PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

JUDICIAL REVIEW AND COURTS BILL

First Sitting

Tuesday 2 November 2021

(Morning)

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not later than

Saturday 6 November 2021

The Committee consisted of the following Members:

Chairs: † Sir Mark Hendrick, Andrew Rosindell

† Barker, Paula *(Liverpool, Wavertree)* (Lab)
† Cartlidge, James *(Parliamentary Under-Secretary of State for Justice)*
† Crawley, Angela *(Lanark and Hamilton East)* (SNP)
† Cunningham, Alex *(Stockton North)* (Lab)
† Daby, Janet *(Lewisham East)* (Lab)
† Fletcher, Nick *(Don Valley)* (Con)
† Hayes, Sir John *(South Holland and The Deepings)* (Con)
† Higginbotham, Antony *(Burnley)* (Con)
† Hunt, Tom *(Ipswich)* (Con)
† Johnson, Dr Caroline *(Sleaford and North Hykeham)* (Con)
† Longhi, Marco *(Dudley North)* (Con)
† McLaughlin, Anne *(Glasgow North East)* (SNP)
† Mann, Scott *(Lord Commissioner of Her Majesty's Treasury)*
† Marson, Julie *(Hertford and Stortford)* (Con)
† Moore, Damien *(Southport)* (Con)
† Slaughter, Andy *(Hammersmith)* (Lab)
† Twist, Liz *(Blaydon)* (Lab)

Huw Yardley, Seb Newman, *Committee Clerks*

† attended the Committee

Witnesses

Sir Stephen Laws KCB, QC, First Parliamentary Counsel 2006 to 2012, Senior Fellow, Policy Exchange 2018 to present

Professor Richard Ekins, Head, Policy Exchange's Judicial Power Project

Professor Jason Varuhas, Professor of Law, University of Melbourne

Professor David Feldman, Professor of English Law, University of Cambridge

Dr Jonathan Morgan, Reader in English Law, Cambridge University

Public Bill Committee

Tuesday 2 November 2021

(Morning)

[Sir Mark Hendrick *in the Chair*]

Judicial Review and Courts Bill

9.25 am

The Chair: Before we begin, I have a few preliminary announcements. First, if Members wish to remove their jackets, they should feel free to do so, because this room is quite warm. I encourage Members to wear masks when they are not speaking. This is in line with guidance of the House of Commons Commission. Please also give each other and members of staff space when seated and when entering and leaving the room.

Members should send their speaking notes by email to hansardnotes@parliament.uk. Similarly, officials in the Gallery should communicate electronically with Ministers. Please switch any electronic devices to silent. As many of you will be aware, tea and coffee are not allowed during sittings, but water is provided at most desks.

Today we will consider the programme motion on the amendment paper. We will then consider a motion to enable the reporting of written evidence for publication and a motion to allow us to deliberate in private about our questions before we commence the oral evidence session. In view of the time available, I hope we can take these matters formally.

Ordered,

That—

1. the Committee shall (in addition to its first meeting at 9.25 am on Tuesday 2 November) meet—

(a) at 2.00 pm on Tuesday 2 November;

(b) at 11.30 am and 2.00 pm on Thursday 4 November;

(c) at 9.25 am and 2.00 pm on Tuesday 9 November;

(d) at 9.25 am and 2.00 pm on Tuesday 16 November;

(e) at 11.30 am and 2.00 pm on Thursday 18 November;

(f) at 2.00 pm on Tuesday 23 November;

2. the Committee shall hear oral evidence in accordance with the following Table:

Date	Time	Witness
Tuesday 2 November	Until no later than 10.25 am	Sir Stephen Laws, KCB, QC; Professor Jason Varuhas, University of Melbourne; Professor Richard Ekins, University of Oxford
Tuesday 2 November	Until no later than 11.25 am	Professor David Feldman, University of Cambridge; Dr Jonathan Morgan, University of Cambridge
Tuesday 2 November	Until no later than 2.45 pm	Richard Leiper QC; André Rebello OBE, Senior Coroner for Liverpool and the Wirral and Hon Secretary of the Coroners' Society of England and Wales
Tuesday 2 November	Until no later than 3.30 pm	Public Law Project; Law Society; Liberty
Tuesday 2 November	Until no later than 4.30 pm	Inquest; Justice; Amnesty
Tuesday 2 November	Until no later than 5.00 pm	Dr Joe Tomlinson, University of York; The Law Society of Scotland; Aidan O'Neill QC

3. proceedings on consideration of the Bill in Committee shall be taken in the following order: Clauses 1 to 15; Schedule 1; Clauses 16 and 17; Schedule 2; Clause 18; Schedule 3; Clauses 19 to 29; Schedule 4; Clauses 30 to 32; Schedule 5; Clauses 33 to 48; new Clauses; new Schedules; remaining proceedings on the Bill;

4. the proceedings shall (so far as not previously concluded) be brought to a conclusion at 5.00 pm on Tuesday 23 November.—*(James Cartlidge.)*

Resolved,

That, subject to the discretion of the Chair, any written evidence received by the Committee shall be reported to the House for publication.—*(James Cartlidge.)*

The Chair: Copies of written evidence that the Committee receives will be made available in the Committee Room and will be circulated to Members by email.

Resolved,

That, at this and any subsequent meeting at which oral evidence is to be heard, the Committee shall sit in private until the witnesses are admitted.—*(James Cartlidge.)*

9.28 am

The Committee deliberated in private.

Examination of Witnesses

Sir Stephen Laws, Professor Richard Ekins and Professor Jason Varuhas gave evidence.

9.30 am

The Chair: Before we hear from the witnesses, please may I have any declarations of interest in connection with the Bill?

Andy Slaughter (Hammersmith) (Lab): I am a non-practising barrister.

The Chair: We will now hear from the first panel. We have three witnesses, all are appearing virtually. I thank you all for attending today's evidence session. We will hear from Sir Stephen Laws QC, senior research fellow at the Policy Exchange and former First Parliamentary Counsel; Professor Jason Varuhas, from the University of Melbourne; and Professor Richard Ekins, from the University of Oxford.

Before calling the first Member to ask a question, I remind all Members that questions should be limited to matters in the scope of the Bill. We must stick to the timings in the programme motion that the Committee

has agreed. We have until 10.25 am for this session, which gives us just under an hour. Could the witnesses please introduce themselves?

Sir Stephen Laws: My name is Sir Stephen Laws. I spent my career in the Office of the Parliamentary Counsel, starting in 1976. From 2006 until 2012 I was the First Parliamentary Counsel, head of the office and responsible for the offices of the Government business managers. Since retirement, I have been a senior research fellow at the judicial power project at the Policy Exchange.

Professor Varuhas: Good morning, I am Jason Varuhas. I am a professor of law at the University of Melbourne, where I am also the director for the Centre for Comparative Constitutional Studies in the law school. My interests lie in public law, private law and the law of remedies.

Professor Ekins: I am from the University of Oxford. I have led Policy Exchange's judicial power project for the last few years and have written a fair bit about cases involving judicial review that warrant criticism or are problematic. I have made submissions, as have my colleagues, to the independent review of administrative law and in response to the Government consultation, and most recently another paper for Policy Exchange outlining possible amendments that might be made to the Bill.

The Chair: Thank you. Could I invite the first question? John?

Q1 Sir John Hayes (South Holland and The Deepings) (Con): I am not particularly choosy about who answers this—indeed, you might all want to, but I am thinking particularly of Professor Ekins. The independent review of administrative law drew attention to other areas that the Bill might address—I am thinking of where abstract principles have been used to counter decisions of Parliament. The sovereignty and the will of Parliament are critical, and the abstract principles—I am referring to the Prorogation case, for example—should surely be addressed by the Bill. Linked to that is the Adams case, with which you will be familiar and which you will be familiar and which the Attorney General spoke about in a powerful speech a week or so ago, which challenges the Carltona principle. Is it not important that the Bill reinforces that principle, which would be good news for anybody who has been a Minister, is a Minister or, indeed, is on the Opposition side of the House and hopes to be one?

Professor Ekins: I will go first, since you directed that at me. It is true that the independent review of administrative law noted a worrying trend in relation to cases in which fairly abstract constitutional principles were used to develop the law in surprising ways. It is true that the review held short of recommending legislation in response, but it attended to this as a problem, and I think it is quite rightly within your field of vision as something that should be attended to. The review noted in particular the perfect legitimacy of Parliament legislating in response to particular cases that it thinks break new ground in problematic ways, which might include the Prorogation judgment or Unison, Evans and other cases. That would also include the Adams case, which the review briefly referred to. It is very true that that case made a significant change that is problematic for our law and government. Sir Stephen and I wrote a paper last year for Policy Exchange noting the shortcomings of the judgment—that it really undermines the Carltona doctrine, which is central to the way in which Parliament confers power on Ministers and how civil servants exercise that power. I think it will be a very good contribution to the rule of law to restore and vindicate that principle.

