonathan Sumption QC, "Judicial and Political Decision-Making: The Uncertain Boundary" [2011] *Judicial Review* 301, 311: "The real reason for the growing significance of judicial review since the 1960s seems to me to have been, not the growing power of the executive, but the declining public reputation of Parliament and a diminishing respect for the political process generally. The classic Diceyan analysis of the sovereignty of Parliament, according to which power filtered up from the people through their representatives in the House of Commons to determine the policies and fortunes of ministers, held the field for many years. But over the past half-century its influence has declined, and in the process the political significance of judicial review has increased. There is a widespread perception that Parliament is no longer capable of holding ministers or officials to account, because party discipline enables ministers with a majority in the House of Commons to control it." Sumption goes on to note (critically) Lord Steyn's jeremiad about executive dominance of Parliament in *Jackson v Attorney General* [2006] 1 AC 262 at [71]; for further criticism, see Richard Ekins, "Legislative Freedom in the United Kingdom" (2017) 133 LQR 582, 602-603.

[19] For criticism, see Richard Ekins, "Judicial Supremacy and the Rule of Law" (2003) 119 LQR 127.

extension of judicial review, whatever the cost in terms of legal certainty. Thus, limitations on the scope of judicial review, whether on traditional grounds of non-justiciability or in the context of a particular (otherwise clear) legislative ouster, are viewed with suspicion and are to be overcome or gradually displaced.

c. Scepticism about parliamentary sovereignty, both in terms of the security of its foundations in UK law (which are assumed to be open to judicial revision, especially in the context of limitations on judicial review) and in terms of its compatibility with the rule of law.[20] For some jurists, the rule of law and parliamentary sovereignty are framed as rival principles, which judges are to take into account in adjudicating disputes, and which may be reconciled by imposing limits on Parliament.[21] That is, the rule of law is asserted to be a master principle that justifies judges in rejecting parliamentary sovereignty and in breaching, or even quashing, statute.
d. The assumption that executive power is on the rise,[22] that Parliament is largely helpless in resisting the rise, and that the historic rights of Parliament are being overridden by the executive, a problem which is taken to be worsening as the UK leaves the EU. On this view, the Supreme Court must serve as the guardian of the constitution,[23] intervening to check the government's supposed misuse of public powers and helping to vindicate the rights of a Parliament that cannot defend itself.
e. In the particular context of Brexit, tempers have run high and political opposition to government decisions in this context has at times manifested itself in litigation. This includes truly outlandish claims that supply and confidence agreements amount to bribery, that legislation authorising the Prime Minister to trigger Article 50 was insufficiently specific to be effective, and that the referendum was procured by fraud and its result should be undone by court order. The courts have seen off these extravagant challenges,[24] but they reveal the increasing hold on the imagination of many lawyers of a narrative in which judicial review is a means of political participation or protest. They also reveal the significance of new models of litigation funding, viz. crowd-funding, in which the public are invited to contribute to overtly political litigation, the legal merits of which may be extremely weak.

14. The developments in doctrine briefly noted above constitute a far-reaching transformation in the law and practice of judicial review, which go well beyond the bounds of judicial review as it was understood and affirmed by earlier generations of judges. The transformation

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[20] For criticism, see ibid, Richard Ekins, "Legislative Freedom in the United Kingdom" (2017) 133 LQR 582, and Tom Bingham, *The Rule of Law* (Penguin, 2011), chapter 12.

[21] Lord Hope, "Is the Rule of Law now the Sovereign Principle?" in Rick Rawlings et al (eds.), *Sovereignty and the Law* (OUP, 2013), 89; cf. Ekins, "Legislative Freedom in the United Kingdom".

[22] Relatedly, some senior judges have suggested, extra-judicially, that the expansion of judicial review is attributable in part to the changing nature of the state, in which the executive now undertakes ever more responsibilities. See Lord Neuberger, n15 above at [20] and Lord Philips, The Gresham Special Lecture, Lincoln's Inn, 8 June 2010. Cf. Jonathan Sumption, n18 above at 311: "The traditional explanation, which will be found in Wade's book as well as in other standard textbooks, is that it [that is: "the age of judicial activism that followed" the 1940s and 1950s] was provoked by the rapid expansion in the powers of the executive. I do not myself think that this is a sufficient explanation. The powers of the executive have been expanding for more than two centuries, and the implications have always been well understood. Chief Justice Hewart's celebrated book, *The New Despotism*, was published in 1929. The real reason for the growing significance of judicial review since the 1960s seems to me to have been, not the growing power of the executive, but the declining public reputation of Parliament and a diminishing respect for the political process generally."

[23] Cf. John Finnis, "Rejoinder" and "Appendix: Guardians of the Constitution" in Richard Ekins, *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018), pp.113, 129-131.

[24] *R (Webster) v Secretary of State for Exiting the European Union* [2018] EWHC 1543 (Admin), *R (Wilson) v Prime Minister* [2019] EWCA Civ 304.

remains incomplete, which is to say that the judicial reticence about considering challenges to the merits of policy has certainly not entirely disappeared and in many judicial review cases the courts interpret statutes faithfully and aim not to take over the public body's decision.[25] In controversial appellate judgments, senior judges often dissent and make clear why the majority has wrongly exceeded the court's role.[26] However, the direction of travel is clear and the ground is set for further inroads to be made into traditional grounds of non-justiciability and the introduction of still more demanding grounds of review, such as proportionality, as well as the proliferation of common law rights. The intellectual foundations for such extension are weak – they rely on misunderstanding of the political constitution and the rule of law – but they are likely to drive further expansion because they have a hold on the imagination of some judges and many (academic) lawyers. The narrative that has been ascendant throughout the Brexit years remains, and if anything is growing louder, viz. that only the courts can defend "us" from the executive (or electorate).

