The topic of my contribution today is a specific aspect of Sir Rupert’s recommendations, both in his 2010 Final Report and in his 2017 Supplementary Report, namely his proposals to introduce special costs rules for judicial review, with the specific intention of increasing access to judicial review for litigants of modest means.

One of the peculiarities of proposals for reform in judicial review – of which there have been several over the last decade – is that the Government is both the master of the reform process, and one of the main “repeat players” as a litigant – the others being local authorities, tribunals and inferior courts, and bodies such as Ombudsmen and regulators. Thus, central Government is not in this context an independent rule-maker, but a participant in– indeed principal target of – the litigation which is the subject of the proposed reforms. And judicial review costs the Government money – it costs it money because it has to pay for its own lawyers; for its opponent’s costs when it loses – or very often when it settles; and in some cases, where legal aid is available, for the publicly funded lawyers representing its impecunious opponents even when it is successful. It can also cost it money xxx when a judicial review challenge to a cost saving measure is successful and the measure is overturned – as in the case of a challenge to amendments to the Personal Independence Payment Regulations in 2017 which the Government estimated would lead to 1.6m claims being reviewed and reverse savings of nearly £1bn per year.

So in a time of austerity, Government might be said to have a financial interest in limiting judicial review claims – or, at least, the costs involved. The money to defend judicial reviews of course comes from shrinking budgets leaving less to do the “real” business of Government, not to pay lawyers’ fees.

Set against this context is the importance of access to judicial review in a democratic society as a mechanism for holding the executive to account. Judicial review plays – I suggest – though admittedly I am partial given the objects of the Public Law Project – a particularly important role in the wider principle of access to justice and the Rule of Law.

As Lord Reed explained so eloquently in *UNISON v Lord Chancellor* [2017] UKSC 53 (para 68- I make it a rule to quote this paragraph any time I talk about access to justice):

**At the heart of the concept of the rule of law is the idea that society is governed by law. Parliament exists primarily in order to make laws for society in this country. Democratic procedures exist primarily in order to ensure that the Parliament which makes those laws includes Members of Parliament who are chosen by the people of this country and are accountable to them. Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, 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. That is why the courts do not merely provide a public service like any other.**

Now Lord Reed made those comments in the context of access to the employment tribunal to enforce private law disputes. But they are at least equally apposite – I would argue significantly more so – in the context of judicial review, which has a fundamental role to play in ensuring “**that the executive branch of government carries out its functions in accordance with the law**”, and therefore in ensuring respect for the Rule of Law in a democracy.

And it must be obvious, one would have thought, that, just as access to justice is impeded by court fees, so it is impeded if individuals cannot afford to bring judicial review proceedings because – whatever arrangements they may make to meet their own lawyers’ fees – they cannot afford to take the risk of being ordered to pay their public authority opponent’s potentially substantial costs if they lose. To understand that deterrent effect, one need only ask what the reaction would be if the court fees for bringing judicial review proceedings (currently around £1000 to reach a final hearing) were increased to £20,000, with no provision for means-test for fee remission, to understand the deterrent effect of the risk of adverse costs order.

The constitutional role of judicial reviews is the unavoidable backdrop to any discussion of procedure and in particular costs. It was rightly recognised as such by Sir Rupert Jackson in his 2010 final Report and in his 2017 supplemental Report. It was also recognised by the Ministry of Justice in its proposals for the reform of legal aid in England & Wales which led to the Legal Aid Sentencing and Punishment of Offenders Act 2012. The MOJ explained the proposal to retain legal aid for (most) judicial review proceedings on the basis that:

“…proceedings where the litigant is seeking to hold the state to account by judicial review are important, because these cases are the means by which individual citizens can seek to check the exercise of executive power by appeal to the judiciary. These proceedings therefore represent a crucial way of ensuring that state power is exercised responsibly”

A word about legal aid: it plays an important, but limited, role in ensuring access to judicial review. Legally aided litigants not only have their own lawyers’ costs met but benefit from costs protection which means they will not ordinarily be ordered to pay their opponents’ costs if they lose. However legal aid is only available to the very poorest. The disposable income and capital thresholds are set at such a level, and calculated in such a way, as to exclude the vast majority of the working population, or anyone with any significant assets even if these are not practically realisable. Even for those who are financially eligible, there are areas of the country where it is virtually impossible to find a legal aid lawyer with the appropriate expertise, particularly given the removal of legal aid from so many areas of substantive law. There are significant disincentives for lawyers to take on any but the strongest cases as they will not be paid at all if permission is refused. The MOJ’s own statistics show that the number of legal aid certificates for judicial review proceedings has fallen off dramatically in the last few years.

The question then is whether the special constitutional role of judicial review, or any other feature of the judicial review procedure, justifies special costs rules to address the access to justice barrier.

Some such rules are already well established. In public interest cases, the Court can grant a pre-emptive ‘Costs Capping Order’ if it accepts that the claimant will not be able to proceed with the claim absent the certainty and protection which such an order affords. The jurisdiction to grant such an order, in the form of a PCO, was first recognised in *Corner House [2005] 1 WLR 2600* precisely because it was considered that this would promote access to justice in context of the need, through judicial review, to vindicate the rule of law and stop the unlawful exercise of executive power. The rules were codified in the Criminal Justice and Courts Act 2015. Again, like legal aid, their benefit is limited. They are only available in public interest cases. Even in a public interest case, too great a private interest for the applicant can be fatal to the granting of a CCO. They cannot be granted until and unless permission is granted and so an applicant must be in a position to take the risk of being ordered to pay the defendant’s pre-permission costs, if permission is refused, which can be substantial. The court is required to impose a reciprocal cap on the claimant’s costs which if set too low can make it uneconomical for lawyers to act under CFA arrangements, meaning the applicant may have to meet some of his own lawyers’ costs too.

In environmental cases, the so-called ‘*Aarhus’* rules impose caps of £5000 on defendants’ recoverable costs and £35,000 on claimants’ costs. These are to meet the requirement under the Aarhus convention that proceedings not be ‘prohibitively expensive’ for citizens. But they are limited to claims falling within that Convention.

The limitations of these rules, and the importance of judicial review, led Sir Rupert Jackson to make two main proposals about costs in judicial review, neither of which has however been accepted by the Government. The first, in his 2010 report, was for a form of qualified one way costs shifting by which all judicial review claimants would benefit from protection similar to that afforded under the legal aid system – they would only be required to pay costs in a sum which was reasonable for them to pay. As is well known, the Government accepted Sir Rupert’s recommendation to introduce QOCS for personal injury claims but has not – so far at least – accepted the recommendation for judicial review claims. It did however accept his *quid pro quo* of removing the recoverability of ATE premiums. ATE it is to all intents and purposes now unavailable in judicial review.

In his 2017 Supplemental report, acknowledging that it seemed unlikely that the Government would introduce QOCS, Sir Rupert made an alternative suggestion, drawing on the influential report of the Westgate working group. His suggestion was that the costs regime applicable to Aarhus claims be extended to all judicial reviews, with some modifications. That suggestion was so unacceptable to the Government that when in March 2019 they published a consultation on the proposals in the Supplemental Report, they did not invite any views on this proposal, indicating instead that they were not persuaded that there was an access to justice problem and even if there was, the availability of legal aid and CCOs was a sufficient answer. That consultation has recently closed and PLP and ALBA have expressed serious concerns about the failure to consult on these – or any other – proposals to address the access to justice problem in JR.