Sir Stephen Laws: If I can come in, I endorse everything that Professor Ekins said. The Adams case is very disturbing and undoes the assumption on which, for almost three quarters of a century, government has carried on. It needs to be urgently reversed.

On the question of parliamentary sovereignty, one of the great defects of the law as currently applied in proceedings for judicial review is that it does not adequately distinguish between the different sorts of decision making to which it is applied. It assumes that the same or very similar principles, processes and remedies are appropriate for a challenge to what you can call casework decisions by public officials in individual cases as should be applied to challenges to legislative decisions.

It seems to me that courts are deciding what the rules should be in future, hypothetical cases, or what the rules should have been in past cases that are not before them. They need to apply very different principles from those that they apply when they have one case before them and the public official has been doing something very similar—*[Interruption.]*

The Chair: Your sound has gone, Sir Stephen.

Professor Varuhas: May I come in while Sir Stephen fixes his audio?

The Chair: Yes, you can come in while Sir Stephen gets his sound back.

Professor Varuhas: I also agree that there are some concerns that attend the Supreme Court's increasing attraction to articulating very broad constitutional values and rights. That was something that the independent review of administrative law drew attention to, and particularly the court's articulation of these norms not revealing any particular principle. The right of access to courts has perhaps unsurprisingly been classed as of fundamental constitutional value, but not the right to life, for example. Moreover, these values have been used at times, it seems, to subvert parliamentary intention in the interpretation of legislation. I think there is a more general need for a reassertion of legislative or parliamentary intention as the touchstone of statutory interpretation, which would help to counter some of these problematic trends.

On the provision for suspended quashing orders in the Bill before the Committee, part of the rationale for suspended relief is that, in cases where controversial constitutional values are invoked or there are controversial interpretations of statute where Parliament's intention is in question, relief can be suspended as a prompt for Parliament to enter the fray and inject its voice on behalf of the polity into the delineation of constitutional values and norms, and to make clear, where there is any doubt as to its intention, what its intention was in a particular statutory context. The suspended orders in the Bill are in part a response to that jurisprudence, although, as I mentioned, more reforms could of course be introduced to clarify parliamentary intention as the touchstone of statutory interpretation.

The Chair: Sir Stephen, do you want to come back in, because you were cut short by the sound? *[Interruption.]* We are still having sound issues, so we will try to come back to you later. I do not know whether it is a technical

[The Chair]

issue at your end or this end. Sorry about that, Sir Stephen. In the meantime, I will take a question from Andy Slaughter.

Q2 Andy Slaughter: Good morning, gentlemen. I think this is supposed to be a more general session on judicial review, although we also have one eye on what is in the Bill. Lord Faulks, the chair of the independent review, said in this report that,

"overall, the way that judicial review worked was satisfactory"

and that

"any decision to do something about it radically would…be wrong and potentially contrary to the rule of law."

From some of the answers you have already given, it sounds as though you may not entirely agree with that. Where do you differ from Lord Faulks, if at all? On the contrary view, how do you think judicial review can help to improve decision making by public bodies?

The Chair: Can I ask who that is directed to first, Andy?

Andy Slaughter: Any of the witnesses.

The Chair: Who wants to take that question?

Professor Ekins: I will go first, and then my colleagues can take a turn. I am always happiest when agreeing with Lord Faulks, and I am certainly not willing to propose a radical overhaul of judicial review. It is a central institution of our constitution and there would be dangers in trying to put it entirely on a statutory basis—a course of action that has been thought through but that I think would be fraught with difficulty.

The question is whether it has gone too far in some domains and in some directions, and that conclusion is entirely compatible with the idea that you do not want to overhaul it at large and that no radical reform is necessary. A correction could be made in certain cases, where judicial review is extended into the heart of the political constitution, as you saw in the Prorogation case, which I know Lord Faulks was much exercised about and was highly critical of, and in other cases, where the techniques involved—we have talked about some of them already—are difficult to square with parliamentary sovereignty and the primacy of Government decision making in relation to the public interest, and where, rather than a supervisory jurisdiction being in play, one has intrusion into the merits.

One can make some significant corrections on the margins—if you call it the margins—without undermining the central value of judicial review. In relation to its value, Ministers should clearly be subject to the law; they should not exceed the scope of their statutory powers, or go beyond the scope of prerogative powers for that matter. The courts have a vital role to play in vindicating those legal limits and in correcting deficiencies in process, where decision making might have flouted the requirements of natural justice or in extremis has simply made an irrational decision, although one would expect that to be less common. So there is undoubtedly a very valuable role for judicial review to play, but that is consistent with noting—as do some senior and retired judges—that what has gone on in some significant, major, politically salient cases is unjustifiable and warrants a legislative response.

Q3 Andy Slaughter: Can I follow up on that before the other witnesses come in? Are you saying that, if any amendment is needed, the correct response would be a sort of tit-for-tat response—that is, responding to individual judgments rather than something more systemic? You said that

"the Bill's measures are a carefully considered, limited response to two important Supreme Court judgments."

Some of the things that the Lord Chancellor has said in the context of human rights have implied the same thing—that, effectively, there will be a second-guessing or a corrective effect on judgments of the superior courts. Is that how you see this working?

Professor Ekins: In part. With respect, I would not say tit for tat, but judgments that put the law in doubt in significant ways, or break new ground in ways that are constitutionally problematic, deserve a response to correct the law. It is not a response to dress down the judges; it is to restore or make the law to that which Parliament wishes it to be. I think that much good can be done by a systematic response to cases where the law has been changed in difficult ways. That would be the central mode of action.

There is a sense sometimes, though, that one should respond to grounds of action. For example, a legislative response to the Adams case—I have drafted a possible response—would not necessarily, and does not, mention that case by name, but it restates the Carltona principle. It makes it clear that the Carltona principle has a central place in our law and constitution—so, partly just a general change but motivated by cases where this has been put in doubt.

Q4 Andy Slaughter: I have seen the paper you have written on that. It does appear to imply a sort of ping-pong effect, where you see what the courts do one day and we here do it another day. Obviously, it would be easier if the Government were able to do that by statutory instrument, but it seems like quite a radical departure from the way that we do things normally.

Professor Ekins: With respect, I do not think that it is a radical departure. I think that legislative responses to judgments that put the law in a difficult place were, maybe not routine, but they are certainly unimpeachable constitutionally. In a sense, this is an opportunity, in this Bill, to look back across several decades of legal development, or at the least the last decade or two, and make some changes that are worth making in this context. Whether power should be used by statutory instrument, I would be much less comfortable with, in so far as some of the changes we are talking about involve the meaning and application of a judgment.

Q5 Andy Slaughter: Yes, that is the point. We have all been involved in emergency legislation from time to time. It is relatively rare, and it is something of an occasion, so in that sense it marks things out. The danger would be if that were to become routine and there was effectively an office of Government that is there to be corrective of the courts when Governments get it wrong.

Professor Ekins: I would not imagine that it needs to be emergency legislation. Sometimes it will have to be, as was the case after the Ahmed case, where legislation was moved from within a matter of weeks to a number of days, but much more often, we simply need to pay attention and be willing to bring forward legislation in response. Obviously, legislative time is scarce, so that will always be difficult to prioritise, but noting when the law of judicial review has been developed in startling ways that really are not justified in responding is a significant exercise of Parliament's responsibility.

The Chair: Does any other panel member want to come in to respond to Andy Slaughter's question? Sir Stephen, have we got you back yet?

Sir Stephen Laws: I think so; I apologise. I think I detected a problem at this end. There are some systematic approaches that need to be adopted. I think it is right that Parliament should retain its ability to react to individual cases, but that is difficult because time is short and, quite often, by the time the courts have set the framework, they have intervened, in a way, in the political argument.

I would like to come back to the point I was trying to make when I was muted. There are distinctions between intervention by judicial review in casework and intervention by judicial review in legislative actions, because the remedies and principles that are applied to legislative actions are themselves legislative. If the courts are deciding judicial review decisions that set the rules for future hypothetical cases, they are usurping the legislative function. The systematic approach needs to distinguish more clearly between judicial review of legislative actions and system management issues, and judicial review of casework.

Professor Varuhas: Obviously, there are many cases in the judicial review casework of the courts that raise no problems whatsoever, but the IRAL report identified some problematic areas where there were patterns where courts were potentially exceeding the institutional and constitutional limits of their role. It was acknowledged in the conclusion to the IRAL report that there were some instances where the Supreme Court had exceeded the supervisory conception of review. It is also important to note that IRAL acknowledged very clearly that it was legitimate for Parliament to legislate in the field of judicial review, including the response to particular judgments. I note that the modern machinery of judicial review was established by legislative instruments and statute, particularly the Senior Courts Act 1981. The entire modern machinery of review is owed to legislation.

A number of problematic areas have already been mentioned by my colleagues. One is that the courts have turned from scrutinising individual decisions to scrutinising and evaluating entire administrative systems and invalidating them, without an acknowledgement that the courts lack expertise and experience in the field of design of large administrative systems.