15. The developing law of judicial review cannot be squared either with the political constitution, in which some actions of government (let alone Parliament) should not be subject to judicial supervision, or with the rule of law, in which judicial power should be disciplined. The extension of judicial review to new domains and decisions invites litigation to be politics by other means. It implicates judges in decision-making for which they have no constitutional responsibility and which they lack the institutional capacity to address competently. This practice rightly concerns parliamentarians, ministers, and civil servants in their attempts to govern. Importantly, the extension of judicial review compromises rather than vindicates the rule of law. In some cases, it involves unjustified and unprincipled lawmaking on the part of courts; in other cases, it implicates courts in the breach or at least disregard or circumvention of legislation that they should uphold. There are very strong constitutional reasons for concern about the expanding scope of judicial review, concerns that are illustrated clearly in some recent high-profile cases.

Important recent cases and their constitutional significance

16. This section considers a selection of Supreme Court cases that involve judicial review of government action and demonstrate clear and serious constitutional failings. With one exception, the cases date from 2015-2020; they are set out below in reverse chronological order. The judgments warrant legislative reversal, on which more below, and taken together help illustrate some of the distinctive ways in which judicial review is liable to be misused. They also confirm the risk that corrective legislation may be misinterpreted, which would constitute a further breach of constitutional fundamentals, and which the Panel ought to take into account. My point is not that the prospect of lawyerly and judicial resistance should lead the Panel, and in due course the government and Parliament, to shy away from legislation. On the contrary, the likelihood that there would be litigation aiming to disarm and undermine reforming legislation confirms the scale of the constitutional problem. It is also a reason for Parliament to take care to minimise the prospects that subversion will succeed and, especially, to commit to continue to legislate until the reforms hold. In our constitution, it is unacceptable for judges to assert or to exercise a veto over legislative reform of the law of judicial review.

[25] See *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) at [105-109] for an excellent review of considerations that bear on rationality review and which, when present, should incline the Court to be very slow indeed to interfere with the government's decision.
[26] See *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5, Lord Carnwath, Lord Reed and Lord Hughes dissenting, and *R (Evans) v Attorney General* [2015] UKSC 21, Lord Hughes and Lord Wilson dissenting.

17. The first case I commend to the Panel's attention is *R v Adams*.[27] Strictly, this was a criminal appeal rather than an application for judicial review. However, like many other classic judicial review cases that arose in the context of other legal proceedings, the appeal has the substance of a challenge to the lawfulness of government action, in this case to the validity of the Interim Custody Order (ICO) made in relation to Mr Adams. The Supreme Court misinterprets the Detention of Terrorists (Northern Ireland) Order 1972 under which the ICO was made, and holds that an ICO signed by the Minister of State for Northern Ireland must have been personally considered by the Secretary of State himself to be lawful. The Supreme Court's judgment displaces the *Carltona* principle in its application to the 1972 Order and casts doubt on the principle's application more generally.[28] The Supreme Court does not take the intention of the legislator to settle the meaning of the 1972 Order. This is clear from the Court's indifference to the context in which the Order was made and the public statements made in parliamentary proceedings related to the Order, and from the Court's reliance instead on subsequent practice and its own evaluation of the seriousness of the consequences of (temporary) detention. In rejecting the *Carltona* principle as a presumption about legislative intent, the Supreme Court not only misconstrues the 1972 Order, it also fundamentally misunderstands government. Its judgment needlessly puts in doubt the validity of a host of other legal acts and invites litigation to challenge their validity, which threatens to unsettle the workings of government.

18. The second case I commend to the Panel's attention is *Cherry/Miller (No 2)*.[29] The Supreme Court's judgment extends judicial review to a prerogative power central to the workings of parliamentary government, which had not otherwise been subject to judicial control. The Court ignores the strong reasons for non-justiciability, and fails to consider at all the Divisional Court's judgment, asserting that its judgment simply polices the scope of the power to prorogue rather than considering the merits of its exercise. The distinction is real but its deployment in this case was obvious sophistry. By treating "legality" as going to scope, and measuring that legality by standards of constitutional reasonableness, the Court limited the scope of the power to reasonable exercises of it, exercises which would be lawful only if the Court was satisfied with the political reasons offered for them. The judgment is remarkable in many ways, not least that it requires the Prime Minister to show to the Court's satisfaction that there are good reasons for prorogation.

19. In outlining its incoherent account of the relation between the power's scope and its exercise, the Court – talking of "legality" – relied on the "principles" of parliamentary accountability and parliamentary sovereignty. The first principle has never otherwise been a ground for expanding the reach of judicial review, even if it is a good reason in some cases for the Court to conclude that review is impossible or unnecessary (because the control on abuse of power is parliamentary accountability). It is essentially part of the domain of constitutional conventions, which the Court, having rightly declared them non-justiciable in *Miller (No 1)*, precipitately treated as justiciable "principles of legality" in *Miller (No 2)*. As for parliamentary sovereignty, the Court's account of it is, with respect, novel and nonsensical (attributing it not to Queen, Lords and Commons enacting statutes, but to the proceedings of the Houses), and was invented in order to rationalise judicial interference with prorogation. In future cases litigants will rely on the judgment as a ground to invoke

[27] *R v Adams (Northern Ireland)* [2020] UKSC 19

[28] See further Richard Ekins and Sir Stephen Laws, *Mishandling the Law: Gerry Adams and the Supreme Court* (Policy Exchange, 2020).

