Response of the Public and Administrative Law Group of St. John's Chambers, Bristol[1]

To

The Ministry of Justice White Paper on Judicial Review Reform[2]

Public and Administrative Law Group

29th April 2021

Preliminary

1. We should start by saying that the Consultation period for this response is unfortunately short. We made the same point, as did others, for the consultation period for the IRAL document. IRAL had 'some sympathy' with these views and particularly with the opinion that the time given was 'inadequate' [1].[3] The period for this consultation is some 6 weeks which requires consideration of a number of approaches by the courts on some fundamental aspects of judicial review ('JR'). Frankly, it gives the impression of unnecessary haste and, one hopes, will not result in the Government repenting at leisure.

2. In our view, it is also worth repeating a constitutional fundamental. It cannot be too often stated that it is for the courts and not the Government to decide whether its policy or particular decisions are lawful. It is not clear to us that the Government recognises this fundamental principle. More fundamentally, it is for the courts to determine the interpretation of statutes and whether policies of the Government or any particular decisions by them are lawful and not for the Government itself. The Government cannot mark its own homework. More to the point it should not place restrictions on those (the judges) whose task it is to see that the Government complies with the law.

3. This is an essential feature of the rule of law. Judicial review remedies are an exercise of the court's prerogative jurisdiction to supervise the lawfulness of the public law actions of everybody subject to their jurisdiction (which jurisdiction is derived from the Crown) without exception in order to do justice according to law. This includes ministers and departments, even if acting bona fide in their official capacities - *M v. Home Office* [1994] 1 AC 377. If a public servant

[1] A sub-group of practitioners in the field of public law in St. John's Chambers.
[2] CP 408.
[3] See also p. 128, 5th b/p.

does not act lawfully then he does not act on behalf of the public at all, but in his private capacity - *Entick v Carrington* (1765) 19 State Tr. 1029. Any attempt by Parliament to impose a statutory limitation (as opposed to seeking by agreement with HM Judges changes to the court's practice and procedure) and thus precluding claims for judicial review, which it has always been a prerogative of the court to allow, whether by the issue of prerogative writs or under the judicial review procedure, would be a direct interference with one of the most fundamental principles of our constitution.

4. In the Foreword to the White Paper it is said by the Lord Chancellor:

> *"The Panel's analysis identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made. The reasoning of decision-makers has been replaced, in essence, with that of the court." [para. 2].*

5. By way of comment, we observe that, first, there will always be particular cases where it can be argued that a court or judge has moved towards looking at the merits of a particular decision rather than simply its legality. The question is not that but whether it can be said that there is *generally* a trend or approach where the courts have changed from looking at legality to looking at merits and acting as an appellate, rather than a judicial review, tribunal. The IRAL Panel did not appear to us to come to any such conclusion and that is supported by our own observations.

6. They dealt with 'Moderating Judicial Review' in chap. 3. They observed that there were two concerns: 'judicial overreach' of which they identify one particular example while not enumerating other examples.[4] They concluded that Parliament should not legislate on this topic or on that of the multiplicity of the grounds for JR [3.17] but went further and observed that in fact the courts 'respected' the judgment of public bodies [3.22-3.23] and further observed that this quality of respect was 'inherent' in JR [3.23]. That is further supported by IRAL conclusion 15; '*the courts will respect institutional boundaries*', p. 132.

7. We do not see in these passages or anywhere else in the IRAL Report anything that supports the Government's approach as set out by the Lord Chancellor.

8. In the Foreword it was also said:

[4] They suggest there are several others given by an academic contributor although none are particularised (para. 3.6-3.7).

> *" ……. my aim as Lord Chancellor is twofold. Firstly, I want to use these reforms to restore the place of justice at the heart of our society by ensuring that all the institutions of the state act together in their appropriate capacity to uphold the Rule of Law. That means affirming the role of the courts as 'servants of Parliament', affirming the role of Parliament in creating law and holding the executive to account, and affirming that the executive should be confident in being able to use the discretion given to it by Parliament." [para. 4].*

9. It seems to us that on such an important topic an approach which reduces the 'Rule of Law'[5] to a proposition in the second sentence of the quoted passage, "*That means* ……", is sadly lacking. It reduces the topic and the role of the courts to being 'the servants of Parliament', apparently reducing the judges to the status of valets to the legislature rather than part of an important and free-standing body on which law and justice depend;[6] then Parliament is the body which creates law and holds the executive to account, apparently without the intervention of the courts; and finally that the executive should be confident in using the discretion given to it by Parliament, apparently in that case without the possible intervention of any outside body such as the courts.[7]

