A Drop in the Oceana, or a Tsunami of Change?

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Abstract—The passage of five ouster clauses within the last two years has reignited familiar debates about the judiciary's proper constitutional role. This article defends the *Privacy International* plurality judgment, justifying the strong interpretative presumption against the ouster of the High Court's supervisory jurisdiction on the grounds of (a) a free-standing principle of hostile interpretation and (b) a fuller understanding of parliamentary sovereignty. It argues that the recent decisions in *Oceana* and *LA (Albania)* are flawed insofar as they deviate from the ratio of *Privacy International*. In addition, it argues that the cases are indicative of a wider reticence to challenge an executive which is increasingly hostile to judicial review. Finally, it comments on the recent jurisprudence of the Supreme Court and suggests that the constitutional landmarks of *Cart* and *Privacy International* are awaiting their demolition.

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I view with apprehension the attitude of judges who … show themselves more executive minded than the executive … I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.[1]

Introduction

What do section 3 of the Dissolution and Calling of Parliament Act 2022, section 2 of the Judicial Review and Courts Act 2022, and sections 13, 51 and 53 of the Illegal Migration Act 2023 have in common? They are ouster clauses, a purportedly 'exceptional'[2] form of legislation used to curtail judicial review. Cumulatively, they represent significant pushback by the government against what they perceive to be overly interventionist judges. The clauses reverse the seminal Supreme Court decisions of *Cherry/Miller*[3] and *Cart*,[4] and almost completely insulate Upper Tribunal immigration decisions from judicial review. The recently passed Safety of Rwanda (Asylum and Immigration) Act goes even further.[5] It declares Rwanda safe despite a unanimous Supreme

[1] *Liversidge v Anderson* [1942] AC 206 (HL) (Lord Atkin), quoting Lewis Carroll, *Through the Looking-Glass*.
[2] Independent Review of Administrative Law, para. 2.89.
[3] *R (Miller) v The Prime Minister*; *Cherry v Advocate General for Scotland* [2019] UKSC 41, [2020] 1 AC 373.
[4] *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663.
[5] It was touted by the Prime Minister as 'the toughest legislation ever introduced to Parliament'. The Home Office, 'Bill to make clear Rwanda is a safe country and stop the boats' (Gov.UK, 6 December 2023) <https://www.gov.uk/government/news/bill-to-make-clear-rwanda-is-a-safe-country-and-stop-the-boats>.

Court ruling to the contrary, immediately ousting this from any form of judicial scrutiny.[6]

Four years after *Privacy International*,[7] both *Oceana*[8] and *LA (Albania)*[9] provide a markedly different and profoundly unwelcome perspective on the judicial interpretation of ouster clauses; one which promotes undue deference to Parliament at the expense of access to justice. The first part of this article will set out the judgment and reasoning of the majority in *Privacy International*, arguing that the approach taken in the case is welcome, not just as a high-water mark of common law judicial review but also as an affirmation of the uniquely important right to access the courts. The second and third parts will analyse the recent *Oceana* and *LA* decisions, arguing that both are deeply flawed. It will be argued that (a) they fail to interpret the ouster clause in question in line with the principles laid down by *Privacy International*, (b) they fail to recognise the particular constitutional threats which ouster clauses pose, and (c) they fail to understand the proper role of the judiciary. Given the recent proliferation of

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[6] While Parliament can of course legislate to overturn judicial decisions (s3 Compensation Act 2006, overturning *Barker v Corus (UK) plc* [2006] UKHL 20; War Damages Act 1965, overturning *Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75), this power has been used to resolve questions of *law*. Legislating that *facts* are not as they are runs the risk of severely compromising the independence of the judiciary. In the House of Lords debate, Lord Hoffmann could find only one precedent of this kind: the Poisoning Act 1530, through which Henry VIII deemed a cook guilty of poisoning and had him boiled to death without a trial. HL Deb 14 February 2024, vol 836, col 305.

[7] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 49.

[8] *R (Oceana) v Upper Tribunal* [2023] EWHC 791.

[9] *R (LA (Albania)) v Upper Tribunal* [2023] EWCA Civ 1337.

purportedly valid ouster clauses, the Supreme Court should take urgent steps to rectify this misstep; the clause should never have been given effect and its progeny should equally be rejected.

***Privacy International*: a constitutional watershed**

Any judge tasked with the interpretation of an ouster clause should immediately turn to Lord Carnwath's judgment in *Privacy International*. It sets out an authoritative set of principles through which they must be interpreted, affirms the importance of access to justice, and reminds the reader of public law's unique ability to hold seemingly unchecked power to account.

The facts of the case read like a spy thriller: – a legal challenge against GCHQ's mass surveillance campaigns.[10] The Regulation of Investigatory Powers Act 2000 (RIPA) established the Investigatory Powers Tribunal (IPT) to consider such complaints against public bodies. In 2016, the IPT dismissed a

[10] Codenamed 'Tempora', this hacking involved secretly tapping into fibre-optic cables to monitor, access and process all forms of telephone and online activity. As the NSA's principal partner in mass surveillance, GCHQ also ran a program called OPTICNERVE which 'saved a snapshot every five minutes from the cameras of people video-chatting' online. In 2013, they forced the *Guardian* to destroy hard drives containing Snowden's leaked documents in a failed attempt to prevent their publication. For more information, see Glenn Greenwald, *No Place to Hide* (Macmillan US 2014) and Edward Snowden, *Permanent Record* (Metropolitan Books 2019). GCHQ's existence was not publicised until 1976, and the journalist who revealed this was deported for doing so: *R v Secretary of State for the Home Department, ex parte Hosenball* [1977] 1 WLR 766.

complaint brought by Privacy International against GCHQ, holding that its surveillance was legal under 'thematic warrants'. These were broad authorisations which covered 'an entire class of property, persons or conduct', such as 'all mobile phones in London'.[11] In short, GCHQ could (and did) spy on everyone.

Privacy International sought to challenge this in the High Court. However, they were prima facie barred from doing so by section 67(8) of RIPA, which provided that:

> 'determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court'.

The High Court and a unanimous Court of Appeal held that this prevented any supervisory oversight – a finding which a majority of the Supreme Court overturned. Lord Carnwath (with whom Lady Hale and Lord Kerr agreed) gave the leading judgment, alongside a separate concurrence by Lord Lloyd-Jones. Lord Carnwath began by noting the parallels with the seminal case of *Anisminic*,[12] in which section 4(4) of the Foreign Compensation Act 1950 was found not to oust the jurisdiction of the High Court, despite providing that 'the determination by the [Foreign Compensation] Commission … shall not be called in question in

[11] Privacy International, 'The Queen on the application of Privacy International v. Investigatory Powers Tribunal (UK General Hacking Warrants)' <https://privacyinternational.org/legal-action/queen-application-privacy-international-v-investigatory-powers-tribunal-uk-general> accessed 25 May 2024.