[29] *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41

"constitutional principles" or "principles of legality", pitched in abstract terms or framed in a novel way, to require the courts to break new ground.

20. The judgment was a lawmaking act, positing a new and non-statutory justiciable limit on the power to prorogue, a limit that requires courts to evaluate the reasons for prorogation, reasons which a court is incompetent to evaluate. (A sign of that incompetence was the extravagance of the Court's language in assessing this prorogation's significance.) In quashing the September prorogation, the Supreme Court makes clear an ambition to be the guardian of the constitution, having no confidence in the dynamics of the political constitution to avoid or to penalise abuse of the power to prorogue. The judgment gave political victory to one side in a fiercely fought controversy, not because settled law required as much but because the Court took the view that new law was needed and that it should make it. The Court attempts to conceal its law-making act beneath a veneer of legal learning, but the concealment is not effective. The judgment caused understandable outrage, undermining the trust that many parliamentarians and much of the public have in impartial adjudication. Notably, the Court failed to engage with Parliament's own detailed provision in relation to prorogation in Autumn 2019;[30] further, the Court evaded the limits in the Bill of Rights 1689, which forbad judicial interference in parliamentary proceedings, which must include prorogation. The judgment places the legal validity of future prorogations under a cloud of doubt, inviting litigation. Likewise, the judgment invites legal challenges to royal assent and to dissolution, if or when the Fixed-term Parliaments Act 2011 is repealed, and to government formation more generally.

21. I note that in evidence to the Constitution Committee on 4 March this year (Q2), the Deputy President of the Supreme Court, Lord Hodge, said:

> I agree [with Lord Reed] that our constitution is largely a political constitution and depends in large measure on political conventions for its smooth operation, including, as you say, the support of the Executive by Parliament. Many aspects of the relationships between Government and Parliament, between Government and the judiciary and between Parliament and the judiciary are governed by political conventions. As the court said in Gina Miller 1, those matters are not justiciable. I hope people will understand that our role is confined to the legal aspects of the constitution, such as the principle of the sovereignty of Parliament, and making legal rulings on the interpretation of legislation that allocates powers within the UK to the devolved Administrations and legislatures. We had the example recently of the Scottish Parliament's legal continuity Bill on EU withdrawal where we had to rule on the relationship between the UK legislation and the Scottish legislation. We see our role very much as focusing on and confined to the adjudication of legal rules.

While this is a welcome statement, as was the Supreme Court's ruling in relation to the justiciability of the Sewel Convention in *Miller (No 1)*,[31] it is impossible to square with the Court's intervention in *Cherry/Miller (No 2)*. The Supreme Court chose to make up a new legal limit on the power to prorogue, a limit that went well beyond the provision Parliament had made in legislation enacted only a few months before and a limit that involved the Court

[30] The Northern Ireland (Executive Formation etc) Act 2019

[31] At [146]: "Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question (as in the Crossman diaries case - *Attorney General v Jonathan Cape Ltd* [1976] 1 QB 752), but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world."

making a highly contested and contestable evaluation about the political merits of the prorogation.

22. I note also that in late summer and early autumn 2019, there was much talk amongst senior public lawyers about litigation to force the Prime Minister to resign in the event of a vote of no confidence succeeding in the House of Commons.[32] This would have been an attempt to get the courts to go beyond the terms of the Fixed-term Parliaments Act, taking over fundamental questions about government formation. Lord Sumption, in evidence to the Public Administration and Constitutional Affairs Committee of the House of Commons on 8 October 2019 lent his weight to this argument.[33] Any such litigation should have foundered on the obvious intentions of Parliament in enacting the Fixed-term Parliaments Act, which relied on the political constitution settling questions about resignation from office and the like.[34] However, in the light of *Cherry/Miller (No 2)*, it is easy to see how the Supreme Court might choose to interject itself into the heart of the relationship between the Commons and the Government and further to undermine the political constitution.

23. The third case I commend to the Panel's attention is *R (Privacy International) v Investigatory Powers Tribunal*.[35] The case involved a challenge to a decision of the Investigatory Powers Tribunal on grounds of error of law. The relevant legislation included an ouster clause, framed by reference to the reasoning of the *Anisminic* judgment, which protected decisions of the Tribunal from challenge by way of judicial review proceedings. The legislation instead made provision for the Secretary of State to make regulations allowing for appeals to the Court of Appeal. The legislation was designed to enable the Tribunal, which was in effect a specialist court, to make decisions in a sensitive field (concerning national security and human rights) without risk of proceedings in an ordinary court, where evidence might not be capable of being kept properly secret. The majority in the Supreme Court misinterpreted the ouster clause so that it did not protect a decision of the Tribunal that involved an error of law. Notably, Lord Carnwath, in the majority, reasoned that when "the principle of legality" was engaged, and a provision ousted the jurisdiction of the court, the object of interpretation was *not* Parliament's intention in enacting the provision.[36] Instead, the Court would be free to substitute some alternative meaning for the provision. Lord Carnwath rationalised this interpretive approach on the grounds that the principle of the rule of law, given legislative force by way of section 1 of the Constitutional Reform Act 2005, required as much. His judgment goes on to speculate about what the Court should do if legislation is expressed so clearly as to be incapable of being interpreted not to oust judicial review. Astonishingly, he asserts that it would be open to the courts to decline to give effect to such legislation, that is legislation ousting review or even legislation limiting the application of statutory rights of appeal to a decision by the High Court on judicial review.