10. The 'Rule of Law' has been the subject of judicial comment, in decided cases and extra-judicially, and in many academic texts. We select one of the better known and easily available examples of the latter which deals with the Rule of Law under various heads:

> *"The scope of the rule of law is broad and it incorporates different values. It has managed to justify – albeit not always explicitly – a great deal of the specific content of judicial review, such as the requirements that laws as enacted by Parliament be faithfully executed by officials; that orders of courts should be obeyed; that individuals wishing to enforce the law should have reasonable access to the courts; that no persons should be condemned unheard; that decisions should be communicated before they are enforced and that power should not arbitrarily exercised."* [8]

There are other examples stemming from what is said there such as, in the case of discretionary power, that there are always recognised rules and principles which restrict it. Then there is the essential nature of judicial independence so that judges are separated from the executive and can independently adjudicate on all legal disputes. And fairness is added, in the sense that the law

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[5] See its importance from s. 1 Constitutional Reform Act 2005: nothing in the Act adversely affects 'the existing constitutional principle of the rule of law'. [Emphasis supplied].

[6] If Lady Hale is seen as the authority for this phrase, what she said was that 'judicial review' was the servant of Parliament – a recognition of parliamentary supremacy – but something quite different from 'the courts' [18].

[7] The next paragraph, 5, of the Foreword simply refers to the role of the courts in the context of their procedural function of having the right series of remedies.

[8] See de Smith's *Judicial Review*, 8th Edn., at 1-024 – 1-025. The quoted passage goes on to add other qualities such as that public laws should be certain, ascertainable in advance and not retrospective and that it applies equally to all. It continues by identifying other constitutional principles that are linked with it.

should be even-handed between Government and citizen.[9] Other, and more comprehensive, definitions could no doubt be given, particularly those in the late Lord Bingham's important work '*The Rule of Law*',[10] which do not come close to defining it in the way set out in the Foreword.

11. However, it is disturbing that the Lord Chancellor apparently does not recognise these principles and appears to rely instead on some dubious propositions. It is suggested that "*the courts [are] 'servants of Parliament'*". If that means simply that courts must apply Acts of Parliament it is probably unobjectionable, although that topic is itself subject to a good many judicial decisions on how, for example, courts should interpret Acts which have particular constitutional significance.[11] It is also worth observing that "*The sovereignty of Parliament ..... is an ever-present threat to the position of the courts; and it naturally inclines the judges towards caution in their attitude to the executive, since Parliament is effectively under the executive's control.*" [12]

12. The Lord Chancellor's propositions proceed with "*affirming the role of Parliament in creating law and holding the executive to account,*". Parliament undoubtedly creates law – it does not do so exclusively since the courts shape and develop the common law - but it is the second part of the proposition that is the problem. Undoubtedly Parliament has an important political role in holding the executive to account. The issue is how effectively that role is carried out. There are a number of comments that can be made:

12.1 It has been pointed out by many commentators, to the extent that it is a common-place, that the government and its ministers are, formally, accountable to Parliament. However:

> *"But here again the theory is far from the reality. The party system means in practice that, in anything but the last resort, the government controls Parliament. This is especially evident in the process of legislation. Bills are drafted by Government departments and are often driven through Parliament by the party whips and with inadequate time for many of their clauses to be properly considered. ..... Ministerial responsibility fails in practice to control legislation effectively; most statutes being enacted in almost exactly the form on which the government decided in advance."* [13]

[9] Wade and Forsyth *Administrative Law*, 10th Edn., pp. 17-21.
[10] Allen Lane, 2010.
[11] See, e.g., *Thorburn v. Sunderland City Council* [2003] 1 QB 151 (Laws LJ). And there is still argument to be had on whether Parliament's powers can extend to fundamental constitutional change such as abolishing the rule of law, judicial independence and judicial review (Wade & Forsyth, citing authorities, at p. 25). See also the *Axa General Insurance* case, post, para. 12.6.4, at [50-51].
[12] Wade & Forsyth, above, p. 21.
[13] Wade & Forsyth, above, p. 26 and the *Axa General Insurance* case, post para. 12.6.4, at [50-51].

