

Sovereign Therefore Limited:  
The Unconstitutionality of Ouster Clauses for Errors of  
Law under the British Constitution

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**ABSTRACT**

*This paper makes a radical claim: it argues that ouster clauses that seek to prevent judicial review for errors of law are incompatible with, and thus inadmissible under, the British Constitution. In other words, the claim is that judicial review for illegality is a constitutional fundamental that not even Parliament is competent to abolish. Two arguments are deployed to support that contention. Firstly, it is argued that a full grasp of the core constitutional principle of parliamentary sovereignty logically entails Parliament's inability to oust the judicial review jurisdiction of the courts with respect to errors of law, as parliamentary sovereignty and ouster clauses are mutually exclusive concepts. Secondly, it is argued that this limitation to Parliament's legislative remit is the manifestation of a higher order law that necessarily constrains the exercise of legislative power in a democracy.*

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In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new 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.<sup>1</sup>

## I. INTRODUCTION

### A. Aim of this Article

This article contends that ouster clauses<sup>2</sup> ('ousters') that purport to oust the jurisdiction of the courts to review executive decisions for errors of law (or, interchangeably, 'illegality' or 'classic *ultra vires*') are incompatible with, and therefore inadmissible under, the Constitution of the United Kingdom.<sup>3</sup> To be sure, the contention is not merely that ousters *should not* be enacted by Parliament because they are inimical to a healthy constitutional balance. This would be to implicitly accede to a view of the constitutional order that this paper rejects, namely that '[e]verything that happens [in the United Kingdom] is constitutional'<sup>4</sup> and that where the constitutional equilibrium is to be struck is ultimately a matter for the political arena. The contention of this piece is more radical, as statutory provisions that unequivocally purport to bar the courts from submitting decisions taken by public bodies to judicial review for illegality ought to be denied legal effect by the courts, notwithstanding unambiguous intentions

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<sup>1</sup> R (*Jackson*) v *Attorney General* [2005] UKHL 56; [2006] 1 AC 262 [302]-[303] by Lord Steyn.

<sup>2</sup> Ouster clauses are defined as '[s]tatutory provisions which seek to limit [or indeed outright oust] the ordinary jurisdiction of the court': *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 170.

<sup>3</sup> Reference to 'review' in this paper is intended to include all the components involved in the process of judicially reviewing an administrative act for errors of law: from the scrutinising of the act's fit under the empowering primary legislation to the nullification *ab initio* of the administrative act for want of fit (whether by way of quashing order or declaration).

<sup>4</sup> John A.G. Griffith, 'The Political Constitution' (1979) 42 MLR 1, 19.

to the contrary by Parliament, because such statutory provisions are unconstitutional.

This argument will be advanced in two parts. In the first part, I will argue that the core constitutional principle of parliamentary sovereignty itself logically necessitates Parliament's inability to oust judicial review for errors of law. Thus, the very thing that is often invoked as the ultimate justification for the constitutionality of ouster clauses — the notion of parliamentary sovereignty — will be shown to act as a logical bar to the abolition by Parliament of judicial review for illegality. In the second part, I will argue that this 'legislative disability', which will have been shown in the first part to be derivable from the notion of sovereignty, is in the final analysis the consequence of a higher order law that necessarily constrains the exercise of legislative power in a democracy.

## **B. The Type of Ouster Clauses to Be Discussed**

This article deals exclusively with ouster clauses that are designed to preclude the review of executive decisions or acts falling outside the jurisdiction (in the classic *ultra vires* sense) afforded to the decision-maker by the empowering legislation.<sup>5</sup> In other words, this paper tackles ouster clauses that purport to bar the courts from scrutinising and, if need be, impeaching a public body's decision for illegality. Of course, ouster clauses may also be designed to limit the applicability of the various common law principles of good administration, such as natural justice, reasonableness, proper purpose, etc. However, this paper does not address the constitutional position of these other

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<sup>5</sup> 'Jurisdiction' is used here in its enlarged, post-*Anisminic* sense: see *O'Reilly v Mackman* [1983] 2 AC 237, 278. Moreover, the reader may legitimately query the decision to restrict this analysis to statutorily derived public powers. Why not address public powers derived from other sources, such as prerogative powers? To echo what is said further down in the main text, this omission should not be treated as an admission. The decision to so restrict the analysis is due to multiple factors. First, statute-derived powers undeniably constitute the bulk of administrative powers in use today making their treatment of the utmost relevance. Second, the core contention is radical and controversial enough as it is that it would be unhelpful in the circumstances not to adopt as narrow a scope as possible. Third, and relatedly, the nature of prerogative executive powers is in itself a controversial topic and an analysis of ouster clauses pertaining to those powers would necessarily make assumptions that could attract criticism and thus further detract from the core case. We shall return to prerogative powers in the future.

‘precepts of legality enforced by judicial review against public agencies’.<sup>6</sup> This omission should not, however, be treated as an admission that these are undeserving of the same fundamental status. It will undoubtedly be important to return to these matters in a future contribution. For now, it is simply considered that tackling ouster clauses that purport to shield administrative decisions from judicial review for errors of law is an undertaking to which one entire contribution can properly be devoted.

In principle, review for errors of law is a straightforward affair. Consider the underpinning theory to begin with, where Parliament, the legislative sovereign, grants powers to a body or a person. That body or person possesses that power only by virtue of grant of that power by the legislature; absent such a conferral, the body or person is no more legally empowered, nor no less legally burdened, than a private, lay individual. The picture that emerges is that of a primordial legal ‘black hole’, incrementally populated with ‘jurisdictional spotlights’ as Parliament empowers bodies or persons with various public administrative capacities. This imagery vividly brings to life the ‘fundamental principle, inherent throughout the legal system, that powers can be validly exercised only within their true limits’.<sup>7</sup> If a power is not exercised according to its limits, the exercise of the power is but a purported one as, in truth, it is an act carried out by the body or person that falls within the legal nothingness, that is, the black hole, and however close it might have gotten to the jurisdictional spotlight, it does not benefit from its vitalising effect. The law, in other words, does not ‘see’ the act, as the ‘authority has in law done nothing’.<sup>8</sup>

Review for errors of law is one important way of giving effect to the above theoretical underpinnings. The court looks at the empowering statute and compares its terms with the action purportedly taken on that basis by a public body. If it turns out that the public body has acted inconsistently with the terms of the applicable law, that body has acted ‘without authority’ and its actions are in effect writ in water, having no effect at law.<sup>9</sup> *UNISON*<sup>10</sup> is instructive in that

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<sup>6</sup> T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (OUP, 2013) 217.