24. The fourth case I commend to the Panel's attention is *R (UNISON) v Lord Chancellor*.[37] The case divides opinion, partly, I suggest, because of scepticism about the merits of the government's policy and sympathy for the claimants. However, the judgment is best

[32] See Sir Stephen Laws, *The Fixed-term Parliaments Act and the Next Election* (Policy Exchange, 2019), n14.
[33] In answer to Q54.
[34] See Sir Stephen Laws, *The Fixed-term Parliaments Act and the Next Election* (Policy Exchange, 2019).
[35] [2019] UKSC 22
[36] At [107] and [111]; see also [130]
[37] [2017] UKSC 51

understood as a striking instance of the deployment of the principle of legality.[38] The Supreme Court attributes to Parliament an implausible intention, in enacting the statute, which authorises judicial second-guessing of the Lord Chancellor's policy in relation to tribunal fees. No rational legislature committed to the rule of law would form or act on this intention and it is striking that the Court's interpretation is one that empowers the Court to set policy. The challenge succeeded by inviting the Court to consider empirical evidence of how the tribunal fees had changed the incentives of potential litigants. This was not evidence that the Court could adequately evaluate and the controversy in question was otherwise live in the political realm, where it rightly belonged. The judicial focus on access to court (or in this case to a tribunal) ignored the balance of considerations and interests, which was for the Lord Chancellor, accountable to Parliament, to weigh up. The judicial remedy, quashing the fees order, mandated compensation to persons who had brought claims before the tribunal, while doing nothing for those who had not brought a claim. The judgment will be a ground for litigation in other cases, in which the courts will be invited to review complex empirical evidence and to denounce alleged systemic unfairness. It remains unclear how far the courts will encourage this type of litigation; the interpretive technique is obviously of wide general application and is likely to prove highly significant.

25. The fifth case I mention, more briefly, is *Miller (No 1)*.[39] I mentioned the case above in the context of the Supreme Court's welcome recognition that it was not for the courts to enforce constitutional convention.[40] That statement of principle has, alas, been overtaken by *Cherry/Miller (No 2)*. In any case, the best explanation for the majority judgment in *Miller (No 1)* is that the Supreme Court understood its duty to be to guard the constitution, that the decision about whether to trigger Article 50 was simply too important to be left to the prerogative, and/or that Parliament needed the Court's help in controlling the executive.[41] In fact, Parliament, and in particular the House of Commons, quite manifestly retained effective control and the political constitution was working as it should quite apart from judicial intervention. The judgment will encourage more litigation about the prerogative, especially in relation to treaty making and unmaking, and about the constitution more generally, including the relationship between Parliament and government. Lord Reed, in dissent, warned his colleagues that "the legalisation of political issues is not always constitutionally appropriate, and may be fraught with risk, not least for the judiciary".[42] The warning was justified. The apparent political success, and clear legal success, enjoyed by the applicants in *Miller (No 1)* encouraged the successive Brexit litigation and in *Cherry/Miller (No 2)* the Supreme Court, including Lord Reed himself, failed to heed the warning.

26. The sixth case I commend to the Panel's attention is *R (Evans) v Attorney General*.[43] The Supreme Court, in an overlapping majority decision, undercut a clear statutory power in the Freedom of Information Act 2000. Three judges, including Lord Reed, misinterpreted the statutory provision, robbing it of any real legal effect. Their interpretation relied on the principle of legality, asserting abstract constitutional principle including the rule of law, and ignored the obvious intention of Parliament in enacting the provision, an intention confirmed not only by the clear words but by the scheme and context of the enactment.

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[38] See further Sir Stephen Laws, *Second-Guessing Policy Choices: The rule of law after the Supreme Court's UNISON judgment* (Policy Exchange, 2018) and Jason Varuhas, "The Principle of Legality" (2020) 79 *Cambridge Law Journal* (forthcoming).

[39] [2017] UKSC 5

[40] At [146], quoted in n31 above.

[41] Richard Ekins, "Constitutional Practice and Principle in the Article 50 Litigation" (2017) 133 LQR 347.

[42] *Miller (No 1)* at [240]

[43] [2015] UKSC 21

Two other judges joined the first three in the result but reasoned instead that the exercise of the power should be quashed on the grounds that it was unreasonable for the Attorney General simply to take a different view to the Upper Tribunal on the question of disclosure. This line of reasoning too ignored the statutory context, including the point of the statutory power and the scheme the Act made for political accountability for use or misuse of the power. The judgment suggests that in cases that seem to involve the constitutional position of a court, in this case the Upper Tribunal, the courts may well misinterpret legislation or subject the exercise of a statutory power to such intense judicial review as to prevent the power's exercise. The judgment leaves the Act at best in a state of uncertainty, encouraging ministers to exercise the statutory power before the Upper Tribunal hears appeals and yet threatening that such use may itself be unlawful. For the rule of law, it is a debacle – as the two judges in dissent make clear.

