Society of Legal Scholars (SLS) Response to the Panel of the Independent Review of Administrative Law call for Submission of Evidence on Effectiveness of Judicial Review

The Society of Legal Scholars is a learned society with charitable status (registered with the Charity Commission for England and Wales: No. 282719), whose aim is the advancement of legal education and scholarship in the United Kingdom and Ireland. The Society is the learned society for those engaged in law teaching and/or legal scholarship. The Society is legal education's principal representative body to the professional bodies and the Government. The SLS holds an annual conference each year. In addition, the Society organises and/or sponsors seminars and workshops throughout the year.

The role of the SLS and the importance of academic law and academic lawyers, is as stated by former President Professor Sir Neil MacCormick QC, FBA:

> **The Society of Legal Scholars seeks to advance legal science and legal education, continuing a tradition in which legal studies have been centrally included within university education since its earliest beginnings. Vitality in academic law can be confidently said to characterise most of the many jurisdictions in which members of the SLS are at work. They take pride in their role as representatives of the learned tradition of humane scholarship.**
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> **The spirit of a legal education defined by: rigour and accuracy in the study and analysis of the texts of the law; understanding of texts in the light of underlying principles and possible theoretical approaches to their construction; critical appreciation of problematic aspects of law; and a readiness to enquire into the contexts in which law operates. Also, there should be a firm awareness of law's character as a practical discipline; this includes an awareness of legal practice and its requirements, but is not exhausted by that. In the broadest sense it requires a grasp of law as a domain of practical reason.**
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> **The fate of constitutionalism and the Rule of Law is nowhere a matter for complacency. Teachers of law protected by a justly defined academic freedom and imbued with a proper sense of professional self-respect and civic responsibility have a special role to play in maintaining critical awareness of the preconditions for law and liberty. The part they play is scarcely less vital than that of an independent judiciary and legal profession.**

Section 1 – Questionnaire to Government Departments

Based on the Terms of Reference as set out in the Introduction, the IRAL has created the following questionnaire to be sent to Government Departments. The questions are

as follows:

Before commencing our answers, we wish to emphasise our solidarity, as a learned society that contains wide membership and political views, with the importance of access to justice and a commitment to the rule of law as central features of the UK constitution. The SLS believes that judicial review is essential to the maintenance of the rule of law. On this basis, we do not regard judicial review as an impediment to good government and administration, but as a vital safeguard that is capable of facilitating good government and administration. As Lord Reed stated in *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51:

> **At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade. That is why the courts do not merely provide a public service like any other [para 68].**

We have proceeded in the following answers to do what any good academics could and should do when it comes to matters of great difficulty: reflect the complexity of the issues before us. However, please do not think that in reflecting that complexity we are half-hearted on these issues. As a society, we stand by Lord Reed's comments above.

1. *In your experience, and making full allowance for the importance of maintaining the rule of law, do any of the following aspects of judicial review seriously impede the proper or effective discharge of central or local governmental functions? If so, could you explain why, providing as much evidence as you can in support?*

    a. *judicial review for mistake of law*
    b. *judicial review for mistake of fact*
    c. *judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)*
    d. *judicial review for disappointing someone's legitimate expectations*
    e. *judicial review for Wednesbury unreasonableness*

f. *judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account*
g. *any other ground of judicial review*

The above grounds of review are well-established and widely used in UK courts to ensure the effective operation of public administration and to hold governments to account. None of them as a ground of challenge can be said to impede the proper or effective discharge of central or local governmental functions in any systematic way. It should be noted that judicial review for mistake of fact is available only in very limited circumstances. However, reasonable questions regarding the operation of judicial review consistently arise in our annual conference, in funded seminars and workshops, and in our associated journal, *Legal Studies*, about approaches that go beyond the grounds noted above. The crux of the question is whether there any other legitimate grounds of judicial review, and if so, what are they? For example, in 2019 the SLS Best Paper Prize winner, Prof Dean Knight, discusses how 'contextual review' used by courts in the UK and in other common law jurisdictions is often unconnected to any specific ground of review, and is potentially problematic in terms of its relationship to rule of law values such as public accessibility, clarity, and stability, amongst other things. Knight identifies this type of review as, 'a judicial method that rejects doctrinal or categorical methods to guide judicial supervision of administrative action', and which 'emphasises an unstructured, normative and discretionary approach' (p 3). He notes that advocates of this type of review stress advantages in terms of flexibility and adaptability, but he also cautions that its use may decrease consistency and predictability. Prof Knight's paper was published in March 2020: D Knight, 'Contextual review: the instinctive impulse and unstructured normativism in judicial review' (2020) 40(1) *Legal Studies* 1.