<sup>7</sup> William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) Chapter 2, 11.

<sup>8</sup> *ibid.*

<sup>9</sup> *HM Treasury v Ahmed (No 2)* [2010] UKSC 5, [2010] 2 AC 534 [1].

<sup>10</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869.

respect. In that case, the question was whether fees of access to tribunals imposed by the Lord Chancellor pursuant to Section 42(1) of the Tribunals, Courts and Enforcement Act 2007 were *ultra vires* (i.e., were mistaken as to the applicable law) because they had the effect of creating a ‘real risk that persons will effectively be prevented from having access to justice’,<sup>11</sup> an effect which the 2007 Act was interpreted as not empowering fees set under it to produce. Lord Reed found that the court fees had such an effect and that, therefore, the Order responsible for those fees was to be quashed and treated as unlawful *ab initio*.

The kind of ouster clause that this article contends is repugnant to the Constitution; it is the kind of ouster clause that seeks to prevent the courts from engaging in the process just described.

### C. The Trigger for this Article

Until very recently, this paper’s relevance to public and administrative lawyers might have been legitimately doubted. That it was concerned with a question of academic interest only would have been fair criticism — although, to my mind at least, not a fatal criticism, for the quest to uncover the true nature and implications of our Constitution is surely an intrinsically worthy enterprise. The reason why the utility of this paper may have heretofore been doubted is well known to public lawyers, as ever since the case of *Anisminic* the courts have drawn the distinction between a decision and a purported decision.<sup>12</sup> This distinction, which was reaffirmed as recently as in 2019 in the *Privacy International* case,<sup>13</sup> has effectively rendered nugatory statutory provisions seeking to preclude the courts from judicially reviewing ‘decisions’ taken by public bodies. That was so because a ‘decision’ afflicted by an error of law was in fact not a ‘decision’ but a ‘nullity’, or a ‘purported decision’, which was, as such, not captured by the ouster clause.<sup>14</sup> In providing for the screening of ‘decisions’ from judicial review, Parliament was deemed not to have intended to preclude the review and quashing of ‘purported decisions’. Hence, there was no need to run a constitutional ‘strikedown’ argument in order to neutralise an ouster clause.

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<sup>11</sup> *ibid* [87].

<sup>12</sup> *Anisminic* (n 2) 170.

<sup>13</sup> R (*Privacy International*) v *Investigatory Powers Tribunal* [2019] UKSC 22; [2020] AC 491.

<sup>14</sup> *ibid* [54].

Today, the relevance of the question at the heart of this paper — namely, whether Parliament has the competence to prevent review and quashing of executive decisions taken under an empowering statute but afflicted by one or more errors of law — cannot be in doubt. Section 2 of the Judicial Review and Courts Act 2022 (‘JRCA 2022’) is an ouster clause worded in such a way that immunises it from the linguistic distinction just discussed.<sup>15</sup> Indeed, in providing that “‘decision’ includes any purported decision”,<sup>16</sup> Parliament closes the interpretative gap through which the courts have, until now, bypassed ouster clauses. It follows that if, and most likely when,<sup>17</sup> s 2 JRCA 2022 is litigated, the arguments will necessarily focus on what is perhaps the most profound, contentious, and divisive of constitutional questions. Indeed, although in normal times it is certainly preferable to avoid asking whether Parliament’s legislative remit knows any limits, here the Supreme Court is bound to be asked to directly address and answer the question of Parliament’s ability to enact ouster clauses. The object of this article is therefore to suggest an answer to this critically important question.

#### D. Caveat

An important caveat must be borne in mind throughout this paper. As will become clear further down, one assumption upon which this contribution *in part* rests is that tribunals are not constituent entities of the judicial system. Tribunals, instead, are ‘judicialised’ executive bodies, but nothing more than that. Thus, in subscribing to the position as it was laid down by Lady Hale in *Cart*<sup>18</sup> — where Her Ladyship clearly held the view that tribunals were not part of the ‘legal system’ (it is submitted that ‘judicial system’ is slightly more helpful terminology)<sup>19</sup> — this article conforms to the current authoritative legal characterisation of tribunals. My view is that Lady Hale is right to say that tribunals are not judicial entities *properly so called*. Of course, one may take issue

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<sup>15</sup> This also applies to s 3 of the Dissolution and Calling of Parliament Act 2022 which predates s 2 JRCA 2022, but the ouster in Section 2 JRCA 2022 is more likely to make waves and thus is the one discussed here.

<sup>16</sup> s 2(7) JRCA 2022.

<sup>17</sup> This is for two main reasons. First, it is clear from the second ground of appeal in *Privacy International* (n 13) that there is an appetite to run a ‘strike down’ argument. Second, it is my hope that a flurry of academic commentary prompted by the enactment of s 2 JRCA 2022 will convince practitioners to bring such a case before the court.

<sup>18</sup> *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663.

<sup>19</sup> *ibid* [43].

with that assumption and with Lady Hale's characterisation of tribunals,<sup>20</sup> but it is not the aim of this paper to participate in that debate — that is a matter for another enterprise. Should the reader reject the aforementioned characterisation of tribunals, then for them the arguments in this paper will only apply to ouster clauses designed to preclude the judicial review of decisions taken by executive bodies other than tribunals.

To be clear, if one takes the view that tribunals are proper executive bodies, then the following discussion applies to ouster clauses shielding tribunal decisions as much as it does to ouster clauses shielding decisions from other, more traditional, executive bodies. But, if one takes the view that tribunals are constitutionally distinct from executive bodies and should be considered as constituents of the legal (or judicial) system, then to that person the arguments herein apply to ouster clauses attached to decisions taken by all executive bodies, but not to tribunals.