Another area is in proportionality—where the courts strike a balance between competing considerations. That tends to supplant the role of the statutory decision maker, whose role is to weigh up all those considerations. Then there are the areas we have already mentioned, where the court has taken upon itself to speak for the polity in articulating constitutional values. One would expect that is a role for Parliament first and foremost. Also, there is where the courts have used those values to interpret legislation in the light of the concerns they consider normative appealing, rather than necessarily to give effect to the legislative intention that sits behind legislation.

What the IRAL process showed is that it can be very difficult to legislate as to the substance of judicial review at an abstract level, but what can be done is that responses can be made to particular judgments. There are plenty of examples through history where Parliament has done so. Also, the rules governing the procedure and remedies of review have always been housed in the Senior Courts Act—they are the product of Parliament; Parliament has updated and amended those procedures and remedies over time. This latest batch of reforms, particularly the remedial reforms, can be seen as a further incremental development of the remedial system.

Remedies can be important, because they can provide an outlet for wider concerns, such as the public interest or interest in good administration, and they can provide a way to modulate the boundaries of review, to ensure that it does not stray beyond ordinary practicalities and infringe upon fundamental principles. Again, I think that is entirely legitimate and there are many examples of Parliament legislating as to remedies.

Q6 Andy Slaughter: You are talking on a fairly high level here—I think Professor Ekins mentioned "heart of the constitution" cases, which are obviously very sexy to talk about—whereas most of the submissions we have had are from non-governmental organisations, environmental groups or people dealing with special educational needs, who are concerned that some of the provisions in the Bill may limit the opportunity because either a suspended or a prospective-only order will mean that, for some reason or other, they are unable to get their case before the court. Are you sympathetic to that at all?

Professor Varuhas: These remedies will not prevent anyone from getting in the court door, because they are remedies, which apply after a finding of unlawfulness has been found by a court. I think these remedies are welcome, because they provide for a greater remedial flexibility for courts—for courts to tailor remedies in their discretion, to the exigencies of the particular facts of the case. It is important to bear in mind that these remedies will be discretionary and the courts will take into account a range of relevant considerations in exercising that discretion. Courts are well versed in exercising remedial discretion—courts can be expected to respond to the justice of the particular case. What the Bill does is to give the courts more options.

The most common consequence of a finding of unlawfulness is that the impugned administrative measure is a nullity, which means it never existed. That will suffice in many cases, but in some cases it will be an overly blunt measure that can have very drastic effects. For example, a large infrastructure project may be started and there might be a slight technical or procedural error at the outset.

If the project proceeds and is then nullified as if it never existed, that will have very negative effects on the people who had contracted with the Government and, by being critically disruptive, on the national economic interest, and could lead to significant economic waste. In that sort of case, a suspended order allowing the

Government time to respond to the finding of unlawfulness and make relevant provisions to accommodate that finding, or a prospective order that holds that what has gone before remains good and that the nullification takes effect only prospectively, can play an important role in protecting very important public interests, interests of good administration and the interests of third parties who might interact with Government.

Indeed, if something like a large infrastructure project were invalidated, it could undermine the confidence of market players in contracting or working with Government, because the rug could be pulled out from the project at some later point once a lot of money and time has been sunk into it. I think these are very moderate reforms seeking to give the courts greater remedial flexibility to tailor remedial responses to the particular context of the case, in the light of the range of interests implicated.

Sir Stephen Laws: I am sympathetic to people who have a view about what remedies should be granted to litigants in the case in question, but I am not sympathetic to the idea that judicial review should be an extra step in the political debate about whether a piece of legislation should exist or continue to exist. The Unison case provides a startling example of the sort of absurd consequence that you would get from the nullity remedy.

In that case, the courts overturned fees to be charged to people who wanted to take their employment cases to hearing. The result of nullifying the regulations involved a very large amount of money being paid not to the people who were deterred from bringing their cases to employment tribunals, but either to the people who did bring them and lost, or to employers in those litigations who lost and had to pay the fees of the people who had been successful. That was a ridiculous remedy for a mischief that harmed people other than those who got their money back.

Professor Ekins: I agree with my colleagues that clause 1 increases remedial discretion and focuses it to some extent, although one can argue about how it does that. Much of the response to these two clauses has been overstated.

We have not yet spoken about clause 2 and the limitation of review of the relevant decisions of the upper tribunal. Again, that has been a bit misunderstood or framed and received by some groups as though it were an abolition of judicial review at large in some way, but I think it is a restatement of the law that Parliament tried to create in 2007 in the relevant legislation. The Supreme Court sort of glossed that in 2011, and many senior judges have been unhappy with the way that it was decided then and the way it was worked out subsequently.

In limiting review in the way that clause 2 does—with plenty of safeguards, I should add—one is not barring the door to the courtroom, but bringing an end to an otherwise never-ending series of procedural steps. Looking into it, one can always find a benefit from further procedural steps, but it is a perfectly reasonable and proportionate response to limit judicial review in that context, where the decision maker in question is another court. It is not a Minister detaining someone, or something like that; it is the upper tribunal, and as a court, it warrants an immunity from judicial review in that context. People should be much more relaxed than some have been about those two measures.

Q7 Andy Slaughter: I have just one more question on clause 2, although not on Cart per se. You will be aware, because it has been quoted quite widely, that the press release that accompanied the introduction of the Bill stated that

"it is expected that the legal text that removes the Cart judgment will serve as a framework that can be replicated in other legislation."

That appears to signal an intent on the Government's part to use the ouster more commonly in future. Is that how you read it? Do you think that that is a good or bad way of going about things?

The Chair: Who wants to take that one first?

Professor Ekins: I will, since I was talking about Cart just now.

It is true that they have signalled that. I think that this will be an effective ouster clause because it is a perfectly constitutionally irreproachable response to the Supreme Court's judgment. It restates Parliament's intention and is protecting a court's jurisdiction—not an ordinary court's, but a specialist court's, albeit one with pretty wide jurisdiction.

I think that it will work as an ouster clause. I do not think that the courts will view it with disdain or try to undercut it as they have done with some other ouster clauses. To that extent, it will provide a framework, partly because it is limited: it is designed to limit judicial review without ousting it altogether. It is a safeguard in relation to true procedural failure, bad faith and so on, which is fine and proper.

I think that it could be used as a framework for other cases. In the Policy Exchange paper that I published last week, I suggested one such context: the Investigatory Powers Tribunal, another specialist court, which was subject to the protection of an ouster clause enacted in 2000, as David Davis mentioned in his *Guardian* article last week. That ouster clause was undercut by the Supreme Court in 2019, using some of the problematic techniques that we have talked about—openly departing from legislative intent and distorting the meaning of the statute.

I think that Parliament should enact an ouster clause, modelled on clause 2, that protects the Investigatory Powers Tribunal. There will be pretty sharp limits on how often you want to use the clauses, of course—this one is controversial, and they will all be controversial. Whenever there is a suggestion that there is not a proper context for ouster, the controversy will be higher.

We have talked before about intrusions that judicial review has made on some relationships at the heart of the political constitution. There is a case to be made for ouster, or for limitation of review, in that context. You will be aware of the Dissolution and Calling of Parliament Bill, which is making its way through Parliament now. Clause 3 of that Bill is a partial response to the Prorogation judgment, and quite rightly so; it protects the prerogative of Dissolution, when it is restored, from judicial review. I think that that is justified and that you may have to act similarly in relation to Prorogation law or other aspects of the political constitution.

I would not expect the approach to be widely used, but I think that there are contexts in which it is reasonable and justified.

Sir Stephen Laws: I agree with all of that. As a drafter of legislation, whenever I was asked to draft an ouster clause, as I was from time to time, my response

was always: "There's no hope of it ever succeeding, unless you're presenting a politically and legally justifiable alternative route for people who would otherwise be going to the court." That, of course, is what the Cart judgment does, for the reasons that Professor Ekins has given: the upper tribunal is a proper court; the Investigatory Powers Tribunal is a proper remedy; and, in the case of the Prorogation judgment, the remedy is political because that is how the constitution is set up. In relation to the major matters of the relationship between Parliament and Government, it is Parliament that has the remedy, ultimately, in being able to pass a vote of no confidence in the Government and require their resignation or a general election.

Professor Varuhas: On clause 2, the first thing that I would say is that it derives from a clear recommendation from the expert independent review of administrative law and has subsequently been subject to a full Government consultation. Former Law Lords have also come out in support of the policy, including Lord Hope, who is the former Deputy President of the Supreme Court, and Lord Carnwath, who—importantly—was the inaugural Senior President of Tribunals and was subsequently a Law Lord on the Supreme Court. He said that the ouster would restore what was always intended: that the upper tribunal should have equal status with the High Court. That was the intention behind its designation as a superior court of record. As colleagues have stressed, that is a really important point: the upper tribunal has equivalent status to the High Court.

