Response from the Faculty of Advocates
to the
Government Response to the Independent Review of Administrative Law

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A. Introduction

i. We are grateful for the opportunity to provide this response to the UK Government's consultation on the reform of judicial review.

ii. Before turning to the substantive questions in the consultation, we feel that a number of assertions made in the Government's response document should not stand unchallenged where they are clearly predicated on, doubtless inadvertent, misunderstandings of the law.

iii. At paragraph 25 of the response, it is stated baldly and incorrectly that the Scottish Parliament is a body which can act lawfully in an unreasonable manner. The authority cited for that startling proposition is the decision of the UKSC in *AXA General Insurance v Lord Advocate*[1].

iv. The decision in *AXA* does not give *carte blanche* to the Scottish Parliament to act unreasonably or irrationally. Indeed, Lord Hope says at para 52 that such common law concepts of review are not required "because there is already a statutory limit on the Parliament's legislative competence". Lord Hope goes on to say that it would be wrong of judges to substitute their views for the considered judgment of the democratically elected legislature. It is anticipated the UK Government does not disagree with that sentiment. If it is sought to be suggested that the Scottish Government or the Scottish Parliament is able to act unreasonably or irrationally with impunity, that suggestion is simply wrong. Sections 29, 54 and 57 of the Scotland Act 1998 make it clear that neither the Scottish Parliament nor the Scottish Government has the power to (i) act or (ii) legislate (by way of an Act of the Scottish Parliament or through secondary legislation) outside the limits of competence set out in that Act. There are regular challenges in the Scottish Courts on the basis of the limits of this competence.[2]

v. If the point sought to be made is that the Scottish Parliament's decisions about *which* legislation to enact cannot be challenged on the grounds of rationality, that is clearly a matter falling within political accountability to the electorate and an area into which the Scottish courts will not stray.[3] Again, we do not anticipate this being a concept with which the UK Government disagrees. The statement at para 25 of the response that "a decision by the Scottish Parliament to do something unreasonable is a lawful one which it has the power to make" is simply inaccurate. To the extent that any of the reasoning in the response is predicated on that misunderstanding, it would be unsafe.

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[1] 2012 SC (UKSC) 122

[2] See the following recent examples: *KLR & RCR International Ltd v Scottish Ministers* [2020] CSOH 98; *S v Scottish Ministers* [2021] CSOH 23; *For Women Scotland Ltd v Lord Advocate* [2021] CSOH 31; *Philip v Scottish Ministers* [2021] CSOH 32

[3] *AXA General Insurance Ltd v Lord Advocate* 2012 SC (UKSC) 122 at 147 per Lord Reed.

vi. We note also that there is a tendency for the response only to cite representations which support its stated aim of "affirming the role of the courts as 'servants of Parliament'"[4]. Indeed, the phrase 'servant of Parliament' itself appears to have been taken without context from the IRAL submission of Lady Hale. Lady Hale's submission says:

"In the vast majority of cases, judicial review is the servant of Parliament. It is there to ensure that public authorities at all levels act in accordance with the law which Parliament has laid down. In only a very few cases does it operate to ensure that public authorities act in accordance with the common law. If Parliament does not like what a court has decided, it can change the law.

It is beyond debate that public authorities must act in accordance with the law. There is no balance to be struck between that fundamental principle, established since the 17th century, and carrying on the business of government. The business of government must be carried on lawfully."

vii. By contrast, we note that contributors to the Judicial Power Project are cited throughout the response with approval. Whilst we of course respect and welcome academic exploration of the law as part of its continued adaptation to the world in which we live, academic exploration alone inevitably fails to appreciate the practicalities and consequences of the (often black and white) positions taken in furtherance of academic hypothesis. The stated aim of that group is as follows:

"the project aims to understand and correct the undue rise in judicial power by restating, for modern times and in relation to modern problems, the nature and limits of the judicial power within our tradition and the related scope of sound legislative and executive authority"

It is perhaps, therefore, unsurprising that the group's response to IRAL coincides with the stated views of the UK Government. There is, however, particularly from a Scottish perspective, a constitutional fallacy on which the Judicial Power Project's stated aim is predicated: the unchallenged supremacy of the Westminster Parliament.

viii. What we may take from the line of constitutional case law which led up to, and culminated in, the UKSC decision in *Cherry/Miller*[5] is the following: what is fundamental to our present day UK constitution is respect for, and the preservation of, a liberal constitutional Parliamentary representative democracy[6] in which the national executives in this Union State are accountable

[4] Foreword, page 8

[5] 2020 SC (UKSC) 1

[6] In *AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46 Lord Reed observed at §§152-3:

> "152… Lord Steyn said in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 at p 591:
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> > 'Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law.'
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> 153 The nature and purpose of the Scotland Act appear to me to be consistent with the application of that principle. As Lord Rodger of Earlsferry said in *HM Advocate v R* [2004] 1 AC 462, §121, the Scotland Act is a major constitutional measure which altered the government of the United Kingdom; and his Lordship observed that it would seem surprising if it failed to provide effective public law remedies, since that would mark it out from other constitutional documents. In *Robinson v Secretary of State for Northern Ireland* [2002] NI 390, §11, Lord Bingham of Cornhill said of the Northern Ireland Act 1998 that its provisions should be interpreted 'bearing in mind the values which the constitutional provisions are intended to embody'. That is equally true of the Scotland Act.

to the national legislatures from which they spring (and can exercise the power of government only so long as they maintain the confidence of the legislatures), and the legislatures are themselves accountable to the electorates whom they are entrusted to represent and serve.[7]

ix. What the commitment to democracy and the rule of law also entails is that the common law constitutional principle asserting the sovereignty of the Crown in the Union Parliament[8] does not - and cannot compatibly with the preservation of the rule of law - mean acceptance of any kind of (Westminster) Parliamentary *absolutism*[9] such as was classically expounded and described by

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Parliament did not legislate in a vacuum: it legislated for a liberal democracy founded on particular constitutional principles and traditions. That being so, Parliament cannot be taken to have intended to establish a body which was free to abrogate fundamental rights or to violate the rule of law..."

[7] As Lord Hope of Craighead noted in *R (Jackson) v Attorney General* [2006] 1 AC 262 at §§125-6 (emphasis added):

"125 …In the field of constitutional law the delicate balance between the various institutions whose sound and lasting quality Dicey [*The Law of the Constitution*, 10th ed. (1959)] at p 3, likened to the work of bees when constructing a honeycomb is maintained to a large degree by the mutual respect which each institution has for the other. …

126 As Professor Hart, *The Concept of Law*, p 108, indicates, the categories which the law uses to identify what is law in these circumstances are too crude. There is a strong case for saying that the rule of recognition, which gives way to what people are prepared to recognise as law, is itself worth calling 'law' and for applying it accordingly.

