

The UK Internal Market Bill and the Mother of all Ouster Clauses

Dr Ronan Cormacain

This piece is [cross-posted](#) with the kind permission of the [UK Human Rights Blog](#), with the piece originally appearing on 15th October 2020.

The [United Kingdom Internal Market Bill](#) is due for second reading in the House of Lords on 19 October 2020. It is not an understatement to say that the Bill contains provisions which represent one of the most egregious assaults on the Rule of Law in recent times, nor is it an understatement to say that there is a remarkable hostility to it from across the political spectrum, and across the Brexit divide.. It has also [united the UK's legal profession](#) against it. In Reports for the Bingham Centre for the Rule of Law [here](#) and [here](#) we pointed out how this violation of international law breaches the Rule of Law. I have also previously argued that the Bill contains an unacceptable [breach of domestic law](#). The former Attorney General Dominic Grieve [argued](#) that the Bill contained an unacceptable ouster clause. I wish now to hone that argument by characterising what is now clause 47 of the [Bill](#) as containing not just a simple ouster clause, but the mother of all ouster clauses.

Brief explanation / history of ouster clauses

An ouster clause is a provision in primary legislation which ousts the jurisdiction of the courts. It deems that provision (or decisions made under or in accordance with that provision) as not susceptible to judicial challenge. An ouster clause makes the subject matter of the clause non-justiciable, putting it outside or beyond the reach of the courts.

Parliament and the courts have played a game of cat and mouse over ouster clauses for at least the last 70 years.

The Foreign Compensation Act 1950 was enacted to compensate British citizens for property seized by foreign governments. [Section 4 \(4\)](#) originally provided that:

(4) 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.

The House of Lords in [Anisminic v Foreign Compensation Commission](#) [[1969] 2 AC 147] didn't like the idea that decisions of the Commission were beyond the law, and decided that the ouster clause only applied to lawful determinations. With somewhat strained reasoning, they decided that Parliament would never dream of saying that unlawful determinations were non-justiciable, and since the ouster clause did not refer to 'purported determinations', then it had no effect in the current case.

Parliament initially sought to amend the 1950 Act so that it also excluded 'purported determinations', but due to opposition within Parliament, that amendment did not succeed (for commentary, see Ian Loveland, ['Constitutional Law, Administrative Law, and Human Rights'](#)

, 8th Edition at page 69).

Jumping forward with indecent haste to modern times, Parliament enacted another ouster clause in the Regulation of Investigatory Powers Act 2000. [Section 67\(8\)](#) originally provided that:

(8) ... 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

As in *Anisminic*, the Supreme Court in [Privacy International v Investigatory Powers Tribunal](#) [2019] UKSC 22 did not like this ouster clause and ruled that, despite its clear wording, it did not in fact oust the jurisdiction of the court in cases of error of law. According to [Qureshi, Tench and Hopkins](#), this 'recalibrated the delicate balance of the rule of law, interpreting s.67 (8) of the 2000 Act in such a way that arguably goes against Parliament's clear intention.'

Taking a teleological approach, the clear intention of Parliament in both statutes was to put these matters beyond the reach of the courts. The judges in both cases instead used an interpretative approach which highlighted the importance of the Rule of Law and constitutional propriety. In non-legal terms, an ouster clause will only work if Parliament really, really, **really** wants it. . In *Privacy International*, the Supreme Court's reasoning made clear that this is because it is a logical attribute of the concept of parliamentary supremacy that there must be an independent arbiter of the scope of limited powers conferred by Parliament, otherwise there is no means to enforce its will.

The Ouster Clause in the UK Internal Market Bill

Clause 47 of the UK Internal Market Bill contains an attempt to so completely exclude judicial scrutiny that I hesitate before calling it a simple ouster clause. It isn't that it seeks to simply oust the jurisdiction of the courts (which it does, except in relation to judicial review cases). It goes further and makes application to courts completely pointless by deeming what is done under the clause completely lawful in all circumstances. Although this strains the taxonomy of 'ouster' to breaking point, in the absence of a better word I continue to classify it in this way. **Clause 47 contains a general ouster clause, and then 9 specific and detailed ousters.** These are set out below.