27. The final case I commend to the Panel's attention is *R (Cart) v Upper Tribunal*.[44] This 2011 case predates the 2015-2020 period but is important because of its relevance to the question of when (and how) Parliament may oust the jurisdiction of the courts, as well as how the Supreme Court understands its function in judicial review. The case concerned legal challenge by way of judicial review proceedings to the Upper Tribunal's refusal of leave to appeal to the Court of Appeal. The Supreme Court held that not all such refusals would be open to challenge by way of judicial review proceedings but that some refusals should be open to challenge, otherwise important questions of law might not come before the general courts. The Court thus in effect took the Act to oust judicial review in this context. However, the Supreme Court took it upon itself to choose to allow judicial review in some cases in order to manage its docket, to avoid being overrun by cases but to retain continuing control over important questions of law. The problem is that the Court's reasoning is legislative and is better suited to Parliament deciding on appeal criteria than to a court deciding whether legislation permits or prohibits review. The consequence of the judgment has been needless litigation inviting the High Court to quash decisions of the Upper Tribunal. The significance of the judgment is that the Supreme Court held that there need not be review in relation to all decisions of the Upper Tribunal and that thus, in effect, the Tribunals Act could oust judicial review without even including an express ouster clause. The Supreme Court's pragmatism in this case is an absence of principle, with the Court not really interpreting the statute but superimposing upon it the Court's own structure of review. This is relevant to the need for, and the prospects for, legislation to limit judicial review. Legislation expressly ousting review of all decisions of the Upper Tribunal, and thus reversing *Cart* to this effect, would be relatively likely to succeed without inviting judicial subversion, which would be a useful precedent clearly to establish.

Questions of principle and the case for legislative intervention

28. I suggest that the first priority for the Panel should be to set out clearly the principled basis on which government and Parliament are entitled to consider the changing law of judicial review and to propose and enact legislation that corrects missteps in its development. Unless it is firmly established that legislative correction is legitimate in principle, attempts by Parliament to exercise its constitutional responsibilities may be liable to encounter destructive, illegitimate judicial hostility. Not all judges are likely to be hostile, but it is not easy to predict the balance of judicial opinion on this point. The Panel should affirm a series of propositions – statements of principle – that properly frame public discourse about judicial review and legislative intervention. I suggest four propositions:

[44] [2011] UKSC 28

a. The rule of law does not mean the rule of judges (or the rule of courts). The rule of law requires judicial self-discipline and does not permit invocation of abstract or novel principles as a ground to depart from or to gloss settled law, including especially fundamental constitutional law. The rule of law is a sound principle of political morality, which is given shape and content in our constitutional tradition by way of specific constitutional choices and legal rules, including for example about justiciability, choices and rules that judges are not free to set aside.
b. Judicialising the political constitution is wrong and should cease. It distorts and undermine the set of conventions and practices that have long grounded responsible government and parliamentary democracy. It also politicises courts and litigation, eroding public trust in the judiciary and the rule of law.
c. More generally, there are questions that courts should not address, and decisions that should not be the subject of legal proceedings. There are limits to the institutional competence and constitutional responsibility of courts, limits which should foreclose from the outset certain claims for judicial intervention.
d. The judicial, lawyerly and (longer-standing) legal-academic loss of confidence in politics, which is part of the explanation for the expansion of judicial review, is ungrounded. That is, the scepticism expressed by some judges and lawyers, and many legal academics, about parliamentary government or electoral politics cannot be squared with sound empirical study or a proper understanding of our constitution, its historical record, or the institutional dynamics in which it consists.

29. Note that there is a mismatch between what judges say in some cases or lectures (or evidence to Parliament) and what they say in other cases, when new ground is broken. The rhetoric about parliamentary sovereignty in *Privacy International*, for example, is very far indeed from the rhetoric in *Miller (No 1)*, where the Supreme Court was anxious to stress its fidelity to parliamentary sovereignty, which was and is a fundamental constitutional rule. The assertions sometimes made by judges and other jurists about Parliament's incapacity to legislate in relation to judicial review, or about the judicial willingness to misinterpret such legislation and thus deliberately to defy the will of Parliament, should be denounced. They cannot be openly defended to a wider public, including Parliament, and judges attempt no such defence, instead relying on the relative inattention of parliamentarians.

30. I suggest that the Panel should attend to this inconsistency and should invite government and Parliament to attend likewise and to record publicly their commitment to parliamentary sovereignty and their intention to legislate on this understanding of their authority. That is, parliamentarians should make clear, with the Panel's support, that courts do not enjoy a veto over legislative changes to the law of judicial review, that it is perfectly proper for Parliament to review the law the judges have made and to change or reverse it. The Panel should anticipate and disarm the argument that such legislation is, by definition, an attack on the rule of law. Again, the rule of law does not entail a free-wheeling jurisdiction on the part of courts to extend the law of judicial review, to judicialise the political constitution, to misinterpret Acts of Parliament, or to second-guess policy choices. If or when Parliament acts to correct such misuses of judicial power, it acts to vindicate the rule of law.

31. It is true that legislating about judicial review will not be straightforward. Indeed, for the reasons already noted it is likely to prove controversial and difficult. There is, in addition, a plausible argument that effective changes in the law of judicial review require a change in judicial culture and judicial attitude, which requires a change of heart on the part of judges, for which one simply cannot legislate effectively. Lord Sumption suggests something similar.

While he thinks legislation could be effective, he argues that for a legislative solution to work it would need to be comprehensive, viz. to put the entire law of judicial review on a statutory footing, sweeping away all that comes before it.[45] For obvious reasons, this would be no small task. However, it is open to Parliament to consider a range of legislative interventions, including those I outline later in this submission, and there is good reason to think that targeted legislation, short of total codification, may be effective.