There is a further point to be made, which relates to how many bites of the cherry one person might have. It is worth reminding ourselves what a Cart judicial review is. It will have been a claim in the first-tier tribunal that will have been unsuccessful. The claimant will then seek permission to appeal to the upper tribunal. The first-tier tribunal will decline permission, and then the claimant will appeal to the upper tribunal against the declination of permission to appeal to the upper tribunal. The upper tribunal will have declined permission to appeal. It is not clear, given the upper tribunal's status as a superior court of record, that one then needs a further bite of the cherry by going to the High Court via judicial review, and potentially all the way up the judicial hierarchy.

Whatever the case is more generally, in this instance the clause is justified, and it is a targeted response to a particular problem. Also it is not a pure ouster, because in clause 2(4) the path remains open for claimants to bring a judicial review in the High Court in serious instances of illegality, such as where the upper tribunal acts in bad faith or in fundamental breach of principles of natural justice. That is an important point to bear in mind: there is still a route to the High Court in cases of serious unlawfulness.

The Chair: A few Members have indicated they wish to ask questions, so I will take them in order.

Q8 Tom Hunt (Ipswich) (Con): There has been lots of debate about whether these reforms are necessary or good for parliamentary democracy. It is important to reflect on the fact that of course it was in the Government's manifesto that they would propose significant reform to the way in which judicial review works. To what extent do the witnesses see the mandate of an election as important to the functioning of our democracy?

The Chair: Who wants to take that one? Is it a googly?

Professor Ekins: I will start. Clearly the mandate on which the Government campaign and secure a majority is significant. It is true that page 48 of the Conservative party manifesto makes a commitment to look again at the constitution and to take measures to ensure that judicial review does not become "politics by another means"—a phrase Lord Sumption used in his Reith lectures and also used by the High Court and the Court of Appeal in judgments in 2019. It is also true that the commitment does not spell out what it will involve, and that is partly what the Committee is considering and the Government have been thinking through—as has the independent review of administrative law.

There should be no constitutional question about the entitlement of Parliament to legislate on judicial review. The Lord Chief Justice of England and Wales, Lord Burnett, has made that crystal clear in various public statements. The question, of course, is the merits of the proposals—the devil may be in the detail. It would be wrong, as we have discussed, to overhaul judicial review. It would be a mistake—not improper, but a mistake—to try to put it on a statutory footing at large, but changes can be made where problems have arisen.

The political salience of judicial review has clearly risen in the last five years—indeed in the last decade or two. If one can identify the problematic trends and respond to them in a targeted and careful way, one would be acting properly and in accordance with the manifesto, even if I would be cautious myself in connecting any particular proposal to the manifesto because it was not quite that specific.

Sir Stephen Laws: I have nothing particular to add to that, as it all seems right. In my submission to the independent review of administrative law I drew attention to what I thought were the beginnings of a breakdown in trust between the political world and the judiciary, and the political salience of the issues around judicial review is evidence of that. Plainly, there can be no question about Parliament's right to legislate, and the need to do so has been demonstrated.

Professor Varuhas: I would add that the concerns reflected in the manifesto around the judicial review and whether the courts had in certain contexts overreached were vindicated in the IRAL report, which did pinpoint at multiple times areas of concern. This set of reforms, regarding remedies and the Cart ouster, have been through an incredibly thorough process. An expert independent panel was constituted, the Independent Review of Administrative Law, with five distinguished academic lawyers and others drawn from the profession, chaired by Lord Faulks. The reforms in the Bill derive from that panel's recommendations.

The panel stressed the need for reforms to emphasise remedial flexibility and it recommended the ouster of Cart judicial reviews. Those recommendations were then put out to general consultation—a Government consultation. At each stage there were a lot of consultation responses, so the reforms we see before us are the product of an incredibly thorough, expert-led process. To my mind it is not a surprise that the reforms are well justified in the end.

The Chair: Thank you. Are you happy with that, Tom?

Tom Hunt *indicated assent.*

The Chair: Sir John Hayes.

Q9 Sir John Hayes: I am listening closely to what you have all said. You have described a sort of creeping judicial activism. The case you have made is that the Bill effectively reaffirms the proper role of judicial review against a drift into a whole range of political areas where judicial review is used as a means of perpetuating political debates. I have particular concern with the perpetual use of the idea of rule of law to legitimise that judicial activism. I would be interested in your view on that. A very good example is the Privacy International case, where the extraordinary judgment by Lord Carnwath talked about the essential counterpoints to the power of Parliament to make law. It describes the courts as such. This is an extraordinary and outrageous thing for a judge to say. It is time, to put it bluntly, that we put some of these people back in their box. Is it not?

The Chair: Who wants to take that question? Anybody?

Professor Ekins: I will go first. I have been highly critical of the Privacy International judgment, and I share the view that the majority judgment, or Lord Carnwath's judgment, with which Lady Hale and Lord Kerr agreed, was outrageous. Those three judges are no longer on the Supreme Court, but that judgment is part of the common law and it does warrant a response. There were many other things going on in May 2019, so maybe it is not a surprise that it did not get much public attention, but that judgment did constitute a very serious attack on some fundamentals of the constitution.

Parliamentary sovereignty was openly questioned and the rule of law was set in apparent tension with parliamentary sovereignty, which is deeply wrong, I think. The rule of law requires respect for the law, which includes parliamentary sovereignty and the stability of statute, and the primacy of legislative intent in interpreting statute is one of the fundamental ways in which the rule of law is secured. It is true that the rule of law is often bandied about as though it warrants adventurous judicial action that cannot be squared with the existing constitutional law or with the terms of statute, because we are going to make it better and we are going to impose further controls on the Government or public bodies.

As Lord Hughes, who was on the Supreme Court at the time, said, that is to confuse the rule of law with the rule of courts. You do not see that just with the Privacy International case, we see it in the Evans case, involving the Freedom of Information Act 2000, where a clear statutory power was undone. Three judges interpreted it so that it does not exist any more, and another two judges, also during the majority, attacked its exercise in a different way. This is a worrying trend, and the independent review noted the Evans case.

If Parliament can notice and respond to those judgments, it will both correct the law that has been undone and make clear that the technique is seen and is not tolerated as legitimate. In cases where judicial review breaks new ground and is being carried out in a way that is inconsistent with statute and long-standing principle and rules—the Prorogation judgment is very large here—the litigation is an extension of political argument and a way of getting the courts to weigh in on your side in a controversy. That is destructive of the courts' reputation and of the political constitution that should be framing those arguments, and it is not vindicating the rule of law but undoing it and undoing the political foundation for our parliamentary democracy.

Sir Stephen Laws: I would agree with that. It seems to me that the fundamental principle that should be upheld as part of the rule of law is the need for legal certainty and predictability. Judicial law making undermines that because it produces new law that nobody was able to expect, and because of the myth that the common law has always existed, it also creates the further injustice of retrospective effect.

If ordinary citizens cannot predict with certainty before they act what conduct will escape censure, that is a serious injustice. If public officials cannot be sure that what the law allows them to do, adherence to the law for them ceases to be a matter of principled compliance and becomes instead a straightforward commercial exercise in risk management, and that is a very bad thing for the management of public affairs generally.

The Chair: There seems to be consensus on that. I am conscious of time; Jason, would you like to come in on that quickly?

Professor Varuhas: I think the rule of law is an important value, but all too often, it is used to denote what someone thinks is good. It is often invoked without elaboration and as a trump card. The rule of law is an important value, particularly the principle of government and the law, but other values and aspects of the rule of law can be important.

As Sir Stephen alluded to, you can see that with the proposal for prospective orders, for example. You might have a decision-making procedure created by regulation, with many decisions made under that in regard to particular people. If you invalidate that ad initio, the consequence will be that all those decisions in regard to all those individuals would be thrown into doubt. They would have planned their lives on the basis of the decisions that had been rendered in regard to them.

On the one hand, you might say that voiding ad initio and rendering a decision a nullity upholds the rule of law, but it can undermine other aspects of the rule of law, such as certainty, predictability and people's ability to plan their lives in the light of decisions that have been made in regard to them. The beauty of prospective orders is that they can be calibrated to save those past decisions and provide certainty, finality and confidence in the administration of justice for those individuals, while ensuring that the system complies with legal requirements going forward.

The Chair: I am conscious of time. As I said earlier, we have to move on to the second panel soon, so this will be the final question. I call Dr Caroline Johnson.

Q10 Dr Caroline Johnson (Sleaford and North Hykeham) (Con): I have a question about the potential for quashing judgments not to be retrospective. To what extent does the legislation provide protection for the individual and balance that with the potential for political activity? How does it make sure that judges have good guidance on when they should and should not use the measures that will become available to them?

Professor Varuhas: One of the motivations for the provisions is to provide the courts with flexibility to adapt remedies to the particular needs of the given case. That is a response to a series of Supreme Court decisions that have held, contrary to long-standing authority, that a funding of unlawfulness automatically voids administrative measures as if they never existed. That has never been the position, because there has always been remedial discretion to modulate the effects of unlawfulness.