It must never be forgotten that *this rule, which is underpinned by what others have referred to as political reality, depends upon the legislature maintaining the trust of the electorate. In a democracy the need of the elected members to maintain this trust is a vitally important safeguard. The principle of parliamentary sovereignty which in the absence of higher authority, has been created by the common law is built upon the assumption that Parliament represents the people whom it exists to serve*."

[8] See *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 [2018] AC 61 at § 43:

"Parliamentary sovereignty is *a* fundamental principle of the UK constitution … It was famously summarised by Professor Dicey as meaning that Parliament has

> "the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament": *Introduction to the Study of the Law of the Constitution*, 8th ed (1915),p 38.

The legislative power of the Crown is today exercisable only through Parliament. This power is initiated by the laying of a Bill containing a proposed law before Parliament, and the Bill can only become a statute if it is passed (often with amendments) by Parliament (which normally but not always means both Houses of Parliament) and is then formally assented to by HM The Queen. Thus, Parliament, or more precisely the Crown in Parliament, lays down the law through statutes - or primary legislation as it is also known - and not in any other way."

[9] In *R (Jackson) v Attorney General* [2006] 1 AC 262 Lord Hope observed (at page 303-4 §§ 104, 106)**:**

"Our [UK] constitution is dominated by the sovereignty of Parliament. But Parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified … [E]ven Dicey himself was prepared to recognise that the statesmen of 1707 believed in the possibility of creating an absolutely sovereign legislature which should yet be bound by unalterable laws: *Thoughts on the Scottish Union*, pp 252-253, quoted by Lord President Cooper in *MacCormick v. Lord Advocate*, 1953 SC 396, 412. So here too it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in accord with the reality."

In *AXA General Insurance Co Ltd v Lord Advocate* [2011] UKSC 46, 2012 SC (UKSC) 122 Lord Hope noted at §50:

"The question whether the principle of the sovereignty of the Union Parliament is absolute or may be subject to limitation in exceptional circumstances is still under discussion. For Lord Bingham, writing extra-judicially, the principle is fundamental and in his opinion, as the judges did not by themselves establish the principle, it was not

Dicey as the "despotism of the King in Parliament" which was "the one fundamental dogma of *English (sic)* constitutional law".[10] The accuracy of this view of the *UK* constitution was questioned by the Lord President of the Court of Session, Lord Cooper of Culross, specifically for its incompatibility with the specifically Scottish constitutional tradition.[11] But even within the specifically English constitutional tradition, Blackstone speaks of "civil liberty" and of *popular* rather than Parliamentary sovereignty as foundations of the "British constitution" when discussing the constitutional limitations placed on the prerogative powers of the "king of England" (sic). He notes at the outset of Chapter 7 "Of the King's Prerogative" in Book 1 of his 1765-1769 *Commentaries on the Laws of England* that:

"one of the principal bulwarks of *civil liberty, or (in other words) of the British constitution*, was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, *without the consent of the people*, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, *subsists between the prince and the subject*." (emphasis added)

x. In a liberal constitutional democracy (such as the UK constitution undoubtedly commits the United Kingdom to be), an independent and impartial judiciary[12] is tasked with upholding the

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open to them to change it: *The Rule of Law* (2010), p 167. Lord Neuberger of Abbotsbury, in his Lord Alexander of Weedon lecture, "Who are the masters Now?" (6 April 2011), said at § 73 that, although the judges had a vital role to play in protecting individuals against the abuses and excess of an increasingly powerful executive, the judges could not go against the will of Parliament as expressed through a statute. Lord Steyn on the other hand recalled at the outset of his speech in *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 §71, the warning that Lord Hailsham of St Marylebone gave in *The Dilemma of Democracy* (1978), p 126 about the dominance of a government elected with a large majority over Parliament. This process, he said, had continued and strengthened inexorably since Lord Hailsham warned of its dangers. This was the context in which he said in § 102 that the Supreme Court might have to consider whether judicial review or the ordinary role of the courts was a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons could not abolish."

[10] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982), 29 and 33:

"A sovereign may wish to do many things which he either cannot do at all or can do only at great risk of serious resistance, and it is on many accounts worth observation that the exact point at which the external limitation begins to operate, that is, the point at which subjects will offer serious or insuperable resistance to the commands of a ruler whom they generally obey, is never fixed with precision.

…

It would be *rash* of the Imperial Parliament to abolish the Scotch Law Courts, and assimilate the law of Scotland to that of England. But no one can feel sure at what point Scotch resistance to such a change would become serious.

…

The one fundamental dogma of *English (sic) constitutional law is the absolute legislative sovereignty or despotism of the King in Parliament. But this dogma is incompatible with the existence of a fundamental compact, the provisions of which control every authority existing under the constitution*.".

[11] See the passage from *MacCormick v. Lord Advocate*, 1953 SC 39 IH per Lord President Cooper which is set out in full at §xii below.

[12] In *R (Cart) v Upper Tribunal (Public Law Project intervening)* [2011] QB 120, Laws LJ in the Divisional Court observed (at §37) that it is a necessary corollary of the sovereignty of Parliament that there should exist an authoritative and independent body which can interpret and mediate legislation made by Parliament.

rule of law[13] and with ensuring the equal protection of the laws to all.[14] Thus, the UK executive is bound by the decisions of the courts, and the executive may not ignore or purport to set aside those court decisions simply because it does not agree with them (politically or legally).[15]

xi. The defining principles of judicial review in Scots law are set out by Lord Hope in *West v Secretary of State for Scotland* 1992 SC 385 at page 412:

"The following propositions are intended therefore to define the principles by reference to which the competency of all applications to the supervisory jurisdiction … is to be determined:

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[13] See *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 [2019] 2 WLR 1219 per Lord Carnwath at §§ 120-1:

> "[O]f more recent origin, is the express statutory recognition of the 'rule of law' in section 1 of the Constitutional Reform Act 2005. That provides:
>
> '*The rule of law*
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> This Act does not adversely affect - (a) the existing constitutional principle of the rule of law …"
>
> This court has recognised the special status of such 'constitutional statutes', in particular their immunity from 'implied repeal' : a status which (in the words of Laws LJ in another case)
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> 'preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes and, now, applying the Human Rights Act 1998) will pay more or less deference to the legislature, or other public decisionmaker, according to the subject in hand.' (*Thoburn v Sunderland City Council* [2003] QB 151, §§ 63-64, approved in *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, § 66.)
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> In his introduction to *The Rule of Law*, Lord Bingham underlined the significance of section 1 of the 2005 Act to his general discussion of the concept. He attributed the absence of a statutory definition to the probable recognition by parliamentary counsel of the 'extreme difficulty of devising a pithy definition suitable for inclusion in a statute', and their wish instead to 'leave it to the judges to rule on what the term means if and when the question arises for decision', so enabling 'the concept to evolve over time in response to new views and situations' (*op cit*, pp 7-8). Whatever the explanation, Parliament having recognised this 'existing constitutional principle', and provided no definition, there is nothing controversial in the proposition that it is for the courts, and ultimately the Supreme Court (created by the same Act), to determine its content and limits."