12.2 This should not need emphasis because it is something that has been satirised since at least the last part of the 19th century. Gilbert and Sullivan had their character, Sir Joseph Porter KCB, explaining how he became First Lord of the Admiralty: "*I always voted at my party's call and I never thought of thinking for myself at all*."[14]

12.3 There might be something in the government's point about Parliamentary *control* of legislation or holding the government to account if there was serious evidence that MPs were able to act independently and free from party discipline which is enforced in the last resort, as we have seen recently, by expulsion from the party – or by other disciplinary sanctions.

12.4 Hence the elaborate measure of theoretical control, whether by 2nd Reading debate on the principles or debate on the detail at Committee and Report stages are just that, theoretical only. We have not mentioned the House of Lords since its powers have been emasculated under the Parliament Acts 1911-1949 and any amendments to legislation can be overturned by obedient majorities in the Commons.[15]

12.5 The position is worse when delegated legislation (by statutory instrument or otherwise) is considered. The sheer volume of such legislation causes real problems of control. Parliament can seek control of this by using the negative or affirmative resolution procedures but the problem is that such instruments are not subject to even the detailed scrutiny of Bills at Committee stage – there is generally no power to amend - and so may only be looked at critically and in detail when challenged in court, normally by JR.[16]

12.6 In short, the emphasis by the government in this document on control by Parliament (see, e.g., [20], [22], [24], [26], [27-29], [31], [34-35]) as what might be thought of as some sort of substitute for JR or to which JR might or should be subordinated is thoroughly misplaced. We say that because if one looks at a number of paragraphs of the White Paper there are instances where, in order to emphasise Parliamentary importance in JR, the positions is slanted if not actively misrepresented:

[14] *HMS Pinafore*: he had no qualifications for the post and had started Parliamentary life as a successful attorney ('*this junior partnership, I wean, was the only ship that I'd ever seen*').
[15] It is not the place here to discuss the undoubted need for House of Lords reform.
[16] We have not forgotten that there is some control through the Select Committees (e.g., the Joint Committee on Statutory Instruments).

12.6.1 Paragraphs 20-25 seek to stress that JR is as much a creation of statute as through the common law. It refers, correctly, to 17th century seminal cases[17] but then jumps two centuries to refer to the Judicature Acts (1873-75)[18] which, it is said:

> *"…. placed the courts on a statutory footing and combined the common law courts and courts of equity, thereby showing how Parliament could both define the jurisdiction of the courts and clarify the bounds of the Rule of Law."* [22].

12.6.2 That tells only part of the story. Section 16 of the Act provided that the High Court should exercise all the jurisdiction formerly exercised by the Courts of Kings Bench, Common Pleas, Exchequer and High Court of Chancery – and some other courts.[19] Parliament was careful not to trim the powers of the new courts in their new administrative structure but to ensure that they inherited all the powers of the old courts of common law and equity which had been acquired over the centuries as part of their jurisdiction at common law, ultimately as part of the King's courts. There was therefore a continuum, not a new start.

12.6.3 It would have been surprising if Parliament had done anything different and certainly it took no steps to redefine the powers of the new courts as inherited from their predecessors, so that there was a seamless transition. Hence any powers of JR, and they were considerable as can be seen from the nineteenth century and earlier cases, continued in full force. This does not come close to showing that JR is '*as much a creation of statute as it is the development of the [common law] …..*' [22] but if anything is an affirmation and recognition by Parliament of existing common law principles and their force.

12.6.4 The further suggestion [25] is that Parliament by granting 'plenary powers' could exempt a body from all or part of supervision by the courts through JR. Accepting for the moment that Parliament could do that (whether it would be wise to do so[20] is another matter) the only example given is the Supreme Court's decision in *Axa General Insurance v. Lord Advocate* [2011] UKSC 48.

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[17] The well-known *Cases of Prohibitions del Roy* and *Proclamations*.
[18] Known as the Supreme Court of Judicature Act 1873.
[19] There was a similar provision in ss. 17-19 for the transfer of the existing appellate jurisdictions to the new Court of Appeal.
[20] The Government thinks it would be 'an unusual thing to do' [25].

12.6.5 As to that case, it is correct the SC found that under the devolution legislation a decision by the Scottish Parliament through legislation to do something unreasonable, irrational or arbitrary could not be challenged by JR and hence, the Government says, would not infringe the rule of law. This is a decision in highly unusual circumstances and two points need to be made: the first is that the SC expressly said that the issue of whether legislation was within the competence of the Scottish Parliament, under s. 29 Scotland Act 1998 or at common law envisaging various scenarios including the abolition of JR,[21] could be dealt with in the courts by JR.