[12] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

any court of law'. He summarised its ratio, as understood by later cases,[13] into three principles:

i) 'That there is (at the least) a strong presumption against statutory exclusion of review by the High Court of any decision of an inferior court or tribunal treated as made without jurisdiction and so a "nullity";
ii) That for this purpose there is no material distinction between an excess of jurisdiction at the outset, and one occurring in the course of proceedings;
iii) That a decision which is vitiated by error of law… is, or is to be treated as, made without jurisdiction and so a nullity.'[14]

This final point is the most important. It summarises Lord Reid's now-seminal speech in *Anisminic*, which held that the term 'determination' did not include a 'purported determination', and the ouster clause could thus not apply to one. The logic relies on two senses of the word 'decision' being employed simultaneously. In one, it refers to 'a decision made without error'; in the other, it bears its ordinary meaning of 'conclusion' or 'resolution.'[15]

Given that RIPA's draftsmen were clearly aware of the decision in *Anisminic*,[16] Lord Carnwath held that s67(8) was not

[13] Most importantly, *O'Reilly v Mackman* [1983] 2 AC 237 (HL); *R v Hull University Visitor, Ex p Page* [1993] AC 682 (HL).
[14] *Privacy International* (n 7) [43].
[15] Summarised in *Privacy International* (n 7) [45]-[48] (Lord Carnwath).
[16] The predecessor of s67(8), section 7(8) of the Interception of Communications Act 1985, was drafted before the decision in *Page* confirmed a much broader interpretation of *Anisminic*. However, the

'materially different'.[17] The words in parentheses, '(including decisions as to whether they have jurisdiction)', excluded judicial review for errors of fact, but had no impact on the review of errors of law.[18] Noting Laws LJ's conclusion in *Cart*[19] that 'the jurisdiction of the King's Bench Division extended to all inferior jurisdictions without distinction', Lord Carnwath held that there was 'no principled distinction' between the Foreign Compensation Commission and the IPT (despite the quasi-judicial character of the latter).[20] Finally, he held that a limited statutory right to appeal was irrelevant, as 'a power entirely in the gift of the executive does nothing to weaken the case for ultimate control by the courts'.[21] In short, '[i]n the language of *Anisminic*', the clause did not exclude review.[22]

The outcome in *Privacy International* is justified by the long-established 'strong interpretative presumption against the exclusion of judicial review.'[23] This dates back to at least 1669, before the Glorious Revolution established our modern

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Regulation of Investigatory Powers Bill was introduced in February 2000, seven years after *Page*.

[17] *Privacy International* (n 7) [22] (Lord Carnwath).

[18] Compare 'except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court' (s 67(8) RIPA) with 'the determination by the commission of any application made to them under this Act shall not be called in question in any court of law' (s 4(4) FCA).

[19] *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin).

[20] *Privacy International* (n 7) [66].

[21] ibid [104]. See also *R (Evans) v Attorney General* [2015] UKSC 21.

[22] *Privacy International* (n 7) [109].

[23] ibid [37].

constitutional settlement, and long before A.V. Dicey defined sovereignty.[24] The court's jurisdiction can thus only be ousted through 'the most clear and explicit language'.[25] This is a manifestation of the principle of legality, which holds that 'Parliament must squarely confront what it is doing and accept the political cost' of its actions.[26] The fate of clause 11 of the 2003 Asylum and Immigration (Treatment of Claimants etc) Bill 2003, 'the most extreme form of ouster clause promoted by government in modern times', demonstrates this.[27] The clause:

> 'prevent[ed] a court…from entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity by reason of –
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> (i) lack of jurisdiction,
> (ii) irregularity,
> (iii) error of law,
> (iv) breach of natural justice, or
> (v) any other matter.'

It thus expressly circumvented the logic of *Anisminic* by including 'purported determinations' amongst the ousted grounds of review. Doing so is an extremely odd legislative choice; as Lord Wilson has commented extrajudicially, 'purported' in this context

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[24] *Smith, Lluellyn v Comrs of Sewers* (1669) 1 Mod 44, 86 ER 719; *R v Plowright* (1685) 3 Mod 94, 87 ER 60; *R v Moreley* (1760) 2 Bur 1041; *Ex p Bradlaugh* (1878) 3 QBD 509. See the even stronger formulation of the principle in *R v Cheltenham Commissioners* (1841) 1 QB 467, where Lord Denman CJ held that 'the statute *cannot* affect our right and duty to see justice executed'.

[25] *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 [30].

[26] *R v Home Secretary, ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115.

[27] *Privacy International* (n 7) [101] (Lord Carnwath).

can only mean wrongly made.[28] Nonetheless, it demonstrates a commitment to wholly block judicial review.

The fierce backlash which the clause provoked demonstrated both its extremity and how constitutional law adapted in response. Lord Steyn described the Home Office as 'attacking [our] democratic institutions', and the Bill as an attempt 'to immunise manifest illegality.'[29] Lord Woolf, the Lord Chief Justice at the time, described it as a 'blot on the reputation of ministers' which was 'fundamentally in conflict with the rule of law,' and "could be the catalyst for a written constitution."'[30] Mullen suggests that the dicta in *Jackson*[31] asserting a common law power to strike down primary legislation was a reaction to the clause,[32] and eventually, under duress, the clause was withdrawn. Parliament's decision to draft RIPA in similar language to that considered in *Anisminic* demonstrates that they did not have a

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[28]Alex Dean, 'Is parliament really sovereign?' (*Prospect Magazine*, 17 December 2020).) <https://www.prospectmagazine.co.uk/politics/40872/is-parliament-really-sovereign> accessed 25 May 2024.

[29] Lord Steyn, 'A Challenge to the Rule of Law' (Speech, Inner Temple Hall, Immigration Law Practitioners' Association, 15 March 2004) 'Law' (Speech to Inner Temple Hall, in Immigration Practitioners' Association) <https://ilpa.org.uk/wp-content/uploads/resources/12992/04.03.334.pdf> accessed 25 May 2024.

[30] Lord Woolf, Squire Centenary Lecture, 'The Rule of Law and a Change in Constitution' (3 March 2004)., (Squire Centenary Lecture, 3 March 2004).

[31] *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262.

[32] Tom Mullen, 'Reflections on Jackson v. Attorney General: Questioning Sovereignty' (2007) 27 Legal Stud 1. Mullen discusses the following paragraphs of *Jackson* (n 31): [102] (Lord Steyn), [104] and [107] (Lord Hope), [159] (Baroness Hale).

clear enough intention to confront this backlash and thus to oust the courts.

The Supreme Court holding otherwise in *Privacy International* would have severely compromised access to justice, a uniquely important 'meta-right' needed to secure the enforcement of other rights. RIPA purported to wholly insulate *every* decision of the IPT from judicial review. This would allow them to independently develop 'local law' in a contradictory manner to the High Court, ignoring precedent and derogating from the certainty that the rule of law is supposed to provide.[33] More worryingly, it would allow the IPT to define their own jurisdiction. Were they to grow tired of hearing about investigatory powers, they could decide to hear particularly dramatic criminal appeals instead. Were the IPT to send someone to prison for contempt, no matter how unreasonable or unjustified this was, there could be no appeal.[34] The courts have necessarily recognised that they must enforce the limitations imposed by Parliament upon administrative tribunals, preventing the 'contradiction in terms [of] a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure.'[35]

Lord Sumption dissented alongside Lord Reed, stating that the ouster was sufficiently clear to prevent jurisdiction in

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[33] Lord Carnwath in *Privacy International* (n 7) [90] and [139]. While views on the rule of law's content vary, even the most formalistic conceptions agree that the law should be certain. For example, see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (OUP 2009).

[34] Dinah Rose KC, oral argument before the Supreme Court: *Privacy International* (n 7).

[35] *R v Shoreditch Assessment Committee, Ex p Morgan* [1910] 2 KB 859, 880 (Farwell LJ).

substantive appeals. To them, the rule of law was 'sufficiently vindicated' by the fact that the IPT was presided over by a senior judge and that 'it exercise[d] a power of judicial review' in its own right.[36] They thought that the structure of the clause was clearly intended to address the *Anisminic* decision,[37] and that the High Court would still be able to intervene if the error were solely one of procedural failings.[38] Lord Wilson, in a spirited minority of one, thought that *Anisminic* was wrongly decided. He argued that ouster clauses should be given their natural meaning to reverse '50 years of linguistic confusion'.[39]

Lord Wilson's dissent, however, accurately pinpoints the main issue with the 'clarity' test adopted by the other six judges. Namely, the threshold required has frequently been redefined upwards, a seemingly deliberate tactic to avoid answering the question of whether the courts can constitutionally ever be ousted.[40] The most egregious example appears in *Privacy International* itself, in which the Supreme Court read down as 'too unclear' a clause which had been previously described as an 'unambiguous ouster'.[41] Shrinking the goalposts as the ball hurtles past the goalkeeper is an unsustainable strategy which provides little help to Parliamentary draftsmen and actively hinders first

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[36] *Privacy International* (n 7) [172], [197].
[37] ibid [223]-[224].
[38] ibid [205].
[39] ibid [214].
[40] ibid.
[41] *R (A) v Director of Establishments of the Security Service* [2009] UKSC 12, [2010] 2 AC 1 (Lord Brown). The Court of Appeal described this dictum as 'powerful persuasive authority': *Privacy International v Investigatory Powers Tribunal* [2017] EWCA Civ 1868 (Court of Appeal) [48].

instance judges.[42] The courts' predisposition to say one thing and later hold another thus renders comparisons to the 2007 super-ousting Asylum Bill nugatory. Regardless of what their judgments implied, it is unclear whether the majority in *Privacy International* would have actually given effect to such a clause.