Finally, this paper should not lose its *prima facie* appeal from the standpoint of the reader who disagrees with the view that tribunals are constitutional equivalents of other executive bodies. Indeed, although for this reader the ouster clause in s 2 JRCA 2022 is immune from the arguments that will be made in this contribution because it protects a decision made by a tribunal, there are two reasons why she might still be interested in reading on. Firstly, as just mentioned, the law currently stands in favour of the view that tribunals are not judicial bodies, which means that legal arguments can confidently be run on that basis. Secondly, the government openly intends to use '[t]he explicit *Cart* ouster clause ... as an example to guide the development of effective legislation in the future'.<sup>21</sup> It is likely that such future legislation will not only seek to shield decisions made by tribunals from judicial review but also decisions taken by more 'traditional' executive decision-makers. The arguments hereunder can be considered as a pre-emptive strike on such constitutional aberrations.

## E. Angle of Attack

It will have become apparent to the reader acquainted with the case law on ouster clauses that this article aims to show why the second question

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<sup>20</sup> Timothy Endicott, *Administrative Law* (5th edn, OUP 2021) 490.

<sup>21</sup> Judicial Review Reform Consultation, 'The Government Response' (2021) CP 477 [55].

which arose but ultimately was not answered in the *Privacy International* case — namely ‘whether ... Parliament may by statute “oust” the supervisory jurisdiction of the High Court to quash the decision of an inferior court or tribunal of limited statutory jurisdiction<sup>22</sup> — should be answered in the negative.

In the *Privacy International* litigation, it ultimately proved unnecessary for the majority<sup>23</sup> to answer that question. Applying the *Anisminic* interpretive approach to the construction of Section 67(8) of the Regulation of Investigatory Powers Act 2000, the majority found that Parliament had not in fact intended to oust the courts’ judicial review jurisdiction for errors of law made by the Investigatory Powers Tribunal (‘IPT’). The second question did not therefore arise for consideration. Nevertheless, some justices in the majority provided substantive *obiter dicta* on the second question, and the dissentients, having found that Parliament had in fact intended to exclude the jurisdiction of the courts to review decisions of the IPT for errors of law, necessarily had to grapple with it.

Accordingly, the approach I have chosen for this paper is to frame my arguments around Lord Sumption’s discussion of and answer to that question in his dissenting judgment.<sup>24</sup> This approach, I believe, maximises the impact of this contribution on the law. Indeed, while Lord Sumption is no longer in the Supreme Court, it is noteworthy and, in fact, of paramount importance that Lord Reed unqualifiedly agreed with Lord Sumption’s judgment in *Privacy International*.<sup>25</sup> Since Lord Reed is the acting President of the Supreme Court, His Lordship is, incontestably, an influential figure on the bench.<sup>26</sup> As things currently stand, Lord Reed’s Supreme Court would most likely follow Lord Sumption’s reasoning. Thus, instead of arguing against ouster clauses in isolation and leaving it to others to pluck and apply the substantive reasoning hereunder to the case law, I have decided to apply it myself to Lord Sumption’s judgment to show where His Lordship (respectfully) erred in concluding that Parliament did have the power to oust judicial review in that case. There are other reasons why direct engagement with Lord Sumption’s judgment is valuable, and these will become clear later.

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<sup>22</sup> *Privacy International* (n 13) [207].

<sup>23</sup> Lady Hale and Lords Kerr, Carnwath and Lloyd-Jones.

<sup>24</sup> *Privacy International* (n 13) [207]-[211].

<sup>25</sup> *ibid* [169].

<sup>26</sup> Conor Gearty, ‘In the Shallow End’ (2022) 42 *London Review of Books*.



Finally, as will be seen below, it is noteworthy that nothing in Lord Sumption's answer to the second question turns on the distinction between tribunals and other executive bodies.<sup>27</sup> Therefore, while the question in *Privacy International* is narrowly framed and refers only to 'inferior courts' and 'tribunals of limited statutory jurisdiction' — understandably, as the decision challenged in that case was that of the IPT — Lord Sumption's answer can safely be read as answering the broader question of whether Parliament may, by statute, oust the supervisory jurisdiction of the High Court to quash the decision of any decision-making body empowered by statute. This only further emphasises the pertinence of framing the substantive arguments of this paper around Lord Sumption's (and thus Lord Reed's) reasoning. Indeed, an attack on His Lordship's disposal of arguments against ouster clauses in a case involving tribunal decisions is, at one and the same time, a pre-emptive attack on his disposal of arguments against ouster clauses in a case involving more traditional executive decision-makers.

## F. Signposting

In outline, Lord Sumption thought there were two possible arguments available to someone trying to persuade a court to deny legal effect to ouster clauses. The first, the *conceptual argument*, argued that, by denying effect to ousters, the courts would be, far from violating parliamentary sovereignty, affirming it.<sup>28</sup> Second, the *radical argument* argued that a higher law, to be 'ascertained and applied by the court[s]',<sup>29</sup> required the courts to outrightly preclude Parliament from ousting judicial review.<sup>30</sup> Ultimately, for Lord Sumption, none of these arguments proved successful, as the question of whether Parliament was competent to oust judicial review was, in the final analysis, to be answered in the affirmative.

### 1. *Conceptual Argument/Argument for Sovereignty*

In Section II, I argue that Lord Sumption's *conceptual argument* — which is really an *argument from sovereignty* (and which will henceforth bear that name), 'conceptual' merely reflecting the conclusion arrived at by Lord Sumption in the

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<sup>27</sup> In contradistinction to Lord Wilson's answer, see *Privacy International* (n 13) [238]-[253].

<sup>28</sup> *Privacy International* (n 13) [209].

<sup>29</sup> *ibid* [208].