General ouster - cl 47(1) - having effect notwithstanding any other law

Clauses 44, 45 and 47, and any regulations made under them, have effect '*notwithstanding any relevant international or domestic law with which they may be incompatible or inconsistent*'.

The phrase '*relevant international or domestic law*' is defined in clause 47(8) and includes '*any other legislation, convention or rule of international or domestic law whatsoever, including any order, judgement or decision of the European Court or of any other court or tribunal*'.

This is breath-taking in its width. The reference is to any other domestic law whatsoever, meaning that, at one fell swoop, the entire corpus of British law is disapplied from these regulations.

Specific ouster 1 - cl 47(2)(a) - regs deemed not unlawful

Regulations under clause 44 or 45 are not to be regarded as unlawful on the grounds of incompatibility or inconsistency with international or domestic law. . This is another way of spelling out one of the specific implications of the general ouster that they

have effect notwithstanding incompatibility / inconsistency (as if there were any room for doubt left by the generality of that wording).

Specific ouster 2 - cl 47(2)(a) - lawful to breach the ECHR

Section 6(1) of the Human Rights Act 1998 (which makes it unlawful for a public authority to breach a right set out in the European Convention on Human Rights) does not apply in relation to making regulations under clauses 44 or 45. So even if the action of making these regulations is in breach of human rights, it is still deemed to be lawful.

Specific ouster 3 - cl 47(2)(b) - withdrawal agreement rights no longer effective

[Section 7A](#) of the European Union (Withdrawal) Act 2018 guaranteed the rights and duties set out in the withdrawal agreement. These rights now cease to be recognised so far and for as long as they are incompatible or inconsistent with clauses 44, 45 and 47, and regulations made under those clauses. S. 7A isn't actually repealed, but its provisions are instead disapplied in these circumstances.

Specific ouster 4 - cl 47(2)(c) - withdrawal agreement no longer to be interpreted in accordance with withdrawal agreement

[Section 7C](#) of the European Union (Withdrawal) Act 2018 requires that in determining the meaning of UK legislation governing withdrawal from the EU, it should be interpreted in accordance with the withdrawal agreement. But specific ouster 4 states that section 7C ceases to have effect so far and for as long as it would require an interpretation which would be inconsistent or incompatible with clauses 44, 45 and 47, and regulations made under them. The net result is that in determining the meaning of domestic obligations under the withdrawal agreement, there is no obligation to interpret these in accordance with the withdrawal agreement. This is Orwellian in its reversal of simple linguistic logic - if you want to know what the withdrawal agreement means, you cannot look at the withdrawal agreement.

Specific ouster 5 - cl 47(2)(d) - any inconsistent law at all has no effect

This is a specific ouster which also acts as the broadest of all possible ousters. It states that *'any other provision or rule of domestic law ... ceases to have effect so far and for as long as it is incompatible or inconsistent'*. This is another attempt to disapply the entire corpus of the statute book and the entire corpus of English common law from these provisions. No matter what the source or longevity of a law, stretching back from the Human Rights Act 1998 to habeas corpus to Magna Carta 1215, if it is inconsistent with regulations that a Minister makes under these powers, it has no effect. It is an appalling proposition that a Minister has the power to simply ignore every single law currently in effect in the UK, with no possibility whatever of legal recourse.

Specific ouster 6 - cl 47(3) - a dog is a cat

Legislative drafters often joke about laws deeming that a dog is a cat. See for the example the extended discussion of legislative definitions by [Roznai](#). Specific ouster 6 deems that, for the purposes of the Human Rights Act 1998, a regulation under these provisions is to be treated as if it were primary legislation. Even though the two things are from fundamentally different parts of the legislative hierarchy, they are to be treated as being the same thing. The reason for this is clear - secondary legislation in breach of human rights can be declared void by a court, primary legislation cannot be declared void. The most that can happen, under [s. 4](#) of the Human Rights Act, is that a court can issue a declaration that the law is incompatible with a Convention Right. Even though a dog is a dog, it is now deemed to be a cat.