This is because Lord Carnwath, Lady Hale, and Lord Kerr did not stop at reading section 67(8) down. No longer supported by Lord Lloyd-Jones, they suggested that the 'discussion needs to move beyond' the 'highly artificial' logic of *Anisminic*.[43] It was 'ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review.'[44] Taking up the court's role as 'constitutional guardian of the rule of law,'[45] they held that there was a:

> 'strong case for holding that, consistently with the rule of law, binding effect **cannot** be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law.'[46]

[42] The High Court and Court of Appeal judgments in *Privacy International* are just one example. Case notes on the CA decision are equally amusing in hindsight: see Robert Craig, 'Ouster clauses, separation of powers and the intention of parliament: from *Anisminic* to *Privacy International*' [2018] Public Law 570.
[43] *Privacy International* (n 7) [128]-[129].
[44] ibid [131] (emphasis added).
[45] ibid [139].
[46] ibid [144] (emphasis added).

Instead of engaging in linguistic trickery, the court should instead use a balancing exercise to decide the extent to which an ouster should be given effect:

> 'regardless of the words used, it should remain ultimately a matter for the court … having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law.'[47]

This conclusion (albeit in obiter) is ostensibly shocking for a court which has never struck down primary legislation on common law grounds.[48] However, it should not be seen as a radical constitutional uprising or a wide-ranging statement that the Supreme Court can now strike down law at will.[49] Rather, it should be viewed as a nuanced affirmation of the important principle that an independent judiciary is a necessary corollary of untrammelled parliamentary power. For the laws which Parliament passes to be effective, an independent body such as the High Court must be able to enforce the limits it prescribes (a

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[47] ibid [144].

[48] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001). cf particular readings of *Rochefoucauld v Boustead* [1897] 1 Ch. 196, which suggest that the Court of Appeal disapplied section 7 of the Statute of Frauds to allow oral evidence of an express trust over land to be admissible despite statutory words to the contrary. See further William Swadling, 'The nature of the trust in Rochefoucauld v Boustead' in Charles Mitchell (ed.), *Constructive and Resulting Trusts* (Hart Publishing 2010).

[49] cf the judgments in *Marbury v Madison* (1803) 5 US 137 (United States); *Harris v Minister of the Interior* (no.2) [1952] 4 SA 769 (South Africa); *Movement for Quality Government in Israel v. Knesset* (2024) HCJ 5658/23 (Israel).

principle with which Lord Reed and Lord Sumption agree!)[50] If the IPT 'went rogue', judicial review is the primary mechanism by which their abuse of jurisdiction would be tackled.[51] A body that often expresses itself through confusing texts needs an independent and consistent arbiter to determine what they mean.[52] In the same way that Parliament are seen as incapable of binding their successors,[53] they are prima facie incapable of binding their interpreter.[54] The judgment also must be situated within its background – the complete restriction of access to justice. Confining it to this context allows courts to give effect to softer limitations on their jurisdiction, such as those imposing time limits on judicial review to ensure certainty in planning

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[50] *Privacy International* (n 7) [210], where they state that 'Parliament's intention that there should be legal limits to the tribunal's jurisdiction is not therefore consistent with the courts lacking the capacity to enforce the limit … it would be a strange thing for Parliament to intend, and although conceptually possible, it has never been done'.

[51] *Privacy International* (n 7) [122]-[133].

[52] An amusing example of the difficulty of ascertaining specific legislative intent is seen in *BP Oil Development Ltd v CIR* [19901991] 64 TC 498, in which Staughton LJ held that he could 'not attempt any purposive construction of the detailed provisions of the [statute], since [he was] not sure what their purpose is'.

[53] This view is contestable, but the firm weight of authority suggests that so-called 'manner and form' restrictions such as a 'referendum lock' would not be legally binding. *Ellen Street Estates Ltd v Minister for Health* [1934] 1 KB 590; *Jackson v Attorney General* [2005] UKHL 56 [32] (Lord Bingham) and [133]; *Re Allister* [2023] UKSC 5 [66] (Lord Steyn). It appears to only be afforded to the House of Commons: the Parliament Act 1911, the Parliament Act 1949, and the House of Lords Reform Act 1999. cf *Jackson* (n 31) [163] (Lady Hale); Scotland Act 2016, s 1; Wales Act 2017, s 1.

[54] For further discussion of this view, see *Cart* [2009] EWHC 3052 (Admin) at [36]-[41] (Laws LJ), endorsed by Lady Hale in the Supreme Court in the same case at [30].

decisions,[55] while subjecting more fundamental limits to much stricter review.[56]

The belief that the case flagrantly violates parliamentary sovereignty is grounded in a rigid and flawed conception of this doctrine which fails to recognise any constitutional developments since the Glorious Revolution of 1689. It is a view based on Dicey's absolutist rule that 'no person or body [has] a right to override or set aside the legislation of Parliament',[57] a view which simply no longer reflects reality.[58] Hunt notes that this reductive view juxtaposes the "irreconcilable' and 'radically opposed narratives of democratic positivism (rooted in the sovereignty of Parliament) and liberal constitutionalism (rooted in the sovereignty of the individual and the courts' task in protecting that sphere)' in a manner which is 'embarrassingly at odds with both legal and political reality.'[59]

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[55] *R v Secretary of State for the Environment, ex parte Ostler* [1977] QB 122. Note that they are still to be read 'as narrowly as possible'; *R (Richards) v Pembrokeshire CC* [2004] EWCA Civ 1000 [46]-[47].

[56] Noted by Hayley J Hooper, 'No Superior Form of Law?', (2024) Public Law 1.

[57] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, 1915). This view is unfortunately propagated by the *Privacy International* dissents, by s1(4) of the Rwanda Bill, and by Saini J in *Oceana*.

[58] *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 All ER 70; Nick Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 International Journal of Constitutional Law 144.

[59] Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Bloomsbury 2003).

The relationship between Parliament and the courts may well have been forged in the fires of the Glorious Revolution, but it was changed by the Acts of Union,[60] by our membership of the EU,[61] and by the Human Rights Act 1998.[62] It was changed by the rise (and the apparent demise) of 'constitutional statutes'[63] and by the Constitutional Reform Act 2005.[64] The courts' supervisory role has blossomed alongside our constitution into what we now know as public law.[65] Similarly, the post-Dicey judiciary have not just developed many elaborate interpretative approaches – --[66] they *have* also disapplied primary legislation.[67]

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[60] See the judgments of Lord President Cooper in *MacCormick v Lord Advocate* [1953] SC 396 and Lord Hope in *Jackson* at [106].

[61] Nick Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) 9 International Journal of Constitutional Law 144.

[62] R *(on the application of HS2 Action Alliance Limited) (Appellant) v Secretary of State for Transport and another (Respondents)* [2014] UKSC 3 [207] (Lord Neuberger).

[63] *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); *HS2* [2014] UKSC 3 [208], before the doctrine's dismissal as 'academic' in *Re Allister* [2023] UKSC 5.

[64] *Privacy International* (n 7) [120], [142] (Lord Carnwath).

[65] Even in 1964, the UK '[did] not have a developed system of administrative law'; *Ridge v Baldwin* [1964] AC 40 (Lord Reid).