The Bill reasserts that remedial flexibility so that remedies can be tailored to the particular needs of relative interests and values implicated in the facts of the case. In proposed new section 29A(8) of the Senior Courts Act 1981, you have a list of factors that will guide courts in exercising their discretion, and those factors are drawn from the common law, so dovetail with pre-existing doctrine. Importantly, they give litigants and the Government fair warning of the factors that will bear on remedial decisions. Subsection (8) requires that

"the court must have regard to"

those factors, which has the benefit that the court will apply the same framework in every case. That provides consistency of principle and ensures transparency, because the court will have to work through those particular factors to reach a conclusion regarding what type of order ought to be given on the facts of the case.

In my view, one problem with subsection (9) is that it erects a presumption. It is a particularly weak presumption, and therefore one might question what the justification for it is, but more generally I am not necessarily in favour of a presumptive approach one way or the other, because that can undermine the court's capacity to adapt to the particular facts of the case and respond to the particular factors that arise—the public interest in good administration, the interests of third parties and so on. Necessary flexibility is built into the scheme, but there is also fair warning of the factors that will be taken into account pursuant to subsection (8), which is a particularly important provision in that regard.

The Chair: I am conscious of the time, and I think the Minister will want to ask the final question, so I will take a short response to Dr Johnson's question from one of you. Then I will move across to the Minister before we close the panel.

Professor Ekins: Briefly, I agree with everything that Jason said. One could add a little more detail perhaps to the factors in subsection (8), tying in with Sir Stephen's point about the significance of whether something is a legislative act. That seems like something that should be at the forefront of the court's mind. It is a weak presumption in subsection (9). One could either remove it or tailor it, narrowing it so that the presumption arises only where the decision making in question is legislative in character or on a general policy decision, rather than casework, to use Sir Stephen's term. At the moment, it is a very broad presumption, and a very weak one, and it might be more useful if it were narrowed and applied in a more focused way.

The Chair: Quickly, Sir Stephen.

Sir Stephen Laws: I am a legislative drafter. I am used to people asking me to guarantee when a discretion is conferred that it will be exercised in the way that they wish. I think I agree with Professor Ekins that more detail would be desirable.

The Chair: Thank you. To ask the final question, I call the Minister.

Q11 The Parliamentary Under-Secretary of State for Justice (James Cartlidge): Thank you, Sir Mark; it is a pleasure to serve under your chairmanship. I thank our three very distinguished guests for their excellent contributions and some very interesting points. I will finish with one point on Cart JR. I think Professor Varuhas made the point about the upper tribunal effectively being a superior court. On Second Reading, my hon. Friend the Member for Newbury (Laura Farris), who has acted on Cart JR cases as a barrister, made this point about consistency: in very few other areas of law do we have what we call three bites of the cherry. Very briefly, does it not seem strange that no one arguing to maintain Cart JR seems to be arguing that all the other areas where there are only two bites of the cherry should now have three? Would that not be the logical conclusion of that position?

The Chair: I think we have time for only one response, so who should take it?

James Cartlidge: It probably has to be Professor Varuhas.

Professor Varuhas: I reiterate what I said before in response to your question. The phrase on the number of bites of the cherry comes from a speech given by Lord Carnwath, who raised this point and considered that it was disproportionate that an applicant in this context should have so many bites of the cherry, given that the upper tribunal has the status of the High Court. It is a judicial body, independent of Government, that is staffed by senior members of the judiciary with specialist expertise. Given the credentials of the institution, it seems disproportionate to allow a further three or four bites of the cherry after an application has proceeded through those stages and been found not to have merit. I think the point is well made.

I will abuse my position to add one further point on the remedies provision. Professor Ekins reminded me that I meant to say that one discretionary factor that should be added under subsection (8) is the public interest, which is a curious omission because the public interest can be seriously prejudiced by decisions on remedies in the interests of the economy, national security and so on. That should be factored into the remedies.

Although I went slightly off topic at the end, I certainly agree—

The Chair: Order. I am afraid that brings us to the end of our time. I thank our witnesses on behalf of the Committee for their evidence today.

Examination of Witnesses

Professor David Feldman and Dr Jonathan Morgan gave evidence.

10.25 am

Q12 The Chair: We now move on to panel 2. We have one witness present, Dr Jonathan Morgan, and a virtual witness, Professor David Feldman.

[The Chair]

We will hear oral evidence from Professor David Feldman and Dr Jonathan Morgan, both of the University of Cambridge, for just under an hour. Without any further ado, I ask them to make their introductory addresses.

Professor Feldman: Thank you, Chair. I am David Feldman, the emeritus Rouse Ball professor of English law at the University of Cambridge and emeritus fellow of Downing College, Cambridge.

I have been working in this field for some 40 years, and I take a great interest in what is going on. In relation to the proposed new provisions set out in clauses 1 and 2, I suggest that one should approach them on the basis of the constitutional background and the importance of judicial review and access to courts.

On the constitutional importance of keeping public officials within the limit of the powers set by Parliament, parliamentary sovereignty requires that there should be independent interpreters and adjudicators to keep the people to whom statute delegates power within the limits set by Parliament. That is complicated by the requirement of the rule of law that requires obedience to law by Government and scrutiny by an independent judiciary on the lawfulness of behaviour.

The combination of parliamentary sovereignty and the rule of law, together with article 6 of the European convention on human rights, where applicable, requires access to independent and impartial courts and tribunals and it requires the availability of effective remedies for violations of law, where those are found to have taken place.

The Chair: Professor Feldman, may I interrupt before you go any further? We obviously want to use the majority of our time for questions from Members. Although I am happy for you to give a brief presentation, I want to introduce our other witness so that we can open up for questions. If you could bring your opening remarks to a close, I can get Jonathan Morgan to introduce himself. The floor is still yours, but please be conscious of that.

Professor Feldman: The conclusion is that the provisions in clauses 1 and 2 affect access to courts and the effectiveness of remedies and, therefore, should be examined with very great care to make sure they are justified.

Q13 The Chair: Thank you. Dr Jonathan Morgan, do you want to say a bit about yourself and your view on the topic? Then we will open up for questions.

Dr Morgan: My name is Jonathan Morgan. I am a reader in English law at the University of Cambridge and a fellow of Corpus Christi College. Like any academic, I would be delighted to address you on the sexy subject of constitutional theory, but having heard what my learned friend has experienced, I will not do that now. I will just say a couple of things about the Bill before us.

It seems to me that clause 1 is highly welcome, but it needs two significant amendments to make it perfect. Clause 2, which is on the Cart review, is compatible with the rule of law, but there are some very real costs to doing this, and Parliament needs to confront them. One of the costs is that the very few people who succeed in Cart reviews will not have that avenue in future. I am happy to substantiate those in questions, but I will not enlarge on that now.

Q14 Dr Johnson: I have a question for Dr Morgan. I am not a lawyer, so forgive me if this question is insufficiently sophisticated. The Cart review is a judicial review of the upper tribunal in the immigration service. My understanding is that judicial reviews are designed to review the capacity of the Government to make a lawful decision, but we have heard that the upper tribunal is not a Government decision; it is a court decision. Is the Cart judicial review unusual in that respect? Are there other examples, or is it an anomaly that there is a review of a decision by a senior court, rather than a Government decision?

Dr Morgan: I think you have put your finger on it, lawyer or not, because Cart deals with a fairly unusual situation, exactly as you have said. This is to do with the level of appeals within the judiciary. Critics of clause 2, who say that this is doing violence to the rule of law and is setting a bad precedent by immunising the Government from being judicially reviewed, are therefore somewhat missing the point. Clause 2 has its cost, but I do not think it immunises Government decisions from judicial review. It simply says how many reviews or appeals there should be within the judiciary. I was here for the previous panel of witnesses, and in terms of whether you have permission to review within the court system, the number of "bites of the cherry" is a good way to put it.

One overall criticism of the Supreme Court might be that it failed to give proper respect to the tribunal system as a branch of the judiciary. It had a slightly legacy, old-fashioned view of the tribunal system as something that needed to be under the supervision of the High Court, and so on. That is why Lord Carnwath, who, as we have heard, is a former Senior President of Tribunals, has been a critic of the Cart decision. It is important to see clause 2 as to do with arrangements within the judiciary. Yes, there is an ouster clause in clause 2, but it does not immunise administrative or Government decisions. It immunises decisions of what is, in effect, a court by another name—the upper tribunal.

The Chair: Dr Feldman, do you want to come in on that? I noticed that your volume was quite low. If possible, could you raise your voice a little bit?

Professor Feldman: I beg your pardon; I did not hear that.

Q15 The Chair: Would you like to respond to the question? If you do, could you please raise the volume a little? You were very quiet in your opening remarks.

Professor Feldman: Thank you. The only thing I would add to what Dr Morgan has said is that judicial review is seen as a general safety net. One of its functions is certainly to scrutinise Government decision making and action, but it is there as a backstop to deal with unlawful action by any public body. One starts with the presumption that judicial review is available unless there is some specific reason for excluding it. It is clear that the justification for interfering with access to judicial review may be stronger where a body is a judicial body,

and where a litigant has already had the chance to have his or her case heard by an impartial and independent tribunal, rather than simply by an administrative body.