The *Miller/Cherry* prorogation case [2019] UKSC 41, which we surmise is one of the contributing factors that led to this review, is notable for not including an explicit ground of review in its analysis. Indeed, the Supreme Court disregarded the 'improper purpose' ground relied on by the Inner House of the Court of Session ([2019] CSIH 49), but did not explicitly provide an alternative ground of review in its judgment. The justifications presented by the court were multifaceted, touching on precedent and constitutional principle. The Court cited precedents in terms of reviewing the prerogative (*Case of Proclamations* (1611) 12 Co Rep 74; *Entick v Carrington* (1765) 19 State Tr 1029), and they also mentioned that they had a duty to uphold constitutional principles, such as parliamentary sovereignty and parliamentary accountability [paras 41-51]. However, the lack of reference to traditional judicial review principles has led to much speculation from constitutional scholars and others as to what the actual ground of review was: perhaps a new 'breach of constitutional principle' ground was introduced (see, eg, M

Elliott, 'A new approach…', www.publiclawforeveryone). It is also notable that the *Miller/Cherry* judgment was devoid of rule of law justifications, which have been especially prominent in recent cases (eg, *R (Jackson) v Attorney General* [2005] UKHL 56; *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46). Of course, the common law is dynamic and new grounds of review can arise based on the particular circumstances. But if it was a new ground that the Supreme Court was relying on in *Miller/Cherry*, then this should be acknowledged and further articulated.

Given that judicial review claims are often time-consuming and expensive, clarifying whether any grounds of judicial review have been added to the traditional and well-established grounds would be of much benefit for those bringing such claims. It may also be helpful to have greater clarity in judgments as to which grounds are being considered.

h. *the remedies that are available when an application for judicial review is successful*
i. *rules on who may make an application for judicial review*
j. *rules on the time limits within which an application for judicial review must be made*
k. *the time it takes to mount defences to applications for judicial review*

2. *In relation to your decision making, does the prospect of being judicially reviewed improve your ability to make decisions? If it does not, does it result in compromises which reduce the effectiveness of decisions? How do the costs (actual or potential) of judicial review impact decisions?*

3. *Are there any other concerns about the impact of the law on judicial review on the functioning of government (both local and central) that are not covered in your answer to the previous question, and that you would like to bring to the Panel's attention?*

Consideration regarding the impact of judicial review on the functioning of government frequently arises in many SLS activities, including at our annual conferences (especially in particular sections, such as Public Law, Jurisprudence, and related sections), at seminars and workshops, and in the pages of our associated journal, *Legal Studies*. Not just with the UK, but internationally, there is a lively ongoing discussion regarding how judicial review is impacting upon government functionality. Scholars within the UK and from around the world regularly debate and critique the power that courts wield through judicial review (eg, Forsyth (ed), *Judicial Review and the Constitution* [2000]; J Sumption, 'Judicial and Political Decision-making' (2011) 16(4) Judicial Review 301). Much of this discussion revolves around its

impact on central government, including what decisions should stay within the political sphere and remain exempt from judicial review proceedings. The emergence of wider judicial review powers in the UK has led to strong opinions on both sides, as many feel that these powers are necessary to the rule of law and provide an enhanced check on overzealous governments and parliaments, whilst others believe that these enhanced powers have gone beyond the traditional role of the judiciary and threaten the operation of democracy. Either way one comes down on these issues, it should not be forgotten that judges, just like central and local government, can and do wield significant public power, and that this happens primarily—if not exclusively—through judicial review and other forms of adjudication.

Evaluations of how judicial review affects local government may need to be examined further. Notably, a quantitative review in 2010 by some leading scholars suggested that, overall, judicial review had led to positive developments in local government in England and Wales (L Platt, M Sunkin & K Calvo, 'Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England and Wales' 20 *Journal of Public Administration Research and Theory* i243). The authors noted that judicial review often promoted good public administration values and helped resolve tension between competing values, such as individual and collective justice. However, the study found that local officials were often surprised by judicial review judgments, and that some were unpredictable and considered a 'shock'. Financial problems also arose after particular judgments, putting local authorities in an awkward position. Although judicial review has produced many positive outcomes at the local government level, determining how to soften the downsides of judicial review on local authorities could be valuable going forward.

From this, we would appreciate your response to the following questions:

1. Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

In considering the impact of judicial review, close attention should be paid to the academic literature on the value and effects of judicial review, which clearly demonstrates that this cannot be assessed solely by reference to the outcomes of cases that go to a full hearing. See V Bondy, L Platt and M Sunkin, *The Value and Effects of Judicial Review* (2015). See also Sunkin and Bondy, "The Use and Effects of Judicial Review: Assumptions and the Empirical Evidence" in J Bell et al (eds), *Public Law Adjudication in Common Law Systems* (2016) Ch 14 and R Thomas, "Mapping Immigration Judicial Review Litigation: An Empirical Legal Analysis" [2015] PL 652.