[66] *R v Home Secretary, ex parte Simms* [1999] UKHL 33, [2000] 2 AC 115 (the principle of legality); *Ghaidan v Godin-Mendoza* [2004] UKHL 30 (extremely strained interpretative approaches under s 3 of the Human Rights Act 1998); *Barclays Mercantile Business Finance Limited v Mawson* [2004] UKHL 51 (purposive construction of tax statutes); alongside *Anisminic*, *Cart* and *Privacy International*.

[67] *R v Secretary of State for Transport, ex parte Factortame* (no.2) [1991] 1 AC 603 (HL),) HL (disapplication of primary legislation which conflicts with EU law). See also *Dillon & Ors* [2024] NIKB 111, which disapplied ten sections of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. The case is also interesting for Colton J's view that 'there is little suggestion or authoritative support for the proposition, outside the context of ouster clauses, that the courts can rule that an Act of

Sovereignty can be retained as the fundamental principle of our constitution without reading it as a rule which ensures that Parliament gets what it wants, all the time. Parliament's legitimacy derives not just from historical fact, but from their democratic credentials.[68] They legislate within an 'environment of omni-applicable constitutional principles'[69] which forcefully protect 'meta-rights' such as access to justice and the right to vote.[70]

Parliament is contrary to the rule of law and therefore, unconstitutional' (emphasis added).

[68] This claim is highly contested and outside the scope of this article. It appeals to an intuitive understanding that in the UK, Parliament are empowered to make law insofar as they are democratically elected, not just 'because they can', a view vindicated by the *Miller* decisions' view of sovereignty. It is for this reason that it has been suggested that Parliament are incapable of passing extremely anti-democratic laws such as those abolishing the right to vote: *AXA v HM Advocate* [2011] UKSC 46 [51] (Lord Hope); *Moohan v Lord Advocate* [2014] UKSC 67 [35] (Lord Hodge); *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 (Lord Dyson MR); TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press 1993). cf Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001) ch 10, which staunchly defends the 'social fact' thesis and argues that while there may be a moral duty to disobey anti-democratic laws, there is no legal power to do so. In any case, it is 'romanticism to believe that a judicial decision could hold back what would, in substance, be a revolution' (Lord Irvine, cited in Goldsworthy) (emphasis added).

[69] Christian Magaard, 'Reconciling the Proactive Principle of Legality with Parliamentary Sovereignty' (UK Constitutional Law Blog, 17 November 2022) <https://ukconstitutionallaw.org/2022/11/17/christian-magaard-reconciling-the-proactive-principle-of-legality-with-parliamentary-sovereignty/> accessed 25 May 2024.

[70] Pavlos Eleftheriadis, 'Parliamentary Sovereignty and the Constitution' 2009) 2009) 22 Canadian Journal of Law and Jurisprudence 267, 345; Conor Crummey, 'The Safety of Rwanda Bill

Parliament get what it wants, most of the time.[71] In public law, however, 'context is everything.'[72]

R (Oceana) v Upper Tribunal: shorely not!

All these issues have been thrown into focus by the decision in *R(Oceana)*, which gives effect to an ouster with little regard for precedent or principle. Section 11A of the Tribunals, Courts and Enforcement Act 2007 (introduced by section 2 of the Judicial Review and Courts Act 2022), provides that decisions of the Upper Tribunal regarding immigration refusals are:

> '(3) final, and not liable to be questioned or set aside in any other court.
>
> In particular—
>
> (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;
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> (b) the supervisory jurisdiction does not extend to, and no application or petition for judicial

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and the Judicial "Disapplication" of Statutes' (UK Constitutional Law Blog, 26 March 2024) <https://ukconstitutionallaw.org/2024/03/26/conor-crummey-the-safety-of-rwanda-asylum-and-immigration-bill-and-the-judicial-disapplication-of-statutes/> accessed 25 May 2024.

[71] *Jackson* (n 31) [102] (Lord Steyn).

[72] *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 [28] (Lord Steyn).

> review may be made or brought in relation to, the decision'[73]

unless 'the Upper Tribunal is acting or has acted in bad faith' or 'in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice'.[74] Most importantly, like the Asylum Bill, it defines 'decision' as including 'any purported decision'.[75]

The legislation was recommended by the Independent Review of Administrative Law ('IRAL') and overturns the much-governmentally-maligned judgment in *Cart*.[76] This allowed appeals to the High Court from the Upper Tribunal if they raised 'some important point of principle or practice' or "other compelling reason',[77] in the absence of statutory guidance. The IRAL suggested that only 0.22% of these were successful and argued that 'the continued expenditure of judicial resources on considering [*Cart*] applications … cannot be defended.'[78]

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[73] Tribunals, Courts and Enforcement Act 2007, ss 11A(2), 11A(3)
[74] Tribunals, Courts and Enforcement Act 2007, s 11A(4)(c).
[75] Tribunals, Courts and Enforcement Act 2007, s 11A(7).
[76] *R (Cart) v Upper Tribunal* [2011] UKSC 28.
[77] Section 13(6) Tribunals, Courts and Enforcement Act 2007; *Cart* (n 4) [52]-[57] (Lady Hale).
[78] The Independent Review of Administrative Law [3.46]. By way of comparison, between 2000 and 2009, the IPT upheld only 10 out of 1500 complaints (0.0067%, five of which came from one family!), and its abolition was not suggested. Ian Cobain and Leila Haddou, "'Independent" court scrutinising MI5 is located inside Home Office' (*The Guardian*, 5 March 2014) <https://www.theguardian.com/politics/2014/mar/05/independence-ipt-court-mi5-mi6-home-office-secrecy-clegg-miliband> accessed 25 May 2024.

The IRAL neglected to mention that they had no data for 5,457 out of the 5,502 reviews considered (99.182%!) and simply 'assumed that all cases which were not reported were failed *Cart* [judicial reviews]', which 'seriously misrepresent[ed] the statistical findings.'[79] In a more thorough analysis, Barczentewicz estimates that 7.6% of 42,000 *Cart* appeals succeeded.[80] Given that 'reported judgments are extremely rare', JUSTICE argue that on the data available, the rate is significantly higher, at 26.7%.[81]

The governmental response to the IRAL is just as, if not more, flawed. The section on ouster clauses begins with a quote from Richard Ekins suggesting that the 'rule of law does not mean the rule of judges.'[82] It attributes a passage to Lady Hale,

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[79] JUSTICE, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law Consultation Call for Evidence – Response' (April 2021) [24]. Even the explanatory notes to the Bill acknowledge this and estimate it at 3%.

[80] Mikołaj Barczentewicz, 'Should Cart Judicial Reviews be Abolished? Empirically Based Response' (*UK Constitutional Law Blog,* 5 May 2021). <https://ukconstitutionallaw.org/2021/05/05/mikolaj-barczentewicz-should-cart-judicial-reviews-be-abolished-empirically-based-response/> accessed 25 May 2024.

[81] JUSTICE (n 79) [24-25].

[82] Judicial Review Reform, 'The Government Response to the Independent Review of Administrative Law' (March 2021, CP 408) [26]. Ekins' Judicial Power Project has been criticised as 'helping to drive the political agenda of the extreme right in the Conservative Party in the UK', targeting 'seemingly … any institutional check on executive power, political as much as legal'. They advocated amending the Judicial Review and Courts Bill to overturn *Cart*, *Privacy International*, *Evans*, *UNISON*, *Cherry/Miller*, and *AXA*, alongside other judgments which affirm the importance of an independent and powerful judiciary. His endorsement should be read in this light. David Dyzenhaus, 'The Snake Charmers' (*Verfassungsblog,* 7 March 2022) <https://verfassungsblog.de/os5-

suggesting that 'the courts should remain … the servant of Parliament.'[83] This is not what she said.[84] The response asserts the government's intention to ensure the clause overturning *Cart* 'will be used as an example to guide the development of effective legislation' to oust the courts. In addition, it promises a 'review' of all ouster clauses on the statute book, including RIPA.[85] As Lord Carnwath commented extrajudicially, its analysis 'fails to identify a problem requiring legislative intervention' and is both 'muddled and inconclusive.'[86] What it does do, however, is show

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snake-charmers/> accessed 25 May 2024; Thomas Poole, 'The Executive Power Project' (*London Review of Books,* 2 April 2019); <https://www.lrb.co.uk/blog/2019/april/the-executive-power-project> accessed 25 May 2024; Richard Ekins, 'How to Improve the Judicial Review and Courts Bill' (2021) <https://policyexchange.org.uk/wp-content/uploads/2021/10/How-to-Improve-the-Judicial-Review-and-Courts-Bill.pdf> accessed 25 May 2024. See also Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36 University of Queensland Law Journal, 2, 355.