[14] In *Ghaidan v. Godin Mendoza* [2004] UKHL 30 [2004] 2 AC 557 s Baroness Hale noted at § 132:

> "Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. …[I]t is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. *Democracy values everyone equally even if the majority does not*."

[15] *R (Evans) v Attorney General* [2015] UKSC 21 [2015] AC 1787 per Lord Neuberger, Lord Kerr of Tonaghmore and Lord Reed at § 52:

> 52 First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, *it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive.* Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well-established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General's argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it. And the fact that the member of the executive can put forward cogent and/or strongly held reasons for disagreeing with the court is, in this context, nothing to the point: many court decisions are on points of controversy where opinions (even individual judicial opinions) may reasonably differ, but that does not affect the applicability of these principles."

The Court of Session has power, in the exercise of its supervisory jurisdiction, to regulate the process by which decisions are taken by any person or body to whom a jurisdiction, power or authority has been delegated or entrusted by statute, agreement or any other instrument.

The sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the person or body does not exceed or abuse that jurisdiction, power or authority or fail to do what the jurisdiction, power or authority requires.

The competency of the application does not depend upon any distinction between public law and private law, nor is it confined to those cases which English law has accepted as amenable to judicial review, nor is it correct in regard to issues about competency to describe judicial review [according to Scots law]… as a public law remedy.

By way of explanation we would emphasise these important points:

Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted.

The word "jurisdiction" best describes the nature of the power, duty or authority committed to the person or body which is amenable to the supervisory jurisdiction of the court. It is used here as meaning simply "power to decide", and it can be applied to the acts or decisions of any administrative bodies and persons with similar functions as well as to those of inferior tribunals. An excess or abuse of jurisdiction may involve stepping outside it, or failing to observe its limits, or departing from the rules of natural justice, or a failure to understand the law, or the taking into account of matters which ought not to have been taken into account. The categories of what may amount to an excess or abuse of jurisdiction are not closed, and they are capable of being adapted in accordance with the development of administrative law.

There is no substantial difference between English law and Scots law as to the grounds on which the process of decision-making may be open to review. So, reference may be made to English cases in order to determine whether there has been an excess or abuse of the jurisdiction, power or authority or a failure to do what it requires.

Contractual rights and obligations, such as those between employer and employee, are not as such amenable to judicial review. The cases in which the exercise of the supervisory jurisdiction is appropriate involve a tri-partite relationship, between the person or body to whom the jurisdiction, power or authority has been delegated or entrusted, the person or body by whom it has been delegated or entrusted and the person or persons in respect of or for whose benefit that jurisdiction, power or authority is to be exercised."

xii. With all of that in mind, our view is that judicial review of public authorities plays an essential role in a modern democracy. The simple issue is this: in a constitutional democracy, all power is limited. The location of the boundaries of power is a matter of law and, therefore, the task of the courts to explain (*Cherry* at §38). The Scots tradition of sovereignty draws the line in a different place from that of the English tradition. The matter is, perhaps, set out most cogently in *MacCormick v Lord Advocate* 1953 SC 396, per the Lord President (Cooper) at 411:

"The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law. It derives its origin from Coke and Blackstone, and was widely popularised during the nineteenth century by Bagehot and Dicey, the latter

having stated the doctrine in its classic form in his Law of the Constitution. Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England. That is not what was done. Further, the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which either contain no such power or emphatically exclude subsequent alteration by declarations that the provision shall be fundamental and unalterable in all time coming, or declarations of a like effect. I have never been able to understand how it is possible to reconcile with elementary canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions."

xiii. The supreme authority in the United Kingdom is the rule of law and its application is administered through a balance of the three branches of government and not through attempts by one branch to curb or blunt the role of the others.[16] Indeed, in *Moohan v Lord Advocate* [2014] UKSC 67, Lord Hodge said at §35:

"I do not exclude the possibility that in the very unlikely event that a parliamentary majority abusively sought to entrench its power by a curtailment of the franchise or similar device, the common law, informed by principles of democracy and the rule of law and international norms, would be able to declare such legislation unlawful."

xiv. Having clarified those matters, we turn now to the specific questions raised in the consultation.

1. Do you consider it appropriate to use precedent from section 102 of the Scotland Act, or to use the suggestion of the Review in providing for discretion to issue a suspended quashing order?

1.1. In all the circumstances, it is our view that it would be reasonable for this power generally to be available to judges dealing with applications for judicial review. It is our view that the nature of judicial review is such that the maximum amount of flexibility and discretion ought to be afforded to members of the judiciary in order to permit them to respond adequately to the circumstances brought before them, and to grant an effective remedy where any such remedy is appropriate. The inclusion of a power akin to the section 102 power would permit such flexibility whilst ensuring that the public body under review is not disproportionately inconvenienced by a cliff-edge decision which could require the re-making of a decision in a hurried manner, potentially resulting in further procedural issues. We are clear, however, that the use of any such power

[16] *Cherry v Advocate General for Scotland* 2020 SC (UKSC) 1 at [33]:

"Thirdly, the Prime Minister's accountability to Parliament does not in itself justify the conclusion that the courts have no legitimate role to play. That is so for two reasons. The first is that the effect of prorogation is to prevent the operation of ministerial accountability to Parliament during the period when Parliament stands prorogued. Indeed, if Parliament were to be prorogued with immediate effect, there would be no possibility of the Prime Minister's being held accountable by Parliament until after a new session of Parliament had commenced, by which time the Government's purpose in having Parliament prorogued might have been accomplished. In such circumstances, the most that Parliament could do would amount to closing the stable door after the horse had bolted. The second reason is that the courts have a duty to give effect to the law, irrespective of the minister's political accountability to Parliament. The fact that the minister is politically accountable to Parliament does not mean that he is therefore immune from legal accountability to the courts."

should be discretionary and not mandatory. As set out below, the power is available in Scotland but has only rarely been used.