Q16 Dr Johnson: I have a quick question, and forgive me for not knowing this. The upper tribunal is a superior court of record that, according to my notes, is equivalent to the High Court. Is it normal for High Court decisions to be subject to judicial review?

Professor Feldman: The answer is that the courts held in Cart that being a superior court of record does not immunise a body from being subject to judicial review. For practical purposes, the High Court is immune to judicial review, because it is the High Court that carries out judicial review. It extends, as they used to say, to all inferior courts and tribunals—that is, below the level of the High Court—as well as public officials. It is a matter of basic principle that the upper tribunal was to be subject to this, even if, as Lord Justice Laws said in Cart, the upper tribunal would be seen as the avatar of the High Court.

Dr Morgan: In my view, this is what went wrong in 2007, so apologies to any Members who were in Parliament then. In 2007, Parliament thought that by designating the upper tribunal as a superior court of record, it would immunise it from judicial review. That is what the Government argued in Cart, but they failed to convince the High Court, the Court of Appeal and the Supreme Court.

To ingratiate myself with Members, I will say that the fault was not only that of Parliament but that of the Leggatt report on tribunals, which said that there should not be judicial review of the upper tribunal and that by designating it a superior court of record, Parliament would immunise it from judicial review. I am afraid that Sir Andrew Leggatt turned out to be wrong on that when it got to the courts. It is true that Leggatt had said that there should be an express ouster clause, which Parliament did not put in. If Parliament in 2007 had gone for the belt-and-braces approach and not relied only on the status of the upper tribunal as a superior court of record, Cart would never have happened and we would not be here today discussing it. In a way, this problem has been 20 years in the making.

Q17 Dr Johnson: Just to be clear, it is the equivalent of the High Court but it is not treated as such.

Dr Morgan: More or less. I think Lord Justice Laws called it the alter ego of the High Court, but that is not quite the same thing.

Q18 Andy Slaughter: May I clarify whether, at present, a judge can make a quashing order limiting or eliminating its retrospective effects, or suspend the effect of a quashing order? There has been some debate around that, given the proposals in the Bill.

Dr Morgan: I wrote an article about that in 2019 before IRAL was even thought of. It is not like me to be ahead of the trend. In it, I analysed in particular the Supreme Court's decision in Ahmed and others *v.* HM Treasury—the freezing orders case. Ahmed causes enough doubt on the question that legislating to put it beyond question is a worthwhile use of Parliament's time. There are some precedents the other way—in a case called Liberty, the divisional court suspended a declaration—but on quashing orders, the reasoning of the Supreme Court in Ahmed (No. 2) suggests that it is just not possible to suspend a quashing order. In my view, that is unfortunate, because judicial review remedies are in every other respect discretionary, so why not here? In the debate on IRAL in the House of Lords, Lord Hope said that he was dismayed to be in a "minority of one" when he dissented in Ahmed on postponing it. He certainly approves of clause 1. It is at least a doubtful point, and sufficiently doubtful that the legislation is worth it.

Q19 Andy Slaughter: You are saying there are two separate issues: whether it is a sensible proviso, and whether there is certainty at the moment.

Dr Morgan: Yes. My position is that it is a sensible remedy, and at the moment, it is certainly not clear whether the courts can do it. Clause 1 will, beneficially, clarify that.

Andy Slaughter: But a court might attempt to impose—

Dr Morgan: For a court below the Supreme Court, the obvious precedent that the applicant would cite would be Ahmed, and it would be very hard for a lower court to get round that, I think.

Q20 The Chair: I see Professor Feldman nodding his head. Do you want to comment on that point?

Professor Feldman: I think that is completely right. There is a big distinction between quashing orders and declarations for this purpose. What Ahmed (No. 2) did was to eliminate the difference—a quashing order quashes, whereas a declaration can only declare that a body has a duty or has breached a duty or has not breached a duty, and that is something that is not limited as to time. I also agree with Dr Morgan as to the effect of Ahmed (No. 2) on lower courts. However, I think there is a big distinction to be drawn between the suspending of a quashing order where, as the Bill says, the retrospective impact remains when the quashing order eventually takes effect, and a prospective-only order, which seems to me to raise significantly more problems of principle and of practice.

Q21 Andy Slaughter: Clause 1 gives the courts a discretionary power to grant a full remedy to a claimant, but to limit the retrospective effects of the judgment for any other individual who has not issued a claim before the date of judgment. Is that right? If so, are you concerned that it could lead to unjust outcomes for those already impacted by unlawful decisions?

Professor Feldman: One of the difficulties of having a prospective-only remedy is that it is only prospective, and by definition a remedy of this kind would take effect only if the court had already decided that the claimant had been treated unlawfully. To say to a claimant, "This is going to be prospective only" strongly implies it is not going to protect the claimant himself or herself. Some way would have to be found of protecting the claimant, and other people in the position of the claimant, if one did not want to be stuck in the position of saying, "These people were treated unlawfully, but they are not going to have a remedy."

In clause 1, there is nothing that makes it explicitly clear that a court could say, "I am going to give you a prospective-only remedy, except that it would be

retrospective for the purpose of protecting you." The court might be able to do that, but then you also have the problem of other people in the same position as the claimant—all those people would have been treated unlawfully. It seems strange to me that they should have to suffer unlawfully because the remedy is only prospective.

The language of clause 1, under which proposed new section 29A(4) of the Senior Courts Act 1981 would state,

"if the impugned act is…upheld"

is very odd. Subsection (5) says,

"it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect."

That makes it quite difficult to see why one should give a remedy to people who are deemed in that case not to have suffered a legal wrong.

I think it is quite a problem, unless the clause is amended to expressly allow a judge to give a remedy to someone who has obtained a prospective-only order, despite the fact that the law and treatment were to be treated as entirely lawful.

The Chair: Have you finished, Professor Feldman?

Professor Feldman: Yes, thank you.

The Chair: Dr Morgan.

Dr Morgan: I agree with what David Feldman said, but perhaps I could suggest a solution. This is an amendment that should be made to clause 1. Proposed new section 29A(2) to the Senior Courts Act 1981 says that the order

"may be made subject to conditions."

I think the court should have the power to set as a condition of making a prospective-only order or suspending the order that compensation should be paid to the particular applicant. In my view, that would be a way of squaring the circle of postponing the effect of quashing an entire piece of legislation—saying that is not going to happen today, but is going to happen in six months' time to give the Government time to prepare.

Of course, that would work great injustice on a successful particular applicant who has paid to take their case to court, has won and then does not get any redress at all. However, if the court were empowered to grant compensation, that could be a way of achieving both those things. I am a public lawyer, but I also teach contract and property law. If you get an injunction in a tort case, the court might suspend the injunction for a period of time and, if it does so, it will give compensation during the period of suspension. It is on that sort of model that I think this could work.

You could argue that while proposed new section 29A(2) says orders

"may be made subject to conditions",

the explanatory notes say that those could be any conditions the court likes. However, given that the courts cannot award compensation for public law wrongs, it is very doubtful whether that implicitly contains a power to award compensation. I think that proposed new section 29A(2) should be amended to say that orders may be "made subject to conditions including, if the court sees fit, compensation." That might be a way of reconciling those competing objectives.

Q22 Andy Slaughter: Do I take that to mean that the way the proposed new section is drafted could dissuade individuals from initiating judicial review proceedings, because they may not obtain a remedy?

Dr Morgan: Yes. That point was made by many Members on Second Reading. It could be a real problem, in particular if it became the norm and the court ordinarily postponed orders. In my view, the court should not ordinarily do that; it should be in exceptional cases only. That takes us on to the presumption in subsection (9) —but perhaps we will come back to that at a separate point. There are two problems with it: first, the presumption; secondly, the absence of a compensation power.

Professor Feldman: May I add two things to what Dr Morgan has said? I agree with what he says in principle.

First, the compensation remedy may not be useful to all claimants. If one is about to be deported as a result of having one's unlawful decision treated as lawful, for example, compensation is unlikely to be an effective and adequate remedy. There are lots of other types of administrative wrong that lead to people suffering loss or injury that cannot readily be financially compensated.

Secondly, if one is going to compensate, one has to consider all the other people who have been treated unlawfully, who are in a similar position to the claimant, but who are not before the court, so the court cannot order compensation for them. Perhaps one needs to consider whether a court should be empowered to require the provision of a compensation scheme for all those in a similar position to the claimant. That could be a lawful step.

It is also true, as Dr Morgan said, that the administrative law of the English system does not treat financial compensation as a readily available remedy. Therefore, some express permission would have to be made to allow the courts to do it.

Q23 Andy Slaughter: I do have one other question on ouster but, Dr Morgan, just before we leave clause 1, you mentioned a presumption. Do I take it from what you have said already that you are concerned about that provision in clause 1? Is that because of the way that it is drafted, or because of the inclusion of a presumption per se, in this context?

