FOREWORD (PUBLIC LAW)

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It is a sign of the strength of law as a subject at Oxford University that the Oxford University Undergraduate Law Journal is now in its 15th year of publication, and continues to offer an opportunity for undergraduates to develop their skills in legal research and writing. It also continues to attract high quality articles.

This year's public law articles all display careful research and analysis. They are varied in subject matter. One of them concerns a traditional public law subject: ouster clauses. Another of them concerns a question which is of wider significance, although approached in the context of public law: the value of uncertainty in the law. Another concerns an interesting question of comparative law: how the law's approach to the concept of detention in Canada and in the UK affects the operational effectiveness of the police. The fourth addresses a significant question of public international law: whether the obligation to provide facilities for detained individuals to receive consular assistance extends to individuals who are citizens of the detaining state but are also citizens of another state.

In the first article, *'Some Ousters Are More Equal Than Others: Rethinking Section 2 of the Judicial Review and Courts Act 2022'*, Prakruti Rao argues that it is regrettable that an ouster clause was introduced by section 2 of the Judicial Review and Courts Act 2022, in order to restrict the ability to seek judicial review of decisions of the Upper Tribunal. In her view, it would have been

preferable for such a restriction to have been introduced by means of judicial development of the common law. As she acknowledges, that would have required the reversal of the judgment of the Supreme Court in *Cart v Upper Tribunal*[1]. The Supreme Court is very slow to reverse its own decisions, and *Cart* was a decision on an issue of principle by an enlarged bench of seven justices. A challenge to its correctness would face a number of problems. What error was there in the reasoning in *Cart*? What could be said to have changed since it was decided, apart from the identities of the judges? Any attempt to have *Cart* reversed would also have to have been brought by the government after losing a judicial review of an Upper Tribunal decision, which was an uncommon event. It might have been thought simpler and safer for the government to achieve the desired result by legislation, implementing a recommendation of the Independent Review of Administrative Law[2], which had been requested by judges to look at the question because of the volume of *Cart* reviews and their very low rate of success. Those were also matters of legitimate concern to the government, not only because of the implications for the courts, but also because of the consequences for the implementation of controls on immigration and asylum.

In the second article, '*Constructive Uncertainty in Public Law*', Wei Pheng Koon conceptualises uncertainty as to the law as a principle which has a number of valuable aspects in public law. One is that it encourages comity between different branches of government, as uncertainty as to the legal limits of their powers

[1] [2011] UKSC 28, [2012] 1 AC 663.
[2] The Independent Review of Administrative Law, CP 407 (2021), Introduction, para 10.

incentivises them to avoid conflict with one another which could result in those limits being tested and determined, possibly to their disadvantage. This is an idea which has previously been developed by Professor Aileen Kavanagh.[3] A second aspect is that the fuzzy boundaries of legal principles provide the law with the flexibility to adapt its solutions to particular circumstances. This idea, rooted in Hart's conception of legal rules as possessing an 'open texture' or 'penumbra of doubt',[4] has also been developed by Professor Endicott.[5] An example given by the author in the context of public law is the adaptability of the requirements of a fair hearing to the circumstances. The third aspect is that decision-makers' recognition of their own uncertainty encourages them to exercise restraint and to defer to others possessing greater expertise. Although, as I have indicated, this is not altogether virgin territory, the article presents a thoughtful synthesis of a number of strands of thought.

In the third article, '*How Does the Definition of Detention Restrict the Police? A Comparative Analysis of Canada and the United Kingdom'*, Ibrahim Ejaz enters an area of the law which is less familiar to British public lawyers. The focus is on how the legal definition of 'detention' by the police, triggering procedural protections for the detainee such as protection against self-incrimination and the right to legal advice, can affect day to day policing, and in particular the ability of the police to promote public order and protect the public. The author shows how the Canadian definition can result in 'detention' occurring at a much earlier stage of an investigation than in the UK, and how the

[3] The Collaborative Constitution (2023).
[4] HLA Hart, *The Concept of Law* (1961).
[5] TAO Endicott, *Vagueness in Law* (2000).

triggering of protections at that earlier stage can inhibit the ability of the police to pursue their investigations effectively. Uncertainty as to when detention will be held to have occurred is shown to incentivise caution by the police in pursuing their inquiries—consistently with one of the themes of Wei Pheng Koon's article, but not necessarily in the public interest. The Canadian case law is analysed in greater detail than the corresponding British law, and the impact of the European Convention on Human Rights on the latter might be worth greater consideration. However, this is an interesting and original article.

In the fourth article, *'Two Passports, One Right? Reimagining Consular Protection in the Age of Dual Nationality'*, Laura Romero carries out a timely examination of an important question in public international law. Article 36 of the Vienna Convention on Consular Relations applies where a national of a state (the 'sending state') is arrested or detained in another state (the 'receiving state'), and requires the receiving state to inform the consulate of the sending state and to allow its consular officers to visit their national and to arrange for his legal representation. The question is whether that obligation applies where the national of the sending state is also a national of the receiving state. The circumstances may vary greatly from one case to another. Take, for example, the case of a person born in the UK to Bangladeshi parents, who has lived in the UK all her life. She possesses both British and Bangladeshi citizenship. She may be arrested in the UK. Is she entitled to the assistance of the Bangladeshi consulate? The view might be taken that no useful purpose would be served by such an interpretation of article 36: she is for all practical purposes in the same position as any other British citizen. What if she travels to Bangladesh and is arrested there. Is she entitled

to the assistance of the British consulate? Its assistance would serve a useful purpose, as she is not in the same position as other Bangladeshi citizens. She may, for example, not speak Bengali, have any knowledge of Bangladeshi criminal procedure, or know how to instruct a Bangladeshi lawyer. So should article 36 be interpreted as applying to dual nationals as it does to every other national of the sending state? Or should it be interpreted as having no application to dual nationals? Or should its application to dual nationals depend on some assessment of whether their 'effective' or 'predominant' nationality is that of the receiving state or the sending state, or on an assessment of their individual need for assistance? Should the issue be approached on the basis that article 36 is concerned with diplomatic relations between states, or on the basis that its concern is to provide procedural protection to individuals? The problem is analysed carefully in a most interesting and well-written article.