1.2. Within the legal order of the European Union, in general, judgments of the Court of Justice are said to be declaratory of existing EU rights; they do not create new rights. Accordingly, the CJEU's decisions, for example as to the direct effect or the invalidity of a particular EU provision, generally have retrospective effect and apply to all legal relationships arising and established before the judgment.[17]

1.3. In exceptional circumstances, however – 'in application of a general principle of legal certainty which is inherent in the EU legal order' – the CJEU has limited its rulings so they can be immediately relied upon only by the party who had brought the case before it (and any others who, prior to the date of delivery of this judgment, had already brought legal proceedings or made an equivalent complaint in relation to the matter under challenge).[18] In noting that 'exceptionally' it may limit the temporal effect of a ruling, the Court of Justice has noted:

> "The court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with community legislation by reason of objective, significant uncertainty regarding the implications of community provisions, to which the conduct of other Member States or the Commission may even have contributed."[19]

1.4. Such a limitation on the temporal effect of a judgment is, however, within the exclusive jurisdiction of the Court of Justice.[20] It is not open to national courts to limit the effects of a ruling of the Court of Justice in this way.

1.5. The principal justification for the CJEU assuming a jurisdiction to overrule prospectively is that the retrospective effect of overruling can be to disturb transactions carried out, and expectations formed, while the old view of the law prevailed.[21] In *Société Régie Networks v Direction de Contrôle*

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[17] *Amministrazione delle Finanze dello Stato v Denkavit* [1980] ECR 1205, 1223.

[18] See, e.g., Case 43/75 *Defrenne v Sabena (No 2)* [1976] ECR 455; Case 262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR 1889, [1991] 1 QB 344.

[19] Case C-209/03 *R (Bidar) v Ealing London Borough Council* [2005] ECR I-2119.

[20] Cases 66, 127, 128/79 *Amministrazione delle Finanze dello Stato v Meridionale Industria Salumi* [1980] ECR 1237.

[21] See, e.g., Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke GbR v Land Hessen* [2012] 2 AL ER 127, CJEU at paras 92 and 94: ' ... Articles 42(8b) and 44a of Regulation No 1290/2005, and Regulation No 259/2008, are invalid in so far as, with regard to natural persons who are beneficiaries of EAGF and EAFRD aid, those provisions impose an obligation to publish personal data relating to each beneficiary without drawing a distinction based on relevant criteria such as the periods during which those persons have received such aid, the frequency of such aid or the nature and amount thereof. ... In view of the large number of publications which have taken place in the Member States on the basis of rules which were regarded as being valid, it must be held that the invalidity of the provisions mentioned in paragraph 92 of the present judgment does not allow any action to be brought to challenge the effects of the publication of the lists of beneficiaries of EAGF and EAFRD aid carried out by the national authorities on the basis of those provisions during the period prior to the date on which the present judgment is delivered.'

Fiscal Rhône-Alpes Bourgogne,[22] the Grand Chamber of the CJEU of Justice not only limited the retrospective temporal effect of its decision but also *prospectively suspended* the effects of its declaration that a Commission contested decision was invalid until such time as a new decision was adopted by the Commission, so that it could remedy the illegality established in the judgment.[23]

1.6. In a decision in 2005, influenced in part by the practice of the Court of Justice, the Appellate Committee of the House of Lords stated that they considered that they also now had the inherent power, in appropriate cases, to make their new rulings as to the law prospective only, leaving unaffected the validity or lawfulness of past decisions made on the basis of the common earlier understanding of the law: see *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 280, departing from the decision in *Kleinwort Benson Ltd v Lincoln County Council* [1999] 2 AC 349 where Lord Goff of Chieveley had stated (at 379) that 'a system of prospective overruling, … although it has occasionally been adopted elsewhere (with, I understand, somewhat controversial results) has no place in our legal system'.

1.7. The provisions of section 102(2)(a) of the Scotland Act 1998, s 81(2)(a) of the Northern Ireland Act 1998 and s 153 of the Government of Wales Act 2006, also each give the courts the express power to remove or limit the retrospective effect of their decisions that any devolved legislation passed by the devolved legislatures or made by the devolved executives is in fact *ultra vires* (because unconstitutional) and hence a nullity.

1.8. In our experience in Scotland, the courts have rarely found it necessary to use their powers under section 102 SA.

1.9. One example in which the powers were used was by the UK Supreme Court in its decision in *Salvesen v. Riddell* [2013] UKSC 22, 2013 S.C. (UKSC) 236 in finding that section 72(10) of Agricultural Holdings (Scotland) Act 2003 was outside the legislative competence of the Scottish Parliament because its operation was incompatible with respect for the Article 1 Protocol 1 ECHR property rights of agricultural landlords. The court suspended its finding of incompatibility for 12 months or such shorter period as might be required for the defect to be corrected and for that correction to take effect, and gave permission to the Lord Advocate to apply to the Court of Session for any further orders under section 102(2)(b) of the Scotland Act 1998 that might be needed to enable the Scottish Ministers to achieve the correction before the suspension came to an end.

1.10. In *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 the UK Supreme Curt stated that it would consider making an order under section 102(2)(b) SA 1998 to allow the Scottish Parliament and the Scottish Ministers an opportunity, if so advised, to correct the defects which the court had identified in the provisions of Part 4 of the Children and Young People (Scotland) Act 2014 which mandated the appointment of a "named person" to collect and collate

[22] Case C-333/07 *Société Régie Networks v Direction de Contrôle Fiscal Rhone-Alpes Bourgogne* [2008] ECR I-10807 at para 126.

[23] In Case C-475/03 *Banca Popolare di Cremona v Agenzia Entrate Ufficio Cremona* [2006] ECR I-9373, AG Jacobs had first suggested in his Opinion of 17 March 2005 that the retrospective and prospective effect of a ruling of the CJEU might be subject to a temporal limitation that the ruling should not take effect until a future date, namely, when the State had had a reasonable opportunity to introduce new legislation. This case was subsequently put out for a re-hearing by the Court, and AG Stix-Hackl delivered a further Opinion on the issue on 14 March 2006 at paras 130 ff. In the event, the challenge to the State legislation at issue was unsuccessful and so the Court did not have to consider the issue of limiting its ruling prospectively.

private and personal data on every child in Scotland in the name of promoting each child's well-being. The court stated that it did not think that it was appropriate to set out the possible terms of such an order until it had received written submissions from the parties on the terms of the order, including both the period of suspension and any conditions which should be attached to the order. In the event, no remedial measures were attempted and the affected provisions were never brought into force by the Scottish Government.

1.11. In principle the section 102 SA powers are available in criminal law cases, and in these different considerations apply. In *AB v HM Advocate* [2017] UKSC 25, 2017 SC (UKSC) 101 the UK Supreme Court remitted to the High Court of Justiciary the question as to whether a section 102 SA 1998 remedy might be ordered in respect of the Supreme Court's finding that legislation of the Scottish Parliament was Convention incompatible to the extent that it deprived a person, A, who is accused of sexual activity with an under-aged person, B, of the defence that he or she reasonably believed that B was over the age of 16, if the police had previously charged A with a 'relevant sexual offence'.