[83] ibid. This language has been repeated by former immigration minister Robert Jenrick, who claimed that 'in our sovereign parliament, the law is our servant': Robert Jenrick, 'Adopt my amendments to Rwanda Bill or face an illegal migration catastrophe' (*Telegraph*, 12 January 2024) <https://www.telegraph.co.uk/news/2024/01/12/jenrick-migration-bill-rwanda-illegal-migration-catastrophe/> accessed 25 May 2024.

[84] She instead stated that 'in the vast majority of cases, judicial review is the servant of Parliament'. The government's modification of the quote into a suggestion that they 'should remain' the servant of Parliament suggests a level of deference which is ordinarily not afforded to Parliament. Lord Carnwath, 'Response to Consultation', (27 April 2021) [14] <http://www.landmarkchambers.co.uk/wp-content/uploads/2021/04/IRALresponse-rcfinal3.pdf> accessed 25 May 2024.

[85] This intention is given effect by the clauses in the Illegal Migration Act and the Rwanda Bill: 'Judicial Review Reform Consultation: The Government Response' (July 2021) CP 477 [55].

[86] Lord Carnwath's Response to the Consulation: [13], [15].

that clause s11A is intended to be a precedential 'template' for future ousters.[87]

Questionable methodology behind the clause aside, the first and only question which needs asking is whether the wording is clear enough to oust the courts in light of the principle of legality.[88] Backlash to the passage of the Judicial Review and Courts Bill was nowhere near as substantial as that faced by its widely reviled ouster siblings, the Illegal Migration Bill and the Safety of Rwanda Bill. The Law Society stated that the abolition of *Cart* reviews was cause for 'some concern.'[89] A joint statement from 290 organisations condemned the passage of the 'senselessly cruel' Illegal Migration Act as 'dismantl[ing] human rights'[90], while 270 claimed that the 'shameful' Rwanda Bill is an 'attack on the constitutional role of the judiciary and the rule of law'.[91] Suella Braverman and James Cleverly declared under s19(1)(b) of the Human Rights Act that the bills were potentially incompatible

[87] See the Illegal Migration Act 2023 and the Safety of Rwanda (Asylum and Immigration) Act 2024.
[88] *Privacy International* (n 7) [99]-[101] (Lord Carnwath).
[89] The Law Society, 'Judicial review reform' (22 April 2022) <https://www.lawsociety.org.uk/topics/human-rights/judicial-review-reform> accessed 25 May 2024.
[90] Liberty, 'Joint Civil Society Statement on the Passage of the Illegal Migration Act' (18 July 2023) <https://www.libertyhumanrights.org.uk/issue/joint-civil-society-statement-on-the-passage-of-the-illegal-migration-act/> accessed 25 May 2024.
[91] Liberty, 'Over 260 Charities and Expert Organisations Call on House of Lords to Reject Shameful Rwanda Bill' (27 January 2024) <https://www.libertyhumanrights.org.uk/issue/over-260-charities-and-expert-organisations-call-on-house-of-lords-to-reject-shameful-rwanda-bill/> accessed 25 May 2024.

with the ECHR.[92] Though neither bill was in the 2019 Conservative Manifesto,[93] the House of Lords capitulated to the enormous majority in the Commons. As a result, all the bills, and all their ouster clauses, were passed anyway.[94] This failure of the parliamentary process demonstrates how legal constitutionalism functions as a 'backstop',[95] needed most when governments disregard the right of access to justice, a cornerstone of the rule of law.[96]

Soon enough, section 11A found itself hauled before a judge because of Mary Oceana, a woman from the Philippines who used a proxy to fraudulently take an English test and was served with notice for her removal from the UK. After the rejection of her appeals to both the First-tier Tribunal and the

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[92] Illegal Migration Bill, p1; Safety of Rwanda (Asylum and Immigration) Bill 2023, p1.

[93] Arguably, the Bill was contrary to their promise to 'continue to grant asylum and support to refugees fleeing persecution'.

[94] The Rwanda Act has, at the time of writing, has just received Royal Assent. Given the calling of a general election and Labour's pledge to abandon the scheme, it is unclear to what extent it will ever be tested by the courts.

[95] This is shown by both *Miller* cases, borne throughout the case law of 'exceptional circumstances' review, and in its most extreme form, Carl Schmitt's claim that the 'sovereign is he who controls the exception'. Given Schmitt's later participation in the Nazi state, this latter claim functions as something of a warning. Carl Schmitt, *Political Theology: Four Chapters on the Theory of Sovereignty* (George Schwab, MIT Press 1988) 5; Hayley J Hooper, 'Legality, Legitimacy, and Legislation: The Role of Exceptional Circumstances in Common Law Judicial Review' (Spring 2021) 41(1) Oxford Journal of Legal Studies 142.

[96] *Kennedy v The Charity Commission* [2014] UKSC 20 [112]; *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 [127]; *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [66]-[85].

Upper Tribunal, she applied to judicially review the proceedings. The jurisdictional issue was 'overlooked' at the permission stage and later raised by the Home Department, resulting in a trial solely on the clause's validity.[97]

After referring to the IRAL, the statutory background, and section 11A's 'plain and ordinary meaning,'[98] Saini J criticised the 'time, energy and cost expended in pursuing … [judicial review] proceedings,'[99] before outlining his view of the natural justice exception under s11(A)(4). For there to be a 'fundamental breach' of natural justice, he held, it must be 'so grave as to rob the process of any legitimacy'.[100] It is not clear what this entails outside of kangaroo courts, show trials and the so-called telephone justice of the Soviet Union.[101] Yet, in any case, it is indeed a 'substantial hurdle', which is difficult to imagine ever being met within the modern British legal system. It is no wonder that Mary Oceana was unable to jump it.

The second ground of appeal is where Saini J discusses the efficacy of the ouster clause. He held that 'the point of the legislation … was to remove *Cart* [judicial reviews]'[102] and that the

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[97] *Oceana* (n 8) [2].
[98] ibid [29].
[99] ibid [31].
[100] ibid [33].
[101] *telefonnoye pravo*, or telephone justice, refers to the practice of the judiciary taking phone calls from those with political power and ruled according to what they were told. Attorney General Dick Thornburgh, 'The Rule of Law in the Soviet Union: How Democracy Might Work' (1990) <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/06-27-90b.pdf> accessed 25 May 2024.
[102] *Oceana* (n 8) [45].

decision in *Cart* arose solely 'because Parliament had not … specified how the scope of judicial review should be limited.'[103] Adding that 'the new legislation was preceded by an analysis of the number of *Cart* challenges and their success rate,' he found that 'the change does not conflict with the rule of law in any sense.'[104] He dismissed the possibility that the clause should be read in any way other than its 'plain and ordinary meaning',[105] tellingly citing Lord Brown's comment that 'the rule of law is weakened … if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff.'[106]

With respect to Saini J, this is mistaken. The High Court should not be questioning, let alone answering, what Parliament were attempting to do; the test is solely whether the words are clear enough, or, putting the point more bluntly, if there is any 'tenable construction' of the clause which retains the court's jurisdiction.[107] The judgment thus fails to give due regard to the court's constitutional obligation to restrictively interpret ouster clauses and merely asserts that the language is 'clear' enough to oust the court. The 'point of the legislation' was indeed to remove *Cart* judicial reviews, in the same way that the point of s67(8) of RIPA was to prevent the IPT from having its decisions questioned, and the point of s4(4) of the Foreign Compensation Act was to insulate the Commission from judicial review.