Specific ouster 7 - cl 47(4) - ouster of jurisdiction in all cases, other than in judicial review

This ouster is that *'no court or tribunal may entertain any proceedings for questioning the validity or lawfulness of regulations ... other than proceedings [for judicial review]'*. So if a litigant has a contractual claim against the Government, and part of this claim is that regulations under this Bill are unlawful, the court has no power to hear that part of the claim. Or if in criminal proceedings the defendant alleges that the regulation under which they have been prosecuted is *ultra vires*, a court has no power to even listen to that part of the defence. This ouster is stricter than simply excluding all but judicial review cases, it also excludes judicial review cases unless that judicial review is *'for the purpose of questioning the validity or lawfulness of regulations'* (see definition of the cases to which this applies in clause 47(8)). So if the course of judicial review proceedings an applicant wishes to challenge the validity of these regulations, the court can only hear that argument if the purpose of the judicial review is to challenge the validity of the regulations.

This is a straightforward ouster of the jurisdiction of all courts, other than courts hearing judicial review cases of the validity of the regulations. It is also a denial of the right to a fair trial and a denial of access to justice if a court is barred by the legislature from hearing a particular legal argument.

Specific ouster 8 - cl 47(5) - no extension of time limits for judicial review

Under this specific ouster, the standard time limits for judicial review are not to be extended *'under any circumstances'*. As ousters go, this isn't so draconian, as it merely prohibits the exercise of any judicial discretion over whether a time limit should be extended. The reason for the discretion is that there can sometimes be circumstances where the imposition of a strict time limit causes injustice. This clause takes away the judicial power to avoid those injustices.

It is incidentally a breach of the Sewel Convention for Westminster to legislate procedural points on the administration of justice in Northern Ireland and Scotland without first obtaining a legislative consent motion from those jurisdictions. See further my arguments on legislative competence over administrative law [here](#).

Specific ouster 9 - cl 47(6) - judicial review is subject to these provisions

This specific ouster reinforces the general ouster by stating that judicial review proceedings are subject to all these provisions. The repetitious nature of this provision is an attempt to absolutely constrain the courts.

Conclusion

With this Bill, Parliament is being asked to move on from the halcyon days when ouster clauses were an unsophisticated attempt to stop judges from hearing a case. **Clause 47 of this Bill is the mother of all ouster clauses.** The only way a court can even hear a claim around these provisions is if it is exercising its powers of judicial review (with no extension of time limits) and the purpose of the review is to question the validity of regulations. It cannot use powers under the Human Rights Act 1998 to declare regulations void. The Lord Chancellor [claims](#) that the Government's amendments to the Bill make clear that it is intended to preserve access to court for judicial review challenges. In fact, these provisions render the ability to apply to a court for judicial review nugatory as any regulations made under them are deemed lawful no matter what, and any provision of UK law whatsoever with which those regulations are incompatible simply does not have effect.

These provisions breach the Rule of Law as they attempt to put any regulations made under them beyond the reach of the law. They are anathema to our ideals of separation of powers as Parliament and the Executive can do what they want without any check provided by the Judiciary. Parliament should follow the example set in the 1960s when its predecessor refused to overturn the *Anisminic* decision by passing a new ouster clause. The mother of all ouster clauses should never enter onto the statute book.

Dr Ronan Cormacain is Senior Research Fellow and lead of The Rule of Law Monitoring of Legislation Project

URL: <https://binghamcentre.biicl.org/comments/108/the-uk-internal-market-bill-and-the-mother-of-all-ouster-clauses>

© 2020 BIICL | A company limited by guarantee | Registered in England No. 615025 | Registered Charity No. 209425