1.12. In his submissions to the High Court of Justiciary, the Lord Advocate did not seek any order suspending the effect of the judgment of the Supreme Court for any period, or on any conditions, to allow the Convention incompatibility to be corrected by the legislature. Instead, he asked the court to remove or limit any retrospective effect of the judgment per section 102(2)(i) SA, so that the benefit of the ruling would be available to the accused and to accused persons in other live cases but not in relation to concluded cases. The Lord Advocate was concerned that persons who, between 1 December 2010 and 5 April 2017, had been deprived of the reasonable belief defence by operation of the impugned provisions of section 39(2)(a)(i) of the Sexual Offences (Scotland) Act 2009 - and who were therefore convicted on this strict liability basis - should not now be able to pray in aid the finding of the UK Supreme Court in this case.

1.13. The issue of limiting the retrospective nature of judgments on Constitutional incompatibility arose before the Irish Supreme Court in the criminal appeal *A. v The Governor of Arbour Hill Prison* [2006] 4 IR88, on which the Lord Advocate also sought to rely in the case of *AB (supra)*. The Irish Supreme Court there ruled that its earlier decision in *CC v Ireland* [2006] IESC 33, [2006] 4 IR 1 (which had declared the Criminal Law Amendment Act 1935, making it an offence to have unlawful carnal knowledge with a girl under the age of consent, to be inconsistent with the Irish Constitution) should *not* be accorded unlimited retrospective effect. Instead, the Irish Supreme Court decided that, because the Irish State authorities had relied in good faith on a statute in force at the time, and the accused had not sought to impugn the bringing or conduct of the prosecution on any grounds that might in law have been open to him (including the constitutionality of the statute), the final decision in the case would be deemed to be, and to remain, lawful, notwithstanding any subsequent ruling that the statute, or a provision of it, was unconstitutional. The decision is perhaps of limited use given that the Irish Supreme Court did not address any issues arising under and in terms of Article 7 ECHR and the prohibition against retroactivity in the sphere of criminal law and regulation.

1.14. The provisions of section 102 SA do not directly address the issue of unlawfulness arising from Convention incompatibility[24] but it seems plain that the provisions of the Scotland Act 1998, including section 102, have themselves to be read and given effect to in a way which is compatible

[24] (although compatibility with Convention rights is inherent in the legislative competence of the Scottish Parliament: section 29(1)(d) SA, and section 102 envisages the making of orders in respect of decisions relating to compatibility issues: section 102(4)(b))

with Convention rights, as required by section 3 of the Human Rights Act 1998 (HRA).[25] The denial of retrospective effect of a judgment to address unlawfulness in a criminal case at the very least raises issues as to its compatibility with the common law principle of no punishment without law (*nulla poena sine lege*) which is also encompassed in Article 7 ECHR in the following terms:

> **Article 7 -** *No punishment without law*
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

1.15. In *Del Río Prada v Spain* (2014) 58 EHRR 37 the Strasbourg Grand Chamber summarised its approach to Article 7 ECHR thus:

> **"1. Principles established by the Court's case-law**
>
> *(a) Nullum crimen, nulla poena sine lege*
>
> 77 The guarantee enshrined in art.7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under article 15 even in time of war or other public emergency threatening the life of the nation. It should be construed and applied, as follows from its object

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[25] The following discussion in the House of Lords when the Scotland Bill was being debated would seem to confirm this (HL Hansard 8 October 1998):

> "Lord Mackay of Drumadoon moved Amendment No. 291L:
> § Page 43, line 39, at end insert—
> '(2) No person shall he guilty of an offence solely as a result of the retrospective effect of subordinate legislation made under subsection (1) above.'
>
> The noble and learned Lord said:
> This amendment seeks to achieve the simple purpose that if, for whatever reason, the order-making power provided for in Clause 92 is used, under no circumstance can it be used to create a criminal offence with retrospective effect. It would be inequitable to leave open that possibility and this amendment is designed to stop that. I beg to move.
>
> 4.45 p.m.
> Lord Hardie
> Again, I agree entirely with the sentiment behind the amendment. In our submission, it is not necessary. *Any order under this Bill will have to comply with the Human Rights Bill, which by then will be enacted. Article 7(1) of the convention, which will be incorporated into domestic law by then, prohibits that precise situation. No one can be held guilty of a criminal offence on account of an act or omission which did not constitute a criminal offence under national or international law when it was committed. That is the simple answer*. With that explanation, I invite the noble and learned Lord to withdraw the amendment."

and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.[26]

78 Article 7 of the Convention is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage.[27] It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty.[28] While it prohibits in particular extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy.[29]

79 It follows that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the courts' interpretation of it and after taking appropriate legal advice, what acts and omissions will make him criminally liable and what penalty he faces on that account.[30]

80 The Court must therefore verify that *at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable*, and that the punishment imposed did not exceed the limits fixed by that provision."[31]

1.16. In the event, in the *AB* case the High Court refused the Lord Advocate's application for a section 102 SA order limiting its retrospective effect. The court was not satisfied that any such measures would be of practical value or Convention compliant, not only in relation to the accused but to all those who would be affected by it (namely those already convicted by application of the provision). It was not clear that any limitation on retrospectivity was "necessary" given, among things, that

(1) challenges to cold cases in which successful prosecutions had long concluded may already, depending on the facts, be barred by reason of acquiescence;[32]
(2) the terms both of section 124(2) of the Criminal Procedure (Scotland) Act 1995 on the finality of interlocutors and sentences pronounced by the High Court,[33] and of the five judge decision of

[26] See *SW and CR v United Kingdom* (1996) 21 EHRR 363 at [34] and [32] respectively and *Kafkaris* (2009) 49 EHRR 35 at [137].

[27]Concerning the retrospective application of a penalty, see *Welch v United Kingdom* (1995) 20 EHRR 247 at [36]; *Jamil v France* (1996) 21 EHRR 65 at [35]; *Ecer v Turkey* (2002) 35 EHRR 26 at [36]; and *Toma v Romania* (1051/06) 24 January 2012 at [26]–[31].

[28] See *Kokkinakis v Greece* (1994) 17 EHRR 397 at [52].

[29] See *Coëme v Belgium* (32492/96, 32547/96, 32548/96, 33209/96 and 33210/96) 22 June 2000 at [145]; for an example of the application of a penalty by analogy, see *Başkaya v Turkey* (2001) 31 EHRR 10 at [42]–[43].

[30] See *Cantoni v France* (17862/91) 15 November 1996 at [29], and *Kafkaris* (2009) 49 EHRR 35 at [140].

[31] See *Coëme* (32492/96, 32547/96, 32548/96, 33209/96 and 33210/96) 22 June 2000 at [145], and *Achour v France* (2007) 45 EHRR 2 at [43].