2. In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

Section 2 – Codification and Clarity

3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

Whether statutory intervention would help or hinder matters is unclear, as it would depend on what was articulated in statute and how widely or narrowly the provisions were written. There are certainly implications for rule of law and access to justice, so any statute that attempted to clarify the principles of judicial review or access to review that potentially ousts future meritorious claims would be unacceptable (see *R (Unison) v Lord Chancellor* [2017] UKSC 51). For instance, Bradley, Ewing and Knight do state that, 'All sides accept that Parliament has authority to legislate on the scope of judicial review, whether to enlarge it or restrict it in different ways' (*Constitutional & Administrative Law* (17th ed), p 643). Yet when it comes to restricting the role of judicial review, *Anisminic* [1969] 2 AC 147 and *Privacy International* [2019] UKSC 22 demonstrate that the courts will still pursue jurisdiction in respect to unlawful decisions, even if relatively clear ouster clauses are present. Thus, any statutory provisions that would prohibit the courts from reviewing unlawful decisions would likely be challenged or face a difficult time in the courts.

However, if it is possible to further articulate the scope of judicial review and help determine what issues should and should not be going to the courts, then a statutory intervention could potentially help (see also our answer to Question 4 below).

4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

This is a complex question that has no straightforward answer. There is significant and sometimes difficult case law on the general ambit of judicial review and the Human Rights Act 1998; here, it is arguable that the difficulties are inherent in an era when many functions previously exercised by the state are outsourced. If the courts are thought to get it wrong in a particular case it is open to Parliament to intervene (eg Health and Social Care Act 2008 s.145, reversing *YL v. Birmingham City Council* [2007] UKHL 27). It is not easy to see that statutory intervention could helpfully provide any general clarification.

The specific issue of the amenability of prerogative decisions to judicial review also arose in the *Miller/Cherry* litigation. It should be noted that this issue arises relatively rarely. One of the striking aspects of the *Miller/Cherry* litigation was the divergence between courts regarding issues of justiciability. The Divisional Court in England and Wales unanimously ruled (3-0) that the matter was 'inherently political' and that there 'are no legal standards against which to judge' the legitimacy of the PM's prorogation decision (*R (Miller) v Prime Minister* [2019] EWHC 2381 (QB), [51]). It is also notable that the Divisional Court panel included three very senior judges: the Lord Chief Justice of England and Wales, the Master of the Rolls and the President of the Queen's Bench Division. However, in a unanimous judgment the Supreme Court allowed the appeal to proceed, stating that even though they cannot decide political questions, they should not shy away from legal disputes because of 'political controversy' ([2019] UKSC 41, [31]). A similar pattern occurred in Scotland. In the Outer House of the Court of Session, Lord Doherty ruled that issues of prorogation were matters of 'high policy and political judgment', and therefore not justiciable ([2019] CSOH 7, [26]). However, the Inner House unanimously allowed the appeal, ruling the prorogation unlawful ([2019] CSIH 49).

Some may see the above as the common law functioning in a proper manner, as higher courts are correcting the decisions of lower courts. However, the situation could also be viewed as a flashpoint of uncertainty and confusion in the courts. This is especially the case considering that very experienced judges in two jurisdictions came to starkly different conclusions regarding what counts as a political decision of 'high policy and political judgment' that is either immune or highly unlikely to form the basis for a judicial review, and what may be merely politically controversial but justiciable.

Evidently, if senior judges cannot agree on these matters, then Parliamentary intervention may be necessary to clarify the issues. However, any possible intervention should be weighed against how it will affect judicial review on the whole, as opposed to just the limited and exceptional circumstances in relation to *Miller/Cherry*.

5. Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

Section 3 - Process and Procedure

6. Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective

government and good administration without too many delays?

7. Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

8. Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

We would be concerned about restricting access to courts by tightening rules on costs and standing. In fields of public or collective interest, such limitations can create a structural imbalance where decisions can be challenged by those with private or property interests, but decisions cannot be challenged in the broader public interest. We should also note the need to comply with the UK's international legal obligations on access to justice in environmental matters, especially under the UNECE Aarhus Convention on Access to Environmental Information, Public Participation in Decision-Making, and Access to Justice on Environmental Matters (1998).

9. Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

10. What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

11. Do you have any experience of settlement prior to trial? Do you have experience of settlement 'at the door of court'? If so, how often does this occur? If this happens often, why do you think this is so?

12. Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings? If so, what type of ADR would be best to be used?

13. Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

~ENDS~

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Society of Legal Scholars for the UK and Ireland (SLS).