32. Restoring the constitutional balance will require a change in judicial attitudes. The Panel has a part to play in contributing to judicial culture and by articulating a critique of the misuse of judicial review proceedings in some cases, and some types of case, the Panel may encourage judicial culture to change for the better. The government and Parliament may contribute to this end insofar as they attend to the law the judges have made or are making and articulate their concerns about its implications for how we are governed. However, it will not be straightforward for judicial culture to change, even if or when many judges share a concern that the law of judicial review is heading in the wrong direction.

33. Judges are capable of correcting some judicial errors, but others may run too deep, and/or it may be difficult for judges to coordinate in correcting errors, precisely because they are judges not legislators. It may well take legislative intervention to correct some problematic aspects of judicial culture, to encourage a different disposition towards the constitutional role of the court and the approach judges should take to other institutions. While reform of the Human Rights Act would seem to be beyond the Panel's remit, it is plausible to infer that the Act has changed the way in which judges approached questions of justiciability more widely. Having been required to consider otherwise non-justiciable matters in the context of convention rights, some judges have been willing to do so outside that context, or at least to leave behind the traditional wariness about addressing some types of question. Repeal of the Human Rights Act (or its amendment) would change the legal powers and duties of courts; it would also be a powerful, if indirect, contribution to judicial culture.

34. While the Panel should be attentive to the importance of judicial culture, it should not eschew the need for legislative intervention – such intervention, if carefully considered, may be an essential contribution to turning that culture around. The legal establishment is primed to respond to legislative intervention as a foreign, illegitimate encroachment on constitutional fundamentals. This is an illegitimate extrapolation of the common law tradition's long scepticism about ouster clauses. That scepticism has its place: for centuries, judges have construed ouster clauses narrowly, preserving the court's jurisdiction. However, that tradition was developed in the context of a law of judicial review that was, conversely, much narrower, more restrained and more respectful of constitutional limits. It cannot be right, for example, for the traditional scepticism about ouster clauses to mean that Parliament is effectively helpless to legislate to overturn the law that the Supreme Court made, in a rushed and incoherent judgment, in *Cherry/Miller (No 2)*. Likewise, if Parliament enacts legislation that in some respect would return the courts to an understanding of judicial review held by an earlier generation of judges, it would be wrong for this legislation to be read narrowly (artificially) per a general hostility to ouster clauses. The legislation in question would not be abolishing judicial review, but would instead be specifying its application and restoring principled limits on its scope.

35. Judicial review has an important part to play in constitutional law and practice, not least in restraining public bodies from exceeding the scope of their statutory powers. Courts should

[45] In evidence to the Public Administration and Constitutional Affairs Committee, 6 October 2020.

read statutes presuming that Parliament does not intend to authorise a public body to act free from challenge by way of judicial review – but the presumption must be defeasible if parliamentary sovereignty is good law. Importantly, the presumption should not operate as a kind of constitutional ratchet, securing each new extension of the law of judicial review from any realistic prospect of legislative correction. If or when Parliament legislates, for example, to secure the political constitution from judicial interference, interference senior judges say that they oppose, judges and lawyers should recognise such legislation to be constitutionally legitimate and should not misconstrue or circumvent it.

How to legislate about the law of judicial review

36. My colleague Sir Stephen Laws has set out a detailed set of proposals for corrective legislation, which I commend to the Panel's attention. My own proposals overlap in part with his and can be divided into two categories. The first concerns legislation to reverse (overturn) the law made in particular judgments; the second concerns legislation intended to address wider trends in judicial review and/or to anticipate and prevent certain types of public action being subject to unjustified legal challenge.

Reversing particular judgments

37. There is a very strong case for Parliament to enact legislation reversing the outcome of particular problematic judgments. Such legislation would vindicate the rule of law, correcting unjustified judicial lawmaking and avoiding the needless legal uncertainty such judgments typically introduce. Importantly, such legislation would be an unmistakable signal to the courts that government and Parliament are willing and able to exercise their constitutional responsibility and to change the law – or to restore the law – when wayward judgments put it in doubt. Strictly, judges should be indifferent to whether legislation is changed in response to a judgment: if they simply uphold the law that Parliament enacted, or otherwise settled propositions of the common law, then it is of course no insult to the court for Parliament later to decide that the law now needs to be changed. However, if or when the law has been unsettled by appellate court judgments that depart from sound legal reasoning, legislative correction may well be perceived as a rebuke and may chasten later courts, viz. making them that much more likely to hew close to sound legal method.

38. Recalling the high-profile appellate judgments considered above, I would encourage the Panel to recommend Parliament consider the following corrective legislation:

    a. In relation to *R v Adams*, legislation to deem valid any Interim Custody Order signed by the Minister of State or Under Secretary of State irrespective of whether it has been considered personally by the Secretary of State, legislation which would not reinstate Mr Adams's conviction for escape from lawful custody but would prevent him or other former detainees from recovering damages for unlawful detention;
    b. In relation to *Cherry/Miller (No 2)*, legislation (i) to specify that the courts cannot entertain legal challenge to advice to Her Majesty to prorogue Parliament, Her Majesty's decision to prorogue, or the act of prorogation itself unless an express statutory limit is in play, and (ii) to provide in terms that prorogation is a proceeding in Parliament and falls within Article IX of the Bill of Rights;
    c. In relation to *Privacy International*, legislation to specify that decisions of the Investigatory Powers Tribunal are not to be challenged by way of judicial review

proceedings and may only be called into question by the Court of Appeal (and then Supreme Court) in accordance with statutory appeal rights;