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[103] ibid [48].
[104] ibid [49].
[105] *Oceana* (n 8) [29].
[106] *Cart* (n 4) [100] (Lord Brown).
[107] *Privacy International* (n 7) [22] (Lord Carnwath).

The reasoning adopted in *Anisminic* is expressly precluded by section 11A(7), which for the second time in legal history (following the Dissolution and Calling of Parliament Act 2022),), includes 'purported decisions' within the ambit of a statutory 'decision'. As such, a different approach must be taken to reading down the clause. The provision in s11A(3) that 'any error made in reaching the decision is immune from review' could be read as distinct from the outcome that 'any erroneous decision is immune from review'. Adopting the distinction made by the *Privacy International* majority, the reference to jurisdiction could be held to purely refer to errors of fact. Alternatively, 'supervisory jurisdiction' could be read as distinct from the wider 'jurisdiction' of the High Court, be it equitable or declaratory.[108] However, these approaches are extremely strained. Thus, they would rightly be condemned as more 'highly artificial'[109] linguistic manoeuvres, likely inviting yet another ouster clause in response.

Instead, the court should read the exceptions in section 11A(4) expansively; blocking appeals for error of law is a fundamental breach of natural justice. This is the logic which underpins our legal system – occasionally decision-making bodies err, and these errors ought to be corrected. Even the Supreme Court makes no pretence to infallibility.[110] Allowing the Upper Tribunal to develop immigration law in isolation from the High Court would lead to contradictory law on the same topics, which

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[108] See *Kaldas v Barbour* [2017] NSWCA 275, in which the New South Wales Court of Appeal held that the 'supervisory jurisdiction' did not include declaratory remedies.

[109] *Privacy International* (n 7) [82], [129] (Lord Carnwath).

[110] See the 1966 Practice Statement, and for just one example *R v Shivpuri* [1987] AC 1, overturning *Anderton v Ryan* [1985] AC 560 one year after it was decided.

would never be 'channelled into the legal system'.[111] The clause thus shatters the rule of law where people need it most.

While this reading requires a stretch of the word 'procedural' beyond its ordinary meaning, this can be justified by the principle of hostile interpretation.[112] Fully embracing this as the sole ground for reading down the clause would allow the court to move past their reliance on the fifty-year fiction of *Anisminic* and show Parliament that their prototype has failed. The wording of section 11A is not as harsh as that of the Asylum Bill, and including 'safety valves' within ouster clauses should not be a justification for their validity. More importantly, this allows for the right outcome without needing to assert the extremely controversial power to annul legislation on common law grounds.

The weakest part of the *Oceana* judgment is its examination (or lack thereof) of this secondary question: whether the court can ever be wholly ousted. In 536 words, Saini J asserts that parliamentary sovereignty means that 'legislation … is supreme,' that 'the High Court enjoys no immunity from these principles,' and that section 11A is clear enough to oust the court's supervisory jurisdiction.[113] 'Putting aside obiter observations in certain cases and academic commentaries,' Saini J held, 'the legal position under the law of England and Wales is

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[111] *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 [30].
[112] The Court of Appeal has held that what natural justice entails is a matter of law for the court, who are the 'author and sole judge' of procedural standards; *R. v Panel on Take-overs and Mergers, ex parte Guinness PLC* [1990] 1 QB 146, 183 (Lloyd LJ).
[113] *Oceana* (n 8) [51]-[54].

clear and well-established.'[114] The judgment expressly and somewhat mysteriously proceeds 'without citing from the extensive body of case law and learning on this subject.'[115] This is unfortunately evident from its analysis.

Why Saini J chose not to engage with these observations is both unclear and unexplained, given that their zenith came in the most recent and the most authoritative case on the very subject before him. *Oceana* thus deliberately disregards the Supreme Court's emphatic statement of the importance of access to justice, as well as the obiter comments, which directly contradict its narrow view of the judicial role. Given that *Privacy International* was not raised by the claimant but by Saini J himself, it is perhaps understandable. However, given the recent proliferation of ouster clauses designed to circumvent *Anisminic*, it is a question in need of much greater discussion.

The role of a first instance judge in such a case is extremely difficult. The Supreme Court have an aforementioned penchant for striking down clauses previously understood to be effective. Given the hostile Parliamentary-judicial relations[116] and

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[114] ibid [52]. cf *Jackson* (n 31) [102] (Lord Steyn), [107] (Lord Hope), [159] (Baroness Hale); *AXA v HM Advocate* [2011] UKSC 46 [51] (Lord Hope); *Moohan v Lord Advocate* [2014] UKSC 67 [35] (Lord Hodge); *Shindler v Chancellor of the Duchy of Lancaster* [2016] EWCA Civ 469 [49] (Lord Dyson MR); *Public Law Project v Lord Chancellor* [2016] UKSC 39 [20] (Lord Neuberger); *Privacy International* (n 7) [144] (Lord Carnwath); *Sooy v Secretary of State for the Home Department* [2023] CSOH 93 [76] (Lord Richardson).

[115] *Oceana* (n 8) [51].

[116] Rowena Mason, '"An activist blob": Tory party attacks on lawyers' (*The Guardian*, 16 August 2023)

the extremist approaches of certain commentators,[117] it is understandable why lower courts do not stray too far from orthodoxy. While the High Court is not expected to assert a novel right to strike down legislation and take a sledgehammer to the 'foundational principle of our constitution',[118] their 'hostile attitude'[119] towards ouster clauses is an indispensable safety net. It is disappointing to see it cast aside so easily.

Alongside the ballot box, judicial review is one of two mechanisms for preventing the abuse of power. It has already been shown that the IRAL analysis of *Cart* reviews was deeply flawed. Restricting access to the courts is a paradigmatic violation of the rule of law.[120] It is also the unique context in which the judiciary feel most able to push back against parliamentary

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<https://www.theguardian.com/politics/2023/aug/16/tory-party-criticisms-legal-professionals-timeline> accessed 25 May 2024.

[117] Richard Ekins implied that Lord Carnwath, Lady Hale, and Lord Kerr should be 'removed from office' were they to 'defy or overturn fundamental constitutional law' by giving effect to the obiter in *Privacy International*. It should be noted that the same author recommended the Queen withhold Royal Assent from the Benn Act in violation of both parliamentary sovereignty and a centuries-old constitutional convention and the criticism should be read in this light. Richard Ekins, 'Do our Supreme Court judges have too much power?' (*The Spectator*, 15 May 2019) <https://www.spectator.co.uk/article/do-our-supreme-court-judges-have-too-much-power/> accessed 25 May 2024.

[118] *R (Miller) v The Prime Minister; Cherry v Lord Advocate* [2019] UKSC 41 [42].

[119] *Privacy International* (n 7) [34].

[120] *Kennedy v The Charity Commission* [2014] UKSC 20 [112]; *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 [127]; *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [66]-[85].

overreach.[121] As Lord Dyson held in *Cart,* there is 'no principle more basic to our system of law than the … constitutional protection afforded by judicial review.'[122] This sentiment has been repeated time and time again at the highest appellate level,[123] culminating in Lord Reed's judgment in *UNISON*, where it was invoked to strike down secondary legislation imposing higher employment tribunal fees. 'Without such access [to justice]' he held,

> 'laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade.'[124]

Stephen Sedley points out that 'any state can set out rows of shining rights like medals on a leader's chest,' noting that even

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[121] So-called 'exceptional circumstances review' primarily arises from discussions of this type; *Jackson v Attorney General* (n 31) [102] (Lord Steyn), [107] (Lord Hope), [159] (Baroness Hale); *AXA v HM Advocate* [2011] UKSC 46, [51] (Lord Hope), and *Privacy International* (n 7) [144] (discussed above).

[122] *Cart* (n 4) [122]. This was agreed with by the unanimous Supreme Court, which cannot be said for the solitary dictum of Lord Brown which Saini J cited instead.