[32] *Robertson v Higson*, 2006 SC (PC) 22

[33] Section 124(2) of the Criminal Procedure (Scotland) Act 1995 provides as follows:
"(2) Subject to Part XA and sections 288ZB and 288AA of this Act and paragraph 13(a) of Schedule 6 to the Scotland Act 1998, every interlocutor and sentence pronounced by the High Court under this Part of this

the Appeal Court in *Beck & Ors, Petitioners*[34] would appear to limit the possibilities of those already convicted applying directly to the court for a remedy

(3) Further, and in any event, it would not be a constitutionally appropriate use of the section 102 SA power for the court to impede or put further obstacles in the way of an application being made to the Scottish Criminal Cases Review Commission in terms of section 194A-L of the Criminal Procedure (Scotland) Act 1995. The policy considerations in relation to the balancing of finality as against opening up convictions are subsumed within the assessment by the SCCRC of the "interests of justice" test and lie wholly within the province of the Commission. [35]

1.17. In sum, the overall experience in Scotland is that, while the section 102 SA power is rarely required to be used, it is, in principle, a useful discretionary remedial power for courts to have available to them. Section 102 SA 1998 permits a court to reach a view on lawfulness, having available to it a discretion to prevent, or at least mitigate, any unintended consequences of that determination.

2. Do you have any views as to how best to achieve the aims of the proposals in relation to Cart Judicial Reviews and suspended quashing orders?

2.1. It is our view that there is no reasonable basis on which to remove the ability to seek *Cart/Eba* judicial reviews.

2.2. As commentators have already pointed out, the figures in the IRAL report (at para 3.45) are flawed insofar as they relate to England. The headline success rate of 0.22% is misleading, as identified by Tomlinson and Pickup in their article *Putting the Cart before the Horse? The Confused Empirical Basis for Reform of Cart Judicial Review*, UK Constitutional Review, 29th March 2021. The authors state that, on the basis of outcomes the panel had access to via legal databases, the success rate figure would be 12 out of 45 cases, not 5,502. This represents a higher success rate of 26.7%. The figure being relied on artificially deflates the actual success rate by taking 5,457 cases - where no data as to outcome is given - and assuming that they were all failures. Further, in England, *Cart* cases are generally not reported because they go through a specific procedure, the dynamics of which mean that reports of successful cases are unlikely. The authors refer to CPR54.7A, and note that under this procedure, hearings – and, therefore, reported judgments – are inevitably extremely rare. If permission is granted, it is unusual for the Upper Tribunal or the Home Office to request a hearing. Instead, the usual course is that there is no such request and the Master

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Act shall be final and conclusive and not subject to review by any court whatsoever, except for the purposes of a reference under section 288ZB or an appeal under section 288AA of this Act or paragraph 13(a) of that Schedule, and it shall be incompetent to stay or suspend any execution or diligence issuing from the High Court under this Part of this Act.

[34] *Beck & Ors, Petitioners* [2010] HCJAC 8, 2010 SLT 519 (Lord Justice General (Hamilton), Lord Kingarth, Lord Eassie, Lord Reed and Lady Dorrian) at paragraphs 28-31

[35] See *Coubrough's Executrix v HM Advocate*, [2010] HCJAC 32, 2010 SLT 577, HCJAC at paragraph 33:

"[33] Section 194C of the 1995 Act provides that the SCCRC may refer a case to the Court if they believe that (a) 'a miscarriage of justice may have occurred' and (b) 'it is in the interests of justice' to do so. In terms of section 106(3), an appellant can bring under review 'any miscarriage of justice'. There is no other provision in the Act governing what test the Court is to apply in determining whether to 'set aside' the verdict of the trial court and to 'quash' the conviction (ss 118(1)(b)). The sole basis for reaching a determination is that the Court is satisfied that a miscarriage of justice has occurred. That exercise has to be carried out by the Court without regard to such policy considerations as certainty or finality in the criminal process. Such considerations are for the SCCRC to take into account under the heading of 'the interests of justice' when deciding whether to refer a case. It is to the SCCRC that Parliament has entrusted that responsibility."

quashes the decision of the Upper Tribunal that refused permission. The case then goes back to the Upper Tribunal, where an Upper Tribunal Judge, usually the Deputy President, reconsiders whether to grant permission (and, in practice, usually does so). Typically, the authors note, this is done on the papers with limited written reasoning. It would be highly unusual for this process to be reported or for there to be any judgment to be found on databases such as BAILII or Westlaw. The authors note that success in the judicial review system does not usually come in the form of a judgment, but some other resolution. This is recognised elsewhere in the IRAL report (para C.22) but not in relation to *Cart* cases. It must also be borne in mind that the IRAL report recognised there had been insufficient time to undertake an in-depth study of immigration cases.

2.3. Insofar as Scotland is concerned, there is no evidence of such reviews being problematic and no such views have been expressed by Scottish judges. It is acknowledged that the majority of petitions relate to immigration and asylum (see para 5.18 of the IRAL report). An average of 40% of all petitions are resolved or discontinued without a hearing (para 5.19 of the IRAL report). It is acknowledged that 1 in 2 petitions are granted permission after a hearing. It is also acknowledged that once permission is granted most cases do not proceed to a substantive hearing. The number of cases which proceed to a substantive hearing, 52 in 2019/2020, 42 in 2018/2019, and 47 in 2017/2018, do not indicate that there is a problem in the number of petitions being heard, where 76% of those petitions concern immigration and asylum. A success rate of 30% cannot be described as 'very small' (para 5.21 of the IRAL report) when that is far higher than the misleading figure of 0.22% relied on elsewhere. In any event, there is no indication – whether according to the number of cases or the perceived success rate – that the 'second appeals test' is operating otherwise than intended, and primarily as an important 'safety valve',[36] particularly having regard to the acknowledged complexity of the Immigration Rules (para 12 of the IRAL report).

2.4. Our view also is that the potential injustice at issue has not received any attention at all in the IRAL report, even though it is important. In the Immigration and Asylum Chamber, almost all cases involve asylum and human rights. The potential injustices at stake concern the most fundamental rights and may literally be a matter of life and death. The cases that succeed in a *Cart* judicial review also, by definition, involve important points of law or practice, which would otherwise not be considered, or legally compelling reasons. In any full assessment of the proportionate use of judicial resource, account needs to be taken of the weight of those interests.

2.5. We have set out above our views in relation to suspended quashing orders by way of a power akin to the section 102 power.

3. Do you think the proposals in this document, where they impact the devolved jurisdictions, should be limited to England and Wales only?

3.1. As a matter of principle, given that judicial review is not a reserved matter, our view is that any changes should be restricted to England & Wales.