d. In relation to *UNISON*, legislation to restore the Lord Chancellor's discretion to set tribunal fees, subject to parliamentary accountability, and legislation to provide that fees paid on the basis of the quashed fee order are to be deemed to have been lawfully levied, but that any fees already reimbursed are not now to be recovered;
e. In relation to *Miller (No 1)*, there is no direct opportunity for corrective legislation because of course the effect of the judgment was to require legislation (before Article 50 could lawfully be triggered), which was promptly enacted;
f. In relation to *Evans*, legislation to restore the impugned executive override power, subject to parliamentary accountability, specifying that the minister may exercise the power to block disclosure notwithstanding a contrary determination by the Information Commissioner or Upper Tribunal, on grounds that appear to him relevant to the public interest in disclosure; and
g. In relation to *Cart*, legislation providing that no decision of the Upper Tribunal, including a decision not to allow permission to appeal to the Court of Appeal, may be subject to challenge by way of judicial review proceedings and specifying that challenge is possible only by way of statutory appeal rights;

39. Enacting legislation of this kind would help to restore the rule of law, unwinding some of the worst judicial excesses in recent years and making clear that courts are not free to depart from statutory limits or to impose new legal limits on powers, prerogative or statutory, that are otherwise disciplined by parliamentary (political) accountability.

40. If or when Parliament exercises its lawmaking authority to reverse the outcome of a problematic judgment, the judgment is less likely to serve as a foundation for further judicial overreach. However, in some cases, Parliament may need to go further. For example, in addition to legislating about prorogation, Parliament should consider legislating to specify that the Supreme Court's judgment in *Cherry/Miller (No 2)* does not form part of the law of (any part of) the United Kingdom. The point would not be to revive the quashed prorogation of 10 September 2019 but to prevent future courts, including the Supreme Court, from relying on the authority of the judgment. This is important precisely because the reasoning on which the Supreme Court acted, which later courts may follow, is incompatible with the integrity of the political constitution and the rule of law.

Legislating about judicial review in general

41. There is a strong case for Parliament to legislate to restore traditional limits on the scope of judicial review. I am not closely familiar with the Australian legislation governing judicial review. While there may be much to learn from their experience, I suspect that the context of enactment in the UK would be rather different, viz. such legislation might receive a problematic reception by an unsympathetic, or even hostile, judiciary. If pitched too generally, the legislation in question might be less than useful. Quite apart from this, it would be difficult to codify exhaustively the grounds of judicial review. While I would not want to close the door to legislation of this kind, my proposal is for more narrowly cast legislation, which would address some of the main types of problem cases.

42. Parliament should enact legislation that specifies that the object of statutory interpretation is the intention of the enacting legislature, which is to be inferred from the statutory text read in the context of its enactment. While an enactment falls to be applied to facts as they arise (whether or not foreseen or foreseeable at the time of enactment), and only in that

limited sense is "always speaking",[46] its meaning – its scope – would be settled at the time of enactment. Legislation that specifies that the intention of the enacting legislature is the object of interpretation would be a restatement of existing law. However, its significance is that it would make it much more difficult for courts to invoke the principle of legality to rationalise imposing on the statutory text a meaning that Parliament clearly did not intend. The point might be made more forceful still if the legislation in question also reversed high-profile instances of statutory misinterpretation or perhaps even recited in a preamble the mischief that the statute was intended to address and correct.

43. In addition, Parliament should amend the Interpretation Act to provide that the *Carltona* principle applies unless the contrary intention is made out. This would correct the instability in our law introduced by *R v Adams*, affirming that the *Carltona* principle is indeed a presumption about Parliament's intentions, a presumption that may be beaten back in this or that particular context but is the default against which Parliament legislates.

44. Section 1 of the Constitutional Reform Act 2005 has no obvious legal effect, save to introduce an uncertain qualification to the propositions otherwise made out in the Act. The section was a rhetorical flourish, designed to reassure senior judges that the change in the Lord Chancellor's role would not imperil their constitutional position. It was a failure in legislative craft and while there would ordinarily be no need to correct it, Lord Carnwath's reliance on the section in *Privacy International* as a ground to subvert, or openly defy, Parliament's authoritative intention is a cause for concern. The solution might be to specify more fully, by way of an amendment to section 1, that the rule of law does not mean the rule of courts and that nothing in the Act qualifies parliamentary sovereignty in any way. One might specify further that the Act does not authorise the Supreme Court to serve as guardian of the constitution and that the Court's duty is instead to adjudicate disputes in accordance with law. This would help to address some of the worst excesses in recent years, as well as the undercurrent that is likely to invite and rationalise future excesses.

45. Parliament should consider enacting legislation that would specify factors or principles relevant to substantive review, which courts would have to take into account in adjudicating any challenge to the lawfulness of an exercise of public power. The factors might include the extent to which the decision maker is subject to parliamentary accountability and the extent to which the decision involves polycentric considerations or high policy.[47] Such specification might do little more than recall and affirm principles of judicial restraint already made out in long-established case law. However, the point of the legislation would precisely be to make such principles authoritative and to bolster them against erosion in future cases.

46. In relation to the particular (growing) problem of proportionality review, Parliament should legislate to specify that no act or decision of a public body may be quashed or otherwise held to be unlawful on the ground that it is disproportionate, save as required by the Human Rights Act.[48] This would categorically forbid the Supreme Court from introducing proportionality as a general ground of review, which senior jurists have warned the Court not to do. Legislating would partly address the problem of judicial invention of common law rights. If or when a clear legal right could be identified and enforced without proportionality

[46] For detailed discussion of this much misunderstood idea, see: Stephen Laws, "Parliamentary Sovereignty, Statutory Interpretation and the Supreme Court" *The UK Supreme Court Yearbook* (forthcoming) and Richard Ekins, "Updating the meaning of violence" (2013) 129 LQR 17.