12.6.6 The second point is that, as the SC recognised, the limitation on JR was appropriate in this exceptional circumstance because the courts would be dealing with the considered judgement of a democratically elected legislature [52].

12.6.7 To attempt to translate this to the circumstances of a decision made, not by a democratically elected legislature but by the executive, whether through a civil servant or a Minister seeking to exercise statutory (or common law) powers would be bizarre. We do not suppose the Government is seeking to do this – in which case we do not see the point of the example.

12.6.8 In para. 26 there is a reference to the rule of law and its relationship with '*a range of moral and normative values.*' It prays in aid a lengthy quote from Professor Ekins which, with respect, does not take the debate very far. The professor seems to regard the rule of law as simply a '*principle of political morality*' (and hence despite its name apparently not a legal rule at all) which the judges are not free to set aside.

12.6.9 This is compounded because in the same passage the professor says: "*The rule of law requires judicial self-discipline and does not permit invocation of abstract or novel principles as a ground to depart from or gloss settled law, including especially fundamental constitutional law.*" It is difficult to

[21] Envisaging a situation where a Parliament dominated by one party might seek '*to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise.*' [51].

see the meaning of the whole quote and the passage set out is distinctly odd. The law is full of examples where the courts, in developing the common law, have invoked novel principles and have certainly 'glossed' settled law.

12.6.10 *Donoghue v. Stevenson*[22] is a well-known example where the House of Lords extended dramatically the duty of care in tort. *Hedley Byrne v. Heller* is another example of another extension or gloss. In the constitutional field *De Keyser's Royal Hotel v. R.* is an example of the courts extending (or glossing) the law to protect the citizen against the unlawful and arbitrary use of prerogative powers. There must be many other examples and to use this approach as a means for saying that any existing powers of the courts should be restricted does not strike us as an honest approach to a difficult topic.

12.6.11 The government deals with legality and discretion at paras. 27-32. It concedes that it is for the courts to apply this principle in JR cases but professes a concern that the courts have gone beyond '*the usual constraints of substantive review*' [27] citing a comment by Lord Browne-Wilkinson in a 1998 decision[23] and the well-known case of *Roberts v. Hopwood* [1925] AC 578. Whether the House of Lords then went too far in imposing limitations on a local authority's power to pay its staff what it believed to be the proper level of wages is a matter of debate. However what can be said is that the application of the general principle of ensuring that administrative decisions were not unreasonable (within the relevant statutory parameters) or perhaps, better, that irrelevant considerations were not taken into account was well settled at that time, as the textbooks recognise.[24]

12.6.12 Furthermore, the courts were not imposing their own standard of reasonableness but upholding the decision of the District Auditor[25] that the level of wages was unreasonable and unlawful. And finally, there is and was nothing to stop Parliament intervening and changing the law and, e.g., giving a local authority a wider discretion to deal with particular problems.[26]

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[22] *D. v. S* [1932] AC 562; *HB v. H.* [1964] AC 465; *De KRH v R* [1920] AC 508.
[23] *Ex parte Pierson* [1998] AC 539 at 575-576.
[24] See Wade & Forsyth, at pp. 293-294 referring to *Rooke's Case* [1598] 5 Co. Rep. 59b and also de Smith, paras. 5-008 – 5-010.
[25] An expert central government official well able to form judgements about local authority expenditure and broad levels of reasonableness in the context of local authorities generally.
[26] As, for example, Parliament did in remitting the surcharges in *Roberts* (Audit (Local Authorities) Act 1927, s. 2(6)). And as Parliament did in the Travel Concessions Act 1964 to give councils wider powers to allow concessionary fares following earlier, adverse decisions of the courts.

12.6.13 In short, there is nothing in the point that decisions like this are any reason for restricting the courts' powers because they do not show, as the government seems to think, that the courts *generally* are asserting a right to decide 'matters of moral value'. It is correct that the courts are there to answer 'specific questions' [31]. However, if Parliament or the law require an answer to a moral question in a given case, it is for the courts to provide that answer Neither is there any basis for restricting judicial powers simply because, as the government asserts, there are other methods of assuring governmental accountability [31] and [34-35]. The government provides no assessment of these other mechanisms – particularly the suggestion of parliamentary control to which we have referred above - and, if they seek to pursue that approach, that lack of assessment is a grave failing.