<sup>30</sup> *ibid*.

light of his understanding of the nature and implications of parliamentary sovereignty — is rooted in an incomplete understanding of the notion of parliamentary sovereignty. Therefore, and however unintentionally, Lord Sumption erects, and then attacks, a strawman. In truth, a fully-fledged grasp of the notion of parliamentary sovereignty leads to the conclusion that ouster clauses are logically incompatible with that notion, as parliamentary sovereignty and ouster clauses for illegality are mutually exclusive concepts. Consequently, ouster clauses cannot survive in the statute book so long as parliamentary sovereignty remains the core constitutional principle of the British legal system.<sup>31</sup>

This conclusion will be arrived at via a close reading, and an intertwined discussion of, Laws LJ's judgment in *Cart*<sup>32</sup> and Lord Sumption's judgment in *Privacy International*.<sup>33</sup> Contrary to Lord Sumption's claim in *Privacy International* that he was merely reiterating Laws LJ's argument in *Cart*,<sup>34</sup> it will be shown that Laws LJ's version of the *argument from sovereignty* is not only fundamentally different from Lord Sumption's, but is also one which displays a true grasp of the nature, and implications, of parliamentary sovereignty. The decision to utilise and, in a sense, revitalise Laws LJ's judgment in *Cart* has important practical ramifications. With the obfuscatory veil draped by Lord Sumption over Laws LJ's argument in *Cart* lifted, the version of the *argument from sovereignty* advocated for in this article is revealed to have endorsement at the Court of Appeal level, making it a more realistic contender for the Supreme Court's seal of approval. This is another reason why direct engagement with Lord Sumption's judgment is valuable.

## 2. Higher law argument

In Section III, I argue that the fundamental problem with Lord Sumption's summary dismissal of the *radical* or *higher law argument* is that His Lordship equates the absence of a written constitution with the absence of a higher law patrolling the boundaries of the vast territory afforded to primary

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<sup>31</sup> A constitutional fact which was recently unqualifiedly reaffirmed in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 [43].

<sup>32</sup> *R (Cart) v Upper Tribunal* [2011] QB 120.

<sup>33</sup> *Privacy International* (n 13).

<sup>34</sup> *ibid* [208] in conjunction with [210].

legislation.<sup>35</sup> I will endeavour to show that this is a *non sequitur*: a higher law anterior to, and immune from, primary legislation will be shown to exist and to require the striking-down of ouster clauses notwithstanding the lack of a constitutional text.

## II. THE ARGUMENT FROM SOVEREIGNTY

### A. Introduction

As mentioned in sub-section F above, Lord Sumption in his dissenting judgment in *Privacy International* claimed that he was reiterating Laws LJ's *argument from sovereignty* in *Cart*.<sup>36</sup> The initial aim of this section is to rebut that claim by demonstrating that the two arguments are fundamentally different. Indeed, close analysis of the relevant passages in the two judgments will reveal that Lord Sumption was not in fact reiterating Laws LJ's position, as the conclusions reached by Their Lordships with respect to the possibility of ousting judicial review are actually diametrically opposed. The upshot is that there are two versions of the *argument from sovereignty* available in the case law for the Supreme Court to choose between. Once this initial task is completed, the section will go on to demonstrate why Laws LJ's conception of parliamentary sovereignty — and therefore the Lord Justice's version of the *argument from sovereignty* — is the right one. In proceeding as such, not only is Lord Sumption's *argument from sovereignty* substantively countered, but a better alternative is revealed to have judicial endorsement.

### B. The Judgments

#### 1. *Lord Sumption: Privacy International*

According to Lord Sumption, refusing to give effect to an ouster clause would, 'up to a point', go towards vindicating 'the sovereignty of Parliament, and not limiting it'.<sup>37</sup> This is because it is difficult to imagine Parliament at once intending 'to create a tribunal with [both] limited jurisdiction

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<sup>35</sup> *ibid* [209].

<sup>36</sup> *ibid* [208].

<sup>37</sup> *ibid* [210].

and unlimited power to determine such limit at its own will and pleasure'.<sup>38</sup> However, the contradiction in statutory terms produced by an ouster clause, far from being conclusive, was but one factor among others to be considered when interpreting an ouster clause.<sup>39</sup> The argument was, in the final analysis, 'a variant of the claimant's primary case [i.e., first ground of appeal] about Parliamentary intention'<sup>40</sup> and in that sense '[a] sufficiently clear and all-embracing ouster clause might demonstrate that Parliament had indeed intended to [abolish the court's judicial review jurisdiction]'.<sup>41</sup> While it would certainly be unorthodox and 'a strange thing for Parliament to intend', it was nevertheless 'conceptually possible' for Parliament to provide as much.<sup>42</sup>

## 2. *Lord Justice Laws: R (Cart) v Upper Tribunal*

Germane to our purposes is the passage between [32] and [39] of the Lord Justice's judgment. Laws LJ begins with the avowal of a discomfort, as His Lordship is not at ease to circumvent an ouster simply by invoking the weighty presumption, repeatedly established since *Anisminic*, against an intention of Parliament to oust the review and quash nullities. Instead, Laws LJ felt the need to explain the underlying rationale that gives rise to the presumption, lest it become nothing more than 'an article of faith'.<sup>43</sup> According to Laws LJ, the reason for the presumption is that judicial review is fundamental to the rule of law.<sup>44</sup> The requirements of the rule of law are many,<sup>45</sup> but the one that is contravened by, and which triggers the presumption against, ouster clauses is that 'statute law has to be mediated by an authoritative judicial source'<sup>46</sup> lest the meaning of the law 'be degraded to nothing more than a matter of opinion'.<sup>47</sup> Thus, 'the very effectiveness of statute law [i.e., vindication of Parliament's

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<sup>38</sup> Lord Sumption in *Privacy International* (n 13) [208] citing Farwell LJ in *R v Shoreditch Assessment Committee, Ex p Morgan* [1910] 2 KB 859, 880 (emphasis added).

<sup>39</sup> *Privacy International* (n 13) [208].

<sup>40</sup> *ibid* [210].

<sup>41</sup> *ibid*.

<sup>42</sup> *ibid*.

<sup>43</sup> *Cart* (n 32) [33].

<sup>44</sup> *ibid* [34].

<sup>45</sup> *ibid* [35].

<sup>46</sup> *ibid* [36].

<sup>47</sup> *ibid* [38].

legislative sovereignty] ... requires' that an independent and impartial body, namely, a court, be the ultimate interpreter of statutes.<sup>48</sup>

Having laid down the foundations atop which the robust presumption against ouster clauses rests, Laws LJ shifts gears: 'the need for ... an authoritative judicial source *cannot* be dispensed with by Parliament'.<sup>49</sup> These are unequivocal terms from the Lord Justice as they amount to saying that 'judicial review cannot be abolished by Parliament'.