3.2. The description of "prospective only remedies" at paragraph 60 gives us some cause for concern. Whilst we entirely see the rationale for a suspended quashing order akin to that under section 102 of the Scotland Act 1998, the description at paragraph 60 appears to suggest that unlawful actions

[36] *PR (Sri Lanka) v Secretary of State for the Home Department* [2012] 1 WLR 73, [2011] EWCA Civ 988, per Lord Justice Carnwath at para 33:
'The introduction of the second-appeals test in 1999, following a Court of Appeal review, was designed to ensure best use of the limited judicial resources of that court. The emphasis was to be on important points of law or principle. The alternative "compelling reasons" test, the wording proposed by senior judges, was to be an "exceptional" remedy, a "safety valve". The required value-judgement was entrusted to the court.'

would be found to be unlawful but such orders would only have prospective effect, thereby presumably leaving in place the decision that has been found to be unlawful. If that is the intention, that proposal would entirely defeat the purpose of judicial review.

3.3. In order for a remedy to be effective for a petitioner/applicant, the unlawful decision must be capable of being quashed and remitted to the decision-maker for reconsideration. Where there is a broader finding of unlawfulness in relation to legislation etc, we see the rationale for the decision-maker being given an opportunity to remedy the issue of lawfulness but it is no answer at all to say that unlawful legislative acts in the past should remain enforceable because "a policy has cost a considerable amount of taxpayers' money". Where taxpayers' money has been spent on a matter which transpires to have been unlawful, that is a political accountability issue and not an issue of law. It is therefore a matter for the executive and legislature and not the courts.

3.4. Where there may be a genuine benefit to a reduction/quashing order having only prospective effect, that power ought to be available to judges on a discretionary basis only. That would seem to us to be reasonable and in keeping with the flexibility that is essential in judicial review in order for it to function properly.

3.5. Insofar as *Cart* judicial reviews are concerned, the relevant Scottish case is *Eba v Advocate General* 2012 SC (UKSC) 1. In our view, there is no question that such judicial reviews should be retained in Scotland, and, in any event, judicial review is not a reserved matter. Our view is that there should be no concern as regards forum shopping where a claimant is only able to raise such proceedings following a relevant First-tier Tribunal hearing in Scotland (*Tehrani v Secretary of State for the Home Department* 2007 SC (HL) 1. Our view is that it is also questionable whether the UK Government can, as a matter of law, legislate to exclude or otherwise restrict judicial review in respect of (UK-wide) reserved or excepted matters such as *Cart* judicial reviews (para 5.50 of the IRAL report).

4. (a) Do you agree that a further amendment should be made to section 31 of the Senior Courts Act to provide a discretionary power for prospective-only remedies? If so, (b) which factors do you consider would be relevant in determining whether this remedy would be appropriate?

4.1. The Senior Courts Act does not apply in Scotland, so we make no comment in relation to that particular statute.

4.2. We reiterate, however, that it is our view that the section 102 SA power is a useful discretionary power for judges to have available to them. The relevant factors to be taken into account, as contained in section 102, are sensible and in our view should be replicated in any changes in England & Wales, bearing in mind the jurisdictional differences, particularly inherent in section 102(4) and (5A).

5. Do you agree that the proposed approaches in (a) and (b) will provide greater certainty over the use of Statutory Instruments, which have already been scrutinised by Parliament? Do you think a presumptive approach (a) or a mandatory approach (b) would be more appropriate?

5.1. Our view is that neither a default position nor a mandatory position would be appropriate. It is an insufficient safeguard for minority interests for a provision simply to have been supported by a majority in Parliament. We reiterate the words of Lady Hale in *Ghaidan v Godin Mendoza* [2004] 2 AC 557:

"[I]t is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not."

5.2. There is no proper basis for the suggestion of a default or mandatory position. We wholly appreciate that the public interest must be protected as well as that of the petitioner/ applicant but, in our view, that is achieved by ensuring that judges have available to them the whole range of remedies on a discretionary basis so that they, in the exercise of their professional judgment, can respond to the facts and circumstances of the cases presented to them.

5.3. The notion that judicial review is improved through the *reduction* of discretion is flawed.

6. Do you agree that there is merit in requiring suspended quashing orders to be used in relation to powers more generally? Do you think the presumptive approach in (a) or the mandatory approach in (b) would be more appropriate?

6.1. For the reasons already set out above, we do not believe default or mandatory orders to be appropriate. Judicial review requires the widest possible discretion to be afforded to the judge in order for it to be effective in the multitude of circumstances to which is it applicable. Hard and fast rules, including defaults or presumptions, are not conducive to the proper functioning of the court's constitutional role as guardian of the rule of law.

7. Do you agree that legislating for the above proposals will provide clarity in relation to when the courts can and should make a determination that a decision or use of a power was null and void?

7.1. It is our view that judges who exercise the supervisory jurisdiction of the courts are, by their nature, highly capable and highly experienced. They are able to determine the lawfulness of an action or decision and are able to hear argument from all parties about the appropriate order that the court should make, where it is considering the making of an order.

7.2. The attempt to make a 'one size fits all' guide for judicial review is bound only to cause further confusion and further litigation where parties are seeking to clarify what the court is *meant* to do in any given circumstance.

7.3. As we have set out above, discretion on the part of a judge is key to the effective functioning of judicial review. The hamstringing of the judiciary will not lend itself to the efficient administration of justice.

8. Would the methods outlined above, or a different method, achieve the aim of giving effect to ouster clauses?

8.1. We disagree with the proposition that ouster clauses are anything other than an attempt to avoid scrutiny. By their very nature, that is what they are designed to do.

8.2. It is fundamentally at odds with the independent scrutiny of government actions and the constitutional separation of powers for there to be any statutory intervention that attempts to circumscribe the substantive grounds upon which judicial review may proceed. That is so, even to the extent of any purported codification of the existing law, ostensibly in the interests of certainty

or clarity, which would, even on the most benign view of matters, risk ossifying the necessary and continuous development of the law to meet the changing needs of society, and introduce needless ambiguity as to the state of the existing law.

8.3. Judicial review is the exercise by the judiciary of its constitutional power, as a branch of government alongside the legislature and the executive. This constitutional role was expounded recently by Lord Drummond Young in *Wightman v Advocate General for Scotland* 2019 SC 111:

> "[48] The function of the judiciary and its constitutional independence of other organs of government is likewise of fundamental importance in the United Kingdom's constitutional system. The primary function of the courts is to decide the law as it now exists. Judges obviously develop the law, sometimes in important respects. This has always been a feature of the common law, both in Scotland and in England and Wales (where I use the expression 'common law' to denote judge-made law, rather than to distinguish it from the civilian origins of systems such as Scots law). On occasion judicial development of the common law has been far-reaching in its effects; the development of the law of negligence and the law of judicial review during the twentieth century are two obvious examples. Judicial decisions can also develop and modify the meaning of statutes, although in every case the judicial interpretation must find some basis in the terms of the statute itself. Nevertheless, the primary function of the courts is to declare the law as it presently exists, and where necessary to provide mechanisms to enforce that law.
>
> [49] That function is independent of the constitutional functions of both Parliament and the executive. Judicial independence is fundamental to the constitutional arrangements of the United Kingdom, and indeed all other civilised nations."