12.6.14 Overall this section provides no justification for imposing restrictions on the courts' existing powers of JR.

12.7 The position could be summarised by observing that the Government's assertion that it is merely "*affirming the role of Parliament in creating law and holding the executive to account*" [4] is misguided and disingenuous. In a modern democracy (which hopefully the UK will remain), the rule of law applies, both to the citizens and, importantly, to the Executive. It must act within the law. Whether it does so is a matter for the independent judiciary, not Parliament. Parliament, in turn, holds the Executive to account from a *political* but not *legal* perspective – it cannot rule on individual cases. By contrast, the judiciary cannot – and very clearly does not – hold to account the Executive on the *political* content of its decisions, only whether they are *legal*. Whether Parliament does hold the Executive to account (politically) or does not do so, does not affect whether the Judiciary should ensure the legality of a decision, which is something quite distinct. One should not – as the Government is seeking to do – conflate the two.

12.8 This is the separation of powers, designed to ensure that the Executive administers its powers within the law - see e.g. Lord Mustill in *R v Home Secretary ex p FBU* [1995] 2 AC 513, at 567 and *Miller (no 2)* [2019] UKSC 41 at [28], [34].

13. Finally, "*affirming that the executive should be confident in being able to use the discretion given to it by Parliament*", begs so many questions that it is difficult to know where to start. The most obvious is that the discretion given may be subject to challenge, in which case the

courts are immediately involved. Even without any immediate or direct challenge on the assumption that there are no issues of interpretation, there may be legitimate, legal objections to the way in which the discretion is exercised (e.g., notice that should have been given has not been, consultation provided for has not been undertaken properly or at all). One of the most obvious grounds of challenge to the exercise of a discretion is because material considerations (mandated by Parliament) have not been taken into account or immaterial considerations have been taken into account.

14. It does not by any means follow that the exercise of a discretion – even assuming that Parliament has expressed its parameters clearly – may not be challengeable perfectly legitimately on many or all of the standard grounds found in JR cases, some of which have been referred to above. The phrase used by the government may express an ideal but we question whether it has any utility in the real word of government and the law.

15. That said, it and the other phrases used may express a direction of travel desired by the Government but we do not believe there is any material to support it.

Specific questions

The decision in Cart

16. In chapter 3 but principally in chapter 4, the question is asked whether the case of *Cart*[27] should be overruled by Parliament. The decision of the Supreme Court dealt with the decisions of the Upper Tribunal (designated as a superior court of record and therefore, prima facie, of equivalent status to the High Court) and a refusal of permission to appeal to that tribunal from a First-tier Tribunal. The refusal of permission cannot itself be appealed. The Supreme Court held that, in restricted circumstances, if the decision of the First-tier Tribunal was affected by an error of law then the UT's refusal of permission could be judicially reviewed and quashed.

17. The Government, in agreement with IRAL,[28] considers that this power to grant JR could usefully be removed. The Government observes that [50]:

> *"..... the Supreme Court's justification for Cart Judicial* ***Reviews was that they*** *would provide "for* ***some overall judicial supervision of the decisions of the Upper Tribunal, particularly in relation to refusals of permission to appeal to it, in order to guard against the risk that errors of law of real significance slip through the system.***"

[27] *R. (Cart) v. Upper Tribunal* [2012] 1 AC 663 and *Eba v. A-G* [2012] 1 AC 710.
[28] IRAL Report at [3.35] ff.

18. It commends the aim of the SC's rationale [51]. But it thinks it should nonetheless be removed because, first, there is a disproportionate amount of judicial resources devoted to such JRs[29] and, while this may cause some injustice in a few cases [52], public resources should not be diverted to such cases. The second reason is the status of the UT as a superior court of record which means it should not be amenable to JR – its status has been downgraded by *Cart*. This argument did not succeed before the Supreme Court.

19. In our view, where it is accepted that there are a number of cases where injustice can be caused it is not a good argument to consign these cases to a sort of judicial dustbin. The function of the courts and tribunals is to do justice in individual cases. This is their core function and is normally seen as a higher value than a bureaucratic worry about resources.

20. In any event, applications for JR are brought because there is no other remedy. Since it is obvious that there are cases where leave to appeal should have been given but was not, why not amend the statute and give the UT or the Court of Appeal power to reconsider a refusal of leave?

21. The second reason for removing JR is the supposed offence to the status of the Upper Tribunal. It is essentially unsatisfactory that a tribunal, however important, should not be subject to the jurisdiction of the regular courts. As has been said in earlier cases, the rule of law requires that: *"there must be no Alsatia in England where the King's writ does not run."*[30] Much the same approach is taken in other jurisdictions. Where there was an attempt to set up a new appellate court to deal with challenges to Acts of Parliament and called the High Court of Parliament and consisting of senators and MPs as judges, the South African Supreme Court struck it down.[31] While it is not suggested that the present situation is on all fours with that extreme example the point of principle is the preservation of the jurisdiction of the ordinary courts, whether original or supervisory, over inferior courts or tribunals.