At this point, a potential charge of internal inconsistency must be countered on behalf of Laws LJ to circumvent ambiguity and cherry-picking of his judgment. The charge is as follows: it is difficult to see how Laws LJ can simultaneously speak of a presumption against the ousting of judicial review and of a categorical impossibility for Parliament to dispense with judicial review. The nature of the presumption is that it can be displaced and yet we are told Parliament cannot even do so, as the two propositions appear mutually exclusive. I suggest, however, that these propositions can readily be reconciled. For Laws LJ, the presumption operates merely as a first line of defence against the ousting of judicial review; it is perfectly legitimate to presume both (i) that it is the legislature's intention to conduct its business in a constitutionally sound manner by keeping with the rule of law and (ii) that it is Parliament's intention for the limits it sets to be respected. In other words, the presumption is the manifestation of (i) a routine application of the principle of legality in conjunction with (ii) the same rule of interpretation as adopted by Lord Sumption. This presumption has clear operational potency as evidenced by *Anisminic* and its progeny,<sup>50</sup> and it is also the least contentious path to the nullification of an ouster clause. But it is not, according to Laws LJ, the ultimate justification for denying legal effect to ouster clauses, as if push came to shove and the presumption is displaced, Parliament would have to be declared outright incompetent to abolish judicial review. In other words, a presumption and a hard-edged denial of validity are not mutually exclusive, but rather two mechanisms of different intensities invoked to reach the same result, namely the nullification of ouster clauses and with it the preservation of judicial review. Whilst in most cases the presumption will be sufficient to neutralise an ouster

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<sup>48</sup> *ibid.*

<sup>49</sup> *Ibid* (emphasis added).

<sup>50</sup> E.g., *Anisminic* (n 2), *O'Reilly* (n 5).

clause, in others it will be defeated by unequivocal language — such as an ouster clause modelled on s 2 JRCA 2022 — and recourse to hard-edged limitation of Parliament’s legislative competency will be necessary, on Laws LJ’s account.

### C. The Fork in the Road and Challenge Posed

Despite Lord Sumption’s claim that in laying down his conceptual argument he was merely reiterating ‘the view suggested by Laws LJ in the Divisional Court in [*Cart*],<sup>51</sup> the two judgments plainly arrive at drastically different conclusions. As just seen, for Laws LJ ‘the need for ... an authoritative judicial source *cannot* be dispensed with by Parliament’.<sup>52</sup> In stark contrast, for Lord Sumption, Parliament may, in the ultimate analysis, dispense with judicial review for errors of law by enacting a clear enough ‘all-embracing ouster’.<sup>53</sup>

A choice must therefore be made between Lord Sumption’s and Laws LJ’s version of the *argument from sovereignty*. To inform that choice, it is necessary to appreciate that the fork in the road between the two views is the result of a fundamental disagreement as to the nature, and therefore the implications of, parliamentary sovereignty. First, for Lord Sumption, ‘parliamentary sovereignty’ is shorthand for ‘what Parliament intends to be law is law’. This is clear from the way His Lordship reduces the conundrum posed by ouster clauses to an interpretative one. I will call this the ‘thin’ version of parliamentary sovereignty. Laws LJ, on the other hand, advances a substantive understanding of the notion of parliamentary sovereignty. This is clearest when two of His Lordship’s claims are considered together, namely that an ‘authoritative judicial source *cannot* be dispensed with by Parliament’<sup>54</sup> and that to limit Parliament’s legislative power is in fact to ‘affirm’ its sovereignty.<sup>55</sup> Thus, for Laws LJ, the notion of parliamentary sovereignty cannot be reduced to, and thus (what comes to the same) is at least not fully captured by, the notion of giving effect to Parliament’s expressed intentions without question. I will call this the ‘thick’ version of parliamentary sovereignty.

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<sup>51</sup> *ibid* [208].

<sup>52</sup> *Cart* (n 32) [38] (emphasis added).

<sup>53</sup> *Privacy International* (n 13) [210].

<sup>54</sup> *Cart* (n 32) [38] (emphasis added).

<sup>55</sup> *ibid*.

At first glance, Laws LJ's substantive version of sovereignty seems like judicial supremacism cloaked under the pretence of affirming parliamentary sovereignty. It is true that, without more, His Lordship's assertions could appear rather arbitrary in light of the Diceyan conception of parliamentary sovereignty which was, once again, recently reaffirmed by the apex court.<sup>56</sup> And yet, there is one crucial clue rather casually revealed by Laws LJ which, it is argued, plants the signpost to the fundamental and true rationale underpinning the idea of a substantive conception of parliamentary sovereignty that entails Parliament's inability to enact ouster clauses. Critically, His Lordship draws a direct comparison between the 'old rule that Parliament cannot bind itself' and his rule that judicial review cannot be ousted by Parliament.<sup>57</sup> The implicit proposition that inheres in this direct comparison drawn by Laws LJ is the rule that Parliament cannot bind itself and shares the same rationale as the rule that Parliament cannot dispense with judicial review. Now, the fact that Parliament is disabled from binding its future self is a truism that no one, let alone Lord Sumption, would seek to deny — and indeed His Lordship acknowledges it.<sup>58</sup> Thus, the challenge appears straightforward: if the analogy drawn by Laws LJ is revealed to be sound, by parity of reasoning, the proponents of the 'thin' version of sovereignty have no choice but to admit the validity of Laws LJ's 'thick' version. They must also concede that however 'clear and all-embracing'<sup>59</sup> the ouster clause, it cannot succeed in ousting judicial review for errors of law.

#### D. Challenge Answered

Our inquiry into the rationale behind the rule that Parliament cannot bind itself starts with Sir William Wade's seminal article, *The Basis of Legal Sovereignty*.<sup>60</sup> The crucial passage for our present purposes is the following, in which Wade quotes *Salmond on Jurisprudence*:<sup>61</sup>

But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal ... It is the law because it is the

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<sup>56</sup> R (*Miller*) v *SS for Exiting the EU* [2017] UKSC 5; [2017] 2 WLR 583 [43].