[123] *R & W Paul Ltd v The Wheat Commission* [1937] AC 139; *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286; *R v Secretary of State for the Home Department, Ex p Leech* [1994] QB 198; *Simms*; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; *R (Evans) v Attorney General* [2015] UKSC 21.

[124] *R (UNISON) v Lord Chancellor* [2017] UKSC 51 [68], [66]-[85] of the judgment elaborate on the importance of access to justice.

'Stalin did it'.[125] Any form of right is only as meaningful as its ability to be upheld in the courts.

LA (Albania): 'everybody knows … the sequel's never quite as good'[126]

Unfortunately, the Court of Appeal affirmed the *Oceana* judgment in *R (LA (Albania))*.[127] All three members stood by Saini J's judgment. Dingemans LJ held that the effect of section 11A was not to 'exclude' the jurisdiction of the court, but to 'reduce' it by allocating its powers to the 'judicial' Upper Tribunal.[128] He adopted the reasoning of Saini J and argued that even the 'second appeals test adopted by the Supreme Court in *Cart* expressly contemplated that some errors of law would not be corrected'.[129] In extremely pointed language, he then held that 'it is the duty of

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[125] Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011) 289. The 1936 Constitution of the Soviet Union, or the 'Stalin Constitution' recognised a myriad of social, economic and democratic rights which were invariably deviated from. In just one example of this, the Constitution's main author, Nikolai Bukharin, was executed after a show trial in which he allegedly tried to kill Lenin, Stalin, and Gorky: Robert Conquest, *The Great Terror: Stalin's Purge of the Thirties* (50th Anniversary edn, Bodley Head 2018).

[126] Kermit the Frog, Bret McKenzie, 'We're Doing a Sequel' in *Muppets Most Wanted* (soundtrack).

[127] Saini J's reasoning has also been affirmed in the Court of Session's Outer House in *Sooy v Secretary of State for the Home Department* [2023] CSOH 93. Lord Richardson's refusal to describe the Privacy International dicta as 'out of date' or inaccurate at [76] is interesting, though his assertion that s 11 does not fall within these 'exceptional circumstances' is questionable for the reasons given above.

[128] *R (LA (Albania)) v Upper Tribunal* (n 9) [31].

[129] ibid [34].

the Courts to give effect to the clear words used by Parliament, because no one, including a Court, is above the law.'[130] Underhill LJ held that 'the language [of section 11A] is explicit, and there is nothing constitutionally improper in such a limitation.'[131] Lewis LJ agreed with both that 'the wording of section 11A of the 2007 Act, read in context, is clear'.[132]

The same criticisms levelled above apply just as forcefully (if not more so) to the Court of Appeal's uncharacteristically brief judgment. Once more, there is no discussion of the necessarily hostile interpretative approach that the ratio of *Privacy International* requires them to take. Once more, the judges assert the purported clarity of the clause. Once more, the court misinterpret *Cart* as a case in which the Supreme Court came up with a stop-gap solution, rather than one in which they affirmed the constitutional importance of access to justice. In holding that the court is 'bound to apply'[133] the clause, Underhill LJ invokes an extremely contestable distinction between the 'reduction'' and the 'exclusion' of judicial review. It begs the question of whether he would have found RIPA to have merely 'reduced' the court's role instead of 'excluding' it.[134] The change in approach appears momentous; on the Court of Appeal's analysis, *Privacy International* and its ancestors may have simply been consigned to the dustbin of history.

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[130] ibid [36].
[131] ibid [51].
[132] ibid [48].
[133] ibid [31].
[134] An argument advanced by Lord Sumption and Lord Reed in dissent: *Privacy International* (n 7) [197], [211].

In a case note on *Oceana*, Hooper notes four axes around which a purported ouster clause should be interpreted:

> '(1) the clarity of statutory language, (2) the extent of restriction on the role of the court, (3) the character of the institution and decision shielded from review, and (4) the impact (if any) on fundamental rights and the wider legal system.'[135]

The Court of Appeal ignore the fourth, glossing over the judiciary's role as a vital counterpart to untrammelled legislative sovereignty in place of acting as the 'servant' which the government want them to be. In short, the decisions are an abdication of judicial responsibility.

While Murray rightly comments that the case shows that the 'issues raised by ouster clauses ought not to be reduced to a game of constitutional-law Top Trumps' in which the rule of law and parliamentary sovereignty compete for first place,[136] the effect of the judgment is just that. A narrow, dubious view of 'parliamentary sovereignty' triumphs over all else, veering into the language of Lord Reed and Lord Sumption's dissent rather than *Privacy International*'s binding ratio.[137]

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[135] Hayley J Hooper, 'No Superior Form of Law?' [2024] PL 1.

[136] Philip Murray, 'Ouster Clause Redux: The Court of Appeal's Decision in LA *(Albania)'* (*UK Constitutional Law Blog*, 21 November 2023) <https://ukconstitutionallaw.org/2023/11/21/philip-murray-ouster-clause-redux-the-court-of-appeals-decision-in-la-albania/> accessed 25 May 2024.

[137] cf *Privacy International* (n 7) [207] (Lord Sumption).

More broadly, while the court, Murray,[138] and Elliot[139] all view section 11A as a 'partial' ouster, given Saini J's incredibly narrow interpretation of the s11A(4) exceptions, it is nothing of the sort. Even the Big Bad Wolf of ouster clauses, the 2003 Asylum Bill, had a right to appeal where 'a member of the Tribunal ha[d] acted in bad faith.' The availability of a statutory right to appeal if judges take leave of their senses, or if all the UK's other safeguards to justice simultaneously collapse, should not be an indication of an ouster clause's strength. Rather, following Hooper, it is the extent of the limitation which should be analysed.

The constitutionally proper approach to the construction of ouster clauses is outlined by Fordham J in another recent case, *Exolum*.[140] He held that although 'Parliament's statutory overlay can undoubtedly influence the scope and shape of judicial review … the final arbiters of whether and how that operates are the Courts.' Such a clause does not operate in a vacuum but must be squared with the 'constitutional touchstone' of 'the need to secure the level of scrutiny required by the rule of law … [a]nd it is the Courts who determine what the rule of law requires.'[141] This is the language of *Privacy International*, the language of precedent, and the language of principle. It is the very language that *LA (Albania)* fails to speak.

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[138] ibid.

[139] Mark Elliott, 'Oceana: Ouster clauses and parliamentary sovereignty' (*Public Law for Everyone*, 5 July 2023) <https://publiclawforeveryone.com/2023/07/05/oceana-ouster-clauses-and-parliamentary-sovereignty/> accessed 25 May 2024.

[140] *R (Exolum Pipeline) v Crown Court at Great Grimsby* [2023] EWHC 2811.

[141] ibid [11].

The Changing Court

Though it is submitted that a narrow interpretation of the ouster at issue is plausible and that an appeal should succeed, the Supreme Court is much changed in personnel since *Privacy International*. Lord Carnwath, Lady Hale and Lord Kerr all retired in 2020, continuing the chaotic if not characteristically British tradition of the senior judiciary making heterodox claims about legislative sovereignty in their final decisions.[142] After the harsh executive criticism of Lady Hale's presidency of the Supreme Court,[143] her successor Lord Reed has been much more reticent. In a series of recent cases,[144] Gearty argues that the court has

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[142] The other notable candidate being Lord Steyn's speech in *Jackson*.

[143] Former Prime Minister Boris Johnson claimed in Parliament that 'the court was wrong to pronounce on what is essentially a political question at a time of great national controversy' and in one of his final speeches in the House of Commons boasted that he 'saw off Brenda Hale'. This is likely a reaction to the two *Miller* decisions. HC Deb 25 September 2019, vol 664, col 775; HC Deb 18 July 2022, vol 718, col 726.