22. We do not think therefore that Parliament should seek to alter the decision of the Supreme Court in *Cart.*

[29] The success rate is 12 cases, or 0.22%, where an error of law was found.
[30] *Czarnikow v. Roth Schmidt & Co*. [1922] 2 KB 478 at 488 (Scrutton LJ).
[31] *Minister of the Interior v. Harris* 1952 (4) SA 769.

Suspended quashing orders

23. The suggestion is that the court should have power to suspend quashing orders following the precedent in s. 102 Scotland Act 1998 which allows defects identified in the litigation to be corrected, having regard to the extent to which (among other things) persons who are not parties to the proceedings would otherwise be adversely affected.

24. Provided the court has discretion as to the terms of the suspension and, more importantly, whether there should be any suspension at all we would cautiously support such a provision. We do not believe it is appropriate for Parliament to 'mandate' the court to use a suspensive order unless there is an exceptional public interest in not doing so [56, 69]. That is far too high a bar. Nor should Parliament 'presume' that such an order should be used [69]. It is difficult to see how a suspended quash would work if such were mandated or presumed. What would be the precise terms of the mandate or presumption? Would there be a suspension until further consideration? Over what period? Is it for the courts to indicate what further issues should be dealt with or what consultation should be carried out? How much detail would need to be specified? None of this seems to us to add to certainty.

25. There may be merit in setting out criteria which the court should 'take into account'. Much will depend on the criteria: whether the cost of compensation for remedying quashed provisions would be excessive is in our view to place on a court a burden which in other circumstances the government seems to think a court is not well equipped to decide (see, e.g., the comments at [31]). The same would apply if the test was whether the remedial action was particularly onerous/complex/costly [56].

26. The answer to question 2 is that it is for the government to decide how best suspended quashing orders can be achieved and justify their approach. It is too early to say if they would work in the absence of much further work and consultation on detailed proposals. They should not be proceeded with at present.

Devolved jurisdictions – question 3

27. We have no views on whether the document's proposals have an impact on the devolved jurisdictions.

Remedies

28. **Prospective only remedies,** like suspended quashing orders, as we understand it would operate as a quash for the future – a form of prospective overruling – so that the decision or secondary legislation would not operate in the future but its past use would be valid.

29. The obvious injustice is to those who brought the proceedings and who are immediately affected by the unlawful decision or legislation. They are left remediless. It is pointed out that such an order would help to reduce expenditure for the government and improve its budgeting. And, it is said, it might also help to avoid administrative problems with the immediate quashing of a legislative scheme.

30. We do not think that prospective only remedies have been justified [63, 64, 67]. It is not clear what problems there have been in the past. There are references to 'administrative chaos' and increased expenditure in dealing with the consequences of quashing but nothing we have seen makes these orders necessary. The fact that they are used in relation to Scottish legislation in the particular circumstances that apply there does not seem to us to be a sensible precedent for their use in much broader circumstances in the rest of the UK.

31. It is not clear whether it is intended that such orders would be used in relation to delegated legislation only or wider administrative 'decisions' [63] and we would be wholly against mandating or presuming their use [68]. If they were to be used it would be for the courts to develop the relevant principles on a case by case basis – no doubt balancing the injustice to those adversely affected by the unlawful statutory instrument or decision against any harm to those who have relied on it. There might be in a particular case, for example, Human Rights Act implications for the claimant(s) in any form of prospective overruling.

32. In any event, the suggestion in [68] that '*legal certainty and hence the Rule of Law*' be best served by prospectively invalidating statutory instruments - and other delegated legislation, it is not clear - by way of a presumption to that effect and/or by mandating that the remedies are prospective only unless there is exceptional public interest to the contrary, is wholly unacceptable.

33. In the first place, the premise on which this is apparently based is that '*Parliament focussed solutions are more appropriate where statutory instruments are impugned*' [68]. If it is intended to say that the '*parliament focussed*' solution is because there is effective scrutiny of delegated legislation before it is enacted, as we have observed already (above, at 12.4-12.5) this is simply

neither accurate nor credible. Parliamentary scrutiny, particularly given the volume of delegated legislation, can be perfunctory and judicial scrutiny may be the most effective form and the first that the legislation receives.