<sup>57</sup> *Cart* (n 32) [38].

<sup>58</sup> *Privacy International* (n 13) [208].

<sup>59</sup> *ibid* [210].

<sup>60</sup> William Wade, 'The Basis of Legal Sovereignty' (1955) *Cambridge Law Journal* 172.

<sup>61</sup> *ibid* 187.

law, and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament, for this would be to assume and act on the very power that is to be conferred.<sup>62</sup>

This is a rule of logic. Wade, developing on Salmond's observations, rightly points out that, 'if no statute can establish the rule that the courts obey Acts of Parliament[, then] no statute can alter or abolish that rule'.<sup>63</sup> Therefore, one readily notices that the fundamental reason why Parliament cannot bind its future self is that to do so would undermine parliamentary supremacy, for some later Acts would need to be struck down or ignored if they were incompatible with earlier, 'enshrined' ones. A further corollary deducible from Salmond's rule of logic must be that it cannot be possible for Parliament to divest itself of, transfer, or share its legal sovereignty — this too would be to proceed on the assumption that Parliament's legal sovereignty is a product of its own will, a proposition which Salmond has just shown is absurd as a matter of logic. Thus, in Wade's words, the 'apparent paradox that [those rules are] unalterable by [an all-powerful] Parliament turns out to be a truism' that logically flows from the ultimately political, and not legal, fact of parliamentary sovereignty.<sup>64</sup>

The final piece of the puzzle is to demonstrate why it would be an infringement of the same rule of logic — again, that legislative sovereignty is not a product of Parliament's will — for Parliament to shield decisions afflicted by errors of law from judicial review and therefore prevent them from being nullified, whether by a quashing order or a declaration. Again, if this can somehow be demonstrated, the challenge is answered. It is helpful to picture the following scenario. An executive body acts outside jurisdiction because it has, for example, considered a matter which it was not entitled to consider on its way to reaching a determination.<sup>65</sup> Now, realise that for as long as its decision stands, it has in essence both crafted its own jurisdiction — or, what comes to the same, *legislated* it — and acted pursuant to said *sui generis* legislation. In the usual course of things, of course, the public body's decision would be quashed or declared unlawful *ab initio* by a court for want of a legal basis. Yet, *ex hypothesi*,

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<sup>62</sup> *ibid*; Sir John Salmond, *Salmond on jurisprudence* (10th edn, Sweet & Maxwell 1947) 155 (emphasis added).

<sup>63</sup> Wade (n 60) 187.

<sup>64</sup> *ibid* 188.

<sup>65</sup> These are essentially the facts of *Anisminic* (n 2).



this otherwise impeachable act is now rendered unimpeachable by operation of an ouster clause enacted by Parliament which precludes the court from reviewing a flawed decision. What has just occurred? Effectively, Parliament has vested the notional public body with *de facto* legislative competence; the executive has been allowed to ‘write [its] own laws’.<sup>66</sup> And in granting another body legislative competence, Parliament has done the very thing which the rule of logic expounded above has shown it is logically disabled from doing — because, once again, it is not the source of its own legislative supremacy — namely, transferring or sharing its legislative sovereignty with another body.

The challenge has therefore been answered. Ouster clauses are plainly incompatible with an orthodox Diceyan conception of parliamentary sovereignty. What is often invoked as the ultimate justification for Parliament’s power to enact ouster clauses if it so wishes, namely, the core constitutional principle of parliamentary sovereignty, has been shown to disable Parliament from doing that very thing.

### E. Briefly Addressing Criticism

Some commentators have expressed scepticism at Laws LJ’s analogy between the old and trite rule that Parliament cannot bind itself, and His Lordship’s strict rule that Parliament cannot oust judicial review. In particular, Aileen McHarg objects that Laws LJ’s analogy is ‘far from compelling’ and a tad deceiving.<sup>67</sup> That is so because, in her view, while the former rule is derived from the fact that every iteration that Parliament enjoys ‘unlimited legislative competence’, the latter rule is one which stems from the sacrosanctity of the ‘rule of law’.<sup>68</sup> Therefore, to McHarg, while the former rule is a product of the core constitutional notion of parliamentary sovereignty, to suggest as much of the latter rule by drawing an analogy with the former is to ‘turn the doctrine [of parliamentary sovereignty] on its head’.<sup>69</sup>

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<sup>66</sup> *Cart* (n 32) [37].

<sup>67</sup> Aileen McHarg, ‘Giving Substance to Sovereignty: Parliamentary Sovereignty and Parliamentary Effectiveness’ in Brice Dickson and Conor McCormick (eds), *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Bloomsbury 2021) 211.

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid* 212.

In this section, I have attempted to show that the analogy is actually sound and that both rules share the same source. In other words, McHarg's 'distinction of sources' argument has been shown to be unfounded. Indeed, both the rule that says Parliament cannot bind its future self and the one that says Parliament cannot dispense with judicial review for errors of law are corollaries of, and thus are derived from, the notion of parliamentary sovereignty. Ouster clauses are not denied effect because 'they are deemed to be incompatible with the rule of law'.<sup>70</sup> They are denied effect because they run counter to parliamentary sovereignty when that notion is properly understood. As shown, once it is realised that the rule that courts continuously obey Acts of Parliament (i.e., parliamentary sovereignty) is of extra-legal nature (i.e., that it is not a rule that emanates from Parliament itself), it becomes clear that Parliament cannot meddle with that rule, which it would be doing if it purported to alter its own legislative competence (which gives us the rule against entrenchment of legislation), or to transfer or share its legislative authority (which gives us the rule against ouster clauses for errors of law). In other words, Parliament's legislative authority must remain both limitless *and* exclusive. And since an ouster clause for errors of law is tantamount to Parliament transferring its legislative authority to another body, denying it legal effect is not to violate but to preserve Parliament's *exclusive* legislative authority.