[144] *Begum v Secretary of State for the Home Department* [2021] UKSC 7 on the deprivation of Shamima Begum's citizenship; *R (SC, CB and eight children) v Secretary of State for Work and Pensions* [2021] UKSC 26 on the two-child benefit cap's compliance with the ECHR and the UNCRC; *R (AB) v Secretary of State for Justice* [2021] UKSC 28 on a policy of solitary confinement for young offenders' compliance with the UNCRC. Also indicative of this attitude are the Scottish *UNCRC* reference [2021] UKSC 42 on whether the Scottish Parliament could incorporate the UNCRC into their domestic law; *R (Elan-Cane)* [2021] UKSC 56 on whether the ECHR required provision for non-gendered passports; the *Scottish Independence Referendum* case [2022] UKSC 31 on whether the SNP could hold an independence referendum; *Re Allister* [2023] UKSC 5 which seemingly dismissed the doctrine of constitutional statutes as conflicting with parliamentary sovereignty. See also Charlotte O'Brien, 'Inevitability as the New Discrimination Defence: UK Supreme Court

'master[ed] an approach to judicial review so light-touch as to be almost no touch at all,'[145] and a statistical analysis of its decisions compared to those under previous court presidents found that 'the Reed court is more conservative when it comes to public law.'[146]

A high-profile example is the baffling and unanimous decision that allowing Shamima Begum into the UK for the purposes of her citizenship appeal would be 'unjust' to Sajid Javid

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Mangles Indirect Discrimination Analysis While Finding the Two-Child Limit Lawful' (*Oxford Human Rights Hub*, 26 July 2021) for the 'reactionary' tenor of the 'dispiriting' and 'trigger-happy' judgment in *SC*, which 'tak[es] pot-shots at children's rights, discrimination judicial reviews, charities, the UN Convention on the Rights of the Child, pretty much any challenge to sexually discriminatory social security policies, and the basic construct of indirect discrimination'. In private law, one could also view *Fearn v Tate Gallery* [2023] UKSC 4 (upholding a nuisance claim against the Tate's viewing gallery for overlooking floor-to-ceiling glass-walled apartments); *Barry Congregation v BXB* [2023] UKSC 15 (denying vicarious liability for the rape of a woman by an elder of the Jehovah's Witnesses); *YXA v Wolverhampton CC* [2023] UKSC 52 (denying negligence liability for the failure of a local authority to take a child into care); *Paul v Wolverhampton NHS Trust* [2024] UKSC 1 (denying liability for psychiatric injury on the 'rough and ready' *Alcock* mechanisms) as small-c conservative decisions.

[145] Conor Gearty, 'In the Shallow End' (2022) 44*: London Review of Books* no 2.(Vol,),

[146] Lewis Graham, 'The Reed Court by Numbers: How Shallow is the "Shallow End"?' (*UK Constitutional Law Blog*, 4 April 2022) <https://ukconstitutionallaw.org/2022/04/04/lewis-graham-the-reed-court-by-numbers-how-shallow-is-the-shallow-end/>.

and Priti Patel.[147] While the *Rwanda* judgment[148] shows a willingness to push back against the executive, it was primarily founded on the United Nations Higher Commissioner for Refugees' strong evidence. Therefore, it is likely not indicative of a wider shift away from this new attitude.[149] In any case, Parliament has just deemed Rwanda safe through another, even stronger ouster clause.[150]

The consequences of allowing *Cart* to be amputated from the wider body of judicial review, however, are much more severe for the many asylum seekers and immigrants who rely on it. The

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[147] *Begum v Secretary of State for the Home Department* [2021] UKSC 7, [90]. Former Lord Chancellor Robert Buckland has welcomed this 'appropriate degree of restraint', suggesting that 'it is essential … we remain blessed with sensible judges like Lord Reed'. It is somewhat surprising to see this, given that Lord Reed is no stranger to constitutional innovation nor a typically 'conservative' judge; he wrote the judgment in *UNISON* and concurred with Lord Neuberger's somewhat radical approach in *Evans*. In the aftermath of the *Rwanda* judgment, the executive seems somewhat less happy with his court's output.

[148] *R (AAA) and others v Secretary of State for the Home Department* [2023] UKSC 42.

[149] The other grounds for the decision were the UK's international treaty obligations and customary international law, which is binding on states with or without their consent (ibid [20]-[26]). Given that *R (LA (Albania))* was handed down the day after the *Rwanda* appeal, it may be that two anti-executive decisions in two days were one too many.

[150] The problematic constitutional aspects of the Rwanda Act are numerous and beyond the scope of this article. In short, it disapplies parts of the Human Rights Act and a number of international treaty obligations, prevents compliance with ECtHR interim measures, conflicts with customary international law (which is binding upon all states, regardless of consent), and defines 'decision' as including 'purported decision'; tacitly admitting Rwanda to be unsafe.

Upper Tribunal is not immutable; *A v Secretary of State for the Home Department*[151] is clear evidence. Both the First-tier Tribunal and the Upper Tribunal inexplicably believed the German claimant to be Ghanaian and sanctioned her deportation, ignoring her valid claim under EU law. Without the institutional backstop of *Cart*, A *would* have been unjustly and unlawfully deported.

The often overlooked epilogue to *Privacy International* is that the High Court quashed the IPT's decision and held that the use of 'thematic warrants' to justify mass surveillance was unlawful.[152] Citing the 'great case' of *Entick v Carrington*,[153] Bean LJ and Farbey J held that 'aversion to general warrants is one of the basic principles on which the law of the United Kingdom is founded.'[154] The IPT, despite all its expertise, had ignored 'one of the permanent monuments of the British Constitution',[155] and had significantly erred in law.

Section 13(4) of the Illegal Migration Act prevents review of executive decisions to detain. The desire to oust more and more issues from judicial review makes the government's commitment to re-examining every ouster clause on its statute book all the more worrying. GCHQ's illegal spying ought to be

[151] *A v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin).
[152] *Privacy International v Investigatory Powers Tribunal* [2021] EWHC 27 (Admin).
[153] *Entick v Carrington* (1765) 19 State Tr 1029.
[154] *Privacy International v Investigatory Powers Tribunal* [2021] EWHC 27 (Admin) [48].
[155] The Supreme Court of the United States, *Boyd v. United States* (1886) 116 US 616, 626.

held to account.[156] Whether immigrants are entitled to remain in the country is a question which must be answered correctly. Whether the rate of success is 0.22% or 26.7%, *Cart* reviews save much more than rare 'grain[s] of wheat'. The rule of law demands that our world-leading judicial system must be accessible,[157] and ouster clauses prevent this, be it through 'reduction' or 'exclusion'.

Conclusion

Oceana and *LA (Albania)* are indicative of a wider judicial carelessness at a time when protection of our courts could not be more important. With a former Home Secretary decrying the Human Rights Act as the 'Criminal Rights Act' at the 2023 Conservative Party Conference[158] and Parliament legislating akin to Humpty Dumpty ('when I say "safe country", it means just what I choose it to mean'),[159] access to justice is increasingly under threat. This article has argued that the reasoning in both *Oceana*

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[156] Lord Carnwath admitted that this particularly important context influenced the Supreme Court's approach to interpreting s 67(8): see the 'Enemy Of The People' Panel Discussion (The Oxford Union) <https://www.youtube.com/watch?v=ADqHie9lEY8/> accessed 25 May 2024.

[157] Tom Bingham, *The Rule of Law* (Penguin 2011).

[158] Rajeev Syal, 'Suella Braverman claims 'hurricane' of mass migration coming to UK' (*The Guardian*, 3 October 2023) <https://www.theguardian.com/politics/2023/oct/03/suella-braverman-claims-hurricane-of-mass-migration-coming-to-uk> accessed 25 May 2024.

[159] The Safety of Rwanda (Asylum and Immigration) Act 2024, deeming Rwanda a 'safe country' for the purpose of non-refoulement despite clear evidence to the contrary.

and *LA (Albania)* is wrong, according to both precedent and principle. In both cases, the court failed to apply the correct test to the clause, wrongly absolved itself of its own jurisdiction, and abdicated their proper constitutional role in favour of unjustifiable executive deference. However, given the Supreme Court's recent shift in attitude, it is unlikely that any appeal can resurrect *Cart*. The best we can hope for is a eulogy.