34. If it is intended to say that Parliamentary scrutiny is appropriate either as part of or following a quash then the question has to be asked: what will happen to any injustice suffered by the claimant in the litigation? How is it intended that should be balanced against any remedial legislation and what provision will be made for compensating the claimant(s)? And, more fundamentally, how is Parliament the appropriate body to adjudicate in such situations?[32]

35. We have dealt above with some of the details on suspended quashing and presumptive overruling and hence have answered question 6. Again, the Government has simply not justified their use.

Nullity

36. Our views on attempts to alter the position on nullity can be expressed quite briefly:

36.1 It does not appear to us to be a course that was favoured by the IRAL report (see the conclusions at pp. 55-56) and, more generally, attempts to tinker with the doctrine seem to us to fall foul of well-established authority in English law; see, e.g., Lord Diplock in *Hoffman-La Roche & Co v. SSTI* [1975] AC 295 at 365:

> *It would however be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any less consequence in law than to render the instrument incapable of ever having had any legal effect."*[33]

36.2 There are safeguards in the sense that the courts use a presumption of validity in favour of an order or regulation until it is set aside. And in such an application to the court it is well settled that the court may refuse to quash a defective instrument because, e.g., the applicant has no standing or because he is late in seeking a remedy.

36.3 The government relies [73], as did the IRAL, on the case of *Cheblak*[34] for the proposition that unlawful exercise of public power does not lead inevitably to it being null

[32] See above, para. 12.7.
[33] See also *Boddington v. BT Police* [1999] 2 AC 143 at 158 to the same effect.
[34] *R. v. Home Secretary, ex parte Cheblak* [1990] 1 WLR 890 (CA).

and void. This was a *habeas corpus* case and it appears to have turned on the technical difference between the remedy in those proceedings and other proceedings to quash an unlawful act or regulation. However, it is a proposition that has been contradicted by the Law Commission[35] and in the HL – see *R. v. Home Secretary, ex parte Khawaja* [1984] AC 74 at 99 and 111.

36.4 There may well be academic authority supporting the Government's approach but that, with respect, is not the same as high authority in the courts. Furthermore [75], there is in these circumstances no need to legislate to remove any suggested differences in the courts.

36.5 Additionally, there is plainly room, as the government recognises [77], for some operation of the nullity rule. The result is, in trying to square this particular circle, the government arrives at solutions [81] which necessarily involve legislation with all the problems of definition with which the government has not grappled. Matters, unsatisfactorily, are put in the broadest terms, e.g., '*breach of the principle of legality*'; '*all other standard public law grounds except lack of competence/power*'.

36.6 The courts have been able to deal with the issue of nullity over the years. The basic principle is well settled. The courts are capable of developing and adapting these principles as the law needs to develop and the government should not interfere by legislation.

36.7 The answer to question 7 is 'no'.

Ouster clauses

37. The basic approach appears in [86] where it is said:

> *Ouster clauses are not a way of avoiding scrutiny. Rather, the Government considers that there are some instances where accountability through collaborative and conciliatory political means are more appropriate, as opposed to the zero-sum, adversarial means of the courts. In this regard, ouster clauses are a reassertion of Parliamentary Sovereignty, acting as a tool for Parliament to determine areas which are better for political rather than legal accountability.*

38. In our view it is plain that ouster clauses **are** a way of avoiding scrutiny, particularly of the legality of a particular document or decision. The reason why accountability through

[35] Law Com. No. 226 on Administrative Law in Part XI.

'*collaborative and conciliatory political means*' do not work when a citizen seeks justice are precisely because the citizen has little influence over the political process. The important issue is that his or her legal rights should be upheld and that is what the courts are for and not the political process.

39. That apart we have already pointed out the grave weaknesses of the political/Parliamentary process in delivering proper scrutiny of government decisions. The truth is that once the political/collaborative process is invoked the citizen starts at a considerable disadvantage and lacks power to influence the process in his favour. Adjudication by an impartial judge restores the balance of advantage. We have not forgotten what Professor Ekins is reported as saying [87] but it seems to us that a proper understanding of our constitution leads precisely to the conclusions we have set out above at, e.g., paras. 12.1-12.5 and 12.7, and not to the more rose-tinted view he espouses.

40. If the government does not want '*to uphold instances of injustice, of course*' then, in our view, it will leave well alone and not seek to meddle in this area but rather leave development to the courts. The IRAL warned against the use of ouster clauses; see p. 130 at 8(f).