## **F. Conclusion**

There are two key takeaways from this section. Firstly, the veil cast over Laws LJ's argument by Lord Sumption has been lifted. It is simply not the case that for Laws LJ too the dilemma is merely 'conceptual' and interpretative. There are two starkly contrasting versions of the *argument from sovereignty* to be found in the case law. This is important, as the Supreme Court has a choice between two alternatives that have curial support. Secondly, this article has shown that the correct choice is Laws LJ's strict version of the argument since it flows from a 'thick', and true, conception of sovereignty. Indeed, a careful examination of the notion of parliamentary sovereignty reveals inbuilt disabilities derived from the fact that Parliament is not the source of its own legislative supremacy. One of the said disabilities is that Parliament cannot bind its future self. Another is that it cannot transfer, or share, its legislative competence. And since ouster clauses for errors of law result in Parliament

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<sup>70</sup> McHarg (n 67) 211.

effectively granting executive legislative competence, such ouster clauses must be denied legal effect so long as parliamentary sovereignty continues to reign supreme. In the name of parliamentary sovereignty, ouster clauses must not be given legal effect in this legal system.

### III. THE HIGHER LAW ARGUMENT

#### A. Introduction

According to Lord Sumption, the radical argument contends that courts may, in exceptional circumstances, strike down statute in the name of a 'higher law'.<sup>71</sup> His Lordship rejects that argument on the basis that: '*in the absence of a written constitution* capable of serving as a higher source of law', primary legislation is supreme.<sup>72</sup> The purpose of this section is to show that this is a *non sequitur*: the lack of a textual constitution does not entail a completely limitless legislative remit for Parliament. Written constitutions recognise, rather than create, principles and rights fundamental to, and ever-present in, democratic societies.<sup>73</sup> Accordingly, these principles and fundamental rights are also present in democratic societies with unwritten constitutions, such as the Constitution of the United Kingdom.

The challenge this section sets out to meet can be formulated as follows. If it can be shown, as it will be, that in attempting to preclude the quashing of executive decisions or acts that are afflicted by an error of law, Parliament is seeking to use its legislative powers in a way that runs counter to the justification for its very own legislative empowerment, then it must follow that it is disabled from doing so. Importantly, the contention here is not merely that 'we *should not* attribute to Parliament intentions that flout the very conditions on which the legitimacy of its enactments depends'.<sup>74</sup> Rather, it is that notwithstanding such intentions, eminently clear as they may be, they cannot prevail.

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<sup>71</sup> *Privacy International* (n 13) [208].

<sup>72</sup> *ibid* [209] (emphasis added).

<sup>73</sup> *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532, 548.

<sup>74</sup> *Allan* (n 6) 219 (emphasis added).

The argument made in this section buttresses the *argument from sovereignty* made in the previous section. It serves to show that the notion of parliamentary sovereignty and its logical ramifications — one of which being that Parliament may not oust the judicial review jurisdiction of the courts to quash decisions afflicted by errors of law — far from being products of sheer happenstance, are manifestations of the necessary limitations on legislative power that operate in democratic political systems.

## **B. Democracy and its Underpinning Ideals**

The starting point, and one fundamental assumption for the purpose of this section, is that the United Kingdom is a democracy. This is not a contentious assumption. It is supported by the observable fact that the lawmaker is Parliament, an entity constituted of representatives elected from time to time via universal suffrage. In Britain, therefore, the wielding of political power is contingent on the continuing assent of the people, as '[t]he electorate can throw out the government'.<sup>75</sup> That is the cornerstone feature of the democratic form of government. It follows that it is the ideals that underpin democracy which need unearthing to assess whether, in light of 'the constraints inherent in the best conception of democracy',<sup>76</sup> ouster clauses are admissible under the British Constitution.

It is helpful, in seeking to identify democracy's underpinning ideals, to take as a starting point its antithesis, autocracy.<sup>77</sup> To understand the motivation behind the shift from autocracy to democracy — and therefore to grasp the ideals that underpin, and that are sought to be given effect to by, democratic forms of government — we must understand, at least in outline, the lessons often attributed to the Age of Enlightenment. Distilled to its essence, one of the main takeaways from the philosophical revolution of the 17<sup>th</sup> and 18<sup>th</sup> centuries was that no person is invested with inherent moral supremacy and that any political regime that is premised on such a notion is absurd and, ultimately, wicked. Diderot, for example, made the point trenchantly when he proclaimed that 'the arbitrary government of a just and enlightened prince is always bad'.<sup>78</sup> To be sure, 'arbitrary government' is here used to mean the wielding of political

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<sup>75</sup> John Laws, *The Constitutional Balance* (Bloomsbury 2015) 31.

<sup>76</sup> Allan (n 6) 218.

<sup>77</sup> Laws (n 75) 31: 'Without democracy the government is by definition autocratic'.

<sup>78</sup> Ritchie Robertson, *The Enlightenment* (Penguin 2020), 833.

authority justified purely on the footing of a title derived from lineage or any other factual circumstances. The vice in all such claims to authority was that normative statements ('you ought to do this') could not, without being absurd, rest on mere statements of fact ('because I am X, Y, Z.'). Indeed, as Hume famously remarked, it was 'altogether inconceivable' (and here 'inconceivable' should be understood in the sense of 'impossible') that normative statements could be deduced from factual premises, and this was precisely the rule of logic that the autocratic form of government so blatantly flouted.<sup>79</sup>

Instead, a normative statement may only validly be rooted in an appeal to reasons (i.e., by an appeal to the goodness of the consequences which it is thought will be produced by the act). But as soon as one person claims that she has good reasons to demand that others act as she wills, the natural response, from those who disagree, is to argue that the expected consequences of the act are not in fact beneficial; or that they are but that the act suggested is not the proper way to achieve them; or that those actions should not take priority over others, etc. The ability to reason is universal and 'difference and disputation' about what ought to be done is inevitable.<sup>80</sup> Indeed, 'it is an inherent feature of unruly humankind that what benefits the people will always be contentious'.<sup>81</sup> Once this is grasped, the path to democracy starts to take shape. There is, however, one last condition of the human kind (the universality of reason and the plurality of normative outlooks being the two just identified) that remains to be acknowledged.