Dr Morgan: I would take the presumption out altogether. I think what this clause is doing—certainly what it should be doing—is enlarging the power of the courts to tailor relief in a way that they see fit, and removing the obstacle that the Supreme Court laid in their path in Ahmed *v*. HM Treasury (No. 2). Thus, I just do not see why it is there. The Government say that it is to encourage the courts to use this remedy, but I do not see why we should try and push the courts in a particular direction.

I also think, if subsection (9) is taken out, subsection (8) could be taken out as well. At the moment there is a need to try and direct the court what to take into account; the drafting is already getting very complicated. I think that probably everyone who has written you a paper has suggested more paragraphs that could be put in subsection (8); I think it is going to end up very long indeed. We are talking here about High Court judges; it is very senior judges who will be making these decisions, and in my view, they can simply be trusted to make the appropriate decision based on the facts. That is my first point—I would take it out.

If we are going to keep it in, it is virtually doing nothing at all. I think the courts will be very reluctant to find that there is an adequate redress, because they will say, "The claimant is not going to get anything, so that is not adequate redress." I think if the court does find that it is satisfied, they will say, "There is a good reason to make the quashing order immediate and retrospective, because that is what we ordinarily do. It is important to do that to keep the Government within the limits of its powers." I think that subsection (9) is not going to do anything other than generate needless litigation about this; it will become a question that has to be considered in every case, whether it is really relevant to the facts or not. Therefore, I suggest that subsection (9) should go.

Andy Slaughter: Professor Feldman, do you agree with that?

Professor Feldman: I do. Subsections (8) and (9) have twin disadvantages. First, they try to create a presumption that something will happen regularly, when we know that it will not, for the reasons that Dr Morgan has given. Secondly, they are unnecessary because the courts are quite capable of making judgements for themselves. Look at subsection (8)(f):

"any other matter that appears to the court to be relevant."

This opens up the field very nicely; I do not see anything there that is necessary.

Q24 Andy Slaughter: Finally, I will ask the same question that I asked the previous panel about ouster, and the Government's comment in a press release that the

"text that removes the Cart judgment will serve as a framework that can be replicated in other legislation."

Do you think that is a sensible way to go about legislating?

Professor Feldman: Is that for me?

Andy Slaughter: For either, or both.

Professor Feldman: I will start then, if I may. I think there is a real difficulty about a provision of this kind being used as a template, because there are two questions that arise. First, is this a situation in which it is justifiable to exclude the High Court supervisory jurisdiction? Secondly, have we drafted a provision that will work and have that effect?

In relation to the first, I think it is important to note that parliamentary sovereignty and the rule of law generally require that people should have access to courts to determine the lawfulness of action. There is a functional inconsistency between Parliament's saying that there are limits to the powers of a body or person and, on the other hand, saying that that person or body can decide for themselves, effectively, what those limits are. That is quite apart from the importance of access to courts for the rule of law.

I approach this by asking whether this sort of exclusion of review is justifiable. On balance, I think it is, for a combination of reasons. First, because it excludes review of judicial bodies, not of administrative or executive agencies. Secondly, because the number of people who will suffer, although we can never be quite sure, looks as if it will be relatively small compared with the number of people who would suffer generally if we cut off all judicial review. Somewhere around 3.4% of these cases end up being successful, the Government estimate, compared with 30% to 50% in most other judicial review situations. Bearing in mind the need to use judicial time as efficiently as possible, it may be that this is not a proportionate use of judicial time, in which case one might say—although I say this with great disquiet—that the ouster is justified.

Does it work? Yes, I think it does, for roughly those reasons. Courts will not kick against it, given that the claimant will have had two bites at the cherry already before a judicial tribunal. Is it a template? I am not sure that it will be either necessary or perhaps effective to use this sort of thing in situations in which someone is getting review of other types of decision by other types of agency in different circumstances. For example, I note that in another Bill before the House, the Dissolution and Calling of Parliament Bill, there is an attempt to exclude judicial review of decisions concerned with Dissolution of Parliament and purported decisions. Clause 3 of that Bill does not go into any such elaborate provision as are provided here. Presumably, the drafter of that considers that it will work, because of the nature of the decision that is being considered.

Dr Morgan: My position—

The Chair: Very quickly, because four more people want to ask questions. We are running on time.

Dr Morgan: Very briefly, I broadly agree. I think this will work for Cart. I think the Government are mistaken to see it as any kind of template, and that they can put exactly the same words into another Bill about some other different matter and that it will work, because it is not only about the words that Parliament uses but the entire context. Sir Stephen Laws, himself a parliamentary draftsman, made just that point—that it is not only the literal meaning of the words but the whole context. That is why it will work in Cart, but it may not work in another statute, even if precisely the same words were used. I would not see it as a template or model.

Q25 Sir John Hayes: So you are clear that the law needs to be altered, because of what you said about the 2007 circumstance. There is a good argument for greater clarity and certainty around this area of work. Furthermore, there is an argument for going further. For the reason that you just gave, there is an argument for taking a more comprehensive view of how judicial review should be reformed. I am particularly mindful of the points that were made in the earlier evidence session about judicial activism and the challenge that it represents to Lord Bingham's affirmation. You will remember the Jackson *v.* Attorney General case about the Crown in Parliament and its supremacy. The need for legislation is clear. The Bill is good in parts but, if anything, the Government need to go further.

Dr Morgan: There was a debate earlier about whether this should be described as tit for tat, which I do not like either, but doing it on a case-by-case basis. If you are not a lawyer and you read through the Cart judgments, you will see that it is all highly technical stuff about the number of appeals you should have within a particular structure. I have never heard anyone suggest that the judges in Cart were guilty of judicial activism. I think it is a relatively technical problem that has created a lot of expense and lots of hopeless judicial reviews, and the Government are taking action to address that.

I will not keep saying "sexier subjects", but the more egregious examples of muscular judicial review have been mentioned earlier: Privacy International, the Prorogation case, and Evans *v.* Unison. There is a case for Parliament to reverse them. In my view, it has a constitutional right to do so if it wishes, but they should probably be taken one by one. Maybe we need a different Bill to do that, and the Government can tell us whether that is their intention, but the two clauses here deal with some real problems in a fairly unflashy way. Ouster clauses might be needed if we are to reverse the other cases, but I think that has to be debated separately. It is not really within the scope of the Bill at all.

Q26 Sir John Hayes: So in that sense, the Bill is welcome. I take your interesting point about compensation and how clause 1 might be amended as a way to deal with some the challenges associated with the Bill, but essentially the Bill is needed and, inasmuch as it aims to do what you describe, is welcome.

On the issue of judicial activism, is this the right Bill to explore that, or are you suggesting, as you implied just a moment ago, that perhaps another piece of legislation will be introduced to deal with that in the light of the Evans case, the Miller case and the other cases that we have seen prevailing over a number of years? There is a challenge for democratic Government that needs to be addressed.

Dr Morgan: In my view, it would be a shame if the valuable things that are in the current Bill were lost because other things were put in that were frankly much more controversial. I am not the manager of parliamentary time; I do not know how easy it is to get another Bill going through. There is always a temptation—the Minister laughs—to tag things on, so maybe this is an opportunity not to be missed. I have read Richard Ekins's list of desirable amendments, which would keep Parliament going for about five years, and with heated rows, if all those were put in.

Sir John Hayes: I will take that as an invitation to table some desirable amendments and probe the Government on exactly that matter. I am grateful.

The Chair: Professor Feldman, do you want to come in on that?

Professor Feldman: Only to say that I would not want to be thought to agree with the suggestion that there has been a sudden rush of judicial activism. Judicial activism is extremely difficult to define, and people who say there is a lot more judicial activism than there used to be tend to pick on a very small number of fairly high-profile cases over the last few years. It may be that there are more of those than one might have expected in the length of time passing. Having been involved in this subject for over 40 years, as I said before, it seems to me that there has been a process of gradual—it has been gradual—development of principles of administrative law and their application since the 1950s, so we are talking about getting on for 70 years.

Nothing has happened suddenly and things have not all gone in one direction; there has been progress in one direction and then a pushback. I suspect we may be going through a pushback at the moment, within the judiciary itself. Judicial activism is a term that I do not really understand and I would not want it to be the basis of legislation.

Q27 Sir John Hayes: I simply recommend that you read the Attorney General's speech on this, delivered in Cambridge about a week ago, which sets out exactly why this matters and defines judicial activism pretty well. I make no more comment, but refer you to that.

Professor Feldman: Thank you. I shall read it with interest.

Q28 Janet Daby (Lewisham East) (Lab): Returning to quashing orders, the Bill proposes the introduction of suspended quashing orders. They would allow the courts to give public bodies a certain amount of time to correct an unlawful act, instead of immediately striking it down. Could this have any negative implications for claimants in judicial review proceedings?

Dr Morgan: I think I just want to repeat what I said earlier, which is that it certainly could. To adopt Professor Feldman's example, if the court suspends the effect of its order in an immigration case, you might have been deported by the time the order comes into force. Certainly it could cause serious problems for applicants in particular cases, but there are countervailing advantages, particularly where we are dealing with the general legislative scheme, which the court would otherwise immediately quash with retrospective effect. That could cause enormous difficulties in a very important area.