8.4. The judiciary, in this regard, plays a key and vital role in the governance of the United Kingdom in that it is the body which holds the executive *legally* accountable for its actions and decisions. This role is mirrored in that of the legislature, which is tasked with holding the executive *politically* accountable between general elections on behalf of the public. Thus, any intervention by statute in a manner which is designed to restrain the ability of the judiciary to carry out its constitutional function would be wholly inappropriate and would be a breach of the separation of powers.

8.5. There are, of course, particular decisions for which so-called 'ouster clauses' have been deemed appropriate in order to provide legal certainty. Any such matters should be restricted, however, to those which are absolutely necessary in order to maintain good governance. Any broadening of the use of ouster clauses should not be considered.

8.6. In any event, as mentioned above, it is entirely possible that any statutory intervention in the judicial review process would be liable to challenge, of itself, on the basis that it is fundamentally oppressive. In this regard, it may be pertinent to observe the following, somewhat prescient, words of Lord Steyn in *R (Jackson) v Attorney General* [2006] 1 AC 262 at para 102 (which also appeared in the passage from Lord Hope in *Axa* at footnote 4 above):

> "In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the … Supreme Court may have to consider whether this is [a] constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish."

8.7. There is no question of it being appropriate for a government to seek to hamstring the judiciary's powers, in an attempt to make decision making easier, by removing one of the consequences of

bad decision making. A procedure for the review of decision making by public bodies needs to be flexible and free from extra-judicial interference.

8.8. There is no case for any decisions being made immune from judicial review, since no power conferred on Government is unlimited. Any such suggestion is chilling. It is the essential province of the judiciary to police those limits. As Lord Drummond Young rightly observed in *Cherry & Ors v Advocate General for Scotland* [2019] CSIH 49, 2020 SC 37 at para 102:

"The rule of law requires that any act of the executive, or any other public institution, must be liable to judicial scrutiny to ensure that it is within the scope of the legal power under which it is exercised. The boundaries of any legal power are necessarily a matter for the courts, and the courts must have jurisdiction to determine what those boundaries are and whether they have been exceeded. That jurisdiction is constitutionally important, and in my opinion the courts should not shrink from exercising it. Consequently, if the expression 'non-justiciable' means that the courts have no jurisdiction to consider whether a power has been lawfully exercised, it is a concept that is incompatible with the rule of law and contrary to fundamental features of the constitution of the United Kingdom."

9. Do you agree that the CPRC should be invited to remove the promptitude requirement from Judicial Review claims? The result will be that claims must be brought within three months.

9.1. This requirement does not apply in Scotland so we make no substantive comments on it save to say that, where it is within the power of the courts to extent time limits in order to permit investigation of extra-judicial resolution, that would add to the flexibility of the system and would prevent 'time bar' applications unnecessarily burdening the courts' administration.

9.2. Any such extension would likely require some form of public notification in order to protect the interests of interested and potentially interested parties.

10. Do you think that the CPRC should be invited to consider extending the time limit to encourage pre-action resolution?

10.1. Our response to this question is contained within our answer to question 9 above.

11. Do you think that the CPRC should be invited to consider allowing parties to agree to extend the time limits to bring a Judicial Review claim, bearing in mind the potential impacts on third parties?

11.1. Our response to this question is contained within our answer to question 9 above.

12. Do you think it would be useful to invite the CPRC to consider whether a 'track' system is viable for Judicial Review claims? What would allocation depend on?

12.1. In our experience, the courts' administration service, including the courts themselves, are perfectly capable of determining which applications are urgent and which are not urgent. There is no need for a separate track scheme to be implemented in order for them to do so.

12.2. In Scotland, this is done by way of a motion for urgent disposal under the Rules of the Court of Session. Such a motion is considered by the court and, on cause shown, an expedited timetable for the application can be issued.

12.3. That is sufficient insofar as distinguishing between urgent and non-urgent applications in our view.

13. Do you consider it would be useful to introduce a requirement to identify organisations or wider groups that might assist in litigation?

13.1. We do not believe this to be a useful or appropriate requirement.

13.2. There are innumerable bodies and authorities who might have an interest in applications for judicial review. Creating a pre-approved list of them will serve only to marginalise smaller voices around the edges.

13.3. There is a mechanism – in Scotland at least – for interested parties to seek to intervene, either in writing or by way of oral submissions. Petitioners are able to list those potentially interested parties in the petition in order to bring it to their attention. Beyond that, more significant issues will come to the attention of interested bodies due to their nature and those bodies can, if so advised, then seek to intervene either at first instance or beyond.

13.4. It is overly simplistic to view organisations that might seek to intervene as a single homogenous body which could be distilled into a database.

14. Do you agree that the CPRC should be invited to include a formal provision for an extra step for a Reply, as outlined above?

14.1. This a discrete issue of procedure outwith Scotland so we make no comments on it.

15. As set out in para 105(a) above, do you agree it is worth inviting the CPRC to consider whether to change the obligations surrounding Detailed Grounds of Resistance?

15.1. This a discrete issue of procedure outwith Scotland so we make no comments on it.

16. As set out in para 105(b) above, is it appropriate to invite the CPRC to consider increasing the time limit required by CPR54.14 to 56 days?

16.1. This a discrete issue of procedure outwith Scotland so we make no comments on it.

17. Do you have any information that you believe would be useful for the Government to consider in developing a full impact assessment on the proposals in this consultation document?

17.1. We have set out our broader views in relation to this consultation in our introduction hereto. We invite the Government to have regard to those representations.

17.2. The courts exist, as one of the three pillars of the state, to provide rulings on what the law is, and how it should be applied. That is their fundamental function. The principle of access to justice dictates that, as a generality, anyone who wishes to do so can apply to the court to determine

what the law is in a given situation: *Wightman v Secretary of State for Exiting the EU* [2018] CSIH 62, 2019 SC 111 per Lord President Carloway at §21. Government must, in a civilised society, be conducted in accordance with the law; and a major function of public law remedies is to achieve that result.

17.3. Procedural niceties should not stand in the way of due observance of the rule of law, and enforcing the rule of law is a vital function of the courts: *Taylor v. Scottish Ministers* [2019] CSIH 2, 2019 SLT 288 per Lord Drummond Young at § 15. The importance of the rule of law should be self-evident: a system of democratic government that pays proper respect to the rights of the individuals present within its territorial jurisdiction must be based on a system of rules, and those rules must be properly interpreted and consistently applied.

29 April 2021