Man is a gregarious species. No doubt there are solitary individuals, 'but society ... is the paradigm'.<sup>82</sup> Indeed, 'amongst the Things peculiar to Man is his Desire of Society'.<sup>83</sup> This is an observable fact; it is hardwired in our condition as much as the ability to reason is. The upshot is that a structure to regulate collective life needs to be erected lest cacophony ensues because, as we have seen above, individuals will inevitably advance conflicting normative propositions — we need a structure to solve our unsocial sociability without falling foul of the autocratic fallacy. In other words, we need a mechanism to

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<sup>79</sup> David Hume, *Treatise of Human Nature* (Clarendon Press, 1896), 469: 'You cannot derive an ought from an is'.

<sup>80</sup> *Laws* (n 75) 31.

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.* 7.

<sup>83</sup> Hugo Grotius, *The Rights of War and Peace* (Liberty Fund, 2005), 79.

invest political power in a ruler (whose political decisions for the community are authoritative and ultimate) which does not make a mockery of the realisations made above, namely (i) that only reasons can validly ground normative propositions and (ii) that the faculty of reason is a universal feature of the human condition.

The answer, of course, is the democratic machinery. Democracy provides a political battleground, the outcome of the tussle occurring in which is dictated by a candidate, and her normative outlook having garnered the greatest share of support from reasoning-capable human peers. That way, and for the time being, the exercise of the ruler's political authority is cured of arbitrariness in the sense that the exercise of her political authority, which manifests itself through the enactment of laws, is taken to have the tacit assent of the polity. It is only through the polling booth that 'the measures passed by government' may acquire the 'crucial moral authority' which is so blatantly lacking in autocracies.<sup>84</sup>

### C. Implications for Judicial Review

#### 1. Generally

Having established in outline the ideals that motivate the establishment of, and therefore underpin, the democratic form of government, we are now equipped to ascertain the ground rule in accordance with which the exercise of democratically acquired political power must be conducted. That ground rule, in turn, shapes to the most minute detail the 'conditions under which [those who wield political power] are permitted to do so'.<sup>85</sup>

The foregoing entails the following. Since it is only because it accedes to political power via a democratic procedure that the lawmaker's (Parliament's) promulgations are cured from the scourge of arbitrariness — such cure being, again, the chief aim of the democratic machinery — it must follow that *the lawmaker is disabled from empowering those taking decisions pursuant to, and acting in accordance with, its promulgations to act in an arbitrary fashion*. That is the ground rule. Had it been otherwise, the legislature would be allowing an exercise of public powers which does not advance the purpose (which is what 'to act arbitrarily'

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<sup>84</sup> John Laws, 'Law and Democracy' [1995] Public Law 72, 85.

<sup>85</sup> *ibid* 79.

means in this context) of the only legitimate source of public or executive powers in a democracy, namely the legislature's own promulgations. In other words, the ruler's law would 'stifle its own justification'.<sup>86</sup> Thus, 'any delegation of power to a public authority must be applied to the furtherance of legitimate public purposes' which Parliament has authored.<sup>87</sup> It follows that Parliament does not draft its laws on a blank canvas. Instead, indelible terms and conditions invariably populate every single Act of Parliament. These provide that Parliament cannot violate the democratic justification that lends its words the power of law, which it would be doing if it permitted arbitrary acts under the law it promulgates to withstand judicial scrutiny. Law in a democracy, therefore, has a baseline substance that is 'impervious to any purported legislative abrogation';<sup>88</sup> law is the sovereign.<sup>89</sup>

## 2. *Classic ultra vires or illegality*

The necessity of the *ultra vires* or illegality ground of review, and thus the inadmissibility of ouster clauses that prevent the quashing of executive decisions afflicted by the vice of illegality, is very straightforwardly distilled from the foregoing discussion. As this article has demonstrated earlier, a 'decision ... that flouts the limits of [the] empowering legislation' is tantamount to the executive crafting its own jurisdiction or, what comes to the same, legislating.<sup>90</sup> But this is pure arbitrariness: the executive does not benefit from the same democratic cure as the legislature; it cannot craft *sui generis* purposes but must give effect to Parliament's own. If Parliament were allowed to preclude the quashing of decisions plagued by errors of law, it would be actively sabotaging the democratic rationale upon which its own legislative power rests, something which, as we have seen, the ground rule necessarily prohibits.

## IV. CONCLUSION

The chief aim of this article was to mount a frontal attack on ouster clauses. Particularly, this article has focused on ouster clauses designed to prevent the review and quashing of executive decisions purportedly taken

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<sup>86</sup> Laws (n 75) 32.

<sup>87</sup> Allan (n 6) 224.

<sup>88</sup> *ibid* 217.

<sup>89</sup> As the title of Allan's latest book, *The Sovereignty of Law* (n 6), rightly suggests.

<sup>90</sup> Allan (n 6) 220.

pursuant to an empowering statute, but ultimately afflicted by one or more errors of law. With the *argument from sovereignty*, this article has shown that a fully-fledged understanding of the notion of parliamentary sovereignty, the core constitutional principle of the United Kingdom's legal system, leads to the rejection of ouster clauses. One cannot at once espouse the principle of parliamentary sovereignty and accept the validity of ouster clauses. With the *higher law argument*, I have sought to show that the foundations upon which the exercise of political power rests in a democracy entail Parliament's inability to allow decision-makers acting pursuant to its laws to act arbitrarily.

In conclusion, if this analysis has found favour with the reader, they are invited to ponder whether the above arguments can in some way be extended to capture all the grounds of judicial review currently recognised by the courts. In other words, can an argument be made, using what has been said above and especially in Section III, to say that Parliament should not be able to oust judicial review for grounds other than illegality? There is scholarship that argues for the fundamentality of all grounds of judicial review — and 'fundamentality' here should be understood to mean imperviousness to unilateral riddance by Parliament of these grounds of review.<sup>91</sup> There is also recent high-level *obiter dicta* that points this way.<sup>92</sup> No particular claims to that effect are made here, but there is no reason why we should not now direct our efforts to the inquiry of whether such a claim can be made in light of the constitutional arrangement of the United Kingdom where Parliament may make the *law* it wishes, so long of course as it does not purport to give the executive legislative competence.

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<sup>91</sup> Allan (n 6) 217.

<sup>92</sup> *Privacy International* (n 13) [144].