The Ahmed case was about quashing these freezing orders, made by requirement of the United Nations Security Council on suspected international terrorists. The court said that the whole legislative scheme had to be immediately quashed, as many Members will remember. It required emergency legislation to deal with it. In cases like that it could be beneficial, but it could cause a problem for a particular applicant. My earlier answer suggested how we might try and address it; Professor Feldman was right to say that damages and compensation are not always the answer, but they might be sometimes.

Q29 The Chair: Professor Feldman, do you want to comment on that?

Professor Feldman: I will just say that lying behind this there is a difficulty that faces people drafting legislation like this. The onus is to be general and to apply to all kinds of decisions and rules, whereas, in fact, quashing a rule has rather different implications from quashing an individual decision, so the approach to it has to be similarly different.

The Chair: Are you happy with that, Janet?

Janet Daby: Yes, that is fine.

Q30 Marco Longhi (Dudley North) (Con): I am glad you mentioned immigration and asylum a few moments ago, because back in 2004 the Labour Government tried to remove judicial review by using a very broadly worded ouster clause. Does this not suggest that removing Cart JR, with a tightly worded ouster clause, is in fact just a moderate and proportionate step?

Dr Morgan: The context was slightly different. You could say the ouster clause before us in clause 2 is less extreme, because it allows for JR on certain very narrow grounds. That is one reason why the courts would be

more likely to accept what is now proposed than the Labour proposals back then. Of course, they were never even enacted, let alone reached the courts, so it will be a nice hypothetical question about whether it would have survived scrutiny or not. All it shows is that this particular question of having a huge volume of challenges, very few of which succeed, is not a new problem. It has been there for at least 20 years. Successive Governments have wrestled with it.

Cart was a very noble attempt to hold a balance, but even some of the judges who decided the case—Lord Brown and Lord Hope—have now accepted that their solution has not worked and perhaps a more drastic solution, as in clause 2, is justified. I think if the judges themselves are accepting that they went too far, that is something Parliament should take careful note of.

Marco Longhi: Thank you. I am glad that you referred to the words "less extreme" in your commentary.

Professor Feldman: I agree with what Dr Morgan said.

Q31 James Cartlidge: I was very struck by the point from Professor Feldman about resource and proportionality in relation to the Cart judicial reviews. He made the point about the 3.4% success rate being very low compared with estimates of success. I am not sure that that is necessarily definitive. You suggested 50% for what we might call other JRs. The average number of judge days used on these cases is something like 180 days of what is, after all, the High Court judge's time, so your point on proportionality is important in terms of resource—albeit the legal considerations are very important as well. Currently, we as a Government, who are accountable for resources, are faced with this covid-related backlog, particularly in the Crown court but in other parts of the courts as well. Given the average number of judge days, would you agree that currently the resource issue is even more important to take into account?

Professor Feldman: That is a perfectly fair point. Success rates in judicial review are extremely difficult to assess. There have been some very good studies. The consensus that has emerged seems to be of between 30% and 50% success rates, which takes account not only of the favourable decisions from judges, but also of the favourable, or more or less favourable, out-of-court settlements of the claims, which allow litigants to withdraw their claims before they get to a full hearing. If it is 3.4% or so, that is, I would say, a significant but not huge figure.

The question for Parliament is: what amount of injustice should be contemplated as acceptable in the face of the shortages of judicial time? As the Supreme Court said in Cart, if you overload judges with a certain type of decision, less time is available for them to deal with other types of claims, which might be equally or more deserving. It is a really difficult question, but I think it is a fair one.

Dr Morgan: This is a deeply political question, because what it requires is a trade-off between expense, court time and the rational use of limited court time against the achievement of justice. We must not forget that sometimes Cart reviews do succeed. That means that there is either a point of law of public importance that the High Court has corrected, or that something has gone very seriously wrong with the facts of a particular case. Again, the High Court has given justice to the particular individual. The kind of cases we are talking about involve very vulnerable individuals. It was put rather well by Andy Slaughter on Second Reading:

"Cart reviews are a last-gasp defence for some of the most vulnerable people in the most desperate situations."—[*Official Report*, 26 October 2021; Vol. 702, c. 230.]

In order to save money and economise on judicial resources, that is the cost that Parliament faces. In the end, that is why this is probably a question for Parliament, rather than the courts, because Parliament has the public purse, which the courts do not. It is very hard for the courts to make decisions which inevitably influence resource allocation.

That is not a criticism of the Supreme Court and Cart. Lord Dyson in Cart said something very interesting. He suggested that Parliament in 2007 should have addressed this question and failed to do it, and it now fell to the courts to do it instead. That was the suggestion in Cart itself; the courts felt they had been left to deal with some unfinished business in the 2007 Act. Well, the courts gave their answer and, in my view, Parliament is fully entitled to take a different view, but with the costs of it to certain individuals squarely in mind.

Q32 James Cartlidge: Thank you very much, that is a fair point. On the matter of resource, it clearly is a political point. It is, after all, the most fundamental role of Parliament historically. You will be aware that we referred to the 2004 Bill—I think it was introduced in 2003—and you have made the point that it is effectively long-running governmental aim, regardless of party to address this. I think I am right that in when the Immigration and Asylum (Treatment of Claimants, etc.) Bill was in Committee, the then Minister, the right hon. Member for Tottenham (Mr Lammy), said that at that time it was something like 3.6%, so it seemed to be viewed then by a Government of a different colour, on the proportionality issue, disproportionate.

I had the great privilege of attending the Lord Chancellor's swearing in. One of the things he swears is that he will ensure that resources are provided to the judiciary. This is not just about public money per se; it is about time, which is incredibly precious. Arguably, there is a context which goes back some years which seems to recognise on both sides that this is disproportionate in resource terms.

Dr Morgan: I agree. This does not seem to be a partisan point. It is about how best to deploy the resources of the judiciary. I hope the judges have been consulted on this reform, but retired judges who speak on it in the House of Lords seem to be sympathetic to the objectives.

Q33 Dr Johnson: Dr Morgan, you talked about people in these situations being very vulnerable. Obviously, it is important that we get as many of these decisions correct as possible. Why are the very few appeals that are successful, successful? Are there other ways in which we could reduce the number of people who may have had an erroneous decision? In particular, where there has been a win in the Cart judicial review, is it due to legal technicalities of process and, if so, how much difference would that have had on the actual decision of the upper tribunal if they had followed the process? Would the person have had the same outcome?

Dr Morgan: The answer might be to a slightly different question. I refer the Committee back to some things that were said in Cart itself. Both Baroness Hale and Lord Phillips, two Presidents of the Supreme Court at different times, said the reason why there are so many immigration and asylum challenges is because people are desperate. Lady Hale said:

> "There is every incentive to make the road as long as possible, to take every possible point, and make every possible application."

She went on to say she did not blame people, because people are desperate, and we can hardly blame them for doing this, but she said that that was why there was such a problem. It does create a resource problem for the courts, because in the immigration and asylum system there is bound to be a huge number of applications, even if most of them are doomed to fail. In fact, Lord Phillips seemed to recognise that Cart was sowing the seeds of a great problem. He said:

> "The stringency of the criteria that must be demonstrated will not discourage a host of applications in the field".

He was the judge who came closest to saying we should not have had Cart judicial reviews, as they are now known, at all.

That is one reason why this creates such a problem: people will try every avenue to challenge a decision, even in a fairly hopeless case, for reasons that we can all appreciate. That is why I think an even more stringent approach than Cart is perhaps needed to close down the avenue, if that is what you want to do.

Q34 Dr Johnson: I guess I was asking about concern about those few people who may have had a change in decision and would argue against that change. I am interested in understanding the reality of those people's situations. Would the decision of the upper tribunal have been the same had the legal process been followed? Are those decisions based on legal technicality rather than merits of case?

Dr Morgan: The statistics that the Government presented in their response to the consultation used a criterion of success that I think answers your question. A successful Cart judicial review did not just mean that the High Court sent it back to the upper tribunal; you then had to win in the upper tribunal, so you actually had a good case on the facts. The Government came up with a figure of 3.5% success in that sense, so I do not think that they could be written off as legal technicality cases, although some people do successfully get a Cart JR and then fail when it goes back to a substantive hearing, and it could fairly be said that some of those are legal technicalities.

Members in the Second Reading debate referred to various case studies of actual live cases where something had clearly gone badly wrong and it was only a Cart JR that rescued it. I cannot remember whether it was 50 cases per annum or 50 cases in total—it is not a huge number—but in each case, it really matters to someone's life.

The Chair: Are there any final questions? We are running short of time, but I will take one more if anybody wants to come in.

There are no further questions from Members, so I thank both witnesses for coming in to give evidence in person. It has been very useful indeed.

Ordered, That further consideration be now adjourned. —*(Scott Mann.)*

11.22 am

Adjourned till this day at Two o'clock.