[47] See n25 above.

[48] Unless and until amended, retained EU law may require courts to evaluate the proportionality of government action. The legislation proposed in this paragraph could amend retained EU law to this effect.

analysis, the right could be upheld. But if the right were simply an occasion for the court to review the proportionality of government action, it would no longer support the extension of judicial review into new contexts.

47. There is a case for general legislation to restore the idea of non-jurisdictional errors of law to our legal tradition. It is often plausible to infer that Parliament confers a jurisdiction on some public body, within the scope of which the public body (including inferior court) should be free to act. On this view, only some errors of law, namely those that involved a very clear departure from the terms of the empowering statute, would render the decision ultra vires and void ab initio. Other errors of law might be subject to correction on review, and the decision rendered voidable, subject to their gravity and consequences.

48. Parliament should legislate to protect particular domains of government action, and particular types of decision, from challenge by way of judicial review proceedings. Legislation about prorogation, in response to *Cherry/Miller (No 2)*, and/or dissolution, in the course of repealing the Fixed-term Parliaments Act, would involve such provision, without which the political constitution will remain highly exposed to political litigation. In legislating to reverse *Cherry/Miller (No 2)*, *Cart*, or *Privacy International*, Parliament would impose limits on the reach of judicial review and restate the law as it was understood by earlier generations of judges (or other judges earlier in the litigation: say, the Divisional Court in *Cherry* and the Court of Appeal in *Privacy International*). It would be fully open to Parliament to do so in other contexts, including in advance of anticipated political litigation. Recall Lord Hodge's disavowal of judicial capacity to enforce the political constitution: general legislation that specifies this limit on judicial action, whether it takes the form Sir Stephen recommends or is framed differently, would provide some assurance that judges, now or in the future, will not judicialise politics and thereby politicise adjudication.

49. In particular, Parliament should consider enacting legislation to list prerogatives that have traditionally not been subject to judicial control and to specify in terms that they are non-justiciable. The list would include at least declaring war, dissolution, prorogation, appointing and dismissing ministers, and making or unmaking treaties.[49] Reversal or cancellation of *Cherry/Miller (No 2)* would be necessary to avoid subsequent courts reviewing exercise while purporting simply to police the limits of the scope of the prerogative.

50. Legislating to oust, or pre-empt, judicial review would obviously be controversial and there would be a risk that such legislation would go too far. However, there is a very strong argument for legislation in a range of contexts, including government formation (and the relations between Queen, Ministers and Parliament more generally), foreign policy, military action, and high policy, including macroeconomic and social policy. It might be easiest to justify legislation when it clearly restates limits long accepted by UK judges and/or when it responds to litigation that has breached such limits or threatens future breach.

51. In addition to the substantive reforms outlined above, Parliament should consider procedural reforms. Parliament should consider introducing much tighter restrictions on calling evidence in the course of judicial review proceedings, including evidence that is likely to be difficult for courts competently to evaluate. Relatedly, there are reasons to tighten the rules of standing, which are extremely loose and which may encourage applications that allege systemic fairness rather than particular wrongs, as well as to limit the capacity for third parties to intervene in judicial review proceedings. Finally, there is a case for

[49] See the useful list in *L v South Australia* (2017) 129 SASR 180; [2017] SASCFC 133 at [108], [112]-[113].

legislation to overhaul the rules of disclosure, which force government to release much information that should not be made public and which changes the character of judicial review proceedings, with judges often ending up considering in detail the inner workings of government. There may need to be provision made in litigation by analogy to the protections that government enjoys under the Freedom of Information Act.

Conclusion

52. The modern expansion of judicial review has significant implications for responsible government, for parliamentary democracy, and for the rule of law. It is clear that the scope and intensity of judicial review has changed over time and continues to change. It is entirely reasonable for Parliament to evaluate the law the courts have made – and are making – and to legislate in response when it judges this necessary. At a minimum, Parliament should legislate to reverse the outcome of cases in which courts clearly misinterpret statutory powers or evade statutory limits, or entertain challenges to decisions that ought not to be the subject of legal proceedings or, worse, second-guess and quash decisions that in our tradition ought to be exclusively for politically responsible persons. Parliament's willingness to exercise its authority in this way is important. It may help change judicial attitudes, both in relation to particular controversies but also by making clear that Parliament takes its constitutional responsibilities – its sovereignty – seriously.

53. Parliament should go further and enact wider corrective legislation. Legislation should address (a) the misuse of the principle of legality, by specifying that legislative intent is the object of statutory interpretation, and (b) the displacement of the *Carltona* principle, by specifying that the principle is the default. Parliament should amend section 1 of the Constitutional Reform Act 2005 to distinguish the rule of law from the rule of courts, to declare in terms that the Supreme Court is not the guardian of the constitution, and to affirm parliamentary sovereignty. Legislation should categorically prevent the Supreme Court from introducing proportionality as a general ground of review. Legislation should also protect certain domains of government action, and types of decision, from judicial challenge. This is necessary to protect the political constitution. Quite how far such legislation should extend may be an open question, but the status quo is unstable – the last few years have made it very clear that courts are willing and able to shrug off traditional limits on their jurisdiction and to extend the reach of judicial review.