41. The justification in [93] is that the Supreme Court in the *Privacy International* case[36] were wrong when they gave as a reason for construing the ouster clause narrowly was that, without JR, there would be the risk of creating a 'local law'. It is then said that the existence of the Courts of Equity and other bodies with local jurisdiction runs counter to that. The point is an odd one. The criticism of local laws has been historically that there might have been a kind of '*Alsatia*' (above, para. 21) whereas the King's courts, in which were included the courts of Equity, provided for a united jurisdiction throughout the kingdom. So the King's courts supervised or controlled the local courts[37] by the prerogative writs and other means and they similarly supervised other bodies such as the Visitor of a university (also referred to in [93]) and they similarly control arbitrators because Parliament realised that it was important to give some defined rights of appeal to the courts in arbitration disputes. As a justification for ouster clauses it is a thoroughly bad point.

42. The answer to question 8 is 'no' and the proposed changes to ouster clauses should not be attempted.

[36] [2019] UKSC 22.
[37] E.g., the Tolzey Court here in Bristol (now part of the county court).

Procedural reform

43. We agree that the requirement of **promptness** could be removed and the time limit for JR generally left simply at 3 months.

44. The answer to question 9 is 'yes'.

45. We think that the 3 month time limit is generally satisfactory and need not be extended, particularly given the court's power to extend time, which occasionally and in exceptional circumstances has been for a period of years.[38] However there is merit in giving the parties ability to **mutually agree** that time should be extended. To avoid matters dragging on interminably possibly that should be subject to the supervision of the court, perhaps by restricting any extension to (say) a further 3 months or providing for supervision by the court on application to it. The answer to questions 10 and 11 is 'yes'.

46. There is already a Planning Court within the Administrative Court and so the idea of 'tracking' JR claims may have merit and does deserve further investigation. Such a system would apply to clearly defined claims in other areas but would need to be subject to further consultation before any implementation was considered. So the answer to question 12 is 'yes'.

47. We are not sure about how a duty to identify **interveners** would work. There are obvious problems of definition. The present position, e.g., with PAP letters, is that parties are expected to identify details of 'Interested Parties' which, of course, are narrowly defined. We do not think this further duty could be easily defined and we think that it would probably would not be useful. Hence the answer to question 13 is 'no'.

48. We agree that it would be helpful to make provision for a **Reply** 7 days after the AoS. A Reply might clarify matters and at extremes might even result in settlement. The answer to question 14 is 'yes'.

49. We appreciate that **summary grounds** may be less necessary if the PAP procedure has been followed.[39] However we do not agree that Summary Grounds of Resistance could be

[38] See the recent case of *R. (CARA) v. North Devon District Council* [2021] EWHC 646 Admin.

[39] There seems to be confusion between summary and detailed grounds of resistance see [106]. Detailed grounds are only necessary after permission is granted and where the court has made an order for directions, not before as the paragraph seems to suggest. So we have assumed that we are being asked about summary grounds; see [105a].

omitted when the PAP procedure has been followed. There are many cases (as the government recognises) where more material becomes available and, in any event, the claim as drafted may differ, whether or not new material is produced, from the way it was put at the PAP stage either in minor or major ways. All have to be dealt with. It is better in our view to retain the AoS and Summary Grounds of Resistance in all circumstances. Putting it at its lowest, if the Summary Grounds are really the same as in the PAP response a copy and paste exercise is not beyond the wit of most advocates. The suggested changes introduce unnecessary complications.

50. We do not object to the **extension of times** for Detailed Grounds (not summary grounds) so the answer to question 15 is 'no' and to question 16, 'yes'.

51. As to **PAP procedures** we find that they are operated (when they are operated) reasonably well and claims are set out in reasonable detail as are PAP responses. The reason for this may be that in both cases it is easy to use these later as a basis for a claim or summary response with a consequent saving of effort and costs. If there are those who do not observe the procedures when they should or do not observe them adequately, we are not sure how this could be dealt with save, perhaps, by some sort of costs sanction when the case reaches the court. Otherwise, another way to deal with any perceived problems (we do not know what they are as we think the procedure operates reasonably well) would be to involve the court at the PAP stage which in our view would be counter-productive, as the essence of the procedure is that the parties can set out the cases without complete formality and try to reach a negotiated solution.

52. We do not know what a call for 'greater clarity' involves [109]. In the absence of definition we can take this no further.

Public and Administrative Law Group,
St. John's Chambers,
Bristol.

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